

ENTERED



102299

COURT FILE NUMBER 2001-05482
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

COM
Oct 21, 2020
Justice Eidsvik

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

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

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and MANTLE MATERIALS GROUP, LTD.

APPLICANTS JMB CRUSHING SYSTEMS INC., 2161889 ALBERTA LTD., and MANTLE MATERIALS GROUP, LTD.

DOCUMENT **BRIEF OF LAW OF JMB CRUSHING SYSTEMS INC. FOR ORDERS IN RESPECT OF BUILDERS' LIENS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Gowling WLG (Canada) LLP
1600, 421 – 7th Avenue SW
Calgary, AB T2P 4K9

Attn: Tom Cumming/Caireen E. Hanert/Alison J. Gray
Phone: 403.298.1938/403.298.1992/403.298.1841
Fax: 403.263.9193
File No.: A163514

I. INTRODUCTION

1. This Bench Brief is submitted by JMB Crushing Systems Inc. (“**JMB**”) in support of FTI Consulting Canada Inc., in its capacity as the Court-appointed monitor (the “**Monitor**”) of JMB and 2161889 Alberta Ltd., in responding to two applications contesting the Monitor’s determination of the validity of certain builders’ lien claims (collectively, the “**Lien Claims**”) submitted by Jerry Shankowski and 945441 Alberta Ltd. (collectively, “**Shankowski**”) and RBEE Aggregate Consulting Ltd. (“**RBEE**”) in accordance with the Order – Lien Claims – MD of Bonnyville, granted May 20, 2020 by the Honourable Justice K.M. Eidsvik (the “**Bonnyville Lien Process Order**”).
2. JMB submits the Lien Claims are invalid, as they do not comply with the requirements of the provisions of the *Builders’ Lien Act*, RSA 2000, c B-7 (the “**BLA**”), as there is no improvement to land.

II. FACTS

3. JMB relies upon the facts as set out in the Monitor’s Bench Brief, as well as the Affidavit of Jason Panter sworn October 9, 2020 (the “**Panter Affidavit**”) and the Affidavit of Blake Elyea sworn October 16, 2020 (the “**Elyea Affidavit**”).

III. ISSUE

4. The issue before this Court is whether the Lien Claims are valid under the *BLA* because they relate to work done or materials supplied in respect of an improvement to land.
5. JMB asserts the Lien Claims are invalid. While aggregate was extracted, crushed and tested to complete the 2020 supply under the Bonnyville Contract (as defined below), that aggregate cannot be traced to an improvement on or in a specific parcel of land. The Bonnyville Contract makes no mention of a specific project (i.e., an improvement) for which the aggregate is to be used or specific lands upon which an improvement was or is to be made. Rather, the contract merely requires JMB to provide Product (as defined below) to the MD of Bonnyville, which Product is to be delivered and stockpiled for the MD of Bonnyville.

IV. LAW AND ARGUMENT

6. As stated above, the Lien Claims are not valid liens under the *BLA*, as they do not comply with the legislative requirement that any work or services provided, or materials supplied, be for an identifiable improvement to land.

A. The Legislative Scheme

7. When determining the right of a lien claimant to maintain a lien, builders' lien legislation must be strictly interpreted. Further, because builders' liens interfere with common law property rights, no right should be found unless the law clearly expresses it. As the *BLA* creates an extraordinary statutory remedy, lien rights must be given a practical interpretation so as not to unduly prejudice the rights of owners and third parties.

Rahco International Inc. v Laird Electric Ltd., 2006 ABQB 592 ("*Rahco*") at para 25 [Tab 1, JMB Brief for October 16 Application ("JMB Oct 16 Brief")]

Royal Bank of Canada v 1679775 Alberta Ltd., 2019 ABQB 139 at para 27 [Tab 2, JMB Oct 16 Brief]

8. In referring to the Supreme Court of Canada's decision in *Clarkson Co. Ltd. v Ace Lumber Ltd.*, the New Brunswick Court of Appeal stated:

We should not, therefore, give a large and liberal interpretation to the words "to be used in an improvement".

Beloit Canada Ltd. v Fundy Forest Industries Ltd., 1981 CanLII 2865 (NBCA) at para 16 [Tab 3, JMB Oct 16 Brief]

9. Section 6(1) of the *BLA* governs the lien claims in this case. Section 6(1) provides:

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement; or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, ... a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

BLA, s. 6(1) [Tab 4, JMB Oct 16 Brief]

10. "Owner" is defined in s. 1(j) of the BLA as "a person having an estate or interest in land at whose request, express or implied, ...work is done...for an improvement", and "Improvement" is defined in s. 1(d) of the BLA as:

anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land.

BLA, s 1(d), (j) [Tab 4, JMB Oct 16 Brief]

11. Consequently, to have a valid builders' lien, the following must be proven:
- (a) The owner must request the work be done for an improvement to her land;
 - (b) There must be an improvement to the owner's land;
 - (c) The improvement must be a thing constructed, erected, built, placed, dug or drilled, on or in the land; and
 - (d) The improvement must be affixed to the land or intended to be or become part of the land.

B. The Lien Claims are Invalid

12. JMB submits the Lien Claims are invalid, as there is no improvement for which work was done or materials supplied.
13. Pursuant to the agreement between JMB and the MD of Bonnyville effective November 1, 2013, as amended (the "**Bonnyville Contract**"), JMB was required to supply, haul and stockpile, on an ongoing basis, 200,000 tonnes of crushed rock/gravel aggregate (the "**Product**") yearly to various sites as designated from time to time by the MD of Bonnyville. The key terms of the Bonnyville Contract are:

1. In this Agreement, capitalized words will have the following meanings:

[...]

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

(f) “Services” means the hauling and stockpiling of crushed aggregate by JMB as set out in this Agreement and anything else which is required to be done to give effect to this Agreement; [...]

11(c) A minimum of 200,000 (two-hundred-thousand) tonnes of Product per year, shall be supplied and/or stockpiled at designated locations within the geographic boundaries of the MD [...]

11(e) ...The annual quantities shall not be less than 200,000 (two-hundred-thousand) tonnes of Product delivered and stockpiled for the MD by JMB.

Panter Affidavit, Exhibit “C”

14. When one reviews the key terms of the Bonnyville Contract, it is evident that it is one of supply, pursuant to which JMB was to produce and deliver 200,000 tonnes of the Product to the MD of Bonnyville over the course of a year. The Product was to be delivered to, and stockpiled at, a location designated by the MD of Bonnyville. Consequently, to have a valid Builders’ Lien, RBEE and Shankowski must show that the production and delivery of the Product to be stockpiled amounts to an improvement under the *BLA*.
15. However, the Bonnyville Contract only refers to the Product being supplied for the purpose of maintaining a stockpile of the Product at the MD Yard. There is no mention in the Bonnyville Contract of any construction project for which the Product is needed. Rather, the only evidence is that the Product was used on an as-needed basis for road maintenance.

Elyea Affidavit, para •

Supplemental Affidavit of David Howells, sworn October 9, 2020 (“**Supplemental Howells Affidavit**”), paras 4(a) – 4(c)

16. The express purpose of the work performed on the Shankowski Land was to remove the aggregate from the land, so it could be processed and hauled to the MD Yard and stockpiled in satisfaction of the Bonnyville Contract. Neither Shankowski nor RBEE identify an “improvement” to which this work is connected in support of the Lien Claims. Shankowski merely asserts in his Brief of Law (at para 37) that the Product “was clearly intended to be incorporated into an “improvement” on the Lands of the MD or Bonnyville or other lands of the MD of Bonnyville...”. Shankowski does not identify what that “improvement” is. RBEE states the repair of soft spot sections of a variety of road locations in the MD of Bonnyville is the improvement for the purposes of the *BLA*.

17. The definition of improvement in the *BLA* is exclusive, not inclusive. In Alberta, in order for work to have "improved" land, one or more of the activities listed in the opening words of the section (i.e. constructed, erected, etc.) must have occurred and the work product must be both "affixed to" the land and "intended to be or become part of the land". Absent any of these factors, the work is not an improvement and, consequently, not lienable. Consequently, to qualify as an "improvement" under the *BLA*, RBEE and Shankowski must point to something "constructed, erected, built, placed, dug or drilled or intended to be constructed, erected built, placed, dug or drilled, on or in land" that incorporated the Product to establish an improvement, which they have not done.

Rahco, supra at paras 42, 64 [Tab 1, JMB Oct 16 Brief]

BLA, s. 1(d) [Tab 4, JMB Oct 16 Brief]

18. In their written submissions, RBEE and Shankowski cite authority stating the overall project must be considered to determine if work done or services provided amounts to an improvement under the *BLA*. While "improvement" must be considered from the perspective of the overall project, the law requires the improvement for which work or services is said to have been provided to be identified, and by extension, identifiable. The Bonnyville Contract has no identifiable lands or projects; the Bonnyville Contract only contemplates the general supply, delivery and stockpiling of the Product, which the MD of Bonnyville can then use at its discretion. As RBEE admits, the Product was used on various roads in the MD of Bonnyville on an as-needed basis.

Supplemental Howells Affidavit at para 4(a)-(c)

Davidson Well Drilling Limited (Re), 2016 ABQB 416 at paras 79, 81-82 [Tab 12, RBEE Authorities]

Grey Owl Engineering Ltd. v Propak Systems Ltd. at paras 18, 22 [Tab 6, Shankowski Authorities]

19. All of the authorities cited by both RBEE and Shankowski have a readily identifiable improvement, with an identifiable location, which then permits the Court to assess whether the work or services provided were directly related to the process of constructing the improvement. If so, the conclusion is that the work or services was provided in respect of an improvement undertaken at a specific location. In this case, there is no such readily identifiable improvement

undertaken by the MD of Bonnyville or a location where that improvement is to be undertaken in connection with the Bonnyville Contract.

PTI Group Inc. v ANG Gathering & Processing Ltd., 2002 ABCA 89 at paras 16-17 [**Tab 11, RBEE Authorities**]

20. The decision in *Northern Dynasty Ventures Inc. v Japan Canada Oil Sands Limited* does not assist RBEE and Shankowski. In that case, the Court was considering s. 6(4) of the *BLA*, which applies to rental equipment that is on a contract site or in the immediate vicinity thereof, and “is used or is reasonably required to be available for the purpose of the work.” Thus, the focus of the analysis is the “contract site”, which is the site where the improvement is being undertaken. In *Northern Dynasty*, the contract site was where an oil sands project was being constructed, and the location of the rental equipment was sufficiently close to the contract site to permit a lien claim with respect to that site. Even if this decision and the principles set out there in applied to factual circumstances outside of s. 6(4) of the *BLA*, there is no identifiable “contract site” in this case, as again, the Bonnyville Contract does not refer to a specific project or location for which the product is to be used. The Bonnyville Contract only specified the Product was to be stockpiled and used by the MD of Bonnyville on an as needed basis.

Northern Dynasty Ventures Inc. v Japan Canada Oil Sands Limited, 2020 ABQB 275 at paras 10-12 [**Tab 9, RBEE Authorities**]

21. Shankowski faces an additional hurdle to his Lien Claim, as Shankowski provided no work or services as it relates to the Bonnyville Contract. Although Shankowski argues that he supplied materials, namely the raw aggregate, to the MD of Bonnyville, JMB submits that Shankowski did not supply materials to the MD of Bonnyville pursuant to the Bonnyville Contract. Rather, it was JMB that supplied the Product.
22. The only connection Shankowski has to the Product is through the Aggregates Royalty Agreement entered into between JMB and Shankowski (the “**Shankowski Royalty Agreement**”). Pursuant to the Shankowski Royalty Agreement, in exchange for JMB paying Shankowski a royalty on all extracted aggregate, JMB was given the exclusive right to explore, prospect for, test, get, process and dispose of aggregates contained at the Shankowski Pit. The Shankowski Royalty Agreement exists independently and apart from the Bonnyville Contract

and does not form part of the chain of contracts entered into for the purpose of completing the 2020 supply of Product under the Bonnyville Contract.

Panter Affidavit, paras 5 – 7, Exhibit “A”

23. The Shankowski Royalty Agreement makes no reference to the Bonnyville Contract, the lands liened, or any lands owned by the MD of Bonnyville. It also makes no reference to any particular project for which the extracted aggregate is to be used, and there is no evidence the Shankowski Royalty Agreement was entered into for the express purpose of supplying Product to the MD of Bonnyville. Further, there is no evidence Shankowski did anything to “supply” the aggregates to JMB; rather the evidence is JMB and to a very limited extent RBEE, excavated all of the aggregate that formed a part of the Product supplied to the MD of Bonnyville pursuant to the Bonnyville Contract.

Panter Affidavit, paras 12(a), (d)

V. CONCLUSION

24. As there is no identifiable project being undertaken by the MD of Bonnyville on any identifiable lands as required by the *BLA*, the Lien Claims are invalid.

All of which is respectfully submitted this 16th day of October, 2020.

GOWLING WLG (CANADA) LLP



Tom Cumming/Caireen E. Hanert/Alison J. Gray
Counsel for JMB Crushing Systems Inc.