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COURT FILE NUMBER 2001 05482

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

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



JS Nov 27 2020
J.Eidsvik

APPLICANT/CLAIMANT SHAMROCK VALLEY ENTERPRISES LTD.

DOCUMENT **BRIEF BY SHAMROCK VALLEY ENTERPRISES LTD.**

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BRIEF OF SHAMROCK VALLEY ENTERPRISES LTD.

**IN RESPECT OF THE TRUST CLAIM ARISING IN CONNECTION WITH
 WORK COMPLETED FOR M.D. OF BONNYVILLE ROADWORK**

TO BE HEARD BY THE HONOURABLE MADAM JUSTICE EIDSVIK

NOVEMBER 27, 2020 AT 10:00am

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I. INTRODUCTION

1. This is the brief of the applicant, Shamrock Valley Enterprises Ltd. ("**Shamrock**"). This brief is submitted in respect of the within application by Shamrock, wherein Shamrock seeks an Order:
 - a. declaring that a trust was created pursuant to the Prime Contract (as defined below);
 - b. declaring that the Holdback Amount (as defined below) includes funds held in trust for Shamrock, to the extent of \$18,969.56 plus interest and costs;
 - c. awarding costs of this Application to Shamrock, on a solicitor and own client basis, or on such basis as this Honourable Court may deem just and appropriate; and
 - d. directing that the sum of \$18,969.59, plus interest in accordance with the *Judgment Interest Act*, RSA 2000 c J-1, plus costs, be paid from the Holdback Amount (as defined below) by the Monitor to Shamrock or Shamrock's counsel (being Morrow Tchir LLP).

II. FACTS

A. THE PRIME CONTRACT

2. On or about November 1st, 2013, JMB Crushing Systems Inc. ("**JMB**") and the Municipal District of Bonnyville No. 87 (the "**MD**") entered into an agreement (the "**Prime Contract**").¹
3. Pursuant to the Prime Contract, the MD retained JMB to supply gravel/aggregate to the MD and transport gravel/aggregate for stockpiling at the lands legally described as NE 19-61-5-W4 (the "**MD Stockpile Lands**").²
4. Paragraph 26 of the Prime Contract includes the following express term:³

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

¹ Affidavit of Murry Nielsen, sworn November 6th, 2020 [the "Nielsen Affidavit"] at para 2(a).

² *Ibid.*, at para 2(a).

³ Affidavit of Jason Panter, sworn October 9, 2020 [the "Panter Affidavit"] at Exhibit "C", s. 26.

5. The Prime Contract defines “**Services**” as:⁴

... the hauling and stockpiling of crushed aggregate by JMB as set out in this Agreement and anything else which is required to be done to give effect to this Agreement.

B. SHAMROCK SUBCONTRACT

6. On or about December 2019, JMB (as prime contractor in respect of the Prime Contract) retained Shamrock (as subcontractor) to transport gravel/aggregate to and stockpile gravel/aggregate at the MD’s Stockpile Lands.⁵

7. Between approximately December 2019 to March 2020, in accordance with the terms agreed between Shamrock and JMB, Shamrock did transport gravel/aggregate to and stockpile gravel/aggregate at the MD’s Stockpile Lands (referred to as the “**Shamrock Services**”). The last day Shamrock supplied the Shamrock Services was March 21st, 2020.⁶

8. To the knowledge of the corporate representative of Shamrock, the MD used, or intended to use, the gravel/aggregate transported by Shamrock to and stockpiled at the MD Stockpile Lands in the maintenance and construction of roads within the MD, including but not limited surfacing work on Highway 660 and Range Road 55.⁷

9. Shamrock issued two invoices to JMB for the Shamrock Services, for the total amount of \$18,969.56, broken down as follows:⁸

Invoice No. IN054325	\$ 1,012.32
Invoice No. IN054741	\$ 17,053.92
Subtotal:	\$ 18,066.24
GST @ 5%	\$ 903.31
	\$ 18,969.55

10. Despite repeated demands for payment, JMB failed or refused to pay the outstanding amount owed to Shamrock for the Shamrock Services. The amount of \$18,969.55 remains outstanding.⁹

⁴ *Ibid.*, at Exhibit “C”, s. 1(f).

⁵ Nielsen Affidavit, *supra* note 1 at para 3.

⁶ *Ibid.*, at para 4.

⁷ *Ibid.*, at para 5.

⁸ *Ibid.*, at para 6, Exhibit B and Exhibit C.

⁹ *Ibid.*, at para 11.

C. DEMAND FOR PAYMENT & PUBLIC WORKS ACT CLAIM

11. On or about April 24th, 2020, Shamrock (through its legal counsel) served upon JMB and the MD, written notice of Shamrock's demand for payment of the amounts owing from JMB to Shamrock for the Shamrock Services.¹⁰
12. On or about April 24th, 2020, Shamrock (though its legal counsel) also served upon JMB and the MD, written notice of Shamrock's claim pursuant to section 14 of the *Public Works Act*, RSA 2000 c. P-46 [*Public Works Act*].¹¹
13. JMB and the MD did not respond to Shamrock's demands for payment, nor did they respond to Shamrock's written notice of claim pursuant to the *Public Works Act*.¹²

D. CCAA PROCEEDINGS & BUILDERS LIEN DETERMINATION

14. On May 1st, 2020, The Honourable Madam Justice K.M. Eidsvik granted the CCAA Initial Order (the "**Initial Order**") in the within proceeding. Pursuant to the Initial Order, FTI Consulting Canada Inc. was appointed to act as Monitor of JMB in the within proceeding. The Initial Order was subsequently amended and restated on May 11th, 2020.
15. On May 20th, 2020, the Honourable Madam Justice K.M. Eidsvik granted an order (the "**Bonnyville Lien Claims Order**"). Pursuant to the Bonnyville Lien Claims Order:
 - a. The MD was ordered to pay the sum of \$3,563,768.40 (the "**Funds**") to the Monitor. The Funds represented the amount invoiced by JMB to the MD under the Prime Contract, but which the MD had not yet paid to JMB, for the period up to and including April 30th, 2020.
 - b. The Monitor was ordered to holdback from the Funds the sum of \$1,850,000.00 (the "**Holdback Amount**"). The Holdback Amount was deemed to be the amount the MD was required to hold back pursuant to section 18 of the *Builders' Lien Act* from payments it made or makes to JMB for those amounts invoiced up to and including April 30th, 2020.

¹⁰ *Ibid.*, at para 8, Exhibit "D".

¹¹ *Ibid.*, at para 8, Exhibit "D".

¹² *Ibid.*, at para 8.

- c. A lien determination procedure for the MD of Bonnyville Lien Claimants (as defined in the Bonnyville Lien Claims Order) was established.
16. On or about May 26th, 2020, Shamrock served its Lien Notice on counsel for the Monitor in the form prescribed by the Bonnyville Lien Claims Order.¹³
17. On or about July 27th, 2020, the Monitor served its Lien Determination Notice on Shamrock, wherein the Monitor determined that Shamrock's Lien Claim is not a valid Lien or Lien Claim.¹⁴

III. ISSUES

18. The issues before this Court for the within application by Shamrock are:
 - a. Does the Prime Contract give rise to an express trust?
 - b. If so, is Shamrock a beneficiary of the trust?
 - c. If so, what is the extent of Shamrock's claim to the trust property?
 - d. Is Shamrock entitled to be paid the amount of its arrears from the Holdback Funds?

IV. BRIEF ANSWER

19. Shamrock takes the position that:
 - a. The Prime Contract gives rise to a valid express trust.
 - b. Shamrock is a beneficiary of the trust.
 - c. Shamrock's claim to the trust property is equal to the sum of \$18,969.55, being the unpaid arrears owing from JMB to Shamrock for the Shamrock Services, plus interest and costs.
 - d. Shamrock is entitled to be paid the sum of \$18,969.55 from the Holdback Funds.

V. LAW AND ARGUMENT

A. Does the Prime Contract Give Rise to an Express Trust?

20. An express trust arises when a person (settlor) has expressed an intention to transfer property to another person (trustee) for the benefit of one or more person(s) (beneficiaries), and the settlor

¹³ *Ibid.*, at para 9, Exhibit "E".

¹⁴ *Ibid.*, at par 10, Exhibit "F".

conveys the trust property to the trustee.¹⁵ The trust instrument or declaration evidences the terms of the trust, including the rights and obligations of the parties to the trust.

21. In order for an express trust to be valid, it must meet the following requirements:

a. Three Certainties: The “**Three Certainties**” must exist, including¹⁶:

- i. Certainty of intention;
- ii. Certainty of subject matter;
- iii. Certainty of objects; and

b. Constitution of Trust: In order for the trust to be validly created, title to the trust property must be conveyed to the trustee.¹⁷

22. A valid trust exists even if the beneficiaries are unaware of its existence when it is created.¹⁸

23. In the matter before the court, the Prime Contract is the trust instrument. The settlor of the express trust is the MD. The trustee is JMB. Shamrock is a beneficiary of the trust. The requirements for a valid express trust are met in this case, as set out in more detail below.

a. The Three Certainties

i. Certainty of Intention:

24. The test for Certainty of Intention focuses on whether the settlor intended to create a trust. The requirement for Certainty of Intention is met if the language of the trust instrument is sufficiently clear to establish that the settlor did intend to impose an obligation on the trustee to hold trust property for the benefit of the beneficiary. If the settlor clearly and specifically says that property is to be held in trust, then an express trust will have been created.¹⁹

25. The language of paragraph 26 of the Prime Contract (reproduced below) satisfies the requirement for Certainty of Intention, as it demonstrates a clear intention on the part of the MD to create a trust.

¹⁵ Maria Elena Hoffstein, *Halsbury's Laws of Canada – Trusts*, 2020 Reissue (LexisNexis Canada), 2020 at HTR-20; *Lubberts Estate (Re)*, 2014 ABCA 216 at para 49.

¹⁶ *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 83, [2010] 3 SCR 379.

¹⁷ *Lubberts Estate (Re)*, 2014 ABCA 216 at para 49.

¹⁸ *Valard Construction Ltd. v Bird Construction Co.*, 2016 ABCA 249 at para 105.

¹⁹ *Beck v Otto*, 2017 ABQB 569 at para 58.

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

26. In particular, the words “*hold that part of them in trust*” is sufficient to demonstrate a clear intention to impose an obligation on JMB to hold the relevant funds in trust for the benefit of the beneficiaries. The last sentence of paragraph 26 of the Prime Contract also refers to the relevant funds as “*trust funds*”, which distinguishes the trust property from other funds paid by the MD to JMB. This language is further evidence of an intention to create a trust. The last sentence of paragraph 26 of the Prime Contract requires JMB to ultimately convey the relevant funds to the beneficiaries of the trust. This is consistent with an intention to impose an obligation on JMB to hold the funds for the benefit of the beneficiaries. The language of the Prime Contract satisfies the requirement for Certainty of Intention.

ii. Certainty of Subject Matter

27. The test for Certainty of Subject Matter focuses on whether the trust property (ie: the subject matter of the trust) is clearly ascertained or ascertainable.²⁰ Trust property is ascertained if the trust instrument clearly identifies specific trust property. Trust property is ascertainable if the trust instrument set out a formula or method for identifying the trust property.
28. The requirement for Certainty of Subject Matter is met in this case. Paragraph 26 of the Prime Contract (reproduced below) expressly identifies the trust property.

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

29. The trust property is the funds paid by the MD to JMB pursuant to the Prime Contract, in an amount equal to the total of all unpaid costs incurred by JMB in providing the Products and Services. The

²⁰ Maria Elena Hoffstein, *Halsbury's Laws of Canada – Trusts*, 2020 Reissue (LexisNexis Canada), 2020 at HTR-27.

trust property includes that portion of the funds paid by the MD to JMB which are required to pay outstanding amounts owing to the subcontractors of JMB who, at the request of JMB, supplied Products and Services within the meaning of the Prime Contract.

30. The language of paragraph 26 of the Prime Contract sets out a clear method to ascertain the trust property, thereby satisfying the requirement for Certainty of Subject Matter.

iii. Certainty of Objects

31. The test for Certainty of Objects focuses on whether the beneficiary or beneficiaries of the trust are ascertained or ascertainable. Certainty of objects requires that the persons or the class of persons who are the intended beneficiaries must be sufficiently certain so that the trust can be performed.²¹
32. The requirement for Certainty of Objects is met in this case. The language of paragraph 26 of the Prime Contract identifies the class of persons who are the intended beneficiaries of the trust. The beneficiaries of the trust are those persons who are entitled to payment in respect of the costs incurred by JMB in providing the Products and Services pursuant to the Prime Contract. The beneficiaries of the trust include the subcontractors of JMB who, at the request of JMB, supplied Products and Services within the meaning of the Prime Contract.

b. Constitution of Trust

33. For an express trust to be valid, it must be completely constituted. Constitution of the trust is the process by which legal ownership of the trust property is conveyed to the trustee.²²
34. The requirement for constitution of the trust is met in this case. The MD conveyed funds to JMB pursuant to the Prime Contract. The transfer of that portion of the funds which constitutes trust property satisfies the requirement for constitution of the trust.
35. In particular, the MD was ordered to pay, and did pay, the sum of \$3,563,768.40 (the "Funds") to the Monitor on the basis that JMB was entitled to receive the said Funds, and the Funds were therefore

²¹ *Bruderheim Community Church v Moravian Church in America (Canadian District)*, 2020 ABCA 393 at para 16.

²² Maria Elena Hoffstein, *Halsbury's Laws of Canada – Trusts*, 2020 Reissue (LexisNexis Canada), 2020 at HTR-29.

an asset of JMB. The Funds represented the amount invoiced by JMB to the MD under the Prime Contract, but which the MD had not yet paid to JMB, for the period up to and including April 30th, 2020. If the Court finds that the trust had not yet been constituted prior to the payment of the Funds to the Monitor, the act of conveying the funds to the Monitor as an asset of JMB satisfies the requirement for constitution of the trust.

B. Is Shamrock a Beneficiary of the Trust?

36. Shamrock is a beneficiary of the trust.
37. As set out above, the beneficiaries of the trust are those persons who are entitled to payment in respect of the costs incurred by JMB in providing the Products and Services pursuant to the Prime Contract. The beneficiaries of the trust include the subcontractors of JMB who, at the request of JMB, supplied Products and Services within the meaning of the Prime Contract.
38. The Prime Contract defines “Services” as expressly including the hauling and stockpiling of crushed aggregate. The services that Shamrock provided to JMB include the hauling and stockpiling of gravel/aggregate to the MD Stockpile Lands. The arrears owing from JMB to Shamrock for the hauling and stockpiling of gravel/aggregate are costs incurred by JMB directly related to the Services. As such, Shamrock is a beneficiary of the trust.

C. What is the extent of Shamrock’s Claim to the Trust Property?

39. Shamrock’s claim to the trust property is equal to the sum of \$18,969.55, being the unpaid arrears owing from JMB to Shamrock for the Shamrock Services, plus interest and costs.

VI. CONCLUSION

40. All requirements for a valid express trust are met. Paragraph 26 of the Prime Contract satisfies the requirements for Certainty of Intention, Certainty of Subject Matter and Certainty of Objects. The payment of funds by the MD to JMB satisfies the requirement for constitution of the trust. The Prime Contract gives rise to a valid, express trust.

41. The Funds paid by the MD to the Monitor, including but not limited to the Holdback Funds, are subject to an express trust in favour of Shamrock in the amount of \$18,969.56. Shamrock is entitled to payment in the amount of \$18,969.56 plus interest and costs from the Holdback Funds.
42. Shamrock respectfully requests that the Court grant an order declaring that the Holdback Amount, to the extent of \$18,969.56 plus interest and costs, are held subject to a trust in favour of Shamrock, and grant a direction that the Monitor pay the said amounts to Shamrock.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF NOVEMBER, 2020.
Morrow Tchir LLP



Per: Caeleigh V. Morrow
Counsel to Shamrock Valley Enterprises Ltd.