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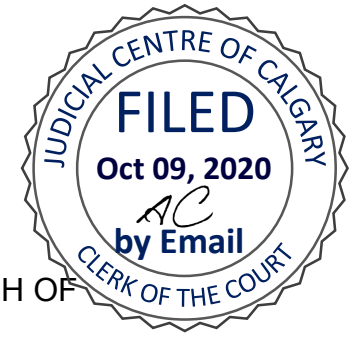


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| COURT FILE NUMBER | 2001 05482 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |

COM
Oct 16 2020
J.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.

APPLICANT: JMB CRUSHING SYSTEMS INC.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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**BRIEF OF THE APPLICANTS, JERRY SHANKOWSKI & 945441 ALBERTA LTD.**

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**TAB**

**BRIEF OF JERRY SHANKOWSKI AND 945441 ALBERTA LTD.**

## Part I – Statement of Facts

### Overview

1. This Brief is filed in relation to the Application and Affidavit submitted for filing on October 9, 2020, by the Applicants, Jerry Shankowski ("Shankowsi") and 945441 Alberta Ltd. ("945441") ("Shankowski Applicants"), in which the Shankowski Applicants seek an Order to declare the Builders' Liens filed by RBEE Aggregate Consulting Ltd. ("RBEE") and by J.R. Paine & Associates Ltd. ("J.R. Paine") invalid pursuant to s. 48(1)(c) of the *Builders' Lien Act* (Alberta)[1] ("*BLA*") and to direct the Registrar for the North Alberta Land Registration District to discharge the 2 Builders' Liens forthwith, notwithstanding s. 191(1) of the *Land Titles Act*[2].

2. Shankowski is the registered owner of the lands legally described as:

FIRST
MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21

---

[1] RSA 2000, c. B-7.

[2] RSA 2000, c L-4, s. 191(1) and (3) provide:

> Registration of judgment, order or certificate
>
> 191(1) Subject to subsection (3), the Registrar shall not register a judgment, order or certificate made in any proceedings of a court that operates to cancel a certificate of title, terminate an interest in land or discharge an instrument or a caveat unless the judgment, order or certificate
>
> (a) is consented to by all the parties to the proceedings or their solicitors,
>
> (b) was granted ex parte and states that it does not have to be served on any person,
>
> (c) is accompanied with a written undertaking from those persons having a right to appeal from the judgment, order or certificate, or their solicitors, that no appeal from the judgment, order or certificate will be commenced,
>
> (d) is accompanied with a certificate of the clerk of the court that issued the judgment, order or certificate to the effect
>
> (i) that no defence or demand of notice of proceedings has been filed in the proceedings on behalf of any defendant, or
>
> (ii) that the time for appeal from the judgment, order or certificate has expired and that no notice of appeal has been filed,
>
> or
>
> (e) is accompanied with a certificate of a solicitor to the effect
>
> (i) that an appeal to the Court of Appeal has been finally disposed of or discontinued, that the time for an appeal to the Supreme Court of Canada has expired and that no notice of appeal has been filed, or
>
> (ii) that the judgment, order or certificate has been appealed to the Supreme Court of Canada and that the appeal has been finally disposed of or discontinued.
>
> [ ... ]
>
> (3) This section does not apply to
>
> (a) an order removing a builders' lien or removing a certificate of lis pendens with respect to a builders' lien, or
>
> (b) a judgment, order or certificate that expressly states that it shall be registered notwithstanding the requirements of subsection (1).

QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 - ROAD 0.417 1.03
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME
SECOND
MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 - ROAD 0.417 1.03
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME
(the "Lands")

3. Shankowski holds the Lands in trust for 945441, and conducts business through 945441.

4. On May 20, 2020, in this Action, an Order ("Eidsvik May 20 Order") was granted by the Honourable Madam Justice K.M. Eidsvik ("Eidsvik J.") establishing a protocol for any builders' liens registered or capable of being registered in respect of the Contract between JMB Crushing Systems Inc. ("JMB") and the Municipal District of Bonnyville No. 87 ("MD of Bonnyville"), and discharging any builders' liens then registered against certain lands ("MD of Bonnyville Lands") stipulated in the Eidsvik May 20 Order and owned by the MD of Bonnyville.

5. On or about May 13, 2020, J.R. Paine caused the J.R. Paine Lien to be registered against the Lands.

6. On or about May 15, 2020, RBEE caused the RBEE Lien to be registered against the Lands.

7. The Eidsvik May 20 Order provides a separate protocol for builders' lien claims against any interest of JMB in any lands in relation to the Contract between JMB and the MD of Bonnyville.

PART II **Background Facts – Applications to Discharge Builders' Liens**

8. Neither Shankowki or 954441 requested, expressly or impliedly, any work or services to be provided on or in respect of an improvement on the Lands by either RBEE or J.R. Paine, and any such work or services were requested by JMB.

9. RBEE and J.R. Paine, or either of them, could have registered a builders' lien against the MD of Bonnyville Lands prior to the granting of the Eidsvik May 20 Order, and could have had their lien claims dealt with pursuant to the Eidsvik May 20 Order, but neither of them did so.

10. JMB has been removing aggregate (gravel) pursuant to an Aggregates Royalty Agreement[3] between the Shankowski Applicants and JMB CRUSHING SYSTEMS ULC. The Shankowski Applicants understand that JMB is either a director or indirect shareholder or a successor to JMB CRUSHING SYSTEMS ULC. It is pursuant to the attached Aggregates Royalty Agreement that JMB has been removing and selling aggregates, including gravel and sand from the Pit on the Lands (the "Shankowski Pit"). Although Shankowski is the registered owner of the Lands, he holds the Lands in trust for his corporation, 945441, and carries on business through 945441.

11. A builders' lien was registered by RBEE on or about May 15, 2020, and a builders' lien was registered by J.R. Paine & Associates Ltd. ("J.R. Paine") on or about May 13, 2020.[4]

12. A true copy of a Builders' Lien Statement of Lien which was provided to Shankowski by Alberta Land Titles Office regarding the Lien filed by RBEE is Exhibit "C" to the Shankowski Affidavit.

13. A true copy of a Builders' Lien Statement of Lien which was obtained by the lawyers for the Shankowski Applicants from Alberta Registries regarding the Lien filed by J.R. Paine is Exhibit "D" to the Shankowski Affidavit.

14. It is submitted that each of the Builders' Liens registered is invalid as being contrary to the spirit and intent of the Order granted in this Action by the Honourable Madam Justice K.M. Eidsvik ("Justice Eidsvik") on May 20, 2020 ("Eidsvik May 20 Order[5]"), establishing a builders' lien protocol regarding actual and potential lien claims regarding the Contract between JMB and the Municipal District of Bonnyville No. 87 ("MD of Bonnyville").

15. It is submitted that each of the Liens filed could have, and properly should have, been filed against the MD of Bonnyville Lands, instead of being filed against the Lands, and in any event should be subject to the Builders' Lien protocol established under the Eidsvik May 20 Order.

16. Neither of the Shankowski Applicants requested, expressly or implicitly, any materials or services to be provided respecting an improvement on the Lands. Rather, if anyone requested materials or services to be provided, it would have been JMB. There are no buildings or other permanent structures on the Lands. Neither of the Shankowski Applicants have had any interaction with RBEE or J.R. Paine to date, other than receiving the notifications of the builders' liens from the Land Titles Office. It is submitted that neither of the Shankowski Applicants is an "owner" within the meaning of the *BLA* regarding the Liens registered by RBEE and J.R. Paine because of

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[3] Exhibit "A" to the Affidavit of Jerry Shankowski sworn October 9, 2020 ("Shankowski October Affidavit").
[4] Exhibit "B" to the Shankowski Affidavit.
[5] Exhibit "E" to the Shankowski Affidavit.

the fact that neither of the Shankowski Applicants requested any materials or services to be provided respecting an improvement on the Lands, expressly or impliedly.

17. Further, it is submitted that the materials or services provided by RBEE and J.R. Paine, respectively, would have been provided on or respecting an improvement on the Lands of MD of Bonnyville and not on or in respect of an improvement on the Lands.

18. With respect to the Lien registered by RBEE, the claimed services are stated to be "Aggregate (gravel) crushing work".

19. With respect to the Lien registered by J.R. Paine, the claimed services are stated to be "inspection of aggregate".

20. Before aggregate can be crushed, it has already been extracted from the Lands and no longer is affixed to or part of the Lands, but rather has become moveable property or chattel.

21. Before aggregate can be inspected, it has already been both extracted from the Lands and crushed, which again means it is no longer affixed to or part of the Lands, but rather has become moveable property or chattel.

22. There have been no "improvements" added to the Lands by either RBEE or J.R. Paine, and there were no "improvements" on the Lands prior to the supply of services by either RBEE or J.R. Paine.

23. It is submitted that neither RBEE nor J.R. Paine provided services on or in respect of an "improvement" on the Lands, but rather provided services in respect of moveable property, being the aggregate that had by that time already been extracted from the Lands.

24. Under the Aggregates Royalty Agreement, JMB pays 945441 certain royalty rates for different kinds of aggregate based on type and size. 945441 does not get paid until the aggregate is removed from the Lands.

25. It is submitted that the royalties paid are effectively a form of rent for the use of the Lands.

26. Neither of the Shankowski Applicants received any notice under the *BLA* which would have been required to make either of the Shankowski Applicants liable for any work or materials supplied on or in respect of an improvement on the Lands if either of the Shankowski Applicants were a normal landlord or lessor.

27. Each of the RBEE Lien and the J.R. Paine Lien claims a Lien in the fee simple estate of the Lands. In addition, the J.R. Paine Lien claims that the fee simple estate in the lands is owned by the MD of Bonnyville, which is not true in respect of the Lands. A copy of the title to the Lands is attached to the J.R. Paine Lien as Schedule "B", but the first page of the J.R. Paine Lien claims a lien in the fee simple estate and indicates that the fee simple estate is owned by the MD of Bonnyville. Shankowski is the registered owner of the fee simple estate in the Lands, which he

hold in trust for 945441. The MD of Bonnyville does not own any interest in the Lands, including but not limited to the fee simple estate.

28. Neither the RBEE Lien nor the J.R. Paine Lien alleges that any work or services were provided at the request, expressly or impliedly, of either of the Shankowski Applicants, and does not allege that either of the Shankowski Applicants is an "owner" of the Lands within the meaning of the *BLA*, by which it would be necessary to allege that the services were provided at the request, expressly or impliedly, of either of the Shankowski Applicants, respectively.

29. Each of the RBEE Lien and the J.R. Paine Lien alleges that any services were provided at the request of JMB and not either of the Shankowski Applicants.

30. In addition, the J.R. Paine Lien alleges that the services were provided at the request of both JMB and the MD of Bonnyville.

31. It is submitted that it is too late for either RBEE or J.R. Paine to claim a builders' lien pursuant to the protocol established by the Eidsvik May 20 Order, as the RBEE Lien alleges that the last services were provided on April 8, 2020, and the J.R. Paine Lien alleges that the last services were provided on April 6, 2020.

## Part III – Statement of Argument

### Statutory Provisions

32. The *BLA* contains the following definitions (s. 1):

> **Definitions**
> **1** In this Act,
> [ ... ]
> (b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;
> (c) "court" means the Court of Queen's Bench;
> (d) "improvement" means 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;
> (e) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;
> (f) "lienholder" means a person who has a lien arising under this Act;
> [ ... ]
> (j) "owner" means a person having an estate or interest in land at whose request, express or implied, and
> (i) on whose credit,

(ii) on whose behalf,
(iii) with whose privity and consent, or
(iv) for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

[ ... ]

(l) "registered lienholder" means a lienholder who has registered a statement of lien in the appropriate land titles office and includes a lienholder who has registered a statement of lien that has been removed pursuant to section 27 or 48(1);

[ ... ]

(n) "subcontractor" means a person other than
(i) a labourer,
(ii) a person engaged only in furnishing materials, or
(iii) a person engaged only in the performance of services,

who is not a contractor but is contracted with or employed under a contract;

[ ... ]

(p) "work" includes the performance of services on the improvement.

33. Section 6 of the *BLA* governs the creation of a lien:

**Creation of lien**

**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, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

(2) When work is done or materials are furnished

(a) preparatory to,
(b) in connection with, or
(c) for an abandonment operation in connection with,

the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done or the material to be furnished, the lien given by subsection (1) attaches to all estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding the estate in fee simple in the mines and minerals has expressly requested the work or the furnishing of material, in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to that person's estate, if any, in the rest of the land.

(3) A lien attaching to an estate or interest in mines and minerals also attaches to the minerals when severed from the land.
(4) For the purposes of this Act, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

34. The *BLA* provides in s. 34:

**Registration of lien**
**34(1)** A lien may be registered in the land titles office by filing with the Registrar a statement of lien in the prescribed form.
(2) The statement of lien shall set out
(a) the name and residence of
(i) the lienholder,
(ii) the owner or alleged owner, and
(iii) the person for whom the work was or is being done or the materials were or are being furnished,
(b) the date when the work was completed or the last materials were furnished, or if the statement of lien is filed before the completion of the contract or subcontract, as the case may be, a statement that the work is not yet completed or the materials have not yet all been furnished,
(c) a short description of the work done or to be done or of the materials furnished or to be furnished,
(d) the sum claimed as due or to become due,
(e) a description, sufficient for registration, of the land and estate or interest in the land to be charged, and
(f) an address for service of the lienholder in Alberta.
(3) A statement of lien shall be signed by the lienholder or the lienholder's agent.
(4) In the case of a lien arising in connection with an oil or gas well or an oil or gas well site it is not necessary to set out in the statement of lien the name of the owner or alleged owner of the oil or gas well or the oil or gas well site.
(5) When a lienholder desires to register a lien against a railway, it is a sufficient description of the land to describe it as the land of the railway company.
(6) The statement of lien shall be verified by an affidavit in the prescribed form of the lienholder or of the lienholder's agent or assignee.
(7) When the statement of lien is made by a corporation, it shall be verified by the affidavit of an officer or employee of the corporation or its agent.
(8) When the affidavit is made by a person other than the lienholder it may be made not only as to the facts within the personal knowledge of the deponent, but also as to the facts of which the deponent is informed, if the deponent gives the

source of the deponent's information and states that the deponent believes the facts to be true.

35. The *Mines and Minerals Act* (Alberta)[6] provides the following definitions:

**Interpretation**
**1(1)** In this Act,

[ ... ]

(n) "mine" means any opening or excavation in, or working of, the surface or subsurface for the purpose of working, recovering, opening up or proving any mineral or mineral-bearing substance, and includes works and machinery at or below the surface belonging to or used in connection with the mine;

[ ... ]

(p) "minerals" means all naturally occurring minerals, and without restricting the generality of the foregoing, includes

(i) gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl, but

(ii) does not include

(A) sand and gravel that belong to the owner of the surface of land under section 58 of the *Law of Property Act*,

(B) clay and marl that belong to the owner of the surface of land under section 57 of the *Law of Property Act*, or

(C) peat on the surface of land and peat obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations;

[ ... ]

36. The *Law of Property Act*[7], s. 58(1) and (2), provide:

**Sand and gravel**
**58(1)** The owner of the surface of land is and is to be deemed at all times to have been the owner of and entitled to sand and gravel on the surface of that land, and all sand and gravel obtained by stripping off the overburden or excavating from the surface, or otherwise recovered by surface operations.
**(2)** The sand and gravel referred to in subsection (1) is deemed not to be a mine, mineral or valuable stone but is deemed to be and to have been a part of the surface of land and to belong to the owner of the surface.

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[6] RSA 2000, c. M-17.
[7] RSA 2000, c. L-7.

[ ... ]

37. The *Law of Property Act*, s. 79, provides:

> **Mineral leases**
> **79** It is hereby declared that the term "lease" as used in the *Land Titles Act* and any Act for which the *Land Titles Act* was substituted includes, and is deemed to have included, an agreement whereby an owner of an estate or interest in a mineral within, on or under any land for which a certificate of title has been granted under the *Land Titles Act* or any Act for which the *Land Titles Act* was substituted, demises or grants or purports to demise or grant to another person a right to take or remove any of the mineral for a term certain or for a term certain coupled with a right subsequently to remove any of the mineral so long as it is being produced from the land within, on or under which that mineral is situated.

**Builders' Lien Issues**

Conflict with Eidsvik May 20 Order

38. Each of the RBEE Lien and the J.R. Paine Lien are invalid as regards the interests of Shankowski and / or 945441 in the Lands as either being contrary to the spirit and intent of the Eidsvik May 20 Order, or as being in respect of work or services that were not requested, expressly or impliedly, by either Shankowski or 945441, and as not being provided for an improvement to the Lands.

39. The Eidsvik May 20 Order requires the MD of Bonnyville to pay the amounts invoiced by JMB to the MD of Bonnyville to April 30, 2020, to the Monitor, FTI Consulting Canada Inc., and then directs any registered Liens to be removed from the MD Lands.

40. Paragraph 4 of the Eidsvik May 20 Order is particularly significant. It provides:

> **Stay of Lien Claims**
> 4. No person shall be permitted to commence or serve any Lien Claims, or to preserve or perfect any Lien Claim under the BLA, for Work done in respect of the Contract or the Lands for the period up to and including April 30, 2020. Any such Lien or Lien Claim is hereby stayed, and any person seeking to serve or enforce any Lien or Lien Claim shall be required to seek the rights and remedies set out in this Order. *[emphasis added]*

41. The Eidsvik May 20 Order defines numerous terms:

> **Definitions**
> 3. For the purpose of the within Order, the following terms shall have the following meanings: (a) "**BLA**" means the *Builders' Lien Act*, RSA 2000, c B-7;

(b) "**Claims Bar Date**" means 5:00p.m. (Calgary time) on June 1, 2020, or such other date as may be ordered by the Court;
(c) "**Contract**" means the agreement between MD of Bonnyville and JMB dated November 1, 2013, as amended, pursuant to which JMB provided Product to MD of Bonnyville and hauled the Product for stockpiling at the Lands;
(d) "**CRA Amount**" means $236,000.00 to be paid to the CRA from the Funds less the Holdback Amount in accordance with this Order;
(e) "**Determination Notice**" means written notice of a Lien Determination;
(f) "**Disputed Amount**" means the amount disputed as owing by MD of Bonnyville to JMB, which is $131,237.60;
(g) "**Funds**" means those amounts invoiced by JMB to MD of Bonnyville but not yet paid by MD of Bonnyville for the period up to and including April 30, 2020 in relation to the Contract, less the Disputed Amount, which is $3,563,768.40;
(h) "**Holdback Amount**" means the amount to be held by the Monitor from the Funds, which is $1,850,000.00;
(i) "**Interested Party**" means any party who gives notice in writing to the Monitor of its interest in a Lien Determination;
(j) "**JMB**" is JMB Crushing Systems Inc.;
(k) "**Lands**" means those lands legally described as:

LEGAL DESCRIPTION
MERIDIAN 4 RANGE 5 TOWNSHIP 61
SECTION 19
QUARTER NORTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 8622670 ROAD 0.416 1.03
B) PLAN 0023231 DESCRIPTIVE 2.02 4.99
C) PLAN 0928625 SUBDIVISION 20.22 49.96
EXCEPTING THEREOUT ALL MINES AND MINERALS

(l) "**Lien**" means a lien registered under the BLA against the Lands in respect of the Work or the Contract;
(m) "**Lien Claim**" means a claim of any Lien Claimant to the extent of such Lien Claimant's entitlement to receive payment from the major lien fund, as defined in the BLA, as it relates to the Work performed by the Lien Claimant or a subrogated claim for such Work;
(n) "**Lien Claimant**" means a claimant who: (i) has registered a Lien for its Work against the Lands; or (ii) has a Lien Claim and has provided a Lien Notice to the Monitor as described herein;
(o) "**Lien Determination**" means a determination of the validity of a Lien, a Lien Claim and the quantum thereof, whether by the Monitor or this Court;
(p) "**Lien Notice**" means the form attached as Schedule "A" hereto;
(q) "**MD of Bonnyville**" is the Municipal District of Bonnyville No. 87;

> (r) "**Monitor**" means FTI Consulting Canada Inc., in its capacity as the Court-appointed monitor of JMB, and not in its personal capacity or corporate capacity;
> (s) "**Product**" means the aggregate produced by JMB pursuant to the Contract; and
> (t) "**Work**" means work done or materials furnished with respect to the Contract or the Lands.

42. Therefore, by the definition of "Work", the Lien Claims of the 2 Builders' Lien Claimants, RBEE and J.R. Paine are arguably "stayed", as they involve "Work" allegedly provided in relation to the Contract between JMB and the MD of Bonnyville, even if the Lien Claimants also allege that the Work was provided on or in respect of an "improvement" to the Lands of the Shankowski Applicants.

43. The definition of "Lien Claim" does not relate only to the MD Lands, however, and extends to the "Work":

> (m) "**Lien Claim**" means a claim of any Lien Claimant to the extent of such Lien Claimant's entitlement to receive payment from the major lien fund, as defined in the BLA, as it relates to the Work performed by the Lien Claimant or a subrogated claim for such Work;

44. The definition of "Lien Claimant" does not relate only to the MD Lands, as there are 2 ways to be a "Lien Claimant" under the Eidsvik May 20 Order:

> (n) "**Lien Claimant**" means a claimant who: (i) has registered a Lien for its Work against the Lands; or (ii) has a Lien Claim and has provided a Lien Notice to the Monitor as described herein;

45. Going back to the prohibition in paragraph 4 of the Order, it is the definition of "Lien Claim", "Work", "Lands" and "Contract" that appears to be most important:

> **Stay of Lien Claims**
> 4. No person shall be permitted to commence or serve any Lien Claims, or to preserve or perfect any Lien Claim under the BLA, for Work done in respect of the Contract or the Lands for the period up to and including April 30, 2020. Any such Lien or Lien Claim is hereby stayed, and any person seeking to serve or enforce any Lien or Lien Claim shall be required to seek the rights and remedies set out in this Order. *[emphasis added]*

46. It is submitted that the claims of the 2 Lien Claimants against the Lands of our Client are barred by the Consent Order of May 20, 2020, and ought to be declared invalid and removed from the Lands of the Shankowski Applicants. Alternatively, it is submitted that the Court should expressly make the 2 Lien Claims subject to the protocol established by the Eidsvik May 20 Order, and direct that the 2 Liens be removed from the Lands of the Shankowski Applicants.

Non-Compliance with the *BLA*

47. Further, neither of the RBEE Lien or the J.R. Paine Lien specifies or alleges that any work or services were requested, expressly or impliedly, by either Shankowski or 945441, contrary to s. 34(2)(a)(ii) and s. 34(2)(a)(iii) of the *BLA*, and therefore does not allege that either Shankowski or 945441 is an "owner" of the Lands within the meaning of the *BLA*.

48. The deadline for registering each of the RBEE Lien and the J.R. Paine Lien has expired and neither of the RBEE Lien nor the J.R. Paine Lien can be amended or saved by an Order of the Court under s. 37 of the *BLA*.

49. The claimed services here are crushing of aggregate (gravel) and inspection of aggregate, respectively.

50. Unfortunately, there is no definition of "mineral" in the *BLA*. Likewise, there is no definition of "mineral" in the *Interpretation Act (Alberta)*[8].

51. There is a definition of "mine" and "mineral" in the *Mines and Minerals Act (Alberta)*, and they expressly exclude gravel, sand, clay and marl, as that *Act* provides:

> **Interpretation**
> **1(1)** In this Act,
> [ ... ]
> (n) "mine" means any opening or excavation in, or working of, the surface or subsurface for the purpose of working, recovering, opening up or proving any mineral or mineral-bearing substance, and includes works and machinery at or below the surface belonging to or used in connection with the mine;
> [ ... ]
> (p) "minerals" means all naturally occurring minerals, and without restricting the generality of the foregoing, includes
> (i) gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl, but
> (ii) does not include
> (A) sand and gravel that belong to the owner of the surface of land under section 58 of the *Law of Property Act*,
> (B) clay and marl that belong to the owner of the surface of land under section 57 of the *Law of Property Act*, or
> (C) peat on the surface of land and peat obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations;

[8] RSA 2000, c. I-8.

[ ... ]

52. Therefore, because sand and gravel are excluded from the definition of "mineral" in the *Mines and Minerals Act*, and a "mine" is defined with reference to a mineral, a quarry or gravel pit would not be a mine within the definition of that *Act*.

53. However, there is no reason that the Court should apply the definition of "mineral" in the *Mines and Minerals Act* to the word "mineral" in the *BLA*. If the Legislature had intended the definitions of "mine" and "mineral" in the *Mines and Minerals Act* to apply to matters under the *Builders' Lien Act*, it could easily have expressly so provided.

54. This is important because s. 6(2) of the *BLA* specifically deals with the creation of a lien for work done or materials supplied preparatory to, in connection with or for an abandonment operation in connection with the recovery of a mineral. If gravel is seen by the Court as being a mineral, then the Court should apply s. 6(2) of the *BLA* and find that the work of each Lien Claimant was done "in connection with" the recovery of a mineral.

55. The wording of s. 6(2) of the *BLA* may thinly indicate an implied intention to utilize the definition of mineral in the *Mines and Minerals Act*, though, as it refers to the lien attaching "to all estates and interests in the mineral concerned, other than the estate in fee simple in mines and minerals, unless the person holding the estate in fee simple in mines and minerals has expressly requested the work or the furnishing of material, in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to that person's estate, if any, in the rest of the land". If gravel is a mineral, that particular mineral is not included in the fee simple estate in mines and minerals according to the *Mines and Minerals Act* and s. 58 of the *Law of Property Act*.

56. The Shankowski Applicants do not own the "mines and minerals" in the Lands within the meaning of the *Mines and Minerals Act*, as the title is expressly subject to a form of the normal exclusion, "excepting thereout all mines and minerals and the right to work the same".

57. In *Northern Dynasty Ventures Inc. v. Japan Oil Sands Limited*[9], the issue was the rental of equipment used to crush and screen gravel at a gravel pit, which was then supplied and delivered to the "project site" at the oil sands project. The Lien Claimant there was claiming a builders' lien in the oil sands project and not in the gravel pit. None of the equipment was located at the oil sands project site, but only at the gravel pit.

58. In the course of deciding the issue, Kendall J. stated at para. 12:

> 12 It is clear that the removal of gravel did not improve the gravel pit. The common purpose in this case is the construction of the Hangingstone Project.

59. Similarly, in this case it could be said that crushing of the gravel or the testing of the crushed gravel did not improve the gravel pit or the Lands of the Shankowski Applicants.

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[9] 2020 ABQB 275 per Kendall J. (attached at **Tab 1**).

60. The services claimed to have been provided by RBEE are stated to be "Aggregate (gravel) crushing work", and the services claimed to have been provided by Paine are stated to be "... testing of aggregate materials".

61. The *BLA* defines "improvement" as (s. 1(d)):

> (d) "improvement" means 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;

62. The definition expressly excludes "a thing that is neither affixed to the land nor intended to be or become part of the land". Once the gravel or rock is extracted from the Lands, it is no longer part of the Lands. It is not thereafter again "affixed to the land nor intended to be or become part of the land". The services provided would be considered an improvement to the lands of the MD of Bonnyville No. 87, and J.R. Paine has also registered its lien against the lands of the MD of Bonnyville, and the lands of another gravel pit.

63. It is submitted that the Lien registered by J.R. Paine has a fatal deficiency in that it claims a lien:

> "[ ... ] in the fee simple estate OR (specify if some other type of estate or interest applies) _____
>
> Name The Municipal District of Bonnyville No. 87
> Address 4905 – 50 Avenue, Bag 1010
> Bonnyville, Alberta T9N 2J7"

64. It does not expressly name Jerry Shankowski as a person whose interest is being liened.

65. It is clear that the MD of Bonnyville has no "interest in land" in the Lands of the Shankowski Applicants. Accordingly, it is submitted that the J.R. Paine Lienis also invalid for that reason.

66. Section 34 of the *BLA* provides:

> **Registration of lien**
> **34(1)** A lien may be registered in the land titles office by filing with the Registrar a statement of lien in the prescribed form.
> (2) The statement of lien shall set out
> (a) the name and residence of
> (i) the lienholder,
> (ii) the owner or alleged owner, and
> (iii) the person for whom the work was or is being done or the materials were or are being furnished,

(b) the date when the work was completed or the last materials were furnished, or if the statement of lien is filed before the completion of the contract or subcontract, as the case may be, a statement that the work is not yet completed or the materials have not yet all been furnished,

(c) a short description of the work done or to be done or of the materials furnished or to be furnished,

(d) the sum claimed as due or to become due,

(e) a description, sufficient for registration, of the land and estate or interest in the land to be charged, and

(f) an address for service of the lienholder in Alberta.

**(3)** A statement of lien shall be signed by the lienholder or the lienholder's agent.

**(4)** In the case of a lien arising in connection with an oil or gas well or an oil or gas well site it is not necessary to set out in the statement of lien the name of the owner or alleged owner of the oil or gas well or the oil or gas well site.

**(5)** When a lienholder desires to register a lien against a railway, it is a sufficient description of the land to describe it as the land of the railway company.

**(6)** The statement of lien shall be verified by an affidavit in the prescribed form of the lienholder or of the lienholder's agent or assignee.

**(7)** When the statement of lien is made by a corporation, it shall be verified by the affidavit of an officer or employee of the corporation or its agent.

**(8)** When the affidavit is made by a person other than the lienholder it may be made not only as to the facts within the personal knowledge of the deponent, but also as to the facts of which the deponent is informed, if the deponent gives the source of the deponent's information and states that the deponent believes the facts to be true. *[emphasis added]*

67. The Statement of Lien does not expressly name the "owner" of the Lands in which the Lien is claimed properly, because it only lists the Municipal District of Bonnyville No. 87, and not the owners of the other 2 sets of Lands listed in Schedule "B" and "C".

68. However, the registered Statement of Lien actually attaches copies of the Titles to the lands of our Client and the lands of other land owner, and naturally, the name of the registered owner appears on the applicable titles. But the registered owner is not necessarily an "owner" according to the definition of "owner" in the *BLA*. And the Statement of Lien contains no allegation that the Shankowski Applicants requested, expressly or impliedly, that the services be provided.

69. In *Canadian Helicopters Ltd. v. Udo Stephen Building Materials Ltd.*[10], Master Funduk dealt with a misdescription of both the owner and the interest against which the Lien was claimed. Master Funduk stated[11]:

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[10] 2003 ABQB 322 (attached at **Tab 2**).

[11] At para. 11 – 19.

[12] The issue is whether there is a substantial compliance with s. 34(2) *Builders' Lien Act*. Section 34(2)(e) requires a description "of the land and estate or interest in the land to be charged". The clause is conjunctive.
[13] To find substantial compliance I would have to read down the statement of lien from a fee simple to a leasehold estate and to read down the person whose interest is sought to be charged from the Crown to the Applicants. That is too large a step.
[14] When a statute requires that a lien claimant identify whose interest is being charged and what interest is being charged that is a matter of "real importance," to use a description in a case referred to: *Ed Miller Sales & Rental Ltd. v. Canadian Imperial Bank of Commerce*, 51 Alta. L.R. (2d) 54 (Alta. C.A.).
[15] *482851 Alberta Ltd. v. Canadian Cabinet Brokers Inc.*, [1994] A.J. No. 692, is a case where the statement of lien showed the lien claimant to be someone who was in fact the agent of the lien claimant, although the statement of lien did not disclose that the lien claimant was an agent for the lien claimant. The chambers judge held that there had been substantial compliance with the Act.
[16] I would not disagree with that decision but it is not helpful where the statement of lien claims against the fee simple (obviously the owner's fee simple) instead of the leasehold interest of a lessee.
[17] Ms. Brosseau has not referred to any case law which supports a position that what was done by Undo is substantial compliance with the Act. The objects of the Act cannot overcome a lack of substantial compliance. I see no difference in principle between this case and *Electric Furnace Products Co. v. Quality Rentals*, 80 Alta. L.R. (2d) 384 (C.A.). Registering a statement of lien against the fee simple owner's fee simple interest is not registering a statement of lien against a lessee's leasehold interest. They are different parties, lessor and lessee, and different interests in land. The fact that they are different parties with different interests is the reason for s. 15.
[18] In law there is a substantial difference between a fee simple interest in land and a lessee's leasehold interest in land. That substantial difference is not done away with, for builders lien claimants, by the Act. Claiming a lien against a fee simple interest is not sufficient to encompass a lien claim against a leasehold interest anymore than the reverse is legally feasible. Claiming a lien against a leasehold interest is not a claim against the fee simple interest. The fact that in law a leasehold interest is less than a fee simple interest is irrelevant for builder lien purposes.
[19] A right to lien the Applicants leasehold interest ceased to exist a long time ago. Section 37 cannot be issued to resurrect a lien which has ceased to exist.

70. In *Thibeault Masonry Ltd. v. Phillipe*[12], Master Breitkreuz stated:

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[12] 2006 ABQB 746 (attached at **Tab 3**), at para. 11 - 15

A. Has the respondent substantially complied with s. 34 of the *Builders' Lien Act*?

[11] Section 34(2) of the *Builders Lien Act*, R.S.A. 2000, c. B-7 (the "Act") clearly establishes that a statement of Lien shall set out, among other things, the name of the lienholder.

> 34(2) The statement of lien shall set out
> (a) the name and residence of
> (i) the lienholder
> (ii) the owner or alleged owner, and
> (iii) the person for whom the work was or is being done or the materials were or are being furnished ...

[12] Section 37(1) of the Act provides some relief for the requirements of s. 34, provided that there has been substantial compliance with s. 34.

> 37(1) A substantial compliance with section 34 is sufficient and a lien shall not be invalidated by failure to comply with any requirements of section 34 unless, in the opinion of the court, the owner, contractor, subcontractor, mortgagee or some other person is prejudiced by the failure.

[13] In ***Canadian Helicopter Ltd. v. Udo Stephen Building Materials Ltd.***, [2003] A.J. No. 444 (Q.B.) Master Funduk was faced with an application to expand the scope of a lien to include leasehold interests that were not identified on the statement of lien. At para. 17 he states "the objects of the Act cannot overcome a lack of substantial compliance." Further, at para. 19 he notes that "A right to lien the applicants leasehold interest ceased to exist a long time ago. Section 37 cannot be issued to resurrect a lien which has ceased to exist."

[14] The Alberta Court of Appeal, in ***Quality Rentals v. Electric Furnace Products Company Ltd.,*** [1991] A.J. No. 429 held at pages 3 and 5 that a lien registered against the wrong lands cannot be saved by the curative provisions of the Act where the lien that is to be repaired has ceased to exist under the statute. At page 3 the court states:

> Can relief under s. 27(2), the curative provision of the *Builders Lien Act*, be supplied when the lien that is to be repaired by the court has ceased to exist by the operation of the balance of the statute, in particular s. 317. [31(7)?] In our view, the judgment of Stuart, J. in ***McDonald v. MacKenzie*** (1914), 7 W.R.R. 604 (Alta S.C.) which denies curative relief in these circumstances must be affirmed, this appeal allowed and the order of Master Floyd restored. We agree with the appellant that to do otherwise would permit a potential lien holder who has filed his lien against the wrong lands to have that lien validated as a charge against the correct lands...

[15] Both of these decisions clearly show that the requirements of s. 34 of the Act are onerous and not to be taken lightly. Failure to properly describe the interest to be liened or properly describe lands are substantive errors which are not curable by s. 37. It follows that failure to name a valid lienholder also is not curable by s. 37.

71. In *LT Interior & Drywall Ltd. v. Sota Centre Inc.*[13] Greckol J. dealt with an appeal from a Master's order determining the validity of a builders' lien against the interest of the registered owner where the Statement of Lien did not indicate that the services were requested, expressly or impliedly, by the registered owner, but only by a tenant. The Master struck out the Statement of Claim as against the registered owner, and Greckol J. upheld that decision. Greckol J. stated[14]:

> [25] The Statement of Lien must identify the "owner" since, according to s. 6 of the ***Builders' Lien Act***, the lien is "on the estate or interest of the owner in the land in respect of which the improvement is being made." The word "owner" has a singular meaning under the Act. The term is defined under s. 1(j) as "a person having an estate or interest in land at whose request, express or implied, and (i) on whose credit, (ii) on whose behalf, (iii) with whose privity and consent, or (iv) for whose direct benefit, work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material." [emphasis added]
>
> [26] As the Defendants point out, a registered owner may be an "owner" if the appropriate notice under s. 15 of the Act has been given (which was not done in this case) or if the actions of the registered owner qualify the registered owner as an "owner" under s. 1(j) of the Act.
>
> [27] The Defendants argue that the Statement of Lien defines the parameters of the estate or interest to which the lien is to attach. The Statement of Lien in this case does not allege that the registered owner, 924745 Alberta, requested that the Plaintiff perform work for it. Rather, it states that the work was requested by So ta Centre.

72. Greckol J. concluded[15]:

> [42] The question is whether the Statement of Lien properly attaches the interest of the landlord, 924745 Alberta, and whether the Statement of Claim in turn effectuates that claim. The entity against which the lien is filed must have made the request, express or implied, and on whose credit, behalf, with whose privity and consent, or for whose direct benefit work is done or material furnished: ***Hillcrest***. The Statement of Lien does not claim that the landlord and registered owner is an "owner" within the terms of the Act, that it is a person at whose request work was done or materials furnished for an improvement of the lands. The Statement of Claim as amended does not identify 924745 Alberta as having made such request or having an active participation in the construction.

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[13] 2003 ABQB 552 per Greckol J. (*"LT Interior"*) (attached at **Tab 4**).
[14] At para. 25 – 27.
[15] At para. 42– 44.

> [43] The Statement of Claim does assert the provisions in the lease between the landlord or registered owner and Sota that contemplates "the participation of the Defendant 924745 in the building process" and that "all improvements require the landlord's approval." However, the Statement of Claim, although arguably by its words encompassing the claim now asserted because of the relationship evidenced in the terms of the lease, cannot assert a claim that is broader than the Statement of Lien. The claim founded in the Statement of Lien is crystalized in the Statement of Claim which must be filed within 180 days. The Statement of Lien did not attach the interest of the Defendant as registered owner as it did not claim that 924745 Alberta requested that the work be done. The Statement of Claim cannot advance a claim which is broader than the claim protected by the Statement of Lien. For that reason, the Amended Statement of Claim in the present case does not disclose a cause of action against 924745 Alberta, or the purchaser of the property, 411 Capital Corp.
> [44] The appeal against the Order of the Master must fail, as there is no demonstrable error of law in his decision.

73. Similarly, in this case, the Statement of Lien by RBEE names Shankowski as the owner of the fee simple estate by claiming a lien against the fee simple estate and then inserting his name and address.

74. However, further down in the Statement of Lien, it indicates that:

> The Lien is claimed in respect of the following work or materials:
> Aggregate (gravel) crushing work
> Which work or materials were or are to be provided for:
> Name of person or Corporation: JMB Crushing Systems Inc.
> Address: [address set out]

75. The Statement of Lien does not indicate that our Client requested, expressly or impliedly, the work or services to be provided.

76. For ease of reference, the *BLA* defines "owner" as (s. 1(j)):

> (j) "owner" means a person having an estate or interest in land <u>at whose request, express or implied</u>, and
> (i) on whose credit,
> (ii) on whose behalf,
> (iii) with whose privity and consent, or
> (iv) for whose direct benefit,
> work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

68 Precisely like the Statement of Lien dealt with by Greckol J. in *LT Interior*, the Statement of Lien of RBEE does not allege that Shankowski or 945441 requested, expressly or impliedly, that the work or services be provided. Although the Shankowski Applicants may not be a true lessor or landlord in every sense, however, they are merely charging for the tonnage of aggregate removed by JMB.

77. Similarly, in this case, the Statement of Lien by J.R. Paine does not explicitly name either of the Shankowski Applicants as the owner by claiming a lien against the fee simple estate and then inserting their name and address. Rather, one has to look to Schedule "B" to see that Shankowski is the registered owner of 2 of the listed parcels of land in one title. Clearly, from the *LT Interiors* case, merely being the registered owner is not by itself sufficient to meet the definition of "owner" under the *BLA*.

78. However, further down in the J.R. Paine Statement of Lien, it indicates that:

> The Lien is claimed in respect of the following work or materials:
> The work provided by the Claimant was the testing of aggregate materials.
> Which work or materials were or are to be provided for:
> Name of person or Corporation: JMB Crushing Systems Inc., The Municipal District of Bonnyville No. 87.
> Address: [address of MD of Bonnyville set out]

79. The Statement of Lien does not indicate that either of the Shankowski Applicants requested, expressly or impliedly, the work or services to be provided.

80. It should be noted that the *Law of Property Act*, s. 79, provides:

> **Mineral leases**
> **79** It is hereby declared that the term "lease" as used in the *Land Titles Act* and any Act for which the *Land Titles Act* was substituted includes, and is deemed to have included, an agreement whereby an owner of an estate or interest in a mineral within, on or under any land for which a certificate of title has been granted under the *Land Titles Act* or any Act for which the *Land Titles Act* was substituted, demises or grants or purports to demise or grant to another person a right to take or remove any of the mineral for a term certain or for a term certain coupled with a right subsequently to remove any of the mineral so long as it is being produced from the land within, on or under which that mineral is situated.

81. Like the *BLA*, the *Law of Property Act* does not define the term "mineral", so that the word in the *Law of Property Act* may be interpreted by the Court to include sand and gravel. This would further put our Client more closely in the position of a Lessor or Landlord and JMB in the position of a Lessee or Tenant, and the interest of JMB as being a leasehold interest separate and different from the fee simple estate of the Shankowski Applicants.

82. In *Western Minerals Ltd. v. Gaumont*[16], the Supreme Court of Canada dealt with an appeal from a judgment of the Alberta Supreme Court, Appellate Division, reversing a decision of Egbert J., who held that, on the evidence before him, including expert evidence, a party holding title to "mines and minerals" owned the sand and gravel. After the Trial Judgment, the Alberta Legislature passed the *Sand and Gravel Act*, which specifically referred to the Trial Judgment, came into force between the Trial Judgment and the hearing of the Appeal in the Appellate Division, and which declared sand and gravel to be and have always been owned by the owner of the surface. The Appellate Division agreed with the Trial Judge that it was a matter of interpretation of a particular grant or reservation as to whether sand and gravel were intended to be included in "mines and minerals", but disagreed that the sand and gravel were included in the particular reservation in that case. In any event, the intervention of the Legislature mandated the result in that case regardless of what it might have been otherwise. The majority of the Supreme Court of Canada held that the evidence in this case failed to establish that sand and gravel were intended to be included in the reservation of mines and minerals in this case[17], and dismissed the appeal and affirmed the Judgment of the Appellate Division. Locke J. held that, in the absence of the newly passed *Sand and Gravel Act* the Trial Judge should have been held to be correct[18]. The full Court held that the *Sand and Gravel Act* was *intra vires* the Legislature of Alberta, retroactive in effect and dictated the result.

83. Further, in *Crow's Nest Pass Coal Co. (Ltd.) v. The Queen*[19] the Supreme Court of Canada held, in a case arising from British Columbia, that the word "mineral" standing alone in a grant included all mineral substances. At p. 761, Locke J. for the Court stated:

> The word "minerals" standing alone in the grant should, in my opinion, be construed as meaning mineral substances and, as these authorities and references indicate, petroleum and natural gas were prior to and at the time the grants were made and now are regarded as such.
> The witnesses called by the appellant appear to treat the word "mineral" as being synonymous with "metallic" even without the added words "precious or base". This position is, in my opinion, untenable. All metals are minerals but all minerals are not metals. In *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd.* v. *Farquharson[12]*, Lord Atkinson, delivering the judgment of the Judicial Committee, said, in part (p. 869), "in one sense natural gas is as rock oil is, a mineral, in that it is not an animal or a vegetable product and all substances found on, in, or under the earth must be in one or the other of these categories of animal, vegetable or mineral substances". If natural gas is not a mineral substance, how is it to be classified? I find no answer to that question in the oral evidence in this case.

84. Therefore, clearly, in the absence of the *Sand and Gravel Act* (replaced by the *Mines and Minerals Act*) sand and gravel are minerals, but could have been included in a reservation or grant

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[16] [1953] 1 S.C.R. 345, [1953] 3 D.L.R. 245 (attached at **Tab 5**).
[17] E.g. per Rand J. at p. 352; per Kellock J. at p. 358-359.
[18] At pp. 362 – 365.
[19] [1961] S.C.R. 750, 30 D.L.R. (2d) 93, 36 W.W.R. 513 (attached at **Tab 6**).

of mines and minerals or not, depending on the intention of the particular parties involved in a transfer or reservation of mines and minerals.

85. It is submitted that the interest of JMB in the Lands of our Client is in the nature of a *profit à prendre* which has been recognized as an interest in land. In *Scurry-Rainbow Oil Ltd. v. Galloway Estate*[20], Alberta Court of Appeal declined to interfere with a chambers judge's decision that the interest of a lessee under an oil and gas lease was in the nature of a *profit à prendre* and an interest in land, as was the Lessor's retention of a royalty and a reversionary interest in the lessee's profit a prendre and a fee simple estate in the leased substances *in situ*. The Court stated[21]:

> 9 In her analysis of the first, and perhaps the most critical issue, the learned trial judge found that a lessor's royalty under a P. & N.G. lease can be of interest in land in the form of a "species of rent" or "akin" to a profit à prendre. The appellants contend that the lessor's royalty could not be a profit à prendre because that is exactly what the lessor grants to the lessee under a P. & N.G. lease (see *Berkheiser v. Berkheiser*, [1957] S.C.R. 387). The trial judge's response to that argument was that she could see no theoretical reason why a freeholder could not grant a right that is characterized as a profit while reserving to himself or herself another kind of right which could also be characterized as a profit. However, the trial judge's decision did not rest solely on those findings of a species of rent or a lessor's profit à prendre. We have concluded that we need not decide on that basis to answer the questions before us. Even if she had erred on those points, that would not interfere with her ultimate conclusions. Nor would that constitute a reversible error, because she held that whether or not the reserved royalty in the subject P. & N.G. lease, in itself, amounted to an interest in land, a lessor's retention of the reversionary rights in the leased substances would be an interest in land capable of supporting a caveat. In other words, she found that such a reversionary right, if in fact it was retained in a subject P. & N.G. lease, would be sufficient. She then went on, in each case to apply a two-step analysis, as follows. Firstly, having concluded that the retention of the right of reversion in a given P. & N.G. lease *could* amount to an interest in land, she held that she then had to look at each of the subject leases to see if in fact that had been done; and secondly, if that interest had been retained under the subject lease, then she concluded that she should review each G.R.T.A. to determine if that interest in land had been conveyed to the trustee and would support the caveat filed by it.
>
> 10 We find no reversible error in the learned trial judge's analysis of each of the subject leases and G.R.T.A.'s. We find her answers fully supportable.
>
> 11 It is our conclusion that following each of the so-called "initial" P. & N.G. leases, the lessor retained not only a reversionary right to the lessee's profit à prendre on the leased substances, but also a fee simple interest in those substances in situ, as constituted by the royalty reserved to the lessor in the lease.

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[20] 1994 CarswellAlta 216, 1994 ABCA 313 (attached at **Tab 7**).
[21] At para. 9 – 11.

> That interest is, of course, subject to the grant under the lease of a profit à prendre to the lessee (see *Berkheiser*, supra).

86. Therefore, each Lien Claimant, RBEE and J.R. Paine could have and should have liened only the interest of JMB in the Shankowski Applicants' Lands and not the fee simple estate of the Shankowski Applicants, as JMB had an "interest in land" in the Shankowski Applicants' Lands and requested, expressly or impliedly, the work to be provided. The fact that JMB had an interest in land takes JMB out of the definition of "contractor" in the *BLA* and puts JMB in the definition of "owner".

87. There is no evidence that the Shankowski Applicants requested, expressly or impliedly, either Lien Claimant to provide services on or in respect of an "improvement" in the Lands.

*88.* In *Acera Developments Inc. v. Sterling Homes Ltd*[22], a land owner and developer, Acera, had entered into an agreement with a builder, Sterling, for the sale of lots. The agreement contemplated that the property would be subdivided by an approved subdivision plan being filed. The builder began building homes without obtaining a filed subdivision plan. Jeffery J. found that the builders' lien claimant, Sterling, did not have a reasonable chance of success in proving that Acera had requested, expressly or impliedly, that materials or services be supplied for an improvement to the lands. Jeffery J. stated[23]:

> Did Acera make either an express or implied request that the work be done?
> [34] The existence of a request for work is a question of fact. The circumstances of each case will determine whether there was an implied request for work. See *Royal Trust Corp. of Canada v. Bengert Construction Ltd.*, (1988) 1988 ABCA 58 (CanLII), 85 A.R. 210 (Alta. C.A.), at para. 18.
> [35] The Court of Appeal in *Royal Trust*, at paragraph 24, agreed with the following statement of guidance for determining whether there was a "request":
>
> > Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept "request" in s. 1(j):–it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.
> > In ordinary language the word "request" indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with "ask" and "solicit", synonyms which agree in meaning "to seek to obtain by making one's wants or desires known." "Request", he says, has a suggestion of greater courtesy and formality in the manner of asking.
>
> [ ... ]
> [56] One of the earliest statements on privity and consent from the Supreme Court of Canada recognizes that it requires something in the nature of a direct

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[22] 2009 ABQB 494 (attached at **Tab 8**).
[23] At para. 34 – 35 and 56 – 60.

dealing, more than mere knowledge or consent from the liened party to the work being done by the lien-claimant. In *John A. Marshall Brick Co. v. York Farmers Colonization.*, (1917) 1917 CanLII 596 (SCC), 54 S.C.R. 569, at page 581, the Court said:

> While it is difficult if not impossible to assign each of the three words "request" "privity" and "consent" a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in Graham v. Williams, and approved in Gearing v. Robinson at page 371, that "privity and consent" involves:
>
> > something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged [...]. Mere knowledge of, or mere consent to, the work being done is not sufficient.

[57] In *Suss Woodcraft Ltd. v. Abbey Glen Property Corp.*, 1975 CanLII 252 (AB QB), [1975] 5 W.W.R. 57, McDonald J. of the Alberta Supreme Court determined that something "in the nature of a direct dealing" was required between the lien claimant and the liened party to indicate there was privity and consent to the work being done.

[58] There was privity and consent to the Lot Purchase Agreement but, as with the question of whether there was an express or implied request, that related to the creation, servicing and conveyance of lots and payment therefor. There is no reasonable prospect of Sterling succeeding in having the Court construe that agreement as evidencing privity and consent on the part of Acera for the construction at its behest of show homes or spec homes, early or ever. Put another way, Acera could not successfully sue Sterling for breach of the Lot Purchase Agreement if Sterling never built any houses on the lots it purchased.

[59] Further, I agree with Acera that there has been no evidence of any other direct dealings on its part with Sterling from which I could infer privity and consent to an implied request to build homes.

[60] In result I am unable to find Sterling has any reasonable prospect of succeeding in proving that Acera was an "owner" as defined in the *BLA*. Overall, I also can find no reasonable basis to think Sterling might be able to prove it proceeded to construct the spec homes or the show homes at the instance of Acera or as a consequence of Acera's actions, statements, conduct or any agreement to somehow be at risk for the work. The two were each pursuing their own interests in the same project, nothing more. Timely subdivision registration by Acera would enable Sterling to sell its product; early construction by Sterling would help Acera to service and sell new lots in later phases. But neither requested those actions of the other, expressly or impliedly, in the manner required for a valid builders lien, and I see no reasonable prospect of Sterling proving at trial that Acera did.

89. Analogizing to the situation described in the *Scurry-Rainbow* decision[24], the Shankowski Applicants' right to payments in respect of removed aggregates is in the nature of rent, and they are therefore in the nature of a Lessor of an interest in the aggregates (sand and gravel). Their fee simple estate in the Lands should not be held liable for the builders' liens unless they expressly or impliedly requested the services of the Lien Claimants to be provided or unless a s. 15 notice was served and they did not respond. The fact that they would profit if the aggregates were removed and sold should not be the deciding factor.

90. Further, if the Court decides that aggregates are a mineral because the *BLA* does not define "mineral", then s. 6(2) of the *BLA* provides that:

> (2) When work is done or materials are furnished
>
> (a) preparatory to,
>
> (b) in connection with, or
>
> (c) for an abandonment operation in connection with,
>
> the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done or the material to be furnished, the lien given by subsection (1) attaches to all estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding the estate in fee simple in the mines and minerals has expressly requested the work or the furnishing of material, in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to that person's estate, if any, in the rest of the land.

91. Either the Court applies the definition of "mine" and "mineral" in the *Mines and Minerals Act*, which expressly excludes sand, gravel, clay and marl, or it does not.

92. If it does not, then s. 6(2) of the *BLA* would exclude a Lien in the Shankowski Applicants' fee simple estate in the Lands, other than "mines and minerals", which fee simple estate includes sand and gravel by *Law of Property Act, s. 58*[25], unless the Shankowski Applicants expressly requested the provision of the services. But, again, by the definition of "owner" in the *BLA*, the Shankowski Applicants are only an "owner" to the extent that they requested, expressly or impliedly, the work to be done, and they did not.

93. The Court is to adopt a strict interpretation in determining whether a lien claimant is entitled to a lien.[26] In *Clarkson Co. Ltd., supra*, Ritchie J., for the Supreme Court of Canada, stated:[27]

> The above excerpts from the reasons for judgment of the majority of the Court of Appeal indicate to me that the conclusion there reached is predicated in large

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[24] Discussed above at para. 85.
[25] Quoted above at para. 36
[26] *Ace Lumber Ltd. v. Clarkson Co.*, 1963 CanLII 4 (SCC), [1963] S.C.R. 110 at 114 (attached at **Tab 9**), cited in *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107 (attached at **Tab 10**), at para. 14.
[27] At p. 114.

measure on the assumption that the provisions of *The Mechanics' Lien Act* which describe and delimit the classes of persons entitled to a lien thereunder are to be liberally construed and that their language is to be adapted to meet the circumstances here disclosed.

With the greatest respect, I am, however, of opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:

> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

The same view was adopted in the unanimous opinion of the Supreme Court of Oregon in *Timber Structures v. C.W.S. Grinding & Machine Works*[2], where it was said:

> We agree with the defendant that the right to a lien is purely statutory and a claimant to such a lien must in the first instance, bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment.

94. It is clear from the case law that an Order made under the *CCAA* can affect and override underlying procedures and priorities under provincial (and even other federal) legislation.

95. Section 11 of the *CCAA* provides:

> **General power of court**
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

96. Section 11.02 of the *CCAA* provides:

> **Stays, etc. — initial application**
> **11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
> **Stays, etc. — other than initial application**
> **(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
> **Burden of proof on application**
> **(3)** The court shall not make the order unless
> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.
> **Restriction**
> **(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

97. In *Sulphur Corp of Canada Ltd. Re*[28], Lovecchio J. held that the broad powers of the Court under s. 11 (now s. 11.02) of the *CCAA* to make an order, on any terms that it may impose, were wide enough to allow the Court to impose Debtor-in-Possession ("DIP") financing and to give such DIP financing super-priority over other charges, including registered Builders' Liens under the *BLA*. Lovecchio J. stated[29]:

> ***The Paramountcy Argument and the Jurisdiction of the Courts***
> 23 Sections 11(3) and 11(4) of the *CCAA* read as follows:
> 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
> 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, . . . [staying

[28] 2002 ABQB 682, 2002 CarswellAlta 896 (**Tab 11**).
[29] At para. 23– 38.

proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Hunters Trailer & Marine Ltd., Re*. 3 In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte* 30 day stay of proceedings under the *CCAA* and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

26 In discussing the objective of the *CCAA*, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors . . .

At para 18:

> I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4 th ) 141 (B.C.C.A.), at 146 that:" . . . the *CCAA*'s effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

Finally, at para. 51:

> As I have indicated above, I am of the view that the Court has the inherent or equitable jurisdiction to grant a super priority for DIP financing and administrative costs, including those of the monitor and professional advisors of the debtor company. While this jurisdiction is invoked when an initial application is made under the *CCAA*, the Court is not limited to granting a priority only for those costs which arise after the date of the application or initial order. So long as the monies were reasonably advanced to maintain the status quo pending a *CCAA* application or the costs were incurred in preparation for the *CCAA* proceedings, justice dictates and practicality demands that they fall under the super-priority

> granted by the Court. To deny them priority would be to frustrate the objectives of the *CCAA*.

27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Smoky River Coal Ltd., Re* 4 confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote: These statements about the goals and operations of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s.11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the *CCAA*. It is within this context

that my initial Order and the June 19 Order were based.

29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re* [5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. In that case, Farley J., held that s. 11 of the *BLA* eliminated the Court's inherent jurisdiction to grant a super-priority DIP order over validly registered builders' liens. Farley J. did not even consider s. 32 of the *BLA*. His decision was based solely on s. 11 of the *BLA*, which is not at issue in the case at hand.

30 In *Royal Oak Mines Inc.*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the ***Court of Queen's Bench Act***[7], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the ***Mechanics' Liens Act***[8] , also a provincial statute.

32 I have the greatest of respect for my colleague from Ontario but, in this case s. 11 of the *BLA* was not invoked by the Applicants and in the final analysis I would see the matter differently. In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the *CCAA*, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

34 In *United Used Auto & Truck Parts Ltd., Re*[9], Mackenzie J.A., of the Court of Appeal [of British Columbia], wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over *CCAA* relief. I do not think that Parliament intended that the objects of the *Act* could be indirectly frustrated by secured creditors.

35 Parliament's way of ensuring that the *CCAA* would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

***Paramountcy***

37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the *CCAA*, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the *BLA*.

38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal *CCAA* and the *Legal Professions Act* of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the *CCAA*, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the *CCAA* "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

98. We been unable able to find case law dealing with the situation encountered in this case where a party contracting with the Debtor/Applicant in the *CCAA* proceedings registers a lien against other lands in violation of a claims procedure order issued in the *CCAA* proceedings.

99. On a slightly related point, however, there is *Kerr Interior Systems Ltd., Re*[30], a decision of the Alberta Court of Appeal. In that case, a third party had registered a builders' lien not against the property of the Debtor / Applicant in the *CCAA* proceedings, but against other lands not owned by the Debtor / Applicant. The Chambers Judge had held that the lien claimants were not secured creditors of the Debtor / Applicant in the *CCAA* proceedings because they had not registered liens against the property of the Debtor / Applicant. The majority of the Court of Appeal reversed,

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[30] 2009 ABCA 240 **(Tab 12)**.

holding that monies owned by the third party to the Debtor / Applicant and in turn owed by the Debtor / Applicant to opposing creditors were impressed with a trust. Further, the Court held that the amounts were readily ascertainable or identifiable, and that the trust interests were not dependent upon filing of a lien and survived even if the lien was not registered within the appropriate time frame.

100. O'Brien JA briefly set out the facts[31]:

> Facts
> 2 Briefly, the background of these two related appeals is as follows: Kenroc Building Materials Co. Ltd. (Kenroc) and Superior Plus LP and Winroc, a division of Superior Plus LP (collectively, Winroc) appeal the chambers judge's decision sanctioning a Plan of Arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), proposed by the respondents, Kerr Interior Systems Ltd. (Kerr) and Composite Building Systems Inc. (Composite).
> 3 Kenroc and Winroc both supplied building materials to Kerr for a construction project in Saskatoon owned by 101051911 Saskatchewan Ltd. (101). Kerr and Composite encountered financial difficulties and initiated proceedings under the CCAA. On November 7, 2007, they were granted a Protection Order under the CCAA. At the time of that order, 101 owed Kerr money, while Kerr owed money to both Winroc and Kenroc for building materials, all in relation to Second Avenue Lofts, the Saskatoon construction project (the project).
> 4 On November 6, 2007, the day before the Protection Order was granted, Winroc filed a builder's lien against the property owned by 101 in the amount of $46,425.26. On November 14, 2007, Kenroc filed a builder's lien against the property owned by 101 in the amount of $103,236.95. No other creditors filed liens. On January 18, 2008, 101 paid $150,000.00 into court in Saskatchewan as security for the builder's liens, which were discharged from title without prejudice to Kerr's legal position. The funds paid into court by 101 came out of the amount owing by 101 to Kerr for work performed on the project.
> 5 The proposed Plan of Arrangement listed Kenroc and Winroc in the class of unsecured creditors with all other creditors.
> 6 Kenroc and Winroc opposed court approval of the Plan on the basis that they were secured creditors based on their status as holders of valid builders' liens or trust claims. The chambers judge sanctioned the Plan, concluding that Kenroc and Winroc were not secured creditors under the CCAA because that status is only created when there is a lien against the debtor's property, and the liens filed by Kenroc and Winroc were against 101's property. Nor did Kenroc and Winroc's trust claims fall within the definition of secured creditor under the CCAA as they were merely statutory or "deemed" trusts that did not attach to a traceable or existing asset belonging to the debtors at the time the original stay was granted.

[31] At para. 2 – 6.

101. O'Brien JA then noted[32] the definition of "secured creditor" in the *CCAA* which includes "the holder of ... a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds".

102. He then noted the trust provisions of the *Saskatchewan Builders' Lien Act*[33].

103. He then analyzed the effect of these statutory provisions on the claims of Kenroc and Winroc34, and concluded that they were each secured creditors of the Debtor / Applicant, and that the Chambers Judge had erred in treating them as unsecured creditors.

104. The whole Court was prepared to grant Winroc's appeal. In relation Kenroc's interest, O'Brien JA stated[35]:

> 16 In short, Kenroc's equitable interest in the monies owed to it by Kerr constituted a trust in respect of the property of Kerr, being the latter's equitable interest in the monies owed to it by 101, such as to constitute Kenroc a secured creditor within the meaning of section 2 of the CCAA. The trust attached to the contractor's receivable, which is property of the contractor, and thereby falls within the CCAA definition of secured creditor.
>
> 17 The filing of the lien was not necessary to perfect the trust obligation, which was independent of the lien. The amount owed to Kenroc was ascertainable as at November 7, 2007. It was the amount of $103,236.98, and that is the extent of the trust interest (subject to adjustments). The determination of the exact amount owing under a secured instrument on a given date is commonplace and does not create any uncertainty.

105. The *BLA* also creates trusts in relation to monies payable under a Contract in relation to which a builders' lien may be created. Section 22 of the *BLA* provides:

> **Money held in trust**
>
> **22(1)** Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit of those persons.

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[32] At para. 7.
[33] At para. 8.
[34] At para. 10 – 21.
[35] At para. 16 – 17.

**(2)** When a person other than a person who received the payment referred to in subsection (1)

(a) is entitled to the money held in trust under this section, and

(b) receives payment pursuant to that trust,

the person, to the extent that the person owes money to other persons who provided work or furnished materials for the work or materials in respect of which the payment referred to in clause (b) was made, holds that money in trust for the benefit of those other persons.

**(3)** A person who is subject to the obligations of a trust established under this section is released from any obligations of the trust when that person pays the money to

(a) the person for whom that person holds the money in trust, or

(b) another person for the purposes of having it paid to the person for whom the money is held in trust.

106. Section 24 of the *BLA* provides:

**Major lien fund and minor lien fund**

**24(1)** When a certificate of substantial performance is issued,

(a) any lien arising out of work done or materials furnished before the date of issue of a certificate of substantial performance is a charge on the major lien fund, and

(b) any lien arising out of work done or materials furnished on and after the date of issue of a certificate of substantial performance of the contract is a charge on the minor lien fund.

(2) When a minor lien fund does not arise under section 23, any lien arising out of work done or materials furnished is a charge on the major lien fund. *[emphasis added]*

107. Section 25 of the *BLA* provides:

**Liability of owner**

**25** An owner is not liable under this Act for more than

(a) the total of the major lien fund and the minor lien fund, or

(b) the major lien fund, where a minor lien fund does not arise under section 23.

108. The *BLA* defines the "major lien fund" and the "minor lien fund" in section (s. 1(h) and (s. 1(i):

(h) "major lien fund" means

(i) where a certificate of substantial performance is not issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that has not been paid by the owner in good faith while there is no lien registered;

(ii) where a certificate of substantial performance is issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that, with respect to any work done or materials furnished before the date of issue of the certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered;

(i) "minor lien fund" means the amount required to be retained under section 23(1) or (1.1) plus any amount payable under the contract

(i) that is over and above the 10% referred to in section 23(1) or (1.1), and

(ii) that, with respect to any work done or materials furnished on and after the date of issue of a certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered;

109. Where a court orders a lien discharged under s. 27 or s. 48, the lien is a charge upon the money paid into Court. Section 44 of the *BLA* provides:

**Lien as charge against money**

44 Notwithstanding section 43, if the court has ordered that a lien be removed under section 27 or 48(1) the lien, as a charge against the money paid into court or the security given, does not cease to exist by reason that

(a) a certificate of lis pendens is not registered in the appropriate land titles office, or

(b) an action has not been commenced within 180 days from the date that the lien is registered.

110. Although the Court has not ordered the liens removed pursuant to s. 27 or 48 of the *BLA*, but rather pursuant to the *CCAA*, we submit that an analogy can still be drawn. If the Monitor pays these 2 Lien Claimants out of the monies paid by the MD of Bonnyville, it will release Shankowski and 945411 to the extent of the payment.

111. Further, by the *BLA*, an "owner" cannot be made liable for more than the major lien fund and the minor lien fund. It is submitted that the major lien fund has already been determined by the Eidsvik May 20 Order and directed to be paid by the MD of Bonnyville to the Monitor, and is submitted to be the "Holdback Amount" of $1,850,000.00. The issue of the minor lien fund does not arise, as the Lien Claimants indicate that the last work was supplied in April, 2020.

112. As the major lien fund has already been paid to the Monitor and is subject to the Lien Claims of RBEE and J.R. Paine already, it is submitted that, even if either Shankowski and 945411 are "owners" within the meaning of the *BLA*, they cannot be held liable for more than the amount already paid to the Monitor by the MD of Bonnyville, and they have no further remaining liability, and the Liens registered against the Shankowski Lands are invalid on this ground, also.

**Part IV – Relief Sought**

113. The Shankowski Applicants seek an Order declaring the RBEE Lien and the J.R. Paine Lien invalid and directing the Registrar of the North Alberta Land Registration District to remove or discharge the RBEE Lien and the J.R. Paine Lien forthwith notwithstanding s. 191(1) of the *Land Titles Act*, and for any other relief that may be required and for costs of the Application on a scale as between a solicitor and client or on such other scale or in such sums as this Honourable Court deems just and appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of October, 2020.

HAJDUK GIBBS LLP
Solicitors for Jerry Shankowski and 945441 Alberta Ltd.
Per:

Richard B. Hajduk
Barrister & Solicitor

# TAB 1

2020 ABQB 275
Alberta Court of Queen's Bench

Northern Dynasty Ventures Inc v. Japan Canada Oil Sands Limited

2020 CarswellAlta 731, 2020 ABQB 275, [2020] A.W.L.D. 1507, 317 A.C.W.S. (3d) 189

# Northern Dynasty Ventures Inc. and Tyalta Industries Inc. (Plaintiffs) and Japan Canada Oil Sands Limited formerly Japan Oil Sands Alberta Limited(Defendant) and Highway Rock Products Ltd. (Third Party Defendant)

G.D.B. Kendell J.

Heard: January 15, 2020
Judgment: April 20, 2020
Docket: Edmonton 1403-06762

Counsel: Patrick D. Kirwin, for Appellant, Northern Dynasty Ventures Inc.
Bradley J. Smith, for Respondent, Tyalta Industries Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Construction law
IV Construction and builders' liens
IV.5 Services and materials for which liens available
IV.5.d Claims by lessors of equipment

**Headnote**

Construction law --- Construction and builders' liens — Services and materials for which liens available — Claims by lessors of equipment

Defendant was operator of oil sands project, it entered into master purchase agreement with contractor, and plaintiffs N Inc. and T Inc. were subcontractors — N Inc. entered into gravel contract with contractor where it granted contractor exclusive licence to remove sand and gravel from gravel pit which was located approximately 30 kilometres away from project site — T Inc. rented contractor equipment used to crush and screen sand and gravel at gravel pit, and at all relevant times T Inc.'s equipment was located at gravel pit and not at project site — All of gravel was provided to operator for its use in connection with project — Subcontractors filed liens for unpaid accounts rendered to contractor, and entitlement to lien fund was subject of application before master — Master declared validity of N Inc.'s lien in amount of $1,260,312.75, as well as validity of T Inc.'s lien in amount of $721,830.68, and directed payment of T Inc.'s pro rata share out of lien fund — N Inc. appealed — Appeal dismissed — Section 6(4) of Builders' Lien Act provided that person who rented equipment to owner, contractor or subcontractor was, while equipment was on contract site or in immediate vicinity of contract site, deemed to have performed service and have lien for reasonable and just rental of equipment — Project site was contract site and not gravel pit, and T Inc. equipment was used to crush and screen gravel and sand for use in project — It was clear that removal of gravel did not improve gravel pit and nothing was constructed at gravel pit — Off-site work performed using rental equipment resulted in gravel and sand that was used in project and directly contributed to actual physical construction of improvement — Rental equipment was part of overall project or common purpose in relation to project — Common purpose was construction of project — Project required gravel, which was not available on project site and had to be transported, and gravel pit and project site had geographical proximity — Section 6(4) of Act required more than geographical proximity, and required equipment to be in immediate vicinity of contract site — Immediate vicinity was interpreted in context of factual matrix, and on specific facts of case, gravel pit was in immediate vicinity of contract site — There was common purpose in work being done at gravel pit and at project, as work being done at gravel pit was part of overall project — Improvements could not have been carried out in absence of sand and gravel — Two

 

sites clearly had common purpose, construction of project site, and work performed was integral part of overall project — T Inc. satisfied requirements of s. 6(4) of Act and its lien was valid.

**Table of Authorities**

**Cases considered by *G.D.B. Kendell J.*:**

*Bahcheli v. Yorkton Securities Inc.* (2012), 2012 ABCA 166, 2012 CarswellAlta 940, 21 C.P.C. (7th) 371, 524 A.R. 382, 545 W.A.C. 382, 65 Alta. L.R. (5th) 127, 43 Admin. L.R. (5th) 74 (Alta. C.A.) — referred to

*Davidson Well Drilling Ltd. (Receiver of) v. Bank of Montreal* (2016), 2016 ABQB 416, 2016 CarswellAlta 1401, 54 C.L.R. (4th) 233, 41 Alta. L.R. (6th) 348 (Alta. Q.B.) — referred to

*E Construction Ltd. v. Sprague-Rosser Contracting Co.* (2017), 2017 ABQB 99, 2017 CarswellAlta 228, [2017] 5 W.W.R. 799, 49 Alta. L.R. (6th) 126, 63 C.L.R. (4th) 201 (Alta. Q.B.) — referred to

*MJ Ltd. v. Prairie Mountain Construction (2010) Inc.* (2016), 2016 ABQB 395, 2016 CarswellAlta 1816, 42 Alta. L.R. (6th) 339, 57 C.L.R. (4th) 254 (Alta. Q.B.) — considered

*Maple Reinders Inc. v. Eagle Sheet Metal Inc.* (2006), 2006 ABQB 150, 2006 CarswellAlta 217, 54 C.L.R. (3d) 186, 62 Alta. L.R. (4th) 383, 393 A.R. 375 (Alta. Q.B.) — referred to

*Maple Reinders Inc. v. Eagle Sheet Metal Inc.* (2007), 2007 ABCA 247, 2007 CarswellAlta 994, 62 C.L.R. (3d) 170, 76 Alta. L.R. (4th) 215, 284 D.L.R. (4th) 249, 412 A.R. 133, 404 W.A.C. 133 (Alta. C.A.) — referred to

*PTI Group Inc. v. ANG Gathering & Processing Ltd.* (2002), 2002 ABCA 89, 2002 CarswellAlta 479, [2002] 6 W.W.R. 585, 1 Alta. L.R. (4th) 4, 16 C.L.R. (3d) 115, 303 A.R. 375, 273 W.A.C. 375 (Alta. C.A.) — considered

*Tervita Corp. v. ConCreate USL (GP) Inc.* (2015), 2015 ABCA 80, 2015 CarswellAlta 289, 42 C.L.R. (4th) 179 (Alta. C.A.) — referred to

*Trotter and Morton Building Technologies Inc. v. Stealth Acoustical & Emission Control Inc.* (2017), 2017 ABQB 262, 2017 CarswellAlta 642, 57 Alta. L.R. (6th) 399, 68 C.L.R. (4th) 4 (Alta. Q.B.) — considered

*1508270 Ontario Ltd. v. Laudervest Developments Ltd.* (2007), 2007 CarswellOnt 10017 (Ont. S.C.J.) — considered

**Statutes considered:**

*Builders' Lien Act*, R.S.A. 2000, c. B-7

Generally — referred to

s. 6(1) — considered

s. 6(4) — considered

*Construction Act*, R.S.O. 1990, c. C.30

s. 1(2)(b) — considered

APPEAL by subcontractor from master's decision determining validity of lien.

***G.D.B. Kendell J.*:**

**Background**

1 The Appellant, Northern Dynasty Ventures Inc. ("NDV"), appeals the order of Master Birkett granted on May 22, 2019, where she ordered and declared the validity of NDV's lien in the amount of $1,260,312.75, as well as the validity of lien of the Respondent, Tyalta Industries Inc. ("Tyalta"), in the sum of $721,830.68, and directed the payment of Tyalta's pro rata share out of the lien fund. Tyalta was awarded the sum of $244,493.23.

2 The background facts as set out in NDV's Special Brief, which were not disputed, are as follows:

Japan Canada Oil Sands Limited, ("JACOS"), is the operator of an oil sands project known as the Hangingstone Expansion Project near Fort McMurray, Alberta ("Hangingstone Project").

On or about August 28, 2013, JACOS entered into a Master Purchase Agreement with Highway Rock Products Ltd. "HRP".

NDV and Tyalta were subcontractors to HRP in respect of the Master Purchase Agreement.

  

On or about September 16, 2013, NDV entered into a written agreement with HRP (the "Gravel Contract"), whereby NDV granted HRP an exclusive license to remove sand and gravel from a gravel pit which was located approximately 30 kilometers away from the Hangingstone Project site, accessible by road a driving distance of 89 kilometers. The consideration for the Gravel Contract was payments to be made by HRP to NDV.

Tyalta rented to HRP equipment used to crush and screen sand and gravel at the gravel pit.

All of the gravel was provided to JACOS for its use in connection with the Hangingstone Project.

The Gravel Contract was terminated by NDV due to unpaid accounts owing by HRP to NDV.

NDV and Tyalta filed liens against JACOS' lease for unpaid accounts rendered to HRP.

The lien fund was set in the sum of $671,684.70.

$403,010.02 has been paid to NDV. The entitlement to the balance of the lien fund was the subject of the Application before Master Birkett. At all relevant times, the Tyalta equipment was located at the gravel pit and not at the Hangingstone Project site.

**Standard of Review**

3 The standard of review from an appeal of a Master to a Justice is correctness, and the appeal is a hearing de novo: *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 (Alta. C.A.) at para 30.

**Analysis**

4 This appeal involves the interpretation of Section 6(4) of the *Builders' Lien Act*, RSA 2000, c B-7, which provides:

6(4) For the purposes of this Act, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

5 NDV argues that Tyalta's lien is invalid because it cannot satisfy this provision. It submits that the "contract site" is the Hangingstone Project site, and argues that the gravel pit is not in the immediate vicinity of the Hangingstone Project site.

6 Tyalta replies that: "having the rental equipment be used in the specific areas covered by a mineral lease is not required to establish lien rights. All that is necessary is a sufficient nexus to the use of the rental equipment and improvements to the estate or interest to which the lien attaches".

7 Our Court of Appeal has set out the interpretive approach to be followed in respect of this Act, and explained that a liberal approach may be taken to determining the scope of a lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien: *Tervita Corp. v. ConCreate USL (GP) Inc.*, 2015 ABCA 80 (Alta. C.A.) at para 5; see also *E Construction Ltd. v. Sprague-Rosser Contracting Co.*, 2017 ABQB 99 (Alta. Q.B.) at para 47; *Davidson Well Drilling Ltd. (Receiver of) v. Bank of Montreal*, 2016 ABQB 416 (Alta. Q.B.) at para 22. Our Court of Appeal also explored the purpose of this Act in *Maple Reinders Inc. v. Eagle Sheet Metal Inc.*, 2007 ABCA 247 (Alta. C.A.) at para 22, aff'g 2006 ABQB 150 (Alta. Q.B.).

***A. Where is the Contract Site?***

8 The contract site was not defined in the Master Purchase Agreement or in the Gravel Contract.

  

9 The reference to "contract site" only appears in s 6(4) of the *Builders' Lien Act*. Counsel advised that there has been no judicial consideration of "contract site" in the *Builders' Lien Act*.

10 I find that the Hangingstone Project site is the "contract site". The Tyalta equipment was used to crush and screen gravel and sand for use in constructing the Hangingstone Project. Although NDV reaped the financial benefits, given the exclusive lease of the gravel pit granted to HRP, the gravel pit was not improved: nothing was constructed at the gravel pit. The off-site work performed using the rental equipment resulted in gravel and sand that was used in constructing the Hangingstone Project, and directly contributed to the actual physical construction of the improvement. As argued by counsel for Tyalta, the rental equipment was part of the overall project or common purpose in relation to the Hangingstone Project.

11 As Master Prowse found in *MJ Ltd. v. Prairie Mountain Construction (2010) Inc.*, 2016 ABQB 395 (Alta. Q.B.) at para 53: " . . . a builders' lien under current Alberta legislation can be validly registered on land, even though the improvement was not made on that land, provided that there is a common purpose, including at least some geographical proximity, between the site where the work was done and the land upon which the lien was registered".

12 It is clear that the removal of gravel did not improve the gravel pit. The common purpose in this case is the construction of the Hangingstone Project.

13 It is clear on the record before me that the Hangingstone Project required gravel, which was not available on the Hangingstone Project site, and thus had to be transported to the site.

14 I find on the facts of this case that the gravel pit and the Hangingstone Project site had some geographical proximity as set out in MJ Trucking above. However, s 6(4) of the *Builders' Lien Act* requires more that geographic proximity: it requires the equipment to be in the immediate vicinity of the contract site.

***B. What is the Meaning of Immediate Vicinity?***

15 No authority was provided to establish that the immediate vicinity means the closest gravel pit available. Both "immediate" and "vicinity" are synonymous with near.

16 I must interpret "immediate vicinity" in the context of the factual matrix.

17 In oral submissions, NDV argued that there was another gravel pit which was 49 kilometers away from the Hangingstone project, thus closer, by road, than the gravel pit chosen. No evidence was provided that this gravel pit was suitable for Hangingstone's purpose.

18 NDV argued that immediate vicinity in the builders' lien context was canvassed in the Ontario case of *1508270 Ontario Ltd. v. Laudervest Developments Ltd.*2007 CanLII 79364*1508270 Ontario Ltd. v. Laudervest Developments Ltd.*, [2007] O.J. No. 5434, 2007 CarswellOnt 10017 (Ont. S.C.J.), in reference to the *Construction Lien Act*, RSO 1990, c 30, which states at s 1(2):

> 1 (2) For the purpose of this Act, materials are supplied to an improvement when they are,
>
> b) placed upon land designated by the owner or an agent of the owner that is in the *immediate vicinity* of the premises, but placing materials on the land so designated does not, of itself, make the land subject to a lien;

19 In *Laudervest Developments Ltd.*, the Court found that the producer of kitchen cabinets intended to be installed in a condominium project was not entitled to a lien for cabinets which had been directed to be stored at the contractor's warehouse. Storing the cabinets at an off-site warehouse did not meet this definition.

20 *Laudervest Developments Ltd.* is distinguishable on its facts. This is not a case of materials stored off-site, such as lumber placed on an adjacent property. Further, the Court explained the rationale of the *Act* (at para16):

  

> . . . When a contractor or material supplier provides work and materials are incorporated into the owner's land or placed in the owner's control, the owner receives a benefit, whether it is paid for or not. The contractor is not in a position to takeback the materials and deprive the owner of the benefit because they have become part of the owner's improvement to the property. The lien remedy stands in the place of the contractor's ability to retrieve his work product and gives him a higher priority than other creditors . . .

21 In that case, the cabinets never became part of the owner's improvements and there was nothing for the contractor to takeback since it retained control of the cabinets.

22 In this case, the renting of equipment is considered 'work' under s 6(1) of the *Builders' Lien Act*. The rental equipment was used to crush, screen and extract gravel, which was used in the constructions of the Hangingstone Project, resulting in an improvement. Tyalta cannot "takeback" the rental use of the equipment or the sand and gravel that has been used in the construction of the Hangingstone Project: it has become part of the owner's land. As submitted by Tyalta in its Brief before the Master, at para 17:

> Furthermore, the BLA [*Builders' Lien Act*] distinguishes between when materials are supplied and when work is supplied. The BLA recognizes that "work" is lienable when it supplied on or in respect to an improvement (Section 6(1)(a)), as opposed to materials, which are lienable when they are furnished in respect of an improvement Section 6(1)(b).

23 I find on the facts of this specific case that the gravel pit and the Hangingstone Project site are in the immediate vicinity of each other. Thus, as the rental equipment was at all relevant times located at the gravel pit, the rental equipment was in the immediate vicinity of the contract site (the Hangingstone Project site). The gravel was not obtained out of country, out of province, or even in central or southern Alberta. Given the nature of gravel pits, immediate vicinity must be considered in context.

24 Take, for example, Tim Hortons. If someone was located in the centre of the City of Edmonton and argued that a Tim Hortons restaurant 30 kilometers away, as the crow flies, or a driving distance of 89 kilometers was in their immediate vicinity, I would dispute that claim, because there are numerous Tim Hortons locations that are much closer than the distance described. The same cannot be said for a gravel pit. Immediate vicinity must be considered on the specific and unique facts of a particular case.

***C. Is There a Common Purpose Between the Two Sites? Is This a Case of an Overall Purpose?***

25 Although I have found that the Hangingstone Project site is the "contract site", it is not necessary to determine same, as I am satisfied the two sites are in the immediate vicinity of each other. I accept Tyalta's argument that there is a common purpose in the work being done at the gravel pit and at the Hangingstone Project, as the work being done at the gravel pit is part of the "overall' Hangingstone Project.

26 In *Trotter and Morton Building Technologies Inc. v. Stealth Acoustical & Emission Control Inc.*, 2017 ABQB 262 (Alta. Q.B.) Master Prowse stated at para 57:

> In other words, even where the lien is filed on the 'wrong' land it is the "overall project" (to use the language found in the D*avidson* decision) which is considered, and thus work may be considered to have been done on an improvement even where the work was done on another parcel of land and not the parcel that was liened."

27 Even if I am incorrect in finding that the Hangingstone Project site is the "contract site", *Trotter and Morton Building Technologies Inc.* stands for the proposition that a lien filed against the wrong parcel of land may still be valid, as long as the "work" performed at the wrong land (i.e. the gravel pit) is found to be part of the overall project.

28 In her oral decision, the Learned Master referred to the Alberta Court of Appeal decision in *PTI Group Inc. v. ANG Gathering & Processing Ltd.*, 2002 ABCA 89 (Alta. C.A.), where Berger J.A. had stated at para 18:

  

> The remedy contemplated by the Act, as both Moir and Lieberman JJ.A. recognized *(in Hett et al. v. Samoth Realty Projects Ltd. (1977) 3 Alta. L.R. (2d) 97 at 105)*, must be subject to some limit. That limit will largely be determined by the factual matrix of each case that presents for adjudication. The relevant inquiries will include:
>
> a) whether the contractors, subcontractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement.
>
> b) whether the off-site services could have been provided on the site.
>
> c) whether the improvement could have been carried out absent such off-site services.
>
> d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were "primary" in nature.

29 It is not contested that the sand and gravel were necessary for the Hangingstone Project construction. It is not contested that the Hangingstone Project site did not have the sand and gravel necessary for the project. I heard no evidence the Hangingstone Project site could have been improved without the sand and gravel, thus I am I am prepared to find that the improvements could not have been carried out in the absence of the sand and gravel.

30 The final question is, were the services of Tyalta so integral and essential to the construction of the project, that it can be said to be primary in nature? The Learned Master below stated at page 60 of the Proceedings Transcript:

> Now I understand Mr. Kirwin's [Counsel for NDV] argument that this case is not directly on point. They are talking about primary versus secondary services, but I think the analysis of off-site and the focus on the factual matrix of each case presented for adjudication is applicable to this situation where we have -- obviously the aggregate is necessary. We have got over a $6 million contract to provide aggregate to this Hangingstone Project. The off-site services could not have been provided on site. The evidence is there were other gravel pits around but certainly not on the Hangingstone site itself.

31 I find that the test in *PTI Group Inc.* is applicable in this case, and has been met. The two sites clearly have a common purpose: the construction of the Hangingstone Project site. The "work" performed is an integral part of the overall project.

***D. The Floodgates Argument***

32 NDV argued that in the event that Tyalta was entitled to a lien for its equipment not on the Hangingstone Project contract site, then the lessors of any vehicles used by HRP to transport gravel to the Hangingstone Project site would also be entitled to a lien; so too would be the lessors of equipment to any other subcontractors or material suppliers, not at the contract site, but whose equipment was used to produce products at the site.

33 With respect, the leased equipment in this case is not the same as a truck which simply transports gravel from the gravel pit to the Hangingstone Project site. The rented crushing and screening equipment were a Cone Crusher, a Jaw Crusher, a Conveyor, a Telescoping Conveyor, a Screener and a Nor-Tech Feeder. While I do not profess to know what each of the pieces of equipment actually do, the equipment was used to extract, crush and screen the sand and gravel so that it was suitable for the Hangingstone Project.

34 As per s 6(4) of the *Builders' Lien Act*, a person who rents equipment on the terms set out in the section is deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

35 Further, the key is that the equipment has to be at the contract site or in the immediate vicinity of the contract site.

36 It would be speculative to discuss the potential rights of other persons under the *Builders' Lien Act* without a proper factual matrix. In considering NDV's argument, material suppliers who are not at the contract site would have to be in the immediate

  

vicinity in order to claim a lien. Immediate vicinity would have to be assessed in the context of each material supplier, and each material supplier would have to establish that they fall under s 6(4) of the *Builders' Lien Act* as a person who rents equipment to an owner, contractor, or subcontractor, and that the rented equipment is being used or is reasonably required to be available for the purpose of the work. In my view, it would be unjust to use this argument to defeat Tyalta's legitimate claim for a lien under s 6(4).

**Conclusion**

37 In my view, Tyalta has satisfied the requirements of s 6(4) of the *Builders' Lien Act* and its lien is therefore valid. The appeal is dismissed.

38 If the parties are unable to agree on costs, they may provide written submissions to me within 60 days after the release of this decision.

*Appeal dismissed.*

# TAB 2

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Arres Capital Inc. v. Graywood Mews Development Corp. | 2011 ABQB 411, 2011 CarswellAlta 1082, 50 Alta. L.R. (5th) 21, 204 A.C.W.S. (3d) 240, 8 R.P.R. (5th) 289, 525 A.R. 303, [2011] A.W.L.D. 3354, [2011] A.W.L.D. 3355, [2011] A.W.L.D. 3356, [2011] A.W.L.D. 3357, [2011] A.J. No. 732, 5 C.L.R. (4th) 97 | (Alta. Q.B. [in Chambers], Jun 29, 2011)

2003 ABQB 322
Alberta Court of Queen's Bench

Canadian Helicopters Ltd. v. Udo Stephen Building Materials Ltd.

2003 CarswellAlta 500, 2003 ABQB 322, [2003] A.W.L.D. 271, [2003] A.J. No. 444, 121 A.C.W.S. (3d) 998, 23 Alta. L.R. (4th) 67, 30 C.L.R. (3d) 77

# CANADIAN HELICOPTERS LIMITED AND CANADIAN HELICOPTERS WESTERN (A DIVISION OF CANADIAN HELICOPTERS LIMITED) (Applicants) and UDO STEPHEN BUILDING MATERIALS LTD. AND GUEST PLUMBING & HEATING LTD. (Respondents)

Master Funduk

Heard: March 19, 2003
Judgment: April 9, 2003
Docket: Edmonton 9903-23658

Counsel: B.E. Mintz for Applicants
D.J. Brosseau for Respondents

Subject: Contracts; Corporate and Commercial; Property
**Related Abridgment Classifications**
Construction law
IV Construction and builders' liens
IV.4 Property or interest subject to lien
IV.4.e Crown property
IV.4.e.ii Federal
IV.4.e.ii.A General principles
Construction law
IV Construction and builders' liens
IV.4 Property or interest subject to lien
IV.4.i Leasehold interest
IV.4.i.i Registrability of lien against leasehold interests
**Headnote**
Construction law --- Construction and builders' liens — Property or interest subject to lien — Crown property — Federal — General
Lessees leased portion of unpatented Crown land and contracted with general contractor to build aircraft hanger on land — Material supplier registered builders' lien against property — Lessees brought application to cancel lien — Application granted — Statement of lien indicated that material supplier was claiming lien against fee simple interest, which was Crown's interest, and not against lessees' leasehold interest — Material supplier could not have lien against Crown's fee simple — Builders' Lien Act does not bind Crown.

 

Construction law --- Construction and builders' liens — Property or interest subject to lien — Leasehold interest — Registrability of lien against leasehold interests

Lessees leased portion of unpatented Crown land and contracted with general contractor to build aircraft hanger on land — Material supplier registered builders' lien against property — Lessees brought application to cancel lien — Application granted — Statement of lien indicated that material supplier was claiming lien against fee simple interest, which was Crown's interest, and not against lessees' leasehold interest — Material supplier could not have lien against Crown's fee simple — Fee simple estate is not attachable where work done or material provided is in relation to leasehold interest unless lien claimant gives notice to fee simple owner — It would be too big a step to read down statement of lien from fee simple to leasehold estate and to read down person whose interest was sought to be charged from Crown to lessees in order to find that material supplier had substantially complied with s. 34(2) of Builders' Lien Act — Lien claimed against fee simple does not encompass lien against leasehold interest — Contract between lessees and general contractor clearly showed that lessees had leasehold interest in land and material supplier could have obtained that information from general contractor — Lien not valid against Crown or against lessees' leasehold interest.

**Table of Authorities**

**Cases considered by *Master Funduk*:**

*Ed Miller Sales & Rental Ltd. v. Canadian Imperial Bank of Commerce*, 51 Alta. L.R. (2d) 54, 7 P.P.S.A.C. 87, 37 D.L.R. (4th) 179, 79 A.R. 161, 1987 CarswellAlta 57 (Alta. C.A.) — considered

*Electric Furnace Products Co. v. Quality Rentals*, 46 C.L.R. 24, [1991] 5 W.W.R. 539, 80 Alta. L.R. (2d) 382, *(*sub nom. *Quality Rentals v. Electric Furnace Products Co.)* 80 D.L.R. (4th) 572, *(*sub nom. *Quality Rentals v. Electric Furnace Products Co.)* 117 A.R. 63, *(*sub nom. *Quality Rentals v. Electric Furnace Products Co.)* 2 W.A.C. 63, 1991 CarswellAlta 97 (Alta. C.A.) — followed

*482851 Alberta Ltd. v. Canadian Cabinet Brokers Inc.*, 17 C.L.R. (2d) 23, 160 A.R. 48, 1994 CarswellAlta 472 (Alta. Q.B.) — considered

**Statutes considered:**

*Builders' Lien Act*, R.S.A. 2000, c. B-7

Generally — considered

s. 15 — referred to

s. 34(2) — considered

s. 34(2)(e) — considered

s. 37 — referred to

*Interpretation Act*, R.S.A. 2000, c. I-8

s. 14 — referred to

**Tariffs considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68

Sched. C, Tariff of Costs, column 1 — referred to

APPLICATION by lessees of property to cancel builders' lien.

***Master Funduk*:**

1 The issue in this lawsuit is the validity of the builders lien registered by the first Respondent.

2 The land is unpatented Crown land. The Applicants are lessees of part of the land. There is of course no leasehold title registered at Land Titles.

3 The Applicants contracted with Impact Custom Builders Inc. to build an aircraft hanger on the land. The contract is in writing. It says that the Applicants will hold back 15% of the contract price, to be released to Impact 46 days after substantial completion of the project: clause 3.5.

  

4 Udo was a materialman. It supplied material to Impact which went into the project.

5 The Applicants say that it took possession of the hanger on June 15, 1998 and that the work was substantially completed by Impact by June 19, 1998. The Applicants paid Impact after 45 days had lapsed.

6 The statement of lien was registered on September 8, 1998.

**Issues**

***One***

7 I need not decide if the statement of lien was registered in time.

***Two***

8 The statement of lien claims a lien "in the following land", which is described, and says that the owner is the provincial Crown.

9 My interpretation of the statement of lien is that Udo is claiming a lien against the Crown's interest, which is a fee simple interest, not against the Applicants' leasehold interest.

10 Udo cannot have a lien against the Crown's fee simple. First, the Builders Lien Act does not bind the Crown: s. 14 Interpretation Act. The Builders Lien Act does not say that it binds the Crown and this is not a case where the Crown advances a claim relying on the Act for its benefits but not its burdens. Second, in any event, a fee simple estate is not attachable where the work done or material provided is in relation to a leasehold interest unless the lien claimant gives a s. 15 Builders Act notice to the fee simple owner.

11 Ms. Brosseau, for Udo, says that Udo is now claiming a lien only against the Applicants leasehold interest. Given that position it is not necessary to deal with Ms. Brosseau's submission about the Applicant challenging the validity of a lien claim against the Crown's fee simple interest.

12 The issue is whether there is a substantial compliance with s. 34(2) Builders' Lien Act. Section 34(2)(e) requires a description "of the land and estate or interest in the land to be charged". The clause is conjunctive.

13 To find substantial compliance I would have to read down the statement of lien from a fee simple to a leasehold estate and to read down the person whose interest is sought to be charged from the Crown to the Applicants. That is too large a step.

14 When a statute requires that a lien claimant identify whose interest is being charged and what interest is being charged that is a matter of "real importance," to use a description in a case referred to: *Ed Miller Sales & Rental Ltd. v. Canadian Imperial Bank of Commerce* (1987), 51 Alta. L.R. (2d) 54 (Alta. C.A.).

15 *482851 Alberta Ltd. v. Canadian Cabinet Brokers Inc.*, [1994] A.J. No. 692 (Alta. Q.B.), is a case where the statement of lien showed the lien claimant to be someone who was in fact the agent of the lien claimant, although the statement of lien did not disclose that the lien claimant was an agent for the lien claimant. The chambers judge held that there had been substantial compliance with the Act.

16 I would not disagree with that decision but it is not helpful where the statement of lien claims against the fee simple (obviously the owner's fee simple) instead of the leasehold interest of a lessee.

17 Ms. Brosseau has not referred to any case law which supports a position that what was done by Undo is substantial compliance with the Act. The objects of the Act cannot overcome a lack of substantial compliance. I see no difference in principle between this case and *Electric Furnace Products Co. v. Quality Rentals* (1991), 80 Alta. L.R. (2d) 382 (Alta. C.A.). Registering a statement of lien against the fee simple owner's fee simple interest is not registering a statement of lien against

  

a lessee's leasehold interest. They are different parties, lessor and lessee, and different interests in land. The fact that they are different parties with different interests is the reason for s. 15.

18 In law there is a substantial difference between a fee simple interest in land and a lessee's leasehold interest in land. That substantial difference is not done away with, for builders lien claimants, by the Act. Claiming a lien against a fee simple interest is not sufficient to encompass a lien claim against a leasehold interest anymore than the reverse is legally feasible. Claiming a lien against a leasehold interest is not a claim against the fee simple interest. The fact that in law a leasehold interest is less than a fee simple interest is irrelevant for builder lien purposes.

19 A right to lien the Applicants leasehold interest ceased to exist a long time ago. Section 37 cannot be issued to resurrect a lien which has ceased to exist.

20 Ms. Brosseau says that Udo did not know who had an interest in the land that the project was being built on. But what stopped it from getting that information before it supplied material? The Applicants had a written contract with Impact. Impact was the general contractor. Udo supplied material to the general contractor. If the materialman is willing to supply material on credit to a contractor without more it can hardly complain. The contract between the Applicants and Impact clearly show that the Applicants have just a leasehold interest and that the building was being built for the Applicants.

21 It was just a matter of Udo asking Impact the right questions. If Impact declined to give Udo the necessary information to get material on credit and Udo still provided material on credit it took a business risk that it would be paid by Impact. It cannot now complain as against the Applicants.

**Decision**

22 I find:

1. The lien is not valid as against the Crown.

2. The lien is not a lien against the Applicants leasehold interest.

3. The Registrar of Land Titles will cancel the registration of the statement of lien.

4. The Applicants will have costs of the present lawsuit on column 1.

*Application granted.*

# TAB 3

2006 ABQB 746
Alberta Court of Queen's Bench

Thibeault Masonry Ltd. v. Philippe

2006 CarswellAlta 1316, 2006 ABQB 746, [2006] A.W.L.D. 3107, [2006] A.W.L.D. 3108, [2006] A.J. No. 1279, 153 A.C.W.S. (3d) 276, 408 A.R. 220, 56 C.L.R. (3d) 135

# Thibeault Masonry Ltd. (Applicant) and Sylvain Philippe (Respondent)

Master W. Breitkreuz

Heard: August 24, 2006
Judgment: October 10, 2006
Docket: Edmonton 0603-08633

Counsel: Jeremy Taitinger for Applicant
Herve Durocher for Respondent

Subject: Contracts; Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Construction law
IV Construction and builders' liens
IV.2 Procedure to obtain lien
IV.2.a Registering claim
IV.2.a.iii Assignee's right to file

Construction law
IV Construction and builders' liens
IV.2 Procedure to obtain lien
IV.2.b Defects and formalities
IV.2.b.viii Miscellaneous

**Headnote**

Construction law --- Construction and builders' liens — Procedure to obtain lien — Defects and formalities — Miscellaneous issues

Numbered company was hired by applicant contractor to provide masonry services on building project, for which invoices were issued — Individual mason registered lien under Builders' Lien Act on June 21, 2006 for work last performed on May 25, 2006 — Mason admitted on cross-examination that any funds outstanding were payable to numbered company, not him — Numbered company executed assignment of rights to lien, dated June 20, but signed on August 21, 2006 and delivered it to contractor — Amount of $23,077.52 was paid into court in place of lien on July 17, 2006 — Contractor brought application for declaration that lien was invalid and for payment out of court of funds — Application granted — Although curative provision found in s. 37 of Act allowed relief for substantial compliance with s. 34 of Act, it could not cure failure to name valid lienholder — Section 37 could not be used to resurrect lien rights which had ceased to exist — Builders' lien was declared invalid.

Construction law --- Construction and builders' liens — Procedure to obtain lien — Registering claim — Assignee's right to file

Numbered company was hired by applicant contractor to provide masonry services on building project, for which invoices were issued — Individual mason registered lien under Builders' Lien Act on June 21, 2006 for work last performed on May 25, 2006 — Mason admitted on cross-examination that any funds outstanding were payable to numbered company, not him — Numbered company executed assignment of rights to lien to mason, dated June 20, but signed on August 21, 2006 — Amount of $23,077.52 was paid into court in place of lien on July 17, 2006 — Contractor brought application for declaration that lien was invalid and for payment out of court of funds — Backdated assignment of lien rights was not effective, as it was executed outside of 45-day lien period — Lien did not indicate that mason was assignee of numbered company — No lien rights existed on date

 

assignment was executed — Respondent mason did not address his mind to issue of assignment until after cross-examination — Assignment was backdated to one day prior to filing of lien — Payment of moneys out of court to contractor was ordered — Builders' lien was declared invalid.

**Table of Authorities**

**Cases considered by *Master W. Breitkreuz*:**

*Canadian Helicopters Ltd. v. Udo Stephen Building Materials Ltd.* (2003), 2003 ABQB 322, 2003 CarswellAlta 500, 30 C.L.R. (3d) 77, 23 Alta. L.R. (4th) 67 (Alta. Master) — followed

*Electric Furnace Products Co. v. Quality Rentals* (1991), (sub nom. *Quality Rentals v. Electric Furnace Products Co.)* 2 W.A.C. 63, 1991 CarswellAlta 97, 46 C.L.R. 24, [1991] 5 W.W.R. 539, 80 Alta. L.R. (2d) 382, (sub nom. *Quality Rentals v. Electric Furnace Products Co.)* 80 D.L.R. (4th) 572, (sub nom. *Quality Rentals v. Electric Furnace Products Co.)* 117 A.R. 63 (Alta. C.A.) — considered

*Knox v. Stagecoach Homes Inc.* (2006), 2006 CarswellAlta 1131, 2006 ABQB 640 (Alta. Q.B.) — followed

**Statutes considered:**

*Builders' Lien Act*, R.S.A. 2000, c. B-7

Generally — referred to

s. 30 — considered

s. 34 — referred to

s. 34(2) — referred to

s. 34(2)(a) — referred to

s. 34(2)(a)(i) — referred to

s. 37 — referred to

s. 37(1) — referred to

s. 41(2) — referred to

s. 41(2)(a) — referred to

s. 48(1)(c) — referred to

*Judicature Act*, R.S.A. 2000, c. J-2

s. 20(1) — referred to

s. 20(2) — referred to

**Tariffs considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68

Sched. C, Tariff of Costs, column 1 — referred to

**Regulations considered:**

*Builders' Lien Act*, R.S.A. 2000, c. B-7

*Builders' Lien Forms Regulation*, Alta. Reg. 51/2002

Generally — referred to

APPLICATION by contractor for declaration of invalidity of builders' lien and for payment out of court.

***Master W. Breitkreuz*:**

  

1 In March 2006, 4296265 Canada Inc. entered into a contract with the applicant for masonry services to be provided on a project known as Holland Gardens, at 6315 - 135 Avenue, Edmonton, Alberta.

2 4296265 Canada Inc. issued six invoices between April 5, 2006 and May 25, 2006 to the applicant with respect to the work.

3 On June 21, 2006 the respondent registered a lien, bearing registration number 062 264 045 (the "lien"), against property legally described as:

> Plan 0522234
>
> Block 1
>
> Lot 1
>
> Excepting thereout all Mines and Minerals
>
> Area: 2.23 Hectares (5.51 Acres) More or Less
>
> (The "Lands")

4 The work that is the subject of the lien was last performed on May 25, 2006.

5 According to s. 41(2) of the *Builders' Lien Act*, R.S.A. 2000, c. B-7, any lien rights that 4296265 Canada Inc. may have had expired on July 10, 2006.

6 $23,077.52 was paid into Court on July 17, 2006 in place of the lien, pursuant to a consent order granted by this Court.

7 On July 19, 2006 the respondent swore an affidavit proving his lien. He was cross-examined on his affidavit on August 17, 2006.

8 Under cross-examination the respondent admitted that no money is owing to him pursuant to the lien and that any funds that are alleged to be outstanding are payable to 4296265 Canada Inc.

9 On August 22, 2006, five days after the cross-examination on the respondent's affidavit, the applicant received a copy of an assignment purporting to transfer any and all rights, claims and causes of action pursuant to the *Builders Lien Act* in and to the lands from 4296265 Canada Inc. to the respondent. The assignment was executed on August 21, 2006 but dated June 20, 2006.

10 The first issue is what effect does the back-dated assignment have on the lien?

**A. Has the respondent substantially complied with s. 34 of the Builders' Lien Act?**

11 Section 34(2) of the *Builders Lien Act*, R.S.A. 2000, c. B-7 (the "Act") clearly establishes that a statement of Lien shall set out, among other things, the name of the lienholder.

> 34(2) The statement of lien shall set out
>
> (a) the name and residence of
>
> (i) the lienholder
>
> (ii) the owner or alleged owner, and
>
> (iii) the person for whom the work was or is being done or the materials were or are being furnished ...

  

12 Section 37(1) of the Act provides some relief for the requirements of s. 34, provided that there has been substantial compliance with s. 34.

> 37(1) A substantial compliance with section 34 is sufficient and a lien shall not be invalidated by failure to comply with any requirements of section 34 unless, in the opinion of the court, the owner, contractor, subcontractor, mortgagee or some other person is prejudiced by the failure.

13 In *Canadian Helicopters Ltd. v. Udo Stephen Building Materials Ltd.*, [2003] A.J. No. 444 (Alta. Master) Master Funduk was faced with an application to expand the scope of a lien to include leasehold interests that were not identified on the statement of lien. At para. 17 he states "the objects of the Act cannot overcome a lack of substantial compliance." Further, at para. 19 he notes that "A right to lien the applicants leasehold interest ceased to exist a long time ago. Section 37 cannot be issued to resurrect a lien which has ceased to exist."

14 The Alberta Court of Appeal, in *Electric Furnace Products Co. v. Quality Rentals*, [1991] A.J. No. 429 (Alta. C.A.) held at pages 3 and 5 that a lien registered against the wrong lands cannot be saved by the curative provisions of the Act where the lien that is to be repaired has ceased to exist under the statute. At page 3 the court states:

> Can relief under s. 27(2), the curative provision of the *Builders Lien Act*, be supplied when the lien that is to be repaired by the court has ceased to exist by the operation of the balance of the statute, in particular s. 317. [31(7)?] In our view, the judgment of Stuart, J. in ***McDonald v. MacKenzie*** (1914), 7 W.R.R. 604 (Alta S.C.) which denies curative relief in these circumstances must be affirmed, this appeal allowed and the order of Master Floyd restored. We agree with the appellant that to do otherwise would permit a potential lien holder who has filed his lien against the wrong lands to have that lien validated as a charge against the correct lands...

15 Both of these decisions clearly show that the requirements of s. 34 of the Act are onerous and not to be taken lightly. Failure to properly describe the interest to be liened or properly describe lands are substantive errors which are not curable by s. 37. It follows that failure to name a valid lienholder also is not curable by s. 37.

**B. Was the back-dated assignment of the lien rights effective within the 45 day lien period?**

***Judicature Act***

16 The *Judicature Act*, R.S.A. 2000, c. J-2, lists the criteria for making an assignment of a legal chose of action. S. 20 provides:

> (1) When a debt or other legal chose in action is assigned by an absolute assignment made in writing under the hand of the assignor and not purporting to be by way of charge only, *if express notice in writing of the assignment has been given* to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, the absolute assignment is effectual in law to pass and transfer
>
> (a) the legal right to the debt or chose in action from the date of the notice of the assignment,
>
> (b) all legal and other remedies for the debt or chose in action, and
>
> (c) power to give a good discharge for the debt or chose in action without concurrence of the assignor,
>
> and is subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted.
>
> (2) In the case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action has had notice
>
> (a) that the assignment is disputed by the assignor or anyone claiming under the assignor, or

  

> (b) of any other opposing or conflicting claims to the debt or chose in action, the debtor, trustee or other person is entitled, if the debtor, trustee or other person thinks fit, to call on the several persons making claim to the debt or chose in action to interplead concerning it.

*emphasis added*

17 Section 20 of the *Judicature Act* deals with debts and legal choses of action. A legal chose of action according to *Henry Black, Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing Co, 1990) is:

> A thing in action; a right of bringing an action or right to recover a debt or money. Right of proceeding in a court of law to procure payment of sum of money, or right to recover a personal chattel or a sum of money by action.

18 The right to lien a property is a chose in action. It is clear from s. 20 of the Judicature Act that an assignment is "effectual in law" only if "express notice in writing of the assignment has been given" to the person against whom the assignor would have been entitled to claim. In the present case, the applicant would be the person to whom notice should be given.

19 The assignment in the matter at hand was executed on August 21, 2006. Notice of the assignment could not have been given to the applicant prior to this date. Therefore, if there was an assignment, it could not have become effective before August 21, 2006.

***Builders' Lien Act***

20 The respondent attempts to rely upon s. 30 of the *Builders' Lien Act* in conjunction with the curative provisions of s. 37 as authority for the proposition that an assignment of lien rights executed outside of the statutory 45 day lien period but back-dated to one day prior to the date the lien was filed should save the lien.

21 Section 41(2) of the Act establishes the time period within which a lien must be registered:

> 41(2) A lien for the performance of services may be registered at any time within the period commencing when the lien arises and
>
> > (a) subject to clause (b), terminating 45 days from the day that the performance of the services is completed or the contract to provide the services is abandoned,...

22 Section 30 of the *Builders' Lien Act* allows for assignment of lien rights but specifically refers to the "right of a lienholder".

> 30 The right of a lienholder may be assigned in writing and, if not so assigned, passes on the lienholder's death to the lienholder's personal representative.

23 Therefore, only the existing rights of a lienholder may be assigned. However, no lien rights existed on August 21, 2006, the day the assignment was executed.

***No Contemplation of Assignment***

24 The respondent has admitted under cross-examination that no money is owing to him. If an assignment was in place prior to the lien being filed then any funds that are alleged to be outstanding would be payable to the respondent. The applicant submits that the respondent did not address his mind to the issue of assignment until after he was cross-examined on his July 19, 2006 affidavit, well after any lien rights had expired.

25 Further, the failure of the respondent to state any facts regarding a purported assignment in his June 21, 2006 statement of lien is further evidence that he did not address his mind to the issue of an assignment until after being cross-examined on his July 19, 2006 affidavit.

  

26 The applicant submits that an assignment cannot be effective on a date prior to either party to the assignment contemplating its existence.

**C. If there was a lien, and if the assignment is valid, has the respondent complied with the Regulations to the Act?**

27 *Builders' Lien Forms Regulation*, Alta. Reg. 51/2002 provides the proper form that a statement of lien should take:

> (Name of lienholder) of (residence of lienholder) (if claimant is the assignee of the original lienholder, state the facts) claims a lien under the *Builders' Lien Act* upon the estate of (name and residence of the owner of the land upon which the lien is claimed) in the following land: (set out concise legal description).

28 The regulations clearly instruct that "if claimant is the assignee of the original lienholder, state the facts".

29 The statement of lien filed by the respondent on June 21, 2006 makes no reference to an assignment of lien rights as required by the regulations under the Act. Further, the statement of lien makes no reference whatsoever to 4292626 Canada Inc., the party with which the applicant had contracted for the work.

30 The respondent has back-dated his assignment to June 20, 2006, one day prior to the lien being filed. If this date is held to be the effective date of the assignment the respondent still has not complied with the regulations. The respondent did not state the facts giving rise to the respondent filing the lien in place of 4296265 Canada Inc. and did not disclose the assignment on the face of the statement of lien.

**D. Conclusion**

31 Following the reasoning of Master Funduk in *Canadian Helicopter*, the respondent in this application cannot use s. 37 to resurrect lien rights which have ceased to exist. Any lien rights which 4296265 Canada Inc. may have had expired on July 10, 2006. Therefore, any rights purported to be assigned on August 21, 2006 are non-existent.

32 The lien was filed on June 21, 2006 by the respondent, who had no contractual relationship with the applicant and who has acknowledged under oath that no funds are owed to him pursuant to the work. This amounts to substantial non-compliance with s. 34 of the Act and does not give rise to s. 37 remedies.

33 If the lien is valid, the Judicature Act clearly establishes that an assignment is only effective as of the date express written notice is given to a party against whom the assignor has, or may have, a claim against. The fact that the respondent dated the assignment June 20, 2006 is irrelevant. The relevant date is August 22, 2006.

34 If the lien is valid, there can be no assignment under the *Builders' Lien Act*. Section 30 permits the assignment of lien rights. However, only existing rights may be assigned. As of August 21, 2006 there were no lien rights to be assigned. A statement of claim cannot be back-dated to resurrect a limitation period nor can a statement of lien be backdated to resurrect a lien period. It follows that an assignment cannot be back-dated to bring a potential lien claimant back within the 45 day lien period.

35 If the assignment is valid, the respondent did not comply with the regulations to the *Builders' Lien Act*. The statement of lien contains no indication that the respondent was an assignee of 4296265 Canada Inc. This is required by the *Builders' Lien Regulations*, even though the assignment was purportedly dated June 20, 2006.

36 The applicant submits that the assignment executed on August 21, 2006 is simply an attempt to resurrect expired lien rights. Permitting assignments outside of the 45 day lien period cannot be the intention of s. 30 of the *Builders' Lien Act*. If s. 30 is read to allow assignments to be executed outside of this period then there is no need for a statement of lien to list a valid lienholder. If a question of validity is raised at a lienholder could simply locate a party who did file a lien and assign that party the otherwise expired lien rights. This would render compliance with s. 34(2)(a)(i) of the *Builders' Lien Act* unnecessary.

  

37 I have concluded that the respondent has failed to name a valid lien claimant, which is a specific requirement of s. 34 of the Act, and has failed to assign lien rights prior to the expiry of those rights under both the *Judicature Act*, and the *Builders Lien Act*, and has failed to state the facts giving rise to the purported assignment of lien rights, as required by the regulations.

38 I agree with the applicant that these failures render both the lien and the assignment invalid.

39 I am fortified in my conclusion by a decision released on September 1, 2006 by Justice Alan Macleod: *Knox v. Stagecoach Homes Inc.*, 2006 ABQB 640 (Alta. Q.B.) which confirms a strict interpretation of the *Builders' Lien Act* in the creation, enforcement, or lapse of a lien.

40 Accordingly, there will be an order directing that:

a) The builders' lien registered by the respondent as instrument no. 062 264 045 be declared invalid against the lands pursuant to section 48(1)(c) of the *Builders' Lien Act*.

b) The Clerk of the Court immediately release to the applicant all funds held pursuant to my July 17, 2006 order which directed that $23,077.56 be deposited with the Court as security for the lien of the respondent.

c) All costs of these proceedings under column 1, schedule C.

*Application granted.*

**End of Document**



  

# TAB 4

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Norson Construction Ltd. v. Clear Skies Heating & Air Conditioning | 2017 ABQB 544, 2017 CarswellAlta 1607, 71 C.L.R. (4th) 228, 283 A.C.W.S. (3d) 23, 62 Alta. L.R. (6th) 336, [2017] A.W.L.D. 5018 | (Alta. Q.B., Sep 8, 2017)

2003 ABQB 552
Alberta Court of Queen's Bench

LT Interior & Drywall Ltd. v. Sota Centre Inc.

2003 CarswellAlta 918, 2003 ABQB 552, [2003] 11 W.W.R. 556, [2003] A.W.L.D. 317, [2003] A.J. No. 822, 123 A.C.W.S. (3d) 634, 20 Alta. L.R. (4th) 93, 25 C.L.R. (3d) 259, 343 A.R. 173

# LT INTERIOR & DRYWALL LTD. (Plaintiff) and SOTA CENTRE INC., 924745 ALBERTA INC., SOTA HOLDINGS INC., P2G TECHNOLOGIES INC., 411 CAPITAL CORP., CINDY WHITEHEAD-DOWN and ROBERT BENVIE (Defendants)

Greckol J.

Heard: June 17, 2003
Judgment: June 20, 2003
Docket: Calgary 0201-04560

Counsel: Shaun T. MacIsaac for Plaintiff
W. Donald Goodfellow, Q.C. for Defendant

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure
**Related Abridgment Classifications**
Construction law
IV Construction and builders' liens
IV.2 Procedure to obtain lien
IV.2.b Defects and formalities
IV.2.b.i Claim on wrong property
IV.2.b.i.B Curative provisions
Construction law
IV Construction and builders' liens
IV.2 Procedure to obtain lien
IV.2.b Defects and formalities
IV.2.b.ii Wrong owner named
Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.c Pleadings
IV.10.c.i Amendments
Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.c Pleadings
IV.10.c.ii Sufficiency of pleadings

 

Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.m Appeal and judicial review
IV.10.m.ii Practice and procedure

**Headnote**

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Appeal and judicial review — Practice and procedure

Tenant was company that held lease — Lease stipulated that any improvements required landlord's prior approval and would remain property of landlord — Contractor performed work for company that had same director as tenant — Company's cheque was not honoured — Contractor registered lien against fee simple interest rather than leasehold interest — Contractor brought action against landlord based on approval granted under lease — Neither lien nor statement of claim indicated that landlord requested work — Limitation period for bringing action subsequently expired — Landlord successfully brought application for order striking out statement of claim as disclosing no reasonable cause of action — Contractor appealed — Appeal dismissed — Contractor was entitled to hearing de novo on appeal but had to show either clear error of law or palpable and overriding error of fact — Applicable test was whether "beyond doubt" that no cause of action was disclosed — Statement of lien did not claim that landlord requested work — Statement of claim could not assert broader claim than in statement of lien — Contractor failed to show demonstrable error of law.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Pleadings — Sufficiency of pleadings

Tenant was company that held lease — Lease stipulated that any improvements required landlord's prior approval and would remain property of landlord — Contractor performed work for company that had same director as tenant — Company's cheque was not honoured — Contractor registered lien against fee simple interest rather than leasehold interest — Contractor brought action against landlord based on approval granted under lease — Neither lien nor statement of claim indicated that landlord requested work — Limitation period for bringing action subsequently expired — Landlord successfully brought application for order striking out statement of claim as disclosing no reasonable cause of action — Tenant appealed — Appeal dismissed — Statement of lien did not claim that landlord requested work — Statement of claim could not assert broader claim than in statement of lien — Contractor failed to show demonstrable error of law.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Pleadings — Amendments

Claimant who fails to identify proper owner in lien and statement of claim is not entitled to amend statement of claim following expiration of limitation period for bringing action — Curative provisions do not allow claimant to commence what is essentially new cause of action after time limit has expired.

Construction law --- Construction and builders' liens — Procedure to obtain lien — Defects and formalities — Wrong owner named

Tenant was company that held lease — Lease stipulated that any improvements required landlord's prior approval and would remain property of landlord — Contractor performed work for company that had same director as tenant — Company's cheque was not honoured — Contractor registered lien against fee simple interest rather than leasehold interest — Contractor brought action against landlord based on approval granted under lease — Neither lien nor statement of claim alleged landlord had requested work — Limitation period for bringing action subsequently expired — Landlord successfully brought application for order striking out statement of claim as disclosing no reasonable cause of action — Contractor appealed and brought application for leave to amend statement of claim to include proper relief against landlord — Appeal dismissed; application dismissed — Statement of lien did not claim that landlord requested work — Statement of claim could not assert broader claim than in statement of lien — Contractor was not entitled to amend statement of claim to assert lien and claim outside of statutory time period — Curative provisions did not allow contractor to commence new cause of action after time limits expired.

Construction law --- Construction and builders' liens — Procedure to obtain lien — Defects and formalities — Claim on wrong property — Curative provisions

Tenant was company that held lease — Lease stipulated that any improvements required landlord's prior approval and would remain property of landlord — Contractor performed work for company that had same director as tenant — Company's cheque was not honoured — Landlord agreed to sell property to purchaser — Contractor registered lien against fee simple interest rather than leasehold interest — Purchaser registered caveat against title of property — Purchaser entered premises and terminated

  

lease without notice to contractor — Contractor brought action against landlord based on approval granted under lease — Neither lien nor statement of claim alleged landlord had requested work — Limitation period for bringing action subsequently expired — Landlord and purchaser successfully brought application for order striking out statement of claim as disclosing no reasonable cause of action — Contractor appealed and brought application for leave to amend statement of claim to include proper relief with respect to termination of lease — Appeal dismissed; application dismissed — Purchaser could not be liable for failing to give notice of termination of lease since lien did not attach to leasehold interest — Contractor was not entitled to amend statement of claim to assert lien and claim outside of statutory time period — Curative provisions did not allow contractor to commence new cause of action after time limits expired.

**Table of Authorities**

**Cases considered by *Greckol J.*:**

*Hillcrest Contractors Ltd. v. McDonald (No. 2)* (1977), 2 Alta. L.R. (2d) 273, 5 A.R. 554, 1977 CarswellAlta 36 (Alta. Master) — referred to

*Husky Oil Operations Ltd. v. Ledcor Industries Ltd.* (2002), 2002 ABQB 294, 2002 CarswellAlta 372, 314 A.R. 308 (Alta. Q.B.) — considered

*K. & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd.* (1998), 1998 CarswellAlta 417, 39 C.L.R. (2d) 14, [1998] 8 W.W.R. 45, 216 A.R. 164, 175 W.A.C. 164, 60 Alta. L.R. (3d) 356, 1998 ABCA 178 (Alta. C.A.) — considered

*Leeds v. Alberta (Minister of the Environment)* (1989), 6 R.P.R. (2d) 152, 98 A.R. 178, 42 L.C.R. 114, 61 D.L.R. (4th) 672, (sub nom. *Leeds v. Alberta)* 68 Alta. L.R. (2d) 322, (sub nom. *Leeds v. Alberta)* [1989] 6 W.W.R. 559, 1989 CarswellAlta 122 (Alta. C.A.) — referred to

*Matwychuk v. Western Union Insurance Co.* (1992), 5 Alta. L.R. (3d) 384, 12 C.C.L.I. (2d) 78, 134 A.R. 230, [1993] 2 W.W.R. 49, 1992 CarswellAlta 160 (Alta. Q.B.) — followed

*Menduk v. Gore Mutual Insurance Co.* (1969), 67 W.W.R. 573, 1969 CarswellAlta 12 (Alta. T.D.) — referred to

*Northern Electric Co. v. Manufacturers Life Insurance Co.* (1976), [1977] 2 S.C.R. 762, 18 N.S.R. (2d) 32, 12 N.R. 216, 79 D.L.R. (3d) 336, 20 A.P.R. 32, 1976 CarswellNS 32, 1976 CarswellNS 32F (S.C.C.) — followed

*South Side Woodwork (1979) Ltd. v. R.C. Contracting Ltd.* (1989), 33 C.L.R. 43, 95 A.R. 161, 1989 CarswellAlta 516 (Alta. Master) — referred to

*Wil-ton Construction Ltd. v. Amerada Minerals Corp. of Canada* (1989), 69 Alta. L.R. (2d) 285, 35 C.L.R. 113, 98 A.R. 296, 61 D.L.R. (4th) 360, 1989 CarswellAlta 142 (Alta. C.A.) — considered

**Statutes considered:**

*Builders' Lien Act*, R.S.A. 2000, c. B-7

s. 1(j) "owner" — considered

s. 6 — considered

s. 6(1) — referred to

s. 15 — referred to

s. 15(2) — considered

s. 34 — referred to

s. 34(2) — referred to

s. 34(2)(a)(iii) — considered

s. 37 — considered

s. 41(1)(a) — referred to

s. 41(2)(a) — referred to

  

s. 41(4) — referred to

s. 43 — referred to

s. 43(1) — referred to

s. 43(5) — referred to

*Land Titles Act*, R.S.A. 2000, c. L-4

s. 14(5) — considered

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68

R. 129 — considered

R. 129(1) — referred to

R. 129(1)(a) — referred to

R. 129(1)(b) — referred to

R. 129(2) — referred to

R. 500 — considered

APPEAL by contractor from judgment of master striking out statement of claim as disclosing no reasonable cause of action; APPLICATION by contractor for leave to amend statement of claim to include proper relief against landlord and purchaser.

***Greckol J.*:**

**I. Nature of The Application**

1 This is an appeal from a decision of a Master striking the Amended Statement of Claim as against 924745 Alberta Inc. and 411 Capital Corporation. The claim concerns a builder's lien filed in relation to construction work undertaken from July 3, 2001 to September 25, 2001 by the Plaintiff for the Defendants, Sota Centre Inc., Sota Holdings Inc., and P2G Technologies Inc., at a project site then owned by 924745 Alberta.

**II. Facts**

2 On May 28, 2001, P2G Technologies entered into a lease with 924745 Alberta, the terms of which provided that any improvements to the premises would require the lessor's prior approval and would remain the property of the lessor.

3 On June 27, 2001 the original lease between P2G Technologies and 924745 Alberta was amended so that the lessee became Sota Holdings. Mr. Benvie is the sole director of Sota Centre, one of two directors of Sota Holdings, and one of three directors of P2G Technologies.

4 The Plaintiff is a general contracting firm. In June 2001, Les Toth, the President and Manager of the Plaintiff, met with Charles Edmond, Robert Benvie, and Rollie Tremblay, representatives of Sota Centre, who advised that Sota Centre needed construction work done for its business.

5 From July to September 2001 the Plaintiff oversaw the construction work on the premises. Mr. Toth heard Mr. Benvie say that he was the owner of the lands and premises. Mr. Benvie told the Plaintiff to issue invoices for the work to Sota Centre. Sota Centre paid the invoices by way of a cheque in the amount of $190,000.00, which was not honoured. Further invoices were issued. Monies remain owing for the work done.

  

6 On September 21, 2001, 924745 Alberta, as vendor, entered into an agreement for sale of the property with the Defendant 411 Capital Corporation, which registered a caveat against the title on October 16, 2001 on the basis of the agreement.

7 On September 26, 2001 the Plaintiff registered a builder's lien against the fee simple interest of the registered owner, 924745 Alberta, but not against Sota Holding's leasehold interest. The Statement of Lien alleges that work and materials were provided at the request of Sota Centre. There was no notice to 924745 Alberta, the registered owner of the fee simple, given under s. 15 of the ***Builders' Lien Act***, R.S.A. 2000, c. B-7.

8 About March 6, 2002, 411 Capital Corp. entered the premises and terminated the lease with Sota Holdings.

9 On March 25, 2002 the Plaintiff issued a Statement of Claim in these proceedings, which was amended on March 28 th . The Amended Statement of Claim reads that work was done "on the credit, on the behalf, on the privity and consent, or on the direct benefit" of the Defendant 924745 Alberta.

10 On April 4, 2002, the 180 day period for issuance of a Statement of Claim and filing of a *lis pendens*, as specified by s. 43 of the ***Builders' Lien Act***, expired.

11 On July 22, 2002, 924745 Alberta Inc., 411 Capital Corp., and Cindy Whitehead-Down, the sole director of 924745 Alberta, applied for an Order pursuant to Rule 129(a) and (b) of the ***Alberta Rules of Court*** that the Amended Statement of Claim against them be struck out as disclosing no cause of action or as being scandalous, frivolous and vexatious.

12 On August 1, 2002, the Plaintiff brought a Notice of Motion for an Order permitting a further amendment to the Amended Statement of Claim in order to seek relief against 924745 Alberta and 411 Capital Corp. The proposed Amended Amended Statement of Claim referred to 924745 Alberta as the "registered owner" of the property and confirmed that the arrangements for the construction were between the Plaintiff and Defendant Sota. It also added that 924745 Alberta requested that the work be performed. The Plaintiff's Notice of Motion also sought a declaration that its lien was valid, or an order directing issues for trial.

13 On August 16, 2002 the applications came before the Master who directed that the Statement of Claim be struck out as against 924745 Alberta, 411 Capital Corp., and as against the Defendant Robert Benvie. He denied the Plaintiff's application to amend the Amended Statement of Claim.

14 On August 26, 2002 the Plaintiff filed a partial Discontinuance of the action against Cindy Whitehead-Down, and intends to do so with respect to the claim against Robert Benvie.

15 On July 11, 2002, the Plaintiff filed a Notice of Appeal appealing the Order of the Master. In these appeal proceedings, and by affidavit of Les Toth sworn May 29, 2003 the Plaintiff seeks a further amendment to the Amended Statement of Claim to provide further particulars of the claim against 924745 Alberta, and to advance a claim against 411 Capital Corp, relying on s. 14(5) of the ***Land Titles Act***, R.S.A. 2000, c. L-4 and s. 15(2) of the ***Builders' Lien Act***.

**III. Rules and Legislative Provisions**

16 Rule 129 (1) provides:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
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> (a) it discloses no cause of action or defence, as the case may be, or
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> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,

  

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

17 The relevant sections of the ***Builders' Lien Act*** provide:

1. In this Act,

. . .

(j) "owner" means a person having an estate or interest in land at whose request, express or implied, and

(i) on whose credit,

(ii) on whose behalf,

(iii) with whose privity and consent, or

(iv) for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material.

. . .

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, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

. . .

15(1) When the estate on which a lien attaches is a freehold estate for a life or lives or a leasehold estate then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or that person's agent, notice in writing of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or that person's agent, within 5 days after the receipt of the notice, gives notice that the person holding that estate will not be responsible for the doing of the work or the furnishing of the materials.

(2) When the estate on which a lien attaches is leasehold, no forfeiture or cancellation of a lease, except for non-payment of rent, is effective to deprive a lienholder of the benefit of the lien, but the lienholder may, in order to avoid forfeiture or termination of the lease for non-payment of rent, pay any rent due or accruing due on the lease and continue the lease to its term and the sum so paid may be added to the claim of the lienholder.

(3) This section applies in respect of land other than minerals.

. . .

34(2) The statement of lien shall set out

(a) the name and residence of

  

(i) the lien holder,

(ii) the owner or alleged owner

(iii) the person for whom the work was done or is being done or the materials were or are being furnished,

(b) the date when the work was completed or the last materials were furnished . . .

(c) a short description of the work done...

(d) the sum claimed as due or to be due

(e) a description, sufficient for registration, of the land and estate or interest in the land to be charged, and

(f) and address for service for the lienholder or the leinholder's agent.

. . .

37(1) A substantial compliance with section 34 is sufficient and a lien shall not be invalidated by failure to comply with any requirements of section 34 unless, in the opinion of the court, the owner, contractor, subcontractor, mortgagee or some other person is prejudiced by the failure.

(2) When, in the opinion of the court, a person is prejudiced by a failure to comply with section 34, the lien shall be invalidated only to the extent that the person is prejudiced by the default.

(3) Nothing in this section dispenses with the requirement of registration of a lien.

. . .

41(1) A lien for materials may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned, or

. . .

(2) A lien for the performance of services may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day that the performance of the services is completed or the contract to provide the services is abandoned, or

. . .

(4) In cases not referred to in subsections (1) to (3), a lien in favour of a contractor or subcontractor may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day the contract or subcontract, as the case may be, is completed or abandoned, or

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day the contract or subcontract, as the case may be, is completed or abandoned.

. . .

  

43(1) A lien that has been registered ceases to exist unless, within 180 days from the date it is registered,

(a) an action is commenced under this Act

(i) to realize on the lien, or

(ii) in which the lien may be realized, and

(b) the lien claimant registers a certificate of lis pendens in respect of the claimant's lien in the appropriate land titles office.

. . .

(5) The Registrar without charge may on the Registrar's own initiative, and shall on request, cancel registration of a lien where the lien has ceased to exist under subsection (1).

**IV. Issues**

***A. Appeal of the Master's Order***

18 The Plaintiff, on the basis of error of law, seeks an Order setting aside the Master's decision to allow the application under Rule 129 to strike out the claims against the Defendants 924745 Alberta and 411 Capital Corp. The issues raised in this appeal are:

1. Does the Amended Statement of Claim allege a cause of action against the Defendants 924745 Alberta Inc. and 411 Capital Corp.?

2. Is the Amended Statement of Claim scandalous or vexatious?

***B. Application to Amend the Statement of Claim***

19 The Plaintiff also brings application to further amend the Amended Statement of Claim to provide further particulars of the claim against 924745 Alberta, and to advance a claim against 411 Capital Corp, relying on s. 14(5) of the ***Land Titles Act***, R.S.A. 2000, c. L-4 and s. 15(2) of the ***Builders' Lien Act***.

**V. Analysis**

***A. Appeal of the Master's Order***

20 Rule 500 of the Alberta Rules of Court provides for an appeal from a decision of a Master in Chambers. The appeal is to be a review and a rehearing as if the case were before this Court for the first time (*Menduk v. Gore Mutual Insurance Co.* (1969), 67 W.W.R. 573 (Alta. T.D.) at 577). I agree with the view expressed by Rooke J. in *Matwychuk v. Western Union Insurance Co.* (1992), 134 A.R. 230 (Alta. Q.B.) that, although the hearing is *de novo*, the Master's decision should not be disturbed on appeal unless there is some clear error in the interpretation or application of the law, some palpable and overriding error of fact, or some other appropriate reason why the decision should be varied. In the present case, the Plaintiff complains of error of law.

21 The Master decided that the claim as against 924745, 411 Capital Corp. and Robert Benvie should be struck out pursuant to Rule 129(1)(a). The Plaintiff does not take issue with the decision concerning Robert Benvie.

*1. Does the Statement of Claim allege a cause of action against 924745 Alberta Inc. and 411 Capital Corp.?*

22 Section 6 of the ***Builders' Lien Act*** states that the provider of work or materials has "a lien on the estate or interest of the owner in the land in respect of the improvement being made." The foundation for a builders' lien action is the Statement of Lien. Section 34(2)(a)(iii) mandates the content of the Statement of Lien. The Statement must identify, among other things,

  

the "owner", the "person for whom the work was done or is being done or the materials were or are being furnished," and must provide a "description of the land and estate or interest in the land to be charged."

23 The Defendants note that the Statement of Lien was registered against the fee simple interest of the registered owner, 924745 Alberta, but not against Sota Holdings' leasehold interest. Further, the Statement of Lien identifies Sota Centre as the party for whom the work or materials were provided and does not state that the work was requested by 924745 Alberta.

24 Section 37 of the ***Builders' Lien Act*** states that substantial compliance with s. 34 is sufficient and a lien shall not be invalidated by failure to comply unless the owner is prejudiced by the failure. The Plaintiff argues that there has been substantial compliance with the requirements of s. 34.

25 The Statement of Lien must identify the "owner" since, according to s. 6 of the ***Builders' Lien Act***, the lien is "on the estate or interest of the owner in the land in respect of which the improvement is being made." The word "owner" has a singular meaning under the Act. The term is defined under s. 1(j) as "a person having an estate or interest in land at whose request, express or implied, and (i) on whose credit, (ii) on whose behalf, (iii) with whose privity and consent, or (iv) for whose direct benefit, work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material." [emphasis added]

26 As the Defendants point out, a registered owner may be an "owner" if the appropriate notice under s. 15 of the Act has been given (which was not done in this case) or if the actions of the registered owner qualify the registered owner as an "owner" under s. 1(j) of the Act.

27 The Defendants argue that the Statement of Lien defines the parameters of the estate or interest to which the lien is to attach. The Statement of Lien in this case does not allege that the registered owner, 924745 Alberta, requested that the Plaintiff perform work for it. Rather, it states that the work was requested by Sota Centre.

28 The Defendants rely on *Husky Oil Operations Ltd. v. Ledcor Industries Ltd.* (2002), 314 A.R. 308 (Alta. Q.B.) for the proposition that a claimant can obtain no greater or further rights than those claimed in the Statement of Lien. They argue there is nothing in the Statement of Lien or Amended Statement of Claim alleging that the work was requested by 924745 Alberta. They also maintain that the time for registering the lien or a statement of claim has long since expired, and an amendment to cure that deficiency would also be time barred.

29 In the Statement of Claim filed March 25, 2001, 924745 Alberta is identified as the registered owner of the land and premises and as the landlord. P2G Technologies, and then Sota Holdings, are identified as the tenant pursuant to a lease which provided that the tenant would arrange for the construction "with the participation of the Defendant 924745 in the building process," "all improvements require the landlord's approval," and the tenant would remove any liens. The Statement of Claim goes on to particularize the relationship between the Plaintiff, Sota Holdings and P2G Technologies, in terms of the contract for building services and materials; and states that the builder's lien was filed on September 26, 2001.

30 The Statement of Claim further alleges that on August 30, 2001 the Defendant Sota supplied the Plaintiff with a cheque for $190,000 which did not clear the bank; and on September 27, supplied a further cheque of $50,000. Further, it alleges that on October 2, 2001 Ms. Whitehead-Down, the sole Director of 924745 Alberta, contacted the Plaintiff's representative, Les Toth, and asked for copies of the invoices. The Plaintiff contends in the Statement of Claim that it was lead to believe the invoices would be paid by Ms. Whitehead-Down, because in a follow-up meeting, she did not advise that an agreement for sale of the premises had been signed, she refused to provide a copy of the lease; she did not advise that the tenant was in default of the lease; and she did not dispute the quality of the work. The Plaintiff claims this amounted to a representation that Sota Centre was a tenant in good standing. It also claims in the pleading that the value of the improvements increased the value of the premises and the improvements were incorporated into the premises.

31 The Statement of Claim provides at para. 30.1 that the initial and additional work "was done on the credit, on the behalf, on privity and consent, and on direct (sic) benefit of the Defendant 924745." The Amended Statement of Claim corrects the

  

grammar in para. 30.1 by providing at para. 34, the work was done "on the credit, on the behalf, on the privity and consent, or on the direct benefit" of the Defendant 924745 Alberta Inc.

32 The Plaintiff seeks, among other remedies, a declaration that it is entitled to a valid and subsisting lien against the interests of the Defendants in the lands.

33 As counsel for the Plaintiff emphasizes, Rule 129 provides that no evidence shall be admissible on an application under clause (a) of subrule (1). In an application to invoke this provision of Rule 129, the Court should consider whether it is "beyond doubt" that the pleadings disclose no cause of action or whether justice and reason dictate that the matter go to trial: *Leeds v. Alberta (Minister of the Environment)* (1989), 68 Alta. L.R. (2d) 322 (Alta. C.A.) at p. 8.

34 The Plaintiff points out that 924745 Alberta is identified in the Statement of Claim as the landlord, and the Defendants Sota Holdings and P2G Technologies, as the tenant pursuant to a lease that provided the tenant would arrange for the construction "with the participation of the Defendant 924745 in the building process," and "all improvements require the landlord's approval."

35 The Plaintiff further argues that the pleadings disclose the basis for the claim against 924745 Alberta because para. 30.1 (as amended to become para. 34) uses the language from s. 1(j) of the Act and states that the work was done "on the credit, on behalf, on privity and consent or on the direct benefit of the Defendant 924745." The Plaintiff maintains these words are sufficient to convey to the Defendant that it is alleged the owner actively participated in the request for the work and should be liable.

36 The Plaintiff argues that the "request" concept in s. 1(j) of the Act has been interpreted to involve active participation by the entity eventually held to have made a "request" and so to be within the definition of "owner": *K. & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd.* (1998), 216 A.R. 164 (Alta. C.A.).

37 In the *K. & Fung Canada Ltd.* case the issue was whether the Respondent in all the circumstances was an "owner" pursuant to s. 1(j) of the Act; that is, whether the Respondent expressly or impliedly requested the work and materials which were the subject of the lien. Here, since this is a Rule 129 application, the question is whether the Plaintiff has plead that 924745 Alberta was an "owner" pursuant to s. 1(j) of the Act; that is, whether the company expressly or impliedly requested the work and materials which are the subject of the lien. As noted, the Plaintiff relies on the words used in para. 30.1 as conveying the "request" or "active participation" concept, although the word "request" is not used; and relies on reference in the Statement of Claim to the language in the lease between the landlord and the tenant specifying the participation of the landlord in the building process. In addition, the Plaintiff relies on *Northern Electric Co. v. Manufacturers Life Insurance Co.* (1976), [1977] 2 S.C.R. 762 (S.C.C.) to support its argument that the nature of the commercial relationship between the landlord-owner and the tenant may be sufficient to find the owner is liable and argues that this relationship will be proven at trial.

38 The Defendants respond that the Courts in Alberta have held that for the holder of a freehold estate to be regarded as an "owner" under the Act, two requirements must be met. First, there must be a "request, express or implied" that the work be done and the materials be furnished. Second, the lien claimant must establish that the actions of the "owner" met one of the four requirements in s. 1(j); that is, "on whose credit, on whose behalf, with whose privity and consent, or for whose direct benefit," work was done or material furnished: *Hillcrest Contractors Ltd. v. McDonald (No. 2)* (1977), 2 Alta. L.R. (2d) 273 (Alta. Master) at 275. The Defendants say that although the lease contemplates approval of the landlord, there is no evidence before this Court that the landlord's approval was obtained. In *K. & Fung Canada Ltd.*, the court considered whether the landlord exercised the rights under the lease. Here, however, I am not to consider evidence in the context of this Rule 129 application.

39 The Defendants also argue that the Plaintiff understood this was a leasehold improvement situation but took no steps to learn the true interest of Sota Holdings in the property.

40 The Defendants argue that the claims against the Defendants could only have been advanced if raised in the Statement of Claim within 180 days after the Statement of Lien was filed, and cannot be now be resuscitated: *Wil-ton Construction Ltd. v. Amerada Minerals Corp. of Canada* (1989), 61 D.L.R. (4th) 360 (Alta. C.A.). There, O'Leary J., for the Court, wrote at p. 367 that:

  

> Section 32(1) states clearly that unless an action is commenced to realize on the lien, or in which the lien may be realized, within 180 days from registration, the lien "ceases to exist." There is no doubt that a total failure to commence the action contemplated by s. 32 (1) would result in loss of the lien as against all estates or interests in the land: see Macklem and Bristow, ***Construction and Mechanics' Liens in Canada*** , 5th ed. (1985), at pp. 282-289.
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> ...
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> The Act indicates that a lien may charge several separate and distinct interests in the same land. The same lien may attach the interest of either or both a landlord and his tenant. There may be more than the one statutory owner whose interest are subject to a lien. Section 4(2) contemplates that a number of separate and distinct estates or interests in minerals may be charged by the same lien. In a given situation a lienholder may consciously elect to enforce his lien against some liened interests but not others. It seems to me that failure to name as a defendant an owner or the holder of a prior registered encumbrance results in the lien ceasing to exist as against the interest of that person just as effectively as if no enforcement action had been commenced.

41 Finally, the Defendants contend that if the lien has ceased to exist as against the lands now sought to be attached, the curative section does not give the Court jurisdiction to revive the lien against those interests: *South Side Woodwork (1979) Ltd. v. R.C. Contracting Ltd.* (1989), 33 C.L.R. 43 (Alta. Master) at 58. The claimant has to register against the proper interest.

42 The question is whether the Statement of Lien properly attaches the interest of the landlord, 924745 Alberta, and whether the Statement of Claim in turn effectuates that claim. The entity against which the lien is filed must have made the request, express or implied, and on whose credit, behalf, with whose privity and consent, or for whose direct benefit work is done or material furnished: *Hillcrest Contractors Ltd.* The Statement of Lien does not claim that the landlord and registered owner is an "owner" within the terms of the Act, that it is a person at whose request work was done or materials furnished for an improvement of the lands. The Statement of Claim as amended does not identify 924745 Alberta as having made such request or having an active participation in the construction.

43 The Statement of Claim does assert the provisions in the lease between the landlord or registered owner and Sota that contemplates "the participation of the Defendant 924745 in the building process" and that "all improvements require the landlord's approval." However, the Statement of Claim, although arguably by its words encompassing the claim now asserted because of the relationship evidenced in the terms of the lease, cannot assert a claim that is broader than the Statement of Lien. The claim founded in the Statement of Lien is crystalized in the Statement of Claim which must be filed within 180 days. The Statement of Lien did not attach the interest of the Defendant as registered owner as it did not claim that 924745 Alberta requested that the work be done. The Statement of Claim cannot advance a claim which is broader than the claim protected by the Statement of Lien. For that reason, the Amended Statement of Claim in the present case does not disclose a cause of action against 924745 Alberta, or the purchaser of the property, 411 Capital Corp.

44 The appeal against the Order of the Master must fail, as there is no demonstrable error of law in his decision.

*2. Is the Statement of Claim scandalous or vexatious?*

45 It is unnecessary to consider this alternative basis for the Rule 129 application.

***B. Application to Amend the Statement of Claim***

46 The Plaintiff also brings application to further amend the Amended Statement of Claim to provide further particulars of the claim against 924745 Alberta, and to advance a claim against 411 Capital Corp, relying on s. 14(5) of the ***Land Titles Act***, R.S.A. 2000, c. L-4 and s. 15(2) of the ***Builders' Lien Act***.

 

47 The Plaintiff cannot make the proposed amendment now concerning the claim against the registered owner, asserting that the work was done at its request, since the Rule 129 application has succeeded on the basis that the Statement of Lien was flawed and the Statement of Claim could not advance a broader claim than the Statement of Lien.

48 To permit the amendment of para. 34 as proposed by the Plaintiff would allow the Plaintiff to assert a lien and a claim outside the statutory time period. The curative provisions do not avail the Plaintiff to, in effect, commence a new cause of action after the time limits have expired: *Wil-ton Construction Ltd.*

49 The Plaintiff also seeks to amend the Statement of Claim to allege that the Defendant 411 Capital Corp. terminated the lease of the premises without notice to the Plaintiff for a reason other than non-payment of rent, and therefore the interest of 411 Capital Corp. is subject to the Plaintiff's lien pursuant to s. 15(2) of the Act. However, s. 15(2) is premised on the lien having attached to the leasehold interest, which it has not.

**VI. Conclusion**

50 The appeal of the Master's Order made under Rule 129 striking the Plaintiff's claim against 924745 Alberta and 411 Capital Corp. based on the lien, is dismissed. Further, I exercise my discretion under Rule 129 to strike the Plaintiff's claim based on misrepresentation as against those Defendants, given that the misrepresentation is alleged to have occurred on October 2, 2001, after the provision of the goods and services that are the subject of the lien.

51 The present application to amend the Amended Statement of Claim is dismissed insofar as the amendments concern those matters in respect of which the Statement of Claim has been found to disclose no cause of action. The application to amend to include a claim based on s. 15(2) of the Act must fail because the lien does not attach the leasehold interest.

52 Although the equities appear to be with the Plaintiff's position, I am constrained by the law to dismiss the appeal and the Plaintiff's application to amend the amended Statement of Claim.

*Appeal dismissed; application dismissed.*

# TAB 5

WESTERN MINERALS LTD. AND WESTERN LEASEHOLDS LTD. (PLAINTIFFS) ..... APPELLANTS; *June 13, 16, 17

1952

1953 *Mar 18

AND

JOSEPH ALBERT GAUMONT AND THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

AND

FARMERS UNION OF ALBERTA ..... INTERVENANT,

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WESTERN MINERALS LTD. AND WESTERN LEASEHOLDS LTD. (PLAINTIFFS) ..... APPELLANTS;

AND

JAMES WARREN BROWN AND THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

AND

BEAVER SAND & GRAVEL LTD. .....(DEFENDANT);

AND

FARMERS UNION OF ALBERTA ..... INTERVENANT.

*Real Property—Ownership of Sand and Gravel—Whether reservation in Certificate of Title of mines, minerals and valuable stone, includes sand and gravel—The Land Titles Act, R.S.A., 1942, c. 205, s. 62.*

*Constitutional Law—Validity of The Sand and Gravel Act, S. of A., 1951, c. 77—Applicability to pending action.*

The appellant, Western Minerals Limited, held a certificate of title as the registered owner in fee simple under *The Land Titles Act*, R.S.A., 1942, c. 205, and amendments thereto, of all mines, minerals, petroleum, gas, coal and valuable stone in or under two certain quarter sections of land of which the respondents Gaumont and Brown were the respective owners under the Act of the surface rights. The appellant, Western Leaseholds Limited, was lessee from its co-appellant. Both appellants sued for a declaration that they were the registered and equitable owners of all minerals and/or valuable stone including the

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Cartwright JJ.

1953

WESTERN MINERALS LTD. *et al* *v.* GAUMONT *et al*

WESTERN MINERALS LTD. *et al* *v.* BROWN *et al*

sand and gravel within, upon or under the said lands and for certain other relief. The actions were consolidated and tried together and judgment was given in favour of the appellants. Following the filing of notice of appeal by the respondents, *The Sand and Gravel Act,* S. of A., 1951, c. 77, came into force providing that as to all lands in the Province the owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to all sand and gravel on the surface of that land and obtained or otherwise recovered by surface operations. By order of the Appellate Division, Gaumont and Brown were permitted to raise the terms of the Statute as a further ground of appeal. The Appeal Court allowed the appeal and dismissed the plaintiffs' action. On appeal to this Court.

*Held:* 1.—That the appeal should be dismissed.

*Per* Kerwin, Taschereau, Rand, Kellock, Estey and Cartwright, JJ.:—The appellants failed to establish that "mines, minerals, petroleum, gas, coal and valuable stone" in their Certificate of Title should be construed as including sand and gravel.

*Per* Locke, J.—Apart from the provisions of *The Sand and Gravel Act,* the only question to be determined was the meaning of the language employed in the certificate of title by reason of s. 62 of *The Land Titles Act* (R.S.A. 1942, c. 205) and on the proper construction of that instrument, sand and gravel were included. The appellants should, therefore, have their costs of the trial.

2. *Per Curiam*—That *The Sand and Gravel Act* is *intra vires* of the Provincial Legislature and is declaratory of what is and has always been the law of Alberta, and so applied to the present litigation and is fatal to the appellants' claim.

APPEALS from the judgments of the Appellate Division of the Supreme Court of Alberta (1) which allowed the Defendants' appeals from the judgments of Egbert J. (2) in favour of the Plaintiffs. The two actions were brought by the Plaintiffs for a declaration that they were the registered and equitable owners of all minerals and/or valuable stone including sand and gravel, upon or under certain lands the title to the surface of which was vested in the Defendants and for certain other relief. The two actions were consolidated and tried together. The Defendant, Beaver Sand & Gravel Ltd., took no part in the action. By leave of the Court, the Farmers Union of Alberta was permitted to intervene. Following the delivery of judgment by the trial judge *The Sand and Gravel Act,* 1951, S. of A., c. 77, came into force and the Defendants who, in the meantime had filed notice of appeal, applied for and were granted leave to amend and plead the Act as a further ground of appeal. The Plaintiffs then served the Attorney General for the Province of Alberta

(1) (1951) 3 W.W.R. (N.S.) 434. (2) (1951) 1 W.W.R. (N.S.) 369.

with notice that they intended to bring into question the constitutional validity of the Act and thereafter, by order of the Appellate Division, the Attorney General was added as a party Defendant.

*H. W. Riley Q.C.* and *H. Patterson* for the appellants.

*W. G. Morrow* for the respondents.

*J. J. Frawley, Q.C.* for the Attorney General of Alberta.

*J. A. Ross* for the Farmers Union of Alberta, Intervenant.

KERWIN J.:—On the argument the Court decided that *The Sand and Gravel Act,* c. 77 of the 1951 Statutes of Alberta was *intra vires.* That Act applies to the present litigation and on this point I agree with the reasons of my brother Cartwright. However, the statute was enacted after the judgment at the trial and if at the date of that decision the appellants were entitled to judgment in their favour as the trial judge held, they should have, at least, the very considerable costs of the action, including the trial.

I have come to the conclusion that the appellants were not so entitled. At the outset it should be emphasized that the plaintiff, Western Minerals Limited, was registered as owner pursuant to *The Land Titles Act* of the Province of Alberta of an estate in fee simple of and in all mines, minerals, petroleum, gas, coal and valuable stone in or under the lands in question in the two actions and the right to enter upon or occupy such portions of the lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone. On the other hand, the respondent Gaumont has a certificate of title that he is the owner of an estate in fee simple in his lands "reserving thereout all mines and minerals. Subject to the exceptions, reservations and conditions contained in transfer of record as 6489 B.D." The reservation in this transfer, dated April 5, 1915, from a former owner, Western Canada Land Co. Limited, to one Bolster, reads:— "reserving to the transferor, its successors and assigns, all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land and the right to enter upon and occupy such portions of the said lands as may be necessary or convenient for the purpose of working, mining, removing,

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and obtaining the benefit of the said mines, minerals, petroleum, gas, coal, and valuable stone." Similarly, the respondent Brown has a certificate of title dated November 16, 1945, as owner of an estate in fee simple in his lands "reserving thereout all mines and minerals and the right to work the same as set forth in transfer of record as 5755 F.V." This transfer from a prior owner to Brown is dated August 1, 1945, and the reservation is the same as that in the transfer of Gaumont's lands from Western Canada Land Co. Limited to Bolster.

While there is no evidence as to when the certificate of title was granted by which the appellant, Western Minerals Limited, is declared to be the owner of the mines, minerals, etc. its date is of no importance. The question for determination is whether under the terms of the three certificates of title the sand and gravel in the lands are owned by the respondents Brown and Gaumont respectively or by Western Minerals Limited. In *Attorney General for the Isle of Man* v. *Moore* (1), Lord Wright, speaking for the Judicial Committee, at page 267, states (referring to a statute): "The principles to be applied in determining such a question have now been established by decisions of the House of Lords dealing with words of reservation in the Railway Clauses Act and similar Acts." In the earlier case of *Attorney General for the Isle of Man* v. *Mylchreest* (2), the Judicial Committee had arrived at the same conclusion as the House of Lords, and it might be noted that in *Re McAllister* v. *Toronto Suburban R.W. Co.* (3), the Ontario Court of Appeal considered these decisions applicable in an expropriation under s. 133 of the then Ontario Railway Act. All of these decisions were as to the meaning of certain statutes and the effect of the decision of the Privy Council in the *Moore* case is that the same principles are to be applied to the construction of statutory provisions of an entirely different type. I see no reason that they should not also be applied to the construction of certificates of title under *The Land Titles Act* (R.S.A. 1942, c. 205). S. 62 of that Act provides that "every certificate of title . . . shall . . . be conclusive evidence . . . that the person named therein is entitled to the land included in the same

(1) [1938] 3 All E.R. 263. (2) (1879) 4 App. Cas. 294.
(3) (1917) 40 O.L.R. 252.

for the estate or interest therein specified." The point is whether the estate or interest of the parties includes the sand and gravel.

It was not contended that they fell within the term "mines" but it was urged that they were "minerals". The enumeration of "petroleum, gas, coal and valuable stone" affords a context to show that the word is not used in its widest sense: *Attorney General for the Isle of Man* v. *Mylchreest* (*supra*); *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd.* v. *Farquharson* (1). Furthermore, I am quite sure that Gaumont and Brown, as holders of certificates of title, or any other purchasers of lands in Alberta would never imagine that sand and gravel were excluded from their estate or interest under "minerals": *Lord Provost* v. *Farie* (2). My brother Kellock has detailed the evidence adduced on behalf of the appellants and I therefore do not repeat it. It is quite apparent that that evidence falls far short of showing that in the mining and commercial world, and by land owners, sand and gravel were considered to be minerals. There can be really no question that, as held by the trial judge, sand and gravel do not come within the term "stone".

The appeals should be dismissed with costs payable by the appellants to the respondents Gaumont and Brown. There should be no order as to the costs of the Attorney General of Alberta or of the intervenant.

RAND J.:—Two questions are raised in this appeal: whether a reservation of "all mines, minerals, petroleum, gas, coal and valuable stone" contained in two conveyances of land in Alberta, includes sand and gravel, both of which will be embraced within the treatment of the latter; and whether a statute passed after judgment at trial, effects retroactively the exclusion of gravel from the scope of the reservation.

Evidence was adduced to show the place of gravel in the scientific and engineering classifications of minerals, which was undoubtedly pertinent to the issue; but as the question arises out of the sale and purchase of land, the understanding of persons who deal in land or its constituents is of primary importance; and in the circumstances here there are factors of special significance to that understanding.

(1) [1912] A.C. 864. (2) (1888) 13 App. Cas. 657.

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In Crown grants of lands in the colonies the reservation of mines and minerals was exceptional, but in western Canada from the early stages of its organization that was not the case. The uninhabited territory of what was later called the Northwest Territories, then little better than a wilderness, was transferred to the Dominion by an Imperial Order-in-Council in 1870. In the course of the subsequent administration, including a comprehensive immigration program, the Dominion Government in 1889 by an order authorized by the Dominion Lands Act, provided for the reservation of mines and minerals in grants made under that Act. There is not readily accessible the extent of land patented between that date and 1905; but the reports of the Commissions on Western Lands and Subsidies submitted to Parliament in 1935 show that between 1905, when Alberta and Saskatchewan were formed, and 1930, when the remaining public lands were transferred to them, approximately fifty million acres had been disposed of, the individual applications for which approached three hundred thousand in number. This was in addition to at least nine million acres granted after 1905 on commitments made before that time. From this uniform practice, the reservation became notorious throughout the West, and a matter of common knowledge in land dealings. Large areas had, it is true, been conveyed to the Hudson's Bay Company and to railway companies without reservation, but these were widely known as exceptions to the generality of titles.

Since 1931 the same policy has been continued by statutory provisions in all three provinces, Manitoba, Revised Statutes (1940) c. 48; Saskatchewan, Revised Statutes (1940) c. 37; and Alberta, statutes of 1949, c. 81; in all of them the expression "mines and minerals" is found.

From the commencement, also, of the Dominion administration, a form of the so-called Torrens system of land titles has been in force. By its effect the ownership of land is conclusively evidenced by an official Certificate of Title, and this system has, likewise, been continued by the provinces since their formation.

In this background of uniformity of public administration and of phraseology in relation to mines and minerals, and the formal establishment of title by certificate, it would,

I think, be difficult to attribute to that collocation of words any other than the same meaning throughout that western territory, certainly, on the record here, throughout Alberta; and, apart from questions, as between the immediate parties to a transfer, of rectifying the certificate, it would be a rare case in which an enquiry into the actual or presumed intentions of parties to a grant or transfer, where the same expression is alone in question, would be justified. What is to be sought, then, is the general sense of those words in the vernacular of engineers, business men and land owners, the latter of whom constitute a substantial fraction of the population in the prairie section. The recent decision of the Judicial Committee in *Borys* v. *Canadian Pacific Railway Company* (1), dealing with the word "petroleum", adopted that use as the determinant of its scope.

The vernacular is, in turn, a fact itself to be ascertained. There are varying degrees of appreciation of the meaning of words, and, apart from the opinions of individuals, positive data evidencing the common acceptation are not always at hand; but one of reliability is that of neutral conduct which indicates the assumption of such an acceptation.

It is, therefore, of some significance, that although gravel in general building and railway construction has long been used as material, and during the past thirty years, most extensively in road building, no case has been cited in which the question here has been directly raised before a Canadian court. That seems to be particularly noteworthy in relation to railways. By The Railway Act, 1903, as well as its revision of today, the sections which authorize expropriation of land do not entitle the company to the mines or minerals unless expressly purchased. On the other hand, the statute provides, as in s. 202 of the present Act, that "any stone, gravel, earth, sand, water or other material" required for the construction, maintenance or operation of the railway may, for any such purpose, be taken. The inclusion of the word "gravel" in this context points, at least in the understanding of Parliament, to a genus of materials forming part of land which embraces gravel but excludes minerals. In the first twenty years of

(1) [1953] 7 W.W.R. (N.S.) 546.

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this century, a vast network of railways was built in the West for which immense quantities of gravel were required for ballasting, a great deal of which must have been obtained from lands in which the minerals were reserved to the Crown; but nothing has been disclosed to suggest a claim for compensation ever asserted by the Dominion.

Geologically, the soil was formed by the disintegration of hard surface minerals plus the later ingestion of vegetable matter. Gravel is produced in the course of that disintegration by the attrition of rock fragments and contains all sizes from a grain of sand to stones of several inches in diameter. The difference, then, between the ordinary soil and gravel is a matter largely of gradation in physical refinement of a common substance, and that fact may explain the absence of previous controversy through the natural tendency to treat the latter as ordinary roughage of the soil rather than discrete mineral substance.

Viewing the evidential matters and opinions placed before the Court in the light of these considerations, I take the vernacular sense of the words "mines and minerals" not to extend to gravel.

But the reservation before us, by the additional words "valuable stone", itself evidences that exclusion. Stone, lacking any real use qua land, has, from the earliest times, been used for building all manner of structures, and so far has acquired a higher degree of distinctiveness from the soil than gravel: it was and is that utility that gives it special character and value. It is not seriously contended that "valuable stone" includes gravel, but its presence in the reservation implies that other stone is excluded, which, *a fortiori*, excludes material produced by a fragmentation of stone that basically changes its useful character.

Then is the legislation to be interpreted as a prospective alteration of the previous law or a retroactive declaration of what the law was prior to the judgment at trial? Here is a case in which the boundary between property rights, depending upon the scope to be given general words in common parlance, is somewhat vague and uncertain, and in which the determination by the legislature can safely be taken to express the general understanding of the language being interpreted. That in such a situation and by way of precaution the legislature should resort to a

declaration of pre-existing law arises from an apprehension of widespread disruption of what are thought to be settled interests. For that purpose the legislature has access to sources of relevative considerations not effectively available to a court of justice. The word "shall" in the context implies a conclusive effect to the words "be deemed" and, that, considering the recitals in the preamble, the expression was intended to operate upon the subject matter of these proceedings, I entertain no doubt. The Appeal Division was consequently concluded by it.

I would, therefore, dismiss the appeal with costs.

KELLOCK, J.:—These appeals raise the same question, namely, the proper construction of a reservation in certain certificates of title to lands in the province of Alberta of the following reservation: "all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land and the right to enter upon and occupy such portion of the said land as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone."

In the case of the respondent Gaumont the certificate is dated July 11, 1928, while that of the respondent Brown is dated August 1, 1945. These certificates are to be read in conjunction with s. 62 of *The Land Titles Act*, R.S.A. 1942, c. 205.

The appellants are entitled to the benefit of these reservations and claim title thereunder to the sand and gravel in, upon or under the lands. They contend that sand and gravel are "minerals" within the meaning of that term as used in the reservations. This contention was given effect to by the learned trial judge, but was rejected by the Appellate Division which also held that the respondents were, in any event, protected by *The Sand and Gravel Act* of Alberta, 15 Geo. VI, c. 77, passed on April 7, 1951, after delivery of the judgment at trial.

The word "minerals", standing alone, and considered in contradistinction to animal or vegetable substances, would no doubt include such materials as sand and gravel. In

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*Darvill* v. *Roper*, (1), Kindersley V. C. said at p. 299, in reference to a similar contention, that

> Every portion of the soil, not merely the limestone rock, but the gravel, the pebbles, all, even to the very substance of the loam or mould which forms the soil, would be included.

In *Attorney-General for the Isle of Man* v. *Mylchreest*, (2), Sir Montague Smith pointed out, in the Judicial Committee, considerations which enter into the question as to the sense in which the word may, in any particular case, have been used, as follows:—

> It was contended for the Crown that the word "minerals" used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shewn by any of the above-mentioned modes of explanation that in the particular instrument to be construed, it was employed in this narrower sense.

It seems plain from the context in the case at bar that the word is not used in its widest sense. At page 308 of *Mylchreest's* case, Sir Montague Smith said with respect to the language there in question,

> If the word "minerals" were intended to be used in its widest signification, it was obviously unnecessary to make specific mention of flagg, slate and stone.

Similarly, in the case at bar there is an enumeration of substances which would be quite unnecessary if "minerals" were employed in the broad sense.

In *Barnard-Argue-Roth-Stearns Oil and Gas Co., Ltd.* v. *Farquharson*, (3), the Judicial Committee had to consider a conveyance which reserved to the grantor "all mines and quarries of metals and minerals and all springs of oil . . ." Lord Atkinson, delivering the opinion of the Board, expressed the same idea at p. 869 as follows:

> It is obvious, however, for several reasons, that in this clause of the grant the word "minerals" is not used in this wide and general sense. First, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense, namely, "metals" and "springs of oil in or under the said land . . ."

(1) [1855] 3 Dr. 294. (2) [1879] 4 App. Cas. 294.
(3) [1912] A.C. 864.

Lord Gorell in *Budhill's* case, (1), put the matter as follows at p. 134:—

> The enumeration of certain specified matters tends to show that its object was to except exceptional matters.

If the broad meaning is not to be given to the word in the reservation here in question, the onus would appear to be on those who assert, in doubtful cases at least, that the word is inclusive of the substance in controversy: *Savill* v. *Bethell,* (2). It may very well be that such a substance as "lead" would obviously fall within the scope of such a reservation, but where, as here, "coal and valuable stone" are specifically mentioned, it is incumbent, in my opinion, upon those who assert that such ordinary materials as sand and gravel were intended to be included, to establish this.

In *Attorney-General for Isle of Man* v. *Moore,* (3), Lord Wright, delivering the opinion of the Privy Council, reaffirmed the principles to be applied as follows:—

> The principles to be applied in determining such a question have now been established by decisions of the House of Lords . . . that this type of question is an issue of fact to be decided according to the particular circumstances of the case, the duty of the court being to determine what the words meant in the vernacular of mining men, commercial men and land owners at the relevant time. Such an issue is necessarily an issue of fact because it must depend on evidence of the actual user of the words—that is, the way in which they were in practice used by the classes of persons enumerated.

The learned trial judge was of opinion that the sand and gravel question in the case at bar were "not separable either commercially or geologically" and dealt with them as forming one deposit. He referred to them throughout his judgment as gravel only. In his view, the deposit did not come within the word "mines" as used in the conveyances, as he was of opinion that it had been authoritatively determined by the decisions that a "mine" was limited to underground workings and that there was nothing in the evidence before him to indicate that the word should have any other meaning in the present instance. It is not necessary to consider this particular aspect of the matter as the appellants do not rely on the word "mines" but on

(1) [1910] A.C. 116. (2) [1902] 2 Ch. 523 at 537.
(3) [1938] 3 All E.R. 263.

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the word "minerals". The learned judge was also of opinion on the evidence that the words "valuable stone" in the conveyances in the case at bar were limited to cut stone and that they did not include "gravel".

With respect to the meaning of the word "minerals" in the present certificates, the learned judge concluded that the appellants had established on the evidence that it included gravel, although he expressed "a strong suspicion" that that was not the intention of the parties to the transactions but that if sand and gravel had been mentioned at the date of the original conveyances, they would have been excluded from the reservations. It is necessary to examine the evidence.

The appellants rely in the first place upon the testimony of a member of the engineering faculty of a university who, in addition to his academic duties, carries on a consulting practice in connection with the construction industry. This witness testified as follows:—

Q. In the phraseology or popular language of a mining man, is a commercial deposit of gravel surface or soil or minerals or what?

A. Well, in my opinion, it is a mineral. The reason for that is that in the general definition a mineral is anything that is not plant or animal.

Q. Yes?

A. The use of the "commercial" though, restricts it so that your mineral material as contained in a conveyance has to have some commercial value. Well, a gravel deposit that is being worked for profit obviously has commercial value, and by fundamental definition it is a mineral, and therefore it is a mineral substance.

This evidence is, of course, completely worthless in that it is pure argument and does not answer at all the relevant question as to the meaning of the word "minerals" in the vernacular of mining men. The witness made a similar attempt to include gravel within the meaning of "valuable stone." He said:—

Well, on the question of the definition of valuable stone as it is most commonly used or as it has most commonly been used, it probably has meant stone that was quarried; in other words, building blocks that were taken out or blocks of stone that were taken out and then faced off and so on and turned into building stone. On the other hand, you don't have to extend the definition any appreciable amount to include gravel as a valuable stone. It definitely is valuable and it is stone.

The appellants also rely on the evidence of a chemical engineer who is an officer of the appellant Western Minerals Limited. When asked the following question in chief:

Q. Now, sir, you and your companies are in the mining game in its various branches. In the phraseology, or, if you like, the popular language of the mining world, what is gravel? Mineral or surface?

he answered,

A. I would say it was a mineral.

It is not too clear what was intended by the question itself. The contrast is between "mineral" on the one hand and "surface" on the other, and in the case of a transfer of surface rights exclusively it may be that, in certain circumstances, gravel would not pass to the grantee. But such a question is not the relevant question. It is whether or not, when used in its ordinary sense by mining men, the word "minerals" would be understood as inclusive of gravel. That question was neither put nor answered. The following additional testimony of the same witness does not clarify matters:—

Q. If that sand could be sold today, would it be considered as a mineral?

A. If it was handled commercially at commercial rates I would say so.

Q. Is that your standard?

A. I believe that is what makes it commercial.

. . .

Q. Well, in a chemical sense there is no doubt that sand would be a mineral, is there? I am speaking in the commercial sense. If you could sell that sand today would it be a mineral?

A. Yes, it has value.

Q. And if you can't sell it then today, it isn't a mineral in the commercial sense? Correct?

A. Yes, I will answer that yes.

I do not think, therefore, that there is any evidence in the record at all on this aspect of the matter.

With respect to the understanding of land owners, the appellants called an employee of the Hudson's Bay Company who had been employed by that company since 1931. He described himself as a "land department representative" or "inspector". What the duties of this witness are, does not appear. He testified that the Hudson's Bay Company had originally owned two and a quarter million acres of land in the province of Alberta, of which there remained unsold approximately sixty thousand acres.

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Whether or not the witness had anything to do with the land sold or any part of it, or what sales were made since 1931, he did not say. The following evidence of the witness is relied on by the appellants:—

Q. Now, the Hudson's Bay Company granted a number of commercial gravel permits on lands from which they have parted with the surface?

A. Yes, sir.

. . .

Q. In these various gravel permit transactions which you have spoken about with the Hudson's Bay Company, are they all cases in which the Hudson's Bay Company owned minerals and valuable stone?

A. Yes, sir.

Q. All right, sir. In the understanding of land representatives is gravel a mineral or part of the surface?

A. I would say mineral.

The same infirmity appears in this evidence as in that of the previous witness to which I have just referred, the attention of the witness being directed to the contrast between "mineral" and "surface" and not to the real question. Moreover, his evidence is presumably based upon the dispositions of lands made by the Hudson's Bay Company, but his knowledge of such transactions or of the language of the conveyances does not appear. In my opinion, his evidence does not touch the question as to the meaning of "minerals" as ordinarily used by owners of land.

It was for the appellants to establish that the word "minerals" is here used in the sense of including either sand or gravel. I think they have failed to do so.

It is not without relevance to observe that the lands in question were sold on the one hand and bought on the other for agricultural purposes. So far as any vendor or purchaser knew at the time of the grants, it might have developed that the whole or the greater part of the lands were underlaid with gravel, to get at which would have destroyed the lands for the purposes for which they were purchased, in which event the grant would have been swallowed up by the reservation. In my view, as pointed out by Lord Gorell in *Budhill's* case, *supra*, the enumeration of the specific substances indicates that the intention was to reserve exceptional substances only. Sand and gravel deposits are no doubt less frequent in the Edmonton area than apparently they are in the neighbourhood of Calgary, but the specific exception of "valuable stone", in

my opinion, indicates that the parties intended that apart from building stone, other stone or allied substances such as sand or gravel were not reserved.

I would therefore dismiss the appeals with costs.

ESTEY, J.:—I agree that the appeal should be dismissed on the basis both, as the learned judges in the Appellate Division held, that the word "minerals," as used in the reservations, did not include sand and gravel and that, upon the principle underlying *Boulevard Heights* v. *Veilleux* (1), the provisions of *The Sand and Gravel Act* are applicable to this litigation.

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta setting aside the judgment delivered at the trial by Egbert J. in favour of the present appellants in these consolidated actions.

The issues concern the ownership of deposits of sand and gravel in the northeast quarter of Section 21 in Township 55 and Range 22 west of the 4th Meridian in the Province of Alberta and the southwest quarter of Section 21 in Township 57 and Range 21 west of the said Meridian, of which lands the respondents Gaumont and Brown are respectively the registered owners of what have been referred to in these proceedings, for the purpose of convenience, as the surface rights.

As against the respondent Gaumont the appellants claimed, in addition to a declaration of right, an injunction restraining him from removing either sand or gravel from the land and damages for trespass in respect of quantities of these materials theretofore taken from the land by this respondent. The respondent Brown had entered into an agreement with the respondent Beaver Sand and Gravel Limited, under which that company had removed and was continuing to remove gravel and sand from the property, and, as against them, the appellants claimed, in addition to a declaration of right, an injunction to restrain the removal of further material, an accounting and damages.

(1) (1916) 52 Can. S.C.R. 185.

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At the outset of the trial a written admission made by the solicitor for the respondents Gaumont and Brown was read into the record, this being that the plaintiff Western Minerals Limited was:—

> registered as owner pursuant to *The Land Titles Act* of the Province of Alberta of an estate in fee simple of and in all mines, minerals, petroleum, gas, coal and valuable stone in or under
>
> the said lands
>
> and the right to enter upon or occupy such portions of the lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone.

Various transfers and agreements of sale evidencing dealing with these lands by the parties and others and the predecessors in title of the appellant Western Minerals Limited and the respondents Gaumont and Brown were filed and, in the reasons for judgment of the learned Chief Justice of Alberta delivering the unanimous opinion of the Appellate Division, various of these instruments have been referred to as an aid to the interpretation of the expressions "mines and minerals" in these several documents. From these it appears that in the year 1915 the Western Canada Land Company Limited transferred the northeast quarter of Section 21 of the surface rights of which the respondent Gaumont is now the registered owner to one Bolster, with a reservation of the mines and minerals and other named mineral substances and the right to enter and work the same, and thereafter a certificate of title for the said lands issued to Gaumont excepting the mines and mineral substances reserved in the transfer to Bolster. The respondent Brown had agreed to purchase the said southwest quarter of Section 21 from one of the predecessors in title of the appellant Western Minerals Limited by an agreement made in the year 1940, by which the vendor reserved the mines and mineral rights in similar, though not identical, terms to those expressed in the transfer to Bolster and it was shown that, as far back as 1919, the respondent Brown's father had agreed to purchase the land from the then registered owner in an agreement containing a like reservation and had thereafter entered into an agreement in similar terms for the purchase of the land in 1928. In the case of the respondent Brown, a certificate of title

under the provisions of *The Land Titles Act* had been issued in the year 1945, with an exception as to mines and minerals and the right to work the same in similar terms.

In addition to these documents, evidence was given which made it quite clear that both Gaumont and Brown purchased these lands for agricultural purposes and that they have lived there and farmed the lands for a long period of years prior to the commencement of these actions and to show that the gravel, and such sand as is intermingled with it, cannot be removed without destroying the surface and rendering that portion of the land thereafter worthless for farming purposes.

With respect for contrary opinions, I think none of this evidence was relevant to the issue raised by the pleadings and decided by Mr. Justice Egbert. That question was as to the interpretation to be placed upon the language of the certificate of title of the appellant Western Minerals Limited which is above referred to. It is so restricted, in my opinion, by the provisions of s. 62 of *The Land Titles Act* (c. 205, R.S.A. 1942) which, so far as relevant, reads as follows:

> Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

The reservations mentioned in s. 61, other than those which are irrelevant to the present considerations, are merely any subsisting reservations or exceptions contained in the original grant of the land from the Crown. These lands formed part of the lands originally granted by the Government of Canada to the Canadian Pacific Railway Company and there is no evidence that the grant contained any exceptions and there were none such in the conveyance of the said lands to the Western Canada Land Company Limited, one of the predecessors in title of the appellant Western Minerals Limited. There is no evidence that

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there was any prior certificate of title relating to the interest of the appellant Western Minerals Limited declared by the certificate of title in question in existence. The title of the said appellant to the mines, minerals and other mineral substances described in it is not in any way impeached.

S. 62 of *The Land Titles Act*, with a change which does not affect the matter to be considered, re-enacted s. 57 of *The Land Titles Act* (57-58 Vict. c. 28) enacted by the Parliament of Canada, dealing with titles to land in the Northwest Territories and the manner of its disposition. The system of landholding adopted by the Federal Act and by the Province of Alberta in 1905 was that which has come to be known as the Torrens system, the object of which was to provide a system of landholding where the root of the title was a certificate granted under governmental authority, which would declare an absolute and indefeasible title to realty or to some interest therein and to simplify its transfer. The first of the Acts providing for such a system was enacted by the South Australian Legislature, at the instance of Sir Robert Torrens, in 1858, and it was thereafter adopted in all of the States of the Commonwealth of Australia, the declared purpose of such statutes being as above stated (Hogg's Australian Torrens System, p. 1). It would, in my opinion, be directly contrary to the true intent and meaning of *The Land Titles Act* to allow the estate declared by the certificate of title to be cut down or limited in any manner by evidence as to the intention of the parties to earlier dealings with the land in question to be inferred from the language of agreements made between them or conveyances made pursuant to such agreements such as have been admitted in the present case. The extent of the rights of the appellant Western Minerals Limited is declared by the certificate of title and the first matter to be determined is the meaning of the language employed in that document as of the date from which the judgment at the trial was delivered.

The certificate of title declares Western Minerals Limited to be the owner of all mines, minerals, petroleum, gas, coal and valuable stone in or under the said lands. Grammatically, this means all mines, all minerals, all petroleum, all gas, all coal and all valuable stone, as is pointed out by Lord Russell of Killowen in delivering the judgment of the

Judicial Committee in *Knight Sugar Co.* v. *Alberta Ry. & Irrigation Co.* (1). In *Attorney General of Ontario* v. *Mercer* (2), in considering the interpretation to be placed upon the 109th section of the *British North America Act*, the Earl of Selborne, L.C. in dealing with the contention that the natural meaning to be assigned to the word "royalties" should be restricted, said (p. 778):—

> It is a sound maxim of law, that every word ought, primâ facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

It is this principle that should be applied in construing the language of this certificate of title.

The material, the ownership of which is in dispute, consists of deposits which lay a short distance beneath the surface upon the lands in question. On Gaumont's land it was some 35 acres in extent and on Brown's some 8 acres. The expert witnesses called who dealt with the point agreed that these were glacial deposits and it is common ground that such material did not constitute the subsoil of the remaining portions of either quarter section or any material part of it. Mr. R. M. Hardy, the Dean of the Faculty of Engineering of the University of Alberta, speaking generally of the substance which is designated as gravel, said that it is largely composed of various types of rock and in this area of limestone rocks and contains felspar, silica and in some cases mica. The gravel on the Gaumont pit was estimated by the witness John E. Prothroe, a graduate engineer, to run about 40 per cent gravel and 60 per cent fines (without defining the latter term). The deposits on Brown's land were estimated at about 60 per cent gravel and 40 per cent fines. Sand was mingled with the gravel to some extent in both deposits. A sample taken from the pit on Gaumont's land and which is said to be representative shows the material to contain quantities of small stones, the largest of which is not more than an inch in diameter, quantities of much smaller stones and particles of stone as well as sand. A witness, D. S. Harvie, a chemical engineer who had examined the material in both pits, said that the quality was better than in other pits in the area and that in the Brown pit the stones or pebbles were very uniform in size which was uncommon

(1) [1938] 1 W.W.R. 234 at 237. (2) (1883) 8 App. Cas. 767.

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and made it what he described as a "premium" gravel. During the course of the examination-in-chief of Dean Hardy at a time when the learned trial judge was directing questions to the witness, counsel for the present appellants said that he did not think that the defendants challenged the "scientific fact that the gravel itself was a mineral" and counsel for the respondents then said: "From the straight geological standpoint we are not opposing that proposition" and later that the defendants did not suggest that it was not a mineral.

The date upon which the certificate of title in question was issued was not proven. The appellant Western Minerals Limited was, however, incorporated on April 18, 1944, and it is, in my opinion, a proper inference from the documents filed that the certificate was issued later in that year. I am unable to find in the record, whether in the evidence tendered on behalf of the present appellants or the present respondents, anything to support a contention that the word "minerals" or the expression "all minerals" conveyed at that time or thereafter any meaning other than their ordinary or natural meaning. The material in question is admittedly a mineral substance and was contained in deposits situate beneath the surface of the land differing entirely in their nature from the surrounding lands. The enumeration of petroleum, gas, coal and valuable stone following the word "minerals" in the certificate cannot restrict, in my opinion, the meaning to be assigned to the word. If the language was that of an agreement or conveyance, inferences as to the intention of the parties might restrict the meaning of the term. I think also if the word was contained in an Act of the Legislature the meaning of the term might be affected by circumstances from which it might be inferred that the intention of the Legislature was to give it other than its natural meaning. No such consideration, however, can affect the construction of the language of a certificate of title issued pursuant to the provisions of *The Land Titles Act*. Applying the principle stated in *Attorney General of Ontario* v. *Mercer*, which is not of course limited in its application to statutes, I can find nothing in the context in which the word is used, or in the nature of the subject matter, which requires the word to be construed in other than its primary and natural sense.

This, in my opinion, was the state of the law as of the date of the commencement of this action and as of the date of the judgment at the trial. The situation, however, appears to me to be materially altered by the enactment of *The Sand and Gravel Act* by the Legislature of Alberta following the judgment at the trial and before the appeal of the present respondents came on for hearing before the Appellate Division.

While the validity of this legislation was questioned, in consequence of which the Attorney General of the Province intervened in the litigation, this Court decided during the course of the hearing that the statute lay within the powers of the Provincial Legislature under head 13 of section 92 of the British North America Act. The preamble to the statute refers to the judgment given following the trial of the present action, and by section three it is declared that the owner of the surface of land is and shall be deemed to be and at all times to have been the owner of and entitled to all sand and gravel obtained by stripping off the overburden, excavating from the surface or otherwise recovered by surface operations. I am unable to construe this language, when read with the context, in any other way than as a declaration that this has always been the law. Accordingly, the word "minerals" in the certificate of title should have been construed as excluding the material in question and effect must be given to this direction of the Legislature.

In my opinion, this appeal should be dismissed with costs. As I think the present appellants were entitled to succeed at the trial and have lost the benefit of that judgment only by reason of the enactment of *The Sand and Gravel Act* I would allow them the costs of the trial. I think there should be no costs in the Court of Appeal.

CARTWRIGHT, J. (concurred in by Taschereau, J.):—The issue in these appeals is as to the ownership of certain sand and gravel situate in or under the lands of the respondents Gaumont and Brown. These respondents are the owners of what was, as a matter of convenience, referred to on the arguments as "the surface" of the lands in question. They appear to be the owners in fee simple of such lands subject to a reservation in favour of the appellant Western Minerals Limited and those claiming under it. It is

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admitted that, as a result of such reservation having been made, the said appellant is "the owner of an estate in fee simple in all mines, minerals, petroleum, gas, coal and valuable stone in or under such lands, together with the right to enter upon or occupy such portions of the said lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone."

In or about the year 1942 the respondent Gaumont opened a gravel pit on his lands and has been disposing of gravel therefrom since that time. In 1948 the respondent Brown made an agreement with the respondent Beaver Sand and Gravel Limited pursuant to which that company had been taking gravel from his land. There are concurrent findings of fact, and I did not understand it to be questioned before us, that the gravel in both pits is covered by a black top soil about one inch in depth followed by from five to seven inches of light brown soil which is in turn followed by sand and gravel to a depth not exceeding eight feet and that it is not possible to remove sand or gravel from the pits without destroying the surface. It seems clear that any gravel or sand which has been taken or is proposed to be taken from the lands in question has been or will be recovered by surface operations.

The action against Gaumont was commenced in August 1949 and that against Brown in July 1950. In each action the plaintiffs claimed a declaration that they are "the registered and equitable owners of all minerals and/or valuable stone including the sand and gravel within, upon or under the said lands", an injunction, an accounting, and damages for trespass. The actions were consolidated for the purposes of trial and were tried before Egbert J. on October 11 and 12, 1950. That learned judge gave judgment on February 9, 1951 in favour of the plaintiffs. Judgment was entered on February 28, 1951. A notice of appeal was given on behalf of the defendants in each action on March 8, 1951. On April 7, 1951, *The Sand and Gravel Act* being Chapter 77 of the Statutes of Alberta, 1951, was assented to and came into force. By order of the Appellate Division of the Supreme Court of Alberta

the defendants were permitted to amend the notices of appeal by including the terms of the last-mentioned Statute as a further ground of appeal. On August 16, 1951, notice was given on behalf of the plaintiffs that they intended to question the constitutional validity of *The Sand and Gravel Act*. On September 24, 1951 by order of the Appellate Division the Attorney-General of the Province of Alberta was added as a party defendant.

The appeals were heard on September 24 and 25, 1951. Judgment was delivered on October 19, 1951, allowing the appeals, dismissing the actions, declaring the defendants to be the owners of the sand and gravel in or under the lands in question, declaring *The Sand and Gravel Act intra vires* of the Legislature of Alberta, and declaring that such Act "is and was retroactive and applicable to the issues between the present parties". On November 26, 1951, the Appellate Division granted special leave to appeal to this Court.

The unanimous judgment of the Apellate Division was delivered by the learned Chief Justice of Alberta, who first examined the matter without regard to *The Sand and Gravel Act* and reached the conclusion that on the evidence and the authorities, apart altogether from the provisions of the last-mentioned Statute, the judgment at trial should be reversed. The learned Chief Justice then considered the Statute and held that it was decisive in favour of the defendants.

I am in respectful agreement with the Appellate Division as to the effect of the Statute. In my opinion, *The Sand and Gravel Act* is declaratory of the law. A consideration of all its provisions indicates an intention not to alter the law but to declare what, in the view of the Legislature, it is and always has been. In Blackstone's Commentaries, Volume 1, on page 86, that learned author says:—

> Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the Kingdom is almost fallen into disuse, or become disputable; in which case the Parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever has been.

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In Craies on Statute Law, 4th Edition at pages 60 and 61 it is said:—

> For modern purposes a declaratory act may be defined as an act passed to remove doubts existing as to the common law, or the meaning or effect of any statute. Such acts are usually held to be retrospective. The usual reason for passing a declaratory act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes.

It is true that the word "declared" is not found in the statute, but there are many other *indicia* of the intention of the Legislature. In the preamble there is a recital of the judgment of the learned trial judge, of the doubts and uncertainties as to the ownership of sand and gravel in the Province resulting therefrom and of the desirability of resolving these doubts and uncertainties. Then it is enacted (by ss. 2 and 3) in regard to all lands in the Province that "the owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to all sand and gravel on the surface of that land and all sand and gravel obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations".

S. 4(1) of the Act may not be strictly necessary. It is the corollary of s. 3 and reads:—

> The sand and gravel referred to in section 3 shall not be deemed to be a mine, mineral or valuable stone but shall be deemed to be and to have been a part of the surface of land and to belong to the owner thereof.

The words in s. 3:—"is and shall be deemed at all times to have been" and those in s. 4(1):—"shall be deemed to be and to have been" appear to me, in the words of Blackstone quoted above, to declare what the law "is and ever has been".

With all respect to Mr. Riley's argument on this point, I think it clear that the word "deemed" as used in this Statute means "conclusively presumed". To construe it as meaning "deemed, *prima facie*, until the contrary is shewn" would be to revive those doubts and uncertainties which it was the expressed intention of the Legislature to remove.

There is, of course, no doubt of the general rule that unless the intention of the Legislature collected from the words of the Statute is clear and unequivocal we are to presume that an act is prospective and not retrospective. As it is put in the well-known maxim:—"*Omnis nova constitutio futuris formam imponere debet non praeteritis*". But it has often been held that where an act is in its nature declaratory the presumption against construing it retrospectively is inapplicable. (*vide* Craies on Statute Law op. cit. p. 341 and cases there cited).

Having concluded that the Act is declaratory of what is and has always been the law of Alberta in this regard, I do not find it necessary to decide whether, under the applicable Statutes and rules of Alberta, an appeal to the Appellate Division is—to use the words of Duff J., as he then was, in *Boulevard Heights* v. *Veilleux* (1)—"an appeal strictly so-called, not an appeal by way of re-hearing"; for even assuming it to be so, I think it clear that the Appellate Division would be bound to give effect to a Statute, passed after the judgment from which the appeal is taken but before the hearing or decision of the appeal, declaring what the law is and always has been and so, of necessity, declaring what it was at the time of the trial. This proposition appears to me to be so obvious as not to require authority to support it but if authority is needed it is, I think, to be found in the following passages in the judgments in *Boulevard Heights* v. *Veilleux* (*supra*):—

per Duff J. (as he then was) at pages 191 and 192:—

> There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal. The question we have to consider is another question. The Legislature of Alberta has no authority to prescribe rules governing this court in the disposition of appeals from Alberta; and the enactments invoked by Mr. Clarke, which do not profess to declare the state of the law at the time the action was brought, or at the time the judgment of the Appellate Division was given, can only affect the rights of the parties on this appeal to the extent to which the statutes and rules by which this court is governed permit them so to operate.

per Anglin J. (as he then was) at pages 193 and 194:—

> It is impossible to say that the provincial appellate court should have given effect to an amendment of the statute law which was not in force when it rendered judgment. Nor can an amendment not declaratory

(1) [1915] 52 Can. S.C.R. 185 at 192.

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in its nature, such as was that dealt with in *Corporation of Quebec v. Dunbar*, (1) cited by Mr. Clarke, enable us to say that the law was at the date of the judgment appealed from what the subsequent amendment has made it.

per Brodeur J. at page 196:—

> If it was a declaratory law that had been passed by the provincial legislature, of course we would be bound by it.

In *K.V.P.* v. *McKie et al* (2). This Court, applying the principles stated in *Boulevard Heights* v. *Veilleux* (*supra*), declined to give effect to an Ontario statute passed after the date of the judgment of the Court of Appeal for Ontario from which the appeal was brought. Kerwin J., who delivered the unanimous judgment of the Court said, at page 701:—

> The 1949 Act is not an enactment declaratory of what the law was deemed to be.

The case of *Eyre* v. *Wynn-Mackenzie* (3), relied upon by counsel for the appellants is distinguishable. In that case judgment had been given, and the time for appealing had expired before the passing of the Act there in question. An application was made to extend the time for appealing so as to enable the appellant to have the benefit of the provisions of such Act. In refusing leave Lindley L. J., speaking for the Court of Appeal, said:—

> If we give leave to appeal in this case, we should be re-opening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that.

In my opinion the law is correctly stated in the following passage in Craies on Statute Law (op. cit.) at page 341, provided the words "cases pending" are understood as including actions in which, while judgment has been given, an appeal from such judgment is pending at the date of the declaratory act coming into force:—

> Acts of this kind, (i.e., declaratory acts), like judgments, decide like cases pending when the judgments are given, but do not re-open decided cases.

For the appellants reliance was placed on the judgment of the Court of Appeal for Ontario in *Beauharnois Light, Heat and Power Co. Ltd.* v. *The Hydro-Electric Power Commission of Ontario et al* (4), and particularly the

(1) 17 L.C.R. 6.
(2) [1949] S.C.R. 698.
(3) [1896] 1 Ch. 135.
(4) [1937] O.R. 796.

following passages in the judgment of Middleton J. A. who delivered the unanimous judgment of the Court of Appeal:—

> The rights of the parties had already passed into judgment, and the legislation has no effect upon this action. It is true the legislation was passed and was in effect when the appeal was heard in this Court, but the duty of an appellate Court is to reconsider the case and to correct any error made, in its opinion, by the trial Judge, and to pronounce the judgment that, in its opinion, the trial Judge ought to have pronounced: see Ontario Judicature Act, R.S.O. 1927, ch. 88, sec. 26.
>
> . . .
>
> The intention of the Legislature is embodied in the formal Act of Parliament and can only be gathered from the words used in that enactment. The Legislature, in matters within its competence, is unquestionably supreme, but it falls to the Courts to determine the meaning of the language used. If the Courts do not determine in accordance with the true intention of the Legislature, the Legislature cannot arrogate to itself the jurisdiction of a further appellate Court and enact that the language used in its earlier enactment means something other than the Court has determined. It can, if it so pleases, use other language expressing its meaning more clearly. It transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given it by the Courts, and that it always has meant something other than the Courts have declared it to mean. Very plainly is this so when, as in this case, the declaratory Act was not passed until after the original Act had been construed, and judgment pronounced.

To understand what was before the Court in the *Beauharnois* case it is necessary to refer shortly to the facts. In 1935 the Ontario Legislature had passed an Act (c. 53) providing that a number of contracts to which The Hydro-Electric Power Commission of Ontario was a party "are hereby declared to be and always to have been illegal, void and unenforceable as against the Hydro-Electric Power Commission of Ontario" and further providing that:—

> No action or other proceeding shall be brought, maintained or proceeded with against the said Commission founded upon any contract by this Act declared to be void and unenforceable, or arising out of the performance or non-performance of any of the terms of the said contracts;

S. 6(4) of *The Power Commission Act* of Ontario, R.S.O. 1927, c. 57, read as follows:—

> Without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office.

In the earlier case of *Ottawa Valley Power Co.* v. *The Hydro-Electric Power Commission* (1), which arose under the same statute, the Court of Appeal had held that the

(1) [1937] O.R. 265.

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substantive enactment declaring void the contracts in question in that action was *ultra vires* of the Legislature because it assumed to destroy civil rights outside the Province and that the Legislature could not, by enactment of adjectival law, preclude the courts of Ontario from so declaring.

In the *Beauharnois* case Rose C. J. H. C. delivered judgment on January 13, 1937, following the *Ottawa Valley Power Co.* case. An appeal was heard in April, 1937. In the meantime on January 29, 1937, c. 58 of the Ontario Statutes of 1937, I Geo. VI was enacted as follows:—

> The meaning and effect of subsec. 4 of sec. 6 of *The Power Commission Act* is and always has been that without the consent of the Attorney-General no action of any kind whatsoever shall be brought against The Hydro-Electric Power Commission of Ontario, and that without the consent of the Attorney-General no action of any kind whatsoever shall be brought against any member of The Hydro-Electric Power Commission of Ontario for anything done or omitted by him in the exercise of his office.

It was to this enactment that the passages quoted above from the judgment of Middleton J. A. were directed.

With the greatest respect, it seems to me that this enactment was merely a further attempt by enacting adjectival law to preclude the Courts from declaring that a substantive enactment of the Legislature was beyond its powers and was therefore rightly held ineffectual. If and insofar as the judgment in the *Beauharnois* case negatives the power of the Legislature to declare the law, retrospectively or otherwise, in regard to matters entirely within the ambit of its constitutional powers it ought not to be followed. The question of the constitutional validity of *The Sand and Gravel Act* was disposed of adversely to the appellants at the hearing of the appeal, and consequently I do not think that they are assisted by the judgment in the *Beauharnois* case.

I would dismiss the appeals for the reasons given above and would not have found it necessary to examine the other ground upon which the judgment of the Appellate Division proceeds if it were not for Mr. Riley's submission that if the appeals should be decided against his clients solely on the basis of *The Sand and Gravel Act* the costs in the courts below should be borne by the respondents.

In view of this submission I have considered the matter without regard to the provisions of the last-mentioned Statute and find myself in agreement with the reasons of my brother Kellock on this aspect of the case. I therefore do not think that the order as to costs made by the Appellate Division should be varied.

In the result the appeals should be dismissed. The respondents are entitled to their costs in this Court. While we are indebted to Mr. Ross, who appeared for the intervenant, for a most helpful argument, I do not think that the appellants should be ordered to pay costs to his client. There will therefore be no order as to the costs of the intervenant.

*Appeals dismissed with costs.*

Solicitors for the appellants: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for the respondents: *Morrow & Morrow.*

Solicitor for the Attorney General of Alberta: *R. J. Wilson.*

Solicitors for the Intervenant: *Lavell and Ross.*

# TAB 6

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*April 26, 27, 28 May 1 Oct. 3

THE CROW'S NEST PASS COAL COMPANY (LIMITED) (*Suppliant*) APPELLANT;

AND

THE QUEEN, THE CALIFORNIA STANDARD COMPANY, CANADIAN GULF OIL COMPANY AND THE BRITISH AMERICAN OIL COMPANY LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Mines and Minerals—Crown grant—Reservation of "minerals, precious or base (other than coal)"—Whether petroleum and natural gas included—British Columbia Southern Railway Aid Amendment Act, 1896 (B.C.), c. 4, s. 3—An Act to Extend the Rights of the Crown to Prospect for Minerals on Railway Lands to all Free Miners, 1899 (B.C.), c. 58, s. 1.*

By a petition of right the suppliant company asked, *inter alia*, for a declaration that it was the owner of the petroleum and natural gas in and underlying certain lands granted by the Crown to the suppliant's predecessor in title, the British Columbia Southern Railway Company, and further asked, by an amendment made at the trial, for an order rectifying the reservation in respect to minerals by striking out the words "any minerals, precious or base (other than coal)" and substituting therefor the words "any minerals as defined in the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

*Mineral Act, 1896,* cap. 34, Statutes of British Columbia, 1896". The trial judge dismissed the action and this judgment was affirmed by a majority in the Court of Appeal. The suppliant appealed to this Court.

*Held:* The appeal should be dismissed.

The word "minerals" standing alone in the grant should be construed as meaning mineral substances and, as the authorities and references referred to indicated, petroleum and natural gas were prior to and at the time the grants were made and now are regarded as such. *Ontario Natural Gas Co. v. Gosfield* (1890), 19 O.R. 591 and (affirmed) (1891), 18 O.A.R. 626; *Dome Oil Co. v. Alberta Drilling Co.* (1916), 52 S.C.R. 561; *Creighton v. United Oils Ltd.,* [1927] 2 W.W.R. 458; *Stuart v. Calgary & Edmonton Ry. Co.,* [1927] 3 W.W.R. 678; *Knight Sugar Co. v. Alberta Railway Co.,* [1938] 1 All E.R. 266; *District Registrar v. Canadian Superior Oil of California Ltd.,* [1954] S.C.R. 321, referred to.

The contention that the words "precious or base (other than coal)" which followed the word "minerals" in the grants limited the meaning to metallic substances was rejected.

The contention that the terms of s. 3 of the *British Columbia Southern Railway Aid Amendment Act, 1896,* indicated that it was the intention of the legislature that only such rights as free miners might acquire under the *Mineral Act, 1896* (which rights were restricted to minerals as defined in that Act) should be reserved to the Crown, and accordingly the words of the grant should be so construed, also failed. The rights of free miners at the time of the grants were not limited to searching for minerals as defined by the *Mineral Act, 1896*. Before the grants were made, by an *Act to Extend the Rights of the Crown to Prospect for Minerals on Railway Lands to all Free Miners* passed on February 27, 1899 (c. 58), it was declared that every free miner within the meaning of the *Mineral Act* should be entitled to exercise on his own behalf all the rights of the Crown to prospect for minerals over all lands in British Columbia, whether owned by railway companies or otherwise. This applied to the lands in question granted later that year to the railway company and the definition in the *Mineral Act* did not apply to the word "minerals".

The words "minerals precious or base" meant all mineral substances other than coal and in their context were free from ambiguity.

The amendment asking for rectification, for which claim no facts were pleaded, was made some 59 years after the grants were issued and accepted by the grantee. Prior to the time of the grants the parties had expressly directed their attention to petroleum as well as to coal, and during the period of 59 years the appellant had acted upon the said grants and sold portions of the lands subject to the exceptions contained in them.

If, as was suggested, there was a duty to convey the lands to the railway company subject only to the rights of the Crown to precious metals and to those of free miners, the right of action for the reformation of the grants would presumably be against the Crown either on a contract to be implied from the fact that upon the faith of the promised grants the railway was built, or upon the footing that there was a statutory duty to convey the lands subject only to the above exceptions. No such contract was pleaded and the decision in *A.-G. for British Columbia v. Esquimalt & Nanaimo Ry. Co.* [1950] A.C. 87,

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would apparently bar such a claim if made. If there were any such right of action it would be vested in the British Columbia Southern Railway Company and, as there was no allegation that any such right had been assigned to the appellant, that company would be a necessary party to the proceedings.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from the judgment of Whittaker J. at the trial dismissing the action. Appeal dismissed.

*J. J. Robinette, Q.C., J. L. Farris, Q.C.,* and *J. A. McAlpine,* for the suppliant, appellant.

*M. M. McFarlane, Q.C.,* and *A. W. Hobbs,* for the respondents.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] which dismissed an appeal of the present appellant from the judgment of Whittaker J. at the trial dismissing the action. DesBrisay C.J.B.C. dissented and would have allowed the appeal.

The appellant is the successor in title of the British Columbia Southern Railway Company to large tracts of land described as portions of Lots 4588 and 4589 in the District of Kootenay in the Province of British Columbia. These lands together with certain additional areas, were conveyed by deeds dated December 1, 1904, duly registered in the Nelson Land Registry Office at that time. The terms of the conveyances were made subject to the reservations, limitations, provisos, conditions and exceptions expressed in the original grant from the Crown.

There were two grants from the Crown to the railway company of the lands in question dated August 18, 1899, the terms of which, save as to the description of the property conveyed, were identical. The operative portions of the grants read:

> Know Ye that We do by these presents, for Us, Our Heirs and Successors, in consideration of the fulfilment of the provisions of the Railway Aid Act, 1890 and amending Acts, give and grant unto the British Columbia Southern Railway Company, its successors and assigns all that parcel or lot of land (describing it) . . . .

[1] (1960), 32 W.W.R. 529, (1961), 25 D.L.R. (2d) 110.

The further term of the grants that has given rise to the present litigation read:

> PROVIDED also that it shall at all times be lawful for US, OUR HEIRS AND SUCCESSORS or for any person or persons acting under OUR or their authority to enter into and upon any part of said lands and to raise and get thereout any minerals, precious or base (other than coal) which may be thereupon or thereunder and to use and enjoy any and every part of the said land and the easements and privileges thereto belonging for the purpose of such raising and getting and every other purpose connected therewith.

By the petition of right the appellant asserted that it was entitled to the petroleum and natural gas to be found under such lands, that the Crown had issued permits to the Canadian Gulf Oil Company and the California Standard Company to do exploratory drilling for petroleum and natural gas on such lands, that these permits had been assigned to the British American Oil Company Limited and asked damages for trespass against the Crown and these companies and an injunction restraining them from entering upon the said lands. This aspect of the claim for relief was abandoned at the trial and does not require consideration. The petitioner asked further for a declaration that it was the owner of the petroleum and natural gas in and underlying the said lands, and, by an amendment made at the trial, an order rectifying the reservation in respect to minerals by striking out the words "any minerals, precious or base (other than coal)" and substituting therefor the words "any minerals as defined in the *Mineral Act, 1896,* cap. 34, Statutes of British Columbia, 1896".

These two claims for relief are to be considered separately. While in dealing with the first of these the question to be determined is the proper interpretation of the words "minerals, precious or base" in the grants from the Crown, the circumstances leading up to the making of such grants are matters to be considered.

The British Columbia Southern Railway Company was incorporated under the name of The Crow's Nest and Kootenay Lake Railway Company by c. 44 of the Statutes of 1888 and given authority to construct and operate a line of railway in the Kootenay District in the province. The name of this company was changed to the present name by c. 56 of the Statutes of 1891.

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By the *Railway Aid Act, 1890,* c. 40, s. 1, the Lieutenant-Governor in Council was authorized to grant 20,000 acres of public land for each one mile of railway completed throughout its entire length upon compliance by the company with certain terms which were defined. By s. 14 it was provided that the provisions of the *British Columbia Railway Act,* passed at the same session, should apply to the enterprise. Section 18, to which as amended much importance is assigned by the appellant, reads:

> Nothing in this Act contained shall prejudice the rights of free miners to search for, get and win the precious metals and to use timber for mining purposes, subject to the mineral and land laws of the province and to the provisions of this Act.

Between the years 1890 and 1896 various statutes extended the time for the completion of the railway. In 1896 by c. 4 entitled *The British Columbia Southern Railway Aid Amendment Act* it was enacted that it should be a sufficient compliance with the provisions of the *Railway Aid Act, 1890,* as amended, to entitle the railway company to the grant authorized that the company should construct and equip the several sections of its line of railway within the times fixed by an Act passed at that session. Section 3 of this Act reads:

> Nothing in this Act and no grant to be made hereunder shall be construed to interfere with free miners entering upon and searching for minerals and acquiring claims in accordance with the mining laws of the province.

The railway line was completed and the company applied for a grant of the subsidy lands.

By a report dated August 17, 1899, made by the Minister of Finance to the Lieutenant-Governor in Council, it was recommended that a block of land be laid out and Crown grants be issued, subject *inter alia* to the proviso above quoted. The Crown grants were made upon the authority of an Order in Council of the same date.

As originally drafted, the contention of the petitioner was that upon the true construction of the original grants the rights to the petroleum and natural gas in the lands were conveyed to the railway company. The amendment made at the trial some 59 years after the grants were issued and accepted by the grantee asking for rectification as above mentioned did not specify the basis for the claim as is

usual in asking for relief of this nature. No contract between the Crown and the railway company was pleaded though this question was argued at the trial and dealt with in the judgment of the learned trial judge.

It was contended by the petitioner at the trial that the words "minerals, precious or base (other than coal)" in the grant should be construed as that word was defined in the *Mineral Act* of 1896. That this was the proper construction was supported, it was said, by the reservation of the rights of free miners under the mining laws of the province, by the *Railway Aid Act* as amended, rights which it is contended were restricted to searching for minerals of a metallic nature.

The *Mineral Act* of 1896, by s. 2 under a sub-heading "Interpretation", reads in part:

> In the construction of this Act, the following expressions shall have the following meanings respectively, unless inconsistent with the context:—
>
> "Mineral" shall mean all valuable deposits of gold, silver, platinum, iridium, or any of the platinum group of metals, mercury, lead, copper, iron, tin, zinc, nickel, aluminum, antimony, arsenic, barium, bismuth, boron, bromine, cadmium, chromium, cobalt, iodine, magnesium, manganese, molybdenum, phosphorus, plumbago, potassium, sodium, strontium, sulphur (or any combination of the aforementioned elements with themselves or with any other elements), asbestos, emery, mica, and mineral pigments.

In *Lord Provost and Magistrates of Glasgow v. Farie*[1], where the question was as to whether the word "minerals" in the context "mines of coal, ironstone, slate or other minerals" in *The Waterworks Clauses Act, 1847,* included common clay forming the surface or subsoil of the land, Halsbury L.C. said that the question to be decided was a question of fact as to "what these words meant in the vernacular of the mining world, the commercial world, and land owners" at the time they were used in the conveyance. This statement of the law was adopted by the Judicial Committee in *Borys v. C.P.R. and Imperial Oil Ltd.*[2]

The appellant called three witnesses in an attempt to establish that, applying this test, the word "minerals" alone or with the words "precious or base" added did not in the

[1] (1888), 13 App. Cas. 657.
[2] [1953] A.C. 217 at 227, 1 All E.R. 451.

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vernacular include petroleum or natural gas in 1896 when the definition referred to appeared in the *Mineral Act* or when the grants were made or, indeed, at the present time.

Mr. R. M. Thompson, a professor in the Department of Geology in the University of British Columbia, was permitted to say that, in his opinion, neither petroleum or natural gass fell within the definition of minerals in the Act of 1896. He said that since these substances were not products of an inorganic nature they "cannot be thought of as minerals". The witness said further that the words "minerals, precious or base (other than coal)" in the reservation from the Crown did not in his opinion include petroleum or natural gas. To this he added that they would not bear this meaning to a scientist. In general mining parlance, he considered base minerals meant such metals as lead and zinc. Cross-examined, he said that petroleum and natural gas were hydrocarbons but that to a scientist they were not minerals because "they are not created by a process of inorganic activity".

Mr. L. G. N. Crouch, a mining engineer and professor of mining at the same university with considerable practical experience in Canada and elsewhere, considered that in 1896 "the definition of minerals in the *Mineral Act* of 1896 in common parlance" would not include petroleum or natural gas nor would they today. He also said that in his opinion the words of the grant "any minerals, precious or base (other than coal)" in common mining parlance in 1896 would not include them. His reason for this opinion was that among mining men minerals were thought of as solid materials and that to a mining engineer the words "precious or base" were applied only to metals in 1896 and at the present time. Cross-examined, he said that to a mining engineer natural gas and petroleum are not included in the expression "minerals" and believed that they had not been so in 1896. He said that he had been assisted in reaching this conclusion by reading reports of the Minister of Mines, journals of the period 1896 to 1900, and examining some of the provincial mining statutes.

Mr. W. H. Matthews, a professor of petroleum geology in the same university and a mining engineer, said that the origin of petroleum and natural gas was "plant and animal

material laid down in ancient seas" and that "from a scientific point of view" they were not minerals. He said he based this opinion on the fact that they were of organic origin and "the fact that they are of mixed composition not individual species"; minerals he considered were of inorganic origin and accordingly coal was not a mineral since it was of organic origin and of mixed composition meaning mixtures of materials rather than pure substances. He was asked and permitted to say that petroleum and natural gas did not fall within the definition of minerals in the Act of 1896 nor within the language of the exception from the grant. He said that petroleum is not "regarded scientifically as a mineral" and considered that this was also the case in 1896. In common parlance in the mining world in British Columbia he said "any minerals precious or base other than coal" would not include petroleum or natural gas. He was of opinion that minerals precious or base referred to metallic minerals which would not include petroleum.

These three witnesses were all born after 1899 and so had no personal knowledge as to the accepted meaning of these terms at the time of the enactment of the *Mineral Act, 1896,* nor at the date of the grants.

The Crown did not call any witnesses.

The learned trial judge, Whittaker J., was of the opinion that it had been established by the authorities that the word "mineral" when used in a legal document or act of Parliament included petroleum and natural gas unless the context or the circumstances indicated a contrary intention. He considered that "any" minerals in the words of the grant meant "all" minerals. The word "base" as applied to minerals he held meant all minerals other than those classed as precious. As to the evidence of the three witnesses, he considered that it was insufficient to prove the meaning of these terms in the vernacular in 1896, according to the test proposed by Lord Halsbury in the *Farie* case.

In the Court of Appeal the late Sidney Smith J.A. said that he was in substantial agreement with the reasons of the learned trial judge.

Davey J. A. agreed with Whittaker J. that the words of the grant "any minerals precious or base (other than coal)" included petroleum and natural gas and adopted his reasons for that conclusion. Referring to the evidence, he said that

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it was largely argumentative and did not touch the question of how conveyancers, land owners and commercial men would have understood the words. He did not consider the words "precious or base", in their context, words of limitation but that they applied to minerals generally, including substances of organic origin as well as metals. With these conclusions, I agree.

The learned Chief Justice of British Columbia reviewed the statutes which authorized the grants and was of the opinion that the railway company was entitled as of right under their provisions to a conveyance of the lands, less only precious metals or minerals and coal without the reservation of base minerals contained in the grants. He would in consequence have allowed the appeal.

The question as to whether petroleum and natural gas are mineral substances within the meaning of the term in various statutes has been considered in several cases to which the learned trial judge referred. In the more recent cases it would appear that the fact that they are mineral substances has been conceded.

In *Ontario Natural Gas Company v. Gosfield*[1], the question to be decided was whether natural gas was a mineral within the meaning of s. 565 of *The Municipal Act,* R.S.O. 1887, c. 184, which read, in part, "the corporation of any township or county wherever minerals are found may sell or lease . . . the right to take minerals, etc." Street J. held that it was. After referring to the meaning assigned to the word "mineral" in several dictionaries and among other authorities to the decision in *Lord Provost v. Farie,* he adopted the statement of Lord Macnaghten at p. 690 of the report of that case which was followed by the learned trial judge in the present matter.

The appeal from this judgment was dismissed[2]. Hagarty C.J.O. considered that it was impossible to hold that natural gas was not a mineral and that there was nothing in the section limiting its ordinary meaning. Osler J.A. agreed with Street J. saying that the word was to be given its widest signification. MacLennan J.A. agreed that natural gas was a mineral within the meaning of the statute and said that at the time the Act was passed (1887) gas was a well-known mineral substance.

[1] (1890), 19 O.R. 591.

[2] (1891), 18 O.A.R. 626.

In *Dome Oil Co. v. Alberta Drilling Co.*[1] the appellant contended that oil was not a mineral within the meaning of s. 63A of *The Companies Ordinance* of the North-West Territories which authorized the company "to dig for . . . minerals . . . whether belonging to the company or not". As to this, Anglin J. said, in part (p. 582) "rock oil is admittedly a mineral within definitions of that word well established and generally accepted. It was something well-known as a mineral when the legislation under consideration was passed". That was 1901. He continued "the word 'minerals' in a statute bears its widest signification unless the context or the nature of the case requires it to be given a restricted meaning". Brodeur J. said, in part (p. 586), "rock oil in its popular and scientific meaning is a mineral substance. Mineral bodies occur in three physical conditions, solid, liquid and gas, and although the term 'mineral' is more frequently applied to substances containing metals, rock oil and petroleum are embraced in that term" and referred to *Ontario Natural Gas v. Gosfield.* The dissenting judgments of Idington and Duff JJ. were upon another issue in the case.

In *Creighton v. United Oils Ltd.*[2], Walsh J. said, in part, "it is admitted and it is established as a scientific fact that petroleum and natural gas are minerals within the ordinary meaning of that word and were so regarded long before this legislation (the *Dominion Lands Act,* R.S.C. 1886, c. 54) was passed."

In *Stuart v. Calgary & Edmonton Ry. Co.*[3], Hyndman J.A. stated that it was well settled that gas and oil are minerals in a judgment concurred in by all of the members of the Appellate Division.

In *Knight Sugar Co. v. Alberta Railway Co.*[4], where the reservation in the transfer was of "all coal and other minerals" it was admitted that petroleum and natural gas were minerals (p. 269).

In the case of *District Registrar v. Canadian Superior Oil of California Ltd.*[5], it was apparently taken for granted that such substances were minerals within the meaning of s. 21

[1] (1916), 52 S.C.R. 561, 28 D.L.R. 93.
[2] [1927] 2 W.W.R. 458.
[3] [1927] 3 W.W.R. 678, 23 Alta. L.R. 205.
[4] [1938] 1 All E.R. 266.
[5] [1954] S.C.R. 321, 3 D.L.R. 705.

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of the Manitoba *Provincial Lands Act, 1887,* where the reservation was of "gold or silver mines or any other mineral". The only mention of this aspect of the matter was in the judgment of our late brother Estey who said that petroleum and natural gas were admittedly base minerals. The contrary of this was not apparently considered to be fairly arguable.

The grants in question were made in the year 1899. It is not alleged in the pleadings and I find nothing in the evidence to indicate that these words at that time bore any other meaning than they did at the time of the trial.

The word "petroleum" is derived from the Latin—"petra", rock, and "oleum", oil. Dictionaries in use at the time the grants were made and at the time of the trial may be referred to in determining the commonly accepted meaning of the term. Murray's New English Dictionary, publication of which commenced in 1893, defines "petroleum" as a mineral oil occurring in rocks or on the surface of the water in various parts of the globe. The current New Oxford Dictionary defines "mineral oil" as a general name for petroleum and the various oils distilled from it. Webster's New International Dictionary describes "mineral oil" as any oil of mineral origin such as petroleum. In Soule's Dictionary of Synonyms, petroleum, rock oil, and mineral oil are said to be synonyms.

That the word "minerals" was considered by the legislature to include petroleum in the year 1892 is shown by s. 2 of the *Coal Mines Amendment Act,* c. 31, of that year to which the learned trial judge has referred. This Act apparently contained the first reference to petroleum by name in the statutes and authorized the issue of prospecting licences for coal or petroleum. So far as relevant the section reads:

> Any person desirous of prospecting for coal or petroleum, and acquiring a lease of any lands held by the Crown for the benefit of the province, under which coal measures or petroleum are believed to exist, or wishing to procure a licence for the purpose of prospecting for coal or petroleum upon lands under lease from the Crown in which the mines and minerals, and power to work, carry away, and dispose of the same, is excepted or reserved . . . .

The reservation of minerals was thus assumed to reserve petroleum.

The word "minerals" standing alone in the grant should, in my opinion, be construed as meaning mineral substances and, as these authorities and references indicate, petroleum and natural gas were prior to and at the time the grants were made and now are regarded as such.

The witnesses called by the appellant appear to treat the word "mineral" as being synonymous with "metallic" even without the added words "precious or base". This position is, in my opinion, untenable. All metals are minerals but all minerals are not metals. In *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd. v. Farquharson*[1], Lord Atkinson, delivering the judgment of the Judicial Committee, said, in part (p. 869), "in one sense natural gas is as rock oil is, a mineral, in that it is not an animal or a vegetable product and all substances found on, in, or under the earth must be in one or the other of these categories of animal, vegetable or mineral substances". If natural gas is not a mineral substance, how is it to be classified? I find no answer to that question in the oral evidence in this case.

The appellant contends, however, that the words "precious or base (other than coal)" which followed the word "minerals" in the grants limit the meaning to metallic substances.

These words appeared in the *Mineral Acts* of 1884 and 1891 in the following context:

> Minerals shall include all minerals precious or base (other than coal) found in veins, lodes or rock in place and whether such minerals are found separately or in combination with each other."

They were omitted from the definition of the term in the Act of 1896 above quoted for obvious reasons.

Apart from the fact that the words following the word "coal" in the above quoted definition do not appear in the grants, the interpretation clauses of each of these statutes are limited in their application to the construction of the Act in which the expressions appear. If it be permissible to refer to similar language in the earlier mining statutes as an aid to interpretation, it may be noted that the term "all the baser metals and minerals" first appeared in the mining ordinance of the Colony of British Columbia in 1869. In the

[1] [1912] A.C. 864.

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*Mineral Act* of 1884 this expression was replaced by the words "all minerals precious or base". Standing alone the expressions, so far as the latter relates to base minerals, seem to be synonymous. That "all the baser metals and minerals" included both metallic and non-metallic substances is perfectly clear.

It is, however, contended that the terms of s. 3 of the *British Columbia Southern Railway Aid Amendment Act, 1896*, hereinbefore quoted, indicate that it was the intention of the legislature that only such rights as free miners might acquire under the *Mineral Act, 1896* should be reserved to the Crown. Those rights were restricted to minerals as defined in that Act. Accordingly, it is argued that the words of the grant should be so construed.

In the interest of accuracy it should be pointed out that the grants were not made under the authority given to the Lieutenant-Governor in Council by the Act of 1896 but by the *Railway Aid Act* of 1890. Section 3 reads: "Nothing in this Act and no grant to be made *hereunder*." The *Amendment Act* of 1896 did not purport to repeal s. 18 of the *Railway Aid Act* and in strictness it is the terms of that section which are applicable. In view, however, of the course of the argument, I have considered the question on the basis that s. 3 applied, as was done at the trial.

I am unable to agree that the section, if applicable to these grants, should be so construed. It should be pointed out that it is inaccurate to say that the rights of free miners at the time of the grant were limited to searching for minerals as defined by the *Mineral Act, 1896*. Before the grants were made, by an *Act to Extend the Rights of the Crown to Prospect for Minerals on Railway Lands to all Free Miners* passed on February 27, 1899 (c. 58), it was declared that every free miner within the meaning of the *Mineral Act* should be entitled to exercise on his own behalf all the rights of the Crown to prospect for minerals over all lands in British Columbia, whether owned by railway companies or otherwise. This applied to the lands in question granted later that year to the railway company and the definition in the *Mineral Act* did not apply to the word "minerals".

While I consider that the definition in the statute has no application to the words of the grant, if I were of a contrary opinion I would have difficulty in accepting the evidence of the witnesses so far as it was admissible that petroleum and natural gas were not within its terms. While the great majority of the materials mentioned are metallic, the list includes sulphur, phosphorus, boron, bromine and iodine, all of which are described in the New Oxford Dictionary as non-metallic elements. That portion of the definition reading "or any combination with the aforementioned elements and themselves or with any other elements" was not discussed in the evidence. To deal with one alone of these last mentioned substances, it is a matter of common knowledge in Western Canada that sulphur in considerable quantities is found in some petroleums and that there is a large industry in Alberta today devoted to extracting sulphur from the natural gas found in various parts of that province. This would appear to bring the substance within the definition. The matter was not explored in the cross-examination, no doubt for the reason that it was rightly considered that the definition had no application to the words of the grant.

The fact that the rights of free miners were preserved, assuming s. 3 applied, did not in the opinion of the learned trial judge prevent the Lieutenant-Governor in Council from reserving the rights of the Crown and those claiming under the Crown to minerals, precious or base, if that were considered to be in the public interest. It was his opinion that there was no legal obligation upon the Crown or upon the Lieutenant-Governor in Council to make the grants, the statute merely conferring a discretionary power upon the Lieutenant-Governor in Council. With these conclusions the majority of the members of the Court of Appeal expressed their agreement.

It was upon this last mentioned aspect of the case that the learned Chief Justice differed from the trial judge and the other members of the Court. It was his opinion that upon the true construction of the various statutes the railway company had become entitled to a conveyance of the lands subject only to the rights of the Crown to precious metals and to those of free miners. That being so, and the

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words of the grant being, in his opinion, ambiguous, he considered that they should be so construed as conveying the fee simple with those exceptions only.

The opinion that this conclusion might be invoked as an aid in construing the language of the grants proceeds upon the basis that the words "minerals precious or base" are ambiguous. With the greatest respect, I disagree. For the reasons I have stated I consider that the words mean all mineral substances other than coal and in their context are free from ambiguity.

The conclusion that there was a duty resting upon the Crown or upon the Lieutenant-Governor in Council to convey the lands subject only to these exceptions might in certain circumstances justify a claim by the grantee to reform the grants. That aspect of the claim made by the amendment to the petition of right was not argued before us and is not mentioned in the judgments at the trial or in the Court of Appeal. It was not, however, abandoned.

The amendment which asked for the reformation of the grant appeared in para. 18 of the petition, and reads:

> In the alternative an order rectifying the reservation in respect to minerals contained in the third proviso of the Crown grants of Lots 4588 and 4589 by striking out the words "any minerals precious or base other than coal" and substituting therefor the words "any minerals as defined in the Mineral Act 1896 cap. 34, Statutes of B.C. 1896."

As I have stated, no facts are pleaded such as mutual mistake as the basis for this claim. The evidence contains no suggestion that the grants issued in 1899 were not accepted without question by the railway company. It is also of significance that, as pointed out by Davey J.A., on April 15, 1891, the president of the railway company wrote to the Premier saying that the company expected to commence work on the line in the near future and that it was anxious to prospect for coal and coal oil by boring on a block of 400,000 acres which the Crown might grant to the company under the *Railway Aid Act* and requested that a Minute of Council be passed designating the areas to be thereafter granted. Such a Minute was passed. The parties having expressly directed their attention to petroleum as well as to coal, Davey J.A. considered that the exclusion of coal alone

in the grants indicated clearly that it was not the intention of the parties that the company should also get the petroleum.

There is this further to be added. So far as the record shows, no question was ever raised by the grantee that the title conveyed by the grants was not that to which it was entitled or by its successor in title, the present appellant, until 1958. During this period of 59 years it is admitted that the appellants have acted upon the grants and sold portions of the lands subject to the exceptions contained in them.

If there was such a duty resting upon the Crown or the Lieutenant-Governor in Council, as is suggested, the right of action for the reformation of the grants would presumably be against the Crown either on a contract to be implied from the fact that upon the faith of the promised grants the railway was built or upon the footing that there was a statutory duty to convey the lands subject only to these exceptions.

No such contract is pleaded and the decision of the Judicial Committee in *Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Company*[1], would apparently bar such a claim if made. Whether the cause of action be one or the other it would vest in the British Columbia Southern Railway Company and that company would be a necessary party to the proceedings since there is no allegation that any such right of action was transferred by that company to the appellant.

It is unnecessary in the construction of these grants to consider the question argued before us that in case of ambiguity they should be construed most strictly against the Crown since it is said that there was valuable consideration for the making of the grant. I consider that there is no ambiguity.

I also refrain from expressing any opinion upon the question as to the application of the various Land Acts of the province upon which the respondent relies since I consider it unnecessary for the disposition of the appeal.

[1] [1950] A.C. 87.

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I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the suppliant, appellant: Farris, Stultz, Bull & Farris, Vancouver.*

*Solicitors for the respondent, Attorney-General of British Columbia: Lawrence, Shaw, McFarlane & Stewart, Vancouver.*

*Solicitor for the respondent, The California Standard Company: D. A. Lawson, Vancouver.*

*Solicitor for the respondents, Canadian Gulf Oil Company and The British American Oil Company Limited: J. D. Forin, Vancouver.*

# TAB 7

1994 ABCA 313
Alberta Court of Appeal

Scurry-Rainbow Oil Ltd. v. Galloway Estate

1994 CarswellAlta 216, 1994 ABCA 313, [1994] A.J. No. 669, [1995] 1 W.W.R. 316, 157 A.R. 65, 23 Alta. L.R. (3d) 193, 50 A.C.W.S. (3d) 148, 77 W.A.C. 65

# SCURRY-RAINBOW OIL LIMITED on its own behalf and on behalf of the other Gross Royalty Trust Certificate Holders in FREDRICK BERTRAM FISHER NO. 2 GROSS ROYALTY TRUST except those who might also be Defendants (Plaintiff/Respondent) v. DAISY MARIE BURDEN and MARLENE MERLE BOUCHARD as Executrices of Estate of CLARENCE C. GALLOWAY, Deceased (Defendants/Appellants); MOBIL OIL CANADA LTD. and CANADIAN OIL COMPANY LIMITED et al. (Defendants/Not Parties to the Appeal)

SCURRY-RAINBOW OIL LIMITED on its own behalf and on behalf of the other Gross Royalty Trust Certificate Holders in FREDERICK BERTRAM FISHER NO. 2 GROSS ROYALTY TRUST except those who might also be Defendants (Plaintiff) v. ALLEN T. FLETCHER and HILDA A. FLETCHER (Defendants); NORMAC OILS LTD. and ICG RESOURCES LTD. (Not Parties to the Appeal)

FIRST CITY TRUST COMPANY (Plaintiff/Respondent) v. EDITH JOAN NOBLE (Defendant/Appellant); CANADIAN INDUSTRIAL GAS & OIL LTD. and HEWITT OILS (ALBERTA) LTD. et al. (Not Parties to the Appeal)

Foisy, Stratton and Irving JJ.A.

Judgment: September 12, 1994
Docket: Docs. Calgary Appeal 14168, 14178, 14197

Counsel: *R.A. McLennan, Q.C.*, and *B.R. Burrows, Q.C.*, for plaintiff (respondent) Scurry-Rainbow Oil Limited.
*J.B. Ballem, Q.C., G.D. Baker* and *P.D. Edwards*, for defendants (appellants) Daisy Marie Burden and Marlene Merle Bouchard.
*D.A. Thurmeier* and *S.K. Luft*, for defendants Allen T. Fletcher and Hilda A. Fletcher.
*James E. Redmond, Q.C.*, and *D.I. Bliss*, for plaintiff (respondent) First City Trust Company.
*G. Barrington-Foote, Q.C.*, and *D.G. Mills*, for defendant (appellant) Edith Joan Noble.
*S. Carscallen*, for Mineral Owners' Representative.
*J.B. Laycraft*, for Unitholders' Representative.

Subject: Natural Resources; Property; Civil Practice and Procedure; Estates and Trusts
**Related Abridgment Classifications**
Estates and trusts
IX Perpetuities and accumulations
IX.1 Rule against perpetuities
IX.1.c Application of rule
IX.1.c.iii Trusts
Judges and courts
XVIII Stare decisis
XVIII.1 General principles
Natural resources
III Oil and gas

  

III.5 Oil and gas leases
III.5.b Profit à prendre
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.a Royalty agreement
III.6.a.i Interpretation
Natural resources
III Oil and gas
III.9 Practice and procedure
III.9.e Evidence

**Headnote**

Oil and Gas --- Oil and gas lease — Interpretation — General
Oil and Gas --- Exploration and operating agreements — Royalty agreement — Interpretation — General
Perpetuities and Accumulations --- Rule against perpetuities — Application of rule — Trusts
Energy and natural resources — Oil and gas — Exploration and operations — Royalty agreements — Under gross royalty trust agreements freehold mineral owners assigning royalty or potential royalty interests as lessors under oil and gas leases to trust companies — Trust companies then selling units in interest — Lessors retaining reversionary right to lessees' profit à prendre on leased substances as well as fee simple interest in substances in situ, subject to grant under lease of profit à prendre to lessee — Interests being interests in land which continued to be enforceable — Gross royalty trust agreements not postponing vesting of interest — Rule against perpetuities not applying.
Energy and natural resources — Oil and gas — Freehold petroleum and natural gas leases — Royalties — Under gross royalty trust agreements freehold mineral owners assigning royalty or potential royalty interests as lessors under oil and gas leases to trust companies — Trust companies then selling units in interest — Lessors retaining reversionary right to lessees' profit à prendre on leased substances as well as fee simple interest in substances in situ, subject to grant under lease of profit à prendre to lessee — Interests being interests in land which continued to be enforceable — Gross royalty trust agreements not postponing vesting of interest — Rule against perpetuities not applying.
Perpetuities and accumulations — Under gross royalty trust agreements freehold mineral owners assigning royalty or potential royalty interests as lessors under oil and gas leases to trust companies — Trust companies then selling units in interest — Lessors retaining reversionary right to lessees' profit à prendre on leased substances as well as fee simple interest in substances in situ, subject to grant under lease of profit à prendre to lessee — Interests being interests in land which continued to be enforceable — Gross royalty trust agreements not postponing vesting of interest — Rule against perpetuities not applying.
The plaintiffs in three separate actions were royalty certificate holders pursuant to gross royalty trust agreements ("G.R.T.A.") entered into with three separate trust companies. Under the G.R.T.A., freehold mineral owners assigned their royalty or potential royalty interests as lessors under oil and gas leases to trust companies, which then sold units in the interest. In the first case, the owner leased the lands before entering into the G.R.T.A., and production commenced under the lease after the G.R.T.A. was executed. In the second case, the G.R.T.A. was executed during the term of the initial lease which then expired. Two subsequent leases were executed by the owners or their successors and both of those leases expired without production. In the third case, the G.R.T.A. was executed during the term of an initial lease. New leases were executed after the initial lease expired. Production commenced under the new leases. The three actions were designated as test cases, and preliminary issues of fact and law were determined prior to trial. The trial judge determined that, subject to certain qualifications depending upon when the G.R.T.A. was executed relative to the lease, all of the G.R.T.A. created interests in land which continued to be enforceable as did the caveats. In each case the ultimate successor to the mineral title appealed.

**Held:**

Appeals dismissed.
Following the initial grant of the oil and gas leases, the lessors retained a reversionary right to the lessees' profit à prendre on the leased substances as well as a fee simple interest in those substances in situ, subject to the grant under the leases of the profit à prendre to the lessees. Those interests were interests in land. In accordance with the terms of the G.R.T.A., the lessor in each case granted to the trustee a royalty carved out of the mineral owners' interest in the land, and that supported the caveats filed by

  

the trustees. Finally, although the enjoyment of the interest under the G.R.T.A. may be postponed, there was no postponement of the vesting of the interest itself, and therefore the rule against perpetuities did not apply.

**Table of Authorities**

**Cases considered:**

*Berkheiser v. Berkheiser*, [1957] S.C.R. 387, 7 D.L.R. (2d) 721 — *applied*

*Denver Joint Stock Land Bank of Denver v. Dixon*, 122 P. 2d 842 (Wyo. S.C., 1942) — *considered*

*Guaranty Trust Co. of Canada v. Hetherington*, 67 Alta. L.R. (2d) 290, [1989] 5 W.W.R. 340, 95 A.R. 261 (C.A.) [leave to appeal to S.C.C. refused (1989), 70 Alta. L.R. (2d) liii, [1990] 1 W.W.R. lxxi, 103 A.R. 240] — *distinguished*

*Publix Oil & Gas Ltd., Re* (1936), [1936] 3 W.W.R. 634, 18 C.B.R. 331, [1937] 1 D.L.R. 203 (Alta. C.A.) — *referred to*

Appeal from decision of Hunt J., 8 Alta. L.R. (3d) 225, [1993] 4 W.W.R. 454, 138 A.R. 321, with respect to enforceability of gross royalty trust agreements related to oil and gas leases.

**Per curiam:**

1 Considerable litigation has been commenced concerning the entitlement to royalties payable under mineral leases in cases involving various types of agreements called Gross Royalty Trust Agreements ("G.R.T.A.'s"). These agreements were quite common in the Alberta oil patch in the period from the late 1940's to the early 1960's. Their basic concept was that royalties reserved to lessors on production of petroleum of natural gas under lease ("P. & N.G. Leases"), usually to oil companies, would be payable by the lessees to a trust company which would hold them in trust subject to the terms of the agreement. The trust company would issue certificates of ownership, originally on the strength of instructions from the settlor, and subsequently as evidenced by transfers executed in agreed form and recorded with the trustee.

2 Although the various G.R.T.A.'s in use had many common features, their precise terms often differed from agreement to agreement. In many situations the question was raised as to whether a subject agreement was enforceable only as a contractual right against the mineral owner and settlor or as an interest in land binding his successors in title. It has also been questioned whether various G.R.T.A.'s should continue to apply where the initial P. & N.G. lease had expired and a new one was entered into after execution of the G.R.T.A. In the light of these circumstances, trust companies often paid the royalties received by them into court.

3 Through a series of Queen's Bench orders, three test cases were identified and it was ordered that before these cases would go to trial, preliminary questions of mixed fact and law should be decided by the Court. Those were addressed in Queen's Bench by Hunt J. in a carefully crafted and detailed judgment.

4 The questions themselves are set out fully in the learned trial judge's decision reported at [1993] 4 W.W.R. 454 at 460-61, 138 A.R. 321 at 326-27 [8 Alta. L.R. (3d) 225]; and the answers given by her are as follows [pp. 512-13 W.W.R.]:

**A. The Burden Case**

1. The Trustee acquired, by virtue of the Fredrick Bertram Fisher No. 2 Gross Royalty Trust Agreement, an interest in land sufficient to permit registration by the Trustee of a caveat under the *Land Titles Act* which would allow the Trust to be enforced against a mineral owner subsequent to the original settlor of the Trust.

2. The Fredrick Bertram Fisher No. 2 Gross Royalty Trust Agreement does not offend the rule against perpetuities.

**B. The Fletcher Case**

1. The Trustee acquired by virtue of the Halvard Kolstad Gross Royalty Trust Agreement an interest in land sufficient to permit the registration by the Trustee of a caveat under the *Land Titles Act* which would allow the Trust to be enforced against a mineral owner subsequent to the original settlor of the Trust;

  

2. The Halvard Kolstad Gross Royalty Trust Agreement applies to royalties under petroleum and natural gas leases which came into effect subsequent to the lease which was in existence at the date when the Agreement was entered into. It would not apply to the initial lease entered into thereafter, had there been no lease in existence as of the date of the Agreement;

3. The Halvard Kolstad Gross Royalty Trust Agreement does not offend the rule against perpetuities.

**C. The Noble Case**

1. The Trustee acquired by virtue of the Deed of Trust pursuant to which the Crichton-Ponoka Royalty Trust was established an interest in land sufficient to permit registration by the Trustee of a caveat under the *Land Titles Act* which would allow the Trust to be enforced against a mineral owner subsequent to the original settlor of the Trust;

2. The Royalty Trust Agreement creates an interest enforceable whether production is obtained from the affected mines and minerals pursuant to a lease extant at the time an Affected Trust was settled or otherwise;

3. The Trust Agreement does not offend the rule against perpetuities.

5 In all three cases the parties filed an agreed statement of facts which included facts relating to the commercial context in effect when the subject G.R.T.A. was entered into.

6 In all three cases, the learned trial judge's answers support the continuing enforceability of the subject G.R.T.A.'s and the caveats filed thereon. In each case the ultimate successor in title to the subject minerals has appealed. We agree with the answers given by the trial judge and with her rationale for those answers, except to the extent mentioned herein.

7 The comprehensive decision of the learned trial judge (supra) sets out details of the mineral leases involved, the caveats filed by the trust companies, and the relevant chains of title and they need not be repeated here.

8 It will be noted that all cases raise the issues of whether the trustee's interest under the relevant G.R.T.A. constituted an interest in land so as to support a caveat and whether the rule against perpetuities was offended under the circumstances. The second two cases raised a third issue, namely whether the subject G.R.T.A. applies to royalties under P. & N.G. leases which came into effect after the G.R.T.A. had been executed.

9 In her analysis of the first, and perhaps the most critical issue, the learned trial judge found that a lessor's royalty under a P. & N.G. lease can be of interest in land in the form of a "species of rent" or "akin" to a profit à prendre. The appellants contend that the lessor's royalty could not be a profit à prendre because that is exactly what the lessor grants to the lessee under a P. & N.G. lease (see *Berkheiser v. Berkheiser*, [1957] S.C.R. 387). The trial judge's response to that argument was that she could see no theoretical reason why a freeholder could not grant a right that is characterized as a profit while reserving to himself or herself another kind of right which could also be characterized as a profit. However, the trial judge's decision did not rest solely on those findings of a species of rent or a lessor's profit à prendre. We have concluded that we need not decide on that basis to answer the questions before us. Even if she had erred on those points, that would not interfere with her ultimate conclusions. Nor would that constitute a reversible error, because she held that whether or not the reserved royalty in the subject P. & N.G. lease, in itself, amounted to an interest in land, a lessor's retention of the reversionary rights in the leased substances would be an interest in land capable of supporting a caveat. In other words, she found that such a reversionary right, if in fact it was retained in a subject P. & N.G. lease, would be sufficient. She then went on, in each case to apply a two-step analysis, as follows. Firstly, having concluded that the retention of the right of reversion in a given P. & N.G. lease *could* amount to an interest in land, she held that she then had to look at each of the subject leases to see if in fact that had been done; and secondly, if that interest had been retained under the subject lease, then she concluded that she should review each G.R.T.A. to determine if that interest in land had been conveyed to the trustee and would support the caveat filed by it.

10 We find no reversible error in the learned trial judge's analysis of each of the subject leases and G.R.T.A.'s. We find her answers fully supportable.

  

11 It is our conclusion that following each of the so-called "initial" P. & N.G. leases, the lessor retained not only a reversionary right to the lessee's profit à prendre on the leased substances, but also a fee simple interest in those substances in situ, as constituted by the royalty reserved to the lessor in the lease. That interest is, of course, subject to the grant under the lease of a profit à prendre to the lessee (see *Berkheiser*, supra).

12 This "in situ approach" is well expressed in American authorities; in particular in *Denver Joint Stock Land Bank of Denver v. Dixon*, 122 P. 2d 842 (Wyo. S.C., 1942), at p. 849 the Court said:

> The right to a royalty interest in oil does not merely attach after the oil has been severed from the ground and has become personal property. It is not merely rent issuing out of the annual produce of the land. It goes further than that. The right, extending as it does to oil which is to come from particular land, extends to and is necessarily connected with the corpus of the land, and is, accordingly, a right which exists in the oil which still is in place, inchoate though it may be, follows it as it comes from the ground and still is attached after it has become personal property. To call it personal property is but emphasizing a particular stage of the right on its way to fulfilment. It ignores that it is a right which necessarily extends to part of the corpus of the land. If it were possible to divide the oil in the ground in such a manner that the land in which the royalty portion would be found could, together with the royalty interest, be delivered to the owner of the royalty interest intact, then clearly it would be considered as real property. That is not possible, but in theory the equivalent of that right, aside from bringing the oil to the surface, is substantially the right of the owner of a royalty interest in particular land. The fact that real property, when severed, becomes under our terminology and classification, personal property, should not obscure the real nature of the right.

13 The concept that royalty reserved to a lessor in an oil and gas lease is considered to be real property or, in other words, an interest in land, seems to be universally accepted by American courts. I concede that it would be wrong to conclude that American Courts have universally adopted the position expressed in *Denver v. Dixon* (supra), and it would be equally erroneous to rely too heavily on U.S. decisions. We agree with the learned trial judge's comments on the point where, at p. 1404 of the Appeal Book [p. 464 W.W.R.] she said:

> First, since the development of the oil and gas industry in Alberta and other parts of western Canada, Canadian courts have been called upon to make many decisions relating to the industry's activities. Due to the early dearth of jurisprudence and the fact that many industry practices in Canada were modelled upon those in the United States, Canadian courts have at times relied upon American decisions. Although such decisions can be of assistance, in my view they must be used cautiously because of the fact that different American jurisdictions have adopted varied approaches to basic concepts of oil and gas law, approaches that at times are in distinct contrast to those of Canadian courts.

14 Nevertheless, the American cases are persuasive when not in conflict with authoritative Canadian decisions. In *Summers Oil and Gas*, Permanent Edition, vol. 3A, ch. 20, para. 572, it is said [p. 8]:

> Most courts have recognized, directly or indirectly, that after lease the lessor has three distinguishable sorts of legal interests in the land and minerals. They are his interest in the surface, the right to receive rents and royalties under the existing lease, and a reversionary interest in the minerals in place, contingent upon the termination of the existing lease. These interests are all merged in the lessor.

15 The decision of the Supreme Court in *Berkheiser* (supra) is entirely consistent with the American authorities, particularly *Denver v. Dixon* (supra). In *Berkheiser* the owner of land, by will, devised the land to the appellant. Thereafter, the land owner leased the oil and gas for ten years and "so long thereafter as the leased substances or any of them are produced". The issue was whether the lease severed the mines and minerals from the fee simple interest in the lands and thereby adeemed the devise so that the royalties fell into the residue or whether they went to the appellant under the devise.

16 In reasons given separately from the majority, but entirely consistent with the reasons of the majority, after considering the nature of the right granted to the lessee under the mineral lease as either a profit à prendre or an irrevocable license to search for and to win the leased substances, Rand J. said [p. 392]:

  

> This treats the legal title to the substances as *remaining in the lessor* and the interest of the lessee as analogous to that of an ordinary lessee of land, that is, as having only an interest in relation to them. [Emphasis added.]

17 The decision in *Berkheiser* thus recognized that in a mineral lease of the nature there under consideration (which contained terminology essentially the same as in the P. & N.G. leases under consideration before us), the owner retained an interest in land. The interest in the royalties to be received under the lease forms part of that interest and is therefore also an interest in land.

18 The decision of this court in an earlier case, *Re Publix Oil & Gas Ltd.*, [1936] 3 W.W.R. 634, is consistent with that conclusion. Nor do any other cases to which we were referred persuade us otherwise.

19 The appellant in the *Burden* test case argued both at trial and before us that the decision of this Court in *Guarantee Trust Co. of Canada v. Hetherington*, 67 Alta. L.R. (2d) 290, [1989] 3 W.W.R. 340, should be followed as the same form of G.R.T.A. was used in both cases.

20 Although the same form of G.R.T.A. was used, other circumstances of those cases differed significantly. This court in *Hetherington* said at p. 292 (Alta. L.R.), the following:

> We ... have concluded that the royalty assigned under each agreement is limited, *by the facts of these cases*, to the royalty payable under the recited Rio Bravo leases. Accordingly, we find it unnecessary to consider the many other arguments advanced before us, *including the issue of whether the interest conveyed by the royalty trust agreement created a caveatable interest in land*. (emphasis added)

21 It is clear that the *Hetherington* court did not consider whether the G.R.T.A.'s there in issue, on the specific facts before it, conveyed an interest in land to the trustee. The court instead reached its decision on the basis of the perceived intention of the parties to the subject G.R.T.A.'s to the effect that the royalty assigned to the trustee was limited to the initial lease. By the terms of the subject G.R.T.A.'s, royalties payable under future leases would be substituted for the royalty payable under the initial lease only in specifically defined circumstances (cl. 25). Those circumstances did not include the termination of the initial lease by effluxion of time. In *Hetherington*, unlike the situation with the *Burden* case, that is exactly what occurred. In the *Hetherington* judgment, the court concluded at p. 298 (Alta. L.R.), as follows:

> The limited circumstances which would trigger cl. 25 never occurred, and, accordingly, its powers of substitution never arose.

22 In considering whether the Rule Against Perpetuities was offended, the learned trial judge carefully analyzed the facts of each of the test cases and considered that that Rule was not offended. We find no reversible error in her reasoning and conclusions.

23 Our conclusions, which constitute the foundation for the answers to the questions posed, may be summarized as follows:

24 1. The initial P. & N.G. lease, in each of the test cases, is correctly categorized as a grant of a profit à prendre to the lessee. The interest thus acquired by the lessee is less than a full fee simple interest — it is in fact a working interest granted to permit the lessee to mine, operate and produce the leased substances.

25 2. Following the grant of the lease, the grantor-lessor is left with two things, namely:

(a) a fee simple interest in the subject minerals "in situ", but subject, of course, to the grant of the profit à prendre; and

(b) the reversionary interest in the subject minerals with respect to the lessee's profit à prendre.

These are clearly interests in land.

26 3. In accordance with the terms of the G.R.T.A. in each test case, the lessor-settlor granted to the trustee a royalty carved out of the mineral owner's said interest in land and this supported the caveat filed by it.

  

27 4. As pointed out by the trial judge, while the enjoyment of this interest may be postponed, because of the nature of oil and gas, there is no postponement of the vesting of the interest itself.

28 In the result we would answer the question put in issue in these proceedings as did the learned trial judge and we dismiss the appeals.

*Appeal dismissed.*

# TAB 8

# Court of Queen's Bench of Alberta

**Citation: Acera Developments Inc. v. Sterling Homes Ltd., 2009 ABQB 494**

**Date:**20090825
**Docket:**0901 05041
**Registry:** Calgary



Between:

**Acera Developments Inc.**

Appellant

- and -

**Sterling Homes Ltd.**

Respondent

**Corrected judgment:** A corrigendum was issued on October 5, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Decision**
**of the**
**Honourable Mr. Justice P.R. Jeffrey**

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[1] This appeal seeks to reverse the order of Master Laycock on June 16, 2009, dismissing an application to declare a builders' lien invalid pursuant to section 48(1)(c) of the *Builders' Lien Act*, R.S.A. 2000 c. B-7 ("*BLA*"). The Appellant also refers to Rule 159 of the *Rules of Court.*

[2] In this appeal the Court must determine whether the construction of show homes and spec homes by a home builder, in the early days of an arrangement between the builder and a real estate developer for the sale over time of 136 new lots, can give rise to a valid builders' lien.

[3] The builders' lien (the "Lien") was registered by Sterling Homes Ltd. ("Sterling"), against the lands (the "Lands") of Acera Developments Inc. ("Acera").

**A. Issues**

[4] There are five issues in this appeal:

1. What is the standard of review?

2. What is the burden of proof and who bears the onus?

3. Is Acera an "owner" under the *BLA*?

4. Is there an "amount due" to Sterling?

5. Was the Lien filed out of time?

**B. Facts**

[5] Sterling builds semi-detached and residential housing throughout Alberta.

[6] Acera owns a 250 acre parcel located in the Town of Cochrane and has been developing a new residential community known as The Ranch of Cochrane ("TRC").

[7] At TRC Acera proposes approximately 2200 dwelling units and 50 acres of commercial development. Phase 1 was to consist of 287 dwelling units and 4 multi-family sites on 44 acres.

[8] Following an initial agreement and deposit, in June 2007, Sterling and Acera entered into a Lot Purchase Agreement for 136 four-plex townhouse lots (the "Lots"). Sterling paid to Acera a further deposit for a total of $2,476,331.20. The remaining purchase price ($ 9,905,324.80) was to be paid on or before a "Completion Date."

[9] Both parties are experienced players in this particular industry and had the assistance of counsel in the formation of the Lot Purchase Agreement. The starting point for the agreement was Acera's standard form, but it is not clear the degree to which Acera's standard form was modified following negotiations between the parties.

[10] It was a condition precedent to the Lot Purchase Agreement in favour of Acera that Acera was to register a plan of subdivision for TRC on or before December 31, 2007. Acera could unilaterally extend that deadline by 90 days or some longer period if it did so in writing.

[11] By the Lot Purchase Agreement Acera imposed several requirements on the design of the homes that Sterling would build called the "Architectural & Construction Guidelines". In

addition to the Architectural & Construction Guidelines, Acera required that the homes reflect TRC being an environmentally low-impact development.

[12] Acera built the underground services, developed and paved the roadways and installed hydrants and streetlights for Phase I of TRC, but failed to receive the requisite municipal approval of the plan of subdivision and failed, therefore, to register the plan of subdivision.

[13] Despite the absence of subdivision approval, in the fall of 2008 Sterling started constructing homes. Four of the homes, in one single townhouse-style building, were to be part of a larger show home parade, and eight of the homes, in two further sets of four semi-detached homes, were to be "spec homes" and ready for future third party purchasers.

[14] Acera continued to report the status of its subdivision approval process to Sterling and support Sterling's applications for building permits. Acera actively held Sterling to its architectural controls for TRC, rejecting some of the initial plans Sterling submitted to it.

[15] Sterling excavated, laid foundations, framed structures, completed some of the rough-in plumbing and electrical work and brought the homes to various stages of completion.

[16] In the absence of a registered plan of subdivision no lots had been created. As no lots had been created, Acera did not transfer any lots to Sterling, as contemplated by the Lot Purchase Agreement.

[17] In the middle of January of 2009 Sterling suspended further work. On March 16, 2009 Sterling filed its Lien against the Lands.

[18] On April 3, 2009 Acera filed a Notice to Prove Lien pursuant to section 48(3) of the *BLA*. In response to that Notice, on April 20, 2009, Sterling filed an Affidavit Proving Lien.

[19] On April 3, 2009 Acera also commenced this application by Originating Notice to declare the lien invalid. The matter was heard by Master Laycock. He stated that he was prepared to issue reasons if the parties were prepared to wait three weeks; however, if a decision was required immediately, he would provide his decision without reasons. Acera requested that Master Laycock give his decision right away; he dismissed its application.

[20] It is from that decision that Acera appeals. Since then Acera has posted $1,750,000.00, pursuant to an order from Master Hanebury on July 17, 2009 that stands in place of and as security for Sterling's lien claim.

## C. Analysis

### 1. Standard of Review

[21] The standard of review on an appeal from the Master is "correctness and hearing *de novo*": Côté, J.A. in *United Utility Workers Assn. of Canada v. TransAlta Corp.*, 2004 ABCA 200, 354 A.R. 58, at para. 20.

**2. Burden**

[22] Both parties agree that builders' liens are creatures of statute and that the statute granting rights to a builders' lien must be given a strict interpretation: see *The Clarkson Company Limited v. Ace Lumber Limited*, [1963] S.C.R. 110, at p.114.

[23] Marceau, J. stated in *Vinterra Properties Inc. v. Calabria Interiors Ltd.*, 2005 ABQB 130, 377 A.R. 60, at paragraph 39:

> I have conducted this detailed analysis in order to clarify the issue of onus in applications such as this: I conclude that if the party challenging the validity of the lien resorts to section 48(1)(c), the onus will be upon that party. If, however, the party challenging the lien choses instead to serve the registered lien holder with a Notice to Prove Lien under section 48(3), then the onus of proving the lien will rest on the lien holder.

[24] Here a Notice to Prove Lien was filed but the application before me is not stemming from Sterling's steps to do so, in which it would bear the burden, but from Acera's s.48(1)(c) application.

[25] The burden Acera bears on the *de novo* rehearing of its application is a heavy one, since granting the application would have the effect of summarily dismissing Sterling's lien claim before it even initiates any enforcement steps. Therefore this Court will, for these purposes, assume to be true all allegations of fact proffered on behalf of Sterling that conflict with the allegations of facts of Acera.

[26] The issue in this appeal is whether Acera has demonstrated that any further steps by Sterling to enforce its lien claim have no reasonable prospect of success. There must be no genuine issue for trial; it must be plain and obvious that Sterling's case is bound to fail.

[27] In *1246789 Ontario Inc. v. Sterling*, (2000), 194 D.L.R. (4th) 346 (Ont. Div. Ct.), the owner brought a motion to vacate the lien under section 47(1) of the Ontario *Construction Lien Act*, R.S.O. 1990 c. C-30. At paragraph 12 the Court states:

> The motions judge ruled that in a motion under s.47, he should limit himself to deciding whether the question of the validity of the Architects' lien merits a trial; in other words, is there a genuine issue for trial? With that approach, we agree. A motion under s.47 is analogous to a motion for summary judgment under Rule 20: Re: Dominion Bridge, October 20 1999 (S.C.J.) Ferrier J., (unreported). As such, if there are genuine issues of fact the matter should be left to be determined by the trial judge: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.).

[28] Further, in *Fairview Investments Ltd. v. J.D. Irving Ltd.*, (1999), 187 Nfld. & P.E.I. R 175 (Nfld. T.D.), the court states at paragraphs 10-13:

> Section 26(2) of the Act permits the court, "upon application" and "upon another appropriate ground" to vacate the registration of a claim of lien and the registration of a certificate of action.
>
> This power should only be exercised in the clearest cases - See the discussion in Macklem and Bristow, *Construction, Builders' and Mechanics' Liens in Canada*, (6th ed.), (Toronto: Carswell, 1990), at p. 7-42.
>
> I note further *Seabord Construction Ltd. v. Central Realities Ltd.* (1977), 14 Nfld. & P.E.I.R. 135 (Nfld. C.A.), in which decision Gushue, J.A., albeit in a different context, confirmed that the entitlement to a lien should be determined at trial.
>
> Thus, on a summary application such as this, while the court is given the jurisdiction by the Act to vacate a claim of lien prior to trial, the consideration required starts from the position that the statute contemplates resolution of lien claim issues at trial, that interlocutory proceedings (at least in the enforcement action) are discouraged, and that a claim of lien should be vacated before trial only in the clearest of cases.

[29] Accordingly, it is not enough for Acera to show that it has a strong likelihood of success. Acera must show that there is no reasonable prospect of success for Sterling: *H.(V.A.) v. Lynch*, (2000) 78 Alta. L.R. (3d) 1 (C.A.) at para. 20. See also: *Racho International Inc. v. Laird Electric Ltd.*, 2006 ABQB 592, 398 A.R. 332 (Master), at paras. 21-23.

[30] Any conclusion that Acera has not satisfied this burden, that is, any conclusion that the lien is not invalid for purposes of this application, does not mean that the lien is valid. Sterling would still have to take the necessary steps to enforce its alleged lien rights. See in this regard: *Daon Development Corp. v. Bahry's Glass Ltd.*, (1982) 48 A.R. 212 (Alta. Q.B.).

**3. Is Acera an Owner?**

[31] The *BLA* states in part:

> 6 ... 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, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

1(j) "owner" means a person having an estate or interest in land at whose request, express or implied, and

(I) on whose credit,

(ii) on whose behalf,

(iii) with whose privity and consent, or

(iv) for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

[32] Acera says it was not an "owner". These statutory provisions set out a three-part test for whether a party is an "owner": Did Acera have an interest or estate in the lands? Did Acera make either an express or implied request that the work be done? Was the work done on Acera's credit, or on Acera's behalf, or with Acera's privity and consent, or for Acera's direct benefit? Acera must show that Sterling has no reasonable prospect of succeeding on at least one of these tests.

*Does Acera have an interest or estate in the lands*?

[33] Acera conceded that, as the registered owner of the Lands, it has an interest therein.

*Did Acera make either an express or implied request that the work be done*?

[34] The existence of a request for work is a question of fact. The circumstances of each case will determine whether there was an implied request for work. See *Royal Trust Corp. of Canada v. Bengert Construction Ltd.*, (1988) 85 A.R. 210 (Alta. C.A.), at para. 18.

[35] The Court of Appeal in *Royal Trust*, at paragraph 24, agreed with the following statement of guidance for determining whether there was a "request":

> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept "request" in s. 1(j):–it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.

> In ordinary language the word “request” indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with “ask” and “solicit”, synonyms which agree in meaning “to seek to obtain by making one’s wants or desires known.” “Request”, he says, has a suggestion of greater courtesy and formality in the manner of asking.

[36] Sterling’s position is that by virtue of paragraph 9(a)(v) of the Lot Purchase Agreement, Acera not only requested but required Sterling to build the homes it did, at least to the extent of completing the exterior and roof, and to do so within a certain period of time. Paragraph 9(a)(v) states:

> 9(a) The Builder covenants and agrees:
>
> ...
>
> (v) to complete the construction of the roof and exterior walls including finishing materials and colours for the Dwelling and the grades and landscaping on the Lands, all as approved by and to the satisfaction of the Developer, within 12 months of the Completion Date. In the event of default by the Builder, the Builder shall pay the Developer on receipt of invoice, the cost of completing roof and exterior walls including finishing materials and/or landscaping, which the Developer or its agent shall do, or of any other action taken by the Developer to remedy any non-compliance with such agreement for completion of construction, and which construction, finishing work or landscaping action shall be done or taken in exercise of the reasonable discretion of the Developer in order to comply with the plans of elevation, exterior finish and colours, finished grades, footing elevation, and driveway elevation approved by the Developer or to satisfy any other obligations existing on it. (underlining added)

[37] Acera states that clause 9 of the contract should be read as though it is prefaced with the words “if the Builder proceeds to build”. It says that only this interpretation is consistent with the remainder of the agreement and the overall context of how such projects evolve. Acera argues that the contract does not require Sterling to build anything, but “if” Sterling does build a house “then” it must meet the Architectural & Construction Guidelines, the environmental standards and it must complete the exterior by a certain date. The provision ensures that once construction has started, the home will not be abandoned mid-way through construction in a way that adversely affects the remaining community. The exterior must leave the impression the house is complete. Acera’s position is that the Lot Purchase Agreement contemplates that if construction has started, then Sterling must comply with the provisions in clause 9.

[38] Acera argues that clause 9(a)(iii) illustrates this meaning:

> 9(a) The Builder covenants and agrees:
>
> ...
>
> (iii) that no Dwelling shall be erected or stand on the Lands unless such Dwelling is constructed in strict conformity with the Architectural Guidelines, plans of elevation, finished grades ...

[39] Acera says this means the parties contemplated no houses being constructed and argues that the use of the word "unless" in this clause shows that the contract is requiring Sterling to comply with Acera's Architectural & Construction Guidelines "if" it chooses to build a house.

[40] I agree with Acera. Acera as a developer has an interest in maintaining certain standards and a common theme in TRC. Clause 9 addresses its ability to protect those interests. The Lot Purchase Agreement contemplates that Sterling, as a builder, will build homes. It does not expressly or impliedly request that Sterling build homes. The essential contract in this case, the Lot Purchase Agreement, is an agreement to purchase lots. It contains no request, express or implied, that Sterling build on them for Acera's sake or at all. It deals with the price of, servicing of, conveyance of, and payment for those lots. It contemplates that show homes *may* be built by Sterling after building permits rather than after subdivision registration and, in such a case, payment is also accelerated.

[41] The concluding words in clause 9(a)(v) underlined above make it clear that the parties agreed that clause 9(a)(v) arises after Sterling has elected to proceed towards building a particular house. Sterling must build at least the exterior and roof "in order to comply with the ... approved by [Acera]". These words are past tense. That is, the requirement to complete the exterior and roof arises only after Sterling chooses to build and gets its plans approved by Acera as compliant with the community standards.

[42] I also note that the defined word "Dwelling" which appears in paragraph 9(a)(v) is defined in paragraph 9(a)(i) as a "single detached dwelling house". Sterling acknowledged under cross-examination that the show homes and spec homes it was building were all semi-detached houses (here four-plexes) and therefore paragraph 9(a)(v) does not actually apply to Sterling's show homes and spec homes that are the basis for its Lien.

[43] Sterling could point to no other evidence that would show an express request that the homes be built. Acera has satisfied me that Sterling has no reasonable chance of success in demonstrating that an express request to build homes has been made by Acera.

[44] I also do not regard there to be any genuine issue for trial that there was an implied request. There was no "active or positive proposal" by Acera to Sterling nor any reasonable basis to infer one.

[45] Sterling adduced affidavit evidence which it argues points to an implied request on the part of Acera to build homes. Sterling argues that by Acera's course of conduct it impliedly requested that the work be performed. It says that Acera "wanted" Sterling to build, it "encouraged" Sterling to build and that it "requested" Sterling to build.

[46] Acera merely "wanting" Sterling to build is not enough to constitute a request that it do so; it must be made known by an active "seeking to obtain". The statement that Acera "requested" Sterling to build is at the end of a Sterling Affidavit as a conclusory type of statement, unsupported by any additional specifics, bases or factual allegations.

[47] Sterling's evidentiary support for its allegation that Acera "encouraged" Sterling to start building, even if I assume all those allegations of fact will be proven at trial, will not prove the proposition that Acera "encouraged" Sterling. Sterling's affidavit points only to Acera's involvement in vetting the designs for the homes for compliance with the architectural controls. All homes had to comply with Acera's Architectural & Construction Guidelines and Acera had the right to revise any proposed designs. I do not regard the review for compliance with architectural controls to amount to "active participation" from which a request might be implied by a trial judge, as referred to in *K. & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd.* 1998 ABCA 178, 216 A.R. 164.

[48] Checking for compliance with Architectural & Construction Guidelines was not active participation in the nature of implying a request to start building. Acera expected that Sterling would build homes, but did not require or request it. When construction proceeded, the construction had to comply with various standardizing requirements. This does not imply a request to build. The architectural controls are in place to standardize any and all construction across the entire development. Similarly, the cooperation and collaboration between the parties does not provide a reasonable prospect of success at trial that it might be construed as an implied request by Acera that Sterling build spec homes or show homes.

[49] In argument Sterling also pointed to Acera's statement of the "cooperation and collaboration" between the two parties. The cooperation and collaboration stemmed from the parties common interest in the success of TRC, not around whether Sterling would build spec and show homes.

[50] In my view, Acera has demonstrated that Sterling has no reasonable prospect of proving that Acera did anything more than know that Sterling had chosen to start construction of the show homes and spec homes before sub-division approval and registration. It did not impede Sterling. It ensured Sterling's chosen designs complied with the TRC guidelines and supported Sterling's request for building permits.

[51] Under cross examination on its affidavit Sterling conceded that Acera had no role whatsoever in the timing of starting the spec home construction. It could only point to an understanding on the part of Acera that a show home would be built, ensuring compliance with architectural controls and parts of the Lot Purchase Agreement, which I have already dealt with.

Understanding Sterling will build is, like knowledge and awareness, not enough to create an implied request. There may have been no surprise that Sterling would build homes on the lots, as Sterling is a home builder, but this falls far short of an implied request. Even considering all these alleged indicia of an implied request in combination, I see no reasonable prospect of Sterling succeeding at trial that a request by Acera that Sterling start construction could be implied.

> *Was the work done on Acera's credit, or behalf, or with their privity and consent or for their direct benefit?*

[52] There was no evidence that Sterling's improvements were done on the credit of Acera. To the contrary, Sterling financed its own construction of its own houses. It was not the business of Acera. Sterling argued that the work was "for" Acera's credit, but the *BLA* requires that it be "on" its credit. The two are not the same.

[53] The work on the houses also was not on behalf of Sterling. The evidence leaves no doubt that Sterling is building these homes in order to sell them and make its own profit. Acera does not participate in that profit.

[54] Acera gains no direct benefit from the early construction of the houses by Sterling, or the construction at any time. Acera does not share in any resale of the lots, with or without houses on them. Timely construction on and resale of the lots likely helps Acera advance to development on subsequent phases and perhaps additional lots, but this is not a sufficiently "direct" benefit as is required to establish lien rights. Accordingly, I see no genuine issue to be tried that the work was done on Acera's credit, behalf or for its direct benefit.

[55] In dealing with whether the work was done with Acera's privity and consent, Sterling has conceded that the work was done with Acera's *knowledge* and consent, but says nothing proves it was not done with the privity of Acera. Sterling, on the other hand, says the Lot Purchase Agreement and the course of collaborative dealings between the parties demonstrates the privity between them.

[56] One of the earliest statements on privity and consent from the Supreme Court of Canada recognizes that it requires something in the nature of a direct dealing, more than mere knowledge or consent from the liened party to the work being done by the lien-claimant. In *John A. Marshall Brick Co. v. York Farmers Colonization.*, (1917) 54 S.C.R. 569, at page 581, the Court said:

> While it is difficult if not impossible to assign each of the three words "request" "privity" and "consent" a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in Graham v. Williams, and approved in Gearing v. Robinson at page 371, that "privity and consent" involves:

> something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged [...]. Mere knowledge of, or mere consent to, the work being done is not sufficient.

[57] In *Suss Woodcraft Ltd. v. Abbey Glen Property Corp.*, [1975] 5 W.W.R. 57, McDonald J. of the Alberta Supreme Court determined that something "in the nature of a direct dealing" was required between the lien claimant and the liened party to indicate there was privity and consent to the work being done.

[58] There was privity and consent to the Lot Purchase Agreement but, as with the question of whether there was an express or implied request, that related to the creation, servicing and conveyance of lots and payment therefor. There is no reasonable prospect of Sterling succeeding in having the Court construe that agreement as evidencing privity and consent on the part of Acera for the construction at its behest of show homes or spec homes, early or ever. Put another way, Acera could not successfully sue Sterling for breach of the Lot Purchase Agreement if Sterling never built any houses on the lots it purchased.

[59] Further, I agree with Acera that there has been no evidence of any other direct dealings on its part with Sterling from which I could infer privity and consent to an implied request to build homes.

[60] In result I am unable to find Sterling has any reasonable prospect of succeeding in proving that Acera was an "owner" as defined in the *BLA*. Overall, I also can find no reasonable basis to think Sterling might be able to prove it proceeded to construct the spec homes or the show homes at the instance of Acera or as a consequence of Acera's actions, statements, conduct or any agreement to somehow be at risk for the work. The two were each pursuing their own interests in the same project, nothing more. Timely subdivision registration by Acera would enable Sterling to sell its product; early construction by Sterling would help Acera to service and sell new lots in later phases. But neither requested those actions of the other, expressly or impliedly, in the manner required for a valid builders lien, and I see no reasonable prospect of Sterling proving at trial that Acera did.

**4. Is there an "amount due" to Sterling?**

[61] This is not unlike the decision of this Court in *Beaudoin v. Waters*, [1997] 9 W.W.R. 370, 203 A.R. 1, (Alta. Q.B.), where a lien claimant voluntarily performed work that improved the property of another. There the claimant failed in the absence of an underlying enforceable obligation to pay. There the work was done for the worker's own perceived benefit. A lien claim is not valid, according to section 6 of the *BLA* and this Court in *Beaudoin*, where no amounts are due to the lien holder. Here Sterling chose to proceed when it did and how it did. It faced an obligation to purchase lots but not to build. There is no "amount due" to Sterling for this work. There may be an amount due to Sterling in the future if it sells the lots and houses, but not from Acera.

[62] Sterling said it has an enforceable claim in unjust enrichment. Unfortunately for Sterling, juristic reasons for the enrichment existed here. See in this regard: *Garland v. Consumers' Gas*, 2004 SCC 25, [2004] 1 S.C.R. 629, at paras 44 to 46.

**5. Timing of filing the Lien**

[63] Acera also argued that the lien was not filed in time to be valid. Construction on the homes was suspended in the middle of January 2009.

[64] Section 41 of the *BLA* states, in part**:**

> 41(4) ...a lien in favour of a contractor or subcontractor may be registered at any time within the period commencing when the lien arises and
>
> (a) ...terminating 45 days from the day the contract or subcontract, as the case may be, is completed or abandoned

[65] Sterling argues that it has not completed or abandoned the homes and that it was within the time period required to file its Lien. Sterling relies on *Elizabeth Townhouses Ltd. v. Dieleman Planner Company Ltd.*, [1975] 2 S.C.R 44. There the Supreme Court of Canada held that in order to constitute abandonment a cessation of work would have to be permanent in the sense that it was not intended to carry the project to completion.

[66] The evidence is such that Sterling may resume its work on the show and spec homes. Under cross examination Sterling stated that it suspended construction on the homes because it was uncomfortable that the registration of the subdivision had not taken place. There was no certain indication that it intended to walk away from the project completely. There is a genuine issue for trial here, one that has a reasonable prospect of success for Sterling.

**D. Conclusion**

[67] Acera demonstrated that Sterling has no reasonable prospect of showing that Acera meets the definition of "owner" or that an amount is due to Sterling in accordance with Section 6 of the *BLA.* I therefore allow the appeal and declare the Lien invalid.

[68] Sterling said at the end of oral argument that if I found in Acera's favour that it will seek a stay pending its appeal of my decision.

[69] While a stay application has not yet been advanced, given the extensive range of evidence I reviewed and the lengthy submissions of counsel for the parties on the issues before me, I am prepared to grant now a limited stay of this decision. This stay will lapse at noon Friday, August 28, 2009 unless Sterling files and serves before then its Notice of Appeal. If it so filed and served, then the stay will extend until the earlier of (i) determination by the Court of

Appeal or (ii) steps taken by Acera to require Sterling to apply formally for a stay pending determination by the Court of Appeal.

[70] I impose the limited stay because I am satisfied that, based upon the evidence to date, while a continuation of the lien under a stay may cause Acera considerable financial harm, not granting one may cause Sterling irreparable harm from the loss of secured position relative to other alleged Acera creditors. Based upon the materials presented to me, the balance of convenience favours Sterling.



[71] Costs shall follow the cause.

Heard on the 5th day of August, 2009.
**Dated** at the City of Calgary, Alberta this 25th day of August, 2009.

**P. R. Jeffrey**
**J.C.Q.B.A.**

**Appearances:**

Peter Ridout
for the Appellant

Jane Sidnell
for the Respondent

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**Corrigendum of the Reasons for Decision**
**of**
**The Honourable Mr. Justice P.R**

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The following changes have been made to this judgment:

[4] In the first line, “four” has been corrected to read “five”.

[9] In the third line, “formation” is corrected to read “form”.

[15] The word “construction” is corrected to read “completion”.

[42] In the second line, reference is made to “paragraph 9(a)(i)” where the lower case “i” is used. Similarly, paragraph [69], fifth line, lower case “i” is used.

[51] A comma is inserted in the fifth line to read: “Understanding Sterling will build is, like knowledge and awareness, not enough ...”.

[55] In the first line, “Acera” is corrected to read “Sterling”.

[69] In the fifth line, “files and serves” is corrected to read “filed and served”.

# TAB 9

1962
*Nov. 29, 30
1963
Jan. 22

THE CLARKSON COMPANY LIMITED, TRUSTEE IN BANKRUPTCY OF L. DI CECCO COMPANY LIMITED, and THE SISTERS OF ST. JOSEPH FOR THE DIOCESE OF TORONTO IN UPPER CANADA (*Defendants*) .....APPELLANTS;

AND

ACE LUMBER LIMITED and DANFORD LUMBER COMPANY LIMITED, carrying on business under the firm name of CADILLAC LUMBER (*Plaintiffs*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Mechanics' liens—Construction equipment supplied on rental basis—Whether liens created in respect of rentals charged—The Mechanics' Lien Act, R.S.O. 1960, c. 233, s. 5.*

A subcontractor, engaged to erect form work for concrete floors, columns and other portions of specific buildings on lands owned by the Sisters of St. Joseph, contracted with A Ltd. and D Ltd. for the rental of certain construction equipment. The subcontractor later became bankrupt, and, in a mechanics' lien action, A Ltd. and D Ltd. filed claims in respect of the rentals charged for the said equipment. These claims were rejected by the master but were allowed on appeal to the Court of Appeal by a majority decision. An appeal was then brought to this Court.

*Held:* The appeal should be allowed.

While *The Mechanics' Lien Act,* R.S.O. 1960, c. 233, may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it.

The submission that the price of the rental of the equipment was the proper subject-matter of a lien within the meaning of s. 5 of the Act on the ground that such rental constituted "the performance of a service" in respect of the constructing and erecting of the buildings in question, or alternatively, that it constituted the furnishing of materials used in the construction and erection thereof, was rejected. As the equipment was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been "material" furnished "to be used in the constructing or erecting of the building" within the meaning of the section. Also, the lien created by s. 5(1) in respect of "materials" furnished was a lien for the "price of" such "materials". This was a different thing from the price of the rental of materials and it was illogical to suppose that the legislature intended to create a lien for the "price" of the materials in favour of a person who never parted with title to them, who supplied them on the understanding that they would be returned and to whom they were in fact returned.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

The word "performs" in s. 5 was to be taken as connoting some active participation in the performance of the service on the part of the lien claimant. Having regard to the rule of construction applicable in the circumstances, the respondents, by merely making their equipment available at a fixed rental, could not be said to be persons who performed any service upon or in respect of the building within the meaning of the section.

*Timber Structures v. C.W.S. Grinding & Machine Works*, 229 P. 2d 623, referred to; *Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al.* (1940), 15 M.P.R. 39, approved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from the report of Bristow, Master, in a mechanics' lien action. Appeal allowed.

*C. A. Thompson, Q.C.*, and *J. W. Craig*, for the defendants, appellants.

*R. E. Shibley* and *J. W. McCutcheon*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] (Kelly J.A. dissenting) allowing the mechanics' lien claims asserted in this action by Acrow (Canada) Limited (hereinafter referred to as Acrow) and Dell Construction Company Limited (hereinafter referred to as Dell) in the sums of $10,380.29 and $20,632.59 respectively, being the price of the renting of certain construction equipment to L. Di Cecco Company Limited for the purpose of facilitating the carrying out by the latter company of a subcontract to erect form work for concrete floors, columns and other portions of certain buildings known as the House of Providence, situate on lands owned by the Sisters of St. Joseph.

The facts are not in dispute and it is apparent that title to the equipment in question remained in Acrow and Dell respectively, that it was for the most part delivered to the job by the Di Cecco Company and was always returned by that company or its trustees in bankruptcy after use. All of the equipment in question was furnished to the Di Cecco Company on a straight rental basis and no personnel of either Acrow or Dell were employed in connection with its installation or employment.

[1] [1962] O.R. 748, 33 D.L.R. (2d) 701.

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Ritchie J.

The determination of this appeal depends upon the true construction to be placed upon s. 5 of *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, and specifically upon whether that section is to be so construed as to create a lien in respect of the rentals charged for the said equipment by the two lien claimants.

The material provisions of s. 5 of *The Mechanics' Lien Act* read as follows:

> (1) Unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any . . . building . . . for any owner, contractor, or subcontractor, by virtue thereof has a lien for the price of the work, service or materials upon the estate or interest of the owner in the . . . building . . . and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used, . . . and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, . . .
>
> (2) The lien given by subsection 1 attaches to the land as therein set out where the materials delivered to be used are incorporated into the buildings, . . . on the land, notwithstanding that the materials may not have been delivered in strict accordance with subsection 1.

It was submitted on behalf of the respondents in this Court as it had been in the Court of Appeal for Ontario that the price of the rental of the said equipment was the proper subject-matter of a lien within the meaning of this section on the ground that such rental constituted "the performance of a service" in respect of the constructing and erecting of the buildings in question, or alternatively, that it constituted the furnishing of materials used in the construction and erection thereof.

All the judges of the Court of Appeal agreed with Roach J.A. that as the equipment here in question was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been "material" furnished "to be used in the constructing or erecting of the building" within the meaning of the said s. 5. I agree with the reasoning and conclusion of Mr. Justice Roach in this regard. As that learned judge has also observed, the lien created by s. 5(1) in respect of "materials" furnished is a lien for the "price

of" such "materials". This is a different thing from the price of the rental of materials and it would appear to me that it would be illogical to suppose that the legislature intended to create a lien for the "price" of the materials themselves in favour of a person who never parted with title to them, who supplied them on the understanding that they would be returned and to whom they were in fact returned.

The respondents' contention that the rental of this equipment constituted the "performance of a service" within the meaning of the said s. 5 was however upheld by the Court of Appeal and Roach J.A., in the course of the reasons for judgment which he delivered on behalf of the majority of that Court, having expressed the view that the phrase "work or service" as employed in that section is disjunctive and that "the 'performance of service' must therefore mean the doing of something exclusive of 'work' or the placing or furnishing of materials to be used etcetera that enhances the value of the land", went on to say that:

> The words "performance of service" may not be the most apt words that the legislature could have used to express its intention, but in the context in which they have been used I think their meaning is sufficiently plain. They must be given a meaning consistent with the spirit of the Act. In the context in which they have been used I interpret them as meaning to supply aid or an essential need in the construction process.

After observing that the employment of the form of equipment supplied by the lien claimants was essential to the modern type of construction involved in the contract in question and that until recent years the function performed by that equipment involved the fabrication of forms on the job, the labour and material for which had the protection and security of the Act, Mr. Justice Roach concluded that "those who supply the service under this modern technique are equally entitled to that protection and security". He then proceeded to quote the provisions of s. 4 of *The Interpretation Act*, R.S.O. 1960, c. 191, to the effect that "the law shall be considered as always speaking," etc. and to say:

> To deny to these appellants the same security under the Act as was given to those who applied the earlier technique in the construction industry would be wrong and quite contrary to the spirit and purpose of the Act. In this connection I adopt the language of Brown J. in *Johnson v. Starrett* (1914), 127 Minn. 138 at 142 citing *Schaghticoke Powder Co. v. Greenwich and Johnsville Ry. Co.*, 183 N.Y. 306 where he said ". . . in the construction of statutes their language must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts".

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It appears to me that this latter argument loses much of its force when it is remembered that *The Mechanics' Lien Act* in question was revised by the Legislature of Ontario in the same year (1960) in which the equipment was rented. This is not a question of adapting the language of an old statute to meet new conditions, but rather one of determining the intention of the legislature with respect to a building practice which was currently employed at the time when the statute was enacted.

The above excerpts from the reasons for judgment of the majority of the Court of Appeal indicate to me that the conclusion there reached is predicated in large measure on the assumption that the provisions of *The Mechanics' Lien Act* which describe and delimit the classes of persons entitled to a lien thereunder are to be liberally construed and that their language is to be adapted to meet the circumstances here disclosed.

With the greatest respect, I am, however, of opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:

> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

The same view was adopted in the unanimous opinion of the Supreme Court of Oregon in *Timber Structures v. C.W.S. Grinding & Machine Works*[1], where it was said:

> We agree with the defendant that the right to a lien is purely statutory and a claimant to such a lien must in the first instance, bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment.

[1] 229 P. 2d 623 at 629.

The words "perform" and "service" are both susceptible of a variety of meanings according to the context in which they are employed and as has been indicated, if the statutory language is liberally construed and selected meanings are assigned to each of these words in order that they may be adapted to the circumstances, it may then be logical to construe the phrase "any person who performs any . . . service upon or in respect of . . . constructing any building" as including a person who rents non-consumable equipment for temporary use to facilitate the building's construction. In my view, however, different considerations apply to the strict construction of a statute which creates a lien, on the one hand, for any person who "performs any work or service" and on the other hand for any person who "furnishes any material". Even if it were accepted that the presence of the equipment at the building site in itself constituted a "service upon or in respect of . . . constructing" the building it is nevertheless my view that the words "furnishes" and "performs" as they occur in s. 5 of the Act must be given separate meanings and that the latter word must be taken as connoting some active participation in the performance of the service on the part of the lien claimant. Having regard to the rule of construction, which I consider to be applicable under the circumstances, I do not think that by merely making their equipment available at a fixed rental, the respondents can be said to be persons who performed any service upon or in respect of the building within the meaning of the section.

None of the cases so thoroughly analyzed in the Court of Appeal appears to me to constitute any direct authority for the proposition that the provisions of s. 5 of the Act or any equivalent statutory provisions create a lien for "services" in respect of the furnishing of equipment alone on a straight rental basis as in the present case. On the other hand, in the case of *Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al.*[1], the Supreme Court of Nova Scotia, construing statutory language which was substantially the same as that with which we are here concerned, concluded that no lien under the heading of service could arise for the rental of a drill sharpener employed in sharpening tools used in

[1] (1940), 15 M.P.R. 39, 2 D.L.R. 472.

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Ritchie J.

the actual making of a mine. It appears to me that Doull J., who rendered the decision of that Court, was correct in adopting the view that:

> ...unless expressly so provided by statute, no lien can be acquired for the value or use of tools, machinery or appliances furnished or loaned for the purpose of facilitating the work where they remain the property of the contractor and are not consumed in their use but remain capable of use in some other construction or improvement work.

It is true that this language was adopted by Mr. Justice Doull from the resumé of American cases contained in Corpus Juris, vol. 40 at p. 86, but it seems to me to have been well applied to the statute which he had before him and that it applies with equal force to the *Mechanics' Lien Act* of Ontario.

As has been indicated, the practice of renting construction equipment appears to have been current in the construction business at the time when *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, was enacted and it seems to me that as the legislature at that time made no express provision for the inclusion of the renters of such equipment amongst those persons entitled to a mechanics' lien, it does not now lie with the Courts to create such a lien by adapting the statutory language that was used so as to accomplish that purpose.

For these reasons, as well as for those contained in the dissenting opinion of Kelly J.A., I would allow this appeal, set aside the order of the Court of Appeal for Ontario and direct that the report of the learned master from which the appeal was taken to that Court be restored.

The appellants will have the costs of this appeal and of the appeal to the Court of Appeal for Ontario.

*Appeal allowed, order of the Court of Appeal for Ontario set aside and report of the Master restored.*

*Solicitors for the appellant, The Clarkson Co. Ltd.: Aylesworth, Garden, Thompson & Denison, Toronto.*

*Solicitors for the appellants, The Sisters of St. Joseph: T. A. King, Toronto.*

*Solicitors for the respondent, Acrow (Canada) Ltd.: White, Bristol, Beck & Phipps, Toronto.*

*Solicitors for the respondent, Dell Construction Co. Ltd.: Lorenzetti, Mariani & Wolfe, Toronto.*

# TAB 10

# In the Court of Appeal of Alberta

**Citation: Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd., 2011 ABCA 107**

**Date:** 20110405
**Docket:** 1003-0205-AC
**Registry:** Edmonton



**Between:**

**Canbar West Projects Ltd.**
**carrying on business under the name and style of**
**Can-West Projects Ltd. and Can-West Projects and**
**the said Canbar West Projects Ltd.,**
**the said Can-West Projects Ltd. and**
**the said Can-West Projects Ltd. and the said Can-West Projects**

Appellants (Plaintiffs)

- and -

**Sure Shot Sandblasting & Painting Ltd.**,
**1150044 Alberta Ltd. and**
**Royal Bank of Canada**

Respondents (Defendants)

**And Between:**

**Sure Shot Sandblasting & Painting Ltd. and**
**1150044 Alberta Ltd.,**

Respondents
(Plaintiff by Counterclaim)

- and

**Wallace English and Paul Saruga**
**carrying on business under the name of Can-West Projects Ltd.,**
**Canbar West Projects Ltd., Canbar West Projects Ltd.**
**carrying on business under the name of Can-West Projects Ltd.**
**and Canbar West Projects Ltd., carrying on business under the name of**
**Can-West Projects**

Appellants
(Defendants by Counterclaim)

**The Court:**

**The Honourable Madam Justice Marina Paperny**
**The Honourable Mr. Justice Keith Ritter**
**The Honourable Madam Justice Patricia Rowbotham**

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**Memorandum of Judgment**

Appeal from the Order by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 19th day of May, 2010
Filed on the 6th day of July, 2010
(Docket: 0903-04369)

## Memorandum of Judgment

**The Court:**

[1] The appellants appeal a summary decision of a chambers judge pursuant to the provisions of the *Builders' Lien Act*, R.S.A. 2000 c. B-7 in which the judge declared the appellants' builders' lien invalid and ordered that their certificate of *lis pendens* be vacated. We allow this appeal, vacate the declaration of invalidity and restore the certificate of *lis pendens*.

Background

[2] Some of the facts underlying this appeal are not disputed. Brook Parker ("Parker") is the sole shareholder, director, and president of both respondents, 1150044 Ltd. ("1150044") and Sure Shot Sandblasting & Painting Ltd. ("Sure Shot"). 1150044 is the owner of:

> Plan 0821250
> Block 1
> Lot 6A
> Excepting thereout all mines and minerals
> Area: 1.37 hectares (3.39 acres) more or less

Sure Shot was in the process of constructing facilities for its use on those lands. In September 2008, Parker negotiated with the appellants' principal, Wallace English ("English"), regarding part of the construction to meet Sure Shot's needs. These negotiations resulted in a written contract between Sure Shot and Can-West Projects Ltd. ("Can-West"), by which Can-West agreed to complete a substantial part of the construction for a fixed price of $899,640. Parker signed the contract on Sure Shot's behalf and Paul Saruga ("Saruga") signed for Can-West. Although the contract is stated to be between Sure Shot and Can-West, the signature page states that Parker signed as the "owner".

[3] Thereafter, work was done under the supervision of the project engineer, SCL Engineering Ltd. ("SCL"). In the fall of 2008, Can-West submitted three invoices totalling $257,619.16 (net of builders' lien hold backs) which were approved by SCL and paid by 1150044.

[4] In early 2009, Can-West issued two further invoices totalling $239,433.20. SCL approved both invoices, but 1150044 has not paid them, nor has it paid the lien hold back relating to the earlier invoices. On February 3, 2009, the partially completed project started on fire and burnt to the point where demolition and reconstruction were required. The appellants say that work done by Sure Shot caused the fire. Sure Shot and 1150044 say that the appellants' negligence was the cause of the fire. The respondents maintained insurance on the partially completed structure and have been paid for its loss by the insurer. The respondents filed a counter-claim claiming the cost of the replacement of the building, loss of equipment in the building, the cost of demolition, and loss of profits due to Sure Shot's inability to conduct its business. The total counterclaim is for $3,154,329.92.

[5] The affidavits filed on behalf of the appellants and the respondents contain several factual assertions which are not agreed on.

(a) English and Parker disagree on whether English told Parker that Can-West was not incorporated when the contract was signed, and that he intended to incorporate a new company to fulfill Can-West's obligations. English says he advised Parker of this fact and Parker denies receiving that advice.

(b) English and Saruga deposed that the insurer engaged Can-West to demolish the structure after the fire. In support of this, they attach an email from the adjusters which provided that only the necessary demolition be done at that time to prevent further damage to property or further harm. The adjusters' quote for the demolition was $81,900.00 net of GST for concrete and $88,680.00 net of GST for the building. Parker deposes that he did not ask Can-West to demolish the building.

[6] English deposed that he and his partner, Saruga, always intended to incorporate a new company to do the work under the name of "Can-West Projects Ltd." However, when they searched the name, it was already in use and they, therefore, sought to incorporate under a similar name by replacing the hyphen in Can-West with its spelt-out equivalent "Bar" so that the name became "Canbar West Projects Ltd." ("Canbar"). Their new company was incorporated under this name on October 14, 2008, and on November 22, 2008, this company registered "Can-West Projects" as a trade name. All invoices and some of the other related documentation were sent by Canbar using letterhead previously prepared for Can-West Projects Ltd. Some of the related documentation was signed by Saruga on behalf of "Can-West Projects", which is the trade name that Canbar registered for its use. All cheques paid were made out to Can-West Projects Ltd. but were deposited to Canbar's corporate account.

[7] Parker deposed that the first he ever heard of Canbar was when he received a filed copy of the builders' lien registered in Canbar's name, carrying on business as Can-West Projects Ltd.

[8] English and Saruga both deposed that Canbar West Projects Ltd. performed the work.

Decision below

[9] The chambers judge held that the appellants' lien was invalid. The party named in the agreement was "Can-West Projects Ltd.", but that corporation never came into existence. If a person did not exist, it could not maintain builders' lien rights. Further, Canbar West Projects Ltd. did not notify the respondents of its incorporation and the role it was playing in the project, nor did it adopt the agreement. While the lien-holder (i.e. Canbar West Projects Ltd.) existed, the person who allegedly did the work (i.e. "Can-West Projects Ltd.") did not. The chambers judge held that the potential for confusion was real, because an actual company named "Can-West Projects Ltd." existed, which would make upholding the builders' lien on the land prejudicial to the defendants.

Standard of Review

[10] Whether the chambers judge properly interpreted the applicable sections of the legislation is a question of law reviewable on correctness: ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8. By contrast, appellant intervention with respect to findings of fact, inferences from the evidence, and questions of mixed law and facts is only warranted where there is a palpable and overriding error: ***Housen v. Nikolaisen*** at para. 36.

Analysis

[11] This appeal is about statutory interpretation. Section 6(1) of the *Builders' Lien Act* 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, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

[12] Section 1(j) of the *Act* defines the owner as:

> (j) "owner" means a person having an estate or interest in land at whose request, express or implied, and
>
> (i) on whose credit,
>
> (ii) on whose behalf,
>
> (iii) with whose privity and consent, or
>
> (iv) for whose direct benefit, work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

[13] This appeal requires the interpretation of the relevant sections of the *Builders' Lien Act.* This task requires that the words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act* and the intention of the legislature: ***Re Rizzo & Rizzo Shoes Ltd***., [1998] 1 S.C.R. 27, 221 N.R. 241 at para. 21; ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, 2 S.C.R. 559 at para. 26.

[14] The general interpretive directives set out in ***Rizzo*** and ***Bell*** are subject to modification when builders' lien statutes are being interpreted. Specifically, courts are required to adopt a strict interpretation in determining whether a lien claimant is entitled to a lien, and a liberal approach with respect to those to whom the statute applies: ***Ace Lumber Ltd. v. Clarkson Co.***, [1963] S.C.R. 110 at 114, 36 D.L.R. (2d) 554; ***Hett v. Samoth Realty Projects Ltd.*** (1977), 4 A.R. 175 at para. 13, 76 D.L.R. (3d) 362 (C.A.). Builders' liens are business oriented statutes with practical, as opposed to formalistic, goals; their overall intent is to ensure that "the land that receives the benefit shall bear the burden": ***Scratch v. Anderson*** (1909), [1917] 1 W.W.R. 1340 at 1342, 33 D.L.R. 620 (Alta. C.A.); aff'd 44 S.C.R. 86, 1910 CarswellAlta 98; ***Schubert v. A-S4 Steel Ltd.***, 2010 ABCA 62, 474 A.R. 340 at para. 26.

[15] The definition of an owner under section 1(j) requires a lien claimant to establish three elements: 1) the person claimed against must have an estate or interest in the land at issue, 2) that person must have requested the work, expressly or impliedly, and 3) the work must have been done on his credit, with his privity and consent, or for his direct benefit. In this case there is no doubt that the first and third elements are present as 115004 admits that it owns the lands and it directly benefited from the work done. However, the respondent argues that there was no request to the lien claimant or alternatively the lien claimant as described in the lien, i.e. Canbar, did not do the work.

[16] Giving s. 6(1) and the definition of "owner", their plain ordinary meaning gives a person who did work or supplied material for an owner the right to file a lien under the *Act*. Owners caught by this right include owners for whose direct benefit the work was done or the materials were furnished. So long as the owner requested the work anyone who provides materials or services in doing that work is a potential lien claimant. In other words, the *Act* provides a route to the right to a lien that does not involve a contract between the owner and a lien claimant. Nothing in the *Act* requires that the owner have direct dealings with the party who did the work or supplied the materials. In fact, in many instances the owner will not know who actually performed the work or supplied the materials as the owner will have engaged a general contractor that relies on a variety of sub-contractors and suppliers of materials. In this case, the respondent Sure Shot acting as agent for 115044 entered into a written agreement with Can-West Projects Ltd. relating to construction of a facility to be used by Sure-Shot. It cannot argue that it did not request the work and materials that form the basis of this lien.

[17] It also does not matter that the respondents' principal filed an affidavit that he had never heard of Canbar before he received the lien. The real issue is whether Canbar did the work. The only evidence before the chambers judge established that it did. Although it did not exist as a corporation when the work started, it came into being well before most of the work that forms the subject matter of the lien was done. Both English's and Saruga's affidavits confirm that Canbar did the work operating under the trade name it had registered, i.e. "Can-West Projects." Although some of the documentation it submitted was not exactly in that registered trade name, that does not take away from who actually performed the work. Moreover, the fact that the respondent thought someone else was doing the work does not alter the fact that Canbar actually did it.

[18] With respect to the portion of the work preformed before Canbar's incorporation, only the 10% lien hold-back relating to that work forms part of the lien claim. In our view, that part of the work was "adopted" by Canbar after its incorporation. Section 15(3) of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9 (*"ABCA"*) provides:

> (3) A corporation may, within a reasonable time after it comes into existence, by any act or conduct signifying its intention to be bound by it, adopt a written contract made before it came into existence in its name or on its behalf, and on the adoption
>
> (a) the corporation is bound by the contract and is entitled to the benefits of the contract as if the corporation had been in existence at the date of the contract and had been a party to it, and
>
> (b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (5), to be liable under subsection (2) in respect of the contract.

[19] That provision provides two ways in which a corporation may adopt a contract if it was made in its name or on its behalf. In our view, both routes to adoption are made out on the facts of this case. Although the chambers judge relied on the difference between the name in the contract and the name that was incorporated, minor variations in name surely must be included with respect to contracts made in the name of a then non-existent corporation. As stated by Bruce Welling in *Corporate Law in Canada: The Governing Principles*, 3d ed. (Queensland: Scribblers Publishing, 2006) at 292:

> [A] corporation may only adopt a contract that was made 'in its name or on its behalf'. Rarely would the corporate name have been both pre-booked and exactly reproduced in the pre-incorporation negotiations. Where a corporate name was used in negotiations, it isn't clear how much variation from that name can be tolerated. I suppose the distinction between 'X Corp' and 'X Corporation' or 'X Inc" won't cause problems, but if the parties use 'ABC Corp' in negotiations I suggest that the newly incorporated 'XYZ Corp' would have difficulty proving that the negotiations were in its name.

[20] Moreover, s. 15(3) provides a second route to adoption, namely that contracts may be adopted when they are made on behalf of a non-existent corporation. In this case, English deposed that he always intended to incorporate and expected to use the name "Can-West Projects Ltd." He could not use that name because it was already taken and he therefore used the close alternative, "Canbar West". Even if the variation in name is significant enough to make a real difference when considering the "in the name of" route to adoption, the contract is nevertheless capable of being adopted as one that was made on "behalf of" Canbar West. It was always English's intention to use

a corporation in the performance of the work and the respondent has advanced nothing to show how the difference between a hyphen and its spelt-out equivalent affected it.

[21] This leads us to the conclusion that the construction contract was adopted by Canbar. Once it adopted the contract it stepped into the shoes of the party that entered into the contract on its behalf and became entitled to the benefits of the contract as if it had been in existence and a party to it as of the date of the contract. Although the respondents argue they were taken aback when they learned that the corporate entity claiming the lien was Canbar and not Can-West, they were quickly apprised of the facts regarding the name issue and that issue made no difference to them. The chambers judge held that they suffered prejudice because an actual Can-West existed and might take action against the respondents claiming it did the work at issue. This holding ignores the fact that the actual Can-West did not perform any work under the contract and that as of the chambers application was out of time for filing a lien. It also ignores the fact that the real Can-West did not assert any right to a lien, or that it did the work or supplied any materials to the project. This concern is at best artificial.



Conclusion

[22] We conclude that the chambers judge erred in law in his analysis of the issue of whether a the lien was valid. We allow the appeal and declare the lien to be valid and subsisting. We also restore the *Lis Pendens* filed by the appellants. However, given his decision regarding the lien validity, the chambers judge did not deal with other issues relating to judgment for whatever amount may be proved under the lien, interest on that amount, and dismissal, or trial of an issue, respecting the counterclaim filed by the respondent Sure Shot. We therefore direct that these issues be returned to Queen's Bench for determination or direction as provided for in s. 53 of the *Builders' Lien Act*.

Appeal heard on April 1, 2011

Memorandum filed at Edmonton, Alberta
this 5th day of April, 2011

Authorized to sign for: Paperny J.A.

Ritter J.A.

Authorized to sign for: Rowbotham J.A.

**Appearances:**

D.G. Groh, Q.C.
for the Appellants

J.E. McGee, Q.C.
for the Respondents

# TAB 11

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Danielson v. Calgary (City) | 2005 ABQB 55, 2005 CarswellAlta 123, [2005] A.W.L.D. 1023, 28 M.P.L.R. (4th) 103, 29 M.P.L.R. (4th) 103, 364 A.R. 334, [2005] A.J. No. 84, 137 A.C.W.S. (3d) 95 | (Alta. Q.B., Jan 27, 2005)

2002 ABQB 682
Alberta Court of Queen's Bench

Sulphur Corp. of Canada Ltd., Re

2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, [2002] A.W.L.D. 345, [2002] A.J. No. 918, 319 A.R. 152, 35 C.B.R. (4th) 304, 5 Alta. L.R. (4th) 251

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

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.A. 2000, c. B-9

AND IN THE MATTER OF SULPHUR CORPORATION OF CANADA LTD.

Lovecchio J.

Heard: June 19, 2002
Judgment: July 16, 2002
Docket: Calgary 0201-06610

Counsel: *Brian P. O'Leary*, *Q.C.*, for Applicants
*Karen Horner*, for Sulphur Corporation of Canada Ltd.
*Howard A. Gorman*, for Proprietary Industries Inc.

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
**Headnote**
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Company had working capital shortfall of almost $10 million and approximately $9 million of builders' liens had been registered against its assets — Company obtained protection under Companies' Creditors Arrangement Act — Order under Act stayed all actions by creditors and authorized company to borrow $200,000 in debtor in possession financing from major shareholder which would rank in priority to all other creditors — Several builders' lienholders brought application for determination of jurisdiction of court to grant debtor in possession financing charge ranking ahead of registered liens — Company brought application for extension of stay and increase in amount of financing — Court has jurisdiction to grant charge for debtor in possession financing which ranks in priority to liens under Builders Lien Act — Section 11 of Companies' Creditors Arrangement Act provides courts with broad and liberal power to be used to help achieve overall objective of Act, which is to foster restructuring of insolvent companies to preserve and enhance their value for mutual benefit of companies and creditors — No specific limitations were placed on exercise of courts' discretion under s. 11 — Provisions of federal Companies' Creditors Arrangement Act were in conflict with provisions of provincial Builders Lien Act and Companies' Creditors Arrangement Act should prevail — Major shareholder's increased debtor in possession financing proposal was only plan that could result in

  

creation of greater value — Given magnitude of amounts involved, prejudice to lienholders was outweighed by potential benefit for all parties — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11 — Builders Lien Act, S.B.C. 1997, c. 45.

**Table of Authorities**

**Cases considered by *Lovecchio J.*:**

*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — distinguished

*Hunters Trailer & Marine Ltd., Re*, 2001 CarswellAlta 964, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — followed

*Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151, 1995 CarswellBC 369 (B.C. C.A.) — followed

*Royal Oak Mines Inc., Re*, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — distinguished

*Smoky River Coal Ltd., Re*, 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — considered

*United Used Auto & Truck Parts Ltd., Re*, 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — considered

*United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

**Statutes considered:**

*Builders Lien Act*, S.B.C. 1997, c. 45

Generally — referred to

s. 11 — considered

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — considered

s. 11 — considered

s. 11(3) — considered

s. 11(4) — considered

*Court of Queen's Bench Act*, R.S.M. 1970, c. C280

s. 59 — referred to

*Legal Profession Act*, S.B.C. 1987, c. 25

Generally — referred to

*Mechanics' Liens Act*, R.S.M. 1970, c. M80

s. 11(1) — referred to

APPLICATION by builders' lienholders for determination of jurisdiction of court under *Companies' Creditors Arrangement Act* to grant debtor in possession financing charge which would rank ahead of registered liens; APPLICATION by insolvent company for extension of stay and increase in debtor in possession financing.

***Lovecchio J.*:**

**INTRODUCTION**

  

1 This is an application by several builders' lien claimants of Sulphur Corporation of Canada Ltd. to determine whether this Court has the jurisdiction under the *Companies' Creditors Arrangements Act* [1] to grant a debtor in possession financing charge which would rank in priority to their registered liens. In a concurrent application, Sulphur sought an extension of the stay and an increase in the DIP financing of $450,000.

**BACKGROUND**

2 The basic facts in the applications are not in dispute. They are briefly summarized below.

3 Sulphur is a company incorporated under the laws of the Province of Alberta and Proprietary Industries Inc. owns 79.59% of Sulphur's issued and outstanding voting shares.

4 Sulphur's only activity has been to develop and construct a sulphur terminal and processing facility in Prince Rupert, British Columbia. The facility has not been completed and it generates no cash flow.

5 On April 19, 2002, Sulphur obtained protection under the *CCAA* in an *ex parte* application. The Order stayed all actions against Sulphur by all of its creditors for a period of 30 days, named Arthur Andersen Inc. (which firm was subsequently taken over by Deloitte & Touche Inc.) as the Monitor and authorized Sulphur to borrow an amount not exceeding $200,000 from Proprietary to finance the continued activities of Sulphur. This DIP financing was to rank in priority to all other creditors of Sulphur, except those claiming under the Administrative Charge (being primarily the Monitor's fees and disbursements).

6 A number of affidavits have been filed in this matter. Based on these affidavits, it appears the financial position of Sulphur is extremely precarious.

7 Sulphur has a working capital shortfall of $9,751,435.00. On December 7, 2001, Sulphur ceased paying its trade creditors for their work and materials provided for the construction and development of the facility. The trades continued to work on the facility and were not advised by Sulphur that funding from Proprietary had ceased until around January 8, 2002.

8 Approximately $9,000,000.00 of builders' liens have been registered against Sulphur's assets. It would appear these liens were registered in early 2002, and the Applicants represent a total of $6,498,252.98 or 59% of that amount.

9 By the middle of December, 2001, Proprietary had advanced a total of $17,791,338.00 to Sulphur. Of that amount, $1,000,000.00 was advanced as consideration for a share subscription and $1,166,200.00 to exercise Share Purchase Warrants. The balance of the advances, in the amount of $15,625,138.00, was a loan. At the time the loan advances were made only one debenture, securing the first $1,180,000.00 advance under the loan, was issued and despite the requests and the demands of Proprietary, the then existing management of Sulphur failed or refused to execute debentures securing the balance of the advances under the loan, contrary to the commitment of Sulphur to secure all advances.

10 On April 18, 2002, an additional debenture to secure the balance of the indebtedness was issued. Proprietary is the only secured creditor of Sulphur.

11 The only other major creditor of Sulphur is Ridley Terminals Inc. The facility is on leased lands and Sulphur was unable to make its lease payments to Ridley under the Phase-One sublease and the Phase-two sublease for the month of April, 2002. At the time of the initial Order, the total lease arrears owed to Ridley with respect to the lands is $24,966.25. On or about March 20, 2002, Ridley issued a Notice of Default under the subleases to Sulphur.

12 It was also deposed that Proprietary is the only party willing to provide interim financing to Sulphur and that financing would not be provided unless it ranked as a first charge after the Administrative Charge.

13 Pursuant to the Order of Hart. J dated May 16, 2002, the stay of proceedings and all other terms of my initial Order were confirmed and continued until June 19, 2002.

  

14 On June 19, 2002, the Applicants sought an order to vary the DIP financing provisions of my initial Order, such that the DIP financing be ranked as a secured charge but after their claims.

15 During this hearing, I further extended the May 16 Order until July 19, 2002 and increased the DIP financing, allowing an additional $200,000 to be borrowed from Proprietary. Despite Proprietary's earlier position, Proprietary consented to lend this additional amount, notwithstanding my ruling that the priority of these additional funds and the original funds could be varied depending on the answer given to the jurisdictional question raised by the Applicants.

**ISSUE**

16 The only real issue still to be determined in this application is the following:

> Does this Court have the jurisdiction to grant a charge under the ***CCAA*** to secure a DIP financing which ranks in priority to a statutory lien under the under the ***Builders Liens Act***[2] of British Columbia?

**DECISION**

> This Court has the jurisdiction to grant a charge under the *CCAA* to secure a DIP financing which ranks in priority to a statutory lien under the under the *BLA* of British Columbia.

**ANALYSIS**

***Position of the Applicants***

17 The Applicants argues that s. 32(2) of the *BLA* establishes a priority for liens over all other charges, except those listed, and a charge to secure a DIP financing is not listed. As a result, the Applicants argue there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

18 The Applicants also contend that the *CCAA* contains no specifically enunciated statutory basis for the Court to grant a charge to secure a DIP financing which ranks in priority to the statutory liens of the builders' lien claimants. They do not dispute that the Court has the inherent jurisdiction to grant a security interest in certain circumstances but they maintain this contest comes down to the Court's inherent jurisdiction (an equitable power) versus an express provincial statutory provision and as such it falls outside of the limited purview of the paramountcy doctrine.

***Position of the Respondent***

19 The Respondent argues that s. 32(2) of the *BLA* only establishes a priority for liens over advances by a mortgagee, under a registered mortgage, and a DIP financing is not a registered mortgage. As a result, the Respondent argues there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

20 If that position is not maintained, then the Respondent disagrees with the Applicants' submission that this is a contest between the Court's equitable power versus an express statutory priority provision. The Respondent submits there is a statutory basis for the initial Order and, as a result, if there is a conflict between the charge and the liens, then the charge created under the *CCAA* being a federal statute, is paramount to liens provided for in the *BLA* being a provincial statute. The Respondent relies on ss. 11(3) and 11(4) of the *CCAA* as the statutory provisions which empower the Court to create the charge.

***Discussion***

***The BLA Statutory Interpretation Argument***

21 Section 32 of the *BLA* states the following:

  

> 32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.
>
> 32(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

22 If the circumstances of this case did not give rise to a paramountcy issue, s. 32 of the *BLA* would govern. Clearly, the DIP financing is not a registered mortgage and the validly registered builders liens would have priority. (See discussion on *Baxter* below).

***The Paramountcy Argument and the Jurisdiction of the Courts***

23 Sections 11(3) and 11(4) of the *CCAA* read as follows:

> 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, . . . [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Hunters Trailer & Marine Ltd., Re.*[3] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the *CCAA* and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

26 In discussing the objective of the *CCAA*, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors . . .

At para 18:

> I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.), at 146 that:" . . . the *CCAA*'s effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

Finally, at para. 51

  

> As I have indicated above, I am of the view that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative costs, including those of the monitor and professional advisors of the debtor company. While this jurisdiction is invoked when an initial application is made under the *CCAA*, the Court is not limited to granting a priority only for those costs which arise after the date of the application or initial order. So long as the monies were reasonably advanced to maintain the status quo pending a *CCAA* application or the costs were incurred in preparation for the *CCAA* proceedings, justice dictates and practicality demands that they fall under the super-priority granted by the Court. To deny them priority would be to frustrate the objectives of the *CCAA*.

27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Smoky River Coal Ltd., Re*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s.11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the *CCAA*. It is within this context that my initial Order and the June 19 Order were based.

29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. In that case, Farley J., held that s. 11 of the *BLA* eliminated the Court's inherent jurisdiction to grant a super-priority DIP order over validly registered builders' liens. Farley J. did not even consider s. 32 of the *BLA*. His decision was based solely on s. 11 of the *BLA*, which is not at issue in the case at hand.

30 In *Royal Oak Mines Inc.*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the ***Court of Queen's Bench Act***[7], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the ***Mechanics' Liens Act***[8], also a provincial statute.

32 I have the greatest of respect for my colleague from Ontario but, in this case s. 11 of the *BLA* was not invoked by the Applicants and in the final analysis I would see the matter differently. In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the *CCAA*, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

34 In *United Used Auto & Truck Parts Ltd., Re*[9], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-

  

> priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over *CCAA* relief. I do not think that Parliament intended that the objects of the *Act* could be indirectly frustrated by secured creditors.

35 Parliament's way of ensuring that the *CCAA* would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

***Paramountcy***

37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the *CCAA*, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the *BLA*.

38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*[10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal *CCAA* and the *Legal Professions Act* of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the *CCAA*, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the *CCAA* "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

***The Exercise of That Discretion***

39 Sulphur has a working capital deficiency of over $9,000,000. Proprietary had ceased funding construction. Given the registered liens and the security position of Proprietary, funding from any other third party, other than Proprietary, is an illusion. Sulphur would have no chance to recover or restructure but for the provision of some interim financing to permit an assessment of where it goes, if anywhere at all, other than into bankruptcy.

40 When a Court chooses to grant a stay order under s. 11 of the *CCAA*, a significant portion of the order must address how costs will be covered for ongoing operations, the assessment process and the formation of a meaningful plan of arrangement.

41 A balancing of the interests of all of the stakeholders is involved. The Court must proceed with caution throughout this entire process.

42 Wachowich C.J.Q.B. affirmed the test set out by Tysoe J, in *United Used Auto & Truck Parts Ltd., Re* [(1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])], that there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the parties whose position is being subordinated.

43 In this case, a determination of priorities is not before me but, from the record, the following appears to be the lineup. Prior to insertion in the line of the Administrative Charge and the DIP financing, Proprietary appears to have a secured position of $1,180,000, there are registered liens of approximately $9,000,000 and then the balance of the secured position of Proprietary. In addition, the landlords position of roughly $25,000 must be fit into the equation.

44 This facility has not been completed and, until it is, any cash flow is a pipe dream. Someone must come up with a plan to reorganize this unfortunate situation as a simple sale of the unfinished facility will, in all likelihood, yield the least in dollars for all to share.

  

45 There is conflicting evidence on what the plant may be worth. This is partly driven by the method chosen (liquidation vs. going concern, and who is preparing the report). The highest number for a completed facility is $23.3 million to $24.2 million and on an uncompleted basis it may be as low as $1.00.

46 The best chance for the lienholder's to be paid is likely on completion as a liquidation appears to lead to a shortfall even for them. I realize that I have potentially eroded their position by $400,000 with the DIP financing in a liquidation scenario. However, that money is coming from Proprietary and they are the ones who have the greatest interest in seeing value created and at this point they are also the only ones who will finance a scheme that might see the creation of greater value.

47 In my view given the magnitude of the numbers we are dealing with, at this stage the prejudice to the lienholder's is outweighed by the potential benefit for all concerned.

48 Having said that, I wish to add that all future applications which would seek to amend or vary the DIP financing in any way will receive the Court's careful scrutiny. Sulphur will be obligated to file evidence demonstrating that the DIP financing would have the impact of increasing the value of the facility so as to avoid any further erosion of the lienholder's position.

**CONCLUSION**

49 For the foregoing reasons, I answer the jurisdictional question posed in the affirmative.

**COSTS**

50 The issue of costs may be spoken to at a latter date if Counsel wish.

*Order accordingly.*

Footnotes

1 R.S.C. 1985, c. C-36.

2 R.S.B.C. 1997, Chapter 45.

3 (2001), 94 Alta. L.R. (3d) 389 (Alta. Q.B.).

4 (Alta. C.A.).

5 (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

6 (1975), [1976] 2 S.C.R. 475 (S.C.C.).

7 R.S.M.1970, c. C280.

8 R.S.M. 1970, c. M80.

9 (2000), 16 C.B.R. (4th) 141 (B.C. C.A.).

10 (B.C. C.A.)

# TAB 12

# In the Court of Appeal of Alberta

**Citation: Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd., 2009 ABCA 240**

**Date:** 20090625
**Docket:** 0803-0135-AC
0803-0136-AC
**Registry:** Edmonton



**Appeal No. 0803-0135-AC**

**Between:**

**Kerr Interior Systems Ltd. and Composite Building Systems Inc.**

Respondents
(Debtors)

- and -

**Kenroc Building Materials Co. Ltd.**

Appellant
(Creditor)

**Appeal No. 0803-0136-AC**

**And Between:**

**Kerr Interior Systems Ltd. and Composite Building Systems Inc.**

Respondents
(Debtors)

- and -

**Superior Plus LP, and Winroc, a division of Superior Plus LP**

Appellant
(Creditor)

---

**The Court:**

**The Honourable Mr. Justice Ronald Berger**
**The Honourable Mr. Justice Clifton O'Brien**
**The Honourable Mr. Justice Jack Watson**

**Reasons for Judgment Reserved of the Honourable Mr. Justice O'Brien**
**Concurred in by the Honourable Mr. Justice Berger**

**Reasons for Judgment Reserved of The Honourable Mr. Justice Watson**
**Dissenting in Part**

Appeal from the Judgment by
The Honourable Madam Justice M.B. Bielby
Dated the 16th day of May, 2008
Filed on the 16th day of May, 2008
(2008 ABQB 286, Docket: 0703-14357)

**Reasons for Judgment Reserved of**
**The Honourable Mr. Justice O'Brien**

## Introduction

[1] I have had the advantage of reading a draft of the judgment prepared by Watson J.A., which fairly sets out the factual context, and identifies the issues in this appeal. I agree that the appeal of Winroc should be allowed for the reasons given by him. However, I would also allow the appeal of Kenroc, on the ground that it also was a beneficiary of the statutory trust created by the Saskatchewan legislation.

## Facts

[2] Briefly, the background of these two related appeals is as follows: Kenroc Building Materials Co. Ltd. (Kenroc) and Superior Plus LP and Winroc, a division of Superior Plus LP (collectively, Winroc) appeal the chambers judge's decision sanctioning a Plan of Arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), proposed by the respondents, Kerr Interior Systems Ltd. (Kerr) and Composite Building Systems Inc. (Composite).

[3] Kenroc and Winroc both supplied building materials to Kerr for a construction project in Saskatoon owned by 101051911 Saskatchewan Ltd. (101). Kerr and Composite encountered financial difficulties and initiated proceedings under the CCAA. On November 7, 2007, they were granted a Protection Order under the CCAA. At the time of that order, 101 owed Kerr money, while Kerr owed money to both Winroc and Kenroc for building materials, all in relation to Second Avenue Lofts, the Saskatoon construction project (the project).

[4] On November 6, 2007, the day before the Protection Order was granted, Winroc filed a builder's lien against the property owned by 101 in the amount of $46,425.26. On November 14, 2007, Kenroc filed a builder's lien against the property owned by 101 in the amount of $103,236.95. No other creditors filed liens. On January 18, 2008, 101 paid $150,000.00 into court in Saskatchewan as security for the builder's liens, which were discharged from title without prejudice to Kerr's legal position. The funds paid into court by 101 came out of the amount owing by 101 to Kerr for work performed on the project.

[5] The proposed Plan of Arrangement listed Kenroc and Winroc in the class of unsecured creditors with all other creditors.

[6] Kenroc and Winroc opposed court approval of the Plan on the basis that they were secured creditors based on their status as holders of valid builders' liens or trust claims. The chambers judge sanctioned the Plan, concluding that Kenroc and Winroc were not secured creditors under the CCAA because that status is only created when there is a lien against the debtor's property, and the liens filed by Kenroc and Winroc were against 101's property. Nor did Kenroc and Winroc's trust claims fall within the definition of secured creditor under the CCAA as they were merely statutory or

"deemed" trusts that did not attach to a traceable or existing asset belonging to the debtors at the time the original stay was granted.

**Legislation**

[7] The definition of a secured creditor under section 2 of the CCAA includes the beneficiary of a trust in respect of all or any property of the debtor companies, in this case Kerr and Composite. Section 2 provides:

> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds

[8] The governing provisions of the Saskatchewan *Builders' Lien Act*, S.S. 1984-85, c. B-7.1 (S.B.L.A.), are as follows:

> 6(1) All amounts received by an owner, other than the Crown, that are to be used in the financing of an improvement, including the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.
>
> (2) Where the owner provides his own capital or where the owner is the Crown, and where amounts become payable under a contract to a contractor, the moneys in the hands of the owner or received by him for payment under the contract at any time thereafter constitute a trust fund for the benefit of the contractor.
>
> (3) Where the owner's interest in an improvement is sold by the owner, an amount equal to the positive difference between:
>
> > (a) the value of the consideration received by the owner as a result of the sale; and

> (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any encumbrances which are entitled to priority under this Act;
>
> constitutes a trust fund for the benefit of the contractor.
>
> (4) The owner is the trustee of the trust fund created by subsections (1) to (3), and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.
> ...
>
> 7(1) All amounts:
>
> (a) owing to a contractor, whether or not due or payable; or
>
> (b) received by a contractor;
>
> on account of the contract price of an improvement constitute a trust fund for the benefit of:
>
> (c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and
>
> (d) labourers who have been employed by the contractor for the purpose of performing the contract.
> ...
>
> 33 Every lien is a charge on the holdback required to be retained by section 34, and subject to subsection 28(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.

**Analysis**

[9] Kenroc's position must be assessed, of course, at the date of the stay, namely, November 7, 2007. Neither the subsequent filing of its lien, nor the payment into court, can improve its entitlement.

[10] As at November 7, 2007, 101 owed Kerr the amount of $302,922.09 for materials and services provided to the project. As of that date, Kerr owed Kenroc $103,236.95 for materials supplied to the project.

[11] I interpret section 6(2) of the S.B.L.A. to impose a trust for the benefit of Kerr, with respect to the amount of $302,022.09 owed by 101 to Kerr. Thus, Kerr had an equitable interest in this trust fund.

[12] I further interpret section 7(1) of the S.B.L.A. to mean that the amount of $302,022.09 owed to Kerr was impressed with a trust for the benefit of Kenroc, among others, as a subcontractor.

[13] Accordingly, there was what may be called a double trust. Kerr had a trust interest in the monies owed by 101, and Kenroc had a trust interest in the monies owed to it by Kerr, which interest was secured by the first trust.

[14] These trust interests were not dependent upon the filing of a lien and, survived, even if a lien was not registered within the appropriate time frame: *Arthur Anderson Inc. v. Merit Energy Ltd.*, 2004 SKCA 124, [2005] 4 W.W.R. 603, paras. 32-34. In that case, the Saskatchewan court concluded at para. 34:

> Section 20 codifies the law contained in *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Manufacturing Co.* [[1995] S.C.R. 694]. In that case, it was argued that a potential lien claimant lost not only the right of lien but the rights conferred upon him under the trust provisions, if he or she failed to register. The Supreme Court of Canada rejected this idea and held that the rights of the trust beneficiary are unimpaired by the lapse of the right to claim a lien.

[15] I do not think it necessary to rely in this case upon section 33 of the S.B.L.A., which creates a charge on the holdback; however, that section confirms the intent of the legislation to grant lien claimants a secured position.

[16] In short, Kenroc's equitable interest in the monies owed to it by Kerr constituted a trust in respect of the property of Kerr, being the latter's equitable interest in the monies owed to it by 101, such as to constitute Kenroc a secured creditor within the meaning of section 2 of the CCAA. The trust attached to the contractor's receivable, which is property of the contractor, and thereby falls within the CCAA definition of secured creditor.

[17] The filing of the lien was not necessary to perfect the trust obligation, which was independent of the lien. The amount owed to Kenroc was ascertainable as at November 7, 2007. It was the amount of $103,236.98, and that is the extent of the trust interest (subject to adjustments). The determination of the exact amount owing under a secured instrument on a given date is commonplace and does not create any uncertainty.

[18] The trust fund obligation was "reasonably ascertainable" at the material date. In *British Columbia v. Henfrey Samson Belair Ltd*, [1989] 2 S.C.R. 24, McLachlin J., as she then was, speaking for the majority, stated at para. 19 that whether a statute created a trust depends on the facts of the particular case. She added that if the money collected is "identifiable or traceable", then a trust within the ordinary meaning of that term should be given effect. Here, pursuant to the Saskatchewan statute, the monies owed by 101 to Kerr, and in turn owed by Kerr to Kenroc, are impressed with a trust. All of these amounts were readily ascertainable or identifiable as at November 7, 2007.

[19] My colleague refers in his judgment to other subcontractors of Kerr who might have filed liens but did not so do. I question the relevance of this concern. In the first place, there was no evidence of any trusts with respect to the monies owed by 101 to Kerr, relative to the subject project, except for the claims of Kenroc and Winroc. While the Monitor had envisaged other potential liens against Kerr, he could not say whether those potential claims arose with respect to the subject Saskatchewan project, or other projects being supplied by Kerr. In any event, no other creditor advanced a trust claim. If another creditor could establish a trust claim, then it should have filed proof in accordance with the applicable Claims Procedure.

[20] I am reluctant to construe the CCAA to defeat the trust obligations imposed by the Saskatchewan legislation in favour of subcontractors. Nor is there any reason to interpret the Saskatchewan statute in a narrow and strict manner. This is not colorable legislation. The legislation gives these trusts a broad and early scope.

[21] The purpose of the Saskatchewan legislation is to ensure that subcontractors are secured, at least to a minimal extent, and that they obtain payment to that extent before general creditors. I resist any attempt to carve up the statute into little parts – it is all one scheme designed to protect subcontractors. As pointed out by Winroc, the suppliers rely upon the protections provided by the statute in their assessment of credit risk. While the definition of secured creditor in the federal statute must prevail, there is no need here to construe it in a fashion that strips the protections at a time when the suppliers most need it; i.e., in dealing with the insolvent contractors, such as Kerr.

**Conclusion**

[22] The appeals both of Winroc and Kenroc are allowed. Their secured claims are both directed to be dealt with in the manner outlined by Watson J.A., respecting the Winroc trust claim.

Appeal heard on April 1, 2009

Reasons filed at Edmonton, Alberta
this 25th day of June, 2009

O’Brien J.A.

I concur:

Berger J.A.

**Watson J.A. (dissenting in part):**

**Introduction**

[23] These appeals relate to the same essential question, namely whether a chambers judge erred in sanctioning a Plan of Arrangement under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") respecting the respondents ("Kerr" and "Composite"). That Plan did not (a) recognize a secured creditor status that the appellants ("Winroc" and "Kenroc") asserted for themselves, nor (b) give Winroc and Kenroc a separate voting class on the Plan, nor (c) give Winroc and Kenroc a priority claim to the money paid into court.

[24] The Plan put Winroc and Kenroc into a class with other unsecured creditors of Kerr and Composite. As such, they would receive less than 100% on their claims, like others in that creditor class. The chambers judge approved the Plan: (2008), 91 Alta. L.R. (4th) 202, [2008] A.J. No. 547 (QL), 2008 ABQB 286 (the "Reasons").

[25] Winroc and Kenroc say they had valid and effective builders' liens and / or trust claims against money which had been paid into court. That money had been paid into court by a third party, 101051911 Saskatchewan Ltd. ("10105"), in order to vacate builders' liens filed by Winroc and Kenroc against 10105's land improvement project in Saskatoon. Winroc and Kenroc had supplied materials to Kerr and Composite, which had in turn worked on 10105's project. Winroc and Kenroc read the Saskatchewan *Builders' Lien Act*, S.S. 1984-85-86, c. B- 7.1 ("SBLA") to say they had a secured claim against Kerr upon that money being paid into court.

[26] In addition to claiming priority to the money in court (which would only cover part of their claims against Kerr), Winroc and Kenroc also say that their special position put them into their own special creditor class and thus entitled them to separate voting rights under the Plan of Arrangement pursuant to sections 4, 5 and 6 of the CCAA. As their own special creditor class, Kenroc and Winroc could influence the Plan because the chambers judge held that, under s. 6 of the CCAA, she could only sanction the Plan with majority support from every class. The chambers judge did not find them entitled in priority to either the funds paid into court or as a separate creditor class. She agreed with Kerr, Composite and their CCAA Monitor that they belonged in the unsecured creditors' class where they were outvoted such that the Plan of Arrangement was accepted.

[27] Winroc and Kenroc alternatively submit that, even if they were not entitled to be in a special class, the Plan of Arrangement was not fair and reasonable as it did not ensure that they got paid 100% of their lien claims out of the money deposited in court. The chambers judge did not agree. Although I agree with aspects of the chambers judge's reasoning, I also agree in part with Winroc's position, and would allow the appeal but only to that extent. My colleagues go further and, for well expressed reasons, allow Kenroc's appeal also.

**Context**

[28] Kenroc and Winroc supplied building materials to Kerr which were said to be part of Kerr's contribution to 10105's construction project called "2nd Avenue Lofts" in Saskatoon. Composite pre-fabricated special walls, while Kerr installed special walls, ceilings, floors and partitions. Composite and Kerr found themselves in financial difficulty in 2007 in part by having given fixed price bids on projects in an era of rapidly escalating labour and material costs. Realizing their predicament, Composite and Kerr sought support of their banker, the Royal Bank of Canada, and their major secured creditor, Co-operators Investment Counselling Ltd., in arranging a compromise of their debts so that they could complete their contracts (including that with 10105) and stay in business.

[29] On November 6, 2007, Winroc filed a builders' lien under the SBLA against 10105's Saskatoon project claiming $46,425.26. Winroc says that Kerr owed approximately $170,000.00 more to Winroc than was covered by the lien.

[30] On November 7, 2007, the chambers judge granted an order under the terms of the CCAA staying any "proceeding or enforcement process in any court or tribunal" as well as "the taking of any self-help or enforcement process in any court or tribunal" and "the taking of any self-help or seizure remedies" except with leave of the Court.

[31] On November 9, 2007, Winroc also sued Composite in Alberta Court of Queen's Bench for $138,749.27. On November 14, 2007, Kenroc filed a builders' lien against the 10105 project for $103,236.95. On January 28, 2008, 10105, which owed Kerr $302,022.09 at the time, paid $150,000.00 into the Saskatchewan Queen's Bench to discharge the liens filed by Winroc and Kenroc but without prejudice to Kerr's legal position.

[32] Kerr continued to work on their contracts on a cash flow basis that not expand their debts and indeed, reduced their debt. Kenroc continued to supply materials to Kerr for the 10105 project and had been paid $223,000.00 by Kerr since the stay order.

[33] The Plan of Arrangement placed before the chambers judge in April, 2008, would have seen 34 unsecured creditors receive 52% of the debt owed to them by Kerr and / or Composite, thus to settle approximately $5,000,000.00 of debt for about $2,600,000.00. Kenroc and Winroc were put in the unsecured creditors class under the Plan. The Monitor opined that six other members of that class also potentially had similar lien or trust claims. It calculated the total claims of eight such parties (including Winroc and Kenroc) was $574,536.51. Of the eight creditors the Monitor felt might be better off under a lien fund, six of them voted for the Plan. Of the unsecured creditors class, 92% in number and 91% in value voted in favour of the Plan of Arrangement.

**Legislation**

[34] The chambers judge found it unnecessary to determine whether there was any conflict between the CCAA and SBLA in this case: Reasons, paras. 26 to 31. No party served a notice to challenge the reach of either statute on grounds of paramountcy or of inter-jurisdictional immunity. None of the Attorneys General of Canada, Saskatchewan or Alberta participated in the submissions before her nor before us. The CCAA has been recognized as an exercise of the federal insolvency power for decades: ***ATB Financial v. Metcalfe & Mansfield Alternative Investment II Corporation*** (2008), 92 O.R. (3d) 513, [2008] OJ. No. 3164 (QL), 2008 ONCA 587 at paras 102 - 104. The CCAA is not oblivious to provincial legislation but, as pointed out in ***R. v. Henfrey Samson Belair Ltd.,*** [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78 (QL) at para 21: "[t]he provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*" ([1985] 1 S.C.R. 785, [1985] S.C.J. No. 35 (QL)). We need not decide if there is any conflict between CCAA and SBLA.

[35] Kenroc and Winroc submit that the SBLA helps them claim the status of either a secured creditor or another special class of creditor through s. 2 of the CCAA. Kenroc and Winroc offer an alliance of the SBLA and CCAA, not an opposition. The CCAA definitions are at the heart of the case, since the court is evaluating a Plan of Arrangement involving corporations under the CCAA. The chambers judge did not read down the relevant terms of the SBLA when deciding that they did not put Kenroc and Winroc into a special class under s. 2 of the CCAA, nor will we.

[36] Section 2 of the CCAA defines a secured creditor as follows:

> "secured creditor" *means a holder of a* mortgage, hypothec, pledge, *charge, lien* or privilege on or against, or any assignment, cession or transfer of, all or *any property of a debtor company as security for indebtedness of the debtor company*, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, *or a trust in respect of, all or any property of the debtor company*, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; [emphasis added]

[37] Kenroc and Winroc assert that they are either lien holders or trust beneficiaries under this definition by operation of the SBLA. Section 7 of the SBLA provides:

> 7(1) All amounts
>
> (a) owing to a contractor, whether or not due or payable; or
>
> (b) received by a contractor;

> on account of the contract price of an improvement constitute a trust fund for the benefit of:
>
> (c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and
>
> (d) labours who have been employed by the contractor for the purpose of performing the contract.
>
> (2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor.

[38] Section 15 of the SBLA sets out a priority for the trust in the context of the SBLA. Section 20 of the SBLA says the trust exists even if a lien registration deadline is missed. Sections 22(1) and 33 of the SBLA also provide:

> 22(1) A person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.
>
> *****
>
> 33 Every lien is a charge on the holdback required to be retained by section 34, and subject to section 28(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.

[39] Various procedures respecting assertion of a lien are set out in the SBLA. Section 56(1) of the SBLA provides for payment into court by "any person" of the "full amount" owing "in any registered claim of lien" to vacate the lien.

[40] Kenroc and Winroc say the foregoing provisions establish their rights both as lien holders and as beneficiaries of a trust. Kenroc and Winroc also suggest the reference to a "charge" under s. 33 also applies to assist them.

[41] A claimant who is not a secured creditor is an "unsecured creditor" under s. 2 of the CCAA: Reasons, para. 36. Kenroc and Winroc's alternative position is that, even if they fell into an unsecured creditor class, they would still be distinct from the other unsecured creditors having regard to the factors set out in ***Re: Canadian Airlines Corporation*** (2000), 265 A.R. 201, [2000] A.J. No. 771 (QL), 2000 ABQB 442, at para. 96 and ***Resurgence Asset Management LLC v. Canadian Airlines Corporation*** (2000), 261 A.R. 120, [2000] A.J. No. 610 (QL), 2000 ABCA 149 at para. 27; see also ***Sovereign Life Assurance Company v. Dodd***, [1892] 2 Q.B. 573 (Eng. C.A.) and ***Re: Stelco Inc***. (2005), 15 C.B.R. (5th) 307, [2005] O.J. No. 4883 (QL), at paras. 23 - 36.

**Standard of Review**

[42] There are no material facts in dispute. Extricable questions of law as to interpretation of the CCAA and SBLA are reviewed for correctness. If correct on statutory construction principles, the chambers judge exercised judgment in deciding if Winroc and Kenroc be recognized as a special class in order to make the plan "fair and reasonable" or to reflect differences between them and other unsecured creditors in light of the factors in ***Canadian Airlines***, ***Resurgence*** and ***Stelco Inc***. On those latter questions, judgment and discretion is involved and a reasonableness standard should apply: see ***BCE Inc, et al. v. 6796508 Canada Inc., et al.***, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37 (QL), 2008 SCC 69 at para. 161; ***ATB Financial***, *supra* at paras. 106 - 120; ***New Skeena Forest Products Inc. v. Kitwanga Lumber Company*** (2005), 39 B.L.C.R. (4th) 338, [2005] B.C.J. No. 671 (QL), 2005 BCCA 192 at para. 20; ***Luscar Ltd. v. Smoky River Coal Ltd.*** (1999), 237 A.R. 326, [1999] A.J. No. 676 (QL), 1999 ABCA 179 at paras. 61 - 72; ***Re: Keddy Motor Inns Ltd.*** (1992), 90 D.L.R. (4th) 175, [1992] N.S.J. No. 98 (QL), at para. 44. As noted in ***BCE***, there is no such thing as a perfect Plan of Arrangement: para. 155.

**Reasons of the Trial Judge**

[43] The chambers judge was aware that compliance with the CCAA was necessary to justify approval of a Plan of Arrangement.

[44] As to the lien claims, she held that Kenroc's and Winroc's builders' liens were filed against 10105's project, and thus did not constitute a lien against Kerr's property. Kenroc and Winroc contest this finding by saying that inasmuch as 10105 paid $150,000.00 into court to get their liens discharged, the $150,000.00 paid into court was effectively paid by 10105 to Kerr (as money in excess of that was owed to Kerr). Since it was paid to discharge Kenroc's and Winroc's liens on 10105's project, they suggest that the lien fund was property which was controlled by Kerr as money owed to Kerr. They say it was therefore transfixed by their lien claims or by their trust claims for the purposes of giving them secured creditor status over it even if the amounts specified in the lien documents covered only what was paid into court and was only part of their overall claims against Kerr and Composite.

[45] The chambers judge held that before the money was paid into court by 10105, it was 10105's property, albeit that 10105 owed money to Kerr. She noted that the money was paid into court under a Saskatchewan Court of Queen's Bench order dated January 18, 2008 that said Kerr's consent "shall not prejudice the legal position of Kerr" respecting the liens, their propriety or amounts owing. The order recited that those issues are "properly dealt with under Kerr's *Companies Creditors Arrangement Act* proceedings in Alberta": Reasons, para. 45.

[46] In other words, she held that the Saskatchewan order did not purport to recognize or grant any special attachment to the money paid into court merely because the order was to vacate builders' liens affecting 10105's project. Moreover, the money was paid in after the chambers judge's stay order was in place, so it could not be said that the Alberta Court of Queen's Bench had purported to approve an attachment of that money favouring any specific creditor. Further still, Kenroc's builders' lien was also filed after the stay order. Such "self-help" by Kenroc was, in her view, barred by the stay order and was conduct itself inconsistent with the philosophy and purposes of the CCAA: Reasons, paras. 50 - 53, citing ***Alternative Fuel Systems Inc. v. Remington Development Corporation*** (2004), 346 A.R. 28, [2004] A.J. No.60 (QL), 2004 ABCA 31, at paras. 54 - 55; ***Re: Scaffold Connection Corporation***, [2000] 7 W.W.R. 516, [2000] A.J. No. 115 (QL), 2000 ABQB 33 at para. 22.

[47] Orders aside, the chambers judge was satisfied that the CCAA process would have to decide how to dispose of that money in court. While in court and subject to court proceedings, she was not persuaded that the money was Kerr's property or had it been unconditionally transferred or paid to Kerr: ***D & K Horizontal (1998) Ltd. (Trustee Of) v. Alliance Properties Ltd.*** (2002), 216 Sask. R. 199, [2002] S.J. No. 152 (QL), 2002 SKQB 86 at para. 19; ***Climenhaga v. Canada***, [2008] A.J. No. 1180 (QL), 2008 ABQB 340 at para. 215; see also ***Stone Sapphire Ltd. v. Transglobal Communications Group Inc.***, [2009] A.J. No. 341 (QL), 2009 ABCA 125 from (2008) 96 Alta. L.R. (4th) 187, [2008] A.J. No. 1036 (QL), 2008 ABQB 575 (see paras. 11 - 39). The money was not paid into court by Kerr, nor were the original liens filed against Kerr's real property as in ***Deloitte & Touche Inc. v. Merit Energy Ltd.*** (2004), 254 Sask. R. 161, [2004] S.J. No. 585 (QL), 2004 SKCA 124.

[48] The chambers judge rejected a companion contention that s. 22(1) of the SBLA created a lien right against the money in court, because, by its terms, the lien only applied to "the estate or interest of the owner in the land". There was evidence before the chambers judge that 10105 was "the owner" of the land for this purpose at the time the liens were filed: Reasons, para. 54 to 55.

[49] The chambers judge held, in light of the order of January 18, 2008, that the statutory trust created by s. 7 of the SBLA was effective as of November 7, 2007: Reasons, para. 58. As of November 7, 2007, 10105 owed money to Kerr in excess of $150,000.00. Kenroc and Winroc say Kerr was a "contractor" within the meaning of s. 7(1)(a) of the SBLA as of November 7, 2007. As such, they say that Kerr was trustee of a trust fund that arose under s. 7(1) whether or not the liens had yet been filed and that Kerr was not entitled to "appropriate or convert any part of the trust fund

to his own use or to any use inconsistent with the trust". The chambers judge, however, found that Kerr never received the $150,000.00 into its possession, nor did Kerr do anything with respect to its account receivable claim against 10105 or the $150,000.00 which was an appropriation or conversion of the trust fund. Kerr consented, without prejudice, to a Queen's Bench order whereby 10105 paid into court $150,000.00, recognizing that it, 10105, owed money to Kerr. By paying in, 10105 would obtain release of the liens and leave it to Kerr and the lienholders to deal with the validity of the lien claims.

[50] The chambers judge was apparently not persuaded that paying the money into court by 10105 constituted wrongful interference with the "goods of another" such as to constitute a "conversion" by Kerr of the $150,000.00: see ***373409 Alberta Ltd. (Receiver of) v. Bank of Montreal***, [2002] 4 S.C.R. 312, [2002] S.C.J. No. 82 (QL), 2002 SCC 81 at para. 8; ***Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce***, [1996] 3 S.C.R. 727, [1996] S.C.J. No. 111 (QL) at para. 31. She did not mention the term "appropriation" but, under her reasoning, Kerr did not appropriate since Kerr never received the money. I read her decision to be that Kerr did not take, use or destroy the $150,000.00 in a manner inconsistent with the "owner's right of possession" because Kerr did not receive the money and, once paid into court, Kerr did not control the money. The chambers judge found that no trust was impressed on that money: Reasons, para. 65.

[51] The chambers judge opined that in order for the statutory trust under s. 7(1) of the SBLA to function as a trust under s. 2 of the CCAA at the time of the Court's CCAA intervention, there had to be an "identifiable asset which forms the subject matter of the trust" relying *inter alia* on ***Henfrey Samson Belair***: Reasons, para. 65(b). In her view, by the time the specific fund of money arrived in court, it was not subject to an identifiable trust in favour of Winroc and Kenroc even if it was akin to a partial payment of a quantity of accounts receivable held by Kerr against 10105.

[52] Finally, the chambers judge rejected the submission that Winroc and Kenroc deserved their own special class even if not secured creditors: Reasons, para. 56 and paras. 80 - 88.

**Analysis**

[53] I would separate the topic of liens from the topic of statutory trusts and deal with trusts first.

**Trust Claims**

[54] On the premise accepted by the parties that Kerr was a contractor and that 10105 owed Kerr money within the meaning of s. 7(1) of the SBLA for work to which the appellants contributed as sub-contractors, the statutory trust under s. 7(1) of the SBLA might be impressed on the receivables to which Kerr is entitled "on account of the contract price of an improvement" whether or not the amount owing was "due and payable". By the terms of s. 7(1) of the SBLA, a court would have to decide if 10105 owed Kerr for work on the improvement and if what 10105 owed Kerr was for a contract price inclusive of "materials or services to the contractor" by the sub-contractor claiming

the trust. The policy behind this seems clear enough: it would encourage companies in the position of Kerr to be scrupulous about their accounts receivable and not to appropriate or convert them to the disadvantage of the sub-contractors with whom they have privity of contract for work on the specific contract.

[55] Winroc and Kenroc seek a finding that Kerr's receivables from 10105 were impressed with a trust in their favour in the amount of their liens, and that this trust continued to be attached to the $150,000.00 paid into court. Winroc and Kenroc would have to do more than identify what 10105 owed Kerr respecting the Saskatoon project in order to eventually prove that they were beneficiaries even of the statutory trust against Kerr's receivables from 10105. Winroc and Kenroc would have to quantify their contribution to Kerr's efforts on the Saskatoon project in order to identify a "trust fund" out of what Kerr was entitled to be paid by 10105 on that project. The SBLA facilitates this quantification of the trust fund by allowing sub-contractors to specify amounts owing by way of lien claims. This does not mean that the trust or lien does not exist in a legal sense prior to the specification of the quantum by the filing of the lien. However, the trust fund contemplated by s. 7(1) of the SBLA becomes identifiable for the purposes of s. 2 of the CCAA in favour of a specific claimant sub-contractor from out of the general world of receivables held by a contractor only when it has been particularized sufficiently to fit the language of s. 7(1) of the SBLA and the proper reading of s. 2 of the CCAA.

[56] If the Legislature of Saskatchewan intended that the statutory trust not require, for the purposes of an effective marriage with s. 2 of the CCAA, at least some measures of certainty contemplated by Donovan Waters, in *Waters' Law of Trusts in Canada*, 3rd Ed., [Toronto: Thomson Carswell, 2005] at p. 149, it did not say so expressly by the terms of s. 7 of the SBLA. On the other hand, the Legislature appears clearly to have intended to assist and protect sub-contractors by imposing a generalized trust obligation upon the general cash flow of contractors to prevent contractor mischief and to help guard the sub-contractors ability to recover their earnings in the relevant industrial context.

[57] For this appeal, however, the crucial enactment is s. 2 of the CCAA. I agree with the chambers judge that in order to constitute a "trust" for the purposes of s. 2 of the CCAA, the "trust fund" had to rise beyond a generalized statutory trust as defined in s. 7(1) of the SBLA. It had to reach the position of a trust at law, hence requiring it to be reasonably ascertainable as of the date the legal effect of the trust must exist: ***Henfrey Samson Belair***, *supra* at paras. 17 to 19. I also agree with the chambers judge that the effective date for the determination of the trust over property of Kerr in this case was November 7, 2007. That is the date that the CCAA proceedings were established and the stay by court order issued. However, I respectfully disagree with her in part. I find that, in Winroc's case, a trust framed by the amount of $46,425.26 was sufficiently ascertainable as of November 7, 2007, so as to make it effective for the purposes of s. 2 of the CCAA as of that date. Moreover, that trust carried forward its legal effect by the establishment of the lien fund in court out of Kerr's receivables which had been impressed with the trust as of that date.

[58] By comparison, the Kenroc lien had not been filed by November 7, 2007. Accordingly, while Kenroc might have had a generalized trust for the purposes contemplated by s. 7 of the SBLA over Kerr's receivables from 10105, Kenroc's trust claim was not specific as of that date in the same way that Winroc's was for the purposes of s. 2 of the CCAA. Moreover, as pointed out by the chambers judge, it would conflict with the policy of the CCAA for claimants to be able to ignore stay orders and take steps to *improve* their creditor positions after the orders come into effect. Kenroc suggests, however, that it did not need to "improve" its position as beneficiary of a sufficiently ascertainable trust effective as of November 7, 2007.

[59] Article 14 of the stay order of November 7, 2007 expressly suspended the running of any time limitation period that might otherwise run as to the ability to file a builders' lien against property "belonging to any customers of the Applicants for whom the Applicants are doing work" so the stay order itself did not erase the potential value of a lien. Moreover, Kenroc contends that this Court should find that its claim was as ascertainable under the CCAA process as was Winroc's claim as of November 7, 2007, even if not particularized by a filed lien. Accordingly, Kenroc says that because the CCAA contemplates a method for court ascertainment by a summary process of the nature of claims made, its statutory trust still must be found to have existed as of November 7, 2007. It follows that we must still consider Kenroc's position under this heading of trust. I would deal with Winroc first.

[60] The specific amount of Winroc's trust claim was identified by Winroc through its lien claim documents which had been filed before November 7, 2007. The possibility that Winroc may have had a larger but more ambiguous trust claim against Kerr's other receivables does not destroy the particularity of the specific claim set out in the lien documents. Moreover, in my view, the degree of precision of that specific claim against Kerr's receivables met the test in ***Henfrey Samson Belair*** even if Winroc might be called upon to substantiate its lien claim in court and even if Winroc faced the possibility of set off under s. 18.1 of the CCAA or faced some other potential diminution of the quantum of its entitlement. I say so for several reasons.

[61] First, by the specifics of the lien form, the trust property was identifiable not only in quantum and claimant but also identifiable as against specific property, namely a specified indebtedness owed by 10105 to Kerr. With the boost, as it were, of the statutory trust, that trust met the requirements under ***Henfrey Samson Belair***. Unlike the situation in ***Henfrey Samson Belair***, the trust funds did not become "commingled" or untraceable. Rather, they were eventually dis-aggregated from the indebtedness of 10105 to Kerr and were paid into court specifically to discharge Winroc's lien, albeit subject perhaps to adjustment later. Second, s. 12(2) of the CCAA does contemplate a process whereby a claim, whether secured or unsecured, may be resolved by the court on summary application by the company or by the creditor. It follows that the degree of precision of the Winroc claim as of November 7, 2007, was not destroyed by the existence of a possibility that a court may, on summary application, adjust the amount Winroc had claimed in a timely manner. Third, the original order of November 7, 2007 and the procedure order of January 24, 2008, predicted and then set out such a claims procedure under the CCAA. It is apparent from both orders that the court

provided for a process for acceptance or adjustment of trust claims that were sufficiently precise at common law as of November 7, 2007 within the meaning of ***Henfrey Samson Belair***. In light of these circumstances, the Winroc trust claim met the criteria of s. 2 of the CCAA as of November 7, 2007 at least to the extent of the amount set out in the filed lien documents, namely a trust framed by the amount of $46,425.26. The expression "framed by the amount" is stated to reflect the fact that the actual effective quantum of the Winroc claim may be subject to adjustment.

[62] Before leaving Winroc's situation, I would add that we were treated by Kerr to an ingenious suggestion that Winroc's statutory trust prevented Kerr from having a property interest in the money paid into court. The suggestion is that because of the statutory trust, Kerr never had a legal right or control of the money paid into court, and hence it was not, after being paid into court, the "property of the debtor" to be subject of a trust under s. 2 of the CCAA. This argument is too clever by half. It amounts to saying that because the 10105 funds were impressed with a trust under s. 7 of the SBLA before being paid into court, they could not become Kerr's such as to further become property of Kerr impressed with a trust under s. 2 of the CCAA. This argument promotes a practical conflict between the application of the two statutes. General principles of statutory construction encourage courts to make co-ordinated legislation work together (if it is possible to do so consistently with proper interpretation principles) by assuming a harmony, coherence and consistency: see e.g. ***R. v. Ulybel Enterprises Ltd.***, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52; ***Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)***, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24 (QL), 2006 SCC 24 at para. 54; ***Pointe-Claire (City) v. Quebec (Labour Court)***, [1997] 1 S.C.R. 1015, [1997] S.C.J. No. 41 (QL), at para. 61; ***Food and Drug Administration et al v. Brown & Williamson Tobacco Corp. et al.***, (2000) 529 U.S. 120 (U.S.S.C.) per O'Connor J at p. 128. *A fortiori* we would do this when s. 2 of the CCAA clearly envisions trusts, liens and charges emanating from other statutes or law . As stated in ***Chatterjee v. Ontario***, [2009] S.C.J. No. 19 (QL), 2009 SCC 19 at para. 2: "It was held in *Canadian Western Bank* that, "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (para. 37; emphasis in original)." Accordingly, I would not convolute the concept of trust to find that the existence of a trust for one purpose defeats its existence for another purpose in otherwise companionable legislation.

[63] By comparison with Winroc, Kenroc's claim was not identified by way of a precise lien having been filed as of November 7, 2007. Kenroc, accordingly, bases its status as a trust claimant in the more generalized argument that Kerr's receivables in the amount of $302,022.00 owed by 10105 as of November 7, 2007, qualified as Kerr's property that was impressed with a trust in favour of Kenroc for whatever contribution Kenroc had made to the 10105 project by then.

[64] Kenroc, moreover, would distinguish itself for the purposes of the Plan of Arrangement from being inserted to a class with any other of Kerr's subcontractors who might conceivably also have filed builders' liens against the 10105 project in Saskatoon but did not do so. Kenroc would dismiss the idea that those other potential claimants are in the same creditor class with Kenroc on the basis that (a) the existence of such potential builders' lien claimants was still speculative at the time of the Plan of Arrangement hearing below, and (b) those claimants, if any, should be taken to have

elected to fall into the general unsecured creditor category under the Plan of Arrangement. Kenroc says it never made any concession that it was an unsecured creditor. Kenroc says that it pressed with specificity its trust claim prior to the Plan of Arrangement. Kenroc suggests that its ability to rope into court a specific sum of money out of Kerr's receivables by the lien against 10105 merely gave it a practical ability to enforce its existing trust rights, and did not improve its position in legal terms. Accordingly, Kenroc says that it should like Winroc be able to assert that it was a beneficiary of an enforceable trust at the time of the Plan of Arrangement at least in the specific amount that constituted its aliquot share of the $150,000 paid into court, namely $103,236.95.

[65] Kenroc further suggests there would be no unfairness to other creditor classes for lack of specificity of Kenroc's quantum as of November 7, 2007. Kenroc says that the quantum of other claims, secured or unsecured, would not have been known to other creditors as of that date. Kenroc says all creditors would be subject to the adjustment plans under the Claims Procedure Order of January 24, 2008, which itself did not exist until after the money was paid into court. Accordingly, Kenroc suggests that all creditors would have known by the date of the Plan of Arrangement precisely what the various claim classes were, including Kenroc's position. The purpose of the Plan was to organize division of the available assets. The other classes would be able to decide whether to vote to support the Plan or not under those circumstances.

[66] The difficulty with Kenroc's argument is that the parties here effectively conceded that, as a matter of law, the crucial date for distinguishing claims as secured or unsecured under s. 2 of the CCAA was November 7, 2007, not the later date when money was paid into court nor the further later date of the hearing on the Plan of Arrangement. To repeat, the crucial date for defining claims as secured was November 7, 2007. It may be that some existing secured claims might be identified after November 7, 2007, but their nature and quantum would have to have existed as of November 7, 2007, and not be created later. If Kenroc met the definition of a secured creditor on November 7, 2007 by its argument, then so were other potential builders' lien claimants, a potential circumstance noted by the Monitor. It would not matter for the larger purpose of the CCAA proceedings that other builders' lien claimants might have had trust claims against other projects than 10105 with which Kerr was involved. If they chose to claim secured status, they might, indeed, be collated into a secured creditor class of analogous secured creditors. Arguably, they would be candidates for a class that would be differentiated from the unsecured creditors' class.

[67] Kenroc seeks to fortify its position by a policy position that would answer the respondent's claims as to the legislative policy behind the CCAA. The respondent's submission which found considerable favour with the chambers judge was that the CCAA was a process intended to keep businesses in operation for the benefit of commerce and industry generally, and for the better recovery of creditors who might otherwise be left begging if bankruptcy occurred. The respondent and the chambers judge suggested that it was important, as a matter of policy, that there be a predictable and reliable system in place that would allow rapid distillation of creditor classes, swift available asset compilation and fair and equitable, though partial, distribution. The respondent and chambers judge did not appear to favour a system whereby late blooming trust claims could legally

materialize well after the crucial stay order date, not only to the disadvantage of the debtor but also of other creditors. Against this policy of predictability and reliability, Kenroc says that one should not forget that the CCAA process empowers the debtor over creditors, in that the debtor decides when to seek the stay order, and the debtor already can discriminate amongst its creditors by the nature of specific trusts or liens or charges that it arranges with creditors.

[68] Kenroc's submission that it possessed an effective and ascertainable trust claim against Kerr's assets as of November 7, 2007, advances Kenroc beyond being the holder of a generalized statutory trust on an unspecified segment of Kerr's receivables. Recognition of a trust in the manner proposed by Kenroc could create through s. 2 of the CCAA something of a checkerboard of otherwise analogous rights and claimants in relation to CCAA proceedings because different provinces or jurisdictions might enact as to similar types of lien claims – e.g. builders' liens – differently. It might even encourage a competition amongst provinces to fortify their own versions of statutory trusts in an effort to priorize them against other province's statutory trusts for CCAA situations. Further, for some companies every significant creditor of the company could, by virtue of the company's business, claim a statutory trust of some sort. If all such trusts qualify under the CCAA regardless of the circumstances, there would be competition between statutory trusts, and feasibility problems as to achieving a consensus Plan of Arrangement.

[69] Kenroc was not the holder of a cognizable common law trust under ***Henfrey Samson Belair***. As the chambers judge noted, Kenroc was banned by Article 11 of the stay order from improving its position against Kerr's property. Indeed, that sort of preservation of a debtor's property is a key element of the aims of the CCAA. What Kenroc did was take action with a view to selecting out a portion of Kerr's receivables, i.e. effectively seizing a portion of Kerr's unsecured property subject at the time to supervision of the court, in order to install it in a special legal box where Kenroc could claim to be the only party entitled to have access to it. I am not persuaded that, in doing so, Kenroc's position can be characterized as an alliance of the SBLA and the CCAA which would have the effect of retroactively declaring Kenroc's general statutory trust against receivables to be a sufficiently precise trust at law as of November 7, 2007 against the fund paid into court later. Kenroc's trust simply did not reach the level required by s. 2 of the CCAA on November 7, 2007.

[70] I also am not persuaded that there was conversion of trust property by Kerr under s. 7(2) of the SBLA to the disadvantage of Kenroc by what happened after November 7, 2007. Conversion of trust property can occur in various ways: ***373409 Alberta Ltd.***; see also ***Ambrozic v. Burcevski*** (2008), 433 A.R. 25, [2008] A.J. No. 552 (QL), 2008 ABCA 194 at para. 48 - 56, leave denied [2008] S.C.C.A. No. 332 (QL). I am not persuaded that the sort of conversion discussed in those cases was done by Kerr when 10105 paid $150,000.00 into court and the liens were vacated. Accordingly, s. 7(2) of the SBLA would not assist Kenroc's position in the sense of retroactively providing precision to Kenroc's claim at the date of the payment in, and thereby to impress part of the $150,000.00 with a sufficiently specific trust in favour of Kenroc as of the date of the payment in and then also as to the date of hearing on the Plan of Arrangement.

[71] It follows that while I agree with Winroc that as of November 7, 2007, it had an identifiable and effective trust claim for the amount of its lien and for the purposes of s. 2 of the CCAA, I do not agree that the same situation applies to Kenroc.

**Lien Claims**

[72] It is not necessary to discuss extensively the questions relating to the rights of lien holders under the SBLA, a task more suitable to the Courts of Saskatchewan when the Saskatchewan statute differs in significant manners from the Alberta statute. In ***Merit Energy Ltd.***, the Saskatchewan Court of Appeal held that lien claimants have a lien as soon as materials are first provided to the debtor even if not yet registered, and that a judicial order as to payment into court merely substitutes the lien fund for the property against which the lien was filed. That case, however, was one where the debtor owned the land so it does not reach the present situation.

[73] In Winroc's case, as of November 7, 2007, the lien had been placed against 10105's land respecting a debt owed by 10105 to Kerr, which was not then under CCAA protection. In light of the view I have taken above as to Winroc's trust claim, it is not necessary for me to decide whether Winroc's timely lien attached to property of the debtor for the purposes of s. 2 of the CCAA. It would appear arguable that if ***Merit Energy Ltd.*** is adapted to the present situation, the payment in by 10105 converted the land interest of 10105 as attached by the lien into a moneys' worth attached by a substitute security favouring Winroc. I need not decide this question as there may be implications of doing so not presently before this Court. I can safely leave that task of statutory interpretation of the SBLA to the Saskatchewan courts.

[74] As to Kenroc's position, however, it is clear that its lien was not filed against Kerr's property such as to qualify under s. 2 of the CCAA as of November 7, 2007. Section 22 of the SBLA provides for a lien against "an estate or interest of the owner in the land". Section 33 of the SBLA assists the lien by also saying that the lien is a charge on the holdback funds and "additional amounts" as defined. On the face of those provisions, the charge is nourished by the lien.

[75] In that sense, the lien did not exist in a physical sense manifested by a lien document. Kenroc says, however, that ss. 22 and 33 of the SBLA recognize a lien and a charge on the identified property independent of the filing of the physical lien document. Kenroc says that, under Saskatchewan law, the lien document (and its filing deadline) may have some practical effect in the event of intervening interests, but the lien itself starts with the provision of work or supplies and continues thereafter until the work or supplies are paid for or some adjudication happens. Whether or not that is so, Kerr was not an owner of an estate or interest in the land against which the Kenroc lien was filed *after* November 7, 2007. Even assuming that, at the time of the liens, Kerr had a valid receivables claim against 10105, that was not a land property interest caught by the SBLA statutory lien. Accordingly, the s. 22 statutory lien was not then a lien against "property of the debtor" within the meaning of the statutes read together on November 7, 2007. What happened by reason of the

payment into court did not change Kerr into an owner of land covered by the lien backwards to November 7, 2007. Once again, the terms of s. 2 of the CCAA are crucial here.



[76] The January 18, 2008 Saskatchewan order did not convert 10105's "land" interest, which Kenroc says was captured by its lien, into a security covered fund of money that was retroactively "property of the debtor" Kerr as of November 7, 2007. The situation is arguably different for Winroc as noted above. The Saskatchewan courts will decide what to make of the legal meaning and effect of the lien fund in court. It is arguable that Kerr had an interest in the lien fund. Kerr would presumably favour the lien fund being available to distribute to its creditors as per the Plan of Arrangement. Kerr would also presumably be able to make submissions in the summary process contemplated by the CCAA as against the validity or quantum of the lien or as to claim set-offs and defences to the lien claim. Those capacities, however, are not the same thing as Kerr being the owner of land on November 7, 2007.

[77] Kenroc invokes s. 33 of the SBLA to stretch the "lien" defined under s. 22 to include a "charge upon any additional amount owed in relation to the improvement by a payer to the contractor or any subcontractor". Kenroc cite no direct authority for the proposition that this "charge" should be treated as a charge on "property of the debtor company" for the purposes of s. 2 of the CCAA in relation to Kenroc's putative share of the $150,000.00 put into court. Whether the lien, when it existed and before it was vacated by the court order of January 18, 2008, was capable of constituting a "charge" upon a receivable of Kerr by reason of being a valid "lien" on land of 10105, is a moot point. It is also a complex one not discussed below. $150,000.00 was paid into court by 10105 but that did not happen until after November 7, 2007. It was not even required to happen on November 7, 2007, because Kenroc's lien had not been filed.

[78] Accordingly, as of November 7, 2007, there was no lien fund existing against which Kenroc had a legal claim as a lien holder. I repeat that I say nothing about Winroc in this respect. As of November 7, 2007, Kerr arguably had a receivables claim against 10105. By the SBLA, Kenroc and Winroc arguably had a lien as of November 7, 2007, but against land property of 10105. By s. 56 of the SBLA, the land owner can choose to pay the money claimed under liens into court so it can get out of the litigation. Indeed, an owner might conceivably pay into court even if it disputed the claim. Once the money is paid in, the lien is vacated, and, grammatically, so is the "charge". What is created in their place is something we can leave to the Saskatchewan courts to define. Kenroc did not challenge the order paying into court nor the discharge of their filed lien. If Kenroc would ordinarily have acquired a replacement interest in Kerr's property through the payment in process – a point the chambers judge disputed in light of the stay – it did not acquire that interest until the money was paid into court. That was well after November 7, 2007.

[79] The notional Kenroc share of the lien fund of $150,000 was treated as part of the Kerr assets for the Plan of Arrangement, but Kerr could not after November 7, 2007, just go to the Saskatchewan Court of Queen's Bench and take the money out as if it were Kerr's property. By then, Kerr's receivables, whether they were still owing to it by third parties or they were cobbled

together in the Monitor's hands or elsewhere, were subject to court disposition in service of the aims of the CCAA. In my view, Kenroc's position boils down to a claim that it was entitled to create, after the vital date of November 7, 2007, a substitute claim against Kerr's property to replace a statutory lien against 10105's property. One can imagine various scenarios whereby creditors, notwithstanding a CCAA stay, engage in a scramble to convert their claims into something more effective, retroactively. In my view allowing creditors to do so would affront the objectives and terms of the CCAA. In the result, I reject Kenroc's position as to the lien claims.

**Approval of the Plan**

[80] Winroc and Kenroc submit that even if their claims were found to not meet the test for classification as a secured creditor class either by way of lien or trust, the policy indicated by the SBLA and the nature of their relationship with Kerr and Composite is such that the only fair and reasonable approach to the situation would have been to recognize them as a special class entitled to vote as a separate group. Further, they submit that it would only be fair and reasonable to give them full access to the money paid into court, as it was by their actions that the funds were paid in by 10105. To do otherwise, they say, would undermine the benefits and purposes of builders' lien legislation by (a) taking funds which are collected pursuant to such special legislation and making that money available for the benefit of others who are unsecured creditors with no special rights grounded in such legislation, and (b) using those funds ultimately to the benefit of the debtor company, whose overall arrangement offer for others would be improved by inclusion of funds which ought to have been earmarked for Winroc and Kenroc.

[81] In saying this, Winroc and Kenroc submit that the potential existence of lien claims (similar or not) by other parties who did not or could not take steps to particularize and enforce any such lien claims is irrelevant. Similarly they effectively say that the existence of any legislative limitations on lien claims under Alberta legislation is also irrelevant. Further, they effectively say that the process for referring arrangements to creditors for votes under the CCAA is irrelevant insofar as it relates to the type of special claim that they are making here. In their submission, this Court should amend the Plan of Arrangement to require that the $150,000.00 be used to pay their lien claims with interest in priority to any other distributions.

[82] Insofar as Kenroc is concerned, I cannot say that the chambers judge acted unreasonably in defining the classes and in approving the Plan of Arrangement as she did. Her decision was within the range of reasonable options that were available to her under the circumstances: see by analogy, ***Khosa v. Canada (Minister of Citizenship and Immigration)***, [2009] S.C.J. No. 12 (QL), 2009 SCC 12 at para. 59. Her decision on those questions deserves deference: ***Royal Bank of Canada v. Fracmaster Ltd.*** (1999), 244 A.R. 93, [1999] A.J. No. 675 (QL), 1999 ABCA 178 at paras. 3 - 4; ***Re: Gauntlet Energy Corporation***, (2004) 32 C.L.R. (3d) 68, [2004] A.J. No. (QL), 2004 ABCA 20, at para. 12. In my view, she reasonably weighed the factors in ***Canadian Airlines***, ***Resurgence*** and ***Stelco***.

[83] She put Kenroc in a category of unsecured creditors which arguably included claimants of a similar nature who did not run rough-shod over the stay order of November 7, 2007. I reject Kenroc's suggestion that it ought to have been distinguished from other potentially similar creditors on the basis that those others had failed to be as proactive and self-identifying as Kenroc was. In light of the stay order, it was within the chambers judge's discretion, acting - as the CCAA contemplates - in a "summary" fashion, to decide if there were others in a situation similar to Kenroc. In light of the standard of review, I am unable to say that the chambers judge acted unfairly in putting Kenroc with other unsecured creditors. Had Kenroc been with the other six creditors in a class separate from other unsecured creditors, Kenroc would have been in the same position it is now, viz., with others who voted in favour of the Plan of Arrangement.

[84] Finally, I am not persuaded that the chambers judge ought to have, in service of fairness, amended the Plan to at least give Kenroc the money paid into court by 10105 to vacate its lien. To do so would have been a distortion of the Plan as an overall balanced effort to reflect the interests of unsecured creditors of which Kenroc was one. It might be said that there is some similarity between this aspect of Kenroc's argument and that of the dissatisfied claimants in ***BCE,*** in that Kenroc points to legislation which it says at least identifies them in a special manner. However, unlike Winroc, Kenroc did not deploy the SBLA in a timely way as regards the CCAA proceedings. The chambers judge did not act unreasonably or contrary to the CCAA in how it dealt with Kenroc.

[85] Winroc's position is separate from Kenroc. I would not regard the situation as one where it would be appropriate or just to upset the entire Plan of Arrangement in order to reflect the effective trust status of Winroc. On my reasoning, the chambers judge would have designated Winroc in a class of secured creditors for the purposes of the Plan, albeit framed by Winroc's lien-identified claim for $46,425.26. Winroc's other claims would fall into the general unsecured category and that situation is not affected by this judgment. I need not speculate whether the chambers judge might still have put Winroc in with other comparable secured creditors if at the time of the hearing as to the Plan she found others of that sort. I proceed on our present record.

**Conclusion**

[86] Winroc's appeal is allowed to the following extent. I would declare that Winroc's trust claim is a secured claim under s. 2 of the CCAA as framed by the amount of $46,425.26 out of the $150,000.00 paid into court. Upon proof satisfactory to the chambers judge that Winroc is, indeed, entitled to the $46,425.26 or some lesser figure as against Kerr for supplies to Kerr related to the 10105 project, that amount thus determined by the chambers judge can be disbursed to Winroc by court authority in a manner suitable to a secured claimant. The chambers judge can deal with that issue summarily under the CCAA. We would encourage the parties to settle the point by consent.

[87] Kenroc's appeal should in my view be dismissed.

Appeal heard on April 1, 2009

Reasons filed at Edmonton, Alberta
this 25th day of June, 2009

Watson J.A.



**Appearances:**

J.S. Ehmann, Q.C.
for the Appellant Kenroc Building Materials Co. Ltd.

J.G. Hanley
for the Appellant Superior Plus LP

D.R. Bieganek
for the Respondents Kerr Interior Systems Ltd. and Composite Building Systems Inc.

J.H. Hockin
for the Monitor of the Respondent (not a party to the appeal)