

Clerk's Stamp:

COURT FILE NUMBER	1501-02652
COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF(S)	PACER CONSTRUCTION HOLDINGS CORPORATION
DEFENDANT(S)	PACER PROMEC ENERGY CORPORATION AND PACER PROMEC ENERGY CONSTRUCTION CORPORATION
DOCUMENT	<u>BRIEF OF LAW AND ARGUMENT OF THE RECEIVER</u>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15 th Floor, 850 - 2 nd Street S.W. Calgary, Alberta T2P 0R8 Attn: David Mann / David LeGeyt Ph. (403) 268-7097/3075 Fx. (403) 268-3100 File No.: 548476-5
HEARING DATE AND TIME	May 7, 2015 at 2:00 p.m.
PRESIDING JUSTICE:	The Honourable Justice B. Nixon

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I. **INTRODUCTION**

1. Capitalized terms not defined herein are given the meaning ascribed to them in the First Report of FTI Consulting Canada Inc. in its capacity as the Court appointed Receiver and Manager of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation.
2. The Receiver filed an Application in these proceedings on May 1, 2015 seeking a number of different heads of relief from this Honourable Court including the approval of a Claims Process and Lien Protocol (collectively the “**Claims Process**”). This Brief addresses only that aspect of the Receiver’s Application.
3. The Receiver respectfully submits that this Court has the authority to approve the Claims Process and ought to do so. Approving the Claims Process enables the Receiver to effectively administer the receivership of the Debtors, upholds substantive rights established by the *Builders’ Lien Act*, RSA 2000 c B-7 (the “**BLA**”), and accomplishes the goals and purpose of the BLA in the context of this receivership.

II. **FACTS**

4. The Receiver was appointed by Order of this Honourable Court dated March 10, 2015. This appointment is pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, section 13(2) of the *Judicature Act*, RSA 2000 c J-2, and section 99(a) of the *Business Corporations Act*, RSA 2000 c B-9.
5. The Debtors are involved in a number of construction projects. The Debtors’ most significant contracts are with two counterparties: ThyssenKrupp Industrial Solutions (Canada) Inc. (“**Krupp**”) and Canadian Natural Resources Ltd. (“**CNRL**”).
6. The Debtors have six projects with CNRL. Liens have been, and continue to be, filed against some of these projects. The Receiver is of the view that it should complete the two ongoing CNRL contracts as this is in the best interest of the Debtors’ stakeholders. To complete these projects it will be necessary for the Receiver to address outstanding claims against the Debtors, especially lien claims.
7. The Debtors have two contracts with Krupp. One concerning the Kearl Lake Oil Sands Project and the other a project known as MLMR. Both of these contracts are completed, however, Krupp has refused to pay amounts owing to the Debtors. Both the Debtors and their

subcontractors have liened these projects. Collecting the amounts outstanding, including exercising lien rights, is an important aspect of the receivership of the Debtors.

III. **LAW AND ARGUMENT**

8. The issue before the Court is whether this Honourable Court should approve the Claims process. Within that issue are two analyses:

- (a) The Claims Process is necessary and does not alter substantive BLA rights; and
- (b) The Claims Process advances the goals and purpose of the BLA, and is an effective way for lien claimants to exercise their rights in this receivership.

1. **The Court should Approve the Claims Process**

9. The issue raised by this application is whether the Court should approve the Claims Process. An important aspect of this is that the proposed Claims Process encompasses the claims of persons with lien rights, which would otherwise be governed by the substantive and procedural provisions of the BLA. However, it is respectfully submitted that this does not prevent the Court from approving the Claims Process. Rather, the Court should approve the Claims Process as it both preserves the substantive rights created by the BLA and is the most effective way to ensure that the broader goals and purposes of the BLA are met in the receivership.

(a) **The Claims Process is necessary and does not alter substantive BLA rights**

10. “[O]ne of the duties of a receiver and manager is to ascertain what creditors have claims, the amount of those claims, and the priority of those claims.” In fulfilling this duty, Court-appointed receivers frequently “seek the assistance of the Court in establishing a claims process where ownership of the assets in the debtor’s possession or liability of the debtor is in dispute.”

- ***bcIMC Construction Fund Corp v Chandler Homer Street Ventures Ltd*, 2008 BCSC 897 at para 49. [at TAB 1]**
- ***Bank of Montreal v Scott*, 2013 SKQB 64 at para 11. [at TAB 2]**

11. In determining whether to approve any claims process, it is important to consider the context of the debtor’s business and recognize that “[t]he remedy of receivership is flexible” and capable of adapting to specialized circumstances.

- Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Thomson Reuters, 2011) at 1. [at TAB 3]
12. The Debtors are in the construction business and therefore, unsurprisingly, lien rights are an important aspect of this administration. Accordingly, the proposed Claims Process addresses lien rights and is designed to allow the Receiver to fulfill its duty to ascertain the validity, amount, and priority of the various creditor claims. Importantly, the Claims Process accomplishes this without altering the substantive rights or procedures created by the BLA.
13. The BLA creates substantive lien rights and prescribes procedures through which lien claimants can exercise these rights. The Claims Process leaves intact the substantive rights created by the BLA because it provides for the determination of liens where a lien is alleged, and for the payment of liens established as valid, subject to the BLA. The Claims Process simply provides an expedited and efficient process through which lien claimants can obtain and enforce their substantive rights in the receivership. This differentiates the within Application from the one in *Railside Developments Ltd, Re*, where a receiver sought to override substantive legislative provisions. In *Railside*, the receiver sought an order approving the designation of a construction project as a condominium notwithstanding that it could not obtain the statutorily required consent of encumbrancers. The Court did not grant the order requested. The Claims Process here is distinguishable because it does not seek to oust substantive legislative rights.
- *Railside Developments Ltd, Re* 2010 NSSC 13, additional reasons at 2010 NSSC 237. [at TAB 4]
14. Furthermore, the procedures in the Claims Process bear a strong resemblance to those found in the BLA, and were designed to be consistent with the BLA. The main thrust of the Claims Process is to expedite and add efficiency to the procedures prescribed by the BLA, not to change them. For example, the Claims Process allows the removal of liens upon payment of alternate security into Court, a process mirroring the mechanism found in section 48 of the BLA.
- *Builders' Lien Act*, s 48. [at TAB 5]
15. Furthermore, the Receiver (i) is an officer of the Court, (ii) has a duty of even-handedness that mirrors the Court's own duty of fairness in the administration of justice and (iii) is said to be "fiduciary" for all creditors of the debtor. Thus, in the Claims Process, as in the processes for enforcement of liens contained in the BLA, lien claims are assessed by a disinterested third party concerned with completing the assessment in a fair manner. Notably, the Claims Process still

places the Court as the ultimate adjudicator of lien rights should a claimant disagree with the decision of the Receiver or Claims Officer.

- ***Bank of Nova Scotia v Diemer***, 2014 ONCA 851 at para 31 citing ***Confectionately Yours Inc, Re***, 219 DLR (4th) 72 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011) at p 186. [at TAB 6]

16. Finally, Courts have recognized a claims process as an appropriate mechanism for dealing with lien claims in the context of a receivership. The Saskatchewan Court of Queen's Bench contemplated such a claims process, saying:

Because the Receiver decided to operate the corporation *without addressing the lien claims, either by a claims procedure or a form of allocation of assets that are subject to s. 22(2) of the BLA*, does not nullify any priority the Lien Claimants may have to the net proceeds. *The use of a claims procedure to have priorities adjudicated upon is common in court-appointed receiverships.*

- ***Boomer Transport Ltd v Prevail Energy Canada Ltd***, 2014 SKQB 368 at para 41. [at TAB 7]

17. This quotation confirms that claims processes are permissible in receiverships and demonstrates the Court's recognition of a claims process as an appropriate mechanism for addressing builders' lien claims.

18. Further precedent for the use of a claims process to determine builders' lien issues in a receivership comes from ***Arthur Andersen Inc v Merit Energy Ltd***. In *Merit*, the Saskatchewan Court of Appeal allowed an appeal of a chambers judge's decision that certain liens claimed "were invalid and extinguished". The *ratio* of the case is that a claims process can serve as a procedural mechanism to determine the validity of a lien but the process cannot extinguish a substantive lien right where the claimant supplies facts that show it is entitled to a lien under provincial lien legislation. The Claims Procedure is designed in this way.

- 2004 SKCA 124. [at TAB 8]

- (b) **The Claims Process supports the goals and purpose of the BLA and is the most effective way for lien claimants to exercise their rights in this receivership**

19. The proposed Claims Process supports the purpose and goal of the BLA. "The purpose of lien legislation is to create a mechanism allowing lienholders to enforce their liens at a minimal expense and in a procedurally uncomplicated manner." This goal is reflected in many provisions of the BLA. For example, section 49(6) requires the Court to use summary procedures where

possible to adjudicate lien claims. Section 53 of the Act requires the claimant to make a pre-trial application and allows the Court to hear oral evidence at this application to determine the validity of a lien. Clearly, the BLA places an emphasis on adjudicating lien claims through cost-effective and uncomplicated proceedings.

- *Builders' Lien Act*, ss 49, 53. [at TAB 5]
- *Maple Reinders Inc v Eagle Sheet Metal Inc*, 2007 ABCA 247 at para 21, citations omitted. [at TAB 9]

20. These goals are advanced by the Claims Process which, consistent with the existing case law "is intended to be an efficient and flexible process in order that claims of creditors can be established expeditiously with a view to distribution of available assets as soon as reasonably possible". The Claims Process provides an efficient and simple mechanism for lien claimants to exercise their rights in the receivership. Approving the Claim Process supports the BLA's goal of providing a cost effective and uncomplicated process for lienholders to exercise their rights.

- *Computershare Trust Co of Canada v Cookstown Holdings Ltd*, 2014 ONSC 685 at para 13. [at TAB 10]

21. Additionally, it is respectfully submitted that the Claims Process is a more efficient and less complicated procedure for claimants to enforce their lien rights than the procedures set out in the BLA. The BLA process contemplates that proceedings to enforce a lien be commenced by Statement of Claim. In contrast the Proof of Claim form contemplated by the Claims Process is straightforward and less complex. The form is designed to elicit information relevant to the Receiver's initial assessment of lien claims and, it is respectfully submitted, the vast majority of claimants would find it easier to fill out the Proof of Claim than file a Statement of Claim and thereafter comply with the Rules of Court concerning the production of records, questioning, and trial.

22. Additionally, addressing lien claims through the Claims Process increases the efficiency of the receivership overall. Absent approval of the Claims Process, the Receiver will be forced to defend multiple proceedings commenced by lien claimants prosecuting their lien claims. This would result in increased cost which erodes the estate. Implementing the Claims Processes realizes efficiencies by dealing with all claims against the Debtors in a single process and advances the fundamental principle of insolvency law that claims against a debtor should be

dealt with in a single proceeding. Increased efficiency in the receivership is an additional factor weighing in favour of the Court approving the Claims Process.

- Roderick J. Wood, *Bankruptcy & Insolvency Law*, (Toronto: Irwin Law Inc, 2009) at 2-4. [at TAB 11]

IV. **CONCLUSION**

23. Courts have previously recognized claims processes as valid mechanisms for determining lien rights in a receivership. The proposed Claims Process provides a simple and cost efficient process for determining lien claims in the receivership while also preserving substantive rights created by the BLA. It advances the underlying purpose and goals of the BLA. The Claims Process allows the Receiver to effectively administer the receivership while providing lien claimants with a simple and cost effective process to enforce their rights. The existing jurisprudence supports the approval of the Claims Process in the circumstances. For these reasons, the Court should approve the Claims Process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DENTONS CANADA LLP, Solicitors for FTI Consulting
Canada Inc.

For Per: 
David Mann / David LeGeyt

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6.	<i>Bank of Nova Scotia v Diemer</i> , 2014 citing <i>Confectionately Yours Inc, Re</i> , 219 DLR (4 th) 72 and Kevin P. McElcheran, <i>Commercial Insolvency in Canada</i> , 2d ed. (Markham: LexisNexis, 2011)
7.	<i>Boomer Transport Ltd v Prevail Energy Canada Ltd</i> , 2014 SKQB 368
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9.	<i>Maple Reinders Inc v Eagle Sheet Metal Inc</i> , 2007 ABCA 247
10.	<i>Computershare Trust Co of Canada v Cookstown Holdings Ltd</i> , 2014 ONSC 685
11.	Roderick J. Wood, <i>Bankruptcy & Insolvency Law</i> , (Toronto: Irwin Law Inc, 2009)