| | |
|---|---|
| | Clerk's Stamp |
| COURT FILE NUMBER | 2201-02948 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| APPLICANT | CROWN CAPITAL PARTNER FUNDING LP, by its manager, CROWN PRIVATE CREDIT PARTNERS INC. |
| RESPONDENT | RBEE AGGREGATE CONSULTING LTD. |
| DOCUMENT | **BRIEF OF LAW OF RMC CONSTRUCTION MATERIALS LTD.** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | RMC CONSTRUCTION MATERIALS LTD.<br><br>**Attention: Chris Zelyas**<br>Dentons Canada LLP<br>2500 Stantec Tower<br>10220 - 103 Avenue NW<br>Edmonton, AB T5J 0K4<br>Phone: (780) 423-7387<br>Facsimile: (780) 423-7276<br>Dentons file: 573989-3 |


**Counsel for RMC Construction Materials Ltd.**

**Chris Zelyas**

**Dentons Canada LLP**
2500, 10220 - 103 Avenue NW
Edmonton, AB T5J 0K4
Ph: 780-423-7387
Fax: 780-423-7276
Email: chris.zelyas@dentons.com
File: 573989-3

**Counsel for the Applicant, Crown Capital Partner Funding LP, by its Manager, Crown Private Credit Partners Inc.**

**Kelly J. Bourassa / Jessica MacKinnon**

**Blake, Cassels & Graydon LLP**
3500, 855 – 2nd Street SW
Calgary, Alberta T2P 4J8
Ph: 403-260-9697 / 403-260-9657
Fax: 403-260-9700
Email: kelly.bourassa@blakes.com
jessica.mackinnon@blakes.com
File: 79294/16

**TABLE OF CONTENTS**

## I. INTRODUCTION AND OVERVIEW

1. Through these proceedings, FTI Consulting Canada Inc. (the "**Receiver**") asks this Honourable Court to award $4,485,480.64 in damages, plus interest, against RMC Construction Materials Inc. ("**RMC**") with respect to three invoices issued by RBee Aggregate Consulting Ltd. ("**RBee**") for the alleged provision of aggregate and hauling services.

2. The Receiver's claim fails on two independent grounds.

3. First, and most fundamentally, the Receiver has failed to provide any evidence whatsoever to establish that the aggregate and hauling services claimed in RBee's invoices were actually provided to RMC. The Receiver attempts to simply rely on the fact that the invoices were issued, but this is plainly insufficient for the Receiver to meet its burden of proof. Rather, evidence is required to show that the amounts of aggregate and the extent of hauling set out in the invoices was indeed provided by RBee. The Receiver has failed to do so despite its statutory power to compel such supporting evidence from the employees of RBee. This Court should conclude that the Receiver's refusal to present such evidence arises because the evidence would not have supported its case.

4. Even if the Receiver had been able to provide adequate evidence supporting its claim—which it has entirely failed to do—RMC has raised a valid defence of equitable set-off based on the fact that RBee overbilled RMC by 504,336 tonnes and $7,106,857.50 worth of aggregate over the life of the Project. RMC discovered this overbilling at the end of the 2021 aggregate crushing season and was able to calculate its extent accurately on the basis of contemporaneous project records which demonstrate the extent of aggregate provided by RBee. When compared to the amounts invoiced by RBee, its significant overbilling becomes clear. Because RBee's overbilling far exceeds its claim under the invoices by several millions of dollars, RMC owes RBee nothing.

5. The Receiver's attempts to defeat RMC's set-off fail on the evidence and applicable law.

6. The Receiver first argues that RMC's set-off defence is barred because RMC had a contractual option to verify the amounts of each and every aggregate delivery by RBee. By opting instead to conduct a single end-of-project reconciliation, the Receiver says that RMC somehow forfeited its set-off right. This analysis ignores governing case law, which provides that for a claim or defence to be contractually barred, the agreement at issue must clearly state this as a consequence. The agreement between the parties contains no such language, such that RMC's right of set-off defence remains intact. This Court should not grant the Receiver a multi-million dollar windfall for aggregate never delivered under a contract that fully permits RMC's valid set-off defence.

7. The Receiver next claims that RMC's evidence in support of its set-off defence is unreliable. To the contrary, RMC's evidence comes from first-hand sources who were actually present on the Project, and whose analysis of RBee's overbilling are based on contemporaneous project records and accurate calculations. The Receiver has adduced no evidence that RMC's analysis is in any way faulty, and instead simply speculates that the Project records *may* have somehow been inaccurate. This is insufficient to defeat RMC's set-off defence, particularly in light of the compelling and uncontradicted evidence put forth by RMC in support of its set-off.

8. Finally, the Receiver alleges that RMC's set-off defence is barred under the *Limitations Act*. This ignores a wealth of case law—and the explicit text of the *Limitations Act* itself—which provides that the defence of equitable set-off is not subject to limitations. Even if the two-year limitation period did apply here, it would not have started to run until RMC should have reasonably discovered RBee's overbilling. On the facts of this case, that did not arise until the end of the 2021 aggregate crushing season, when facts first came to RMC's attention that led to a plausible suspicion of overbilling by RBee.

9. RMC therefore respectfully requests that this Court reject the Receiver's application with costs payable forthwith.

## II. FACTUAL BACKGROUND

### A. The Project

10. RMC is a major supplier of concrete for infrastructure, commercial and residential projects. It is one of Canada's largest independent concrete producers.[1]

11. In April 2018, RMC entered into a contract with the Aecon-Flatiron-Dragados-EBC Partnership ("**AFDE**"), to supply AFDE with concrete for use in its construction of the generating stations spillway for the Site C hydroelectric dam and generating station project located on the Peace River near Fort St. John, British Columbia (the "**Project**").[2] AFDE is the prime contractor and the British Columbia Hydro and Power Authority ("**BC Hydro**") is the owner with respect to the Project.[3]

12. Timely provision of sufficient amounts of concrete for construction of the Project was of obvious importance to RMC and AFDE. Pursuant to their contract, RMC would be assessed $25,000 in liquidated damages for each day that concrete was unavailable on a "day of pour".[4]

---

[1] Affidavit of Nicholas Burak, sworn on December 23, 2022 ("**Burak Affidavi**t"), para 3.

[2] Burak Affidavit, para 4; Transcript, Cross-Examination of Scott Marshall ("Marshall **Cross-Examination**"), 12:3-24.

[3] Burak Affidavit, para 4.

[4] Burak Affidavit, para 61 and Exhibit "A"; Transcript, Cross-Examination of Nicholas Burak ("**Burak Cross-Examination**"), 13:20-24.

### B. The Supplier Agreement

13. Aggregate is a key material used in the production of concrete.[5] To ensure that RMC could meet its demanding concrete production obligations, RMC entered into an agreement dated May 7, 2018 with RBee, whereby RBee would crush and supply RMC with specified minimum amounts of various types of aggregate per season, which RBee was to produce and stockpile on the Project site (the "**Supplier Agreement**)".[6]

14. Under the Supplier Agreement, RBee's entitlement to payment by RMC was based on the quantity of aggregate products that it actually delivered to the stockpile:[7] pursuant to s. 1 and Schedule "B", the pricing was on a unit rate basis, whereby RMC was obligated to pay RBee a specified rate per tonne for each specified type of aggregate.[8]

15. RMC had the option, if it so chose, to subject RBee's claimed quantities of aggregate supplied to third-party verification within 60 days of its delivery to RMC, pursuant to s. 5 of the Supplier Agreement. The Supplier Agreement did not specify any particular method of verification that RMC may or may not utilize. Nor did it state that RMC could not challenge RBee's entitlement to payment unless the s. 5 verification option was engaged.

16. The Supplier Agreement is silent with respect to set-off. RMC and RBee did not agree to abrogate or remove any right of set-off that the parties may have with respect to one another.

### C. RBee's Supply of Aggregate Products

17. RBee proceeded to supply RMC with sufficient quality aggregate during the 2018 to 2021 crushing seasons (typically from about May to October, weather dependent).[9] During this period, RBee was the sole aggregate supplier to RMC and with respect to the Project as whole.[10] All of the aggregate supplied by RBee was delivered to a stockpile on the Project site, which was empty upon the commencement of RBee's performance of the Supplier Agreement.[11]

18. RMC constructed two batch plants on the Project site to produce the concrete (the "**Batch Plants**").[12] The Batch Plants were located in close proximity and were immediately adjacent to the

---

[5] Burak Cross-Examination, 13:25-26.
[6] Burak Affidavit, para 5 and Exhibit "A".
[7] Burak Cross-Examination, 37:23-25.
[8] Burak Affidavit, para 6 and Exhibit "A".
[9] Burak Affidavit, para 60.
[10] Burak Cross-Examination, 17:16-25.
[11] Burak Cross-Examination, 24:16-18; Burak Affidavit, para 24.
[12] Burak Affidavit, para 4.

Project stockpile.[13] All of the aggregate delivered by RBee to the Project stockpile was subsequently consumed in RMC's on-site Batch Plants to produce concrete, except for the 4,170 tonnes of winter abrasive material that was used for sanding roads at the Project site, the delivery and payment for which RMC does not dispute.[14]

19. RBee periodically invoiced RMC during the 2018 to 2021 crushing seasons for the quantities of aggregates that it claimed to have delivered to the stockpile, generally once per month. Until the fall of 2021, RMC paid RBee's invoices without opting to engage in a third-party verification process with respect to each and every product delivery. RMC's evidence, which is uncontradicted, is that it did not engage in optional third-party verification with respect to each delivery simply because it had no reason whatsoever to suspect that RBee's claimed quantities were materially inaccurate.[15]

20. RMC's uncontradicted evidence is that, consistent with standard practice in the industry, it anticipated completion of a final quantity verification and reconciliation exercise upon the completion of RBee's performance under the Supplier Agreement.[16] RMC communicated this expectation through conversations held with RBee, and it was understood by RBee.[17] This was also consistent with the practice of the parties with respect to the smaller projects that commenced and concluded while RBee's performance on the Project was still ongoing.[18]

21. RMC did not think it was necessary or desirable to engage in repeated third-party verification and payment reconciliations with respect to each one of RBee's deliveries. This would have constituted a significant administrative burden on RMC's part.[19] Furthermore, given the large scale of the Project, RMC was incredibly focused during the 2018 to 2021 crushing seasons on the task at hand – producing enough concrete to meet its obligations to AFDE.[20] RMC was more concerned with paying RBee's invoices in a timely manner to ensure that it had sufficient cash flow to keep supplying the aggregate products that were absolutely critical to ensuring that RMC could produce a sufficient amount of concrete.[21]

---

[13] Burak Affidavit, Exhibit "C"; Second Affidavit of Nicholas Burak, sworn on January 28, 2023 ("**Second Burak Affidavit**"), para 16.

[14] Burak Cross-Examination, 28:22-27 – 29:1-14; Second Burak Affidavit, para 17.

[15] Burak Affidavit, para 12.

[16] Burak Affidavit, para 13; Second Burak Affidavit, para 23.

[17] Burak Affidavit, para 13; Burak Cross-Examination, 39:17 – 40:6.

[18] Second Burak Affidavit, paras 22-23.

[19] Burak Affidavit, para 65.

[20] Burak Cross-Examination, 38:2-13.

[21] Burak Affidavit, para 16.

### D. RMC's First Concerns in the Fall of 2021

22. It was not until the end of the 2021 crushing season that RBee's billings raised concerns for RMC. After RMC received RBee's October 31, 2021 invoice #23256 in about mid-November 2021, it first became apparent that RBee had invoiced RMC for significantly more product, both in terms of quantity and monetary value (before GST), than had been anticipated and estimated by the parties under the Supplier Agreement.[22] Yet RMC would need to continue its production of concrete into 2022 because the Project had experienced some delay.[23]

23. More significantly, RBee purported in this same invoice #23256 to have delivered a total of 195,058 tonnes of aggregate to the stockpile since its last invoice issued on September 30, 2021.[24] This was significantly more than the average of 76,586 tonnes that RBee claimed to have delivered across its previous monthly invoices. As RMC believed RBee to have been supplying as much aggregate material within specification as it could during the previous periods, [25] the extremely high quantities detailed in RBee's October 31, 2021 invoice raised a red flag.

24. In addition, RMC also discovered in about October 2021 that RBee had been invoicing RMC for greatly higher quantities of aggregates than it was actually delivering on another project located near Drayton Valley, Alberta (the "**Vogel Pit Project**").[26]

25. Given the totality of this information that RMC learned in the fall of 2021, RMC believed these issues were serious enough to warrant the completion of a quantity verification not just with respect to RBee's October 2021 claimed deliveries, which were particularly suspect, but all of RBee's claimed deliveries over the course of the Project. In December of 2021, RMC advised RBee that it would conduct the quantity verification and reconciliation that it had always planned on performing upon the conclusion of RBee's performance – but earlier on.[27] RMC also advised that it understandably chose to suspend any further payment of RBee's invoices, including invoice #23219 dated September 30, 2021 and invoice #23256 dated October 31, 2021.[28]

### E. RMC's Quantity Verification

26. In his Affidavit sworn December 23, 2022 (the "**First Burak Affidavit**"), Nicholas Burak, Vice President and Chief Financial Officer of the RMC Group of Companies Ltd.,[29] provides a

---

[22] Burak Affidavit, para 17.
[23] Burak Affidavit, paras 11, 18.
[24] Burak Affidavit, Exhibit "B".
[25] Burak Cross-Examination, 24:3-15.
[26] Burak Affidavit, para 20.
[27] Burak Affidavit, para 21.
[28] Burak Affidavit, para 21.
[29] An entity related to RMC Group of Companies Ltd. as both entities are under common control.

comprehensive account of how he calculated and verified the quantity of aggregates actually delivered by RBee on the Project up through October 31, 2021 (the end of the 2021 crushing season). It should be noted that Mr. Burak's expertise is not simply limited to financial matters. As part of his role as Vice President, he oversees RMC's operations team and has personally visited the Project site in excess of 20 times.[30] He interfaces regularly with RMC's quality control team. Mr. Burak has over a decade of experience in the concrete industry.[31]

27. Mr. Burak relied on two key types of contemporaneous business records to complete his verification:

(a) **RMC's Batch Records**, which together recorded the cumulative amount of aggregate products consumed in RMC's concrete production as of October 31, 2021; and

(b) **AFDE's Survey**, which disclosed the amount of aggregate products delivered by RBee to the stockpile but not yet consumed in RMC's concrete production as of October 31, 2021.[32]

28. Consistent with common industry practice, Mr. Burak added the stockpile quantities, as reflected in the October 31, 2021 AFDE Survey, to the cumulative amount of aggregates removed from the stockpile and consumed in concrete production as of October 31, 2021, as detailed in the Batch Records, to determine the total quantity of aggregates actually delivered by RBee as of October 31, 2021.[33] As is detailed in RMC's argument below, the aggregate quantities disclosed through both the AFDE Survey and the Batch Records are highly accurate and reliable.

### F. RMC's Quantity Reconciliation

29. Once RMC obtained the quantity of aggregates in the stockpile from the AFDE Survey, converted from cubic meters to tonnes, and the total tonnes of aggregates removed from the stockpile and consumed in RMC's Batch Plants from the Batch Records, both as of October 31, 2021, it then proceeded to reconcile the sum of those quantities with the quantities that RBee purported to have delivered, for which it invoiced RMC.

30. The First Burak Affidavit provides detailed evidence as to how Mr. Burak performed the RMC Product Reconciliation. The outcome of RMC's Product Reconciliation was astounding. It disclosed that RBee had invoiced RMC for over 500,000 more tonnes of aggregate than it actually delivered.[34]

---

[30] Burak Cross-Examination, 11:5-10.

[31] Burak Cross-Examination, 61:25 – 62:4.

[32] Burak Affidavit, para 22.

[33] Burak Affidavit, para 65.

[34] Burak Affidavit, para 54; Burak Second Affidavit, para 14.

Under Mr. Burak's updated Product Reconciliation, it was the equivalent of RBee having overcharged RMC by $7,106,857.50, not including GST.[35]

31. To be clear, RMC did not wait until FTI Consulting Canada Inc. (the "**Receiver**") was appointed as receiver to raise its concerns in relation to the potential overbilling under the Supplier Agreement, as the Receiver alleges at paragraphs 8 and 58 of its Brief of Law. Rather, the evidence is clear that RMC advised RBee in December 2021 that RMC would be performing a verification with respect to the quantities RBee claimed to have delivered for the Project before paying RBee's most recently issued September and October 2021 invoices.[36] At this point, RBee would have been alerted to the possibility that it may not be able to collect its corresponding accounts receivables for RMC.[37] The Receiver complains that it was not informed by RMC of its concerns until the March 15, 2022 "Initial Call" between RMC and the Receiver; however, the Receiver was not appointed until March 11, 2022.[38]

32. It was not until after the Receiver's appointment in March of 2022 that RMC was notified that RBee had generated invoice #23311 dated December 31, 2021, in the amount of $181,758 for claimed hauling services related to its supply of aggregate to RMC in November and December 2021.[39] As there was nothing to substantiate that RBee actually performed this hauling, such as supporting weigh tickets or load slips, RMC also understandably declined to pay this invoice.[40]

### G. RMC's Continued Need for Aggregate Supply in 2022

33. Although RMC was surprised to learn of RBee's overbillings at the end of the 2021 crushing season, that did not result in an acrimonious relationship between RMC and RBee. RMC had successfully worked with RBee and completed several previous projects, wherein RMC performed a verification and reconciliation of the amounts of aggregate produced by RBee at the end of those projects.[41] RMC assumed that RBee must have made some type of error in calculating its aggregate quantities, as opposed to intentionally overbilling RMC.[42]

34. After RBee was placed in placed into receivership in March 2022, it became apparent that RBee would no longer be in a position to supply RMC with aggregate, such that RMC would need to work

---

[35] Burak Affidavit, para 54; Burak Second Affidavit, para 14.
[36] Burak Affidavit, para 21.
[37] Burak Affidavit, para 21.
[38] Fifth Report of the Receiver dated October 28, 2022, para 1.
[39] Burak Affidavit, para 57.
[40] Burak Affidavit, para 57.
[41] Burak Affidavit, para 60; Second Burak Affidavit, para 23.
[42] Burak Affidavit, para 60.

quickly to find a new supplier.[43] The urgency of the situation cannot be understated. If RMC did not find a new supplier quickly, it would be at risk of running out of aggregate while it was still required to produce concrete for AFDE.[44] If that were to happen, RMC would be assessed $25,000 in liquidated damages for each day that concrete was unavailable on a "day of pour".[45]

35. Considering this context, RMC decided not to call on the performance bond issued by Western Surety Company with respect to RBee's performance on the Project (the "**Performance Bond**"). RMC's primary concerns were that if it called on the Performance Bond, it could lead to delay in securing a replacement aggregate supplier, which would have had huge cost implications to RMC. Further, the surety would likely contest a claim on the Performance Bond in any event.[46] RMC was fearful that the surety could delay in processing a claim or outright reject a claim, which could have caused considerable delay if legal proceedings became necessary against the surety.[47]

36. RMC was also optimistic that whatever entity was to purchase RBee's equipment on the Project site through the Receivership would be in a position to resume aggregate production much sooner than the surety could likely arrange for a replacement supplier.[48] RMC was aware that the Receiver was marketing RBee's equipment as an attractive purchase due to its potential use on the Project.[49] Due to the remote location of the Project site, it would have likely taken several weeks, if not months, to remove the old RBee equipment from the Project site and bring in new equipment.[50]

37. RMC was also optimistic that if it was able to engage the purchaser of the equipment as its new supplier, then any potential damages to RMC could be fully mitigated, provided RMC was able to engage a new supplier at the same or better rates as those under the Supplier Agreement.[51] RMC was hopeful it could do so, given that the prices under the Supplier Agreement remained at fair market value in 2022.[52] If this transpired, there would be no loss for the Performance Bond to cover, and its purpose was not to compensate RMC for RBee's past overbilling in any event.[53]

38. In about May of 2022, RMC came to understand that a new entity involving Bernie Reed (RBee's principal), A-1 Quality Belting Ltd. ("**A-1**"), had purchased the equipment and machinery previously

---

[43] Burak Affidavit, para 61.
[44] Burak Affidavit, para 61.
[45] Burak Affidavit, para 61 and Exhibit "A"; Burak Cross-Examination, 13:20-24.
[46] Second Burak Affidavit, para 20.
[47] Second Burak Affidavit, para 20(d).
[48] Second Burak Affidavit, para 20.
[49] Second Burak Affidavit, para 20(b).
[50] Burak Affidavit, para 62.
[51] Second Burak Affidavit, para 20(e).
[52] Second Burak Affidavit, para 20(e).
[53] Second Burak Affidavit, para 20(e).

owned by RBee located at the Project site.[54] Given the constraints, the urgency of the situation, the lack of other realistic options (especially due to the remote location of the Project), and the fact that Mr. Reed had, through RBee, reliably supplied RMC with sufficient quality aggregate for a number of years, RMC made a business decision to engage Mr. Reed's new company, 2128222 Alberta Ltd., operating as Paragon Custom Crushing ("**Paragon**"), to provide RMC with aggregate.[55] Paragon proceeded to reliably provide RMC with aggregates of sufficient quality and quantity to enable it to meet its 2022 concrete production obligations.[56]

39. Upon the Receiver questioning whether RMC contracted with A-1 or Paragon to supply it with aggregate after RBee went into receivership, Mr. Burak clarified that A-1 was the entity that purchased the equipment but that it was Paragon that was operating the equipment and providing RMC with aggregate during the 2022 crushing season.[57] Mr. Burak has further explained that he did not distinguish carefully between the two entities as Mr. Reed was the principal of both of them, and he viewed them as part of the same group of companies.[58]

## III. ISSUES

40. There are two primary issues before this Court:

(a) Whether the Receiver has met its burden to prove that RBee actually provided the quantities of the goods and services for which it claims in the three unpaid RBee invoices rendered in September, October and December 2021 totalling $4,485,480.64 (the "**Unpaid Invoices**"), such that RMC is liable to pay those invoices; and

(b) If so, whether RMC has established a defence of set-off due to RBee's overbillings throughout the duration of its performance on the Project.

## IV. ARGUMENT

### A. Introduction

41. As a preliminary matter, we note that the governing law pertaining to the adjudication of this dispute is the law of the Province of British Columbia, pursuant to s. 33 of the Supplier Agreement. However, there is one exception: the limitations of actions law of Alberta applies given that these

[54] Burak Affidavit, para 63; Second Burak Affidavit, para 24.
[55] Burak Affidavit, para 63; Second Burak Affidavit, para 24; Nicholas Burak Response to Undertaking #11
[56] Burak Affidavit, para 63; Second Burak Affidavit, para 24.
[57] Burak Cross-Examination, 76:5-12.
[58] Second Burak Affidavit, para 24.

proceedings were commenced in Alberta, pursuant to s. 12 of the *Limitations Act*, RSA 2000, c L-12 (the "***Limitations Act***").[59]

**B. The Receiver's Burden of Proof**

42. It is well-established law that a plaintiff bears the burden of proving its claim. Such a party who commences proceedings to collect on unpaid invoices bears the legal burden, on a balance of probabilities, to prove that the defendant is liable to pay for the outstanding invoices.[60] This extends to proving the provision and the value of the goods or services that were invoiced.[61]

43. In *Ili's Painting Services Ltd. v Homes by Bellia Inc*., the Alberta Court of Queen's Bench considered a claim brought by the plaintiff subcontractor seeking payment for painting services that it provided to the defendant home builder.[62] The plaintiff produced invoices to support the value of the work it was claiming for. The Court held that the plaintiff bore the "legal burden of proof as to the existence of the contract, the provision of work, [and] the agreed price or proven value of that work."[63]

44. However, the Plaintiff in *Ili's Painting* did not meet its burden of proof by simply introducing the invoice documents into evidence. In fact, the Court found the content of the invoices produced by the plaintiff to be "dubious" such that they consequently had "no evidentiary value" in and of themselves.[64] It was only through the testimony of the plaintiff's witnesses that the plaintiff could succeed in proving that it had provided the claimed services and was entitled to payment.

45. In these proceedings, the Receiver bears the burden of establishing that RMC is liable for the amounts billed in the Unpaid Invoices. It is not sufficient for the Receiver to simply provide copies of the disputed invoices. It must prove that RBee actually provided the goods and services claimed in those invoices.

46. Even if the Receiver adduced evidence that RBee supplied RMC with *some* amount of the goods and services claimed in the Unpaid Invoices—which it has not—this would also be insufficient. Rather, consistent with the case law, the Receiver's burden extends to proving the value of RBee's work, pursuant to the Supplier Agreement, for which it claims RMC is liable. To succeed in its Application, the Receiver must prove that RBee actually provided the quantity of aggregate products and hauling services to RMC that are claimed in the Unpaid Invoices.

---

[59] *Limitations Act*, s. 12. **[Tab 2]**

[60] *R & B Plumbing & Heating Ltd. v Gilmour*, 2018 BCSC 1295 at para 107. **[Tab 24]**

[61] *Highridge Homes Ltd. v de Boer*, 2021 BCSC 1112 at para 57. **[Tab 18]**

[62] *Ili's Painting Services Ltd. v Homes by Bellia Inc*., 2020 ABQB 248 ("***Ili's Painting***"). **[Tab 20]**

[63] *Ili's Painting* at para 16. **[Tab 20]**

[64] *Ili's Painting* at paras 10-11. **[Tab 20]**

47. Although the Receiver argues that RMC has failed to prove, on a balance of probabilities, its defence of set-off – that RBee overbilled RMC over the course of the Project – the Receiver has neglected to meet its own basic burden of proof. RMC need not establish its set-off defence unless the Receiver has first met its primary burden of proving the actual quantity of aggregates and hauling services that were supplied by RBee and billed in the Unpaid Invoices. To be clear, the Receiver's argument at paragraph 68 of its Brief of Law that RMC should be estopped from exercising or attempting to exercise rights similar to its Verification Rights provided for in the Supplier Agreement relates to RMC's set-off defence. Even if accepted, the proposition does nothing to establish that the Unpaid Invoices are "properly due and payable" in the first instance.

48. The Receiver has failed to meet its primary burden. It has adduced no evidence in these proceedings beyond the bare invoices themselves to prove that RMC is liable for the amounts claimed in the Unpaid Invoices. Despite stating in its Brief of Law at paragraph 55 that "[b]ased on the Receiver's review of the books and records of RBee … the Unpaid Invoices were properly issued and the Outstanding Amounts are due and payable", the Receiver has not actually identified any books and records of RBee that support the amounts billed in the invoices.

49. The Receiver has also failed to tender any weigh tickets or load slips that RMC expected to receive to substantiate and verify any of RBee's claimed hauling charges in the Unpaid Invoices.[65] Although the Receiver submits at paragraph 74 of its Brief of Law that certain change orders submitted by RMC to AFDE and an October 2021 email exchange "supports the fact that hauling was completed by RBee", these documents do not establish or provide any indication as to how much hauling was actually performed by RBee, how RBee calculated or tracking its hauling quantities, when the hauling was performed, or how much RMC agreed to pay RBee for any such hauling that it billed in its invoice #23311 dated December 31, 2021. There is a complete lack of substantiation.

### C. The Receiver's Failure to Compel Evidence from Bernie Reed

50. The Receiver has failed to present any evidence that the goods and services claimed in the Unpaid Invoices were actually delivered. One would have expected such evidence to be available from RBee employees, such as Bernie Reed, RBee's principal. The Receiver states that it has attempted to contact Mr. Reed and obtain evidence from him but that Mr. Reed has not responded.[66] Despite having the power to compel Mr. Reed's evidence and the critical nature of the evidence that Mr. Reed could likely provide, the Receiver has declined to exercise that power. An adverse inference against the Receiver's case should arise as a result.

---

[65] Burak Affidavit, para 57.

[66] For example, see the Receiver's Supplemental Report dated January 20, 2023 ("**Receiver's Supplemental Report**"), para 25.

51. Pursuant to the Bankruptcy Order pronounced and filed May 18, 2022 in these proceedings, the Court adjudged RBee to be bankrupt and appointed the Receiver as Trustee of RBee's estate.[67] Section 158(c) of *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "***BIA***") states that RBee is required to attend before the Receiver for examination under oath. The Receiver respectively has a duty to examine RBee pursuant to s. 161(1) of the *BIA*. The examination is to be conducted with respect to the bankrupt's conduct, the causes of bankruptcy and the disposition of the bankrupt's property.[68] Since RBee is a corporation, the Receiver is given power by s. 159 of the *BIA* to specify the officer or person who had control of the corporation who is to attend for examination, which in these proceedings, would be Mr. Reed. However, there is no indication that the Receiver even attempted to obtain an ordinary resolution passed by the creditors to proceed with an examination of Mr. Reed, or to proceed on the written request or resolution of a majority of the inspectors, pursuant to s. 163(1) of the *BIA*.

52. In *Howard v Sandau*, the Alberta Court of Queen's Bench cited the "leading statement" about adverse inferences:

> The failure to bring before the tribunal some circumstances, documents or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.[69]

53. An adverse inference is also appropriate because the Receiver bears the burden of proof on its claim with respect to the Unpaid Invoices. In *Chapman Management & Consulting Services Ltd. v Kernic Equipment Sales Ltd*., an action was brought by a receiver on behalf of the insolvent plaintiff.[70] Each of the parties argued that the other party's failure to call a third party witness, Fred Dettmers, required the Court to draw an adverse inference against the other party.[71] The plaintiff argued that Mr. Dettmers should have been called by the defendant to rebut the allegation that the defendant's system for use in book binding operations was deficient and caused the insolvent plaintiff damages.[72] Similarly, the defendant argued that the plaintiff should have called Mr. Dettmers to prove its allegations.[73] As a third-party witness, Mr. Dettmers was presumably equally

---

[67] Order of Justice G.A. Campbell pronounced and filed May 18, 2022. **[Tab 30]**

[68] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, ss. 158(c), 161(1). **[Tab 1]**

[69] *Howard v Sandau*, 2008 ABQB 34 at para 39. **[Tab 19]**

[70] *Chapman Management & Consulting Services Ltd. v Kernic Equipment Sales Ltd*., 2004 ABQB 870 ("***Chapman***"). **[Tab 7]**

[71] *Chapman* at paras 176-177. **[Tab 7]**

[72] *Chapman* at para 176. **[Tab 7]**

[73] *Chapman* at para 177. **[Tab 7]**

available to either party. The Court considered the failure of the plaintiff to call Mr. Dettmers to work adversely against its case, given that the plaintiff bore the onus of proof.[74]

54. Mr. Reed was not only an available witness (he is alive and the Receiver knows how to contact him) but also a compellable witness in relation to the Receiver under the *BIA*. Further, the evidentiary deficiencies created by the absence of his evidence in relation to the Receiver's primary onus of proof are significant. In the circumstances, it is no excuse for the Receiver to claim that Mr. Reed has not returned its calls. Further, the Receiver has provided no explanation whatsoever with respect to its failure to adduce evidence from other employees of RBee. The Court should therefore infer that the Receiver opted against adducing evidence from such key witnesses because of a concern that their evidence would have been detrimental to the Receiver's position.

### D. RMC's Set-Off Defence

55. Only if the Court finds that the Receiver has met its primary burden in establishing that RMC is liable for the amounts claimed in the Unpaid Invoices must it determine whether RMC has established its set-off defence through its verification of the aggregate quantities delivered by RBee throughout the course of RBee's performance on the Project.

#### 1. The Supplier Agreement

56. RMC agrees with the Receiver's submissions at paragraphs 60-61 of its Brief of Law: the Supplier Agreement was the only written agreement between the parties and it should be interpreted by reading the contract as a whole, and giving the words used their ordinary and grammatical meaning, to determine the objective intent of the parties while considering the factual matrix.

(a) Reading the Supplier Agreement as Whole

57. Under the Supplier Agreement, RBee's entitlement to payment by RMC was based on the quantity of aggregate products that it actually delivered to the stockpile.[75] Importantly, while RMC had the option to subject RBee's claimed quantities of aggregate supplied to the third-party verification mechanism detailed in s. 5 of the Supplier Agreement (referred to by the Receiver as the RMC's "**Verification Rights**"), the Supplier Agreement does not state that RMC could not challenge RBee's entitlement to payment unless it engaged s. 5.

58. At the most basic level, any party who receives goods or services is entitled to verify whether it has actually received the goods or services for which it is billed. Section 5 of the Supplier Agreement

---

[74] *Chapman* at paras 177, 180. **[Tab 7]**

[75] Burak Affidavit, para 6 and Exhibit "A" Supplier Agreement, s. 1 and Schedule B; Burak Cross-Examination, 37:23-25.

provides for one such mechanism but it does not operate to exclude RMC's pre-existing right to perform a different verification at a different time. Had the parties intended s. 5 to operate to the exclusion of the performance of any other verification, they would have included express words to that effect in the Supplier Agreement.

59. In addition, the Supplier Agreement is silent with respect to set-off. RMC and RBee did not agree to abrogate or remove the right of set-off that the parties have with respect to one another.

(a) The Objective Intention of the Parties

60. The parties always intended to perform a final quantity verification upon the conclusion of RBee's performance on the Project, consistent with standard industry practice.[76] Although the Receiver submits the opposite and contends that "the reliability of the evidence is in question"[77], the Receiver has misconstrued RMC's evidence on this point.

61. Mr. Burak's evidence is that he believed RBee to understand that RMC would perform one reconciliation at the end of the Project, in part due to it being standard industry practice, and in part because RMC had done so on prior projects for which RBee supplied RMC with aggregate.[78]

62. The prior projects that Mr. Burak referred to in his First Affidavit were projects that started after the Project at issue commenced, but which were completed before the subject Project was finished.[79] They were "prior" or "previous" projects in the sense that they were completed before the Project at issue was completed.[80]

63. The words of the Supplier Agreement are also illustrative of the intentions of the parties. Section 18 provides that, in the event of termination, RBee's payment would be limited to the amount of aggregate actually delivered and verified up to the date of termination. This clearly indicates the intent of the parties: upon the conclusion of RBee's performance, a final verification would be performed to ensure that RBee was not paid for aggregate in excess of what it actually supplied.

64. This, of course, also accords with basic common sense: to pay RBee for more aggregate than it had actually supplied would result in an unjust windfall at RMC's expense. The Receiver cannot justifiably force RMC to pay for aggregate that it never received.

---

[76] Burak Affidavit, para 13; Second Burak Affidavit, para 23.

[77] Brief of Law of the Receiver, para 62.

[78] Burak Affidavit, para 13; Second Burak Affidavit, para 23.

[79] Second Burak Affidavit, para 23.

[80] Second Burak Affidavit, para 23; Burak Cross-Examination, 18:3-13.

### 2. The Case Law is clear that RMC's 2021 Verification can support a Set-Off Defence

65. The case law is clear that explicit, unequivocal words must be used in a contract to exclude a party's pre-existing substantive right or defence, such as RMC's ability to perform a quantity verification other than the one specified in s. 5 of the Supplier Agreement. As stated by the British Columbia Court of Appeal in *Ainsworth Lumber Co. v KMW Energy Inc*.:

> It is trite law that unless a contract clearly states an intention to exclude rights normally arising from it, such an intention should not be inferred … At common law a party to a contract is entitled to recover from the other party . . . damage . . . resulting from that other party's breach of the contract, unless by the terms of the contract itself he has agreed that such damage shall not be recoverable. In the absence of express words in the contract a court should hesitate to hold that a party had surrendered any of his common law rights to damages for its breach…[81]

66. The Court in *Ainsworth*, a case concerning a construction dispute, applied the above principle in holding that the plaintiff owner's failure to exercise its contractually specified right, to rectify any deficiencies in the defendant's work, did not otherwise limit the remedies available to the owner for the contractor's breach.[82]

67. *Ainsworth* followed a long line of British Columbia precedent, including the Court of Appeal decision of *First City Development Corp. v Stevenson Construction Co*., where the Court applied similar logic to a construction contract notice of claim provision, stating as follows:

> I approach the construction of art 36 with the provision established by the decided cases in mind: <u>if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words</u> . . . [Emphasis added][83]

68. Applying this principle here, the fact that RMC did not exercise its option pursuant to s. 5 of the Supplier Agreement to verify RBee's claimed quantities on an ongoing basis cannot function to prohibit RMC from performing a different verification or from seeking compensation for RBee's overbilling. The clear and express words required to effect such a serious result are entirely absent from the Supplier Agreement.

69. The British Columbia courts have applied this principle to set-off claims in construction disputes: unequivocal words must be used in the applicable contract to exclude a party's substantive right to set-off damages against amounts claimed for work by a contractor. Again, as there are no such

---

[81] *Ainsworth Lumber Co. v KMW Energy Inc*., 2004 BCCA 415 at para 19 ("***Ainsworth***") **[Tab 4]** citing *P & M Kaye Ltd. v Hosier & Dickinson Ltd.* (1971), [1972] 1 WLR 146 (UK HL).

[82] *Ainsworth* at paras 9, 21. **[Tab 4]**

[83] *First City Development Corp. v Stevenson Construction Co*., [1985] BCJ No. 2062, 1985 CarswellBC 762 at para 6. **[Tab 14]**

words in the Supplier Agreement, RMC may set-off the amounts of the Unpaid Invoices against the RBee's overbillings disclosed through RMC's 2021 quantity verification.

70. The decision of the British Columbia Supreme Court in *Swagger Construction Ltd. v University of British Columbia* is most instructive in this regard.[84] In *Swagger,* the plaintiff contractor brought an action against the project owner for non-payment of Certificate of Progress #33. The defendant owner had paid the contractor in excess of $40 million pursuant to the first thirty-two Certificates of Progress.[85] The owner asserted set-off against the contractor on the basis of a number of the contractor's breaches of contract.

71. The Court in *Swagger* held that the owner was entitled to set-off its damages against the unpaid amounts claimed by the contractor. The Court reasoned as follows:

> …the law only requires that the words used by the parties in [curtailing ordinary rights] will be clear and unequivocal, since the right of set-off, whether it is called a common law or an equitable right, is a substantive defence. And I observe here that in the Contract which is before me that defence is expressly preserved, since there is no provision in the Contract which expressly provides for its exclusion. … The law requires that the parties use clear and unequivocal words to express such an exclusion of a party's substantive right.[86]

### 3. The Set-Off that RMC Asserts is Equitable Set-Off

72. RMC asserts a defence of equitable set-off against the Receiver's claim. The Court in *Chevron Canada Resources v Canada* affirmed the principles pertaining to equitable set-off, as stated by the Supreme Court of Canada in *Telford v Holt* at paragraph 27:

1. The party relying on a set off must show some equitable ground for being protected against his adversary's demands;

2. The equitable ground must go to the very root of the plaintiff's claim before a set off will be allowed;

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;

4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and,

---

[84] *Swagger Construction Ltd. v University of British Columbia*, 2000 BCSC 1839 ("***Swagger***"). **[Tab 28]**

[85] *Swagger* at para 12. **[Tab 28]**

[86] *Swagger* at paras 23, 33. **[Tab 28]**

5. Unliquidated claims are on the same footing as liquidated claims.[87]

73. Only the first three principles noted above are requirements that RMC must establish. RMC easily meets each element of equitable set-off in the circumstances of this case.

74. The first requirement—an equitable ground for being protected against RBee's/the Receiver's claim—is clearly established here. It would be manifestly unfair to force RMC to satisfy the Unpaid Invoices when RBee breached the Supplier Agreement by substantially overcharging RMC over the course of the Project, including with respect to the periods to which the Unpaid Invoices pertain.

75. The second and third requirements of equitable set-off are also met. RMC's set-off clearly goes to the root of and is clearly connected with the Receiver's (RBee's) claim for payment of the Unpaid Invoices, given that the Unpaid Invoices pertain to the same type of work on the same Project for which RBee substantially overbilled RMC (and for which RMC has already paid).

### 4. Estoppel

76. At paragraph 68 of its Brief of Law, the Receiver argues that, since RMC did not choose to exercise the Verification Rights mechanism provided in s. 5 of the Supplier Agreement, "it is now estopped from exercising or attempting to exercise other, similar rights." However, the Receiver has failed to adduce the necessary evidence to meet any of the basic elements of the defence of estoppel.

77. For RMC to be estopped, RBee must have acted upon the fact that RMC did not choose to exercise the Verification Rights mechanism provided in s. 5 of the Supplier Agreement, and done so to its detriment.[88] There can be no estoppel when the party alleging it is not influenced by the conduct of the other party.[89] The Receiver has presented no evidence at all that RBee was influenced by RMC's decision not to engage its s. 5 Verification Rights. Thus, the defence of estoppel fails.

### 5. The Receiver's Cases on Verification Clauses

78. The Receiver relies on *Paradigm Holdings Ltd v Ngan & Siu Investments Co*.[90] and *Arrow Transfer Co v Royal Bank*[91] to support its position that RMC should be estopped from performing any

---

[87] *Chevron Canada Resources v Canada*, 2019 ABQB 418 at para 178 ("***Chevron***") **[Tab 9]** citing *Telford v Holt*, [1987] 2 SCR 193 (SCC) at para 27 ("***Telford v Holt***").

[88] *Casa Rio Developments Ltd. v Hooymans*, 2014 BCCA 287 at para 18 **[Tab 8]** citing *Canadian Superior Oil Ltd. v Paddon-Hughes Development Co. Ltd*, [1970] SCR 932.

[89] *Allen v Hay*, 64 SCR 76, 1922 CarswellBC 74 at para 4 (SCC) **[Tab 5]**; *Paul v Vancouver International Airport Authority*, 2000 BCSC 341 at para 85. **[Tab 22]**

[90] *Paradigm Holdings Ltd v Ngan & Siu Investments Co*., 2008 BCCA 172 ("***Paradigm***"). **[Tab 21]**

[91] *Arrow Transfer Co v Royal Bank*, [1972] SCR 845 (BC), 1972 CarswellBC 103 ("***Arrow***"). **[Tab 6]**

verification other than the mechanism outlined in s. 5 of the Supplier Agreement. Neither of these cases are in the construction context nor pertain to set-off defences.

*(a) Paradigm Holdings Ltd v Ngan & Siu Investments Co*

79. The Receiver is of the view that *Paradigm* supports its position that, by not exercising the exact contractually specified method of verification, RMC cannot attempt to "exercise other, similar rights."[92] However, a close reading of the decision actually supports the opposite proposition. In fact, the Court in *Paradigm* held that the buyer should have relied on another, similar method of verification, other than that which was expressly provided for in the contract.

80. The basis of the contractual adjustment clause in *Paradigm* was that the purchase price of two strata condominium units "shall be adjusted according to the actual size of the property registered as per Strata Plans for subject strata corporation on a pro-rata bases [sic] upon Completion."[93]

81. The buyer did attempt to invoke the contractual adjustment clause upon the completion date by relying on the Strata Plans in seeking a price reduction. However, the Court held that the buyer could not rely on the contractual method of adjustment (the square footage disclosed in the Strata Plans) because it was "obvious" that the Strata Plans were not up-to-date and were inaccurate.[94] Rather, the Court held that the buyer should have relied on another, similar method of verification, that was not specified in the contract – by actually measuring the square footage.

82. The buyer was not entitled to rely on a method of verification that was obviously inaccurate, which would have resulted in a significant windfall to the buyer at the expense of the seller.[95] To accept otherwise would result in a commercially insensible result.[96] It is for these reasons that the Court held the adjustment clause was not triggered. If this Court is inclined to follow *Paradigm*, then RMC submits that not permitting RMC to rely on its 2021 verification would result in a significant windfall to the Receiver, which would not promote a commercially sensible result.

*(b) Arrow Transfer Co v Royal Bank*

83. *Arrow* is highly distinguishable on the basis of the contractual verification clause in question. It is a case about a customer verifying the accuracy of its bank statements. Unlike the procedure outlined in s. 5 of the Supplier Agreement, the subject clause in the account agreement between the bank

---

[92] Brief of Law of the Receiver, para 68.
[93] *Paradigm* at para 7. **[Tab 21]**
[94] *Paradigm* at para 27. **[Tab 21]**
[95] *Paradigm* at paras 25, 27. **[Tab 21]**
[96] *Paradigm* at para 24. **[Tab 21]**

and its customer expressly absolved the bank of any responsibility for errors if the customer did not provide notice of same within 30 days from when it should have received its statements, as follows:

> …at the end of the said 30 days the account as kept by the Bank shall be conclusive evidence without any further proof … and all the entries therein are correct … the Bank shall be free from all claims in respect of the account.[97]

84. This clause is clear and express: it permits no interpretation other than that a claim by the customer would be barred after the 30-day period passed without such a claim being made. It meets the requirements of *First City*, *Ainsworth* and *Swagger* by clearly depriving the customer of a claim that would otherwise exist. This is in stark contrast to the situation before this Court in this case, where the Supplier Agreement says absolutely nothing about barring any claim by RMC if it opted not to engage in third-party verification of each and every aggregate delivery provided by RBee.

### E. RMC's Evidence supporting its Set-Off Defence is Reliable

85. RMC's evidence as to the AFDE Survey, the density factors used to convert the quantity of aggregate from cubic meters in the AFDE Survey to tonnes, and RMC's Batch Records (collectively, "**RMC's Set-Off Evidence**") are accurate and reliable for the purposes of establishing RMC's set-off defence.

86. As a preliminary matter, it should be kept in mind that RMC's Product Reconciliation discloses that the amount *owed by RBee to RMC*, net of RBee's September and October 2021 invoices, is over $3,100,000.[98] Yet RMC is not counterclaiming for this amount. It is merely asserting a defence of set-off. Thus, even a very large theoretical margin of error – up to the equivalent of over $3,100,000 worth of aggregate – would have no impact on the outcome of these proceedings. However, to be clear, RMC maintains that its Production Reconciliation is highly accurate and reliable, and would not have a margin of error even remotely approaching the amount required to result in a nil balance between the parties.

87. Another overarching issue, raised repeatedly by the Receiver, is that RMC's Set-Off Evidence should be discounted on the basis that it was created for some purpose other than RMC's aggregate verification or that it was not commissioned for the purposes of this dispute.[99] RMC does not agree with this proposition. RMC's Set-Off Evidence is almost entirely based on business records. Contemporaneous business records have an inherent indicia of reliability. For this reason, business records are excepted from the rule against hearsay evidence.[100] The only exception in

---

[97] *Arrow* at para 4. **[Tab 6]**

[98] Burak Affidavit, para 58; updated to reflect Second Burak Affidavit, para 13.

[99] For example, see the Receiver's Brief of Law at paras 10, 12, 35, 36, 38, 39, 42, among other paras.

[100] *R v Christhurajah*, 2016 BCSC 2400 at para 44. **[Tab 25]**

this case is that density testing on the 40-20mm aggregate from the Project occurred on December 22, 2022, and was conducted for the purposes of RMC's reconciliation. But this evidence also is reliable—it represents independent laboratory testing conducted by a third party on material sourced from the Project in order to ensure that the conversion from volume to weight in RMC's reconciliation was accurate.

88. In any event, other than the fact that contemporaneous business records form almost all of RMC's Set-Off Evidence, RMC does not accept that the purpose for which its Set-Off Evidence was created is relevant. The issue is simply whether the Evidence is accurate and reliable, which RMC establishes in the affirmative in the sections below.

89. In contrast, the Receiver has adduced speculative second-hand evidence in an attempt to argue that RMC's analysis is unreliable. The Receiver's evidence in this regard should be rejected, or, if admitted, afforded little weight.

90. In the words of the British Columbia Supreme Court in *Suzuki v Jackson*, "[a]ll we have is speculation and speculation carries little weight in balancing probabilities."[101] A "mere possibility" or speculation falls below the evidentiary standard required to prove a fact on a balance of probabilities.[102] The requisite standard is probable, not possible.[103]

91. The opinion evidence proffered by the Receiver's two "Construction Solutions" professionals[104] should be ruled inadmissible, or in the alternative, afforded little weight, on the basis that they purport to give advice of what, in their views, should have occurred on the Project, but they have not been qualified in any way as experts on aggregate production. Their CVs are dominated by claims preparation work, with some management of general capital projects, and no claim is advanced that they possess the requisite expertise to opine on regular practice or procedure as it relates to aggregate production or measurement.[105]

92. The courts have become increasingly wary of the opinions of generalists in fields with complex sub-specialities. For instance, in *R v Scott*, the British Columbia Court refused to allow a general psychiatrist to offer an opinion in the area of neuropsychiatry, quoting Supreme Court of Canada precedent that "The evidence must be given by a witness who is shown to have acquired special

---

[101] *Suzuki v Jackson*, 1980 CarswellBC 1590 at para 27. **[Tab 27]**

[102] *Gilead Sciences, Inc. v Idenix Pharmaceuticals Inc*., 2015 FC 1156 at para 254. **[Tab 15]**

[103] *Gilead Sciences, Inc. v Idenix Pharmaceuticals Inc*., 2015 FC 1156 at para 254. **[Tab 15]**

[104] See Receiver's Supplemental Report, paras 23-24.

[105] Receiver's Supplemental Report, Appendix "G".

or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."[106]

93. Given the lack of any credible attempt to qualify the Receiver's in-house claims specialists as experts on aggregate production, their evidence should be rejected. Their evidence is also problematic given that they had no involvement in the Project, and have never attended at the Project site. Certainly, the evidence of those who were actually involved on the Project should be preferred with respect to whether the stockpile site was flat, whether the appropriate density factors were applied, and whether there was wasted or lost product.

94. The evidence of those who actually have direct first-hand knowledge on these points supports the fact that RMC's Set-Off Evidence is reliable and accurate.

### 1. The Stockpile Area was Flat

95. The Receiver attempts to cast doubt on the reliability of the AFDE survey evidence, which recorded the amount of aggregate in the Project stockpile as of October 31, 2021 by speculating that the stockpile may not have been on flat ground. The Receiver relies on its construction claims personnel for the proposition that stripping, clearing and grubbing do not make an area flat, and that a visual inspection is not sufficient to determine whether the area was level.[107]

96. The problem with the Receiver's position is that it does not establish that the stockpile area was not flat. It does not fundamentally contradict the overwhelming evidence provided by RMC from individuals who were actually at the Project site, who testify that the area was indeed flat.

97. Before the commencement of AFDE's work on the Project, BC Hydro engaged a third party to prepare the site that would contain the stockpile and RMC's Batch Plants.[108] Scott Marshall, AFDE's Project Director, is intimately familiar with the Project site and the day-to-day operations on the Project, where he has worked full-time on-site since Project inception.[109] He testified that AFDE ensured the stockpile site was flat and levelled once the site preparations had been completed.[110] In accordance with standard industry practice and the practice employed by AFDE with respect to other areas of the Project, AFDE performed an inspection to ensure the site was level and then formally accepted the handover of the area from BC Hydro.[111]

---

[106] *R v Scott,* 2018 BCSC 2562 at paras 43-44, 48. **[Tab 26]**

[107] Receiver's Supplemental Report, para 24(a).

[108] Marshall Cross-Examination, 26:23-25.

[109] Marshall Cross-Examination, 11:14-20.

[110] Marshall Cross-Examination, 25:18 – 26:9.

[111] Marshall Cross-Examination, 25:7-17; 27:23-24.

98. In addition, the evidence of Mr. Burak is that RMC also performed an inspection of the stockpile area prior to commencement of the work on the Project, also in accordance with standard industry practice.[112] This involved walking over and viewing the entirety of the area, which would have revealed any slopes or other irregularities, and none were revealed.[113] Like Mr. Marshall, Mr. Burak was personally present at the stockpile site and has attested that the area was flat and without slopes, minor or otherwise.[114]

99. A level area was required for building the structures (the Batch Plants)[115] and stockpiling the aggregate.[116] Had this area not been flat or adequate "to go to work", RBee, RMC or AFDE would have likely commenced a corresponding claim, given that stockpiling aggregate on a sloping area would have been operationally difficult, and would have led to problems with stockpiling on the Project and verifying how much aggregate was in the stockpiles.[117] No such problems arose on the Project, and none of the parties raised an objection in relation to any inadequacies pertaining to the stockpile site at any time, further confirming that the stockpile area was flat.[118]

100. The possibility that the stockpile area may not have been flat is pure speculation on the part of the Receiver, who never personally visited the Project site. There is no evidence on record to suggest that the stockpile area was not flat. To the contrary, Mr. Marshall testified that he was personally "out there at the [stockpile] site" and able to determine that the stockpile area was flat (i.e. containing no dips or slopes) and adequate for the purposes for which it would be utilized.[119] The Receiver's claims to the contrary are speculative and are not supported by the evidence.

101. The evidence that AFDE and RMC were able to visually determine that the stockpile area was flat, provided by Mr. Marshall, a seasoned Project Manager with real-world experience in managing "mega" public infrastructure projects,[120] and Mr. Burak, who has observed this method of inspection on multiple aggregate production projects,[121] should be preferred over the opinion of the Receiver's consultants, who have no proven expertise or experience in terms of aggregate production.[122]

---

[112] Second Burak Affidavit, para 7.
[113] Second Burak Affidavit, para 7.
[114] Second Burak Affidavit, para 9.
[115] Marshall Cross-Examination, 25:18 – 26:9.
[116] Second Burak Affidavit, para 8.
[117] Marshall Cross-Examination, 25:18 – 26-9; Second Burak Affidavit, para 8.
[118] Second Burak Affidavit, para 8.
[119] Marshall Cross-Examination, 25:18 – 26:9, 27:8 – 28:4.
[120] Affidavit of Scott Marshall, sworn December 16, 2022 ("**Marshall Affidavit**"), para 2.
[121] Second Burak Affidavit, para 7.
[122] Receiver's Supplemental Report, Appendix "G".

### 2. There Was No Diversion of Aggregate

102. The possibility that aggregate may have been removed from the stockpile by some party other than RMC or otherwise removed for use in something other than concrete production (and thus not accounted for in RMC's verification) is also pure speculation raised by the Receiver.

103. The Receiver has provided no evidence that this actually occurred. The Receiver has only stated in its latest report that "consideration of wasted or lost product" should be considered.[123] This falls far short of demonstrating that any such wastage or loss of aggregate actually arose.

104. Indeed, RMC's evidence is conclusive and to the contrary. Other than the 4,170 tonnes of abrasive that were provided by RBee, the delivery and payment for which RMC does not dispute, the evidence is that no aggregate was used on the Project for any purpose other than concrete production.[124]

105. When asked during his cross-examination, Mr. Marshall agreed with the Receiver's suggestion that aggregate "could" be used for purposes other than concrete production on a project site.[125] However, when asked whether aggregate was in fact used to build or maintain any roads on the Project site in particular, Mr. Marshall conclusively rejected that proposition.[126]

106. Mr. Marshall also testified that:[127]

(a) The Project site is the most secure construction site he has ever worked on;

(b) No aggregate products delivered by RBee would have left the Project site;

(c) The Project stockpile was the only location to which RBee delivered aggregate for use in RMC's Batch Plants; and

(d) He was "very confident" that no aggregates were taken from the stockpile but not used in RMC's Batch Plants – this would have been "highly unlikely".

107. Mr. Burak's evidence was to the same effect in cross-examination: no aggregate for concrete production was used on potholes, leveling, or to maintain roads.[128]

---

[123] Receiver's Supplemental Report, para 24(d).
[124] Second Burak Affidavit, para 17.
[125] Marshall Cross-Examination, 20:13-15.
[126] Marshall Cross-Examination, 21:6-17.
[127] Marshall Cross-Examination, 21:6 – 22:24; 23:19-21.
[128] Burak Cross-Examination, 29:3-25.

108. In addition, RMC staff have been constantly on-site during the Project. If anyone started removing aggregate from the stockpile, that RMC paid for, for purposes other than concrete production, RMC's staff would have prevented such removal.[129] This did not occur on the Project.[130]

### 3. The AFDE Survey Accurately Measured the Stockpile Volume

109. The evidence of Mr. Marshall is that the AFDE Survey conducted on October 31, 2021 recorded the quantities of aggregate in the stockpile to a high degree of accuracy, with an error margin of only about +/- 3mm millimeters relative to aggregate piles that typically spanned heights of 10 meters or more.[131] Although AFDE obtained surveys for a number of purposes, including for the purposes of submitting advance billings to BC Hydro, Mr. Marshall confirmed his belief that the AFDE Survey data was accurate and reliable for the purposes of calculating the precise amount of each kind of aggregate that was located in the Project stockpiles as of October 31, 2021.[132] His evidence surrounding the accuracy of the AFDE Survey itself was not challenged in cross examination on his Affidavit.

### 4. RMC Relied on Accurate Density Factors

110. Because the AFDE Survey measured the stockpile quantities of the various aggregate products in in volume (cubic meters), RMC was required to multiply these values by a density factor for each class of aggregate to obtain the quantities in weight (tonnes). A density factor represents an aggregate material's mass per unit volume (i.e. density).[133]

111. In RMC's original fall 2021 calculations, it utilized density factors obtained from AFDE. However, the reliability of the AFDE-provided density factors could not be confirmed and it was revealed in late December 2022 that AFDE had simply used an estimated average density factor of 1.6 for all classes of aggregates for the purposes of its interim billings to BC Hydro.[134] As a result, RMC relied on laboratory testing of the densities of the four relevant classes of aggregate supplied by RBee that it had commissioned, which Mr. Burak utilized in providing updated calculations in his Affidavit sworn December 23, 2022.[135]

112. Although three of the four classes of aggregates tested (the 20-14 mm product, 14-5 mm product and sand) were with respect to samples crushed during the 2021 season by RBee on the Vogel Pit

---

[129] Second Burak Affidavit, para 17.
[130] Second Burak Affidavit, para 17.
[131] Marshall Affidavit, paras 10-12, 14.
[132] Marshall Affidavit, paras 7, 14.
[133] Burak Affidavit, para 33.
[134] Burak Cross-Examination, 65:18 – 66:8.
[135] Burak Affidavit, para 34.

Project near Drayton Valley, Alberta, they were nevertheless river deposit gravel, of the same kind and nature as the products sourced on the Project.[136] As stated by Arun Aggarwal, who has direct expertise and experience in aggregate quality testing, the densities were expected to be very similar to the density of the products sourced on the Project.[137]

113. After considering the Receiver's concerns surrounding the density factors obtained from testing the Vogel Pit samples, RMC undertook a search of its records and was able to locate laboratory testing results provided by Wood Environment & Infrastructure Solutions ("**Wood**") dating back to 2019 with respect to aggregate crushed by RBee on the Project for the 20-10 mm and 14-5 mm products.[138] As anticipated, the Wood density factors are very similar to the density factors obtained from testing the Vogel Pit samples, with negligible differences.[139]

114. In any event, Mr. Burak proceeded to update his verification and reconciliation calculations using the Wood density factors for the 20-10 mm and 14-5 mm products. Using the Wood density factors obtained from testing aggregate sourced from the Project reduced the total of RBee's overbilling on the Project slightly, down to the amount of **$7,106,857.50** before GST.[140]

115. There are two categories of densities: compacted density and loose density. A compacted density for any given aggregate product will be higher than a loose density because there are fewer voids in a compacted mass of aggregate relative to aggregate that is in a loose state.[141] Despite the fact that a loose density is typically appropriate for application with respect to aggregates in a stockpile, to provide the most conservative and beneficial calculation to RBee, Mr. Burak has utilized the compacted densities for each class of aggregate disclosed through the laboratory testing, including the Wood density factors.[142] With the higher, compacted densities, the calculated weight of aggregate in the stockpile as of October 31, 2021 is higher and more favourable to RBee than had Mr. Burak utilized the loose densities.

116. The Receiver provides submissions at paragraph 36 of its Brief of Law regarding the density factors that AFDE and BC Hydro agreed to use to convert the stockpile quantities from cubic meters to tonnes. As stated above, RMC did not use the density factors selected by AFDE and BC Hydro in the preparation of its Product Reconciliation, and as such, these density factors are not relevant.

---

[136] Burak Second Affidavit, paras 10-11.

[137] Burak Second Affidavit, para 11.

[138] Burak Second Affidavit, para 12.

[139] Burak Second Affidavit, para 12.

[140] Burak Second Affidavit, para 13.

[141] Burak Affidavit, Exhibit "F", as per Arun Aggarwal, Lab Supervisor with CRJ Civil Ltd.

[142] Burak Second Affidavit, para 13; Burak Affidavit, paras 36-37 and Exhibit "F", as per Arun Aggarwal, Lab Supervisor with CRJ Civil Ltd.

117. The Receiver also states in its Brief of Law at paragraph 43 that Mr. Burak noted during his cross-examination that the laboratory density testing was intended to be "an estimate." This is a misstatement of Mr. Burak's evidence. Mr. Burak was not referring to the density testing itself as an estimate but rather RMC's overall internal planning process that considers stockpiles at various sites. Mr. Burak confirmed in his testimony that, when it comes to matters of payment or invoicing (as opposed to planning) – RMC uses "actuals", not estimates.[143]

118. The Receiver's suggestion that RMC's calculations of RBee's overbilling should be rejected because of uncertainty on density factors is again based on mere speculation that was ultimately contradicted by the actual evidence. The Receiver's claims personnel could only state that it should not be assumed without verification that aggregate from different locations have the same density factor.[144] RMC has now provided evidence that the density factors for aggregate from the Vogel Pit and from the Project site were highly similar to one another. RMC also has presented contemporaneous evidence of density factors from the Project for the 40-20 mm, 20-10 mm and 14-5 mm aggregate products, which, when applied to the stockpile simply confirm RBee's significant overbilling on the Project.

### 5. The Batch Records Reliably Recorded the Aggregate Removed from the Stockpile

119. Once RMC transferred the aggregate supplied by RBee from the stockpile to its nearby Batch Plants, each aggregate product was weighed by RMC's automated scales, controlled by its batching software, to ensure that accurate quantities of each aggregate product were mixed into each batch of concrete produced.[145] RMC's batching system automatically recorded the quantities of each aggregate product consumed in each batch of concrete in its Batch Records.[146]

120. RMC created and maintained its Batch Records to provide assurance to AFDE that RMC was producing concrete in compliance with the material proportions and quantities specified in AFDE's concrete mix design. For example, if AFDE's mix design specified a target of 100 tonnes of sand per batch of concrete, RMC's Batch Records, which AFDE would review, would detail the actual amount of sand mixed into each batch of concrete and would thus disclose to AFDE whether there was any variance relative to the target.[147]

121. RMC's Batch Plants were independently audited and certified by Concrete BC, which required that RMC batch its aggregates to meet specified minimum tolerances, meaning that RMC's Batch

[143] Burak Cross-Examination, 66:13-26.
[144] Receiver's Supplemental Report, para 24(b).
[145] Burak Cross-Examination, 30:6-14, 31:9-10, 32:7 – 33:3.
[146] Burak Affidavit, para 42.
[147] Burak Cross-Examination, 45:5 – 46:12.

Records would be accurate to within these minimum tolerances. Depending on the scale capacity, the minimum tolerances specified by Concrete BC for aggregates range from +/- 0.3% to +/- 3%.[148]

122. In addition to the two successful audits and inspections that Concrete BC completed on July 11, 2018 and September 15, 2021, its also required RMC to obtain more frequent periodic scale calibrations by qualified technical staff employed by a scale manufacturer or authorized scale company.[149] From the beginning of RMC's concrete production on the Project in about the summer of 2018 to the end of 2021, RMC obtained a total of 17 independent scale calibrations from Precision Scale, a firm that specializes in industrial scale inspection and calibration services.[150]

123. The Receiver raises the possibility that there may have been wasted or lost product to a such a degree that it should have been considered in RMC's quantity verification. Again, this is simply speculation.[151] There is no evidence to prove that aggregate was in fact wasted or lost. To the contrary, the evidence of Mr. Burak is that RMC did not observe any wastage and would not expect to have lost any more than a de minimis amount of aggregate.[152]

124. It was the practice of RMC to fill its trucks to a level such that no aggregate would be lost during transport from the stockpile to the Batch Plants. Furthermore, the Batch Plants were immediately adjacent to the stockpile area such that RMC was only required to transport the aggregate a distance of about 50 meters to 330 meters, depending on the location of the specific pile within the stockpile area.[153] It is quite unlikely that RMC could have lost any material amount of aggregate considering its careful practices and the short transport distances. Further, RMC had a strong economic incentive to avoid any such wastage.[154]

125. The only aggregate delivered by RBee and removed by RMC from the stockpile that may not have been accounted for in Mr. Burak's verification was the amount of aggregate products, if any, that were located in the Batch Plant bins on October 31, 2021, having been moved from the stockpile but not yet weighed and recorded inside the Batch Plants.[155] However, the total capacity of these bins was confirmed to be only about a couple thousand tonnes – a "minuscule" capacity relative to the amount in the stockpile.[156] By means of comparison, RBee claimed to deliver 1,761,480 tonnes

[148] Burak Affidavit, para 26.
[149] Burak Affidavit, para 26.
[150] Nicholas Burak Response to Undertaking #6, Precision Scale Calibration Reports.
[151] Receiver's Supplemental Report, para 24(d); Receiver's Brief of Law at paras 33-34.
[152] Burak Second Affidavit, para 16.
[153] Burak Second Affidavit, para 16.
[154] Burak Second Affidavit, para 16.
[155] Burak Cross-Examination, 30:22 – 31:20.
[156] Marshall Cross-Examination, 31:21 – 32:4; 36:19 – 37:15.

of aggregate over the course of its performance on the Project.[157] To put that in perspective, the total capacity of the bins, assuming they are full, is only 0.11% of the total quantity of aggregate that RBee claimed to deliver over the course of its performance.

### F. The Performance Bond

126. The Receiver's consultants comment that "in normal course operations it would be typical practice for a contractor to call on a performance bond in the event of a contract default. RMC has not provided an explanation for why they did not call on the Performance Bond with RBee."[158]

127. RMC fails to see how the performance bond is relevant to the issues in this Application. Although the Receiver states in its Supplemental Report dated January 20, 2013 that RMC produced a copy of the Performance Bond in response to an undertaking of Mr. Burak at his cross-examination, this is incorrect.[159] RMC produced a copy of the Performance Bond as required by the Receivership Order, not in response to the undertaking.[160]

128. In any event, RMC has explained why it did not call on the Performance Bond. RMC was concerned that it would cause delay in securing a replacement aggregate supplier, especially if the surety denied a claim on the Performance Bond, which it would have given that RMC had not and ultimately did not sustain a loss due to RBee's failure to complete its work under the Supplier Agreement.

129. As RMC was able to find a replacement contractor to provide it with aggregate for the 2022 season using the same pricing as under the Supplier Agreement,[161] it did not sustain a loss due to RBee's default. This would have provided the Western Surety Company with a complete defence to a claim on the Performance Bond, had RMC submitted a claim.

130. As explained by the British Columbia Court of Appeal in *Addco Drywall Ltd. v White Rock Manor Joint Venture*, the surety under a performance bond is not liable beyond the amount by which the obligee's costs of completion exceeded the amount which was owing to the principal by the obligee at the time the obligee terminated the principal's contract.[162] Similarly, the Court in *York (City) v*

---

[157] Burak Affidavit, Exhibit "E".

[158] Receiver's Supplemental Report, para 24(e).

[159] Receiver's Supplemental Report, para 11.

[160] Undertaking Responses of Nicholas Burak, response to undertaking #8.

[161] Undertaking Responses of Nicholas Burak, response to undertaking #9 and #11.

[162] *Addco Drywall Ltd. v White Rock Manor Joint Venture*, 1993 CarswellBC 1175 (BCCA). **[Tab 3]**

*Wellington Insurance Co.* recognized that the surety is not required to pay more than the actual loss suffered by the obligee.[163]

### G. RMC's Set-Off Defence is not barred by the Limitations Act

#### 1. Limitations of Actions does not Apply to RMC's Set-Off Defence

131. As stated above, RMC agrees with the Receiver's position stated in paragraph 85 of its Brief of Law that the limitations law of Alberta applies to these proceedings, given that they were commenced in Alberta.

132. However, pursuant to Alberta limitations law, the statutory limitation period does not apply to the defence of set-off that RMC asserts. This was most recently affirmed in the Alberta Court of Queen's Bench's decision in *Harvest Operations Corp. v Obsidian Energy Ltd*., wherein the Court held that the defendant could assert its set-off defence notwithstanding that the claims comprising its set-off would have been statute-barred if advanced as a cross-claim.[164] In so holding, the Court stated that:

> In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a *defence* and one which is in the nature of a cross-claim. When a defendant is sued, he can raise any matter which is properly in the nature of a *defence*, without fear of being met by a period of limitation. No defence, properly so-called, is subject to a time-bar.[165]

133. The Alberta Court of Queen's Bench in *Chevron* similarly held "that equitable set-off is a substantive defense to which a statutory limitation period is inapplicable."[166] *Chevron* was appealed but neither limitations periods nor set-off were issues on appeal.[167] To be clear, the set-off that RMC asserts is equitable set-off, as detailed above.

134. Lastly, the Alberta Court of Queen's Bench in *Deerland Farm Equipment (1985) Ltd. v 626343 Alberta Ltd*. has also confirmed that no limitation period applies to equitable set-off by virtue of s. 6(1) of the *Limitations Act*.[168] In *Deerland*, the Court was satisfied that the defendant was able to meet the principles of equitable set-off as stated by the Supreme Court of Canada in *Telford v*

---

[163] *York (City) v Wellington Insurance Co*., 1998 CanLII 14704, 1998 CarswellOnt 3641 (Ont Ct J). **[Tab 29]**

[164] *Harvest Operations Corp. v Obsidian Energy Ltd*., 2020 ABQB 563 ("***Harvest***"). **[Tab 17]**

[165] *Harvest* at para 58 **[Tab 17]** citing *Pierce v Canada Trustco Mortgage Co.*, 2005 CarswellOnt 1876 at para 43 (ONCA).

[166] *Chevron* at para 174. **[Tab 9]**

[167] *Chevron Canada Resources v Canada*, 2022 ABCA 108. **[Tab 10]**

[168] *Deerland Farm Equipment (1985) Ltd. v 626343 Alberta Ltd*., 2003 ABQB 1027 ("***Deerland***"). **[Tab 12]**

*Holt*.[169] The Court also held that the defendant's equitable set-off qualified as a "claim" as contemplated in s. 6(2) of the *Limitations Act*, which reads together with s.6(1) as follows:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) and (4) are satisfied.
>
> (2) When the added claim
>
> (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
>
> (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,
>
> the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.[170]

135. In the result, the Court in *Deerland* held that it was obvious that the defendant's equitable set-off fell within the provisions of subsection (2) of the *Limitations Act*, and in those circumstances no limitation period applied.[171]

### 2. Even if Limitations of Actions applies to RMC's Set-Off Defence, RBee's Overbilling was not Reasonably Discoverable until the fall of 2021

136. In the alternative, if this Court finds that a limitation period applies to RMC's defence of set-off, then RMC submits that RBee's overbillings were not reasonably discoverable (i.e. RMC did not know, and RMC not ought to have known of the overbilling) until the fall of 2021.

137. RMC agrees with the Receiver that s. 3(1)(a) of the *Limitations Act* provides the elements for the standard 2-year limitation period in that:

> 3(1) … if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

---

[169] *Deerland* at para 13. **[Tab 12]**

[170] *Limitations Act*, ss. 6(1) – 6(2). **[Tab 2]**

[171] *Deerland* at para 17. **[Tab 12]**

> … the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

138. It is clear that RMC did not have actual knowledge of nor did it suspect RBee's overbillings until towards the end of the 2021 crushing season, when it became concerned with the extraordinarily high quantities of aggregate billed in RBee's October 31, 2021 invoice #23256, relative to all of its previous invoices.[172] RMC's concern was then validated when it completed its verification and payment reconciliation at the very end of the 2021 crushing, which confirmed that RBee had in fact been significantly overbilling RMC.[173]

139. The Receiver argues at paragraph 90 of its Brief of Law that RMC ought to have known about RBee's overbillings earlier than the end of the 2021 crushing season – either 60 days after the issuance of each of RBee's invoices or at the end of each crushing season – because RMC ought to have been performing quantity verifications at these times. RMC disagrees with this position. RMC ought not to have reasonably discovered RBee's overbillings until its reasonable suspicion of overbilling arose toward the end of the 2021 crushing season.

140. In *Grant Thornton LLP v New Brunswick* (also relied on by the Receiver), the Supreme Court of Canada held that plaintiff will have constructive knowledge, sufficient to form the basis for discoverability, "when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise." [174]

141. The Receiver also discusses *Prescott Finishing Inc v Prescott (Town)* at paragraph 92 of its Brief of Law but contends that the decision is distinguishable.[175] To the contrary, the facts in *Prescott* are highly analogous to the facts in this matter. In *Prescott*, the Court found that calculations required to disclose a billing error and corresponding overpayments for water and sewer services required a high level of experience and skill.[176] As such, even though the plaintiff's technical director possessed the needed experience and skill, and was able to competently perform the calculations to disclose the overbilling, the Court nevertheless considered the plaintiff to have acted diligently in not performing calculations earlier on, such that the overbilling was not reasonably discoverable until the plaintiff actually performed the calculations at a later date.[177]

142. As with the calculations required to disclose the overbilling in *Prescott*, the verification exercise that RMC ultimately performed at the end of 2021 required considerable technical skill and experience.

---

[172] Burak Cross-Examination, 24:3-15.

[173] Burak Affidavit, para 60.

[174] *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 44. **[Tab 16]**

[175] *Prescott Finishing Inc v Prescott (Town)*, 2010 ONSC 212 ("***Prescott***"). **[Tab 23]**

[176] *Prescott* at para 175. **[Tab 23]**

[177] *Prescott* at paras 57, 175-177. **[Tab 23]**

To verify the quantity of aggregate in the stockpile, it was necessary to operate a topographic laser scan survey instrument, download the corresponding data into a specialized computer program to create a 3D rendering of the surface,[178] and then convert the corresponding quantity of aggregate in cubic meters to tonnes.[179] Obviously, this process required skill and experience.

143. In addition, Mr. Burak, who is a Chartered Account and the Chief Financial Officer of RMC, needed to extract the Batch Record data from RMC's automated batching system, generate a Microsoft Excel spreadsheet report that compiled the Batch Record data, create a pivot table to further summarize the data, and then complete a spreadsheet reconciliation considering the Batch Record data, the survey quantities, and the quantities that RBee billed.[180] The level of skill and experience required to perform RMC's 2021 quantity verification and reconciliation is very comparable to the level of skill and experience that the plaintiff in *Prescott* was required to draw upon to perform the utility calculations that disclosed the utility overbillings in that case.

144. The recent decision from the Ontario Court of Appeal in *Espartel Investments v MTCC No 993* also provides some helpful guidance as to what an exercise of reasonable diligence entails in the context of invoices containing overbillings.[181] In *Espartel*, the plaintiff brought an action seeking repayment for invoiced amounts that it was overcharged for electricity service from 2006 to 2015.[182] The plaintiff became aware of error in the billing, that resulted in the overcharging and corresponding overpayment, in 2017.[183]

145. First, the Court *Espartel* clarified that "it is reasonable discoverability — rather than the mere possibility of discoverability — that triggers a limitation period."[184] In holding that the claim was not statute-barred, the Court stated that the "error was not evident on the face of the Utility Agreement or invoice. If an error is not apparent on the face of documentation (i.e., error in conversion of wattage in a formula) then it is not reasonably discoverable and therefore the limitation … is not triggered."[185] It is clear that there was no error apparent on the face of RBee's invoices, at the very least until RBee's abnormally large October 2021 invoice, and as such, the overbilling was not reasonably discoverable until the fall of 2021.

---

[178] Marshall Affidavit, para 8.

[179] Burak Affidavit, para 33.

[180] Burak Affidavit, paras 42-54.

[181] *Espartel Investments v MTCC No 993*, 2022 ONSC 4315 ("***Espartel***"). **[Tab 13]**

[182] *Espartel* at para 4. **[Tab 13]**

[183] *Espartel* at para 3. **[Tab 13]**

[184] *Espartel* at para 139. **[Tab 13]**

[185] *Espartel* at para 140. **[Tab 13]**

146. In any event, the evidence shows that RMC was, in fact, exercising reasonable diligence through anticipating the completion of a final quantity verification and reconciliation at the end of RBee's performance on the Project. Importantly, this practice is consistent with the industry standard, and was the practice employed on other projects that RMC and RBee had completed while the Project was still ongoing.[186] Furthermore, RMC had no suspicion to trigger the exercise of completing a quantity verification until the fall of 2021.

147. The Supplier Agreement provided RMC with the option to perform quantity verifications on a more frequent basis, that went above and beyond the industry standard. However, the fact that RMC declined to perform quantity verifications in excess of the industry standard is not evidence that RMC was failing to exercise reasonable diligence.

148. The Receiver argues in the alternative that RMC ought to have been performing detailed quantity verifications at the end of each crushing season because it was important to monitor the Project stockpile to ensure there was enough aggregate for continued concrete production.[187]

149. However, it is one thing to monitor the Project stockpile and another thing to perform a quantity verification and reconciliation. AFDE monitored the Project stockpile via laser survey and RMC maintained Batch Records produced through its automated batching system in the ordinary course of its business operations.[188] But to complete a verification and reconciliation of the nature that would have disclosed RBee's overbillings, it would have been necessary to extract the Batch Record data from RMC's automated batching system, generate a Microsoft Excel spreadsheet report that compiled the Batch Record data, create a pivot table to further summarize the data, and then complete a spreadsheet reconciliation considering the Batch Record data, the survey quantities, and the quantities that RBee billed.[189] This is no small undertaking considering that RMC was incredibly focused on ensuring that it met its concrete production requirements throughout the duration of the Project.[190] RMC was acting reasonably and following the industry standard by planning to perform a quantity verification and reconciliation at the end of the Project.

[186] Burak Affidavit, para 13; Second Burak Affidavit, para 23.
[187] Brief of Law of the Receiver, para 97.
[188] Second Burak Affidavit, para 15.
[189] Burak Affidavit, paras 42-54.
[190] Burak Affidavit, para 19.

### 3. In the alternative, if RBee's Overbilling was Reasonably Discoverable before the fall of 2021, then RBee's Overbilling would not have Warranted Bringing a Proceeding until RBee's Performance on the Project was nearly Complete

150. Further, and in the alternative, even if RBee's overbilling was reasonably discoverable before the fall of 2021, the third necessary element of s. 3(1)(a) the *Limitations Act* – that the injury warranted bringing a proceeding – would not be satisfied, if at all, until RBee's performance on the Project was nearly complete.

151. In *Clark Builders and Stantec Consulting Ltd. v GO Community Centre*, the Alberta Court of Queen's Bench held that the "warranted" element of the *Limitations Act* "required a type of cost-benefit assessment, considering the would-be claimant's knowledge, economic factors, and any practical impediments at the relevant time."[191] The economic factors, specifically, embrace "a consideration of the extent of the injury in comparison to the economics of a prospective action."[192]

152. Of paramount importance to RMC throughout the Project was that RBee continue to reliably supply RMC with enough quality aggregate to meet RMC's demanding concrete production obligations, failing which RMC would be assessed significant liquidated damages on a daily basis.[193] RMC's focus was on obtaining maximum production.[194] Furthermore, securing a replacement aggregate supplier would have been challenging but more importantly, risky, considering RMC's ongoing critical needs for a reliable supply of quality aggregate to maintain its concrete production.[195]

153. Even once disclosed, RMC did not believe that RBee had deliberately overbilled RMC in bad faith.[196] Rather, RMC assumed that RBee had simply made an error in its calculation of the aggregate delivery quantities for which it invoiced RMC. Before RBee was placed into receivership, RMC anticipated being able to resolve the issue amicably.[197]

154. Had RMC discovered RBee's overbilling earlier that it did, it would not have been economical or practical for RMC to commence an action against RBee in any event. Given the always amicable

---

[191] *Clark Builders and Stantec Consulting Ltd. v GO Community Centre*, 2019 ABQB 706 at paras 261, 265 ("**Clark**"). **[Tab 11]**

[192] *Clark* at para 266. **[Tab 11]**

[193] Burak Affidavit, para 61 and Exhibit "A"; Burak Cross-Examination, 13:20-24.

[194] Burak Cross-Examination, 23:26 – 24:15.

[195] Burak Affidavit, paras 61-62.

[196] Burak Affidavit, para 60.

[197] Burak Affidavit, para 60.

relationship between RMC and RBee, the parties would have worked to correct RBee's quantity measurement and calculations.

155. Importantly, commencing an action against RBee at the first sign of overbilling would been counterproductive to the completion of RBee's performance on the Project, which was absolutely critical to RMC's success on the Project. It would have jeopardized RBee's performance going forward. This would not be a small risk considering the implications if RBee was to terminate its involvement with RMC and the Project, leaving RMC unable to meet its concrete production obligations and therefore subject to $25,000 per day in liquidated damages.[198]

156. RMC held a vital interest in maintaining a working relationship with RBee until the completion of the Project. Obtaining a replacement supplier in a timely manner would have been exceedingly difficult considering that would have likely taken several weeks, if not months, to remove the old RBee equipment from the remote Project site location and bring in new equipment.[199]

157. A cost-benefit analysis would have clearly indicated that commencing a proceeding against RBee at the first sign of overbillings would not have been warranted. Rather, the economics of the matter are such that any legal action against RBee would not likely have been favourable from a cost-benefit perspective until RBee's performance on the Project was nearing completion.

**H. RMC's continuing Relationship with Mr. Reed**

158. The Receiver has repeatedly raised the fact that RBee's principal, Mr. Reed, is the owner and sole director of A-1 and Paragon, the respective corporations the purchased and now operate RBee's old machinery on the Project.[200] The Receiver also suggests that RMC should be seeking compensation or relief from A-1 or Paragon.[201]

159. Despite the involvement of Mr. Reed, A-1 and Paragon are distinct corporations from that of RBee. RMC simply has no legal basis to assert a claim for which RBee is liable against these distinct corporate entities.

160. The Receiver does not state what it is asking the Court to do with this information. The innuendo present in the Receiver's submissions surrounding this issue is that Mr. Reed and his related corporations, and possibly RMC, have engaged in some type of improper dealings. The Receiver has stopped short of explicitly alleging such impropriety, likely because there is simply no evidence supporting it. As per RMC's evidence, it ultimately engaged with Mr. Reed's other corporations to

[198] Burak Affidavit, para 61.
[199] Burak Affidavit, para 62.
[200] Receiver's Brief of Law, para 52.
[201] Receiver's Brief of Law, para 99.

provide ongoing aggregate production because, after RBee was placed into receivership, A-1 purchased all of the on-site aggregate production equipment. RMC had no practical option other than to deal with Mr. Reed's other companies due to the time constraints on the Project and the $25,000 per day penalty that would arise with any delay in aggregate production.[202]

161. Ultimately, the Receiver's submissions on this point are irrelevant to the key issue in these proceedings – whether the Receiver can meet is burden to prove that RMC is liable for the Unpaid Invoices, and whether RMC has established a set-off defence.

## V. CONCLUSION

162. The evidence is clear in this case on both of the main issues before this Court. The Receiver has failed to meet its burden to establish that the work and aggregate claimed in the Unpaid Invoices was actually delivered by RBee. Its claim should be rejected for this reason alone. Its complaints that it has not been able to do so because Mr. Reed has not returned its calls provide a completely inadequate explanation in light of the Receiver's statutory right to compel such evidence from Mr. Reed.

163. Even if the Receiver had been able to provide some evidence in support of its claim—which it has utterly failed to do—its claim would fail because of RMC's valid defence of equitable set-off. RMC has adduced compelling evidence from witnesses who were actually on the Project site and on the basis of contemporaneous Project records that RBee overbilled RMC for more than $7,000,000 worth of aggregate. The Receiver has not been able to persuasively answer RMC's set-off, and its arguments on this point are speculative and ignore the applicable law.

164. For the foregoing reasons, RMC respectfully requests that this Court reject the Receiver's application and order it to pay RMC's costs with respect to same forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of January, 2023.

**DENTONS CANADA LLP**

Per: 

**Chris Zelyas, Counsel for RMC Construction Materials Ltd.**

[202] Burak Affidavit, paras 61-63.

## Table of Authorities and Documents Cited

**Tab No.**

**Legislation**

1. *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3.
2. *Limitations Act*, RSA 2000, c L-12.

**Case Law**

3. *Addco Drywall Ltd. v White Rock Manor Joint Venture,* 1993 CarswellBC 1175 (BCCA.)
4. *Ainsworth Lumber Co. v KMW Energy Inc.,* 2004 BCCA 415.
5. *Allen v Hay*, 64 SCR 76, 1922 CarswellBC 74 (SCC).
6. *Arrow Transfer Co v Royal Bank*, [1972] SCR 845 (BC), 1972 CarswellBC 103 (SCC).
7. *Chapman Management & Consulting Services Ltd. v Kernic Equipment Sales Ltd*., 2004 ABQB 870.
8. *Casa Rio Developments Ltd. v Hooymans*, 2014 BCCA 287.
9. *Chevron Canada Resources v Canada*, 2019 ABQB 418.
10. *Chevron Canada Resources v Canada*, 2022 ABCA 108.
11. *Clark Builders and Stantec Consulting Ltd. v GO Community Centre*, 2019 ABQB 706.
12. *Deerland Farm Equipment (1985) Ltd. v 626343 Alberta Ltd*., 2003 ABQB 1027.
13. *Espartel Investments v MTCC No 993*, 2022 ONSC 4315.
14. *First City Development Corp. v Stevenson Construction Co*., [1985] BCJ No. 2062, 1985 CarswellBC 762.
15. *Gilead Sciences, Inc. v Idenix Pharmaceuticals Inc*., 2015 FC 1156.
16. *Grant Thornton LLP v New Brunswick*, 2021 SCC 31.
17. *Harvest Operations Corp. v Obsidian Energy Ltd*., 2020 ABQB 563.
18. *Highridge Homes Ltd. v de Boer*, 2021 BCSC 1112.
19. *Howard v Sandau*, 2008 ABQB 34.
20. *Ili's Painting Services Ltd v Homes by Bellia Inc*, 2020 ABQB 248.
21. *Paradigm Holdings Ltd v Ngan & Siu Investments Co*., 2008 BCCA 172.
22. *Paul v Vancouver International Airport Authority*, 2000 BCSC 341.
23. *Prescott Finishing Inc v Prescott (Town)*, 2010 ONSC 212
24. *R & B Plumbing & Heating Ltd. v Gilmour*, 2018 BCSC 1295.
25. *R v Christhurajah*, 2016 BCSC 2400.
26. *R v Scott*, 2018 BCSC 2562.
27. *Suzuki v Jackson*, 1980 CarswellBC 1590 (BCSC).
28. *Swagger Construction Ltd. v University of British Columbia*, 2000 BCSC 1839.
29. *York (City) v Wellington Insurance Co.,* 1998 CanLII 14704, 1998 CarswellOnt 3641 (Ont Ct J).

**Other Documents Cited**

30. Bankruptcy Order of Justice G.A. Campbell pronounced and filed May 18, 2022.

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to January 11, 2023

Last amended on September 1, 2022

À jour au 11 janvier 2023

Dernière modification le 1 septembre 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

**PART VI**

# Bankrupts

## Counselling Services

### Counselling

**157.1 (1)** The trustee

**(a)** shall provide, or provide for, counselling for an individual bankrupt, and

**(b)** may provide, or provide for, counselling for a person who, as specified in directives of the Superintendent, is financially associated with an individual bankrupt,

in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b), and the estate of the bankrupt shall pay the costs of the counselling, as costs of administration of the estate, according to the prescribed tariff.

### Idem

**(2)** Where counselling is provided by a trustee to a debtor who is not a bankrupt, that counselling must be provided in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b).

### Effect on automatic discharge

**(3)** Subsection 168.1(1) does not apply to an individual bankrupt who has refused or neglected to receive counselling under subsection (1).

1992, c. 27, s. 58; 1997, c. 12, s. 93; 2005, c. 47, s. 96.

## Duties of Bankrupts

### Duties of bankrupt

**158** A bankrupt shall

**(a)** make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;

**(a.1)** in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;

**(b)** deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers,

**PARTIE VI**

# Faillis

## Services de consultation

### Consultations

**157.1 (1)** Dans les cas où le failli est une personne physique, le syndic :

**a)** est tenu de lui offrir des consultations, ou de voir à ce qu'il lui en soit offert;

**b)** peut offrir des consultations aux personnes qui, selon les instructions du surintendant, ont des rapports financiers avec le failli.

Le syndic s'acquitte des tâches que lui confie le présent paragraphe conformément aux instructions émises par le surintendant aux termes de l'alinéa 5(4)b); les frais des consultations sont à la charge de l'actif, à titre de frais d'administration, selon le taux prescrit.

### Idem

**(2)** Les consultations offertes par le syndic à un débiteur qui n'est pas un failli doivent être offertes conformément aux instructions données par le surintendant aux termes de l'alinéa 5(4)b).

### Effet sur la libération d'office

**(3)** Le paragraphe 168.1(1) ne s'applique pas au failli qui est une personne physique, dans la mesure où il a refusé ou omis de se prévaloir des consultations offertes aux termes du paragraphe (1).

1992, ch. 27, art. 58; 1997, ch. 12, art. 93; 2005, ch. 47, art. 96.

## Obligations des faillis

### Obligations des faillis

**158** Le failli doit :

**a)** révéler et remettre tous ses biens qui sont en sa possession ou sous son contrôle, au syndic ou à une personne que le syndic autorise à en prendre possession en tout ou en partie;

**a.1)** dans les circonstances prévues par les instructions du surintendant, remettre au syndic, pour annulation, toutes les cartes de crédit délivrées au failli et en sa possession ou sous son contrôle;

**b)** remettre au syndic tous les livres, registres, documents, écrits et papiers, notamment les documents de titre, les polices d'assurance et les archives et

insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

**(c)** at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;

**(d)** within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

**(e)** make or give all the assistance within his power to the trustee in making an inventory of his assets;

**(f)** make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

**(g)** make disclosure to the trustee of all property disposed of by transfer at undervalue within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

**(h)** attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;

**(i)** when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;

**(j)** submit to such other examinations under oath with respect to his property or affairs as required;

déclarations d'impôt, ainsi que les copies de ce qui précède, se rattachant de quelque façon à ses biens ou affaires;

**c)** aux date, heure et lieu que peut fixer le séquestre officiel, se présenter devant ce dernier ou devant tout autre séquestre officiel délégué par le séquestre officiel, pour y subir un interrogatoire sous serment sur sa conduite, les causes de sa faillite et la disposition de ses biens;

**d)** dans les cinq jours suivant sa faillite, à moins que le séquestre officiel ne prolonge le délai, préparer et soumettre en quatre exemplaires au syndic un bilan en la forme prescrite attesté par affidavit et indiquant les détails de ses avoirs et de ses obligations, ainsi que les noms et adresses de ses créanciers, les garanties qu'ils détiennent respectivement, les dates auxquelles les garanties ont été respectivement données, et les renseignements supplémentaires ou autres qui peuvent être exigés; si les affaires du failli sont mêlées ou compliquées au point qu'il ne peut adéquatement lui-même en préparer un relevé convenable, le séquestre officiel peut, comme dépenses d'administration de l'actif, autoriser l'emploi d'une personne compétente pour aider à la préparation du relevé;

**e)** dresser un inventaire de ses avoirs ou donner au syndic toute l'assistance qu'il peut donner pour dresser l'inventaire;

**f)** révéler au syndic tous les biens aliénés au cours de la période allant du premier jour de l'année précédant l'ouverture de la faillite, ou de la date antérieure que le tribunal peut fixer, jusqu'à la date de la faillite inclusivement, et comment, à qui et pour quelle considération toute partie des biens a été aliénée, sauf la partie de ces biens qui a été aliénée dans le cours ordinaire du commerce, ou employée pour dépenses personnelles raisonnables;

**g)** révéler au syndic tous les biens aliénés par opération sous-évaluée au cours de la période allant du premier jour de la cinquième année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement;

**h)** assister à la première assemblée de ses créanciers, à moins d'en être empêché par la maladie ou pour une autre cause suffisante, et s'y soumettre à un interrogatoire;

**i)** lorsqu'il en est requis, assister aux autres assemblées de ses créanciers ou des inspecteurs, ou se rendre aux ordres du syndic;

**(k)** aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;

**(l)** execute any powers of attorney, transfers, deeds and instruments or acts that may be required;

**(m)** examine the correctness of all proofs of claims filed, if required by the trustee;

**(n)** in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;

**(n.1)** inform the trustee of any material change in the bankrupt's financial situation;

**(o)** generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and

**(p)** until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

R.S., 1985, c. B-3, s. 158; 1992, c. 27, s. 59; 1997, c. 12, s. 94; 2004, c. 25, s. 73; 2017, c. 26, s. 9.

**j)** se soumettre à tout autre interrogatoire sous serment au sujet de ses biens ou de ses affaires, selon qu'il en est requis;

**k)** aider de tout son pouvoir à la réalisation de ses biens et au partage des produits entre ses créanciers;

**l)** exécuter les procurations, transferts, actes et instruments qu'il peut être requis d'exécuter;

**m)** examiner l'exactitude de toutes preuves de réclamations produites, s'il en est requis par le syndic;

**n)** s'il a connaissance que quelqu'un a produit une réclamation fausse, rapporter immédiatement le fait au syndic;

**n.1)** aviser le syndic de tout changement important de sa situation financière;

**o)** d'une façon générale, accomplir, au sujet de ses biens et du partage du produit parmi ses créanciers, tous actes et toutes choses que le syndic peut raisonnablement lui demander de faire, ou que les Règles générales peuvent prescrire, ou qu'il peut recevoir l'ordre de faire du tribunal par une ordonnance spéciale rendue à l'égard d'un cas particulier, ou rendue à l'occasion d'une requête particulière du syndic, d'un créancier ou d'une personne intéressée;

**p)** jusqu'à ce qu'il ait été disposé de sa demande de libération et jusqu'à ce que l'administration de son actif ait été complétée, tenir le syndic constamment informé de son adresse ou de son lieu de résidence.

L.R. (1985), ch. B-3, art. 158; 1992, ch. 27, art. 59; 1997, ch. 12, art. 94; 2004, ch. 25, art. 73; 2017, ch. 26, art. 9.

### Where bankrupt is a corporation

**159** Where a bankrupt is a corporation, the officer executing the assignment, or such

**(a)** officer of the corporation, or

**(b)** person who has, or has had, directly or indirectly, control in fact of the corporation

as the official receiver may specify, shall attend before the official receiver for examination and shall perform all of the duties imposed on a bankrupt by section 158, and, in case of failure to do so, the officer or person is punishable as though that officer or person were the bankrupt.

R.S., 1985, c. B-3, s. 159; 1992, c. 27, s. 60.

### Lorsque le failli est une personne morale

**159** Lorsque le failli est une personne morale, le fonctionnaire qui exécute la cession ou tout dirigeant de la personne morale ou toute personne qui, directement ou indirectement, en a, ou en a eu, le contrôle de fait, désigné par le séquestre officiel, doit se présenter devant lui pour être interrogé et doit remplir toutes les obligations que l'article 158 impose à un failli, et, s'il omet de le faire, il est susceptible d'être puni comme s'il était le failli.

L.R. (1985), ch. B-3, art. 159; 1992, ch. 27, art. 60.

### Performance of duties by imprisoned bankrupt

**160** If a bankrupt is undergoing imprisonment, the court may, in order to enable the bankrupt to attend in court in bankruptcy proceedings at which the bankrupt's

### Exécution de fonctions par un failli emprisonné

**160** Lorsqu'un failli subit un emprisonnement, le tribunal peut, afin de lui permettre d'assister devant le tribunal aux procédures en faillite auxquelles sa présence

personal presence is required, to attend the first meeting of creditors or to perform the duties required of the bankrupt under this Act, direct that the bankrupt be produced in the protective custody of an executing officer or other duly authorized officer at any time and place that may be designated, or it may make any other order that it deems proper and requisite in the circumstances.

R.S., 1985, c. B-3, s. 160; 2004, c. 25, s. 74(E).

personnelle est requise, ou de lui permettre d'assister à la première assemblée des créanciers, ou de remplir les obligations que la présente loi lui impose, ordonner qu'il soit amené sous la garde d'un huissier-exécutant ou d'un autre fonctionnaire dûment autorisé, à tels date, heure et lieu qui peuvent être désignés, ou le tribunal peut rendre toute autre ordonnance qu'il juge utile dans les circonstances.

L.R. (1985), ch. B-3, art. 160; 2004, ch. 25, art. 74(A).

## Examination of Bankrupts and Others

### Examination of bankrupt by official receiver

**161 (1)** Before a bankrupt's discharge, the official receiver shall, on the attendance of the bankrupt, examine the bankrupt under oath with respect to the bankrupt's conduct, the causes of the bankruptcy and the disposition of the bankrupt's property and shall put to the bankrupt the prescribed question or questions to the like effect and such other questions as the official receiver may see fit.

### Record of examination

**(2)** The official receiver shall make a record of the examination and shall forward a copy of the record to the Superintendent and the trustee.

### Record of examination available to creditors on request

**(2.1)** If the examination is held

**(a)** before the first meeting of creditors, the record of the examination shall be communicated to the creditors at the meeting; or

**(b)** after the first meeting of creditors, the record of examination shall be made available to any creditor who requests it.

### Examination before another official receiver

**(3)** When the official receiver deems it expedient, the official receiver may authorize an examination to be held before any other official receiver.

### Official receiver to report failure to attend

**(4)** Where a bankrupt fails to present himself for examination by the official receiver, the official receiver shall so report to the first meeting of creditors.

R.S., 1985, c. B-3, s. 161; 1997, c. 12, s. 95; 2004, c. 25, s. 75(F); 2005, c. 47, s. 97.

## Interrogatoire des faillis et autres

### Interrogatoire du failli par le séquestre officiel

**161 (1)** Avant la libération du failli, le séquestre officiel, lorsque celui-ci se présente devant lui, l'interroge sous serment sur sa conduite, les causes de sa faillite et la disposition de ses biens, et lui pose les questions prescrites ou des questions au même effet, ainsi que toutes autres questions qu'il peut juger opportunes.

### Compte rendu

**(2)** Le séquestre officiel établit le compte rendu de l'interrogatoire et le transmet au surintendant et au syndic.

### Communication sur demande

**(2.1)** Si l'interrogatoire est tenu avant la première assemblée des créanciers, le compte rendu est communiqué aux créanciers à l'assemblée, sinon il n'est communiqué qu'aux créanciers qui lui en font la demande.

### Interrogatoire devant un autre séquestre officiel

**(3)** Lorsqu'il l'estime utile, le séquestre officiel peut autoriser un interrogatoire devant tout autre séquestre officiel.

### Le séquestre officiel doit signaler le défaut de se présenter

**(4)** Lorsqu'un failli ne se présente pas pour être interrogé par le séquestre officiel, ce dernier en fait rapport à la première assemblée des créanciers.

L.R. (1985), ch. B-3, art. 161; 1997, ch. 12, art. 95; 2004, ch. 25, art. 75(F); 2005, ch. 47, art. 97.

### Inquiry by official receiver

**162 (1)** The official receiver may, and on the direction of the Superintendent shall, make or cause to be made

### Enquête par le séquestre officiel

**162 (1)** Le séquestre officiel peut, et sur les instructions du surintendant doit, effectuer ou faire effectuer toute

any inquiry or investigation that may be deemed necessary in respect of the conduct of the bankrupt, the causes of his bankruptcy and the disposition of his property, and the official receiver shall report the findings on any such inquiry or investigation to the Superintendent, the trustee and the court.

**(2)** [Repealed, 2005, c. 47, s. 98]

### Application of section 164

**(3)** Section 164 applies in respect of an inquiry or investigation under subsection (1).

R.S., 1985, c. B-3, s. 162; 2004, c. 25, s. 76(F); 2005, c. 47, s. 98.

### Examination of bankrupt and others by trustee

**163 (1)** The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

### Examination of bankrupt, trustee and others by a creditor

**(2)** On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

### Examination to be filed

**(3)** The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

R.S., 1985, c. B-3, s. 163; 1997, c. 12, s. 96; 2004, c. 25, s. 77(E).

enquête ou investigation qui peut être estimée nécessaire au sujet de la conduite du failli, des causes de sa faillite et de la disposition de ses biens, et le séquestre officiel fait rapport des conclusions de toute enquête ou investigation de ce genre au surintendant, au syndic et au tribunal.

**(2)** [Abrogé, 2005, ch. 47, art. 98]

### Application de l'art. 164

**(3)** L'article 164 s'applique relativement à une enquête ou à une investigation prévue par le paragraphe (1).

L.R. (1985), ch. B-3, art. 162; 2004, ch. 25, art. 76(F); 2005, ch. 47, art. 98.

### Interrogatoire du failli et d'autres par le syndic

**163 (1)** Le syndic, sur une résolution ordinaire adoptée par les créanciers, ou sur la demande écrite ou résolution de la majorité des inspecteurs, peut, sans ordonnance, examiner sous serment, devant le registraire du tribunal ou une autre personne autorisée, le failli, toute personne réputée connaître les affaires du failli ou toute personne qui est ou a été mandataire, commis, préposé, dirigeant, administrateur ou employé du failli, au sujet de ce dernier, de ses opérations ou de ses biens, et il peut ordonner à toute personne susceptible d'être ainsi interrogée de produire les livres, documents, correspondance ou papiers en sa possession ou pouvoir qui se rapportent en totalité ou en partie au failli, à ses opérations ou à ses biens.

### Examen par le créancier

**(2)** Sur demande faite au tribunal par un créancier, le surintendant ou une autre personne intéressée et sur preuve d'une raison suffisante, une ordonnance peut être rendue pour interroger sous serment, devant le registraire ou une autre personne autorisée, le syndic, le failli ou tout inspecteur ou créancier ou toute autre personne nommée dans l'ordonnance, afin d'effectuer une investigation sur l'administration de l'actif d'un failli; le tribunal peut en outre ordonner la production par la personne visée des livres, documents, correspondance ou papiers en sa possession ou son pouvoir qui se rapportent en totalité ou en partie au failli, au syndic ou à tout créancier, les frais de cet interrogatoire et de cette investigation étant laissés à la discrétion du tribunal.

### L'interrogatoire doit être produit

**(3)** Le témoignage de toute personne interrogée sous l'autorité du présent article doit, s'il a été transcrit, être produit au tribunal et peut être lu lors de toute procédure prise devant le tribunal aux termes de la présente loi et à laquelle est partie la personne interrogée.

L.R. (1985), ch. B-3, art. 163; 1997, ch. 12, art. 96; 2004, ch. 25, art. 77(A).

Province of Alberta

# LIMITATIONS ACT

Revised Statutes of Alberta 2000
Chapter L-12

Current as of December 15, 2022

Office Consolidation

© Published by Alberta King's Printer

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

## Copyright and Permission Statement

The Government of Alberta, through the Alberta King's Printer, holds copyright for all Alberta legislation. Alberta King's Printer permits any person to reproduce Alberta's statutes and regulations without seeking permission and without charge, provided due diligence is exercised to ensure the accuracy of the materials produced, and copyright is acknowledged in the following format:

© Alberta King's Printer, 20__.*

*The year of first publication of the legal materials is to be completed.

## Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

## Regulations

The following is a list of the regulations made under the *Limitations Act* that are filed as Alberta Regulations under the Regulations Act

| | **Alta. Reg.** | *Amendments* |
|---|---|---|

**Limitations Act**

**Limitation periods**

**3(1)** Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

**(1.1)** If a claimant who is liable as a tort-feasor in respect of injury does not seek a remedial order to recover contribution under section 3(1)(c) of the *Tort-feasors Act* against a defendant, whether as a joint tort-feasor or otherwise, within

(a) 2 years after

(i) the later of

(A) the date on which the claimant was served with a pleading by which a claim for the injury is brought against the claimant, and

(B) the date on which the claimant first knew, or in the circumstances ought to have known, that the defendant was liable in respect of the injury or would have been liable in respect of the injury if the defendant had been sued within the limitation period provided by subsection (1) by the person who suffered the injury,

if the claimant has been served with a pleading described in paragraph (A), or

(ii) the date on which the claimant first had or in the circumstances ought to have had the knowledge

described in subclause (i)(B), if the claimant has not been served with a pleading described in subclause (i)(A),

or

(b) 10 years after the claim for contribution arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim for contribution.

**(1.2)** For greater certainty, no claim for contribution against a defendant in respect of damage referred to in section 3(1)(c) of the *Tort-feasors Act* is barred by the expiry of a limitation period within which the person who suffered that damage could seek a remedial order.

**(2)** The limitation period provided by subsection (1)(a) or (1.1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a),

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) or (1.1)(a) to the principal, first actually acquired that knowledge,

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death;

(ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) or (1.1)(a) at that time;

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), if the representative acquired the knowledge after being appointed.

**(3)** For the purposes of subsections (1)(b) and (1.1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

(c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;

(d) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct that causes the death, on which the claim is based, occurs;

(e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs;

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

**(4)** Repealed 2022 c23 s3.

**(5)** Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a) or (1.1)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b) or (1.1)(b).

**(6)** to **(8)** Repealed 2022 c23 s3.

RSA 2000 cL-12 s3;2007 c22 s1;2014 c13 s4;2017 c7 s2; 2022 c23 s3

**(3)** The claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended under this section.

**(4)** This section applies to a proceeding in which a claimant seeks a remedial order in relation to a claim that arises on or after January 1, 2018, irrespective of whether the proceeding is commenced before or after the coming into force of this section.

2019 c23 s1

**Claims added to a proceeding**

**6(1)** Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

**(2)** When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

**(3)** When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

**(4)** When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

**(5)** Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.

1996 cL-15.1 s6

### Agreement

**7(1)** Subject to section 9, if an agreement expressly provides for the extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

**(2)** An agreement that purports to provide for the reduction of a limitation period provided by this Act is not valid.

RSA 2000 cL-12 s7;2002 c17 s4

### Acknowledgment and part payment

**8(1)** In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.

**(2)** Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.

**Acquiescence or laches**

**10** Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

1996 cL-15.1 s10

**Judgment for payment of money**

**11** If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

1996 cL-15.1 s11

**Conflict of laws**

**12(1)** The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

**(2)** Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.

RSA 2000 cL-12 s12;2007 c22 s1

**Actions by aboriginal people**

**13** An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the *Limitation of Actions Act*, RSA 1980 cL-15, had not been repealed and this Act were not in force.

1996 cL-15.1 s13

1993 CarswellBC 1175
British Columbia Court of Appeal



1993 CarswellBC 1175, [1993] B.C.W.L.D. 1911, 11 C.L.R. (2d) 79, 41 A.C.W.S. (3d) 506

# ADDCO DRYWALL LTD. v. HANS HAEBLER, WHITE ROCK MANOR JOINT VENTURE, BIRCH HOLDINGS LTD., 326189 B.C. LTD., H.C.M. PROJECTS LTD., and THE GUARANTEE COMPANY OF NORTH AMERICA

ADDCO DRYWALL LTD., YVAN G. LETEMPLIER, AGATHE S. LETEMPLIER, ROBERT C. LETEMPLIER, GAVIN E.M. LAWRENCE, DENNIS R. HONAIZER, VIC SEMENOV and BELCO CONSTRUCTION LTD.

Lambert, Toy and Legg JJ.A.

Judgment: June 3, 1993
Docket: Doc. CA014299

Counsel: *W.E. Knutson*, for appellant.
*R. Jenkins*, for respondent.
*R.M. Young*, for respondent Guarantee Company of North America.

**Related Abridgment Classifications**
Construction law
II Contracts
II.1 Building contracts
II.1.g Miscellaneous
Construction law
II Contracts
II.6 Breach of terms of contract
II.6.d Damages
II.6.d.i Penalties and liquidated damages
II.6.d.i.B Application of damages provisions
Construction law
II Contracts
II.6 Breach of terms of contract
II.6.d Damages
II.6.d.x Miscellaneous
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.h Contract for service or repair
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.q Miscellaneous

**Headnote**
Construction Law --- Building contract

Construction Law --- Breach of terms of contract — Damages — Penalties and liquidated damages — Application of damages provisions

Construction Law --- Breach of terms of contract — Damages

Breach of terms of contract — Breach by contractor — Defective workmanship — Plaintiff being hired under fixed price contract to complete drywall and exterior stucco on building — Plaintiff's contract being terminated for delay and inadequate workmansip — Plaintiff bringing action for unpaid balance of contract price and owner counterclaiming for damages caused by plaintiff's breaches — Trial judge finding parties liable to each other and setting off amounts owing — Plaintiff being entitled to judgment for net recoverable amount of $29,473 — Owner appealing — Appeal allowed in part and owner being awarded additional $49,140.

The owner decided to build a residential and commercial structure. The plaintiff was hired under a fixed price contract on standard terms to complete the drywall and the exterior stucco on the building. The contract price was $626,273. The contract called for top quality work and set completion dates within a construction schedule. A surety company granted the plaintiff a performance bond and a labour and material payment bond. As a result of delays and inadequate workmanship, the owner terminated the plaintiff's contract. The plaintiff alleged that the contract was wrongfully terminated and brought an action for the unpaid balance of the contract price. The owner counterclaimed for damages caused by the plaintiff's breaches. The owner also counterclaimed against the surety company. The trial judge found that the plaintiff was entitled to the agreed amount of $235,950 for work it had completed by the time the contract was terminated. The trial judge also found that the owner was entitled to recover $206,477 with respect to the damages caused by the plaintiff's breaches. The net result was that the plaintiff was entitled to judgment in the amount of $29,473. The owner appealed.

**Held:**

The appeal was allowed in part.

The majority of the owner's claims was dismissed because the court was not persuaded that any of the trial judge's conclusions, which were incorporated into the amounts awarded in his judgment, were clearly and plainly wrong. There was, however, inconsistency in the trial judge's reasons with respect to the owner's claims for overhead costs and painting. In view of the fact that both counsel expressed the hope that there would be no need for a new trial, it was appropriate to award one-half of the owner's claims, or $49,140. In the result, the judgment was varied from a judgment in favour of the plaintiff in the amount of $29,473 to a judgment in favour of the owner in the amount of $19,666. It followed that judgment should go against the surety company for the same amount, $19,666.

**The judgment of the court was delivered by *Lambert J.A.* (orally):**

1 This is an appeal from the order of Mr. Justice Singh in the Supreme Court of British Columbia. Mr. Justice Singh's reasons are reported at (1991), 46 C.L.R. 255. Since the reasons are extensive and deal with the evidence and the claim in detail it is unnecessary for me to summarize them or to state the facts in anything other than summary form.

2 The defendants, White Rock Manor Joint Venture, Birch Holdings Ltd., and 326189 B.C. Ltd., whom I will together call the owners, decided to build a residential and commercial structure in White Rock. The defendant H.C.M. Projects Ltd. was the project manager for the project. The defendant Hans Haebler was the principal of H.C.M. and of 326189 B.C. Ltd.

3 The plaintiff Addco Drywall Ltd., which I will call Addco, was hired under a fixed price contract on standard terms to complete the drywall and the exterior stucco on the building. The contract price was $626,273 and with agreed extras it became $645,000 or thereabouts. The contract called for top quality work and set completion dates within a construction schedule.

4 The Guarantee Company of North America granted Addco a performance bond and a labour and material payment bond. Those bonds were in the amount of $313,136.50 each. That is, each was for 50 per cent of the contract price.

5 On 10 June, 1988, Addco began work on the project.

6 On 30 September, 1988, the owners terminated Addco's contract because of delays in carrying out the work. Addco had not completed either the stucco or the drywall work by that time. As well as the delays there were some suggestions relating to inadequate workmanship.

7 On 6 October, 1988, Addco and the owners entered into an amending agreement which set out new performance requirements for Addco. This amendment also entitled the owners to contract with alternative contractors if the schedule was not maintained.

8 On 18 October, 1988, the owners terminated the stucco portion of the contract.

9 On 22 November, 1988, the owners terminated the drywall portion of the contract.

10 Addco alleged that the contract was wrongfully terminated. It also said that it had completed 90 per cent of the work. It brought a claim against the owners for $235,950. That amount represented unpaid work which had been performed under the contract.

11 Addco also brought a claim against Mr. Haebler and H.C.M. for inducing breach of contract.

12 The owners alleged that breaches by Addco gave rise to grounds to terminate the contract and to hire alternative contractors to complete the work. They brought a counterclaim for $700,582. That amount was made up in this way:

| | |
|---|---|
| stucco claim | $261,203 |
| drywall claim | $270,870 |
| miscellaneous claim | $168,509 |
| | -------- |
| Total | $700,582 |

The claim for stucco represented the amount that had actually been paid out by the owners to Chalifour Bros. Construction Ltd., on a cost-plus basis, to complete the work that had not been done by Addco, and to remedy defects in the work done by Addco, all in relation to stucco.

13 Similarly, the amount of $270,870 was the amount actually paid out by the owners to Seymour Building Systems Ltd., under a cost-plus contract, to complete the work that had not been completed by Addco, and to remedy defects in the work that had been done by Addco.

14 The miscellaneous claim is made up of a number of amounts, some 10 or 12 in number, under various headings, some of which represented money paid out and some of which represented additional costs incurred in other ways.

15 The owners also sought to rely on the performance bond secured by the Guarantee Company. They counterclaimed against the Guarantee Company for the cost of completing the work and for the correction of deficiencies in Addco's work.

16 The Guarantee Company named Addco as a third party to the counterclaim. The Guarantee Company claimed against Addco that if the funds were to be paid out under the bond, Addco's breaches under the contract required it to indemnify the bonding company. The issue in that respect was adjourned at the trial pending the outcome of the action between Addco and the owners.

17 As I have said the action was tried by Mr. Justice Singh. It took 19 days at trial. Mr. Justice Singh reached these principal conclusions in the course of his reasons all leading to his ultimate award of judgment. I will number them.

> 1. Addco's failure to abide by the scheduling requirements, notwithstanding delays not attributable to its workers, gave the owners justifiable grounds to terminate the contract on 30th September, 1988.
>
> 2. The amending agreement set out performance requirements which were additional to the ones in the original contract. The amending agreement stands as a mutually agreed modification of the original contract and also constitutes evidence that Addco regarded the original contract as continuing after the owners' notice of termination.

3. The owners were justified in terminating the amended contract with respect to stucco on 18 October, 1988.

4. Addco's failure to meet the timetable and the existence of deficiencies in the drywall work were grounds for the owners to treat the contract as entirely at an end on 22 November, 1988.

5. Addco was entitled to the agreed amount of $225,950.75 for work it had completed by the time the contract was terminated on 22 November, 1988 and for which it had not been paid.

6. The owners are entitled to recover the necessary cost of making good the defects in the work that Addco contracted to do.

7. The deficiencies in the stucco when Addco was terminated were not as commonplace or severe as the owners have suggested.

8. With respect to mitigation the owners have failed to discharge the onus of proving that all of their expenditures following Addco's alleged breaches were reasonable in the circumstances.

9. The owners are entitled to recover these reasonable costs of completion and of remedying defects, and those reasonable costs recoverable by the owners are:

| | |
|---|---|
| (a) costs to complete unfinished aspects of the work on a cost-plus basis | $ 85,000 |
| (b) costs to correct the stucco portion | $ 40,000 |
| (c) costs to correct the drywall portion | $ 46,100 |
| Total | $171,100 |

10. The owners are also entitled to recover additional amounts from Addco as follows:

A. $19,500 for the scaffolding costs after 15 November, 1988 that Addco had agreed to pay;

B. $5,750 as one half of the cost for clean-up and window/stucco cleaning;

C. $4,100 for installing trim to cover gaps in the drywall;

D. $9,142 for one half of the heating costs which is justified by the delays caused by Addco, and;

E. $985 for consultant reports which arose from Addco's breaches.

Those additional amounts total $35,377.

11. The total amount recoverable by the owners is $206,477.

12. Addco is entitled to a declaration of lien and a net recoverable amount of $29,473.75. This amount is arrived at by deducting the judgment in favour of the owners of $206,477 from the judgment in favour of Addco of $235,950.75.

13. The claim against HCM Projects and Hans Haebler is dismissed.

14. The ownersrsquo; counterclaim against the Guarantee Company is also dismissed.

18 The defendant owners appealed from that judgment. There was no cross-appeal. The issues set out in the factum filed by the appellants are these:

1. Did the learned trial judge err in reducing the owners' counterclaim for damages relating to:

(a) Cost of completing the stucco work;

(b) Cost of completing the drywall work;

(c) Costs of miscellaneous trades and increased overhead.

2. If successful on appeal, are the owners entitled to judgment against the Guarantee Company of North America in addition to Addco?

19 Counsel for the appellant conceded that on the authorities he must show that the trial judge was "clearly and plainly wrong" as to findings of fact. The appellant's counsel proposed to do that by indicating aspects of the trial judge's conclusions where he submitted that the trial judge had failed to consider relevant evidence or had misapprehended the evidence or both.

20 Counsel for the appellant also emphasized that the owner had actually paid out $530,000 to Chalifour and to Seymour to have the job completed and had paid out other amounts and had recovered less than one-third of the total of all those amounts and that the owner had been required to have the job completed in that way by the breaches of the contract committed by Addco.

21 In this connection it must also be noted that the first estimate done by a firm of quantity surveyors was that it would cost $47,305 to complete the project. There is a huge discrepancy between that estimate and the amounts actually paid out and it is in relation to that discrepancy that the trial judgment wrestled with individual items of the claim.

22 Counsel for the appellant made a careful analytical submission in relation to the cost of completion and the cost of remedying defects. He did so separately in relation to the stucco and to the drywall. He pointed to seeming discrepancies between the trial judge's conclusions and parts of the evidence. There are statements in the trial judge's reasons that record conclusions contrary to specific items of evidence. But the trial judge was considering the matter as a whole. He was not required to indicate what evidence he accepted, what evidence he attached less weight to, or what evidence he rejected. He had the benefit of 19 days of trial and he saw and heard the witnesses first hand. I am not persuaded that any of his conclusions which were incorporated into the amounts awarded in his judgment were clearly and plainly wrong in relation to the stucco and the drywall completion and correction work as carried out by Chalifour and Seymour.

23 I would not accede to the appellant's arguments therefore in relation to the cost of completion and the cost of remedying defects with respect to the stucco and the drywall contracts carried out in a cost-plus basis by Chalifour and by Seymour.

24 That brings me to the miscellaneous claims. Only the largest two of the disallowed claims were contested by the appellant on this appeal. Those two largest amounts were:

25 (a) H.C.M. overhead ..... $70,701

26 (b) Painting ..... $26,580

27 I propose to deal first with painting. When the trial judge was dealing with the miscellaneous claims he considered the claim for temporary heat and temporary light, and then right after that he considered the claim for painting. On those two miscellaneous claims he said this [at p. 288]:

**Temporary Heat and Temporary Light:**

One-half of the heating costs is justifiable by the delays caused by Addco, or $9,142. There will be no costs for temporary lighting.

**Painting:**

While Addco's failures with respect to drywall may have led to discorganization, and even delay, in the scheduling of the painters' work, I am not convinced that this would have led directly to cost overruns. The means by which the defendants calculate their "loss", i.e. invoices paid minus tender price, is artificial. In addition, in a letter dated April 19, 1989, H.C.M. blamed Seymour for painting cost overruns. There will be no award for these expenditures.

28 The trial judge therefore awarded half of the heating costs which he said were "justifiable" by the delays caused by Addco. The heating equipment was required because winter was coming on. The process of drying out the or [sic] drywall before painting was delayed. And it had become much slower because of the lower temperatures. It was for that reason that the temporary heat allowance was made.

29 It seems to me, with respect, that the allowance with respect to painting ought to fall on the same basis as the allowance with respect to temporary heat. The temporary heat was very largely to have the walls in condition for painting and the painting delays were very much caused by the conditions that led to the requirement for temporary heat. There is nothing in the trial judge's reasons on this point that would cause me to understand why there is the discrepancy between the allowance for painting and the allowance for temporary heat.

30 Both counsel expressed fervent hope that there would be no need for a new trial on this matter and having regard to the amounts involved and having regard to that expression I would not order a new trial in order to rehear evidence with respect to the painting cost. Instead I would award half of the amount claimed so that the painting award is consistent with the temporary heat award. The amount claimed was $26,580, I would award $13,290.

31 The overhead costs claimed in the amount of $71,701 were made up of additional compensation paid to employees whose work was said to be devoted to remedying the deficiencies and seeing the cost-plus contracts of Chalifour and Seymour carried out. The amount was claimed for a period of two and a half months. In arriving at that figure, a careful allowance was made for the amount by which the contract would have been extended in any event which was said to be a couple of weeks. Consideration was also given to the date when the first tenant moved in. What the trial judge said on this question was this [at p. 288]:

**H.C.M. Overhead Costs:**

I am not convinced that these costs would not have been incurred by H.C.M. but for the delays on its White Rock project which were legitimately due to Addco's performance. The delayed completion of the building was due in part to the failures of Seymour and Chalifour as well as, no doubt, other contractors. *Some delays were attributable to the defendants*. A list of delays which were not caused by Addco would include: inadequate provision of guard rails and planking in the scaffolding; brickwork not on schedule for balcony spandrels; water damage because of a lack of flashing; window delays; delayed final stucco colour selection; design changes; uncertainty about fireplaces with concurrent flue changes and coring of concrete floors; wall misaligned and locations changed to suit windows and doors; bathtub changes requiring additional coring of concrete floors; and water damage through overflow or pipe bursts and lack of adequate heating (Exhibit 35). (my emphasis)

32 In the course of that passage the trial judge said "Some delays were attributable to the defendants," but as can be seen he awarded no part of the overhead costs. There is nothing in the trial judge's reasons to indicate that the delays that were attributable to the defendants did not lead to a delay of the completion of the project. There were other causes for delays and if it were the case that the delays caused by the defendants made no difference to the ultimate completion date then, of course, no additional overhead costs should be recovered. But the trial judge does not say that is so and it does not seem reasonable that that would be so. On the other hand the trial judge itemized a number of delays that were not attributable to Addco.

33 In my opinion, having regard to the fact that the parties do not wish to have this matter retried but wish us to assess damages in the best way that we can, I would find that there was an inconsistency within the trial judge's reasons and I would award one half of the amount claimed for overhead costs. That one half is $35,850.

34 The total of the two amounts that I would award under the miscellaneous heading, one for painting and one for overhead costs, is $49,140. Accordingly, I would vary the judgment at trial from a judgment in favour of Addco in the amount of $29,473.75 to a judgment in favour of the owners in the amount of $19,666.25.

35 I add, for the benefit of counsel, that my calculations are all "errors and omissions excepted," and if counsel find that my calculations are wrong, then my error or errors should be corrected.

36 The appeal has been allowed in what must be regarded in the whole of the context as a minor extent. It has been substantially dismissed. In my opinion, the fair and proper order to make in those circumstances is that each party should bear its own costs of the appeal.

***Toy J.A.*:**

37 I agree.

***Legg J.A.*:**

38 I agree.

***Lambert J.A.*:**

39 The judgment between these parties is awarded accordingly. Mr. Justice Legg has reminded me that it would follow that a judgment should go against the Guarantee Company for the same amount, namely, $19,666.25. The claim over by the Guarantee Company in its third party proceedings against Addco remains to be adjudicated.

***Toy J.A.*:**

40 I agree.

***Legg J.A.*:**

41 I agree.

***Lambert J.A.*:**

42 Order accordingly.

*Appeal allowed in part.*

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Ainsworth Lumber Co. Ltd. v. KMW Energy Inc.,*** 2004 BCCA 415

Date: 20040729
Docket: CA029555

Between:

**Ainsworth Lumber Co. Ltd.**

Appellant
Respondent by Cross Appeal
(Plaintiff)

And

**KMW Energy Inc.**

Respondent
Respondent by Cross Appeal
(Defendant)

And

**Bigelow-Liptak of Canada Limited**

Respondent
(Third Party)

And

**Thermal Ceramics, a division of Morganite Canada Corporation**

Respondent
Appellant by Cross Appeal
(Third Party)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith

K.A. Short and D.M. Twining — Counsel for the Appellant Ainsworth Lumber Co. Ltd.

2004 BCCA 415 (CanLII)

| | |
|---|---|
| W.E. Knutson and S. Chaskar | Counsel for the Respondent Bigelow-Liptak of Canada Limited |
| R.R.C. Twining and K.A. Wigmore | Counsel for Respondent, Thermal Ceramics, a division of Morganite Canada Corporation |
| Place and Dates of Hearing: | Vancouver, British Columbia June 22 and 23, 2004 |
| Place and Date of Judgment: | Vancouver, British Columbia July 29, 2004 |

**Written Reasons by**:
The Honourable Madam Justice Newbury

**Concurred in by:**
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith

2004 BCCA 415 (CanLII)

As Mr. Knutson suggested, GC 14 related largely to the failure of Equipment to meet the Specifications (which were generally not performance-based) rather than to meet the warranties given in GC 17 with respect to fitness and suitability for the purpose contemplated by the contract. Mr. Twining on behalf of Thermal emphasized that at trial, Ainsworth had approached the case against KMW as one for breach of warranty rather than breach of any Specification.

[9] I believe all counsel agreed, however, that the gas ducts in which the refractory was installed were "Equipment" as defined, and that both GCs 17 and 18 were therefore relevant. General Conditions 17 and 18 provided in material part as follows:

> 17. WARRANTIES
>
> 17.1 The warranties hereinafter provided shall apply to all Equipment designed, engineered, manufactured or supplied by the Vendor or its subsuppliers under this Contract, save and except commercial items such as motors, indicating instruments, controls, pumps, cylinders, and others alike are subject only to the respective manufacturers' warranties.
>
> 17.2 The Vendor warrants that it shall use sound engineering and manufacturing principles and practices in the performance of the Contract and shall apply that degree of skill, care, judgment, and supervision necessary to assure that the Equipment shall be of good quality and proper, fit, suitable and sufficient for the purpose contemplated. The Vendor further warrants that notwithstanding inspection,

2004 BCCA 415 (CanLII)

payment for or acceptance of the equipment [sic], the quality of materials, documentation and workmanship shall be as set forth in the specifications and in accordance with the best trade practices, and the Equipment shall fulfil the terms of all warranties established by the Contract. The Vendor further warrants that the Equipment shall be new and free from defects in materials and workmanship for which the Vendor is responsible. The engineering and manufacturing to be performed pursuant to the Contract will be in accordance with high standards of the Vendor's industry. The period of the warranty shall begin upon Commissioning and Start-up of the Plant, and shall end one (1) year later. It shall in any case expire twenty-four (24) months from date of delivery of last major item of the Equipment as listed under Appendix IV. Replacement or repair of any work hereunder shall be warranted for the remaining portion of this express warranty period, but not less than six (6) months from the date of such repair or replacement.

17.3 The Vendor warrants furthermore that, throughout the period of acceptance-testing pursuant to Appendix III hereof, the Equipment shall meet or exceed the specifications provided in Appendix IV hereof and guarantees that during such period the Equipment shall not impair production of OSB at the Plant to the capacity and specifications provided in the General Technical Specifications hereof.

. . .

17.5 The Vendor shall promptly correct by repair or replacement any part of Equipment being defective or failing to conform to this Contract, whether observed before or after the start of the warranty period as per Subclause 17.2, and whether or not fabricated, installed or completed, provided that Owner's claim in writing was received by the Vendor prior to the expiration of the warranty period. Subject to any applicable limitation on the liability of the Vendor pursuant to Subclause 30.1, the Vendor shall bear all direct costs of

2004 BCCA 415 (CanLII)

correcting such defective Equipment. If the Vendor, upon written notice by the Owner, fails to correct defective or non-conforming Equipment within a reasonable time for such correction, the Owner, after two weeks written notice to the Vendor to do so, may correct it and charge all reasonable direct costs for material and labour to the Vendor.

THE VENDOR AND OWNER AGREE THAT IN CONSIDERATION OF THE ABOVE EXPRESSED WARRANTIES, ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE EXCLUDED, AND IN NO EVENT SHALL THE VENDOR BE LIABLE FOR INDIRECT, SPECIAL, CONSEQUENTIAL OR CONTINGENT DAMAGES WHICH MAY ARISE FROM A BREACH OF ANY OF THE FOREGOING WARRANTIES.

. . .

18. REMEDIES/THE OWNER'S RIGHT TO DO WORK

18.1 In the event that the Equipment needs to be corrected or modified due to a breach of Vendor's warranty or due to incorrect instructions being given by the Vendor's Representatives, the Vendor shall upon written notice from Owner or if the Vendor's Representatives are at the Site, upon verbal notice to such Representatives, provide free of charge the necessary supervisory personnel, and supply such equipment and materials as are necessary in order to correct or modify the Equipment. For such purposes, the Owner shall make available to the Vendor free of charge the necessary raw materials and energies, plant operating and maintenance personnel and plant maintenance tools.

18.2 If the Vendor defaults or neglects to fulfil the obligations under this Contract and fails within two (2) weeks after receipt of written notice from Owner to remedy such default, the Owner may, upon three (3) days' written notice and without prejudice to any other remedy Owner may have, make good such deficiencies.

2004 BCCA 415 (CanLII)

18.3 If the correction of the default cannot be completed within the two (2) weeks, the Vendor shall be considered to be in compliance if it:

(a) commences the correction of the default within the specified time, or

(b) provides the Owner with a schedule for such correction, which is acceptable, and

(c) completes the correction in accordance with such schedule.

18.4 The Owner has authority to stop the progress of the Vendor's Work whenever in his opinion such stoppage may be necessary to ensure the safety of life, or the Work, or neighbouring property. This includes authority to make changes in the Vendor's Work, and to order, assess and award the cost of such Vendor's Work, extra to the Contract or otherwise, as may in his opinion be necessary. The Owner shall within five (5) working days confirm in writing any such instructions. In such a case if Vendor's Work has been performed under direct order of the Owner, the Vendor shall keep his right to claim the value of such Vendor's Work. [Emphasis added.]

[10] Also relevant is GC 30.1, which provided:

30. LIMITATION OF RIGHTS AND REMEDIES

30.1 It is agreed and understood between the parties that the representations, obligations and warranties of the Vendor and the rights and remedies of the Owner in case of breach of any obligation, guarantee or warranty are exclusively defined in this Contract. Neither party shall be held liable for consequential, indirect or incidental damages, including without limitation loss of profit and production, except as expressly set out in this Contract. [Emphasis added.]

2004 BCCA 415 (CanLII)

to impose on KMW an obligation it would not otherwise have had, if called upon by the Owner. It did not on my reading require the Owner to invoke GC 18.2, and gave no suggestion that by not doing so, Ainsworth would be depriving itself of its right to sue for damages. (Indeed, by excluding liability for indirect costs, GC 30.1 suggested that KMW was to be liable for direct costs arising as a result of a breach of warranty.) Any other conclusion would unreasonably diminish the warranties in GC 17, fail to give effect to the clear wording of GC 18.2, and negate the Owner's duty to mitigate its damages by moving to correct a breach as quickly as possible. (The latter consideration is particularly germaine where, as here, the Owner was precluded from suing for lost profits and consequential damages that would arise on the shutdown of the plant.)

[19] It is trite law that unless a contract clearly states an intention to exclude rights normally arising from it, such an intention should not be inferred: ***First City Development Corp. v. Stevenson Construction Ltd.*** (1985) 14 C.L.R. 250 (B.C.C.A.) at 253; ***Hancock v. B.W. Brazier (Anerly), Ltd.*** [1966] 2 All E.R. 901 (C.A.), at 904. As Lord Diplock stated in ***P.M. Kaye Ltd. v. Hosier & Dickinson Ltd.*** [1972] 1 W.L.R. 146 (H.L.):

2004 BCCA 415 (CanLII)

> At common law a party to a contract is entitled to recover from the other party . . . damage . . . resulting from that other party's breach of the contract, unless by the terms of the contract itself he has agreed that such damage shall not be recoverable. In the absence of express words in the contract a court should hesitate to hold that a party had surrendered any of his common law rights to damages for its breach, though it is not impossible for this to be a *necessary* implication from other provisions of the contract. [at 166]

[20] Even if I am wrong, and Ainsworth did breach an "obligation" under GC 18.2, and that term was a fundamental one, there was no evidence of KMW's acceptance or treatment of that "breach" as constituting a "repudiation" of the contract. The trial judge made no finding to that effect. Again, it is trite law that an innocent party's acceptance of a repudiation must be clearly communicated to the other party: see ***Agrifoods International Corp. Ltd. v. Beatrice Foods Inc.*** (1997) 34 B.L.R. (2d) 294 (B.C.S.C.) at para. 24 and the cases cited at para. 25 thereof, and ***Ginter v. Chapman et al***. (1967) 60 W.W.R. 385 (B.C.C.A.) at 391 (aff'd [1968] S.C.R. 560). Or, as stated in more colourful language by Asquith, L.J. in ***Howard v. Pickford Tool Co. Ltd.*** [1951] 1 K.B. 417 (C.A.), at 421, "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind." In this case, moreover, KMW's contention that it

2004 BCCA 415 (CanLII)

should have been given the opportunity to remedy the defective refractory is affirmative of the contract, not repudiatory.

[21] In summary, I conclude that if the trial judge found that Ainsworth wrongfully "repudiated" the contract by virtue of failing to follow the procedure described in GC 18.2, and thereby immunized KMW from liability for damages for its breach, he was in error. In my opinion, GC 18.2 did not by its terms put Ainsworth to an "election" of any kind, or oblige it to give KMW the notice and opportunity described therein, or otherwise limit the remedies available to Ainsworth for breach of the warranties in GC 17. Even if Ainsworth had "repudiated" the contract by failing to invoke the procedure in GC 18.2, KMW did not purport to accept a repudiation. Last, even if it had, Ainsworth would have remained entitled to recover damages for all direct costs and expenses it suffered as a result of KMW's admitted breach.

***Alternative Reading***

[22] As earlier mentioned, all counsel read the Reasons and argued the appeal on the basis that Ainsworth was found to have breached a term of the contract and that that breach amounted to a repudiation of the contract. But if the trial judge's intention was to say (as he did in fn. 47) that in fact it was KMW who "repudiated" the contract and Ainsworth

2004 BCCA 415 (CanLII)

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Hapag-Lloyd AG v. Iamgold Corporation | 2021 CAF 110, 2021 FCA 110, 2021 CarswellNat 1620, 2021 CarswellNat 7322, 340 A.C.W.S. (3d) 479 | (F.C.A., Jun 2, 2021)

1922 CarswellBC 74
Supreme Court of Canada

Allen v. Hay

1922 CarswellBC 74, [1922] 3 W.W.R. 366, 64 S.C.R. 76, 69 D.L.R. 193

# Hay (Plaintiff) Respondent v. Allen (Defendant) Appellant

Idington, Duff, Anglin, Brodeur and Mignault, JJ.

Judgment: May 31, 1922.

Counsel: *C.W. Craig, K.C.*, for defendant, appellant.
*D.L. McCarthy, K.C.*, for plaintiff, respondent.

**Related Abridgment Classifications**
Conflict of laws
VI Contracts
VI.1 Choice of law
VI.1.c Forum conveniens
VI.1.c.i General principles
Conflict of laws
X Bills of exchange and negotiable instruments
Estoppel
I What constitutes
Evidence
I Proof
I.7 Proof of specific issues
I.7.h Foreign law
I.7.h.i Expert evidence
**Headnote**
Bills of Exchange --- Conflict of laws
Conflict of Laws --- Contracts — Choice of law — Forum conveniens
Estoppel --- What constitutes
Evidence --- Proof of foreign law — Method of proof — Expert evidence
Evidence --- Proof of foreign law — Method of proof — Expert evidence — Conflicting or confusing evidence
Estoppel — Bills of Exchange — Foreign Law — Promissory Note Given to Bank without Consideration in Foreign State — Note Taken by Bank to Present False Appearance of Assets — Substantive Law of That State Precluding Maker from Denying Liability — Application of Foreign Law — Liability of Maker without Proof of Prejudice Ascribable to His Conduct.
Defendant made a promissory note to a bank in the state of Washington, U.S.A., but without consideration, and solely at the request of the bank's officials in an attempt on their part to present a false appearance of assets. The bank subsequently passed into the hands of the bank commissioner of the state for liquidation of its affairs, and the bank commissioner sued the maker of the note in British Columbia. It was held that, as the evidence established that it was part of the substantive law of the state of Washington, as shown by the cases cited, that under such circumstances the maker of the note could not be permitted to deny

the existence in law of his liability under the note, the bank com missioner was entitled to recover, without having to make out a case of estoppel by including proof of prejudice ascribable to defendant's conduct.
Judgment of the Court of Appeal of British Columbia [1922] 1 W.W.R. 646, affirming judgment of MacDonald, J. [1921] 2 W.W.R. 33, affirmed, Idington, J. dissenting.

***Idington, J.*** **(dissenting):**

1 Respondent sued in his capacity of bank commissioner of the state of Washington upon a promissory note for $10,521 given by the appellant to the Northern Bank & Trust Company of which, and by virtue of statutory enactments of said state, the respondent has become by reason of its insolvency the administrator and as such entitled, instead of said bank, to sue upon said promissory note.

2 There never was any consideration for said promissory note. It therefore never was a valid security. This is established by the evidence of appellant and memorandum of agreement given by the president of the bank contemporaneously with the giving of the note.

3 It is sought and, so far successfully, before the learned trial Judge (29 B.C.R. 323, [1921] 2 W.W.R. 33) and in the Court of Appeal ([1922] 1 W.W.R. 646) to overcome that difficulty by virtue of the law, it is said, estopping the appellant from setting up any such defence under the circumstances in question which are alleged to have constituted fraud on the part of the appellant.

4 To render such an estoppel *in pais* an effective answer to the defence of no valuable consideration, there must be shown on the part of the party setting up such an estoppel, not only the existence of actual misrepresentation or fraud, but also that the party contracted with was ignorant thereof and was thereby induced to change his position on the faith of it.

5 Such, as I understand the evidence of the expert giving the law of the state of Washington, is the law of that state on the issue thus raised herein, as it is our law on the subject.

6 The only doubt created as to such statement of the law was the hesitation of the witness as to the effect of the decision by the Supreme Court of that state in the case of *Moore* (*State Bank Examiner*) *v. Kildall*, 191 Pac. Rep. 394, to which he referred the learned trial Judge for his consideration.

7 I find, on reading it for myself, therefore, that the Court found and, as I agree, correctly so, if I may be permitted to say so, that there was in fact valuable consideration for the note in question therein.

8 I am unable, therefore, to attach much importance to that case for what we are concerned with herein.

9 The estoppel, as pleaded in some of the pleas, sets up the misleading of the state examiner as something the respondent can rely upon.

10 There seem to be several answers thereto.

11 It is the claim of the bank that is here in question. And there is no evidence that the bank was either misled or that it was induced in any way to change its position by reason of the alleged fraud.

12 The evidence in support of the claim of the respondent, so far as the evidence before us goes, proves that he, by virtue of his taking over the administration of the assets, stands on no higher ground than that of the bank itself.

13 And if the evidence of such officers as had the duty at various times of examining the bank's assets is to be considered at all, it falls very far short of maintaining any such pretension as set up. Indeed, on the contrary, it shows for the most part that the result would have been the same.

14 And if the suggestion in respondent's factum that Moore was only the examiner and not the commissioner is worth considering, we have no evidence of that officer who was then the superior of Moore.

15 In short, despite what counsel sets up that the burden of proof is on the appellant, I submit it clearly is upon him pleading any defence to prove it, and this has not been done, or pretended to have been done, by anything presented in this case.

16 To render the contention if possible more absurd, this note was given before the statute law was changed, and it was in 1917, to render it more drastic, and there is no pretence that it was retroactive, so far as the evidence goes. The reference in same and in respondent's factum to *Remington's Code* are not very helpful as these books are not available.

17 Indeed we have cases cited to us from American authorities, in other jurisdictions than Washington state, which are of no more binding force on the Washington Courts than they would be on us.

18 We are asked to extend the law of estoppel *in pais* beyond anything sworn to be the law of Washington, and far beyond anything in our own law, in a way that we should not for a moment countenance.

19 The conduct of the appellant may have been the result of crass stupidity, or of deliberate fraud, but that is, I must respectfully submit, no reason for our departing from the principle of the law, which is to take the law of a foreign state from the sworn evidence of expert witnesses testifying thereto, and so far as that is not established thereby relying upon our own law.

20 To confuse the duty towards the party to the contract with that due to someone else is as yet no part of our law and is not proven to be the law of Washington.

21 The case cited by counsel for respondent of *Smith v. Kay*, 7 H.L. Cas. 750, at p. 770, is in no way applicable to what is in question herein. That was indeed the converse of this case. Indeed it suggests rather the thought that the fraud in question herein was one joined in by the bank, if not wholly the product of the bank, and hence suggests another remedy for the kind of fraud involved herein than can be afforded in such cases as this.

22 The joint effort of the bank and the appellant to deceive, may have laid a foundation for an action of deceit but that would not help here where only the neat question of the proper application of the doctrine of estoppel *in pais* is all that should concern us.

23 The appeal should be allowed with costs throughout.

***Duff, J.*:**

24 It is not disputed that the plaintiff must fail if the right of recovery depends upon the rules of the law of British Columbia. It is therefore incumbent upon him to prove the law of the state of Washington. This he must prove as matter of fact by the evidence of persons who are experts in that law. These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion. *Nelson* (*Earl*) *v. Bridport* (*Lord*), 8 Beav. 527, 10 Jur. 871; *Bremer v. Freeman*, 10 Moo. P.C. 306; *Di Sora v. Phillips*, 10 H.L. Cas. 624, 33 L.J. Ch. 129; *Concha v. Murietta; De Mora v. Coneha*, 40 Ch.D. 543, 60 L.T. 798; *Rice v. Rice*, 4 O.R. 579, at p. 589.

25 In *Bremer v. Freeman, supra*, Lord Wensleydale's judgment delivered on behalf of the Privy Council included a most searching examination of the French authorities bearing upon the point of French law in dispute.

26 I think applying these principles the learned trial Judge, Mr. Justice Macdonald, (29 B.C.R. 323, [1921] 2 W.W.R. 33) was entitled to examine the authorities upon which he relied. The decision in *Moore* (*State Bank Examiner*) *v. Kildall*, 191 Pac. Rep. 394, was based upon more than one ground and the substantive grounds upon which the Court proceeded in pronouncing the judgment was that the note sued upon, having been given for the express purpose of enabling the officials of the bank to present a false appearance of assets, the plaintiff was, representing as he did the interests of the creditors, entitled to insist as against the defendant that the instrument sued upon was an enforceable obligation. The Court cited with approval and relied on a passage quoted from a decision of the Supreme Court of Illinois in the case of *Golden v. Cervenka*, 116 N.E.R. 273, at p. 281. That passage in full is in the following words:

Where notes of other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the Examiner and enable the Bank to continue business, although the circumstances may have been such that the Bank itself could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped, upon the insolvency of the bank, to allege want of consideration. *Hurd v. Kelly*, 78 N.Y. 588, 34 Am. Rep. 567; *Best v. Thiel*, 79 N.Y. 15; *Sickles v. Herold*, 149 N.Y. 332, 43 N.E.R. 852, affirming 15 Misc. Rep. 116, 36 N.Y. Supp. 488; *State Bank of Pittsburg v. Kirk*, 216 Pa. 452, 65 Atl. 932; *Peoples' Bank v. Stroud*, 223 Pa. 33; *Dominion Trust Co. v. Ridall*, 249 Pa. 122, 94 Atl. 464; *Lyons v. Benney*, 230 Pa. 117, 79 Atl. 250, 34 L.R.A. (N.S.) 105. In one such case (*Lyons v. Benney, supra*) the defence was set up by an affidavit which the court held insufficient, saying:

> The substance of this affidavit of defence is that the appellant made and delivered his note to the bank in furtherance of a scheme to deceive the bank examiner, under a promise made to him by the bank that he would not be held liable upon the obligation. He agreed that it should appear as one of the assets of the institution for the purpose of deceiving those whose duty it was to examine them, and he now sets up the defence that, as it was to serve no other purpose, it is to be regarded as a worth less piece of paper under this agreement with the bank ... So this appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent showing of assets, and as the fraud was perpetrated upon the creditors, now represented by the bank's receiver, he can maintain an action on the note for their benefit ... Neither the law nor good conscience can sanction the contention of the defendant that he ought to be permitted to take advantage of the fraudulent agreement between him and the bank to which its creditors were not parties and for whom the receiver sues.

27 One of the decisions mentioned in this passage, *Lyons v. Benney*, is referred to by the learned trial Judge, a decision of the Supreme Court of Pennsylvania, and that Court in that case cited and relied upon the following passage from the judgment of Ross, J. delivered in *Pauly v. O'Brien*, in the Circuit Court of California, and reported in 69 Fed. Rep. 460. In his judgment, Ross, J. says at pp. 461-2:

> If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of the vice-president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive and therefore fraudulent showing of assets? Obviously nothing. There will be judgment for the plaintiff for the amount due upon the note sued upon, according to its terms, with costs.

28 The law as laid down in this passage cited from the judgment of Ross, J. delivered in 1895 and in that cited from the judgment of Dunn, J. speaking on behalf of the Supreme Court of Illinois, in 1917, appears from the evidence given in this case to be a law of the state of Washington.

29 Mr. Craig in a very able argument contended that the oral witnesses who spoke as to the law of the state of Washington deposed to the effect that the liability of the defendant, if it existed at all, arose from the application of the general principle of estoppel *in pais*; being conditioned consequently by the existence of the constituents of estoppel including a change of position on the part of the party relying upon the estoppel brought about in consequence of the conduct of the other party. I think if Mr. Craig's minor premise is sound, namely, that the rule invoked by the plaintiff does rest upon a strict application of the doctrine

of estoppel as recognized in the law of the state of Washington as well as in English law his conclusions necessarily follow. But in truth this premise is much more than doubtful; the cause of action and the only cause of action vested in the plaintiff is the bank's cause of action, to that he succeeds by force of the statute and if the principles of the common law were to be applied it is quite plain that nothing done by the defendant with the concurrence of the bank could, consistently with such principles, preclude the defendant from resisting the bank's claim.

30 The rule expounded in the authorities already referred to is a rule resting on broader and deeper principles. The statutory custodian of the property of the insolvent corporation while he succeeds to the assets of the corporation does so primarily in the interest of the creditors and (although in the first instance his right to the assets is not the right of the creditors but the right of the corporation in liquidation), the legal relations of the corporation undergo some alteration by reason of the change of status involved in its statutory dissolution and the rule above mentioned has been established as a rule of policy, a rule required in such circumstances by justice and convenience. A person who has participated in an attempt on the part of officials of the corporation to present a false appearance of prosperity and for that purpose has been content to represent himself as a debtor of the company is most permitted to deny the existence in law of this liability; but this rule is a substantive rule of law, it is not a mere rule of evidence. It is analogous to the rule by which a person improperly placed on the list of shareholders of a joint stock company and entitled therefore to have his name removed must act promptly. If he fail to act promptly he will be denied relief and in winding-up proceedings will be compelled to pay for the shares; because it is conclusively presumed against him that the presence of his name has added to the credit of the company.

31 The appeal should be dismissed with costs.

***Anglin, J.*:**

32 If the plaintiff, in order to succeed, were obliged to establish the facts necessary to make a case of estoppel against the defendant, including proof of prejudice ascribable to the defendant's conduct, I should be of the opinion that such a case was not made out. But the evidence it the record established to my satisfaction that it is a rule of substantive law in the state of Washington that

> one giving a note as "live paper" to make an appearance of assets so as to deceive the bank examiner is estopped, on the insolvency of the bank, to allege want of consideration.

33 *Moore* (*State Bank Examiner*) *v. Kildall*, 191 Pac. Rep. 394; *Barto v. Nix*, 46 Pac. Rep. 1033-4; *Skagit State Bank v. Moody*, 150 Pac. Rep. 425. That is undoubtedly what the defendant did in the present case.

34 Other cases cited at bar and in the judgment delivered in the Court of Appeal indicate that a similar rule obtains in other American jurisdictions. *Lyons v. Benney*, 230 Pa. 117, 79 Atl. Rep. 250, 34 L.R.A. (N.S.) 105 (Penn.); *Pauly v. O'Brien*, 69 Fed. Rep. 460 (Cal.); *Golden v. Cervenka*, 116 N.E. Rep. 273, at p. 281 (Ill.).

35 The judgment holding the defendant liable was in my opinion right and should be upheld.

***Brodeur, J.*:**

36 The action is on a promissory note and is instituted by the bank commissioner of the state of Washington. In 1914, the defendant Allen, who was then living in the United States, gave an accommodation note to the Northern Bank & Trust Company for the purpose of making an appearance of assets so as to deceive the bank examiner. The Northern Bank & Trust Company, in spite of these misrepresentations as to its assets, had a few years later, to be put in the hands of the bank commissioner of the state who, according to the laws of the state of Washington, proceeded to the liquidation of the affairs of the bank. He found among the assets Allen's promissory note; and as Mr. Allen is now living in British Columiba he is sued before the Courts of this province by the bank examiner for the payment of this note.

37 His defence is that there was a total failure of consideration.

38 The case has to be decided by the laws of the state of Washington where the note was signed and the liability was incurred.

39 There is no doubt that no consideration was given. But it is contended by the bank commissioner, Hay, that, according to the laws of the state of Washington a note given in similar circumstances can be sued upon by the official liquidator of the commissioner.

40 This note was evidently given for a fraudulent purpose, viz., for the purpose of showing in the bank returns assets which did not in reality exist and also for the purpose of inducing the public to deposit their moneys in the bank. Very severe laws have been passed in that state in order to put an end to such fraudulent transactions; and the jurisprudence is to the effect that the bank commissioner could sue on these notes though they were originally given without consideration.

41 In the case of *Golden v. Cervenka* (1917) 116 N.E.R. 273, the Supreme Court of Illinois, where similar legislation exists, decided that

> Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business, although the circumstances may have been that the bank could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped, upon the insolvency of the bank, to allege want of consideration.

42 In two cases of *Lyons v. Benney*, 230 Pa. 117, 79 Atl. R. 250, 34 L.R.A. (N.S.) 105, and *Pauly v. O'Brien*, 69 Fed. Rep. 460, the principle of law which has been enunciated is that the giving of such notes is a fraud upon the creditors of the bank.

43 A decision of the Appellate Division of the Supreme Court of Washington in 1920 is to the same effect. It was held in the case of *Moore* (*State Bank Examiner*) *v. Kildall*, 191 Pac. Rep. 394, that "one giving a note as live paper" to make an appearance of assets so as to deceive the bank examiners is estopped on the insolvency of the bank to allege want of consideration.

44 It is contended by the defendant that the prejudice which is essential to constitute a case of estoppel has not been proved in this case.

45 We have in this case facts which are absolutely similar to those that were in issue in the *Moore v. Kildall* case and there is no doubt, according to my opinion, that if Allen was still living in the state of Washington and had been sued there he would have been condemned to pay the note. We have then here to apply the same principles of law and to render the same decision as should have been rendered there, and even if our general notions as to the application of the rule of estoppel are violated in some respects we have to disregard these notions and apply the law as it is enunciated in the Washington decisions.

46 I consider that the appellant has been legally condemned to pay his note and his appeal should be dismissed with costs.

***Mignault, J.*:**

47 There is no difficulty here as to the facts. The defendant appellant, without consideration, signed at the request of one Phillips, then president of the Northern Bank & Trust Company of Seattle, state of Washington, a note for $10,000 in favour of the said bank, and a year later, at the request of one Collier, who had replaced Phillips as president of the bank, he signed a renewal note for a like amount, receiving from Phillips and subsequently from Collier a written acknowledgment that there was to be no liability under the note and its renewal. This note was given to the bank to create a false appearance of assets and so deceive the state bank examiner and prevent the closing up of the bank.

48 The law to be applied is that of the state of Washington, proved by expert witnesses. The respondent, the bank commissioner of that state, is entitled to sue on this note. He represents the bank and its creditors. The vital question is whether in a suit by the bank commissioner, acting on behalf of creditors of the insolvent bank as well as of the bank itself, the appellant is estopped from setting up the collateral agreement with the bank that he should not be liable on this note?

49 I think, according to the evidence made of the law of estoppel in force in the state of Washington, and under the decisions cited by the learned trial Judge, (29 B.C.R. 323, [1921] 2 W.W.R. 33) who was referred to them by the expert witness called

by the appellant for a statement of the law governing estoppel in the state of Washington, that the appellant is estopped from raising the defence of non-liability or want of consideration against the respondent.

50 My only doubt, at the hearing, was whether prejudice to the creditors, necessary for estoppel, had been shown. But I think on consideration that prejudice must be assumed, for to allow an insolvent bank to continue in business by a show of fictitious assets is certainly prejudicial to all who deal with the bank and acquire rights against it. It may well be that had the appellant not given his note, the bank might have been allowed by the bank examiner to remain open for a further period, but that is merely a surmise, and too much reliance must not be placed on the statement of Moore, one of the bank examiners, that he thinks he would not have done more than he did had the appellant's note not been exhibited to him. But the intention, to which the appellant weakly allowed himself to become a party, was unquestionably to deceive the state bank examiner, and under these circumstances the decisions which, in the state of Washington, are accepted as the law and which apply to such a case the doctrine of estoppel, are consonant with the true principles of justice and fair dealing, and I think they fully support the judgment appealed from.

51 The appeal should be dismissed with costs.

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** SNS Industrial Products Ltd. v. Bank of Montreal | 2009 CarswellOnt 628, 174 A.C.W.S. (3d) 1188 | (Ont. S.C.J., Feb 6, 2009)

1972 CarswellBC 103
Supreme Court of Canada

Arrow Transfer Co. v. Royal Bank

1972 CarswellBC 103, 1972 CarswellBC 314, [1972] 4 W.W.R. 70, [1972] S.C.R. 845, [1972] S.C.J. No. 64, 27 D.L.R. (3d) 81

# Arrow Transfer Company Ltd. v. Royal Bank of Canada, Bank of Montreal, Canadian Imperial Bank of Commerce and Seear

Abbott, Martland, Ritchie, Spence and Laskin JJ.

Judgment: March 30, 1972

Counsel: *B. W. F. McLoughlin*, for appellant.
*C. C. I. Merritt, Q. C.* and *H. A. McCandless*, for Royal Bank of Canada.
*R. J. Harvey, F. R. Read* and *J. S. Clyne*, for Bank of Montreal.

**Related Abridgment Classifications**
Bills of exchange and negotiable instruments
III Cheques
III.11 Forged or unauthorized cheques
III.11.a Forged cheques
III.11.a.ii Duty of customer to notify bank
III.11.a.ii.B Verification agreements

**Headnote**
Banking and Banks --- Cheques — Forged or unauthorized cheques — Forged cheques — Duty of customer to notify bank
Banks and banking — Fraud by customer's employee — Name of drawer of cheque forged — Effect of verification agreement between bank and customer — Liability of bank.
Appeal from the judgment of the British Columbia Court of Appeal, [1971] 3 W.W.R. 241, 19 D.L.R. (3d) 420, dismissing an appeal from the judgment of Seaton J., 72 W.W.R. 19, 9 D.L.R. (3d) 693. Appeal dismissed.
One S., an accountant employed by appellant, having access to appellant's cheque forms, forged cheques drawn on the respondent Royal Bank which totalled over the years $165,109.03. Some of the cheques were taken directly to the Royal Bank while others were deposited to the credit of accounts, or negotiated for cash, at other banks, including the respondent Bank of Montreal. Appellant claimed against the Royal Bank for debiting its account without authority, alternatively for conversion or negligence, and against the Bank of Montreal for conversion, for negligence or for money had and received. Between appellant and the Royal Bank there was at all material times a written "verification agreement" which placed on appellant the responsibility of protesting the correctness of statements furnished by the bank to its customer within a stated period of time following its receipt, failing which their correctness was to be conclusively presumed.
*Held* that the appeal must be dismissed; the verification agreement provided the Royal Bank with a complete defence to appellant's action; that agreement was a contract defining the terms on which the bank continued appellant's account; the debits entered in appellant's account paid by the banks were "debits wrongly made" within the terms of the agreement and appellant's failure (with one exception) to give notice freed the bank from any claim in respect of them. For the reasons given below, and by Laskin J. in this Court, the claims against the respondent Bank of Montreal must also be dismissed.

***Martland J.*** **(Abbott, Ritchie and Spence JJ. concurring):**

1 This is an appeal from the unanimous judgment of the Court of Appeal for British Columbia, [1971] 3 W.W.R. 241, 19 D.L.R. (3d) 420, which dismissed the appellant's appeal from the trial judgment, 72 W.W.R. 19, 9 D.L.R. (3d) 693.

2 The appellant's claim was made in respect of 73 forged cheques which, over a period of 5 years, had been paid out by the respondent, the Royal Bank of Canada, hereinafter referred to as "Royal", and which had been debited to the appellant's account with that bank. The total amount of these cheques was $165,109.03. Of these cheques, the forger, Seear, an employee of the appellant, had deposited with the respondent, Bank of Montreal, hereinafter referred to as "Montreal", cheques in the total amount of $128,418.23, on which Montreal had collected that amount from Royal.

3 Seear, in 1963, had become chief accountant and office manager of the appellant. His practice was to use the appellant's printed blank cheque forms, by filling in the name of a payee, or cash, and an amount. He would forge the signatures of the appellant's officers authorized to sign its cheques. He cashed the cheques made payable to cash at the Royal. Some of the others were deposited with Montreal to the credit of certain trade names adopted by Seear. From time to time he withdrew the moneys in these accounts. It was not until May 1968 that an audit revealed that the seventy-third of the cheques above mentioned, in the amount of $9,077.14, was a forgery, and notice was then given to Royal.

4 In 1962 the appellant had entered into an agreement with Royal in the following terms:

> In consideration of THE ROYAL BANK OF CANADA (hereinafter called the 'Bank') opening or continuing an account with the undersigned, the undersigned hereby agrees with the Bank in respect of each account with the undersigned now or hereafter kept by the Bank at any of its branches or agencies to verify the correctness of each statement of account received from the Bank and if a statement of account and relative vouchers are not received by the 10th day after the end of each month or, if statements are not to be prepared monthly, by the 10th day after the end of the term agreed on for their preparation to obtain them from the Bank and within 30 days after the time when they should have been received to notify the Bank in writing at the branch or agency where the account is kept of any alleged omissions from or debits wrongly made to or inaccurate entries in the account as so stated and that at the end of the said 30 days the account as kept by the Bank shall be conclusive evidence without any further proof that except as to any alleged errors so notified and any payments made on forged or unauthorized endorsements the account contains all credits that should be contained therein and no debits that should not be contained therein and all the entries therein are correct and subject to the above exception the Bank shall be free from all claims in respect of the account.
>
> Dated at Vancouver, this 6th day of August, 1962.
>
> ARROW TRANSFER CO. LTD. General A/C
>
> [Sgd.] J. W. Charles
>
> [Sgd.] G. T. Campbell

5 The primary claim of the appellant against Royal was that it had paid out the total amount in question without authority from the appellant. Royal's defence to this claim was based upon the agreement set out above, hereinafter referred to as the "verification agreement". No notice to Royal had been given by the appellant within the time prescribed in the agreement in respect of any of the forged cheques, except only the last one. The appellant recovered judgment in the amount of that cheque, i.e., $9,077.14, but its action in respect of the remainder of its claim, i.e., $156,031.89, was dismissed.

6 The claim of the appellant against Montreal was for $128,418.23 as money had and received by it to the use of the appellant, or, alternatively, as damages for conversion of that amount. This claim was dismissed.

7 I agree with the opinions expressed in the Court of Appeal that the verification agreement provided Royal with a complete defence to the action. That agreement is a contract, defining the terms upon which the bank continued the account of the

# Court of Queen's Bench of Alberta

**Citation: Chapman Management & Consulting Services Ltd. v. Kernic Equipment Sales Ltd., 2004 ABQB 870**

2004 ABQB 870 (CanLII)

**Date:** 20041209
**Docket:** 9901 17749
**Registry:** Calgary

Between:

**Chapman Management & Consulting Services Ltd.**

Plaintiff

- and -

**Kernic Equipment Sales Ltd.**

Defendant

---

**Reasons for Judgment**
**of the**
**Honourable Mr. Justice P.J. McIntyre**

---

## I. NATURE OF ACTION

### A. Introduction

[1] This case involves the Kernic Trim Collection System, a system supplied by Kernic Equipment Sales Ltd. ("Kernic") to Commercial Bindery and Mailing Services Ltd. ("CBM") for managing waste produced during book binding operations. CBM was owned solely by Garth Chapman.

[2] This action alleges that the Trim Collection System was defective. The Plaintiff claims this led to severe operational problems at its plant, caused by excess dust and poor waste collection. CBM alleges the poor performance of the Kernic System resulted in CBM being unable to meet its customers' deadlines as planned, which caused its costs to skyrocket, and eventually saw CBM declare bankruptcy.

[172] The Defendant submits that where it is reasonable to do so, the Court should enforce exculpatory clauses. As per *Hunter*, *supra*, the only reasons for not enforcing an exculpatory clause are unconscionability or inequality of bargaining power, which the Defendant asserts are not present here. In this case, the Defendant submits, two commercial parties of their own free will contracted to this agreement, including the exclusion clause. Kernic gave a 1-year promise, and Chapman gave up the right to do anything beyond returning the Blue Box for the purchase price. It argues that Garth Chapman had seen the exclusion clause, and initialled the page to indicate his acceptance of it.

[173] The Defendant argues there was no fundamental breach here - the breach was not fundamental because CBM achieved the revenues it had forecasted. Furthermore, reference letters from CBM's customers stated they were happy with the product they received from CBM - the only evidence the Court is faced with regarding the severity of the problems encountered is CBM employees' testimony.

[174] Furthermore, based on the facts presented, the Defendant submits there was no specific defect proven, and that the Plaintiff's allegations of what went wrong are vague. The Plaintiff has no engineering proof of a defective design, only anecdotal evidence. It notes the Plaintiff's engineer, James Adams, was unable to reach a definitive conclusion on what went wrong.

## VII. FINDINGS OF FACT

### A. Findings on Adverse Inferences

[175] In the absence of an explanation, the failure of a party to civil litigation to call a witness who would have knowledge of the facts being disputed and would presumably be willing to assist that party can lead to an adverse inference being drawn: *Spartan Developments Ltd. v. Capital City Savings & Credit Union Ltd.*, 2004 ABCA 12. When CBM entered receivership and bankruptcy, the receiver sold the binding machinery and Blue Box to another binding company, Alberta Trade Bindery. The Plaintiff alleges that Alberta Trade Bindery experienced the same type and degree of operational problems with the Blue Box as CBM had, ultimately leading to Alberta Trade Bindery ceasing to use the Blue Box. This allegation is supported by the evidence of Cam Wilson and Matt Chapman, who both stayed on as employees when Alberta Trade Bindery took over.

[176] Accordingly, the Plaintiff submits the failure of the Defendant to call the President of Alberta Trade Bindery, Fred Dettmers, to testify and rebut this allegation requires the Court to draw an adverse inference against the Defendant's case.

[177] The Defendant responds by arguing that adverse inferences work both ways. It submits the failure of the Plaintiff to call Dettmers to testify and expand on the continued problems Alberta Trade Bindery encountered with the Blue Box should lead to an adverse inference against the Plaintiff's case. The Defendant correctly submits that it is the Plaintiff who bears the

2004 ABQB 870 (CanLII)

onus of proof in this action, and that if Alberta Trade Bindery's alleged problems with the Blue Box form part of its evidence, the Plaintiff should have called Dettmers.

[178] Additionally, the Defendant highlights the Plaintiff's failure to call Vern Hebner, the Plant Manager at CBM during the time these problems were occurring. They suggest the failure of the Plaintiff to call such a crucial witness leads to the presumption that the evidence Vern Hebner would have given would have hurt the Plaintiff's case. Specifically, it notes the Plaintiff could have called Vern Hebner to testify that the baler test did not work but did not do so.

[179] Adverse inferences from failing to call witnesses are essentially matters of common sense. I will deal with the witnesses identified by the parties about whom adverse inference may be drawn. Vern Hebner was the plant manager for CBM. I would have expected the Plaintiff to call him. Not doing so leads me to draw the inference that he would not assist the Plaintiff in its case as to the problems with the Kernic. I will refer to the significance of failing to call him again later.

[180] I consider the failure by the Plaintiff to call Fred Dettmers, the owner of Alberta Trade Bindery, to work adversely to the Plaintiff's case. Matt Chapman and Cam Wilson were not in managerial positions at Alberta Trade Bindery. They cannot speak to the reason that Alberta Trade Bindery stopped using this Blue Box, as this was a managerial decision. To the extent that they are impliedly reporting Fred Dettmers' decision, that is inadmissible hearsay.

### B. Findings on David Gillie's Evidence

[181] While I endorse the comments previously made in *Peters*, cited above, I do so with qualification to the type of evidence the witness is giving. If a witness is testifying about observations of a car accident, or recollections of a crime scene, I find the proposition that their memory would become more clear with the passage of time difficult to accept. However, in a case such as this one, where a witness is testifying about detailed business conversations and activities of which notes and records were kept, I find it possible that upon reviewing these notes and records before trial - notes that the witness may not have had a chance to review before examinations for discovery - a witness' memory of the events in question may be refreshed and clarified.

[182] Having made that observation, I did not find Gillie to be a particularly helpful witness. I was startled by some of the changes between the discoveries and his testimony. However, I am not prepared to find he was coached to change his testimony. In my view, his testimony had to be looked at with caution.

### C. Findings on Expert Evidence Regarding Liability

[183] With respect to the expert witnesses on liability, I prefer the evidence of James Adams. He had the tremendous advantage of being at CBM while it was operating the Kernic System. He

2004 ABQB 870 (CanLII)

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Casa Rio Developments Ltd. v. Hooymans,* 2014 BCCA 287

Date: 20140717
Docket: CA040240

Between:

**Casa Rio Developments Ltd.**

Appellant
(Plaintiff)

And

**Vikki Hooymans, I-Tech Electrical Services Ltd. and Ronald J. Ethier**

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated August 16, 2012 (*Casa Rio Developments Ltd. v. Hooymans*, Kelowna Docket S91259).

Counsel for the Appellant: D.J. Switzer

The Respondent R.J. Ethier appeared in person

Place and Date of Hearing: Kelowna, British Columbia
June 23, 2014

Place and Date of Judgment: Vancouver, British Columbia
July 17, 2014

**Written Reasons by:**
The Honourable Mr. Justice Chiasson

**Concurred in by:**
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Willcock

2014 BCCA 287 (CanLII)

2014 BCCA 287 (CanLII)

***Summary:***

*The appellant entered into a written Contract of Purchase and Sale with the corporate respondent for the purchase by the corporate respondent of a unit in a real estate development being undertaken by the appellant in Oliver, British Columbia. A dispute arose between the corporate respondent and the appellant regarding some unfinished electrical work the respondent was to do for the project. Consequently, payment for some of this work remained outstanding. The respondent contended that it did not have to complete the purchase until all deficiencies were remedied. The appellant disagreed and terminated the contract for non-performance by the respondent. On a summary trial, the judge agreed with the appellant's interpretation of the contract, but held it was estopped from contending it did not have to remedy the deficiencies because a real estate agent who acted for both sides in the transaction represented to the contrary.*

*Held: appeal allowed. Neither estoppel nor material facts to support an estoppel were pleaded. Estoppel was not argued in this context. The judge erred finding an estoppel because it was not properly before the Court. Even if it were, there are many issues that would have had to be addressed that were not. The Supreme Court Civil Rules were amended in 2010 with the objective of facilitating the efficient disposition of disputes, but this did not affect the need for a clear delineation of issues and the positions of parties.*

**Reasons for Judgment of the Honourable Mr. Justice Chiasson:**

## Introduction

[1] This appeal illustrates the continuing importance of pleadings and examines some basic requirements for a finding of estoppel.

## Background

[2] On July 11, 2007, the appellant entered into a written Contract of Purchase and Sale (the "Contract") dated July 10, 2007 with the corporate respondent for the purchase by the corporate respondent of a unit in a real estate development being undertaken by the appellant in Oliver, British Columbia. On April 2, 2009, pursuant to an addendum to the contract, the corporate respondent was replaced by the respondent Ronald J. Ethier. Subsequently, steps were taken to add the respondent Vikki Hooymans as a party to the contract, but they were not completed.

e-mail to Ms. Karen Lewis, the realtor who was acting as dual agent on this transaction. He asked Ms. Lewis the following question:

> If Casa Rio deficiencies are not repaired, does this mean they get paid anyway? Does this prolong the closing date? They haven't fixed anything.

He added the following comment:

> Let's be honest, this worries me, Karen, the suite is unacceptable.

[57] Ms. Lewis responded on the same day by telling Mr. Ethier that he was correct and that "Casa Rio must fix all the deficiencies on the list before any funds can be released and this includes your deposit."

[58] Mr. Ethier has sworn that he relied upon the advice that he received from Ms. Lewis, that he was not obliged to complete until the deficiencies had been remedied. His evidence of reliance upon that advice is not challenged and I find that he did so.

[59] The contract itself was not terminated until the plaintiff made time of the essence again by its correspondence of May 20, 2009, and the new date stipulated for completion of May 27, 2009, had passed.

[60] I have found that Mr. Ethier relied upon the advice he received from Ms. Lewis. She was acting as agent for both parties in this transaction. In my view, Mr. Ethier was entitled to rely upon that advice.

[61] In the result, I conclude that the deposit should be released to Mr. Ethier.

[16] On this basis, the judge dismissed the appellant's claim.

## Position of the appellant

[17] The appellant asserts that the judge erred in holding that Mr. Ethier was not obliged to complete because he relied on the advice of the real estate agent. Alternatively, it contends that the judge's order cannot be sustained in light of the fresh evidence.

## Discussion

[18] The three basic requirements of an estoppel by representation are:

> a representation or conduct intended to induce a course of conduct on the part of the person to whom the representation is made;
>
> an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made;
>
> detriment to such person as a consequence of the act or omission.

2014 BCCA 287 (CanLII)

> (*Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co. Ltd*, [1970] S.C.R. 932).

[19] Estoppel is a technical principle on which there has been some disagreement concerning the type of representation required to give rise to an estoppel. Most authorities hold that the representation must be a statement of existing fact. The factual component of a representation of mixed fact and law likely can support an estoppel. It has been suggested that a statement relating to the interpretation of a contract would qualify (B. MacDougall, *Estoppel*, (Markham, ON: LexisNexis, 2012) at §4.75), but, in my view, this must be tempered by the fact that the ultimate interpretation of a contract is a question of law: *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37 at para. 13.

[20] Estoppel is somewhat of an extraordinary principle because it operates to bar a party from exercising otherwise available legal rights. The principle should be pleaded, but even when it is not as such, it is essential to plead material facts to support the application of the principle. In *32262 B.C. Ltd. v. McDonell,* [1998] B.C.J. No. 1503 (S.C.) at para. 47, Madam Justice Morrison observed:

> From the cases, it appears the requirement that estoppel be pleaded is not a strict rule. Where it appears clear either from the pleadings or the evidence or both that estoppel is at issue, I believe it is appropriate to consider the issue. The underlying concern is fairness. On one side, the court appears reluctant to be overly technical and deny a party the right to rely on estoppel just because it was not specifically called such in the pleadings, while at the same time, the court appears unwilling to make a determination based on an issue that the parties have not had an opportunity to fully address over the course of proceedings. Estoppel should not be sprung on a party at the last minute. It should only be considered if both parties have had a chance to present evidence and cross-examine witnesses on the matter; such that the parties have had the opportunity to fully address the issue.

I agree with this statement.

[21] In the present case, neither estoppel nor material facts to support an estoppel were pleaded. We are advised that estoppel was not argued in this context. Reference to the e-mail exchange with the real estate agent was made only as an

2014 BCCA 287 (CanLII)

# Court of Queen's Bench of Alberta

**Citation: Chevron Canada Resources v Canada, 2019 ABQB 418**

2019 ABQB 418 (CanLII)

**Date:** 20190606
**Docket:** 9701 07434
**Registry:** Calgary

Between:

**Chevron Canada Resources, a Partnership of Chevron Canada Resources Limited and Chevron Development Company Limited**

Plaintiff

- and -

**The Attorney General of Canada, the Louis Bull Indian Band, the Montana Indian Band and the Samson Indian Band**

Defendants

- and -

**Her Majesty the Queen In Right of Canada, the Louis Bull Indian Band, the Montana Indian Band and the Samson Indian Band**

Third Parties

---

**Reasons for Judgment**
**of the**
**Honourable Mr. Justice R.J. Hall**

---

Chevron's representations to the Crown by way of overpayment were somehow considered to be representations to the defendant Bands, the estoppel defence would fail because, as I have found in the discussion on the "Change of Position Defence" above, the defendant Bands did not rely on the representations to act on them, or in some way change their position to their detriment.

**Equitable Set off for Underpayment**

[170] As noted above, underpayments were also discovered at the same time as the overpayment of royalties was identified (in the fall of 1996). These relate to Chevron's improper deduction for a Gas Cost Allowance Rate ("GCA") when it did not own the plant. The Crown claims equitable set off in respect of the underpayments. Underpayment #1 accrued from 1977 through to January 1991. The amount claimed for Underpayment #1 was $501,111.98, adjusted following trial, as a result of the settlement with the Ermineskin Band, to $364,232.52. Those amounts are not in dispute. Chevron argues that the Crown brought its claim for Underpayment #1 after the expiry of the limitation period, as set out in the *Limitation of Actions Act*. Underpayment #2 continued from February 26, 1991 to October 7, 1996. The claim for set off of Underpayment #2 is not in issue and Chevron agrees it should be deducted from the overpayment claim.

[171] The defendant Bands have not advanced a claim in respect of the underpayments.

[172] The issues for determination are: (1) Does limitations legislation apply to the claim for equitable set off of Underpayment #1 for the 1977-1991 period?; (2) Should Underpayment #1 be set off against the overpayments?; and (3) If so, does set off apply to any amounts found owing by the defendant Bands for the overpayment?

**Limitation Period**

[173] The Statement of Claim was issued in this action on May 23, 1997, and the Crown's Counterclaim was advanced in July 1999. The applicable limitations statute in place at the time the action was commenced is the *Limitation of Actions Act*, which provides at section 4(1)(c)(i) that actions for the recovery of money must be commenced within six years of when the cause of action arose. The underpayments combined in Underpayment #1 are outside the six-year period.

[174] I agree with the Crown that equitable set off is a substantive defense to which a statutory limitation period is inapplicable: ***Pierce v Canada Trustco Mortgage Co*** (2005), 254 DLR (4th) 79 (ONCA) [***Canada Trustco***] at para 46, leave to appeal to SCC refused, 31044 and 31045 (20 October 2005).There, the Ontario Court of Appeal noted that there was no Canadian case directly on point at that time on the issue of whether legal and equitable set off should be treated the same for the purpose of application of a statutory limitation period. The Court explained, at paragraphs 43 to 45:

> 43 ... However, there is clear authority in the United Kingdom that equitable set off is a substantive defence to which a statutory limitation period is inapplicable. The leading case is *Henriksens Rederi A/S v. Rolimpex*, [1973] 3 All E.R. 589 (Eng. C.A.), which involved a claim for recovery of freight charges. The defendant alleged that the goods came damaged and sought to raise the resulting damages by way of an equitable set off defence. Under the applicable Hague Rules, the claim for damages was statute barred. However, Denning L.J. held that

2019 ABQB 418 (CanLII)

equitable set off is a true substantive defence that is not subject to a limitation period. He said, at pp. 593 and 595-96:

> In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a *defence* and one which is in the nature of a *cross-claim*. When a defendant is sued, he can raise any matter which is properly in the nature of a *defence*, without fear of being met by a period of limitation. No defence, properly so-called, is subject to a time-bar [emphasis in original].
>
> ...
>
> Although it is often described as an 'equitable set off', it would, I think, be more accurately stated to be an 'equitable defence'... When the contractor sues for the contract price, the employer can say to him: 'You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me.' It is on a par with the case of a defendant who says that the plaintiff has repudiated the contract by an anticipatory breach, or that the plaintiff has been guilty of a breach going to the root of the contract. On accepting it, the defendant is discharged from further performance and can set up the breach as a defence. So also with any breach by the plaintiff of the selfsame contract, the defendant can in equity set up his loss in diminution or extinction of the contract price. It is in the nature of a defence. As such it is not subject to time-bar.

44 Lord Denning's view was approved by the English Court of Appeal in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* (1993), [1994] 4 All E.R. 890 (Eng. C.A.), at 945 and applied in *Filross Securities Ltd. v. Midgeley* (1998), 31 H.L.R. 465 (Eng. C.A.). This position has also been adopted in Australia in *Australian Mutual Provident Society v. Specialist Funding Consultants Pty Ltd.* (1991), 24 N.S.W.L.R. 326 (New South Wales S.C.) and *Sidney Raper Pty Ltd. v. Commonwealth Trading Bank of Australia*, [1975] 2 N.S.W.L.R. 277 (New South Wales C.A.).

45 In my view, the English and Australian authorities are particularly persuasive in light of Wilson J.'s judgment in *Telford v. Holt*. In that judgment, Wilson J. synthesized the principles developed by the English courts of equity over the last 200 years. Thus, it is entirely appropriate to have regard to English cases in order to interpret the law of set off in Canada. Similarly, the Australian case law is drawn directly from the jurisprudence of the English courts and is, therefore, also persuasive in this domain. Finally, I note that in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at 70, La Forest J. cited s. 2 of the *Limitations Act*, R.S.O. 1980, c. 240, and observed that it "gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases."

2019 ABQB 418 (CanLII)

[175] Chevron relies on *obiter* in the Alberta decision of ***Fabutan Corporation v Clement***, 2007 ABQB 750, where this Court concluded, at paragraph 14: "...I am not convinced that, even if the Defendants had not contracted out of the right to use set off, that claiming set off for a limitation-barred claim is permissible as a claim for legal or equitable set off." It appears to me that the Court is expressing doubt that the claim advanced would meet the test for either legal or equitable set off, not that the limitation period should apply to such claims. In support of my view, I point to paragraph 13, where the Court noted that counsel for the Defendants "were unable to point to any nexus, connection, or relationship between the proposed "set off" claim and the claim advanced by the Plaintiff".

[176] The issue, therefore, is whether Underpayment #1 is properly claimed by way of equitable set off, with the result that the six-year statutory limitation period does not apply.

**Test for Equitable Set off**

[177] The Supreme Court of Canada has stated that: "Equitable set off is available where there is a claim for a money sum whether liquidated or unliquidated": ***Telford v Holt***, [1987] 2 SCR 193 [***Holt***] at para 27.

[178] The principles that apply for equitable set off are described in ***Holt*** at paragraph 35:

> 1. The party relying on a set off must show some equitable ground for being protected against his adversary's demands;
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set off will be allowed;
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and,
> 5. Unliquidated claims are on the same footing as liquidated claims.
>
> [Citations omitted]

[179] The Crown says these principles are satisfied here. The equitable ground is unjust enrichment, as Chevron was enriched by deducting the GCA when it was not entitled to do so, and as a result, the Crown and the defendant Bands were deprived. The Crown further argues there is no juristic reason for this enrichment. As for the connection between the claim for overpayment and the claim for set off for underpayment, the Crown notes that the contract at issue is the same, the parties are the same, and the underpayment is the same in both periods of time (for Underpayment #1 and Underpayment #2).

[180] Chevron agrees that equitable set off applies to Underpayment #2, but argues that there is no equitable ground for granting set off for Underpayment #1. This is because, Chevron asserts, the Crown was eight and a half years late in filing its Counterclaim. Also, the Crown continued to advise Chevron that it was allowed to deduct GCA at the plant, even after being advised of the underpayments, and ignored requests from the First Nations to review GCA deductions. Chevron argues that the Crown's unreasonable delay in prosecuting its claim for Underpayment #1, and its continued participation in the mistaken deduction of GCA after this action was commenced

2019 ABQB 418 (CanLII)

# In the Court of Appeal of Alberta

**Citation: Chevron Canada Resources v Canada, 2022 ABCA 108**

**Date:** 20220323
**Docket:** 1901-0210AC;
1901-0211AC
**Registry:** Calgary

2022 ABCA 108 (CanLII)

**Between:**

**Chevron Canada Resources, a Partnership of Chevron Canada Limited, and Chevron Canada Development Company**

Respondents/Cross-Appellants
(Plaintiffs)

- and -

**The Attorney General of Canada**

Respondent/Cross-Respondent
(Defendant)

- and -

**The Samson Indian Band and the Louis Bull Indian Band**

Appellants/Cross-Respondents
(Defendants)

---

**The Court:**

**The Honourable Justice Frans Slatter**
**The Honourable Justice J.D. Bruce McDonald**
**The Honourable Justice Barbara Lea Veldhuis**

---

**Memorandum of Judgment**

Appeal from the Order by
The Honourable Justice R.J. Hall
Dated the 6th day of June, 2019
Filed on the 12th day of August, 2019
(2019 ABQB 418, Docket: 9701-07434)

2022 ABCA 108 (CanLII)

> Did the recipient change its position and make commitments it would not otherwise have made, but for the receipt of the funds?

The trial judge concluded that none of the Bands had established a change of position defence: reasons at paras. 150-53. The related defence of estoppel was also not established on this record: reasons at para. 169. There was therefore no defence to Chevron's claim for recovery of the overpayments.

*The Indemnity Claim*

[35] The Bands argued that they were entitled to be indemnified by Canada for the judgment granted against them to Chevron, because Canada was negligent and in breach of its fiduciary duties in not identifying the overpayments. The trial judge rejected this argument, because Canada's default had resulted in a windfall to the Bands, not a loss: reasons at para. 197.

[36] Canada argued that it had not been enriched, because the funds had simply flowed through to the Bands. The Bands were accordingly enriched, and Canada should be entitled to be indemnified for the judgment granted to Chevron against it. The trial judge concluded that the Band's arguments against indemnification were not sound, and that each Band had to indemnify Canada: reasons at paras. 201-202.

*The Final Result*

[37] The trial judge granted Chevron judgment against Canada and each defendant Band, jointly and severally. Each Band's liability was for its proportionate share of the overpayment:

| | |
|---|---|
| Samson Indian Band | $7,882,765 |
| Louis Bull Band | $1,967,506 |
| Montana Indian Band | $1,012,269 |

Canada was entitled to be indemnified by each defendant Band: reasons at paras. 211-215.

## Issues on Appeal

[38] At this stage, two of the Bands have settled the claim, leaving only the Samson Indian Band and the Louis Bull Indian Band as appellants. They appeal the judgment granted to Chevron against them, and the judgment requiring them to indemnify Canada.

[39] Chevron has been paid by Canada, and it is not entitled to be paid twice. Chevron's judgment against the Bands is therefore moot, except perhaps with respect to the issue of costs, and whether Canada is entitled to indemnity from the Bands or the trust funds.

2022 ABCA 108 (CanLII)

2022 ABCA 108 (CanLII)

[40] Canada did not appeal the judgment granted against it and (notwithstanding these pending appeals) has paid that judgment. There is no indication on this record that Chevron was not entitled to judgment for the mistaken payments, but even if there was such an error, Canada's liability is *res judicata*. A remaining issue therefore is the capacity in which Canada paid that judgment.

[41] Having paid the judgment, a further issue is whether there is any "change of position" defence that would preclude Canada from indemnifying itself from the trust funds.

[42] Finally, Chevron has launched a cross-appeal against the amount of interest on the overpayments that it was awarded at trial.

The Status of the Defendants

[43] Chevron asserted a claim for unjust enrichment and also for money had and received to its use as a result of mistaken payment. The latter cause of action is now largely assimilated into the former, but any remaining difference between the two does not affect the resolution of these appeals.

[44] A threshold problem with the pleadings and the judgment under appeal is the failure to recognize the status of the defendants. A trust is not a "person" in law. In the context of these appeals, the trusts are best seen as a pool of assets with respect to which certain persons have duties or entitlements. The legal title to the assets vests in the trustee. The trustee, however, must generally keep the trust assets segregated from the trustee's personal assets. The trustee cannot derive a personal benefit from those assets, and so cannot be personally "enriched" by any mistaken payment into the trust. The beneficiaries are the ones who can ultimately derive personal benefit, but (subject to a few exceptions) they do not control the trust assets, or claims by or against the trust. For the purposes of the law of unjust enrichment, any "enrichment" of the corpus of the trust should be distinguished from any long term benefit that the beneficiaries might obtain from such an enrichment.

[45] Canada at all times acted as a trustee and only as a trustee. At common law and under statute, all the trust property is vested in the trustee: *Trustee Act*, RSA 2000, c. T-8, s. 17(1). "*Vis-à-vis* the world the trustee is the 'owner', and the world is entitled to expect that the trustee, though a fiduciary, has indeed the power to act as an owner.": D. Waters, Law of Trusts in Canada, 2d ed, (Toronto: Carswell, 1984), p. 983. As far as Chevron was concerned, it was dealing with Canada as the owner of the Pigeon Lake oil reserves. Canada was entitled to be indemnified for its proper expenses out of the trust funds, but that was no concern of Chevron.

[46] However, while Canada had the legal title and was entitled to act as owner, it never had any beneficial interest in the Pigeon Lake Royalties. Because it is a breach of fiduciary duty for a trustee to derive any personal benefit from the trust assets, Canada could not be enriched personally by the overpayments; only the corpus of the trusts could be enriched. The judgment

# Court of Queen's Bench of Alberta

**Citation: Clark Builders and Stantec Consulting Ltd v GO Community Centre, 2019 ABQB 706**

**Date:** 20190913
**Docket:** 1503 15084
**Registry:** Edmonton

2019 ABQB 706 (CanLII)

Between:

**Clark Builders and Stantec Consulting Ltd**

Appellants

- and -

**GO Community Centre**

Respondent

---

**Reasons for Decision**
**of the**
**Honourable Mr. Justice W.N. Renke**

---

## Introduction

[1] Clark Builders and Stantec Consulting Ltd (Stantec) have appealed an Order of Master Birkett of May 10, 2018 (the Order). The Order dismissed the applications of Clark Builders and Stantec for summary dismissal of the action of GO Community Centre (GCC) against them, confirmed that GCC has standing to bring its action against both Defendants, and awarded costs to GCC.

[2] GCC had filed its action against Clark Builders and Stantec on September 30, 2015. The action concerns the construction of the GO Centre Sports Complex (the GO Centre), part of the Saville Community Sports Centre at the University of Alberta's South Campus. The focus of the litigation has been on the Defendants' alleged negligence in designing the heating, ventilation, and air conditioning (HVAC) systems for the GO Centre. GCC contracted with Clark Builders but it has no contract with Stantec.

> para 42]. It will not suffice to wait idly for information to come to hand. Some research and inquiry may be expected of a reasonable plaintiff as part of determining what ought to have been known[: ***Saxton v Credit Union Deposit Guarantee Corporation***, 2004 ABQB 631, paras 29 and 30; ***Owners: Condominium Plan 9421549 v Main Street Developments Ltd.***, 2004 ABQB 962, revd on other grounds 2006 ABCA 194, para 74(QB)]. The burden is not high to establish at least a triable issue on due diligence, but it is usually expected that the plaintiff to put forward some evidence of steps taken to ascertain the identity of tortfeasors and give a reasonable explanation for why information was not obtainable with due diligence earlier – and doing nothing for two years after an accident except possibly requesting a police report will not usually amount to due diligence [***Wakelin v Gourley*** (2005), 76 OR 272 (Ont M), paras 25 and 26; affirmed, [2006] OJ No 2764]. [footnotes omitted but citations added to text]

What a claimant knew will inform what the claimant ought to have known in the circumstances.

**3. Facts, Not Law, Not Assurance of Success**

[258] Discovery relates to the facts, not the applicable law or any assurance of success: ***Weir-Jones Technical Services*** at para 56; ***Templanza v Wolfman***, 2016 ABCA 1 at para 19, leave to appeal refused [2016] 2 SCR xi; ***De Shazo v Nations Energy*** at para 31; ***Main Street Developments*** at paras 55-56(QB). Thus, "knowledge" refers to knowledge of the facts supporting a claim, not knowledge that, in law, the facts support a claim: ***Laasch v Turenne***, 2012 ABCA 32 at para 24; ***CNRL v Jensen Resources*** at para 43; ***Stobbe v Paramount Investments Inc***, 2013 ABCA 384 at para 15; ***Luscar Ltd v Pembina Resources Ltd***, 1994 ABCA 356 at para 129.

**4. Injury**

[259] With respect to s. 3(1)(a)(i), what is required is knowledge of the injury, not knowledge of whether there is a cause of action: ***Oxford Grande*** at para 20; ***Sun Gro Horticulture Canada Ltd v Alberta Metal Building Sales Inc***, 2006 ABCA 243 at para 11.

[260] Further with respect to s. 3(1)(a)(i), what is required is knowledge of the injury not knowledge of the cause of the injury: ***Oxford Grande*** at para 12.

**5. Warranted**

[261] The "warranted" element requires a type of cost-benefit assessment. The assessment is not finely balanced, as if an action were warranted as soon as "the costs of the action are just outweighed by the benefits:" ***Novak v Bond***, [1999] 1 SCR 808, McLachlin J, as she then was, at para 87.

[262] According to Justice McLachlin in ***Novak v Bond***, the test for whether injuries "warrant" bringing a proceeding is whether

> a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could – not necessarily should – bring an action. This approach is neither purely subjective nor purely objective. The question becomes: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" The reasonable person would only consider that the plaintiff

2019 ABQB 706 (CanLII)

> could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. Purely tactical considerations have no place in this analysis.

See ***JN v GJK***, 2004 ABCA 394 at para 14; ***Laasch v Turenne*** at para 19.

[263] On the subjective/objective features of this approach, Justice Hunt-McDonald wrote in ***Currie v Craig***, 2018 ABQB 46 at paras 40-41 that

> [40] The Alberta Law Reform Institute's report on limitations (*Alberta Law Reform Institute, Limitations, Report No. 55* (December 1989) [ALRI Report]) has been relied on by the courts when interpreting the Limitations Act: see e.g. *Keyland Development Corporation v Rocky View (Municipal District No 44)*, 2016 ABQB 735 at paras 107, 109. The ALRI Report states that the discovery period "will not begin until the claimant first knew that his injury was sufficiently serious to have warranted bringing a proceeding" and that the effect of the discovery rule is to "invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time ...": ALRI Report at 24, 33.
>
> [41] Accordingly, there are subjective and objective elements in the analysis of when an action must be commenced. For the subjective part of the test, the Court must examine the situation from the plaintiff's perspective; the Court must then determine objectively when a proceeding is warranted: ***RP Choma Financial and Associates Inc v McDougall***, 2008 ABQB 359 at para 51.

[264] Factors relevant to s. 3(1)(a)(iii) concern not whether the claimant knew or should have known about the injury but whether there were circumstances that did not warrant (or urged or militated against) bringing an action.

[265] The "warranted" factors relate to a claimant's knowledge, economic factors, and any practical impediments faced by the claimant. As for "knowledge," Justice Hunt-McDonald cautioned in ***Currie v Craig*** at para 42 that

> [42] It is clear that s. 3(1)(a)(iii) allows for situations where knowledge of the injury is not sufficient to immediately warrant bringing a proceeding. The courts may decide in such cases to delay the start of the limitation period accordingly: ***Yugraneft Corp v Rexx Management Corp*** … at para 58.

[266] Justice Clackson canvassed economic factors in ***Main Street Developments*** at para 63(QB):

> It is not every nick, bump, bruise, failing or deficiency that warrants action. Thankfully, we Canadians are still reasonably tolerant and non litigious. The question of whether an injury warrants proceedings is not strictly an issue of fault, or even potential economic gain. What warrants proceedings embraces a consideration of the extent of the injury in comparison to the economics of a prospective action. This assessment involves a blended objective/subjective analysis.

And at para 72(QB):

> [72] In my view, it would have been reasonable to consider the following matters: the extent of the damage, the cost of remedying the damage, the

2019 ABQB 706 (CanLII)

> likelihood of success, the cost of proceedings, the likely time necessary to achieve success, the time to be personally expended by the Board's members in pursing action, the willingness of the individual owners to finance the litigation, the complexity of the potential litigation, whether the entire costs of the proceedings would have to be paid up front, and whether all or a portion of the litigation could be undertaken by contingency arrangement. No doubt, there are other matters which it might have been reasonable to consider in this case. However, the foregoing is representative of the kind of issues that a cost benefit analysis might reasonably encompass in this Plaintiff's circumstances.

See also ***R P Choma Financial v McDougall***, Hanebury M at paras 48 – 49.

[267] Justice Jones discussed a claimant's "practical ability" to bring an action in ***Champagne v Sidorsky***, 2017 ABQB 557 at paras 33-34:

> [33] The Alberta Court of Appeal first noted in ***N.(J.) v Kozens***, 2004 ABCA 394 at para 14 that the phrase "warrants bringing a proceeding" involves determining the point at which a Plaintiff could reasonably have brought an action. In ***Amack v Yu***, 2015 ABCA 147 at para 44, the court explained that the analysis is not narrowly confined to economic considerations. The phrase "could reasonably have brought an action" raises the question of practical ability. In each individual case, the Court explained, the judge must determine whether particular circumstances or interests have the practical effect of preventing a plaintiff from being able to commence an action.
>
> [34] In ***Gayton***, the court quoted from para 15 of ***Kozens*** to provide some examples of when a Plaintiff may not reasonably be able to bring an action, when viewed objectively with regard to the Plaintiff's own situation. These include when:
>
> > (a) the costs and strains of litigation would be overwhelming to him or her;
> >
> > (b) the possible damages recoverable would be minimal or speculative at best; or,
> >
> > (c) other personal circumstances combined to make it unfeasible to initiate an action.

See ***Novak v Bond*** at para 40.

**C. What does the Record Disclose?**

[268] After setting out some background information, I will describe the evidence chronologically, for the most part. Proper treatment of some developments will require stepping out of then back into the sequence of events.

**1. Background**

[269] The GO Centre was substantially completed in May 2011 and commissioned and "transferred" to the University in about June 2011. The GO Centre was operational as of about June 2011.

[270] On the evidence, GCC and the GCC Partners had a presence in the GO Centre from its inception:

2019 ABQB 706 (CanLII)

# Court of Queen's Bench of Alberta

**Citation: Deerland Farm Equipment (1985) Ltd. v. 626343 Alberta Ltd., 2003 ABQB** 1027

**Date:** 20031212
**Docket:** 0103 17343, and 0103 18260
**Registry:** Edmonton

2003 ABQB 1027 (CanLII)

Between:

No. 0103 17343

**Deerland Farm Equipment (1985) Ltd.**

Plaintiff

- and -

**626343 Alberta Ltd. and Stadnick Land & Cattle Co. Ltd.**

Defendants

And Between:

**Stadnick Land and Cattle Co. Ltd.**

Plaintiff

- and -

**Deerland Farm Equipment (1985) Ltd., John Deere Limited, John Deere Consumer Products Limited, John Deere Company, John Deere Credit Inc., and John Deere Finance Limited**

Defendants

And Between:

**626342 Alberta Ltd. and Stadnick Land & Cattle Co. Ltd.**

Plaintiff by Counterclaim

-and-

**Deerland Farm Equipment (1985) Ltd.**

Defendant by Counterclaim

-and -

**John Deere Limited, John Deere Consumer Products Limited, John Deere Company, John Deere Credit Inc., John Deere Finance Limited, John Deere Harvester Works and Deere & Company**

Defendants by Counterclaim

Action No. 0103 18260

Between:

**Clayton Richard Stadnick, Richard John Stadnick, Stadnick Land & Cattle Company Ltd., 6263442 Alberta Ltd., and Her Majesty the Queen in Right of Alberta, as Represented by the Minister of Health and Wellness**

Plaintiffs

- and -

**Deerland Farm Equipment (1985) Ltd., John Deere Limited, Joyhn Deere Consumer Products Limited, John Deer Company, John Deere Credit Inc., John Deere Finance Limited, John Deere Harvester Works, Deere & Company and David Timothy Wilchak**

Defendants

AND BETWEEN:

**626343 Alberta Ltd.**

Plaintiff

- and -

**Deerland Farm Equipment (1985) Ltd., John Deere Limited, John Deere Consumer Products Limited, John Deere Company, John Deere Credit Inc., and John Deere Finance Limited**

Defendants

AND BETWEEN:

**In the Matter of S. 64 of the Personal Property Security Act (Alberta) and in the Matter of Rule 168 of the Alberta Rules of Court**

**626343 Alberta Ltd.**

Applicant

- and -

**John Deere Credit Inc**.

Respondent

2003 ABQB 1027 (CanLII)

---

**Memorandum of Decision**
**of**
**W. Breitkreuz, Master in Chambers**

---

2003 ABQB 1027 (CanLII)

[1] The plaintiff, Deerland Farm Equipment (1985) Ltd. applies for summary judgment and the defendants, 626343 Alberta Ltd. and Stadnick Land & Cattle Co. Ltd. resist that and apply to have their counterclaim which was filed about 10 weeks after their statement of defence to be approved nunc pro tunc. Any reference to the plaintiff and defendants hereafter will mean this plaintiff and these defendants in action No. 0103 17343.

[2] The plaintiff's claim is for the balance of rental owing on a number of pieces of equipment leased by the plaintiff to the defendants. The lease agreements were assigned to John Deere Credit with recourse; there is alleged default, John Deere Credit reassigned the leases to the plaintiff upon payment by the plaintiff to the amounts allegedly owing, and the plaintiff now claims for those amounts.

[3] The thrust of the plaintiff's argument is that the defendants have contracted out of the various defences ordinarily available to a defendant in these circumstances and accordingly the principles relating to set-off are not available to the defendants in these circumstances. I do not agree.

[4] The defendants have evidence to support their argument that there were problems with the leased equipment that can be construed by a trial judge as amounting to a fundamental breach of the various lease contracts which go to the heart of the contracts, and in those circumstances the principles of set-off must be applied as a matter of fairness and equity.

[5] The test to be applied in an application for summary judgment has been stated in various ways by numerous courts including our Court of Appeal. One of the ways of stating the test is found in ***German v. Major et al***, (1985) 30 Alta.L.R. (2d) 270 as whether "it is plain and obvious that the action cannot succeed." It is obvious from the quote that it was the defendant applying for summary judgment.

[6] Other cases speak of the material clearly demonstrating that the action is bound to fail. Or that the claim has no reasonable prospect of success.

[7] Obviously that must be read in my case to mean that a defence has no prospect of success, or that the material clearly demonstrates that the defence is bound to fail, or that it is plain and obvious that the defence must fail.

[8] I clearly cannot do that in this case. There is evidence from officers of the defendants that repairmen or fieldmen from the plaintiff's business were sent out to the defendants' farm to correct problems with the various implements. The evidence is that there were numerous re-occurring problems of such a nature that the defendants were finally frustrated with the inability of the equipment to perform the work they were designed to perform and the equipment ended up returned to the plaintiff. The plaintiff apparently has no records of such service trips to the defendants' farm. Apparently no records are kept when equipment is repaired while it is under warranty. As already stated, I do not believe it is appropriate to grant summary judgment in those circumstances.

[9] I realize there are a number of arguments that can be made against the defendants' position because of the strict wording of the contract, but I am not convinced for purposes of a summary judgment application that the defendants' arguments and evidence are so inconsequential or trivial that they ought not to proceed to trial.

[10] The matter of the defendants' application for leave to file the counterclaim nunc pro tunc cannot be separated from the question of whether this is an appropriate case for equitable or legal set-off.

[11] The principles governing set-off have been thoroughly examined in the Supreme Court of Canada case of ***Holt v. Telford***, (1987) 54 Alta. L.R. (2d) 193.

[12] The Supreme Court of Canada accepted the principles laid down by the British Columbia Court of Appeal in ***Coba Industries Ltd. v. Millie's Holdings***, (1985) 6 W.W.R. 14. Each of the principles is derived from a specific English decision, and they are as follows:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: ***Rawson v. Samuel*** (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [***Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt. (U.K.) Ltd.***, (1980) Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: [***Fed. Commerce and Navigation Co. v. Molena Alpha Inc.***, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The Plaintiff's claim and the cross-claim need not arise out of the same contract: ***Bankers v. Jarvis***, [1903] 1 K.B. 549 (Div. Ct.); ***Br. Anzani***.

2003 ABQB 1027 (CanLII)

5. Unliquidated claims are on the same footing as liquidated claims: [Nfld. v. Nfld. Ry. Co. (1888)13 App. Cas. 199 (P.C.)].

[13] There cannot be any question whatever that the defendants' counterclaim meets every one of the tests approved by ***Holt v. Telford***.

[14] The plaintiff argues that a major hurdle facing the defendants in the late filing of their counterclaim is the limitation period. One must go to the Limitations Act, R.S.A. 2000, c. L-12, section 6 (2) which reads:

> (2) When the added claim
>
> (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
>
> (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,
>
> the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

[15] Section 6(1) of the Limitations Act reads as follows:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) and (4) are satisfied.

[16] Obviously the reference to "defendant" in section 6(1) must be read to include defendant by counterclaim.

[17] It must be noted that section 6(1) says the added claim need only satisfy subsection (2), (3) or (4). I also point out that subsub (a) and (b) of subsection (2) are also subjunctive. It is obvious that the defendants' counterclaim falls within the provisions of subsection (2) and in those circumstances no limitation period applies.

[18] It cannot be seriously argued that the 10 week delay in filing the counterclaim can have a large bearing in this matter and in fairness to Mr. Bieganek, it was not vigorously pressed.

[19] The plaintiff's application is dismissed. The defendants' application is allowed with costs.

2003 ABQB 1027 (CanLII)

Heard on the 26th day of November, 2003.
**Dated** at the City of Edmonton, Alberta this 12th day of December, 2003.

**W. Breitkreuz**
**M.C.C.Q.B.A.**

**Appearances:**

D. R. Bieganek
Duncan & Craig LLP
for the Plaintiff, Deerland Farm Equipment (1985) Ltd.

K. P. Feehan and L. B. Brookes
Fraser Milner Casgrain LLP
for 626343 Alberta Ltd. and the Stadnicks

S. J. Weatherill
Emery Jamieson
for John Deere Ltd.

2003 ABQB 1027 (CanLII)

**CITATION:** Espartel Investments v. MTCC No. 993, 2022 ONSC 4315
**COURT FILE NO.:** CV-18-00609321-0000
**DATE:** 20220819

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **BETWEEN:** | |
| ESPARTEL INVESTMENTS LIMITED<br>Plaintiff | Jonathan Kulathungam and Nipuni Panamaldeniya, for the Plaintiff |
| **– and –** | |
| METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 993<br>Defendant | Megan Mackey, for the Defendant |
| | **HEARD:** SEPTEMBER 13, 14, 15, 16, 17**,** December 3, 2021, by Zoom |

**A.P. RAMSAY J.**

## I. OVERVIEW

[1] The trial in this matter took place virtually, judge alone, over the course of six days. The plaintiff, Espartel Investments Ltd. ("the plaintiff") brings this action for damages for overpayments made to the defendant, Metropolitan Condominium No. 993 ("the defendant"), and also seeks interest under a Reciprocal Agreement between the parties. Alternatively, the plaintiff seeks damages for breach of contract and unjust enrichment.

[2] The plaintiff owns a hotel and commercial complex in Toronto. The defendant owns a larger complex adjoining a condominium registered as Metropolitan Toronto Condominium Corporation No. 993 ("the defendant"). The parties share certain facilities and in accordance with a Reciprocal Agreement, the parties are each responsible for paying their proportionate share of the costs associated with the maintenance, repair and service of the shared facilities. The parties share a health club and underground garage. Banquet facilities for the plaintiff's hotel are located in the defendant condominium building. The defendant pays the bills for the electricity consumed

2022 ONSC 4315 (CanLII)

in these areas then bills the plaintiff at the end of the year, sending the plaintiff an invoice, which is the end result of information inputted at year end in an Excel spreadsheet by which it calculated the amount owed by the plaintiff. The parties have used this system for years.

[3] After a retrofit in 2015, the plaintiff requested changes to the 2016 invoice. In 2017, the defendant retained a consultant who identified several errors, including a conversion error from watts to kilowatts on the spreadsheet and an error with respect to the garage. The errors, if corrected, resulted in a significant reduction in the amount owed by the plaintiff to the defendant. By virtue of the process agreed to by the parties to determine the charge back for electricity to the plaintiff, the errors are longstanding.

[4] The plaintiff seeks to recover overpayments made to the defendant from 2006 to 2015. The plaintiff commenced this action by way of statement of claim issued on November 21, 2018. The plaintiff submits that it was not until August 22, 2017, when the plaintiff was advised of the errors discovered by the defendant's consultant, that the plaintiff discovered that it had been overpaying for hydroelectricity. The plaintiff relies on the ten-year limitation period under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 or, alternatively, the two-year limitation period under the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B.

[5] The defendant submits that the claims are barred by the two-year limitation period under the *Limitations Act*, 2002, and argues that the ten-year limitation period under the *Real Property Limitations Act* does not apply. The defendant pleads, as a defence, a right to set off amounts for alleged underpayment in electricity and water costs by the plaintiff for the same period of time, and, in support of its claim for set off, relies primarily on a report it commissioned from an electrical engineer prior to the litigation.

## II. THE PARTIES AND THEIR POSITIONS

### *i. The Plaintiff*

[6] The plaintiff is the owner and operator of Ramada Hotel on Jarvis Street in Toronto, as well as a commercial retail condominium which is part of the same complex.

[7] The plaintiff contends that the sole dispute is the historical errors in calculating the electricity and the allocation of the hydroelectricity costs between the plaintiff and the defendant. It submits that the parties have operated for over 20 years utilizing an agreed upon Utility Agreement. In or around 2015, the plaintiff performed an electrical retrofit, installing lower wattages energy efficient bulbs in certain areas. The plaintiff submits that it was not until the report of the defendant's consultant in 2017 that the plaintiff discovered the errors in the Utility Agreement which has existed for years and resulted in the plaintiff overpaying for hydroelectricity.

[8] The plaintiff submits that it is the defendant who is asking the court to re-interpret the Utility Agreement and to rewrite the Utility Agreement between the parties. The plaintiff argues that there is no error in the Utility Agreement which requires any "rectification." The errors were

2022 ONSC 4315 (CanLII)

[138] While in some cases suspicion may trigger that exercise as was the case in *Crombie*, that case is distinguishable as the motion judge concluded that the claims were readily available and discoverable.

[139] On the evidence before me, this case is most similar to *Van Allen v. Vos*, 2014 ONCA 552, 121 O.R. (3d) 72 [*Van Allen*], and the principle of "reasonable discoverability" would apply. In that case, the parties were partners in a dental practice for 20 years, but it was only after the termination of the partnership that the plaintiff's accountant discovered that the profits of the partnership had not been distributed in accordance with the parties' agreement for several years. The Ontario Court of Appeal held that under section 5(1)(b) of the *Limitations Act*, it is reasonable discoverability – rather than the mere possibility of discoverability – that triggers a limitation period: *Van Allen* at para. 34.

[140] The error was not evident on the face of the Utility Agreement or invoice. If an error is not apparent on the face of documentation (i.e., error in conversion of wattage in a formula) then it is not reasonably discoverable and therefore the limitation period under section 5(1)(b) is not triggered: *Van Allen*, at para. 34.

[141] The evidentiary threshold for a "reasonable explanation on proper evidence" as to why the claim could not have been discovered through the exercise of reasonable diligence is low, and the plaintiff's explanation should be given a generous reading and considered in the context of the claim: *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at para. 32. Beyond that though, there is overwhelming evidence of a reasonable explanation and due diligence by the plaintiff. Thompson testified that at various times he was tasked with going through to ensure the bills were inputted correctly. On the evidence before the court, the defendant did input the bills correctly. They even arrived at the correct costs per unit, but in the actual implementation of the formula, though it indicated kWH for all to see, the defendant failed to actually convert wattage from watts to kilowatts. Since the defendant had the Word document and was responsible for its implementation to produce the Utility Agreement, the defendant should have caught the error, but did not. The errors though became imbedded, in a sense, and as the parties suggested, may have existed for 20 years. It no wonder that it came as a surprise to the defendant and to Horwood.

[142] None of the professional accountants, auditors or the management company noticed the errors which were only caught when the defendant retained the consultant Segal. Precluding recovery by the plaintiff due to the failure to retain an expert to review documentation that would have revealed the mistreatment of expenses would be to hold a party to an unreasonably high standard: *Van Allen* at para. 34

[143] On the evidence, I find that the plaintiff did not know or could not have known, with the exercise of reasonable diligence of the error in the formula which led to the overpayment until August 22, 2017, when the plaintiff's representatives were advised by the defendant's representatives of the error discovered by the Segal report. Accordingly, the statement of claim issued on November 21, 2018, was commenced within the two years from when the plaintiff knew that it had suffered a loss or damage, that the defendant had caused the loss or damage, and that

2022 ONSC 4315 (CanLII)

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Technicore Underground Inc. v. Toronto (City) | 2011 ONSC 7205, 2011 CarswellOnt 14960, 94 M.P.L.R. (4th) 115, 11 C.L.R. (4th) 268, 211 A.C.W.S. (3d) 535, [2011] O.J. No. 5667 | (Ont. S.C.J., Dec 5, 2011)

1985 CarswellBC 762
British Columbia Court of Appeal

First City Development Corp. v. Stevenson Construction Co.

1985 CarswellBC 762, [1985] B.C.W.L.D. 3095, [1985] B.C.J. No. 2062, 14 C.L.R. 250, 33 A.C.W.S. (2d) 79

# FIRST CITY DEVELOPMENT CORP. LTD. et al. v. STEVENSON CONSTRUCTION CO. LTD. *

Taggart, Aikins and Hutcheon JJ.A.

Judgment: August 23, 1985
Docket: Vancouver No. CA002528

Counsel: *B.W.F. McLoughlin, Q.C.*, and *D. Tuck*, for appellant.
*H.S. Silber* and *E.A. Dolden*, for respondents.

**Related Abridgment Classifications**
Construction law
II Contracts
II.6 Breach of terms of contract
II.6.f Exclusion of liability
Contracts
VII Construction and interpretation
VII.9 Disclaimer clauses

**Headnote**

Construction Law --- Breach of terms of contract — Exclusion of liability
Building contracts — Damages for delay — Clause providing that claim for damages to be made within reasonable time and not later than time of final certificate — Final certificate never issued — Plaintiff commencing action one year after completion — Clause not barring action — Plaintiff's claim allowed.
The plaintiffs entered into a standard building contract with the defendant, whereby the latter agreed to complete construction of a building by January 31, 1982. Article 36 of the construction contract provided that the claim for damages was to be made in writing "within a reasonable time after the first observance of such damages and not later than the time of final certificate". Substantial completion was certified by the architect on May 25, 1982, but no final certificate of completion was ever issued. In March 1983, the plaintiffs brought the present action claiming damages for delay.
At trial it was held that art. 36 applied to claims for pure economic loss arising from a breach of contract but this article did not provide a bar to proceedings in the absence of a final certificate of completion. The defendant appealed.

**Held:**

The appeal was dismissed.
The only limitation in art. 36 is by the words "not later than the time of final certificate". There was responsibility placed upon each party by art. 36 to give notice of the claim in writing within a reasonable time but the failure to do so did not create a bar to the making of a claim.

**Table of Authorities**

**Cases considered:**

Hancock v. B.W. Brazier (Anerley) Ltd., [1966] 2 All E.R. 901, [1966] 1 W.L.R. 1330 (C.A.) — *followed*
Simpsons Ltd. v. Pigott Construction Co. (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47 (Ont. C.A.) — *followed*

**The judgment of the Court was delivered by *Hutcheon J.A.*:**

1 The defendant, Stevenson Construction Co. Ltd., was committed by its contract with the appellants, First City Development Corp. Ltd., Continental Pacific Development Corporation and I. & B. Management Ltd., to complete the construction of a building by January 31, 1982. Substantial completion was not certified by the architect until May 25, 1982. In March 1983 the plaintiffs brought the present action claiming damages for delay. By an agreement dated January 27, 1984, the parties posed to the Court three preliminary questions for answer:

(i) Does art. 36 (of the contract between the parties) apply to claims for pure economic loss arising from breach of contract by the contractor;

(ii) If the Court decides the first question in the affirmative, has the plaintiff complied with art. 36 given that no final certificate had been issued at any material time prior to the commencement of this action;

(iii) If the Court decides the first question in the affirmative, and furthermore decides that the plaintiff has not complied with art. 36, is the plaintiff then barred from recovering any damage which it may have incurred, assuming the defendant delayed the performance of the contract (or was guilty of delay in the performance of the contract) and assuming the delay constituted a breach of contract.

2 In his reasons for judgment [reported (1984), 8 C.L.R. 125], Mr. Justice Meredith answered question (ii) in the affirmative. He does not appear to have dealt with question (i) in his reasons. However, the formal order under appeal contains a paragraph adjudging that question (i) be answered in the affirmative.

3 Mr. Justice Meredith's findings have been challenged on this appeal but I do not consider that it is necessary to deal with that challenge. I agree with Mr. Silber, counsel for the plaintiffs, that art. 36 does not provide a bar to proceedings in the absence of a final certificate of completion. In this case, no final certificate of completion was ever issued by the architect.

4 The articles to be considered, arts. 27 and 36, are found in the general conditions of many standard building contracts.

5 A convenient arrangement is to set out first the relevant part of art. 36 and then of art. 27:

**Article 36. Damage and Mutual Responsibility**

If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage. Claims under this paragraph shall be made in writing to the party liable within a reasonable time after the first observance of such damage and not later than the time of final certificate, except as expressly stipulated otherwise in the case of faulty work or materials, and may be adjusted by agreement or in the manner set out in Article 41, and the party reimbursing the other party as aforesaid shall thereupon be subrogated to the rights of the other party in respect of such wrongful act or neglect if it be that of a third party.

**Article 27. Certificates and Payments**

. . . . .

No payment made to the Contractor and no partial or entire use or occupancy of the work by the Owner shall be construed as an acceptance of any work or material not in accordance with this Contract. *The issuance of the final certificate shall constitute a waiver of all claims by the Owner otherwise than under Article 17 of these Conditions and the acceptance of such final certificate by the Contractor shall constitute a waiver by him of all claims except those previously made and still unsettled if any*. Should the Owner fail to pay the sum named in any certificate of the Architect or in any award by arbitration, upon demand when due, the Contractor shall receive, in addition to the sum named in the certificate or award, interest thereon at the rate of two per cent (2)% per month or fraction thereof.

(My underlining) The claims under art. 17 excluded from art. 27 are those arising from defects discovered within one year of substantial completion.

6 I approach the construction of art. 36 with the proposition established by the decided cases in mind: if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words. Two citations are sufficient. In Hancock v. B.W. Brazier (Anerley) Ltd., [1966] 2 All E.R. 901, [1966] 1 W.L.R. 1330 (C.A.), the English Court of Appeal held that an article such as art. 17 was not clear enough in meaning to take away from the owner the right to sue in respect of structural defects which were not discoverable within six months.

7 The Ontario Court of Appeal, in Simpsons Ltd. v. Pigott Construction Co. (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47 (C.A.), held that neither art. 17 nor art. 32 were sufficiently clear to excuse the builder from liability in an action brought within the statutory limitation period. Article 17 provided for corrections after final payment and art. 32 resembled art. 36 in the present case except that claims were to be made not later than the time of final payment.

8 The only limitation clearly stated in art. 36 is that by the words "not later than the time of final certificate". I then turn to art. 27 for the meaning of "the time of final certificate". For the owner the time is the issue of the final certificate; for the contractor the time is the acceptance of the final certificate. When that time has passed, all known claims are barred save those excluded by art. 27. There is a responsibility placed upon each party by art. 36 to give notice of a claim in writing within a reasonable time but, in my opinion, the failure to do so does not create a bar to the making of a claim. The clear words that are required to create that bar are not present in art. 36.

9 The injunction to the parties in art. 36 is of a kind similar to that to the contractor in art. A-6: "The Contractor shall ... make such investigations as to the supply of materials ... as may be reasonably required ... and shall make such estimates as may be reasonably required. ..."

10 The respondents filed a cross-appeal from the paragraph of the formal order appealed from adjudging that art. 36 applies to claims for pure economic loss arising from breach of contract by the contractor. Since I consider that art. 36 by itself, and in so far as it requires written notice to be given within a reasonable time, is not a clause of time limitation for the bringing of an action, I do not find it necessary to examine the merits of the cross-appeal.

11 I would dismiss both the appeal and cross-appeal with costs of the appeal to the respondents in any event of the cause. There will be no costs of the cross-appeal.

*Appeal dismissed.*

Footnotes

* Leave to appeal to the Supreme Court of Canada was refused on October 29, 1985.

Federal Court Cour fédérale

**Date: 20151102**

**Docket: T-1156-12**

**Citation: 2015 FC 1156**

2015 FC 1156 (CanLII)

**Ottawa, Ontario, November 2, 2015**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**GILEAD SCIENCES, INC AND GILEAD SCIENCES CANADA, INC**

**Plaintiffs**
**(Defendants to the Counterclaim)**

**and**

**IDENIX PHARMACEUTICALS, INC, UNIVERSITA DEGLI STUDI DI CAGLIARI, L'UNIVERSITÉ MONTPELLIER II AND CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE**

**Defendants**

**AND BETWEEN:**

**IDENIX PHARMACEUTICALS, INC,**

**Plaintiff to the Counterclaim**

**and**

**GILEAD PHARMASSET LLC, GILEAD SCIENCES, INC, AND GILEAD SCIENCES CANADA, INC**

**Defendants to the Counterclaim**

**AND**

**UNIVERSITA DEGLI STUDI DI CAGLIARI,
L'UNIVERSITE MONTPELLIER II AND
CENTRE NATIONAL DE LA RECHERCHE
SCIENTIFIQUE**

**Third Parties to the Counterclaim**

2015 FC 1156 (CanLII)

**PUBLIC JUDGMENT AND REASONS**
**(Confidential Judgment and Reasons issued October 9, 2015)**

## I. Introduction

[1] Gilead Sciences, Inc and Gilead Sciences Canada, Inc, (together with the Defendant by counterclaim Gilead Pharmasset LLC, hereinafter referred to collectively as [Gilead], seek a declaration that Canadian Patent No 2,490,191 [the '191 Patent] is invalid. They initiated the claim as interested persons under section 60 (1) of the *Patent Act*, RSC 1985, c P-4, as amended, s 27 [the *Act*].

[2] The Defendant, Idenix Pharmaceuticals Inc [Idenix] and the other defendants in the main action are the owners of the '191 Patent.

[3] Gilead Sciences, Inc through its subsidiary, Gilead Pharmasset LLC, is the owner of Canadian Patent 2,527,657 [the '657 Patent] filed on April 21, 2004 and issued June 14, 2011.

from the factual basis) fact ("It bears repetition that the soundness (or otherwise) of the prediction is a question of fact").

[253] The predicted inferred fact that Idenix says arises from its primary facts based on the antiviral activity demonstrated in the 2'-C-Me/OH compounds and sound line of reasoning is that in 2003, the skilled person could soundly predict that, when synthesized, the 2'-C-Me/F nucleoside will demonstrate therapeutic antiviral activity such as is found in its 2'-C-Me/OH compound.

[254] It is common ground that to prove a fact, the evidence must establish the fact on a level of proof on a balance of probabilities, usually described as a likelihood or probability. Anything below that evidentiary standard is not an established fact. Anything found not to be a fact on the balance of probabilities from the evidence is a mere possibility, or if dealing with inferences, mere speculation.

[255] By the Court's analysis that follows, I find that Idenix has not established on the balance of probabilities from the relevant evidence presented to the Court that the skilled chemists on the date of filing of the '191 patent application could soundly predict any antiviral activity in a 2'-C-Me/F nucleoside prior to its synthesis. Accordingly, the '191 Patent is invalid for lack of utility, demonstrated or soundly predicted, as a finding of fact.

2015 FC 1156 (CanLII)

2021 SCC 31 (CanLII)

**SUPREME COURT OF CANADA**

**CITATION:** Grant Thornton LLP *v.* New Brunswick, 2021 SCC 31

**APPEALS HEARD:** March 24, 2021
**JUDGMENT RENDERED:** July 29, 2021
**DOCKET:** 39182

**BETWEEN:**

**Grant Thornton LLP and Kent M. Ostridge**
Appellants

and

**Province of New Brunswick**
Respondent

**AND BETWEEN:**

**Grant Thornton International Ltd.**
Appellant

and

**Province of New Brunswick**
Respondent

- and -

**Chartered Professional Accountants of Canada**
Intervener

**CORAM:** Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

| | |
|---|---|
| **REASONS FOR JUDGMENT:** (paras. 1 to 64) | Moldaver J. (Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. concurring) |

2021 SCC 31 (CanLII)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

would include knowledge of a duty of care as well as knowledge of a breach of the standard of care.

[42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.

[43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise

2021 SCC 31 (CanLII)

(*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

2021 SCC 31 (CanLII)

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

> As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]

# Court of Queen's Bench of Alberta

**Citation: Harvest Operations Corp v Obsidian Energy Ltd, 2020 ABQB 563**

**Date:** 20200928
**Docket:** 1901 08891
**Registry:** Calgary

2020 ABQB 563 (CanLII)

Between:

**Harvest Operations Corp.**

Plaintiff

- and -

**Obsidian Energy Ltd.**

Defendant

---

**Reasons for Decision**
**of**
**J.T. Prowse, Master in Chambers**

---

[1] The two parties to this litigation, Harvest and Obsidian (previously named Penn West) are Alberta-based exploration and production companies with a long history of operating in Alberta and of working together on various joint ventures with one or the other taking the role of operator.

[2] Harvest, as operator of four facilities (the Hayter Area Facilities), says Obsidian owes it approximately $2.9 million, and it seeks summary judgment.

[3] Obsidian responds that the $2.9 million claim is out of time. In other words Obsidian says it is entitled to immunity from the claim under the *Limitations Act*.

[4] Obsidian, as operator of many other unrelated joint ventures, says it is owed, and brings this summary judgment application on its counterclaim for approximately $750,000.

[5] Harvest does not deny that claim, but says it has (in effect) paid Obsidian's $750,000 claim by set off against Harvest's $2.9 million claim (reducing Harvest's claim to approximately $2,150,000).

[6] Harvest says that it is permitted at law to exercise this set-off even if its claim for $2.9 million is barred under the *Limitations Act*.

[7] I note, parenthetically, that the figure of $750,000 is uncertain. I will use that figure in these reasons but will await further evidence and submissions from the parties if either maintains it is inaccurate.

[8] For the reasons which follow, a summary of my conclusions is as follows:

> (i) Obsidian has no limitation defence to any of Harvest's claims, and
>
> (ii) If I am wrong and some or all of Harvest's claims are statute barred, Harvest can still use those statute barred claims as a defence by way of set-off to Obsidian's counterclaim of $750,000.

**When did the limitation period begin to run?**

[9] In order to evaluate Obsidian's limitations defence, it is necessary to delve into the invoicing practices used with respect to the Hayter Area Facilities.

[10] The parties have agreed on a detailed description of the joint billing system, which is attached as schedule 'A' to these reasons.

[11] Obsidian, in its written argument, correctly summarized the import of paragraphs 30 to 36 of ***Royal Well Servicing Ltd v Murphy Oil Co***, 2018 ABQB 514 as follows:

> Based on the application of discoverability rules the limitation period was found to run from the time the services were completed and a reasonable period of time allowed to issue the invoice and permit payment.

[12] Harvest issued monthly invoices to Obsidian with respect to the Hayter Area Facilities (the "Joint Interest Billings" or "JIBs"), and these invoices were all paid.

[13] The contracts also called for an adjustment to be made within 180 days of year end. That adjustment is typically referred to as the "throughput adjustment", "equalization", "EQs", "EQ Services" or "13th month adjustments". Depending on in whose favour the adjustment was, it either resulted in an "EQ" invoice, or a credit to Obsidian.

[14] For the five calendar years 2012, 2013, 2014, 2015 and 2016 the adjustments were always in Harvest's favour, and Harvest issued five EQ invoices totalling its claim of $2.9 million. Those have not been paid.

[15] Here is an example, taken from one of the contracts, of the language used to describe the monthly and annual invoices:

> Operator shall distribute the Surplus Capacity usage charges, as may be charged from time to time pursuant to Clause 103 of the Appendix to Exhibit "A" titled "CAPACITY USAGE", to the Owners on an interim basis in proportion to their Facility or Functional Unit Participation and such distribution shall be subject to an annual adjustment pursuant to Subclause (d) hereof. [emphasis added]

2020 ABQB 563 (CanLII)

[16] It is quite clear from the language used in the contracts that the monthly billings are interim billings. This fits with the commercial background, which Harvest's expert witness describes as follows:

> The 13th month adjustments are a necessary exercise as expenses for facilities will often come to the Operator months after the close of a production year.

[17] In addition, the majority of Harvest's claims, which total $2.9 million, are made up of claims for 'surplus capacity fees'. In three of the four contracts for the Hayter Area Facilities, surplus capacity fees are not billed monthly, but only annually.

[18] Obsidian mounts a hopeless argument that somehow the monthly invoices are final invoices, due 30 days after issuance, and that the '13th month adjustments' or 'EQs' are somehow an attempt to correct earlier final invoices which should not, according to Obsidian, extend the commencement of the limitation period.

[19] To the contrary, it is clear from the contracts between the parties that the earliest the limitation period could begin to run was 30 days (for payment) following 180 days after calendar year end. As the parties had contractually agreed to extend the limitation period from 2 years to 4 years, the final column of the following chart shows the earliest date upon which a limitation period could have expired:

| Calendar year | Amount of EQ invoice | Ideal (180 day) invoice date | Date by which invoice should have been paid | 4 year limitation date to commence proceedings |
|---|---|---|---|---|
| 2012 | $766,000 | June 28, 2013 | July 28, 2013 | July 28, 2017 |
| 2013 | $746,000 | June 28, 2014 | July 28, 2014 | July 28, 2018 |
| 2014 | $632,000 | June 28, 2015 | July 28, 2015 | July 28, 2019 |
| 2015 | $603,000 | June 29, 2016 | July 29, 2016 | July 29, 2020 |
| 2016 | $157,000 | June 28, 2017 | July 28, 2017 | June 28, 2021 |

[20] Since Harvest commenced these proceedings on June 26, 2019, the only claims for unpaid EQs which might be limitation barred are the EQs for calendar year 2012 and calendar year 2013, as June 26, 2019 is earlier than the date is set out in the far right column for 2014, 2015 and 2016.

[21] What about Harvest's claims for calendar years 2012 and 2013? Are they barred by the *Limitations Act*?

[22] I will now consider the following arguments advanced by Harvest:

> A. Obsidian has given a written acknowledgement of indebtedness which has prevented the limitation period from expiring. My conclusion is that Harvest is correct in that assertion with respect to the operating expense portion of the calendar year 2012 and 2013 claims.

2020 ABQB 563 (CanLII)

B. Obsidian has made a part payment which has prevented the limitation period from expiring. My conclusion is that Harvest does not have an arguable position on this assertion.

C. A reasonable time for invoicing was later than 180 days after calendar year end. I conclude this is correct and therefore none of Harvest's claims are statute barred.

D. If Harvest's claims for calendar 2012 and 2013 were statute barred, Harvest can set-off those claims against Obsidian's otherwise valid claim against it for $750,000. This is clearly a correct assertion.

**A. Obsidian has given a written acknowledgement of indebtedness which has prevented the limitation period from expiring.**

[23] Harvest says Obsidian gave a written acknowledgment that extends the limitation period pursuant to section 8(2) of the *Limitations Act*, which states:

> (2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment. [emphasis added]

[24] Obsidian replies that, to the extent that it may have made a written (in this case email) acknowledgment of indebtedness regarding operating expenses, this is subject to settlement privilege, and is not admissible in evidence.

[25] The first topic then is whether the Obsidian's email of August 2017 (recognizing the validity of Harvest's operating expense EQs for, inter alia, 2012 and 2013) was sent in a context which triggers settlement privilege.

[26] The requirements for settlement privilege are:

> (a) the existence, or contemplation, of a litigious dispute;
>
> (b) an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed; and
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[27] Ingredients (a) and (c) seem to exist here, so the contentious point is whether there was an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed.

[28] That express or implied intent was found in the leading case of the Alberta Court of Appeal in ***Bellatrix Exploration Ltd v Penn West Petroleum Ltd***, 2013 ABCA 10, 2013 CarswellAlta 76.

[29] The background in ***Bellatrix*** was set out in paragraph 2 of the decision as follows:

> Two oil and gas companies were involved in a number of projects in western Canada. Commercial disputes arose in relation to three of these ventures, which resulted in discussions between the parties aimed at resolving those conflicts. Ultimately, the parties were unable to resolve all of their disputes, and two of the

2020 ABQB 563 (CanLII)

> three matters are now in litigation. In part, the pleadings allege that the limitation period has passed and the claim was filed too late. In response, it is suggested that the nature of the ongoing discussions somehow extends the limitation period, or otherwise precludes its application in the circumstances. In advance of any ruling on this issue, the parties sought direction on the admissibility of their correspondence. A Master of the Court of Queen's Bench concluded that the impugned correspondence was admissible by way of an exception to settlement privilege. An appeal of that decision was dismissed. That decision is the subject of this appeal. [the appeal was allowed].

[30] Fairly early in the correspondence between Bellatrix and Penn West, each of them began labelling their correspondence 'without prejudice', and when they met they agreed the meeting was without prejudice. Shortly after the meeting Bellatrix retained litigation counsel.

[31] The Court in Bellatrix did not expressly discuss the interplay between the use of 'without prejudice' and whether there was an intent that communication not be disclosed if negotiations broke down, but I think it is significant here (although not conclusive) that neither side denoted their correspondence or meetings to be 'without prejudice'.

[32] Another factor which should be considered is that, as a matter of course, under the contracts in question, there was an inherent protocol of discussions in order to finalize accounting issues. See for example, from the attached appendix 'A' describing the invoicing and the built-in mechanism for ongoing discussions of invoicing.

[33] For example, here is a description of one of the tools on the joint-billing system (found in Appendix 'A' to these reasons);

> Property Message Section: Both the Joint Owner and the Operator can utilize the comments section to provide back-up attachments, reasons for questions and responses to questions. This section is utilized to manage reconciliation and verification correspondence until such time as the questions about a charge are answered or closed, or the questions are forwarded to another department for further handling. This section is where Harvest would attach the individual spreadsheets for the 13th month adjustments as back-up when the 13th month adjustments are completed and released on the Cost Centers through EnergyLink.

[34] This is unlike a contract for the provision of goods and services where, perhaps in the majority of cases, invoices will be issued and paid. The whole context of this type of oil and gas contract is a process which involves the sharing of information, the issuance of challenges and the resolution if possible, often by one side conceding some points and the other side conceding others.

[35] I would be alarmed to see oil and gas companies involved in this type of invoice adjusting exercise begin labelling all their correspondence 'without prejudice'. It's just a normal part of their business to share information and debate, compromise and adjust billings. This must take place hundreds if not thousands of times a year in Calgary. What is the public policy in labelling all these communications as being subject to settlement privilege? It is part of their everyday business. Is there really a fear that they will stop adjusting billings out of concern that there statements will later be used against them in a court proceeding? I suggest not.

2020 ABQB 563 (CanLII)

[36] I see nothing in this process or the facts of this case which indicate that the information shared and positions taken while following this protocol were intended to be kept confidential if the matter later proceeded to litigation.

[37] Accordingly, I find that the email sent by Obsidian to Harvest in August of 2017 to be an acknowledgement of debt for operating expenses for calendar 2012 and 2013.

**B. Obsidian has made a part payment which has prevented the limitation period from expiring.**

[38] Harvest asserts that the limitation period applicable to its claim has been extended by a part payment made by Obsidian. Section 8(2) of the *Limitations Act* in that regard is quoted above in paragraph 23 of these reasons.

[39] My understanding is that this alleged payment occurred when Harvest unilaterally logged onto the joint billing system and accepted certain minor adjustments in Harvest's favor which had earlier been earlier conceded by Obsidian.

[40] In my view, given that Obsidian did not actively participate in this 'adjustment', the adjustment cannot qualify as a part payment by Obsidian pursuant to section 8(2) of the *Limitations Act*.

**C. A reasonable time for invoicing was later than 180 days after calendar year end.**

[41] In ***Bellatrix*** the Court of Appeal makes the following observation at paragraph 40:

> Where one party has a duty to provide an accounting to another, and detailed set-off calculations are required, it may not be possible to discover a cause of action until the accounting is done, or there is a clear refusal to perform or pay.

[42] That is precisely what happened here.

[43] The final and third trigger to the commencement of the limitation clock is that:

> the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, [section 3(1)(a)(iii) of the *Limitations Act*]

[44] How would it be warranted for Harvest to sue Obsidian when they were following the contractually mandated and customary process of sharing information and proposals for resolution? Only if that process comes to an unsuccessful conclusion would it be warranted for Harvest to commence litigation against Obsidian.

[45] It is not as if any delays on the part of Harvest were done to extend the limitation period or were out of the ordinary course of business for these two parties.

[46] Harvest's witness deposes:

> I have been working in the petroleum industry for more than 30 years. During that time, I have been overseeing preparation of EQs for over 25 years. In my experience, EQs are typically issued and paid well after the adjustment period deadline prescribed in the applicable agreements.

[47] More importantly, Harvest's witness provides evidence (some of which is summarized below) as to the conduct, not industry wide, but specifically as between Harvest and Obsidian.

[48] With respect to Obsidian, it paid "late" EQs in the past:

2020 ABQB 563 (CanLII)

- the 2011 EQ under the Agreements was issued to Obsidian by way of JIB Invoice 29132 on September 10, 2013, which was 619 days after the 2011 year end and 347 days after the 180 day adjustment period stipulated in the Agreements.
- On October 22, 2013, Obsidian issued a cheque with cheque number 1180380 paying the 01-34 Compressor "late" EQ in full without further verification.
- Obsidian and Harvest subsequently engaged in communications to verify the remainder of the 2011 EQs and on August 25, 2014 Obsidian advised that it was "prepared to pay Harvest for the 2011 Hayter Equalizations after discussions between [Obsidian's] Accounting Equalization group and Joint Venture."
- Obsidian agreed to pay $720,736.95 for the 1-34 Battery and $76,336.26 for the 8-35 Battery and issued cheque number 1210115 on November 25, 2014. On November 11, 2014, by way of cheque number 1210115, Obsidian paid this "late" EQ in full.

[49] With respect to Obsidian, it issued "late" EQs itself:

- Until May 1, 2016 Obsidian was the operator of the Leafland Gas Plant 13-16-040-05W5 and Harvest was a non-operating owner. Between 2009 and 2015, Obsidian never issued the EQs within the agreed upon 365 day adjustment period and on average issued EQs 444 days after the end of the adjustment period, with the latest being 1,249 days after the end of the adjustment period.
- Until May 1, 2015 Obsidian was the operator of the Pembalta plant and gas gathering system and Harvest was a non-operating owner. Between 2011 and 2014, Obsidian never issued the EQs within the agreed upon 365 day adjustment period, but instead issued the EQs 669 to 1,374 days after the end of the adjustment period.

[50] As readers may recall, Obsidian's primary position is that the four year limit started 30 days after monthly invoices were issued in 2012 and 2013. I have rejected that argument on the basis expressed in paragraph 15 through 20 of these reasons.

[51] Obsidian's alternative argument is the four year time period begins 180 days plus 30 days after calendar year end, notwithstanding that the parties were, long after that deadline passed, following their duties to provide an accounting to each other and to engage in detailed set-off calculations, and where, following this practice, Obsidian itself had sent EQs to Harvest as many as 1,374 days after the expiry of the adjustment period.

[52] I reject this alternative argument. My conclusion is that the four year time limit for all of the five calendar years in question began in 2016 at the earliest, and accordingly Harvest is not statute barred from pursuing any of its $2.9 million claim.

**D. If I am in error and Harvest is not entitled to judgment for its claims for calendar 2012 and 2013 due to the *Limitations Act,* can Harvest set-off those time barred claims against Obsidian's otherwise valid claim $975,000?**

2020 ABQB 563 (CanLII)

[53] Under the subject contracts Obsidian agreed that Harvest could set off, against Obsidian's claims, any amount that Harvest was owed under any other contracts between Obsidian and Harvest.

[54] This provides Harvest with a defence to Obsidian's claim, and not simply a cross-claim.

[55] Does it make any difference if (contrary to my conclusions set out previously) the claims which Harvest intends to use for this defence are statute barred?

[56] The answer to the question is clearly no, it does not make a difference.

[57] Statute barred debts are not excluded, because, by using its contractual set-off rights, Harvest is not seeking relief from the Court. Obsidian's 'immunity' from claims under the *Limitations Act* is only an immunity to court action.

[58] Perhaps the clearest enunciation of this principle is by Denning L.J. in ***Henriksens Rederi A/S v. Rolimpex***, [1973] 3 All E.R. 589 (Eng. C.A.) [cited with approval by the Ontario Court of Appeal in ***Pierce v. Canada Trustco Mortgage Co.***, 2005 CarswellOnt 1876, 197 O.A.C. 369, 254 D.L.R. (4th) 79, 5 B.L.R. (4th) 178] as follows:

> In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a *defence* and one which is in the nature of a *cross-claim*. When a defendant is sued, he can raise any matter which is properly in the nature of a *defence*, without fear of being met by a period of limitation. No defence, properly so-called, is subject to a time-bar [emphasis in original].

[59] The parties in their submissions erroneously focussed on equitable set-off, perhaps led astray by case law debating whether the same outcome results with equitable set-off as with legal set-off (the latter being a defense, not a cross-claim).

[60] If I am wrong in my conclusion that all of Harvest's claims have been brought on time, it is clear that Harvest can utilize any time barred claims as set-off against Obsidian's claim for $750,000.

**Conclusions**

[61] For the reasons given above it is my conclusion that none of Harvest's claims are time barred. If I am in error in that conclusion then Harvest can utilize any time barred claims as set-off against Obsidian's claim for $750,000.

**Costs**

[62] If the parties cannot agree on the costs outcome of this ruling they may make submissions in that regard.

Heard on the 9th and 23rd days of September, 2020.
**Dated** at the City of Calgary, Alberta this 28th day of September, 2020.

2020 ABQB 563 (CanLII)

**J.T. Prowse, Q.C.**
**M.C.C.Q.B.A.**

**Appearances:**

Eugene J. Bodnar/ Lukas Frey
Scott Venturo Rudakoff LLP
for Harvest

Craig O. Alcock
Burnet, Duckworth & Palmer LLP
for Obsidian

2020 ABQB 563 (CanLII)

## Appendix 'A'

*JOINT INTEREST BILLING PROCESS*

The billing process utilized by the parties in this matter starts with an Operator's internal accounting system which allocates incurred costs and received revenue to either:

(a) a project-specific Authority for Expenditure ("AFE"); or

(b) property-specific cost centers ("Cost Centers"), for instance, the:

(i) 8-35 Battery Cost Center with Cost Center No. 2027000;
(ii) 1-34 Compressor Cost Center with Cost Center No. 2018000;
(iii) Satellite Cost Center with Cost Center No. 303649;
(iv) 1-34 Battery Cost Center with Cost Center No. 2017000.

AFEs and Cost Centers are set up to split costs between all Joint Owners under the specific project or property. There are numerous sources for costs and revenue. The costs and revenue are actual costs paid by the Operator and actual revenue received by an Operator in a month allocated based on a Joint Owners' working interest. It is unusual to have estimated costs or revenue allocated to the AFEs or Cost Centers.

The oil and gas industry utilizes an accounting software called "EnergyLink", by Red Dog Systems Inc. Before EnergyLink was rebranded it was known as JIBLink. EnergyLink interfaces with an Operator's accounting system to generate monthly invoices called "Operator Invoice – JIB" ("JIB Invoice"). Each JIB Invoice is specific to each Joint Owner and its working interest in a property.

Each JIB Invoice has a specific invoice number and invoices are generated after an Operator's accounting system month-end is closed. Once an Operator's accounting system month-end is closed, the interface to EnergyLink is run and the JIB Invoices are generated by and released through EnergyLink. Release dates can range anywhere after the 1st of the month to the last day of the month for the preceding month's costs/revenues. An Operator typically releases its monthly JIB Invoices within the first seven days of the following month.

JIB Invoices are broken down into AFE Statements and Operations Statements. The Operations Statement is the statement which is applicable to how operating costs and revenue are allocated to each Cost Center.

Each Cost Center specific Operations Statement is further broken down into "Minor Account Description". The Minor Account Descriptions are very specific categories of costs or revenue, including:

(a) *Revenue*: Sales product revenue for volumes an Operator markets on behalf of Joint Owner(s).

(b) *Royalty Expense*: Freehold or Crown Royalties paid by an Operator on behalf of Joint Owner(s).

(c) *Operating Expense*: Includes costs an Operator has incurred to operate the property and examples include (but are not limited to):

(i) Costs paid by Operator for services rendered by service companies,
(ii) Employee wages and accompanying allocations for employees working on the properties,
(iii) Contract Operator costs,
(iv) Fixed costs including taxes, lease rentals, government levies,
(v) Trucking and treating of emulsion and water
(vi) Gathering, compression, processing and treating fees for properties operated by Operator
(vii) Facility-Income (revenue received from third parties usage of capacity);
(viii) Variable Overhead.

(d) *Operating Expenses – Non-Operated*: Represent costs an Operator (e.g. Harvest) pays to another operator of other facilities for services provided by the other operator in order to allow the Operator to operate the joint properties (e.g. Hayter properties) and are generally billed to an Operator by the other operator through the JIB system as well. An Operator then bills these non-operated operating expenses to the Joint Owner (e.g., Obsidian).

(e) *Transportation to Custody Transfer Point*: Represent costs to move sales products from plant gate to sales terminal.

The sum of all costs/revenue for each Cost Center is the net payable on the Cost Center for the accounting month.

Once JIB Invoices are generated and released, EnergyLink is used to manage and process joint interest billings.

*MANAGEMENT OF JIB INVOICES THROUGH ENERGYLINK*

A Joint Owner has numerous tools to use to manage each expense or revenue listed on a JIB Invoice:

2020 ABQB 563 (CanLII)

(a) *Designate the status of an expense or revenue*: This process can only be completed by a Joint Owner and the Operator has no input or control:

(i) *Received***:** Joint Owner has received but has not opened and reviewed the JIB Invoice;

(ii) *Viewed***:** Joint Owner has opened but has not reviewed the JIB Invoice;

(iii) *Accepted Modified* – Specific expenses or revenues have been accepted by Joint Owner with some expenses or revenues flagged until resolved with the Operator;

(iv) *Accepted As Is* – Specific expenses or revenue has been accepted in whole without further reconciliation or verification needed;

(v) *All Disputes Closed* – all specific expenses or revenue of the JIB Invoice has been accepted and all outstanding disputes have been unparked for payment.

(b) *Ability to dispute charges*: If a Joint Owner does not agree to a charge, it can designate the charge as disputed and request further information from the Operator to verify the charge. The reason for the dispute is added into the comments section. Both the Operator and Joint Owner can close a dispute depending on the resolution.

(i) If an Operator agrees with a charge challenged or questioned by a Joint Owner, the Operator can reverse it and the Operator can close the dispute.

(ii) If the Joint Owner has verified the additional information provided by an Operator and then agrees with the charge, the Joint Owner unparks (closes the dispute) and accepts the charge for further processing.

(iii) If additional information has been provided by the Operator and after a reasonable time no response is received from the Joint Owner, the Operator may net the dispute and close it. This option is usually a last resort to clean up an account.

*Property Message Section*: Both the Joint Owner and the Operator can utilize the comments section to provide back-up attachments, reasons for questions and responses to questions. This section is utilized to manage reconciliation and verification correspondence until such time as the questions about a charge are answered or closed, or the questions are forwarded to another department for further handling. This section is where Harvest would attach the individual spreadsheets for the 13th month adjustments as back-up when the 13th month adjustments are completed and released on the Cost Centers through EnergyLink.

*TYPES OF 13TH MONTH ADJUSTMENTS*

There are three types of Adjustments:

2020 ABQB 563 (CanLII)

(a) *Operating Costs* (OPEX) invoiced through the year are reallocated based on actual throughput. Costs are charged monthly on an interim basis utilizing facility working interest, or where allowed under the agreement, estimated throughput interests. Of the 4 Agreements, only the one for the Satellite allows for interim interest to be calculated based on estimated throughput and utilized for monthly billings.

(b) *Third Party Fee Revenue* invoiced through the year are reallocated based on a Joint Owner's calculated actual percentage of available surplus capacity. Revenue is allocated monthly on an interim basis utilizing facility working interests, or where allowed under the agreement, estimated throughput interests. Of the 4 Agreements, only the one for the Satellite allows for monthly fee revenue to be shared on an interim interest based on estimated throughput.

(c) *Owner Excess Capacity Usage Fees* allocated to Joint Owners that have exceeded their capacity and corresponding revenue allocated to other Joint Owners based on their percentage of surplus capacity. These fees are typically not charged throughout the year. Rather, they are calculated and charged in accordance with the 13th month adjustments based on actual volumes and actual capacity usage.

Adjustments resulting from the 13th Month Adjustment process are uploaded into the Operator's internal accounting system and interfaced to EnergyLink with the other revenue/costs for each Cost Center. The 13th month adjustment charges billed through the JIB process are treated as part of the Operating Expenses Category noted at paragraph 6 above. The following Minor Account Descriptions are used to document the 13th month adjustment charges:

(a) For OPEX Adjustments: "Recoveries Other - Op Cost Equalization"
(b) For Third Party Fee Revenue: "FAC Income"
(c) For Owner Excess Capacity Usage Fees: "Processing Fees – Excess Capacity"

2020 ABQB 563 (CanLII)

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Highridge Homes Ltd. v. de Boer,*
2021 BCSC 1112

Date: 20210609
Docket: S53879
Registry: Vernon

Between:

**Highridge Homes Ltd.**

Plaintiff

And

**Vanessa Marilyn de Boer and Dirk Johannes de Boer**

Defendants

And

**Highridge Homes Ltd. and Tusk Contracting Ltd.**

Defendants by Counterclaim

Before: The Honourable Mr. Justice Wilson

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | J.C. Boschert |
| Counsel for the Defendants: | C.T. Hart |
| Place and Date of Trial/Hearing: | Kelowna, B.C.<br>April 26, 27 and 29, 2021 |
| Place and Date of Judgment: | Kelowna, B.C.<br>June 9, 2021 |

2021 BCSC 1112 (CanLII)

[56] The parties entered into a document agreement which was made an exhibit at the trial. The document agreement included the following terms:

> 3. For the purposes of this action a copy of a document that is listed on the List of Documents of any party may be entered in evidence in the trial of this action by any party by filing such copy as an exhibit. Unless any party notifies the other in writing by March 30, 2021 to the contrary (the "**Notice**"), such entry by filing the copy of the document as an exhibit shall, without further evidence, be *prima facie* proof that:
>
>    a. a copy of a document is a true copy of the original document,
>
>    b. it was written or created or is effective from the date it bears on its face,
>
>    c. if an author is indicated, the document was prepared by or on behalf of that person who had knowledge of its contents at the time;
>
>    d. purported signatures appearing on a document are authentic;
>
>    e. where on its face or by its content or nature it was intended to be delivered to another person (e.g., a transmittal slip) that it was so delivered in the normal course of business, whether by post, fax, telex, or physical delivery,
>
>    f. where on its face, it purports to have been written or created by or under the instructions of the person who signed it, or purported to authorize its creation that it was so written created or authorized, and
>
>    g. where it purports on its face to have been received on a particular date or at a particular time that it was so received.
>
> 4. The Notice shall enumerate for which of the documents listed in the List of Documents formal proof will be required at trial.
>
> 5. Copies of documents, rather than originals, may be tendered as evidence at trial unless any party prefers the original.
>
> 6. Any party may lead evidence to contradict any document filed in accordance with this Agreement or prove that a document was not written by or under the instructions of the party whose signature appears on it or the date or dates that appear on the face of the document are incorrect, or prove that the document was not sent or received on a particular date or at a particular time.

[57] Mr. Glinsbockel's affidavit included the invoices from third-party contractors that made up the plaintiff's third invoice, and confirmation that the plaintiff paid all of those invoices. Based on Mr. Glinsbockel's affidavit and the document agreement, I conclude that while the defendants are at liberty to contest the legitimacy and validity of the invoices, it would be inappropriate to dismiss them collectively due to any overarching concerns pertaining to the plaintiff's conduct relating primarily to the

2021 BCSC 1112 (CanLII)

Tusk invoices. The burden to prove the invoice remains with the plaintiff, but the affidavit from Mr. Glinsbockel is nonetheless evidence for the Court to consider.

[58] The parties had a cost-plus contract, and the defendants agreed to pay those invoices incurred in the construction of their home. The plaintiff was obligated to consult with the defendants if costs were expected to be much greater than had been estimated on the Cost Estimate Sheet. The defendants had accepted and paid the charges up to and including the plaintiff's second invoice, except for the Tusk invoice.

[59] When a construction contract is terminated prior to completion it is difficult to evaluate whether or not the project was on or close to budget, absent evidence as to the value of the partially completed work. On the whole and with some exceptions, the evidence does not establish that the defendant paid others for work that was not done, or that it incurred costs for the plaintiff's account on the third invoice that were improper or inflated. Subject to my comments below, the amounts claimed by the plaintiff under its third invoice are allowed.

**Tusk bills**

[60] I have already indicated that there are concerns with the Tusk invoices. The first Tusk invoice was in the amount of $28,662.50 plus GST for a total of $30,095.63. After the August 12 meeting, Tusk redrafted the same invoice and added $15,000 under the heading "Structural fill – priced per load". The revised invoice was for $43,662.50 plus GST for total invoice amount of $45,845.63.

[61] Tusk had agreed previously it would not charge for the structural fill, but would charge for the trucking. Whether the defendants' complaint about the first Tusk invoice was well-founded or not, the plaintiff was not at liberty to simply rewrite Tusk's invoice to charge for the fill that it had agreed would be provided at no charge.

[62] Following the termination of the Building Contract, Tusk then issued a third invoice. The invoice was in the total of $9,050 plus GST for a total of $9,502.51

2021 BCSC 1112 (CanLII)

# Court of Queen's Bench of Alberta

Citation: Howard v. Sandau, 2008 ABQB 34

Date: 20080111
Docket: FL06 00503
Registry: Lethbridge

2008 ABQB 34 (CanLII)

Between:

Christina Anne Howard

Applicant

- and -

Merele Wayne Sandau

Respondent

**Editorial Notice**

On behalf of the Government of Alberta **personal data identifiers** have been removed from this unofficial electronic version of the judgment.

that Ms. Howard was actually living in the apartment, never saw anyone else living there and referred to the fact that Ms. Howard's vehicle was always there. Ms. Robinson did admit that she didn't reside in Redcliff at the time, and that her office hours at 25 Broadway during that period of time were not regular.

[37] Based on the foregoing evidence alone, I would be inclined to find as a fact that Ms. Howard resided in the apartment at [...] Broadway from December 9th, 2002 through to June 30th, 2003. But the balance of probability is tipped in favour of Mr. Sandau's version of the living arrangements during this period of time when one adds to this evidence an adverse inference against Ms. Howard which I am prepared to draw for reasons set out below.

ADVERSE INFERENCE

[38] It was established during the evidence of Mr. Sandau that Eric Desjardins was in Court during the trial or, at least, part of the trial. Mr. Sandau identified Eric. During argument, counsel for Mr. Sandau specifically requested that the Court drawn an adverse inference against Ms. Howard with respect to the residency issue at [...] Broadway. No explanation in the evidence was given by Ms. Howard or anyone as to why Eric Desjardins was not called as a witness during the trial.

[39] The failure of a party to call a witness in a civil case may result in an adverse inference being drawn against that party. This principle has been well documented in both case law and academic sources. A number of cases have adopted the following statement from *Wigmore, Evidence in Trials at Common Law, 1979* as the "leading statement" on adverse inference:

> The failure to bring before the tribunal some circumstances, documents or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstance which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

[40] The development of this principle can be traced to cases dating from the 19th century. In *R. v. Burdett* (1820), 4 B & Ald. 95 at 122 Bets, J. stated:

> Every man will do what he can to shield himself from...the burden of punishment. We all know this. We all expect it...A failure to offer an explanation must tend to create a belief none exists.

2008 ABQB 34 (CanLII)

# Court of Queen's Bench of Alberta

**Citation: Ili's Painting Services Ltd v Homes by Bellia Inc, 2020 ABQB 248**

2020 ABQB 248 (CanLII)

**Date:** 20200414
**Docket:** 1501 12796 and 1501 12799
**Registry:** Calgary

Between:

**Ili's Painting Services Ltd.**

Plaintiff

- and -

**Homes by Bellia Inc.**

Defendant

---

**Reasons for Judgment**
**of the**
**Honourable Mr. Justice N. Devlin**

---

## Introduction

[1] The defendant, Homes by Belia, built two large, luxury, custom homes in Priddis in 2014-2015. These homes were located on adjacent properties at 302 and 306 Hawks Nest Lane ["302" and '306" respectively]. The plaintiff, Ili's Painting ["Ili's"] claims it provided painting services at both homes and was never paid. It filed builder's liens on both properties, leading to this lawsuit.

[2] The defendant agrees that Ili's did this work at 302, but argues that the lien was filed too late. It also claims that Ili's work was unsatisfactory, leading the it to incur substantial remedial

costs that should be deducted from any award. In respect of 306, the defendant claims that it had no contractual relationship with the plaintiff whatsoever, but rather hired a different company, Tussnad Painting owned by Zoltan Kristo ["Kristo"], for the job. Kristo agreed that he and his crew did most of the work at 306, but testified that he did so as a subcontractor to the plaintiff, who had previously been his long-time employer.

2020 ABQB 248 (CanLII)

**The issues**

[3] This action turns on the resolution of five sequential issues:

i. what was the agreed or proven price for painting 302;

ii. was the lien on 302 filed in time;

iii. were there deficiencies in the plaintiff's work that reduce the amount owing for that work; and

iv. who painted 306?

**Scope of the work**

[4] The work at issue involved lacquering baseboards, casings, doors, and built-in shelving, along with staining railings and staircases. This painting is done by spray application, and is distinct from the priming and painting of the walls. It is a multi-step process, involving priming, sanding, application of multiple coats, and finishing work after final installation on certain components. This process required a considerable amount of work in both houses and took several weeks to complete at each.

**The evidence**

[5] This trial heard from four witnesses: Marton Locsher ["Locsher"], who owns and operates the plaintiff company, which bears his wife's name; Joe Beckei ["Beckei"], one of the plaintiff's former employees who did much of the work at 302; Kristo; and Paul Bellissimo ["Bellissimo"], the owner/operator of the defendant company.

[6] Builder's lien actions are designed to be efficient, cost-effective summary proceedings; *Builder Lien Act*, RSA c B-7, section 49(6). That objective was thwarted in this case by the deficient, curious documentary record, coupled with an unfortunate lack of full candour from each of the witnesses, save for Kristo.

[7] Reliable evidence did not abound in this trial. Loscher, while broadly in the right in this case, tried to improve his position and left out parts of the real story. He also had difficulty explaining the sequence of invoices he rendered for the work at 302, and had no documentary record for when the work commenced and concluded at either location.

[8] Most problematically, Loscher presented invoices from Beckei to support the value of the work done at 302 that were shown to be after-the-fact creations. Their character came to light on account of Beckei's anglicization of his Hungarian surname. Beckei testified that his family changed it long ago as it is difficult for English-speakers to spell. The invoices in question were

signed “Beckei”, yet his name in the substantive portion of the invoices was spelled in the traditional Hungarian way: “Becskei”. The signature was also in a markedly different handwriting than the contents. Beckei eventually explained that this was because the invoices were actually prepared by the plaintiff’s wife, who is also ethnically Hungarian, and did not turn her mind to the fact that Beckei had changed his name.

[9] Loscher’s evidence explaining certain aspects of his pricing did not fare well when the math underlying them was critically analyzed in cross-examination. He also denied that there were any issues with the work or any conflict with Bellissimo. I do not find that this accurately reflected the true state of affairs.

[10] Beckei’s recall of the events and time period of the dispute was less than stellar and he left the impression that he was testifying to assist Loscher recover funds for their mutual benefit. Beckei testified to the same questionable invoices discussed above, though he eventually explained them truthfully. However, he contradicted Loscher on what they comprised, and testified to rates and hours of work that rendered their contents dubious. Specifically, his testimony did not support Loscher’s evidence that these sums were in part intended to flow through to other workers. The amounts on these invoices, when put up against Beckei’s evidence of his hourly rate, would have had him working somewhere in the range of 1000 hours in a two-month period. This would both be a physical impossibility and inconsistent with Beckei’s timesheets and testimony as to his hours of work

[11] While I have no doubt that Beckei did work extensively at 302, I find that these invoices (Exhibits 3 and 4) were manufactured to assist with this litigation and have no evidentiary value.

[12] Bellissimo’s evidence went most poorly of all. He was evasive, would not give a straight answer to simple questions, could remember little or nothing about dates and timing – a critical subject on which his evidence shifted and changed. He gave explanations for events that were internally and externally inconsistent and sometimes shown to be false, such as his explanation for why the plaintiff did not prime and paint the walls at 302. He gave contradictory evidence between his examination in chief and cross-examination. He also contradicted and denied the contents of an affidavit he had sworn previously in the action, and even contradicted his own statement of defence. He went so far as to say that he did not recall if an affidavit he had sworn only a year after the events in question was accurate. One passage will suffice as an exemplar:

> Q You’d agree, Sir, your testimony under oath in July 2016 was that you received this estimate from Ili’s; correct?
>
> A Your Honor, what I had a year later is what I brought forward. So this was done a year later, this affidavit.
>
> Q It may be done a year later, sir, but was it true when you swore it?
>
> A It was done a year later, that’s all I’m -- I couldn’t recall.
>
> Q Perhaps you’re not understanding my questions. My question is not when it was done. It was whether it was true?
>
> A I can’t recall that.
>
> Q You can’t recall whether it was true?
>
> A Yeah.

2020 ABQB 248 (CanLII)

[13] The Court has considerable sympathy for the situation Bellissimo and his company found themselves in during 2015. These homes were an ambitious crowning achievement for both, and something Bellissimo took evident pride in. Unfortunately, in the period relevant to this litigation, these projects appear to have been going sideways from both a time and money perspective. The defendant was in a hurry to complete the houses and had decided to sell them through auction, an unusual technique in the Canadian home sales market, and one I infer was driven by a rapid requirement for cash. Kristo testified, and I accept, that Bellissimo told him that he "was running out of money and time and everything". These circumstances, coupled with sad and adverse events in Bellissimo's personal life, combined to produce a uniquely stressful time. I conclude that his difficulties with memory for this period are largely an artifact of the pressures he was under, rather than a product of any systematic or intentional program to mislead the court.

[14] That said, the nature and quality of his evidence was such that it is mostly incapable of providing an evidentiary basis for findings that are not independently corroborated. His testimony also appeared to be somewhat hampered by his failure to file an Affidavit of Documents in this case, which led him to assert on numerous occasions that he had documents that could support what he was saying but was being prevented from tendering them. I make no finding as to whether this is true or not, and observe that the documents he did tender often failed to support his position. This is particularly true, as will be discussed below, with invoices he provided in support of the contention that the plaintiff's work had to be extensively corrected or redone.

[15] Kristo was the one witnesses whose evidence I found credible. He gave short, direct, responsive answers. Those answers were consistent, and supported by either logic or extrinsic evidence. His documents were in order. The numbers he presented made sense. When he could not recall detail, he plainly said so. His conduct in regard to these events was professional and ethical. For instance, the amount he ultimately invoiced the defendant when Bellissimo offered to pay him directly was the same to the penny as what he had previously invoiced the plaintiff as its subcontractor. He did not increase the amount or add a margin, notwithstanding the defendant's previous failure to pay. I accept his evidence and prefer it to that of any other witness in this trial where they differ.

**Burdens of proof**

[16] The legal burden of proof as to the existence of the contract, the provision of work, the agreed price or proven value of that work, and the timeliness of the lien lie with the plaintiff. Conversely, the defendant bears the legal burden to prove any alleged deficiencies: ***S & K Restoration Inc v 138-9978 Alberta Ltd (Prime School of Music)***, 2015 ABQB 73 at para 5.

**The parties' previous working relationship**

[17] The plaintiff and defendant had an established business relationship and had worked together on at least 25 residential projects since 2011. None of these had been on the scale of the Priddis homes. Bellissimo testified that the plaintiff was his exclusive interior painting contractor. The commercial relationship between the parties had never before been reduced to writing and has been governed by oral contracts.

2020 ABQB 248 (CanLII)

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Paradigm Holdings Ltd. v. Ngan & Siu Investments Co. Ltd.,*** 2008 BCCA 172

Date: 20080428
Docket: CA035199

Between:

**Paradigm Holdings Ltd.**

Respondent
(Plaintiff)

And

**Ngan & Siu Investments Co. Ltd.**

Appellant
(Defendant)

Before: The Honourable Mr. Justice Smith
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Tysoe

| | |
|---|---|
| S.R. Coval and L.C. Kerr | Counsel for the Appellant |
| J. Nalleweg and P.Y.M. Leung | Counsel for the Respondent |
| Place and Date of Hearing: | Vancouver, British Columbia<br>January 25, 2008 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>April 28, 2008 |

**Written Reasons by**:
The Honourable Mr. Justice Tysoe

**Concurred in by:**
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Lowry

2008 BCCA 172 (CanLII)

**Reasons for Judgment of the Honourable Mr. Justice Tysoe:**

## Introduction

[1] This appeal concerns a contract of purchase and sale dated May 20, 2005 (the "Sale Contract") for the sale of two units in a business park by the appellant, Ngan & Siu Investments Co. Ltd. (the "Seller"), to the respondent, Paradigm Holdings Ltd. (the "Buyer"). In reasons for judgment issued on May 31, 2007 (2007 BCSC 762, 58 R.P.R. (4th) 291), the trial judge ruled in favour of the Buyer and granted it the remedy of specific performance of the Sale Contract.

[2] The two issues decided by the trial judge related to (i) the basis upon which the sale price was agreed and (ii) whether a mistake relieved the Seller of its obligations under the Sale Contract. The trial judge decided both issues in favour of the Buyer, and the Seller appeals the decision on each issue. For the reasons that follow, I have concluded that the appeal should be allowed because the trial judge did not correctly interpret the Sale Contract. As a result, it will not be necessary to deal with the issue of mistake.

## Background

[3] The two units, known as Unit 110 and Unit 210, are located in a two-storey building forming part of a business park in Richmond, British Columbia. Unit 210 is located above Unit 110.

[4] The Seller purchased the two units in 1997. The construction of the units had not been completed at the time of the purchase. Unit 210 was like a loft to Unit 110,

2008 BCCA 172 (CanLII)

with the floor of Unit 210 only extending approximately halfway over Unit 110. The Seller finished the construction by extending the floor of Unit 210 over the other half of Unit 110 and thereby increased the area of the floor of Unit 210 to approximately 1,600 square feet, which was the approximate square footage of Unit 110. All required permits and approvals for the construction were obtained, but the architect who was supervising the construction did not attend to an amendment of the original strata plan to reflect the expansion of the floor of Unit 210.

[5] The Buyer, which owned three other units in the building including the unit adjacent to Unit 210, initially expressed interest in purchasing Unit 210 in 2003. The Seller decided in 2004 to sell the units, and, in early 2005, the parties began negotiating a transaction involving both Unit 210 and Unit 110.

[6] In their negotiations, the parties discussed the purchase price in terms of price per square foot. They settled on a price of $150 per square foot which, based on the Seller's advice that the aggregate square footage of the two units was 3,200 square feet, translated into a price of $480,000.

[7] The Sale Contract was in the standard form approved by the Real Estate Board of Greater Vancouver. It provided for a completion date of August 10, 2005. It stated the purchase price to be $480,000. As is commonly the practice, special terms and conditions not covered by the language of the standard form were contained in attachments to the Sale Contract entitled "Contract of Purchase and Sale Addendum". One of the special terms and conditions agreed to by the parties was contained in the following clause (the "Adjustment Clause"):

2008 BCCA 172 (CanLII)

> This condition is for the sole benefit of the Buyer.
>
> - The purchase price as stipulated within this Contract is based on a total square footage of 3,200 square feet for the two units combined, and is to be verify [sic] by the Buyer. In the event of any discrepancy, the purchase price shall be adjusted according to the actual size of the property registered as per Strata Plans for subject strata corporation on a pro-rata bases [sic] upon Completion.

One of the other special terms and conditions was a provision that, within four business days of acceptance of the offer (June 22, 2005), the Seller was to provide to the Buyer certain specified documents, including the registered strata plan and amendments thereto. Coupled with this provision was a condition precedent that the Buyer was to approve these documents on or before June 28, 2005.

[8] It became apparent after the execution of the Sale Contract that the strata plan registered in the Land Title Office showed the areas of Unit 110 and Unit 210 to be 1,511.253 and 925.69 square feet, respectively, for a total of 2,436.943 square feet. The parties were agreed at trial that the actual aggregate area of the two units was 3,177 square feet.

[9] On June 28, 2005, a little less than a week after the execution of the Sale Contract, the lawyers acting on behalf of the Buyer wrote to the lawyers acting on behalf of the Seller advising that the strata plan showed the areas of the two units to be 1,511.253 and 925.69 square feet and inquired whether there was an explanation. On the same day, the Seller unsuccessfully attempted to have the Buyer sign an amended contract that did not contain the Adjustment Clause and that included a new clause by which the Buyer was to acknowledge receipt of the strata plan.

2008 BCCA 172 (CanLII)

[10] Also on June 28, 2005, the Buyer's lawyer wrote to the Seller's lawyer and removed the condition precedent relating to the documents "Underprotest". He explained that he was using the term "Underprotest" because the Seller had not provided the documents to the Buyer as required by the Sale Contract.

[11] The lawyer acting for the Seller initially took the position on behalf of his client that there was no valid contract. The Seller engaged a different law firm approximately one week before the completion date. The new firm retracted the position taken by the previous lawyer and took the stance that the full amount of the purchase price of $480,000 was payable on closing.

[12] On the completion date, each law firm provided the other with a set of closing documents. The Buyer's law firm sent a set of documents for execution by the Seller, and these documents contemplated purchase prices for the two units of $138,905.75 and $226,635.70, for a total of $365,541.45 (which is equal to $150 per square foot for the area of 2,436.943 square feet shown on the strata plan for the two units). The Seller's law firm sent a set of documents which had been executed by its client, and these documents contemplated an aggregate purchase price of $480,000. The documents prepared by the Buyer's lawyer were not executed by the Seller, and the documents executed by the Seller were not registered by the Buyer. In short, there was a stalemate and the transaction did not complete.

[13] This litigation was commenced a week later when the Buyer issued a writ claiming specific performance of the Sale Contract. The Seller counterclaimed for damages it alleged were suffered by it as a result of having evicted the tenant of one

2008 BCCA 172 (CanLII)

of the units in order to give vacant possession of the unit to the Buyer as required by the Sale Contract.

[14] The trial judge held that the Buyer was entitled to specific performance of the Sale Contract at the adjusted price of $365,541.45. He held that the Seller was not entitled to relief on the basis of unilateral mistake, and he did not deal with the doctrine of common or bilateral mistake. He dismissed the counterclaim.

2008 BCCA 172 (CanLII)

**Discussion**

[15] The trial judge, at paragraph 21 of his reasons, posed the first question before him as: “did the parties agree to a price based on the actual size of the two units, or on the size based on the registered strata plan?” He stated, at paragraph 22, that the question had to be answered by reference to the factual matrix of the contract and that “[t]he words of the written contract are persuasive evidence of the parties' agreement”. He referred to the Adjustment Clause and concluded, at paragraph 24, that it was “an effort to tie the price of sale to the area as indicated on the registered strata plan”. He then reviewed, at paragraphs 25 through 30, the extrinsic evidence surrounding the Sale Contract, which he felt bolstered his conclusion.

[16] The Seller asserts that the trial judge erred by giving prominence to the parties’ evidence about their intentions while relegating the language of the Sale Contract to a secondary status of “persuasive evidence”. In making his comment that the words in the contract were persuasive evidence, it appears that the trial judge was repeating a comment made by Metzger J. in ***Outwest Enterprises Ltd. (c.o.b. Ad/Wise Consultants) v. Timms (c.o.b. Wives Unlimited Cleaning***

***Service)***, 2007 BCSC 560 ¶ 14, and quoted by the trial judge in paragraph 14 of his reasons for judgment. However, the comment by Metzger J. was made in the context of an issue involving a mistake and does not reflect the general approach to be taken in determining the terms of an agreement reached by parties who have reduced it to writing.

[17] Where there is a written contract, the court must first interpret the words of the contract according to their ordinary and natural sense in the context of the contract as a whole, in light of the factual matrix existing at the time the contract was entered into. If the meaning of the words is unambiguous, the agreement of the parties is determined solely from the interpretation of the contract. It is only if the words of the contract bear more than one reasonable interpretation that the court will consider extrinsic evidence to assist it in determining the intentions of the parties: see ***Gilchrist v. Western Star Trucks Inc.***, 2000 BCCA 70, 73 B.C.L.R. (3d) 102 ¶ 17, 18.

[18] In my opinion, the trial judge erred in posing the question as he did and in considering extrinsic evidence of the parties' intentions. The sale price was set out in the Sale Contract at $480,000, and the proper approach was to interpret the Adjustment Clause in order to decide whether it had been triggered and, if it had been, to determine the adjusted price. In the absence of an ambiguity, the extrinsic evidence of the parties' intentions was not relevant.

2008 BCCA 172 (CanLII)

[19] I will repeat the Adjustment Clause for ease of reference:

> The purchase price as stipulated within this Contract is based on a total square footage of 3,200 square feet for the two units combined, and is to be verify [sic] by the Buyer. In the event of any discrepancy, the purchase price shall be adjusted according to the actual size of the property registered as per Strata Plans for subject strata corporation on a pro-rata bases [sic] upon Completion.

The natural and ordinary meaning of the words in the first sentence is that the purchase price was based on the area of the two units being 3,200 square feet and that the Buyer was going to verify the area.

[20] The Buyer did not attempt to verify the area of the units by measuring their floor space prior to the collapse of the transaction on the completion date. As a result, the Buyer did not specify a discrepancy between an area of 3,200 square feet and the actual area of the units prior to the completion date. The Adjustment Clause was not triggered, and the Buyer was not entitled to take the position that the price had been reduced below $480,000. The Buyer repudiated the Sale Contract when it took a contrary position on the completion date. The Buyer's repudiation was accepted by the Seller in its statement of defence. As the Buyer repudiated the Sale Contract, it had no claim against the Seller and, consequently, this appeal should be allowed and the action should be dismissed.

[21] The Buyer submits that the interpretation of the Adjustment Clause sought by the Seller would render meaningless the words "registered as per Strata Plans" in the second sentence of the Adjustment Clause. I disagree. If the area of the units was determined by the Buyer to be less than 3,200 square feet, the price was to be

2008 BCCA 172 (CanLII)

adjusted according to the size of the units shown on the strata plan. As counsel for the Seller put it, the strata plan was intended as the "tie-breaker" in the event that the Buyer determined that the size of the units was not 3,200 square feet. The words did have meaning in the event that a discrepancy between the represented size of the units (3,200 square feet) and their actual size was identified.

[22] The Buyer also submits that the first sentence of the Adjustment Clause cannot be interpreted in isolation from the second sentence which provides for an adjustment of the purchase price according to the actual size of the units shown on the strata plan. The Buyer says that the Sale Contract must be interpreted in a manner that brings about a sensible result and promotes the true intent of the parties and that, in view of the second sentence, the only logical interpretation as to the proper method of verification referred to in the first sentence was that the area of the units would be verified by determining the size as shown on the strata plan.

[23] In support of this submission, the Buyer relies upon paragraph 11 of the decision in ***Urton v. SRI Homes Inc.***, 2007 BCCA 372, 60 C.C.E.L. (3d) 162. In that paragraph, this Court simply quoted the following passage from ***Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Ins. Co.***, [1980] 1 S.C.R. 888 at 901, 112 D.L.R. (3d) 49:

> Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance

2008 BCCA 172 (CanLII)

> was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation . . . which promotes a sensible commercial result.

[24] In my opinion, an interpretation of the words of the Adjustment Clause according to their natural and ordinary meaning does not bring about an unrealistic result or a result that would not have been contemplated in the commercial atmosphere of the transaction. Rather, it is the interpretation urged upon us by the Buyer that does not promote a sensible commercial result.

[25] Under the Buyer's proposed interpretation it would acquire the two units at a discount of approximately $114,500 below the price it negotiated (or approximately $111,000 if one were to take into account the difference between 3,200 and 3,177 square feet). The Buyer would receive one of the units without the benefit of an up-to-date strata plan. This deficiency would have some value, but not of the magnitude of $111,000. The Buyer would receive a windfall at the expense of the Seller.

[26] The result of interpreting the words of the first sentence according to their literal meaning, without inferring that the only method of verification was the strata plan, is that the Buyer had a choice upon learning that the registered strata plan was out-of-date. The Buyer could have chosen to go ahead with the purchase of the units at the price it negotiated, but without the benefit of an up-to-date strata plan for one of the units. Alternatively, the Buyer had the option of withdrawing from the

2008 BCCA 172 (CanLII)

transaction if the Seller did not agree to register an updated strata plan or to reduce the purchase price by a reasonable amount to reflect the obsolescence of the registered strata plan. The Buyer had this option as a result of the condition precedent in the Sale Contract that it was to receive and approve the strata plan. In my view, the literal interpretation is the one that promotes a sensible commercial result.

[27] The Buyer further submits that the Adjustment Clause did not contain any limitation as to how it was to verify the size of the units and that the method of verification was up to it. That is correct. However, the Buyer was not entitled to rely on a method of verification that it knew or ought to have known was inaccurate. It was obvious from a review of the strata plan obtained by the Buyer's lawyer from the Land Title Office that it was not up-to-date. The Buyer was familiar with the building and had inspected the units. It knew that, contrary to what was shown on the strata plan, the area of each unit was roughly the same.

[28] The final aspect of this matter relates to the dismissal of the Seller's counterclaim. The trial judge dismissed the counterclaim on the basis that the Buyer did not repudiate the Sale Contract. As I would hold that the Buyer did repudiate the Sale Contract, the counterclaim should not have been dismissed.

**Conclusion**

[29] The Adjustment Clause was not triggered, and the Buyer repudiated the Sale Contract when it refused to complete the transaction at the unadjusted purchase price of $480,000. I would (i) allow the appeal; (ii) set aside the order for specific

2008 BCCA 172 (CanLII)

performance of the Sale Contract; (iii) dismiss the action with costs to the Seller throughout; and (iv) remit the counterclaim to the Supreme Court.

"The Honourable Mr. Justice Tysoe"

**I agree:**

"The Honourable Mr. Justice Smith"

**I agree:**

"The Honourable Mr. Justice Lowry"

2008 BCCA 172 (CanLII)

| | | | |
|---|---|---|---|
| Citation: | Paul v. Vanc. Int. Airport<br>2000 BCSC 0341 | Date:<br>Docket:<br>Registry: | 20000302<br>C964759<br>Vancouver |

# IN THE SUPREME COURT OF BRITISH COLUMBIA

2000 BCSC 341 (CanLII)

BETWEEN:

**CHRISTOPHER PAUL**
**and S-8002 HOLDINGS LTD.**

PLAINTIFFS

AND:

**VANCOUVER INTERNATIONAL AIRPORT AUTHORITY**

DEFENDANT

**REASONS FOR JUDGMENT**

**OF THE**

**HONOURABLE MADAM JUSTICE STROMBERG-STEIN**

| | |
|---|---|
| Counsel for the Plaintiffs | A. Cameron Ward<br>and J. Levine |
| Counsel for the Defendant | Alan A. Hobkirk |
| Dates and Place of Trial: | January 10-14, 17-21,<br>and 24-27, 2000<br>Vancouver, BC |

The evidence shows very clearly that Mr. Paul and his team were not mistaken as to the legal effect of the July 15 "comfort letter". The very purpose for which this letter was requested by Mr. Tusar and Mr. Capistrano, and provided by the Airport Authority, is one *indicia* that neither side believed the letter created a legal commitment to lease. That purpose, as I have said, was to facilitate applications to regulatory agencies. There is further evidence, by the conduct of Mr. Paul and his team, in attempting over a period of many months to obtain a lease or an option to lease once they realized that the July 15 letter was unsuitable for their purposes of applying for a liquor licence. This is proof that Mr. Paul did not rely on any representation made in the July 15 letter and did not consider the Airport Authority had waived any of its legal rights.

[85] In addition, there is no evidence that Mr. Paul changed his course or altered his position in reliance upon the July 15 letter. Mr. Paul and his team continued along the same path after July 15 that they had started down before July 15--spending some time and money in pursuit of regulatory approvals, hoping to advance to the first plateau in the Airport Authority's approval process. While provision of the letter was a prerequisite to further work being done in

2000 BCSC 341 (CanLII)

seeking the regulatory approvals, I do not accept the assertion that the letter suddenly changed the entire playing field. Clearly, had the proponents received an outright "No" from the Airport Authority, either at the outset or upon their request for the "comfort letter", it is likely they would have discontinued further work on their proposal. However, this does not necessarily lead to the conclusion that the Airport Authority committed itself to the still-evolving proposal by *not* saying "No". By that logic, the Airport Authority would become obligated to anyone whom it encouraged, assisted or facilitated in the furtherance of the development of a proposal still in its infancy. In the circumstances of this case, it would have been entirely unreasonable for Mr. Paul and his team to assume the July 15 letter was a binding commitment to lease. Mr. Paul and his team never indicated to Mr. Kandert that they were relying on the letter to alter their position.

[86] As well, I cannot conclude that Mr. Paul made any expenditure to his detriment in a belief that he had a commitment to lease. He had chosen his path and only sought a "comfort letter" from the Airport Authority to advance his proposal beyond the conceptual stage. Nor can I conclude that the Airport Authority encouraged Mr. Paul to spend time and

2000 BCSC 341 (CanLII)

**CITATION:** *Prescott Finishing v. Prescott (Town) v. Rideau St. Lawrence Distribution*, 2010 ONSC 212
**COURT FILE NO.:** CV06/0886A
**DATE:** 2010/06/22

2010 ONSC 212 (CanLII)

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **B E T W E E N:** | |
| PRESCOTT FINISHING INC. | S.A. Gomery and J. Macdonald, for the Plaintiff |
| Plaintiff | |
| **- and -** | |
| CORPORATION OF THE TOWN OF PRESCOTT | B. Carroll and S. Laushway, for the Defendant |
| Defendant | |
| **- and –** | |
| RIDEAU ST. LAWRENCE DISTRIBUTION INC. | C. Morrison, for the Third Party |
| Third Party | |
| | **HEARD:** September 14, 15, 16, 17 and 18, 2009 (Brockville) and Last written submissions filed on November 21, 2009 |

**REASONS FOR JUDGMENT**

**KERSHMAN J.**

## TABLES OF CONTENT



2010 ONSC 212 (CanLII)

PFI had no reason to believe that there was a problem with the way the consumption was being recorded.

Discovery of Overbilling in 2005

[57] Andrew Green, the former technical director at PFI testified that in May 2005, Environment Canada provided PFI with a survey, the purpose of which was to allow Environment Canada to create a pollution prevention plan. As part of the survey, PFI was required to calculate the mill's total water consumption. Mr. Green undertook this task on behalf of PFI.

[58] Mr. Green testified that he had an extensive background in the operation of dye and finishing mills both in Canada and in the United Kingdom for over 20 years. He worked for PFI from May 2004 until April 2008.

[59] Mr. Green looked at the water usage from 1999 to 2003 using the water bills that he obtained from the PFI office.

[60] After reviewing the bills, Mr. Green's opinion was that PFI's water bills appeared inordinately high. He decided to prepare his own calculations by taking the level of production at the plant during a given period of time and determining how much water would have been consumed during these processes, thereby calculating how much the water bill ought to have been.

[61] Mr. Green testified that he had to create programs in order to do the calculations which took him several hours. He also testified that these calculations required an in-depth knowledge of the production processes involved at a textile plant and the raw materials used in the processes, which he possessed. He further testified that, in his opinion, no one else at PFI had the expertise to do the calculations.

2010 ONSC 212 (CanLII)

that PFI was being overbilled. It was not the amount of time that it took to do the calculations that is the determining factor; it is rather the knowledge of the person undertaking the task and the complexity of the calculations that were done that must be considered.

[175] The actual discovery of the amount of water consumption involved a series of formulae. Based on the testimony of Mr. Green, these formulae were complex. While it may have only taken several hours to do the calculations, they had to be done by a person with a high level of experience and skill. Time taken does not equate to the ease or difficulty of the task undertaken. The knowledge and expertise of the person doing the work is what is key. Mr. Green's 25 plus years of experience was the determining factor in performing the calculations. It must be remembered that in order to perform these calculations, Mr. Green had to go back through the mill's production records and determine various things, including:

(a) how many processes were performed at the mill during that particular month;
(b) what dye and finishing machines had been used;
(c) which types of fabric had been processed;
(d) the volume of each fabric processed; and
(e) how much water was used in the cooling process.

[176] I have reviewed the wording of section 5(1) and section 5(2) of the *Limitations Act, 2002*. In section 5(2), the Plaintiff is "presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved." In my view, the contrary has been proven. Based on the Coulter report and the December 18, 1997 letter, the Plaintiff would not have known that the readings were inaccurate. The Plaintiff relied on Exhibits 3 and 4. The Plaintiff knew that the impellor on the low flow meter had been changed and it knew that the readings were allegedly accurate based on the Coulter testing and report. PFI had sent a letter to the Town dated November 28, 1997 concerning the 350 per cent increase in the water bill. The Town replied by letter dated December 18, 1997 (Exhibit 4) in which it acknowledged that there was an increase in the water billing and that the increase was accurate, as were PFI's bills.

2010 ONSC 212 (CanLII)

[177] I am satisfied that the actions of the Plaintiff were reasonable, based on the evidence that the readings were accurate.

[178] Therefore, in my view, the presumption in paragraph 5(2) of the *Limitations Act* has been rebutted by PFI and that the matter was properly discoverable in 2005. Accordingly, the Plaintiff having commenced the action in September 2006 is within the two-year timeframe set out in the *Limitations Act, 2002*.

[179] I have reviewed the arguments of the parties:

(a) While the hardship may be created for the Town because of the overbilling and overpayment, that is not a problem that should be borne by PFI. It is the Town's problem which it will have to deal with. It is unfortunate that the Town may have to increase taxes; however, that is a consequence of what occurred here. The Town's auditors recommended that a reserve fund of $200,000.00 be set aside to deal with the matter. For whatever reason, the Town set aside a reserve fund of only $100,000.00.

(b) While there may be evidentiary problems in that the actual meter is no longer available, that is not PFI's problem. The meter belonged to the Town. It chose to dispose of it. Furthermore, witnesses could have been called with respect to the meter and some, in fact, were called.

(c) PFI did not "sleep on their rights". It did not discover the problem until 2005 and had no indication that there was a problem until 2005. It relied upon the Coulter test and report as well as the letter from the Town dated December 18, 1997 to deal with the issue of the accuracy of the meter.

[180] In my view, PFI did exercise reasonable diligence in this matter in order to discover the problem. Notwithstanding its diligence, PFI was not able to discover the overbilling until May 2005.

2010 ONSC 212 (CanLII)

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R & B Plumbing & Heating Ltd. v. Gilmour,* 2018 BCSC 1295

Date: 20180801
Docket: S149744
Registry: Vancouver

Between:

**R & B Plumbing & Heating Ltd.**

Plaintiff

And

**Audrey Faye Gilmour**

Defendant

Before: The Honourable Madam Justice D. MacDonald

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | A. Soliman<br>S. Karim, Articled Student |
| Counsel for the Defendant: | R. Luo |
| Place and Dates of Trial: | Vancouver, B.C.<br>March 5-9, April 19<br>and May 3, 2018 |
| Place and Date of Judgment: | Vancouver, B.C.<br>August 1, 2018 |

2018 BCSC 1295 (CanLII)

**Conclusion**

[106] The defendant argued that the burden of proof on a balance of probabilities is on the plaintiff. This is true in terms of the claims in the notice of civil claim.

[107] The plaintiff discharged its burden of proof on a balance of probabilities that the defendant is liable to pay for the outstanding invoices. The non-payment is a fundamental breach of contract. The one exception is the outstanding amount relating to the temporary heater on invoice 6903. The cost of the temporary heater, to the extent that it has not already been discounted, should be subtracted from the outstanding amount that Ms. Gilmour owes to R & B Plumbing.

[108] The burden of proof on a balance of probabilities is on the defendant with respect to her counterclaim. For the most part, the defendant has not met this burden. The exception is with respect to the mixing valve that was not installed on the boiler prior to R & B Plumbing withdrawing from work on the property. This valve needed to be installed by different plumbers to address this deficiency. I am satisfied that the plaintiff owes Ms. Gilmour $504 for the cost of installing the mixing valve.

[109] On or about January 7, 2015, the defendant deposited $18,803.31 in trust with her lawyer as security to release the lien. The defendant is asking for a declaration that I extinguish the lien (i.e. the security being held in lieu of the lien).

[110] The $18,803.31 being held in trust should be paid to the plaintiff, minus any outstanding amount relating to the temporary heater on invoice 6903 that has not already been discounted by the plaintiff and the $504 owing for the mixing valve. The calculation should also take into account prejudgment interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[111] If the parties are unable to agree on the amount that should be subtracted from the $18,803.31, I direct that the Registrar conduct an assessment pursuant to R. 18-1(2) of the *Supreme Court Civil Rules* of the monies to be subtracted from the $18,803.31 that are to be paid to the defendant as a result of my findings regarding the temporary heater and the mixing valve.

2018 BCSC 1295 (CanLII)

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Christhurajah,*
2016 BCSC 2400

Date: 20161207
Docket: 26117-34
Registry: Vancouver

2016 BCSC 2400 (CanLII)

**Regina**

v.

**Kunarobinson Christhurajah,**
**Lesly Jana Emmanuel,**
**Nadarajah Mahendran, and**
**Thampeernayagam Rajaratnam**

**Restriction on publication: pursuant to s. 648(1) of the *Criminal Code of Canada***

Before: The Honourable Mr. Justice Ehrcke

## Oral Ruling on Application No. 34
## Constitutionality of the *Mutual Legal Assistance in Criminal Matters Act*

| | |
|---|---|
| Counsel for the Crown: | P.R. La Prairie<br>C.F. Hough |
| Counsel for the Accused K. Christhurajah: | C. Leggett |
| Counsel for the Accused L.J. Emmanuel: | R.S. Ross |
| Counsel for the Accused N. Mahendran: | M. Nohra<br>M.J. Gismondi |
| Counsel for the Accused T. Rajaratnam: | V.M. Williams |

Place and Date of Hearing: Vancouver, B.C.
November 10, 23, 24 and 28, 2016

Place and Date of Judgment: Vancouver, B.C.
December 7, 2016

2016 BCSC 2400 (CanLII)

**TABLE OF CONTENTS**



## 1. INTRODUCTION

[1] Kunarobinson Christhurajah, Lesly Jana Emmanuel, Nadarajah Mahendran, and Thampeernayagam Rajaratnam, are charged under s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 with knowingly organizing, inducing, aiding, or abetting the coming into Canada of persons not in possession of a passport or other required travel documents.

[2] The Crown alleges that they were involved in transporting undocumented migrants from Thailand to Canada aboard the cargo ship M/V Sun Sea in 2010.

[3] In addition to the *viva voce* testimony of several of the migrants who were on the ship, the Crown seeks to introduce evidence before the jury of events from Thailand in the weeks prior to the ship's departure. Included in the Thai evidence that the Crown seeks to have admitted, are a document called "Record of Arrests" and another document called "Record of Investigation and Seizure." These

admissible, it does have the effect of eliminating the need to establish the twin criteria of necessity and threshold reliability.

[40] In my view, this interpretation is the only one that is consistent with the plain effect and grammatical sense of the words used by Parliament. Moreover, the suggestion that a trial judge retains the principled approach's gatekeeper role and could exclude records tendered under s. 36 on the basis that threshold reliability had not been established, would render s. 36 nugatory and of no practical effect. If the hearsay records are necessary and have threshold reliability, then they are admissible without the assistance of s. 36 of the *MLACMA*.

2016 BCSC 2400 (CanLII)

## 7. DOES SECTION 36 INFRINGE THE RIGHT TO A FAIR TRIAL AND FULL ANSWER AND DEFENCE

[41] As mentioned above, there are other exceptions to the rule against hearsay, and they do not all require the proponent of the evidence to establish threshold reliability -- s. 30 of the *Canada Evidence Act* and s. 715 of the *Criminal Code* are two examples. The latter has been held to be Constitutionally sound, and it has not been suggested that the former is Constitutionally suspect.

[42] In considering the Constitutionality of s. 36 of the *MLACMA*, therefore, it is useful to compare it to those other provisions. How do they preserve their Constitutional integrity despite the fact that they permit the admission of hearsay without requiring the trial judge to make a finding of threshold reliability?

[43] In my view, the answer is this. Where Parliament enacts a provision that permits the admission of hearsay evidence, it must either preserve the requirement for the trial judge to assess the evidence and make a finding of threshold reliability, or it must have some other feature or combination of features that provide sufficient assurance that manifestly unreliable evidence will not be admitted before a jury.

[44] In the case of s. 30 of the *Canada Evidence Act*, there are various safeguards. The primary safeguard is the requirement that records admitted under the section must be shown to be records kept in the usual and ordinary course of

business. That is a very substantial marker of threshold reliability. If the records are kept according to a certain routine procedure, and the keeper of those records is satisfied that the routine procedure is sufficiently reliable for its own business purposes, then it is likely sufficiently reliable for the jury to see the records and consider their probative value. This was recognized by the Court in *R. v. Grimba* (1977), 38 C.C.C. (2d) 469 (Ont. Co. Ct.) at p. 471:

> It would appear that the rationale behind that section for admitting a form of hearsay evidence is the inherent circumstantial guarantee of accuracy which one would find in a business context from records which are relied upon in the day to day affairs of individual businesses, and which are subject to frequent testing and cross-checking. Records thus systematically stored, produced and regularly relied upon should, it would appear under s. 30, not be barred from this Court's consideration simply because they contain hearsay or double hearsay. However, before they qualify under that section, the provision of s. 30 must be strictly complied with: see *R. v. Mudie* (1974), 20 C.C.C. (2d) 262 at p. 266.

[45] Another safeguard in the case of business records is the requirement in s. 30(10) that the records must not be ones made in the course of an investigation or in contemplation of a legal proceeding. That prevents the admission of what might otherwise be self-serving documents.

[46] Critically, s. 36 of the *MLACMA* contains neither of those safeguards. I note, parenthetically, that some of the records that the Crown is seeking to have admitted under s. 36 of the *MLACMA* might have been admitted under s. 30 of the *Canada Evidence Act*, if they had been accompanied with proof that the requirements of that *Act* were complied with.

[47] In the case of s. 715 of the *Criminal Code*, testimony that was taken in certain specified previous proceedings may be admitted if the witness is unavailable due to death, insanity, illness, or absence from Canada. The first thing to notice is that the applicability of the section is carefully circumscribed; it is only if the previous testimony fits into one of the specified categories, such as evidence taken at a preliminary inquiry, that it will be considered for admission. The specified categories are ones in which the witness would have given the testimony under oath or affirmation. Second, the evidence is not admissible if the accused did not have full

2016 BCSC 2400 (CanLII)

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Scott,*
2018 BCSC 2562

Date: 20180718
Docket: X080205
Registry: New Westminster

**Regina**

v.

**Randy William Scott**

Before: The Honourable Madam Justice Ker

## Oral Ruling on Voir Dire #3

| | |
|---|---|
| Counsel for Crown: | R. Flannigan<br>T. Iandiorio<br>E. Lehrer |
| Counsel for Accused | T.E. La Liberté, Q.C.<br>K. Wilkinson |
| Place and Date of Trial: | New Westminster, B.C.<br>July 16-18, 2018 |
| Place and Date of Judgment: | New Westminster, B.C.<br>July 18, 2018 |

2018 BCSC 2562 (CanLII)

assist the trier of fact on this aspect of the case. He will not be permitted to proffer an opinion on intoxication as it relates to Mr. Scott's mental state at the time of the offence.

***Factor Three: Other Exclusionary Rules***

[41] On this point, the parties agree that the proposed evidence is not subject to any other exclusionary rule.

***Factor Four: A Properly Qualified Expert***

[42] The main issue on this *voir dire* is the Crown's objecting to Dr. Levin being qualified as an expert in forensic psychiatry and neuropsychiatry and capable of proffering an opinion on Mr. Scott's mental state at the time of the offence in respect of the six areas the defence proposes to have him address. I have already concluded that the scope of any opinion cannot include commentary on intoxication. Accordingly, five other areas remain.

[43] The Crown argues that Dr. Levin is not qualified to testify in the areas proposed other than general psychiatry because he does not teach in these areas, he has not written peer-reviewed articles in these areas, and although Dr. Levin has experience in forensic psychiatry, he has failed the certification exam three times.

[44] In *R. v. Giles* 2016 BCSC 294, Madam Justice Ross articulated the considerations that inform the assessment of whether an individual is a properly-qualified expert stating:

> [53] In *Mohan*, Justice Sopinka defined the test for a properly qualified expert at 25 as follows:
>
> > The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.
>
> [54] While the basic test identified in *Mohan* has not changed, in the intervening years it has become clear that the expert must be qualified to express the specific opinion proffered. The expert must be confined to express opinions within the scope of that qualification. Finally, there must be an evidentiary foundation to support the qualification and scope, see *R. v. Orr*, 2015 BCCA 88.

2018 BCSC 2562 (CanLII)

[45] Madam Justice Ross went on to note, at para. 55, that it is well established that formal training or certification is not a requirement for qualification as an expert: *R. v. Marquard*, [1993] 4 SCR 223. Expertise in an area can come about from working experiences, as well.

[46] In *Giles*, Ross J. referred to the decision of Mr. Justice Durno stating:

> [60] In *R. v. Pham*, 2013 ONSC 4903, Durno J. dealt with the issue of the scope of the expertise of an RCMP officer the Crown sought to qualify as an expert witness. The officer had extensive experience in drug investigations and dealing personally with drug users. He had also supplemented his knowledge with workshops and reading.
>
> [62] Durno J. provides a non-exhaustive list of factors to assist in the determination of whether the witness is qualified at para. 31:
>
> - the manner in which the witness acquired the special skill and knowledge upon which the application is based;
> - the witness' formal education (i.e. degrees or certificates);
> - the witness' professional qualifications (i.e. a member of the College of Physicians and Surgeons);
> - the witness' membership and participation in professional associations related to his or her proposed evidence;
> - whether the witness has attended additional courses or seminars related to the areas of evidence in dispute;
> - the witness' experience in the proposed area(s);
> - whether the witness has taught or written in the proposed area(s);
> - whether, after achieving a level of expertise, the witness has kept up with the literature in the field;
> - whether the witness has previously been qualified to give evidence in the proposed area(s), including the number of times and whether the previous evidence was contested;
> - whether the witness has not been qualified to give evidence in the proposed area(s) and if so, the reason(s) why; and
> - whether previous caselaw or legal texts have identified the contested area as a proper area for expert evidence and if so, who might give the evidence.

[47] In my view, the factors enumerated by Durno, J. in *Pham* and referred to by Ross J. in *Giles* outline the appropriate considerations to apply in respect of Dr. Levin and the two proposed areas of special knowledge and expertise, that is, forensic psychiatry and neuropsychiatry.

2018 BCSC 2562 (CanLII)

[48] I will deal with the latter first. In so far as neuropsychiatry is concerned, the totality of the evidence, and in particular Dr. Levin's CV, establishes there was some initial concentration or involvement in neuropsychiatry just after Dr. Levin completed his residency in psychiatry. However, Dr. Levin's medical work in that area appears to have started in 2000 and ceased in 2002. He has conducted no research in the area, written no articles in the area, and does not teach in the area. There does not appear to be any evidence that he has kept up with literature in the field of neuropsychiatry, and from what I can determine in so far as attending additional courses or seminars related to the areas of neuropsychiatry, it appears from his CV that his last course on it was in 2004. There is no evidence of his participation or membership in professional associations related to neuropsychiatry. Although a member of the Royal College of Physicians and Surgeons and licensed to practice psychiatry, I am not satisfied on a balance of probabilities that Dr. Levin is an expert in neuropsychiatry. He will not be qualified as an expert with special knowledge and expertise in the field of neuropsychiatry, and he is not permitted to provide an opinion in that area as it relates to Mr. Scott's mental state and the issue of concussions.

[49] I turn now to whether Dr. Levin is an expert in the area of general psychiatry with special knowledge and expertise in the area of forensic psychiatry. The Crown asserts that Dr. Levin is not an expert in this area and ought not to be permitted to testify with respect to this area. The Crown acknowledges that Dr. Levin is a psychiatrist who can provide opinion evidence as to general psychiatry.

[50] Turning again to the factors enumerated by Durno J. and Ross J., the Crown's main contention appears to be that Dr. Levin ought not to be qualified as a forensic psychiatrist because Dr. Levin has three times failed the certification exam for the subspecialty in forensic psychiatry.

[51] However, the content of Exhibits C and D on this *voir dire* establish that Dr. Levin had, at least, the necessary credentials and scope of practice to meet the requirements for forensic psychiatry in 2013 and 2016. While Dr. Levin may have

2018 BCSC 2562 (CanLII)

1980 CarswellBC 1590
British Columbia Supreme Court

Suzuki v. Jackson

1980 CarswellBC 1590, 3 A.C.W.S. (2d) 244

# BETWEEN: TAKASHI SUZUKI, UTAKO SUZUKI, CHIYOTA ISHIKAWA, and MICHIKO ISHIKAWA, suing on their own behalf under the Families Compensation Act, R.S.B.C. 1960, Chapter 138 and amendments thereto and HITOMI KAWAMURA, PLAINTIFFS AND: GORDON DAVID JACKSON, DEFENDANT

McKenzie, J

Judgment: March 26, 1980
Docket: None given.

Counsel: John N. Laxton for the Plaintiffs;
J.J. Camp for the Defendant;

***THE HONOURABLE MR. JUSTICE MCKENZIE*:**

1 Liability is admitted for the injuries suffered on 16 July 1978 by Hitomi Kawamura and for the death of Akiko Iwamura both of whom were in a stopped passenger car when it was struck from the rear by the defendant's car and bunted over an embankment into a river resulting in triple drownings and injuries to the two remaining passengers. This unfortunate group of Japanese were sightseeing in Eastern British Columbia and the two with whom we are presently concerned were enrolled at the University of British Columbia learning English. They had just embarked on their studies.

**CLAIM OF HITOMI KAWAMURA**

2 This is most of the report of the doctor who first attended Hitomi Kawamura. He had the benefit of an interpreter:

> "On arrival in the outpatient department she was conscious, coherent, collected, and soaking wet. Fortunately I was attending a Japanese lawyer from Seattle at the time and was able to communicate verbally with her. Her main complaints at the time consisted of headache, some pain related to the cervical area, and mid dorsal spine. In addition she complained of pain in the right ribs and some discomfort in the legs.
>
> Examination revealed superficial contusions to the head, some limitation of range of motion ir, the cervical spine and discomfort on palpation over the dorsal spine and right ribs. She also had Superficial abrasions and contusions of both legs. Vital and neurological signs are normal. X-ray of the skull, cervical spine, and thoracic spine showed no bony injury. She was detained for three days on account of the neck pain and stiffness and was finally discharged on July 19th.
>
> The prognosis for recovery of these injuries; is good."

3 She describes her condition at that time as follows:

> My neck became very stiff. I was very, very dizzy. I could not walk. My nose was bleeding. My whole body was very numb I could not open my mouth so could not eat anything. I could not lie down or get up by myself. Whenever I stood up I had severe headache, a lot of dizziness and nausea.

She travelled from Jasper to Vancouver in a friend's car and was sick during the journey and had to call an ambulance. At her apartment in Vancouver she "stayed in bed all the time" for two months before returning to Japan.

4 A Vancouver orthopedist saw her on the fifth day after the accident and she complained of severe pain in the back of the neck and back of the head mainly on the right side. She was feeling dizzy upon changing positions of her body. She had some pain over the lower ribs and was taking muscle relaxants. His conclusion then was that she sustained a fairly severe sprain of the neck spine and he advised continued use of a neck collar.

5 He saw her again on the 19th day when she said she was feeling better but she still had pain in the back of the neck and over the ribs. Her neck was stiff and there was pair, between the shoulder blades and back of the right shoulder. All movements attempted before the doctor were painful. He recommended wearing the neck collar three more weeks and aspirin. This was his conclusion:

> "This young woman sustained a sprain of the neck spine in the above-mentioned accident. She is slowly recovering from the injury and I think that she will completely recover, though it may take her six months or more before she is relatively free of symptoms. I don't expect any permanent loss of function as a result of this accident."

6 A Japanese doctor examined her about three months after the 1)1) accident and about six months after when her chief complaints were headache and some pain related to the cervical area especially when she was tired. He said "Her prognosis for recovery of these injuries is good. I advised her to continue wearing the neck collar and to take massage."

7 Thirteen months after the accident the Japanese doctor wrote: "Now there is little cervical pain, her chief complaint when she is tired. It will not be long before she recovers completely. I advised her to play tennis and swim in the summertime and may begin to work in September" (i.e. the next month). She tried both the tennis and work but could not manage either. She returned to her clerical work in a bout:.que in October 1979.

8 This doctor's final report of 3 March 1980 described her present condition as "clinically and radiologically good" and said that "her prognosis is good."

9 The Japanese doctor's reports are rather laconic and based on only two examinations near the end of 1978 with some subsequent "visits" by the patient, which she claimed were ever,i two weeks. It is obvious that he was not deeply impressed by the severity of her injuries. He nowhere mentions acupuncture or hot springs treatment, but she said she took both on his recommendation -acupuncture every two weeks for a year and hot springs once a month for several months.

10 As to her present condition, she says her neck gets very stiff in rainy weather and she claims quite limited ability to turn her head to the left. She suffers headaches, particularly at work upon sitting or bending. She believes that it will be another year before she can work full time. She presently works an hour short of full time but loses about five days a month when she feels unable to work. She continues to take therapeutic massages. She last saw her doctor in September 1979 and has no current appointment. In my opinion the truth lies somewhere between the doctor's assessment and her own.

11 For non-monetary general damages to include pain and suffering and loss of enjoyment of life both past and prospective and for the loss of the benefit which completion of her course at U.B.C. would have given her I award $10,000.00.

12 For loss of earnings up to trial I would reckon the time from the beginning of 1979,when she presumably would be in the job market again after completion of her course,up to October 1979 when she actually returned to work, which means that she lost $775.00 per month for nine months or $6975.00 and since 1 October her earnings have been reduced by some amount each Month because she works short hours. She was earning $775.00 per month when she left her job to come to Canada in the spring of 1978 and she was given $550.00 per month upon her return with the reduction being justified, according to her employer, because she works one hour short of a full day. Were she to work full time the employer would consider her worth $900.00 per month. That reason must be specious because a reduction of $350.00 per month, or 29%, cannot be justified for a

one hour daily shortfall. For want of a precise solution I will consider her loss at $250.00 per month for seven months which is to the end of the current month, a total of $1750.00. In addition there will be for future loss of earnings the sum of $1000.00.

13 Special damages are troublesome because many items are not only unsupported by invoices but they are implausibly high. Some were for acupuncture treatments and hot baths, which were :cot recommended by her doctor, or, at least, he does not mention them and in any event were paid by her parents with no indemnity agreement.

14 I am driven to select only those items which are either conceded by the defence, or which appear reasonable or to the extent that they appear reasonable and on this basis the following are allowed:

| | |
|---|---|
| Items lost in accident, converted to Canadian dollars at the conversion rate of 200 yen to the dollar which will be employed throughout these reasons | $ 462.00 |
| Enrolment at U.B.C. | 100.00 |
| Long Distance calls to and from Japan | 250.00 |
| Costs of attending funerals in Osaka and Tokyo of deceased companions | 200.00 |
| Portion of account of Michiko Sugita | 500.00 |
| Translation services | 250.00 |
| Taxis for treatments | 500.00 |
| Train journeys | 200.00 |
| Miscellaneous | 150.00 |
| Total: | $2,612.00 |

In summary, for the Hitomi Kawamura claim:

| | |
|---|---|
| General damages apart from future loss of earnings | $10,000.00 |
| Loss of earnings | 8,725.00 |
| Future Loss | 1,000.00 |
| Special damages | 2,612.00 |
| Total: | $22,337.00 |

15 Prejudgment interest at 11% will apply to all elements of the award except the $1000.00 awarded for loss of future earnings.

**CLAIM OF PARENTS**

16 The parents' claim arising from the death of Akiko Iwamura gives me a lot of trouble because many of the facts of her life are so obscure. The evidence about her came from her mother, her brother-in-law and certain bank records.

17 She left no estate when she died aged 33. Her marriage of 14 years ago produced a daughter now 12. Six years ago she separated from her husband because he was an inveterate gambler and the child went to live with his parents. She was afraid of her husband because (as it came to me from her mother through a skilled interpreter) he was "not normal, sort of like a hooligan". Her mother had heard that he had done such violence as throwing a kettle of boiling water at his wife. Upon the

separation the wife had gone to Tokyo. The mother testified that she did not know exactly what her daughter was doing in Tokyo but she was "taking piano", and also had a full time job which she thought was in a men's clothing store. When I later inquired about the kind of piano she was taking her mother said that she thought she was giving piano lessons in the classical piano of the European tradition. She had studied the instrument from kindergarten days and had studied for two years in Manilla. There was no hard evidence that she was actually teaching.

18 Since the daughter's departure for Tokyo the mother had seen her only once and that was immediately before her departure for Canada. There was some uncertain evidence which suggested that the daughter might have had a premonition of death in Canada but the mother said that this was not the meaning intended by her evidence. I could not fathom what meaning she intended.

19 The daughter's way of life, place of living and means of earning her livelihood were concealed even from her mother and the justification offered for this secrecy was the daughter's fear that her estranged husband would discover her whereabouts and do her violence.

20 After her separation the daughter started to make remittances under a partly assumed name to four bank accounts in the mother's village — two held in her father's name and the others in a brother-in-law's name. She used her christian name and an assumed surname. The bank books were entered in evidence and the brotherin-law also was a plaintiff's witness. He and the mother swore that upon being advised by the bank of the fact of a remittance their practice was to remove the amount of the remittance from the account. The brother-in-law would give the money to the parents but he did not suggest that he transferred it to their bank account. The mother said that as money was deposited to her husband's account by the daughter it was taken out straight away to purchase such needs as an air conditioning unit (which cost 150,000 yen) for her asthmatic husband, to meet the cost of their daily needs and so that the parents could be comfortable in later life. An examination of the nine bank books (relating to the four bank accounts) does not support this contention of immediate removal. While a great many of the transfers were promptly removed from the account, a number were not including the largest one of 700,000 yen ($3500.00) deposited on 23 February 1977. The explanation offered for the daughter distributing her transfers among four banks was that she was afraid her husband might know that she was sending money to her parents, or somehow he might learn her whereabouts. This is an explanation which does not explain much.

21 Although the mother only saw her daughter once since about 1974 she was able to say,in answer to a question as to how long her daughter intended to carry on making payments, that the daughter had said that she would be looking after the parents while they lived.

22 The parents have a 42 year old son, a 40 year old daughter and a 38 year old son. The mother testified that she and her husband take nothing whatsoever from their wine shop monthly profits of 150,000 yen because all of it goes to repay a 10 million yen debt of the business which will take 10 years to pay off. They each get an old age pension amounting to 20,000 yen ($100.00). The husband earns another 20,000 yen making pre-nuptial gifts for their son-inlaw's business. Since the daughter's death the mother has been forced to babysit in the wine shop which brings in 30,000 yen a month ($150.00). The parents are desperate but despite this they receive no help at all from their three surviving children. The mother believed that even while the daughter was at U.B.C. she would continue to sent money constantly. The payments did stop around the time she left for Canada and she soon after met her death so nothing can be inferred from a lack of remittance while she was in Canada.

23 The son-in-law has an income of 200,000 yen a month ($1000.00). He last saw the deceased seven or eight years ago but he was able to swear that he thought she would send money as long as her parents lived and he gave his opinion that despite his father-in-law being pretty well housebound because of asthma that there was no danger of him dying any earlier because of his condition.

24 Plaintiffs' counsel urges me to take a "rational rather than an intuitive approach" to the assessment of general damages — that is to follow wherever the statistics lead even though it produces higher damages than might have been traditionally awarded before the landmark decisions of the Supreme Court of Canada were handed down in 1968 of which *Andrews v. Grand Toy Alberta Ltd.* (1978) 1 WWR 577 was one.

25 The difficulty I have with the plaintiffs' case arises from the inherent implausibility of the narrative given in support of it and the inexplicable gaps in the narrative. In saying this I am mindful of the difficulties in proving facts which have to be discovered in another country and culture and relayed through an interpreter. After allowing for these difficulties I am not satisfied that evidence could not have been turned up which would have revealed something tangible about the deceased's occupation and earnings. Considering the size of her remittances she must have had an obligation to pay income tax but there is no evidence whatsoever which reveals her earnings or occupation. There is evidence of remittances received in the bank accounts of the mother and brother-in-law but no evidence from the deceased's bank. It is clear that the deceased came by enough money to remit. 4 deposits of 4,400,000 yen ($22,200.00) between December 1974 and June 1978. On February 23, 1977 she sent 700,000 yen ($3500) to her. father and on February 24, 1977 the same amount to her brother-in-law. if the order of payment had been reversed there would have been room for the possibility that the brother-in-law had received it and immediately transferred it to the parents. The fact is that the money was not transferred away at all with any immediacy from the brother-in-law's account and not in any amounts bearing any relationship to 700,000 yen. On May 30, 1978 she sent 550.00 yen ($2750.00) to each of them and followed up to each of them on June 6, 1978 with another 200,000 yen ($1000). There is no discernable pattern either in the time or the amount of the remittances. They run as low as 10,000 yen ($50.00) and sometimes more than one transfer would be credited on the same day and then there would be intervals of two months. There is no detectable pattern of distribution between the parents and the brother-in-law's accounts. This surely does not indicate a steady flow of earnings but an erratic one. One could speculate without profit as to whether or not the earnings were lawful.

26 The plaintiffs have produced actuarial evidence to support a present value of $97.070.00 for the deceased's contributions to her parents using an agreed discount rate of 2 1/2%. This does not take cognizance of a management fee and includes payments for the life expectancy of the last survivor as between the 68 year old father and the 65 year old mother.

27 Consideration must be given here to the contingency problem. What chance is there of a continued flow of bounty? From this odd assortment of jigsaw pieces with so many pieces missing it is impossible to construct a picture which clearly portrays an amply and steady stream. The chance of a reduced flow or a complete drying up is large indeed when the source of the flow is so obscure. No one ll knows where the money was coming from or what talents were being exercised to make it come. No one knows whether these earnings were in any way related to her youthful age or whether or not they were windfall profits of some kind. All we have is speculation and speculation carries little weight in balancing probabilities. The prospect of remarriage cannot be overlooked. One unhappy venture does not remove the possibility of another try. Consideration must also be given to the fact that she had come to Canada to improve her English with the apparent hope of becoming an interpreter. There was no evidence of the quality of her achievement in English when she began the course or of how near or distant a prospect for her was the attainment of the high skills required for an interpreter. Even assuming that all of her remittances were going to her parents it does not seem reasonable to assume that she would, continue payments to the last survivor on the same generous scare. The father is a partial invaLid. The mother and brother-in-law consider that he is in excellent health apart from his asthma but there is no disinterested evidence which supports this and it is asking a lot to assume that his life span will reach the statistical average.

28 Taking all these factors together they justify in my mind a reduction for contingencies of one-third of the actuarial calculation.

29 Quite apart from this element there remains the troublesome question as to whether or not all of the money that arrived in the bank accounts was destined for the parents. The mother and brotherin-law both give their word to this but they are substantially joined in interest and without some outside confirmation I cannot find the scales to be tilted by the whole amount of the remittances.

30 Prominent in my consideration is the possibility that this woman feared having immediate access to her savings because her husband might somehow persuade or force it from her so that the dispersal of the money put it out of her immediate reach but did not deny it to her absolutely. Further it is unlikElY in my view that this daughter would behave so exceptionally as compared to her sister and two brothers who contributed nothing to the struggling parents and it is hard to understand how her mysterious earnings could have been so high, compared to the earnings of others as given in the evidence, so as to allow

such generosity. The award must be reduced to recognize the uncertainty of ultimate destination of the remittances and that reduction is fixed at an additional one-third.

31 Since the actuarial's calculations did not take all remittances into consideration I will work from a round number of ? $100,000.00 and award $53,334.00 for the parents' lost expectancy of future support after deducting a 33 1/3% contingency and 33 1/3% for uncertainty of destination.

32 On this relatively small amount I do not thing any management fee is justified.

33 The special damages create problems too particularly with those which seem excessive. in the Statement of Claim dated may 1979 there is a claim for long distance tolls to Japan of 171,130 yen ($856.00) which seems large enough when one considers that the standard charge seems to be $3.00 per minute. At the trial this item was raised to 500,000 yen ($2500.00). This appears to be outrageous. The original amount is allowed of

| | |
|---|---|
| | $856.00 |
| Notary Public in Japan 6000 yen | 30.00 |
| Items lost in vehicle | 55.00 |
| Account of Kaiko Hiroi. She rendered service with respect to one of the deceased and to Hitomi Kawamura. One-third of her account is allowed | 500.00 |
| Temple expenses | 250.00 |
| Travel and hotel in connection with funeral | 500.00 |
| Funeral expense | 750.00 |
| Total: | $2,941.00 |

34 To summarize, there will be payment as follows:

| | |
|---|---|
| General damages for loss of future support | $33,334.00 |
| Special damages | 2,941.00 |
| Total: | $36,275.00 |

and costs.

35 Prejudgment interest at 11% will apply to $7,500.00 of the general damages and to the special damages.

Citation: Swagger v. U.B.C. et al
2000 BCSC 1839

Date: 20001222
Docket: S004388
Registry: Vancouver

2000 BCSC 1839 (CanLII)

# IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**SWAGGER CONSTRUCTION LTD.**

PLAINTIFF

AND:

**THE UNIVERSITY OF BRITISH COLUMBIA**

DEFENDANT

AND:

**DALLA-LANA GRIFFIN DOWLING KNAPP ARCHITECTS,**
**formerly known as Dalla-Lana/Griffin Architects**
**AXA PACIFIC INSURANCE COMPANY,**
**formerly known as Boreal Pacific property**
**& Casualty Insurance Company**

DEFENDANTS BY COUNTERCLAIM

AND:

**DALLA-LANA GRIFFIN DOWLING KNAPP ARCHITECTS,**
**formerly known as Dalla-Lana Griffin Architects**

DEFENDANTS BY COUNTERCLAIM
and THIRD PARTY

## REASONS FOR JUDGMENT

## OF THE

## HONOURABLE MR. JUSTICE HOOD

| | |
|---|---|
| Counsel for Plaintiff Contractor | D.B. Gleig |
| Counsel for Defendant Owner | D.M. Renwick<br>A.M. Habib |
| Counsel for the Defendant by Counterclaim, Dalla-Lana Griffin Dowling Knapp Architects | J.M. MacEwing |
| Counsel for the Defendant by Counterclaim Axa Pacific Insurance Company | J. Moshonas |
| Date and Place of Trial: | September 13-15, 2000<br>Vancouver, BC |

[1] This is an 18A Trial brought on before me as the Case Management Judge by the Plaintiff Contractor, Swagger Construction Ltd., for judgment on a portion of its claim against the Defendant Owner, the University of British Columbia. It seeks payment of a Certificate of Progress Payment #33, issued by D.G.B.K., the Architects, on March 12, 1999, and in the amount of $674,287.51; a Certificate of Substantial Performance of the Contract dated February 7, 1996, having also been issued by the Architect on September 8, 1998. On that date the Defendant Owner took possession of the subject matter of the construction Contract, the Forest Science Centre, and has occupied it since then.

2000 BCSC 1839 (CanLII)

[12] This leaves for determination the primary issue. The project, the Forest Sciences Centre, is a substantial one. Work commenced on February 20, 1996, and substantial completion was certified by the Architect as of September 8, 1998. The Contractor has been paid, by virtue of the first thirty-two Certificates of Progress Payment, in excess of $40 million. The parties seemingly agree that I need not delve into the circumstances of the issuance of Certificate For Payment #33, or its validity. I do not propose to do so, and for my purposes I will assume that the Certificate was validly issued, and that without more the monies certified are due and payable. For the purposes of the application the facts are not really in dispute.

[13] I will set out here the more relevant provisions of the Contract to which I will refer:

> **ARTICLE A-5 PAYMENT**
>
> 5.1 Subject to the provisions of the *Contract Documents,* and in accordance with legislation and statutory regulations respecting holdback percentages and, where such legislation or regulations do not exist or apply, subject to a holdback of ten percent (10%), the *Owner* shall in Canadian funds:
>
> .1 make progress payments to the *Contractor* on account of the *Contract Price* when due in the amount certified by the *Consultant* together

2000 BCSC 1839 (CanLII)

[23] And in my view the law only requires that the words used by the parties in doing so will be clear and unequivocal, since the right of set-off, whether it is called a common law or an equitable right, is a substantive defence. And I observe here that in the Contract which is before me that defence is expressly preserved, since there is no provision in the Contract which expressly provides for its exclusion.

[24] Mr. Renwick's second point is that specific rights of set-off are contained in four Contract provisions, G.C. 5.5.4, G.C. 5.8.1, S.G.C. 5.3.5 and S.G.C. 5.4.5 and they are inclusive. Hence, they expressly exclude any other right of set-off on the part of the Owner. It would have been a simple matter for the Owner, who drew the Contract, to provide a fifth similar provision granting the Owner a general right of set-off against any sums certified. These provisions, submitted Mr. Renwick, clearly show that the Owner has no other rights of holdback or set-off other than those contained in the four provisions referred to.

[25] Again, I do not agree. The question is not whether there is provision in the Contract granting the Owner a right of set-off. The Owner has that right, in law and in equity, unless and until it is taken away by Contract. Rather, the question is whether there is provision in the Contract clearly

2000 BCSC 1839 (CanLII)

pursuant to that provision. In my view, that would not be a reasonable or natural inference to be drawn from S.G.C. 5.4.5 when considered alone, or in conjunction with other provisions of the Contract. Further, see the observations of Huddard, JA. in ***Metro-Can*** at the bottom of pg. 33 with regard to the effect of the Rights and Remedies provisions of the Contract before her, which are perhaps not as strong as those in the present case since they did not commence with the words "except as expressly provided", on the argument that the provision for the Deficiency Retention Fund was sufficient to exclude the right of set-off as a defence, although she was there referring to the letter agreement in that case.

[33] In my view S.G.C. 5.4.5 simply deals with defective or incomplete work found and certified by the Consultant at the time of substantial performance. It has nothing to do with the Owner's claim for damages for delay. Ordinarily, the defective or incomplete work will be relatively minor. In the ordinary course of events the Contractor makes the necessary corrections. If he does not, the Owner can retain a completion Contractor to do the work, and set-off the costs against the Deficiency Holdback Fund. But the provision does not provide, expressly or even by implication, that the Owner's general right of set-off in the case of other

2000 BCSC 1839 (CanLII)

substantial defective or incomplete work, either missed by the Consultant or discovered at a later date, is excluded. The law requires that the parties use clear and unequivocal words to express such an exclusion of a party's substantive right. And the Contract goes a bit further and says that the exclusion must be express.

[34] I should point out here, as well, that there is at least one express exclusion of the right of set-off in this Contract. I refer to G.C. 5.8.1, under the heading "WITHHOLDING OF PAYMENT". That provision provides:

> 5.8.1 If because of climatic or other conditions reasonably beyond the control of the Contractor, there are items of work that cannot be performed, payment in full for that portion of the work which has been performed as certified by the Consultant shall not be withheld or delayed by the Owner on account thereof, but the Owner may withhold, until the remaining portion of the work is finished, only such an amount that the Consultant determines is sufficient and reasonable to cover the costs of performing such remaining work.

The provision expressly prevents the Owner from setting-off the costs of items of work not done against the price of work performed and certified by the Consultant.

[35] In conclusion then, in my opinion the Owner is entitled to set-off against Certificate #33 its claims for damages for breach of Contract on the part of the Contractor, which

2000 BCSC 1839 (CanLII)

1998 CarswellOnt 3641
Ontario Court of Justice (General Division)

York (City) v. Wellington Insurance Co.

1998 CarswellOnt 3641, 41 O.R. (3d) 750, 75 O.T.C. 33, 82 A.C.W.S. (3d) 678

# The Corporation of the City of York and B.G. Schickedanz Central Inc., Applicants and Wellington Insurance Company and London Guarantee Insurance Company, 667038 Ontario Limited and Deloitte and Touche Inc., Trustee of the Estate of 667038 Ontario Limited, Respondents

Wellington Insurance Company and London Guarantee Insurance Company, Applicants by Counter-Application and The Corporation of the City of York and B.G. Schickedanz Central Inc., and Bank of Montreal, Respondents by Counter-Application

Cullity J.

Heard: August 26, 1998
Heard: August 27, 1998
Judgment: September 15, 1998
Docket: 97-CV-138524

Counsel: *Jarvis K. Postnikoff*, for the Applicants.
*Patricia M. Conway*, for Wellington Insurance Company and London Guarantee Insurance Company.
*Patricia M. Conway*, for the Applicants by Counter-Application.
*Jarvis K. Postnikoff*, for The Corporation of the City of York and B.G. Schickedanz Central Inc.
*Barbara L. Grossman*, for Bank of Montreal.

**Related Abridgment Classifications**
Construction law
III Bonds and sureties
III.1 Bonds
III.1.f Miscellaneous
Insurance
VI Contract of indemnity
VI.2 Subrogation
VI.2.f Defences to subrogated action
VI.2.f.i Waiver of subrogation rights

**Headnote**
Construction law --- Bonds and sureties — Performance bonds
Developer did not complete subdivision pursuant to subdivision agreement with city — Developer subject to receiving order in bankruptcy — City and purchaser who bought part of lands from bank under power of sale brought application against developer, trustee of developer, and insurer to enforce performance bond — Insurer brought counter-application for declaration that bond no longer valid and to be delivered up for cancellation — Application and counter-application to be converted to trial of issue or reference as deemed appropriate — Bond was surety bond which guaranteed developer's performance of obligation under subdivision agreement — Purpose of bond to compensate city for loss or damage incurred due to developer's default up to amount of bond — Insurer not obliged to remedy developer's default by completing work — Unless city proved loss or damage suffered that city was unable to reasonably mitigate city was not entitled to order requiring payment under bond —

Issue of mitigation of damages by means of amending agreement city entered into with purchaser to be dealt with on trial of issue or reference as to loss or damages suffered by city.

Insurance --- Contract of indemnity — Subrogation — Defences to subrogated action — Waiver of subrogation rights

Developer did not complete subdivision pursuant to subdivision agreement between developer, city and mortgagees — Developer subject to receiving order in bankruptcy — Subdivision agreement contained clause which obliged bank to require as condition precedent to sale of lands that purchaser covenant to perform developer's obligations — Bank sold lands but did not require purchaser to enter into covenant — Purchaser entered into similar agreement with city anyway — City and purchaser who bought part of lands from bank under power of sale brought application against developer, trustee of developer and insurer to enforce performance bond — Insurer brought counter-application and claimed against bank for indemnification for any liability insurer had under bond due to developer's defaults — Counter-application dismissed in part — Insurer not entitled to be subrogated to rights of city against bank and no other basis existed for indemnification claim — Bank did not require performance of condition precedent but city waived right to complain of breach of clause when it entered into amending agreement with purchaser.

**Table of Authorities**

**Cases considered by *Cullity J.*:**

*Addco Drywall Ltd. v. White Rock Manor Joint Venture* (1991), 46 C.L.R. 255 (B.C. S.C.) — referred to

*Addco Drywall Ltd. v. White Rock Manor Joint Venture* (1993), 11 C.L.R. (2d) 79 (B.C. C.A.) — referred to

*Thomas Fuller Construction Co. (1958) v. Continental Insurance Co.* (1970), [1973] 3 O.R. 202, 36 D.L.R. (3d) 336 (Ont. H.C.) — referred to

*Trade Indemnity Co. v. Workington Harbour & Dock Board* (1936), [1937] A.C. 1, [1936] 1 All E.R. 454, 105 L.J.K.B. 183, 154 L.T. 507 (U.K. H.L.) — referred to

*Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* (1995), [1996] A.C. 199 (U.K. H.L.) — considered

***Cullity J.*:**

1 This application arose out of the failure of the Respondent 6670378 Ontario Ltd. ("667") to complete the development of a subdivision on lands (the "Lands") located at 1400 Weston Road, Toronto, pursuant to a Subdivision Agreement dated February 15, 1990, between it, The Corporation of the City of York ("the City") and mortgagees, including Bank of Montreal. The Applicants are the City and B.G. Schickedanz Central Inc. ("Schickedanz") who purchased part of the Lands on June 26, 1997, from Bank of Montreal acting under a power of sale.

2 The application concerns the rights of the City to enforce a bond (the "Bond") issued by the respondent Wellington Insurance Company ("Wellington") on May 10, 1990, to secure the performance of 667's obligations under the Subdivision Agreement. The other Respondent, London Guarantee Insurance Company, has assumed--in some manner not fully explained at the hearing--the obligations of Wellington under the Bond. It is conceded that this assumption had no affect on the rights of the City. In view of this concession, and as no issues have been raised, or submissions made, with respect to the effect of the assumption, I will deal with the application and the counter applications as if Wellington continued to be the obligor under the Bond. This, of course, is without prejudice to the rights of Wellington and London Guarantee Insurance Company *inter se* and, on the understanding that, if London Guarantee Insurance Company has, as a matter of law, replaced Wellington as the obligation under the Bond for all purposes, any findings I may make with respect to Wellington's rights, obligations or liability will be applicable to London.

3 Schickedanz is named as an Applicant as its obligations under an Amending Subdivision Agreement dated October 29, 1997, will be affected by the resolution of the issues raised on the application and, in that agreement, it undertook to bring the proceedings.

**A. The Facts**

4 On April 4, 1990, when the Subdivision Agreement was registered on title, 667 was the owner of the Lands and Bank of Montreal was one of two mortgagees. The Bank's mortgage, securing payment of a principal amount of $60,000,000, had

been registered against title on February 22, 1990. The Subdivision Agreement postponed the rights of mortgagees to those of the City under the agreement.

5 The Subdivision Agreement was entered into pursuant to a condition contained in a draft approval of a plan of subdivision (the "Plan") granted to 667 by the Municipality of Metropolitan Toronto on the recommendation of the City. Among other things, the Subdivision Agreement required that 667 perform certain works and provide for certain services at its cost within specified time frames. Article XXVI required 667 to deposit with the City "as a performance and maintenance guarantee" financial securities in an amount equal to 100% of the cost of all of the works and services it was required to complete. The securities were to be in a form satisfactory to the City Solicitor acting reasonably. The City agreed that, as 667's obligation were performed, it would reduce the amount of the securities it held in a manner set out in a schedule to the agreement.

6 The financial securities deposited with the City pursuant to Article XXVI of the Subdivision Agreement included the Bond. This was executed on behalf of 667 and Wellington and was dated May 10, 1990. Its material parts read as follows:

> BOND NO. CCC2224764
>
> AMOUNT: $1,859,775
>
> KNOW ALL MEN BY THESE PRESENTS, that we, 667038 ONTARIO LIMITED, a company incorporated under the laws of the Province of Ontario, hereinafter called "the Principal", as Principal and WELLINGTON INSURANCE COMPANY, a company incorporated under the laws of Canada and duly authorized to transact the business of Suretyship in Canada, hereinafter called "the Surety", as Surety are held and firmly bound unto THE CORPORATION OF THE CITY OF YORK, hereinafter called the OBLIGEE, in the penal sum of ONE MILLION, EIGHT HUNDRED AND FIFTY-NINE THOUSAND, SEVEN HUNDRED AND SEVENTY-FIVE DOLLARS----xx/100 ($1,859,775.00) good and lawful money of Canada, for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.
>
> WHEREAS the above bounden Principal has entered into a certain written Agreement with the above named Obligee in respect to certain items which are attached to this Bond as Schedule "A", said Agreement being dated the 15th day of February, 1990 and by reference made by part hereof:
>
> > NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if that above bounder (sic) PRINCIPAL shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said agreement set forth and specified to be by the said Principal, kept, done and performed at the time and in the manner in said Agreement specified, and shall pay over, make good and reimburse to the above Obligee all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect.
> >
> > NO SUIT or other proceedings to enforce the liability of seif (sic) on this Bond shall be brought unless the Principal and Surety are joined therein by the due service of Process upon the Principal and the Surety.
> >
> > PROVIDED, however, this Bond is executed by the Surety upon the express condition that no right of action shall accrue upon or by reason whereof, to or for the use of benefit of any one other than the Obligee named herein; and the obligation of the Surety is and shall be construed strictly as one of suretyship only.
> >
> > SEALED with our seals and dated this 10th day of May, 1990.

The agreement referred to in the first recital to the Bond was the Subdivision Agreement.

7 The Plan was registered on June 6, 1990. As a consequence, and pursuant to the Subdivision Agreement, certain parts of the Lands were conveyed to, or otherwise acquired by, the City for roads, park land and other municipal purposes. On February

28, 1991, a transfer of a further part of the Lands was made to the Roman Catholic Episcopal Corporation for the Diocese of Toronto for nonprofit housing. Bank of Montreal's mortgage was partially discharged as a result of each of these acquisitions.

8 667 defaulted in its obligations and a receiving order in bankruptcy was made against it on August 4, 1995. As a result of the work done prior to the defaults, the penal sum of the Bond had been reduced to $1,471,694.00. I was informed that this amount represents and estimate of the cost of works and services that 667 was required to, but did not, complete pursuant to the Subdivision Agreement. The greater part of this work was to be undertaken on the portions of the Lands acquired by the City after June 6, 1990.

9 Following discussions between representatives of the City and Wellington, the Director of Finance of the City wrote to Wellington on August 31, 1995, referring to the "City's claim pursuant to the Bond" and giving formal notice of a declaration of default by 667 under the Subdivision Agreement. Wellington resisted the claims of the City and the parties have been unable to reach agreement.

10 On January 7, 1997, Bank of Montreal, under its power of sale, agreed to sell the part of the Lands remaining in the ownership of 667 to Schickedanz for a price of $7,300,000.00. Sections 22 and 23 of the agreement of purchase and sale were as follows:

> 22. The Purchaser acknowledges having been advised that the security (the "Security") currently posted under the agreements with the municipal authorities and utilities and others which pertain to the property and its development and servicing may not be valid, and the purchase price set out in this agreement is predicated upon the basis that the Purchaser will be unable to use or benefit from the Security and will be required to negotiate amendments or replacement agreements with the municipal authorities, utilities and others and undertake the completion of the works and services described in the said agreements as amended or replaced and to deliver security therefor. The Vendor warrants and represents that it has not entered into any agreement with the issuers of the Security or the City to settle the issue of the enforce ability of the Security and will not unilaterally enter into any such agreement while this agreement is in force and effect. The Purchaser convenants and agrees not to enter into an agreement with the issuers of the Security or the City in respect of the Security prior to closing without first obtaining the prior written consent to such agreement from the Vendor.
>
> 23. The Purchaser covenants to use its best efforts to agree with the Corporation of the City of York and Municipality of Metropolitan Toronto to perform and undertake all of the terms of the [Subdivision Agreement] as if it had been an original signatory thereto on or before closing.

11 The sale to Schickedanz was completed by a transfer registered on title on June 26, 1997. Prior to the closing of the sale on that date, Schickedanz had negotiated the Amending Subdivision Agreement with the City. Bank of Montreal was not a party to these negotiations or to the agreement. The final draft of the agreement was forwarded to Schickedanz on June 11, 1997, and executed by the City and Schickedanz after the closing of the sale of the Lands to the latter. Schickedanz was not required by Bank of Montreal to execute prior to the closing any covenants or agreements with the City with respect to its obligations under the Subdivision Agreement. The relevance of this omission will be explained below in the context of a claim by Wellington to be indemnified by Bank of Montreal for any liability Wellington may have under the Bond as a consequence of 667's defaults.

12 The Amending Subdivision Agreement refers to the part of the Lands purchased by Schickedanz from Bank of Montreal as the "Schickedanz Land". The principal purposes of the agreement were to defer payment of a particular levy by Schickedanz to the City until building permits were issued and to defer the issuance of building permits until the rights of the City under the Bond were clarified in legal proceedings. Paragraphs 5 and 7 of the Amending Subdivision Agreement read as follows:

> 5. The Owner agrees that neither it nor any contractor or other person claiming through it shall request the issuance of or be entitled to receive any building permit for a building or buildings to be constructed on [specified parts of the Schickedanz Land] ... until
>
> (a) a final and binding Court Order has been obtained pursuant to litigation by the Owner, whereby the Court:

(i) confirms the obligations of the Wellington Insurance Company (hereinafter referred to as "Wellington") under the Bond and the Subdivision Agreement; and

(ii) orders Wellington to complete the works and services under the Bond or, in the alternative, the Court orders Wellington to pay to the City the amount required to complete the works and services: or

(b) the Owner deposits with the City as financial security for the completion of the works and services required under the Subdivision Agreement, an Irrevocable Letter of Credit in a form satisfactory to the City Solicitor. The Letter of Credit shall be in the amount of $1,471,694.00, or such lesser amount as determined in the sole discretion of the City. The Letter of Credit shall be in favour of the City from any chartered bank in Canada in the amount set out. The Letter of Credit shall be in such terms that the bank shall pay to the Senior Director of Finance and Treasurer for the City upon demand such sums as may be required from time to time to the maximum amount of credit without recourse. The Letter of Credit shall be subject to automatic extension unless thirty (30) days prior to expiration written notice is given to the City that the Letter of Credit will not be extended. The Letter of Credit shall be in such form that it cannot be revoked unless authorized by the Senior Director of Finance and Treasurer for the City and cannot be transferred to any other account...

7. The Subdivision Agreement shall be amended to the extent required to give effect to the provisions of this Agreement, and the Subdivision Agreement as so amended shall remain in full force and effect.

13 In my judgment it is sufficiently clear from these provisions and the cross-examination of the representatives of the City and of Schickedanz on their affidavits filed for the purposes of this application that, in the event that the Order of the Court referred to in paragraph 5(a) of the Amending Subdivision Agreement is not obtained,

(a) Schickedanz has an obligation to complete the work under the Subdivision Agreement on which 667 defaulted; and

(b) to do so whether or not such work relates to the parts of the lands owned by Schickedanz.

While the City was evidently prepared to assist Schickedanz in obtaining such an Order, it was insistent that Schickedanz, or any other purchaser from the Bank of Montreal, should complete the work and post security in the form of a letter of credit if the Order was not obtained. Schickedanz executed the Amending Subdivision Agreement on that basis.

14 By letter dated August 5, 1997, Mr. Postnikoff, acting as solicitor for both the City and Schickedanz, informed Wellington that, unless it gave a written commitment to honour its obligations under the Bond or paid the amount of $1,471,694.00 to his clients within five days, legal proceedings would be commenced by them without further notice.

**B. Relief Sought**

15 The Applicants have requested the following substantive relief:

(a) a declaration that the Bond is valid and subsisting;

(b) a declaration that the City's demands that Wellington complete the work were valid and proper;

(c) a declaration that Wellington has failed to honour its commitments and perform its obligations under the Bond;

(d) a declaration and an order that Wellington perform the work required pursuant to the Bond as demanded by the City;

(e) in the alternative, an order that Wellington pay the sum of $1,471,694 plus accrued interest to the City.

If granted, the Orders requested would relieve Schickedanz of an obligation to complete the work on which 667 defaulted at its own expense pursuant to the provisions of the Amending Subdivision Agreement.

16 In its counter-application Wellington seeks a declaration that the Bond is no longer valid and should be delivered up for cancellation. In the alternative it seeks a trial on the issue of its responsibility to pay the City under the Bond and an indemnity from the Bank of Montreal.

17 In its cross-claim, Bank of Montreal requests declarations and orders designed to establish that Schickedanz has all the obligations of 667 under the Subdivision Agreement and an indemnity from Schickedanz for any amounts Bank of Montreal is liable to pay to Wellington.

**C. Analysis**

***1) Liability of Wellington***

18 Counsel for the Applicants and counsel for Wellington made widely divergent submissions on the nature and extent of the obligations assumed by Wellington under the Bond. In Mr. Postnikoff's submission the effect of 667's default was that Wellington became liable to do the work that 667 had failed to do or, in the alternative, to pay the amount of $1,471,694 remaining under the Bond. He submitted further that the City was entitled to demand that the first of these alternatives be adopted. Ms. Conway's submission was, in effect, that the City had misconceived the nature of the Bond. In her submission it was essentially a guarantee under which Wellington agreed to compensate the City for any loss or damage it incurred as a result of defaults of 667. Such damage had to be proved and, even then, Wellington was entitled to rely on any defence that would have been available to 667 in an action brought by the City, including a duty to mitigate damages. Accordingly, in her submission, there could be no question of the City having a right to demand that Wellington complete the work on which 667 was in default or an absolute right to demand payment of the amount of $1,471,694.00 that represented an estimate of the cost of such work under the schedule to the Subdivision Agreement.

19 Ms. Conway also submitted that any liability of Wellington under the Bond was discharged or terminated by the amendment to the Subdivision Agreement that, in effect, replaced 667 with Schickedanz. For this purpose, she relied on authorities that establish that a material change in the underlying contract between a creditor and the principal will discharge a surety for the latter's performance.

20 While the substitution of Schickedanz for 667 might be described as a sufficient material change to discharge Wellington from any liability under the Bond with respect to defaults by Schickedanz in the future, I believe it would be more accurate to say simply that Wellington has not assumed any obligation with respect to the defaults of anyone other than 667. Whether or not the stipulation that the obligation under the Bond binds the assigns of 667 has any greater significance than the meaningless statement that the Bond binds 667's heirs and executors, the stipulation does not mean that Wellington has undertaken to act as surety for the performance of obligations under the Subdivision Agreement by anyone to whom 667 may assign part of the Lands. The obligations under the Bond must be distinguished from the obligations under the Subdivision Agreement even though the agreement is incorporated into the Bond and regardless of whether Schickedanz can properly be regarded as an "assign" of 667 with respect to the part of the Lands Schickedanz acquired. The Bond creates obligations that are separate and distinct from, although collateral to, the obligations under the agreement. However, I fail to see how the substitution of Schickedanz can negate all liability that Wellington may have as a consequence of the earlier defaults of 667. In this sense and to this extent I find that the Bond remains valid and subsisting. Whether the substitution of Schickedanz affects the determination of any damage or loss suffered by the City is a different question.

21 While I do not accept Mrs. Conway's submission that the substitution of Schickedanz as owner of part of the Lands has the effect of discharging Wellington's obligations under the Bond with respect to the defaults of 667, I believe her first, and more fundamental, submission with respect to Wellington's obligations under the Bond is correct. The structure of the Bond and the language in which its terms are expressed are traditional features of surety bonds that have attracted judicial criticism: *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* (1995), [1996] A.C. 199 (U.K. H.L.) at pp. 208-9; *Trade Indemnity Co. v. Workington Harbour & Dock Board* (1936), [1937] A.C. 1 (U.K. H.L.) at p. 17. While judges have insisted that the nature and extent of the rights and obligations created by such instruments are fundamentally to

be determined as questions of interpretation, one might be forgiven for thinking that the retention of the traditional features is intended to make the task as difficult as possible. Read literally, the Bond does not purport to define the conditions on which Wellington would be liable. Nor does it expressly contemplate the possibility of liability in an amount less than the penal sum reduced in accordance with the provisions of the Subdivision Agreement that are incorporated into the Bond. Further, the terms of the Bond do not indicate with clarity whether the only manner in which Wellington's liability can be discharged is by payment of an amount to the City.

22 The archaic structure of the Bond is explicable only in terms of the long history of instruments of this kind. This is summarized helpfully in *Scott and Reynolds on Surety Bonds* (Carswell, 1994) at s. 2.1(b). The difficulty of interpretation created by adherence to the traditional from -- at least for those who have the task thrust upon them for the first time -- is compensated to some extent by the accumulation of judicial precedents that has developed over the years in England and in this country. General aspects of the relevant law are dealt with in *Scott and Reynolds*, above, chapters 2 and 10, and McGuinness, *The Law of Guarantee* (Carswell, 2nd ed., 1996), at s. 12.9 and 12.10.

23 I am satisfied that Ms. Conway was correct in her submission that the Bond is a surety bond of the traditional kind to which I have referred. In particular, I accept her submissions that:

(a) the Bond constitutes a guarantee by Wellington of 667's performance of its obligations under the Subdivision Agreement. This is indicated by the use of the traditional language and structure of a surety bond as analysed in cases such as *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* and also by the description of Wellington as the "Surety" and the stipulation that "the obligation of the Surety is and shall be construed strictly as one of suretyship only";

(b) Wellington's obligation under the Bond is to compensate the City for any loss or damage it may incur as a consequence of 667's default under the provisions of the Subdivision Agreement. Neither the terms of the Bond nor the jurisprudence supports the existence of an obligation of Wellington to remedy 667's default by completing the work left undone. Surety bonds that are intended to guarantee performance of construction activities often give the surety an option to do the work in lieu of payment to the obligee. Unlike the bond in *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.*, there is no such express provision in the Bond. Even if such a provision is to be inferred from the stipulation that the obligation under the Bond would be void if 667 were to "make good" all loss and damage suffered by the City, this would not impose any obligation on Wellington to choose this option;

(c) although the measure of the damages for which Wellington can be liable under the Bond is limited by the amount of the penal sum reduced in accordance with the Subdivision Agreement, Wellington is not required to pay more than the actual damage or loss suffered by the City. Such damage or loss must be proven: *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.*) *Scott and Reynolds on Surety Bonds*, at p. 2-4. The provisions of the Subdivision Agreement, which are incorporated as part of the Bond, do not override this general rule of the law of guarantees by deeming the damage to be the cost, or the estimated cost, of the work on which 667 defaulted. The position of the Applicants on this question is similar to that accepted by the Court of Appeal, and rejected in the House of Lords, in *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* It appears to confuse a surety bond--an "on default" obligation--with a performance guarantee or stand-by letter of credit--an "on demand" obligation. The distinction is discussed in McGuinness, above, at ss. 12-9 and 12.89. I note that paragraph 5 of the Amending Subdivision Agreement requires Schickedanz to obtain a letter of credit in the event that it does not obtain the Orders it has requested;

(d) Wellington is entitled to any defences that 667 would have against the City including the City's duty to mitigate its damages: *Addco Drywall Ltd. v. White Rock Manor Joint Venture* (1991), 46 C.L.R. 255 (B.C. S.C.), at pp. 276-278; aff'd in part (1993), 11 C.L.R. (2d) 79 (B.C. C.A.), at p.87; and

(e) neither notice to Wellington nor a demand for payment was a precondition of liability under the Bond. Liability arose on, and by virtue of, 667's defaults: *Thomas Fuller Construction Co. (1958) v. Continental Insurance Co.* (1970), [1973] 3 O.R. 202 (Ont. H.C.), at pp. 218-9.

24 It follows, in my judgment, that unless and until the City proves that, as a consequence of the defaults of 667, it has suffered a loss or damage that it could not reasonably have mitigated, the City is not entitled to an order requiring payment under the Bond. The question whether the City has mitigated its damages by entering into the Amending Subdivision Agreement with Schickedanz must be left to be dealt with on a trial of the issue of loss or damage suffered by the City.

***2) Wellington's Entitlement to an Indemnity Against Bank of Montreal***

25 Wellington's application to be indemnified by Bank of Montreal is based on the principle of subrogation. Ms. Conway's submissions on this issue can, I believe, be summarized briefly as follows:

> a) in paragraph 1(b) of Article XLII of the Subdivision Agreement, Bank of Montreal undertook to require, as a condition precedent to the closing of any sale of the lands it might make, that the purchaser would have covenanted with the City to perform all the obligations of 667 under the Subdivision Agreement;
>
> b) as Bank of Montreal did not require performance of the condition precedent, the City had a right of action against Bank of Montreal for any loss incurred by the City as a consequence of Bank of Montreal's breach of its obligation under paragraph 1(b); and
>
> c) Wellington is entitled to be subrogated to the City's rights against Bank of Montreal.

26 Ms. Grossman challenged the validity of this argument on a number of grounds including the interpretation of paragraph 1(b) of Article XLII and the entitlement of Wellington to be subrogated to any rights of the City to damages for Bank of Montreal's breach of its covenant under that provision. She also argued, and sought a declaration, that the effect of the Amending Subdivision Agreement was to impose on Schickedanz an obligation to perform all of the terms of the Subdivision Agreement in the same manner as if it, rather than 667, had executed the Subdivision Agreement in the capacity of the owner of the land. On that basis, she submitted that, whether or not Bank of Montreal had failed to comply with the requirements of paragraph 1(b), no loss could flow from that breach as Schickedanz had covenanted with the City to the effect required by paragraph 1(b).

27 Ms. Grossman argued, in the further alternative, that, if Bank of Montreal was in breach of paragraph 1(b) of Article XLII, the City had waived the breach by entering into the Amending Subdivision Agreement. On that basis, the City would now have no right of action against Bank of Montreal and, in Ms. Grossman's submission, there is no right to which Wellington could be subrogated.

28 Paragraph 1(b) of Article XLII reads as follows:

> (b) in the event of a sale or the conveyance of the Mortgagee's entire freehold interest in the Lands, the Mortgagee shall require as a condition precedent to the closing of any such sale or conveyance, that the new owner (the purchaser) will have covenanted with the City and Metro to perform and undertake all of the terms of this agreement in the same manner as if the purchaser had executed this agreement in the capacity of the Owner.

29 The paragraph raises a number of difficult questions of interpretation of which the most basic arises from the reference to the "Mortgagee's entire freehold interest in the lands" as a sale or conveyance of such an interest is required before Bank of Montreal would acquire any obligation under paragraph 1(b). Another difficulty is that, read literally, the paragraph appears to require the purchaser to agree that no amendments of any kind would be made to the provisions of the Subdivision Agreement that defined the obligations of 667. This seems strange and impracticable in a case like this where the original owner has defaulted prior to the purchase from the mortgagee. This may explain why section 23 of the purchase agreement between Bank of Montreal and Schickedanz did not strictly conform to the requirements of paragraph 1(b) and required Schickedanz only to use "its best efforts" to agree with the City to perform and undertake all of the terms of the Subdivision Agreement as if it had been an original signatory thereto, on or before closing.

30 Paragraph 1(b) was inserted to protect the City. It would bind Bank of Montreal but would not affect the power of the City to negotiate amendments to the Subdivision Agreement with a purchaser. This, of course, is what was done. The covenant

required by the paragraph as a condition precedent to closing was one to which the City would be a party. It is, in my judgment, implicit in the provisions of the paragraph that any amendments agreed to by the City would constitute a waiver of its right to insist on performance of the condition.

31 The final draft of the Amending Subdivision Agreement was delivered to Schickedanz prior to the closing of its purchase from Bank of Montreal, and the City made no attempt to enforce the Bank's obligation pursuant to paragraph 1(b) of Article XLII by enjoining the sale or otherwise. In consequence -- and irrespective of the other questions of interpretation that arise under paragraph 1(b) -- the City has waived its right to complain of any breach by Bank of Montreal of its obligation under the paragraph and there is no right against Bank of Montreal to which Wellington can be subrogated. Any issue with respect to the City's duty to mitigate damages that may arise from the terms of the Amending Subdivision Agreement must be deferred until such damages have been proven. It is possible that the other problems of interpretation that arise under paragraph 1(b) of Article XLII may then have to be considered.

32 In view of my finding on the question of subrogation, Wellington has no right of indemnification against Bank of Montreal on this, the only, basis on which such a right is alleged to exist. Accordingly, it is not necessary to deal with the issues raised in the cross-claim of Bank of Montreal and I decline to do so.

33 At the hearing it was suggested by Ms. Conway that a reference rather than a trial of issues, might be a more appropriate method of dealing with the quantum of any liability of Wellington to compensate the City pursuant to the Bond. I will hear further submissions on this issue and the terms of my judgment and I would appreciate it if counsel would make an appointment for these purposes.

*Order accordingly.*

CERTIFIED E. Wheaton
by the Court Clerk as a true copy of the document digitally filed on May 18, 2022

Clerk's stamp

JUDICIAL CENTRE OF CALGARY
FILED DIGITALLY
2201 02948
May 18, 2022
2:29 PM
CLERK OF THE COURT

| | |
|---|---|
| COURT FILE NUMBER: | 2201-02948 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | CROWN CAPITAL PARTNER FUNDING LP, by its manager, CROWN PRIVATE CREDIT PARTNERS INC. |
| DEFENDANT | RBee AGGREGATE CONSULTING LTD. |
| DOCUMENT | **BANKRUPTCY ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | MLT AIKINS LLP<br>2100, 222 - 3rd Ave SW<br>Calgary, Alberta T2P 0B4<br>Phone: 403.693.5420<br>Fax: 403.508.4349<br>Attention: Ryan Zahara<br>File: 0151020.00013 |

| | |
|---|---|
| **DATE ON WHICH ORDER WAS PRONOUNCED:** | **MAY18, 2022** |
| **LOCATION OF HEARING OR TRIAL:** | **CALGARY, ALBERTA** |
| **NAME OF JUSTICE WHO MADE THIS ORDER:** | **JUSTICE G.A. CAMPBELL** |

**UPON THE APPLICATION** of the Applicant, Crown Capital Partner Fund LP, by its manager, Crown Private Credit Partners Inc. (the "**Crown Capital**") for a Bankruptcy Order against the Respondent, RBee Aggregate Consulting Ltd. (the "**Bankrupt**"), filed on April 28, 2022 (the "**Application**") ; **AND UPON NOTING** the consent of FTI Consulting Canada Inc., the Court-appointed Receiver of the Bankrupt; **AND UPON** reading the materials filed by Crown Capital in respect of the Application; **AND UPON** hearing the oral submissions of counsel for Crown Capital and all other interested parties present;

**IT IS HEREBY ORDERED AND DECLARED THAT**:

1. Service of the Application upon the Bankrupt is deemed good, valid, timely, and sufficient.

2. RBee Aggregate Consulting Ltd., a corporation registered in the Province of Alberta, is adjudged bankrupt by virtue of this Bankruptcy Order hereby made on this date.

3. FTI Consulting Canada Inc., of the Province of Alberta, is hereby appointed as Trustee of the estate of the Bankrupt.

4. The Applicant is awarded costs of this Application, which shall be paid out of the estate of the Bankrupt, on taxation or upon further Order of this Court.

~~A.C~~J.Q.B.A, Justice G.A. Campbell