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COURT FILE NUMBER 2001 05482
COURT Court of Queen's Bench of Alberta
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *COMPANIES'*
CREDITORS ARRANGEMENT ACT, RSC
1985, c. C-36, as amended

COM Nov 27 2020
J. Eidsvik
1103651

AND IN THE MATTER OF THE
COMPROMISE OR ARRANGEMENT OF JMB
CRUSHING SYSTEMS INC. and 2161889
ALBERTA LTD.

APPLICANT/ CLAIMANT QUEST DISPOSAL & RECYCLING INC.
DOCUMENT **BRIEF BY QUEST DISPOSAL & RECYCLING INC.**

**ADDRESS FOR SERVICE
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BRIEF OF QUEST DISPOSAL & RECYCLING INC.

**IN RESPECT OF THE TRUST CLAIM ARISING IN CONNECTION WITH
SERVICES PROVIDED TO JMB FOR MD OF BONNYVILLE CONTRACT WORK**

TO BE HEARD BY THE HONOURABLE MADAM JUSTICE EIDSVIK

NOVEMBER 27, 2020 AT 10:00 AM MST

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I. INTRODUCTION

1. This is the Brief of the Applicant, Quest Disposal & Recycling Inc. (“**Quest**”). This brief is submitted in respect of the within application of Quest, wherein Quest seeks an Order:
 - a. Directing that FTI Consulting Inc. (“**the Monitor**”) provide financial information to Quest Disposal & Recycling Inc. (“**Quest**”) regarding gravel and aggregate transported by JMB Crushing Systems Inc. (“**JMB**”) or its agents from outside of the MD of Bonnyville No. 87 (the “**MD**”) to the MD between August 1, 2019 and March 30, 2020, including locations and dates;
 - b. Declaring that a trust was created pursuant to a written agreement between the MD and JMB;
 - c. Declaring that the Holdback Amount (as defined below) includes funds held in trust for Quest;
 - d. Directing the sum of **\$165,844.71**, plus interest in accordance with the *Judgment Interest Act*, RSA 2000 c. J-1, plus costs, be paid from the Holdback Amount by the Monitor to Quest by way of its counsel Messrs. Kuzyk & Mol Law Office;
 - e. In the alternative, directing the sum of **\$22,941.14**, plus interest in accordance with the *Judgment Interest Act*, RSA 2000 c. J-1, plus costs, be paid from the Holdback Amount by the Monitor to Quest by way of its counsel Messrs. Kuzyk & Mol Law Office; and
 - f. Awarding costs of this Application to the Applicant, Quest, on a solicitor and own client basis, or on such basis as the Honourable Court may deem just and appropriate in the circumstances.

II. FACTS

A. THE PRIME CONTRACT

2. On or about November 1st, 2013, JMB Crushing Systems Inc. (“**JMB**”) and the Municipal District of Bonnyville No. 87 (the “**MD**”) entered into a contract whereby the MD retained JMB to supply gravel / aggregate to the MD and transport the same for stockpiling at various lands within the MD (the “**Prime Contract**”).¹
3. Paragraph 26 of the Prime Contract includes the following express term:²

¹ The Affidavit of Jason Panter, sworn October 9, 2020 [“the Panter Affidavit”] at Exhibit “C”.

² *Ibid.* at Exhibit “C”, s. 26.

From the amounts paid to JMB by the MD, JMB is deemed to hold that part of them in trust which are required or needed to pay for any salaries, wages, compensation, overtime pay, statutory holiday pay, vacation pay, entitlements, employee and employer Canada Pension Plan contributions, employee and employer Employment Insurance contributions, Worker's Compensation premiums and assessments, income taxes, withholdings, GST and all costs directly or indirectly related to the Product and Services. JMB shall pay the foregoing from such trust funds."

4. The Prime Contract defines "Products" and "Services" as follows:³

Product' means the production by JMB of the aggregate described in this Agreement which includes the crushing and cleaning of rock / gravel, and all related services whereby rock / gravel is made into usable crushed aggregate for the MD in accordance with the required specifications set out in this Agreement"

Services' means the hauling and stockpiling of crushed aggregate of JMB as set out in this Agreement and anything else which is required to be done to give effect to this Agreement [emphasis added].

5. Quest was not aware of this provision of the Prime Contract, despite doing business with and providing services for JMB since 2013. Quest provided services such as supplying and maintaining portable toilets and lidded garbage and recycling bins at various earthworks sites in the MD and elsewhere in the Province of Alberta as subcontractor (the "Quest Services").⁴

B. SERVICES PROVIDED BY QUEST DISPOSAL & RECYCLING INC. & DEMAND FOR PAYMENT

6. Quest commenced providing the Quest Services for JMB at various parts of the Province of Alberta in 2013, and provided services up to and including March 2020, rendering invoices for the same on a regular basis. Within the MD, Quest provided services within the MD Stock Yard, Pit #19, the Shankowski Pit and the Reda Pit.⁵
7. Throughout Quest providing services to JMB, it was not uncommon for JMB to use out-of-district pits to supply the MD with gravel and aggregate under the Prime Contract.⁶
8. Between August 1, 2019 and November 25, 2019, Quest provided services on behalf of JMB under the Prime Contract and rendered regular invoices for the same:⁷

³ *Ibid.* at Exhibit "C", sections 1(e) and 1(f).

⁴ The Affidavit of Keith Hayduk, sworn November 17, 2020 ["the Hayduk Affidavit"] at para 3.

⁵ *Ibid.*, at para 4.

⁶ *Ibid.*

⁷ *Ibid.*, at para 5 and Exhibit "A".

Invoice No. & Description	Amount (CAD\$ - GST inclusive)
Invoice No.: 24297 – RE Pit 19 Earthworks (MD of Bonnyville)	\$2,221.71
Invoice No.: 24953 – RE Pit 19 Earthworks (MD of Bonnyville)	\$1,408.83
Invoice No.: 25368 – RE Pit 19 Earthworks (MD of Bonnyville)	\$2,323.35
Invoice No.: 26123 – RE Pit 19 Earthworks (MD of Bonnyville)	\$456.47
Invoice No.: 24298 – RE MD of Bonnyville (Stockyard)	\$1,435.97
Invoice No.: 24954 – RE MD of Bonnyville (Stockyard)	\$1,168.50
Invoice No.: 25369 – RE MD of Bonnyville (Stockyard)	\$387.81
Invoice No.: 24299 – RE Shankowski Pit (MD of Bonnyville)	\$377.64
Invoice No.: 25370 – RE Shankowski Pit (MD of Bonnyville)	\$762.13
Invoice No.: 26124 – RE Shankowski Put (MD of Bonnyville)	\$1,814.55
Invoice No.: 24960 – RE Pit 19 (MD of Bonnyville)	\$2,347.11
Invoice No.: 25375 – RE Pit 19 (MD of Bonnyville)	\$5,134.24
Invoice No.: 25376 – RE Reda Pit (MD of Bonnyville)	\$3,102.83
Total Due:	\$22,941.14

9. The value of the Quest Services provided within the MD directly was **\$22,941.14**⁸.
10. In addition to services provided directly within the MD, Quest also provided services amounting to **\$142,903.57**⁹ that may be encompassed under the Prime Contract, depending on whether or not the Quest Services pertained to pits that serviced the MD, and Quest has requested information from the Monitor in these proceedings through its legal counsel as to the amounts of gravel and aggregate that were transported to the MD from outside pits and where these amounts came from in order to assess this issue.¹⁰

⁸ *Ibid.*, at para 10.

⁹ *Ibid.*, at para 9 and Exhibit “D”.

¹⁰ *Ibid.*, at para 9.

11. Despite a written demand made through counsel on May 1, 2020, JMB has not paid the Quest invoices or any of the outstanding amount due and owing of **\$165,844.71**.¹¹

C. CCAA PROCEEDINGS AND THE HOLDBACK FUNDS

12. On May 1st, 2020, the Honourable Madam Justice K.M. Eidsvik (the “**Justice**”) granted the CCAA Initial Order (the “**Initial Order**”) in the within proceeding. FTI Consulting Canada Inc. (the “**Monitor**”) was appointed to act as Monitor of JMB in the within proceeding. The Initial Order was subsequently amended and restated on May 11th, 2020.
13. On May 20th, 2020, the Justice granted an order addressing various liens claims outstanding in the MD and resulting from JMB’s non-payment of subcontractors (the “**Lien Claims Order**”). The Lien Claims Order did the following, among other things:
 - a. The MD was ordered to pay the sum of \$3,563,768.40 (“**the Funds**”) to the Monitor. The Funds represented amounts invoiced by JMB to the MD under the Prime Contract, but which the MD had not yet paid to JMB, for the period up to and including April 30th, 2020;
 - b. The Monitor was ordered to hold back from the Funds the sum of \$1,850,000.00 (“**the Holdback Amount**”) in trust. The Holdback Amount was deemed to be the amount the MD was required to holdback per section 18 of the Builder’s Lien Act from payments it made to JMB for those amounts invoiced up to and including April 30th, 2020; and
 - c. A lien determination procedure was established for the MD of Bonnyville lien claimants.
14. To the knowledge of Quest, the Holdback Funds are still held in trust by the Monitor. Quest is not a Lien Claimant in these proceedings.

III. ISSUES

15. The issues before the Court for the application by Quest is as follows:
 - a. Does the Prime Contract give rise to an express trust?

¹¹ *Ibid.*, at paras 7, 8 and Exhibit “C”.

- b. If so, does Quest qualify as a beneficiary under the trust?
- c. If so, what is the extent of Quest's claim to the trust property for services provided in the MD?
- d. What is the extent of Quest's claim to the trust property for services provided outside of the MD?

IV. ANSWERS

- 16. Quest takes the position with respect to the issues that:
 - a. The Prime Contract between JMB and the MD gives rise to a valid express trust.
 - b. Quest is a beneficiary of the trust.
 - c. Quest's claim to the trust property is \$22,941.14, being the unpaid invoices owing from JMB to Quest for the Quest Services, plus interest and costs for services provided in the MD.
 - d. Quest's claim to the trust property for services provided outside of the MD depends on where and when JMB transported gravel and aggregate from outside of the MD to inside the MD, and more information is required from the Monitor in this regard.

V. LAW & ARGUMENT

A. THE PRIME CONTRACT GIVES RISE TO AN EXPRESS TRUST

- 17. An express trust arises when a person (the settlor) expresses an intention to transfer property to another person (the trustee) for the benefit of a beneficiary, and the settlor conveys the trust property to the trustee.¹²
- 18. An express trust must unequivocally demonstrate an intention to create a trust and clearly identify the trust property so that it can be ascertained and the objects of the trust so the permitted use may be determined, and if neither the objects nor the subjects are certain, then the request does not create a trust.¹³ A trust instrument or declaration evidences the terms of the trust.
- 19. In order for an express trust to be valid, it must possess the following elements:
 - a. Certainty of Intention;

¹² *Lubberts Estate (Re)*, 2014 ABCA 216 at para 49.

¹³ *Ibid.*, at para 50.

- b. Certainty of Subject Matter;
 - c. Certainty of Objects¹⁴; and
 - d. Conveyance of the trust property to the trustee¹⁵.
20. In the application by Quest, the Prime Contract is the trust instrument that gives rise to the trust. The settlor is the MD, and the trustee is JMB. One of the beneficiaries of the trust is Quest as a provider of services touching on “anything else which is required to be done” to give effect to the Prime Contract.

B. THE THREE CERTAINTIES & CONSTITUTION

Certainty of Intention

21. Concerning certainty of intention, it is required that the settlor intended to create a trust expressly. This requires a trust instrument or declaration by the settlor to clearly establish that the settlor intended, by conveying property to a trustee, to impose an obligation on the trustee to hold that trust property for the benefit of the beneficiary.
22. Paragraph 26 of the Prime Contract provides certainty of intention. The paragraph explicitly states that “*from the amounts paid to JMB by the MD, JMB is deemed to hold that part of them in trust*” for the purposes of, among other things, paying for “*all costs directly or indirectly related to the Product and Services*”. The paragraph also states that “*JMB shall pay the foregoing from such trust funds*” [emphasis added].
23. Paragraph 26 therefore does two things: it requires JMB to hold funds in trust for the payment of its expenses, including the expenses of it providing the “Product” and “Services”, and it imposes an obligation on JMB to pay for those expenses from those trust funds. This satisfies the requirement of certainty of intention.

Certainty of Subject Matter

24. As aforesaid, the trust property being conveyed must be ascertained or ascertainable with sufficient certainty. This requires the trust instrument or declaration by the settlor to clearly identify specific trust property to be conveyed to the trustee under the trust or a manner to determine the trust property to be conveyed.
25. Again, paragraph 26 of the Prime Contract provides certainty of subject matter, as it ascertains the trust property as “*from the amounts paid to JMB by the MD...that part of*

¹⁴ *Ted Leroy Trucking [Century Services] Ltd. Re*, 2010 SCC 60 at para 83 [2010] 3 SCR 379.

¹⁵ *Lubberts Estate (Re)*, 2014 ABCA 216 at para 49.

them...which are required or needed to pay for...all costs directly or indirectly related to the Product and Services” [emphasis added]. As such, the Prime Contract ascertains the trust property as an amount equal to the total of all unpaid costs, directly or indirectly related to the Product and Services provided by JMB to the MD. This includes the expense of contractors generally, and in particular, the Quest Services.

Certainty of Objects

26. Concerning certainty of objects, the beneficiary or beneficiaries of the trust must be ascertained or ascertainable. This requires that the trust instrument or declaration by the settlor clearly identifies or can identify a person or class of persons whom are beneficiaries.
27. Paragraph 26 of the Prime Contract identifies the class of persons who are intended to be beneficiaries of the trust as those whom are entitled to payment in relation to the services provided by JMB to the MD. This includes persons whom contracted with JMB for the purposes of JMB providing the Product or Service to the MD and “anything else which is required to be done” to give effect to the Prime Contract. This encompasses Quest as a person whom has provided services to JMB for the purpose of JMB performing its obligations to the MD under the Prime Contract.

Constitution

28. An express trust will not be valid unless it has been constituted, which requires the settlor to transfer legal ownership to the trustee. Beneficial or equitable ownership rests with the beneficiaries of the trust.
29. Paragraph 26 of the Prime Contract provides that the MD conveys funds to JMB in exchange for its services, and that those funds are held in trust by JMB insofar as JMB owes third parties debts for performing its contractual duties.
30. The MD was ordered to pay and did pay to the Monitor of JMB the sum of \$3,563,768.40 (the “**Funds**”). The Funds were paid to JMB because it was entitled to the same under the Prime Contract for services provided up to and including April 30th, 2020. JMB was accordingly obligated, pursuant to the express trust in the Prime Contract, to hold that amount in trust first and foremost for beneficiaries under the trust.
31. Of the Funds, the Holdback Amount of \$1,850,000.00 is all that remains. This Holdback Amount constitutes trust funds for which Quest and other contractors are beneficiaries.

C. QUEST IS A BENEFICIARY OF THE TRUST

32. As a result of the foregoing, Quest is a beneficiary of the trust.
33. The trust created by the Prime Contract provides that beneficiaries of the trust are those persons whom JMB is required to bear a cost or expense in providing Product or Services under the Prime Contract. These beneficiaries include persons whom, at the request of JMB, provide “anything else which is required to be done” to give effect to the Prime Contract.
34. The definition of Services under the Prime Contract is broad and encompasses a broad spectrum of services. The Quest Services involved Quest providing services such as supplying and maintaining portable toilets and lidded garbage and recycling bins at various earthworks sites in the MD and elsewhere in the Province of Alberta. It provided washroom facilities and waste disposal for JMB that was necessary for it to perform its obligations under the Prime Contract. As such, Quest is a beneficiary of the trust.

D. QUEST IS A CLAIMANT TO TRUST PROPERTY WITH RESPECT TO SERVICES PROVIDED IN THE MD OF BONNYVILLE

35. Quest’s immediately recoverable claim to the trust property is equal to the sum of **\$22,941.14**, being the unpaid invoices owing from JMB to Quest, plus interest and costs.
36. This amount is apparent as it relates to services provided for JMB under JMB’s Prime Contract with the MD, as it pertains to the Quest Services provided in the jurisdiction of the MD.

E. QUEST IS A CLAIMANT TO TRUST PROPERTY WITH RESPECT TO SERVICES PROVIDED OUTSIDE OF THE MD OF BONNYVILLE

37. Quest provided additional services to JMB amounting to **\$142,903.57** outside of the MD. This pertains to Quest Services provided at various gravel and aggregate pits and earthworks locations in the Province of Alberta.
38. Per the evidence of Quest, the corporate representative does believe that some of the aggregate and gravel from other locations was transported to the MD for the purpose of

JMB providing Product and Services to the MD as this was normal practice for JMB as the MD project was quite large and required substantial amounts of aggregate.¹⁶

39. Also, per the evidence of Quest, the corporate representative does believe that either JMB or the Monitor would have information regarding how much aggregate was transported from elsewhere in the Province to the MD, and when.¹⁷
40. As such, Quest seeks that the Court order JMB, the Monitor or both to disclose information concerning the transport of gravel and aggregate from pits located in and around Alberta to pits located in the MD of Bonnyville between August 1, 2019 and March 30, 2020 to ascertain the extent to which Quest may be entitled to claim the \$142,903.57 in outstanding invoices from the trust funds.

VI. CONCLUSION

41. Paragraph 26 of the Prime Contract satisfies the requirements for an express trust, being Certainty of Intention, Certainty of Subject Matter and Certainty of Objects. The payment of funds by the MD to JMB generally, and the payment of the Funds particularly, satisfies the requirement for constitution of the trust by way of conveyance of funds. As such, the Prime Contract gives rise to a valid, express trust.
42. Quest is a beneficiary of the trust, as it was a person that provided services to JMB for the purposes of JMB providing Product and Services to the MD. As such, from the Funds paid by the MD to the Monitor, including but not limited to the Holdback Funds that remain, Quest is entitled to payment in the amount of **\$22,941.14** plus interest and costs for services provided by Quest within the MD.
43. Quest is also a possible beneficiary of the trust in the amount of **\$142,903.57** plus interest and costs, as it performed services outside of the jurisdiction of the MD that may have been connected directly to JMB providing Product and Services to the MD due to the business practice of JMB removing gravel and aggregate from other jurisdictions for use within the MD. The extent of which the \$142,903.57 claim is a trust claim depends upon when and where JMB transported gravel and aggregate from pits outside of the MD into the MD for the purposes of use under the Prime Contract, and whether Quest was

¹⁶ The Hayduk Affidavit at paras 4 and 9.

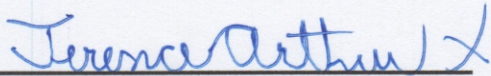
¹⁷ Ibid., at para 9.

providing services at those pits. Only JMB and / or the Monitor possess this information, and it has been requested by counsel for Quest as of November 18, 2020.

44. Quest respectfully requests that the Court grant an order declaring that the Holdback Amount, to the extent of \$165,844.71, or in the alternative, \$22,941.14, plus interest and costs, are held subject to a trust in favour of Quest, order that the Monitor and / or JMB provide particulars regarding gravel and aggregate transported from locations outside of the MD to the MD, including locations and times between August 1, 2019 and March 30, 2020, for the purposes of Quest assessing any further trust claim to funds invoiced for services provided outside of the MD to JMB, and grant a direction that the Monitor shall pay the said amounts to Quest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF NOVEMBER, 2020.

Kuzyk & Mol Law Office



**Per: Terence B. Arthur
Counsel to Quest Disposal & Recycling Inc.**

INDEX OF AUTHORITIES

A. EVIDENCE

TAB 1. Amended and Restated CCAA Initial Order, dated May 11th, 2020.

TAB 2. Order – Lien Claim Process for the MD of Bonnyville, dated May 20th, 2020.

TAB 3. The Affidavit of Keith Hayduk, sworn November 17th, 2020.

TAB 4. The Affidavit of Jason Panter, sworn October 9th, 2020, Exhibit “C”.

B. JURISPRUDENCE

TAB 5. *Lubberts Estate (Re)*, 2014 ABCA 216

TAB 6. *Ted Leroy Trucking [Century Services] Ltd. Re*, 2010 SCC 60 [2010] 3 SCR 379