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JUDICIAL CENTRE OF CALGARY
Clerk's Stamp
FILED
Nov 13, 2020
by Email
CLERK OF THE COURT

JS
Nov. 27 2020
Justice Eidsvik

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.
APPLICANT	R BEE AGGREGATE CONSULTING LTD.
DOCUMENT	**BENCH BRIEF OF THE APPLICANT, R BEE AGGREGATE CONSULTING LTD., IN SUPPORT OF AN APPLICATION TO DECLARE A TRUST, NOVEMBER 27, 2020**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bishop & McKenzie LLP 2300, 10180 – 101 Street Edmonton, AB, T5J 1V3 Telephone: 780-426-5550 Facsimile: 780-426-1305 Attention: Jerritt R. Pawlyk File No. 110151-003

TABLE OF CONTENTS

I. INTRODUCTION

1. This brief is submitted on behalf of the applicant, R Bee Aggregate Consulting Ltd. ("RBEE"). This application involves a trust claim by RBEE to funds in the amount of $1,270,791.71 plus interest and costs, currently being held by the court-appointed monitor of JMB Crushing Systems Inc. ("JMB"), FTI Consulting Canada Inc. (the "Monitor") in accordance with the Honourable Madame Justice Eidsvik's May 20, 2020 Order – Lien Claims Process for MD of Bonnyville.[1]

2. JMB entered into an agreement with the Municipal District of Bonnyville No. 87 (the "Municipality") to provide product, including the crushing of rock and gravel for the Municipal District of Bonnyville No. 87 (the "Municipality").

3. Pursuant to a subcontract with JMB, RBEE supplied the product on behalf of JMB to the Municipality. The Municipality paid JMB for the product supplied by RBEE.

4. The contract between the Municipality and JMB specifies that from the amounts paid to JMB by the Municipality, JMB is deemed to hold that part of the funds in trust which are required or needed to pay for any compensation and all costs directly or indirectly related to the product. JMB was required to pay the foregoing from such trust funds.

5. To date, RBEE has not been paid in full for the product they provided and JMB is in insolvency proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "*CCAA*").

6. RBEE therefore seeks a declaration that the funds held by the Monitor are trust funds, held in favour of RBEE. RBEE also seeks a direction from this Honourable Court that the sum of $1,270,791.71, plus interest thereon in accordance with the *Judgment Interest Act*, RSA 2000 c J-1, and costs, be released by the Monitor to RBEE through its counsel, Bishop & McKenzie LLP.

[1] Order – Lien Claims Process for MD of Bonnyville, dated May 20, 2020 [Tab 1] [Order].

II. FACTUAL BACKGROUND

A. The Agreements

7. On or about November 1, 2013, JMB entered into a contract (the "Prime Contract") with the Municipality to perform services including the crushing of rock and gravel for the Municipality.[2]

8. Paragraph 26 of the Prime Contract provides:

> 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).[3]

9. "Product" is defined in the Prime Contract as:

> the production by JMB of the aggregate described in this Agreement which includes the crushing and cleaning of rock/gravel, and all related services whereby rock/gravel us made into useable crushed aggregate for the [Municipality] in accordance with the required specifications set out in this Agreement
>
> (emphasis added).[4]

[2] Affidavit of David Howells, sworn November 5, 2020 ["Howells Affidavit"] at para 2.
[3] Affidavit of Jason Panter, sworn October 9, 2020 [Panter Affidavit] at Exhibit "C", s. 26 [Tab 2].
[4] *Ibid.*, at Exhibit "C", s. 1(e).

10. On or around February 25, 2020, JMB entered into a Subcontractor Services Agreement (the "Subcontractor Agreement") with RBEE whereby RBEE agreed to perform services on behalf of JMB under the Prime Contract.[5]

11. Pursuant to the Subcontractor Agreement, RBEE's services consisted of crushing rock and gravel to the specifications required by the Prime Contract (the "Product Services").[6]

B. The Trust Claim

12. RBEE performed the Product Services pursuant to the Subcontractor Agreement and rendered invoices for the Product Services to JMB.[7]

13. In accordance with the Subcontractor Agreement, RBEE rendered the following invoices for the Product Services:

Date	Invoice	Invoice Total	Invoice Total (w/ GST)
March 2, 2020	259	$236,196.00	$248,005.80
March 31, 2020	266	$663,804.00	$696,994.20
April 16, 2020	270	$474,428.00	$498,149.40
May 10, 2020	278	$72,045.82	$75,648.11
	Total	**$1,446,473.82**	**$1,518,797.51**

(collectively, the "Invoices"). [8]

[5] Howells Affidavit, *supra* note 2, at para 4, Exhibit "A".
[6] *Ibid.*, at para 5.
[7] *Ibid.*, at para 6.
[8] *Ibid.*, at paras 7-8, Exhibit "B".

14. An Application for Progress Payment prepared by JMB and dated May 10, 2020, confirms that RBEE had performed the Product Services to date of $1,446,473.82 before GST, or $1,518,797.51 inclusive of GST.[9]

15. On or around April 3, 2020, RBEE received payment from JMB in respect of Invoice #259 in the full amount of $248,005.80, inclusive of GST.[10]

16. To date, RBEE has received no further payment for their Product Services completed for JMB. The remainder of the Invoices remain outstanding in the sum of $1,270,791.71, inclusive of GST.[11]

17. Between February 29, 2020 and April 29, 2020 JMB provided invoices to the Municipality with respect to the Product Services provided by RBEE (the "JMB Invoices").[12]

18. The Municipality paid JMB for the JMB Invoices pursuant to the Prime Contract.[13]

19. On or about May 1, 2020, JMB was granted an initial order under the *CCAA,* which was amended and restated on May 11, 2020.[14]

20. On May 20, 2020, the Honourable Madame Justice Eidsvik ordered the Monitor to hold back $1.85 million for lien claimants of JMB (the "Holdback Amount").[15]

21. RBEE brings this application for a declaration that the Holdback Amount, to the extent of $1,270,791.71 plus interest and costs, are funds held by JMB in trust for RBEE.

[9] *Ibid.*, at para 9, Exhibit "C".
[10] *Ibid.*, at para 10.
[11] *Ibid.*, at para 11.
[12] *Ibid.*, at para 12, Exhibit "D".
[13] *Ibid.*, at para 13.
[14] Amended and Restated CCAA Initial Order, dated May 11, 2020 [Tab 3].
[15] Order, *supra* note 1 [Tab 1].

III. ISSUES

22. RBEE submits that this Application raises the issue of whether the Municipality created an express trust in favour of RBEE pursuant to the Prime Contract. In order to determine this issue, RBEE will address the following:

A. whether an express trust was created; and

B. if RBEE is a beneficiary of the express trust.

IV. LAW AND ARGUMENT

23. It is submitted that the funds paid by the Municipality to JMB in respect of the Prime Contract are impressed with a trust, express or otherwise, and under trust terms and conditions for the benefit of RBEE, and other subcontractors of JMB, pursuant to the Prime Contract.

A. An express trust was created

i. The legal test for the creation of an express trust

24. In *Lubberts Estate (Re)*, the Alberta Court of Appeal stated the following regarding express trusts:

> [49] An express trust exists if A, the settler, declares an intention to transfer ascertainable property to B, the trustee, for the benefit of C, an identifiable person or object, the beneficiary, and A conveys the trust property to B.
>
> [50] An express trust will unequivocally demonstrate an intention to create a trust, and clearly identify the trust property so that it can be ascertained and [identify] the objects of the trust so that the permitted use may be determined. E. Gillese, The Law of Trusts 41-47 (3d ed. 2014) & Morice v. Bishop of Durham, 32 Eng. Rep. 947, 952 (Ch. 1805) ("If neither the objects nor the subjects are certain, then the recommendation or request does not create a trust").[16]

25. Recently in *Bruderheim Community Church v Moravian Church In America (Canadian District)*, our Court of Appeal confirmed the three-part test for the creation of an express

[16] *Lubberts Estate (Re)*, 2014 ABCA 216, at paras 49-50 [Tab 4].

trust: “creation of an express trust requires the presence of three certainties, namely intention, subject matter, and object”.[17]

26. RBEE submits that the Municipality intended to and did create an express trust in favour of subcontractors of JMB with respect to outstanding amounts owed in relation to Product or Services provided pursuant to the Prime Contract.

ii. Certainty of intention to create an express trust

27. Certainty of intention requires that the words show that the recipient must take the property for described persons or objects, not beneficially. The words "in trust" suffice but are not necessary[18].

28. The Prime Contract specified that from the amounts paid to JMB by the Municipality, JMB is deemed to hold that part of them in trust which are required or needed to pay for any compensation and all costs directly or indirectly related to the Product and Services. JMB shall pay the foregoing from such trust funds[19].

29. The wording of section 26 of the Prime Contract shows a certainty of intention that the recipient of the funds, JMB, must take the property for described persons or objects in trust, and not beneficially.

30. It is respectfully submitted that there was clear certainty of intention to create a trust in relation to the subject trust funds that were forwarded from the Municipality to JMB in relation to the Prime Contract.

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[17] *Bruderheim Community Church v Moravian Church In America (Canadian District),* 2020 ABCA 393, at para 16 [*Bruderheim*] [Tab 5].
[18] *Carling Development Inc. v Aurora River Tower Inc*., 2005 ABCA 267, at para 51 [*Carling*] [Tab 6].
[19] Panter Affidavit, *supra* note 3*,* at Exhibit C, s. 26 [Tab 2].

iii. Certainty of objects to create an express trust

31. 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[20]. There are certain or ascertainable persons or objects who are to benefit[21].

32. The Prime Contract requires the funds paid by the Municipality to JMB to be held in trust by JMB for anyone who is entitled to compensation directly or indirectly related to the Product and Services.

33. "Product" is defined in the Prime Contract as the production by JMB of the aggregate described in this Agreement which includes the crushing of rock/gravel, and all related services whereby rock/gravel us made into useable crushed aggregate for the Municipality in accordance with the required specifications set out in this Agreement.

34. It is submitted that section 26 of the Prime Contract, together with the definition of "Product" in the Prime Contract creates a certainty of objects. There are certain ascertainable persons who are to benefit from the trust.

iv. Certainty of subject matter to create an express trust

35. Certainty of subject matter regarding the alleged trust requires that there is clear identification of the property which is the subject matter[22]. The appropriate portion must be ascertained *or ascertainable*[23].

36. It is submitted that the JMB Invoices clearly identified the Product or Services provided by the various subcontractors for which JMB was seeking compensation from the Municipality. Therefore, there was certainty of subject matter when the Municipality paid the JMB Invoices as to how those funds were to be allocated.

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[20] *Bruderheim*, *supra* note 17, at para 16 [Tab 5].
[21] *Carling, supra* note 18, at para 51 [Tab 6].
[22] *Ibid*.
[23] *E Construction Ltd v Sprague-Rosser Contracting Co Ltd*, 2017 ABQB 657, at para 24 [Tab 7].

37. In addition, the amount at issue for the trust claims is clearly identified as the Holdback Amount being held by the Monitor in the amount of $1,850,00.00. To the extent that there is a deficiency in the Holdback Amount, as determined by this Honourable Court, JMB will have to replenish the Holdback Amount from its cash reserves in order to honour the trust claims.

B. RBEE is a beneficiary of the express trust

38. RBEE respectfully submits that an express trust was created by the Municipality in favour of RBEE with respect to amounts paid by the Municipality to JMB for Product provided in relation to the Prime Contract. The three certainties are present and a trust has been created.

39. By virtue of the Subcontractor Agreement, RBEE provided Product to the Municipality for which they sought compensation. RBEE is a beneficiary of the trust as they are a person who is entitled to compensation for the Product provided to the Municipality on behalf of JMB.

40. RBEE submitted invoices to JMB for compensation for the Product Services provided by RBEE. The Invoices clearly identified the amounts of Product provided on each invoice. In turn, JMB submitted the JMB Invoices to the Municipality which clearly identified the amount of Product provided by RBEE to the Municipality, which required compensation.

41. The Municipality then paid JMB for the JMB Invoices which claimed compensation on behalf of RBEE for Product. JMB, however, did not in turn pay RBEE for their Product Services.

42. Therefore, RBEE, as a beneficiary of the trust created pursuant to the Prime Contract, is entitled to a declaration that the Holdback Amount, to the extent of $1,270,791.71 plus interest and costs, are funds held by JMB in trust for RBEE.

V. REMEDY SOUGHT

43. RBEE respectfully requests the following relief:

a. a declaration that the Holdback Amount, to the extent of $1,270,791.71 plus interest and costs, are funds held by JMB in trust for RBEE;

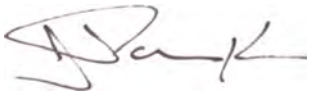
b. awarding costs of this Application to the Applicant RBEE on a solicitor and own client basis, or on such a basis as this Honourable Court may deem just and appropriate;

c. directing the sum of $1,270,791.71, plus interest thereon in accordance with the *Judgment Interest Act*, RSA 2000 c J-1, and costs, be released by the Monitor to RBEE through its counsel, Bishop & McKenzie LLP; and

d. such further and other relief as this Honourable Court may deem just and appropriate.

ALL OF WHICH IS RESPECTIFULLY SUBMITTED THIS 13th day of November, 2020.

BISHOP & McKENZIE LLP



Per: _____
Jerritt R. Pawlyk
Solicitors for the Applicant
R BEE Aggregate Consulting Ltd.

VI. INDEX OF AUTHORITIES

A. Evidence

TAB 1. Order – Lien Claims Process for MD of Bonnyville, dated May 20, 2020.

TAB 2. Affidavit of Jason Panter, sworn October 9, 2020, Exhibit “C”.

TAB 3. Amended and Restated CCAA Initial Order, dated May 11, 2020.

B. Jurisprudence

TAB 4. *Lubberts Estate (Re)*, 2014 ABCA 216.

TAB 5. *Bruderheim Community Church v Moravian Church In America (Canadian District),* 2020 ABCA 393.

TAB 6. *Carling Development Inc. v Aurora River Tower Inc*., 2005 ABCA 267.

TAB 7. *E Construction Ltd v Sprague-Rosser Contracting Co Ltd*, 2017 ABQB 657.

TAB 1

I hereby certify this to be a true copy of
the original Order
Dated this 21 day of May 2020

for Clerk of the Court

Order
Rule 9.5

JUDICIAL CENTRE OF CALGARY
FILED
May 21, 2020
LD
by Email
CLERK OF THE COURT

COURT FILE NO.:	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

INV #501099

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

APPLICANT	JMB CRUSHING SYSTEMS INC.
DOCUMENT	**ORDER – LIEN CLAIMS – MD of BONNYVILLE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming/Caireen E. Hanert/Alex Matthews** Phone: 403.298.1938/403.298.1992/403.298.1018 Fax: 403.263.9193 File No.: A163514

DATE ON WHICH ORDER WAS PRONOUNCED:	May 20, 2020
LOCATION AT WHICH ORDER WAS MADE:	Calgary Court House
NAME OF JUSTICE WHO MADE THIS ORDER:	Madam Justice K.M. Eidsvik

UPON THE APPLICATION of JMB Crushing Systems Inc. ("**JMB**"); **AND UPON HEARING** counsel for JMB; **AND UPON** reviewing the Affidavit of Jeff Buck sworn May 8, 2020 and the Affidavit of Jeff Buck sworn May 20, 2020; **AND UPON** hearing counsel for the Applicant and those parties present; **IT IS HEREBY ORDERED THAT:**

1. The time for service of notice of application for this Order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

2. The Consent Order granted May 11, 2020 by the Honourable K.M. Eidsvik is hereby set aside and the process contemplated therein is replaced by the process set out herein.

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.

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.

Claims Process

5. Within one (1) Business Day of the within Order being granted by this Court, MD of Bonnyville shall remit to the Monitor the Funds, and shall thereafter be deemed to have been in the same position as if (a) no written notices of Lien had been received; (b) no Lien Claims had been made, asserted, delivered, preserved or perfected; and (c) no Lien Notice had been received, and MD of Bonnyville shall have no further liability for such Funds.

6. The Monitor shall hold the Holdback Amount in trust in an interest bearing account in accordance with the terms of this Order, which Holdback Amount shall be deemed to be the amount MD of Bonnyville was required to hold back pursuant to section 18 of the BLA from payments it made or makes to JMB for those amounts invoiced up to and including April 30, 2020.

7. Any person who wishes to assert a Lien Claim against the Lands and who has not yet registered a Lien against the Lands shall deliver a Lien Notice by email to the Monitor's attention within the time frame prescribed by the BLA in order to preserve and perfect their Lien Claim.

8. Pursuant to section 48(2) of the BLA, the Holdback Amount shall stand as security in place of the Lands to the extent of any security granted under the BLA for all Lien Claims registered by Lien or provided to the Monitor by Lien Notice prior to the expiry of the time frame prescribed by the BLA.

9. Lien Claimants who have registered a Lien against the Lands or provided a Lien Notice to the Monitor as set out in paragraph 7 hereof shall only be required to take the steps set out

in this Order to prove their Lien, and shall not be required to take any steps set out in the BLA, including, but not limited to, filing a statement of claim or a certificate of lis pendens.

10. Upon the Monitor providing a certificate to the Registrar of Land Titles confirming receipt of the Funds by the Monitor and that the Funds are sufficient to pay the Liens, the Registrar is hereby authorized and directed under section 191(3)(a) of the *Land Titles Act*, RSA 2000, c L-4 to discharge the registration of the Liens registered on or before the date of this Order against title to the Lands, whereupon the Lien Claimants shall have no further claim against MD of Bonnyville in accordance with paragraph 5 hereof.

11. The Lien Claimant, JMB, any Interested Party and MD of Bonnyville, at the request in writing of the Monitor, shall provide to the Monitor information reasonably necessary for the Monitor to make a Lien Determination.

12. Upon receipt of the information relating to a Lien and Lien Claim contemplated by paragraph 12 hereof, the Monitor shall make its Lien Determination in respect thereof and provide a Determination Notice to the Lien Claimant, JMB and any other Interested Party.

13. If a Lien Claimant, JMB or any Interested Party does not accept a Lien Determination, each of the Lien Claimant, JMB and Interested Party is hereby granted leave to file and serve an application with this Court within 15 days of being served with the Determination Notice by the Monitor at the email address of the Lien Claimant as shown on the Lien or Lien Notice, and on JMB and any Interested Party in the records of the Monitor.

14. Once the 15-day period provided for in paragraph 13 hereof has expired without an application being served and filed with this Court, the Lien Determination of the Monitor shall be final and the Lien Claimant, JMB, and any Interested Parties shall not have any recourse to remedies set out in the BLA with respect to such Liens or Lien Claims, or as and against any of the Funds or the Holdback Amount.

15. The Monitor shall make the following payments from the Funds pursuant to this Order:

    (a) Once the certificate has been provided to the Registrar by the Monitor pursuant to paragraph 10 herein, the Monitor shall pay: (i) to JMB, the total amount of the

Funds less the Holdback Amount and the CRA Amount; and (ii) to CRA, the CRA Amount;

(b) Following each Lien Determination becoming final, the Monitor shall pay to each Lien Claimant the amount of its Lien Claim as set out in the Lien Determination from the Holdback Amount; and

(c) The Monitor, provided that it reserves a sufficient amount of the Holdback Amount to pay the Lien Claims, may pay the amount in excess thereof, if any, to JMB after the Claims Bar Date has passed, and upon the Lien Determinations becoming final in respect of all of the Liens, the Monitor shall pay the remaining Holdback Amount to JMB.

Disputed Amount

16. The Disputed Amount is not subject to the terms of this Order and shall be dealt with by way of separate application to this Court if required.

17. Each party shall be responsible for their own costs regarding the within matter.

J.C.C.Q.B.A.

Schedule "A"
Lien Notice

Claimant: _____

Address for Notices: _____

Telephone: _____

Fax: _____

Email: _____

I, _____ **residing in the** _____ **of**
(name) (city, town, etc.)

_____ **in the Province of** _____
(name of city, town, etc.) (name of province)

do hereby certify that:

1. ☐ I am the Claimant

OR ☐ I am the _____ of the Claimant
(title/position)

2. I have knowledge of all the circumstances connected with the claim referred to in this Lien Notice form.

3. The Claimant has a valid

   (a) **Builders' Lien Claim** in the amount of $_____ arising pursuant to work done or materials furnished on behalf of JMB Crushing Systems Inc.

   (b) **Subrogated Claim** in the amount of $_____ arising pursuant to work done or materials furnished on behalf of JMB Crushing Systems Inc.

4. Attached hereto as Schedule "A" is an affidavit setting out the full particulars of the Claimant's builders' lien claim or subrogated claim, including all applicable contracts,

sub-contracts, the nature of the work completed or materials furnished, the last day on which any work was completed or materials were furnished, any payments received by the Claimant, all invoices issued by the Claimant, and all written notices of a lien served by the Claimant.

DATED at _____, this _____ day of May, 2020.
(location)

_____ _____

Witness

Name: Name:

Must be signed and witnessed

TAB 2

This is Exhibit "C" referred to in the Affidavit of Jason Panter sworn before me this _____ day of October, 2020.

_____

A Commissioner for Oaths in and for the Province of Alberta

3

TERMS AND CONDITIONS AGREEMENT

This Agreement is made effective the 1st day of November, 2013.

Between:

Municipal District of Bonnyville No. 87
(" hereinafter the "MD")

- and -

JMB Crushing Systems ULC
(hereinafter "JMB")

Definitions

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

    a. "Agreement" means this Terms and Conditions Agreement;

    b. "MD" means the Municipal District of Bonnyville No. 87, a municipality under the provisions of the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended, with offices at or near the town of Bonnyville, Alberta;

    c. "JMB" means JMB Crushing Systems ULC, a corporation under the laws of Alberta with offices in the town of Bonnyville, Alberta;

    d. "Parties" means the Municipal District of Bonnyville No. 87 and JMB Crushing Systems ULC;

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

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

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g. "Term" means the period of time this Agreement is in effect; and

h. "Year" means a calendar year commencing on January 1 and ending on December 31 of the same year.

JMB Responsibilities

2. At all times, JMB will comply with all applicable laws.

3. At its own cost, JMB will provide all labour, materials, equipment, supplies and anything else required to produce the Product and provide the Services to the satisfaction of the MD.

4. All personnel of JMB who are directly or indirectly involved with producing the Product and providing the Services are under the direction and control of JMB.

5. JMB will exercise good workmanship and quality control regarding the Product and Services.

6. JMB will prioritize, schedule, plan and establish deadlines such that the Product and Services are provided to the MD in accordance with the terms of this Agreement.

7. JMB shall forthwith report to the MD any damage it causes to MD property.

8. At all times, JMB shall ensure it is meeting all legal requirements to carry on its business and provide the Product and Services to the MD.

9. JMB represents that it is a resident of Canada for the purposes of Canadian income tax legislation.

Prime Contractor

10. JMB will be the prime contractor in the specific areas and geographic locations where the Product and Services are provided, including the pit where the Product is made and for all areas related to providing the Services.

Product & Services

11. At its own cost, JMB is responsible for crushing rock/gravel at a pit to produce the Product which is in a usable aggregate form for the MD and which is in accordance with the following required specifications:

    a. Modified Designation 4 Class 20mm, Modified Designation 4 Class 40 mm in accordance with the following specifications in the table below:

3

DESIGNATION	4	
CLASS (MM)	20	40
40 000		100
PERCENT 25 000		
PASSING METRIC 20 000	100	55-
SIEVE 10 000	35-77	25-
(COSB 8-GP 8 000		
2M)*M 5 000	15-55	8-55
1 250	0-30	0-30
80	0-12	0-12
%FRACTURE BY ALL WEIGHT FACES +5000	40+	25+
PLASITICITY INDEX (PI)	NP-8	NP-8

b. Product specifications are as set out above, or otherwise agreed by the Parties in writing, and are generally described as crushed gravel being Modified Des 4 Class 20/Des 4 Class 40 with no more than 25% passing the 1250um.

c. A minimum of 200,000 (two-hundred-thousand) tonnes of Product per Year, shall be delivered and stockpiled at designated locations within the geographic boundaries of the MD, as determined by the MD acting reasonably.

d. The stockpile locations designated by the MD for the 2013 Year are the MD's yard at NE 19-61-5 W4m and at the Harco Oilfield Services Ltd. NW 14-62-2 W4M. JMB will have unlimited access to the Harco Oilfield Services Ltd. location. JMB will have reasonable access to the MD's yard.

e. Annual quantities, and locations where the Product will be hauled and stockpiled by JMB, shall be confirmed in writing by September 1st of each year. Unless the Parties agree otherwise in writing, the annual quantities shall not be less than 200,000 (two-hundred-thousand) tonnes of Product delivered and stockpiled for the MD by JMB.

f. JMB may make the Product, haul and stockpile to the MD designated locations for the given year as mutually agreed upon by both parties.

g. For delivery and stockpiling of the Product, JMB shall have reasonable access to locations designated by the MD.

Delivery and Stockpiling

12. JMB shall deliver the Product to the MD, and in cooperation with MD staff, stockpile the Product in a continuous cone to a minimum height of 10 (ten) meters. JMB shall supply all equipment and labour for delivering and stockpiling the Product, including trucks, a stacking conveyor(s), bulldozer(s) and any other equipment.

Changes to Product

13. Changes may be made to the Product amounts or specifications as agreed upon by the Parties. When such changes are agreed upon, the Parties shall prepare and execute an amendment to this Agreement.

Ownership of Product

14. JMB shall own the Product until the MD has paid all invoices for the crushing of the Product in a Year, or when all of the Product for the same Year has been delivered to the MD, whichever first occurs.

Term

15. The Term of this Agreement shall be ten (10) years, commencing on November 1, 2013.

Price

16. The price for the Product and Services provided in accordance with the provisions of this Agreement shall be as follows:

    a. For the first 5 years of this Agreement, the MD will pay JMB $25.00 (twenty-five dollars) per tonne; and

    b. The last 5 years of this Agreement, the MD will pay JMB $27.00 (twenty-seven dollars) per tonne.

17. Unless agreed to in writing by the Parties, the MD will not pay JMB any monies other than the amounts per tonne specified in this Agreement for the Product and Services, plus GST.

Invoicing & Set-Off

18. Invoices of JMB shall state the quantity of Product being invoiced, the period the invoice covers, the amount being invoiced, whether the invoice is for crushing or delivery/stockpiling of the Product, GST, and any other reasonable information required by the MD.

19. When crushing is being done in a Year, JMB shall invoice the MD on a bi-weekly basis for 50% (fifty percent) of the applicable price per tonne of the Product which has been crushed and which will subsequently be delivered to the MD in the same Year.

20. When the Product is delivered and stockpiled in a Year as per this Agreement, JMB shall invoice the MD bi-weekly, or other period agreed on in writing by the Parties, for the remaining 50% (fifty percent) of the applicable price per tonne for the Product which is scaled/weighed by JMB and delivered and stockpiled by JMB.

21. Within 30 days of receiving JMB invoices, the MD will pay undisputed amounts.

22. The MD may make adjustments for any overpayments to JMB at any time.

23. For each Year, all invoices for that Year are to be submitted by JMB to the MD by December 31 of that Year.

24. At all times, the MD reserves the right to verify the quantity and quality of Product which JMB invoices it. The MD is not required to pay for Product which does not meet the specifications and the permitted deviations from them in accordance with this Agreement.

25. JMB shall be responsible to remit all amounts required by provincial and federal laws to the appropriate governmental agency.

26. From the amounts paid to JMB by the MD, JMB is deemed to hold that part of them in trust which are required or needed to pay for any salaries, wages, compensation, overtime pay, statutory holiday pay, vacation pay, entitlements, employee and employer Canada Pension Plan contributions, employee and employer Employment Insurance contributions, 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.

27. The MD may set-off and deduct any monies payable to JMB against any financial obligation JMB owes the MD.

Other Fees

28. JMB reserves the right to negotiate with the MD for reasonable and necessary ancillary charges which are assessed by other municipalities or the provincial or federal governments. The MD must agree in writing to any such ancillary charges before they are paid by the MD.

GST

29. The Parties shall comply with the *Excise Tax Act* (Canada) pertaining to GST. JMB shall set out applicable GST as a separate item on all invoices and the MD shall pay such GST. JMB shall be responsible for remitting GST in accordance with the *Excise Tax Act.*

30. JMB and the MD shall have registered Goods & Services Tax ("GST") accounts.

Changes

31. The MD may at any time issue changes to the general scope of the Product and the Services in this Agreement. In such event, the MD and JMB shall agree to an equitable adjustment to the price. Any such agreed changes and adjustments shall be in writing.

Quality Control

32. JMB will ensure the quality of the Product meets the required specifications stated in this Agreement.

33. At JMB's cost, sieve samples shall be taken by a qualified independent geotechnical testing firm at a frequency of 1 (one) sieve per 1,000 (one-thousand) tonnes of Product produced and records shall be kept of such samples. Copies of the sample results will be provided to the MD by JMB within 72 (seventy-two) hours of them being taken.

34. JMB will ensure that the variances from the specifications for the Product do not deviate more than 2% (two percent) from the required specifications. If the variance from the Product specifications continues to deviate from the required specifications for more than 2 (two) consecutive sieves without satisfactory correction by JMB, until the required specifications are met, the MD reserves the right to reject the Product which does not meet the required specifications. Should such deviation occur the MD shall undertake to notify JMB is writing prior to any further action.

35. Test sampling of the Product shall be performed by JMB at the pit and records will be kept of the samples. Such test sampling will be done as frequently as required to ensure the required specifications for the Product is in accordance with the terms of this Agreement. Copies of the test sample results will be provided to the MD by JMB within 72 (seventy-two) hours of them being taken.

36. Spot testing of the Product will be performed by the MD when the Product is delivered to the designated locations specified by the MD and records of such testing will be kept by the MD. Copies of the spot testing results will be provided to JMB by the MD within 72 hours (seventy-two) hours of them being taken. JMB will ensure that the variances from the specifications for the delivered Product do not

deviate more than 2% (two percent) from the required specifications for the Product. If the variance from the Product specifications continues to deviate from the required specifications for more than 2 (two) consecutive sieves of delivered Product without satisfactory correction by JMB, the delivery of the Product will be suspended until an independent geotechnical consultant can verify that the specifications of the Product delivered is meeting the required specifications. JMB will pay the costs for such an independent assessment.

Insurance

37. At all times, JMB shall maintain Workers' Compensation insurance and shall pay its assessments and premiums as required by applicable Workers' Compensation legislation. JMB shall provide the MD with proof of Workers' Compensation coverage as required by the MD.

38. At all times, JMB shall have general liability insurance, with limits of not less than five-million dollars ($5,000,000) per occurrence for bodily injury, death, property damage, loss of use and consequential losses. At the MD's request, JMB shall furnish certificates of insurance as proof of coverage.

Indemnification & Liability

39. JMB shall indemnify and hold harmless the MD, its directors, trustees, officers, councillors, agents and employees, against and from any actions, claims, demands, proceedings, loss, liability, damages on account of injury to or death of persons, damage to or destruction of property belonging to the MD or others, which are directly or indirectly caused by JMB's acts, breach of contract or negligence related to the Product and Services.

40. Nothing in this Agreement shall obligate JMB to indemnify the MD for any loss, liability or damages caused by breach of contract or negligence by the MD, its directors, trustees, officers, councillors, agents or employees.

41. JMB indemnifies the MD for all amounts related to the Product and Services, or related to its personnel, including interest and penalties, which it is required to pay or remit to any governmental agency as required by law, including the Workers' Compensation Board.

Non-Agent

42. The Parties agree that none of the provisions of this Agreement shall be construed so as to constitute JMB as being the agent, partner or servant of the MD. JMB shall have no authority to make any statements, representations or commitments of any kind, or take any action, which may be binding upon the MD, except as may be authorized in writing by the MD.

Termination & Suspension

43. This Agreement automatically terminates without notice and without penalty when the Term expires.

44. Without notice to JMB and without penalty to the MD, this Agreement automatically terminates when JMB goes into receivership, becomes insolvent or is assigned or petitioned into bankruptcy.

45. By notifying JMB in writing, the MD may terminate this Agreement forthwith for a material breach of the terms of this Agreement and without further obligation on the MD beyond the date of such termination.

46. By notifying the MD in writing, JMB may terminate this Agreement forthwith for a material breach of the terms of this Agreement and without further obligation on JMB beyond the date of such termination.

47. At any time, the MD and JMB may mutually agree in writing to terminate this Agreement regardless of the foregoing termination provisions.

48. Upon written notice, the MD may suspend the operation of this Agreement, without penalty, when JMB is not complying with the terms of this Agreement and such suspension shall continue until JMB complies with the terms of this Agreement or the MD terminates this Agreement for a material breach of its terms.

49. Upon written notice, JMB may suspend the operation of this Agreement, without penalty, when the MD is not complying with the terms of this Agreement and such suspension shall continue until the MD complies with the terms of this Agreement or JMB terminates this Agreement for a material breach of its terms.

Mediation & Arbitration

50. Without prejudice to any other right or remedy the Parties may have, in the event of a dispute, the Parties shall make best efforts to resolve the dispute and use mediation before arbitration. When the parties cannot agree on a mediator, the Court of Queen's Bench of Alberta, upon application, shall appoint a mediator.

51. The Parties agree that any disputes arising from the performance of this Agreement, which cannot be settled in negotiation or mediation between the Parties, shall be submitted to a single arbitrator subject to the rules and procedures of the Alberta *Arbitration Act*, which shall be binding and subject to the limitations expressed in this Agreement. Each party shall bear its own costs for arbitration. The Parties shall equally share the costs of the arbitrator. Unless the Parties agree otherwise in writing, the place of the arbitration shall be Edmonton, Alberta. An arbitrator must be qualified to perform the arbitration by having the knowledge, experience, ability and

expertise to perform the arbitration relative to the nature of the dispute between the Parties.

52. When the Parties cannot agree in writing on an arbitrator, the Court of Queen's Bench, upon application, shall appoint an arbitrator.

Notices & Correspondence

53. Any notice required or permitted to be given hereunder shall be in writing, may be delivered personally or by facsimile, email, courier or registered mail, and shall be addressed to the representative of each Party at the address below, until changed by notification in writing to the other Party:

a. To JMB at:

Attention: Jeff Buck
JMB Crushing Systems ULC
P.O. Box 6977
Junction Secondary HWY #660 & Range Road 445
Bonnyville, AB T9N 2H4
Fax: 780-826-6280
Email: admin@jmbcrush.com

b. To the MD:

Attention: Darcy Zelisko
Municipal District of Bonnyville No. 87
Bag 1010
61330 RR 455
Bonnyville, AB T9N 2J7
Fax: 780-826-5064
Email: dzelisko@md.bonnyville.ab.ca

General

54. All references to dollars and "$" in this Agreement are to Canadian Dollars.

55. Time shall be of the essence in this Agreement.

56. In this Agreement, unless otherwise stated, all references to the masculine or feminine gender shall include the other and vice-versa.

57. This Agreement shall be construed and enforced in accordance with the laws applicable in the province of Alberta. The Parties hereto irrevocably attorn to the jurisdiction of the courts and arbitration in Alberta.

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58. This Agreement contains the entire agreement and understanding between the MD and JMB and supersedes all prior representations and discussions pertaining to all matters directly or indirectly covered in this Agreement. There are no conditions, warranties, representations, understandings or agreements of any nature other than as set out in this Agreement.

59. This Agreement may only be amended by a subsequent written instrument signed by both Parties.

60. Failure of the Parties to insist upon or to enforce strict performance of any of the terms of this Agreement shall not be construed as a waiver of their rights to assert or rely upon such terms subsequently.

61. Should any part of this Agreement be held invalid or illegal, that part shall be severed from the Agreement and the remainder shall continue in full force and effect.

62. This Agreement shall not be assigned, except as may be agreed upon by the Parties in writing.

63. Neither Party shall be responsible for any delay or failure to perform its obligations under this Agreement where such delay or failure is due to natural disasters, fire, flood, explosion, acts of terrorism, war, embargo, labour strikes, Acts of God, or any other cause beyond their control. Within seven (7) days from the beginning of such events, the affected Party shall notify the other Party in writing of the existence of the event and its probable impact on its obligations in this Agreement.

64. This Agreement may be executed and delivered by the Parties in counterparts (each of which shall be considered an original) and by facsimile, email or other electronic means, and when a counterpart has been executed and delivered by each of the Parties, all such counterparts shall together constituted one agreement.

IN WITNESS THEREOF the authorized representatives of the Parties have executed this Agreement as of the date first written above.

JMB CRUSHING SYSTEMS ULC
Per:

Jeff Buck, President

MUNICIPAL DISTRICT OF BONNYVILLE No. 87
Per:

AMENDMENT TO AGREEMENT

This is an amendment to the terms and conditions of the agreement signed on the 30th day of September, 2015.

BETWEEN:

Municipal District of Bonnyville No. 87
("hereinafter the "MD")

- And –

JMB Crushing Systems ULC
(Hereinafter "JMB")

WHEREAS the parties wish to amend certain terms of the agreement and WHEREAS both parties have reviewed and agreed upon the following terms and references being amended as follows:

Clause 11 c.

- A minimum of 200,000 (two-hundred-thousand) tonnes of Product per year, shall be supplied and/or stockpiled at designated locations within the geographic boundaries of the MD, mutually agreed upon by both parties. Should the Product be stockpiled in one of the designated pits both quantities and quality of Product shall be monitored and any shortfall shall be supplied in the same year as hauled. The MD will weight Product based on Loadrite scale and provide such records to JMB for confirmation if required.

Clause 11 d.

- ~~The stockpile locations designated by the MD for the 2013 Year are the MD's yard at NE 19-61-5 W4M and at the Harco Oilfeild Services Ltd. NW 14-62-2 W4M. JMB will have unlimited access e Harco Oilfield Services Ltd location. JMB will have reasonable access to the MD's yard.~~

- The stockpile locations designated by the MD for 2015 as agreed upon by both parties will be Pit #19 - with gravel remaining in the Pit until the MD uses the gravel. For 2016 ONLY the designated stockpile locations shall be Pit #19, the Truman pit or the MD yard or as mutually agreed upon.

Clause 11 e.

- Annual quantities, and locations where the Product will be hauled and stockpiled by JMB, shall be confirmed in writing by September 1st of each year except for 2016 ONLY confirmation of quantities and location will be January 1st. With 50% of payment at time of crushing and the remainder September 1st of 2016 providing it is stockpiled in one of the designated pits for $21.00/tonne. Every year thereafter moving forward notification will be September 1st unless the Parties agree otherwise. The annual quantities shall not be less than 200,000 (two-hundred-thousand) tonnes of Product delivered and stockpiled for the MD by JMB.

Clause 16.

- The price for the Product and Services provided in accordance with the provisions of this Agreement shall be as follows:
    a. For the remaining 2 years and moving forward , the MD will pay JMB:
        a. For 2016 - Product is in either of the following pits, namely Pit #19 or Truman Pit $21.00 (twenty-one dollars) per tonne or in MD yard $25.00 (twenty-five dollars) per tonne;
    b. The last five years of this Agreement, the MD will pay JMB $27.00 (twenty-seven dollars) per tonne.

Except as set forth in this Agreement, the Agreement is unaffected and shall continue in full force and effect in accordance with the terms. If there is a conflict between this Amendment and Agreement or any earlier Agreement, the terms of this Amendment will prevail.

JMB CRSHING SYSTEMS ULC
Per:

Jeff Buck, President

MUNICIPAL DISTRICT OF BONNVYILLE NO. 87
Per:

CAO, Chris Cambridge

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AMENDMENT TO AGREEMENT

This is an amendment to the terms and conditions of the agreement signed on the 12th day of December, 2016.

BETWEEN:

Municipal District of Bonnyville No. 87
("hereinafter the "MD")

- And –

JMB Crushing Systems ULC
(Hereinafter "JMB")

WHEREAS the parties wish to amend certain terms of the agreement and WHEREAS both parties have reviewed and agreed upon the following terms and references being amended as follows:

The MD to receive a $1 (one dollar) reduction per tonne on the Product with the following conditions:

- Crush and stockpile 200,000 (two hundred thousand) tonnes of Product at an earlier mutually agreed upon time – starting as soon as December of the prior year and enforceable for the remainder of the term of the Agreement;
- Invoices payable within 90 days of receipt for Product – invoices to be dated within calendar year of Product delivery;
- Failure to notify the MD for Quality Control may result in the Product being refused.

Except as set forth in this Agreement, the Agreement is unaffected and shall continue in full force and effect in accordance with the terms. If there is a conflict between this Amendment and Agreement or any earlier Agreement, the terms of this Amendment will prevail.

JMB CRUSHING SYSTEMS ULC
Per:

Jeff Buck, President

MUNICIPAL DISTRICT OF BONNVYILLE NO. 87
Per:

CAO, Chris Cambridge

AMENDMENT TO AGREEMENT

This is an amendment to the terms and conditions of the agreement signed on the 26th day of February 2018.

BETWEEN:

Municipal District of Bonnyville No. 87
("hereinafter the "MD")

- And –

JMB Crushing Systems ULC
(Hereinafter "JMB")

WHEREAS the parties wish to amend certain terms of the agreement and WHEREAS both parties have reviewed and agreed upon the following terms and references being amended as follows:

The MD to receive a $.50 (fifty cent) reduction per tonne on Product haul for 2018 gravel supply with the following conditions:

- As per request from JMB for full payment of 2018 interim crush by the end of February 2018
- And as per council motion:
  Resolution No. 18.152
  That Council agrees to an early payment on February 28, 2018 to JMB Crushing Systems ULC for the 2018 gravel crushing contract, subject to the Municipal District receiving a reduction of $.50 per tonne on the fall gravel haul portion of the 2018 gravel supply contract with JMB Crushing.

Background:

- As per original agreement dated 1st November 2013 and in particular Clause 16
  a) For the first 5 years of this Agreement, the MD will pay JMB $25.00 (twenty-five dollars) per tonne; and
  b) The last five years of this Agreement, the MD will pay JMB $27.00 (twenty-seven dollars per tonne.

- Amending agreement dated 30th September 2015 and in particular Clause 16
  a) For the remaining two(2) years and moving forward, the MD will pay JMB:
  For 2016 product is in either of the following pits, namely pit #19 or Truman Pit
  $21.00 (twenty-one dollars) per tonne or in the MD yard $25.00 (twenty-five dollars) per tonne
  b) The last five (5) years of this Agreement, the MD will pay JMB $27.00 (twenty-seven dollars) per tonne.

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- Amending agreement dated 12th of December 2016 and in particular Clause 16:
    - The MD will receive a $1.00 (one dollar) reduction per tonne on the Product with the following conditions:
        - Crush and stockpile 200,000 (two hundred thousand) tonnes of Product at an earlier mutually agreed upon time – starting as soon as December of the prior year and enforceable for the remainder of the term of this Agreement.
        - Invoices payable within 90 days of receipt for Product – Invoices to be dated within calendar year of Product delivery.
        - Failure to notify the MD for Quality Control may result in the Product being refused.

Keeping in mind that as per Amending Agreement dated 16th December 2016 and this amending agreement the MD will be receiving a $1.50 (one dollar and fifty cent) reduction for the 2018 crush and supply contract.

Except as set forth in this Agreement, the Agreement is unaffected and shall continue in full force and effect in accordance with the terms. If there is a conflict between this Amendment and Agreement or any earlier Agreement, the terms of this Amendment will prevail.

JMB CRSHING SYSTEMS ULC
Per:

Jeff Buck, President

MUNICIPAL DISTRICT OF BONNVYILLE NO. 87
Per:

CAO, Chris Cambridge

TAB 3

Clerk's Stamp

50383

COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
APPLICANTS:	JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
DOCUMENT:	**AMENDED AND RESTATED CCAA INITIAL ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming/Caireen E. Hanert/Alex Matthews** Phone: 403.298.1938/403.298.1992/403.298.1018 Fax: 403.263.9193 File No.: A163514

DATE ON WHICH ORDER WAS PRONOUNCED: May 11, 2020

NAME OF JUDGE WHO MADE THIS ORDER: Madam Justice K.M. Eidsvik

LOCATION OF HEARING: Calgary Court House

UPON the application of JMB Crushing Systems Inc. and 2161889 Alberta Ltd. (the "**Applicants**"); **AND UPON** having read the Application filed by the Applicants on May 8, 2020,

the Affidavit of Jeff Buck sworn April 16, 2020 (the "**First Buck Affidavit**"), the Supplemental Affidavit of Jeff Buck sworn April 29, 2020, and the Affidavit of Jeff Buck sworn May 8, 2020 (the "**Second Buck Affidavit**"); **AND UPON** reading the First Report of FTI Consulting Canada Inc., in its capacity as Monitor of the Applicants (the "**Monitor**"); **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided with notice of this Application; **AND UPON** hearing counsel for the Applicants, the Monitor, ATB Financial, Fiera Private Debt Fund VI LP and Fiera Private Debt Fund V LP, and those parties present; **AND UPON** reviewing the initial order granted in the within proceedings pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") by the Honourable Madam Justice K.M. Eidsvik on May 1, 2020 (the "**Initial Order**"); **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner

consistent with the preservation of their business (the "**Business**") and Property; and

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order;

(c) with the consent of the Monitor, amounts owing for goods or services supplied to the Applicants, including for the period prior to the date of this Order if, in the opinion of the Applicants following consultation with the Monitor, the supplier or vendor of such goods or services is critical for the operation or preservation of the Business or Property;

(d) in the case of goods or services supplied to the Applicants prior to the date of this Order, any amounts paid to the supplier or vendors shall be limited to those amounts secured by liens, where the Monitor is satisfied with respect to the claim and its lien protection, or amounts paid in connection with ongoing projects that the Monitor is satisfied is necessary in order to ensure the supplier or vendor continues to supply or perform work in respect of such project;

(e) repayment from the ATB Facility (as defined in paragraph 31 below) of amounts advanced by ATB Financial to JMB under a bulge facility created pursuant to an amending agreement dated April 17, 2020 between ATB Financial and the Applicants; and

(f) with consent of the Monitor, repayment of the $200,000 advanced by Canadian Aggregate Resource Corporation to JMB on or about April 10, 2020.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order, subject to the requirements in paragraph (c) hereof.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance;

(ii) Canada Pension Plan; and

(iii) income taxes,

but only where such statutory deemed trust amounts arise after the date of the Initial Order, or are not required to be remitted until after the date of the Initial Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of the Initial Order, or where such Sales Taxes were accrued or collected prior to the date of the Initial Order but not required to be remitted until on or after the date of the Initial Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of the Initial Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order or authorized in the Interim Financing Agreement or the Definitive Documents, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of the Initial Order, subject to paragraphs (c)and (d) herein;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property, subject to those as may be authorized or required under the Interim Financing Agreements or approved by the Interim Lenders in writing; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Interim Financing Agreements or the Definitive Documents (as hereinafter defined in paragraph 33), have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $500,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a

representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including July 31, 2020, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all

Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

    (e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment.

15. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants (or either of them), including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of the Initial Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of the Initial Order, nor shall any person, other than the Interim Lenders where applicable, be under any obligation on or after the date of the Initial Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 13 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date of the Initial Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicants shall indemnify their current and future directors and officers against obligations and liabilities that they may incur in their capacity as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 38 to 40 herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

    (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lenders and their counsel of financial and other information as agreed to between the Applicants and the Interim Lenders which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lenders;

(d) monitor all expenditures of the Applicants and approve any material expenditures;

(e) advise the Applicants in its preparation of the Applicants' cash flow statements and reporting required by the Interim Lenders, which information shall be reviewed with the Monitor and delivered to the Interim Lenders and their counsel on a periodic basis, but not less than bi-weekly, or as otherwise agreed to by the Interim Lenders;

(f) direct and manage any sale and investment solicitation process and all bids made therein;

(g) seek input into various aspects of these CCAA proceedings directly from the Applicants' senior secured lenders, ATB Financial, Fiera Private Debt Fund VI LP and Fiera Private Debt Fund V LP;

(h) advise the Applicants in their development of the Plan and any amendments to the Plan;

(i) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(j) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform its duties arising under this Order;

(k) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(l) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(m) perform such other duties as are required by this Order or by this Court from time to time.

25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any

federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

26. The Monitor shall provide any creditor of the Applicants and the Interim Lenders with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

27. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants, in each case on a bi-weekly basis.

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, and counsel to the Applicants, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the

Property, which charge shall not exceed an aggregate amount of $300,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of the Initial Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 38 to 40 hereof.

INTERIM FINANCING

31. The Applicants are hereby authorized and empowered to obtain and borrow under an interim revolving credit facility in the maximum amount of $900,000 from ATB Financial ("**ATB Financial**", and such facility, the "**ATB Facility**") and an interim revolving credit facility in the maximum amount of $900,000 from Canadian Aggregate Resource Corporation ("**CARC**", such facility, the "**CARC Facility**", CARC and ATB Financial, collectively the "**Interim Lenders**", individually an "**Interim Lender**", and the ATB Facility and CARC Facility, collectively the "**Facilities**") during the Stay Period in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that (a) the Applicants shall not draw on the CARC Facility unless ATB Financial has terminated or is unwilling to permit advances under the ATB Facility; and (b) the maximum amount available under the CARC Facility shall be reduced by the amounts outstanding under the ATB Facility.

32. The ATB Facility shall be on the terms and subject to the conditions set forth in a commitment letter dated April 30, 2020 between ATB and the Applicants and the CARC Facility shall be on the terms and subject to the conditions set forth in a commitment letter dated April 30, 2020 between CARC and the Applicants (as may be amended from time to time by the parties thereto, with the consent of the Monitor, the "**Interim Financing Agreements**"), filed.

33. The Applicants are hereby authorized and empowered to execute and deliver such mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (which, together with the Interim Financing Agreements, are collectively referred to as the "**Definitive Documents**") as are contemplated by the Interim Financing Agreements or as may be reasonably required by the Interim Lenders pursuant to the terms

thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lenders under and pursuant to the Interim Financing Agreements and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

34. The Interim Lenders shall be entitled to the benefits of and are hereby granted a charge (the "**Interim Lenders' Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order, which charge shall not exceed the aggregate amount outstanding under the Interim Facility Agreements. The Interim Lenders' Charge shall have the priority set out in paragraphs 38 to 40 hereof.

35. Notwithstanding any other provision of this Order:

(a) the Interim Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lenders' Charge or any of the Definitive Documents;

(b) upon the termination of the ATB Facility by ATB Financial, on notice in writing to JMB, CARC and the Monitor, if CARC does not make an advance under the CARC Facility that repays the amount outstanding under the ATB Facility in full within seven (7) business days, ATB Financial may without further notice exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Interim Financing Agreement and Definitive Documents in favour of ATB Financial and the Interim Lenders' Charge, including without limitation, to set off and/or consolidate any amounts owing by the Interim Lenders to the Applicants against the obligations of the Applicants to the Interim Lenders under such Definitive Documents or the Interim Lenders' Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants;

(c) upon the occurrence of an event of default under the Interim Financing Agreements, the Definitive Documents or the Interim Lenders' Charge, the Interim Lenders, upon seven (7) business days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Interim Financing Agreements, Definitive Documents, and the Interim Lenders' Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lenders to the Applicants against the obligations of the Applicants to the Interim Lenders under the Interim Financing Agreements, the Definitive Documents or the Interim Lenders' Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(d) the foregoing rights and remedies of the Interim Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

36. Any amounts realized or received by an Interim Lender after an Interim Lender enforces the Interim Lenders' Charge in the manner contemplated by paragraph 35(b) or 35(c) of this Order shall be applied first to the outstanding obligations owing to ATB under the ATB Facility and second to the outstanding obligations owing to CARC under the CARC Facility. For greater certainty, the obligations to CARC secured by the Interim Lenders' Charge are subordinated to the obligations to ATB Financial secured by the Interim Lenders' Charge.

37. The Interim Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), with respect to any advances made under the Interim Financing Agreements or the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

38. The priorities of the Directors' Charge, the Administration Charge, and the Interim Lenders' Charge as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $300,000);

Second – Interim Lenders' Charge, subject to, as between ATB Financial and CARC, paragraph 36 hereof; and

Third – Directors' Charge (to the maximum amount of $250,000).

39. The filing, registration or perfection of the Administration Charge, the Interim Lenders' Charge and the Directors' Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person that has received notice of this Application.

41. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor and the persons entitled to the benefit of those Charges (collectively, the **Chargees**"), or as approved by further order of this Court.

42. Each of the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(f) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof , including the Interim Financing Agreements or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which either is a party;

(g) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Applicants entering into the Interim Financing Agreements or the Definitive Documents, or the execution, delivery or performance of the Definitive Documents; and

(h) the payments made by the Applicants pursuant to this Order, including the Interim Financing Agreements or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

APPROVAL OF SISP

43. The SISP attached as Schedule "A" hereto is hereby approved, and the Monitor is hereby authorized to commence the SISP, in consultation with the Sale Advisor (as defined in the

SISP), the Applicants, the Interim Lenders and the Applicants' senior secured lenders pursuant to the terms of the SISP. The Applicants, the Monitor and the Sale Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder.

44. Sequeira Partners is hereby appointed pursuant to the CCAA as the Sale Advisor to carry out the SISP in cooperation with the Applicants and the Monitor.

45. Each of the Monitor and the Sale Advisor, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the SISP, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Monitor or the Sale Advisor, as applicable, in performing its obligations under the SISP (as determined by this Court).

46. In connection with the SISP and pursuant to sections 20 and 22 of the *Personal Information Protection Act (Alberta)*, the Applicants, the Sale Advisor and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective bidders and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more potential transactions (each, a "**Transaction**"). Each prospective bidder to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the transaction, and if it does not complete a Transaction, shall: (a) return all such information to the Applicants, the Sale Advisor and the Monitor, as applicable; (b) destroy all such information; or (c) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of the Business or any Property shall be entitled to continue to use the personal information provided to it, and related to the Business or Property purchased, in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, the Sale Advisor or the Monitor, as applicable, or ensure that other personal information is destroyed.

ALLOCATION

47. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the Interim Lenders' Charge and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

48. The Monitor shall (i) without delay, publish in the Edmonton Journal a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

49. The Applicants and, where applicable, the Monitor, are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

50. Any Person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to a service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up-to-date form of the Service List on its website at: [http://cfcanada.fticonsulting.com/jmb].

51. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to the email addresses of counsel

as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on its website at:
[http://cfcanada.fticonsulting.com/jmb].

52. Subject to further order of this Court in respect of urgent motions, any interested party wishing to object to the relief sought in an application brought by the Applicants or the Monitor in these proceedings shall, subject to further order of this Court, provide the Service List with responding application materials or a written notice (including by email) stating its objection to the application and the grounds for such objection by no later than 5:00pm Mountain Standard Time on the date that is four (4) days prior to the date such application is returnable (the "**Objection Deadline**"). The Monitor shall have the ability to extend the Objection Deadline after consulting with the Applicants. This paragraph shall not apply to any application served less than 7 days prior to its hearing date.

53. Following the expiry of the Objection Deadline, counsel for the Monitor or counsel for the Applicants shall inform the Commercial Coordinator in writing (which may be by email) of the absence or the status of any objections to the application, and the judge having carriage of the application may determine the manner in which the application and any objections to the application, as applicable, will be dealt with.

GENERAL

54. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

55. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

56. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

57. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

58. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

59. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

60. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

SALE AND INVESTMENT SOLICITATION PROCESS

INTRODUCTION

On May 1, 2020, JMB Crushing Systems Inc. ("**JMB Crushing**") and 2161889 Alberta Ltd. ("**216**", and together with JMB Crushing, collectively, "**JMB**") applied for an Initial Order (the "**Initial Order**") from the Alberta Court of Queen's Bench (the "**Court**") in Court Action No. 2001–05482 pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**"), to, among other things, appoint FTI Consulting Canada Inc. ("**FTI**") as the monitor (the "**Monitor**") of JMB,

The principal secured creditors of JMB are ATB Financial ("**ATB**") and Fiera Private Debt Fund VI LP, by its general partner Integrated Private Debt Fund GP Inc. ("**Fund VI**"), and Fiera Private Debt Fund V LP, by its general partner Integrated Private Debt Fund GP Inc., acting in its capacity as collateral agent for and on behalf of and for the benefit of Fund VI (collectively, "**Fiera**", and together with ATB, the "**Secured Creditors**").

In connection with the CCAA proceedings, a sale, re-capitalization and investment solicitation process is being implemented in respect of JMB (the "**SISP**") in order to solicit interest in and opportunities for a sale of, or investment in, JMB or all or any part of JMB's property, assets and undertakings ("**Property**") and its business operations ("**Business**"). Such opportunities may include one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of one or more of JMB Crushing and/or 216 as a going concern, or a sale of all, substantially all or one or more components of JMB's Property and Business as a going concern or otherwise.

The SISP will be conducted by the Monitor with the assistance of a sale advisor to be retained by the Monitor after consultation with JMB, ATB and Fund VI (the "**Sale Advisor**") and subject to the overall approval of the Court pursuant to the Initial Order.

The Applicants anticipate that there may be a stalking horse bidder. If that is the case, the Applicants reserve their right to amend the SISP to include provisions applicable to a stalking horse bid.

Parties who wish to have their bids and/or proposals considered shall be expected to participate in this SISP as conducted by the Monitor and the Sale Advisor.

OPPORTUNITY

1. The SISP is intended to solicit interest in, and opportunities for a sale of, or investment in, all or part of JMB's Property or Business (the "**Opportunity**"), which primarily consists of aggregate inventory, equipment, surface material leases and royalty agreements. The inventory and lands to which the leases and royalty agreements apply are located in Alberta.

2. In order to maximize the number of participants that may have an interest in the Opportunity, the SISP will provide for the solicitation of interest for:

(a) the sale of JMB's interest in the Property. In particular, interested parties may submit proposals to acquire all, substantially all or a portion of the Property of either JMB Crushing or 216 or both collectively (a "**Sale Proposal**"); and

(b) an investment in the Business as a going concern of JMB. Such proposals for the Business may take the form of an investment in the Business including by way of a plan of compromise or arrangement pursuant to the CCAA (an "**Investment Proposal**").

3. Except to the extent otherwise set forth in a definitive sale or investment agreement with a Successful Bidder (as hereinafter defined), any Sale Proposal or any Investment Proposal will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Sale Advisor or JMB, or any of their respective affiliates, agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of JMB in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

SOLICITATION OF INTEREST

4. As soon as reasonably practicable following the Initial Order, the Sale Advisor shall, in consultation with the Monitor:

(a) prepare: (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest in the Property or Business pursuant to the SISP; (ii) a non-disclosure agreement in form and substance satisfactory to the Monitor (an "**NDA**"); and (iii) a confidential information memorandum ("**CIM**");

(b) gather and review all required due diligence material to be provided to interested parties and continue the secure, electronic data room (the "**Data Room**"), which will be maintained and administered by the Sale Advisor during the SISP;

(c) prepare a list of potential bidders, including: (i) parties that have approached JMB, the Sale Advisor or the Monitor indicating an interest in the Opportunity; and (ii) local and international strategic and financial parties who the Sale Advisor, in consultation with the Monitor and JMB, believes may be interested in purchasing all or part of the Business or Property or investing in JMB pursuant to the SISP (collectively, the "**Known Potential Bidders**");

(d) cause a notice of the SISP (the "**Notice**") to be posted on the Sale Advisor's website and published in the Calgary Herald, Edmonton Journal, Bonnyville Nouvelle and Insolvency Insider once approved by the Court; and

(e) send the Teaser Letter and NDA to all Known Potential Bidders and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the

Sale Advisor, JMB or the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

5. As soon as reasonably practicable following the Initial Order, the Monitor shall issue a press release setting out the information contained in the Notice and such other relevant information that the Monitor` considers appropriate.

PHASE 1: NON-BINDING LETTERS OF INTENT

Qualified Bidders

6. Any party who expresses a desire to participate in the SISP (a "**Potential Bidder**") must, prior to being given any additional information such as the CIM or access to the Data Room, provide to the Sale Advisor written confirmation of the identity of the Potential Bidder, the contact information for such Potential Bidder, and disclosure of the direct and indirect principals of the Potential Bidder.

7. If a Potential Bidder has delivered the NDA and the confirmation contemplated in paragraph 6 above with disclosure that is satisfactory to the Sale Advisor, acting reasonably and in consultation with the Monitor, then such Potential Bidder will be deemed to be a "**Phase 1 Qualified Bidder**".

8. At any time during Phase 1 of the SISP, the Monitor may, acting reasonably, eliminate a Phase 1 Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a Phase 1 Qualified Bidder for the purposes of the SISP.

Due Diligence

9. The Sale Advisor, in consultation with the Monitor, subject to competitive and other business considerations, will afford each Phase 1 Qualified Bidder such access to due diligence materials through the Data Room and information relating to the Property and Business as it deems appropriate. Due diligence access may further include management presentations with the participation of the Monitor, and JMB where appropriate, on-site inspections, and other matters which a Phase 1 Qualified Bidder may reasonably request and to which the Sale Advisor, in its reasonable business judgment and in consultation with the Monitor, may agree. The Sale Advisor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 1 Qualified Bidders and the manner in which such requests must be communicated. Further, and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 1 Qualified Bidders if the Monitor determines it is information that pertains to proprietary or commercially sensitive competitive information.

10. Phase 1 Qualified Bidders must rely solely on their own independent review, investigation and/or inspection of all information relating to the Property and Business in connection with their participation in the SISP and any transaction they enter into with JMB.

Submission of Non-Binding Letters of Intent

11. A Phase 1 Qualified Bidder who wishes to pursue the Opportunity further must deliver an executed letter of intent ("**LOI**"), identifying such bidder's interest in each specific Property or Business, to the Monitor at the address specified in Schedule "A" hereto (including by email or fax transmission), so as to be received by them not later than 5:00 PM (Mountain Daylight Time) on or before **June 19, 2020** (the "**Phase 1 Bid Deadline**").

12. An LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if all of the following conditions are satisfied:

    (a) It is submitted to the Monitor on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;

    (b) It contains an indication of whether the Phase 1 Qualified Bidder is making a:

        (i) Sale Proposal; or

        (ii) an Investment Proposal;

    (c) In the case of a Sale Proposal, it identifies or contains the following:

        (i) the purchase price, in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation. If a Phase 1 Qualified Bidder wishes to acquire Property owned by both JMB Crushing and 216, a price must be allocated for such Property as between the relevant entities;

        (ii) a description of the Property that is expected to be subject to the transaction and any of the Property, obligations or liabilities for each Property expected to be excluded; and

        (iii) a specific indication of the financial capability (including analysis of the Phase 1 Qualified Bidder's current available cash liquidity, summary of key covenants and or restrictions on such liquidity), together with evidence of such capability, of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction;

    (d) In the case of an Investment Proposal, it identifies or contains the following:

        (i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment in the Business;

        (ii) the aggregate amount of the equity and/or debt investment to be made in the Business in Canadian dollars and key assumptions supporting the valuation;

        (iii) the underlying assumptions regarding the *pro forma* capital structure; and

        (iv) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the proposed transaction;

(e) In the case of either a Sale Proposal or an Investment Proposal:

(i) it identifies or contains the following:

(A) a description of the conditions and approvals required for a final and binding offer;

(B) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer and expected timeline for same;

(C) an acknowledgement that any Sale Proposal or Investment Proposal, as applicable, is made on an "as-is, where-is" basis;

(D) all conditions to closing that the Phase 1 Qualified Bidder may wish to impose; and

(E) any other terms or conditions of the Sale Proposal or Investment Proposal, as applicable, that the Phase 1 Qualified Bidder believes are material to the proposed transaction;

(ii) it does not contain any requirement or provision for exclusivity, a break fee or reimbursement of expenses associated with submitting the Sale Proposal or Investment Proposal, conducting the due diligence in respect thereof or otherwise; and

(iii) it contains such other information as reasonably requested by the Sale Advisor or the Monitor from time to time.

13. The Monitor, in consultation with the Sale Advisor, may waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified LOI. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Assessment of Phase 1 Bids

14. Following the Phase 1 Bid Deadline, the Monitor will assess the Qualified LOIs in consultation with, the Sale Advisor, JMB and the Secured Creditors, as appropriate. If it is determined that a Phase 1 Qualified Bidder that has submitted a Qualified LOI: (a) has a *bona fide* interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (b) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed to be a "**Phase 2 Qualified Bidder**", provided that the Monitor, in consultation with the Sale Advisor, may limit the number of Phase 2 Qualified Bidders (and thereby eliminate some Phase 1 Qualified Bidders from the process). Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

15. The Sale Advisor, in consultation with the Monitor, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), which will include a draft purchase/investment agreement (the "**Draft Purchase/Investment Agreement**") which will be made available in the Data Room, and the Bid Process Letter will be sent to all Phase 2 Qualified Bidders who are invited to participate in Phase 2.

PHASE 2: FORMAL BINDING OFFERS

16. Paragraphs 18 to 26 below and the conduct of the Phase 2 bidding are subject to paragraphs 17, 18 and 35, any adjustments made to the Phase 2 process as defined in the Bid Process Letter, and any further order of the Court.

Formal Binding Offers

17. Phase 2 Qualified Bidders that wish to make a formal Sale Proposal or an Investment Proposal shall submit to the Monitor at the address specified in Schedule "A" hereto (including by email or fax transmission), a sealed binding offer that complies with all of the following requirements, so as to be received by them by 5:00 pm. (Mountain Daylight Time) on **July 20, 2020**, or such later date that is determined by the Monitor, in consultation with the Sale Advisor and the Secured Creditors, and communicated to the Phase 2 Qualified Bidders (the "**Phase 2 Bid Deadline**"):

    (a) Subject to paragraph 13, it complies with all of the requirements set forth in respect of the Phase 1 Qualified LOIs;

    (b) It contains: (i) duly executed binding transaction document(s) generally in the form of the Draft Purchase/Investment Agreement; and (ii) a blackline to the Draft Purchase/Investment Agreement;

    (c) It contains evidence of authorization and approval from the Phase 2 Qualified Bidder's board of directors (or comparable governing body);

    (d) It (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Property or Business on terms and conditions reasonably acceptable to the Monitor;

    (e) It includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the earlier of (i) the closing of the transaction with the Successful Bidder, and (ii) that number of days following the Sale Approval Application (as defined below) that the Monitor determines, acting reasonably, is appropriate in light of market conditions at the time, subject to further extensions as may be agreed to under the applicable transaction agreement(s);

    (f) It provides written evidence of a firm, irrevocable financial commitment for all required funding or financing;

(g) It is not conditional upon the outcome of unperformed due diligence by the bidder, and/or obtaining financing;

(h) It specifies any regulatory or other third party approvals the party anticipates would be required to complete the transaction;

(i) It fully discloses the identity of each entity that will be entering into the transaction or the financing, or that is participating or benefiting from such bid;

(j) It is accompanied by a cash deposit (the "**Deposit**") of 10%: (i) of the purchase price offered in respect of a Sale Proposal; (ii) of the total new investment contemplated in respect of an Investment Proposal; or (iii) of the total cash consideration, less the value of the consideration allocated to the credit portion, of a Credit Bid, which shall be paid to the Monitor by wire transfer (to a bank account specified by the Monitor) and held in trust by the Monitor in accordance with this SISP;

(k) It includes acknowledgments and representations of the Phase 2 Qualified Bidder that: (i) it has had an opportunity to conduct any and all due diligence regarding the Property, Business and JMB prior to making its offer; (ii) it has relied solely upon its own independent review, investigation and/or inspection of any documents, the Business and/or the Property in making its bid; and (iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever made by the Sale Advisor, JMB or the Monitor, whether express, implied, statutory or otherwise, regarding the Business, Property, or JMB, or the accuracy or completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Monitor for and on behalf of JMB; and

(l) It is received by the Phase 2 Bid Deadline.

18. Following the Phase 2 Bid Deadline, the Monitor, in consultation with JMB, the Sale Advisor and the Secured Creditors, will assess the Phase 2 Bids received with respect to the Property or Business. The Monitor, in consultation with and the Sale Advisor, will designate the most competitive bids that comply with the foregoing requirements to be "**Phase 2 Qualified Bids**". Only Phase 2 Qualified Bidders whose bids have been designated as Phase 2 Qualified Bids are eligible to become the Successful Bidder(s).

19. The Monitor may waive strict compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Phase 2 Qualified Bid.

20. The Sale Advisor, upon receiving instructions from the Monitor, shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constitutes a Phase 2 Qualified Bid within five (5) business days of the Phase 2 Bid Deadline, or at such later time as the Monitor deems appropriate.

21. If the Monitor is not satisfied with the number or terms of the Phase 2 Qualified Bids, it may, in consultation with the Sale Advisor and the Secured Creditors, extend the Phase 2 Bid Deadline without Court approval.

22. Without limiting anything else herein, the Monitor, in consultation with the Sale Advisor, may aggregate separate bids from unaffiliated Phase 2 Qualified Bidders to create one or more "Phase 2 Qualified Bid(s)".

Evaluation of Competing Bids

23. A Phase 2 Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price, the net value and form of consideration to be provided by such bid, the identity and circumstances of the Phase 2 Qualified Bidder, any conditions attached to the bid and the expected feasibility of such conditions, the proposed transaction documents, factors affecting the speed, certainty and value of the transaction, the assets included or excluded from the bid, any related restructuring costs, the likelihood and timing of consummating such transactions, and the ability of the bidder to finance and ultimately consummate the proposed transaction, each as determined by the Monitor, in consultation with the Sale Advisor.

Selection of Successful Bid

24. The Monitor, in consultation with the Sale Advisor, JMB and the Secured Creditors: (a) will review and evaluate each Phase 2 Qualified Bid, and shall be permitted to negotiate the terms of any Phase 2 Qualified Bid with the applicable Phase 2 Qualified Bidder, and such Phase 2 Qualified Bid may be amended, modified or varied as a result of such negotiations, and (b) identify the highest or otherwise best bid or bids (the "**Successful Bid**"), and the Phase 2 Qualified Bidder making such Successful Bid (the "**Successful Bidder**") for any particular Property or the Business in whole or part. The determination of any Successful Bid by the Monitor shall be subject to consultation with the Secured Creditors and approval by the Court.

25. If the Monitor determines that: (a) no Phase 2 Qualified Bids were received other than the Sale Agreement; (b) at least one Phase 2 Qualified Bid was received, but it is not likely that the transaction contemplated in any such Phase 2 Qualified Bid will be consummated; (c) proceeding with the SISP is not in the best interests of JMB and its stakeholders, then the Monitor shall forthwith: (i) terminate this SISP; (ii) notify each Phase 2 Qualified Bidder that this SISP has been terminated; and (iii) consult with JMB, the Secured Creditors and the Sales Advisor regarding next steps, including concluding the Sale Agreement.

26. The Monitor shall have no obligation to select a Successful Bid, and JMB with the consent of the Monitor, in consultation with the Secured Creditors and the Sale Advisor, shall the right to reject any or all Phase 2 Qualified Bids.

Sale Approval Hearing

27. At the hearing of the application to approve any transaction with a Successful Bidder (the "**Sale Approval Application**"), the Monitor shall seek, among other things, approval from the Court for the consummation of any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by JMB on and as of the date of approval of the Successful Bid by the Court.

28. Any Deposit delivered with a Phase 2 Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder within ten (10) business days of the date on which the Successful Bid is approved by the Court, or such earlier date as may be determined by the Monitor, in consultation with the Sale Advisor.

CONFIDENTIALITY, STAKEHOLDER/BIDDER COMMUNICATION AND ACCESS TO INFORMATION

29. Except as otherwise permitted herein, participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between the Monitor and/or the Sale Advisor, and such other bidders or Potential Bidders in connection with the SISP.

30. All discussions regarding a Sale Proposal, Investment Proposal, LOI or Phase 2 Bid shall be directed through the Sale Advisor and/or the Monitor.

SUPERVISION OF THE SISP

31. The Monitor will oversee, in all respects, the conduct of the SISP by the Sale Advisor and will participate in the SISP in the manner set out herein, and is entitled to receive all information in relation to the SISP.

32. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between JMB or the Monitor and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder or any other party, other than as specifically set forth in any definitive agreement that may be signed by the Monitor for and on behalf of JMB.

33. Without limiting the preceding paragraph, neither the Monitor nor the Sale Advisor shall have any liability whatsoever to any person or party, including without limitation, any Potential Bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, the Successful Bidder, or any other creditor or other stakeholder of JMB, for any act or omission related to the process contemplated by this SISP procedure, except to the extent such act or omission is the result of gross negligence or willful misconduct by the Monitor or Sale Advisor. By submitting a bid, each Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, or Successful Bidder shall be deemed to have agreed that it has no claim against the Monitor or Sale Advisor for any reason whatsoever, except to the extent such claim is the result of gross negligence or willful misconduct of the Monitor or Sale Advisor.

34. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

35. The Monitor shall have the right to modify the SISP if, in its reasonable business judgment in consultation with the Sale Advisor and the Secured Creditors, such modification will enhance the process or better achieve the objectives of the SISP; provided that the service list in these CCAA proceedings shall be advised of any substantive modification to the procedures set forth herein.

Schedule "A"

Sale Advisor

520 5 Ave SW, #400
Calgary, AB T2P 3R7
Facsimile: 1-877-790-6172
Email: asequeira@sequeirapartners.com
Attention: Arron Sequeira

Monitor

FTI Consulting Canada Inc.
520 5 Ave SW, #400
Calgary, AB T2P 3R7
Facsimile: 1 403 232 6116
Email: Deryck.Helkaa@fticonsulting.com
Attention: Deryck Helkaa

JMB

JMB Crushing Systems Inc.
PO Box 6977
Bonnyville, AB T9N 2H4
Email: jeffb@jmbcrush.com
Attention: Jeff Buck

TAB 4

In the Court of Appeal of Alberta

Citation: **Lubberts Estate (Re), 2014 ABCA 216**

Date: 20140625
Docket: 1303-0121-AC
Registry: Edmonton

In the Matter of the Estate of Johanna Frederika Lubberts
also known as Johanna F. Lubberts

Between:

Irene Hanson (Executor and beneficiary) and
Paul Lubberts (beneficiary)

Appellants
(Applicants)

- and -

Marijke Mercredi and Johanna Lubberts

Respondents
(Respondents)

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Madam Barbara Lea Veldhuis
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment of the Honourable Mr. Justice Wakeling

Memorandum of Judgment of the Honourable Madam Justice Picard and
the Honourable Madam Justice Veldhuis
Concurring in the Result

Appeal from the Order by
The Honourable Madam Justice J.M. Ross
Dated the 2nd day of August, 2012
Filed on the 16th day of April, 2013

(2012 ABQB 506; Docket: ES03 131589)

Memorandum of Judgment
of the Honourable Mr. Justice Wakeling

I. Introduction

[1] This case[1] is about the meaning to be attached to two sentences[2] of the April 8, 2008 holograph will[3] of Johanna Frederika Lubberts[4]:

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[1] The *Wills and Succession Act*, S.A. 2010, c. W-12.2 came into force on February 1, 2012. It does not apply to this case. The *Wills Act*, R.S.A. 2000, c. W-12 does, on account of s. 8(1) of the *Wills and Succession Act*. Ms. Lubberts died on December 20, 2009. The opinions expressed in parts III and IV. G of this judgment about the principles governing the interpretation of a will apply with equal force to a will subject to the new *Wills and Succession Act*.

Most appeals do not call upon the court to reconsider the merits of the governing standard. In this subset of appeals, the court's task is to apply an agreed upon governing standard to the facts. The disposition of the appeal does not alter the nature of the governing standard. This appeal does not fit squarely within this subclass. It gives the Court the opportunity to explain why the governing standard and related rules are sound. This is not a task which this Court, to my knowledge, has recently undertaken. The fact that the *Wills and Succession Act*, S.A. 2010, c. W-12.2 came into force only recently and adopts many of the norms at play in this appeal, warrants a fresh restatement of the values these norms promote. A knowledge of the underlying values, as Justice Cardozo has observed, "will count for the future". The Nature of the Judicial Process 165 (1921). See also Holmes, "The Path of the Law", 10 Harv. L. Rev. 457-469 (1897) ("a body of law is more rational ... when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated ... in words").

[2] The Court appreciates that it must read the entire will before attaching a meaning to this portion of the will. *Re Tyhurst Estate,* [1932] S.C.R. 713, 716 ("In construing a will the duty of the court is to ascertain the intention of the testator, which intention is to be collected from the whole will taken together"); *Re Blackstock Estate,* 10 D.L.R. (2d) 192, 196 (Sask. C.A. 1957) ("the duty of the court is to ascertain the intention of the testator from the entire will"); *Marchuk v. Marchuk,* 52 W.W.R. 652, 655 (Sask. Q.B. 1965) ("where a judge is asked to consider a particular portion of a will, it is his duty to look at the whole will"); *Re Mitchell Estate,* 2004 NSCA 149, ¶19 ("Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause"); *Higgins v. Dawson*, [1902] A.C. 1, 3 (H.L. 1901) ("where you are construing a will ... you must look at the whole instrument ... and you cannot rely on one particular passage in it to the exclusion [of the rest of the will]"; *Re Donovan Estate,* 20 A. 3d 989, 992 (N.H. 2011) ("the clauses in a will are not read in isolation; rather their meaning is to be determined from the language of the will as a whole") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012) ("The entirety of the document thus provides the context for each of its parts").

[3] "A testator may make a valid will wholly by the testator's own handwriting and signature, without formality, and without the presence, attestation or signature of a witness". *Wills Act*, R.S.A. 2000, c. W-12, s. 7. Some jurisdictions do not give legal force to holograph wills. E.g., *Wills Act*, 1837, 1 Vict., c. 26, s. 9 (U.K.) ("No will shall be valid unless ... it is in writing and signed by the testator ... and ... the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and ... each witness ... attests and signs the will ... in the presence of the testator"); 12 Conn. Gen. Stat. §45a-251 (2011) ("a will or a codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing to the testator's presence; but any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state") & S.C. Code Ann. §62-2-502 (2013) ("every will shall be ... (1) in writing; (2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and (3) signed by at

> My entire estate – cash, my house ... and my quarter section of land ... if it is then still in my possession, I leave to my son Paul Johan Lubberts[5] and to my youngest daughter Irene Lubberts Hanson to jointly manage it and use it for their own benefit as salary for instance, or for the benefit of one of their siblings or of one of my grandchildren – as for instance medical expenses. Irene and Paul will make these decisions together and without yielding to any pressure applied by possible recipients.

[2] Justice Ross, the motions judge, held that the testator intended to create a trust[6]. She rejected the argument that the testator intended to give her estate to Paul, the testator's son, and Irene, the testator's daughter, or give them a power of appointment. The parties had agreed that if their mother intended to create a trust, it failed due to uncertainty of its objects.

[3] Paul and Irene appeal this judgment.

II. Questions Presented

[4] What is the objective of a court asked to review a will?

[5] What are the best means of achieving this objective?

[6] Is Justice Ross' conclusion that the testator intended to create a trust correct? Or did the testator intend to make a gift of her estate or give a power of appointment to Paul and Irene?

III. Brief Answers

[7] A testator drafts a will to increase the likelihood that on her death property which she has a right to dispose will be transferred to the persons she chooses at the time and in accord with the terms she selected.

[8] It is the court's role to give effect to the testator's intention. This is an indispensable function the exercise of which perfects the transferal process the testator commenced when she signed her will.

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least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will").

[4] Sometimes I will refer to Ms. Lubberts as the testator. The *Wills and Succession Act*, s. 1(1)(j) states that a "'testator' means an individual who makes a will. The term "testatrix" is "archaic". Black's Law Dictionary 1613 (9th ed. B. Garner ed. 2009). See generally M. Asprey, Plain Language for Lawyers 169 (4th ed. 2010) (the author opposes the use of gender-specific words such as actress, manageress and waitress).

[5] To increase readability, this judgment, other than portions which reproduce passages from the testator's wills or codicils, refers to Paul Johan Lubberts as "Paul" and Irene Lubberts Hanson as "Irene".

[6] 2012 ABQB 506, ¶40.

[9] To be faithful to the testator's will, a court must identify the meaning the testator wished to convey by her choice of words. This can only be done, in many cases, if the court has access to relevant evidence which records information, in existence at the time the testator signed her will, about the testator's family and the nature of various family relationships, close friends, interests and many other facts which might influence the testator when engaged in the will-making process. A court, aware of important information about the testator, must carefully read the entire will, giving the words she selected or approved their ordinary meaning. This assumption is made because the testator probably intended to attach the ordinary meaning the community of which she is a part gives to these words. If the will and the context within which it is made reveals that the testator had a different intention, a court must adjust its linguistic standards and give the will a meaning consistent with the testator's language values.

[10] Ascertaining the testator's will is a subjective – as opposed to an objective – enterprise. Values foreign to interpreting contracts and laws are paramount in interpreting wills. A will incorporates a series of choices, which are unilateral acts, and plays a role in our society completely different from that performed by legal instruments which are the product of multiple actors – such as contracts or laws. Subject to public policy concerns, there is no good reason to give a testator's last will and testament a meaning not completely faithful to her wishes.

[11] Parties who advance a claim to property the testator disposes under her will and others with a legitimate interest in ensuring that the testator's intentions are honoured may present to the court information about the life of the testator which may assist the court allocate the testator's property in the manner she wished. There is one qualification which must be stated. Because Ms. Lubberts made her will on April 8, 2008, the Court may not review evidence that relates to the intention of the testator with respect to specific dispositions. But this is not the case for wills made after January 31, 2012. Section 26(c) of the *Wills and Succession Act*, S.A. 2010, c. W-12.2 states that a court "may admit ... evidence of the testator's intent with regards to the matters referred to in the will".

[12] Ms. Lubberts did not intend to give her entire estate to Paul and Irene and leave nothing to her other two children. The words in the April 8, 2008 will and other relevant information disclose that the testator intended to create a trust for the benefit of her children and grandchildren. As the parties have agreed that she failed to create a valid trust, it follows that her estate will be distributed in accordance with governing intestacy principles.

[13] Justice Ross came to the correct conclusion.

IV. Applicable Statutory Provisions

[14] Sections 8 and 126 of the *Wills and Succession Act*, S.A. 2010, c. W-12.2 are as follows:

> 8(1) Except as expressly provided otherwise in sections 23 or 25 or in another enactment of Alberta

[48] To ensure that the lawfulness of the appointor's conduct can be ascertained, equity insists that a workable standard be in place to measure lawful appointor conduct in instances of specific and hybrid powers of appointment. This is the second mark of a valid power of appointment. Justice Gillese describes it in the following passage:

> In creating ... [special and hybrid powers of appointment], the description of the class must be crafted in such a way that it passes the certainty of objects test. Certainty of objects means that the description of the class of possible appointees must be sufficiently clear for the donee to be able to properly exercise the power, if the donee so chooses. In the case of [hybrid] ... powers, it is the class of excepted persons who must be sufficiently clearly described.
>
> ...
>
> The question of certainty of objects is to be determined as of the effective date of the document that declares the donor's intention.

The Law of Trusts 33-34 (3d ed. 2014). See also *Re Gulbenkian's Settlement Trusts,* [1970] A.C. 508, 521 (H.L. 1968) (there must be no doubt about whether a person is an eligible appointee).

E. The Benchmarks of a Valid Trust

[49] An express trust[9] exists if A, the settlor, declares an intention to transfer ascertainable property to B, the trustee, for the benefit of C, an identifiable person or object, the beneficiary, and A conveys the trust property to B.

[50] An express trust will unequivocally demonstrate an intention to create a trust, and clearly identify the trust property so that it can be ascertained and the objects of the trust so that the permitted use may be determined. E. Gillese, The Law of Trusts 41-47 (3d ed. 2014) & *Morice v. Bishop of Durham,* 32 Eng. Rep. 947, 952 (Ch. 1805) ("If neither the objects nor the subjects are certain, then the recommendation or request does not create a trust").

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[9] There are many definitions of a trust. E. Keeton & L. Sheridan, The Law of Trusts 3 (12th ed. 1993) ("A trust is a relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust"); G. Bogert, Trusts 1 (6th ed. 1987) ("A trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another") & Underhill, Trusts and Trustees 1 (4th ed. 1888) ("a trust is an equitable obligation, either expressly undertaken or constructively imposed by the Court, under which the ... trustee ... is bound to deal with certain property over which he has control (and which is called the trust property) for the benefit of certain persons (who are called the beneficiaries ...) of whom he may or may not himself be one").

testator's intention as stated in the will. *Re Madison Estate*, [1997] A.J. No. 51, ¶12 ("I can [not] consider the [drafter's] ... statements ... recounting [the testator's] wishes as to her car ... as this would be considered direct evidence of intention outside the will"); *Haidl v. Sacher*, 106 D.L.R. 3d 360, 363 (Sask. C.A. 1979) (the "trial judge was right in refusing to admit the affidavit evidence in an attempt to establish an intention contrary to that to be determined by giving to the words of the will their ordinary and natural meaning"; *Robinson Estate v. Robinson*, 337 D.L.R. 4th 193, 202 (Ont. C.A. 2011) ("The law properly regards the direct evidence of third parties about the testator's intention to be inadmissible"); *Re Kaptyn Estate*, 2010 ONSC 4293, ¶36 ("The rationale for this principle is admissibility rests in preserving the written will as the primary evidence of the testator's intention and avoiding displacing the written will with an 'oral' will"); *Re Harmer*, 40 D.L.R. (2d) 825, 827 (Ont. H.C. 1963) ("an affidavit purporting to swear to the intentions of the testator ... was plainly inadmissible"); *Stewart v. Selder*, 473 S.W. 2d 3, 7 (Tex. 1971) ("The intention of the testator must be found, in the last analysis, in the words of the will, and for that reason his other declarations of intention dealing with the subject out of specific documents are generally not admissible") & 9 J. Wigmore, Evidence in Trials at Common Law §2471 (J. Chadbourn rev. 1981) (the will records the intention of the testator).

H. The Testator Intended To Create a Trust for the Benefit of Her Children and Grandchildren

[64] The Court finds no error in Justice Ross' conclusion that the testator intended to create a trust for the benefit of her children and grandchildren. Ms. Lubberts wanted her youngest daughter, Irene, and her son, Paul, to hold her estate for the benefit of her children and grandchildren. Justice Ross' determination is supported by the unequivocal message that is contained in the testator's direction to "jointly manage [her estate] ... for their own benefit ... or for the benefit of one of their siblings or one of my grandchildren".[38] She directed them to make decisions with the best interests of her extended family uppermost in their minds. This message is the product of this sentence: "Irene and Paul will make all these decisions together and without yielding to any pressure applied by possible recipients".

[65] While it is obvious that a lawyer instructed to impress the testator's estate with a trust would have used different language[39], the benchmarks of a trust nonetheless still emerge from her

[38] In this context "or" means "and". There is no good reason to conclude that the testator intended her property to be for the benefit of only one of her children or grandchildren. Had a valid trust been created, the trustees could have lawfully given some of the trust property to any or all of the testator's children or grandchildren. See J. MacKenzie, Feeney's Canadian Law of Wills §11.22 (4th ed. looseleaf issue 49 April 2014) ("The courts do not hesitate, where the context requires it, to construe 'or' as if it was 'and'").

[39] There are no words which must be used to evidence an intention to create a trust. G. Bogert, Trusts 25 (6th ed. 1987) ("No formal or technical expressions are required"). But the words used must lead the court to conclude that a person intended to establish a trust. *Tassone v. Pearson,* 2012 BCSC 1262, ¶31 ("The mere fact that the power is given to a trustee is not alone determinative of whether it is a true power or power of appointment") & *Boreing v. Faris,* 104 S.W. 1022, 1024 (Ky. 1907) (the fact that the settlor used the word "committee" instead of "trustee" was not determinative).

will. She intended to make two of her children the trustees. She did not wish to bestow on them a simple option to dispose of her estate if they chose to do so. The testator identified her children and grandchildren as beneficiaries. Indeed she states that her estate is to be managed for the "benefit" of her children and grandchildren. The testator intended Irene and Paul to use the property for the benefit of all her children and grandchildren.

[66] This is one of the benchmarks of a trust. "[A] trustee must perform the terms of a trust, whereas a donee of a power need not exercise the power at all". E. Gillese, The Law of Trusts 23 (3d ed. 2014). Had she been content to give Irene and Paul a choice as to whether they distributed her estate, most likely she would have provided some direction in the event they declined to do so. There is none. This conclusion is in keeping with the testator's character, insight into which are easily drawn from reading her historical wills.

[67] I agree with Justice Ross' implicit determination that there is no basis to conclude that the testator intended the words she used in her will to have any meaning other than their usual and ordinary meaning in Alberta.

[68] The motions judge said this:

> In my view, the language employed by the testatrix indicates that she intended to impose an obligation on Paul and Irene. Paul and Irene are required to make all decisions in relation to the estate together: "Irene and Paul will make all these decisions together and without yielding to any pressure applied by possible recipients". They are directed to jointly "manage" the estate and "use it" to benefit themselves, their siblings or the grandchildren, with examples of such benefits provided. They are not merely empowered to dispose of the estate to any or all of these persons. There is no provision in the Holograph Will regarding the disposition of the estate should Paul and Irene not exercise their joint power of appointment. While this is not determinative (property not disposed of reverts to the estate ...), it is a further indication that the testatrix considered that Paul and Irene would be obliged to act as she directed.

2012 ABQB 506, ¶40.

[69] Her will does not support the argument that the testator intended to give her estate to her youngest daughter and her only son. She knew what a gift[40] was – noting that she had given her children and grandchildren "financial presents on their birthdays" – and did not employ gift language in the two sentences under scrutiny. In addition, the testator announced that she intended to deposit $500 every month into a savings account in the name of Irene and the testator so that on

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[40] In the 2007 holograph codicil the testator employed gift language: "no cash amount will go to my grandchildren ($4000.00 per grandchild was left to each of my grandchildren, since I have on [their] ... birthdays ... given each of them amounts of money) and no cash money to be left to any other persons mentioned in the will, since these *gifts* have been carried out already in the last number of years ... ." (emphasis added).

the testator's death, Irene would have a source of cash which she could access to cover any costs she might incur immediately after her mother's death. Had the testator intended to give her estate to Irene and her son, it is unlikely that she would have taken this step.[41]

[70] Several other features of the April 8, 2008 will strongly speak against the conclusion that the testator intended to give her estate to her youngest daughter and only son. First, the will directed Irene and Paul to manage her estate for the benefit of her children and grandchildren. If the testator had intended to gift her estates to Irene and Paul, the likelihood this direction would have been issued is very low. It would have been superfluous. Second, if the testator had wished to gift her estate to just two of her children and grandchildren, she most likely would have stated the allocation she intended. The testator liked to be the one making the important decisions about her estate. Third, as already noted, the testator would not likely have created a joint bank account for the benefit of Irene if she had intended to gift to Irene a part of her estate.

[71] The use of the word "leave" in the sentence "My entire estate ... I leave to my son ... and to my youngest daughter" does not support the argument that the testator intended on her death to gift her entire estate to her two named children. The rest of the words in the will belie such an intention. "Leave", in this context, is a neutral word, doing nothing more than designating an intention to transfer her estate to her son and youngest daughter in their capacity as managers or trustees of her estate.[42]

[72] This conclusion harmonizes the provisions in the will[43] and is consistent with all the relevant material before the Court. The testator was a mother interested in the future financial security of her children and grandchildren. A gift to only two of her children would leave nothing for her other two children and several grandchildren. The likelihood she intended to do this is very low. Nothing in the April 8, 2008 will reveals a desire on the testator's part to disinherit any of her

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[41] It would have been unnecessary. While it is unclear at law that Irene would have become the legal and equitable owner of the funds in the joint account on her mother's death, it is obvious that the testator assumed this would be the result. See *Lowe Estate v. Lowe*, 2014 ONSC 2436, ¶20 ("where a person gratuitously adds another's name as owner of a bank account with right of survivorship, the transferee must rebut the presumption of resulting trust by proving that it was *not* the transferor's intentions that the funds from the joint account flow to the estate on the transferor's date of death").

[42] Had the testator's August 8, 2008 will consisted of only these few words – "My entire estate ... , I leave to my son ... and my youngest daughter" – the Court could have concluded that Ms. Lubberts' will gifted her estate to Irene and Paul. The word "leave" may mean "bequeath, devise <left a fortune to his wife>." Webster's Third New International Dictionary of the English Language Unabridged 1287 (1971). See also Black's Law Dictionary 973 (9th ed. B. Garner ed. in chief 2009) ("1. To give by will; to bequeath or devise <she left her ranch to her stepson>. This usage has historically been considered loose by the courts and it is not always given testamentary effect").

[43] Justice Scalia and Professor Garner emphasise the importance of textual harmonization: "The imperative of harmony among provisions is more categorical than most canons of construction because it is invariably true that intelligent drafters do not contradict themselves ... . Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously". Reading Law: The Interpretation of Legal Texts 180 (2012).

children. If she had such an intention, she would have said so in plain English. In earlier versions she made it clear that one of her grandchildren had annoyed her sufficiently that he was out of the will. She also left no doubt as to her feelings about her son's girlfriend: "Under no conditions will I ... allow Paul's 'girlfriend', Laurie ... to live in my house or to allow her to obtain an interest in my house, whether she and Paul get married or not ... 'Laurie" has been and still is a disruptive influence in our family relations".

[73] Justice Ross also saw no merit in the argument that the testator gifted her estate to Irene and Paul:

> [22] The overall import of the Holograph Will is, in my view, not consistent with a transfer of ownership of the estate to Paul and Irene. Although the estate is left to them, there is no indication that it is to be for their exclusive benefit or their "property" as stated in the 2007 Holograph Codicil. They are directed to jointly manage the estate, not to receive it. While they can benefit from the estate, the only form of benefit expressly mentioned is salary. This suggests an entitlement to compensation for performing duties in relation to the estate, rather than ownership. It is noteworthy that there is another reference to salary in the Holograph Will where the testatrix indicates that Irene Hanson can access funds contributed by the testatrix to a joint account "to replenish her salary if it is necessary for her to take time off from her job to be able to look after my interests". This reference to salary clearly contemplates compensation for duties.
>
> [23] Another indicator that Paul and Irene are not given ownership of the estate is that they are not required to make all decisions in relation to the estate together. The Holograph Will does not assign shares to each of them; there was, for example, no provision that they should receive the estate in equal shares, nor in any particular percentages, as one would expect in the case of a gift.

[74] The argument that the testator bestowed a power of appointment on Irene and Paul does not appeal to us.

[75] Ms. Lubberts' historical will collection indicates that she is an independent person who calls a spade a spade and likes to be in control. The December 2, 2007 codicil provides ample evidence of the testator's strong desire to control what happens to her property:

> My house ... will become the property of my son ... and my daughter, Irene Lubberts-Hanson, my son to live in the house and take care of it – he cannot rent or sell the house to non-family members. He may ... with Irene's consent sublet part of the house (e.g. the basement suite) but only to members of the immediate family.

[76] Given that the testator had a strong controlling personality, the notion she would be willing to give anyone a power over her estate to do what the appointor thought appropriate is impossible

to accept. As expected, there is no language in any of the historical wills or in the April 8, 2008 will that suggests she had any intention to bestow a power of appointment on Irene and Paul.

[77] The Court concludes that the testator intended to create a trust. The parties agreed that if the Court concluded that the testator intended to create a trust, she failed in this enterprise. They agreed that the objects of the trust are uncertain. This will not be the first time that such a plan has failed for this reason. E.g., *Daniels v. Daniels Estate,* 120 A.R. 17, 21 (C.A. 1991); *Re Madison Estate,* [1997] A.J. No. 51 (Q.B.); *Klassen v. Klassen*, [1986] 5 W.W.R. 746, 757 (Sask. Q.B. 1986); *Re Olson Estate,* 67 Sask. R. 103 (Surr. Ct. 1988); *Re Gilkinson*, 38 O.W.N. 26, 28 (H.C. 1930) aff'd 39 O.W.N. 115 (C.A. 1930); *Yeap Cheah Neo v. Ong Cheng Neo*, [1875] L.R. 6 P.C. 381 (Straits Settlement Penang). See generally *Marchuk v. Marchuk*, 52 W.W.R. 652, 680 (Sask. Q.B. 1965) (those who entrust the drafting of important legal documents to nonlawyers needlessly risk disappointment and promote "family quarrels over the division of assets for years to come").

VII. Conclusion

[78] The appeal is dismissed.

[79] Both the appellants[44] and respondents shall have their costs on a full-indemnity basis from the estate.

Appeal heard on February 25, 2014

Memorandum filed at Edmonton, Alberta
this 25th day of June, 2014

Wakeling J.A.

[44] This dispute was directly attributable to the fact that the testator chose to draft her will without the assistance of a lawyer and utilized unclear language. There is sufficient merit in the appellants' case to justify an order directing the estate to pay the appellants' costs on a full-indemnity basis. *Dice v. Dice Estate,* 351 D.L.R. 4th 646, 665 (Ont. C.A. 2012) ("As the issues on appeal arose from the wording of the will, I would order that the costs of all parties ... be paid by the Estate"); *Re Wigle,* 27 O.W.N. 357, 358 (H.C. 1924) ("There is just enough doubt to give him his costs out of the estate") & *Furlong Estate v. Memorial University of Newfoundland*, [1999] N.J. No. 292 (Nfld. C.A.) (the appeal court ordered that the costs before the trial and appeal courts be paid by the estate on a solicitor-and-client basis).

Picard JA and Veldhuis JA (concurring in the result):

[80] We agree with the conclusion reached by Justice Wakeling that the decision of Justice Ross (2012 ABQB 506) is well written and carefully reasoned, and that this appeal must be dismissed. We find her decision sufficient to dispose of all issues and thus, it is unnecessary to consider the other matters discussed in the memorandum of judgment of Justice Wakeling.

[81] The appeal is dismissed. Costs shall be payable to both appellants and respondents, from the estate, on a full-indemnity basis.

Appeal heard on February 25, 2014

Memorandum filed at Edmonton, Alberta
this 25th day of June, 2014

Authorized to sign for: Picard J.A.

Veldhuis J.A.

Appearances:

D.G. Groh, Q.C.
for the Appellants

R.B. Hajduk
for the Respondents

TAB 5

In the Court of Appeal of Alberta

Citation: Bruderheim Community Church v Moravian Church In America (Canadian District), 2020 ABCA 393

Date: 20201106
Docket: 1803-0041-AC
Registry: Edmonton

Between:

Bruderheim Community Church and Bruderheim Moravian Church

Appellants

- and -

Board of Elders of the Canadian District of the Moravian Church In America

Respondent

The Court:

The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Michelle Crighton
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice J.T. Henderson
Dated the 9th day of February, 2018
Filed on the 9th day of February, 2018

(2018 ABQB 90, Docket: 1703 10116)

Memorandum of Judgment

The Court:

[1] The appellants appeal the chambers judge's refusal to grant a permanent injunction and other ancillary relief, the intended effects of which were to prevent the respondent from interfering with the appellants' continued use of church lands and buildings located in the Town of Bruderheim, Alberta***: Bruderheim Community Church v Board of Elders***, 2018 ABQB 90, 66 Alta LR (6th) 168.

[2] The original grant of the church lands in 1897 was, pursuant to a "Habendum Clause", made subject to a trust "for the purposes of the Congregation of the Moravian Church at Bruderheim." Despite irregularities in the registration of the Habendum Clause against subsequent certificates of title in the Land Titles Office, the chambers judge concluded that the terms of the trust had not changed. The parties do not dispute the continuation of the trust. The current certificate of title vests the fee simple of the church lands in the "Board of Elders of the Canadian District of the Moravian Church in America" ("Board of Elders") in trust, however, for "the Congregation of the Moravian Church." The central issue in this appeal, therefore, is whether the appellants are the intended beneficiaries under that trust.

[3] Some background is required in order to situate the chambers judge's decision.

[4] The *Unitas Fratrum*, or "Unity of the Brethren", is a protestant Christian denomination with a heritage dating back to 1457. Colloquially, the *Unitas Fratrum* is known as the 'Moravian Church'.

[5] The *Unitas Fratrum* is broken into twenty-four provinces. One of those provinces is the "Moravian Church, Northern Province" (the "Northern Province"). The "Book of Order" is the constitutional document for the Northern Province. Where the Bible serves the spiritual aspects of the Northern Province, the Book of Order serves the administrative aspects. The Book of Order also vests oversight of the Northern Province within a Provincial Elders Conference (the "Provincial Conference"). The respondent, Board of Elders, was incorporated to assist the Provincial Conference to administer the Northern Province's Canadian property.

[6] The Book of Order governs the contractual relationship between the parties to this dispute.

[7] The Book of Order establishes the procedure and requirements for the recognition of new congregations. The Bruderheim Moravian Church was formally "undertaken" by the Provincial Conference as a congregation of the Northern Province in December 1895 and an Article of Agreement was finalized in June 1896. In April 1897, the federal government, pursuant to the *Dominion Lands Act,* SC 1879. c.31 issued a grant to three members of the Bruderheim Moravian Church 'in trust for the purposes of the Congregation of the Moravian Church at Bruderheim." In

October 1912, the land was transferred to the Board of Elders in fee simple and that was amended in March, 1922 to include the original trust provision.

[8] The Bruderheim Moravian Church is an unincorporated association, although it has been registered with the Canada Revenue Agency as a registered charity since January 1, 1967. The other appellant, Bruderheim Community Church, was incorporated in April 2017 under the *Religious Societies Land Act*, RSA 2000, c R-15. The Bruderheim Community Church represents some, but not all, of the members of the Bruderheim Moravian Church.

[9] The Book of Order also sets out the procedure and consequences for dissolution of any congregation previously recognized. Article 1041 of the Book of Order mandates that all rules and regulations in congregational bylaws include provisions that expressly vest congregational property to the Northern Province should the congregation be dissolved. Article 1046 of the Book of Order states:

> 1046. Whenever any Moravian congregation expressly or virtually severs its connection with the Moravian Church -Northern Province, or shall become defunct or be dissolved, the rights, privileges, and title to the property thereof, both real and personal, shall vest in the Moravian Church-Northern Province, and be administered according to the rules and regulations of said Church.

[10] As noted by the chambers judge, tensions developed between the Bruderheim Moravian Church and the Provincial Conference and the Northern Province. In May 2016, the Bruderheim Moravian Church resolved "to disassociate ... from the Moravian Church, Northern Province and become ... an independent congregation." That decision to disassociate was supported by 49 members of the Bruderheim Moravian Church congregation. Only three members voted against the resolution.

[11] In response, the Northern Province called for a further special meeting of the Bruderheim Moravian Church to be held on June 6, 2016. At that meeting, it was explained to the congregation that under the Book of Order, property owned by the Bruderheim Moravian Church would vest in the Northern Province on dissolution. As a result, the congregation of the Bruderheim Moravian Church voted against the resolution (53-1) but, in January 2017, adopted revised bylaws which purported to assert that it is “an independent and self-governing evangelical congregation.” Those bylaws make no reference to the Moravian Church, the Northern Province or its governance structure, or the Moravian faith. Forty-five members of the Bruderheim Moravian Church voted to accept the proposed bylaws. Four members abstained. None opposed the resolution.

[12] The Board of Elders concluded, therefore, that the Bruderheim congregation "had no intention of remaining within the ... [Moravian Church-Northern Province] or associating with the denomination in any capacity." The Board of Elders recommended to the Provincial Conference that it dissolve the Bruderheim Moravian Church which it did effective March 16, 2017. On March 22, 2017, the Northern Province advised representatives of the Bruderheim Moravian Church that all real and personal property associated with the Bruderheim church reverted to the Northern Province. The Provincial Conference also demanded that the church property be vacated by May 31, 2017.

[13] The appellants obtained an interim injunction enjoining the respondent from interfering with their use and enjoyment of the church lands and subsequently sought a permanent injunction to the same effect.

[14] In dismissing the appellants' application for a permanent injunction, the chambers judge found, after careful analysis of the materials before him, that the Board of Elders held title to the church lands and buildings as successors to the original trustees from 1897. He found that since 1912 the Board of Elders were trustees on behalf of beneficiaries that were adherents to the worldwide Moravian Church organization with a congregation in Bruderheim and not simply to the Bruderheim Moravian Church. Thus, to be beneficiaries of the trust, he concluded that the local Bruderheim congregation must also be members of the Moravian Church.

[15] The chambers judge concluded that having dissociated themselves from the Northern Province, the Bruderheim Moravian Church congregation ceased to be beneficiaries of the trust. As a result, he concluded that the people on whose behalf the Bruderheim Moravian Church and the Bruderheim Community Church sought the injunction had lost any right to use the church building and property as beneficiaries of that trust. Not having established a right to the church lands, the chambers judge refused the appellants' application for a permanent injunction.

[16] The appellants challenge the chambers judge's interpretation of the objects of the 1897 trust. Creation of an express trust requires the presence of three certainties, namely intention, subject matter, and object: ***Century Services Inc v Canada (Attorney General***), 2010 SCC 60 at para 83, [2010] 3 SCR 379. 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.

[17] The appellants' primary argument on appeal is the chambers judge misconstrued the objects of the trust by concluding that only adherents to the worldwide Moravian Church with a congregation in Bruderheim are beneficiaries under the trust and not the local congregation of the Bruderheim Moravian Church. The appellants also argue procedural unfairness in the chambers

judge's determination that Bruderheim Moravian Church – as an unincorporated association - lacked standing to seek a permanent injunction.

[18] In support of their appeal, the appellants also bring an application under Rule 14.45 of the *Alberta Rules of Court*, Alta Reg 124/2010 seeking an order to admit new evidence on appeal. In that regard, the appellants have offered a body of what is said to be new evidence attached to Wayne Larson's affidavit filed April 25, 2018, concerning which people constitute the congregation of the Bruderheim Moravian Church and their association with use of the church premises over time. Some of the proffered evidence relates to what are said to be links to people of Moravian heritage. The appellants also argue that the new evidence is necessary to respond to the doubts concerning standing insofar as not all of the members of the Bruderheim Moravian Church voted in May 2016 to disassociate from the Northern Province and therefore some of their members may still be beneficiaries under the trust regardless of how those beneficiaries are defined.

[19] In our view the proposed fresh evidence is not admissible under the well-known test in ***Palmer v The Queen***, [1980] 1 SCR 759, but even if it were, it does not assist to resolve the issues on appeal.

[20] The entirety of the new evidence was available to the appellants at the time they brought their application for a permanent injunction. The right of those represented by the Bruderheim Moravian Church and the Bruderheim Community Church to occupy and use the Bruderheim church property has always been in issue. It was specifically in issue before the chambers judge. The proposed new evidence is said to support the legitimacy of the right thus claimed, it being an overview of church usage, of memberships and so forth. The proposed fresh evidence could have been obtained in advance of the hearing through exercise of due diligence.

[21] More significantly, the evidence does not advance the interests on appeal. The chambers judge neither terminated nor varied the terms of the trust. He also understood that not all of the members of the Bruderheim Moravian Church voted to disassociate themselves from the Moravian Church. While he acknowledged, at paras 117-119, that the Board of Elders may at some time need to bring an application to vary or terminate the trust, or for advice and directions in relation to the approach to take in dealing with the church lands, he also emphasized that the trust remained valid and the Board of Elders must continue to hold the church lands in trust for the beneficiaries as he defined them.

[22] It must be borne in mind that these appellants are not, by this appeal, advancing some form of adverse possession claim in the sense that the people represented by the Bruderheim Moravian

Church and the Bruderheim Community Church have used the church property for a long time and want to continue to do so. The chambers judge was alive to the historical usage of the church lands and by whom. This case is about whether the Bruderheim Moravian Church and the Bruderheim Community Church have established a basis for a permanent injunction. The proposed fresh evidence does not assist in resolving that issue. Nothing in the new evidence could reasonably be expected to impact the interpretation of the objects of the trust.

[23] For all of the above reasons, the application to admit the new evidence is denied.

[24] As to the merits of the appeal, we discern no basis for appellate intervention. The chambers judge correctly noted that the test for an interlocutory injunction and a permanent injunction differ in some important respects***: Irving Oil Ltd v Ashar***, 2016 ABCA 15 at para 17-18, 609 AR 388; ***1711811 Ontario Ltd v Buckley Insurance Brokers Ltd***, 2014 ONCA 125 at paras 77-79, 371 DLR (4th) 643. Before a permanent injunction can be granted, whether summarily or after trial, a plaintiff must fully prove its rights. Simply demonstrating a "serious issue to be tried" is not sufficient. Once it has conclusively established its rights, the plaintiff must also demonstrate that it is entitled to the equitable remedy of a permanent injunction: ***Liu v Hamptons Golf Course Ltd***, 2017 ABCA 303 at para 17, [2017] AJ No 972 (QL).

[25] Title to the church lands is held by the Board of Elders. The appellants seek an injunction that would allow the Bruderheim Community Church to occupy and use the church building for their own services by, in effect, altering the title holding and suspending the trust indefinitely.

[26] We agree with the analysis and disposition of the case by the chambers judge for the reasons he gave. There is no palpable and overriding error in his finding as to the character and elements of the trust, as to the legitimacy of the title holding, and as to the voluntary dissociation by those people represented by the Bruderheim Moravian Church and the Bruderheim Community Church from the class of persons who would qualify as beneficiaries of the trust (ie the Moravian Church). In those circumstances, and setting aside the question of standing, there is no basis for an injunction that displace the Board of Elders as the title holder or that would force the Board of Elders to surrender control of the church property to either the Bruderheim Moravian Church or to the Bruderheim Community Church.

[27] As to standing, we also conclude that there was no unfairness occasioned by the chambers judge's conclusion that, while the Bruderheim Community Church had standing, the Bruderheim Moravian Church did not. The parties must have known that standing was or would be a live issue in light of Wakeling JA's dissenting reasons in the appeal from the interim injunction: ***Bruderheim Community Church v Board of Elders of the Canadian District of the Moravian Church in***

America, 2017 ABCA 343 at paras 105-106, [2017] AJ No 1451 (QL). Regardless, while the chambers judge concluded the Bruderheim Moravian Church was not a proper party to the litigation, he nevertheless well and thoroughly considered the substantive issues as if the appellants each had standing.

[28] In conclusion, we endorse the reasons given by the chambers judge for dismissing the appellants' application for a permanent injunction. This court appreciates, as did the chambers judge, that dismissing the permanent injunction raises additional questions relative to the trust and its beneficiaries, but the answers to those questions are for another day.

[29] The appeal is dismissed.

Appeal heard on November 3, 2020

Memorandum filed at Edmonton, Alberta
this 6th day of November, 2020

Authorized to sign for: Veldhuis J.A.

Crighton J.A.

Feehan J.A.

Appearances:

R.O. Langley
for the Appellants

J.B. Laycraft, Q.C./R.E. Harrison
for the Respondent

TAB 6

In the Court of Appeal of Alberta

Citation: **Carling Development Inc. v. Aurora River Tower Inc., 2005 ABCA 267**

Date: 20050816
Docket: 0401-0386-AC
Registry: Calgary

Between:

Carling Development Inc. and Carling Financial Corporation

Appellants
(Plaintiffs/Applicants)

- and -

Aurora River Tower Inc. and Carling Spring Village Inc.

Respondents
(Defendants/Respondents)

Corrected judgment: A corrigendum was issued on November 16, 2005; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Clifton O'Brien

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Picard

Reasons for Judgment Reserved of The Honourable Mr. Justice O'Brien
Concurring in the Result

Appeal from the Judgment by
The Honourable Mr. Justice S. LoVecchio
Dated the 3rd day of December, 2004
Filed the 15th day of April, 2005
(2004 ABQB 897, Docket: 0301-19649)

Reasons for Judgment of
The Honourable Mr. Justice Côté

A. Issues

[1] This appeal involves solicitors' trust conditions, how to rescind them, remedies for their breach, and trial of preliminary issues. The Reasons for Judgment after trial are 2004 ABQB 897.

B. Facts

[2] Here is a brief chronological summary of the facts.

2000 ff.:

1. Investments by many individual investors in three land developments, via a parent company of the respondents, which company was the fundraiser. The appellants were the developers. Their principals were Cheng and Wong, who had given some personal guarantees.

2003:

2. Complaints of non-payment, apparently raised by individual investors. Allegations by the fundraiser that the appellants had misappropriated the funds invested, which the appellants denied.

3. November 1: Regular project meeting. Only available minutes say that it resulted in agreement in principle on conveyance by the appellants to the respondents with indemnity of principals of appellants by respondents. Respondents' parent company was to assume all of the appellants' obligations to the investors and take over the land (via new companies to be incorporated) and to run the developments.

4. November: Mackin held self out to Anderson as an Alberta solicitor (though he knew he could no longer practise under the British Columbia reciprocal arrangement, and was not called to the Alberta bar until December 16). Mackin was the new lawyer for the respondents. Anderson was then the lawyer for the appellant developers.

5. November 6: Meeting between the opposing lawyers: Anderson for the appellants, and Mackin for the respondent fundraising company. Again a request for an indemnity.

someone known and reliable, such as the purchaser's solicitor, closing such a sale safely is almost impossible.

[34] Furthermore, to have a formal closing is very time-consuming and expensive, especially when one solicitor handles a number of transactions closing the same day. Today much Land Titles Office work is done electronically, not by personal attendance at the Land Titles Office. And commonly transactions for sale of land are really three-cornered, and not truly cash transactions. Very often the purchaser borrows part of the purchase price, and wishes to secure it by a new mortgage on what is being bought. Conversely, the vendor often lacks funds to clear off encumbrances, and wishes to use the sale proceeds to do so. Then again, sometimes mortgagees will not advance funds under a new mortgage until the new mortgage is properly registered.

[35] So one solution has long been used in Alberta: solicitors' trust conditions. Most Alberta land transactions close that way: ***Alberta Residential Conveyancing Guide***, ***supra***, s. 4.3.1. For example, the solicitor for the vendor will send to the solicitor for the purchaser a calculation of exactly how much money is owing after all adjustments. He will also enclose a signed fully-registrable ***Land Titles Act*** transfer of land from the vendor to the purchaser. The covering letter by the vendor's solicitor will state that the transfer is sent on the express "trust condition" that if it is used or passed on, the balance owing will (by a certain date) be unconditionally paid by the purchaser's solicitor to the vendor's solicitor. The letter may state that if the addressee cannot accept or perform those conditions, he is to return the transfer unused.

[36] The trust conditions can be much more complicated than that, especially if a new mortgage is being put on and old encumbrances removed.

3. What Legal Relation is Created?

[37] There is authority inside and outside Alberta saying that such "trust conditions" create an express or deemed solicitor's undertaking by the recipient solicitor to perform the conditions. See ***Witten Vogel v. Leung*** (1983) 46 A.R. 53, 148 D.L.R. (3d) 418; ***Kutilin v. Auerbach*** (1988) 54 D.L.R. (4th) 552, 558 (B.C. C.A.), leave den. (1989) 101 N.R. 231 (S.C.C.). I do not question the accuracy of that legal proposition.

[38] However, are "trust conditions" something else as well? In particular, do they create a trust? Does the ordinary law of trusts apply? The answer to that will help decide many questions, such as remedies available, and who is bound.

[39] An escrow or undertaking is not sufficient to solve the problems outlined above.

[40] The term or procedure of escrow strictly applies to deeds, and negatives their delivery, because a deed is effective only on delivery, not on signing or on its date. Escrow would be of use when sending a sealed Agreement for Sale or Bill of Sale, but possibly not when sending a registrable transfer. A ***Land Titles Act*** transfer is not a deed, and becomes effective by filing, not by delivery. When "escrow" is used in a wider sense, it is ambiguous. Cf. ***Tooton v. Atkinson (#1)*** (1983) 52 N. & P.E.I.R. 167 (Nfld. D.C.) (paras. 29-30).

[41] A proposed undertaking is of very little use. An undertaking must be actually given to be of much use to anyone. Even then, it presumably does not cover the period before it was given. And an undertaking has diminished worth in conveyancing in any situation where it is not easy to prove that it was given, so that litigation is needed to test that. One of the major aims of trust conditions is to bypass the need for litigation, and to produce certainty. Trust conditions aim to link obligation directly to use of documents, rather than to words or assent.

[42] An undertaking sometimes may not bind the recipient solicitor's client. If the solicitor is seen as a mere agent, lack of consideration may be a problem there, as non-lawyers may only be bound by contracts, not by promises. Whether he gave the undertaking as an agent, and what that means, could be open to debate. Cf. ***Hoffman & Dorchik v. Agnew, Nykyforuk*** [1985] 1 W.W.R. 656, 36 Sask. R. 257; ***Domfab v. Ross*** (1976) 22 N.S.R. (2d) 185.

[43] Another important aim of trust conditions is to allow simple enforcement between known persons of honor (solicitors) without need to sue their clients, who may be insolvent, unreasonable, litigious, or entrenched behind arguable counterclaims or set-offs. Without trust conditions, the two solicitors may be merely agents of their respective clients. So the clients might have to be sued.

[44] Therefore, sometimes mere undertakings (or escrows) will not provide perfect remedies.

[45] But a trust often will. If the trust condition creates a real trust, then the recipient of the document or money is a mere trustee for the sender. The trustee is the recipient solicitor, not his client. The documents or money sent under trust conditions are not held by the recipient solicitor (or his client) beneficially. If something goes wrong, proprietary remedies are available, not merely an unsecured claim for money compensation. If the recipient's client or some non-lawyer gets possession of the documents or money entrusted, he and they are just as bound.

[46] There is a bigger advantage. On occasion, solicitors send documents on trust to non-lawyers, such as trust companies, share registries, or trustees in bankruptcy. See the Law Society of Alberta's ***Code of Professional Conduct***, Chap.4, Commentary C.11.1 (para. 2) (version VS 2004). If trust conditions did not create trusts or equitable interests, and were nothing but solicitors' undertakings, they would be of little use if the recipient turned out not to have been a solicitor at the relevant time, or if he was struck off the rolls before he obeyed the trust conditions, or even struck off before the Law Society or court could enforce his undertaking.

[47] All that reinforces the conclusion that trust conditions between solicitors are intended to create, and do create, a traditional trust. See ***Hardtman & Strack v. Farr*** (1974) 5 O.R. (2d) 45, which seems to reach the same conclusion.

[48] I believe that most Alberta solicitors who give or receive trust conditions mean and understand what they say: trust conditions really create a trust. For evidence of their understanding and intent, we may look at the only generally-published pieces of evidence. The first is a textbook: Sterk, ***op. cit. supra***, at p. 80. One should note the terminology in the textbook's item (e), and its

quotation from the Law Society of Alberta's former ***Professional Conduct Handbook***, Ruling 19.1(iv) (looseleaf 1977, rev. 1988). The second is also a textbook: ***Alberta Residential Conveyancing Guide***, ***supra***, s. 4.3.1 (p. 4-9). Note the phrase "breach of trust". The third piece of evidence is the Law Society's current ***Code of Professional Conduct***, Chap. 4, R. 11(a), and commentary C.11.2 to R. 11(i), and commentary C.11.3 (revision V2 2004). One should note its terminology: "entrustor", "in trust", and "the trust". Finally, there are the 2004/05 CPLED materials, ***supra***, at p. 3-4. This publication is used to train articling students in Alberta. On that page, it refers to "the trust relationship created through the use of trust conditions", and says that undertakings are not the same as trust conditions, the latter being imposed on the solicitor, not given by him or her.

[49] I do not suggest that the Law Society's Rules on trust conditions bind the courts. They do not, and indeed in one or two respects they seem to make suggestions contrary to established Alberta case law. The Law Society Rules govern the professional discipline of lawyers, and cannot govern property disputes over entrusted documents. Only the courts, legislation on property, and case law, can govern that. In particular, the Law Society can make it a professional offence to impose a certain type of trust condition. But it cannot invalidate such a trust condition, nor can it let the recipient of such a trust condition take and enjoy the property entrusted free of that trust condition. The respondents concede this point, at least in part (factum para. 45).

[50] However, when solicitors have a choice as to what kind of legal relationship to create, pre-existing textbooks and Law Society Rules are an important backdrop against which to interpret the words which the solicitors choose.

[51] In courts of equity, there is an accepted three-part test for creation of an express trust. It is normally satisfied when one solicitor imposes trust conditions upon another. The first part of the test is words which show that the recipient must take the property for described persons or objects, not beneficially. The words "in trust" suffice, but are not necessary. Between two solicitors, handing over money or property to create a mere moral obligation is highly unlikely. The second part of the test for a new trust is clear identification of the property which is the subject matter. Ordinarily that property is the documents or money enclosed in the letter containing the trust conditions, and said to be subject to the conditions. Occasionally the conditions refer to documents sent previously in a named letter. Usually that part of the test is clearly satisfied. The final part of the test is certain or ascertainable persons or objects who are to benefit. That is even more easily satisfied, as usually the required performance is to be given to the solicitor sending the documents and letter. Occasionally, performance is to be to someone else, such as a mortgagee, but that person is usually clearly identified. These tests are described in Waters, ***Law of Trusts in Canada***, Chap. 5 (3d ed. 2005); Underhill and Hayton, ***Law Relating to Trusts and Trustees***, Chap. 2 (15th ed. 1995).

[52] Therefore, solicitors' trust conditions do create a trust.

4. Terms and Effect of the Trust

[53] What are the terms of the trust? That depends largely upon the wording of the trust conditions, but a few typical examples may suffice. The simplest arises when a vendor's solicitor

sends documents to a purchaser's solicitor before all the contract or conveyancing details are worked out, e.g. when the purchaser does not know what his new mortgagee will accept or require. Then the trust conditions will just say that the documents are sent on trust, to be held at the disposal of the sending solicitor, and to be sent back on demand. That creates a simple bare trust in favor of the sending solicitor. The receiving solicitor and his client acquire no beneficial interest whatever. This is not performance of the sale contract, nor a tender of such performance. It is a temporary storage measure.

[54] The next simplest example comes when the vendor's solicitor sends the purchaser's solicitor a registrable transfer on trust for payment of the precise sum needed to close the sale. In my view, without payment of that sum the receiving solicitor and his client again acquire no beneficial interest in the transfer. However, the trust is alternative or defeasible. It may be performed either by returning the transfer unused, or by paying the specified sum. Once the sum is paid, the obligation to return the transfer ceases. However, until the sum is actually paid (without strings attached), the trust over the transfer remains.

[55] This sort of alternative or defeasible trust may sound a little unusual, but it is not. A formal ***inter vivos*** trust, or one contained in a will, often has such features. An executrix may be constituted trustee and told to hold certain property of the deceased on trust, to pay taxes debts and expenses, to pay certain bequests or equalizing payments, and then to transfer part or all of the remainder of the property to herself beneficially. She cannot take the property beneficially without making the various payments, but once she has made them, she is the sole remaining beneficial owner.

[56] One rule about solicitors' trust conditions is very clear in Alberta and British Columbia. They bind the recipient solicitor fully, and are in no way qualified by whatever rights, powers or immunities his client has or claims to have. In particular, it is no defence to a claim under the trust conditions that those conditions go beyond, or contradict, the sale contract. Such a defence might be valid in Manitoba: ***Milburn v. Dueck*** [1992] 6 W.W.R. 497, 81 Man. R. (2d) 266 (C.A.). But it is not a defence in Alberta, where the trust condition must be unconditionally obeyed if the documents are not returned: ***Witten, Vogel v. Leung***, ***supra***, at pp. 54-5 (A.R.); ***Minsos, McLeod v. Wedekind*** [1988] A.U.D. 772, [1988] A.J. # 447, Edm. 8703-0801 (C.A.); ***Field & Field v. Parlee McLaws***, ***supra,*** at 132-33 (A.R.); ***McCarthy Tetrault v. Lawson, Lundell*** (1991) 58 B.C.L.R. (2d) 310; cf. Law Society of Alberta ***Code of Professional Conduct***, ***supra***, R. 11(e).

[57] The respondents admit that

> "the court has an inherent jurisdiction to compel compliance with trust conditions. . . In the appropriate circumstances enforcement of such conditions can occur regardless of the contract between the parties whom the solicitors are representing; enforcement occurs against the solicitor, not the party he represents."
>
> (factum, para. 21(a))

TAB 7

Court of Queen's Bench of Alberta

Citation: E Construction Ltd v Sprague-Rosser Contracting Co Ltd, 2017 ABQB 657

Date: 20171031
Docket: 1403 13215
Registry: Edmonton

Between:

E Construction Ltd.

Applicant

- and -

Sprague-Rosser Contracting Co. Ltd. and Regional Municipality of Wood Buffalo

Respondents

Memorandum of Decision on Trust Claim
of the
Honourable Madam Justice J.M. Ross

Introduction

[1] This application was initially made by E Construction Ltd [ECL], a subcontractor and creditor of Sprague-Rosser Contracting Co Ltd [SR], seeking a declaration that funds held by the solicitors for Alvarez & Marsal Canada Inc, the Receiver of SR [Funds], are subject to a trust, and a declaration that ECL has a beneficial right and interest in the Funds.

[2] The Funds were transferred by the legal counsel of the Regional Municipality of Wood Buffalo [RMWB] to Burstal Winger Zammit LLP [BWZ], legal counsel of SR, in trust, regarding RMWB Projects. This occurred prior to the Court appointment of the Receiver and Trustee in Bankruptcy under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] on July 31, 2014.

[3] The Receiver settled SR's claims against the RMWB. The settlement was approved by the Court in a Consent Order dated May 5, 2016 [SR Settlement Order].

[4] The SR Settlement Order provided for transfer of the Funds to be held by the Receiver's counsel. ECL made a claim to the Funds based on its builder's lien [ECL Lien]. Background relating to the ECL Lien and the construction project known as the Saline Creek Drive and Bridge Project [Saline Creek Project] is available in: ***E Construction Ltd v Sprague-Rosser Contracting Co Ltd***, 2017 ABQB 99, [2017] 5 WWR 799 [Lien Decision]. I found that the ECL Lien was invalid. The Lien Decision was appealed.

[5] ECL also asserted a claim to the Funds based on a trust. By Order of April 6, 2017, a trust claim process was established [Trust Claim Process Order]. Pursuant to that process, Pioneer Truck Lines Ltd [Pioneer], an unsecured trade creditor of SR that had provided services on the Saline Creek Project, asserted a trust claim to the Funds.

[6] After the hearing of the ECL and Pioneer trust claim application, but before release of this decision, ECL and the Receiver settled ECL's trust claim, ECL's appeal of the Lien Decision and other claims between ECL and the Receiver. The settlement was approved in an Order dated October 23, 2017 [ECL Settlement Order]. The Pioneer claim was not settled. The Funds were authorized to be distributed as set out in the ECL Settlement Order, subject to the Receiver continuing to hold $120,000 as security for the Pioneer trust claim.

Background Facts

[7] Additional facts relevant to this application are outlined below.

[8] The RMWB through its solicitors made three transfers of funds to SR's solicitors, BWZ, on March 28, 2014, June 10, 2014, and July 24, 2014.

[9] On March 28, 2014, RMWB's solicitor transferred $5,015,203.00 to BWZ on the following conditions:

> This [amount is] provided to you in trust. The funds are not to be released until:
>
> > 1. You and I have defined the liens and/or claims that, in accordance with the agreements between Sprague Rosser and the RMWB, are necessarily paid from the funds held in trust before any of it is releasable to your client. At this time we [are] aware of liens or claims of, including but not necessarily limited to, PCL, H. Wilson, E Construction and E.O.S.; and
> >
> > 2. I, or another lawyer acting on behalf of the RMWB, confirm that the condition is satisfied and the funds are releasable.
>
> If this condition is not sufficiently clear, or you are not comfortable holding the funds on this basis, you are to return the funds to the Regional Municipality of Wood Buffalo.

[10] The funds were transferred to BWZ and were not returned to RMWB.

[11] On June 10, 2014, RMWB transferred $4,342,007.88 to BWZ on the same conditions as the March 28, 2014 transfer. RMWB's solicitor added that, "At this time we [are] aware of liens or claims of, including but not necessarily limited to, Jactec Electric, PCL, H. Wilson, E

Construction and E.O.S." The RMWB solicitor also confirmed that, of the funds transferred that day, $3,804,437.57 was allocated to the Saline Creek Project.

[12] On July 24, 2014, Reynolds Mirth Richard Farmer LLP [RMRF], external legal counsel to RMWB, transferred $486,904.48 to BWZ on condition that:

> These funds are for amounts outstanding on QU2706 [i.e. the Saline Creek Project] and will be provided to you on the sole trust condition that they not be disbursed to your client until our office receives a Certified Copy of Title showing that no liens are registered with respect to the Project.

[13] On July 25, 2014, RMRF confirmed the trust conditions in a letter to BWZ, which stated:

> To my knowledge, you have been sent two amounts:
>
> > 1) On June 10, 2014, RMWB sent $4,342,007.88 to your office to hold in trust for S-R.
> >
> > 2) On July 24, 2014, we, on behalf of RMWB, sent $486,904.48 to your office to hold in trust for S-R.
>
> The same trust conditions below have applied to all amounts sent to your office and apply to any additional amounts unless expressly stated otherwise. These conditions are the following:
>
> > 1) You undertake not to release any funds to your client or anyone else – except for the sole and only exception set out in (2) below – until all liens are removed and our office confirms the receipt of a Certificate of Title showing no liens with respect to whichever project the release relates: the Saline Creek Drive and Bridge Project (the "Bridge Project"), the Abasands Project, or the Saline #3 Project.
> >
> > 2) For funds relating to the Bridge Contract, you may release funds [sic] Dan Peskett of Brownlee LLP on behalf of E Construction Ltd. ("E Construction") on the condition that those funds cannot be released to E Construction until E Construction removes its lien and we receive a satisfactory Certificate of Title showing no liens.
> >
> > 3) Once all liens are removed and we receive the respective Certificates of Title showing no liens, you can release the funds on the condition that all funds are disbursed to S-R's subcontractors. For clarity, you may not release any funds to any subcontractor until we receive Certificates of Title showing no liens.

[14] On November 10, 2015, the Receiver filed an application seeking, among other things, an order approving a settlement agreement between SR, through the Receiver, and RMWB. The application concluded with the SR Settlement Order on May 5, 2016. The SR Settlement Order directed that the Funds in the amount of $4,432,455 be transferred from BWZ to the Receiver to be held in trust on conditions set out in the SR Settlement Order.

[15] Subsequent applications and orders, set out above, have addressed entitlement to the Funds, and provided for distribution of the majority of the Funds. The remaining issue is entitlement to the remaining $120,000 of the Funds.

Issues

[16] Are the Funds subject to a trust for the benefit of unpaid subcontractors and in priority to the claims of SR's secured creditors?

[17] For the purpose of analysis, that primary issue has been divided into the following sub-headings: (A) Trust Analysis, including (i) certainty of intention, (ii) certainty of subject matter, and (iii) certainty of objects; (B) Security Interest; (C) *Bankruptcy and Insolvency Act* Distribution Scheme; and (D) Effect of the SR Settlement Order.

A. Trust Analysis

[18] A preliminary question regarding this issue is whether the trust terms and conditions imposed on funds transferred by RMWB to BWZ are capable of creating a trust?

[19] That question was comprehensively considered and answered by Alberta Court of Appeal in ***Carling Development Inc v Aurora River Tower Inc***, 2005 ABCA 267 at paras 38, 45-52, 371 AR 152 [***Carling***]. Coté JA, for a unanimous Court, wrote as follows:

> 38 *However, are "trust conditions" something else as well? In particular, do they create a trust*? Does the ordinary law of trusts apply? The answer to that will help decide many questions, such as remedies available, and who is bound.
>
> ...
>
> 45 .... If the trust condition creates a real trust, then the recipient of the document or money is a mere trustee for the sender. The trustee is the recipient solicitor, not his client. The documents or money sent under trust conditions are not held by the recipient solicitor (or his client) beneficially. If something goes wrong, proprietary remedies are available, not merely an unsecured claim for money compensation. If the recipient's client or some non-lawyer gets possession of the documents or money entrusted, he and they are just as bound.
>
> 46 There is a bigger advantage. On occasion, solicitors send documents on trust to non-lawyers, such as trust companies, share registries, or trustees in bankruptcy.... If trust conditions did not create trusts or equitable interests, and were nothing but solicitors' undertakings, they would be of little use if the recipient turned out not to have been a solicitor at the relevant time, or if he was struck off the rolls before he obeyed the trust conditions, or even struck off before the Law Society or court could enforce his undertaking.
>
> 47 All that reinforces the conclusion that trust conditions between solicitors are intended to create, and do create, a traditional trust. See *Hardtman & Strack Ltd. v. Farr* (1974), 5 O.R. (2d) 45 (Ont. H.C.), which seems to reach the same conclusion.
>
> 48 I believe that most Alberta solicitors who give or receive trust conditions mean and understand what they say: trust conditions really create a trust....

....

51 In courts of equity, there is an accepted three-part test for creation of an express trust. It is normally satisfied when one solicitor imposes trust conditions upon another. The first part of the test is words which show that the recipient must take the property for described persons or objects, not beneficially. The words "in trust" suffice, but are not necessary. Between two solicitors, handing over money or property to create a mere moral obligation is highly unlikely. The second part of the test for a new trust is clear identification of the property which is the subject matter. Ordinarily that property is the documents or money enclosed in the letter containing the trust conditions, and said to be subject to the conditions. Occasionally the conditions refer to documents sent previously in a named letter. Usually that part of the test is clearly satisfied. The final part of the test is certain or ascertainable persons or objects who are to benefit. That is even more easily satisfied, as usually the required performance is to be given to the solicitor sending the documents and letter. Occasionally, performance is to be to someone else, such as a mortgagee, but that person is usually clearly identified....

52 *Therefore, solicitors' trust conditions do create a trust*. [*emphasis added*].

[20] That leads to a consideration of whether the three-part test for creation of a trust is met in the circumstances of this case.

(i) Certainty of intention

[21] I conclude that the intention to create a trust can be inferred from the communications between RMWB's legal counsel and SR's legal counsel. Correspondence at the time of transfer of the funds, and the subsequent July 25, 2014 letter confirming trust conditions, indicates that the funds are provided "in trust" or on "trust conditions." The Receiver submits that the terms are not determinative. ***Carling*** suggests to the contrary, that the words "in trust" suffice. In ***Jin v Ren***, 2015 ABQB 115 at para 24, [2015] 12 WWR 175, Michalyshyn J observed that while specific words are not determinative, "[t]he words which nearly always reveal intention [to create a trust] are 'in trust,' or 'as trustee for'". Further, there is nothing in the conduct of the parties to suggest otherwise. Again, ***Carling*** is instructive: "Between two solicitors, handing over money or property to create a mere moral obligation is highly unlikely": para 51.

[22] The Receiver argues that the correspondence of March 28, 2014 and June 10, 2014 cannot exhibit any of the three certainties required to establish a trust because they refer to subsequent agreements. The Receiver argues this is nothing more than an "agreement to agree." I reject this argument. In my view, the letter of July 25, 2014, is uncontradicted evidence that the agreements referred to had been reached, on the terms set out therein.

[23] The Receiver contends that a "mere expression of hope" that unpaid subcontractors should be paid from the funds does not amount to an intention to create a trust for the subcontractors' benefit. Otherwise, RMWB would have left itself exposed to pay twice, on SR's claims and on additional and unqualified lien claims. The response to this is in the agreement reflected in the July 25, 2014 letter. If that agreement between RMWB and SR meets the three certainties and creates a trust, payment as contemplated in that agreement would certainly bar a further claim by SR.

(ii) Certainty of subject matter

[24] Only a portion of the funds transferred from RMWB to BWZ related to the Saline Creek Project. Certainty of subject matter regarding the alleged trust requires that the appropriate portion be ascertained *or ascertainable*. As stated by Agrios J in ***Alnav Platinum Group Inc v APM Delstar Inc***, 2001 ABQB 930 at para 19, 306 AR 233 [***Alnav Platinum***]:

> [It] is trite law that if the correct amount can be easily identifiable out of funds earmarked [for] that purpose, which is the case here, it does not matter that the precise amount was not actually identified. The funds out of which easily calculated G.S.T. Claims would be determined were themselves clearly identified, and the G.S.T. Monies further identified out of them [emphasis in the original].

[25] In Appendix "A" to the Second Supplemental Report to the Ninth Report of the Receiver, the funds paid by RMWB to BWZ are allocated between construction projects. The amount allocated to the Saline Creek Project is identified. This meets the requirement of certainty of subject matter, in relation to the total quantum of available funds.

[26] However, the Receiver argues that there is a lack of certainty regarding the share of trust property that each of the alleged beneficiaries is entitled to receive: Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada,* 4th ed (Toronto: Thomson Reuters, 2012) at 159, 164. Although this difficulty could be overcome where there are sufficient assets in the trust to satisfy creditors' claims in full, the Receiver submits that, at the time of creation of the trust, there was a potential for a deficiency, and no agreement regarding how funds would be divided among alleged beneficiaries of the trust.

[27] Regarding claims brought before the Court pursuant to the Trust Claims Process Order, there were sufficient funds to pay the claims in full. There is no evidence that there are (or were) insufficient assets in the alleged trust to satisfy creditors' claims at any other time. The Receiver's argument is not made out on the evidence.

[28] I conclude that certainty of subject matter has been demonstrated.

(iii) Certainty of objects

[29] The Receiver submits that any trust is, as stated in the July 25, 2014 letter, for the benefit of SR. SR certainly had a contingent interest. However, the reference to SR does not preclude the possibility that there were additional objects of the trust. ***Carling*** expressly contemplates that persons who are to receive funds under trust conditions *may be* objects of a trust (at para 51):

> The final part of the test is certain or ascertainable persons or objects who are to benefit. That is even more easily satisfied, as usually the required performance is to be given to the solicitor sending the documents and letter. Occasionally, performance is to be to someone else, such as a mortgagee, but that person is usually clearly identified...

[30] The question is whether the objects were sufficiently identified. The Receiver contends that there is no certainty of objects because only some of SR's subcontractors were named, while others (including Pioneer) were not. In addition, the Receiver argues that uncertainty of objects inheres in the fact that SR was involved with three construction projects. On the evidence before this Court, the Receiver submits, "the possibilities for the class of beneficiaries of the alleged trust are virtually endless and cannot be identified with requisite certainty." The only certain

beneficiary was SR, not subcontractors. As such, the beneficial ownership of the funds rests in SR's hands, and the funds form part of SR's estate.

[31] The July 25, 2014 correspondence stipulated the following trust conditions:

> 1) You undertake not to release any funds to your client or anyone else – except for the sole and only exception set out in (2) below – until all liens are removed and our office confirms the receipt of a Certificate of Title showing no liens with respect to whichever project the release relates: the Saline Creek Drive and Bridge Project (the "Bridge Project"), the Abasands Project, or the Saline #3 Project.
>
> 2) For funds relating to the Bridge Contract, you may release funds [sic] Dan Peskett of Brownlee LLP on behalf of E Construction Ltd. ("E Construction") on the condition that those funds cannot be released to E Construction until E Construction removes its lien and we receive a satisfactory Certificate of Title showing no liens.
>
> 3) Once all liens are removed and we receive the respective Certificates of Title showing no liens, you can release the funds on the condition that all funds are disbursed to S-R's subcontractors. For clarity, you may not release any funds to any subcontractor until we receive Certificates of Title showing no liens.

[32] The failure to include a list of named subcontractors is not determinative. Certainty of objects is shown if the objects of a trust are ascertainable. The conditions set out above are clear that members of the beneficial class are lienholders *and* unpaid subcontractors who are owed monies on identified construction projects, including the Saline Creek Project. There is no issue that parties who applied pursuant to the Trust Claim Process Order fall within that identified class, and no evidence of potential difficulties with identification had other parties come forward. I echo the words of Forsyth J in ***Canada Trust Co v Price Waterhouse Ltd,*** 2001 ABQB 555 at para 35, 288 AR 387, that "[t]he class of beneficiaries here is not amorphous, nebulous or indefinite. Rather, it is possible to determine the membership of the class. Further, it is possible to determine the extent of the membership of the class." In that case, the Court went on to identify "members of the beneficial class [as] those farmer producers who have not yet received payment for the grain they provided under": at para 39. In this application, Pioneer has demonstrated that is a member of the identified class of objects, and there is no reason to believe that it was not possible to determine the membership and extent of the class of unpaid subcontractors on the Saline Creek Project at the time the trust was created.

[33] Certainty of objects is established.

[34] In the result, I conclude that the Funds are impressed with a trust, which was created by the trust terms and conditions imposed on the funds transferred by RMWB for the benefit of the lienholders and unpaid subcontractors on the Saline Creek Project.

B. Security Interest

[35] As an alternative argument, the Receiver submits that if the Funds are subject to a trust in favour of the Applicant, the Applicant's interest is a security interest governed by the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*], in that the trust was intended to secure the payment of SR's obligations to the Applicant and other subcontractors. The Applicant's interest: (i) was not perfected (or registered) as of the date of SR's bankruptcy, and consequently is not effective against the Trustee in Bankruptcy, pursuant to the *PPSA*, s 20(a)(i); and (ii) in any

event, is subordinate to the perfected security interests of RBC and BDC Capital Corporation [BDC], pursuant to the *PPSA*, s 35.

[36] Pioneer submits that the *PPSA* has no application, because the Funds were not provided to secure payment or performance of an obligation. The RMWB, as the settlor, did not intend to or put the money in trust to secure payment or performance, but simply to allow the flow of monies owing on the construction project.

[37] The *PPSA*, s 3, provides:

> 3(1) Subject to section 4, this Act applies to:
>
> (a) Every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) Without limiting the generality of clause (a) a chattel mortgage, conditional sale, a floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

[38] A trust interest only becomes a security interest under the *PPSA* if the *substantive* purpose of creating the trust is to secure payment or performance of an obligation: ***Skybridge Holidays Inc, Re*** (1998), 11 CBR (4th) 126, 1998 CarswellBC 1214 at paras 8-10 (BC SC), aff'd 1999 BCCA 185, 11 CBR (4th) 130. One relevant factor in determining the substance of the transaction is whether the relationship between trustee and beneficiary, or settlor and beneficiary, is a debtor-creditor relationship, or some other relationship (e.g., agent-principal): Ronald C Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 2nd ed (Irwin Law Inc, 2012) at 139 [*PPSL*].

[39] The authors of *PPSL* observe that, where a trustee and beneficiary, or a settlor and beneficiary, are in a debtor-creditor relationship, "the issue to be determined is whether the trust is being used as a vehicle to secure the obligation that is the basis of this relationship or is merely the source of the obligation": at p 140.

[40] SR was debtor of Pioneer and other subcontractors. But SR was neither trustee nor settlor, and had either no interest in the Funds (the July 25, 2104 letter stipulated that *all funds* were to be disbursed to SR's subcontractors), or at most a contingent interest to any potential surplus. Neither RMWB, as settlor, nor BWZ, as trustee, were debtors of Pioneer or other unpaid subcontractors. BWZ's only obligation was to comply with the trust conditions, or return funds to RMWB.

[41] Pioneer's beneficial interest is not related to an obligation of RMWB, nor an obligation of BWZ other than the obligation to fulfill the terms of the trust. I agree that the *PPSA* does not apply.

C. The Bankruptcy and Insolvency Act's Distribution Scheme

[42] The Receiver contends that it is contrary to the bankruptcy distribution scheme under the *BIA* to permit a contractual arrangement between the parties that circumvents a secured creditor's interest and priority. In ***Greenview (Municipal District No 16) v Bank of Nova Scotia***, 2013 ABCA 302 at para 41, 556 AR 34 (***Horizon Earthworks***), the Court of Appeal held:

> Pursuant to section 71 of the *BIA*, upon a bankruptcy order being filed, a bankrupt ceases to have the capacity to dispose or otherwise deal with its property, which shall "subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order...". Upon bankruptcy Horizon's creditors become creditors of the bankrupt estate. While [a contractual provision] may allow payment of contractors and suppliers by Greenview from monies owing Horizon prior to bankruptcy, once bankruptcy occurs any monies owing become the property of the Trustee, and the terms of the contract do not replace the terms of the *BIA* to prefer some of Horizon's creditors over others.

[43] In other words, a pre-bankruptcy contractual arrangement with a bankrupt contractor cannot supersede the provisions of the *BIA* to prefer unsecured subcontractors over a secured creditor: ***AN Bail Co v Gingras***, [1982] 2 SCR 475 at paras 40-42, 54 NR 280 (WL) [***Bail***].The Receiver contends that enforcing the trust in favour of unpaid subcontractors would result in a payment to subcontractors after the bankruptcy, in priority to both secured and other unsecured creditors of the bankrupt estate. That outcome, it submits, is at "direct odds with the principles established by the Supreme Court of Canada in ***Bail***."

[44] However, s 67(1)(a) of the *BIA* provides that "[the] property of a bankrupt divisible among his creditors shall *not* comprise property held by the bankrupt in trust for any other person" (*emphasis added*).

[45] Section 67(1)(a) was found to apply in ***Iona Contractors Ltd (Receiver of) v Guarantee Co of North America***, 2015 ABCA 240, leave to appeal to SCC refused, [2015] SCCA No 404 [***Iona***] in relation to the statutory trust created by s 22 of the *Builders' Lien Act,* RSA 2000, c B-7 [*BLA*]:

> [44] ... It is certainly true that no one can create a trust after bankruptcy in an attempt to withdraw assets from the estate and reorder priorities, but that does not mean that legitimate trusts that arise or are perfected after the bankruptcy are ineffective.
>
> [45] Section 67(1)(a) [of the *BIA*] does not impose any temporal limit on when the trust arises, and only requires that the property be "held by the bankrupt in trust for any other person"... There is no reason in principle why such trust assets should accrue to the benefit of the unsecured creditors of the bankrupt, rather than the intended beneficiaries of the trust.
>
> [46] There is also uncertainty about the concept of the trust "existing" on the date of bankruptcy. It could mean simply that on the date of bankruptcy the trust instrument existed, or the class of beneficiaries existed, or that the trust property had come into existence and was identifiable, or some combination of those. In this case the "trust" clearly existed before Iona's bankruptcy, in a sense that the provisions of *Builders' Lien Act* were in place well before its bankruptcy. The disputed funds were "held back" in accordance with the legislation before Iona's bankruptcy. They were also "payable" before its bankruptcy. The only sense in which the trust did not "exist" on the date of the bankruptcy is that the Airport Authority had not yet drawn the cheque to pay the holdback funds, nor had the deemed Trustee received those funds.

> [47] It can be accepted that a trust cannot be created after bankruptcy if its intent or effect is to defeat the order of priorities under the *Bankruptcy and Insolvency Act*. The trusts under the *Builders' Lien Act*, however, have none of those attributes. The lien rights arise the minute the work is done, and the funds which are captured by the trust were quantified in the hands of the Airport Authority on the dated of the bankruptcy... Nothing in this case about the timing of the formation of the trust or the bankruptcy would render the statutory trust invalid or inoperative.

[46] In ***Royal Bank of Canada v TWY Enterprises Inc***, 2003 MBQB 66 at paras 12-13, 42 CBR (4th) 312, the Court found that funds held in trust by a law firm, pending resolution of a property dispute between parties, constituted trust funds and were not the property of the bankrupt. The funds at issue were the proceeds from the sale of Ms. Hutchinson's residence prior to her bankruptcy. The funds had been forwarded to the law firm of Fillmore Riley to be held pending resolution of a priority dispute between the Royal Bank and TWY. The Court stated:

> [12] I am satisfied that Ms. Hutchinson had no further interest in the funds once they were forwarded to Fillmore Riley. From that point onwards, the disbursement of the funds was a matter entirely between TWY and the Bank. Fillmore Riley was holding the funds in trust solely for the Bank and/or TWY. Ms. Hutchinson retained no beneficial interest in them. The fact that the funds were sent to Fillmore Riley subject to trust conditions does not alter this fact. Ms. Hutchinson had no right to demand a return of the funds. Her only recourse for a failure to fulfill the trust conditions would have been to proceed against Mr. Skwark and/or Mr. Mackinnon for failing to comply with them.

[47] Another example is found in ***Acepharm Inc, Re*** (1999), 9 CBR (4th) 1, 122 OAC 63 (Ont CA). Prior to bankruptcy, the bankrupt made rental payments into a trust account held by a law firm pending determination as to whether the bankrupt or the appellant was the owner of the property. The Court found that the funds were trust funds not accessible by the trustee in bankruptcy:

> [12] The funds were, in every sense, trust funds in the hands of the law firm. To the extent that they might be considered as held in trust by the bankrupt, the appellant was a contingent beneficiary of that trust. If the funds are not "held by the bankrupt in trust for any other person" then the only property the Trustee can reach is the bankrupt's contingent interest. That can be realized by continuing the litigation to a conclusion: see s. 67(1)(d) of the Act.

[48] The funds held by BWZ come within s 67(1)(a) as interpreted in these cases. The trust was created before the bankruptcy, at the latest by July 25, 2014. As of that time, SR had at most a contingent interest in any potential surplus of funds. The Funds were held by SR's solicitor, not on behalf of SR, but in trust for lienholders *and* unpaid subcontractors on the Saline Creek Project. As s 67(1)(a) applies, the Funds are not property of SR, and are not subject to the distribution scheme in the *BIA*.

D. Effect of the SR Settlement Order

[49] This issue was introduced, but not decided, in the Lien Decision (where applicable, I have substituted terms as defined in these reasons, using {}):

> [57] The {Funds} were transferred to be held by the Receiver's counsel under the terms of the {SR Settlement Order}. The {SR Settlement Order} provided [in para 29] that the funds were "subject to the builders lien claims of [ECL] and shall replace and stand as security in place of the [RMWB Lands] pending determination as to the validity and enforceability of the [ECL Lien]. The {SR Settlement Order} further provided that the {Funds} "shall not be disbursed by the Receiver unless such disbursement is either (a) agreed to by each of the Receiver and [ECL] in writing or (b) authorized by further Order of this Honourable Court."
>
> [58] The {SR Settlement Order} further provided (in para 38):
>
> > [ECL] and the Receiver, and any other interested Person, shall be at liberty to make further application to this Honourable Court, on proper notice to any party with an interest to the {Funds}, with respect to the {Funds} held in respect of the [ECL Lien] and the [ECL CLP]. For greater certainty, any interested Person shall be at liberty to make an application that the {Funds} are subject to a trust claim under sections 19 and 22 of the BLA in the event that the [ECL Lien] is determined to be invalid or unenforceable.
>
> …
>
> [60] The Receiver contends that the only trust claim contemplated by the {SR Settlement Order} is a claim under the BLA, ss 19 and 22. Such trust claims are contingent on substantial performance of a contract. This Court issued an Order on June 28, 2016, declaring that the Prime Contract was not substantially performed at the time of its termination on March 19, 2014, effectively disposing of any claim under ss 19 and 22.
>
> [61] ECL does not take issue with this but submits that there may be an alternative trust claim flowing from the trust conditions on which the funds were held by the solicitors for the RMWB before being transferred to the Receiver's counsel pursuant to the {SR Settlement Order}. The Receiver argues that such a trust claim is precluded by the {SR Settlement Order}.

[50] Paragraph 38 of the SR Settlement Order allows any interested person, not only ECL, to make an application with respect to the Funds. That application expressly may include, but is not limited to, a trust claim under the *BLA*, "in the event that the [ECL Lien] is determined to be invalid or unenforceable." The ECL Lien has been determined to be invalid. Pioneer, as a party claiming an interest in the Funds, comes within the terms of paragraph 38.

[51] Paragraph 29 of the SR Settlement Order does not detract from Pioneer's rights under paragraph 38. Paragraph 29 provided for disbursement of the Funds by agreement of the Receiver and ECL, or Court Order. This requirement for the agreement of only ECL, and not any interested person, in my view reflects ECL's priority to the Funds, had the ECL Lien been found to be valid. Since the ECL Lien was declared invalid, the rights under paragraph 38 arose. Under that provision, all interested persons, including but not limited to ECL, may make an application regarding a claimed interest in the Funds. That interest may be based on, but is not limited to, an interest arising from a trust created under the *BLA*.

[52] I conclude that the SR Settlement Order does not stand in the way of Pioneer's application.

Disposition

[53] Pioneer's application is granted. Pioneer is entitled to enforcement of its trust claim against the portion of the Funds that continues to be held by the Receiver as security for the Pioneer trust claim, pursuant to the ECL Settlement Order.

[54] The parties may speak to me regarding costs, if they are unable to agree.

Heard on the 22nd day of June, 2017 and the 5th day of September, 2017.
Dated at the City of Edmonton, Alberta this 31st day of October, 2017.

J.M. Ross
J.C.Q.B.A.

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