COURT FILE NUMBER	2001 05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
APPLICANT	JMB CRUSHING SYSTEMS INC.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	HAJDUK GIBBS LLP Barristers & Solicitors #202 Platinum Place 10120-118 Street NW Edmonton, AB T5K 1Y4 Attention: Richard B. Hajduk Ph: 780-428-4258 Fax: 780-425-9439 FILE: 5448 RBH

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

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I. RELIEF SOUGHT

1. The Applicants apply to this Honourable Court and seek the following relief:

    a. An Order reversing the Determination Notice by the Monitor, FTI Consulting Canada Inc., declaring invalid the Lien Claim presented on or about May 25, 2020 by the Applicants, JERRY SHANKOWSKI ("Shankowski") and 945441 ALBERTA LTD. ("945411") (the "945441 Lien Claim"), to the Monitor, pursuant to the Order – Lien Claims – MD of Bonnyville granted by the Honourable Madam Justice K.M. Eidsvik ("Eidsvik J.") in this Action on May 20, 2020 (the "Eidsvik May 20 Order"), in respect of the Lands defined in the Eidsvik May 20 Order;

    b. An Order declaring valid the 945441 Lien Claim and directing payment thereof from the Funds, as defined in the Eidsvik May 20 Order;

    c. Directing the Monitor to pay the 945441 Lien Claim of the Applicants in the sum of $424,674.05 from the sums paid by the MD of Bonnyville to the Monitor together with pre-judgment interest on such sum and costs sought in subparagraph 1(e) below;

    d. Such other and further relief as may be required and as this Honourable Court deems appropriate and just; and

    e. Costs of this Application in any event of the cause, payable forthwith, on a scale as between a solicitor and client or on such other scale or in such other amounts as this Honourable Court deems appropriate and just.

II. BACKGROUND AND STATEMENT OF FACTS

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

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

4. The Eidsvik May 20 Order set 5:00 p.m. (Calgary time) on June 1, 2020 as the "Claims Bar Date" [1].

5. A considerable amount of the aggregate supplied by JMB to the MD of Bonnyville pursuant to the Contract (as defined in the Eidsvik May 20 Order) were extracted from the lands of the Applicants

[1] Eidsvik May 20 Order, para. 3(b).

and JMB is owed monies by the MD of Bonnyville in respect of such aggregate supplied, and the Applicants are owed royalties in respect of the portion of the aggregate supplied which was extracted from the lands of the Applicants.

6. The Applicant's 945441 Lien Claim was provided to the Monitor prior to the Claims Bar Date, and specifically, on or about May 25, 2020;

7. The Eidsvik May 20 Order specifically prohibited any further Lien Claims in respect of the Contract from being registered against the Lands or any lands of the MD of Bonnyville (Eidsvik May 20 Order, par. 4);

8. The aggregate extracted from the lands of the Applicants were intended for and supplied to the MD of Bonnyville for the purposes of incorporation into an improvement on the Lands or other lands of the MD of Bonnyville, and support a valid builders' lien pursuant to the terms of the *BLA* and the Eidsvik May 20 Order;

9. Materials (aggregate or "Product" under the Eidsvik May 20 Order) have been furnished continuously for many months prior to and after the Eidsvik May 20 Order;

10. The 945441 Lien Claim was provided to the Monitor prior to the Claims Bar Date of June 1, 2020, at 5:00 p.m. set out in the Eidsvik May 20 Order, and specifically, on or about May 25, 2020;

11. The aggregate extracted from the lands of the Applicants were intended for and supplied to the MD of Bonnyville for the purposes of incorporation into an improvement on lands of the MD of Bonnyville, and support a valid builders' lien pursuant to the terms of the *BLA* and the Eidsvik May 20 Order;

12. Under the Aggregates Royalty Agreement between the Applicants and JMB, JMB pays 945441 certain royalty rates for different kinds of aggregate based on type and size. 945441 does not get paid until the aggregate is removed from the lands of 945441 and Shankowski.[2]

13. A copy of the Lien Claim and the Affidavit submitted to the Monitor on or about May 25, 2020, on behalf of 945411 and Shankowski is attached to the Affidavit of Shankowski ("Shankowski Affidavit") as Exhibit "C" to that Affidavit.

14. A copy of the Determination Notice by the Monitor in respect of the 945441 Lien Claim is attached as Exhibit "D" to the Shankowski Affidavit.

15. A considerable amount of the aggregate supplied by JMB to the MD of Bonnyville pursuant to the Contract were extracted from the lands of the Applicants and JMB is owed monies by the MD of Bonnyville in respect of such aggregate supplied, and the Applicants are owed royalties in respect of the portion of the aggregate supplied which was extracted from the lands of the Applicants, Shankowski and 945411. The amounts are set out in the sheets attached to the Affidavit of

[2] Affidavit of Jerry Shankowski, filed, at para. 4.

Shankowski which was attached to and submitted to the Monitor with the Lien Claim of the Applicants.[3]

16. Without the aggregate removed from the lands of the Applicants, JMB would not have been able to supply as much aggregate or "Product" to the MD of Bonnyville as it did and would therefore not be owed as much by the MD of Bonnyville as it currently is.[4]

17. The Eidsvik May 20 Order specifically prohibited any further Lien Claims in respect of the Contract from being registered against the Lands or any lands of the MD of Bonnyville (Eidsvik May 20 Order, par. 4).

18. The aggregate extracted from the lands of the Applicants were intended for and supplied to the MD of Bonnyville for the purposes of incorporation into an improvement on the Lands or other lands of the MD of Bonnyville.

19. The Applicants contracted with JMB to furnish materials for an improvement on the Lands or other lands of the MD of Bonnyville, and in that regard JMB was the agent of the MD of Bonnyville in obtaining the aggregate from the lands of the Applicants pursuant to JMB's contract with the Applicants.

20. Subject to the Claims Bar Date, the deadline for the Applicants to register a lien did not pass by the time the Applicants provided their Lien Claim to the Monitor.

21. The Monitor, pursuant to the Eidsvik May 20 Order, rejected the 945441 Lien Claim of the Lien Claimants, SHANKOWSKI and 945441 ALBERTA LTD. (the "Applicants"), on the basis that:

    a. "it does not relate to work done or materials supplied on or in respect of an improvement; and";
    b. "it was not registered against the Lands or any lands owned by the MD of Bonnyville;"

III. ISSUES

22. The Applicants submit that the following issues are germane to the disposition of the within Application:

    1. Was the aggregate taken from the "Shankowski Pit" on the lands owned by the Applicants supplied on or in respect of an improvement; and,

    2. Was the 945441 Lien Claim of the Applicants required to be registered against the Lands of the MD of Bonnyville or any lands of the MD of Bonnyville?

IV. RELEVANT STATUTORY PROVISIONS/LEGISLATION

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[3] Shankowski Affidavit, at para. 9.
[4] *Ibid.*, at para. 10.

A. Relevant Statutory Provisions/Legislation

1. *Builders' Lien Act* [5]

23. Subsection 1(d) of the *BLA* provides:

> **Definitions**
> **1** In this Act,
> [...]
>
> (d) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

24. Subsection 1(j) of the *BLA* provides:

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

25. Subsection 1(b) of the *BLA* provides:

> (b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;

26. Subsection 6(1) of the *BLA* provides:

> **Creation of lien**
> **6(1)** Subject to subsection (2), a person who
> (a) does or causes to be done any work on or in respect of an improvement, or
> (b) furnishes any material to be used in or in respect of an improvement,

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[5] *Builders' Lien Act*, RSA 2000, c B-7 ("*BLA*").

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

27. Section 9(1) of the *BLA* provides:

> **Furnishing material**
> **9(1)** Material is considered to be furnished to be used within the meaning of this Act when it is delivered either on the land on which it is to be used or on such land or in such place in the immediate vicinity of that land as is designated by the owner or the owner's agent or by the contractor or the subcontractor. *[emphasis added]*

28. Subsection 41(1) of the *BLA* provides:

> **Time for registration**
> **41(1)** A lien for materials may be registered at any time within the period commencing when the lien arises and
> (a) subject to clause (b), terminating 45 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned, or
> (b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned.

V. ARGUMENT

1. The Eidsvik May 20 Order overrode the provisions of the *BLA* as to Lien Claims Registered and As to Lien Claims Not Yet Registered

29. It is clear from reading the Eidsvik May 20 Order that it was intended to and did override, replace and supplant the provisions of the BLA in numerous respects.

30. Instead of having the Builders' Lien Claims of each of the Lien Claimants who had by then registered their Lien Claims against the Lands of the MD of Bonnyville be decided by the Court and those who might have at some point registered a builders' lien claim against the Lands of the MD of Bonnyville, the Eidsvik May 20 Order set up an alternative procedure, and alternative timeline and an alternative decision-maker, subject to review by the Court if such a decision were challenged.

31. Further, the Order prohibited the registration of any further builders' lien claims against the Lands of the MD of Bonnyville regarding the Contract between JMB and the MD of Bonnyville. Indeed, arguably, it also prohibited the registration of any builders' liens against any other lands, whether owned by the MD of Bonnyville or not. In this regard, 2 Builders' Lien Claimants registered builders' liens against the Lands of the Applicants, Shankowski and 945411, in respect of the

Contract between JMB and the MD of Bonnyville, which the Applicants will be seeking to remove in a separate application.

32. It is very clear from the case law that a Court exercising powers under the *Companies' Creditors Arrangements Act (Canada)* ("*CCAA*") has the power to override other statutes[6], including overriding the priorities under the *BLA*, *Land Titles Acts* and prior security agreements for the purposes of providing for DIP (Debtor-in-Possession) financing to enable the applicant debtor under the *CCAA* to continue in business during the pendency of the *CCAA* proceedings. The power is not merely the inherent power of the Court, but rather stems from the express grant of power by s. 11 of the *CCAA* combined with the doctrine of federal paramountcy.

33. It is clear that the Eidsvik May 20 Order affected and changed the rights of the parties and the process by which such rights may be determined and vindicated, and no one has appealed the Eidsvik May 20 Order to our knowledge.

34. Given this, it seems clear that the rights of parties, and the process that the parties must follow, must be determined according to the terms of the Eidsvik May 20 Order, including any procedures and time limitations set out in the Order, rather than by the *BLA* as if the Order had not been granted. The *BLA* is still highly relevant and applicable, naturally, but only to the extent that it has not been overridden by the Eidsvik May 20 Order.

35. Regarding the proper interpretation of an order granted under the CCAA, it is submitted that such orders should be given a large and liberal interpretation in order to give effect to their purpose, rather than a strict interpretation.[7]

2. Was the Monitor correct to deny the Builders' Lien Claim of the Applicants on the basis that the materials supplied do not "relate to work done or materials supplied on or in respect of an improvement"?

36. Given the definition of "improvement" in s. 1(d) the *BLA* set out above in paragraph 23, it is clear that the materials supplied do not have to have been actually incorporated into the Lands or any lands of the MD of Bonnyville to support a Builders' Lien in the Lands or in any lands of the MD of Bonnyville. The Product or "aggregate" was requested and contracted by the MD of Bonnyville to be supplied by JMB, and JMB contacted with the Applicants to obtain some of the aggregate from the gravel pit on the Applicants' lands, and the aggregate was delivered by or on behalf of JMB to the Lands. The aggregate was supplied for the MD of Bonnyville, who clearly meets the definition of "owner" in the *BLA* as set out above at paragraph 24, as the MD of Bonnyville clearly has an interest in the Lands (as the registered owner), and the aggregate was supplied on the credit, on behalf of, with the privity and consent of and for the direct benefit of the MD of Bonnyville.

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[6] e.g. *Sulphur Corporation of Canada Ltd*, 2002 ABQB 682 per Lovecchio J. (**Tab 1**), at para. 23 - 38; *SR Telecom & Co. v. Apex - Micro Manufacturing Corporation*, 2008 BCSC 1768 (**Tab 2**), at para. 39 - 43; *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 (**Tab 3**), at para. 42; *Jameson House Properties Ltd., Re*, 2009 BCSC 964 (**Tab 4**), at para. 25 – 31.

[7] *Royal Bank v Cow Harbour Construction Ltd.*, 2011 ABQB 96 (**Tab 5**), at para. 60; 63 – 65.

37. The request and contract for the aggregate was not merely idle or for no purpose and the MD of Bonnyville clearly intended the aggregate for incorporation into either the Lands or other lands of the MD of Bonnyville. This is sufficient to support a builders' lien. The aggregate was clearly intended to be incorporated into an "improvement" on the Lands of the MD of Bonnyville or other lands of the MD of Bonnyville, and was intended to be part of something to be "constructed, erected, built, placed, dug or drilled, on or in land", and was not something that was "neither affixed to the land nor intended to be or become part of the land".

38. It is clear that a supply of materials does not have to be immediately incorporated into the Lands or any lands in order to support a builders' lien. The intention that the materials will eventually be incorporated into the Lands or other lands of the MD of Bonnvyille is sufficient to support a builders' lien.

39. And JMB clearly meets the definition of "contractor" under the *BLA* as set out in paragraph 25. JMB was a "person contracting with or employed directly by an owner" to "furnish materials for an improvement". JMB clearly had a contract with the MD of Bonnyville for the supply of aggregate.

40. And just as clearly, the Applicants, Shankowski and 945441 Alberta Ltd., meet the requirements of s. 6(1) of the *BLA* quoted above at paragraph 26. It is clear that the Applicants are the source of much of the aggregate supplied by JMB to the MD of Bonnyville, as detailed in the Affidavit of Shankowski provided to the Monitor in support of the Notice of Lien Claim. And the Applicants were persons who "furnished material to be used in or in respect of an improvement" and that this was supplied "for an owner" or "contractor". The Applicants did not have to supply the aggregate directly to the MD of Bonnyville. It is sufficient if the Applicants supplied the aggregate to a "contractor" and in this case the "contractor" was JMB, who then supplied the aggregate to the MD of Bonnyville.

41. Clearly the aggregate supplied was intended to be incorporated into the Lands or other lands of the MD of Bonnyville at some point, even if not immediately. The fact that the MD of Bonnyville chose to stock pile the aggregate for a time on the Lands prior to its incorporation into the Lands or other lands of the MD of Bonnyville does not prevent and should not prevent the Applicants from having and maintaining a builders' lien. Section 9(1) of the *BLA* specifically contemplates this scenario where materials may not be incorporated into an improvement immediately or where they are intended to be incorporated into an improvement on different lands than the "owner" or "contractor" requests them to be delivered to. The MD of Bonnyville has paid money to the Monitor for the aggregate supplied. The question now is whether the Applicants, who supplied the aggregate or much of the aggregate to JMB for further supply to the MD of Bonnyville are to be made to the bear the loss and to have JMB use such monies for its restructuring at the expense of the Applicants. JMB will be unjustly enriched at the expense or detriment of the Applicants if the Applicants are not paid from the monies paid by the MD of Bonnyville. The aggregate supplied by the Applicants and others are the only reason that the MD of Bonnyville owed monies to JMB and the only reason that monies were paid by the MD of Bonnyville to the Monitor. The purpose of the *BLA* is to prevent suppliers of work or materials from being deprived of the value of their

work or materials and to prevent the "owner" or "contractor" or "subcontractor" from being unjustly enriched at the expense of the suppliers of work or materials.

42. It is respectfully submitted that the Monitor erred in determining that the Applicants do not have a valid builders' lien on the basis that the aggregate supplied do not "*relate to work done or materials supplied on or in respect of an improvement*".

43. Beyond that bald statement, the Monitor provided no actual reasons for its decision and it is submitted that bald conclusions or statements without reasons are insufficient to justify denying the Applicants' 945441 Lien Claim and denying them hundreds of thousands of dollars for the aggregate that was taken from their lands for the benefit of the MD of Bonnyville.

44. Clearly, the Eidsvik May 20 Order is premised on the basis that JMB had a valid builders' lien in the Lands of the MD of Bonnyville or other lands of the MD of Bonnyville. That it is the only possible justification for the requirement that the MD of Bonnyville be required to pay the specified monies to the Monitor and that the Eidsvik May 20 Order simultaneously set up a builders' lien claims process for all other actual or potential builders' liens claimants in respect of the Lands or any other lands of the MD of Bonnyville, including the reference to the *BLA* in numerous places in the Eidsvik May 20 Order and the "major lien fund" in para. 3(m) of the Eidsvik May 20 Order. It is non-sensical that JMB could have a builders' lien in the Lands or other lands of the MD of Bonnyville but that the Applicants cannot have such a lien on the rationales provided by the Monitor. Those rationales undermine the justification for the Eidsvik May 20 Order being granted at all, and is not consistent with the "large and liberal" interpretation that are to be given such Orders. In the absence of the Eidsvik May 20 Order, the Applicants could have registered a lien against the Lands at any time until 45 days after the last materials were supplied. The "last materials" have still not been supplied, because the Order prohibited the Applicants from ceasing to supply materials pursuant to their contract with JMB do long as they are being paid for the additional materials, but not the prior materials for which they have not been paid.

45. Courts have taken a rather more wholistic view of the meaning of the defined term "improvement".

46. The definition of "improvement" in the Saskatchewan *Builders' Lien Act* differs slightly from the *BLA*. The Saskatchewan *Builders' Lien Act* defines "improvement" as (s. 2(1)(h)):

> (h) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
> (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
> (ii) the demolition or removal of any building, structure or works or part thereof;
> (iii) services provided by an architect, engineer or land surveyor;

47. In *Grey Owl Engineering Ltd. v. Propak Systems Ltd.*[8], *the Saskatchewan Court of Appeal stated*:

> 16 In my respectful view, this appeal does not turn on whether s. 2(1)(h) should be given an exhaustive or restrictive interpretation. The central issue is whether Grey Owl provided services "on or in respect of an improvement" and is thereby entitled to claim a lien under s. 22 of the Act:
>
> . . .
>
> On examination of s. 22, it can be concluded the Chambers judge fell into error when he asked whether the storage tanks were an improvement without giving effect to the other provisions of the *Act*.
>
> 17 In order to determine whether someone is validly asserting a lien, the first step is to begin with s. 22 read as a whole. It is an error to consider the definitions apart from the section that creates the right being asserted. It is also an error to consider only one of the definitions referred to in the section, when others are relevant, notably the definitions of "contractor," "services," "owner," and "subcontractor" in conjunction with the definition of "improvement," which I will repeat for ease of reference:
>
> . . .
>
> 18 In short, it is a mistake to begin and end the inquiry with whether the storage tanks are the improvement. **The issue is whether Grey Owl provided "services" "on or in respect of an improvement for an owner, contractor or subcontractor" within the meaning of s. 22 and, as part of this analysis, identify the improvement in question.**
>
> 19 The leading authority in this jurisdiction is *Hansen*, which outlines the method to determine whether a person has a claim for a lien relating to an improvement.
>
> [...]
>
> [22] After making these comments, Cameron J.A. stated he was nonetheless not attracted to such an approach, preferring instead to consider *whether the reconstruction of the rail line constituted an improvement to the land* and then asking the question whether Brewster did any work upon that improvement or render any services for it:
>
> > **[18]** I may say, however, that I am not attracted to this fractured approach: it strikes me as overly technical and excessively abstract. From time to time such an approach will be desirable, indeed necessary, to ensure that the benefits contemplated by the Act are realized in practice, as in *C.N.R. v. Nor-Min Supplies Limited*, (1977) 1976 CanLII 22 (SCC), 1 S.C.R. 322. But in this case I doubt the propriety of reasoning after that fashion. I prefer to think that the C.N.R. owns a narrow band of land, which falls within, and crosses the east half of section 25-44-17 W3, in a north-south direction; on part of this land is situated the rail bed and the track, next are the adjoining

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[8] *Grey Owl Engineering Ltd. v. Propak Systems Ltd.*, 2015 SKCA 108, 2015 CarswellSask 612 (**Tab 6**), at para. 16 - 19 ; 22 - 27.

> ditches, followed, on the east side, by a strip of land about 60 meters wide and just over one kilometre long, upon which the ballast was stockpiled for use in rebuilding the line. *The real issue, it seems to me, is whether the reconstruction of the rail line, constituted an "improvement" to this land. And about this I have no doubt--there was an improvement to the C.N.R.'s property as contemplated by The Mechanics Lien Act ....*
> (Emphasis added, *Hansen*)

[23] This approach, which focuses on the main contract or contracts rather than its individual subcontracts and the work being done under them, has been consistently followed and applied in this jurisdiction. In *Pritchard Engineering Company v Coronach*, 1983 CanLII 2440 (SK QB), [1983] 30 Sask R 137 (QB), the main contract was between the owner, the town of Coronach, and Wes-Can Underground Ltd. and involved the construction of a water supply line and associated tasks within the water treatment plant. Wes-Can hired Ray's Transport Ltd. to transport equipment to the job site at Coronach and upon termination of the work to return the equipment to Saskatoon. Applying *Hansen*, Sirois J. found first that the construction work under the main contract was an "improvement" (para. 5) and second that Ray's Transport had provided services "in respect of" that improvement (para. 16). He concluded by saying, "The hauling of the equipment by Ray's Transport to a point on the improvement site was solely to enable Wes-Can Underground Ltd. to carry out its contract with the Town of Coronach."

[24] Similarly, in *BWV Investments Ltd. v Saskferco Products Inc.* (1993), 1993 CanLII 8941 (SK QB), 114 Sask R 306 (QB), MacPherson C.J.Q.B. applied *Hansen* to uphold a claim of lien for the rental of 29 trailers located on the building site and used in the construction of the Saskferco fertilizer plant. As part of his reasoning, MacPherson C.J.Q.B. noted that neither the trailers, nor any part of them, were consumed by or integrated into the actual construction of the fertilizer plant, but that such a finding did not determine the validity of the lien (para. 14). He held that the supply of the trailers constituted a "service performed on or in respect of" the construction of the fertilizer plant (para. 24). This Court allowed an appeal from this decision (see *BWV Investments Ltd. v Saskferco Products Inc.* (1994), 1994 CanLII 4557 (SK CA), 125 Sask R 286 (CA) [*Saskferco CA*]) on the basis that the dispute was governed by Article 8(1) of the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008), as set out in the schedule to *The International Commercial Arbitration Act*, SS 1988-89, c I-10.2, but the Court was not required to consider MacPherson C.J.Q.B.'s application of *Hansen*.

[25] Finally, in *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 1990 CanLII 7611 (SK QB), 84 Sask R 277 (QB), counsel for the Bank argued that steel poles modified and delivered by subcontractors, for use in Saskatchewan Power's transmission lines, could not be considered improvements

because the poles were movable. MacLean J. rejected this argument, finding that the improvement in question was not the poles but the transmission line itself. This Court affirmed the decision in brief oral reasons (see (1990), 1990 CanLII 7684 (SK CA), 84 Sask R 275 (CA)). Neither the Court of Queen's Bench nor this Court referred to *Hansen*, but both Courts appear to have taken it as self-evident that the improvement was the work the owner was performing on the land and not the work performed by the various subcontractors and others contracting with them.

26 In *Hansen*, Cameron J.A. stated, "the principal object of this *Act* is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so" (para. 30). This approach to builders' lien legislation has a long provenance in this jurisdiction. In *Galvin Luber Yards v Ensor*, 1922 CanLII 173 (SK CA), [1922] 2 WWR 15 (Sask CA), this Court followed commentary describing the object of the legislation as being (i) "to prevent the owner of lands, whatever his estate in them, from getting the labor and capital of others without compensation" (p. 18, quoting Samuel Louis Phillips, *A Treatise on the Law of Mechanics' Liens on Real and Personal Property*, 2d ed (Boston: Little, Brown, and Company, 1883) at 296); and (ii) to ensure "by a cheap and expeditious method the payment for work and materials out of property upon which the work has been done, or for which materials have been provided" (quoting William Bernard Wallace, *Mechanics' Lien Laws in Canada*, 2d ed (Toronto: Canada Law Book Company, 1920) at 10).

27 Since the present *Act* was enacted in 1986, this Court has commented on its purpose on several occasions. In *Town-NCountry Plumbing & Heating (1985) Ltd. v Schmidt* (1991), 1991 CanLII 7989 (SK CA), 93 Sask R 278 (CA) [*Town-NCountry*], Cameron J.A. for the Court mentioned two purposes, including that the statute is "concerned with the commercial interests of others, including the owner and the financier, if any, of the improvement" (para. 27); and he stressed that the "statute is primarily concerned with the commercial interests of persons who, under contract and on credit, contribute service or material to the improvement of real property, whether under contract to the owner, to the contractor engaged by the owner, or to any subcontractor" (para. 26). As to how the two purposes interact with each other, he noted importantly that "both purposes may be seen to run through the scheme of the statute" (para. 28).

[Emphasis in original]

48. In *Davidson Well Drilling Ltd. (Receiver of) v. Bank of Montreal*[9] Ross J. discussed and applied Grey Owl and a number of Alberta Court of Appeal cases[10]:

> 70 There are important distinctions between *Orban* and this case. In this case it is clear that the Work constituted an improvement to the Syncrude lands. The

[9] 2016 CarswellAlta 1401, 2016 ABQB 416 per Ross J. (**Tab 7**).
[10] At para. 70 – 84.

existence of an improvement was conceded when the Receiver approved payment of liens registered within 45 days. The Receiver did not revoke this concession at the hearing. From the facts provided regarding the nature of the Work, there is no reason to question that it constituted an improvement, which includes "*anything* constructed, erected, built, placed, *dug or drilled or intended to be* constructed, erected, built, placed, *dug or drilled, on or in land except a thine that is neither affixed to the land nor intended to be or become part of the land*": *BLA* s 1(d).

71 The connection, if any, between the separators and any improvement to the land is not clear from the decision in *Orban*. In contrast, the connection between the equipment and rigs maintained by Roughrider, and the improvement constituted by the Work, is clear. "Roughrider supplied and rendered on-demand (continual) mechanical maintenance services for Davidson's oil and gas drilling and exploration rigs, loader and support equipment essential to exploration drilling (the "Services"). The Services supplied by Roughrider were absolutely essential to the exploration and drilling operations and improvements to the lands" (Affidavit of Laura Secord).

72 The issue is whether this connection is sufficient to show that the Roughrider services were performed "on the improvement": *BLA* s 1 (p).

49. Ross J. then quoted para. 22 – 27 of the *Grey Owl* case, and continued:

74 The Receiver submits that *Grey Owl* should be distinguished, as the Saskatchewan legislation defines "improvement" more broadly than the *BLA*.

75 The *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 2(1)(h) provides:

> (h) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
>
> (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
>
> (ii) the demolition or removal of any building, structure or works or part thereof;
>
> (iii) services provided by an architect, engineer or land surveyor
>
> . . .

76 I reject this proposed distinction. The *BLA* definition of "improvement" is virtually identical. The additional express inclusions under s 2(1)(h)(i) of the Saskatchewan Act do not detract from the breadth of the basic definition under both Acts. In any event, the issue is not whether the Work constituted an improvement, but whether Roughrider's services were "on the improvement" (s 1(p)). This language in the *BLA* is similar to s 22 of the Saskatchewan Act considered in *Grey Owl*, which gave lien rights to those providing services "on or in respect of an improvement".

77 Further, the approach in *Grey Owl* is fully in accord with the approach in a number of Alberta Court of Appeal cases, including *Schlumberger*, discussed above, and *PTI Group Inc. v. ANG Gathering & Processing Ltd.*, 2002 ABCA 89 (Alta. C.A.) at para 11 *[PTI Group]*, citing *Alberta Gas Ethylene Co. v. Noyle* (1979), 20 A.R. 459, 1 A.C.W.S. (2d) 344 (Alta. C.A.) *[Alberta Gas]*.

78 In paragraphs 8-10 *of Alberta Gas*, the Court of Appeal held:

> [8] It is apparent that the work done by Burmac was done directly upon the portable buildings and the propane supplied by Cigas was used in those buildings. This in itself does not create the basis for a lien against the land, as there is no evidence that the portable buildings were improvements. Their description as "mobile" makes it apparent that they were "neither affixed to the land nor intended to be or become part of the land". Further, the respondents do not contend that the portables were improvements.
>
> [9] The improvement involved in this case was the construction of a gas extraction plant. The issue is whether Burmac's work and Cigas' materials were work and materials done or used "upon or in respect of that improvement. In essence this amounts to a determination of whether work done and materials used to provide sleeping accommodation and food services for persons who labour upon an improvement are work done and materials used "in respect of an improvement.
>
> [10] As I see the problem, the respondents' work and materials must be examined in relation to the overall project, rather than in relation to the rented chattels on which they were directly expended. This approach is in line with that taken by Darling, Co. Ct. J. in *Cigas Products Ltd. v. Tamarisk Developments Ltd. and Young*, [1976] 6 W.W.R. 733. In that case the lien claimant had rented propane tanks and heaters to a general contractor for use in drying out concrete and for heating the building during construction. It also installed the equipment and supplied fuel for it. The plaintiff was not allowed a lien for the rental amount of the units, as the British Columbia Mechanics' Lien Act contains no equivalent to our s.4 (4). However, the liens in respect of the cost of the fuel and for the installation of the heating equipment were allowed. The learned County Court judge said at page 735:
>
> > The evidence satisfies me that Cigas qualifies as a materialman supplying materials to or for the improvement, that is, the propane gas for the making of this improvement. Drying out cement and walls is a necessary part of the building procedure. Without getting technical, the chemical process, I understand on the evidence, is equivalent to its being consumed and incorporated in the course of construction. The same reasoning applies to the item of labour and materials to install the tanks, pipes and heaters. Cigas, as I find, is in the position of a subcontractor to do such work and, in a limited sense, to do such work upon and to furnish such materials as the pipes, the fittings and the blocks for the installation of the equipment. Cigas supplied its own workmen under its supervision

> and paid them for the installation labour. Next, the blocks, pipes and fittings are not recoverable or re-usable, but remain on the lands of the defendant Tamarisk."

79 I conclude that both the Alberta Court of Appeal and the Saskatchewan Court of Appeal consider "improvement" from the perspective of the "overall project" involved. In other words:

> (i) the "overall project" is the "improvement";
> (ii) the "overall project" constitutes the "thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land"; and
> (iii) the "overall project" would also be the thing that is "affixed to the land or intended to become part of the land."

80 To the extent that *Orban* is inconsistent with this approach, and I am not sure that it is inconsistent, it has less weight as the decision of a single Justice, while the other decisions cited were by full panels of the Court of Appeal.

81 The focus is thus not whether the equipment serviced by Roughrider was an improvement affixed to the land, but whether the services provided by Roughrider were on the improvement constituted by the Work.

82 *PTI Group* makes it clear that "services need not be physically performed upon the improvement to fall within the meaning of the Act. They must, however, be 'directly related to the process of construction"': para 16. "[I]t is the degree of proximate connection to the process of construction that must be evaluated": para 17. Relevant inquiries include (para 18):

a) whether the contractors, sub-contractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement;

b) whether the off-site services could have been provided on the site;

c) whether the improvement could have been carried out absent such off-site services; and

d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were "primary" in nature.

83 I am satisfied that the connection of Roughrider's services to the Work established by the evidence — essential on-demand maintenance services for equipment that was in turn essential to the drilling operations — demonstrates the required connection to the improvement. Some of the services were provided "out in the field where drilling and exploration operations were being performed". The services were requested by Davidson's field managers and site supervisors when a piece of equipment broke down. "Were it not for Roughrider's essential and timely services, Davidson's drilling and exploration work on the Sites simply would have stopped entirely" (Affidavit of Laura Secord).

84 Roughrider's lien is declared valid in the claimed amount.

50. In *Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services)*[11], *Master Prowse stated:*

> [55] The decision in ***Davidson***, and the Court of Appeal decisions cited therein, fully support the arguments of Trotter and Hamil that their liens are valid on the basis that the relevant 'improvement' was the Horizon oilsands project.
> [56] Further indirect support for the proposition that it is the well, mine or oilsands plant which should be considered to be the improvement is the line of Alberta cases which have validated builders' liens filed on the 'wrong' land (not the land to which the work or materials were supplied) so long as the 'right' land is adjacent to or in close proximity to the liened land, and provided that they are part of a common purpose.
> [57] In other words, even where the lien is filed on the 'wrong' land, it is the "overall project" (to use the language found in the ***Davidson*** decision) which is considered, and thus work may be considered to have been done on an 'improvement' even where the work was done on another parcel of land and not the parcel that was liened. That line of cases is cited in ***MJ Ltd. v Prairie Mountain Construction (2010) Inc.***, 2016 CarswellAlta 1816, 2016 ABQB 395.
> [58] I agree with and am bound by the decision in ***Davidson***, and consequently accept the alternative argument of Trotter and Hamil that their liens are valid, even if the pumphouses themselves are not considered to be an 'improvement' but rather where the Horizon oilsands project is considered to be the 'improvement'.

51. In this manner, the "overall project", being the overall operations of the MD of Bonnyville and its use of the Lands as a storage yard for aggregate (sand and gravel) that may be needed in its operations through the MD of Bonnyville, may be seen as the "improvement", rather than requiring that the aggregate be "installed" in or incorporated in those particular Lands. Denying a lien in these circumstances goes against the intention of the *BLA* as elucidated in the *Grey Owl* case and accepted in the Alberta cases that have followed it.

52. It is respectfully submitted that the Monitor was in error in denying the 945441 Lien Claim on this basis.

2. Was the Monitor correct in denying the Applicants' 945441 Lien Claim Lien Claim because the Builders' Lien Claim of the Applicants was "not registered against the Lands or any lands owned by the MD of Bonnyville;"?

53. It is submitted that the determination of the Monitor that the builders' lien claim of the Applicants is invalid because it was not registered against the Lands or any lands of the MD of Bonnyville almost completely ignores the terms of the Eidsvik May 20 Order.

---

[11] 2017 ABQB 262 (CanLII) per Master Prowse (**Tab 8**), at para. 55 – 58.

54. The Eidsvik May 20 Order specifically prohibited any lien claimants from filing any further builders' lien claims against the Lands or any lands of the MD of Bonnyville or in respect of the Contract between JMB and the MD of Bonnyville and removed any lien claims that had been filed against the Lands of the MD of Bonnyville.[12]

55. But then the Eidsvik May 20 Order granted actual and potential lien claimants until June 1, 2020 to submit Lien Claims to the Monitor. June 1, 2020 was defined as the "Claims Bar Date"[13].

56. The Eidsvik May 20 Order defined "Lien"[14]:

> (l) "**Lien**" means a lien registered under the BLA against the Lands in respect of the Work or the Contract;"

57. The Eidsvik May 20 Order defined "Lien Claim"[15]:

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

58. The Eidsvik May 20 Order defined "Lien Claimant"[16]:

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

59. The Applicants had not needed to register a builders' lien claim prior to the Eidsvik May 20 Order because the supply of aggregate from the lands of the Applicants was on-going and they had until 45 days after the last materials were supplied to register a builders' lien. This is made starkly clear by s. 41(1) the *BLA* quoted above at paragraph 27.

60. The Applicants fully complied with the Eidsvik May 20 Order and submitted their Lien Claim to the Monitor prior to June 1, 2020 as the Eidsvik May 20 Order permitted and required.

61. The Monitor provided essentially no real reasons to justify its decision to deny the builders' lien claim on this basis and supplied only a bald statement or conclusion that the lien claim is invalid on this ground. Much more detailed reasons would be required to justify such a result if it could be justified at all. But a bald conclusion is certainly not sufficient. If this were judicial review, it would be required under the *Vavilov* reasoning of the Supreme Court of Canada that the decision

---

[12] Eidsvik May 20 Order, para. 4.
[13] *Ibid.*, para. 3(b).
[14] *Ibid.*, para. 3(l).
[15] *Ibid.*, at para. 3(m).
[16] *Ibid.*, at para. 3(m).

be set aside. However, this is effectively an application to challenge the determination of the Monitor pursuant to a process mandated by the Eidsvik May 20 Order.

62. In the absence of any real reasons from the Monitor, it is submitted that the Court essentially has to make the decision itself, rather than remitting the decision again to the Monitor which, it is submitted, could result in a pointless and virtually endless round of decisions and challenges. The correct decision is needed, and it is needed expeditiously.

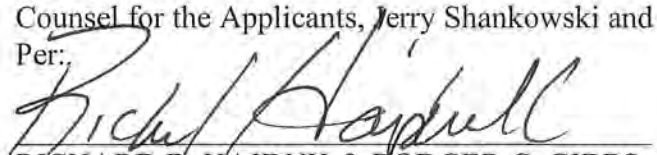
63. Accordingly, it is submitted that the Lien Claim of the Applicants should be allowed, as it fully complied with the Eidsvik May 20 Order on the ground upon which the Monitor rejected it, and fully complied with ss. 1 and 6(1) of the *BLA*. It was lawful, timely and compliant. The Applicants did not need to register the Lien under the *BLA* against the Lands of the MD of Bonnyville or any lands of the MD of Bonnyville because s.. 41(1) of the *BLA* was supplanted by the Eidsvik May 20 Order, and the Lien has not expired prior to the Eidsvik May 20 Order being granted. The Applicants then complied with the Eidsvik May 20 Order and submitted the Lien Claim to the Monitor in accordance with the Eidsvik May 20 Order prior to the Claims Bar Date of June 1, 2020.

64. Destroying any right to a lien due to non-registration was not the intent of the Eidsvik May 20 Order. It simply substituted a different process for "registration" and a different process for determination than provided in the BLA. Instead of registration against the Lands, the 945441 Lien Claim was required to be submitted to the Monitor in a particular form by the Claims Bar Date. This was clearly done.

VI. CONCLUSION

65. The Applicants submit that their Lien Claim is fully compliant with both the BLA and the Eidsvik May 20 Order, and ought to be declared valid and that the Court ought to direct the Monitor to pay the Lien Claim out of the monies paid by the MD of Bonnyville to the Monitor together with costs of the submission of the Lien Claim to the Monitor and costs of this application to challenge the decision of the Monitor, and such further and other relief as may be required and as this Honourable Court deems just and appropriate. For clarity, the Applicants seek the relief set forth in paragraph 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF OCTOBER, 2020.
HAJDUK LLP
Counsel for the Applicants, Jerry Shankowski and 945441 Alberta Ltd.
Per:



RICHARD B. HAJDUK & RODGER C. GIBBS
Barristers & Solicitors

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Danielson v. Calgary (City) | 2005 ABQB 55, 2005 CarswellAlta 123, [2005] A.W.L.D. 1023, 28 M.P.L.R. (4th) 103, 29 M.P.L.R. (4th) 103, 364 A.R. 334, [2005] A.J. No. 84, 137 A.C.W.S. (3d) 95 | (Alta. Q.B., Jan 27, 2005)

2002 ABQB 682
Alberta Court of Queen's Bench

Sulphur Corp. of Canada Ltd., Re

2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, [2002] A.W.L.D. 345, [2002] A.J. No. 918, 319 A.R. 152, 35 C.B.R. (4th) 304, 5 Alta. L.R. (4th) 251

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

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.A. 2000, c. B-9

AND IN THE MATTER OF SULPHUR CORPORATION OF CANADA LTD.

Lovecchio J.

Heard: June 19, 2002
Judgment: July 16, 2002
Docket: Calgary 0201-06610

Counsel: *Brian P. O'Leary*, *Q.C.*, for Applicants
Karen Horner, for Sulphur Corporation of Canada Ltd.
Howard A. Gorman, for Proprietary Industries Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Company had working capital shortfall of almost $10 million and approximately $9 million of builders' liens had been registered against its assets — Company obtained protection under Companies' Creditors Arrangement Act — Order under Act stayed all actions by creditors and authorized company to borrow $200,000 in debtor in possession financing from major shareholder which would rank in priority to all other creditors — Several builders' lienholders brought application for determination of jurisdiction of court to grant debtor in possession financing charge ranking ahead of registered liens — Company brought application for extension of stay and increase in amount of financing — Court has jurisdiction to grant charge for debtor in possession financing which ranks in priority to liens under Builders Lien Act — Section 11 of Companies' Creditors Arrangement Act provides courts with broad and liberal power to be used to help achieve overall objective of Act, which is to foster restructuring of insolvent companies to preserve and enhance their value for mutual benefit of companies and creditors — No specific limitations were placed on exercise of courts' discretion under s. 11 — Provisions of federal Companies' Creditors Arrangement Act were in conflict with provisions of provincial Builders Lien Act and Companies' Creditors Arrangement Act should prevail — Major shareholder's increased debtor in possession financing proposal was only plan that could result in

creation of greater value — Given magnitude of amounts involved, prejudice to lienholders was outweighed by potential benefit for all parties — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11 — Builders Lien Act, S.B.C. 1997, c. 45.

Table of Authorities

Cases considered by *Lovecchio J.*:

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — distinguished

Hunters Trailer & Marine Ltd., Re, 2001 CarswellAlta 964, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — followed

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151, 1995 CarswellBC 369 (B.C. C.A.) — followed

Royal Oak Mines Inc., Re, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — distinguished

Smoky River Coal Ltd., Re, 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — considered

United Used Auto & Truck Parts Ltd., Re, 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — considered

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Statutes considered:

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

s. 11 — considered

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 11 — considered

s. 11(3) — considered

s. 11(4) — considered

Court of Queen's Bench Act, R.S.M. 1970, c. C280

s. 59 — referred to

Legal Profession Act, S.B.C. 1987, c. 25

Generally — referred to

Mechanics' Liens Act, R.S.M. 1970, c. M80

s. 11(1) — referred to

APPLICATION by builders' lienholders for determination of jurisdiction of court under *Companies' Creditors Arrangement Act* to grant debtor in possession financing charge which would rank ahead of registered liens; APPLICATION by insolvent company for extension of stay and increase in debtor in possession financing.

***Lovecchio J.*:**

INTRODUCTION

1 This is an application by several builders' lien claimants of Sulphur Corporation of Canada Ltd. to determine whether this Court has the jurisdiction under the *Companies' Creditors Arrangements Act* [1] to grant a debtor in possession financing charge which would rank in priority to their registered liens. In a concurrent application, Sulphur sought an extension of the stay and an increase in the DIP financing of $450,000.

BACKGROUND

2 The basic facts in the applications are not in dispute. They are briefly summarized below.

3 Sulphur is a company incorporated under the laws of the Province of Alberta and Proprietary Industries Inc. owns 79.59% of Sulphur's issued and outstanding voting shares.

4 Sulphur's only activity has been to develop and construct a sulphur terminal and processing facility in Prince Rupert, British Columbia. The facility has not been completed and it generates no cash flow.

5 On April 19, 2002, Sulphur obtained protection under the *CCAA* in an *ex parte* application. The Order stayed all actions against Sulphur by all of its creditors for a period of 30 days, named Arthur Andersen Inc. (which firm was subsequently taken over by Deloitte & Touche Inc.) as the Monitor and authorized Sulphur to borrow an amount not exceeding $200,000 from Proprietary to finance the continued activities of Sulphur. This DIP financing was to rank in priority to all other creditors of Sulphur, except those claiming under the Administrative Charge (being primarily the Monitor's fees and disbursements).

6 A number of affidavits have been filed in this matter. Based on these affidavits, it appears the financial position of Sulphur is extremely precarious.

7 Sulphur has a working capital shortfall of $9,751,435.00. On December 7, 2001, Sulphur ceased paying its trade creditors for their work and materials provided for the construction and development of the facility. The trades continued to work on the facility and were not advised by Sulphur that funding from Proprietary had ceased until around January 8, 2002.

8 Approximately $9,000,000.00 of builders' liens have been registered against Sulphur's assets. It would appear these liens were registered in early 2002, and the Applicants represent a total of $6,498,252.98 or 59% of that amount.

9 By the middle of December, 2001, Proprietary had advanced a total of $17,791,338.00 to Sulphur. Of that amount, $1,000,000.00 was advanced as consideration for a share subscription and $1,166,200.00 to exercise Share Purchase Warrants. The balance of the advances, in the amount of $15,625,138.00, was a loan. At the time the loan advances were made only one debenture, securing the first $1,180,000.00 advance under the loan, was issued and despite the requests and the demands of Proprietary, the then existing management of Sulphur failed or refused to execute debentures securing the balance of the advances under the loan, contrary to the commitment of Sulphur to secure all advances.

10 On April 18, 2002, an additional debenture to secure the balance of the indebtedness was issued. Proprietary is the only secured creditor of Sulphur.

11 The only other major creditor of Sulphur is Ridley Terminals Inc. The facility is on leased lands and Sulphur was unable to make its lease payments to Ridley under the Phase-One sublease and the Phase-two sublease for the month of April, 2002. At the time of the initial Order, the total lease arrears owed to Ridley with respect to the lands is $24,966.25. On or about March 20, 2002, Ridley issued a Notice of Default under the subleases to Sulphur.

12 It was also deposed that Proprietary is the only party willing to provide interim financing to Sulphur and that financing would not be provided unless it ranked as a first charge after the Administrative Charge.

13 Pursuant to the Order of Hart. J dated May 16, 2002, the stay of proceedings and all other terms of my initial Order were confirmed and continued until June 19, 2002.

14 On June 19, 2002, the Applicants sought an order to vary the DIP financing provisions of my initial Order, such that the DIP financing be ranked as a secured charge but after their claims.

15 During this hearing, I further extended the May 16 Order until July 19, 2002 and increased the DIP financing, allowing an additional $200,000 to be borrowed from Proprietary. Despite Proprietary's earlier position, Proprietary consented to lend this additional amount, notwithstanding my ruling that the priority of these additional funds and the original funds could be varied depending on the answer given to the jurisdictional question raised by the Applicants.

ISSUE

16 The only real issue still to be determined in this application is the following:

> Does this Court have the jurisdiction to grant a charge under the ***CCAA*** to secure a DIP financing which ranks in priority to a statutory lien under the under the ***Builders Liens Act***[2] of British Columbia?

DECISION

> This Court has the jurisdiction to grant a charge under the *CCAA* to secure a DIP financing which ranks in priority to a statutory lien under the under the *BLA* of British Columbia.

ANALYSIS

Position of the Applicants

17 The Applicants argues that s. 32(2) of the *BLA* establishes a priority for liens over all other charges, except those listed, and a charge to secure a DIP financing is not listed. As a result, the Applicants argue there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

18 The Applicants also contend that the *CCAA* contains no specifically enunciated statutory basis for the Court to grant a charge to secure a DIP financing which ranks in priority to the statutory liens of the builders' lien claimants. They do not dispute that the Court has the inherent jurisdiction to grant a security interest in certain circumstances but they maintain this contest comes down to the Court's inherent jurisdiction (an equitable power) versus an express provincial statutory provision and as such it falls outside of the limited purview of the paramountcy doctrine.

Position of the Respondent

19 The Respondent argues that s. 32(2) of the *BLA* only establishes a priority for liens over advances by a mortgagee, under a registered mortgage, and a DIP financing is not a registered mortgage. As a result, the Respondent argues there is no necessity to resort to the doctrine of paramountcy as the *BLA* and the Court's powers are not in conflict.

20 If that position is not maintained, then the Respondent disagrees with the Applicants' submission that this is a contest between the Court's equitable power versus an express statutory priority provision. The Respondent submits there is a statutory basis for the initial Order and, as a result, if there is a conflict between the charge and the liens, then the charge created under the *CCAA* being a federal statute, is paramount to liens provided for in the *BLA* being a provincial statute. The Respondent relies on ss. 11(3) and 11(4) of the *CCAA* as the statutory provisions which empower the Court to create the charge.

Discussion

The BLA Statutory Interpretation Argument

21 Section 32 of the *BLA* states the following:

> 32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.
>
> 32(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

22 If the circumstances of this case did not give rise to a paramountcy issue, s. 32 of the *BLA* would govern. Clearly, the DIP financing is not a registered mortgage and the validly registered builders liens would have priority. (See discussion on *Baxter* below).

The Paramountcy Argument and the Jurisdiction of the Courts

23 Sections 11(3) and 11(4) of the *CCAA* read as follows:

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

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

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

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

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

At para 18:

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

Later, at para.32:

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

Finally, at para. 51

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

27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Smoky River Coal Ltd., Re*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s.11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the *CCAA*. It is within this context that my initial Order and the June 19 Order were based.

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

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

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

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

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

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

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

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-

> priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over *CCAA* relief. I do not think that Parliament intended that the objects of the *Act* could be indirectly frustrated by secured creditors.

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

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

Paramountcy

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

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

The Exercise of That Discretion

39 Sulphur has a working capital deficiency of over $9,000,000. Proprietary had ceased funding construction. Given the registered liens and the security position of Proprietary, funding from any other third party, other than Proprietary, is an illusion. Sulphur would have no chance to recover or restructure but for the provision of some interim financing to permit an assessment of where it goes, if anywhere at all, other than into bankruptcy.

40 When a Court chooses to grant a stay order under s. 11 of the *CCAA*, a significant portion of the order must address how costs will be covered for ongoing operations, the assessment process and the formation of a meaningful plan of arrangement.

41 A balancing of the interests of all of the stakeholders is involved. The Court must proceed with caution throughout this entire process.

42 Wachowich C.J.Q.B. affirmed the test set out by Tysoe J, in *United Used Auto & Truck Parts Ltd., Re* [(1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])], that there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the parties whose position is being subordinated.

43 In this case, a determination of priorities is not before me but, from the record, the following appears to be the lineup. Prior to insertion in the line of the Administrative Charge and the DIP financing, Proprietary appears to have a secured position of $1,180,000, there are registered liens of approximately $9,000,000 and then the balance of the secured position of Proprietary. In addition, the landlords position of roughly $25,000 must be fit into the equation.

44 This facility has not been completed and, until it is, any cash flow is a pipe dream. Someone must come up with a plan to reorganize this unfortunate situation as a simple sale of the unfinished facility will, in all likelihood, yield the least in dollars for all to share.

45 There is conflicting evidence on what the plant may be worth. This is partly driven by the method chosen (liquidation vs. going concern, and who is preparing the report). The highest number for a completed facility is $23.3 million to $24.2 million and on an uncompleted basis it may be as low as $1.00.

46 The best chance for the lienholder's to be paid is likely on completion as a liquidation appears to lead to a shortfall even for them. I realize that I have potentially eroded their position by $400,000 with the DIP financing in a liquidation scenario. However, that money is coming from Proprietary and they are the ones who have the greatest interest in seeing value created and at this point they are also the only ones who will finance a scheme that might see the creation of greater value.

47 In my view given the magnitude of the numbers we are dealing with, at this stage the prejudice to the lienholder's is outweighed by the potential benefit for all concerned.

48 Having said that, I wish to add that all future applications which would seek to amend or vary the DIP financing in any way will receive the Court's careful scrutiny. Sulphur will be obligated to file evidence demonstrating that the DIP financing would have the impact of increasing the value of the facility so as to avoid any further erosion of the lienholder's position.

CONCLUSION

49 For the foregoing reasons, I answer the jurisdictional question posed in the affirmative.

COSTS

50 The issue of costs may be spoken to at a latter date if Counsel wish.

Order accordingly.

Footnotes

1 R.S.C. 1985, c. C-36.

2 R.S.B.C. 1997, Chapter 45.

3 (2001), 94 Alta. L.R. (3d) 389 (Alta. Q.B.).

4 (Alta. C.A.).

5 (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

6 (1975), [1976] 2 S.C.R. 475 (S.C.C.).

7 R.S.M.1970, c. C280.

8 R.S.M. 1970, c. M80.

9 (2000), 16 C.B.R. (4th) 141 (B.C. C.A.).

10 (B.C. C.A.)

TAB 2

2008 BCSC 1768
British Columbia Supreme Court

SR Télécom & Co. v. Apex - Micro Manufacturing Corp.

2008 CarswellBC 2780, 2008 BCSC 1768, [2009] B.C.W.L.D. 1328,
15 P.P.S.A.C. (3d) 136, 173 A.C.W.S. (3d) 749, 52 C.B.R. (5th) 204

SR Télécom & Co., S.E.C. (Plaintiff) and Apex — Micro Manufacturing Corporation (Defendant)

Rice J.

Judgment: December 22, 2008
Docket: Vancouver SO86953

Counsel: David R. Brown, Michael L. Bromm for Plaintiff
J. Kenneth McEwan, Q.C., Gib van Ert for Defendant

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Personal property security
III Perfection of security interest
III.3 Repossession
Headnote
Personal property security --- Perfection of security interest — Repossession
Plaintiff acquired disputed property through asset purchase agreement with another company and assignment agreement — Defendant billed plaintiff for outstanding amounts — Defendant purported to hold disputed property as security for debt owed by plaintiff to defendant — Action was commenced after demand letter from plaintiff to defendant was unsuccessful in securing return of property — Plaintiff brought application pursuant to R. 46(4) of Rules of Court, 1990 and s. 57(1) of Law and Equity Act for order that defendant return to it disputed property in defendant's possession — Application granted — Disputed property was to be returned to plaintiff — Plaintiff established prima facie case on facts — There was serious case to be tried — Parties agreed that plaintiff owned disputed property — It was open to doubt whether there were communications sufficient to establish security interest, but considering low threshold required, it was not ruled out — Plaintiff was ordered to give undertaking to pay damages, of which $25,000 was to be funded as security — Merits of defendant's position and balance of convenience did not weigh heavily enough in defendant's favour on this issue to justify greater security.
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Collins & Aikman Automotive Canada Inc., Re (2007), 37 C.B.R. (5th) 282, 2007 CarswellOnt 7014, 63 C.C.P.B. 125 (Ont. S.C.J.) — referred to
Extreme Retail (Canada) Inc. v. Bank of Montreal (2007), 12 P.P.S.A.C. (3d) 26, 2007 CarswellOnt 5520, 37 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — considered

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Statutes considered:

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Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered
Law and Equity Act, R.S.B.C. 1996, c. 253
s. 57 — referred to

s. 57(1) — pursuant to
Mechanics' Liens Act, R.S.M. 1970, c. M80
Generally — referred to
Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 10(1) — referred to

s. 10(2) — referred to

s. 28(1) — considered

s. 30(2) — referred to
Queen's Bench Act, R.S.M. 1970, c. C280
Generally — referred to

s. 59 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 46(4) — pursuant to

APPLICATION by plaintiff for order that defendant return to it property belonging to plaintiff.

***Rice J.*:**

Introduction

1 This application is brought pursuant to Rule 46(4) of the *Rules of Court* and s. 57(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. The plaintiff SR Telecom & Co., S.E.C. ("SRT") seeks an order that the defendant Apex — Micro Manufacturing Corporation ("Apex") return to it certain chattels (the "disputed property") belonging to SRT but currently in Apex's possession.

2 There is no dispute that the disputed property has at all times been the property of SRX or SRT, despite Apex's actual possession. Apex purports to hold the items as security for a debt owed by SRT to Apex pursuant to an outstanding invoice for approximately $1.48 million.

3 Apex is not opposed in principle to returning the disputed property to SRT and, indeed, claims to have offered several times to hand it all back in return for replacement security, but SRT has refused to give any security. Apex contends that the reason for SRT's refusal to provide a letter of credit or other security is not only because SRT is unwilling, but because it is unable.

Facts

4 SRT's business is the design and marketing of broadband wireless access parts, including wireless telecommunication devices known as customer premises equipment ("CPEs"). SRT does not itself assemble the CPEs. Instead it outsources the job to other companies, including Apex. Apex assembles the CPEs from components provided by SRT and other third party sources.

5 SRT acquired the disputed property, through an asset purchase agreement with another company dated April 4, 2008 (the "APA") and an assignment agreement, also dated April 4, 2008. It had previously belonged to SR Telecom Inc., now called SRX Post Holdings Ltd ("SRX"), which had for some time been operating under the protection of the *Companies' Creditors Arrangement Act* ("*CCAA*"), R.S. 1985, c. C-36.

6 The disputed property included an inventory of these components. The precise number included in the disputed property and their aggregate value is unknown at this point. It also included testing equipment and eight outstanding purchase orders issued by SRX to Apex. If necessary, an accounting will be held on further application to establish the quantum.

7 The APA was approved in advance of its completion by the Quebec Superior Court on March 31, 2008 by way of a "Vesting Order". The deal closed as agreed April 4, 2008 and the order was registered April 15, 2008 by the court-appointed monitor in the *CCAA* Proceeding. Apex was aware of the *CCAA* status of SRX and Apex itself is listed as a creditor in the SRX *CCAA* proceedings, but it has not participated in them.

8 Apex began its business of assembling CPEs for SRX in 2005, and in May, 2005 entered into a Memorandum of Understanding (the "MOU") with SRX. The MOU established that SRX would send Apex certain minimum quantities of the CPE components monthly and deal exclusively with Apex. Allegedly, SRX agreed to pay more per unit when it failed to deliver and pay for assembly of the agreed minimum. This additional payment was called the "short build premium".

9 At the time of the APA transaction, one of SRX's officers was a certain Mr. Paul Simard. Upon completion of the APA, Mr. Simard became an employee of SRT and was subsequently further promoted to vice-president of operations. He was actively involved in managing SRX's and, later, SRT's relationship with Apex. On April 10, 2008, Mr. Simard sent an email to Apex confirming SRX's sale of the assets to SRT and that SRX would no longer be requiring further services from Apex. He indicated that the purchaser of the assets, SRT, would be pleased to discuss new arrangements with Apex. Negotiations followed, during which Apex evidently continued to do business as if SRT had slipped into SRX's shoes.

10 Also on April 10, 2008, SRT sent to Apex a request for a quotation for the assembly of 12,000 CPEs that had recently been ordered by a customer of SRT, Axtel S.A. de C. V. In the request for a quotation, SRT also requested that Apex's answer include

approval of payment on 30 days' net credit terms. On behalf of Apex, an officer, Mr. de Jaray, replied on April 18 declining the credit request on the basis that Apex held no security from the "new company" (SRT) that now owned the ex-SRX assets. He suggested that SRT instead secure delivery by way of insurance. He indicated, however, that if insurance could not be obtained, Apex would be prepared to discuss "alternative security surrounding inventory" such as an irrevocable letter of credit.

11 Apex continued to build CPEs for SRT on a prepaid basis until July of 2008.

12 On July 11, 2008, Apex advised Mr. Simard that Apex had shut down assembly of CPEs for SRT and would not restart assembly unless SRT paid, in full and in advance, for the July short build premium and for assembly of 2000 CPEs.

13 On July 15, 2008, Mr. Simard, on behalf of SRT, tendered a written proposal in an email to Apex that the parties would agree to close down their relationship. The proposal provided, amongst other things, that SRT would pay in advance for the remaining 2000 CPEs and the short build premium in July. These amounts were allegedly paid by SRT in full by August 12, 2008, but the 2000 CPEs were not delivered by Apex.

14 On September 19, 2008, Apex billed SRT for all outstanding amounts, including not only post-APA accounts, but also a number of short build premiums pursuant to the MOU, and more. The total was $1,481,698.

15 This action was commenced on October 6, 2008 after a demand letter from SRT to Apex was unsuccessful in securing the return of the disputed property.

Positions of the Parties

a) SRT

16 SRT rejects Apex's claim of a security interest and seeks return of the assets in question unconditionally.

17 SRT argues that most of the debt said to be owed by SRT arises from SRX's alleged failure to meet the volume estimates set out in the MOU. SRT argues that those estimates were expressly stated in the MOU to be non-binding on the parties to it, and SRT was not a party to the MOU. SRX's debts owed to Apex could not become obligations of SRT unless SRT was a party to the MOU and promised Apex to pay them, which was not the case. Having never represented to Apex that it would assume such an obligation, or order any particular number of CPEs, SRT maintains that it has fully compensated Apex through the payments that it has made on its own orders to Apex since taking over the business. SRT contends that, in any event, the negotiations of July 2008 established an agreement that settled and relieved SRT of any of the burden of those earlier claims.

18 SRT further argues that, because the transfer of the disputed property was effected by a vesting order of the Quebec Superior Court, the vesting order cancelled any alleged security interest and conveyed to SRT absolute and unencumbered title to the disputed property.

19 According to SRT, the *CCAA* as a federal Act prevails by the doctrine of paramountcy in the case of conflict with a provincial statute such as the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 ("*PPSA*"):

> It is important to note that the CCAA is a federal statute and thus the rights and remedies provided in provincial legislation may be superseded by the federal Act. The general goals and intentions of the Act cannot be subverted by provincial legislation.

See *McLaren: Canadian Commercial Reorganization*, at para. 2.2700 and *Collins & Aikman Automotive Canada Inc., Re*, [2007] O.J. No. 4186, 37 C.B.R. (5th) 282 (Ont. S.C.J.), at para. 42.

20 In support of this proposition, SRT relies on *Royal Bank v. Body Blue Inc.*, [2008] O.J. No. 1628, 42 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]), a case in which a party (Body Blue), which had taken title to certain intellectual property pursuant to a *CCAA* vesting order, sought a declaration that title was taken free of certain licensing agreements in favour of a third party, Herbal Care, which had not been represented at the *CCAA* proceedings. The court cited *Extreme Retail (Canada) Inc. v. Bank*

of Montreal, [2007] O.J. No. 3304, 37 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), and agreed, at paras. 20-22, that the vesting order destroyed the licensing rights:

> [20] In this case, the A&V Order determined the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. Although Herbal Care had not been given notice and was not represented at the hearing giving rise to the A&V Order, this non-participation does not, in my view, impact on this motion. Herbal Care took no steps after becoming aware of the A&V Order to set aside or vary the A&V Order and did not appeal the A&V Order. Herbal Care is, in my view, bound by the terms of the A&V Order.
>
> [21] The claim of Herbal Care is one of contract. It is a claim against Old Body Blue. It does not affect the transfer of title to the property, assets and undertaking of Old Body Blue to Body Blue 2006.
>
> [22] Body Blue 2006 holds the transferred assets free and clear of any claim of Herbal Care. Paragraph 6 of the A&V Order clearly provides that after the filing of the Receiver's Certificate, which evidences that the transaction has been completed, any and all "claims" of any "claimant" in or to the "purchased assets" shall vest in the proceeds derived from the completion of the transaction.

21 SRT also relies on *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), leave to appeal dismissed, [1998] O.J. No. 6562, 32 C.B.R. (4th) 21 (Ont. C.A.), in which the Red Cross sought court approval for a transfer of assets. The opponents of the order, while not opposing the transfer, argued that the transfer could not "sanitize" the assets. The court rejected that argument, stating, at para. 42:

> [42] In my view, however, the assets either have to be sold free and clear of claims against them - for a fair and reasonable price - or not sold. **A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back.** In the context of the transfer of the Canadian blood supply operations, the prospect of such a claw back of assets sold, at a later time, has very troubling implications for the integrity and safety of that system. I do not think, firstly, that the argument is a jurisdictional one, and secondly, that it can prevail in any event.
>
> [emphasis added]

22 SRT argues that that the discretion exercised by courts in *CCAA* proceedings when granting vesting orders is statutory, as distinguished from inherent discretion. Such discretion when exercised under a federal statute is paramount to conflicting provincial statutes and will override conflicting rights of creditors secured pursuant to provincial statutes.

b) Apex

23 Apex claims that in its transactions with SRX it acquired a security interest in all of the disputed property in its possession. According to Apex, the security rights were created by the following documents:

> a) an email dated April 9, 2006, from Steve de Jaray, then Apex's CEO, to Bill Aziz who was then SRX's chief restructuring officer;
>
> b) Mr. Aziz's email reply dated April 10, 2006, which stated as follows:
>
> > We will be able to provide a domestic bond through EDC. What you and I discussed was $1 million though. We will need the detailed buildup and will have to agree on the amount of NCNR inventory. The sooner this is available and agreed, the sooner the bond can be put in place. We are currently working with EDC and other lenders to finalize these arrangements. In the interim, as you and I agreed, you have our materials and equipment as security for any risk or exposure you may have;
>
> c) an email dated January 3, 2008, from Mr. de Jaray to Cindy Watson wherein he confirmed the previous email discussion with Mr. Aziz.

24 In paragraphs 8 and 9 of the Statement of Defence, Apex pleads that SRT took by way of assignment from SRX the obligations of SRX to Apex. It claims its right to follow its security pursuant to s. 28(1) of the *PPSA*. Under subsections 10(1) and (2) of the *PPSA*, a security agreement will be enforceable against third parties if the collateral is in the possession of the secured party or the debtor has signed a security agreement. Here, Apex is in possession of the collateral, and so it submits that the security agreement is enforceable against SRT. Apex registered its security interest on or about 21 January, 2008, three months before SRT purchased SRX's assets.

25 Apex's security interest and statutory rights in the disputed property have not, according to them, been cancelled, relinquished or otherwise discharged by the APA or any subsequent dealing, including the *CCAA* proceedings. Section 28(1) of the *PPSA* provides that where collateral is "dealt with" the secured party's secured interest continues to exist against the original collateral unless the secured party authorizes the debtor to deal with the collateral. In short, a security interest is "not affected by a sale and can be enforced against the buyer". This is a statutory formulation of the *nemo dat* rule that one cannot give away more than one possesses: see *Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.*, 2002 ABCA 79, 1 Alta. L.R. (4th) 14 (Alta. C.A.), at para. 11.

26 Under s. 30(2) of the PPSA, a buyer of goods in the ordinary course of the seller's business takes the goods free from any security interest given by the seller. However, this exception, according to Apex, is inapplicable in this case for two reasons. First, SRX's sale of the disputed property was not in the ordinary course of business. It was a court-ordered sale of SRX's assets concluded while SRX was under *CCAA* protection. Second, the exception does not apply where a seller was not the person who gave the security interest: see, to this effect, *New World Screen Printing Ltd. v. Xerox Canada Ltd.*, 2003 BCSC 1685 (B.C. S.C.), at paras. 25-26. SRT acquired the assets from a third party, Lagassé Communications & Industries, Inc. ("Lagassé"), which bought the collateral from SRX.

27 Apex argues that the doctrine of paramountcy is only effective in the case of operational conflict between federal and provincial statutes, in which cases only then is the conflict resolved in favour of the federal enactment. And there can only be an issue of paramountcy where one enactment says "yes" and the other says "no", where the same citizens are being told to do inconsistent things, and compliance with one is defiance of the other: see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) at 191, (1982), 138 D.L.R. (3d) 1 (S.C.C.). In the case at bar, argues Apex, no such operational conflict exists between the applicable provisions of the *CCAA* and the *PPSA*.

28 Further, the vesting order of the Quebec Superior Court was made in an exercise of the broad discretion granted to judges in *CCAA* proceedings by s. 11. Such an exercise of discretion cannot defeat Apex's express rights under a provincial statute because the discretion of a *CCAA* judge under s. 11 does not extend to removing or interfering with those rights. It would be a different matter had the vesting order been made under statutory authority expressly allowing the Quebec court to defeat existing statutory interests. But the Quebec Order was not made under any such express authority.

29 For this proposition, Apex relies on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1 (S.C.C.) ("*Baxter*"). That case involved an appeal of an order appointing a receiver under s. 59 of the Manitoba *Queen's Bench Act*, and granting priority over monies paid to the receiver of the Central Mortgage and Housing Corporation. The order was challenged for being contrary to the priority scheme established by another Manitoba statute, the *Mechanics' Lien Act*. Dickson J. (as he then was), for the Court, allowed the appeal and set aside the order. In doing so, he observed, at 480:

> ...[T]he inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities, which a Court simply cannot do.

Law

30 The test for return of property on an application under Rule 46(4) and s. 57 of the *Law and Equity Act*, where there is no intention to preserve the property prior to trial, is the same as the test for granting an interlocutory injunction: *Midland*

Walwyn Capital Inc. v. Global Securities Corp., [1997] B.C.J. No. 2541 (B.C. S.C.), at para. 10. The plaintiff must establish a *prima facie* case, or serious question to be tried, and the balance of convenience must weigh in favour of granting the order: *Midland*, at para. 12.

31 In assessing the balance of convenience, the court may consider various factors, including:

> ...the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

See *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279, 64 B.C.L.R. (2d) 96 (B.C. C.A.), at para. 24.

Analysis

32 In my view, SRT has established a *prima facie* case on the facts. There is, indeed, a serious case to be tried. The parties agree that SRT owns the disputed property. It is open to doubt whether there were communications sufficient to establish a security interest, but considering the low threshold required, I would not at this point rule it out. However, I have a very strong doubt that all of the debt alleged to be owed to Apex by SRT, or SRX for that matter, is in fact owed because I am not certain that the MOU terms are clearly binding to that extent.

33 As to whether the vesting order had the effect of relinquishing, cancelling or waiving the security interest, I find myself in agreement with the argument of counsel for SRT. It is not, in my view, beyond the authority of a Court to make a CCAA order contrary to the express terms of a provincial statute such as the *PPSA*.

34 Dealing firstly with the decision in *Baxter*, that case did not have anything to do with the statutory discretion conferred by the *CCAA*. Rather, it was dealing with inherent jurisdiction. In *Baxter*, the contest concerned the court's inherent jurisdiction pursuant to s. 59 of the Manitoba *Court of Queen's Bench Act*, a provincial statute, and the *Mechanics' Lien Act*, also a provincial statute. The Supreme Court of Canada noted that the *Queen's Bench Act* was not intended to empower the court to negate the unambiguous expression of the legislative will found in the *Mechanics' Lien Act*.

35 In *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), the Court concluded, at para. 46:

> [46] Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, **the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA.** ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of a corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process. [underline emphasis in original; boldface emphasis added]

36 The occasional confusion between inherent jurisdiction and statutory jurisdiction in the case law was clarified in *Richtree Inc., Re*, [2005] O.J. No. 251, 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]), at para. 7:

> [7] The concept of "inherent jurisdiction" within *CCAA* proceedings is discussed in the recent decision of the British Columbia Court of Appeal in *Re Skeena Cellulose Inc....* The court concludes that when one analyzes cases such as *Re Royal Oak Mines*, as well as others referred to by Farley J. such as *Re Westar Mining Ltd...*, **the court's use of the term "inherent jurisdiction" is a misnomer. In these cases, the courts are exercising a statutory discretion given by the *CCAA* rather than their inherent jurisdiction.**
>
> [emphasis added]

37 On the issue of paramountcy, although the Court of Appeal in *Skeena Cellulose Inc., Re* ultimately found that the *CCAA* and the provincial legislation were not in conflict, the court, at paras. 42 and 50, reiterated that if there were conflict, paramountcy would apply:

> [42] It might be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail.
>
> . . .
>
> [50] ... [I]n approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. ... [E]ven if the Forest Act or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.

38 In *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, [1995] B.C.J. No. 1535, 10 B.C.L.R. (3d) 62 (B.C. C.A.), Cumming J.A. noted, at paras. 26 and 27:

> [26] The jurisprudence which deals with the C.C.A.A. establishes two propositions: (a) first, this legislation is to be broadly interpreted so as to give a Supreme Court justice exercising jurisdiction a good deal of power and flexibility; and, (b) the C.C.A.A. will prevail should a conflict arise between this statute and another federal or provincial statute.
>
> [27] In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* ... the court, in deciding upon the scope of the power to stay proceedings brought by creditors pursuant to the C.C.A.A....:
>
> > In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives ... The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.
> >
> > The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word "creditor" occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.
> >
> > [emphasis added by Cumming J.A.]

39 Counsel for Apex submits that even in the case of statutory discretion, the paramountcy doctrine may not apply in the federal government's favour. It is submitted that where specific and operative provisions of provincial legislation exist, the power of a court to pronounce federal legislation paramount must derive from more than the inherent jurisdiction of the court or even from statutorily-derived jurisdiction. The federal legislation itself must also be specific and operative. In other words, a general federal statutory discretion may not be treated as paramount over specific and operative provincial legislation.

40 The authorities cited by Apex for this proposition included *Baxter*, *Royal Oak Mines Inc., Re*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), and *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, 9 C.B.R. (5th) 135 (Ont. C.A.). In *Stelco Inc., Re*, the Ontario Court of Appeal stated, at para. 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. [emphasis deleted]

41 In *Stelco Inc., Re*, the motion judge had rescinded the appointments of two of the company's directors on the basis of his inherent jurisdiction and the discretion of the court pursuant to the *CCAA*. The Court of Appeal found that s. 11 of the *CCAA* did not permit the exercise of such a discretion in and of itself. The court noted that the discretion under s. 11 was not "open-ended and unfettered". Moreover, "[i]ts exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues... [T]he court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts": at para. 44 [emphasis deleted].

42 Firstly, the argument in *Stelco Inc., Re* did not concern paramountcy, as the statutes in question, the *Canada Business Corporations Act* and the *CCAA*, are both federal statutes. Secondly, the case pertained to the reasonable limits applicable to the *CCAA's* jurisdiction *per se*. In the case at bar, there is no such issue. The discretion exercised by the Quebec court was clearly within the bounds of the statutory authority.

43 I am thus not persuaded by Apex's argument. The *CCAA* gives broad latitude to the courts to intrude on the affairs of companies under its protection, in priority over other legislation, operational and otherwise, including provincial legislation such as the *PPSA*.

44 As for the quantum of Apex's claims, it was very late in the day that they sky-rocketed from basic amounts remaining to be paid for the materials in the hands of Apex to a claim for nearly $1.5 million mainly, if not wholly, on the account of SRX. If the disputed property is not returned, the evidence is that SRT will be exposed to liquidated damages claims under an agreement with another customer, Axtel, for failure to deliver a stipulated number of CPEs on time. As it is now clear that Apex will not deliver the 2000 CPEs in sufficient time for SRT to fulfil its obligations under the other contract, and SRT must deal with another assembler. On these grounds I accept that there is potential for irreparable harm to SRT.

45 If the disputed property in Apex's hands is ordered to be returned to SRT, Apex submits that it must have security of more than an undertaking. Otherwise, the risk of loss will be very high to Apex, SRT having no resources of its own that have been disclosed. Counsel for Apex argued for security in an amount equal to that owed on the outstanding invoice.

46 SRT evidently has been funded generously to date by a prosperous parent company, but there is no evidence of any obligation upon the parent company that can be enforced in court. There is a risk that SRT may not be capable of performing its undertaking. I conclude that the facts warrant an order for an undertaking for damages, but nothing in the magnitude sought. I considered a figure closer to Apex's notional loss of profit on the transaction for assembly of 2000 or more CPEs but I find that as well to be more than is appropriate. I will order SRT to give an undertaking to pay damages, of which it must fund as security CDN $25,000. The merits of Apex's position and the balance of convenience do not weigh heavily enough in Apex's favour on this issue to justify greater security.

Orders

47 The disputed property currently in Apex's possession is to be returned to SRT forthwith at Apex's cost, which shall become a cost that may be claimed in this action.

48 SRT shall give an undertaking for damages, of which $25,000, in cash or by letter of credit, shall be posted as security.

49 I will leave costs to be decided by the trial judge, subject to the right of either party to apply to speak on that issue within ten days of this order.

Application granted.

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Marine Drive Properties Ltd., Re | 2009 BCSC 145, 2009 CarswellBC 285, [2009] B.C.W.L.D. 2022, [2009] B.C.W.L.D. 2023, [2009] B.C.J. No. 207, 175 A.C.W.S. (3d) 323, 52 C.B.R. (5th) 47 | (B.C. S.C., Feb 10, 2009)

2003 BCCA 344
British Columbia Court of Appeal

Skeena Cellulose Inc., Re

2003 CarswellBC 1399, 2003 BCCA 344, [2003] B.C.W.L.D. 467, [2003] B.C.J. No. 1335, 123 A.C.W.S. (3d) 73, 13 B.C.L.R. (4th) 236, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Skeena Cellulose Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corp. (Respondents / Petitioners) and Clear Creek Contracting Ltd. and Jasak Logging Ltd. (Appellants / Applicants) and The Truck Loggers' Association (Intervenor)

Newbury, Hall, Levine JJ.A.

Heard: April 28-29, 2003
Judgment: June 9, 2003
Docket: Vancouver CA030149

Proceedings: affirming (2002), 5 B.C.L.R. (4th) 193 (B.C.S.C.)

Counsel: *J.S. Forstrom*, for Appellants
M.I. Buttery, S.A. Dubo, for Respondents
M. Maclean, J.I. McLean, for Intervenor, Truck Loggers' Association

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Natural Resources; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.vi Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.iii Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Respondent logging company held long term timber harvesting contracts with five contractors, including applicants — Contracts were required to be renewed indefinitely under Timber Harvesting Contract and Subcontract Regulation — Logging company entered into arrangement under Companies' Creditors Arrangement Act — Logging company obtained come-back order allowing it to terminate contracts pursuant to report from monitor being filed 21 days before implementation — Logging company sent letter terminating applicants' contracts — Contracts were terminated before relevant monitor's report was filed

— Creditors' meeting took place within 21 days of report being issued — Application for declaration that cancellation of contracts was invalid was dismissed — Trial judge found that elimination of contracts was consolidation and downsizing, which was permitted under order — Trial judge found that no prejudice occurred by not giving proper notice of cancellation of contracts — Trial judge found that applicants were creditors with claim for specific performance — Applicants appealed — Appeal dismissed — Trial judge correctly found that granting application would allow inappropriate differentiation in treatment between applicants and other creditors — Act gave court authority to allow logging company to break contracts, despite renewal requirements in Regulations — Regulations did not create statutory requirements to which contracts were subject, but dictated specific terms of contracts — Plan was fair, equitable and reasonable considering broad range of interests at stake — Lack of notice did not affect outcome of creditors' meeting — Logging company did not act in bad faith.

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Armbro Enterprises Inc., Re, 22 C.B.R. (3d) 80, 1993 CarswellOnt 241 (Ont. Bktcy.) — considered

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — considered

Blue Range Resource Corp., Re, 1999 CarswellAlta 597, 245 A.R. 154 (Alta. Q.B.) — considered

Cam-Net Communications v. Vancouver Telephone Co., 182 D.L.R. (4th) 436, 1999 BCCA 751, 1999 CarswellBC 2808, 71 B.C.L.R. (3d) 226, 132 B.C.A.C. 52, 215 W.A.C. 52, 2 B.L.R. (3d) 118, 17 C.B.R. (4th) 26 (B.C. C.A.) — considered

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Dylex Ltd., Re, 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — followed

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — considered

Keddy Motor Inns Ltd., Re, 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, *(*sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, *(*sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246, 1992 CarswellNS 46 (N.S. C.A.) — considered

Mine Jeffrey inc., Re, 2003 CarswellQue 90, 35 C.C.P.B. 71, 40 C.B.R. (4th) 95 (Que. C.A.) — considered

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Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, *(*sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, *(*sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151, 1995 CarswellBC 369 (B.C. C.A.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, 1934 CarswellNat 1 (S.C.C.) — referred to

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Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11 — referred to

s. 11(1) — considered

s. 11(2) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

Forest Act, R.S.B.C. 1996, c. 157

Generally — considered

s. 56.1 [en. 1998, c. 29, s. 10] — referred to

Forest Amendment Act, 1991, S.B.C. 1991, c. 11

Generally — referred to

Mechanics' Liens Act, R.S.M. 1970, c. M80

Generally — referred to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157

Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

Pt. 2

Pt. 5

Div. 5

s. 1(1) "AAC reduction criteria"

s. 13

ss. 13-15

s. 24

s. 28(2)(d)

s. 32(g)

s. 32(h)

APPEAL by logging contractors from judgment reported at 2002 BCSC 1280, 2002 CarswellBC 2032, 5 B.C.L.R. (4th) 193 (B.C. S.C.), dismissing contractors' application for declaration that cancellation of contracts pursuant to *Companies' Creditors Arrangement Act* was invalid.

***Newbury J.A.*:**

1 This appeal turns on the interaction of two statutory regimes — the scheme of "replaceable" or "evergreen" logging contracts established by the Province under the *Forest Act*, R.S.B.C. 1996, c. 157, and the scheme of judicial stays and creditors' compromises available under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA"), to insolvent corporations whose indebtedness exceeds $5,000,000.

2 Both schemes are said to involve considerations of fairness and equity. In the case of the *Forest Act*, a detailed series of "contractual" terms is required to be incorporated in agreements between the holders of harvesting licences granted by the Crown, and the contractors they in turn retain to carry out the logging. Most aspects of the relationship are either provided for in the mandatory terms or must be resolved by arbitration, the principles and procedures of which are also regulated by the Act. Most importantly, a licence holder must agree that when such an agreement expires, it will be renewed (or in the statutory terminology, "replaced") on terms substantially the same as those of the expired contract, assuming the contractor has performed its obligations thereunder. In this way, the legislation seeks to provide contractors with a degree of "security" analogous to the security of tenure implicit in a Crown harvesting licence, and to achieve greater fairness between the licence holder and its contractors.

3 In the case of the CCAA, the fairness analysis required to be carried out by the court generally refers to fairness as between classes of creditors. That analysis is tempered by the starker realities of whether the proposal before the court offers a chance of survival to the debtor corporation and whether it will be acceptable to the requisite majority of creditors. Unlike the detailed provisions of the *Forest Act* and regulations thereto, the CCAA is a brief set of "broad-brush" provisions that leave wide avenues of discretion to be exercised by courts in circumstances that may not permit the fine weighing of individual interests. As observed in *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), at 258, the legislation contemplates "rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat but on the best terms they can get."

4 The substantive question raised by this appeal is to what extent considerations of fairness between individual logging contractors who have replaceable contracts with a corporation in CCAA proceedings, should figure in the "rough-and-tumble" considerations applicable to a large corporate insolvency. Looked at another way, does the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?

FACTUAL BACKGROUND

5 The insolvent corporation in this case is Skeena Cellulose Inc. ("Skeena"). At all material times, it owned and operated a pulp mill and three sawmills, and held related forest tenures, mainly in north-western British Columbia. It was a large employer in that region and was one of the major manufacturers of bleached softwood kraft pulp in North America.

6 Skeena has experienced financial difficulties for many years. It underwent a financial restructuring under the CCAA in 1997. Although many of the positive results hoped for from that arrangement improved Skeena's long-term prospects, it appears that various other factors prevented full recovery. In August 2001, the Toronto-Dominion Bank demanded payment of more than $350,000,000 from Skeena and its subsidiaries, froze their operating lines and began to refuse to honour their cheques, including payroll cheques. Other creditors followed suit, and on September 5, 2001, Skeena and its subsidiaries petitioned the Supreme Court of British Columbia for a stay of proceedings under the CCAA.

7 The petition alleged, and it is not disputed, that Skeena owed over $409,000,000 (exclusive of interest) mainly to the Toronto-Dominion Bank and to corporations owned by the Province, which also held over 70 percent of its common shares. This debt was represented by bonds issued under a trust deed secured by charges on all of Skeena's assets, present and future. The petition stated that Skeena and its subsidiaries were insolvent and described the impact their bankruptcy could have on the provincial economy:

> 50. If the Petitioners were to totally cease operations or go into liquidation, the direct loss of jobs in British Columbia would be enormous, including the approximately 1,050 existing Skeena employees and, at least 1,000 employees of logging contractors, road building and silviculture contractors. It would also directly and indirectly impact service industries and business which rely on Skeena for a source of revenue. By the Petitioners' estimate, as many as 7,000 additional jobs in British Columbia would be affected.
>
> 51. A liquidation of the Petitioners would be particularly devastating to the communities of Terrace, South Hazelton, and Prince Rupert. Skeena is the largest employer in those communities, and many hundreds of families depend on Skeena for their livelihoods in those communities.
>
> 52. The loss of this number of jobs would also, of course, have a generally damaging effect on the British Columbia economy, given the spillover effect of lost wages and lost purchases.
>
> 53. Skeena is currently in good standing under its collective agreements and other employment relationships. However, if some or all of the employees would be terminated, severance claims, including payments for group termination under the Employment Standards Act, could be significant.

8 Chief Justice Brenner, who I understand heard most if not all the applications in this matter in Supreme Court, granted an initial order *ex parte* on September 5, 2001, staying proceedings against Skeena and its subsidiaries for 30 days and appointing Arthur Andersen Inc. as Monitor. On October 5, he granted a "Come-back Order" which extended the stay and contemplated that the petitioners would file a formal plan of compromise or arrangement (entitled the "Reorganization Plan") with their creditors on or before November 5; that they would file a formal plan of arrangement (entitled the "Plan of Arrangement") with their shareholders under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44; and that meetings of their creditors would be called to vote on the Reorganization Plan. Under the heading "Post-Filing Operations", the Order stated:

> 11. The Petitioners shall remain in possession of the Assets and shall continue to carry on business in the ordinary course provided that they shall have the right with the approval of the Monitor, or this Court, to proceed with an orderly disposition of such of the Assets as they deem appropriate, either with the consent of any creditor holding security against such Assets or pursuant to an Order of this Court, in order to facilitate the downsizing and consolidation of their business and operations (the "Downsizing").
>
> 12. To facilitate the Downsizing, the Petitioners may:

(a) terminate the employment of such of the Petitioners' employees or temporarily lay off such of the Petitioners' employees as they deem appropriate;

(b) terminate such of the Petitioners' supplier or service arrangements or agreements as they deem appropriate;

(c) abandon such leases, tenures, contracts, rights, authorizations, franchises, dealerships, permits, approvals, uses or consents as are deemed to be unnecessary for the Petitioners' business; . . .

all without interference of any kind from third parties, including landlords and notwithstanding the provisions of any lease, other instrument or law affecting or limiting the rights of the Petitioners to remove or divest Assets from leased premises, and that any liabilities of the Petitioners arising as a result thereof shall be claims provable in these proceedings in the same manner as all creditor claims existing as at the Filing Date and provided that:

(f) the Monitor shall have submitted to the Court a report of any proposed termination of any Forest Act Replacement Contract under the foregoing sub-paragraph (b) at least 21 days before such plan is implemented;

(g) the implementation of any of the plans and procedures contemplated by the foregoing sub-paragraphs (a)-(d) including any termination or partial termination of any contract, shall be without prejudice to the claims of any counter party to such contract to file a proof of claim in such manner as may be provided for in the Reorganization Plan;

(h) the Petitioners shall provide 3 days' written notice of any termination of any executory agreements under the foregoing sub-paragraphs (b) or (c); and

(i) the counter party or parties to any agreements proposed by the Petitioners to be terminated in accordance with the foregoing, including the counter party or parties to any Forest Act Replacement Contracts, may during the applicable 3 day notice period, in the case of executory contracts, or within 21 days of the filing of the Monitor's report, in the case of the Forest Act Replacement Contracts, apply to the Court in this proceeding to show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate. [Emphasis added.]

9 The deadline for the filing of the Reorganization Plan was extended by the Court on several occasions while solutions to Skeena's difficulties were sought and potential purchasers were pursued. Finally, on February 28, 2002, a Plan was filed which proposed that an outside buyer, NWBC Timber & Pulp Ltd. ("NWBC"), would acquire the interests of the secured lenders for $8,000,000. Of this, $2,000,000 would be paid to the Monitor for distribution to the unsecured creditors, so that the secured creditors would receive $6,000,000 on debt in excess of $400,000,000. The claims of governmental bodies for property taxes would be compromised, and the holders of existing common shares would surrender them for no consideration. Skeena would then issue new common shares to NWBC. The Plan was of course subject to many conditions, including approval by the specified classes of creditors and shareholders and the passing of applicable appeal periods in respect of the Court's order. After some amendments, the Plan was approved by the Court on April 4, 2002. Once the conditions contained in the Order were met, NWBC completed its purchase of the shares and secured debt of Skeena in early May.

The Appellants' Logging Contracts

10 The appellants or their predecessors had been performing logging services under contract with Skeena or its predecessors since the 1960s. In 1991, their contracts became "replaceable logging contracts" under new provisions of the *Forest Act*. At the time Skeena's financial difficulties became manifest in 2001, the corporation had five such contracts. All five were due to expire on December 31, 2001, and Skeena was required to offer replacement contracts to the contractors thereunder no later than September 30 of that year.

11 Skeena did not offer replacement contracts to the appellants, but did renew those of its three other logging contractors. Mr. Veniez, the president and chief executive officer of NWBC and Skeena following the Reorganization, explained this decision by reference, at least in part, to the fact that whereas the *Forest Act* scheme requires a licence holder to cut at least 50 percent of

its allowable annual cut ("AAC") through replaceable contracts, Skeena had entered into such contracts for approximately 65 percent of its AAC. Moreover, the change in control of Skeena contemplated by the Reorganization would result in a five percent reduction of its AAC, absent a ruling to the contrary by the Ministry of Forests. Mr. Veniez deposed in these proceedings that:

> 17. As part of its efforts to ensure the economic viability of Skeena, NWBC determined, in consultation with Skeena management at the time, that it would be desirable to reduce the amount of timber required to be harvested under replaceable contracts to the current statutory minimum of 50% of Skeena's AAC.
>
> 18. Because NWBC's acquisition of Skeena represents a change of control, I knew that Skeena's Terrace Woodlands' AAC would be reduced by 5% to approximately 878,000 m^3. Therefore, in consultation with Skeena management, I determined that it would be appropriate to reduce the volume of timber allocated to evergreen contractors to 439,000 m^3, representing a reduction of approximately 160,000 m^3.
>
> 19. I was advised by Skeena management that, until the terminations of Clear Creek and Jasak, Skeena's five evergreen contractors held the following volumes:
>
> | **Contractors** | **Volume** |
> |---|---|
> | Don Hull & Sons | 166,239 m{3} |
> | K'Shian Logging | 166,239 m{3} |
> | Main Logging | 99,828 m{3} |
> | Clear Creek | 83,331 m{3} |
> | Jasak | 83,331 m{3} |
>
> 20. In consultation with Skeena management and the Province, NWBC determined that it would be appropriate to terminate the Clear Creek and Jasak contracts, representing a reduction of "evergreen" volume of approximately 166,662 m^3.
>
> 21. I recognize that by terminating these two contracts, Skeena will be slightly below the 50% allowable minimum under the Contract Regulation, but it is Skeena's intention to re-tender the approximately 6,000 m^3 difference in the form of a new evergreen contract. The approximately 160,000 m^3 balance will be tendered on the open market (as opposed to have to negotiate rates with its existing evergreen contractors). I expect that this tendering process will result in substantial savings to Skeena and significantly reduce its delivered wood costs for this 160,000 m^3. (If the cost differential is $3.90/$m^3$, the savings could be as much as $624,000 per year).
>
> 22. Moreover, a tendering process for this volume of wood will help to establish more accurate fair market values for both evergreen and non-evergreen contracts (in this regard, I am advised by Mr. Curtis that historically it has been difficult to establish these values in light of the predominance of evergreen contracts).
>
> 23. In deciding to terminate certain of Skeena's evergreen contracts, I reasoned that this would better allow Skeena to reorganise the size (volume) and equipment configurations for its different contracts. (Skeena does have the right to insist that its current evergreen contractors log by whatever methods Skeena stipulates, but historically it has been more cost-efficient for Skeena to introduce new logging methods via an open tendering process than by introducing changes to existing replaceable contracts).
>
> 24. Finally, I was advised by Skeena management that Clear Creek and Jasak had, historically, been more expensive than the three other evergreen contractors listed above. That is, through a combination of the rates charged by those two contractors, and their relative efficiency, the cost to Skeena of logs produced by Clear Creek and Jasak was greater than for the other three evergreen contractors above.

> 25. With the foregoing considerations in mind, I, on behalf of NWBC, advised Skeena's management at the time that NWBC would require, as a condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts.
>
> 26. By asking Skeena to terminate those contracts, NWBC was in no way motivated to frustrate the objectives of the *Forest Act*. On the contrary, for the reasons set out above, NWBC perceives these terminations to be an important aspect of what I hope and fully expect will be a successful reorganization of Skeena. [Emphasis added.]

12 On or about March 1, 2002, each of the appellants received a letter from Skeena purporting to terminate its replaceable contract, effective immediately. Neither the Court nor the appellants had received prior notification from Skeena or the Monitor — even though under the terms of the Come-back Order, the Monitor was required to submit to the Court "a report of any proposed termination of any Forest Act Replacement Contract . . . at least 21 days before such plan is implemented" and even though within 21 days of the filing of the Monitor's report, the parties to such contracts were to be entitled to apply to the Court to "show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate." Two weeks later, in its Eleventh Report to the Court, the Monitor referred to the terminations as *faits accomplis*:

> We have been advised that the petitioner has terminated replaceable logging contracts with Jasak Logging Ltd. and Clear Creek Contracting Ltd. in accordance with the Order. Copies of the letters of termination to each of the contractors dated March 4, 2002 and March 1, 2002, respectively are attached.
>
> These replaceable logging contracts have been terminated in accordance with the terms of the Purchase Agreement between NWBC Timber & Pulp Ltd., 552513 British Columbia Ltd. and Skeena Cellulose Inc. dated February 20, 2002.

13 It is not clear to me what "plan" was being referred to in subpara. 12(f) of the Come-back Order quoted above, nor whether it was necessary to "terminate" contracts that had not been renewed. On appeal, however, Skeena acknowledged that the Monitor's report had been filed two weeks after the termination letters were issued and that the "creditors' meeting to vote on the Plan took place before the 21-day time period referred to in the Come-back Order had expired." Thus counsel did not take issue with the Chief Justice's conclusion that Skeena had not complied strictly with the Come-back Order.

14 Upon receiving the letters of termination, the appellants' solicitors wrote to the Monitor's solicitors objecting that that the Come-back Order had not been complied with. They explained:

> Our clients are in a position where they cannot file proofs of claim on March 25 as their contracts are not terminated yet and they do not know if the contracts will be terminated and, if there is a termination, what class of creditor they will be. Due to the failure to deal with this matter in a timely fashion, it appears that the parties have no choice but to postpone the deadline for filing claims to the middle of April with a vote of creditors to take place in early May.

The appellants asked the Monitor for information as to how the termination would result in lower costs to Skeena and requested a copy of the contract of purchase between Skeena and NWBC. The Monitor declined to provide a copy of this agreement on the basis that it was confidential. The agreement was never adduced into evidence.

15 In further correspondence, Skeena characterized its earlier letters to the appellants as having "served to clarify that the previously expired contract with Jasak and Clear Creek would not be reinstated." (My emphasis.) Again, however, since that characterization of the letters was not pursued by counsel in this court or the court below, I will proceed on the footing that the contracts were terminated, as opposed to not having been renewed. (In law, the distinction in this case may be insignificant.) The appellants were told that if they wished to vote on Skeena's Reorganization Plan, they would have to file proofs of claim by March 22. At the same time, Skeena told the appellants it was prepared to discuss future arrangements with them "for the continuation of their services to Skeena."

16 By March 22, the appellants did file conditional proofs of claim in the CCAA proceeding, claiming indebtedness in the amount of $2,925,315.14 in the case of Jasak Logging Ltd., and $2,896,680 in the case of Clear Creek Contracting Ltd. (Mr. Forstrom advised us that these amounts represented the present value of the income stream which the appellants stood to earn under their contracts over the next 50 years or so. I understand that apart from these 'future' losses, nothing was owing by Skeena to the appellants under their expired contracts.) The Monitor disallowed a portion of each claim and instead allowed a claim of $172,430.47 to Jasak and $166,670 to Clear Creek. The appellants notified the Monitor that they disagreed with its position.

17 On March 28, Jasak and Clear Creek filed a motion in Supreme Court seeking an order restraining Skeena from terminating their contracts and declaring them "in full force and effect and are binding upon the parties thereto". Alternatively, they sought the summary determination of the value of their respective claims as creditors in Skeena's plan of arrangement. However, before the motion could be heard, the meeting of Skeena's creditors took place and the Reorganization Plan was approved by the requisite numbers of each class. The appellants did not attend or vote at the meeting. On April 4, 2002 Skeena applied for and obtained court approval of the Plan. As earlier mentioned, NWBC closed its purchase of the shares of Skeena in accordance with the Reorganization Plan in early May. We are told that it has not yet resumed its logging operations.

18 The appellants' motion to have the termination of their contracts declared invalid was heard in Chambers on June 17 and was dismissed by the Chief Justice on September 4, 2002. His reasons are now reported at (2002), 5 B.C.L.R. (4th) 193 (B.C. S.C.).

The Chief Justice's Reasons

19 After reciting the facts before him, the Chief Justice briefly summarized the purpose of the replaceable contract scheme and the nature of replaceable contracts. He noted that in Skeena's CCAA proceeding in 1997, Thackray J. (as he then was) had determined that the Court had the authority under the CCAA to allow Skeena to terminate replaceable logging contracts notwithstanding their unusual 'statutory' aspects. (See *Repap British Columbia Inc., Re* (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.).) Thackray J. had observed:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of the Provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts. There is no doubt that the parties are governed by the regulation and that the regulations forming part of the contract will govern many events by parties to the contracts. However the issue here is whether or not the contract is subject to the particular order that I gave under the *Companies' Creditors Arrangement Act*. I am of the opinion that it is subject to the order which I gave and that this Court had the jurisdiction to give that order. [para. 7]

20 The Chief Justice then turned to the questions of whether on this occasion, Skeena had complied with the "procedures and conditions" stipulated in the Come-back Order and whether the termination conformed to the "broader principles of economic necessity and fairness" underlying the Court's discretionary authority under the CCAA. In connection with the first question, he noted that the Come-back Order had authorized the termination of arrangements and agreements by Skeena only for the purpose of facilitating the "downsizing and consolidation of their business and operations (the 'Downsizing')". He noted the appellants' submission that although Skeena claimed to be "downsizing" its operations, it had maintained its timber harvesting rights and was planning to continue to harvest timber from them, presumably to the extent it always had in the past. On the other hand, there was the fact that the change in control of Skeena would result in a five percent reduction of Skeena's AAC, which Skeena proposed to reflect in a reduction in volume of timber allocated to "evergreen" contractors by approximately 160,000 cubic metres. The Chief Justice concluded that this reduction qualified as "Downsizing" for purposes of the Come-back Order. This conclusion was not specifically challenged on appeal.

21 In response to the appellants' objection that Skeena had terminated their contracts without first filing a report of the Monitor, the Chief Justice agreed that the letters of termination had been "issued untimely". He concluded, however, that since

the appellants had had "clear and unequivocal notice", prior to the creditors' meeting, of Skeena's intention to terminate their contracts and to treat their claims as compromised under the Plan, they had not been prejudiced by the lack of strict compliance. (para. 41.)

22 The remaining question framed by the Chief Justice was whether Skeena's termination of two of its five replaceable logging contracts constituted an "inappropriate differentiation of treatment between the applicants and other [Skeena] creditors." (para. 42.) He noted that one of the unfortunate results of insolvency restructurings is that some persons suffer hardship. In this case, Skeena had had to terminate the employment of many individuals, its unsecured and secured creditors stood to recoup only a small fraction of their claims, and the Court had already dismissed an application brought by the Pulp, Paper and Research Institute of Canada similar to that brought by the appellants. The Court noted the comments of LoVecchio J. in *Blue Range Resource Corp., Re*, [1999] A.J. No. 788 (Alta Q.B.), to the effect that an order authorizing the termination of a contract is appropriate in a restructuring since, like others dealing with the insolvent corporation, the contracting party will have its claim for damages. But that claim should not be elevated above those of other contracting parties; as LoVecchio J. had stated:

> A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route. [paras. 37-8]

23 Similarly in this case, the Chief Justice concluded that the applicants before him were "seeking to be put in a position superior to [Skeena's] other creditors." (para. 50.) In the result, since Thackray J. had already ruled that replaceable contracts could be terminated as part of a CCAA reorganization, and the appellants had had "full knowledge prior to the creditors' meetings that they would have claims under the Plan if their contracts were to be terminated", the Chief Justice saw no reason why the appellants should "in effect, be placed in a better position than other creditors." (para. 53.)

ON APPEAL

24 On appeal, the appellants challenged both the Court's ruling on the question of notice and its substantive ruling that the Come-back Order validly permitted Skeena to terminate the appellants' "evergreen" contracts. Since Mr. Forstrom, counsel for the appellants, focussed on the second argument in his oral submissions in this court — and rightly so in my view — I will deal with it first. It is linked to the argument made by the intervenor, the Truck Loggers' Association, which challenges the court's constitutional and statutory jurisdiction to "permit" Skeena to terminate any replaceable logging contracts, contrary to what Mr. Maclean says is the intention of the *Forest Act*. Mr. Maclean submits that this legislation must prevail over what he characterized as the exercise of the court's "inherent jurisdiction" under the CCAA when the court approves an arrangement which includes the termination of a lease or other contract.

25 It may be useful at this point to review in greater depth the unusual scheme of replaceable contracts imposed by the *Forest Act*, and then to review the CCAA and the "inherent" or 'supervisory' jurisdiction exercised by the courts thereunder.

The Forest Act Scheme

26 The Province first introduced a regime of statutorily-mandated logging contracts in 1991. The initial legislation was revised somewhat in 1996 when the present Regulation 22/96 to the *Forest Act* was enacted. Speaking in the Legislative Assembly in

June 1991, the then Minister of Forests stated that the purposes of the legislation were to "address logging-contractor security in British Columbia", to "improve the balance in . . . contractual relationships" between holders of timber rights and logging contractors, and to provide a quick and inexpensive system for resolving disputes between them. The Minister drew an analogy between the desire of long-term licence holders for security of tenure from the Crown, and the needs of logging contractors and subcontractors, who also make large capital investments in logging equipment, for similar security vis-à-vis the licence holders. Accordingly, the *Forest Amendment Act, 1991*, c. 11, permitted the imposition of a series of requirements on the holders of certain classes of timber licences with respect to logging contracts already in existence, and logging contracts entered into thereafter.

27 Most of the provisions relevant to this appeal are contained in Regulation 22/96. Part 2, headed "Written Contracts and Subcontracts Required", states that persons entering into a timber harvesting contract or subcontract must do so in writing. If the terms of a contract do not comply with the Regulation, the parties are required to make reasonable efforts to cause the contract to do so. Every "replaceable contract" (defined in s. 152 of the Act) must provide that the contractor's interest thereunder is assignable, subject to the consent of the licence holder, which consent may not be unreasonably withheld. As well, every contract must provide that all disputes between the parties in connection with the contract "will be referred to mediation and, if not resolved by the parties through mediation, will be referred to arbitration." (The Regulation leaves unsaid the apparent intention that neither party will have recourse to courts of law to resolve such disputes.) The *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, applies to such arbitrations, but there are also detailed rules in Regulation 22/96 for the mediation and arbitration proceedings and for the keeping of a publicly available "Register of Timber Harvesting Contract and Subcontract Arbitration Awards" by the Ministry of Forests.

28 Part 5 of the Regulation is headed "Replaceability of Contracts and Subcontracts". It requires that the holders of Crown licences carry out specified proportions of their timber harvesting operations by means of replaceable contracts. Different requirements apply to different classes of licence and to operations in the Coastal and Interior regions respectively. As I noted earlier, since Skeena operates in the Coastal region, it is required to harvest at least 50 percent of its timber by means of replaceable contracts.

29 Sections 13-15 of the Regulation deal with the commencement and expiration of replaceable contracts in the following terms:

> 13 (1) A replaceable contract must provide that
>
> (a) if the contractor has satisfactorily performed its obligations under the contract, and conditional on the contractor continuing to satisfactorily perform the existing contract, the licence holder must offer a replacement contract to the contractor, and
>
> (b) the replacement contract must
>
> (i) be offered 3 months or more before the expiry of the contract being replaced,
>
> (ii) provide that it commences on or before the expiry of the contract being replaced,
>
> (iii) provide for payment to the contractor of amounts in respect of timber harvesting services as agreed to by the parties or, failing agreement, as determined under section 25, and
>
> (iv) otherwise be on substantially the same terms and conditions as the contract it replaces.
>
> (2) If a replaceable contract does not provide for an expiry date, the contract expires on the second anniversary of the date on which the contract commenced.
>
> 14(1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may require, for bona fide business and operational reasons, that the contractor

(a) use different timber harvesting methods, technology or silvicultural systems,

(b) move into a new operating area, or

(c) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government.

(2) A replaceable contract must provide that if a requirement made pursuant to subsection (1) results in a substantial change in the timber harvesting services provided by the contractor, the contractor may, within 60 days of receiving notice under subsection (1), elect by notice in writing to the licence holder to terminate the replaceable contract without incurring any liability to the licence holder.

(3) A replaceable contract must provide that, if a requirement is made pursuant to subsection (1) and the contractor does not elect to terminate the replaceable contract as provided for in subsection (2), either party may, within 90 days of the contractor receiving notice under subsection (1), request a review of the rate then in effect.

(4) If, after any changes in timber harvesting services required by the licence holder under subsection (1), the parties are unable to agree upon the rate to be paid for timber harvesting services, a rate dispute is deemed to exist.

15 A replaceable contract must provide that the contract terminates, to the extent that it relates to the licence, upon the cancellation, expiry or surrender of a licence under which the timber harvesting services provided by the contractor are carried out. [Emphasis added.]

30 The Regulation stipulates that if a dispute arises regarding the amount of work to be specified in a replaceable contract, the matter may be referred to arbitration under s. 24. The same is true of any dispute regarding the rates chargeable by the contractor for its work. The arbitrator must determine a rate that is reasonable and competitive by industry standards and which "would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit."

31 Division 5 of the Regulation deals with reductions in work under a replaceable contract due to a reduction in AAC. If the Crown reduces the AAC under a harvesting licence, the holder "must apportion the effect of the reduction in AAC . . . proportionately among (i) all contractors holding replaceable contracts, and (ii) any company operations in respect of the licence." (s. 28(2)(d).) Alternatively, the holder may make a proposal either to reduce the AAC covered by one or more of its replaceable contracts or to terminate one or more such contracts. If the proposal is objected to by one or more of the affected contractors, a "dispute is deemed to exist" between the licence holder and the contractor(s). If not settled by mediation, this dispute must also be arbitrated in accordance with s. 32, which states in part:

(g) an arbitrator must resolve the dispute in the manner that the arbitrator believes most fairly takes into account each of the AAC reduction criteria; [and]

(h) for greater certainty, in making a decision with respect to the dispute

(i) an arbitrator is not restricted to choosing between any of the various AAC reduction proposals made by the parties to the arbitration, and

(ii) an arbitrator may make an award that includes the termination of one or more of the replaceable contracts, or reduces the amount of work available to any contractor or company operation in a manner that is not proportionate to the reduction in AAC. [Emphasis added.]

The Regulation defines the term "AAC reduction criteria" to mean each of the following factors:

(a) the amount of work specified in each replaceable contract to which the proposal relates;

(b) the relative seniority of each contractor with a replaceable contract;

(c) the economic impact of the proposal on the timber harvesting operations carried out under that licence by each contractor with a replaceable contract;

(d) the impact of the proposal on employment;

(e) the economic impact of the proposal on the licence holder; [and]

(f) the impact of the proposal on community stability; . . .

32 As Mr. Forstrom points out, then, the statutorily-mandated terms of replaceable logging contracts "tie" them in a sense to Crown licences themselves. A licence holder must carry out a specified percentage of its logging through contractors under replaceable contracts. If the AAC under the licence is reduced, the work committed to by the licence holder in its replaceable contracts may also be reduced. If the licence is cancelled or surrendered, any replaceable contract referable thereto also terminates. Mr. Forstrom and Mr. Maclean go further, however, and argue that the "tie" confers a "special status" on the contractor and that the status must be recognized in the event of a breach of the obligation to renew or continue the contract, and must be reflected in any CCAA arrangement. I will return below to these arguments.

The CCAA

33 Unlike the *Forest Act* and Regulation, the CCAA is very brief. It operates substantially through judge-made law interpreting and applying its 22 sections. For purposes of this appeal, the key ones are the following:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

* * *

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

* * *

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . . .

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

34 There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

> Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.
>
> *Public Interest*
>
> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A. [at 592-3]

(See also Duff, C.J.C. in *Reference re Companies' Creditors Arrangement Act (Canada)* [1934] S.C.R. 659 (S.C.C.).)

35 In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), for example, this court held that security granted under s. 178 of the *Bank Act* was not exempt from the CCAA provisions applicable to "security" and secured creditors, since otherwise a single creditor (in that case, a bank) could frustrate the objectives of the statute. Gibbs J.A. observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. [at 88-9]

36 In connection with other "priority" issues — the power to grant priority to persons advancing debtor-in-possession ("DIP") financing and to the Monitor for the payment of its fees and disbursements before the payment of secured creditors — this court has called in aid Equity's ability to adapt to changing circumstances in order to achieve the objectives of the statute. In *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), this court declined to follow an earlier case in which the Ontario Court of Appeal had ruled that the receiver of a partnership had no authority to subordinate the interests of secured creditors to liability for the receiver's disbursements, unless one of three exceptions applied. (See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.).) Mackenzie J.A. commented:

> Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the *Kowal* statement of exceptions has been influential in subsequent cases and they were applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). But as Macdonald J. observed in *Westar Mining*, supra at 93-94, different considerations apply under the *CCAA*. The court is concerned with the survival of the debtor company long enough to present a plan

> of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the *Kowal* exceptions to serve that broader interest.
>
> Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the *CCAA***.** In my opinion the jurisdiction under the *CCAA* cannot be restricted to the *Kowal* exceptions. [paras. 21-22; emphasis added.]

In conclusion, he stated:

> In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the *CCAA*. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgement for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.
>
> In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge. [paras. 30-31; emphasis added.]

(I understand that leave to appeal *United Used Auto & Truck Parts Ltd.* was granted by the Supreme Court of Canada [*United Used Auto & Truck Parts Ltd., Re*, 2000 CarswellBC 2132 (S.C.C.)], but that the case settled before the appeal was heard.)

37 In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal Ltd.*; *supra*, and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

38 But in approving and implementing compromises and arrangements under the statute, courts are concerned with more than the efficacy of the plans before them and their acceptability to creditors. Courts also strive to ensure fairness as between the unsecured, secured and preferred creditors of the corporation and as between the debtor and its creditors generally. In the article from which I have already quoted, Stanley Edwards also wrote:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest. If small groups are placed in too strong a position they become capable of acquiring a nuisance value which will make it necessary for the reorganizers to buy them off at a high price in order to effectuate the plan successfully. However, care should be taken that this statutory power of binding minorities should not be utilized to confiscate the legitimate claims of those minorities or of any class of creditors or shareholders. [at 595; emphasis added.]

39 This theme has been repeated and refined in various cases over the years as CCAA courts have struggled with increasingly complex forms of debt and security and with increasingly complicated plans of arrangement. In current terms, the principle of equity is expressed as a concern to see that a plan of arrangement is fair and reasonable and represents an attempt to "balance

interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights". (*Per* Farley J. in *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at 173.) Elsewhere, it has been said that one measure of what is "fair and reasonable" is the "extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in a non-intrusive and as non-prejudicial a manner as possible." (*Per* Blair J. in *Olympia & York Developments Ltd.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.), at 513.) At the same time, fairness and reasonableness are not "abstract notions, but must be measured against the available commercial alternative." Thus in *Canadian Airlines Corp., Re*, [2000] A.J. No. 771, [2000] 10 W.W.R. 269 (Alta. Q.B.), the Court summarized the interaction between the objectives of a CCAA arrangement and the principles of fairness and reasonableness as follows:

> In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.*, *supra*, at page 9:
>
> > "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.
>
> The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566 at 574 (Alta. Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).
>
> The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:
>
> > a. The composition of the unsecured vote;
> >
> > b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
> >
> > c. Alternatives available to the Plan and bankruptcy;
> >
> > d. Oppression;
> >
> > e. Unfairness to Shareholders of [the debtor]; and
> >
> > f. The public interest. [paras. 94-96]

40 Of course, there are also statutory and constitutional limitations on the court's exercise of its authority under the CCAA. The Supreme Court of Canada's decision in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) confirmed that it is beyond the authority of a CCAA court to provide for a priority that runs contrary to the express terms of a statute (in that case, the *Mechanics Lien Act* of Manitoba.) Thus in *Baxter*, the fact that the provincial legislation created a lien having priority over "all judgments, executions, assignments, attachments, garnishments and receiving orders", precluded an order granting CMHC priority for new advances over and above all prior registered liens. Dickson J. (as he then was) stated for the Court:

> . . . the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a Court simply cannot do. [at 480; emphasis added.]

41 *Baxter* continues to be applied today: see *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.). However, the Court in *United Used Auto & Truck Parts Ltd.* distinguished *Baxter* on the basis that the former did not involve an express statutory priority that could not be overcome by the Court's equitable jurisdiction. Mackenzie J.A. noted that the receiver's jurisdiction originates in the "equitable jurisdiction of the Court of Chancery and [that] while that jurisdiction cannot be exercised contrary to a statute, nothing precludes its exercise to supplement a statute and effect a statutory object." (para. 18.)

42 It may be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail. The only case brought to our attention which, on its face at least, applied the doctrine of paramountcy in the CCAA context was *Sulphur Corp. of Canada Ltd., Re*, [2002] A.J. No. 918 (Alta. Q.B.). In addressing the question of whether the Court had the authority to permit DIP financing ranking in priority to liens registered under the *Builders' Lien Act* of British Columbia, LoVecchio J. distinguished *Baxter* and *Royal Oak Mines Inc.*, *supra*, on the basis that the discretion to grant priority for DIP financing was grounded in s. 11 of the CCAA rather than purely in the court's inherent jurisdiction. (This, at least, is what I draw from the Court's comments at paras. 35-37.) Seeing the case before him as involving a conflict between a federal statute and a provincial statute, LoVecchio J. ruled that the former prevailed and that in exercising its jurisdiction under the CCAA, the Court could grant priority for DIP financing. (See also *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 10 B.C.L.R. (3d) 62 (B.C. C.A.).)

The Issues in this Case

43 Against this background, I turn at last to the substantive questions raised by the intervenor and the appellants respectively — did the Chambers judge have the jurisdiction to include in the Come-back Order provisions which contemplated the termination of any replaceable logging contracts; and if so, did he err by failing to consider whether the appellants would be treated fairly in relation to Skeena's other replaceable contractors or by failing to consider whether the termination of the appellants' contracts was, in their words, "a necessary or justifiable part of [Skeena's] reorganization plan at all"?

Jurisdiction

44 On behalf of the Truck Loggers' Association, Mr. Maclean contended that the Chambers judge had strayed outside his jurisdiction because nothing in s. 11 of the CCAA (which permits the granting of a stay) extends to the termination of a contract. On this view, any authority to sanction a termination must originate not in the statute, but in the Court's inherent jurisdiction. Based on the authority of *Baxter*, *Royal Oak Mines Inc.* and *Westar Mining Ltd.*, the intervenor submits that the court's inherent jurisdiction cannot be used to override legislation such as the *Forest Act* and Regulation 22/96.

45 It is true that in "filling in the gaps" or "putting flesh on the bones" of the CCAA — for example, by approving arrangements which contemplate the termination of binding contracts or leases — courts have often purported to rely on their "inherent jurisdiction". Farley J. did so in *Dylex*, for example, at para. 8, and in *Royal Oak Mines Inc.*, *supra*, at para. 4, the latter in connection with the granting of a "superpriority"; and Macdonald J. did so in *Westar Mining Ltd.*, *supra*, at 8 and 13. The court's use of the term "inherent jurisdiction" is certainly understandable in connection with a statute that confers broad jurisdiction with few specific limitations. But if one examines the strict meaning of "inherent jurisdiction", it appears that in many of the cases discussed above, the courts have been exercising a discretion given by the CCAA rather than their inherent jurisdiction. In his seminal article, "The Inherent Jurisdiction of the Court", (1970) 23 *Current Legal Problems*, Sir J.H. Jacob, Q.C., writes that the inherent jurisdiction of a superior court of law is "that which enables it to fulfill itself as a court of law." The author explains:

> On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by the ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law,

> and for this reason such jurisdiction has been called "inherent." This description has been criticized as being "metaphysical," but I think nevertheless it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. . . . The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. [at 27-28; emphasis added]

The author also notes that unlike inherent jurisdiction, the source of statutory jurisdiction "is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition." (at 24.)

46 Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. (As to the meaning of "discretion" in this context, see S. Waddams, "Judicial Discretion", (2001) 1 *Cmnwth. L.J.* 59.) This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

47 In saying this, I leave to one side the jurisdiction of the court to make special provision for the payment of the fees and expenses of a monitor appointed under the CCAA. The monitor's functions are of course analogous to those of a receiver — traditionally a creature of Equity. I suspect that this particular power may be properly described as both an equitable jurisdiction and a statutory discretion. As this court said in *United Used Auto*, nothing precludes the exercise of the equitable jurisdiction of the Court of Chancery to "supplement a statute and effect a statutory object." (para. 18.) In any event, the distinction between these two sources of authority is one that, in my mind at least, 'eludes definition'.

48 Returning, then, to the intervenor's argument, the first question posed by it must in my view be revised to whether the Chief Justice erred in purporting to exercise the statutory discretion given by the CCAA in a manner that conflicts with the *Forest Act*. But the second branch of the question also incorporates an assumption that is problematic. Can it be said that the Come-back Order conflicts with the *Forest Act* or the scheme created thereby? It is true that the Act and Regulation contemplate a perpetual series of contracts (provided the contractor fulfils its obligations thereunder) and contemplate the termination of a replaceable contract only in the event of a reduction in AAC or the expiration or surrender of the licence. But nothing in the legislation to which we were referred purports to invalidate a termination of a replaceable logging contract by the licence holder or to require that a court make an order for specific performance in the event of such a termination. (In a CCAA context, such an order would be very unlikely, as well as futile.) The licence holder will of course be liable in damages for breach of contract, giving rise to a "claim" against the debtor corporation under the CCAA. The licence holder may also be in breach of one or more of its obligations under the Act; but ultimately, a logging contract is still a "contract" at law, notwithstanding that many of its terms are dictated by the legislation for the protection and security of the contractor.

49 Thus I disagree with the intervenor's assertion that the effect of the Come-back Order was to "eliminate" the licence holder's "statutory obligation under the *Forest Act* to replace the contract and to eliminate the other conditions that are required by the Regulation to be included in the contract." In fact, the renewal of the appellants' contracts was not required by the Act *per se*; what the Act required was that each of their contracts contain a clause requiring renewal. It was those contractual terms which were breached. The licence holder's obligations, mandated by the scheme, were not "eliminated" by the Come-back Order or even by Skeena: having been breached, the obligations are recognized as giving rise to claims against the corporation either for specific performance or for damages.

50 It follows in my view that in approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. The breach of contract is recognized as a matter of fact by the court, but is not "permitted" in the sense that the licence holder is somehow immunized from the usual consequences of its breach at law or in Equity. Finally, even if the *Forest Act* or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.

The Exercise of the Court's Discretion

51 The appellants and the intervenor argued that even if the Court did have the authority to grant the Come-back Order on the terms it did, the Chief Justice erred in failing to exercise his discretion so as to achieve "fairness" between the appellants and Skeena's three other logging contractors, whose contracts were, in theory at least, unaffected by the Reorganization Plan. As I mentioned earlier, both the appellants and the intervenor contend that contractors under replaceable contracts have "special status" as persons entitled to share in the benefits of a Crown resource (timber) and that the *Forest Act* scheme is predicated on fairness between them, and between them and the holders of Crown licences. They note that the Chief Justice referred in his "fairness" analysis only to the question of whether the Order differentiated inappropriately "between the applicants and other [Skeena] creditors" and made no reference to fairness as between the appellants and the other three contractors or as between the appellants and Skeena itself. In Mr. Forstrom's submission, it is unfair that his clients should suffer the loss of their very significant income streams under the replaceable contracts when the other three contractors will suffer no such loss, and when the licence holder itself suffers only the loss of five percent of its AAC under the *Forest Act*. (In fact, it is possible the Minister may revoke that reduction upon application by Skeena under s. 56.1 of the Act.) In essence, the argument of the appellants is "Why us?"

52 It is trite law that the scope of review open to an appellate court in respect of the exercise of discretion of a CCAA court (or any other court) is narrow. In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), Macfarlane J.A. (in Chambers) observed that this court should exercise its powers "sparingly" when asked to intervene in this context. In his words:

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. . . . In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. [para. 32]

Macfarlane J.A.'s comments were echoed by the Alberta Court of Appeal in *Smoky River Coal*, *supra*, where Hunt J.A. noted at para. 61 that ". . . Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases."

53 Another principle informing the court's task flows from the fact that a plan of arrangement approved by the court is not the plan of the court. It is a compromise arrived at by the debtor company and the requisite number of its creditors. The court should not readily interfere with their business decision, especially where the plan has been approved by a high percentage of creditors. As observed by Blair J. in *Re Olympia & York*, *supra*, "[I]t is not my function to second guess the business people with respect to the 'business' aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas." (at 510.) (See also *Sammi Atlas Inc., Re*, *supra*, at para. 5, and *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 205, *per* McEachern C.J.B.C.)

54 In this case, the chief executive officer of NWBC and Skeena provided the Chambers judge below with an explanation as to why they chose to reduce the volume of timber allocated to Skeena's evergreen contractors, and why they chose to terminate the contracts of the appellants rather than to terminate all five contracts or reduce the work allocated to all five. I have already mentioned Mr. Veniez's affidavit evidence (see para. 11 above) that the cost to Skeena of logs produced by each of the appellants

was greater than those produced by the other three contractors and that NWBC made it a "condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts."

55 In this court, Mr. Forstrom asked us to discount Mr. Veniez's evidence, contending that since the appellants' objections to the Come-Back Order had been known to NWBC when it completed its purchase of the Skeena shares, NWBC must be taken to have effectively "waived" this condition. I am not persuaded that such an inference necessarily follows from NWBC's completion of the Plan. At that time, the Come-back Order clearly authorized the termination of replaceable logging contracts, and the validity of a similar order had been upheld by Thackray J. in 1997. It may be that in deciding to proceed, NWBC undertook a risk that the appellants would be successful either before the Chief Justice or on appeal, but we have no evidence as to what concessions NWBC may have obtained to protect against that risk.

56 As for the argument that the appellants' contracts were no less costly to Skeena than those of the other three contractors (since the rates chargeable under all five contracts were subject to arbitration), Mr. Veniez deposed:

> 13. I acknowledge that the Contract Regulation dictates that any rates determined according to this process must be determined according to what a licence-holder and a contractor acting reasonably in similar circumstances would agree is a rate that is competitive by industry standards. However, this provides little comfort to licence-holders such as Skeena, because ultimately rates under the Contract Regulation are determined on a cost-plus reasonable profit for replaceable contractors basis which, in my view, acts as a significant disincentive for replaceable contractors to be cost effective on an ongoing basis.
>
> 14. On the contrary, the Contract Regulation in my view creates a legislated disincentive for evergreen contractors to control their cost structures, because volumes under these contracts are guaranteed. This results in high costs being passed on to Skeena.
>
> 15. Prior to NWBC's acquisition of Skeena, and the termination of the replaceable contract that has given rise to this application, I was advised that Skeena, on average, paid approximately 10% more for work done under replaceable contracts than work done pursuant to contracts issued after a competitive bid process. Indeed, I am advised by Derrick Curtis, Skeena's Terrace Woodland's Manager, that in March 2001 Skeena put out to tender a harvesting contract (Setting S83303), consisting of roughly 20,000 m^3, and received tenders from both evergreen and non-evergreen contractors. The latter offered significantly lower rates ($23.95/$m^3$ vs. $27.85/$m^3$, a difference of $3.90/$m^3$), resulting in a 14% reduction in costs to Skeena. [Emphasis added.]

57 There was, then, a "business case" for the actions taken by Skeena and NWBC vis-à-vis the appellants. Clear Creek and Jasak did not apply to cross-examine Mr. Veniez on this evidence, and did not bring anything to our attention which would cast doubt on his statements. In these circumstances, the Chambers judge was entitled to take seriously the assertion that the termination of the appellants' contracts would save Skeena a considerable sum per year and that that fact was important to the only purchaser willing to make an offer acceptable to the requisite number of creditors. In the terminology used by Mr. Forstrom, there was a "causal link" between the terminations and the chances of success of the Reorganization Plan. For this reason, I do not agree with his submission that *Dylex* is different in principle from the case at bar: the appellants' contracts in particular were said to be too costly for Skeena to continue operating under them, in the same way the terminated leases were said to be too costly for Dylex to continue leasing under them. And, weighing Dylex's precarious financial position against that of the landlord (which was described as "less than robust"), the Court 'gave the nod' to the insolvent corporation, rejecting the proposition that Dylex should have to prove that without the three proposed closures (of leases), its proposal would not be viable. (*supra*, para. 10.)

58 In this case, the appellants deposed that the evergreen contracts were important to them, particularly for financing purposes. Mr. Rigsby, the controller of Clear Creek, for example, deposed:

> 26. Clear Creek requires its Replaceable Contract in order to obtain financing for capital costs. Lending institutions require that Clear Creek has a replaceable contract when considering lending money to, or financing equipment for, Clear Creek. Within the logging industry, it is very difficult to obtain financing without the security of a replaceable contract.
>
> . . . . .
>
> 30. Clear Creek remains capable of properly capitalising itself, and maintaining its own equipment and other capital investments in good working order, provided that it has a replaceable contract. If Clear Creek's replaceable contract remains in place, Clear Creek will be able to provide competitive, cost-effective, and efficient services and rates to [Skeena] . . . .

59 This evidence brings us squarely to the question of fairness. As already noted, for purposes of the CCAA, the court must be satisfied that the arrangement proposed is "fair, reasonable and equitable." Courts have made it clear that "equity" is not necessarily "equality"; in the words of Farley J. in *Sammi Atlas Inc., Re*:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights . . . . [para. 4]

60 I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis in this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the deferral and settlement of more than $400,000,000 in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period to save Skeena from bankruptcy was NWBC's acquisition of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims. As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

61 As has been seen, the purchaser required as a condition of proceeding with the Reorganization Plan that the appellants' contracts be terminated. In the absence of evidence that Skeena or the purchaser was motivated by anything other than a desire to improve the debtor corporation's financial prospects for survival post-arrangement, it cannot in my view be said that the Chambers judge erred in ruling that the termination of the appellants' replaceable contracts was a valid part of the Reorganization Plan in this case.

Procedural Question

62 The second ground of appeal advanced by the appellants was that since Skeena had failed to comply strictly with the requirements of the Come-back Order in relation to the termination of their contracts, the terminations were null and void. In response to the Chief Justice's conclusion that the appellants had not been prejudiced by the failure to give timely notice, the appellants submitted that the terminations could not have been effective until 21 days after they received the Monitor's Eleventh Report. In the meantime, the creditors' meeting took place. The appellants contend that since there was uncertainty as to whether their contracts had been validly terminated or would be terminated, it was unclear whether they were entitled to vote at the meeting. Accordingly, they submit that they:

> . . . were effectively disenfranchised in the *CCAA* proceeding. The Come-Back Order contemplates that the effectiveness of any proposed termination of a replaceable logging contract will be determined in a timely way, before the Plan of reorganisation is submitted to the creditors for approval. By failing to give proper notice, [Skeena] created uncertainty about both when and if the Appellants' contracts would be terminated. The Appellants were only entitled to vote in relation to the Plan if they acknowledged that the termination of their contracts was effective when the initial (and clearly invalid) notice was given on March 1, 2002.
>
> This placed the Appellants on the horns of a dilemma. Had the Appellants exercised the right to vote on April 2,2002, based on the premise that their contracts had been terminated, they would be guilty of approbation and reprobation in relation to their position that no valid notice of termination had yet been given and that their contracts remains in force. [Skeena] structured the approval process in such a way that the Appellants would effectively be required to waive their right to proper notice of termination under the Come-Back Order in order to vote on the Plan.

63 In response, Skeena emphasizes that the appellants did file proofs of claim with the Monitor prior to the creditors' meeting. Skeena says the Chief Justice was correct in concluding that the appellants were not prejudiced in fact, since if it is ultimately determined that the replaceable logging contracts were not validly terminated, the appellants will be free to withdraw their proofs of claim; and if the contracts were validly terminated, the appellants will share *pro rata* under the Plan with Skeena's other unsecured creditors once the amounts of all claims have been finally determined.

64 As for the proposition that the appellants could not both reprobate and approbate, Skeena notes that "conditional voting" was permitted by the Monitor in light of the time pressures attendant upon the approval of the Plan. These led the Monitor to allow voting even by those claimants whose claims it had disallowed. The Monitor noted their particular ballots as "objected to" in case the votes cast by them ultimately had an impact on the outcome of the vote for the applicable class. Mr. Zuk, the chair and claims officer for the meeting, deposed that even if all of the disallowed claims were reversed and the appellants' votes were counted, the result would not have been affected. This statement was not challenged by the appellants.

65 In these circumstances, I cannot agree with the appellants that the delay in their receipt of notice of the terminations of their contracts and the delay in the processing of their proofs of claim were prejudicial to them. It is certainly unfortunate that these delays occurred, but there is no evidence (as opposed to speculation) that the delays were the result of bad faith or deliberate omission. On the other hand, the appellants could have had little doubt that they faced major difficulties once the initial CCAA order was granted (September 5, 2001) and once the "replacement" deadline of September 30 passed. Ultimately, the effect of the delay in their receipt of formal notice made no difference to the appellants' position and did not influence the approval of the Reorganization Plan one way or the other, especially given the small amount allowed by the Monitor in respect of the appellants' claims in relation to Skeena's indebtedness. The appellants chose not to attend the meeting and not to vote, even on a conditional basis. In these circumstances, the Chief Justice correctly recognized that, as stated by Rowles J.A. for the Court in *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 71 B.C.L.R. (3d) 226 (B.C. C.A.), a supervising court under the CCAA must be alert to the incentive for creditors to "avoid the reorganization compromise" and must "scrutinize carefully any action by a creditor which would have the effect of giving it an advantage over the general body of creditors." (para. 20.)

66 Moreover, the arguments which the appellants would have made at the show cause hearing have now been made in the Supreme Court and in this court. If my analysis is correct, they would have failed even if the Court's approval of the Reorganization Plan had been delayed in accordance with the apparent intent of the Come-back Order.

67 I cannot say the Chief Justice was wrong in concluding that Skeena's failure to give timely notice was anything other than a procedural error without prejudicial consequences. I would dismiss this ground of appeal, as well as the substantive grounds, for the reasons I have given.

***Hall J.A.*:**

I agree.

***Levine J.A.*:**

I agree.

Appeal dismissed.

TAB 4

2009 BCSC 964
British Columbia Supreme Court [In Chambers]

Jameson House Properties Ltd., Re

2009 CarswellBC 1867, 2009 BCSC 964, [2009] B.C.W.L.D. 6201, 57 C.B.R. (5th) 9

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In The Matter of the Business Corporations Act, S.B.C. 2002, c. 57

And In The Matter of Jameson House Properties Ltd. and Jameson House Ventures Ltd. (Petitioners)

D.I. Brenner C.J.S.C.

Heard: June 5, 8, 11, 2009
Oral reasons: June 11, 2009 *
Docket: Vancouver S087978

Counsel: John R. Sandrelli, David A. Goult, Jordan Schultz for Petitioners
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William E.J. Skelly, Benjamin La Borie for Monitor
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Stephanie Jackson for Her Majesty The Queen in Right of British Columbia as represented by the Superintendent of Real Estate
Clive Bird for EllisDon Corporation
Kimberly S. Campbell for Rahim Fakhari
Richard Butler for Attorney General of BC
George F. Gregory for K. Seffidashti, E.K. Lee, David Parry

Subject: Insolvency; Property; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.vi Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Debtors were real estate developers — Business venture failed and order was granted for protection under Companies' Creditors Arrangement Act ("CCAA") — Majority of creditors voted in favour of arrangement — Purchasers of residential units, who were not creditors, were against plan — Purchasers were against losing right of rescission and extension of completion date — Application brought to approve order — Application granted — Purchasers were not entitled to rescission under Real Estate Development Marketing Act ("REDMA"), and thus were not creditors — Act would not provide purchasers with right to rescind presale contracts — No circumstances arose requiring new disclosure statement, which would have given rise to possibility of rescission — Despite change in ownership of some assets and change to board under arrangement, no change in identity of developer — Changes would strengthen developer — Financing arrangements which triggered filing under CCAA were not shown to be misrepresentation — Any relevant misrepresentation was not material — Developer had honest belief of access

to sufficient funds for project — If restructuring were to succeed, purchasers would receive exactly what was bargained for — Fairness and reasonableness dictated that an REDMA remedies should be overridden by CCAA — Restructuring contingent on having delay claims addressed immediately — Reasons for delay were sound and completion date in presale contracts extended by four months and four days.

Table of Authorities

Cases considered by *D.I. Brenner C.J.S.C.*:

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — considered

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, *(*sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — considered

Pacific National Lease Holding Corp. v. Sun Life Trust Co. (1995), 1995 CarswellBC 369, 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, *(*sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, *(*sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151 (B.C. C.A.) — considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — considered

Salomon v. Salomon & Co. (1896), [1897] A.C. 22, [1895-99] All E.R. Rep. 33, 66 L.J. Ch. 35, 13 T.L.R. 46, 45 W.R. 193 (U.K. H.L.) — referred to

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — considered

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) — considered

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Statutes considered:

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

s. 11(1) — referred to

s. 11(4) — referred to

s. 23 — referred to

Real Estate Development Marketing Act, S.B.C. 2004, c. 41

Generally — referred to

s. 1 "material fact" — considered

s. 16 — referred to

s. 16(2) — referred to

APPLICATION for approval of plan under *Companies' Creditors Arrangment Act*.

D.I. Brenner C.J.S.C. **(orally):**

1 This is an application to approve the final order in this *Companies' Creditors Arrangement Act*, R.S. 1985, c. C-36 ("*CCAA*") proceeding.

2 The Petitioners are developing a mixed residential and commercial property on Hastings Street in Vancouver. After certain of their financing arrangements fell through last year they filed for protection and were granted a first day order under the *CCAA* on November 14, 2008. Pursuant to the meeting process order approved by the Court on May 4, a meeting of Creditors was convened on May 28, 2009. In the result the plan of arrangement was approved by the general Creditors, 97 percent in number and 96.8 percent of value; 100 percent of the secured Creditors approved the plan. The Petitioners applied at the sanction hearing for a final order in the terms of the approved plan of arrangement.

3 Opposing this application are the Presale Purchasers of residential units in this development. I earlier directed that copies of the relevant material including the claims process order and the plan of arrangement be sent to the purchasers. This was done by the Monitor. On an earlier application I ruled that the purchasers were not Creditors within the meaning of the plan and hence they were not entitled to vote at the Creditors meeting. However, approximately 25 of the 75 purchasers attended the sanction hearing as well as earlier hearings through counsel and opposed the granting of the final order.

4 The purchasers object to paragraphs 14 and 15 of the final order which would remove their rescission rights based upon events that occurred prior to this hearing. They also oppose the application to extend the December 31, 2010 completion date for a total of 85 working days as set out in paragraph 16 of the proposed order.

5 There are broadly three issues on this application:

> 1. Do the purchasers have any rights of rescission or damages? Has anything to date rendered the presale contracts unenforceable?
>
> 2. If the purchasers have any of these rights, does the Court have the authority under the *CCAA* and, if so, should the Court exercise its discretion to preclude the purchasers from exercising these rights?
>
> 3. Should the completion date be extended?

6 In my ruling on May 27 I found that the purchasers were not Creditors as defined in the plan of arrangement and hence not entitled to vote at the meeting of Creditors. In reaching that conclusion, I considered and rejected their submission that the *Real Estate Development and Marketing Act*, S.B.C. 2004, c.41 ("*REDMA*") provided certain rights and remedies to them and that by virtue of the conduct of the Petitioners, they had claims for rescission and/or damages that would give them claims against the Petitioners and hence the status of Creditors.

7 A right of rescission arises under *REDMA* if a new disclosure statement is required.

8 In my Reasons on May 27 I outlined the three circumstances in which the statute requires the delivery of a new disclosure statement:

> 1. if there has been a failure to comply with the terms of an existing disclosure statement or a misrepresentation of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed;
>
> 2. if the identity of the developer changes; or

> 3. if in respect of the developer a receiver, liquidator or trustee in bankruptcy or other similar person acting under authority of a court is appointed.

9 To date, the superintendent has made no determination as to whether in the superintendent's opinion a new disclosure statement is required.

10 Has the identity of the developer changed? At financial close Bosa will acquire 50 percent of the equity, 100 percent of the voting shares and will appoint two of the three directors in the petitioners. The term "identity" in the statute has not been judicially considered. The Petitioners say that the identity of the developer when the project started was Jameson House and that the identity after it is completed will be Jameson House. While the directors and shareholdings will change, the identity of the developer will remain the same. The law has long recognized the corporation as a body separate from its shareholders (*Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.)). Strictly speaking, this is so in the case at bar.

11 But all parties agree that *REDMA* is consumer protection legislation. As is submitted by the purchasers, a change in the identity of the shareholders of the corporate developer could be a material fact since it might affect the value, price or use of a development. That change could be so substantial in nature that the superintendent could order a new disclosure statement pursuant to s. 16(2). As noted above no such termination has as yet been made by the superintendent.

12 In this case, Bosa, a highly experienced developer, is joining this project. Its involvement includes Axiom Builders, a Bosa affiliate which is completing the parkade and will issue a fixed price contract for the remaining construction hard costs of no more than $82 million. In addition Bosa and its affiliates will provide various guarantees of the senior construction loan of $75 million. They will join with the TD Bank for 50 percent of the senior construction loan. They will provide a subordinated construction loan of approximately $12 million, and they are committed to providing any additional equity or funding required to complete the project.

13 In the context of *REDMA* as consumer protection legislation, in my view the involvement of Bosa will strengthen the existing developer Jameson House. It will increase the likelihood that the project will be completed as contracted for by Jameson House and the purchasers.

14 In this case, no receiver or trustee has been appointed. A court-appointed Monitor is materially different from a trustee, liquidator or receiver. The latter takes control of the enterprise. A Monitor has no control, and the Monitor's function is limited to overseeing the operations of the debtor and reporting to the court and interested parties. With the court appointment of a Monitor no change of control occurs.

15 As I noted in my May 27 Reasons, the superintendent has not as yet made a s. 16(2) determination as to whether a new disclosure statement is required. When he does and depending on the decision he comes to, the parties advise that they may well return to the court.

16 In my view, the critical issue in this case is whether the failure of the Petitioners' financing arrangements which triggered the *CCAA* filing meant that the financing representation in the April 3, 2007 amended disclosure statement was a misrepresentation. The amendment stated as follows:

> The developer has received a firm commitment for construction financing from HSBC, Bank of Canada, United Overseas Bank Limited and West LBAG Toronto branch with an additional commitment for construction financing from Anthracite Capital Inc. which financing will be secured by the registration of financial encumbrances against title to the Lands. The developer has satisfied all presale conditions under such construction financing commitments.

17 The purchasers say that this amendment was a misrepresentation. They say that the financing was not in fact a firm commitment since it fell away, leading to the *CCAA* filing. In my Reasons on May 27 I observed that the commitment letters for the project financing were in the customary form. The arrangements were in fact firm subject only to the usual due diligence and documentation steps required.

18 The purchasers also say that when the financing fell away due to the deteriorating conditions in the credit market, the representation as to financing in the amended disclosure statement was no longer true, and that under s.16 of *REDMA* the Petitioners were required to but failed to file either a new or further amended disclosure statement. However, the purchasers would have a right of rescission only if a new disclosure statement was required. For this, the misrepresentation caused by the change in circumstances has to be in respect of a material fact. Material fact is defined in *REDMA* as a fact that "affects, or could reasonably be expected to affect, the value, price or use of the development unit or property." It is not clear that the failure of the financing was such a material fact. The developer was able to continue work on the project until November 12, 2008. The principals of the developer held an honest belief, until just prior to the filing that they would have access to sufficient construction financing.

19 More significantly, if this restructuring is approved by the Court and if it succeeds, the purchasers will be entitled to receive precisely what it was they contracted for. If the Petitioners fail to deliver, the purchasers will have their full right of recourse under the terms of the agreements of purchase and sale. This being the case, it is difficult to see that the value, price or use of the development unit or property has so far been affected.

20 Basically there are two diametrically opposed views of this case. The purchasers say that the Petitioners want to hold them to the terms of the purchase contracts while at the same time completing the project at today's much reduced construction cost and to pocket the extra profits. They say that to the extent that these costs are today lower than they were when they signed their contracts, the Petitioners will gain a windfall at the expense of the purchasers. The Petitioners' view is that this restructuring will have the effect of delivering to the purchasers precisely what they contracted and bargained for. They say the restructuring will also provide a substantial recovery for the secured and unsecured Creditors who almost unanimously support the plan. In addition it will provide significant economic benefit to the suppliers of both materials and labour as this project is completed. The Petitioners will take on considerable risk going forward. Costs may well change in the opposite direction and start increasing. Some presale purchasers may fail to complete. The project might not be completed by the deadline.

21 Counsel expressed the concern that I exercise caution on this summary application when interpreting *REDMA* as it is a relatively new statute. Accordingly, I will only conclude on this summary application that I am not convinced on the basis of the material before me that the provisions of *REDMA* would confer on the purchasers a right to rescind the presale contracts. The parties continue to be bound by the terms.

22 Assuming that the order sought is in conflict with the provincial *REDMA* statute, and I am not certain that is the case, should the provincial law be overridden by application of the federal *CCAA* by virtue of the paramountcy doctrine? To put it another way, can or should the court override the rights that the non-creditor purchasers may have under the provincial law? In *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 63 Alta. L.R. (2d) 361, 72 C.B.R. (N.S.) 1 (Alta. Q.B.), at 10 , Mr. Justice Forsyth of the Alberta Court of Queen's Bench stated:

> If promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation it follows that a stay which happens to affect some non Creditors in pursuit of that end is valid.

23 In this case, the evidence regarding the importance of the *REDMA* relief is as follows:

1. The Petitioners will not be able to continue in business without the involvement of the Bosa related entities and the obtaining of certain financing.

2. In turn, both Bosa's involvement and the financing are contingent on the Court granting *REDMA* relief.

3. It is a condition of the plan of arrangement that this relief be granted.

24 It is clear that the relief from *REDMA* that is sought is directed squarely towards the successful restructuring of this enterprise. This is a fundamental purpose of the *CCAA*. Without the relief the arrangement proposed by the Petitioners and voted in favour of by close to 100% of the Creditors, in number and value, will fail. All of the unsecured Creditors and all but one

of the secured Creditors will recover nothing. Set against that is, if this plan is approved, the purchasers will receive precisely what they bargained for. The Petitioners will continue to be bound by all of the terms of the sales agreements and the purchasers will retain all of their remedies in the event of any future breaches on the part of the Petitioners.

25 In *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, [1995] 10 W.W.R. 714, 62 B.C.A.C. 151 (B.C. C.A.) the Court of Appeal considered an appeal from this Court involving an issue as to whether the Supreme Court could allow for the payment of solicitors' fees and disbursements in connection with the taxation of the solicitors' accounts as part of the restructuring cost of the debtor company. Mr. Justice Cumming for the court stated at paragraph 26:

> The jurisprudence which deals with the ***C.C.A.A.*** establishes two propositions: (a) first, this legislation is to be broadly interpreted so as to give a Supreme Court justice exercising jurisdiction a good deal of power and flexibility; and, (b) the ***C.C.A.A.*** will prevail should a conflict arise between this statute and another federal or provincial statute.

In his judgment Mr. Justice Cumming referred to the earlier *Chef Ready* decision (*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C. C.A.)) where the court determined that in the event of a conflict between the *CCAA* and another federal statute, the broad scope of the *CCAA* prevails. That principle in *Pacific National Lease* was held to extend also to provincial legislation.

26 In *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 184 B.C.A.C. 54 (B.C. C.A.) Madam Justice Newbury considered the case in which the court's powers pursuant to the provisions of the *CCAA* conflict with either federal or provincial legislation. She referred to Mr. Justice LoVecchio's decision in *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682, 35 C.B.R. (4th) 304 (Alta. Q.B.). In that case he concluded that he had the jurisdiction under the *CCAA* to grant DIP financing in priority over registered builders' liens as provided under the BC *Builders' Lien Act*, S.B.C. 97, c.45.

27 The next question is whether the *CCAA* enables the Court to grant the *REDMA* relief. That relief, if it is to be found, is contained in s. 11 of the statute. It provides as follows:

> 11.(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Subsection 4 provides:

> A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

The section then goes on to outline the powers of the court to stay, restrain and prohibit either the continuation or the initiation of proceedings against the debtor filing company.

28 Section 11 was interpreted by the Alberta Court of Appeal in *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 175 D.L.R. (4th) 703 (Alta. C.A.). At paragraph 50 Madam Justice Hunt observed that the language of s. 11 is very broad, allowing the court to make an order "on such terms as it may impose" and empowering the court to stay "all proceedings taken or that might be taken", restraining "further proceedings in any action, suit or proceeding" and prohibiting "the commencement of or proceeding with any other action, suit or proceeding." The Court of Appeal held that the language of the *CCAA* was sufficient to give the *CCAA* judge in that case the authority to permanently affect the contractual rights of a non-creditor, saying that this interpretation is supported by the legislative objectives underlying the *CCAA*. In *Luscar*, the issue was whether an arbitration could proceed and the court held that the *CCAA* judge was empowered to restrain that. While the issue in that case was procedural in nature, it seems to me that the language used by the Alberta Court of Appeal would apply equally to substantive matters of substance. In particular, at para. 51 Madam Justice Hunt held that these words were sufficient to give the *CCAA* judge in the case the authority to permanently affect the contractual rates of a non-creditor.

29 In coming to its decision, the Court of Appeal referred to a number of earlier decisions where third party rights had been affected by a stay order. It reviewed the *Norcen* decision earlier referred to and *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]). The latter cases each involved the permanent impairment of third party lessors' contractual rights.

30 This was also recognized in *Clear Creek* by Madam Justice Newbury at para. 37 where she stated at para. 37:

> In the exercise of their "broad discretion" under the ***CCAA***, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights.

31 In *Doman Industries Ltd., Re*, 2003 BCSC 376 (B.C. S.C. [In Chambers]) at paragraph 15, Mr. Justice Tysoe was quoted with approval the Reasons of Mr. Justice Spence in *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]). In that decision, Mr. Justice Spence observed that in interpreting s. 11(4) the court is to take into account the remedial nature of the *CCAA*. Mr. Justice Tysoe agreed with his statement. He also expressed the view in para. 15 that:

> (T)he court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.

32 In *Norcen*, the court observed that while non Creditors would not have the right to vote at the Creditors meeting when the plan was considered, non Creditors are clearly entitled to attend the sanction hearing and make submissions when the debtor company comes to court for approval of its plan. That is what happened in the case at bar.

33 In this case I conclude that if *REDMA* relief is required, the Court should exercise its discretion and grant it. In doing that, the Court has to consider or be guided by two fundamental concepts, fairness and reasonableness. In *Clear Creek*, Madam Justice Newbury quoted with approval the decision in *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.). At para. 94, the Alberta Court of Queen's Bench of Queen's Bench referred to Blair J's decision in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.), in which he pointed out that fairness and reasonableness are the two keynote concepts that underscore the philosophy and workings of the *CCAA*.

34 If the Petitioners breached the statute by failing to file an amended disclosure statement because of the change in financial circumstances, I note that an amended disclosure statement will be filed at financial close. If a new disclosure statement was required because of an identity change, I would also grant *REDMA* relief because of the financial strength and construction expertise of Bosa. In my view Bosa's involvement in this project will, if anything, increase the prospect that this development will be completed in accordance with the terms of the presale contracts.

35 The Petitioners also apply to extend the December 31, 2010 completion date in the presale contracts on account of construction delays. Clause 3.1 provides:

> If the vendor is delayed from completing the construction of the strata lots or obtaining an occupancy certificate or from depositing the strata plan for registration in the Land Title Office as a result of fire, explosion or accident or other cause, act or omission of any governmental authority, strike, walkout, inability to obtain or delay in attaining labour, material or equipment, flood, adverse site, or conditions, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, climactic conditions, interference of the purchaser or any other event beyond the control of the vendor other than lack of money then the date set forth in section 2.3 will be extended for a period equivalent to such period of delay.

36 The purchasers say that the delay claims ought not to be decided summarily. They say that they should be decided in the usual way after the project has been completed and after a trial on full evidence. That may well be the customary way of determining delay claims. In the case at bar we do not have that luxury.

37 This restructuring is contingent on having the delay claims assessed on the available evidence today so that a decision can be made as to whether this restructuring succeeds or fails. Since the delay claims are now all retrospective, I see no difficulty in assessing them now and making the determination sought.

38 I note that there has been no challenge to the facts supporting the delay claims, and no applications have been made to cross-examine on any of the affidavit evidence.

39 The delay claims fall into four categories. The first is for delays encountered in completing the retention truss for the heritage building; two, delays associated with completing the east foundation wall; three, delays resulting from rocks encountered during excavation, and finally delays in the removal of the EllisDon crane.

40 With respect to the heritage retention and associated issues, a number of events and obstructions delayed EllisDon, the original contractor, from completing this part of the project on schedule. There was a delay encountered during the caisson drilling. Another delay arose from utility coordination. Delays were encountered during alterations to the mezzanine floor of the heritage structure. As a result of these circumstances, EllisDon issued Request for Change Order 002 seeking recognition of a 25 working day delay in the construction schedule. The project manager Stantec considered the request to be reasonable and it recommended a change order to the owner to allow a delay in the construction timetable of 25 working days. This was was accepted by the owner.

41 With respect to the neighbouring east wall foundation, after EllisDon started excavating they found that there was some shotcrete encroaching into the project property from the foundation of the building on the east side of the project. A delay of 10 working days for the remedial work was sought. The project manager agreed and recommended the change order to the owner.

42 The third category was rock encountered during the excavation. This generated a 43 working day delay request. The rock slowed the excavation process. A request for change order had been filed by the contractor at the time construction ceased and was being considered by Stantec. The evidence shows that Stantec would have recommended that the owners accept that extension as a reasonable reflection of the delay actually experienced by the contractor.

43 The final delay claim was for the replacement of the EllisDon crane with the Axiom crane. Because of the City requirements as to when these cranes can be moved about on the City streets, these events generated a further delay of some seven working days.

44 In my judgment the evidence supports these delay claims and I would accordingly extend the completion date in the presale contracts of December 31, 2010 by the period sought to May 4, 2011.

45 Finally I want to comment on the role of the Monitor in the role in these proceedings. There was at least some suggestion that adequate notice or information about this proceeding was not provided by the Monitor to the presale purchasers. The Monitor in this case at bar is a highly experienced insolvency professional. Throughout this case and in the discharge of his duties as an officer of this court, I am satisfied that he took all appropriate and reasonable steps to not only communicate information to stakeholders, but also where he considered it appropriate, to explain the proceedings and their consequences, especially for the presale purchasers. Accordingly, I would expressly reject any criticism even if only implied of the Monitor's role in these proceedings.

46 In conclusion the application of the Petitioners will be allowed.

47 Are there any submissions with respect to the wording of the order or any language issues in the order that counsel want to address?

48 MR. SANDRELLI: My Lord, I can only comment that I haven't appropriated all the various changes that have been requested from the various parties that have responded to me with respect to the form of draft order, and that would be my only comment in my submission. You will probably be hearing from others that it should go -

49 THE COURT: Are there any other - is the form of order - any particular submissions?

50 MR. CLEMENS: I have no submissions on the form of order.

51 THE COURT: All right, the order will go. Mr. Sandrelli, you have a copy for me to sign?

52 MR. SANDRELLI: I could - five more.

53 THE COURT: Yes.

54 MR. CLEMENS: My Lord, at the outset of your Reasons you said you were going to deal with the issue of unenforceability and that would be s. 23, but unless I missed something, I don't believe that you addressed that matter. Are the Reasons as they stand or is there going to be something said about that?

55 THE COURT: The Reasons are as they stand.

56 MR. CLEMENS: Thank you.

57 THE COURT: Thank you, Mr. Clemens.

Application granted.

Footnotes

* Affirmed *Jameson House Properties Ltd., Re* (2009), 2009 BCCA 339, 2009 CarswellBC 1904, 57 C.B.R. (5th) 21 (B.C. C.A.).

TAB 5

Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2011 ABQB 96

Date: 20110301
Docket: 1003 11241, 1003 05560
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendant's

And Between:

Docket: 1003 05560
BKCY Action No: 24-115359

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

In the Matter of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

Memorandum of Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") applied to this Court for, and was granted, an initial order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("*CCAA*"). Part of that Initial Order appointed Mr. Patrick Ross as Cow Harbour's chief restructuring advisor ("CRA").

[2] Mr. Ross applies to this Court for an order that he be paid for his role as CRA in accordance with the terms of an agreement with Cow Harbour (the "Agreement") dated April 6, 2010, and that this remuneration be secured against Cow Harbour's property or proceeds under an administrative charge granted under the Initial Order.

II. Facts

[3] Cow Harbour applied for the Initial Order under the *CCAA*, with the support of the Royal Bank of Canada ("RBC"), its primary secured creditor. One of RBC's conditions for its support was that Cow Harbour retain a CRA to oversee its restructuring. The hearing to consider Cow Harbour's application for the Initial Order took place over two days, April 6, 2010 and April 7, 2010.

[4] PriceWaterhouseCooper ("PWC") and Mr. Don MacLean, one of its Senior Vice - Presidents, were closely involved in the lead-up to this Court granting the Initial Order. PWC was also actively involved in the *CCAA* proceedings. It was also eventually appointed Cow Harbour's receiver, when Cow Harbour's creditors concluded that restructuring was not a viable option. PWC and Mr. MacLean continue to be involved in these proceedings. In fact, Mr. MacLean filed an affidavit in opposition to Mr. Ross's application.

[5] Mr. Ross is an independent affiliate partner of Lindsey Goldberg LLP, a private equity fund based in New York. He has extensive high-level business experience, including roles involving business turn-around consulting and acting as the president and chief executive officer of a number of companies in which he steered their economic recovery.

[6] Mr. MacLean provided the initial draft of the Agreement, in the form of a template engagement letter, to Cow Harbour's chief financial officer, Mr. Demetri Koumarelas. Mr. Koumarelas was instrumental in negotiating the terms of the Agreement with Mr. Ross. The draft form of the Agreement was tailored to meet the arrangement between Cow Harbour and Mr. Ross. Cow Harbour and Mr. Ross signed the Agreement on April 6, 2010.

[7] The following provisions of the Agreement are relevant to the application before this Court (Mr. Koumarelas changed some portions of the Agreement through handwritten insertions or changes, which are indicated by italics. Strikeouts represent strikeouts from the original document that PWC provided to Mr. Koumarelas):

3. Fees

PR's [Patrick Ross] compensation for the service referred to above will be as follows:

4.1 Work Fee

* A daily work fee of $2,000.00 payable weekly;
* A completion fee of $500,000 (the "Completion Fee") payable at the completion of this mandate. *"Completion of this mandate" will be defined as 3 months from the date a plan of arrangement is sanctioned by the Court.*

4.2 Success Fee

(a) Financing and sales approved by RBC:

* 1% of any additional or replacement financing raised *or sourced by PR*, with new or existing lenders (only for a new loan) payable from closing proceeds; or

* 1% of any proceeds from a sale of equity or assets *sourced by PR* (other than the sale-leaseback transactions entered into by CHC [Cow Harbour]), payable from closing proceeds; or

* 1% of any combination of financing and sale proceeds *sourced by PR*;

4.3 Termination Fees and success Fees Earned

(a) in the event that PR is terminated without cause prior to ~~CHC emerging from CCAA protection~~ *completion of this mandate*, PR will be paid the greater of i) Success Fees Earned as detailed above and defined below; or ii) a break fee in lieu of success fees calculated as $10,000.00 per week multiplied by the number of weeks worked, in addition to the weekly work fee.

In the event of a termination by either party, the Success Fees Earned will be calculated as follows: i) the full amount of the success fee referred to in 4.2(a) if an agreement is entered into during or after termination, for a transaction contemplated in 4.2(a) with a party who had reviewed information regarding CHC and declared that they had an interest, prior to termination, identified in writing by PR, and only if an agreement is

> entered into within three months of termination and transaction closes within six months of executing an agreement, plus ii) any other success fees earned during the period prior to our termination which remain unpaid (the "Success Fees Earned)

[8] The Initial Order:

(a) required Cow Harbour to hire Mr. Ross as the CRA (Initial Order para.11);

(b) directed Cow Harbour to pay the CRA in accordance with the Agreement (Initial Order para. 31); and

(c) included the CRA's fees and disbursements in the definition of an "Administrative Charge" (Initial Order para. 34), which was given a priority as described more fully in the Initial Order paras. 58 and 60.

[9] At the hearing on April 7, 2010, Ms. Kelly Bourassa, counsel for one of Cow Harbour's creditors, raised the question and contested the appointment of a CRA. Ms. Bourassa argued that it was inappropriate for this Court to appoint a CRA, when the terms of his engagement and, in particular, the contingent fees payable to him, were unknown. This Court invited Mr. McCabe, Cow Harbour's counsel, to advise it of the Agreement's terms. Mr. McCabe consulted with Mr. Ross and then advised this Court that the terms of the Agreement were as follows:

> The CRA is in the courtroom, he advises me that it's $2,000 per day, that's for working days. And he has negotiated a $500,000 success fee. I would point out that the success fee kicks in only if it is a success, it can't - - - it cannot, I submit, Sir, come out of the pocket of the creditors, and it cannot be something that can be detrimentally affected by the charge. (Transcript of Proceedings, April 7, 2010, p. 43, ll. 20-34)

[10] Mr. Ross's evidence, in cross-examination on his affidavit, is that he told Mr. McCabe during a break in the April 7, 2010 proceedings, that his fees under the Agreement were:

- a $2,000 a day fee;
- a $190 day allowance for living expenses;
- a completion fee of $500,000 if Cow Harbour had a plan of arrangement approved by the Court; and
- a 1% success fee on any new financing or equity sale.

(Cross-examination on Affidavit of Mr. Ross, October 28, 2010, p. 21, ll. 1-8)
(the completion fee and success fee are referred to in these reasons as the "Completion Fee" and "Success Fee," respectively).

[11] Ms. Bourassa further objected to the Success Fee and to the securing of the CRA's remuneration under the Administrative Charge. Mr. McCabe responded by saying that the *CCAA* process would be sidetracked by delaying Mr. Ross's appointment and that Mr. Ross was needed to add value to Cow Harbour immediately. This Court indicated that it was premature to discuss a contingent Success Fee (Transcript of Proceedings, April 7, 2010, p. 43, ll. 39-41; p. 44, ll. 1-37). Further submissions were made on April 7, 2010, but none in reference to the CRA, and this Court granted the Initial Order under the terms that Cow Harbour sought. These terms included the appointment of Mr. Ross according to the terms of the Agreement and a provision that his fees and disbursements would be secured by the Administrative Charge. The Initial Order was entered on April 9, 2010.

[12] The Agreement was the subject of portions of the following further hearings:

(a) On April 28, 2010, Cow Harbour sought an extension of the Initial Order's stay of proceedings. Before this hearing, the court-appointed monitor under the Initial Order, Deloitte & Touche Inc. (the "Monitor"), filed its third report, which provided, among other things, information about the terms of the CRA's retainer, indicating that if Cow Harbour's restructuring were successful, the CRA would receive "considerable" contingent compensation, but if not, the CRA would be restricted to his daily work fee. The Agreement was not put before this Court.

(b) At the May 28, 2010 hearing, there was a shift from Cow Harbour's attempt to restructure by refinancing or finding equity, to the CRA's application to hire Ernst & Young Corporate Finance (Canada) Inc. ("E & Y") to sell Cow Harbour or its assets. During this hearing, this Court was advised that the information it was given as to the terms of the Agreement was inaccurate. The Monitor's seventh report raised the issue of whether the CRA would be entitled to a 1% Success Fee on an asset sale. Some of the creditors argued that this Court could not approve the 1% Success Fee, because Mr. McCabe had not fully disclosed the terms of the Agreement to this Court before it granted the Initial Order.

(c) The May 28, 2010 hearing was continued on June 1, 2010, when this Court approved the hiring of E & Y to fulfill a sales mandate that the CRA outlined in his first report, including soliciting purchasers and finding sources within 30 days (the "May 28 Order"). The CRA's counsel advised this Court that E & Y's fees would be paid out of the Completion Fee or the Success Fee, if Mr. Ross received them, or from Cow Harbour if he did not.

[13] Pursuant to the May 28 Order, E & Y compiled a list of prospective buyers, including Aecon Group Inc. ("Aecon"), and sent out teasers to them. Aecon did not respond, so Mr. Ross contacted Mr. Scott Balfour, Aecon's president, asking that Aecon consider this opportunity. In June, Aecon submitted a bid to purchase Cow Harbour's assets for $165 million ("First Aecon Offer").

[14] At the July 6, 2010 hearing, the CRA sought this Court's approval of the First Aecon Offer, which the CRA had accepted. Certain creditors strenuously objected to this Court approving the First Aecon Offer, because the offer did not provide for an allocation of purchase price proceeds among the creditors. This Court did not approve the First Aecon Offer.

[15] As a result of submissions by certain of Cow Harbour's secured creditors, this Court suspended Mr. Ross from his role as CRA and appointed PWC as a "transaction facilitator," assuming the CRA's duties in connection with any further dealing with prospective purchasers, including Aecon, and negotiations with Cow Harbours's creditors. PWC worked with the prospective purchasers and the creditors to secure an offer to purchase Cow Harbour's assets that was acceptable to the creditors. Aecon submitted a further offer (the "Second Aecon Offer"), which contained a purchase price of $180 million and an allocation of purchase price among the creditors.

[16] On August 25, 2010, this Court approved the Second Aecon Offer.

III. Issues

[17] RBC and PWC oppose Mr. Ross's application, arguing that because this Court received misinformation about the terms of the Agreement, the Success Fee is not payable, and even if it is payable, it cannot be secured by the Administration Charge. Further, they argue that the Completion Fee is not payable under the clear language of the Agreement.

[18] Thus, the issues before this Court are:

1. Is Mr. Ross entitled to the Completion Fee?

2. Is Mr. Ross entitled to the 1% Success Fee?

3. If Mr. Ross is entitled to the Success Fee, is it secured by the Administration Charge?

4. Are E & Y's fees are payable from the Completion Fee or the Success Fee, or must Cow Harbour pay them?

IV. Analysis

1. Is Mr. Ross entitled to the Completion Fee?

a. *Mr. Ross's submissions*

[19] Mr. Ross submits that these issues are questions of interpretation of a contract and not a question of redrawing or revising the Agreement. He argues that his substantial performance of the terms of the Agreement is sufficient for payment of the Completion Fee, citing ***Herron v. Hunting Chase Inc.***, 2003 ABCA 219, 330 A.R. 53 at paras. 19-23. Conceding that this Court has not sanctioned a plan of arrangement, he argues that, in any event, the *CCAA*'s policy objectives have been accomplished by an equivalent means, the sale of Cow Harbour's assets.

[20] Mr. Ross cites the following from Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at p. 9:

> The CCAA has a broad remedial purpose, permitting compromises or arrangements to be made between an insolvent company and its creditors. The courts have held that the CCAA allows the debtor company to avoid bankruptcy, to continue operating, and to find a business strategy that enables it to meet the demands of creditors. The CCAA is to be given a large and liberal interpretation so as best to meet its policy objectives.

[21] Dr. Sarra goes on to explain that those objectives include:

> (a) avoiding where possible, the devastating social and economic consequences of the cessation of business operations;
>
> (b) allowing a transition period for debtors in which they can adjust to difficult markets in unsettled times and emerge competitive and innovative, and
>
> (c) balancing the costs of the process with the benefits of potential success and the protection of many interests.

[22] The Supreme Court of Canada in ***Century Services Inc. v. Canada (Attorney General),*** 2010 SCC 60, recently discussed the purpose of the *CCAA*:

> 15 As I will discuss at greater length below, the purpose of the *CCAA* – Canada's first reorganization statute – is to permit the debtor to continue to carry on business and, where possible, **avoid the social and economic costs of liquidating its assets**. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
> [Emphasis added]

[23] This Court, in its October 5, 2010 decision, noted:

> 4 It became clear that Cow Harbour was not going to be able to restructure its affairs through a refinancing, compromise or an equity restructuring. Rather, this matter

> evolved into a liquidation. This Court approved a process that would permit Cow Harbour to restructure by way of a sale of its assets ... The intent behind this process was to effect a sale of Cow Harbour as a going concern.

[24] Mr. Ross argues that the result of the *CCAA* proceedings was a sale to Aecon of a substantial portion of Cow Harbour's assets and business, and that Aecon continues to operate the business as a going concern. He argues that although this was accomplished through a receivership, this was merely a mechanism that expedited the *CCAA*'s intended outcome. He notes that virtually all of Cow Harbour's employees have continued employment, Syncrude Canada Ltd. (Cow Harbour's primary customer) will have its contract with Cow Harbour completed, and Cow Harbour's business continues as a viable business with additional capital resources and management strength from Aecon.

[25] Mr. Ross concludes that he has substantially performed his obligation to obtain Court sanction of a plan of arrangement and therefore, he has earned the Completion Fee.

b. *PWC's submissions*

[26] PWC argues that Mr. Ross has not earned the Completion Fee according to the Agreement's plain wording, since the Completion Fee was only payable "at the completion of [the CRA's] mandate." The Agreement expressly defined this term as "3 months from the date a plan of arrangement is sanctioned by the Court." Noting that this Court has not sanctioned any plan of arrangement, and that in fact there was no "plan of arrangement" since restructuring was not accomplished, PWC concludes that the CRA has not earned the Completion Fee.

c. *RBC's submissions*

[27] RBC supports PWC's submissions and its written submissions were limited to the question of the Success Fee.

d. *Conclusion*

[28] This Court has some sympathy for Mr. Ross's functional analysis. However, the Agreement expressly defined the conditions under which he would earn the Completion Fee:

> A completion fee of $500,000 (the "Completion Fee") payable at the completion of this mandate. *"Completion of this mandate" will be defined as 3 months from the date a plan of arrangement is sanctioned by the Court.*

[29] The handwritten addition of this clause makes it clear that the Completion Fee would be payable 3 months after this Court approves a plan of arrangement. This Court agrees with the CRA that this is a question of interpreting the terms of the contract. The Supreme Court of Canada in ***Eli Lilly & Co. v. Novopharm Ltd.; Eli Lilly & Co. v. Apotex Inc.,*** [1998] 2 S.C.R. 129 said:

> 54 ... The contractual intent of the parties is to be determined **by reference to the words they used in drafting the document**, possibly read in light of the surrounding circumstances which were prevalent at the time ...
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in ***Lampson v. City of Quebec*** (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > . . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself ... [I]f the meaning of the deed, **reading its words in their ordinary sense, be plain and unambiguous** it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses. . . ."
>
> [Emphasis added]

[30] The plain language of the Agreement sets out a specific condition that must be met before the CRA is entitled to be paid the Completion Fee. That specific condition has not been met.

[31] Mr. Ross raised the question of whether substantial performance of the condition would be sufficient performance. In ***Herron***, the Alberta Court of Appeal discussed the issue of substantial performance as follows:

> 19 In earlier days, contractual performance was an all or nothing proposition that could result in one party receiving a substantial windfall. For example, when a contractor carried out his obligations under the contract, but some of his work was defective, the principle of dependency absolved the other party from his obligation to pay anything, even though that party received something of value. To mitigate these harsh consequences, courts developed the notion of "substantial performance". Under the current law, when a contract has been substantially though not perfectly completed, the guilty party is entitled to payment under the contract, less the cost of making good the deficiencies, unless the contract provides otherwise ...
>
> 21 The principles of dependency and substantial performance most often apply in situations in which there is a straight-forward contract for goods or services. [G.H.L. Fridman in *The Law of Contract in Canada*, (4th ed.) (Scarborough: Carswell, 1999)] at 570 suggests that “a party is not relieved from payment for what has actually been done, unless: (1) he has obtained no benefit at all; (2) the work done is totally different from the work contracted to be done; or (3) the contractor abandoned the work before completion.”
>
> [Footnotes omitted]

[32] The structure of the Agreement does not lend itself to an application of the notion of substantial performance. Either the condition is satisfied or it is not. Mr. Ross did not perform the condition required for him to receive the Completion Fee, and Cow Harbour did not receive the benefits for which it contracted. As well, Mr. Ross was paid a daily work fee for the work he did perform, and therefore was not faced with the "all or nothing" proposition described by the courts. Because Cow Harbour has not been restructured and is, in fact, now bankrupt, the work Mr. Ross performed is totally different from the work Cow Harbour contracted him to do, which was to result in Cow Harbour's survival through a restructuring.

[33] In this Court's view, the doctrine of substantial performance is not relevant to the Completion Fee. Furthermore, from Cow Harbour's perspective, the CRA did not complete, or even substantially complete, what he had contracted to do.

[34] The Completion Fee was inserted for Cow Harbour's benefit. Had Mr. Ross completed the mandate, he would earn the Completion Fee. Mr. McCabe quite rightly stated that the Completion Fee would "not come out of the pockets of the creditors" and would only kick in if Mr. Ross completed his mandate. In this case, there was no completion; the condition for payment was not met. A plan of arrangement was never presented to this Court and, accordingly, this Court never sanctioned a plan of arrangement. Mr. Ross did not complete his mandate in accordance with the terms of the Agreement. Therefore, he has not earned the Completion Fee.

2. Is Mr. Ross entitled to the 1% Success Fee?

a. *Mr. Ross's submissions*

[35] Mr. Ross argues that Aecon bought Cow Harbour's assets and that RBC approved the sale. Thus, the requirements of the Success Fee contingency have been met. In particular, he notes that Mr. Koumarelas inserted the words "sourced by PR" and that if the language is ambiguous, it should be interpreted *contra proferentem*. Mr. Ross argues, however, that the words are not ambiguous. Although "sourced" does not have a dictionary definition, its meaning can easily be deduced. He argues that "sourced" is merely a conversion of the noun "source" to a verb. He provides some definitions of "source" including:

> A person who ... is the chief or prime cause of a specified condition, *The New Shorter Oxford English Dictionary*, 1993, *s.v.* "source";
>
> The originator or primary agent of an act, circumstances or result ... , *Black's Law Dictionary*, 9th ed., *s.v.* "source");
>
> "source" as a verb: obtain from a particular source; find out where something can be obtained, *Oxford Dictionary Online* (April 2010).

[36] Based on these definitions, Mr. Ross argues that "sourced by PR" may have two meanings:

(a) he was the originator of or prime cause of or the person who obtained the sale of Cow Harbour's assets to Aecon; or

(b) he was the person who supplied information as to or found out where to obtain Aecon as the purchaser of Cow Harbour's assets.

He further submits that even if all he did was suggest Aecon's name as a potential buyer, this would be sufficient for him to meet the prerequisites for earning the Success Fee.

[37] Mr. Ross argues that he did much more than this, however. He called Scott Balfour, Aecon's president, after Aecon did not respond to the teaser, urging Mr. Balfour to consider the business opportunity that Cow Harbour offered. As a result of this, and further discussions, Aecon submitted a proposal and later, a binding offer. Mr. Balfour, in his October 5, 2010 affidavit, stated that, "Aecon began to pursue the purchase of the business of Cow Harbour as a direct result of communications by Patrick Ross."

b. *PWC's submissions*

[38] PWC argues that Mr. Ross is not entitled to the Success Fee for three reasons:

1. the Agreement states that the Success Fee is payable for "financing and sales approved by RBC" and RBC did not approve the First Aecon Offer that Mr. Ross presented;

2. the Success Fee described to this Court in the initial application was only in respect of new financing or equity sale, but not an asset sale, therefore only a new financing or equity sale would qualify; and

3. Aecon was contacted by the joint efforts of Mr. Ross, E & Y and the Monitor. Therefore, the sale of Cow Harbour's assets were not "sourced by" Mr. Ross.

c. *RBC's submissions*

[39] RBC argues that under the Agreement, the Success Fee would not be payable to Mr. Ross unless RBC approved the financing or sale, and RBC did not approve the First Aecon Offer. It argues that the First Aecon Offer, which was the sale proposal that Mr. Ross sourced, was the $165 million offer that included conditions for the preparation of a plan of arrangement, approval of the plan of arrangement, a court order sanctioning and approving the plan of arrangement, and the requirement that the court order not be appealable. Further, the First Aecon Offer did not provide for the allocation of the proceeds among creditors and did not provide any basis on which a creditor could calculate the sale price of the assets over which it held security.

[40] By contrast, the Second Aecon Offer did not require a plan of arrangement or a non-appealable court order, was $15 million greater than the First Aecon Order, and was presented in conjunction with collateral agreements providing for the allocation of the sale proceeds among most secured creditors.

[41] Not only did RBC not approve the First Aecon Offer, it applied to this Court for the appointment of a receiver, an application heard on the same date as the date Mr. Ross applied for the order approving the First Aecon Offer. This Court refused Mr. Ross's application and appointed PWC as the receiver of Cow Harbour. PWC then entered into negotiations with Aecon and most of Cow Harbour's creditors and was able to secure an offer that was acceptable to RBC and most of the creditors.

[42] RBC further argues that just because this Court approved an offer that Aecon made does not mean that Mr. Ross earned the Success Fee. It is the sale that RBC had to approve, not merely the identity of the offeror.

d. *Conclusion*

i. What does "sourced by PR" mean?

[43] RBC and PWC (collectively, the "Respondents") view the Agreement para. 4.2 narrowly by suggesting that since RBC did not approve the First Aecon Offer, the contingency for the payment was not met.

[44] Neither of the Respondents dealt specifically during argument with what was meant by the term "sourced by" Mr. Ross. PWC suggests that the Second Aecon Offer was not "sourced by" Mr. Ross, but was the result of joint efforts of PWC, E & Y and Mr. Ross. This argument does not take the Respondents far. There is no doubt, on the facts, that Mr. Ross was responsible for bringing Aecon to the table, despite its initial lack of interest in the sale. On a plain reading of the clause, Mr. Ross earned the Success Fee if he was a source of the sale. There is nothing to indicate that it would only be payable if he was the sole source of the sale. In fact, it is arguable that had Mr. Ross sourced some financing and some portion of a sale, he would have been entitled to 1% of whatever he had sourced, even if further aspects of the sale or financing were sourced by someone else.

[45] PWC provided the template for the Agreement and Mr. Koumarelas of Cow Harbour "filled in the blanks." If this Court is incorrect in its interpretation of the Agreement, to the extent that the Agreement is vague, any vagueness would favour Mr. Ross.

[46] Mr. Ross found and acquired a source to buy Cow Harbour's assets. "Source" even its more traditional definitions, refers to the origin, or primary originator, of an act, circumstance, or result. Even if the Monitor, E & Y, and PWC were part of a joint effort to suggest potential buyers and eventually negotiated the Second Aecon Offer, Aecon had expressed no interest in making an offer until it was actively pursued by Mr. Ross. Aecon was "sourced by" Mr. Ross.

ii. Did RBC approve the sale "sourced by" Mr. Ross

[47] RBC approved the Second Aecon Offer, and not the First Aecon Offer. For the reasons given above, this Court finds that the Second Aecon Offer was "sourced by" Mr. Ross. Had the Agreement said that RBC must approve a sale "negotiated by" or "finalized by" Mr. Ross, there might be some merit to distinguishing between the First Aecon Offer and the Second Aecon Offer. However, the Agreement refers only to "sourced by" and this Court finds that Mr. Ross sourced the sale of Cow Harbour's assets to Aecon, even if there were additional players involved in identifying the potential buyer and negotiating the eventual sale.

[48] From a public policy perspective, it would be highly offensive to allow parties to retain an individual to accomplish a task and then once the task is partially performed, allow the parties to prevent the individual from fully performing its task and yet be able to take the fruits of the individual's efforts without the agreed-upon, or some, remuneration. Such an approach would send a chill through the commercial world and, in particular, the insolvency world. This Court should not countenance such an approach.

iii. What is the effect of the Court's lack of accurate knowledge of the actual terms of the Agreement?

[49] PWC argues that the Agreement was not before this Court when it granted the Initial Order, and that this Court granted the Initial Order based on misinformation. It further argues that the only terms of the Agreement that this Court can enforce are those that this Court approved. Because Mr. Ross did not clarify the terms of the Agreement at the hearing, he is not entitled to the Success Fee. He is only entitled to what was known by the Court at the time of the hearing and therefore contemplated by the Initial Order.

[50] This Court does not accept this argument for several reasons. First, the Initial Order expressly refers to the Agreement and orders that the CRA be paid according to the Agreement's terms. This Court was aware that a portion of Mr. Ross's remuneration was contingent, but said that it was premature to address the details of Mr. Ross's remuneration. As importantly, RBC had made it clear at the hearing that resulted in the Initial Order, that its cooperation in Cow Harbour's *CCAA* proceedings was dependent on the appointment of a CRA. RBC was working closely with PWC throughout Cow Harbour's *CCAA* proceedings and PWC provided the template for the Agreement. Because of the short time frame within which this Court had to make a determination concerning its granting of the Initial Order, and RBC's position concerning the appointment of a CRA, this Court had to appoint the CRA and leave the discussion of its remuneration to a later date or not appoint a CRA and thereby lose RBC's support for the proceedings. It chose the former and the discussion concerning the CRA's remuneration did not commence in earnest until after this Court approved the Second Aecon Offer.

[51] Second, it appears that the Respondents are conducting a collateral attack on the Initial Order. The Initial Order was entered and the Respondents did not appeal it. Thus, the Initial Order stands on its terms. As the Alberta Court of Appeal noted in ***Alberta (Child, Youth and Family Enhancement, Director) v. B.M.***, 2009 ABCA 258, 460 A.R. 188:

> 10 It is usually impossible to open up, reconsider, or vary a decision after the formal judgment has been signed and entered. In that case, the judge simply has no jurisdiction to do so.

[52] The relevant portions of the Initial Order read:

> 11 The Applicant is directed to immediately hire Patrick Ross as the Chief Restructuring Advisor (the "Advisor").
>
> 31 ... The Advisor shall be paid in accordance with the agreement between the Applicant and the Advisor as part of the costs of these proceedings...

[53] Third, this Court granted the Order Amending the Initial Order on July 6, 2010 (entered on July 8, 2010). The amending order does not amend the Initial Order's terms dealing with the CRA's remuneration. By July 2010, all parties to these proceedings knew the terms of the Agreement, having discussed them at the May 28, 2010 / June 1, 2010 application, and the actual Agreement became part of the record on June 4, 2010.

iv. What is the Quantum of the Success Fee?

[54] For the foregoing reasons, Mr. Ross is entitled to a Success Fee. The issue then becomes the quantum of the Success Fee. It is clear from these proceedings that other parties exerted efforts to obtain the Second Aecon Offer. Certainly E & Y was partially involved, as well as PWC in its role as transaction facilitator.

[55] From Cow Harbour's perspective, these proceedings were not a "success." However, from the perspective of most of the other creditors, it was. Mr. Ross did not accomplish what he was originally retained to accomplish, but the parties ended up with a *CCAA*-like result, which included satisfying some of the *CCAA*'s broader policy objectives. We can speculate that this might have occurred in any event, had Mr. Ross not pursued Aecon as a potential purchaser. But that is not what is before this Court. What is before it is a purchase of the assets of Cow Harbour and a continuation of its business by a corporation, Aecon, that Mr. Ross sourced and pursued.

[56] One-percent of an amount in the hundreds of millions of dollars is a large sum. The size of the Success Fee does not, however, determine whether Mr. Ross is entitled to it. The calculation of the amount was not challenged in earnest until later in the proceedings, once it became clear that Mr. Ross might be entitled to something nearing that large sum.

[57] Mr. Ross presented the First Aecon Offer of $165 million. That is the starting point for the calculation of the Success Fee. From that, we must take off an amount of effort, monetarily and otherwise, that others expended which resulted in the Second Aecon Offer. In other words, Mr. Ross is entitled to a Success Fee based on the terms of the Agreement and *quantum meruit*. Had this Court given Mr. Ross, with the support of the creditors, the opportunity to finalize the transaction with Aecon, and had he finalized the transaction, he would have been entitled to the full Success Fee regardless of its amount. Quantum does not determine entitlement; the practical result of the application of the Agreement's terms determines entitlement.

[58] Using this formula, the parties are directed to attempt to negotiate Mr. Ross's Success Fee. If they are unable to negotiate an amount satisfactory to them, the may come back before this Court to argue this matter.

3. If Mr. Ross is entitled to the Success Fee, is it secured by the Administration Charge?

[59] Initial Order para. 34 describes the Administration Charge as follows:

> 34 The Applicant's Counsel, the Monitor, counsel to the Monitor, and the Advisor, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $2,000,000.00 as security for their professional fees and disbursements incurred of the Monitor, such counsel and the Advisor, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 58 and 60 hereof.

a. *Mr. Ross's Submissions*

[60] Mr. Ross argues that a broad and liberal interpretation of the Initial Order para. 34 indicates that the Success Fee is covered by the Administration Charge. He notes that Mossip J. of the Ontario Superior Court of Justice in ***Royal Bank of Canada v. 1542563 Ontario Inc.***, [2006] O.J. No. 3811 at para. 4, 152 A.C.W.S. (3d) 150 (Ont. Sup. Ct. Just.) said that courts should take this type of approach when interpreting court orders. He concluded:

> 4 In other words, a defendant cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice ...

b. ***PWC's Submissions***

[61] PWC argues, for many of the same reasons it argued against payment of the Success Fee, that the Success Fee is not secured by the Administration Charge. It submits that because the

Court was misinformed, securing the Success Fee under the Administration Charge would be contrary to the intent of the Initial Order. It notes that Cow Harbour has not been restructured, there was no plan of arrangement and the Success Fee will come out of monies that would otherwise be payable to the creditors.

[62] PWC further argues that the Administration Charge could not possibly secure the Success Fee under the Initial Order because at the time of the Initial Order the Court knew nothing about the terms of the Agreement. Moreover, PWC argues, to find that the Success Fee is secured under the Administration Charge would require the Court to find that:

(a) the Success Fee is owing, even though the only offer brought forward by Mr. Ross was unacceptable to RBC and the other creditors;

(b) the Success Fee ought to be calculated on the basis of the Second Aecon Offer, even though the Second Aecon Offer was the result of PWC's efforts, and Mr. Ross played no role "whatsoever" in this;

(c) the Success Fee is owing even though Cow Harbour was not successfully restructured, and all of Cow Harbour's assets have been, or will be, liquidated and it is no longer carrying on business; and

(d) the Court inadvertently secured the Success Fee under the Administration Charge without knowing anything about the Success Fee when it granted the Initial Order.

c. *Conclusion*

[63] The only question is whether the contingent fees, in particular the Success Fee, are part of the Administration Charge. As this Court has also already determined, the Agreement provided that the Success Fee was contingent on approval by RBC of a sale "sourced by" Mr. Ross. Thus, Mr. Ross was involved in the Second Aecon Offer.

[64] PWC suggests that securing the Success Fee under the Administration Charge is contrary to the intent of the Initial Order. With respect, the ordinary meaning of the words used in the Initial Order are clear; the CRA (Advisor) is entitled to have its fees and disbursements secured by the Administration Charge. Even if there is some vagueness in the meaning of those words, ***1542563 Ontario*** indicates that a broad and liberal interpretation should be applied to achieve the Court's objectives. This Court finds that the purpose of an Administration Charge is to ensure the efficacy of the *CCAA* process by assuring professionals that they will be paid. Otherwise, those professionals will be reluctant to accept assignments or contracts with corporations in financial difficulty. A broad and liberal interpretation of the Initial Order is that the fees and disbursements payable to Mr. Ross and secured by the Administration Charge are those contained in the Agreement, including the Success Fee.

[65] The Success Fee to which Mr. Ross is entitled is secured by the Administration Charge.

4. Are E & Y's fees payable from the Completion Fee, the Success Fee, or must Cow Harbour pay them?

[66] E & Y's fees are payable from the Success Fee under the terms of this Court's order of June 1, 2010, which provided:

> 2. The engagement of Ernst & Young pursuant to the terms set out in the First Report of the Chief Restructuring Advisor ("the Advisor") and the engagement letter of Ernst & Young dated May 26, 2010 is hereby approved as provided therein.

[67] The First Report of the CRA provided at para. 8:

> (iii) The CRA offered to cover the cost of E & Y from his "success fee" if such was earned and paid to the CRA. The "success fee" is described in paragraph 8 of the Monitor's Third Report. If no fee is earned and paid to the CRA, the cost associated with E& Y would be borne by the Company.

[68] Thus, E & Y's fees are payable by Mr. Ross from the Success Fee, as finally negotiated.

V. Conclusion

[69] Mr. Ross's application for payment of the Completion Fee is denied, while his application for payment of the Success Fee is granted. The Success Fee to which Mr. Ross is entitled will be negotiated among the parties or determined by this Court. The Success Fee will be secured by the Administration Charge. E & Y's fees will be payable by Mr. Ross from the Success Fee.

Heard on the 11th day of January, 2010.
Dated at the City of Edmonton, Alberta this 1st day of March, 2011.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Howard Gorman and Randall Van de Mosselaer for PWC
Macleod Dixon LLP

Daniel Carroll, Q.C. for Patrick Felix Ross
Field LLP

Ray Rutman for RBC
Fraser Milner Casgrain LLP

TAB 6

Court of Appeal for Saskatchewan
Docket: CACV2680

Citation: *Grey Owl Engineering Ltd. v Propak Systems Ltd.*, 2015 SKCA 108
Date: 2015-10-14

Between:

Grey Owl Engineering Ltd.

Appellant
(Respondent)

And

Propak Systems Ltd.

Respondent
(Applicant)

Before:	Jackson, Caldwell and Herauf JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Madam Justice Jackson
In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Mr. Justice Herauf
On Appeal From:	2015 SKQB 43, Saskatoon
Appeal Heard:	18 June 2015
Counsel:	Paul J. Harasen for the Appellant Jared D. Epp for the Respondent

Jackson J.A.

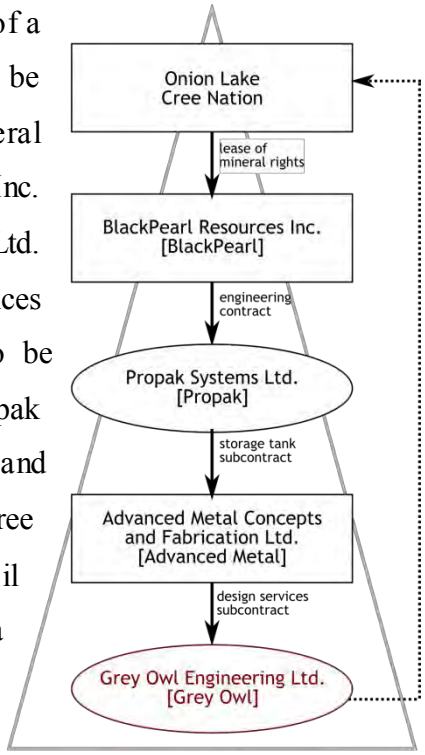
I. Introduction

[1] This is an appeal from a decision of the Court of Queen's Bench made pursuant to s. 56(4) of *The Builders' Lien Act*, SS 1984-85-86, c B-7.1 [*Act*], declaring a lien to be invalid and ordering the payment out of funds held in court to secure the lien: see *Propak Systems Ltd. v Grey Owl Engineering Ltd.*, 2015 SKQB 43 [*Propak Fiat*]. The learned Chambers judge declared the lien invalid on the basis that it was not filed in relation to an "improvement" as defined in s. 2(1)(h) of the *Act*.

[2] Resolution of the appeal turns on whether the Chambers judge erred in his approach to determining what constituted the improvement in this case. In my respectful view, the lien claimant must succeed in this Court for the reasons that follow.

II. Background

[3] The dispute between the parties arose in the context of a classic builders' lien pyramid of relationships, which may be described as follows: Onion Lake Cree Nation leased its mineral rights in a parcel of land to BlackPearl Resources Inc. [BlackPearl]. BlackPearl contracted with Propak Systems Ltd. [Propak] for engineering, procurement, and fabrication services connected to a modular oil extraction system that was to be provided by Propak for use on BlackPearl's leased land. Propak entered into a subcontract with Advanced Metal Concepts and Fabrication Ltd. [Advanced Metal] for the construction of three storage tanks to be used on the land as part of the modular oil extraction facility. In its turn, Advanced Metal entered into a subcontract with Grey Owl Engineering Ltd. [Grey Owl] to provide engineering design services relating to those storage tanks. Grey Owl, the lien claimant, filed its lien against the mineral parcel.



[4] Each storage tank was designed to be 24 to 38 feet tall and to weigh between 34,000 and 43,500 pounds. Each tank was to sit on an engineered gravel pad. Piles would run through the gravel pad and extend about 20 feet into the ground. An anchor chair would be welded to the base of the tank and then bolted to the piles. The three tanks would then be connected to the entire oil extraction facility through steel and fiberglass piping that would be bolted to the tanks.

[5] Grey Owl materially completed the required services, but Advanced Metal abandoned the project before any of the tanks were built and failed to pay Grey Owl for any of the engineering services that were provided in relation to the tanks. The unpaid amount was $95,884.95. Grey Owl then registered a lien against the leased land pursuant to the *Act*.

[6] Propak applied to the Court of Queen's Bench pursuant to s. 56(1) of the *Act* to vacate the lien registered by Grey Owl. This provision requires an applicant to pay into court the full amount claimed plus an extra 25% as security for costs. Propak did so; and, on November 6, 2014, Smith J. ordered that Grey Owl's registered lien be vacated. As a result of this order, and by virtue of s. 56(6) of the *Act*, Grey Owl's lien ceased to attach to the holdback or the land and became instead a charge on the amount paid into court. I have not reproduced s. 56 as this appeal does not turn on the exact wording of that section.

[7] Propak then applied to the Court of Queen's Bench pursuant to s. 56(4) of the *Act* for an order releasing the entire amount held in Court on the ground that Grey Owl was not entitled to register a lien under the *Act*. More particularly, Propak applied under s. 56(4) of the *Act* for an order paying out the funds on the basis that Grey Owl was not entitled to claim a lien as its engineering services were not provided in relation to an "improvement" as defined in s. 2(1)(h) of the *Act*:

> **Interpretation**
> **2**(1) In this Act: …
>
> (h) **"improvement"** means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
>
> (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

> (ii) the demolition or removal of any building, structure or works or part thereof;
>
> (iii) services provided by an architect, engineer or land surveyor;
>
> and **"improved"** has a corresponding meaning ….

[8] Propak submitted that the improvement in question in this case is the storage tanks, which in its submission were not sufficiently affixed to the land to meet the definition in the *Act*. Propak argued that s. 2(1)(h) of the *Act* should be given an "exhaustive and restrictive" interpretation, while Grey Owl argued for an "expansive" interpretation. Propak argued that Saskatchewan's legislation is similar to Ontario's and Alberta's, which (according to Propak) have been given so-called restrictive interpretations: *Kennedy Electric Ltd. v Dana Canada Corporation* (2006), 208 OAC 156 (Sup Ct (Div Ct)), aff'd 2007 ONCA 664, 229 OAC 156; *Canada Inc. v 879115 Ontario Ltd.* (2005), 42 CLR (3d) 220 (Ont Sup Ct); *Rahco International Inc. v Laird Electric Ltd.*, 2006 ABQB 592, 398 AR 332; and *Gauntlet Energy Corp., Re* (2003), 49 CBR (4th) 219 (Alta QB) at paras 4–14, leave to appeal denied 2004 ABCA 20, 49 CBR (4th) 225.

[9] Relying on *Majestic Contractors Ltd. v N.C.L. Contracting Ltd.* (1993), 117 Sask R 12 (QB) [*Majestic*], Grey Owl met these arguments by saying that its lien could be vacated only if it were "plain and obvious" that the lien is invalid. Grey Owl also resisted Propak's arguments by insisting that the storage tanks were sufficiently affixed to the land to constitute an improvement. In support of its position, Grey Owl relied on other decisions such as *Boomars Plumbing & Heating Ltd. v Marogna Bros. Enterprises Ltd.* (1988), 51 DLR (4th) 13 (BCCA).

III. Decision in the Court of Queen's Bench

[10] The Chambers judge issued a fiat granting Propak's application (see *Propak Fiat*). After referring to s. 2(1)(h) and s. 22(1), the Chambers judge began his analysis by stating the issues as follows:

> 1. Would the storage tanks constitute an "improvement" on the land, and thus be a thing capable of maintaining a builders' lien pursuant to s. 22(1) of the *Act*?
>
> (a) Is the statutory definition of "improvement" expansive in its meaning or exhaustive and restrictive?
>
> (b) If exhaustive and restrictive, what was the parties' intention for the tanks?
>
> (*Propak Fiat*, para. 6)

[11] In answering these questions, the learned Chambers judge accepted Propak's submissions. In the concluding paragraph of the judge's reasons, he wrote:

> [16] *The Saskatchewan legislation can most likely be characterized as "exhaustive" within the meaning of the case law*. It expressly contains an exception to the definition of "improvement" and directs the Court to examine the intention of the parties in determining each matter. In order to determine whether the tanks in the matter at hand are improvements and, thus, be a thing capable of maintaining a builders' lien, the Court must examine the intentions of the parties, including the degree of affixation and the ability of the tanks to be moved. *Upon considering all of the material before me in this context, I have concluded that the tanks are not improvements within the meaning of the* Act.
>
> (Emphasis added, *Propak Fiat*)

[12] The Chambers judge concluded that the storage tanks were capable of being moved, which he took as indicative of the parties' intention. The tanks were part of a modular system that could be relocated to any other heavy oil field in Saskatchewan once they were no longer needed on the proposed site. They were not designed to be moved around the site, but they were *capable* of being moved beyond that site once the project was finished. Since they were capable of being moved, the Chambers judge held that they were not an improvement. Since they were not an improvement, Grey Owl's claim of lien was not valid. The Chambers judge accordingly granted Propak's application and ordered that all of the money paid by Propak into court be released to Propak.

IV. Positions of the Parties

[13] In this Court, as often happens, the issues have become more refined. Grey Owl's primary argument is that the appeal should be allowed on the ground that it is not plain and obvious that the lien is invalid. Grey Owl also refers to this Court's approach to lien legislation as stated in *Axcess Capital Partners Inc. v Allsteel Builders(2) Limited*, 2015 SKCA 33 at paras 58–60, 457 Sask R 131 [*Axcess Capital*], and the cases referred to therein, including *Clarkson Company v Hansen* (1983), 22 Sask R 126 (CA) [*Hansen*]. Grey Owl asks that the appeal be allowed, which would mean that Propak's application under s. 56(4) in the Court of Queen's Bench would be taken as dismissed.

[14] Propak reiterates the arguments it made before the Chambers judge, namely that s. 2(1)(h) of the *Act* should be interpreted exhaustively and restrictively. Propak argues that

Saskatchewan's legislation has the most restrictive wording of any province's legislation because it excludes all things that are not affixed to the land or intended to become part of the land. According to Propak, other provinces exclude things that are not affixed nor intended to become part of the land. Both of these requirements must be satisfied in other provinces, while only one needs to be satisfied to trigger the exclusion in s. 2(1)(h) of Saskatchewan's legislation. Propak argues that the Chambers judge's conclusions on intention were reasonable.

[15] Propak says there is no need to adduce evidence of the subjective intention of the owner in order to prove intention. The Chambers judge's decision on intention was reasonable and was consistent with the holdings in several similar cases from other jurisdictions. The issue of intention is a question of fact or mixed fact and law, and it should be reviewed on a deferential standard. Finally, relying on *Arthur Andersen Inc. v Merit Energy Ltd*, 2002 SKCA 105, 220 DLR (4th) 351 [*Arthur Andersen*], Propak argues that this Court has endorsed a strict interpretation of lien legislation when determining who is entitled to claim a lien.

V. Analysis

[16] In my respectful view, this appeal does not turn on whether s. 2(1)(h) should be given an exhaustive or restrictive interpretation. The central issue is whether Grey Owl provided services "on or in respect of an improvement" and is thereby entitled to claim a lien under s. 22 of the *Act*:

> **Lien on land and materials and extension re minerals**
> **22**(1) A person who *provides services or materials on or in respect of an improvement* for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.
>
> (2) Where services or materials are provided:
>
> (a) preparatory to;
>
> (b) in connection with; or
>
> (c) for an abandonment operation in connection with;
>
> the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the services or materials, the lien given by subsection (1) is also a lien on:
>
> (d) all the estates or interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding that fee simple has expressly requested the services or materials;

> (e) the mineral when severed and recovered from the land while it is in the hands of the owner, and to the proceeds of the mineral and to the amounts to be paid in lieu of the proceeds of the mineral to the owner by a person that operates the mine, oil well or gas well;
>
> (f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines, mining claim or land, oil or gas well and the appurtenances thereto;
>
> but, in all other respects, this Act applies to the lien existing by virtue of this subsection notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.
>
> (Emphasis added)

On examination of s. 22, it can be concluded the Chambers judge fell into error when he asked whether the *storage tanks* were an improvement without giving effect to the other provisions of the *Act*.

[17] In order to determine whether someone is validly asserting a lien, the first step is to begin with s. 22 read as a whole. It is an error to consider the definitions apart from the section that creates the right being asserted. It is also an error to consider only one of the definitions referred to in the section, when others are relevant, notably the definitions of "contractor," "services," "owner," and "subcontractor" in conjunction with the definition of "improvement," which I will repeat for ease of reference:

> **Interpretation**
> **2**(1) In this Act: …
>
> (b) "**contractor**" means a person contracting with or employed directly by the owner or his agent to provide services or materials to *an improvement*, but does not include a labourer …
>
> (h) "**improvement**" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
>
> (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
>
> (ii) the demolition or removal of any building, structure or works or part thereof;
>
> (iii) services provided by an architect, engineer or land surveyor;
>
> and "**improved**" has a corresponding meaning; …
>
> (k) "**owner**" includes a person having an estate or interest in land, other than an encumbrance, at whose request, express or implied, and:
>
> (i) on whose credit;

(ii) on whose behalf;

(iii) with whose privity and consent; or

(iv) for whose direct benefit;

an *improvement* is made to the land; …

(q) "**services**" means any labour done or service performed *on or in respect of an improvement* and includes the rental of equipment and the wages of any operator provided with the equipment …

(t) "**subcontractor**" means a person, not contracting with or employed directly by an owner or his agent, but who provides services or materials to an improvement under an agreement with the contractor or under him with another subcontractor, but does not include a labourer ….

(Emphasis added)

[18] In short, it is a mistake to begin and end the inquiry with whether the storage tanks are the improvement. The issue is whether Grey Owl provided "services" "on or in respect of an improvement for an owner, contractor or subcontractor" within the meaning of s. 22 and, as part of this analysis, identify the improvement in question.

[19] The leading authority in this jurisdiction is *Hansen*, which outlines the method to determine whether a person has a claim for a lien relating to an improvement. In *Hansen*, these were the agreed facts (paraphrased):

(a) The Canadian National Railway [CNR] held a licence to remove gravel from certain pits belonging to McMillan Bros. Ltd.

(b) CNR retained Robert Brewster Construction (High River) Ltd. [Brewster] to excavate, crush and haul the gravel ballast to a stockpile.

(c) The digging and processing took place at or near the gravel pit site, but the stockpile was located some five miles distant and adjacent to a CNR right of way.

(d) Brewster rented equipment and hired independent truckers and others to supply services in the performance of its contract with CNR.

(e) All concerned were aware that CNR intended to incorporate the gravel ballast into its rail bed, and this was in fact done by CNR.

(f) The truckers, the equipment lessors, and others, including a number of drivers (all of whom were owed money by Brewster) claimed a lien for payment of their accounts on the footing they were entitled, under *The Mechanics' Lien Act*, RSS 1978, c M-7 (repealed), to liens against the funds being held.

[20] Thus in essence there were three sites in *Hansen*: (i) the gravel pit where digging and processing took place; (ii) the stockpiling site; and (iii) the rail bed into which the gravel would be incorporated in some fashion. In *Hansen*, the trustee argued that that neither the stockpiling, nor the incorporation of the gravel ballast into the rail bed, constituted an improvement, since the definition of that term excluded "a thing that is not affixed to the land or intended to be or become part of the land" (s. 2(h) of the *Act*). It was submitted that the gravel ballast was merely stored, temporarily, upon the stockpiling site—there was never an intention to leave it there—and that when the ballast was used in the rail bed it did not become "affixed" to the land; an article which is placed upon land and rests there only by force of its own weight is not a "fixture" within the meaning of the law.

[21] Cameron J.A., speaking for the Court in *Hansen*, did not accept these contentions. He reviewed the definitions of "materials," "services," "owner," and "subcontractor" in conjunction with the definition of "improvement," which are similar to the present definitions. Since the gravel was intended to be affixed to and incorporated into the CNR land, there was no doubt (i) "the gravel ballast became part of the land upon which the rail bed was located" (para. 16) and (ii) "the land upon which the line was located was the subject of an improvement." Specifically in relation to the stockpiling site, Cameron J.A. found it significant that Brewster had not only placed ballast there but had constructed the site, since Brewster had been required to clear and strip the topsoil, then to grade and slope the site, and finally to top it with gravel. He noted that the definition of "improvement" includes clearing, digging, filling and grading—as it does under the present *Act*.

[22] After making these comments, Cameron J.A. stated he was nonetheless not attracted to such an approach, preferring instead to consider *whether the reconstruction of the rail line constituted an improvement to the land* and then asking the question whether Brewster did any work upon that improvement or render any services for it:

> **[18]** I may say, however, that I am not attracted to this fractured approach: it strikes me as overly technical and excessively abstract. From time to time such an approach will be desirable, indeed necessary, to ensure that the benefits contemplated by the Act are realized in practice, as in *C.N.R. v. Nor-Min Supplies Limited*, (1977) 1 S.C.R. 322. But in this case I doubt the propriety of reasoning after that fashion. I prefer to think that the C.N.R. owns a narrow band of land, which falls within, and crosses the east half of section 25-44-17 W3, in a north-south direction; on part of this land is situated the rail bed and the track, next are the adjoining ditches, followed, on the east side, by a strip of

> land about 60 meters wide and just over one kilometre long, upon which the ballast was stockpiled for use in rebuilding the line. *The real issue, it seems to me, is whether the reconstruction of the rail line, constituted an "improvement" to this land. And about this I have no doubt--there was an improvement to the C.N.R.'s property as contemplated by The Mechanics Lien Act ….*
>
> (Emphasis added, *Hansen*)

[23] This approach, which focuses on the main contract or contracts rather than its individual subcontracts and the work being done under them, has been consistently followed and applied in this jurisdiction. In *Pritchard Engineering Company v Coronach*, [1983] 30 Sask R 137 (QB), the main contract was between the owner, the town of Coronach, and Wes-Can Underground Ltd. and involved the construction of a water supply line and associated tasks within the water treatment plant. Wes-Can hired Ray's Transport Ltd. to transport equipment to the job site at Coronach and upon termination of the work to return the equipment to Saskatoon. Applying *Hansen*, Sirois J. found first that the construction work under the main contract was an "improvement" (para. 5) and second that Ray's Transport had provided services "in respect of" that improvement (para. 16). He concluded by saying, "The hauling of the equipment by Ray's Transport to a point on the improvement site was solely to enable Wes-Can Underground Ltd. to carry out its contract with the Town of Coronach."

[24] Similarly, in *BWV Investments Ltd. v Saskferco Products Inc*. (1993), 114 Sask R 306 (QB), MacPherson C.J.Q.B. applied *Hansen* to uphold a claim of lien for the rental of 29 trailers located on the building site and used in the construction of the Saskferco fertilizer plant. As part of his reasoning, MacPherson C.J.Q.B. noted that neither the trailers, nor any part of them, were consumed by or integrated into the actual construction of the fertilizer plant, but that such a finding did not determine the validity of the lien (para. 14). He held that the supply of the trailers constituted a "service performed on or in respect of" the construction of the fertilizer plant (para. 24). This Court allowed an appeal from this decision (see *BWV Investments Ltd. v Saskferco Products Inc*. (1994), 125 Sask R 286 (CA) [*Saskferco CA*]) on the basis that the dispute was governed by Article 8(1) of the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008), as set out in the schedule to *The International Commercial Arbitration Act*, SS 1988-89, c I-10.2, but the Court was not required to consider MacPherson C.J.Q.B.'s application of *Hansen*.

[25] Finally, in *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 84 Sask R 277 (QB), counsel for the Bank argued that steel poles modified and delivered by subcontractors, for use in Saskatchewan Power's transmission lines, could not be considered improvements because the poles were movable. MacLean J. rejected this argument, finding that the improvement in question was not the poles but the transmission line itself. This Court affirmed the decision in brief oral reasons (see (1990), 84 Sask R 275 (CA)). Neither the Court of Queen's Bench nor this Court referred to *Hansen*, but both Courts appear to have taken it as self-evident that the improvement was the work the owner was performing on the land and not the work performed by the various subcontractors and others contracting with them.[1]

[26] In *Hansen*, Cameron J.A. stated, "the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so" (para. 30). This approach to builders' lien legislation has a long provenance in this jurisdiction. In *Galvin Luber Yards v Ensor*, [1922] 2 WWR 15 (Sask CA), this Court followed commentary describing the object of the legislation as being (i) "to prevent the owner of lands, whatever his estate in them, from getting the labor and capital of others without compensation" (p. 18, quoting Samuel Louis Phillips, *A Treatise on the Law of Mechanics' Liens on Real and Personal Property*, 2d ed (Boston: Little, Brown, and Company, 1883) at 296); and (ii) to ensure "by a cheap and expeditious method the payment for work and materials out of property upon which the work has been done, or for which materials have been provided" (quoting William Bernard Wallace, *Mechanics' Lien Laws in Canada*, 2d ed (Toronto: Canada Law Book Company, 1920) at 10).[2]

[27] Since the present Act was enacted in 1986, this Court has commented on its purpose on several occasions. In *Town-N-Country Plumbing & Heating (1985) Ltd. v Schmidt* (1991), 93 Sask R 278 (CA) [*Town-N-Country*], Cameron J.A. for the Court mentioned two purposes, including that the statute is "concerned with the commercial interests of others, including the owner and the financier, if any, of the improvement" (para. 27); and he stressed that the "statute

[1] In their text on point, Messrs. Gough and Hirschfeld, *Saskatchewan Builders' Lien Manual*, 2d ed (Regina: Law Society of Saskatchewan Library, 2014) at 17 cite *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 84 Sask R 277 (QB), aff'd 84 Sask R 275 (CA), along with *Uranerz Exploration and Mining Ltd. v Blackhawk Diamond Drilling Inc.* (1989), 82 Sask R 169 (QB) and *Northern Industrial Carriers Ltd. v TransGas Ltd.*, [1996] SJ No 37 (QL) (QB) to demonstrate the breadth of the definition of "improvement."

[2] Both quotations are cited in Macklem, et al, *Construction Builders' and Mechanics' Liens in Canada*, 7th ed, vol 1 (Toronto: Carswell, 2005) at 3.1, paras 3–4.

is primarily concerned with the commercial interests of persons who, under contract and on credit, contribute service or material to the improvement of real property, whether under contract to the owner, to the contractor engaged by the owner, or to any subcontractor" (para. 26). As to how the two purposes interact with each other, he noted importantly that "both purposes may be seen to run through the scheme of the statute" (para. 28).

[28] This Court also considered the purpose of the *Act* in *Saskferco CA*. Gerwing J.A., for the Court, reproduced the above quoted passages from *Town-N-Country*. She also cited, with approval, a decision from the British Columbia Court of Appeal: *Defazio Bulldozing & Backhoe Ltd. v W.A. Stephenson Construction (Western) Ltd.* (1986), 28 DLR (4th) 291 (BCCA) [*Defazio*], which considered their *Builders' Lien Act*, RSBC 1979, c 40. In *Defazio*, the British Columbia Court of Appeal commented on the purpose of the statute:

> [4] Clearly, the purposive intent of the legislature in enacting the Act is to preserve, primarily through the trust provisions (s. 2) and the holdback provisions (s. 20), and to direct the contract moneys for the "improvement", whether coming from the "owner" or a mortgagee advancing a building loan, to "persons" entitled thereto as having contributed "work" and "material" to the making of the "improvement" and *to prevent the "owner" from getting the benefit of "work" and "material" without paying for it.*
>
> (Emphasis added, p. 293)

[29] See also *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v Alliance Pipeline Ltd*., 2002 SKCA 145 at para 14, [2003] 4 WWR 29 and, most recently, *Axcess Capital* at paras. 58–60 and *PCL Industrial Management Inc. v Agrium*, 2015 SKCA 55 at paras 26–28, 457 Sask R 298, where the Court again emphasized the remedial nature of the *Act*.

[30] Two factors dictate the Saskatchewan Legislature's approach to its builders' lien legislation. The first factor is that, unlike any other commercial endeavour, the work, services and materials supplied to an improvement are provided on credit in a pyramidal structure, where payment often depends on whether the parties in the pyramid above the lien claimant are paid. The second factor is that the ordinary law of contract does not provide sufficient remedies to ensure that the contract funds flow from the top of the construction pyramid to those entitled to receive them. The statute supplements the law of contract and fosters the provision of credit in a complex piece of legislation designed to assist and facilitate construction: see Gary G.W. Semenchuck Q.C., et al, *Liens in the Construction Industry: A Report Prepared for The Hon. J. Gary Lane, Q.C., Minister of Justice by The Special Advisory Committee to the Minister of*

Justice on Builders' Liens (Regina: Saskatchewan Justice, August 1984) at i–ii and referring to *Hansen*.

[31] A restrictive reading of s. 22 does not serve the interests of those who provide services and materials on credit. To do so would not be in line with the protective purpose of the *Act*. Arguably, a restrictive reading of s. 22 does not serve the commercial interests of the owner and financier of an improvement either in that uncertainty as to who is or who is not entitled to a lien can only increase costs, either in the fixing of the contract price or in the litigation that will inevitably arise.

[32] Propak relies on *Arthur Andersen* to argue that a strict interpretation should be given to the definition of an "improvement" because this interpretation dictates who will be entitled to claim a lien. In *Arthur Andersen*, this Court considered whether a contract constituted a "single contract" for the purpose of s. 29 of the *Act*, which deals with general liens. The Court referred to *Clarkson Company Ltd. v Ace Lumber Ltd.*, [1963] SCR 110 [*Clarkson Company*], where the Supreme Court held that mechanics' lien legislation must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it. It would appear that the approach to statutory interpretation articulated in *Clarkson Company* has been overtaken by such authorities as *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, *Bell ExpressVu Limited Partnership v Rex,* 2002 SCC 42 at paras 28–30, [2002] 2 SCR 559; and *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 at paras 32 and 33, [2005] 3 SCR 425 [*Merk*]. In *Merk*, the Supreme Court of Canada referred to the need to determine the real intention of the Legislature.

[33] That now brings me to the final issue that must be resolved on this appeal: whether Grey Owl is entitled to claim a lien. The issue for this Court, however, narrows to whether it is sufficiently plain and obvious that Grey Owl's lien should be declared invalid so as to permit the monies secured by its lien, and being held in court as security, should be paid out to Propak pursuant to s. 56(4).

[34] In answering this question, some things are clear. First, it is clear that Grey Owl provided "services." The definition of "services" includes "*any* labour done or service performed," including equipment rental. The definition of "improvement" in s. 2(1)(h)(iii) also demonstrates

the clear legislative intent to extend rights to those who provide *design services*. Second, it is also incontestable that Grey Owl contracted with a "subcontractor," i.e., Advanced Metal. The only real issue is whether Grey Owl provided its services "on or in respect of an improvement."

[35] This question, however, is answered by Propak's own evidence. In support of its application under s. 56(4), Mr. Jeremy Stauth on behalf of Propak attested to the following:

> 2. Propak is in the engineering and fabrication industry. *Propak specializes in providing engineering, fabrication, procurement, construction and field services with respect to the production and processing of oil and gas*.
>
> 3. Propak has two different contracts (both of which were made effective March 21, 2014) with BlackPearl Resources Inc., an oil and gas company ("BlackPearl").
>
> 4. The first contract is an Engineering, Procurement and Fabrication contract (the "EPC Contract"). Under the EPC Contract, Propak is obligated to provide engineering, procurement and fabrication services to BlackPearl.
>
> 5. The second contract is a Field Construction contract. This contract governs the installation of the fabricated and procured materials.
>
> 6. On October 20, 2006 BlackPearl executed a lease (the "Lease") with the Onion Lake Cree Nation with respect to the mineral rights on the following mineral parcel located within Saskatchewan (the "Mineral Parcel"): Reference Land Description: BlklPar H Plan No. 101766494 Ext. 0 As described on Certificate of Title BF1 00942755
>
> …
>
> 8. The Lease gives *BlackPearl the right to extract oil* from the Mineral Parcel *using a form of oil recovery technology referred to in the industry as Steam Assisted Gravity Drainage* ("SAGD"). SAGD is an enhanced oil recovery technology that harnesses the power of steam to produce heavy crude oil and bitumen.
>
> 9. After the EPC Contract was executed, Propak retained Advanced Metal Concepts and Fabrication Ltd. ("Advanced Metal") to build three storage tanks. *These tanks were to be used by BlackPearl as part of their oil extraction system*.
>
> 11. Advanced Metal then retained Grey Owl Engineering Ltd. ("Grey Owl") for the purposes of preparing some engineering drawings with respect to the storage tanks.
>
> (Emphasis added, November 28, 2014, Affidavit, Appeal Book, p. 4)

[36] As can be seen from the Stauth affidavit, Grey Owl was retained to provide engineering drawings with respect to storage tanks that were to be used by the contractor or principal subcontractor "as part of their oil extraction system." In such circumstances, it is an error to ask whether the claimant claims a lien in the storage tanks as an "improvement." Applying *Hansen*, the "improvement" with respect to which the legislation is concerned is the project that will lead to the extraction of oil. When this principle is understood, it is clear that Propak's application

could not be allowed. It is not sufficiently plain and obvious that Grey Owl's lien is invalid on the basis put forward by Propak: that Grey Owl did not provide services "on or in respect of an improvement for an owner, contractor or subcontractor" in accordance with s. 22.

[37] Having found error in the decision of the Chambers judge, it is necessary to determine the next step. As I have indicated, Grey Owl did not ask this Court to go on to make any other order, if we were to allow the appeal. Grey Owl maintains the position it took in the Court of Queen's Bench that Propak's application should be dismissed leaving the parties to pursue the usual remedies under the *Act*.

[38] In the end, the appeal must be allowed. The Chambers judge erred by not dismissing Propak's application under s. 56(4). The effect of allowing the appeal is that the parties resume the same positions they occupied before the application was made. Grey Owl's lien continues to be a charge on the funds in court according to s. 56 until further steps are taken by the parties dealing with the funds and until further order of the Court of Queen's Bench.

VI. Conclusion

[39] The appeal is allowed with costs to Grey Owl in this Court and in the Court of Queen's Bench.

"Jackson J.A."

Jackson J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Herauf J.A."

Herauf J.A.

TAB 7

Court of Queen's Bench of Alberta

Citation: Davidson Well Drilling Limited (Re), 2016 ABQB 416

Date: 20160725
Docket: 1303 08651
Registry: Edmonton

In Bankruptcy and Insolvency

In the matter of Davidson Well Drilling Limited

And in the Matter of Recognition of the Order of the Ontario Superior Court of Justice Dated April 16, 2013

Applicant	Pricewaterhousecoopers Inc. in its Capacity as Court-Appointed Receiver of Davidson Well Drilling Limited
Respondent	Bank of Montreal

Corrected judgment: A corrigendum was issued on July 26, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Madam Justice J.M. Ross

Introduction

[1] The Court-appointed Receiver of Davidson Well Drilling Limited [Davidson] seeks approval of its proposed distribution of lien funds. Lien claimants Century Wireline Services [Century], Clean Harbors Energy and Industrial Services Corp [Clean Harbors], 72619 Alberta Ltd (o/a Roughrider International) [Roughrider], Bruno's Trucking Ltd [Bruno's] and Acme

Energy Services Inc [Acme] [collectively, the Lienholders] bring cross-applications to have their liens declared valid.

[2] The lien claims relate to work done by Davidson on two Syncrude Canada Ltd [Syncrude] sites known as the Aurora Mine Site and the Base Mine Site [jointly the Syncrude Sites]. The Syncrude Sites are open pit mine sites on lands subject to oil sands leases.

[3] The projects were described as the Methy Well Work and the Coring Work [jointly the Work].

[4] Davidson contracted with the Lienholders to assist in performing its obligations in relation to the Work.

[5] Syncrude terminated its agreement with Davidson on February 25, 2013. The Receiver was appointed on April 16, 2013.

[6] The Receiver reached a settlement with Syncrude regarding the accounts receivable by Davidson from Syncrude in respect of the Work, which was approved by the Court in an Order pronounced on November 6, 2015 and varied on November 30, 2015 [the Settlement Order]. The Settlement Order also provided that certain liens in relation to the Work were declared valid, and should be paid out from settlement funds.

[7] The Settlement Order scheduled the following applications for hearing:

a. The Receiver's application for a declaration that the Syncrude Sites are open pit mines and that the Work was not done in relation to the extraction of oil or gas, nor was the work done, services performed or materials supplied to an oil and gas well site;

b. Applications and Cross Applications respecting the invalidity or validity of the balance of the lien claims registered against the Syncrude Sites.

[8] An additional issue was set for hearing, whether the settlement payment constituted one lien fund or was broken down into two lien funds respecting each of the Aurora and Base Mine Sites. The parties have agreed that that matter does not need to be determined, as there are sufficient funds available under either project to cover the liens.

The Work

[9] The Receiver provided information from an employee of Syncrude describing the Work. The Work consisted of resource coring, drilling, geotechnical testing, sonic/auger rig drilling, dewatering/depressurizing and exploration work (Affidavit of Christa Piercy).

[10] The Lienholders provided further information about the Work. Some of this information was disputed by the Receiver as hearsay or opinion. However, the following facts regarding the nature of the Work are not disputed:

1. Davidson was a drilling contractor, specializing in environmental drilling;
2. The Work was performed on open pit mine sites (Affidavit of Christa Piercy);
3. The Work did not involve mineral extraction or the direct recovery of oil and gas, whether in the form of petroleum, natural gas or bitumen (Affidavits of Christa Piercy and Robert Racz);

4. The Work involved drilling wells for resource coring. The purpose of resource coring was to explore the location of bitumen from which oil would be processed (Affidavit of Robert Racz; Supplemental Affidavit of Robert Racz);

5. The well holes penetrated a stratum capable of containing a pool or oil sands deposit (Affidavit of Robert Racz).

Was the Work with respect to improvements to an oil or gas well or to an oil or gas well site?

[11] This is the primary issue on this application. It is an important issue, because it determines whether a 45-day or 90-day lien period applies. I have reframed the Receiver's question somewhat to reflect the language of the *Builders' Lien Act*, RSA 2000, c B-7[*BLA*] that gives rise to the issue.

Statutory provisions

[12] Section 6(1) of the *BLA* provides in relation to the creation of a lien:

> 6(1) Subject to subsection (2), a person who
>
> (a) does or causes to be done any work on or in respect of an improvement, or
>
> (b) furnishes any material to be used in or in respect of an improvement,
>
> for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.
>
> (2) When work is done or materials are furnished
>
> (a) preparatory to,
>
> (b) in connection with, or
>
> (c) for an abandonment operation in connection with,
>
> the recovery of a mineral, then…the lien given by subsection (1) attaches to all estates and interest in the mineral concerned…

[13] An "improvement" is "anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land": *BLA*, s. 1(d).

[14] "Work" includes "the performance of services on the improvement" (*BLA*, s 1(p)) and rental of equipment while it is "on the contract site or in the immediate vicinity of the contract site" (*BLA*, s 6(4).

[15] The lien period is addressed in sections 18 and 41 (emphasis added):

> **18(1)** Irrespective of whether a contract provides for instalment payments or payment on completion of the contract, an owner who is liable on a contract under which a lien may arise shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 45 days from

(a) the date of issue of a certificate of substantial performance of the contract, in a case where a certificate of substantial performance is issued, or

(b) the date of completion of the contract, in a case where a certificate of substantial performance is not issued.

(1.1) Notwithstanding subsection (1) and irrespective of whether a contract provides for instalment payments or payment on completion of the contract, an owner who is liable on a contract with respect to improvements to an oil or gas well or to an oil or gas well site under which a lien may arise shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 90 days from

(c) the date of issue of a certificate of substantial performance of the contract, in a case where a certificate of substantial performance is issued, or

(d) the date of completion of the contract, in a case where a certificate of substantial performance is not issued.

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

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

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the last of the materials if furnished or the contract to furnish the materials is abandoned.

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

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

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the performance of the services is completed or the contract to provide the services is abandoned…

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

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

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

[16] The terms "oil or gas well" and "oil or gas well site" are not defined terms under the *BLA*.

[17] The terms "oil well", "gas well", "well", "mine site" and "oil sands site" are defined in other Alberta legislation involved in the regulation of the energy industry in Alberta; primarily the *Oil and Gas Conservation Act*, RSA 2000, c O6 (*OGCA*) and the *Oil Sands Conservation Act*, RSA 2000, c O-7 (*OSCA*).

[18] Under the Oil and Gas Conservation Rules, Alta Reg 151/1971 (O&G Regs), "oil well" is defined as:

> 1.020(2)(8)(i) a well that produces primarily liquid hydrocarbons from a pool or portion of a pool in which the hydrocarbon system is liquid or exhibits a bubble point on reduction of pressure…

and "gas well" is defined as:

> 1.020(2)(12)(i) a well that produces primarily gas from
>
> A. a pool or portion of a pool in which the hydrocarbon system is gaseous or exhibits a dew point on reduction of pressure, or
>
> B. coal by in situ gasification…

[19] "Well" is defined in the *OGCA*:

> 1(1)(eee) "well" means an orifice in the ground completed or being drilled
>
> (i) for the production of oil or gas…
>
> (iii) as an evaluation well or test hole, or
>
> (iv) to or at a depth of more than 150 metres, for any purpose…

[20] The *OSCA* provides the following definitions in s. 1:

> (j) "mine site" means an area within which mining operations are being conducted or that is the subject of an approval under this Act for a mining operation…
>
> (l) "oil sands" means
>
> (i) sands and other rock materials containing crude bitumen,
>
> (ii) the crude bitumen contained in those sands and other rock materials, and
>
> (iii) any other mineral substances, other than natural gas, in association with that crude bitumen or those sands and other rock materials referred to in subclauses (i) and (ii)…
>
> (n) "oil sands site" means an in situ operation site, a mine site or a processing plant, or any one or more of them…

[21] The *OGCA* defines the Regulator as the Alberta Energy Regulator. By virtue of the *OSCA*, s 5, and the *OGCA*, s 94, except as otherwise provided in those or other Acts, the Regulator has exclusive jurisdiction to examine, inquire into, and determine all matters or questions arising under those Acts. The Regulator has designated both the Aurora Site and the Base Mine Site as mines.

Interpretive principles and case law

[22] The following principles apply to the interpretation of the *BLA*:

1. *Interpretation Act*, RSA 2000, c I-8, s 10: "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects."
2. ***Re Rizzo & Rizzo Shoes Ltd***, 1998 1 SCR 27 (SCC) at para 21: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
3. ***Maple Reinders Inc v Eagle Sheet Metal Inc***, 2007 ABCA 247 at para 31: "[The *BLA*] is remedial in character; its purpose is to secure the parties entitled to its benefits for the value of work done and materials supplied." Accordingly, a "technical argument [that] fails to accord with these established principles" should be rejected: para 24.
4. ***Tervita Corporation v ConCreate USL (GP) Inc***, 2015 ABCA 80, para 5, citing ***Clarkson Co v Ace Lumber Ltd***, [1963] SCR 110 at p 114: A liberal interpretation of the *BLA* is called for with regard to the scope of lien rights, while a strict interpretation applies to the procedure that is required to enforce a lien.

[23] The 90-day period for liens "with respect to improvements to an oil or gas well or to an oil or gas well site" defines the period during which an owner is obligated to retain an amount equal to 10% of the value of the improvements, and during which a lienholder is entitled to register a lien. This is not a matter of procedure to enforce a lien, it relates to the scope of the lien right before any enforcement steps are required or taken. I conclude that a liberal interpretation, consistent with the remedial purpose of the *BLA*, is called for.

[24] Counsel located one case dealing with the definition of an "oil or gas well" or "oil or gas well site": ***Williams Scotsman of Canada Inc v Farm Kitchens Inc*** (30 April 2014), Calgary 1301-06799 (ABQB) [***Williams Scotsman***]. Master Mason considered whether the Sawn Lake facility fell within the definition of "oil or gas well" or "oil or gas well site". The Master noted that the site had the following features:

(a) The plant located on site was an oil battery and gas plant;

(b) The plant was connected to the extraction site by pipeline;

(c) Minerals were extracted from the extraction site, and flowed into the plant where they were processed and placed in tanks for shipment by pipeline off site; and

(d) There were no oil and gas wells on site and no extraction took place on site.

[25] In determining that the Sawn Lake facility did not fall within the definition, Master Mason commented:

(a) Both "oil or gas well" and "oil or gas well site are not defined in the *BLA*;

(b) "Courts have long adopted Driedger's modern principle as to the method to follow for statutory interpretation:…the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament";

(c) "The grammatical and ordinary meaning of the words 'oil or gas well' or 'oil or gas well site' relate to the well itself and the area around the well that serves the extraction process"; and

(d) "Had the legislature intended that a longer lien period be granted to providers of services and materials to [a]broader extent…it could easily have included such language, as it did, for example, in section 6(2) of the Act. There, the Legislature created a lien for the furnishing of work and materials 'preparatory to, in connection with, or for an abandonment operation in connection with the recovery of a mineral'. Such language was not used in section 41(2)(b)."

Hansard

[26] Both the Receiver and the Lienholders refer to the Alberta Hansard, Bill 22, the Builder's Lien Amendment Act, 2001, November 13 & 14, 2001 at 997-1000 and 1055-1057 for assistance in the interpretation of the terms "oil or gas well" and "oil or gas well site".

[27] The mover of second reading of the Bill which amended the *BLA* to include the extended 90-day lien period stated:

> For some years now we have been hearing from members of the oil and gas industry that the Builders' Lien Act is not working well for them in certain situations. The Canadian Association of Oilwell Drilling Contractors and the Petroleum Services Association of Canada have told us that typically payments for certain work in the oil and gas sector are not made within 45 days from the completion date. As a result, legal remedies against nonpayments that are now provided by the Builders' Lien Act are not in practice available to this industry sector. The industry has requested that we extend the present 45-day filing period for liens to 90 days.
>
> …Bill 22 extends the filing period for liens to 90 days effective April 1, 2002. However, it specifies that this extension only applies to contractors that drill oil and gas wells or service oil and gas well sites as they are the only ones that are affected by the unique industry payment practices…

[28] Comments by other Members of the Legislative Assembly included:

> We would never obstruct the ability of any organization or group of companies to earn income and to get paid for services once they have provided those services, and this certainly seems to be a streamlining kind of process for what is really a small piece of the oil and gas industry in this province.
>
> They don't have some of the same options as larger organizations have, which would be interim billing or any kind of prorated payment structure. These folks need to wait till the very end of their project to get their money, and if for some reason the money isn't forthcoming, then they have a real tough time securing

> those dollars at a later date. So to give them a little extra time to put a lien in if necessary…
>
> …
>
> [T]his amendment will be beneficial for the oil and gas sector in this province because it will better reflect and enhance the oil and gas industry payment practices, where payment is typically not made in full, as I understand it, within the 45-day period.
>
> …It is an amendment that while other people may consider it just a matter of routine, we need to recognize and understand the importance of the oil and gas well drilling industry and the fact that this drilling and service industry is seasonal in this province… As well, it has its ups and downs, which are reflected in the international prices of both oil and gas.

[29] I note that, other than the comments in Hansard, there was no evidence before me as to what industry payment practices were intended to be accommodated by the extended lien period, or the scope or extent of those practices within the industry, or whether they applied to Davidson and the Lienholders either generally or in relation to the Work.

[30] There is evidence that the drilling involved in the Work was seasonal in nature. For economic, safety and efficiency reasons, sites are accessible only after spring break-up.

Positions of the parties

[31] The Receiver's position is that the terms "oil or gas well" and "oil or gas well site", which were added to the *BLA* in 2001, refer to wells drilled for the purpose of producing oil or gas, as defined in the O&G Regs, and the sites where such wells are located. The Receiver submits that the Work was not done in respect of improvements to an oil or gas well or an oil or gas well site. The Syncrude Sites are open pit mines subject to oil sands leases. The wells drilled as a part of the Work were not for the purpose of extracting oil or gas.

[32] The Receiver submits that the legislation and Hansard indicate that the intention was for the 90-day lien period to apply to drillers and service providers on oil or gas wells and well sites. Oil sands sites were not mentioned in the legislation or in Hansard. Had the legislature intended to include oil sands sites, they would have said so.

[33] The Lienholders submit that the definition of oil or gas wells in the O&G Regs, as wells for the production of oil or gas, is not an appropriate guide to the term in the *BLA*. The *BLA* is not concerned with production of oil and gas. The intention of the extended lien period in the *BLA* is to benefit "contractors that drill oil and gas wells or service oil and gas well sites". It was the activities, and the importance of those activities to the economy of the province, that was important to the legislators.

Analysis

[34] The 90-day lien period was intended to apply to the part of the oil and gas industry that drills and services oil or gas wells. The lien period applies both to the drilling of oil or gas wells, and to sites where oil or gas wells are serviced.

[35] "Oil or gas wells" include exploratory wells, evaluation holes or test wells. This is consistent with the definition of wells in the *OGCA*, and with the general scope of lien rights

under the *BLA*, which extend to preparatory work: ***Peter Hemingway Architect Ltd v Abacus Cities Ltd***, [1980] 6 WWR 348, at para 10 (Alta CA) [***Hemingway***].

[36] In ***Hemingway***, the Alberta Court of Appeal held that "improvements" under the *BLA* are not limited to work directly performed on a physical construction on land, but also apply to preparatory work for the purpose of an intended construction. The Court noted that the definition of improvement "speaks of the future as well as the present": para 10. An "improvement" is "anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled": *BLA*, s. 1(d).

[37] ***Hemingway*** is not directly applicable to this case. The issue here is not whether the Work was "in respect of an improvement". It had to be in respect of an improvement to give rise to entitlement to either a 45-day or a 90-day lien. The Receiver acknowledged that the Work was in respect of an improvement when it obtained Court approval to pay out liens registered within 45 days of termination of the contract. The issue is whether the improvement was "to an oil or gas well or to an oil or gas well site." However, the broad definition of improvement provides a guide to the interpretation of these terms, and an indication that the narrow definition in the O&G Regs should not be adopted. Just as an improvement includes preparatory services; an oil or gas well includes an exploratory well.

[38] The definitions of "oil well" and "gas well" in the O&G Regs are not a useful guide to interpretation of the *BLA*. The O&G Regs are secondary legislation enacted 30 years before the amendments to the *BLA*. Nothing in the language of the *BLA* or the Hansard discussion suggests that the O&G Regs were in the minds of the legislators.

[39] Hansard is consistent with the view put forward by the Lienholders; that the concern of the legislators was the activity of oil or gas well drilling or servicing, and the industry associated with those activities. The inclusion of oil or gas well sites ensured that service providers' lien rights would be included, as well as drillers' lien rights. Nothing in Hansard or the language of the *BLA* suggests that lien rights of drillers should be restricted depending on the location of their work.

[40] The Work performed by Davidson, resource coring, involved the drilling of exploratory oil or gas wells. The purpose of the wells was to locate bitumen, from which oil would be processed. As the wells were exploratory, there was also the potential that oil or gas could be discovered. In my view these features bring the wells within the ordinary and grammatical meaning of oil or gas wells.

[41] The decision in ***Williams Scotsman*** is not inconsistent with this interpretation. Master Mason held that the terms relate "to the well itself and the area around the well that serves the extraction process". She did not suggest that both features must be present. The Sawn Lake facility had neither.

[42] The language in s 6(2) of the *BLA* providing lien rights to work "preparatory to", "in connection with", or "for an abandonment operation in connection with the recovery of a mineral" may include types of work not covered in s 41(2)(b), such as, perhaps, work in connection with an abandonment of an oil or gas well or oil or gas well site. But s 41(2)(b) applies to "improvements", which includes preparatory work.

[43] This interpretation best protects the drilling contractors and those providing services or materials to them, who were intended to benefit from the 90-day lien period. The interpretation

urged by the Receiver would mean that drilling contractors and subcontractors, doing the same work on different sites, would be subject to different lien periods. Depending on the location of their work, they could be denied the benefit of the extended lien period.

[44] This interpretation does have the consequence that different lien periods may apply to work on a site. For example, if there was other construction on the Syncrude Sites unrelated to the drilling of wells, the 45-day lien period would apply. That is a complication for those managing or working on a site; but it is a natural consequence of the legislation, which provides different lien periods for different types of work.

[45] In my view, this interpretation best accords with the language and purpose of the *BLA*. To the extent that there may be ambiguity, it finds further support in the principle calling for a liberal interpretation of provisions of the *BLA* regarding the scope of lien rights.

[46] The lien period in relation to the Work, and in relation to lien claims for all work or services on or in respect of the Work, is 90 days.

Other issues respecting the invalidity or validity of the balance of the lien claims

Century

[47] Century provided well bore depth measuring services on the Base Mine site. It filed a lien for $134,872.50 on May 1, 2013.

[48] In written materials filed in advance of the hearing, the Receiver claimed that Century's lien was registered against the wrong Syncrude lease. This argument was withdrawn at the hearing, based on the ***Ed Miller Sales & Rentals Ltd v R***, (1990) 22 Alta LR (2d) 9, 42 AR 350, at para 53, which held that "work performed anywhere on the large tract covered by the Syncrude leases is work performed on the contract site", for the purpose of lien registration.

[49] The 90-day lien period runs from "the day that the performance of the services is completed or the contract to provide the services is abandoned": *BLA* s. 41(2)(b).

[50] Century last provided services at the site on March 5, 2013. Century was not notified that Syncrude had terminated its agreement with Davidson on February 25, 2013, and anticipated that it would be required to return to the site in May or June 2013. On May 1, 2013, Century become aware that Davidson was in receivership.

[51] Regardless of which of these dates applies, the lien was filed within the 90-day lien period.

[52] The Century lien included amounts for standby and demobilization of its equipment. The Receiver submits that these amounts should be deducted from the lien, citing ***Ashwood Development Corporation Ltd v Douglas Rentals Ltd***, 1982 ABCA 2 [***Ashwood***]and ***Husky Oil Operations Ltd v Ledcor Industries Ltd***, 2002 ABQB 294 [***Husky Oil***].

[53] ***Ashwood*** involved a lien claim under s 4(4) of the *BLA*, which provided:

> 4(4) A persons who rents equipment…shall be deemed, for the purposes of this Act, to have performed a service and has a lien for a reasonable and just rental of the equipment while used on the contract site.

[54] The Court of Appeal held that, under this provision, standby charges for equipment were not included in the lien (at para 6):

> Equipment standing idle on a construction site contributes nothing to the improvement of the site. It is the working of it which creates the improvement and section 4(4) is in consonance with the general purpose of the Act when it restricts the lien for rental of equipment to a "reasonable and just rental of the equipment while used on the contract site.

[55] The *BLA* has since been amended and now provides in s 6(4):

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

[56] Century's lien was filed under s 6(1) for "work on or in respect of an improvement." No policy reason has been offered to interpret lien rights under s 6(1) more narrowly than lien rights of a renter of equipment under s 6(4).

[57] Century's standby work was work as defined by *BLA* s 1(p). The service provided by Century was the service of being available at a moment's notice to start working. Neither the equipment nor the employees required to be near it could otherwise be used by Century at these times since their services were pledged to Syncrude's benefit.

[58] I conclude that Century's standby charges are included in its lien.

[59] In ***Husky Oil*** this Court held that the cost of removing equipment from a site did not give rise to lien rights. The Court noted that the Alberta Court of Appeal in ***Schlumberger Holdings (Bermuda) Ltd v Merit Energy Ltd***, [2001] 10 WWR 631 [***Schlumberger***] held that the cost of transportation of equipment to a site is essential to the performance of work on an improvement, but declined to apply the same reasoning with respect to the costs of removing equipment from the site. With respect, I disagree. In my view, it clearly follows from the reasoning in ***Schlumberger*** that transportation costs of equipment from the site are properly included in a builder's lien. Where equipment is required on site on a temporary basis for the purpose of construction, it is essential to completion of the improvement both that the equipment be delivered to the site when it is needed, and that it be removed from the site afterwards.

[60] I conclude that Century's demobilization costs are included in its lien.

[61] Century's lien in the amount of $134,872.50 is declared valid.

Clean Harbors

[62] Clean Harbors supplied water trucks, vac trucks and porta-potties to the sites for Davidson. Clean Harbors registered two liens: one in the amount of $605,621.36 regarding work on the Aurora Site, and one in the amount of $798,042.90 on the Base Mine Site. Both liens were registered on April 19, 2013. Clean Harbors claimed that its last day of work on the Aurora Site was January 25, 2013 and on the Base Mine Site was January 28, 2013.

[63] The Receiver raised a number of issues regarding the Clean Harbors liens, including whether there was a single contract or a prevenient arrangement pursuant to which the work was undertaken, whether recovery fees could be included in the lien, and whether the liens were filed against the correct Syncrude lease. At the hearing the Receiver withdrew all objections to the

liens other than the issue of whether the lien period was 45 days (in which case the liens were filed out of time) or 90 days (in which case the liens were conceded to be valid).

[64] As I have found that the applicable lien period was 90 days, the Clean Harbors liens are declared valid in the claimed amounts.

Roughrider

[65] Roughrider provided site services related to repair and maintenance of Davidson's rigs and support equipment. Roughrider registered a lien in the amount of $38,525.55 on April 16, 2013. It last provided services on January 16, 2013. As the lien period is 90 days, Roughrider's lien was filed in time.

[66] The Receiver withdrew its objection to the Roughrider lien based on whether a prevenient arrangement had been established. The sole remaining issue regarding the Roughrider lien is whether its work was provided "in respect of an improvement".

[67] The equipment that Roughrider provided maintenance services to was not affixed to the lands or intended to become part of the lands. The Receiver relies on the case of ***Orban Industries Ltd v Gauntlet Energy Corporation***, 2004 ABCA 20, at paras 8 and 13 [***Orban***] for the proposition that labour and materials provided to structures that are not in themselves improvements, are not properly included in the lien.

[68] ***Orban*** is a decision of a single Justice of the Court of Appeal on a leave to appeal application. The chambers judge below held that the provision and installation of sour gas line heater/separator packages, used to extract natural gas, were not improvements. On the leave application, the issue was described as:

> …whether the chambers judge erred in determining that this equipment, its use, its method of installation and the method of affixation satisfied the definition of improvement under the *BLA*. In arriving at her conclusion that it did not, she considered the evidence before her, the purpose and use of the equipment and the specific method of affixation. She concluded, on the evidence before her, that the separator packages in this case were not intended to be or to become part of the land in question. She rejected what she called "the bald proposition" advanced by ***Orban*** that anything done to recover minerals is an improvement to the mineral interest under the *BLA*.

[69] The Appeal Justice held that the issue of whether ***Orban*** had a valid lien under the *BLA* was a question of mixed fact and law, and the standard of review was high. No sufficient error on the "fact specific" issue of whether there was an improvement was shown. The chambers justice had also not erred in law. The Appeal Justice held that the "proposition that a drilling well is an improvement and thus materials supplied or services render in connection with a well are, without more, entitled to a builder's lien" was not supported by the case law.

[70] There are important distinctions between ***Orban*** and this case. In this case it is clear that the Work constituted an improvement to the Syncrude lands. The existence of an improvement was conceded when the Receiver approved payment of liens registered within 45 days. The Receiver did not revoke this concession at the hearing. From the facts provided regarding the nature of the Work, there is no reason to question that it constituted an improvement, which includes "anything constructed, erected, built, placed, dug or drilled or intended to be

constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land": *BLA* s 1(d).

[71] The connection, if any, between the separators and any improvement to the land is not clear from the decision in ***Orban***. In contrast, the connection between the equipment and rigs maintained by Roughrider, and the improvement constituted by the Work, is clear. "Roughrider supplied and rendered on-demand (continual) mechanical maintenance services for Davidson's oil and gas drilling and exploration rigs, loader and support equipment essential to exploration drilling (the "Services"). The Services supplied by Roughrider were absolutely essential to the exploration and drilling operations and improvements to the lands" (Affidavit of Laura Secord).

[72] The issue is whether this connection is sufficient to show that the Roughrider services were performed "on the improvement": *BLA* s 1(p).

[73] Roughrider relies on the Saskatchewan Court of Appeal decision in ***Grey Owl Engineering Ltd v Propak Systems Ltd***, 2015 SKCA 108, at paras 22-26:

> [22] …Cameron J.A. stated he [preferred] instead to consider whether the reconstruction of the rail line constituted an improvement to the land and then [ask] the question whether Brewster did any work upon that improvement or render any services for it…[citing *Clarkson Company v Hansen* (1983), 22 Sask R 126 (CA) (*Hansen*)]
>
> [23] This approach, which focuses on the main contract or contracts rather than its individual subcontracts and the work being done under them, has been consistently followed and applied in this jurisdiction. In *Pritchard Engineering Company v Coronach*, [1983] 30 Sask R 137 (QB), the main contract was between the owner, the town of Coronach, and Wes-Can Underground Ltd. and involved the construction of a water supply line and associated tasks within the water treatment plant. Wes-Can hired Ray's Transport Ltd. to transport equipment to the job site at Coronach and upon termination of the work to return the equipment to Saskatoon. Applying *Hansen*, Sirois J. found first that the construction work under the main contract was an "improvement" (para. 5) and second that Ray's Transport had provided services "in respect of" that improvement (para. 16). He concluded by saying, "The hauling of the equipment by Ray's Transport to a point on the improvement site was solely to enable Wes-Can Underground Ltd. to carry out its contract with the Town of Coronach."
>
> [24] Similarly, in *BWV Investments Ltd. v Saskferco Products Inc.* (1993), 114 Sask R 306 (QB), MacPherson C.J.Q.B. applied *Hansen* to uphold a claim of lien for the rental of 29 trailers located on the building site and used in the construction of the Saskferco fertilizer plant. As part of his reasoning, MacPherson C.J.Q.B. noted that neither the trailers, nor any part of them, were consumed by or integrated into the actual construction of the fertilizer plant, but that such a finding did not determine the validity of the lien (para. 14). He held that the supply of the trailers constituted a "service performed on or in respect of" the construction of the fertilizer plant (para. 24).
>
> [25] Finally, in *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 1990 CanLII 7611 (SK QB), 84 Sask R 277 (QB), counsel for the Bank

> argued that steel poles modified and delivered by subcontractors, for use in Saskatchewan Power's transmission lines, could not be considered improvements because the poles were movable. MacLean J. rejected this argument, finding that the improvement in question was not the poles but the transmission line itself. This Court affirmed the decision in brief oral reasons (see (1990), 84 Sask R 275 (CA)). Neither the Court of Queen's Bench nor this Court referred to *Hansen*, but both Courts appear to have taken it as self-evident that the improvement was the work the owner was performing on the land and not the work performed by the various subcontractors and others contracting with them.
>
> [26] In [] *Hansen*, Cameron J.A. stated, "the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so" (para. 30). This approach to builders' lien legislation has a long provenance in this jurisdiction.

[74] The Receiver submits that ***Grey Owl*** should be distinguished, as the Saskatchewan legislation defines "improvement" more broadly than the *BLA*.

[75] The *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 2(1)(h) provides:

> (h) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
>
> > (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
> >
> > (ii) the demolition or removal of any building, structure or works or part thereof;
> >
> > (iii) services provided by an architect, engineer or land surveyor
> >
> > ...

[76] I reject this proposed distinction. The *BLA* definition of "improvement" is virtually identical. The additional express inclusions under s 2(1)(h)(i) of the Saskatchewan Act do not detract from the breadth of the basic definition under both Acts. In any event, the issue is not whether the Work constituted an improvement, but whether Roughrider's services were "on the improvement" (s 1(p)). This language in the *BLA* is similar to s 22 of the Saskatchewan Act considered in ***Grey Owl***, which gave lien rights to those providing services "on or in respect of an improvement".

[77] Further, the approach in ***Grey Owl*** is fully in accord with the approach in a number of Alberta Court of Appeal cases, including ***Schlumberger***, discussed above, and ***PTI Group Inc v ANG Gathering & Processing Ltd***, 2002 ABCA 89 at para 11 [***PTI Group***], citing ***Alberta Gas Ethylene Co Ltd v Noyle***, 1979 ABCA 334, 20 AR 459 [***Alberta Gas***].

[78] In paragraphs 8-10 of ***Alberta Gas***, the Court of Appeal held:

> [8] It is apparent that the work done by Burmac was done directly upon the portable buildings and the propane supplied by Cigas was used in those buildings.

This in itself does not create the basis for a lien against the land, as there is no evidence that the portable buildings were improvements. Their description as "mobile" makes it apparent that they were "neither affixed to the land nor intended to be or become part of the land". Further, the respondents do not contend that the portables were improvements.

[9] The improvement involved in this case was the construction of a gas extraction plant. The issue is whether Burmac's work and Cigas' materials were work and materials done or used "upon or in respect of" that improvement. In essence this amounts to a determination of whether work done and materials used to provide sleeping accommodation and food services for persons who labour upon an improvement are work done and materials used "in respect of" an improvement.

[10] As I see the problem, the respondents' work and materials must be examined in relation to **the overall project**, rather than in relation to the rented chattels on which they were directly expended. This approach is in line with that taken by Darling, Co. Ct. J. in *Cigas Products Ltd. v. Tamarisk Developments Ltd. and Young* [1976] 6 W.W.R. 733. In that case the lien claimant had rented propane tanks and heaters to a general contractor for use in drying out concrete and for heating the building during construction. It also installed the equipment and supplied fuel for it. The plaintiff was not allowed a lien for the rental amount of the units, as the British Columbia Mechanics' Lien Act contains no equivalent to our s.4 (4). However, the liens in respect of the cost of the fuel and for the installation of the heating equipment were allowed. The learned County Court judge said at page 735:

> The evidence satisfies me that Cigas qualifies as a materialman suppling materials to or for the improvement, that is, the propane gas for the making of this improvement. Drying out cement and walls is a necessary part of the building procedure. Without getting technical, the chemical process, I understand on the evidence, is equivalent to its being consumed and incorporated in the course of construction. The same reasoning applies to the item of labour and materials to install the tanks, pipes and heaters. Cigas, as I find, is in the position of a subcontractor to do such work and, in a limited sense, to do such work upon and to furnish such materials as the pipes, the fittings and the blocks for the installation of the equipment. Cigas supplied its own workmen under its supervision and paid them for the installation labour. Next, the blocks, pipes and fittings are not recoverable or re-usable, but remain on the lands of the defendant Tamarisk."

[79] I conclude that both the Alberta Court of Appeal and the Saskatchewan Court of Appeal consider "improvement" from the perspective of the "overall project" involved. In other words:

(i) the "overall project" is the "improvement";

(ii) the "overall project" constitutes the "thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed,

erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land"; and

(iii) the "overall project" would also be the thing that is "affixed to the land or intended to become part of the land."

[80] To the extent that ***Orban*** is inconsistent with this approach, and I am not sure that it is inconsistent, it has less weight as the decision of a single Justice, while the other decisions cited were by full panels of the Court of Appeal.

[81] The focus is thus not whether the equipment serviced by Roughrider was an improvement affixed to the land, but whether the services provided by Roughrider were on the improvement constituted by the Work.

[82] ***PTI Group*** makes it clear that "services need not be physically performed upon the improvement to fall within the meaning of the Act. They must, however, be 'directly related to the process of construction'": para 16. "[I]t is the degree of proximate connection to the process of construction that must be evaluated": para 17. Relevant inquiries include (para 18):

a) whether the contractors, sub-contractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement;

b) whether the off-site services could have been provided on the site;

c) whether the improvement could have been carried out absent such off-site services; and

d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were "primary" in nature.

[83] I am satisfied that the connection of Roughrider's services to the Work established by the evidence – essential on-demand maintenance services for equipment that was in turn essential to the drilling operations – demonstrates the required connection to the improvement. Some of the services were provided "out in the field where drilling and exploration operations were being performed". The services were requested by Davidson's field managers and site supervisors when a piece of equipment broke down. "Were it not for Roughrider's essential and timely services, Davidson's drilling and exploration work on the Sites simply would have stopped entirely" (Affidavit of Laura Secord).

[84] Roughrider's lien is declared valid in the claimed amount.

Bruno's

[85] Bruno's rented a gen set and a transformer to Davidson. Bruno's removed most of its equipment on March 8, 2013. Bruno's lien in the amount of $92,817.35 was registered on May 14, 2013. As the lien period is 90 days, Bruno's lien was filed in time.

[86] Again, the Receiver is not pursuing the argument that the lien was registered against the wrong Syncrude lease.

[87] Bruno's lien claim included an amount to replace a missing transformer. The transformer was eventually located and returned to Bruno's. As a result, Bruno's has reduced its lien claim to $68,856.85, the amount which it claims is due and owing pursuant to the rental agreement.

[88] The sole remaining issue is whether Bruno's lien should be reduced in respect of charges for demobilization costs and repairs and replacement of missing parts after the rental period. The Receiver's position is that it should, and that the valid amount of the lien is $56,856.50.

[89] The Receiver's argument is based, in part, on ***Orban*** and ***Husky Oil***. I have declined to follow these decisions, for reasons already stated.

[90] The Receiver also claims that these costs are not included under *BLA* s 6(4), which provides that a renter of equipment has a lien "for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work".

[91] As to demobilization costs, this cost was contemplated by the parties and included in the rental contract. The *BLA* s 6(1) provides that a person who works on or in respect of an improvement has a lien "for so much of the price of the work ...as remains due". A renter of equipment is deemed to have provided a service (s 6(4)), and services on an improvement are included in the definition of work (s 1(p)). In my view, the rental amount remaining due to Bruno's, including the agreed demobilization cost, is part of the "reasonable and just rental" that applies to the rental period (i.e., the period that the equipment was used or required to be available).

[92] Repair costs are potentially more problematic. If repair costs amount to a claim in damages, they would not be part of the lien claim. However, where repair costs are contemplated by the parties and included in the rental contract, they are, in my view, part of the reasonable and just rental. In ***Krupp Canada Inc. v JV Driver Projects Inc.***, [2014] A.J. No. 456 Master Robertson reviewed case law and concluded that, while damages claims in tort or for breach of contracts unrelated to an improvement are not properly part of a lien, all contract charges for work on or in respect of an improvement, including amounts assessed on a quantum meruit basis, are included in lien rights.

[93] In this case the charges for repair or replacement of missing items are due under the rental contract and therefore are included in the lien.

[94] Bruno's lien is declared valid in the amount of $68,856.85.

Acme

[95] Acme supplied light towers to Davidson. It was last on site on March 7, 2013, and filed a lien in the amount of $114,758.44 on April 12, 2013. The Receiver concedes that the Acme lien was filed in time.

[96] The Receiver claimed that Acme had not established a prevenient arrangement with Davidson, and that its lien should be valid only for the costs of reasonable rent within the lien period. The existence of a prevenient arrangement is an issue where there is a series of contracts. A lien claimant who files within the lien period running from when the last item was supplied or last service rendered, and who seeks to recover amounts due under several contracts; must establish that the parties contemplated a continuing contract: ***Re Blue Range Resource Corp***, 1999 CanLII 19047 at paras 3-7 (ABQB).

[97] In this case, however, there was one contract between Acme and Davidson, regarding the rental of four 20KW light towers and three 6KW light towers, at agreed monthly and daily rates [the Rental Agreement]. The President of Acme deposed that all of the invoices rendered from Acme to Davidson were pursuant to the Rental Agreement (Affidavit of Howard Evans). The Rental Agreement did not specify which Syncrude leases the towers would be located on; but the Receiver has withdrawn its objection on this ground, acknowledging that work performed anywhere on the large tract covered by the Syncrude leases gave rise to lien rights. This is not a situation, as in ***Re Gauntlet Energy Corporation (Companies' Creditors Arrangement Act)***, 2003 ABQB 1014 where an oil and gas services contract was "very general in its terms", provided "no estimate" of the number of wells, and applied to lands that lacked common ownership.

[98] I conclude that the lien arises from one contract. The question of a prevenient arrangement does not arise.

[99] The Acme lien claim includes amounts due under the Rental Agreement for delivery and removal costs and for maintenance to the light towers. These amounts are properly included in the lien, for the reasons discussed in relation to the Bruno's lien.

[100] The Acme lien claim includes an invoice for $10,101 for a light tower that was not returned to Acme. The Rental Agreement provided that Davidson was responsible for return of units. However, the evidence is that Acme picked up most of the units on March 7, 2013, and arranged for Bruno's to pick up remaining units. They were unable to locate one light tower.

[101] Acme has not established, based on the terms of the Rental Agreement and the circumstances relating to the missing tower, that the charge for the missing tower is part of the reasonable and just rental under the Rental Agreement. That charge ($10,101) is deducted from Acme's lien.

[102] An issue was also raised by the Receiver relating to invoice AE78, in which Acme charged the daily rate rather than the monthly rate, resulting in a charge that was $7836.15 higher than the monthly rental, for a rental period of less than a month. The Rental Agreement does not specify when monthly or daily rates apply. In my view, it is not reasonable and just to charge the daily rate when the resulting charge is higher than the monthly rental, for a rental period of less than a month. The overcharge of $7836.15 is deducted from Acme's lien.

[104] Acme's lien is declared valid in the amount of $96,821.29.

Costs

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

Heard on the 14th day of April, 2016.
Dated at the City of Edmonton, Alberta this 25th day of July, 2016.

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

Appearances:

Darren Bieganek, QC and Tara Matheson
Duncan Craign LLP
for the Applicant

Renn Moodley and Riley Snider
Witten LLP
for the Respondent

Martine H. Pettem
Walsh LLP
for Lienholder, 72619 Alberta Limited (o/a Roughrider International)

Casey A. Smith
Walsh LLP
for Lienholders, Gregory Oilfield Services Ltd. and Cordy Manufacturing Inc.

Benjamin J. Kormos
Walsh LLP
for Lienholders, Clean Harbors Energy and Industrial Services Corp.

G. Stephen Panunto
MJM Barristers
for Lienholder, Century Wireline Services

Philip R. Biggar
The Law firm of W. Donald Goodfellow, QC
for Lienholders, Acme Energy Services Inc. and Bruno's Trucking Ltd.

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice J.M. Ross

The Judgment has been amended by replacing the word Harbours with Harbors on pages 11 and 12 in the heading and paragraphs 62, 63 and 64.

TAB 8

Court of Queen's Bench of Alberta

Citation: Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services), 2017 ABQB 262

Date: 20170411
Docket: 1601 07220, 1601 08559
Registry: Calgary

Between:

Trotter and Morton Building Technologies Inc.

Plaintiff

- and -

**Stealth Acoustical & Emission Control Inc.
operating under the firm name and style of Stealth
Energy Services, Stealth Acoustical &
Emission Control Inc. and Canadian Natural Resources Limited**

Defendants

And Between: Action No. 1601 08559

Hamil Contracting Corp.

Plaintiffs

- and -

**Canadian Natural Resources Limited and
Stealth Acoustical E Emission Control Inc.**

Defendants

Corrected judgment: A corrigendum was issued on November 8, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of
J.T. Prowse, Q.C., Master in Chambers

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[1] These two actions concern the validity of two liens filed under the *Builders' Lien Act*, RSA 2000, c B-7, (the "BLA")

[2] One lien was filed by Trotter and Morton Building Technologies Inc. ("Trotter") and the other lien was filed by Hamil Contracting Corp. ("Hamil").

[3] Trotter and Hamil were subcontracted to Stealth Acoustical & Emission Control Inc. ("Stealth"). Stealth is now in bankruptcy and receivership, leaving Trotter and Hamil unpaid.

[4] Stealth in turn had a contract with Canadian Natural Resources Limited ("CNRL"), who hired Stealth under an "Offsite Fabrication Agreement" to build four pumphouse buildings at Stealth's Calgary facility for use, ultimately, on CNRL's Horizon oilsands project.

[5] Since they were unpaid, Trotter and Hamil filed liens against the Horizon project.

The key issue

[6] The applications which I heard are for declarations that the liens of Trotter and Hamil are valid.

[7] CNRL asserts that the work and materials provided by Trotter and Hamil do not relate to an 'improvement' as defined by the BLA, and therefore cannot form the basis for builders' liens.

[8] Trotter and Hamil counter that the work and materials do relate to an improvement.

[9] For the reasons which follow, I have concluded that both the pumphouse buildings and the Horizon oilsands project are 'improvements' under the BLA, and therefore the liens of Trotter and Hamil are valid (subject to another objection to the Trotter lien – that materials supplied by Trotter were never 'furnished', within the meaning of the BLA – that I will deal with later in these reasons).

The pumphouse buildings as 'improvements'

[10] The pumphouse buildings were very large and heavy buildings, designed to be firmly affixed to the land and designed to be fully integrated into the larger Horizon oilsands project. Without more they would appear to be an 'improvement' to the Horizon site.

[11] However, the buildings were also designed so that, after they were affixed to the land, they could later be moved without damaging them, and there were contingencies which could lead to them being moved in the future.

[12] Accordingly, CNRL argues that the liens are invalid because the pumphouse buildings were not an "improvement" to the Horizon project.

[13] The BLA defines improvement as follows:

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

[14] While CNRL concedes that it was intended that the pumphouse buildings would initially be affixed to the site, CNRL says they were not 'improvements' because they were part of an experimental Mature Fine Tailings De-Watering Project ("MFT Project") which was of uncertain tenure.

[15] CNRL notes that, if the MFT Project failed, or if another technology was discovered which proved superior to the technology used in the MFT Project, then the MFT Project would be shut down and the pumphouse buildings would, if they proved not suitable to be repurposed where they were, either be moved and repurposed for use elsewhere on the Horizon site, or even scrapped if they could not be repurposed.

[16] While CNRL referred in argument to the MFT Project as a "prototype", the MFT Project was built to commercial scale and, if successful (and not overtaken by another technology) it, and the pumphouse buildings, would have formed part of the Horizon oilsands project and provided tailings dewatering for years to come.

Tailings management

[17] The following quote taken from a CNRL document confirms that tailings management is an integral part of the production of oil from oilsands plants, such as the Horizon project. It also provides a description of mature fine tailings:

> The continuous improvement of tailings management is an integral component of successful oil sands mining operations. Reducing the size and need for tailings ponds, and increasing the speed with which they can be reclaimed are ongoing challenges being addressed by the industry.
>
> Canadian Natural has invested more than $1.6 billion in tailings management research and technologies to date. Our investments in tailings management technologies demonstrate our approach to research and development and how we take technologies from pilot project to commercialization. Canadian Natural is using and also researching new processes to reduce the footprint of the Horizon tailings pond and the amount of fresh water required for bitumen processing. These innovative methods will accelerate the process of reclamation, increase water recycling and reduce carbon dioxide (CO2) emissions.
>
> Tailings are the sand, silt, clay and water found naturally in oil sands that remain following the mining and bitumen extraction process. Tailings are transported by pipeline and deposited in ponds where the majority of the solids - mostly sand - settle to the bottom. The remaining fluid - mostly clay, silt and water - flow to the middle of the pond. This mixture is called Fluid Fine Tailings (FFT). As the solids

in the FFT begin to settle it becomes thicker, turning into a mixture called Mature Fine Tailings (MFT).

[18] Some insight into the issues involving mature fine tailings can be found in the following testimony of CNRL's deponent:

> Q. Can you confirm that the four pump houses were intended to be used to recover oil under the leases listed in [the Hamil deponent's] affidavit?
> A. These pump houses weren't specifically for recovering oil. They were for the recovery and treatment of the mature fine tailings.
> …
> Q. And how do you deal with that mature fine tailings layer?
> A. The -- the industry was -- is currently struggling with how to deal with that. No one has a solution for it. And most of the operators are trying something a little bit different to try and find a solution. In our case, we were looking to reclaim that MFT layer from the pond, screen it, screen out the debris, and produce a consistent density of -- of slurry of mature fine tailings, and then pump that back to the plant for recirculation and reprocessing.
> Q. Sorry, to clarify, how do you currently deal with it? I know that the industry is looking for a way, but how do you currently deal with the MFTs?
> A. It's just -- it's continuing to build up in the ponds right now.
> Q. It just builds up in the pond, okay.
> A. Correct.
> Q. And so if it continues to build up in the pond, is the current industry standard -- is the plan to kind of turn that into reclaimed land, like dump it underneath something or leave it there or -- like what does the government want you to do with all this stuff? What do they demand that you do with the MFTs?
> A. My understanding is that ultimately, at the end of mine life, there will be a residual volume of MFT that resides on the site.
> Q. Okay. What's your understanding of the government's regulations dealing with the reclamation of these tailings ponds? Like what do they require you to do?
> A. So my previous answer, at the end of mine life, there will be a residual volume there that currently is being proposed as what's called an end pit lake. So that MFT layer stays within that end pit lake. The balance of the land around is actually reclaimed, revegetated, reforested, but some -- some magnitude of fluid tailings, as it's now called, remains in the end pit lake.

The location and function of the pumphouse buildings

[19] The pumphouse buildings were to be transported (by CNRL) from Stealth's Calgary yard to the Horizon site and placed at known and specifically designated and prepared locations.

[20] A large physical site was specifically prepared for the MFT Buffer Facility (including the pumphouse buildings) which included grading of the land, building access roads and drilling holes for pilings.

[21] Once delivered, the pumphouse buildings would be integrated into the larger Horizon MFT Buffer Facility and tailings ponds through the use of pipelines and electrical lines.

[22] The pumphouse buildings would pump and recirculate MFTs to and from tailings ponds and throughout the MFT Buffer Facility, with one of the buildings injecting gland water throughout the process.

[23] The pumphouse buildings were to be an integral part of the MFT Buffer Facility. The MFT Buffer Facility could not function as designed without the pumphouse buildings in operation.

[24] Furthermore, the entire MFT Buffer Facility, including the pumphouse buildings, were designed to be fully integrated into the larger Horizon project, and would be operated and controlled remotely from Horizon's main control centre.

The size and degree of affixation of the pumphouse buildings

[25] As an example of the size of the pumphouse buildings, one of them was 24 feet wide, 89 feet long and 21 feet high.

[26] Their weight ranged from 200,000 pounds to 260,000 pounds.

[27] There were 12 - 14 piles concrete piles for each of the pumphouse buildings, with a minimum pile depth of 72 feet.

[28] There was a structural steel base for each of the pumphouse buildings. The building and its structural base were then anchored to the piles by having a metal plate attached by bolts to the piles. The structural steel base for each building was to be "stitch welded" to the metal plates which were bolted to the top of the piles.

[29] As the metal plates were bolted to the top of the piles, the bolts could be undone and the pumphouse buildings moved without damaging them.

The likelihood of the pumphouse buildings staying on the liened Horizon site

[30] There is no way of assigning a percentage to the likelihood that the pumphouse buildings would stay where first placed or elsewhere on the Horizon site.

[31] They are very large and heavy structures and firmly affixed to the land. They were intended to be put in place, pumps inserted, and operated as part of the overall Horizon site.

[32] However, if the MFT project proved unsuccessful, or if another superior technology was developed, they might be moved. How likely one of these two contingencies might arise is unknowable.

[33] If the pumphouse buildings were moved, it was quite possible that they would simply be moved to another part of the Horizon site, repurposed, and affixed to another portion of the site. CNRL's deponent discussed that possibility briefly as follows:

> Q. We were talking earlier about the piles. With respect to each one of the buildings, you've got specific designated locations where those buildings are going to be placed and to which they are going to be affixed to the land, correct?
> A. Yeah. Attached to these pilings, that's correct, yes, a somewhat temporary nature so we can remove them, reconfigure them --
> Q. Well, sir --
> A. -- later --
> Q. -- you're speculating. You're just speculating now as to if you need to do it. Right now, the project is that the buildings are going to be placed in specific locations and are going to be affixed to the land, correct?
> A. It's where they're going to start with, but these buildings, like many others that we have on site, we relocate them quite frequently.

Case authority on the 'improvement' issue – the pumphouses as 'improvments'

[34] Counsel for CNRL submits that the facts of this case are similar to the facts considered in ***Re: Gauntlet Energy Corp.***, 2003 CarswellAlta 1885, 49 C.B.R. (4th) 219, which held that the

supplier of sour gas line heater separator packages was not entitled to a lien as the separator packages in question did not constitute an improvement under the BLA.

[35] ***Gauntlet*** can be distinguished for the following reasons:

(i) the reasons in ***Gauntlet*** do not provide a physical description of the separator packages, or their dimensions or weight. I cannot assume that they were of the size and weight of the pumphouse buildings.

(ii) Picture obtained from the pleadings file in ***Gauntlet*** seem to show a building and exterior piping and/or equipment mounted on a structural steel skid. It appears that the building portion was much smaller than the pumphouse buildings in question, but more precise dimensions are not available.

(iii) While we are told that the separator packages were designed to be mounted to skids that were to be welded to metal piles driven in the muskeg, due to a lack of particulars we cannot tell how that degree of annexation compares to the 12 to 15 piles, 72 feet deep that we are dealing with here.

(iv) The separator packages were designed to be moved, from well site to well site, not to other contiguous lands on the same project lands.

[36] Most importantly, while we are dealing with pumphouse buildings which would have been installed and put into service, with the contingent possibility that they might be moved later on, the tenure of the separator packages was so tenuous that drilling at the initial sites to which they were delivered (and against which, I assume, the liens were filed) did not result in producing wells, and the separator packages were never installed. They were moved to new well sites where they were then installed. In other words, it appears that they were never installed on the lands which were liened.

[37] In my view, the pumphouse buildings being constructed under the Stealth contract were 'improvements' under the BLA. They were very large buildings, to be securely affixed to the land, and dedicated to tailings management, which was 'an integral component of successful oil sands mining operations' (to quote CNRL's own literature).

[38] The only factor which points to a different conclusion is the contingency that, after being put into operation, the pumphouse buildings would be moved, likely to another place on the liened Horizon project. In my opinion, that possibility is not sufficient to overcome their status as improvements.

The alternative argument advanced by Trotter and Hamil as to 'improvements'

[39] Trotter and Hamil argue, in the alternative, that even if the pumphouses are not improvements themselves (because of the contingency that they might in the future be removed) then the Horizon oilsands project is the improvement to which their liens attach. For the reasons which follow I accept that alternative argument.

[40] While the provision of unpaid production equipment was held not to be lienable in ***Gauntlet***, supra, leave to appeal refused 2004 CarswellAlta 40, 2004 ABCA 20, and in ***Rahco International Inc. v Laird Electric***, 2006 CarswellAlta 1005, 2006 ABQB 592, Trotter and Hamil note that the rulings in those cases was based on the premise that equipment itself was not

an improvement. It was not argued in those cases that the well, mine or oilsands plant itself was the 'improvement'.

[41] Their alternative argument is based on the premise that it is the Horizon oilsands project, to which pumphouse buildings were to be supplied, that is the improvement.

[42] This argument relies on the specific provisions, found in section 6(2) of the BLA, under which the pumphouses are said to be "materials ... furnished ... in connection with ... the recovery of a mineral". I note this because some of the cases cited in the ***Rahco*** decision deal with equipment not involved in the recovery of a mineral (such as a crop irrigation system).

[43] With respect to the submission that it is the well, mine or oilsands plant which should be considered the 'improvement', support can be found in the decision of the Saskatchewan Court of Appeal in ***Grey Owl Engineering Ltd. v Propak Systems Ltd.***, 2015 CarswellSask 612, 2015 SKCA 108, 392 D.L.R. (4th) 64. I note that the wording of Saskatchewan's builders' lien legislation is almost identical to the wording of the BLA.

[44] In ***Grey Owl***, the Onion Lake Cree Nation leased its mineral rights in a parcel of land to BlackPearl Resources Inc. ("BlackPearl"). BlackPearl contracted with Propak Systems Ltd. ("Propak") for engineering, procurement, and fabrication services connected to a modular oil extraction system that was to be provided by Propak for use on BlackPearl's leased land. Propak entered into a subcontract with Advanced Metal Concepts and Fabrication Ltd. ("Advanced") for the construction of three storage tanks to be used on the land as part of the modular oil extraction facility. In its turn, Advanced entered into a subcontract with Grey Owl Engineering Ltd. ("Grey Owl") to provide engineering design services relating to those storage tanks. Grey Owl, the lien claimant, filed its lien against the mineral parcel.

[45] Each storage tank was designed to be 24 to 38 feet tall and to weigh between 34,000 and 43,500 pounds. Each tank was to sit on an engineered gravel pad. Piles would run through the gravel pad and extend about 20 feet into the ground. An anchor chair would be welded to the base of the tank and then bolted to the piles. The three tanks would then be connected to the entire oil extraction facility through steel and fiberglass piping that would be bolted to the tanks.

[46] In the Court below, Propak argued successfully that the 'improvement' to be considered was the storage tanks, which in Propak's submission were not sufficiently affixed to the land to meet the definition of improvement in the Saskatchewan legislation. Propak cited in support of its argument both the ***Gauntlet*** and ***Rahco*** decisions.

[47] The Saskatchewan Court of Appeal summarized the decision of the Court below as follows:

> The Chambers judge concluded that the storage tanks were capable of being moved, which he took as indicative of the parties' intention. The tanks were part of a modular system that could be relocated to any other heavy oil field in Saskatchewan once they were no longer needed on the proposed site. They were not designed to be moved around the site, but they were capable of being moved beyond that site once the project was finished. Since they were capable of being moved, the Chambers judge held that they were not an improvement. Since they were not an improvement, Grey Owl's claim of lien was not valid.

[48] In overturning the decision below, the Saskatchewan Court of Appeal made the following observations:

> 18 In short, it is a mistake to begin and end the inquiry with whether the storage tanks are the improvement. The issue is whether Grey Owl provided "services" "on or in respect of an improvement for an owner, contractor or subcontractor" within the meaning of s. 22 and, as part of this analysis, identify the improvement in question.
>
> 36 As can be seen from the Stauth affidavit, Grey Owl was retained to provide engineering drawings with respect to storage tanks that were to be used by the contractor or principal subcontractor "as part of their oil extraction system." In such circumstances, it is an error to ask whether the claimant claims a lien in the storage tanks as an "improvement." Applying *Hansen*, the "improvement" with respect to which the legislation is concerned is the project that will lead to the extraction of oil. (emphasis added)

[49] The ***Grey Owl*** decision was approved and applied by the Court of Queen's Bench of Alberta in ***Davidson Well Drilling Ltd.(Receiver of) v Bank of Montreal***, 2016 CarswellAlta 1401, 2016 ABQB 416.

[50] In ***Davidson*** the lien claimants had done work, as subcontractors to Davidson Well Drilling Ltd. ("Davidson"") on two Syncrude Canada Ltd ("Syncrude") sites known as the Aurora Mine Site and the Base Mine Site. The Syncrude sites were open pit mine sites on lands subject to oil sands leases. In the case I am considering, the Horizon project is likewise an open pit mine on lands subject to oil sands leases.

[51] The work provided by the lien claimants consisted of resource coring, drilling, geotechnical testing, sonic/auger rig drilling, dewatering/depressurizing and exploration work.

[52] The particular lien, relevant to the issue of what was the 'improvement', was filed by 72619 Alberta Ltd o/a Roughrider International. Roughrider filed a lien relating to repair and maintenance of Davidson's rigs and support equipment.

[53] Roughrider's lien was challenged on the basis that its work did not relate to an improvement because equipment that Roughrider provided maintenance services to was not affixed to the lands or intended to become part of the lands. ***Gauntlet*** and the refusal of a leave to appeal the ***Gauntlet*** decision were cited in support of the challenge to Roughrider's lien.

[54] The Court in ***Davidson*** rejected the challenge and relied on and approved ***Grey Owl*** as follows:

> 77. Further, the approach in *Grey Owl* is fully in accord with the approach in a number of Alberta Court of Appeal cases, including *Schlumberger*, discussed above, and *PTI Group Inc. v ANG Gathering & Processing Ltd.*, 2002 ABCA 89 (Alta. C.A.) at para 11, citing *Alberta Gas Ethylene Co. v. Noyle,* (1979), 20 A.R. 459, 1 A.C.W.S. (2d) 344 (Alta. C.A.).
>
> 78. In paragraphs 8 - 10 of *Alberta Gas Ethylene*, the Court of Appeal held:
>
> > [8] It is apparent that the work done by Burmac was done directly upon the portable buildings and the propane supplied by Cigas was used in those buildings. This in itself does not create the basis for a lien against the land, as there is no evidence that the portable buildings were improvements. Their description as "mobile" makes

> it apparent that they were "neither affixed to the land nor intended to be or become part of the land". Further, the respondents do not contend that the portables were improvements.
>
> [9] The improvement involved in this case was the construction of a gas extraction plant. The issue is whether Burmac's work and Cigas' materials were work and materials done or used "upon or in respect of" that improvement. In essence this amounts to a determination of whether work done and materials used to provide sleeping accommodation and food services for persons who labour upon an improvement are work done and materials used "in respect of an improvement".
>
> [10] As I see the problem, the respondents' work and materials must be examined in relation to the overall project, rather than in relation to the rented chattels on which they were directly expended ....

79. I conclude that both the Alberta Court of Appeal and the Saskatchewan Court of Appeal consider "improvement" from the perspective of the "overall project" involved. In other words:

> (i) the "overall project" is the "improvement";
>
> (ii) the "overall project" constitutes the "thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land"; and
>
> (iii) the "overall project" would also be the thing that is "affixed to the land or intended to become part of the land."

80. To the extent that [the decision refusing to grant leave to appeal the *Gauntlet* decision] is inconsistent with this approach, and I am not sure that it is inconsistent, it has less weight as the decision of a single Justice, while the other decisions cited were by full panels of the Court of Appeal.

[55] The decision in ***Davidson***, and the Court of Appeal decisions cited therein, fully support the arguments of Trotter and Hamil that their liens are valid on the basis that the relevant 'improvement' was the Horizon oilsands project.

[56] Further indirect support for the proposition that it is the well, mine or oilsands plant which should be considered to be the improvement is the line of Alberta cases which have validated builders' liens filed on the 'wrong' land (not the land to which the work or materials were supplied) so long as the 'right' land is adjacent to or in close proximity to the liened land, and provided that they are part of a common purpose.

[57] In other words, even where the lien is filed on the 'wrong' land, it is the "overall project" (to use the language found in the ***Davidson*** decision) which is considered, and thus work may be considered to have been done on an 'improvement' even where the work was done on another parcel of land and not the parcel that was liened. That line of cases is cited in ***MJ Ltd. v Prairie Mountain Construction (2010) Inc.***, 2016 CarswellAlta 1816, 2016 ABQB 395.

[58] I agree with and am bound by the decision in ***Davidson***, and consequently accept the alternative argument of Trotter and Hamil that their liens are valid, even if the pumphouses themselves are not considered to be an 'improvement' but rather where the Horizon oilsands project is considered to be the 'improvement'.

Other arguments as to lien invalidity – materials not delivered to site

[59] Both CNRL and Hamil submit that some portions of Trotter's lien are invalid insofar as it relates to materials to be supplied by Trotter. CNRL and Hamil argue that these materials were never 'furnished', within the meaning of the BLA, to the Horizon site.

[60] Before proceeding, it should be noted that someone who furnishes materials potentially has two types of liens available to it. See ***J. Wood Co. v Canadian Credit Men's Trust Ass'n***, 1962 CarswellAlta 1, 35 D.L.R. (2d) 245, 39 W.W.R. 593, 4 C.B.R. (N.S.) 149.

[61] One type of lien (provided for by section 17(2) of the BLA) contemplates that an unpaid vendor of materials, who has delivered materials, and thus has lost its possessory lien for the purchase price, nevertheless has a charge over those materials provided that they have not been incorporated into the improvement. Effectively, it extends the possessory lien even though possession has been surrendered.

[62] This type of lien is not under consideration here. Trotter (or its subcontractor) still has possession of the materials in question and thus still has a possessory lien for the purchase price.

[63] The second type of lien, which is at stake here, is a lien which a supplier of a material asserts over the real property against which the lien has been registered. This lien is established under section 6 of the BLA which provides:

> 6(1) Subject to subsection (2), a person who
>
> (a) does or causes to be done any work on or in respect of an improvement, or
>
> (b) furnishes any materials to be used in or in respect of an improvement,
>
> for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.
>
> (2) When work is done or materials are furnished
>
> (a) preparatory to,
>
> (b) in connection with, or
>
> (c) for an abandonment operation in connection with,
>
> the recovery of a mineral, then ... (emphasis added)

[64] While part of Trotter's lien relates to work done by Trotter, as a sub-contractor to Stealth, as the designer of the HVAC system for the pumphouse buildings, some of Trotter's lien relates to the supply of materials, namely air-conditioning and heating units.

[65] These units were to be delivered to the Stealth assembly site in Calgary. From there CNRL would arrange for their transportation to the Horizon site and their subsequent installation in the pumphouse buildings.

[66] Trotter engaged ICE Western Sales ("ICE Western") to provide air-conditioning and heating units.

[67] ICE Western invoiced Trotter for the air-conditioning units in the amount of $190,851.15. Trotter has paid ICE Western the amount of these invoices. Part of Trotter's lien includes this amount. These units remain in the possession of ICE Western.

[68] Ice Western also invoiced Trotter for heating units in the amount of $97,590.15. Trotter paid for and obtained possession of the heating units. They were never delivered to Stealth's yard but remain in the possession of Trotter.

[69] CNRL and Hamil argue that the air-conditioning and heating units are materials never actually 'furnished' within the meaning of the BLA, and therefore Trotter is not entitled to a lien upon the Horizon lands for the amount of the ICE Invoices.

[70] CNRL and Hamil point to section 9(1) of the BLA which states:

> 9(1) Material is considered to be furnished to be used within the meaning of this Act when it is delivered either on the land on which it is to be used or on such land or in such place in the immediate vicinity of that land as is designated by the owner or the owner's agent or by the contractor or the subcontractor.

[71] Unless Trotter can establish that section 6(1)(b) and section 9 apply only to a materialman, namely someone who exclusively supplies materials, then Trotter's lien (insofar as it pertains to materials such as the air-conditioning and heating units) will be invalid, because delivery under section 9 (to the site or some designated place in the immediate vicinity of the site) is a condition precedent to a valid lien regarding materials supplied. See ***Nelson Lumber Co. v Integrated Building Corp.***, [1973] S.C.R. 456, 1973 CarswellAlta 50 at para 7, and ***Creative Door Services Ltd. v Peat Marwick Limited***, 1988 CarswellAlta 300, [1988] A.W.L.D. 1530, 61 Alta. L.R. (2d) 368, at para 36.

[72] Counsel could find no Alberta case precedent on whether section 6(1)(b) and section 9 of the BLA apply only to someone who exclusively supplies materials.

[73] In the Ontario case of ***1508270 Ontario Ltd. v Laudervest Developments Limited***, 2007 CarswellOnt 10017, 186 A.C.W.S. (3d) 909 the plaintiff lienholder had a contract to manufacture, deliver and install all kitchen and bathroom cabinets for a high-rise condominium building. The liens had been discharged pursuant to a payment of security into court, and the defendant was applying to reduce the amount paid into court on the basis that it was more than the maximum lienable amount.

[74] The lienholder (Arya) claimed that the cabinets for the 8th, 9th and 10th floors were manufactured and stored in Arya's factory on the defendant's instructions, and Arya has not been paid for the manufacture, delivery and installation of cabinetry on floors 2 through 7.

[75] The relevant provision of Ontario's *Construction Lien Act* provided:

> Section 14: A person who supplies services or materials to an improvement for an owner, contractor or subcontractor has a lien upon the interest of the owner in the premises improved for the purpose of those services or materials.
>
> Section 1(2): For the purposes of this Act, materials are supplied to an improvement when they are,
>
> > a) placed on the land on which the improvement is made;
> >
> > b) placed upon land *designated by the owner* or an agent of the owner that is *in the immediate vicinity of the premises*, but placing materials on the lands so designated does not, of itself, make the land subject to a lien; (*emphasis added)*
> >
> > c) in any event, incorporated into or used in making or facilitating directly the making of the improvement.

[76] I note that these provisions are quite similar to the provisions in Alberta's BLA.

[77] The Ontario Court then considered a number of authorities, including ***Nelson Lumber*** and ruled:

> Applying the reasoning of the courts in these cases, I find that Arya is not entitled to a lien over the portion of the claim that is for the cabinetry for the 8th, 9th and 10th floors ... because the cabinetry was not delivered to the site or to the immediate vicinity.

[78] In other words, in ***1508270 Ontario*** the Court applied the requirement for delivery of materials to a lienholder who was both providing materials and providing services (i.e. installation).

[79] I am in agreement. I can see no logic for requiring a material supplier to deliver materials in order to obtain a lien, but to allow Trotter a lien for undelivered materials, just because Trotter was also providing work.

[80] Therefore, as the materials being furnished by Trotter never reached the Horizon site, the portion of Trotter's lien for the supply of materials is invalid.

Costs

[81] If the parties cannot agree on costs of this application, then they may seek a ruling from me in that regard.

Heard on the 01st day and 31st day of March, 2017.
Dated at the City of Calgary, Alberta this 11th day of April, 2017.

J.T. Prowse, Q.C.
M.C.C.Q.B.A.

Appearances:

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Corrigendum of the Reasons for Judgment
of
J.T. Prowse, Q.C., Master in Chambers

The action number has been changed from 0801 09808 to 1601 08559 on page one