Clerk's Stamp

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.
RESPONDENT	FTI CONSULTING CANADA INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP Barristers & Solicitors Suite 4000, 421 - 7th Avenue S.W. Calgary, Alberta, Canada T2P 4K9

Attention:	Sean F. Collins / Pantelis Kyriakakis / Nicole Fitz-Simon / Nathan Stewart
Telephone:	(403) 260-3531 / 3536 / 3713 / 3534
Facsimile:	(403) 260-3501
Email:	scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nfitzsimon@mccarthy.ca / nstewart@mccarthy.ca
File No.:	207091-532338

BENCH BRIEF OF FTI CONSULTING CANADA INC.,

IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF

JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD.

IN RESPECT OF THE APPLICATIONS TO CONTEST THE MONITOR'S DETERMINATION NOTICES CONCERNING RBEE AGGREGATE CONSULTING LTD., JERRY SHANKOWSKI, AND 945441 ALBERTA LTD.
TO BE HEARD BY
THE HONOURABLE JUSTICE EIDSVIK

October 22, 2020 at 10:00am

Table of Contents

Page

I. INTRODUCTION ... 1

II. STATEMENT OF FACTS ... 2

A. The Bonnyville Contract ... 2

B. The Bonnyville Lien Process Order and Claims Process ... 5

C. The Monitor's Lien Determinations ... 6

D. The Shankowski Lien Notice ... 7

E. The RBEE Lien Notice ... 8

F. Additional Submissions by Shankowski and RBEE ... 9

III. ISSUES ... 10

IV. LAW ... 10

A. Review of a Claim Determination ... 10

B. The *Builders' Lien Act* (Alberta) ... 11

a. Statutory Interpretation of the BLA ... 11

b. Applicable Statutory Provisions of the BLA ... 11

V. ARGUMENT ... 12

A. RBEE's Lien Claim With Respect to the Lands Was Not Submitted in Time ... 12

B. The Shankowski Lien Notice Fails to Identify the Lands and the ARA Does Not Pertain to the Bonnyville Contract ... 12

C. The General Stockpiling of Product Under the Bonnyville Contract Does Not Give Rise to A Valid Lien Claim ... 13

a. The Bonnyville Contract Has No "Overall Project" Other Than The General Stockpiling of Product ... 13

b. The General Stockpiling of Product Does Not Constitute an Improvement ... 15

D. To the Extent Liens are Claimed against any of the MD of Bonnyville's Roads Such Lien Claims are Invalid ... 18

VI. RELIEF REQUESTED ... 18

VII. LIST OF AUTHORITIES ... 19

SCHEDULE "A" - LAND DESCRIPTIONS ... 20

I. INTRODUCTION

1. This bench brief of FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**", JMB and 216 are collectively referred to as, the "**Companies**"), is submitted in respect of two (2) applications contesting the Monitor's determination of the validity of the builders' lien claims (collectively, the "**Disputed Lien Claims**") submitted by Jerry Shankowski and 945441 Alberta Ltd. ("**945**", Jerry Shankowski and 945 are collectively referred to as, "**Shankowski**") and by RBEE Aggregate Consulting Ltd. ("**RBEE**") pursuant to the Order – Lien Claims – MD of Bonnyville, granted May 20, 2020, by the Honourable Justice K.M. Eidsvik (the "**Bonnyville Lien Process Order**"), in the within proceedings (the "**CCAA Proceedings**"). Capitalized terms used herein and not otherwise defined shall have the same meaning ascribed to such terms in the Bonnyville Lien Process Order.

2. The Disputed Lien Claims arise in connection with services provided or materials furnished in connection with the Terms and Conditions Agreement, dated effective November 1, 2013, between JMB Crushing Systems ULC ("**JMB ULC**"), the amalgamation predecessor of JMB, and the Municipal District of Bonnyville No. 87 (the "**MD of Bonnyville**"), as subsequently amended from time to time (collectively, the "**Bonnyville Contract**").[1] The Bonnyville Contract is the "prime contract"; the agreement between the contractor and the owner.

3. In addition to certain technical requirements not being met, as detailed below, the Monitor's determination that the Disputed Lien Claims do not constitute valid Lien Claims is premised on the fact that: (i) the general and temporary stockpiling of gravel; (ii) that is neither affixed to the Lands or the Excepted Title Lands (both as defined in Schedule "A" hereto) nor intended to be or become part of the Lands or the Excepted Title Lands; (iii) under a "prime contract" which has no specific identifiable projects, progress payments, completion milestones, or purpose, beyond the general supply, delivery, and stockpiling of the Product, at a recurring annual amount (200,000 tonnes / year); (iv) all in a situation, where such Product's ultimate use remains at the general discretion of the owner (the MD of Bonnyville) who can use, not use, transform, or sell the Product as they see fit, does not constitute an improvement to the Lands or the Excepted Title Lands, as contemplated under the BLA (as defined below).

---

[1] Affidavit of Jason Panter, sworn October 9, 2020 at para. 2 ["**Panter Affidavit**"]; Affidavit of Blake Elyea, sworn October 16, 2020 at para. 6 ["**Elyea Affidavit**"]; Eighth Report of the Monitor, dated October 16, 2020 ["**Eighth Monitor's Report**"] at Appendix "A" ["**Bonnyville Contract**"].

4. Overall, the nature of the Bonnyville Contract and therefore the "overall project" is the ongoing supply of Product for the MD of Bonnyville's general discretionary use and not a construction contract which would give rise to lien rights under the *Builders' Lien Act*, RSA 2000, c. B-7 (the "**BLA**").

II. STATEMENT OF FACTS

A. The Bonnyville Contract

5. In accordance with the Bonnyville Contract, JMB was required to supply, haul, and stockpile, on an ongoing basis, 200,000 tones of crushed rock/gravel aggregate (the "**Product**"), per year, to various stockpile sites, as designated from time to time by the MD of Bonnyville. The most recent stockpile site was 61330, Range Rd, 455, Bonnyville, T2N 2J7 (the "**MD Yard**").[2] The MD Yard is located on lands legally described as:[3]

MERIDIAN 4 RANGE 5 TOWNSHIP 61
SECTION 19
QUARTER NORTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:

			HECTARES	(ACRES) MORE OR LESS
A)	PLAN 8622670	ROAD	0.416	1.03
B)	PLAN 0023231	DESCRIPTIVE	2.02	4.99
C)	PLAN 0928625	SUBDIVISION	20.22	49.96

EXCEPTING THEREOUT ALL MINES AND MINERALS

(the "**Lands**").

6. The Bonnyville Contract is the prime contract in this arrangement.[4] The material provisions of the Bonnyville Contract, as amended, are as follows:

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

…

(e) "Product" means the production by JMB of the aggregate described in this Agreement which includes the crushing and cleaning of rock/gravel,

---

[2] Bonnyville Contract, *supra* at Amendment to Agreement, dated February 2020 ["**February 2020 Amendment**"]; Bonnyville Contract, *supra* at s. 12 (as amended).

[3] Affidavit of Jeff Buck, sworn on May 20, 2020 at para. 6 [**Buck Affidavit**].

[4] Elyea Affidavit, *supra* at para. 6(a); Bonnyville Contract, *supra* at s. 10.

and all related services whereby rock/gravel is made into useable crushed aggregate for the MD in accordance with the required specifications set out in this Agreement;

(f) "Services" means **the *hauling and stockpiling of crushed aggregate* by JMB as set out in this Agreement** and anything else which is required to be done to give effect to this Agreement;[5]

…

10. JMB will be the ***prime contractor*** in the specific areas and geographic locations where the Product and Services are provided, including the pit where the Product is made and for all areas related to providing the Services.[6]

11(c) **A minimum of 200,000 (two-hundred-thousand) tonnes of Product per year, shall be supplied and/or stockpiled *at designated locations* within the geographic boundaries of the MD**, mutually agreed upon by both parties. Should the Product be stockpiled in one of the designated pits both quantities and quality of Product shall be monitored and any shortfall shall be supplied in the same year as hauled.[7] …

11(e) … The annual quantities shall not be less than 200,000 (two-hundred-thousand) tonnes of **Product delivered and stockpiled** for the MD by JMB.[8]

12. JMB shall deliver the Product to 61330, Range Rd. 455, Bonnyville, T9N 2J7 (the "MD Yard"), and in cooperation with the MD staff, **stockpile the Product in a continuous cone to a minimum height of 10 (ten) meters**. JMB shall supply all equipment and labour **for delivering and stockpiling the Product**, including trucks, a stacking conveyor(s), bulldozer(s) and any other equipment.[9]

14. The **MD will own the Product after the Product has been crushed and the MD has paid the related invoices issued pursuant to Section 19 of the Agreement.** Any Product owned by the MD and in the possession of JMB shall be held in trust in the custody of JMB as bailee for the benefit of the MD in accordance with the provisions of the Agreement.[10]

15. The Term of this Agreement shall be ten (10) years, commencing on November 1, 2013.[11]

---

[5] Bonnyville Contract, *supra* at ss. 1(e)-(f) [emphasis added].

[6] Bonnyville Contract, *supra* at s. 10 [emphasis added].

[7] Bonnyville Contract, *supra* at Amendment to Agreement, dated September 30, 2015 ["**September 2015 Amendment**"]; Bonnyville Contract, *supra* at s. 11(c) (as amended) [emphasis added].

[8] September 2015 Amendment, *supra*; Bonnyville Contract, *supra* at s. 11(e) (as amended) [emphasis added].

[9] February 2020 Amendment, *supra*; Bonnyville Contract, *supra* at s. 12 (as amended) [emphasis added].

[10] February 2020 Amendment, *supra*; Bonnyville Contract, *supra* at s. 14 (as amended) [emphasis added].

[11] Bonnyville Contract, *supra* at s. 15.

7. The nature of the work performed under the Bonnyville Contract was as follows:

(a) all Product provided under the Bonnyville Contract was intended and stockpiled for the MD of Bonnyville's use, which occurred at the MD of Bonnyville's discretion and mainly related to the construction and maintenance of the MD of Bonnyville's roads, generally and throughout the year;[12]

(b) the scope of the Services and Product provided under the Bonnyville Contract ended upon the temporary stockpiling of such Product at the Lands or any other property designated by the MD of Bonnyville; no further acts, construction, or services were completed;[13]

(c) the Product was never affixed to the Lands nor intended to be or become part of the Lands;[14] it was a general temporary stockpile;

(d) the Bonnyville Contract has no identifiable projects, progress payments, completion milestones, or purpose, beyond the general supply, delivery, and stockpiling of the Product at various sites, which the MD of Bonnyville can then utilize at its discretion; and,

(e) the Bonnyville Contract does not mention or provide for any rights in favour of the MD of Bonnyville concerning subcontractors, lien claims, holdbacks, or other standard provisions typically found in prime construction contracts.

8. After entering into the Bonnyville Contract, but prior to the commencement of these CCAA Proceedings, JMB retained subcontractors, including RBEE,[15] to perform certain services in connection with the Bonnyville Contract, including testing, crushing, hauling, and surveying of the Product at the Lands or as required under the Bonnyville Contract.[16] Unrelated to the Bonnyville Contract,[17] JMB and Shankowski entered into the ARA (as defined below), which is not part of the chain of contracts concerning the Bonnyville Contract.

---

[12] Elyea Affidavit, *supra* at para. 9.

[13] Elyea Affidavit, *supra* at paras. 9-10.

[14] Elyea Affidavit, *supra* at para. 11.

[15] RBEE and JMB entered into an agreement for services in respect of the Bonnyville Contract on around February 25, 2020: Affidavit of David Howells, sworn on May 29, 2020 at para. 3 and Schedule "A" ["**May 29 Howells Affidavit**"].

[16] Buck Affidavit, *supra* at para. 7; Panter Affidavit, *supra* at para. 12(b)-(e).

[17] Elyea Affidavit, *supra* at para. 13.

B. The Bonnyville Lien Process Order and Claims Process

9. On May 20, 2020, the Bonnyville Lien Process Order was granted and provided, *inter alia*, that:

(a) the MD of Bonnyville would pay $3,563,768.40 to the Monitor, being the funds payable to JMB pursuant to the Bonnyville Contract;[18] and,

(b) of the $3,563,768.40 paid by the MD of Bonnyville to the Monitor, the Monitor would retain a holdback of $1,850,000 ("**Holdback Amount**") as security for the various Lien Claims to be established, proven, and determined, in accordance with the process (the "**Lien Process**") set out in the Bonnyville Lien Process Order, which requires the Monitor to review all Lien Claims and issue corresponding lien determinations (collectively, the "**Lien Determinations**").[19]

10. Pursuant to the Bonnyville Lien Process Order, the Holdback Amount stands in place of the Lands, as security for all Lien Claims, pursuant to section 48(2) of the BLA.[20]

11. The relevant terms of the Bonnyville Lien Process Order are as follows:

> "3. For the purpose of the within Order, the following terms shall have the following meanings: **[…]**
>
> (e) "**Determination Notice**" means written notice of a Lien Determination.
>
> **[…]**
>
> (l) "**Lien**" means a lien registered ***under the BLA*** **<u>against the Lands in respect of the Work or the Contract</u>**;
>
> (m) "**Lien Claim**" means a claim of any Lien Claimant to the extent of such Lien Claimant's **entitlement to receive payment from the <u>major lien fund, *as defined in the BLA*</u>, as it relates to the <u>Work performed by the Lien Claimant</u>** or a subrogated claim for such Work;
>
> (n) "**Lien Claimant**" means a claimant **who: (i) has registered a Lien for its Work <u>against the Lands</u>; or (ii) has a Lien Claim and <u>has provided a Lien Notice to the Monitor</u> as described herein**;

[18] Order – Lien Claims – MD of Bonnyville, granted on May 20, 2020, in the within proceedings, at paras. 3(g), 5 ["**Bonnyville Lien Process Order**"].

[19] Bonnyville Lien Process Order, *supra* at paras. 3(h), 3(m)-(p), 6-7, 11-14.

[20] Bonnyville Lien Process Order, *supra* at para. 8.

(o) "**Lien Determination**" means a determination of the validity of a Lien, a Lien Claim and the quantum thereof, whether by the Monitor or this Court;

(p) "**Lien Notice**" means the form attached as Schedule "A" hereto;

[…]

(t) "**Work**" means ***work done or materials furnished with respect to the Contract or the Lands***."[21]

"7. Any person who wishes to assert a Lien Claim against the Lands and who **has not yet registered a Lien against the Lands shall deliver a Lien Notice by email to the Monitor's attention within the time frame prescribed by the BLA** in order to preserve and perfect their Lien Claim."[22]

12. In addition to the various requirements set out therein, the Lien Notices also required:

4. Attached hereto as Schedule "A" **is an affidavit setting out the full particulars of the Claimant's builders' lien claim** or subrogated claim, **including all applicable contracts**, sub-contracts, **the nature of the work completed or materials furnished**, the last day on which any work was completed or materials were furnished, any payments received by the Claimant, all invoices issued by the Claimant, and all written notices of a lien served by the Claimant.[23]

13. The Monitor received six (6) Lien Notices in connection with the Bonnyville Lien Process Order, including those submitted by RBEE and Shankowski.[24]

C. The Monitor's Lien Determinations

14. The Monitor reviewed the Lien Notices and on or around July 27, 2020, issued Determination Notices in respect of the information and evidence contained therein. Details of such Determination Notices are set out in the Eighth Report of the Monitor, dated October 16, 2020 (the "**Eighth Monitor's Report**").[25]

15. Only RBEE and Shankowski have contested the Monitor's Determination Notices, which were as follows: (i) to RBEE, declaring the quantum to be $1,270,791.91 and determining that

---

[21] Bonnyville Lien Process Order, *supra* at paras. 3(e), (l)-(p), (t) [emphasis added].

[22] Bonnyville Lien Process Order, *supra* at para. 7 [emphasis added].

[23] Bonnyville Lien Process Order, *supra* at Schedule "A" (para. 4).

[24] Eighth Monitor's Report, *supra* at para. 15.

[25] Eighth Monitor's Report, *supra* at para. 14. See also Eighth Monitor's Report, *supra* at paras. 15, 22, 25, 27.

RBEE's Lien Claim is invalid; and, (ii) to Shankowski, declaring the quantum to be $424,674.05 and determining that Shankowski's Lien Claim is invalid.

D. The Shankowski Lien Notice

16. On May 29, 2020, Shankowski submitted a Lien Notice (the "**Shankowski Lien Notice**"), to the Monitor asserting a builders' lien claim in the amount of $424,674.05 (the "**Shankowski Lien Claim**"). The Shankowski Lien Notice includes, at Schedule A, the affidavit of Jerry Shankowski, sworn May 29, 2020 (the "**May 19 Shankowski Affidavit**"). The Shankowski Lien Notice is attached, in full, as Appendix "D" to the Eighth Monitor's Report.

17. The Shankowski Lien Notice provides that Jerry and his holding company, 945, were parties to an "Aggregates Royalty Agreement" with JMB ULC (as predecessor in interest to JMB), dated October 29, 2018 (the "**ARA**"),[26] pursuant to which, in exchange for JMB paying Shankowski a corresponding royalty on all extracted material, JMB was granted the exclusive right to extract sand, gravel, and other aggregates from the Shankowski Pit (as identified and defined in Schedule "**A**" hereto).[27]

18. The ARA makes no reference to the Bonnyville Contract, the Lands, or any lands owned by the MD of Bonnyville, or any particular project in which extracted material is to be used.[28] There is no direct connection between the Bonnyville Contract and the ARA.[29]

19. In addition to the ARA, the following provisions of the Shankowski Lien Notice are relevant:

> 7 Out of the aggregates that were removed from the Shankowski Pit in March, 2020, all of them went to the project of the Municipal District of Bonnyville No. 87 ("MD of Bonnyville")… pursuant to the Aggregates Royalty Agreement…
>
> 8 Out of the aggregates that were removed from the Shankowski Pit in April, 2020, **certain of them went to the project of the MD of Bonnyville**… pursuant to the Aggregates Royalty Agreement…

---

[26] Affidavit of Jerry Shankowski, sworn on May 29, 2020 ["**May 29 Shankowski Affidavit**"], at Exhibit A (ARA - undated) ["**ARA**"].

[27] ARA, *supra* at recitals and Articles II, IV. See also, Panter Affidavit, *supra* at paras.5-7.

[28] ARA, *supra*; Elyea Affidavit, *supra* at para. 13.

[29] Elyea Affidavit, *supra* at para. 13.

> 10 I and 945441 claim a builders' lien in that sum [$424,674.05] in the Lands of the MD of Bonnyville or the money paid by the MD of Bonnyville standing in place of the Lands…[30]

20. The Shankowski Lien Notice contains no explicit legal description of the lands over which the Shankowski Lien Claim is asserted.

E. The RBEE Lien Notice

21. On May 29, 2020, RBEE submitted a Lien Notice (the "**RBEE Lien Notice**") to the Monitor, asserting a builders' lien claim in the amount of $1,270,791.71 (the "**RBEE Lien Claim**"). The RBEE Lien Notice includes, at Schedule A, the affidavit of David Howells, sworn May 29, 2020 (the "**May 29 Howells Affidavit**"). The RBEE Lien Notice is attached, in full, as Appendix "B" to the Monitor's Eight Report.

22. The RBEE Lien Notice provides that RBEE and JMB are parties to a subcontractor services agreement, dated February 25, 2020 (the "**RBEE Agreement**"),[31] pursuant to which RBEE provided rock and gravel crushing services in respect of the Shankowski Pit on the Shankowski Lands and the Havener Lands (as such terms are defined in Schedule "**A**" hereto)[32] and that such rock and gravel excavated by RBEE was deposited upon either, or both, of the Lands and the Excepted Title Lands (as defined in Schedule "**A**" hereto),[33] which consist of title to one registered plan excepted from the title to the Lands.

23. RBEE last provided services with respect to the Shankowski Pit on April 6, 2020.[34]

24. On May 15, 2020, RBEE registered liens, pursuant to the BLA, against title to the Shankowski Lands, the Havener Lands, and the Excepted Title Lands. RBEE did not register any lien against title to the Lands.[35]

25. RBEE submitted the RBEE Lien Notice to the Monitor asserting, for the first time, a Lien Claim over the Lands on May 29, 2020, 53 days after RBEE last provided any services.[36]

---

[30] May 29 Shankowski Affidavit, *supra* at paras. 7-10 [emphasis added].
[31] May 29 Howells Affidavit, *supra* at para. 3; see also, May 29 Howells Affidavit, *supra* at Exhibit A.
[32] May 29 Howells Affidavit, *supra* at paras. 3-4, 8-9, 11; see also, May 29 Howells Affidavit, *supra* at Exhibits B and C.
[33] May 29 Howells Affidavit, *supra* at paras. 14-19.
[34] May 29 Howells Affidavit, *supra* at para. 26.
[35] May 29 Howells Affidavit, *supra* at paras. 28-34.
[36] Eighth Monitor's Report, *supra* at para. 21 and Appendix "B".

F. Additional Submissions by Shankowski and RBEE

26. In support of their respective applications to contest the Monitor's Determination Notices, both Shankowski and RBEE have filed new evidence supplementing the information provided to the Monitor in their Lien Notices. Specifically: (i) Shankowski has submitted, the supplemental affidavit of Jerry Shankowski, sworn August 10, 2020 (the "**Shankowski Supplemental Affidavit**"); and, (ii) RBEE has submitted, the supplemental affidavit of David Howells, sworn October 9, 2020 (the "**Howells Supplemental Affidavit**").

27. The Shankowski Supplemental Affidavit asserts, for the first time, *inter alia*, the following:

> 14(f) 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…;
>
> …
>
> 14(l) [Shankowski] 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; …[37]

28. The Howells Supplemental Affidavit asserts, for the first time, *inter alia*, the following:

> 4(a) The Municipality entered into a contract with a third party at the end of February, 2020 to mix a compound known as MC-250 for pathing material using the 112.5 from the 112.5 pile (the "Patching Material"). The Patching Material was mixed between May 15, 2020 and June 20, 2020 and it was **added to the Municipality's already existing stockpile**. The Patching Material is used on **various municipality roads on an as-needed basis**;
>
> 4(b) The Municipality entered into a contract with a third party at the end of February, 2020 to mix a compound known as HF500 using the 216 from the 216 Pile ("Cold Mix"). The Cold Mix was mixed between May 15, 2020 and June 20, 2020. The Cold mix was then used for the following projects around the Municipality for repairs of soft spot sections on each road with various lengths:
>
> i. RR 443 from HWY 28 to TWP RD 614
> ii. RR 485 from HWY 28 to TWP RD 610;
> iii. RR 483 from HWY 660 to TWP RD 611;
> iv. RR 482 from TWP RD 594 to TWP RD 593A;
> v. RR 470 from TWP RD 630 to HWY 55;
> vi. TWP RD 610 from RR 483 to RR 484;
> vii. RR 411 from TWP RD 630 to CHERRY RIDGE;

[37] Supplemental Affidavit of Jerry Shankowski, sworn August 10, 2020 at paras. 14(f), (l).

viii. RR 484 from HWY 28 TWP RD 594; and

4(c) The 216 from the 216 Pile is also used by the Municipality **on various Municipality roads on an as-needed basis** to reduce dust.[38]

III. ISSUES

29. The primary issue for determination by this Honourable Court is whether the Shankowski Lien Claim and the RBEE Lien Claim: (i) give rise to lien rights under the BLA and relate to work done or materials supplied in respect of an "improvement"; and, (ii) are valid Lien Claims under the BLA and the Bonnyville Lien Process Order.

IV. LAW

A. Review of a Claim Determination

30. The issue concerning the conflicting authorities regarding the approach to be taken during the appeal of a Trustee's determination was recently set out by Justice Eamon in ***Aronson v Whozagood Inc***, as follows:

> 29 There is conflicting authority in Alberta over which approach should be taken. Following the decision in *Galaxy Sports Inc., Re*, 2004 BCCA 284 (B.C. C.A.), the Alberta Courts have mainly adopted the hybrid approach (*San Juan Resources Inc., Re*, 2009 ABQB 55 (Alta. Q.B.); *Transglobal Communications Group Inc., Re*, 2009 ABQB 195 (Alta. Q.B.); *Sapient Grid*). This approach requires claimants to put their best foot forward with their proof of claim to ensure efficient and expeditious claims determinations, while ensuring that the process is fair to all concerned. The Court has discretion to admit fresh evidence where the interests of justice require it. The test for admitting fresh evidence is not limited to the stringent test which applies to appeals from trials conducted in a Court as set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) at p 775, 1979 CanLII 8.[39]
>
> …
>
> 34 I prefer the hybrid approach in *San Juan* and the cases that followed it.
>
> > (a) Parliament assigned the roles of investigating and disallowing claims to the bankruptcy trustee (BIA, s 135). Creditors must "specify the vouchers or other evidence, if any, by which [the claim] can be substantiated" and the trustee may require further evidence (BIA, ss 124(4), 135(1)).

---

[38] Supplemental Affidavit of David Howells, sworn October 9, 2020 at paras. 4(a)-(c) ["**Supplemental Howells Affidavit**"] [emphasis added].

[39] *Aronson v Whozagood Inc*, 2019 ABQB 656 at para. 29 ["***Whozagood***"] **[TAB 2]**.

(b) The de novo approach would seriously undercut a bankruptcy trustee's authorities and functions.

(c) The Court can ensure fairness and encourage diligence by creditors in submitting claims to the bankruptcy trustee by allowing fresh evidence in appropriate cases.[40]

B. The *Builders' Lien Act* (Alberta)

a. Statutory Interpretation of the BLA

31. The general approach to the consideration of the validity of lien claims is well established in Alberta, and has been summarized by the Alberta Court of Appeal as follows:

> [5] Section 6 of the *Builders' Lien Act* provides that a person **who improves land has a lien on the land**. Section 10 confirms that the lien arises when the work is first done. ... As a result, **the Act provides some strict rules about the registration and enforcement of the lien**. It is well established that a liberal approach may be taken to determining the scope of the lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien: *Clarkson Co. v Ace Lumber Ltd.*, 1963 CanLII 4 (SCC), [1963] SCR 110 at pp. 114, 36 DLR (2d) 554.
>
> …
>
> [8] The *Builders' Lien Act* creates an extraordinary statutory remedy. The **lien rights under the Act must be given a practical interpretation, so as not to unduly prejudice the rights of owners and third parties:** *Canbar West Projects Ltd. v Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107 at para. 14, 39 Alta LR (5th) 38, 502 AR 235 [...][41]

b. Applicable Statutory Provisions of the BLA

32. A lien is created under section 6(1) of the BLA, which states:

> 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**,

---

[40] *Whozagood*, *supra* at paras. 34-35 **[TAB 2]**. Regarding the standard of review, see *Whozagood*, *supra* at para. 33 **[TAB 2]**; *8640025 Canada Inc. (Re)*, 2018 BCCA 93 at paras. 64-65 **[TAB 9]**.

[41] *Tervita Corporation v ConCreate USL (GP) Inc.*, 2015 ABCA 80 at paras. 5, 8 ["***Tervita***"] **[TAB 3]** [emphasis added].

> 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.[42]

33. The term "improvement" is defined in section 1 of the BLA as:

> 1(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**.[43]

V. ARGUMENT

A. RBEE's Lien Claim With Respect to the Lands Was Not Submitted in Time

34. RBEE's Lien Claim with respect to the Lands, as submitted under RBEE's Lien Notice is out of time. RBEE's Lien Claim, as against the Lands, was not registered with Land Titles and no corresponding Lien Notice was submitted within the statutory time frame provided by the BLA. The Bonnyville Lien Process Order requires Lien Claimants to submit a Lien Notice to the Monitor "within the time frame prescribed by the BLA",[44] being 45 days from the date the Lien Claimant last performed services or furnished materials.[45] The May 29 Howells Affidavit states that RBEE last provided services, in respect of the Shankowski Pit, on April 6, 2020.[46] RBEE first made a Lien Claim against the Lands pursuant to its Lien Notice. The RBEE Lien Notice was submitted on May 29, 2020, being 53 days after RBEE last performed any services. As a result, the RBEE Lien Notice is invalid in respect of the Lands, as it fails to comply with the technical requirements of the BLA.

B. The Shankowski Lien Notice Fails to Identify the Lands and the ARA Does Not Pertain to the Bonnyville Contract

35. The Shankowski Lien Notice fails to identify the lands against which it applies. The Shankowski Lien Notice does not include any legal description identifying lands over which the Shankowski Lien Claim is asserted other than a reference to the "Lands" (and such term is also

---

[42] BLA, *supra* at s. 6(1) **[TAB 1]** [emphasis added].
[43] BLA, *supra* at s. 1(d) **[TAB 1]** [emphasis added].
[44] Bonnyville Lien Process Order, *supra* at para. 7.
[45] BLA at Sections 41(1)(a), 41(2)(a) **[TAB 1]**.
[46] May 29 Howells Affidavit, *supra* at para. 26.

used in the May 29 Shankowski Affidavit to refer to the Shankowski Pit).[47] The Bonnyville Lien Process Orders requires all Lien Claimants to "set out the full particulars of the builders' lien claim".[48] Section 34(2) of the BLA sets out the registration requirements for a builders' lien, requiring Lien Claimants to set out a "description, sufficient for registration, of the land and estate or interest in the land to be charged".[49] Alberta Courts strictly interpret the procedure that is required to enforce a lien, including so that the rights of owners and third parties are not unduly prejudiced.[50]

36. Additionally, the ARA does not pertain to or form any part of the contractual chain associated with the Bonnyville Contract.[51] As set out in the Affidavit of Blake Elyea, sworn October 16, 2020:

> ***JMB entered into the Shankowski Royalty Agreement to ensure that it had access to aggregate <u>to be used for various contracts</u>.*** As set out in the Panter Affidavit, JMB has access to aggregate from multiple pits through a variety of arrangements (ownership, contractual, or otherwise) to ensure that it has the ability to supply its customers. **<u>There is no direct connection between the Shankowski Royalty Agreement (as defined in the Panter Affidavit) and the Bonnyville Contract.</u>** Specifically, the Shankowski Royalty Agreement makes no reference to the Bonnyville Contract, the MD Yard, the Lands or any lands owned by the MD, or any particular project in which extracted material is to be used.[52]

37. The ARA is a free-standing royalty agreement and is not connected to any one contractor, the Bonnyville Contract, or the Lands.[53] The ARA is not a sub-contract, and Shankowski is not a typical supplier of materials or labour, but rather a royalty beneficiary.

C. The General Stockpiling of Product Under the Bonnyville Contract Does Not Give Rise to A Valid Lien Claim

a. The Bonnyville Contract Has No "Overall Project" Other Than The General Stockpiling of Product

[47] May 29 Shankowski Affidavit, *supra* at para. 2: "… removing and selling aggregates, including gravel and sand from the Pit on my Lands referred to in the Aggregates Royalty Agreement on SW-21-56-7-W4 (the "Shankowski Pit")"."

[48] Bonnyville Lien Process Order, Schedule A at para. 4.

[49] BLA at Section 34(2)(e) **[TAB 1]**.

[50] *Tervita*, *supra* at para. 5 **[TAB 3]**.

[51] Elyea Affidavit, *supra* at para. 13; see also ARA, *supra* at recitals.

[52] Elyea Affidavit, *supra* at para. 13 [emphasis added].

[53] See Elyea Affidavit, *supra* at para. 13; see also, Panter Affidavit, *supra* at paras. 6-7.

38. The "overall project" contemplated by the Bonnyville Contract is the general temporary stockpiling of the Product. In determining the validity of the Disputed Lien Claims, the correct method is the "overall project" approach, which requires assessing first what the "improvement" to the land was, and then determining whether the Lien Claimant provided "services" which had a proximate connection with the improvement. Specifically, in ***Davidson Well Drilling Limited (Re)***, Justice Ross summarized the approach, as follows:

> 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."[54]

39. There is no dispute that the Bonnyville Contract is the "prime contract". The overall project is therefore determined in reference to the Bonnyville Contract. Pursuant to the explicit terms of the Bonnyville Contract, its purpose and scope is the ongoing "deliver[y] and stockpil[ing] of the Product"[55] in various stockpile locations, designated by the MD of Bonnyville; recently, the Lands. The Bonnyville Contract's only "overall project" is therefore the general stockpiling of Product, as, the Bonnyville Contract: (i) is the prime contract; (ii) its scope and the Company's duties thereunder end with the stockpiling of the Product; (iii) makes **no reference** to any: (a) identifiable or specific project in which the Product is to be used, (b) specific details concerning planned work which will incorporate the Product, or (c) intended or actual use of the Product beyond a reference to specifications for "Alberta Transportation"; (iv) is an **ongoing** contract for the annual supply of a fixed amount of Product; and, (v) contains **no reference** to any project completion milestones or progress requirements. Furthermore, the Howells Supplemental Affidavit explicitly states that the Product was intended for **the general use of the MD of Bonnyville**.[56]

---

[54] *Davidson Well Drilling Limited (Re),* 2016 ABQB 416 at para. 79 **[TAB 4]** [emphasis added].

[55] Bonnyville Contract at s. 11(e) (as amended); see also, Bonnyville Contract, *supra* at ss. 1(f), 11(c) (as amended); September 2015 Amendment, *supra*; February 2020 Amendment, *supra*.

[56] Howells Supplemental Affidavit, *supra* at paras. 3 ("The aggregate rock and gravel that was crushed by RBEE was deposited onto the Municipality Lands, as defined in my affidavit sworn May 29, 2020…"), 4(a) ("… The Patching

40. Finally, the Bonnyville Contract does not mention or provide for **any rights** in favour of the MD of Bonnyville concerning subcontractors and lien claims, and contains **no** holdback provisions.

b. The General Stockpiling of Product Does Not Constitute an Improvement

41. The general stockpiling of Product does not give rise to an improvement under the BLA. Similar to the current circumstances, Master Summers in ***Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd***[57] ("***Sustainable Developments***") considered whether the loading and hauling of aggregate to a temporary stockpile, ostensibly to be utilized for road graveling over the course of the following year, gave rise to a lien.

42. In *Sustainable Developments*, the Court considered a number of factors in determining that "[c]learly, the aggregate delivered by Budget to the lands at the request of the County of Vermilion was not an improvement to the Kochan lands",[58] all of which factors share a common thread; demonstrating that the gravel stockpile at issue was ***not a permanent improvement***.[59] The factors considered by the Court included that: (i) the contract contemplated that the gravel would be added to and removed from the site during the term of the lease;[60] (ii) the site would be reclaimed subsequently[61] (*i.e.* the gravel would be removed); and, (iii) the owner of the pile was not the same person as the owner of the lands.[62] While the last factor is not present in this case, there is ***no factual dispute*** that the gravel pile on the Lands was placed there only temporarily and was to be used at and for whatever purposes determined by the MD of Bonnyville.

43. Similar to the situation in ***Sustainable Developments***, the stockpiling of Product under the Bonnyville Contract does not constitute an improvement to the Lands or the Excepted Title Lands, as:

Material is used on various Municipality roads on an as-needed basis;"), 4(c) ("the 216 from the 216 Pile is also used by the Municipality on various Municipality roads on an as-needed basis to reduce dust").

[57] *Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd*, 2020 ABQB 391 ["***Sustainable Developments***"] **[TAB 5]**.

[58] *Sustainable Developments*, *supra* at para. 4 **[TAB 5]**.

[59] *Sustainable Developments*, *supra* at paras. 3-4 **[TAB 5].**

[60] *Sustainable Developments*, *supra* at para. 4 **[TAB 5]**.

[61] *Sustainable Developments*, *supra* at para. 4 **[TAB 5]**.

[62] *Sustainable Developments*, *supra* at para. 5 **[TAB 5]**.

(a) the Bonnyville Contract is a long term supply contract, with a fixed amount of Product to be delivered annually to designated stockpile locations (including the Lands) at which point the Product may be used (or not used), sold, altered, disposed of, or abandoned by the MD of Bonnyville at its sole discretion;

(b) there is no evidence that the Lands or the Excepted Title Lands are anything other than a stockpile location for the Product;

(c) the stockpile of the Product is not affixed to the Lands or the Excepted Title Lands and is in no way intended to become affixed to the Lands or the Excepted Title Lands, but rather, temporarily stored until utilized by the MD of Bonnyville, at its discretion at some future point in the year; and,

(d) temporary gravel stockpiles do not fall within the BLA's definition of "improvement", which excepts out "**a thing that is neither affixed to the land nor intended to be or become part of the land**".

44. Stockpiles of gravel have only been determined to give rise to an improvement and corresponding lien rights were such stockpiles are to be used for a **specific and identifiable project**. Specifically, in:

(a) ***Hansen et al v Canadian National Railway et al***,[63] the Court validated a lien claim where gravel was supplied and stockpiled on lands but was intended, by all parties, to be (and was) incorporated into the rail line being reconstructed on the lands.[64]

(b) ***Northern Dynasty Ventures Inc v Japan Canada Oil Sands Limited***,[65] the Court validated a lien claim where rented equipment was used to crush and screen sand and gravel at the gravel pit, before being provided to the owner for use in an oil sands expansion project (the "**Hangingstone Project**") at another site.[66] The Court found that while **the gravel pit itself was not improved**, the work performed resulted in gravel "that ***was used in constructing*** **the Hangingstone Project**, and ***directly contributed to the***

[63] *Hansen et al v Canadian National Railway et al*, 146 DLR (3d) 42, 1983 CanLii 2071 (SKCA) ["***Hansen***"] **[TAB 6]**.
[64] *Hansen*, *supra* at para. 4 **[TAB 6]**.
[65] *Northern Dynasty Ventures Inc v Japan Canada Oil Sands Limited*, 2020 ABQB 275 ["***Northern Dynasty***"] **[TAB 7]**.
[66] *Northern Dynasty*, *supra* at para. 2 **[TAB 7]**.

actual physical construction of the improvement"[67] and was therefore part of the "overall project", being the construction of the project site.[68]

45. The majority of the cases cited by Shankowski and RBEE concern circumstances where the "prime contract" had a specific, identifiable project. For example, in: (i) ***Grey Owl Engineering Ltd. v Propak Systems Ltd***., the prime contract contemplated the construction of a modular oil extraction facility;[69] (ii) ***Pritchard Engineering Company v Coronach,*** the prime contract contemplated the construction of a water supply line and other renovations at a water treatment plant;[70] (iii) ***BW Investments Ltd v Saskferco Products Inc.,*** the prime contract contemplated the construction of a fertilizer plant;[71] (iv) ***Royal Bank of Canada v Saskatchewan Power Corporation,*** the prime contract contemplated the construction of two electrical transmission lines;[72] (v) ***Davidson Well Drilling Limited (Re),*** the prime contract contemplated the drilling of exploratory oil and gas wells;[73] (vi) ***Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services),*** the prime contract contemplated the construction of four pumphouse buildings for use on an oil sands project;[74] (vii) ***MJ Limited (MJ Trucking) v Prairie Mountain Construction (2010) Inc,*** the prime contract contemplated the construction of an administration building for the City of Calgary;[75] and, (viii) ***Neptune Coring (Western) Ltd v Sprague-Rosser Contracting Co***, the prime contract contemplated the construction of a sanitary sewer system.[76]

---

[67] *Northern Dynasty*, *supra* at paras. 10-12 **[TAB 7]** [emphasis added].

[68] *Northern Dynasty*, *supra* at para. 31 **[TAB 7]**. Furthermore, *Northern Dynasty* addressed a claim under s. 6.4 of the BLA.

[69] *Grey Owl Engineering Ltd. v Propak Systems Ltd.,* 2015 SKCA 108 at para. 3 ["***Grey Owl***"], cited in the Brief of the Applicants, Jerry Shankowski & 945441 Alberta Ltd at TAB 6 [the "**Shankowski Brief**"].

[70] *Grey Owl, supra* at para. 23, citing *Pritchard Engineering Company v Coronach*, [1983] 30 Sask R 137 (SKQB).

[71] *Grey Owl, supra* at para. 24, citing *BW Investments Ltd v Saskferco Products Inc.* (1993), 114 Sask R 305 (SKQB).

[72] *Grey Owl, supra* at para. 25, citing *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 84 Sask R 227 (SKQB), aff'd on appeal (1990, 84 Sask R 274).

[73] *Davidson, supra* at paras. 2, 9-10.

[74] *Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services),* 2017 ABQB 262 at para. 4, cited in the Shankowski Brief at TAB 8.

[75] *MJ Limited (MJ Trucking) v Prairie Mountain Construction (2010) Inc*, 2016 ABQB 395 at para. 2, cited in the RBEE Brief at TAB 8.

[76] *Neptune Coring (Western) Ltd v Sprague-Rosser Contracting Co*, 2018 ABQB 883 at para. 1, cited in the RBEE Brief at TAB 16.

D. To the Extent Liens are Claimed against any of the MD of Bonnyville's Roads Such Lien Claims are Invalid

46. While it does not appear to be the case, as the Lien Notices assert a Lien Claim against the Lands, or in Shankowski's case, the Excepted Title Lands and the Lands, to the extent any Lien Claim is asserted against the MD of Bonnyville's roads, which are also public highways, such Lien Claims are likely invalid as a result of section 7(1) of the BLA. Specifically, section 7(1) of the BLA states:

> No lien exists with respect to a **public highway or for any work or improvement caused to be done on it by a municipal corporation**. [emphasis added].

VI. RELIEF REQUESTED

47. The Monitor respectfully requests that this Honourable Court dismiss the Applications of RBEE and Shankowski, seeking to reverse the Monitor's Determination Notices.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of OCTOBER, 2020

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*

Sean F. Collins / Pantelis Kyriakakis / Nicole Fitz-Simon / Nathan Stewart

Counsel to FTI Consulting Canada Inc., in its capacity as the court-appointed monitor of JMB Crushing Systems Inc. and 2161889 Alberta Ltd., and not in its personal or corporate capacity

VII. LIST OF AUTHORITIES

1. *Builders' Lien Act*, RSA 2000, c B-7;
2. *Aronson v Whozagood Inc*, 2019 ABQB 656;
3. *Tervita Corporation v ConCreate USL (GP) Inc.*, 2015 ABCA 80;
4. *Davidson Well Drilling Limited (Re),* 2016 ABQB 416;
5. *Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd*, 2020 ABQB 391;
6. *Hansen et al v Canadian National Railway et al*, 146 DLR (3d) 42, 1983 CanLii 2071 (SKCA);
7. *Northern Dynasty Ventures Inc v Japan Canada Oil Sands Limited*, 2020 ABQB 275;
8. *E Construction Ltd v Sprague-Rosser Contracting Co Ltd*, 2017 ABQB 99;
9. *8640025 Canada Inc. (Re)*, 2018 BCCA 93.

SCHEDULE "A" - LAND DESCRIPTIONS

<table>
<tr><th>Legal Description</th><th>Defined Term</th></tr>
<tr><td>MERIDIAN 4 RANGE 5 TOWNSHIP 61
SECTION 19
QUARTER NORTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:
<table>
<tr><td></td><td></td><td></td><td>HECTARES</td><td>(ACRES) MORE OR LESS</td></tr>
<tr><td>D)</td><td>PLAN 8622670</td><td>ROAD</td><td>0.416</td><td>1.03</td></tr>
<tr><td>E)</td><td>PLAN 0023231</td><td>DESCRIPTIVE</td><td>2.02</td><td>4.99</td></tr>
<tr><td>F)</td><td>PLAN 0928625</td><td>SUBDIVISION</td><td>20.22</td><td>49.96</td></tr>
</table>
EXCEPTING THEREOUT ALL MINES AND MINERALS</td><td>The "Lands"</td></tr>
<tr><td>MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:
<table>
<tr><td></td><td></td><td></td><td>HECTARES</td><td>(ACRES) MORE OR LESS</td></tr>
<tr><td>A)</td><td>PLAN 1722948</td><td>ROAD</td><td>0.417</td><td>1.03</td></tr>
</table>
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK SAME</td><td>The "Shankowski Pit"</td></tr>
<tr><td>FIRST

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
<table>
<tr><td></td><td></td><td></td><td>HECTARES</td><td>(ACRES) MORE OR LESS</td></tr>
<tr><td>A)</td><td>PLAN 1722948</td><td>ROAD</td><td>0.417</td><td>1.03</td></tr>
</table>
EXCEPTING THEREOUT ALL MINES AND MINERALS</td><td>The "Shankowski Lands", including the Shankowski Pit</td></tr>
</table>

<table>
<tr><td>AND THE RIGHT TO WORK SAME

SECOND

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS

HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 ROAD 0.417 1.03

EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK SAME</td><td></td></tr>
<tr><td>SECTION 16
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS

EXCEPTING THEREOUT:
HECTARES (ACRES) MORE OR LESS
A) PLAN 4286BM ROAD 0.0004 1.001
B) ALL THAT PORTION COMMENCING AT THE SOUTH WEST CORNER OF THE SAID QUARTER SECTION; THENCE EASTERLY ALONG THE SOUTH BOUNDARY 110 METERS; THENCE NORTHERLY AND PARALLEL TO THE WEST BOUNDARY OF THE SAID QUARTER 110 METERS; THENCE WESTERLY AND PARALLEL TO THE SAID SOUTH BOUNDARY TO A POINT ON THE WEST BOUNDARY; THENCE SOUTHERLY ALONG THE SAID WEST BOUNDARY TO THE POINT OF COMMENCEMENT CONTAINING… 1.21 2.00
C) PLAN 1722948 ROAD 0.360 0.89

EXCEPTING THEREOUT ALL MINES AND MINERALS</td><td>The “Havener Lands”</td></tr>
<tr><td>PLAN 0928625
BLOCK 1
LOT 1

EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 20.22 HECTARES (29.96 ACRES) MORE OR LESS</td><td>The “Excepted Title Lands”</td></tr>
</table>

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Copyright and Permission Statement

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

© Alberta Queen's Printer, 20__.*

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

Note

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

Regulations

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

	Alta. Reg.	*Amendments*
Builders' Lien Act		
Builders' Lien Forms	51/2002	*108/2004, 217/2009, 164/2010, 227/2011, 130/2012, 124/2015*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "certificate of substantial performance" means a certificate of substantial performance issued under section 19;

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

(c) "court" means the Court of Queen's Bench;

(d) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

(e) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;

(f) "lienholder" means a person who has a lien arising under this Act;

(g) "lien fund" means, as the case may be, the major lien fund, the minor lien fund or both the major lien fund and the minor lien fund;

(h) "major lien fund" means

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

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

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

(ii) where a certificate of substantial performance is issued, the amount required to be retained under

(a) the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and

(b) the work under a contract or a subcontract cannot be completed expeditiously for reasons beyond the control of the contractor or the subcontractor,

the value of the work to be completed or materials to be furnished is to be deducted from the contract price in determining substantial performance.

1985 c14 s3

Valuation of work done

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

1985 c14 s3

Creation and Extent of Lien

Waiver prohibited

5 An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void.

RSA 1980 cB-12 s3

Creation of lien

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

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

(2) When work is done or materials are furnished

(2) In this section, "lot" means a lot, block or parcel.

RSA 1980 cB-12 s6

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.

(2) Notwithstanding that material to be used in an improvement may not have been delivered in strict accordance with subsection (1), if the material is incorporated in the improvement the person furnishing the material has a lien as set out in section 6.

RSA 1980 cB-12 s7

Date of lien

10 The lien created by this Act arises when the work is begun or the first material is furnished.

RSA 1980 cB-12 s8

Priorities

11(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Notwithstanding subsection (1), a payment made pursuant to an assignment, attachment, garnishment or receiving order that is paid, before a lien is registered, to a person for whose benefit the assignment, attachment, garnishment or receiving order is made or issued, takes priority over the lien.

(3) Notwithstanding subsection (2), no judgment, execution, assignment, attachment, garnishment or receiving order shall affect the amount required to be retained under sections 18(1) or (1.1) and 23(1) or (1.1).

(4) A registered mortgage or a mortgage registered by way of a caveat has priority over a lien to the extent of the mortgage money in good faith secured or advanced in money prior to the registration of the statement of lien.

(5) Advances or payments made under a mortgage after a statement of lien has been registered rank after the lien, but a mortgagee who has applied mortgage money in payment of a statement of lien that has been registered is subrogated to the rights

then, if the lienholder sustains loss by reason of the failure or by reason of any misstatement by the mortgagee or vendor of the terms or amount owing, the mortgagee or vendor is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(5) The court may on application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring

(a) the owner or the owner's agent,

(b) the contractor,

(c) a subcontractor,

(d) the mortgagee or the mortgagee's agent, or

(e) the unpaid vendor or the unpaid vendor's agent,

as the case may be, to produce and allow a lienholder to inspect any contract, agreement, mortgage, agreement for sale, statement of the amount advanced or statement of the amount due and owing, on any terms as to costs that the court considers just.

RSA 2000 cB-7 s33;2009 c53 s28

Registration of Lien

Registration of lien

34(1) A lien may be registered in the land titles office by filing with the Registrar a statement of lien in the prescribed form.

(2) The statement of lien shall set out

(a) the name and residence of

(i) the lienholder,

(ii) the owner or alleged owner, and

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

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

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

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

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

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

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

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

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

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

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

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

RSA 2000 cB-7 s34;2001 c20 s10

Forms for registering lien

35(1) A Registrar shall be supplied with printed forms of statements of lien and affidavits, in blank, which must be supplied to every person requesting them and desiring to register a lien.

(2) A Registrar shall decide whether the Registrar's office is or is not the appropriate office for the registration of the statement of lien and shall direct the applicant accordingly.

(3) No lien shall be registered unless the claim or joined claims amount to or aggregate $300 or more.

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.

(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.

(3) A lien for wages 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 work for which the wages are claimed 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 work for which the wages are claimed is completed or 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 the contract or subcontract, as the case may be, is completed or abandoned.

Court of Queen's Bench of Alberta

Citation: Aronson v Whozagood Inc, 2019 ABQB 656

2019 ABQB 656 (CanLII)

Date: 20190822
Docket: BK01 094950
Registry: Calgary

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC, c B-3, AS AMENDED

AND IN THE MATER OF WHOZAGOOD INC.

Between:

Andrew Aronson, Brian Cook, Nicole Foote, and Don Hawley

Appellants

\- and -

Whozagood Inc.

Respondent

Decision
of the
Honourable Mr. Justice J.T. Eamon

I Overview

[1] The Appellants Andrew Aronson, Brian Cook, Nicole Foote, and Don Hawley claimed to be creditors in the bankruptcy of WhoZaGood ("WZG"). Each was retained or employed under one or more written contracts with WZG and provided services to WZG. These contracts provided the Appellants compensation only if certain financial milestones were met. These milestones were not met, so WZG did not owe compensation under those contracts. However, the Appellants claimed that the contracts had been modified by verbal agreements with WZG

which provided them compensation even though the milestones were not met. Mr Aronson further claimed for a "franchise advance".

[2] WZG's Trustee in Bankruptcy disallowed their claims. The Trustee rejected the existence of the verbal modifications. The Trustee further concluded that if the verbal modifications existed, they were not effective under insolvency laws against the Trustee or WZG's creditors. It also rejected the franchise advance claim.

2019 ABQB 656 (CanLII)

[3] The Appellants seek to have the Court allow their claims, under the appeal mechanism in section 135(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA").

[4] The main issues in the appeals are:

(a) Should the Appellants be allowed to use in this appeal, evidence concerning the verbal contract modifications which they had not previously provided to the Trustee in the claims process?

(b) Did the Trustee err in rejecting the claims that WZG and the Appellants verbally modified the written terms of the Appellants' compensation?

(c) Did the Trustee err in concluding that the alleged verbal modifications to the written contracts were not enforceable under insolvency laws?

(d) Was the Trustee biased against the Appellants?

(e) If the disallowances are set aside, how should the Appellants' claims be determined?

[5] For the reasons set out in this Decision, I do not permit the Appellants to provide fresh evidence for the purpose of this appeal. The Trustee erred in disallowing the claims based on an oral agreement for compensation based on the information provided to it. Those disallowances are set aside. However, given the issues over the credibility or reliability of the evidence submitted in support of the claims, I refuse the Appellants' request that the claims be allowed. If the Appellants wish to further pursue the claims, they must arrange for a trial of the issues before a judge of this Court. The Appellants did not advance the claim to a franchise advance on the appeal and in any event, there is no basis to disturb the disallowance of that claim. The bias allegations against the Trustee have no merit.

II The background to the claims

(a) Introduction

[6] Before dealing with the numerous issues arising in these appeals, I will set out brief details of the bankruptcy proceedings, the claims and the Trustee's decision on each claim.

[7] WZG was a company developing an internet based platform which would include rating businesses based on their perceived integrity. It appears the company was also developing a franchise opportunity relating to cannabis supply or sales. It operated mainly out of the home of its President/CEO/majority shareholder Mr Zeviar.

[8] The Appellants were either employees or contractors of WZG, though it does not matter which because none of them claimed priority over other creditors or filed a wage earner's claim.

[9] The Appellants claimed that WZG owed them fixed amounts for services they provided to WZG. The Trustee gave several reasons for its decisions to disallow the claims. Many related to the circumstances in which the claims documentation was created, on the eve of bankruptcy. As an aid to understanding the context, I therefore turn to a brief description of the bankruptcy proceedings and the disputed claims

(b) Bankruptcy proceedings

[10] In the spring 2018, a major creditor of WZG called PDW sought to place WZG in bankruptcy. That action led to a May 19, 2018 Consent Order between PDW and WZG permitting PDW or its agent to carry out a financial review of WZG and imposing certain reporting obligations on WZG.

[11] WZG continued its business activities through the year, but the issues with PDW were not resolved. In late 2018 PDW again asked that the Court place WZG in bankruptcy. In response, WZG filed a Notice of Intention to Make a Proposal to Creditors under the BIA on December 6, 2018. The BIA provides that delivery of that notice stays most creditors' proceedings for a limited time, which allows an insolvent debtor time to formulate a proposal to resolve the claims of its creditors.

[12] WZG then filed, on December 14, 2018, a Proposal for the creditors' consideration. Under the BIA, creditors decide whether to approve a proposal submitted by a bankrupt by voting for or against the proposal.

[13] Each Appellant claimed in the Proposal proceedings that it was a creditor of WZG for remuneration for services provided, and therefore was entitled to vote.

[14] At a creditors' meeting to consider the Proposal held January 4, 2019, PDW objected to the Appellants' claims that they were creditors. Issues also arose whether certain other individuals were barred from voting in favour of the Proposal by section 54(3) of the BIA because they were related to WZG. The Chairperson upheld the latter objections and adjourned the meeting to permit WZG to appeal his rulings. It appears the Chairperson did not rule on the objections to the Appellants' claims.

[15] PDW then applied to this Court to place WZG in bankruptcy, and deem the Proposal rejected by creditors. WZG cross-applied to appeal the Chairperson's ruling on eligibility of related parties to vote. These applications were heard and decided on February 28, 2019. Justice Horner placed WZG in bankruptcy, deemed the Proposal refused by WZG's creditors under subsection 50(12) of the BIA, and appointed the Trustee as the bankruptcy trustee.

(c) The disputed claims

[16] Each Appellant claimed they provided services to WZG in 2018. Each had agreed with WZG to one or more versions of a written "Letter of Undertaking". Each letter provided that compensation would commence once specified financial milestones were met. None of these milestones were met, so no compensation was due under these letters. However, each Appellant also held a promissory note from WZG dated effective October 30 or 31, 2018 promising them payment of a specific amount for "value received from services rendered and lost wages". They claimed the amounts of these notes in the bankruptcy.

2019 ABQB 656 (CanLII)

[17] In response to PDW's objections to their claims in the proposal proceedings, the Appellants asserted a verbal agreement modifying their written arrangements. Mr Hawley explained the circumstances of these claims at the January 4, 2019 creditors' meeting. I will briefly outline his explanation. WZG and the Appellants always expected they would be paid for their services. In 2018, the Appellants became concerned that WZG could not pay them. They discussed this concern with WZG, and WZG verbally agreed to "accrue" compensation for each. WZG promised these accruals although the financial milestones in the Letters of Undertaking had never been met. Their claims for these accrued fees were primarily evidenced by promissory notes and invoices. As mentioned below, some of the Appellants provided additional information about the alleged underlying verbal agreement in the bankruptcy proofs of claim.

[18] The Trustee's reasons for disallowing the claims of the Appellants other than Ms Foote were:

(a) The claimed debts represented by the promissory notes were invalid because no agreement existed which provided for the obligation immediately prior to WZG's filing the Notice of Intention on December 6, 2018. There is no evidence that WZG made a binding agreement to pay the amounts of the promissory notes.

(b) If there were obligations incurred, they were void as creditors' preferences under section 95 of the BIA, because they were incurred during the three month period before the initial bankruptcy event (December 6, 2018) and ending on the date of the bankruptcy (February 28, 2019), and had the effect of giving the recipient a preference over WZG's other creditors. If the transaction is proven to have occurred outside this period, then the period is extended to one year before the initial bankruptcy event because the recipient was not dealing at arm's length with WZG when the transaction was made.

(c) If there were obligations incurred, they were void as creditors' preferences because they were made with a view to giving the recipient a preference over WZG's other creditors.

(d) The transactions were fraudulent conveyances or transfers at undervalue.

[19] Also, Mr Aronson claimed US$ 50,000 for a "franchise advance". The Trustee disallowed this claim for lack of particulars and supporting records. (During oral argument, Mr Hawley stated that this part of the disallowance was not being pursued.)

[20] In Ms Foote's case, the Trustee reasoned:

(a) The debt was invalid, because there was no evidence that the debt represented by promissory note was supported by a binding agreement.

(b) If there were obligations incurred, they were void as creditors' preferences under section 95 of the BIA, because they were incurred during the three month period before the initial bankruptcy event and ending on the date of the bankruptcy, and had the effect of giving Ms Foote a preference over WZG's other creditors.

2019 ABQB 656 (CanLII)

[21] The Trustee also raised issues over exchange rates which some of the Appellants used to convert US dollars to Canadian dollars. These are immaterial in this appeal.

III The procedure for the appeal

(a) Overview

[22] On the appeal, the Appellants argued their case as if the appeal was a new hearing. They did not identify any standard by which the Trustee's decisions should be reviewed. They filed affidavit evidence on their appeals containing additional information, much of which existed and would have been available to them when they filed their proofs of claim but was not provided to the Trustee with their proofs of claim (I refer to this as fresh evidence).

[23] In contrast, the Trustee argued that the Court should defer to the Trustee's fact findings on the reasonableness standard. These fact findings include that the accrued compensation transactions were outside the normal course of business, conducted in secret and not disclosed under the May 2018 Consent Order, represented by backdated promissory notes and invoices, not supported by any new contractual consideration, and entered into on the eve of the bankruptcy. Further, the transactions grossly inflated WZG's compensation obligations when compared to the Letters of Undertaking and had the effect of, and were designed to, defeat or delay other creditors.

[24] The Trustee also objected to the fresh evidence. It submitted that the appeals should be considered on the basis of the information before the Trustee when it disallowed the claims.

[25] Before considering the grounds of appeal, I must address:

(a) The evidence and grounds of appeal which can be considered. Can these be expanded for the appeal, or are the Appellants limited to whatever information they provided to the Trustee during the claims process?

(b) The standards by which the decision under appeal should be reviewed. Should I defer to or pay any attention to the Trustee's decisions under review, or make my decisions without reference to the Trustee's conclusions?

[26] There are many possible combinations, both in terms of the evidence or grounds which can be considered on the review and the nature of deference or attention which should be given to the decision under review (***Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation***, 2018 ABCA 113 at para 64).

[27] For the reasons set out below, I conclude that the Appellants require permission to provide fresh evidence and permission should be refused. Further, the Trustee's fact findings should be reviewed on a deferential standard (palpable and over-riding error).

(b) Nature of appeal and review standards

[28] Registrar Schlosser points out in ***Sapient Grid Corp (Re)***, 2012 ABQB 357 at paras 30-33 that the authorities determining what evidence should be considered on appeal are mixed. There are three approaches:

2019 ABQB 656 (CanLII)

(a) Appeals are *de novo* (conducted as if the original hearing had not taken place) and fresh evidence can be considered on appeal as a matter of course.

(b) Appeals from a Trustee are true appeals, on the record that was before the Trustee.

(c) Appeals are a hybrid, and are on the record that was before the Trustee, unless the Court permits the appeal to be conducted as a *de novo* appeal, involving fresh evidence, where the interests of justice require it.

[29] There is conflicting authority in Alberta over which approach should be taken. Following the decision in ***Re Galaxy Sports***, 2004 BCCA 284, the Alberta Courts have mainly adopted the hybrid approach (***Re San Juan Resources Inc***, 2009 ABQB 55; ***Transglobal Communications Group Inc (Re)***, 2009 ABQB 195; ***Sapient Grid***). This approach requires claimants to put their best foot forward with their proof of claim to ensure efficient and expeditious claims determinations, while ensuring that the process is fair to all concerned. The Court has discretion to admit fresh evidence where the interests of justice require it. The test for admitting fresh evidence is not limited to the stringent test which applies to appeals from trials conducted in a Court as set out in ***Palmer v The Queen***, [1980] 1 SCR 759 at p 775, 1979 CanLII 8.

[30] In contrast, other Alberta judges have adopted the *de novo* approach (***Alberta Permit Pro Inc (Re)***, 2011 ABQB 141; ***Experienced Equipment Sales & Rentals Inc***, 2011 ABQB 641). In ***Alberta Permit Pro***, Veit J preferred the *de novo* procedure, citing the "tight time lines imposed by Parliament in respect of the proceedings, the limited resources of the Trustee, the cost of providing "records", and, most importantly, the considerable delay and additional expense caused by returning matters to the Trustee for reconsideration in every case where either the Trustee did not give sufficient reasons to allow an appeal court to adequately assess the Chair or the Trustee's reasons, or where the Trustee made an error of law on which correctness would be the standard of review ..." (at para 39).

[31] The Alberta Court of Appeal does not appear to have ruled on the question. Some guidance might be taken from its decision in ***Pacer Construction***, where the Court dealt with the procedures and standards of review in respect of a decision under a claims procedure order in a receivership.

[32] The claims officer in that case conducted a hearing between opposing parties, a situation which is not parallel to the manner in which a bankruptcy trustee typically proceeds in determining a claim under section 135 of the BIA. Nevertheless, some of the considerations mentioned by the Court suggest that the hybrid approach would best balance the competing considerations in a bankruptcy proceeding.

[33] The Court held that the judicial review of the claims officer's determination contemplated gatekeeping scrutiny of additional evidence tendered on an appeal, to avoid encouraging a careless approach to the claims process and the effect of transferring the obligations imposed on claims officers to the court (*ibid* at para 104). Further, the standard of review was correctness on questions of law, and palpable and overriding error on questions of fact or mixed fact and law (*ibid* at para 104). This approach provided the adjudicative pragmatism required in commercial matters, ensured the process operated expediently, and respected the presumptions of fitness of the participants in the process (*ibid* at para 105). It also reminded that the correctness standard of

2019 ABQB 656 (CanLII)

review is critically different than the *de novo* standard because the former proceeds with no regard to the original decision while the latter raises a presumption of fitness (*ibid* at para 66).

[34] I prefer the hybrid approach in ***San Juan*** and the cases that followed it.

(a) Parliament assigned the roles of investigating and disallowing claims to the bankruptcy trustee (BIA, s 135). Creditors must "specify the vouchers or other evidence, if any, by which [the claim] can be substantiated" and the trustee may require further evidence (BIA, ss 124(4), 135(1)).

(b) The *de novo* approach would seriously undercut a bankruptcy trustee's authorities and functions.

(c) The Court can ensure fairness and encourage diligence by creditors in submitting claims to the bankruptcy trustee by allowing fresh evidence in appropriate cases.

[35] As to standard of review, I agree with the standard of review analysis of Yamauchi J in ***Transglobal*** (at paras 51-71), and his conclusions (*ibid* at paras 71-72) that legal issues including extricable legal issues arising in questions of mixed fact and law are assessed on the correctness standard, and questions of fact are assessed on the reasonableness standard. His conclusions are also consistent with the developing standards of review applicable to decisions of other adjudicators in insolvency proceedings (see ***Pacer*** at paras 83-106), and best accomplish the needs of commercial parties in insolvency proceedings identified in ***Pacer*** (at paras 93 and 105). Although a bankruptcy trustee does not conduct traditional adversarial hearings, this alone should not preclude the application of a deferential standard to meet the objectives of maintaining the autonomy and integrity of the process, given the Court's over-riding discretion to permit fresh evidence where necessary to do justice.

[36] However, if I decide to allow fresh evidence, the standard of review of fact findings would change to correctness. The correctness standard in this context would require me to consider whether the evidence persuades me that a better decision is available (***Pacer*** at para 66). The issue of whether to allow fresh evidence is addressed in Part IV below.

[37] The Trustee submitted that the correctness standard applies to the Trustee's ultimate conclusion on each issue (whether the Letters of Undertaking govern the parties' contractual relationship; whether the promissory notes are unenforceable under insolvency laws). These are issues of mixed fact and law, so the Trustee's position would substitute the standard of correctness for the usual standard of review for questions of mixed fact and law (palpable and overriding error unless an extricable error of law is identified). I do not agree with the Trustee's position, but the possible difference in the standard of review for questions of mixed fact and law makes no difference in this case because the errors are apparent on either standard.

2019 ABQB 656 (CanLII)

IV Should the Appellants be allowed to use in this appeal, evidence concerning the verbal contract modifications which they had not previously provided to the Trustee in the claims process?

(a) Overview

[38] I must consider whether to allow the fresh evidence on the appeal for the purpose of impugning the Trustee's determinations.

[39] This requires me to consider what the interests of justice require. In this case, the relevant factors are the grounds for disallowance of the claims, the evidence the Appellants provided to the Trustee, the need for, reliability or importance of the fresh evidence, and the fairness and integrity of the claims process.

[40] For the reasons that follow, I conclude the fresh evidence should not be permitted in the present appeal. The evidence is weak (ambiguous, contradictory and vague), there is no principled reason to permit it, and allowing it would undermine the role and authority of the Trustee in the claims examination and approval process.

(b) The record before the Trustee

(i) The proofs of claim and documentation provided to the Trustee by the Appellants

[41] The Appellants provided a proof of claim using the standard form (Form 31) under the BIA, in the following amounts:

(a) Mr Aronson, CDN$301,500 (US$225,000 promissory note).

(b) Mr Cook (for Perfect Processing), CDN$134,000 (US$100,000 promissory note).

(c) Ms Foote, US$25,000 (promissory note of US$25,000).

(d) Mr Hawley, US$175,000 (promissory note of US$175,000; converted to CDN$234,500 in his revised and supplemented claim form).

[42] Each proof of claim stated that the claimant did not claim any right of priority and did not make a wage-earner's claim.

[43] Each claimant provided a promissory note issued by WZG in US dollars in the amounts reflected in their proof of claim.

(a) The notes issued to Mr Cook and Mr Hawley were dated effective October 31, 2018 (the end of WZG's fiscal year). The notes issued to Mr Aronson and Ms Foote were dated effective October 30, 2018.

(b) Each note was signed on behalf of WZG by Mr Zeviar and Mr Hawley.

(c) Each note recited that WZG acknowledged itself indebted to the claimant for "value received from services rendered and lost wages ..."

2019 ABQB 656 (CanLII)

(d) Each note was payable December 31, 2018 and acknowledged that a creditor proposal process was currently underway.

(e) Each note provided that it "contains the entire agreement of the parties with respect to the subject matter hereof and supercedes all other understandings and agreements, oral or written, with respect to the subject matter hereof."

2019 ABQB 656 (CanLII)

[44] Each claimant provided invoices in support of their claim.

(a) Mr Aronson: four invoices for "Professional Fees related to Consulting", purporting to be dated March 31, 2018, June 30, 2018, September 30, 2018, and December 20, 2018, and totalling US$175,000. Also, one invoice purporting to be dated December 19, 2018 for US$50,000 for a "franchise advance".

(b) Mr Cook: three invoices purporting to be dated December 20, 2018 totalling USD$100,000 for "Professional services related to Consulting Agreement" for the second, third and fourth quarters (either for calendar 2018 or fiscal 2018).

(c) Ms Foote: Two invoices purporting to be dated July 30, 2018 and October 31, 2018, for "Professional services related to Consulting Agreement" for the third and fourth quarters (presumably of fiscal 2018) totalling US$25,000.

(d) Mr Hawley: Four invoices purporting to be dated January 31, 2018, April 30, 2018, July 30, 2018, and October 31, 2018 reflecting monthly or quarterly fees under a "Consulting Agreement", totalling US$175,000.

[45] Each claimant provided various versions of the Letter of Undertaking that provided for the appointment of the claimant to a specific position, defined their role in WZG (and, in some cases, its United States subsidiary), and dealt with compensation.

(a) Mr Aronson: Letters dated February 19, 2018 (unsigned), March 6, 2018 (signed), September 10, 2018 (draft). Mr Aronson was to be Senior Vice President, Business Development of WZG. His employment was to commence March 12, 2018.

(b) Mr Cook: Letter of Undertaking dated October 23, 2018, which superseded a Letter of Undertaking dated April 18, 2018 and all other email or verbal "overtures", and pursuant to which he was to serve as a Vice President.

(c) Ms Foote: Letter of Undertaking dated October 31, 2018, under which she was engaged as Director, Franchise Development for the US subsidiary and to assist with WZG's franchise business development efforts effective August 1, 2018.

(d) Mr Hawley: Letter of Undertaking dated January 29, 2018 under which he was engaged as Chief Financial Officer; Letter of Undertaking dated August 27, 2018, to act as Chief Financial Officer and Executive Vice-president, and general manager of the US subsidiary. The August letter provides among other things:

> This LOU overture supercedes the LOU dated Jan. 29, 2018 and the agreement that we owe you nothing other than the $50,000 credit in the payment of the Cannabis Franchise from our previous engagement.

[46] Each Letter of Undertaking provided that compensation (or in Mr Cook's case, "deferred compensation") would commence when specified financial milestones of WZG were met, and specified the amounts of compensation associated with the various milestones.

[47] Some versions of the Letters of Undertaking expressed a "future compensation goal" to develop a cash compensation plan providing for an annual salary. The stated range of the salary objective varied among these versions of the letters, and was conditional on various contingencies occurring or milestones being defined and agreed to.

[48] The Appellants did not represent or claim that WZG achieved any of the milestones triggering the specified compensation, or that the contingencies and milestones for future compensation goals were developed or occurred.

[49] Ms Foote's Letter of Undertaking also provided for fees payable to another entity for sales or marketing events, and an hourly rate to Ms Foote accrued monthly and payable when financial milestones were met. Ms Foote did not provide any account or record of hours worked or events held.

[50] Mr Hawley represented in his revised proof of claim form that in the spring 2018 the United States executives (the Appellants) began to assert that salaries should be accrued in their favour because no cash compensation had been paid, and this created a danger that executives would quit without any prospect of payment. Two other individuals had already quit WZG because they were not paid compensation. Further, other employees/contractors communicated their discomfort and need for an assurance of some cash compensation. Mr Hawley represented that against that backdrop, and after the issue had been raised from March 2018 through September, 2018, Mr Zeviar instructed him to prepare a specific proposal for each employee/contractor including amounts to be accrued. He stated that he did so, and after some discussion prepared promissory notes reflecting the accrual. Further, Mr Zeviar agreed that the $175,000 accrual for Mr Hawley was fair and reasonable compensation for 2018.

[51] Mr Hawley did not state when the proposals were agreed to by WZG or whether or how he relied on them.

[52] Mr Aronson submitted in his proof of claim:

(a) A note to WZG in March 2018 where he asked for compensation in securities during the negotiation of his Letter. This note does not ask for accrued cash compensation.

(b) A redraft of a September 2018 draft letter of undertaking, prepared by Mr Aronson in response to WZG's draft, that provided for a fixed amount of accrued cash compensation.

2019 ABQB 656 (CanLII)

[53] Mr Aronson did not state that his redrafted September 18, 2018 letter was accepted, that an agreement to accrue was made, that he relied on any such agreement, or when such an agreement was made.

[54] Mr Cook stated in his proof of claim that soon after joining WZG (April 2018) he had a discussion with Mr Aronson about compensation:

> Soon after I had a discussion with Andy [Aronson] that the funding was taking a long time to come in and we had not been paid. Our discussion led to asking Don [Hawley] and Zale [Zeviar] to accrue our salaries so at some future time we would receive payment. We were in agreement that the actual payments may take some time based on the economy having revenues but at least we had assurance in writing that the monies were owed and would be paid in future.

[55] The above quotation refers to a written assurance, which could only be the promissory note issued to Mr Cook in mid-December 2018. Mr Cook did not state that he would have terminated his position without changing the compensation structure for past services, that he relied on any such agreement, or when such an agreement was made.

[56] Ms Foote did not provide information about a verbal arrangement or explain the background of her promissory note.

(ii) Other information available to the Trustee

[57] In addition to the proofs of claim, the Trustee had other information concerning the existence of the alleged salary debts. There were two sources of this information.

[58] First, as a result of the Trustee's prior involvement as interim receiver of WZG appointed December 6, 2018 and the Proposal proceedings which were ongoing prior to the bankruptcy, the Trustee collected a large volume of information including copies of claims filed in the Proposal proceedings, and a record of PDW's objections made at the Proposal meeting of creditors and Mr Hawley's explanation in response which described verbal arrangements leading up to the promissory notes (described in para 17 above).

[59] Second, the Trustee had access to the books and records of WZG including creditor and employee lists. This information included:

(c) Company lists of debts, including the lists delivered under the May 2018 Consent Order. WZG did not disclose the Appellants as a creditor in any of the lists until a second version of the creditor list was sent to Mr Zeviar and Mr Hawley on November 29, 2018. By then, PDW had served its second bankruptcy application on WZG scheduled for hearing December 6, 2018. WZG delivered a Notice of Intention to Make a Proposal seven days after this list.

(d) A set of WZG's monthly reports to PDW from May 2018 through October 2018 under the May 2018 Consent Order. WZG was required under the Order to identify any non-ordinary course business transactions in the monthly reports. The verbal arrangements were not disclosed in these reports. The Trustee concluded that the verbal arrangements would be non-ordinary course business transactions, because the modifications would have resulted in accrual of about $1.5 million of

2019 ABQB 656 (CanLII)

new debt, which was more than ½ of the debt listed by WZG on the date of its Notice of Intention.

(e) A list of consulting companies together with amounts paid to them in the last 12 months, prepared by WZG in June 2018. This list did not disclose any accrued salary or mention the Appellants.

(f) An email from Mr Aronson to Mr Zeviar dated October 22, 2018 attaching a draft form of Letter of Undertaking (eventually executed by Mr Cook) which did not mention any accrual of compensation and stated it superseded "any other previous overtures through email confirmations or verbal conversations". This indicated to the Trustee that as late as October 21, 2018 the earlier proposal from Mr Aronson for accrued compensation was abandoned.

(g) An email of the company dated December 5, 2018 that showed the amounts of the promissory notes were not determined until late November or early December 2018.

(h) Company records indicating the promissory notes were not executed until December 19, 2018.

(i) An email which the Trustee suggests is evidence that that the Appellants or some of them and WZG attempted to manipulate the outcome of the Proposal proceedings by inflating the Appellants' compensation amounts in the promissory notes and thus increasing their voting power.

(j) A report apparently authored by Mr Hawley in August 2018 stating, among other things, that all the employees/consultants were working primarily for WZG's shareholding interests. This report did not disclose the existence of the alleged verbal agreement to accrue compensation.

(c) The additional evidence put forward on the appeal

[60] The additional evidence that the Appellants put forward on the appeal builds on the theme that WZG made an oral agreement to accrue minimum compensation (or what Mr Hawley called a "safety net" during argument of the appeal) for 2018.

[61] This additional information, which was not provided by the Appellants to the Trustee prior to the disallowances, is ambiguous and contradictory in four ways.

[62] First, some of the fresh evidence is inconsistent with WZG's records.

[63] Some of the fresh evidence says that the oral agreement to accrue fixed salaries was made before Mr Hawley's August 27, 2018 Letter of Undertaking. Yet, as the Trustee points out, the Appellants were not listed as creditors during much of the time under consideration and not even in the formal reports required from WZG under the May 2018 Consent Order.

[64] Although a debtor's failure to include disputed claims in its creditors' lists is usually not probative of the absence of a debt, its failure to include debts which were later admitted or

2019 ABQB 656 (CanLII)

documented on the eve of bankruptcy can create a suspicious circumstance that requires additional investigation.

[65] The Appellants also tendered an affidavit of Mr Zeviar, WZG's CEO, as fresh evidence on the appeal. He swore that the "accrual amounts for employment between the company and staff were agreed upon long before the [PDW] note was due on Nov 21, 2018". That statement is inconsistent with the actual dates when the amounts were set as reflected in WZG's business records discovered by the Trustee, and with WZG's reporting under the May 2018 Consent Order which failed to disclose the alleged oral agreement or any debts to the Appellants.

[66] Second, some of the fresh evidence is internally inconsistent.

[67] Mr Zeviar deposed that "All agreements were superseded by this urgently requested and necessary method of accrued compensation ..." [underlining added]. If the oral agreement for accrued compensation was made no later than the summer 2017 as some of the Appellants state in their fresh evidence, and also superseded the Letters of Undertaking, as Mr Zeviar states, why did WZG continue through the end of October to make Letters of Undertaking which were inconsistent with the oral agreement? Why did some of the Appellants continue to accept the written letters if the parties actually had changed their agreement? These raise issues over the plausibility of the Appellants' assertions. There might be explanations, but they do not appear from the fresh evidence.

[68] Mr Aronson provided fresh evidence that there were negotiations that resulted in a new Letter of Undertaking dated October 10, 2018. This Letter was agreed to after Mr Aronson explicitly asked WZG to accrue his compensation and submitted a revised draft proposing such language. Like the other Letters of Undertaking, the October 10, 2018 version did not provide compensation until specified financial milestones were met. The natural inference is that WZG did not agree to his request. This strongly suggests that by October 10, 2018, no agreement to accrue fees had been made. Yet, elsewhere in his Affidavit, Mr Aronson states that a binding agreement to accrue salaries was made in April 2018.

[69] Mr Cook signed two Letters of Undertaking, and neither of them contained any commitment to accrue compensation in the event the financial milestones were not met. The later letter, dated October 23, 2018, provides that it supersedes "any other previous overtures through email confirmations or verbal conversations." This suggests, again, that the purported oral agreement did not exist at any time before late October 2018. Yet, elsewhere in his Affidavit, Mr Cook states that a binding oral agreement to accrue salaries was made in April 2018.

[70] Third, some of the fresh evidence is inconsistent with information in the proofs of claim or there are prior inconsistent statements.

[71] Again, Mr Hawley stated in his new affidavit that the oral agreement was made before August 27, 2018:

> ... At the time of executing the New LOU, the oral agreement of Salary Debt of $175,000 and a promise to document and accrue for year-end seemed reasonable and acceptable to me.

[72] This statement is directly contrary to the report authored by Mr Hawley and said to be dated August 31, 2018, which failed to disclose this debt. It also appears inconsistent with Mr Hawley's revised proof of claim, which strongly suggests the oral agreement was made after issues were raised in the March through September 2018 time frame.

2019 ABQB 656 (CanLII)

[73] Fourth, some of the evidence is vague. Most of the new affidavits adopt Mr Zeviar's claim that a binding oral agreement was made in April 2018, but lack detail about when the oral agreement to accrue salary was made and based on what discussions, how the claimant relied on it, or why it was not included in any of the Letters of Undertaking.

(d) Do the interests of justice require that the evidence be considered on this appeal?

[74] I am not persuaded that I should permit the Appellants to use fresh evidence in the appeal. There are three considerations against admitting the evidence, and one consideration favouring admitting the evidence. On balance, the evidence should not be permitted.

[75] First, allowing the evidence would significantly undermine the integrity of the claims process.

(a) There is no apparent reason why the Appellants did not disclose the evidence in their proofs of claim.

(b) The Appellants are experienced business people who would have, or ought to have, understood the need to provide relevant and probative evidence supporting their claims of a verbal agreement which contradicted their written arrangements.

(c) Permitting them to supplement their evidence, without any explanation why they did not disclose full particulars to the Trustee, encourages a careless approach to the claims process and undermines the authority and role of the Trustee in the claims examination and approval process.

[76] Second, the Appellants did not assert they were treated unfairly in the sense they were unaware of the Trustee's concerns about their claims or did not have a fair opportunity to address those concerns before submitting their claim forms.

[77] Third, the evidence is not needed to understand the record that was available to the Trustee when it disallowed the claims.

(a) Although the Trustee did not provide a formal record on the appeal (nor did the Appellants say they asked for preparation of a record for use in the appeal), the Trustee's Preliminary Report and First Report describe the information on which the Trustee acted with sufficient certainty to understand the evidence on which the Trustee acted.

(b) The Trustee sometimes interspersed its responses to the Appellants' new evidence in its description of the basis of its claims determination. It would have been better for the Trustee to present the basis for its original determination separately from commentary or new information put forward in response to an appellant's efforts to provide new evidence. Following the recommendations of Alan Brown in *Bankruptcy Claims after Re Galaxy Sports and Re Lin: No Longer a Businessperson's Statute*? 2011 Annual Review of Insolvency Law 833 at pp 841-842 would help address the practical problem of defining the "record".

2019 ABQB 656 (CanLII)

[78] On the other hand, the evidence could have affected the outcome. If the Appellants had provided more fulsome explanations to the Trustee, the Trustee may have been persuaded to conduct additional investigation or refer the matter to the Court for determination. This favours admission.

[79] Had the evidence been more decisive, or there was unfairness in the process, I would have been inclined to admit it. But that is not this case. The evidence is ambiguous, contradictory, and vague. It raises questions of credibility and reliability of the deponents which cannot be resolved in this summary appeal. Allowing its admission would undermine the claims process, without providing any significant benefit. On balance, it should not be admitted.

2019 ABQB 656 (CanLII)

V Did the Trustee err in rejecting the claims that WZG and the Appellants verbally modified the written terms of the Appellants' compensation?

[80] The Appellants submitted some evidence to the Trustee that could support the existence of an enforceable oral agreement to amend the terms of their compensation. For the reasons set out below, there were many gaps in the evidence of the circumstances and object of the alleged agreement and serious issues over the credibility and reliability of the Appellants' assertions. In these circumstances it was unreasonable to conclude that no oral agreement was made. Rather, more investigation or a different process to resolve the claims was required. The Trustee also incorrectly reasoned that the Appellants had to prove an agreement existed immediately prior to December 6, 2018.

[81] A bankruptcy trustee may reject a proof of claim where the creditor fails to adduce relevant and probative evidence from which a valid claim can reasonably be inferred (***Mamczasz Electrical Ltd v South Beach Homes Ltd***, 2010 SKQB 182 at paras 46-47). The BIA is a business person's statute. Claims might be prepared without legal assistance and in some cases it is reasonable to ask for further information before determining a claim. A bankruptcy trustee may ask for additional information from a claimant. It may examine the bankrupt and others under section 163 of the BIA to obtain additional information, and it may seek directions from the Court in cases of doubtful claims. Of course, the Trustee was not bound by the assertions in the promissory notes, and may go behind them and gather evidence to determine the true basis for the claim.

[82] Mr Hawley's representations in his proof of claim could be construed to mean that the company offered to modify its United States executive compensation arrangements to induce them to forebear exercising their legal rights to terminate the employment or consulting arrangements. The Trustee also had information, from the minutes of the January 4, 2019 Proposal creditors' meeting, that the oral agreement applied to each of the United States executives.

[83] I do not see any objection in principle to the parties' modifying the terms of compensation for past services in exchange for an agreement to continue the consulting relationship. An enforceable modification of an employment agreement may arise from "an implied "tacit agreement" to forbear from exercising the right to terminate the contract ..." (***Globex Foreign Exchange Corporation v Kelcher***, 2011 ABCA 240 at para 128). Further, the requirement of contractual consideration "should not be used to undermine the legitimate commercial expectations of the parties as to the enforceability of their obligations" and "the courts should refrain, if possible, from relieving the parties of covenants freely entered into,

absent some overriding public policy consideration ... (*ibid* at para 135). The same considerations apply to contracts for consulting services.

[84] As WZG approached late 2018 and was contemplating strategies to remain in business, it may well have required the services of its United States executives. In those circumstances, it is plausible that WZG may have had a business reason to amend the written agreements to induce the consultants to remain. Although I find it unusual in the circumstances of this case that the Appellants were so vague in their claim forms, it is also plausible that WZG may have honestly sought to retain its staff with enhanced compensation arrangements.

[85] The Trustee stated that it was unable to find evidence of an agreement. This is concerning for two reasons.

[86] First, there was some evidence of an oral agreement and there were further investigative options which were easily available to the Trustee.

[87] Mr Hawley's assertions were some evidence of an oral agreement. It would be reasonable, when seeking to determine whether such allegations were true, to check the corporate records, ask for details of the discussions, and check with the other party with whom the discussions were allegedly held.

[88] The Trustee checked corporate records. These were contradictory. A creditors list prepared in late November did not include the Appellants until revised with Mr Hawley's input. In contrast, the promissory notes are potential evidence of an agreement after October 31, 2018. They acknowledge a debt for services rendered, and contain entire agreement clauses. They might be construed as terminating and substituting the compensation provisions of the Letters of Undertaking, as of their effective dates (October 30 or 31, 2018).

[89] The Trustee did not ask Mr Hawley or other Appellants for details of the discussions with WZG or the executives, although it was apparent from Mr Hawley's proof of claim form that more information was available from him about what was discussed.

[90] I also find that the Trustee also did not inquire of Mr Zeviar, the alleged counter-party in the discussions, to explain the discrepancies in corporate records or why he signed these notes. Its counsel advised during the appeal hearing that she did not believe the Trustee asked Mr Zeviar about these notes, and there is nothing in the record to indicate the Trustee reviewed Mr Zeviar's affidavit, although its counsel was present during the February 28, 2019 bankruptcy hearing where that affidavit was relied on by WZG.

[91] There was compelling evidence that no oral agreements existed before the end of October 2018. WZG signed a large number of Letters of Undertaking without any mention of an oral agreement. WZG did not report the oral agreements under the May 2018 Consent Order. None of the claimants explained these unusual features. However, the evidence contradicting the existence of a purported oral agreement for the period after October 2018 is less compelling. The last Letter of Undertaking was signed October 31, 2018. The last report under the May 2018 Consent Order was for the period ending October 2018. The Trustee relied heavily on these pieces of evidence, but they do not address the facts after the end of October.

[92] The claims turned heavily on credibility considerations. Given the limitations of the process, where the bankruptcy trustee is essentially an adjudicator but does not in practice hold oral hearings and hear opposing sides, caution is required. The Trustee ought to have made

2019 ABQB 656 (CanLII)

further inquiries of the actual discussions among the claimants and WZG before disallowing the claims or perhaps referred them to the Court for determination in an adversarial process.

[93] Second, the Trustee reasoned that the evidence must show that the agreement was made before the Notice of Intention date.

[94] That proposition is incorrect. The Notice of Intention did not freeze WZG's operations. Management remained in place after the Notice of Intention was delivered, and the Interim Receivership Order made the same day contemplated that WZG retained "full management and control of the business and affairs of WZG and is responsible for identifying and paying all normal course business expenses".

[95] Therefore, I conclude that disallowance on the basis of lack of an agreement or lack of consideration was not reasonable.

[96] I am mindful that another judge of this Court summarily rejected the existence of the claims in the Proposal proceedings. That application involved different parties and likely a different record of evidence.

[97] There is no evidence supporting Mr Aronson's claim to a franchise advance because he did not state to whom the advance was made or whether or when it was repayable. Mr Hawley stated during argument that the Trustee's decision relating to that claim was not being pursued. There is no basis to set aside this aspect of the Trustee's decision.

VI Did the Trustee err in concluding that the alleged verbal modifications to the written contracts were not enforceable under insolvency laws?

[98] The Trustee found the promissory notes were void because they were preferences under section 95 of the BIA, transfers under section 96 of the BIA (transfer at undervalue), or fraudulent conveyances under the *Statute of Fraudulent Conveyances, 1571*, 13 Eliz. 1, c. 5 or section 1 of the *Fraudulent Preferences Act*, RSA 2000, c F-24.

[99] For the reasons set out below, the errors in the Trustee's assessment of the existence of an enforceable oral agreement (discussed above), and the gaps in the evidence whether the Appellants were dealing with WZG "at arm's length", lead me to conclude that the determinations on these points were unreasonable.

[100] The Trustee relied primarily on section 95 of the BIA:

> 95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

2019 ABQB 656 (CanLII)

> (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.
>
> [Underlining added].

2019 ABQB 656 (CanLII)

[101] The issue for the Trustee was whether the promissory notes were given with a view to giving each Appellant (other than Ms Foote) a preference over other creditors (section 95(a)), or were given to a person not dealing at arm's length with WZG and having the effect of giving each Appellant a preference over other creditors (section 95(b)).

[102] The evidence reasonably supports the Trustee's conclusion that the amounts in the promissory notes were agreed to sometime between late November 2018 and December 19, 2018. However, the Trustee's disallowances must be set aside.

(a) The question whether each promissory note was made with a view to giving a preference under section 95(a) and whether the presumption is rebutted under subsection 95(2) partly depends on the circumstances in which the notes were issued, including issues whether the parties actually made an oral agreement for valuable consideration. As discussed earlier, the Trustee's assessment of these issues was incomplete.

(b) The question whether each promissory note had the effect of a preference depends in part on the relationship between the amount of the obligation and the value exchanged for it. This also depends on the circumstances in which the notes were made, and again, the Trustee's assessment of these issues was incomplete.

(c) The question whether each promissory note had the effect of a preference also depends in part on whether each recipient was a related party. The general concern in non- arm's length transactions is that "there is 'no assurance that the transaction will reflect ordinary commercial dealing between parties acting in their separate interests'" (***McClarty v R***, 2008 SCC 26 at para 4). A corporate director or officer may be at arm's length to his or her corporation. So long as the corporation is represented by independent individuals, an individual who is a corporate director and key employee would likely be acting at arm's length in compensation or severance negotiations (***Piikani Energy Corporation (Re)***, 2013 ABCA 293 at paras 31-36, 39).

(d) The evidentiary record before the Trustee did not reasonably address whether the Appellants were dealing at arm's length with WZG under section 95(b). Mr Hawley was the Chief Financial Officer and appears to have been intimately involved, but he appears to have acted as representative of the United States executives. There is no evidence to suggest WZG's CEO or Board were not

acting independently of the United States executives in dealing with the alleged issue of inducing them to remain with WZG. The Trustee submits that each Appellant said in their new affidavits that they were asked by WZG to opine on the reasonableness of the compensation proposed for each other Appellant. If I had admitted this evidence, it would not have cured the gaps. The Appellants seem to have acted as a group. WZG's asking for their positions on compensation of the group members does not necessary indicate WZG was not acting independently.

(e) Section 95 applies where a creditor is given a preference. The Trustee's position implies that before the promissory notes were issued, the claimants had no right to compensation. If so, they arguably were not existing creditors at the time the alleged preference was made. The record does not indicate that the Appellants asserted *quantum meruit* or other claims before they purported to persuade WZG to amend their compensation arrangements.

[103] The Trustee further found the transactions to be transfers at undervalue. Section 96 allows a bankruptcy trustee to apply to the Court for a declaration that such a transfer is void:

> 96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> (a) the party was dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> (iii) the debtor intended to defraud, defeat or delay a creditor; or
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

2019 ABQB 656 (CanLII)

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

[Underlining added].

[104] Assuming a bankruptcy trustee may disallow a claim under section 96 on the same factual grounds as a Court can set aside a transaction under section 96 (a point which was not argued and on which I make no determination), the Trustee's determinations must include whether:

(a) The transaction was at undervalue (BIA, section 1: "the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor").

(b) The recipient was dealing at arm's length.

(c) Whether the debtor intended to defraud, defeat or delay a creditor, if the dealings were at arm's length.

[105] The question whether the transaction was at undervalue, or with a fraudulent or other improper intention under insolvency laws, depends in part on the circumstances under which the alleged oral agreement was made and its object. For example, was the transaction a fair and reasonable exchange to secure the services of the consultants to permit WZG to continue operations and make a proposal? Again, I have found the Trustee's consideration of the circumstances and object of the transactions was incomplete. Further, there was no evidence that WZG was not acting independently in the alleged compensation negotiations.

[106] Similar considerations apply to fraudulent conveyances, whether under the *Statute of Fraudulent Conveyances, 1571*, 13 Eliz. 1, c. 5 or Section 1 of the *Fraudulent Preferences Act*, RSA 2000, c F-24 and to the Trustee's findings that some of the transactions were a sham. The circumstances surrounding the transactions and their object are key considerations in deciding whether the transfers are void or sham transactions.

[107] All these issues are closely related to whether there actually was an agreement. Therefore, the disallowances on these grounds must also be set aside.

[108] I wish to observe that if I had allowed the fresh evidence, I would have come to the same conclusions concerning the Trustee's decisions as set out in Parts V and VI of this Decision. The fresh evidence is not definitive in favour of the Appellants' claims, and raises further issues whether the claims are plausible and the evidence in support of them is credible or reliable. The same applies to Exhibits "Z" and "AA" to Mr Weber's affidavit sworn November 21, 2018, which PDW sought to put forward in response to the Appellants' evidence.

2019 ABQB 656 (CanLII)

VII Was the Trustee biased against the Appellants?

[109] The Appellants submitted during the oral hearing of the appeal that the Trustee was biased or had a conflict of interest because it was involved under the May 2018 Consent Order or as interim receiver, or the Trustee provided notices of disallowance to the Appellants shortly before the first meeting of creditors in the bankruptcy on March 21, 2019.

[110] The law recognizes both disqualification through bias or reasonable apprehension of bias. The Appellants did not recognize this distinction, but I have considered both types.

[111] I have concluded that the bias and conflict of interest allegations have no merit.

(a) Bias issues must be raised in a timely way. The Trustee's prior involvement was disclosed to Justice Horner before she appointed the Trustee as interim receiver and, later, bankruptcy trustee. The Trustee again disclosed its prior involvement in its preliminary report and at the First Meeting of Creditors, where three of the Appellants took exception to the Trustee on the ground of conflict of interest. Notwithstanding that, the Appellants did not include bias or conflict of interest among the grounds of their notice of appeal (or mention it in their lengthy affidavits) or apply to remove the Trustee.

(b) A bankruptcy trustee's prior involvement in a monitoring and reviewing role does not necessarily indicate bias or reasonable apprehension of bias. There is almost no evidence of the Trustee's mandate or retainer under the May 2018 Consent Order other than to assist in reviewing WZG's books and records under the Consent Order. There is no evidence the Trustee took an adversarial role or made conclusions about the Appellants in its earlier mandates.

(c) The timing of delivery of the notices of disallowance does not show bias or create any reasonable apprehension of bias. There is no evidence that the Trustee delayed matters to embarrass, inconvenience or harm the Appellants. A reasonable person, having considered the matter, would not perceive bias. Instead, they would think the Trustee acted responsibly in trying to determine the Appellants' status before the first meeting of creditors so that meeting participants could proceed knowing who had status and who did not. The proofs of claim were submitted shortly before the first meeting of creditors, so it is not concerning that the Trustee provided its decisions shortly before the meeting.

[112] The fresh evidence does not change my conclusions concerning bias issues.

VIII Remedy

[113] I do not accept the Appellants' submissions that the facts are basic, simple and well-supported. These claims cannot be summarily allowed in substitution for the Trustee's decision.

[114] A dispute "depending on issues of credibility, can leave genuine issues requiring a trial" (***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 35; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 45).

2019 ABQB 656 (CanLII)

[115] The evidence before the Trustee was far from conclusive in the Appellants' favour, and raised serious issues over the credibility and reliability of evidence that there actually was an agreement and serious issues that the promissory notes were transactions which should be set aside under insolvency laws or as sham transactions. The record on this summary appeal is not sufficient to permit a fair and just adjudication of these issues.

[116] Again, I would have come to the same conclusion had I considered the Appellants' fresh evidence on this appeal, or Exhibits "Z" or "AA" to Mr Weber's affidavit. All this evidence magnifies the questions over the credibility and reliability of the evidence offered to prove the claims. Again, these questions are not suitable for summary determination.

[117] A trial of the issues is required, where the Appellants' evidence can be tested by cross-examination before a trial judge. At the trial, the grounds for the claims are limited to those set out in the proofs of claims. Although I rejected fresh evidence on the appeal, the evidence at the trial cannot be limited to the Trustee's record, because I have found the claims required further investigation. Further, it is not feasible to limit the evidence because that might unduly limit cross-examination. Therefore, my decision does not prevent a party from using the Appellants' affidavits for cross-examination purposes, the Appellants from relying on any relevant and admissible evidence to bolster their claim, or any respondent from adducing any properly admissible evidence in response.

[118] The burdens of proof depend on the issue under consideration. My conclusions do not decide who bears the onus on any given issue. That is a matter for the trial.

IX Conclusion

[119] The Trustee's counsel will prepare the formal Order, that will provide the necessary recitals identifying the appeal proceedings, and the following directions and determinations:

1. The Trustee's disallowances are set aside, except the disallowance of Mr Aronson's claim to a franchise advance. The claims will be determined by trial of the issues before a justice of this Court in accordance with this Order.

2. If the Appellants wish to further pursue their claims by proceeding to a trial, they must serve written notice of their intention to do so on the lawyers for the Trustee and PDW not later than September 19, 2019. If the notice is not served as required, the Appellants' claims are barred.

3. At any trial of the claims:

   (a) The grounds for the claims are limited to those set out in the Appellants' bankruptcy proofs of claims, which shall serve as the statement of their claims.

   (b) The evidence will not be limited to the evidence before the Trustee.

   (c) This Order does not determine that the Appellants' affidavits are properly admissible, nor prevent a party from using the Appellants' affidavits for cross-examination purposes.

2019 ABQB 656 (CanLII)

4. Any party may apply for further directions, with respect to:

    (a) The nature of participation by the Trustee or PDW, and the time for filing and service of any statement of their objections to the claims.

    (b) A litigation plan setting out required pre-trial steps and the time in which they must be completed, including pretrial examinations or records disclosure under the BIA or the Alberta Rules of Court.

    (c) Security for costs.

    (d) Any other matter required for the economical and efficient determination of the claims.

5. Costs of the appeal are reserved. The parties may make written submissions concerning costs of the appeal within 60 days.

6. Rule 9.4(2)(c) is invoked.

Heard on the 11th day of June, 2019, with additional submissions received June 18, 2019 and June 28, 2019.

Dated at the City of Calgary, Alberta this 22nd day of August, 2019.

J.T. Eamon
J.C.Q.B.A.

Appearances:

Brian Cook (self represented litigant) via telephone, Appellant
Andrew Aronson (self represented litigant) via telephone, Appellant
Don Hawley (self represented litigant) via telephone, Appellant
Nicole Foote (self represented litigant) via telephone, Appellant

Alexis Teasdale, of Bennett Jones LLP
for the Respondent Hardie & Kelly Inc (Trustee of WhoZaGood Inc)

James Reid, of Blake Cassels & Graydon LLP
for PDW Holdings Inc

2019 ABQB 656 (CanLII)

In the Court of Appeal of Alberta

Citation: Tervita Corporation v ConCreate USL (GP) Inc., 2015 ABCA 80

Date: 20150225
Docket: 1401-0072-AC
Registry: Calgary

2015 ABCA 80 (CanLII)

Between:

Tervita Corporation

Appellant
(Plaintiff)

- and -

ConCreate USL (GP) Inc. and the City of Calgary

Respondents
(Defendants)

Corrected judgment: A corrigendum was issued on March 2, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Myra Bielby

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Madam Justice Rowbotham
Concurred in by the Honourable Madam Justice Bielby

Appeal from the Order by
The Honourable Judge G.H. Poelman
Dated the 13th day of February, 2014
Filed on the 6th day of March, 2014

(Docket: 1201-09472)

2015 ABCA 80 (CanLII)

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter

[1] The issue on this appeal is whether the appellant Tervita has a valid builders' lien for the work it did under contract with ConCreate USL (GP) Inc., which in turn had a contract with the land owner City of Calgary. The appellant properly filed its first lien, but it expired for failure to file a *lis pendens* in time. The appellant then filed a second lien for the same work. The summary trial judge held that the second lien was filed in time, but that it was invalid because a contractor could not file a second lien for the same work after the first lien had expired.

Facts

[2] The relevant chronology is as follows:

June 20, 2011	Tervita contracts with ConCreate.
July 26, 2011 to Feb 23, 2012	Tervita does work on the lands.
February 23, 2012	last work done; "anchor lift-off testing" still to be done by Tervita.
March 16, 2012	interim partial receivership order for ConCreate.
Early April, 2012	ConCreate's receiver blocks access/posts guards.
April 5, 2012	first Tervita lien filed.
April, 2012	Tervita contacts City re provision of remaining services directly to it.
April 12, 2012	final receivership order for ConCreate.
July 23, 2012	Tervita email to City consultant "our contract was terminated with ConCreate prior to us being able to complete the work".
July 25, 2012	Statement of Claim issued to enforce first lien.
October 3, 2012	180 days from first lien; *lis pendens* not filed.
October 12, 2012	second (identical) Tervita lien filed.

2015 ABCA 80 (CanLII)

October 24, 2012	City consultant recommends remaining testing not be done; trial judge holds contract abandoned.
November 1, 2012	*lis pendens* filed respecting second lien.
March 25, 2013	original Statement of Claim amended to now refer to second lien.

2015 ABCA 80 (CanLII)

It is conceded that the first lien ceased to be valid on about October 3, 2012, because of the failure to file a *lis pendens* on the title, as required by the *Builders' Lien Act*, RSA 2000, c. B-7.

[3] At the time that ConCreate's receiver blocked access to the site, there were discussions between Tervita on the one hand, and the City of Calgary and its consultants on the other hand, on the prospects of Tervita completing the required testing. By then Tervita would have realized that there was a significant risk that ConCreate would not be fulfilling its obligations to Tervita. It was contemplated that a separate contract or purchase order would be issued from the City directly to Tervita, but in the end that never happened. In October, 2012 Tervita asked for access to the site so that it could complete the last of the testing, which it estimated would take one-half day. After further discussion, the City's consultant indicated that there was no need to do the final testing. At the end of the day, the last work that Tervita ever did on the contract was on February 23, 2012.

[4] The summary trial judge held that Tervita had filed its second lien in time, because the contract was not abandoned until October 23, 2012, when the City's consultant indicated that there was no need to do the final testing. When the parties returned to address costs, the respondents Simply Stone Landscapes Ltd. and A&B Excavating, who are competing lien claimants, raised a new issue. They argued that the statute did not permit the filing of two liens for the same work. The trial judge accepted this new argument, and declared the second lien invalid for that reason.

Timeliness of the Second Lien

[5] Section 6 of the *Builders' Lien Act* provides that a person who improves land has a lien on the land. Section 10 confirms that the lien arises when the work is first done. A lien holder has certain priorities over other creditors, and also has a direct claim against the owner notwithstanding that there may be no privity of contract with the owner. As a result, the *Act* provides some strict rules about the registration and enforcement of the lien. It is well established that a liberal approach may be taken to determining the scope of the lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien: ***Clarkson Co. v Ace Lumber Ltd.***, [1963] SCR 110 at pp. 114, 36 DLR (2d) 554.

2015 ABCA 80 (CanLII)

[6] The key section is s. 41(4):

> 41(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 . . .

The *Act* thus provides that the 45 days to file a lien starts running on the happening of either of two events: 1) the completion of the contract, or 2) the "abandonment" of the contract.

[7] It is immediately obvious that if a narrow interpretation is placed on the term "abandonment", the time for filing a lien will never expire in cases where a contractor is prevented from completing its work by the default of the party with whom it has contracted, such as happened here. It is not disputed that the work called for under the Tervita contract was never actually completed by Tervita; the actions of the receiver prevented that. Further, in a subjective sense Tervita never "abandoned" the contract, because it was always ready, willing and able to complete its obligations. If the contracted work was never completed by Tervita, and the contract was never abandoned (in this subjective sense) then the 45 day time period for filing a lien never started running.

[8] The *Builders' Lien Act* creates an extraordinary statutory remedy. The lien rights under the *Act* must be given a practical interpretation, so as not to unduly prejudice the rights of owners and third parties: ***Canbar West Projects Ltd. v Sure Shot Sandblasting & Painting Ltd.***, 2011 ABCA 107 at para. 14, 39 Alta LR (5th) 38, 502 AR 235. An interpretation which indefinitely delays the time limitation for filing a lien is unlikely to be in accordance with the intention of the legislature: ***Dieleman Planer Co. Ltd. v Elizabeth Townhouses Ltd.*** (1973), 38 DLR (3d) 595 at p. 600 (BCCA), affirmed [1975] 2 SCR 449.

[9] There are two interpretive approaches that accomplish a practical result. The first is with respect to "completion of the contract". Where a contract is objectively terminated by the repudiation or breach of one of the parties, there are a number of consequences, and various legal remedies then become available. One consequence of a termination from breach is that both parties are relieved from any further performance under the contract: ***Keneric Tractor Sales Ltd. v Langille***, [1987] 2 SCR 440 at p. 455; ***Vallieres v Vozniak***, 2014 ABCA 384 at paras. 9-10; ***Think Kitchen Cabinets Ltd. v Harbourvista Apartments Ltd.***, 2014 NSSC 28 at para. 40, 339 NSR (2d) 327. Thus, when the receiver for ConCreate effectively terminated the contract, Tervita's future performance obligations were at an end. While in a physical or functional sense there was still "undone work", in a contractual sense all of the work required by the (now terminated) contract had been exhausted. The contract was "completed" in the sense that no further work would be done under it: ***Think Kitchen Cabinets*** at paras. 45-6.

2015 ABCA 80 (CanLII)

[10] To summarize, in early April, ConCreate's receiver blocked access to the site. Tervita commenced discussions with the City about doing the remaining testing directly for it. By July 23, 2012 Tervita acknowledged that the ConCreate contract had been terminated by breach, which, under this approach, would be the latest that the 45 day lien registration period would start running.

[11] The second interpretive approach relates to the term "abandonment". The term "abandonment" can have a narrow meaning, denoting conduct of the contractor that signifies a subjective intention to cease performing its obligations. This would include the contractor "walking off the job" or "no longer showing up". Abandonment may often be assumed upon the insolvency of the contractor, although in this case Tervita was never insolvent. Under the *Act*, however, a purely subjective test for abandonment as adopted in cases like ***W.M. Fares & Associates Inc. v 3035605 Nova Scotia Ltd.***, 2006 NSCA 120 at para. 23, 249 NSR (2d) 156 is inappropriate.

[12] In some cases a contract may be "abandoned" on an objective basis. The statute just requires abandonment, not necessarily abandonment by the lien claimant. Certainly a subjective abandonment by the lien claimant will be sufficient. However, when it becomes clear that the contract has been rendered un-performable by the conduct of either or both parties, by the actions of third parties, or as a result of external factors, the contract is essentially "abandoned". Once it becomes impractical or impossible to perform the contract, no reasonable party would persist in saying they are "ready, willing and able" to continue performing: ***Lake of the Woods Electric (Kenora) Ltd. v Kenora Prospectors & Miners Ltd.***, (1996), 27 CLR (2d) 184 at para. 49 (OCJ Gen Div). There comes a point in time when it is clear that the contract is at an end. That will also start the 45 days running. At some time between the date when ConCreate's receiver posted guards and blocked access to the site, and the email of July 23, this contract was essentially abandoned.

[13] The summary trial judge noted that in a physical sense the work was never completed, because the "anchor lift-off testing" was never done. He applied a primarily subjective test to "abandonment", noting that Tervita was always ready, willing and able to do the anchor lift-off testing. Tervita's statement on July 23 that the contract was terminated did not indicate that it had been terminated by Tervita, but rather that it had been terminated by others. There was always the possibility that ConCreate's receiver would affirm Tervita's contract, or that the City of Calgary would separately retain Tervita to do the same work. Notwithstanding Tervita's acknowledgment on July 23 that its contract had been terminated, he held that it was not until October 24, 2012 that the City conclusively told Tervita that it would not be allowed to complete performance.

[14] The trial judge relied on ***Dieleman Planer Co. Ltd. v Elizabeth Townhouses Ltd.***, [1975] 2 SCR 449. That decision does not, however, mandate a purely subjective approach to abandonment. It decides that a temporary cessation of work (for example, as a result of

temporary financial problems of the owner) is not the same thing as a permanent abandonment of the contract. ***Dieleman Planer*** implies that there can be an "abandonment" even if the contractor is ready, willing and able to do more work, if the work or the contract is permanently terminated.

[15] A review on appeal discloses that the trial judge applied too narrow a legal test. The test is when the lien claimant knew or should have known that the other party would not complete the contract. Once it would have been obvious to a reasonable contractor that the cessation of work caused by the receivership was not merely temporary, but represented a termination of the contract, the contract was effectively "abandoned". An abandonment can occur without a formal communication from the other parties that the contract is terminated. Here the insolvency of ConCreate, the actions of its receiver in blocking access to the site, the discussion with the City about the possibility of doing the remaining work directly for the City, combined with the other surrounding factors, would cause a reasonable person to conclude that the contract was terminated. Tervita acknowledged that in its email of July 23. The fact that the City of Calgary might enter into a new contract for the same work was irrelevant to the ability to file a lien for the work done under the first contract.

[16] The time to file the lien starts running when the lien claimant knew or ought to have known that the other contracting party would not complete (i.e. had "abandoned") the contract. To resolve this appeal, it is not necessary to determine exactly when the 45 days started to run. The contract had been abandoned, at the very latest, by the time of Tervita's acknowledgment on July 23 that its contract had been terminated. In an objective sense, Tervita realized by that day that the cessation of work was not just temporary. The last day on which a lien could have been filed was approximately September 6, 2012, making the second lien ineffective.

Validity of a Second Lien

[17] As noted, s. 6 of the *Builders' Lien Act* provides that a person who improves land has a lien on the land. Section 10 confirms that the lien arises when the work is first done.

[18] Section 41 requires that the claim for a lien be registered at the Land Titles Office within 45 days from when the work is completed or the contract is abandoned. Section 42 provides that if the lien is not registered within that time "the lien ceases to exist":

> 42 If a lien is not registered within the time limited by section 41, the lien ceases to exist.

Section 43 also requires the filing of a *lis pendens* at the Land Titles Office within 180 days of when the lien has been registered:

2015 ABCA 80 (CanLII)

> 43(1) A lien that has been registered ceases to exist unless, within 180 days from the date it is registered, [an action is commenced to enforce it, and a *lis pendens* is filed].

On their face, sections 42 and 43 draw a distinction between "a lien", and "a lien that has been registered". Each section provides that, in default of complying with the requirements in the section, the defined right "ceases to exist".

[19] The competing lien claimants take the position that when the first lien "ceased to exist" upon failure to file the *lis pendens*, all of the appellant's rights ceased. They draw no distinction between the underlying "lien right" created by s. 6, and the "claim to a lien" that is filed at the Land Titles Office. If one ceases to exist, so does the other.

[20] The appellant argues that there is a distinction between the two. The underlying "lien right" arises under sections 6 and 10 when the work is first started, and does not end until the work is finished or abandoned. Within 45 days of the last of those events, the subcontractor can assert and enforce a lien. During that period of time, the subcontractor can file one or many liens for some or all of the work, each of which could be valid so long as the registration requirements are met. The *Act*, the appellant notes, contains no limit on the number of liens that can be filed. The appellant argues that when the first "lien that had been registered" ceased to exist, that had no effect on the underlying "lien right". That underlying right could still be enforced at any time within 45 days of the abandonment of the contract.

[21] The trial judge confirmed the respondents' interpretation, relying in part on ***Flynn v Church of Christ Development Ltd.***, [1981] AJ No 211 (Master). He concluded that when s. 43 states that the lien "ceases to exist", that refers to all the potential lien rights of the subcontractor. The trial judge stated:

> The lien, however, is a charge against the owner's land created by statute [not to be confused with the underlying contractual claim]. It arises by virtue of section 6(1). But it is not the same thing as a statement of lien. The Act refers to a lien is something that may be claimed in a statement of lien and registered at Land Titles Office and realized by commencing an action. . . . Section 43(1) does not speak to the validity of a statement of lien or the cancellation of the registration of a lien. It says that the lien ceases to exist if the required steps are not taken within 180 days. That means, in my view, that the lien which is created by section 6(1) ceases to exist. What the statute created, it eliminates.

In this passage the trial judge recognized the distinction between the underlying "lien right", and the "statement of lien" which is a part of the methodology of enforcing the lien. He accepted the respondents' argument that there was no distinction between the two, and if one ceased to exist, so did the other.

2015 ABCA 80 (CanLII)

2015 ABCA 80 (CanLII)

[22] It can be noted that the trial judge's interpretation is not fully faithful to the wording of the statute. The *Act* does draw a distinction between what he called the "statement of lien" and the "lien right". As previously noted, s. 41 refers to the "lien", whereas s. 43 refers to a "lien that has been registered". Where s. 43 says that rights "ceased to exist", it refers to a "lien that has been registered", not strictly speaking to the underlying lien right.

[23] The *Act* describes the rights of the parties in different ways. The definitions in the *Act* distinguish between a "lienholder" and a "registered lienholder". Section 46 states that registration has the effect of "continuing" a lien. Section 48(5) provides that if a registered lienholder does not prove its lien after notice is given, it "loses the lienholder's lien". Section 50 provides that multiple liens can be enforced through the same statement of claim, and s. 43(2) confirms that any sheltered registered lienholder can file the necessary *lis pendens*. It seems logical that the failure of the lienholder who issued a statement of claim to file the necessary *lis pendens* would not prevent other "sheltered" lienholders from enforcing their claims independently, so long as they did so within the necessary timelines. For example, if the issuing lien holder settled its claim, and thus failed to file a *lis pendens* because it had lost interest in the action, that would not prejudice other lienholders. If the failure to file the *lis pendens* does end the "lien rights" of the issuing lienholder, it presumably does not have that effect on the "lien rights" of any other lienholder. These provisions all demonstrate a subtle difference between the "lien rights" and the "statement of lien" that is registered at the Land Titles Office.

[24] Thus, the *Act* does not appear to preclude the filing of multiple liens. Since the lien right arises when the work commences, a subcontractor might theoretically file a separate lien at the end of each month, for all the work done that month and in all the previous months. If a statement of claim was subsequently issued later than 180 days after some of the early liens were filed, those liens would undoubtedly "cease to exist". But it does not necessarily follow that all of the lien rights for early work that are also captured by later liens, or at the least those for work that is done later, would also "cease to exist".

[25] As noted, a liberal approach is to be taken in determining whether the claimant has lien rights. After that threshold is reached, a strict interpretation is required of the registration requirements. If it were not for the fact the second lien was filed after the passage of 45 days from the abandonment of the contract, that second lien would have been valid. The first "registered lien" had ceased to exist, but on a proper interpretation of the statute the underlying lien rights should not be taken to have been extinguished as well. If the lien claimant meets all of those requirements, a second lien that overlaps with the claims in a first lien is not *per se* invalid. On a proper interpretation, the expiry of the first lien does not undermine the fundamental validity of the second one.

[26] However, for any "second lien" to be valid, it must be filed in time. As previously noted, the second lien was not registered within 45 days of the abandonment of the contract. It is invalid for that reason.

Conclusion

[27] In conclusion, the appeal is dismissed.

Appeal heard on January 16, 2015

Reasons filed at Calgary, Alberta
this 25th day of February, 2015

Slatter J.A.

I concur: Rowbotham J.A.

I concur: (Authorized to sign for) Bielby J.A.

2015 ABCA 80 (CanLII)

Appearances:

P.R. Mack, Q.C.
for the Appellant

S.B. Cody
for the Respondent Simply Stone Landscapes Ltd.

T. Glenn
for the Respondent 1506561 Alberta Ltd. operating as A & B Excavating

2015 ABCA 80 (CanLII)

Corrigendum of the Reasons for Judgment Reserved

The date in the last sentence of paragraph 16 has been changed to read: " . . . have been filed was approximately September 6, 2012, . . .".

2015 ABCA 80 (CanLII)

Court of Queen's Bench of Alberta

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

2016 ABQB 416 (CanLII)

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);

2016 ABQB 416 (CanLII)

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).

2016 ABQB 416 (CanLII)

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

2016 ABQB 416 (CanLII)

(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…

2016 ABQB 416 (CanLII)

[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:

2016 ABQB 416 (CanLII)

(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)."

2016 ABQB 416 (CanLII)

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

2016 ABQB 416 (CanLII)

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

2016 ABQB 416 (CanLII)

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.

2016 ABQB 416 (CanLII)

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

2016 ABQB 416 (CanLII)

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 "<u>anything</u> constructed, erected, built, placed, <u>dug or drilled or intended to be</u>

2016 ABQB 416 (CanLII)

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

2016 ABQB 416 (CanLII)

> 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.

2016 ABQB 416 (CanLII)

[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,

2016 ABQB 416 (CanLII)

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.

2016 ABQB 416 (CanLII)

[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).

2016 ABQB 416 (CanLII)

[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.

2016 ABQB 416 (CanLII)

[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.

2016 ABQB 416 (CanLII)

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.

2016 ABQB 416 (CanLII)

Court of Queen's Bench of Alberta

Citation: Sustainable Developments Commercial Services Inc v Budget Landscaping & Contracting Ltd, 2020 ABQB 391

Date: 20200707
Docket: 2003 09136
Registry: Edmonton

2020 ABQB 391 (CanLII)

Between:

Sustainable Developments Commercial Services Inc

Applicant

\- and -

Budget Landscaping & Contracting Ltd

Respondent

Endorsement
of
Brian W. Summers, Master in Chambers

---

[1] The application by Sustainable Developments Commercial Services Inc ("Sustainable") to discharge the builder's lien ("Budget Lien") registered by the Respondent Budget Landscaping & Contracting Ltd ("Budget") against the title to land owned by Victor Kochan is granted.

[2] Sustainable asserts two bases upon which the Budget Lien ought to be struck: firstly, that the work done by Budget was not an "improvement" to the lands; and secondly, that Victor Kochan is not an "owner" within the meaning of the *Builders' Lien Act.* I agree with both of those assertions.

[3] With respect to the first point, the work done by Budget was to haul aggregate to Victor Kochan's land. This work was done by Budget under and pursuant to a prime contract between the County of Vermilion and Sustainable and a subcontract between Sustainable and Budget. Both of these contracts are in evidence. Those contracts indicate that the work was to load aggregate at the Bykowski 3 Pit, haul it to the Kochan Stockpile site and stockpile the aggregate there. The evidence of Sustainable's officer James Green goes further to say that the aggregate material was for the purpose of a temporary stockpile to be utilized for road graveling over the course of the following year. Counsel for Budget argues that this information is hearsay (from the County) and that it is inadmissible under Rule 13.18(3) of the *Rules of Court* because

Sustainable's application is not interlocutory, but final. That is, if Sustainable's application is granted, the Budget Lien will be struck.

[4] I accept that Mr. Green's evidence that the aggregate would be used by the County of Vermilion over the course of the year for the county roads is hearsay. However, there is other evidence from Sustainable that the stockpiling of aggregate for the County on the Kochan lands was not an improvement to those lands. Firstly, the contracts make it clear that the aggregate was being stockpiled on the Kochan lands for the benefit of the County of Vermilion. Mr. Green also put into evidence the lease between Mr. Kochan and the County. That lease agreement is entitled "Lease Agreement for Stockpile Site". The lease states the County is the owner of the aggregate material on the Stockpiling Site and its employees and agents may access the site for the purpose of inspecting, removing or adding materials during the term of the lease. The lease also indicates that the County is responsible for the reclamation of the Stockpile Site. Clearly, the aggregate delivered by Budget to the lands at the request of the County of Vermilion was not an improvement to the Kochan lands.

[5] When Mr. Green was cross examined by counsel for Budget he was pressed to admit that his information was corporate. He readily acknowledged that his information was information of the corporation of which he was the representative and a director. I find that Mr. Green's evidence on behalf of the corporation that the aggregate was being stockpiled on the Kochan lands for the County of Vermilion; that the County was the owner of the aggregate at all times and was responsible for reclamation of the lands under the lease is sufficient to prove that the stockpiling of aggregate was not an improvement to the Kochan lands.

[6] Furthermore, Budget has tendered no evidence that the stockpiling of aggregate on the Kochan lands was intended as or in fact constituted an improvement to those lands.

[7] With respect to Sustainable's second assertion, I agree that Victor Kochan was not an owner within the meaning of the *Builders' Lien Act.* The work by Budget forming the basis of the lien claim was for the County of Vermilion, not for Mr. Kochan. There is absolutely no evidence or any suggestion whatsoever that it was for the benefit of Mr. Kochan. No notice was served upon Mr. Kochan pursuant to section 15. The fact that the County of Vermilion had not registered a caveat with respect to its leasehold interest does not give Budget the right to lien Mr. Kochan's fee simple title. The Budget Lien should have indicated that it was against the County of Vermilion's leasehold estate.

[8] Sustainable is entitled to costs under Column 3 of Schedule "C" of *Alberta Rules of Court*. Since I called upon the parties to provide written argument on the issue of whether Budget could lien the fee simple interest of Mr. Kochan, the sum of $500 shall be added to the amount otherwise payable under item 7.

Heard on the 23rd day of June, 2020.
Dated at the City of Edmonton, Alberta this 6th day of July, 2020.

Brian W. Summers
M.C.Q.B.A.

2020 ABQB 391 (CanLII)

Appearances:

Robyn L. Graham
Bryan & Company LLP
for the Applicant

Peter Alexander
Smith Thompson Law LLP
for the Respondent

2020 ABQB 391 (CanLII)

1983 CanLII 2071 (SK CA)

Saskatchewan Court of Appeal

Citation: Hansen, Sawarin, Joyce, Joyce, Buro, Gauthier, Gabruck, Butler Interprovincial Tracking Ltd., Astro Tire Limited, B & D Welding and Machining (1978) Ltd., North Battleford Co-Operative Association Limited, Cedar Construction Equipment Co. Ltd. and Esakin v. Canadian National Railway Company, Clarkson Company Limited, Robert Brewster Construction (High River) Ltd., Higgs, Jordan, Ducrarme: Johnston, Foulston, Nikoforuk, Traves Ditching and Excavating Ltd., Jacobson, Scott, Dahl, Olsen Equipment Ltd., Denton Holdings Ltd., Buchanan: Gotto, Higgens, Elford: Douville, Butler, Aubee, Beckler and Perkins
Date: 1983-03-03

Between:
Hansen, Sawarin, Joyce, Joyce, Buro, Gauthier, Gabruck, Butler Interprovincial Tracking Ltd., Astro Tire Limited, B & D Welding and Machining (1978) Ltd., North Battleford Co-Operative Association Limited, Cedar Construction Equipment Co. Ltd. and Esakin
and
Canadian National Railway Company, Clarkson Company Limited, Robert Brewster Construction (High River) Ltd., Higgs, Jordan, Ducrarme: Johnston, Foulston, Nikoforuk, Traves Ditching and Excavating Ltd., Jacobson, Scott, Dahl, Olsen Equipment Ltd., Denton Holdings Ltd., Buchanan: Gotto, Higgens, Elford: Douville, Butler, Aubee, Beckler and Perkins

Bayda, C.J.S., Brownridge and Cameron, JJ.A.

Counsel:
James H. Gillis, for the appellant;
David F. Woloshyn and Sandra Kochan, for the (plaintiff) respondents Hansen et al. (excluding Peter Esakin);
E.B. Lindgren, for the (defendant) respondent, Higgs et al.
M. Cheryl Crane, for the (defendant) respondent, The Minister of Labour representing Doug Buchanan;
E.P. Miedzybrocki, for the (defendant) respondent, The Canadian National Railway Company;
Shane Weir, for the (plaintiff) respondent, Peter Esakin.

[1] Cameron, J.A.: Pursuant to *Queen's Bench Rule* 188, permitting issues of law to be decided in advance of trial, Mr. Justice Halvorson was requested to determine, on an agreed statement of facts, which of the respondents, Hansen et al. and Higgs et al., were entitled to liens under the *Mechanics' Liens Act*, R.S.S. 1978, c. M-7, as a result of having performed work, or rendered services, or furnished materials in respect of the reconstruction of a section of rail-line owned by the Canadian National Railway Company.

[2] To build the line the C.N.R. needed ballast, and to that end engaged the respondent, Brewster Construction (High River) Ltd., to remove gravel from a pit

located about 3 miles from the line, to crush, screen, and wash the gravel, and then to haul and stockpile it onto a narrow strip of land immediately adjacent to the line. Brewster was required to first strip the stockpiling site of vegetation and topsoil, then to grade it and slope it, and finally to cover it with a 6" pad of "pit-run" gravel.

[3] Having obtained the contract Brewster set up camp at the pit and began work:

(i) *It rented equipment*, namely: a crushing machine from Cedar Construction Equipment Ltd.; a water truck from Fred Buro; a loader from Brian P. Ducharme; and other equipment from Peter Esakin -- all for use at the pit, except the water truck, which was also to be used on the road to the stockpile. (I shall refer to these persons as "the equipment lessors").

(ii) *It engaged independent truckers* to haul gravel ballast from the pit to the stockpile, namely: the respondents (plaintiffs) Hansen, Sawarin, Buro, Gauthier, Gabruck, Butler, and the two Joyces, as well as the respondents (defendants) Higgs, Ducharme, Johnston, Foulston, Nikiforuk, Traves, Jacobsen, Scott and the three Dahls.

(iii) *It contracted for goods and services* with each of Astro Tires Limited (for the supply of tires for Brewsters' trucks); B & D Welding and Machine (1978) Ltd., (for parts and services therefor); and North Battleford Cooperative Association Ltd. (for the supply of groceries to the camp).

[4] All persons involved (including a number of truck drivers represented by the Minister of Labour) were aware of Brewster's contract and knew that the Railway intended to use the gravel ballast in reconstructing its line -- as eventually it did.

[5] After considerable quantities of gravel had been extracted, processed, moved, and stockpiled Brewster experienced financial problems which lead to the appointment of a receiver, The Clarkson Company Limited, pursuant to a debenture which Brewster had earlier given the Canadian Imperial Bank of Commerce. At that time, the Railway owed Brewster some $360,000.00, which, instead of paying to Brewster, it paid to Clarkson. The receiver was then pressed by the truckers, the equipment lessors, the Co-op, and others, including a number of drivers (all of whom were owed money by Brewster) for payment of their accounts in priority to the Bank on the footing they were entitled, under the *Mechanics' Lien Act*, to liens against the funds held by Clarkson. Their claims were founded on ss. 3 and 5 of the Act, which generally speaking, and in the case of a contractor, constitute the money received by him, on account of his contract, as a trust fund for the benefit of his subcontractors.

[6] Four questions were submitted to the Queen's Bench. Three raised substantive issues, with which I will deal first, while the fourth involved a procedural point. Mr. Justice Halvorson was asked first to decide this question:

Does the *Mechanics' Lien Act* of the Province of Saskatchewan have application to

1983 CanLII 2071 (SK CA)

contractors and subcontractors employed under and by virtue of a contract with the Canadian National Railway as owner?

In answer he said:

> Counsel concede this question must be answered in the affirmative, and I agree. Interprovincial railway undertakings are not entirely immune from provincial laws such as mechanics' lien acts (see *Canadian National Railway Company v. Nor-Min Supplies Limited* (1977), 1 S.C.R. 322). Liens cannot be enforced against road beds or other integrals parts of the operation of the railway, but other railway properties are not necessarily exempt. Moreover it has been frequently held that the trust provisions of mechanics lien legislation are separate and distinct from the provision of such Acts which authorize liens against land (see *Canadian Imperial Bank of Commerce v. T. McAvity & Sons Limited* (1959), S.C.R. 478). It appears clear, therefore, that the claimants are entitled to maintain a lien on the trust money so long as they otherwise fit within the confines of the Act.

[7] The C.N.R. agreed the Act applied; however, counsel for Clarkson (even though he had, apparently, conceded this point before the Chambers Judge) nevertheless included in his notice of appeal a ground challenging this answer. In my opinion and for the reasons given the question was answered correctly.

[8] The second question asked,

> Are all or any of the claimants 'subcontractors' as defined by s. 2(1)(n) of the *Mechanics' Lien Act*?

[9] Of the three substantive issues this is the most important and I will consider it after disposing of the third question, which is really quite simple; it is this:

> Will the claims of the 'subcontractors ' take priority over the claim of the Canadian Imperial Bank of Commerce against the funds paid by the Canadian National Railway to the Clarkson Company Limited?

In answer the Chambers Judge said:

> Section 5(1) of the Act stipulates that every person for whose benefit a trust is created under s. 3 has a lien upon the trust fund and the lien takes priority over all general or special assignments of the contract price.
>
> Pursuant to s. 3 the sum payable by C.N. to Brewster constitutes a trust fund in the hands of C.N. (sic) [Brewster] for the benefit of those I have found to be "subcontractors". It is plain enough that these subcontractors are persons for whom the trust was created as stated in section 5, and their claims are prior to the bank's assignment of book debts.

[10] I agree with this; those persons who are entitled to liens as subcontractors, or

1983 CanLII 2071 (SK CA)

as labourers, will have their claims paid in priority to that of the Bank.

[11] The first main issue then is which of the claimants qualify as "subcontractors" within the meaning of s. 3 of the Act. Sections 3 and 5 provide, in part, as follows:

> 3.(1) All sums received by a builder, contractor or subcontractor on account of the contract price constitute a trust fund in his hands for the benefit of the owner, builder, contractor, subcontractor, The Workmen's Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rendered work or services on the contract site, and the builder, contractor or subcontractor, as the case may be is the trustee of all sums so received by him and he shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or work or services on the contract site and all subcontractors are paid for work done, services rendered or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto.
>
> . . . . .
>
> 5.(1) Every person for whose benefit a trust is created by ss. 3 or 4 has, subject to the provisions of that section, a lien upon the trust fund for the value of the work done, services rendered or materials supplied or furnished by that person and the lien takes priority over all general or special assignments and judgments, attachments, garnishments, and receiving orders of the contract price or any portion of the price whenever received, use or made and of right to set off.
>
> (2) Subject to subsec. (2) of s. 3 and to s. 4, the builder, contractor subcontractor, as the case may be shall distribute the money from time to time comprising the trust among the persons for whose benefit the trust is created, according to the liabilities of the builder, contractor or subcontractor to such persons, on a *pro rata* basis.

[12] Mr. Justice Halvorson found that both the gravel pit, and the rail bed, were the subject of an "improvement" within the meaning of the Act -- a prerequisite to a valid claim -- and that the independent truckers, as well as the equipment lessors (but only they) were entitled, as "subcontractors", to liens on the funds in Clarkson's hands. Clarkson contends that neither the truckers, nor the equipment lessors can be entitled to liens because

> (i) there was no "improvement" to land with respect to the gravel pit, as found by the Chambers Judge, or in relation either to the rail bed or the stockpiling site;
>
> (ii) even if there was an "improvement" Brewster cannot be said to have been a "contractor" relative to that improvement; and
>
> (iii) at all events the truckers and the equipment lessors were not

1983 CanLII 2071 (SK CA)

"subcontractors" entitled to the benefits of ss. 3 and 5.

[13] I will deal with these issues, raised by Clarkson, and then turn to consider the position of the Co-op, who filed a notice to vary contending its claim should have been allowed.

(i) *The improvement.*

[14] This issue arises because under the *Mechanics' Lien Act* only a sum payable pursuant to a contract relating to an "improvement" of land constitutes a trust fund in the hands of a contractor for the benefit of his subcontractors. Section 2(1)(d) carries this definition:

> (d.) "*improvement"* means a thing 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 be or become part of the land and includes clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading, or ditching of, in upon or under the land; ...

The receiver submits that no improvement occurred at any time of the three material sites -- the gravel pit, the stockpile, or the rail bed -- but, in my opinion, for reasons which follow, it is not necessary to decide whether there was an improvement at the site of the gravel pit.

[15] As for the other sites, Clarkson argued that neither the stockpiling, nor the incorporation of the gravel ballast into the rail bed, constituted an "improvement", since the definition of that term excludes "a thing that is not affixed to the land or intended to be or become part of the land". It 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. I do not agree with these contentions.

[16] Even if we assume we are dealing with two distinct and separate parcels of land, and are concerned to find an improvement on one or the other -- an uncertain premise, since the lands are contiguous, and nothing separates one site from another except use, and even that is closely related -- I am satisfied that each was the subject of an improvement within the meaning of the Act. The agreed statement of facts established that the gravel "was intended by C.N. to be and was in fact thereafter affixed to and incorporated into the land owned by the C.N. and all parties had knowledge of such intention". There is no doubt then that the gravel ballast became part of the land upon which the rail bed was located. Nor, in my opinion, is there any doubt that the land upon which the line was located was the subject of an improvement.

[17] As for the stockpiling site, it should be remembered that Brewster not only

1983 CanLII 2071 (SK CA)

placed ballast there but constructed the site, since it was required to clear and strip the topsoil, then to grade and slope the site, and finally to top it with a 6" base of "pit-run" gravel. The definition of improvement includes "clearing, ... digging ... filling (and) grading".

[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; 7 N.R. 603. 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 25-44-17W3, 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 kilometer 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 the *Mechanics' Lien Act* and the question then is: did Brewster do any work upon that improvement, or render any services for it?

(ii) *Was Brewster a "Contractor"?*

[19] Section 2(1)(b) provides this definition:

> "contractor" means a person contracting with or employed directly by the owner or his agent *to do work upon*, to *render services for* or to furnish materials for, *an improvement*, but does not include a labourer; ...
>
> (emphasis added)

The gravel ballast, intended for the reconstruction of the rail line, had to be extracted, crushed and washed, then loaded and moved, and finally stockpiled on the site of the improvement. In my view, this, coupled with the preparation of the site, amounted to rendering "services *for*" the improvement, and to performing "work *upon*" the improvement within the meaning of s. 2(1)(b).

[20] I find additional support for this conclusion in the definition of work found in s. 2(1)(p); it includes work and services "*in respect of*" an improvement -- which is a broader notion than that embraced in the words *for* or *upon.* And when this definition, and that of "contractor", are read together (and in conjunction with ss. 3 and 5), it seems to me that Brewster must be regarded as a contractor for the purposes of s. 3.

(iii) *Which of the claimants then are "subcontractors"?*

[21] Once again the Act defines the term -- s. 2(1)(n) reads, in part, as follows:

1983 CanLII 2071 (SK CA)

> “subcontractor” means a person not contracting with or employed directly by an owner or his agent for the *doing of any work, rendering of any services*, or the *furnishing of any material but contracting with* or employed by a *contractor* or under him by another subcontractor, but does not include a labourer; ...
>
> (emphasis added)

(a) *The truckers* - The Chambers Judge held that the independent truckers were subcontractors entitled to the benefits of ss. 3 and 5; he said:

> The real issue is whether the truckers contributed to that improvement. The question of remoteness looms. It is not appropriate to inject a tort notion into a mechanics' lien action, but remoteness does seem to be the foundation for the opposition to the truckers' claims. It must be here remembered that the truckers merely hauled the gravel to the C.N. stockpile and C.N. arranged itself for the building of its road bed.
>
> In the case of *Peterson Truck Company Limited v. Socony Vacuum Exploration Company et al.* (1955), 17 W.W.R. (U.S.) 257, the Alberta Court of Appeal suggested that truckers could have a lien when their only service was hauling materials to an oil well drill site. While the British Columbia Court of Appeal in *Cam Cement Contractors Ltd. et al. v. Royal Bank of Canada et al* (1974), 38 D.L.E. 427 held that truckers merely delivering materials did not thereby acquire a lienable interest, that decision is distinguishable from the instant case due to the different wording of the B.C. Act.
>
> . . . . .
>
> The test is not so much a question of remoteness as whether the work of the truckers was a reasonably direct and significant contribution to the improvement. It seems to me that the trucking services were fundamentally crucial to the new rail bed. The gravel was an important element of the improvement, and its delivery to the stockpile was a major factor. I must conclude that the words “in respect of an improvement” can be construed broadly enough to encompass the transporting of the gravel in this instance.

[22] The appellant contends that:

> (i) the Chambers Judge applied the wrong tests -- the sole issue is whether the truckers had rendered a “service” *upon* or *for* the improvement; and that
>
> (ii) the decision of the British Columbia Court of Appeal in *Cam Cement*, instead of that of the Alberta Court of Appeal in *Peterson Truck*, should have been followed;

[23] In *Peterson Truck* it was found that a trucker, who hauled drilling supplies onto an oil-well drilling site, was entitled to a lien on the footing he performed work or services ‘upon or in respect of” of an improvement (the words of the Alberta Act)

1983 CanLII 2071 (SK CA)

while in *Cam Cement* the suppliers of trucks used to deliver materials to the site were not entitled to claims as "subcontractors" (as defined in the B.C. legislation) because it could not be said they had "place (d) ... materials" on the site. These decisions turned on the distinctive language of the statutes of their respective jurisdictions so neither is of much assistance. The language of the *Saskatchewan Act* is materially different.

1983 CanLII 2071 (SK CA)

[24] Whether the truckers in this case are "subcontractors" and, as such, entitled to the benefits of ss. 3 and 5 will depend on whether, in the language of s. 2(1)(n), they contracted with Brewster "for the doing of any work, or the rendering of any *service* ... *upon* or *for* the improvement". I am satisfied they did so. Brewster contracted with the C.N.R. to render a service for the improvement, namely: extracting, processing, moving, and stockpiling gravel ballast. In turn Brewster engaged the independent truckers to perform part of this service -- moving and stockpiling the ballast. Hence the truckers were subcontractors within the meaning of the Act. And as such they are "persons", under s. 5, for whose benefit the Clarkson Company holds funds in trust.

[25] (b) The *equipment lessors* - Similarly, whether the equipment lessors are subcontractors entitled to a s. 5 lien on the s. 3 trust fund depends on whether they too rendered " services" for the improvement. No doubt, Brewster leashed [sic] the crusher, dragline, loader, and water truck from the equipment lessors (all of whom were aware of Brewster's contract and of the rebuilding of the line), in order to perform its undertaking to extract, crush, and load the gravel. Mindful of that, and bearing in mind the peculiar definition of "services", found in s. 2 (1)(1), which includes "the use of equipment leased by a person ... to a contractor or subcontractor that is used *in connection* with an improvement" it follows, in my opinion, that the equipment lessors rendered "services" for the improvement as contemplated by the Act. Accordingly they are subcontractors entitled to the benefits of s. 3, and to the liens created by s. 5 in relation to the funds held by the Clarkson Company.

[26] (c) *The Co-op* - The Chambers Judge held that while the Co-op had furnished materials (defined in the Act to include every kind of "moveable property") it did not do so *for* the improvement; the claim was too distant. I agree and would dismiss the notice to vary. The Chambers Judge pointed out, correctly, that in this case, those who did *work* or provided *services* were more readily entitled to the benefits of the Act, than others, who furnished *materials*, because the Act defines work to include work and service "*in respect of*" an improvement, while on the other hand only materials furnished for the improvement may be the subject of a claim. In short, it cannot be said that in supplying groceries to the camp the Co-op furnished materials for the improvement entitling it to a claim of lien within the contemplation of the Act.

[27] (d) *Others* - None of the other deductions of the Chambers Judge, respecting which of the claimants may be classed as "subcontractors", is the subject of appeal.

[28] That then leaves for determination the second main issue in this appeal.

2. The Procedural Issue:

[29] The fourth question is this:

> Is there any party to these proceedings barred by the passage of time for asserting its claim to the monies being held by Clarkson by reason that these proceedings have not been properly commenced or alternatively have not been commenced within the time limited prescribed by the *Mechanics' Lien Act* for Saskatchewan?

1983 CanLII 2071 (SK CA)

[30] Several sections of the Act bear upon this issue, but before turning to their consideration, I think it useful to note the context in which this issue arises. In the first place we are dealing with fresh debts owed by Brewster to the claimants -- the claims are not statute barred and the receiver is liable, generally, for their payment. Secondly, 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. It is intended that those persons enjoy greater protection and better remedies, in relation to monies coming to them, than the protection and remedies afforded to them, generally, by the law.

[31] Section 8 of the Act provides, in part as follows:

> 8.(1) An action to assert a claim to trust moneys mentioned in the preceding sections may be commenced by originating notice and ss. 46 to 50, subsecs. (1) and (2) of s. 51 and s. 53 and s. 55 apply *mutatis mutandis* in respect of the action.
>
> (2) ... *notwithstanding anything in this Act*, no action to assert a claim to trust moneys mentioned in the preceding sections shall be commenced except
>
> > (d) in the case of a claim for *services* within one hundred and twenty days after the last work was done for which the claim is made:
>
> (emphasis added)

[32] Each of the plaintiff-claimants last rendered services on days ranging from August 31, 1980 (Cedar, Olsen, and Esakin) to July 1, 1980, (when for example, Gabruck last rendered service). They caused their Originating notice to be issued on December 17th, and, three weeks later, on January 8th, 1981, the first of them to do so, filed an affidavit setting forth the particulars of his claim. The appellant contended that the Originating Notice was either a nullity, because it was not accompanied by the affidavit, or else it did not commence proceedings effectively until the required affidavit was filed on January 8th -- by which date the time for commencement of proceedings by all claimants had expired. We were referred to *Hirsh Corporation Ltd. v. Marzlof et al*, an unreported 1975 decision of the Saskatchewan District Court. In my view that case does not support the appellant's position that in the absence of an affidavit the proceedings are a nullity, or alternatively, are not to be taken as commenced until the affidavit is filed. Nor can I find anything in the Act to support this argument. I am satisfied that the validity of the proceedings is not subject to attack on this basis.

[33] It is clear, however, that when mthe Originating Notice was issued, on December 17th, 1980, the time for commencement of proceedings by *some* of the plaintiff-claimants had expired. The Chambers Judge dealt with this issue, saying,

> the out of time claims are not sheltered by s. 46(13) which states that "an action brought by a lienholder shall be taken to be brought on behalf of all lienholders". In my opinion this does not have the effect of resurrecting stale claims, but merely covers lien claims not yet started nor barred by effluxion of time.
>
> As I read s. 49 a lienholder who was not a party may be allowed to establish his claim at any time during the proceedings prior to distribution of the trust fund. It would, indeed, be anomalous if a lienholder who was not a party could still prove his claim while a lienholder who was already a party, but late with his action, could not do so. Also it is noteworthy that s. 8(1) specifies that s. 49 applies to an action claiming trust moneys.
>
> It is not possible to completely rationalize the foregoing sections; however, it is my conclusion that there is discretion in the court to grant relief to the late claimants if not under s. 54 then under s. 49.

He concluded by holding that the delinquent claimants could launch a motion in this respect either before, or at trial.

[34] These sections read thus:

> 46.(13) Any number of lienholders claiming liens on the same land or trust may join in issuing an originating notice to enforce their liens and an action brought by a lienholder shall be taken to be brought on behalf of all lienholders on the property or trust in question.
>
> . . . . .
>
> 49. At any time before the amount realized in an action for the enforcement of liens on the land or trust fund has been distributed, a lienholder who was not made a party or who has not been served with notice of the proceedings may, on application to a judge and on such terms as to costs or otherwise as may be just, be allowed to prove his claim, and in such case the judgment shall be amended accordingly.
>
> . . . . .
>
> 54. Except as otherwise provided in this Act, where in this Act, a time is limited for registering a document or taking a proceeding, and through accident, mistake or inadvertence the time as limited has been allowed to expire without such document being registered or proceeding taken, the judge may nevertheless upon such terms as seem just extend the time so limited; but such extension is subject to the rights of third persons accrued by reasons of the failure or omission to

1983 CanLII 2071 (SK CA)

register the document or take the proceedings within the time limited.

[35] The appellant submits that even though, on first blush, s. 54 appears to apply, it is inapplicable. I agree. In the first place, s. 8(1), (which prescribes the form of commencement and the procedure to be followed in actions asserting claims to trust money) expressly declares applicable ss. 46 to 50 and ss. 53 and 55 -- no reference is made to s. 54. In the circumstances that is virtually tantamount to an express direction that s. 54 is not to apply. In the second place, s. 8(2) is altogether explicit in providing that, "*nowithstanding anything in this Act,"* no action shall be commenced in relation to a claim on trust money, except, in the case of a claim by a subcontractor for work or services, within 120 days after the last day upon which he did any work. And finally s. 54 itself, begins with the words "Except as otherwise provided in this Act". It follows, in my opinion, that the legislature did not intend to empower the court to extend the time in which an action may be commenced to assert a lien claim on trust funds.

1983 CanLII 2071 (SK CA)

[36] But even though the right to commence action is lost, upon the expiration of the time limited therefor, curiously the lien itself is preserved. The Act appears to vacillate: on the one hand it seeks to set matters at rest, but on the other stops short of terminating the lien. This is clear from s. 49, which empowers the court to permit a lienholder at any time in the course of an action to prove his claim and to recover judgment as long as he comes forward before the amount realized in the action has been distributed. This same desire to have it both ways is apparent with respect to liens on land. Section 37(1) declares that, if a lien on land is not registered within the prescribed time, it "ceases to exist". But then s. 37 (2) promptly resurrects it, deeming such lien "valid", except as against certain intervening interests.

[37] Where does that leave the delinquent claimants in this action? They submit they do not have to rely on s. 54 -- even though they were powerless to start their own actions, they were, nevertheless, allowed to come in on this proceeding (which was commenced in time by *some* of the plaintiff-lienholders) because s. 46(13) provides that an action, on the trust, brought by one lienholder "shall be taken to be brought on behalf of *all* lienholders ..." I am inclined to agree. The words all lienholders would seem to mean *all* subsisting lienholders, not merely *some* of them, namely, those whose time for initiating proceedings on their own is extant, but even so -- and even though I view the lien claimants as having subsisting liens -- I do not think it necessary to find that the late-comers are entitled to come in under this section in view of the powers given to the court by s. 49.

[38] That section empowers the court to allow a lienholder to prove his claim *at any time* before the trust fund has been distributed. The appellant says this section only applies to a person who was not a party to the proceedings, or who had not been served with notice thereof, and is therefore inapplicable in this case because all the late claimants were parties. It will be evident the appellant wants it both ways. It wants the out-of-time claimants treated as parties for the purpose of s. 49, while, at the same time, contending that they are not parties because their time for commencement of action had expired before the proceedings were started. I do not

accept that. And in my opinion the plaintiff-claimants, whose time for initiating proceedings of their own had expired, may be permitted to prove their liens pursuant to s. 49.

[39] For the foregoing reasons I would dismiss both the appeal and the notice to vary with costs to the respondent.

Appeal and notice to vary dismissed.

1983 CanLII 2071 (SK CA)

Court of Queen's Bench of Alberta

Citation: Northern Dynasty Ventures Inc v Japan Canada Oil Sands Limited, 2020 ABQB 275

2020 ABQB 275 (CanLII)

Date: 20200420
Docket: 1403 06762
Registry: Edmonton

Between:

Northern Dynasty Ventures Inc. and Tyalta Industries Inc.

Plaintiffs

\- and -

Japan Canada Oil Sands Limited formerly Japan Oil Sands Alberta Limited

Defendant

\- and -

Highway Rock Products Ltd.

Third Party Defendant

Reasons for Decision
of the
Honourable Madam Justice G.D.B. Kendell

Appeal from the Decision by
L.R. Birkett Q.C., Master in Chambers

Pronounced the 22nd day of May, 2019

2020 ABQB 275 (CanLII)

Background

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

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

> Japan Canada Oil Sands Limited, ("JACOS"), is the operator of an oil sands project known as the Hangingstone Expansion Project near Fort McMurray, Alberta ("Hangingstone Project").
>
> On or about August 28, 2013, JACOS entered into a Master Purchase Agreement with Highway Rock Products Ltd. "HRP".
>
> NDV and Tyalta were subcontractors to HRP in respect of the Master Purchase Agreement.
>
> On or about September 16, 2013, NDV entered into a written agreement with HRP (the "Gravel Contract"), whereby NDV granted HRP an exclusive license to remove sand and gravel from a gravel pit which was located approximately 30 kilometers away from the Hangingstone Project site, accessible by road a driving distance of 89 kilometers. The consideration for the Gravel Contract was payments to be made by HRP to NDV.
>
> Tyalta rented to HRP equipment used to crush and screen sand and gravel at the gravel pit.
>
> All of the gravel was provided to JACOS for its use in connection with the Hangingstone Project.
>
> The Gravel Contract was terminated by NDV due to unpaid accounts owing by HRP to NDV.
>
> NDV and Tyalta filed liens against JACOS' lease for unpaid accounts rendered to HRP.
>
> The lien fund was set in the sum of $671,684.70.
>
> $403,010.02 has been paid to NDV. The entitlement to the balance of the lien fund was the subject of the Application before Master Birkett. At all relevant times, the Tyalta equipment was located at the gravel pit and not at the Hangingstone Project site.

Standard of Review

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

Analysis

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

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

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

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

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

A. Where is the Contract Site?

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

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

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

2020 ABQB 275 (CanLII)

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

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

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

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

B. What is the Meaning of Immediate Vicinity?

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

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

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

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

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

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

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

> ... When a contractor or material supplier provides work and materials are incorporated into the owner's land or placed in the owner's control, the owner receives a benefit, whether it is paid for or not. The contractor is not in a position to takeback the materials and deprive the owner of the benefit because they have

2020 ABQB 275 (CanLII)

> become part of the owner's improvement to the property. The lien remedy stands in the place of the contractor's ability to retrieve his work product and gives him a higher priority than other creditors…

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

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

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

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

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

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

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

[26] In ***Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services)***, 2017 ABQB 262 Master Prowse stated at para 57:

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

2020 ABQB 275 (CanLII)

2020 ABQB 275 (CanLII)

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

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

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

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

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

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

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

D. The Floodgates Argument

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

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

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

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

[36] It would be speculative to discuss the potential rights of other persons under the *Builders' Lien Act* without a proper factual matrix. In considering NDV's argument, material suppliers who are not at the contract site would have to be in the immediate vicinity in order to claim a lien. Immediate vicinity would have to be assessed in the context of each material supplier, and each material supplier would have to establish that they fall under s 6(4) of the *Builders' Lien Act* as a person who rents equipment to an owner, contractor, or subcontractor, and that the rented equipment is being used or is reasonably required to be available for the purpose of the work. In my view, it would be unjust to use this argument to defeat Tyalta's legitimate claim for a lien under s 6(4).

Conclusion

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

2020 ABQB 275 (CanLII)

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

Heard on the 15th day of January, 2020.
Dated at the City of Edmonton, Alberta this 20th day of April, 2020.

2020 ABQB 275 (CanLII)

G.D.B. Kendell
J.C.Q.B.A.

Appearances:

Patrick D. Kirwin
Kirwin LLP
For the Appellant, Northern Dynasty Ventures Inc.

Bradley J. Smith
Verhaeghe Law Office
for the Respondent, Tyalta Industries Ltd.

Court of Queen's Bench of Alberta

Citation: E Construction Ltd v Sprague-Rosser Contracting Co Ltd, 2017 ABQB 99

2017 ABQB 99 (CanLII)

Date: 20170213
Docket: 1403 13215
Registry: Edmonton

Between:

E Construction Ltd

Plaintiff
(Respondent)

- and -

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

Defendants
(Applicants)

Memorandum of Decision
of the
Honourable Madam Justice J.M. Ross

The Application

[1] The Applicant is the court-appointed Receiver of Sprague-Rosser Contracting Co. Ltd. [SR]. Prior to the appointment of the Receiver on July 31, 2014, SR operated a construction company. At the time of the receivership, SR and the Regional Municipality of Wood Buffalo [RMWB] were parties to a construction contract known as the Saline Creek Drive and Bridge Phase 1 Contract [Prime Contract]. The Respondent E Construction Ltd. [ECL] subcontracted with SR to perform work on a portion of the Prime Contract [Subcontract]. ECL later filed a lien under the *Builder's Lien Act*, RSA 2000, c B-7 [*BLA*] against lands owned by the RMWB [RMWB Lands] in respect of work performed [ECL Lien].

[2] The Receiver settled SR's claims against the RMWB, including claims arising under the Prime Contract. The settlement was approved by the Court in a Consent Order in the within action dated May 5, 2016 [Settlement Order].

[3] The Settlement Order provided for the transfer of funds in the amount of $4,432,455 [ECL Lien Funds] to be held by the Receiver's counsel "subject to the builders lien claims of [ECL] and shall replace and stand as security in place of the [RMWB Lands] pending determination as to the validity and enforceability of the [ECL Lien]."

[4] The Settlement Order provided for the discharge of the ECL Lien and the Certificate of *Lis Pendens* registered by ECL [ECL CLP] from the RMWB Lands. It provided that the RMWB had no further interest in the ECL Lien or the ECL Lien Funds. ECL's claim against the RMWB was dismissed and the RMWB was removed as a defendant in the within action.

[5] The Settlement Order also provided that there was no "admission as to the validity or enforceability of the [ECL Lien] and any interested Person shall remain at liberty to contest the validity, enforceability, quantum or other aspect of the [ECL Lien]." The Receiver and any other interested person could apply to the Court to determine entitlement to the ECL Lien Funds.

[6] A further Order, dated June 28, 2016 [Procedural Order], defined issues to be determined regarding the ECL Lien, and provided the procedure to be followed in this application. Pursuant to the Procedural Order, the Receiver is the applicant and ECL the respondent. The Royal Bank of Canada [RBC] is entitled to participate as an interested person.

[7] At the hearing of the application, the parties advised that a number of issues had been resolved between them. The sole issue advanced by the Receiver and the RBC regarding the validity of the ECL Lien is whether the work performed and materials furnished by ECL were in respect to a "public highway" within the meaning of section 7(1) of the *BLA*. ECL contends that s 7(1) does not apply in the circumstances of this case. ECL further contends that work that it performed that was not directly on or under the public highway, but on lands adjacent to it, is not subject to s 7(1).

The Contracts and the Work Performed

[8] SR and the RMWB entered into the Prime Contract on May 9, 2012, for the construction of roadways and a bridge [together "Saline Creek Drive"], and a stormwater pond, at a total contract value of $39,042,810. The Subcontract, effective the same day, provided that ECL would complete parts of the Prime Contract, as are "necessary to construct, install and complete asphalt and concrete pavement work, granular base course work, flat work, curb and gutter work, utilities and associated works," at a total value of $17,512,681. The Subcontract had four parts: "A" (Roads: Prairie Loop Boulevard to Park Street), "B"(Roads: Park Street to South Project Limits), "C"(Bridges), and "E"(Stormwater Ponds at Landfill Site).

[9] The Prime Contract required that SR obtain a Labour and Material Bond in an amount equal to 50% of the total Contract amount. In compliance with this provision, SR obtained a Labour and Material Bond from Western Surety Company.

[10] On March 21, 2014, RMWB terminated the Prime Contract with SR. The Subcontract was not completed at this time. Of the ECL work that had been completed, 99% related to construction of Saline Creek Drive, and 1% related to the construction of the stormwater pond.

[11] On the same day, the ECL Lien was registered on certificates of title to the RMWB Lands. ECL claims that it is owed $3,837,623.47, plus GST and applicable costs.

2017 ABQB 99 (CanLII)

[12] There is no dispute that Saline Creek Drive is situated on the RMWB Lands. ECL did not register a builders' lien on the title to separate lands on which the stormwater pond was constructed. There is therefore no lien claim in respect of the amount owing for that work ($14,182).

[13] Subsequently, ECL contracted directly with the RMWB to complete Part "A" and Part "C" of the Prime Contract.

[14] In October 2014, portions of Saline Creek Drive (Parts "A" and "C") were opened for public use as a roadway accessible by members of the general public. In October 2015, Part "B" was opened for public use.

[15] The Division Manager of ECL, Jack Farrar, in an affidavit sworn on July 10, 2014, deposed that he was aware that Saline Creek Drive was intended to be a municipal road. In a supplementary affidavit sworn on September 2, 2016, he confirmed that it is his understanding that Saline Creek Drive "is a Regional Municipality of Wood Buffalo municipal arterial roadway."

[16] In July 2014, Mr. Farrar also deposed that survey work on Saline Creek Drive was not complete, and no road plan of survey was registered at Land Titles. The certificates of title for the RMWB Lands did not except out road plans on the titles in respect of Saline Creek Drive.

[17] Mr. Farrar was questioned on his affidavits on September 21, 2016. The following excerpt is taken from the transcript:

> Q: I want to take you now to paragraph 4 of the same Affidavit.
>
> A: Yes.
>
> Q: At that paragraph, you describe the scope of the work performed by E Construction as follows:
>
>> E Construction was constructing a new four-lane divided road with a median for the proposed Saline Creek Drive road. And further E Construction was upgrading in constructing underground utilities being water lines and storm sewer and related work to service the surrounding area from Saline Creek Drive road. In addition, E Construction was constructing a new access area to service a road to a Municipal boat launch. And E Construction provided a gravel base for a future asphalt trail for pedestrians and cyclists
>
> So the nature of Saline Creek Drive and Bridge 1 project was for a public highway?
>
> A: It was for construction of a new road, yes.
>
> Q: And it wasn't a private road or a private driveway?
>
> A: No.
>
> Q: [...] So the Saline Creek Drive road was always intended to be a public roadway on completion?
>
> A: Intended.

2017 ABQB 99 (CanLII)

Q: And between the July 2014 Affidavit and the Fort McMurray fires in 2016, the roadway was completed, and it was used by the public as a public highway?

A: It was used by the public following October – part of it was used following October of '14 and part of it was used by the public following October '15.

Q: But the roadway was not for personal use or individual business or user ownership?

A: No.

Q: So you would confirm with me that the Saline Creek Drive road is a Municipal road?

A: It is now.

Q: And that road belongs to the Regional Municipality of Wood Buffalo?

A: Yes.

Q: And the road was intended to be used by members of the public at large?

A: Yes.

[18] In sum, it is undisputed that Saline Creek Drive was intended to be used as a public roadway on completion, and that this intention was known to the parties. It was not complete or in use as a public roadway at the time the ECL Lien was filed, but it has since been opened to the public for use as a roadway. No road plan is registered nor excepted out of the title to the RMWB Lands in respect of Saline Creek Drive.

Statutory Provisions

[19] Section 7(1) of the *BLA* provides that, "No lien exists with respect to a public highway or for any work or improvement caused to be done on it by a municipal corporation."

[20] There is no definition in the *BLA* of a "public highway."

[21] The *Municipal Government Act*, RSA 2000, c M-26 [*MGA*] and the *Land Titles Act*, RSA 2000, c L-4 [*LTA*] speak to public roads and the registration of road plans.

[22] The *MGA*, s 1(1)(z) provides:

(z) "road" means land

(i) shown as a road on a plan of survey that has been filed or registered in a land titles office, or

(ii) used as a public road,

and includes a bridge forming part of a public road and any structure incidental to a public road;

[23] The *LTA*, ss 82 and 84 read:

82(1) When

2017 ABQB 99 (CanLII)

(a) a notification or a plan of survey that is prepared in respect of a public work under the *Public Works Act* or the *Municipal Government Act* …

is submitted for registration, the Registrar shall act under subsection (2). [*Emphasis added*].

(2) When subsection (1) applies, the Registrar shall

(a) register the notification, plan or certificate that is submitted for registration,

(b) make the necessary endorsements on or cancellations of the appropriate certificates of title, and

(c) issue, when appropriate, free of all encumbrances, a new certificate of title for the area taken in accordance with the notification, plan or certificate.

(3) Notwithstanding subsection (2)(c), where

(a) the area taken consists of a public highway, road, street or lane, and

(b) a plan of survey referred to in subsection (1)(a) has been submitted for registration in respect of the area taken,

a certificate of title shall not be issued with respect to that area.

...

84(1) A plan of survey subdividing land may be registered.

(2) A plan of subdivision that is submitted for registration shall

...

(c) show all public roadways and other areas dedicated or set apart for public purposes and indicate the courses and width of each of them.

2017 ABQB 99 (CanLII)

Position of the Receiver and the RBC

[24] At common law, a lien could not be registered against a public street or public bridge: ***Alspan Wrecking Limited v Dineen Construction Limited***, [1972] SCR 829 at 835, 26 DLR (3d) 238 (WL) [***Alspan Wrecking***], approving ***Shields v City of Winnipeg***, (1964) 49 WWR 530 (Man QB, per Dickson J, as he then was) [***Shields***]. Any estate or interest of a municipality in the lands "could not be made subject to a mechanics' lien in view of the paramount right of the public to passage over such streets. The sale of a street under a mechanics' lien would be contrary to the public interest": ***Alspan Wrecking*** at para 17.

[25] The common law principle was recognized in Alberta in ***Western Canada Hardware Co Ltd v Farrelly Bros Ltd***, (1922) 70 DLR 480 at para 38, 18 Alta LR 596 (Alta SC, AD) (QL), where the Court observed that an irrigation canal at issue in the case was analogous to "the

streets of a city where the fee simple is in the city," and that "[n]o one would ever suggest that a mechanics' lien could be filed in a street for work done in paving or repairing it."

[26] The Receiver and the RBC do not rely on the common law principle; however, it is their position that this principle was codified in Alberta by *The Mechanics' Lien Act*, 1930, SA 1930, c 7, and has continued in subsequent lien legislation to the present day. As the *BLA* does not define "public highway," the common law definition should apply. In ***Shields***, Dickson J approved the definition of a "highway" as "a way over which all members of the public are entitled to pass and repass" and noted that "an essential characteristic of a highway [is] that every person should have a right to use it for the appropriate kind of traffic, subject only to any restrictions affecting all passengers alike": paras 49-50.

[27] Master Funduk also observed that public streets could not be liened under the *BLA*, in ***Prairie Roadbuilders Ltd v Stettler (County No 23)*** (1983), 48 AR 108 at paras 3-4, 27 Alta LR (2d) 289 (QB Master) (WL) [***Prairie Roadbuilders***]:

> The project consists of a gathering system and a sewage lagoon. The gathering system consists of sewer pipes under the streets of the hamlet, to which are connected the sewer drain pipes of the residences. The main pipes under the streets eventually channel down to a trunk sanitary line which runs outside the hamlet, along a road allowance for a public highway, then under the highway to a lift station on the lagoon site. The lagoon site contains storage cells for the effluent.
>
> The land on which the lagoon is situate is registered in the name of the county. All of the liens are registered against this land. The streets of the hamlet are not liened and could not be: first, because of s. 5(1) [currently s 7(1)] of the *Builders' Lien Act*, R.S.A. 1980, c. B-12; second, because of s. 172(1) of the *Municipal Government Act*, R.S.A. 1980, c. M-26, which gives title to the streets to the Crown, whose lands are not lienable.

[28] The Receiver and the RBC argue that the *BLA*, s 7(1) prohibits liens on both intended and existing public highways. The section provides that "no lien exists with respect to a public highway or for any work or improvement caused to be done on it by a municipal corporation." An "improvement" under s 1(d) of the *BLA* 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"(*emphasis added*).

[29] The Receiver and the RBC argue further the Prime Contract requirement for a Labour and Material Bond reflects the parties' understanding that work would not give rise to a lien. They refer to ***Greenview (Municipal District No 16) v Bank of Nova Scotia***, 2013 ABCA 302 at para 8, 556 AR 34, where the Court observed that the labour and material payment bond provided in that case, was "an effort to protect sub-trades who are prohibited from filing liens against a municipality." They note that ECL made a bond demand against Western Surety on the same day it registered the ECL Lien.

[30] Regarding ECL's argument that s 7(1) does not apply to incidental work on adjacent lands, the Receiver submits that all incidental structures constructed by ECL were required for the roadway to function as a public highway and form part of the public highway. Further, both

2017 ABQB 99 (CanLII)

the highway itself and the adjacent lands on which related work was done are situated on the same fee simple titles owned by the RMWB. Thus, any incidental structures are also subject to s 7(1).

Position of ECL

[31] ECL does not dispute the facts or most of the legal principles referred to above. However, ECL submits that, when the work was performed and when the ECL Lien was filed, Saline Creek Drive was not yet a public highway. It was not open for use by the public. No legal plan of survey had been done or registered. The lands did not yet come within the definition of a road in either of the ways contemplated in the *MGA*, and further did not constitute a public highway within the meaning of the *BLA*, s 7(1). ECL contends that "dedication" of the land as a public highway, through use or registration, is required before s 7(1) applies. Mere intention to create a public road is not enough to exclude lien rights.

[32] ECL relies on the following cases from British Columbia, in which courts found that work on improvements not yet dedicated as a public street did not come within the common law exception to lien rights.

[33] In ***Vannatta v Uplands Ltd*** (1913), 12 DLR 669, 1913 CarswellBC 234 (BC CA) [***Vannatta***], the owners and developers of a private residential subdivision constructed roads in order to improve the residential subdivision, and entered into an agreement with the municipality that upon completion of the roads the public would have permanent free right of way over them. The British Columbia Court of Appeal held that the roads were not public highways within the *Mechanics' Lien Act*, RSBC 1911, c 154. The roads were on private property and were not dedicated as public highways until they were completed. A contractor was entitled to a lien for work done on the roads, where the work was done before the roads were opened to the public.

[34] ***Defazio Bulldozing & Backhoe Ltd. v. W.A. Stephenson Construction (Western) Ltd*** (1986), 28 DLR (4th) 291, 1986 CarswellBC 145 [***Defazio***] concerned work done on the construction of the Automatic Light Rapid Transit system [the "ALRT" system] connecting Vancouver and its suburbs. The lands were owned by British Columbia Transit, a corporation established under the *Urban Transit Authority Act*, RSBC 1979, c 421 [now *British Columbia Transit Act*]. It was contended that liens filed in respect of that work were precluded as the ALRT was a highway and the *Builders Lien Act*, RSBC 1979, c 40 [*Act*] did not extend to "a highway or to any improvement done or caused to be done on it by a municipal corporation." Highways were defined as including "all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings and approaches and any other public way."

[35] The British Columbia Court of Appeal found the liens to be valid, in three separate sets of reasons.

[36] Carrothers JA held, at paras 28-29, with respect to the exclusion of highways under the *Act*:

> That provision has a practical reason for being in the Act, quite apart from the undesirability of putting city streets and other "highways" in jeopardy of being sold to satisfy an adjudged lien. In the province of British Columbia, the title to all "highways" vests in the provincial Crown with the exception, I believe, of the city of New Westminster which was laid out before the province existed. There is

2017 ABQB 99 (CanLII)

> no certificate of title issued by the land title offices in respect of dedicated "highways" against which claims of lien can be filed. The absence of a certificate of title precludes the filing of a claim of lien under the Act
>
> I consider it an error to expand…the meaning of "highway"…I am of the view that the scheme of the Act clearly shows legislative intent to limit "highway" to one dedicated as such for land title purposes. In the light of the operative scheme of the Act, the most practical and certain method of determining whether the subject property is lienable under the Act as not being a highway, is to ascertain whether a certificate of indefeasible title was issued in respect thereof. If a title can be found to the land in question, it is not for purposes of the Act part of a "highway" within the meaning of this exemption and a claim of lien can be filed against such title.

[37] Lambert JA held that the ALRT system was not a highway, as there was "nothing in the definition of 'highway' that would compel me to apply that word to something to which it would not be applied in ordinary usage": at para 38. He added, at para 40, that it was unnecessary:

> …to consider whether the existence of a certificate of indefeasible title to a parcel of land that might be a highway determines that it is not a highway, and that a claim of lien may properly be filed against it…

[38] Esson JA agreed with the reasons of Carrothers JA, with one "reservation" (at para 42):

> My reservation is with respect to the discussion as to the significance of the existence of a certificate of indefeasible title in relation to the question whether land is a "highway." I consider a resolution of that question unnecessary to the decision; and prefer to express no view with respect to it.

[39] Should I find that s 7(1) of the *BLA* precludes a lien for work done directly on the Saline Creek Drive, ECL submits that its underground work, utility and pedestrian work, and other miscellaneous work, is lienable. There was an underground utility component to the work under the Subcontract, including water lines and storm sewers. ECL also performed work on a multi-use trail adjacent to the road, and miscellaneous work, including mobilization and clean up. It submits that this work – with a total amount owing of $1,308,752.54 – was not directly related to construction of the public highway.

Analysis re Application of s 7(1) of the *BLA*

[40] The British Columbia cases relied on by ECL are distinguishable from the case before me.

[41] In ***Vanatta***, the lands were privately owned at the time that the roads were constructed and the lien was filed. While the private owner had agreed with the municipality to later dedicate the roads, this dedication had not yet taken place. Further, as the Court found, the construction of roads was for the purpose of enhancing the value of the private holding. This is a very different situation from this case, where the lands were publicly held, and the construction undertaken by the municipal corporation, a public body, was for the sole purpose of creating a public road.

[42] In ***Defazio***, the lands were owned by, and the construction undertaken by, a public corporation. However, the common basis for the decision in the three opinions was that the

2017 ABQB 99 (CanLII)

ALRT system did not come within the ordinary or statutory meaning of a public highway. That is not an issue in this case; Saline Creek Drive is clearly within the ordinary meaning of a public highway. To the extent that the existence of a certificate of title was an influential factor in ***Defazio***, Alberta law creates a further distinction. The *BLA* contains no definition of public highway, and there is nothing in the common law definition of a highway or the statutory definition of a road to indicate that the existence of a certificate of title is definitive. The *MGA* defines a road either on the basis of land titles registration of a road plan, *or* use as a public road. The municipality may submit for registration under the *LTA* a road plan of survey or a subdivision plan showing public roadways, but there is no obligation on it to do so, and such registration is not required to bring a road within the *MGA* definition.

[43] I have concluded that s 7(1) of the *BLA* does apply in the circumstances of this case, where a municipal corporation has undertaken construction on lands that it owns, for the purpose of creating a public highway. No lien arises from such work. It does not matter that this is initial construction of the road which is not yet in use, or that no road plan has been registered at land titles.

[44] In my view this interpretation is called for by the language of s 7(1), which precludes liens "with respect to a public highway *or* for any work or improvement caused to be done on it by a municipal corporation." An "improvement" under the *BLA* includes initial construction, and even preliminary work done in relation to intended construction: s 1(d). I am not aware of any provision of the *BLA* which draws a distinction between initial construction and subsequent work on an improvement.

[45] If I accepted ECL's argument, unless a municipal corporation has registered a road plan, which it is not required to do, none of the work involved in initial construction of a public highway would be subject to s 7(1). This would put at risk the policy underlying s 7(1), and reflected in the common law rule, of protecting the "paramount right of the public to passage" on public streets: ***Alspan Wrecking*** at para 17.

[46] As an aside, I note that the British Columbia Court of Appeal held in ***Defazio*** that the public interest protected by the common law rule comes into effect only if there is a question of sale, and not in circumstances where, as here, security has been paid into court to stand in place of the lands. That does not assist ECL, as the common law rule is not relied on here. The exemption in s 7(1) does not depend on the remedy that is sought: it provides that "no lien exists." Further, the Settlement Order stipulated that the provision of security would "replace and stand as security in place of the [RMWB Lands] pending determination as to the validity and enforceability of the [ECL Lien]," and that there was no "admission as to the validity or enforceability of the [ECL Lien]." It is clear under the *BLA* and the Settlement Order that the validity and enforceability of the ECL Lien is not affected by the provision of security.

[47] The Alberta Court of Appeal has held that a liberal interpretation of the *BLA* is called for with regard to the scope of lien rights: ***Tervita Corporation v ConCreate USL (GP) Inc***, 2015 ABCA 80 at para 5, 42 CLR (4th) 179, citing ***Clarkson Co v Ace Lumber Ltd***, [1963] SCR 110 at 114, (1963), 36 DLR (2d) 554. That would suggest that an exemption from the scope of lien rights should be strictly interpreted. This subsidiary interpretive approach cannot overtake the primary principle of statutory interpretation that "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": ***Wilson v Atomic Energy of Canada***

2017 ABQB 99 (CanLII)

Ltd, 2016 SCC 29 at para 102, 399 DLR (4th) 193, citing ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21, 221 NR 241; ***Euro-Excellence Inc v Kraft Canada Inc***, 2007 SCC 37 at para 83, [2007] 3 SCR 20. The primary principle drives my interpretation, but in my view even under a strict interpretation of s 7(1), no lien arises where a municipal corporation has undertaken construction on lands that it owns, for the purpose of creating a public highway, as occurred in this case. There is no requirement in s 7(1) that the highway be already in use, or registered at land titles.

2017 ABQB 99 (CanLII)

[48] In coming to this conclusion, I have not relied on the Receiver's argument regarding the impact of the contractual requirement for a Labour and Material Bond. The existence of this alternative security does not affect ECL's rights under the *BLA*. To hold that it does would, in my view, conflict with s 5 of the *BLA*: "An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void."

[49] It is clear that ECL's work on Saline Creek Drive was done "with respect to a public highway" and was "caused to be done on it by a municipal corporation" the RMWB. The s 7(1) criteria are met, and no lien arises in respect of the work.

Analysis re Work done on Adjacent Lands

[50] I move now to ECL's alternative submission that its underground work, utility and pedestrian work, and other miscellaneous work, was not directly related to construction of the public highway and is not affected by s 7(1).

[51] I note, first, that the definition of "road" in the *MGA*, s 1(1)(z) includes "a bridge forming part of a public road *and any structure incidental to a public road*" (*emphasis added*). ECL submitted that this definition should be considered in interpreting "public highway" in s 7(1). ECL has not suggested that its work on the Saline Creek bridge should be treated any differently than its work on the highway itself. This position is consistent with the common law cases, which have treated public bridges as equivalent to public highways. In my view, the same approach is called for in relation to incidental structures.

[52] The evidence is that the work done by ECL on underground utilities, water lines and storm sewers, whether under or adjacent to the highway, was necessary for Saline Creek Drive to function as a public highway. The same can be said of pedestrian walkways beside the highway. These are "structures incidental to a public road," and properly subject to s 7(1), at least where, as here, they are located on lands owned by the RMWB and included in the same certificates of title as the highway itself.

[53] As to miscellaneous work, such as mobilization and clean up, these services are clearly related to the process of construction of the highway and incidental structures, and are included in the definition of "work" on the improvement: *BLA* s 1(p). These services thus come within the terms of s 7(1), which provide that such work does not give rise to a lien.

Remedies Issues/Trust Claim

[54] During the hearing of this application, two issues arose regarding the scope of the remedy available on this application – whether the remedy should be restricted to a declaration regarding the validity or invalidity of the ECL Lien, or should address distribution of the ECL Lien Funds.

[55] The Receiver took the position that, if the ECL Lien were declared valid or partially valid, it should still have an opportunity to review quantum. This potential issue need not be addressed, as I have found that the ECL Lien is invalid in its entirety.

[56] ECL took the position that, if the ECL Lien were declared invalid, it should still have an opportunity to pursue a trust claim in relation to the ECL Lien Funds. The Receiver submits that the ECL Lien Funds should be released to the Receiver.

[57] The ECL Lien Funds were transferred to be held by the Receiver's counsel under the terms of the Settlement Order. The Settlement Order provided that the funds were "subject to the builders lien claims of [ECL] and shall replace and stand as security in place of the [RMWB Lands] pending determination as to the validity and enforceability of the [ECL Lien]." The Settlement Order further provided that the ECL Lien Funds "shall not be disbursed by the Receiver unless such disbursement is either (a) agreed to by each of the Receiver and [ECL] in writing or (b) authorized by further Order of this Honourable Court."

[58] The Settlement Order further provided (in para 38):

> [ECL] and the Receiver, and any other interested Person, shall be at liberty to make further application to this Honourable Court, on proper notice to any party with an interest to the [ECL Lien Funds], with respect to the [ECL Lien Funds] held in respect of the [ECL Lien] and the [ECL CLP]. For greater certainty, any interested Person shall be at liberty to make an application that the [ECL Lien Funds] are subject to a trust claim under sections 19 and 22 of the BLA in the event that the [ECL Lien] is determined to be invalid or unenforceable.

[59] The Procedural Order which set out the issues to be determined on this application set out only issues to be determined in relation to the ECL Lien. It made no reference to an application relating to a trust claim under sections 19 and 22 of the *BLA* (or any other trust claim). It also did not refer to distribution of the ECL Lien Funds.

[60] The Receiver contends that the only trust claim contemplated by the Settlement Order is a claim under the *BLA*, ss 19 and 22. Such trust claims are contingent on substantial performance of a contract. This Court issued an Order on June 28, 2016, declaring that the Prime Contract was *not* substantially performed at the time of its termination on March 19, 2014, effectively disposing of any claim under ss 19 and 22.

[61] ECL does not take issue with this but submits that there may be an alternative trust claim flowing from the trust conditions on which the funds were held by the solicitors for the RMWB before being transferred to the Receiver's counsel pursuant to the Settlement Order. The Receiver argues that such a trust claim is precluded by the Settlement Order.

[62] There are potentially two issues regarding ECL's proposed application regarding a trust claim: first, the impact of the Settlement Agreement on the proposed claim; and second, whether a trust claim is maintainable on the merits. Interested parties should have an opportunity to speak to these issues before the Court rules on them. Interested parties would include potential trust beneficiaries, which ECL submits may include all unpaid sub-trades on the Prime Contract. In my view, I should not determine *either* of the trust issues until other interested parties have been notified and given an opportunity to make submissions.

2017 ABQB 99 (CanLII)

Disposition

[63] The ECL Lien is declared invalid and unenforceable. No order is given regarding distribution of the ECL Lien Funds. The parties may speak to me regarding costs if they are unable to agree.

Heard on the 7th day of October, 2016; additional submissions filed on October 19, 2016 and October 31, 2016.
Dated at the City of Edmonton, Alberta this 13th day of February, 2017.

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

Appearances:

Daniel R Peskett
Michael T Coombs
Brownlee LLP
Edmonton
for the Plaintiff/Respondent

SF Collins
WW MacLeod
T Stathakos
McCarthy Tetrault LLP
Calgary
for the Defendants/Applicants

Howard A Gorman, QC
Isabel Langlois
Norton Rose Fulbright Canada LLP
Calgary
for the Royal Bank of Canada

2017 ABQB 99 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *8640025 Canada Inc. (Re),*
2018 BCCA 93

Date: 20180314
Docket: CA44978

2018 BCCA 93 (CanLII)

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

**In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44, as amended**

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp.

Between:

8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp.

Respondents
(Petitioners)

And

TNW Networks Corp.; Teliphone Corp.; Cloud-Phone Inc.; ChoiceTel Networks Ltd.; Titan Communications Inc.; 8583498 Canada Ltd.; 9151-4877 Quebec Inc., dba Dialek Telecom; Orion Communications Inc.; Investel Capital Corporation; New York Telecommunication Exchange Inc.. operating as NYTEX; United American Corp. (US Florida), formerly Teliphone USA Corp.; Coastline Broadcasting Ltd.; and Benoit Laliberte

Applicants
(Appellants)

And

Ernest & Young Inc., Court-Appointed Monitor for the Petitioners

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated December 14, 2017 (*8640025 Canada Inc. (Re)*, Vancouver Registry Docket S1610905).

Counsel for the Appellant, Teliphone Corp.:	H.C.R. Clark, Q.C.
Counsel for all other Appellants:	G.F. Gregory
Counsel for the Respondent, Ernst & Young Inc., Court-Appointed Monitor of 8640025 Canada Inc. and Teliphone Data Centres Inc.:	G.G. Plottel S. Nelligan
Counsel for the Respondent, Navigata Communications Ltd.:	K.A. Robertson
Counsel for the Respondent, Bond Mezzanine Fund III Limited Partnership:	R.J. Argue
Place and Date of Hearing:	Vancouver, British Columbia January 30, 2018
Place and Date of Judgment:	Vancouver, British Columbia March 14, 2018

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fisher

2018 BCCA 93 (CanLII)

2018 BCCA 93 (CanLII)

Summary:

CCAA proceedings were taken by two companies (later joined by a third) that carried on a highly-integrated telecommunications business with other companies that were not insolvent and therefore not under CCAA protection. Monitor was appointed and given authority inter alia to pursue a sale of (petitioners') business assets; various disputes arose concerning ownership thereof. BCSC ordered Monitor to carry out a 'derivation' analysis aimed at determining source of funds with which assets had been acquired. Monitor carried out detailed analysis, but in August 2017, this court on an appeal ruled Monitor had lacked authority to sell certain assets.

Similar disputes arose again after Monitor rejected appellants' proof of claim. Leave was granted by this court on the sole issue of what standard of review applied to the Monitor's determination concerning ownership in the course of proof of claim process. Court of Appeal held that the appeal from the Monitor's determination of the proof of claim was a "true" appeal and that the applicable standards of review were those set forth in Housen v. Nikolaisen 2002 SCC 33. This conclusion was seen to be consistent with other Canadian authorities in the insolvency field, the statutory context and the practical realities of a CCAA administration.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is the second time this court has been asked to intervene in connection with a proposed sale on behalf of the petitioning companies 8640025 Canada Inc. ("864") and a subsidiary thereof, Teliphone Data Centres Inc., of certain business assets to a purchaser ("Distributel") pursuant to s. 36 of the *Companies' Creditors Arrangement Act* ("*CCAA*"). It is also the second time that the proposed sale has foundered on the issue of whether the petitioners in fact own the assets in question such that the assets can be sold in the *CCAA* proceeding. Uncertainty on that point arises because the purchaser wishes to acquire all the assets pertaining to a complex and highly integrated telecommunications business (the "Business") carried on by several corporations comprising the "TNW Group of Companies". The petitioners are part of that Group and are insolvent. They have sought the protection of the *CCAA*. Other members of the Group, appellants in this court, are *not* insolvent and are therefore not part of the *CCAA* proceeding. (We were not told what exactly membership in the 'Group' entails.)

Factual Background

[2] Nothing about this *CCAA* proceeding has been simple or typical. It began as a proceeding under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), when the petitioners filed a bankruptcy proposal on November 18, 2016 following the collapse of 864's relationship with an important supplier. Later in November, the petitioners returned to the Supreme Court of British Columbia seeking an initial order under the *CCAA,* including a stay of proceedings in the usual form, the appointment of a monitor, and permission to file a plan or plans of compromise and arrangement. On December 21, 2016, various creditors sought and obtained an order of the Supreme Court discharging the original monitor and replacing it with Ernst & Young Inc. (the "Monitor".) The order was granted and the Monitor was:

> … authorized and directed as part of the Petitioners' restructuring to carry out a process for the solicitation of all offers to invest in the Petitioners or to purchase all or part of the Petitioners' assets, whether as a going concern or otherwise (the "Solicitation Process") on the terms set out in this order….[Emphasis added.]

From this point, the Monitor became largely occupied with the possible sale of the assets of the Business as a going concern rather than with a compromise or arrangement with creditors. This proved to be an arduous task, given the complexity of the Group's organization and the fractious relations amongst its members and former members.

[3] The relevant chronology begins prior to the *BIA* filing when, as I understand it, customer agreements and accounts receivable listed in a proof of claim filed by various companies (including Teliphone Corp., formerly the parent company of 864) were assigned to TNW Networks effective January 1, 2016. Later in January, six creditors of the petitioners sought unsuccessfully to have TNW Networks, Teliphone Corp. and its subsidiary Teliphone Canada Corp. joined as petitioners in the *CCAA* proceeding. Mr. Justice Affleck dismissed the creditors' application in the absence of evidence that the three corporations were insolvent as required by the definition of "debtor company" in s. 2 of the *CCAA*. (See 2017 BCSC 303.)

2018 BCCA 93 (CanLII)

[4] As observed by this court in previous reasons, various issues arose among members of the Group concerning the assets of the Business that could eventually be sold by the Monitor. Part of the problem was solved in February 2017 when TNW Networks was required by court order to assign to the Monitor all of its assets used in or necessary for the Business, including certain customer contracts. But the problem was not solved completely.

2018 BCCA 93 (CanLII)

[5] On April 6, 2017, Mr. Justice Bowden made an order that joined Teliphone Canada Corp. as a petitioner and approved a 'dual-track' plan. It gave the Monitor enhanced powers of management of the petitioners' operations (which powers the Supreme Court later described as "receiver-like"). The Monitor was given the authority to pursue a compromise or arrangement, subject to the direction that doing so was not to delay a "Solicitation Process" for marketing the "Property" as a going concern. ("Property" was defined to mean all the property of the three petitioners and any property of TNW Networks "derived from" property of the petitioners.) The order also addressed the problem of ownership of the assets, instructing the Monitor to carry out a "derivative" analysis of the properties in question:

> Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, <u>and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the Applicants' security (the "Networks Property"), and report the same to the Court.</u> Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty<u>, until determined as set out herein, none of the Property shall be Networks Property</u>. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis. [Emphasis added.]

[6] This court in later reasons (2017 BCCA 303) summarized para. 6 of Bowden J.'s order as having given the Monitor:

> … the authority to sell, subject to the approval of the court, <u>all of the assets of the Petitioners, together with those assets of TNW Networks Corp. that are not excluded</u> by the process established in para. 6. <u>Nothing in the April 6 order authorizes the Monitor to sell any other assets</u>. [At para. 24; emphasis added.]

The order was not appealed.

[7] Despite the April order, the difficulty of determining which assets relating to the Business were assets of the petitioners or TNW Networks, as opposed to assets of other companies in the Group that were asserting ownership (the "Claiming Persons") continued. For example, Teliphone Corp. had filed a proof of claim for some $45 million, based an alleged sale of the shares of the petitioners to Investel Corp. as of the end of 2013. Teliphone asserted it had taken back security for some $22 million, but the Monitor was skeptical, given that no evidence of a registered security interest was located and given the lateness of the claim.

[8] In July 2017, the Monitor applied to the Supreme Court for an order approving an "Asset Purchase Agreement" for the sale of the "Purchased Assets" described therein, to Distributel. The appellants opposed the application on the basis that the Monitor lacked the authority to sell those assets that were property of entities other than the petitioners or TNW Networks.

[9] The Court had before it the Monitor's seventh report, dated June 27, 2017. In it, the Monitor had described its efforts to determine finally the ownership of the assets "of the Business". However, the Monitor reported:

> 119. ...the assets of the Business are highly integrated in nature and there is no meaningful way to segregate the assets and customer relationships of the Business to various legal entities without a major examination, which would be extremely costly and would likely conclude that all of the assets, at minimum, are subject to the security interests of the Secured Creditors. The Monitor notes that:
>
> a) the Business is managed by the same personnel;
>
> b) customer billings are deposited to the same bank account;
>
> c) cash disbursements are made from the same bank account and financed using the same sources of funds including customer billings and loans advanced by the DIP Lender, both prior to and after the commencement of these insolvency proceedings; and
>
> d) the transactions of the Business are all accounted for using a common general ledger.
>
> 120. The complex organizational structure of the Petitioners and the use of different entities makes it extremely difficult to trace the ownership of assets. The Monitor is of the view the complexity of the organizational structure is entirely unnecessary given the relative simplicity of the operating model of the Business.

2018 BCCA 93 (CanLII)

. . .

122. Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any *was not derived directly* or indirectly from the Property of the Petitioners, their subsidiaries, *or any other entities subject to the security interests of the Secured Creditors*.

123. If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking. [Emphasis by underlining added.]

[10] The chambers judge who heard the application on July 18, 2017 no doubt shared the Monitor's frustration. He concluded that it would be a waste of time and money to require further efforts on the Monitor's part and that such work was not required. In his words:

> The ownership and transfer of assets among the group of companies owned and controlled by the respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's Eighth Report, dated July 7, 2017, which contains an acknowledgement and undertaking on behalf of the respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor. [At para. 20; emphasis added.]

As noted later by this court, the order not only vested the Purchased Assets in the purchaser but also "expunged and discharged" the "ownership or other adverse claims" of various Group members, including Teliphone Corp. The Court approved the sale on the terms sought by the Monitor.

[11] It was this order that came before this court, with leave, on August 14, 2017. I can do no better than quote from Mr. Justice Hunter's reasons concerning the issues before the Court on the appeal and its conclusions:

2018 BCCA 93 (CanLII)

Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA [Asset Purchase Agreement], we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.

In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.

The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Teliphone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the *CCAA* court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.

The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets *of the Business* lends support to the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

I then approach this appeal on the footing that the APA does include third party assets. The question is whether the *CCAA* court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order [of Bowden, J.] conferred that authority. The Monitor expressed this argument in the following way in his factum:

> Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category.

2018 BCCA 93 (CanLII)

> Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Teliphone Corp. or any other entity.
>
> These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.
>
> The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8th Report in these terms:
>
>> The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as Appendix "H" to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.
>
> With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the *CCAA* process unless the subsidiaries have been brought within that process as debtor companies, which they have not.
>
> The fact that the assets of Teliphone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security and they cannot do so in this proceeding to which Teliphone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Teliphone Corp. is not part of the *CCAA* proceedings and there is no basis on which its assets could be sold in that process. [At paras. 42–55; emphasis by underlining added.]

[12] In this court's analysis, the evidence suggesting that some of the assets to be sold belonged to Teliphone Corp. or "other entities not before the Court", together with the Monitor's inability to confirm that the assets were assets of the petitioners, had precluded the court below from approving the Asset Purchase Agreement. In the words of Hunter J.A., "The *CCAA* Court had *no jurisdiction* to authorize the sale of assets other than the assets of the petitioners and TNW Networks Corp." (My emphasis.) The appeal was allowed and the order of July 18, 2017 approving the Asset Purchase Agreement was set aside. The stay of proceedings was extended to give interested parties an opportunity to consider the implications of the judgment.

2018 BCCA 93 (CanLII)

September Application

[13] The parties were next before the Supreme Court in September, 2017. By this time, the Monitor had issued its twelfth report and a supplement thereto, in which it described its renewed efforts to clarify ownership of the "Disputed Assets." This report stated that except for assets listed in a schedule as belonging to TNW Networks and customer accounts identified as belonging to other parties, the Disputed Assets consisted primarily of unused domain names, trademarks and tradenames associated with so-called "Legacy Entities" and did not have "material value." TNW Networks claimed ownership of some of these.

[14] The Monitor had reached a revised agreement with Distributel under which the Disputed Assets were to be 'carved out' out of the sale that was now proposed, except for the "Critical Disputed Property" (certain domain names described at para. 102 and an AS number) which the purchaser considered important to the Business, and customer contacts "purportedly assigned to [TNW Networks] in January 2016, which in the Monitor's view is the property of the Petitioners." The purchase price was unchanged from that under the previous agreement, but was subject to later adjustment in certain events, including "if the vendor is unable to vend title to the Disputed Assets." In the meantime, the "Required Purchased Assets" were to be sold and the purchaser was given an option to buy Disputed Assets found to be saleable to it, at a later date. The Monitor's analysis of these was set out at pp. 42–44 of the twelfth report.

[15] On September 15, 2017, the Monitor sought a vesting order approving the sale of the Required Purchased Assets to a Distributel nominee pursuant to the Revised Asset Purchase Agreement. A judge in chambers pronounced the transaction to be "commercially reasonable" and granted the order. Para. 2 of the order stated:

> This Court orders and declares that the Required Purchased Assets (as defined in the Sale Agreement and pursuant to the revised Schedule M to the Sale Agreement) are rightfully owned by the Companies and capable of being sold to the Purchaser by the Monitor pursuant to the terms and conditions of the Sale Agreement. [Emphasis added.]

2018 BCCA 93 (CanLII)

As before, all encumbrances listed in the schedule to the order, and for greater certainty, "all of the Encumbrances affecting or relating to the Required Purchased Assets", were expunged and discharged as against those Assets. (At para. 3; my emphasis.)

2018 BCCA 93 (CanLII)

[16] Para. 12 of the order authorized the Monitor to carry out a "Disputed Claims Process" in respect of the Disputed Assets. Specifically, the Monitor was to:

> (a) return some or all of the Disputed Assets to the person or persons, other than the Petitioners, who claim ownership of such Disputed Assets (the "Claiming Person"), on terms that are agreed to by the Monitor, the Claiming Person, and the Purchaser; or
>
> (b) consult, in its discretion, with Glen Gregory and Sandeep Panesar, who would be afforded reasonable supervised access to the Petitioners' books, records, executive management personnel and premises, to seek a consensus on whether a Disputed Asset may be determined to be:
>
> i) beneficially owned by a Petitioner or otherwise able to be sold by the Monitor pursuant to the Sale Agreement (collectively or individually, a "Saleable Asset"), in which case the Purchaser shall have the right to immediately exercise the Option (as defined in the Sale Agreement) with respect to such Saleable Asset without further order of this court; or
>
> ii) beneficially owned by a Claiming Person and not a Saleable Asset, in which case the Monitor shall release such asset as soon as practicable to such Claiming Person;
>
> (c) failing an agreement referred to in subparagraph (a), or a determination of a Saleable Asset pursuant to subparagraph (b)(i) on or before October 2, 2017, the Claiming Person shall deliver to the Monitor no later than October 13, 2017, a proof of claim, verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the Disputed Asset to be identified. For clarity, such proof of claim may include more than one Disputed Asset. The Monitor shall then, within 15 days of receipt of such proof of claim, on notice to the Claiming Person, either admit the claim or advise that the claim is not admitted. Unless an application is brought in this proceeding to appeal the Monitor's determination within 15 days of notice of the Monitor's determination, the Monitor shall either:
>
> 1) release the Disputed Asset, if the claim is admitted; or
>
> 2) be entitled to classify such asset as a Saleable Asset, if the claim is not admitted.
>
> (the "Disputed Claims Process".)

Upon conclusion of this process, the Monitor was to file a report and seek any consequential orders. Importantly for purposes of this case, the order stated that any person dissatisfied with the Monitor's decision could appeal to the Supreme Court.

[17] I understand the closing of the sale of the Required Purchased Assets took place in the fall of 2017, although the purchase price may not yet have been paid in full.

[18] The Monitor duly began the Disputed Claims process. Proofs of claims were filed by counsel on behalf of TNW Networks, Teliphone Corp. and other "Claiming Persons", who are appellants herein. The Monitor responded by letters dated October 4 and 16, 2017 to counsel for the appellants. In the letters, it again recounted the various steps and court orders summarized above, including the April 2017 order and the August 2017 appeal. The Monitor acknowledged the effect of this court's reasons as follows:

> Paragraph 24 of the Court of Appeal Reasons for Judgment [quoted above at para. 11 of these reasons] confirmed that, pursuant to the April 6 Order, the Monitor has the authority to sell, subject to approval of the Court, all of the assets of the Petitioners, together with those assets of TNW Networks that are not excluded by the process established by paragraph 6 of the April 6 Order.
>
> Paragraph 51 of the Court of Appeal Reasons for Judgment states that the April 6 Order sets up a mechanism for separating assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were not in the former category.
>
> The Court of Appeal Reasons for Judgment also make clear that the Monitor did not have jurisdiction to sell assets merely because they belonged to a subsidiary of one of the Petitioners, or because they may be subject to the interests of the secured creditors. The derivation test set out in the April 6 Order still had to be assessed by the Monitor to confirm whether it did not have jurisdiction to sell the assets.
>
> Accordingly, the Court of Appeal Reasons for Judgment confirm that TNW Networks property, including the customer accounts, that is available to be sold is to be determined in accordance with the derivation test set out in paragraph 6 of the April 6 Order. [Emphasis added.]

2018 BCCA 93 (CanLII)

As far as I am aware, none of the parties challenges the Monitor's assumption that the "derivation process" contemplated by Bowden J.'s April order was to continue in effect.

[19] The Monitor then embarked on an analysis of the Disputed Assets, classified according to each Claiming Person. It stated in the October 4 letter that it had:

> … undertaken the following analysis for each Claiming Person claiming ownership of the customer accounts that were assigned to TNW Networks Corp. by the Assignor Companies. This analysis concludes that the customer accounts were either (i) acquired directly by the Petitioners from Teliphone Corp. in 2013; (ii) assigned by one of the Subsidiaries to TNW Networks Corp.; (iii) assigned to TNW Networks Corp. by other entities that are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets and will not be sold (an "Excluded Asset").

[20] I do not intend to describe each analysis in detail but will refer to some that may be of interest from a legal point of view. I note that at the outset of its analysis, the Monitor provided a table which purported to categorize the source of its "authority to vend property". The table had a column headed "Derived from Entity subject to Security of the Applicants", another headed "Derived from Subsidiary of Petitioners" and another headed "Owned by/Derived indirectly from the Petitioners."

[21] With respect to Teliphone Corp., the Monitor was satisfied that the petitioners had acquired its assets in return for the issuance of Class B shares of 864 on January 1, 2013. Accordingly, the Monitor concluded, the customer accounts were property of the petitioners and not of TNW Networks and were therefore "not subject to the derivation analysis".

[22] The Monitor added, however, that "another basis" for finding the accounts were not TNW Networks property for purposes of the April 6 order was that Teliphone Corp. had granted Bell Canada a general security agreement (GSA") in June 2012. Mr. Panesar of TNW Networks had disputed that Teliphone Corp. was subject to the GSA "as its debts were paid". The Monitor expected that Bell Canada would not recover its debt in full from the *CCAA* proceedings, so that there would be

2018 BCCA 93 (CanLII)

a shortfall that Bell could seek to recoup as against Teliphone Corp. under the GSA. The Monitor concluded:

> Thus, if Teliphone Corp. did not sell its assets to 864, Teliphone Corp. clearly purported to assign its customer accounts to TNW Networks as noted on the [January 1, 2016] Assignment Letter. Accordingly, those accounts were derived from an entity that was subject to the applicants' security, a criterion pursuant the April 6 Order. [Emphasis added.]

[23] With regard to a company called Cloud-Phone Inc., Teliphone Corp. had adduced evidence to show that it was a subsidiary of Teliphone Corp., rather than of one of the Petitioners, but this assertion had not been substantiated by minute book records, share certificates, etc. The Monitor took the view that disputed contracts previously owned by Cloud-Phone Inc. were either property of 864 that had been assigned to TNW Networks, or that there was insufficient evidence to determine that they were Networks Property in accordance with the April order. The Monitor concluded that the accounts were "derived from a Subsidiary and were not, therefore, Networks Property within the terms of the April 6 order."

[24] Similar reasoning applied to a company called Coastline Broadcasting. The Monitor rejected evidence it had received to the effect that this company was owned by Teliphone Corp. It concluded that Coastline's accounts that had been assigned to TNW Networks were "property of a Subsidiary" that had been assigned to TNW. They were therefore not Networks Property.

[25] With respect to two companies – 9151-4877 Quebec Inc. and Orion Communications Inc. – the Monitor found that they had been acquired by Teliphone Corp. prior to the January 2016 transaction under which the Petitioners had acquired the assets of Teliphone Corp. According to the Monitor, the assets of each of these companies had been conveyed to the Petitioners under that transaction. The Monitor considered that evidence tendered by or on behalf of the Claiming Persons was not sufficient to prove that customer accounts derived from these companies were held by TNW Networks and had not been derived "directly or indirectly from an entity subject to the Applicants' security." (The Applicants were the secured creditors who were named as applicants in the text of the April 6 order.) In the result, these

2018 BCCA 93 (CanLII)

accounts were determined not to be Networks Property and were saleable by the Monitor.

[26] With respect to TNW Networks itself, the Monitor said it understood that TNW Networks was claiming accounts of customers with whom it had entered directly into service agreements after January 1, 2016. However, the petitioners had paid all of TNW Networks' costs of doing so, including the costs of personnel and maintenance of infrastructure. TNW Networks, on the other hand, had not maintained a ledger to account for such transactions. The Monitor concluded that the accounts were "derived directly or indirectly from the Property of the Petitioners". As well, it noted, TNW Networks was subject to security held by Bond Mezzanine Fund III Limited Partnership ("Bond III") in the form of a GSA granted prior to the April 6 Order. The Monitor continued:

> That general security agreement attaches to all present and after-acquired property of TNW Networks. As a result, the Monitor has determined that all of the contracts that were assigned to TNW Networks Corp. on and after January 1, 2016 are subject to the Applicants' security and are therefore Property of the Petitioners available for sale. [Emphasis added.]

[27] The Monitor ended its letter of October 4 with the following summary:

> Based on the factors described above, and in particular the following factors, the Monitor has determined that all of the customer accounts assigned to TNW Networks Corp. pursuant to the Assignment Letter are capable of being sold by the Monitor pursuant to the April 6 Order:
>
> 1. the customer accounts were assigned to TNW Networks by the Assignor Companies on or about January 1, 2016, as evidenced by the Assignment Letter;
> 2. all of the customer accounts assigned to TNW Networks were determined by the Monitor to be used in or necessary for the business of the Petitioners;
> 3. the customer accounts were assigned to the Monitor pursuant to the Irrevocable Assignment;
> 4. the April 6 Order authorizes the Monitor to market and sell the assets and undertakings of the Companies (being the Petitioners and TNW Networks), other than assets the Monitor determines were not derived directly or indirectly from the property of the Petitioners, the Subsidiaries or any other entity subject to the secured creditors' security; and

2018 BCCA 93 (CanLII)

> 5. all of the customer contracts and accounts (except for the Excluded Assets) have been determined by the Monitor to have not been derived, directly or indirectly, from the Property of the Petitioners, the Subsidiaries or any other entity subject to the secured creditors' security.
>
> Accordingly, the Proof of Claim of the Claiming Persons relating to the customer accounts, apart from the Excluded Assets, is not admitted, pursuant to the Vesting Order. [Emphasis added.]

[28] In its letter of October 16, 2017, the Monitor reviewed the reasons it had previously expressed for rejecting the proof of claim of the Claiming Persons. It summarized its reasons under three headings – "Claiming Persons were identified as shell companies", "Teliphone Corp. transferred its assets to the Petitioners" and "The derivation of assets held by TNW Networks". The Monitor also provided a table which again summarized its findings with respect to specific assets held by specific companies.

[29] In the end, the Monitor disallowed all the claims of the Claiming Persons.

The December 2017 Application

[30] On November 27, 2017, the purchaser under the Revised Purchase Agreement exercised its option to acquire certain of the Disputed Assets, conditional on Court approval. On December 14, 2017, counsel again appeared before the chambers judge below seeking a second vesting order and the Court's approval of the sale of the assets under the option. Although we are told that no formal notice of appeal was filed, the Court (see para. 6 of the reasons) and counsel treated the hearing as an appeal of the Monitor's disallowance of the proof of claim. (As noted earlier, the order of September 2017 had stated that anyone not satisfied with the Monitor's decisions to allow or reject proofs of claim could appeal to the Court.)

[31] The submissions of counsel occupied eight days and the Agreement was subject to a deadline of December 28 – a fact that made it impossible for the judge to deliver complete reasons at the end of the hearings on December 14. However, he provided a summary of his conclusions, acknowledging they were "inevitably conclusory, not analytical."

2018 BCCA 93 (CanLII)

The Chambers Judge's Reasons

[32] The chambers judge noted the difficulties concerning ownership that had persisted throughout the *CCAA* process in this case, and this court's comments on those difficulties. He continued:

> The difficulties arise in large part for three reasons, in my view. The first and most important is that the management of the TNW Group made a decision before this *CCAA* process began to operate the Group as if it was a single company. For example, the whole of the business has been managed by the same people, all customer billings had been deposited to a pooled bank account, and all transactions, regardless of which company in the Group was involved in a particular transaction, have been records in a common general ledger.
>
> The second reason for difficulty in determining ownership of assets is that although the Monitor has asked for records of various important transactions to be provided, in several instances no such documents were forthcoming. There may be legitimate reasons for the absence of documents, one of which may be that they do not exist, but that has added to the difficulties, and it is for the appellants to demonstrate to the Monitor what they own. They have not provided readily accessible particulars of the claimed assets.
>
> A third reason for the difficulties is that affidavits proffered in this proceeding by the appellants have in some instances challenged the accuracy of audited financial statements long after they have been prepared.
>
> I will also comment that the reliability of affidavits made by the management of the TNW Group of companies has been called into question. The Monitor, in my opinion, has properly considered them with a critical eye. [At paras. 8–11.]

[33] A "salient feature" of the appellants' argument, the judge observed, was that the standard of review applicable on the appeal to the Monitor's determination was one of correctness. The chambers judge said he did "not agree entirely." He found that the leading authority on the question of standard of review was *Re AbitibiBowater Inc.* 2011 QCCS 4284, which (the judge stated at para. 13 of his reasons) indicated that a *reasonableness* standard applied to the Monitor's decision to reject the Claiming Persons' proof of claim. In his analysis, the Monitor's determinations about the ownership of assets had largely involved questions of *fact*: the proof of claim was "rejected principally because the management of the TNW Group was unable to provide the Monitor with satisfactory evidence of ownership."

2018 BCCA 93 (CanLII)

[34] *Abitibi* involved the findings of a *claims officer* appointed by a *CCAA* monitor to determine, *inter alia*, the *value* of a claim asserted by a company, "Woodbridge", against a subsidiary of Abitibi Consolidated Corp. Inc., which was in *CCAA* proceedings. I note that s. 20 of the CCAA, which deals with the determination of the values or "amounts" of claims, does not state expressly by whom they are to be decided, although under s. 20(2) it is the company, or petitioner, that "may admit the amount of a claim for voting purposes under reserve of the right to contest liability" and that may divide the claims into classes under s. 22(1). Thus the Alberta Court of Appeal observed in *Alternative Fuel Systems Inc. v. Remington Development Corp.* 2004 ABCA 31:

> A company which invokes the *CCAA* process retains a great deal of control over it. Under the *CCAA* claims process, the company, not the monitor, initially accepts or rejects claims. Section 12(2)(a)(iii) [now s. 20(1)(a)(iii)] states, "if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor".
>
> Section [20(2)(a)(iii)] permits different treatment of different claims. The company can admit a claim, or refer it to a court to determine by summary application or trial. In recent cases, recognizing the need for expedited valuation of claims to facilitate the process, the courts have begun appointing a claims officer to make this determination. [At paras. 52–3.]

If the company does not admit a proof of claim, the amount is to be determined by the court on summary application under s. 20(1)(a)(iii) or s. 20(1)(b).

[35] Appeals are dealt with in more general terms under s. 13, which provides:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this *Act* may appeal from the order or decision on obtaining leave of the judge appealed from or of the court in which the appeal lies and on such terms as to security and in other respects as the judge or court directs. [Emphasis added.]

[36] The claims officer in *Abitibi* had had a written record before him as well as *viva voce* evidence from various witnesses. He ultimately adopted a value of $24 million (U.S.), considerably more than the $9 million (U.S.) that the monitor had allowed. As will be discussed more fully below, the Court decided that the appeal from the claims officer's decision to the Court was "not to proceed on a *de novo*

2018 BCCA 93 (CanLII)

basis" but to be decided applying the criteria of a "true appeal". (At para. 70.) The standards of review applicable to the appeal were to be those enunciated in *Housen v. Nikolaisen* 2002 SCC 33.

2018 BCCA 93 (CanLII)

[37] The chambers judge acknowledged that the case at bar did not involve a decision made after an adversarial proceeding before a claims officer. But, he observed, the Monitor here had been given "receiver-like powers" by the Court and had conducted its own inquiry into the proofs of claim in accordance with the April 2017 order. The appellants had put their full case before the Monitor and provided numerous affidavits. The judge then stated his conclusion on the question of standard of review:

> As in *Abitibi* I view the matter before me as a true appeal. The appellants must demonstrate the Monitor fell into overriding and palpable error. In my view, the Monitor properly made its determinations on the evidence before it. I do not agree with Mr. Gregory that it ignored relevant and probative evidence. Even when considering the evidence and making findings of fact, the Monitor is entitled to a margin of error. If I disagree with a factual finding of the Monitor, that is not sufficient in itself to set it aside. It must be an overriding and palpable error; a clear and obvious mistake. I am not persuaded the Monitor fell into that type of error. [At para. 15; emphasis added.]

It will be noted that this standard was *not* one of reasonableness, which the judge had approved earlier in his analysis.

[38] After dismissing some of the more specific arguments made by counsel, the chambers judge approved the "sale, assignment, transfer and conveyance of all of the [O]ptional [P]urchased [A]ssets" listed in a schedule to the Monitor's fifteenth report. Para. 3 of the order stated:

> This Court orders and declares that all of the Schedule "A" Assets are rightfully owned by the Companies and capable of being sold to the Purchaser by the Monitor pursuant to the terms and conditions of the APA.

The Appeal

[39] It is from this order that the appellants now appeal, with leave. I emphasize that leave was granted for an appeal limited to the following question:

> Did the chambers judge err in holding that in *Companies' Creditors Arrangement Act* proceedings the standard of review on an appeal from a determination made by a Court-appointed Monitor conducting a proof of claim process with respect to the ownership of disputed assets is "overriding and palpable error; a clear and obvious mistake", as opposed to "correctness"?

[40] Thus this court is not asked to rule on any particular finding on any specific proof of claim made by the Monitor and affirmed by the chambers judge, but simply to answer the question posited. Nevertheless, the appellants who are represented by Mr. Gregory seek in their factum an order that:

> a. This appeal from the order of [the chambers judge] be allowed,
>
> b. The appeal from the Monitor's decisions respecting 8583498 Canada Ltd. (often referred to as "Rocket") and ChoiceTel
>
> i. be allowed;
>
> ii. this Court declare that those companies own and have always owned the customer accounts and hard assets that the Court of Appeal list attributed to them; and
>
> iii. those assets be returned to them forthwith.
>
> c. The appeal from the Monitor's decisions respecting all of the hard assets attributed to the remaining appellants
>
> i. be allowed;
>
> ii. this Court declare that those companies own and have always owned the customer accounts and hard assets that the Court of Appeal list attributed to them; and
>
> iii. those assets be returned to them forthwith.
>
> d. The remaining issues be remitted to Mr. Justice Affleck for decision in accordance with this decision.

Teliphone Corp. on the other hand seeks an order setting aside the chambers judge's order dated December 14, without more.

[41] In my view, we ought not to undertake any issues beyond the one posed in the leave order. I would word the question slightly differently: what standard(s) of review was the chambers judge required to apply to the Monitor's determination, in the course of whether to allow or reject the proof of claim before it, of which assets could be sold to the purchaser? My answer is that the appeal to the Supreme Court was a "true appeal" in this case and was subject to the standards of review

2018 BCCA 93 (CanLII)

applicable to most civil appeals – the standard of correctness for *extricable* questions of law, and the standard of "palpable and overriding error" for questions of fact or mixed fact and law. In my opinion, this conclusion accords not only with the binding authority of *Housen* and persuasive Canadian authorities in the insolvency field (including *Abitibi)*, but also with the statutory context and the practical realities of a *CCAA* administration. I turn briefly to these factors.

2018 BCCA 93 (CanLII)

The CCAA

[42] As is well-known, the *CCAA* began its life as a very short statute in 1933 to "preserve enterprise value, jobs and good will through amicable settlement with creditors": see Janis Sarra, *"*The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments*"*, (2011) 50 *Can. Bus. L.J.* at 212. In her text *Rescue! The Companies' Creditors Arrangement Act* (2007), Professor J. Sarra defines the purposes of the *CCAA* as "providing a court-supervised process to facilitate the negotiation of compromise and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors." (At 1.)

[43] In *Century Services Inc. v. Canada (Attorney General)* 2011 SCC 60, the Supreme Court described the purpose of the *CCAA* as being to permit insolvent debtors to "continue to carry on business and, where possible, avoid the social and economic cost of liquidating [their] assets." The Court noted that at the time of its enactment, the *Act* was "innovative", since it allowed the insolvent debtor to "attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation." (At para. 16.) The Court also described three ways of "exiting *CCAA* proceedings":

> The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor is compromised or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of

> the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the organization's regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations. [At para. 14.]

2018 BCCA 93 (CanLII)

[44] The Supreme Court described the *BIA* and *CCAA* as "forming part of an integrated body of insolvency law" (at para. 78) and suggested that courts should rely first on an interpretation of the provisions of the statute before turning to inherent or equitable jurisdiction to "anchor measures taken in a *CCAA* proceeding." Deschamps J. for the majority agreed with Professor Sarra and Justice G. Jackson that "When given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives." (At para. 65.)

[45] In recent years, the *CCAA* has often been invoked in so-called "liquidating *CCAA*s" in which the sale of substantially all the assets of the debtor company takes place and the company ceases to operate. Although this development has been questioned as contrary to the original purpose of the *CCAA* (see A. Nocilla, "Is Corporate Rescue Working in Canada?" (2013) 53 *Can. Bus. L.J.* 382), innovation has been the hallmark of the evolution of the *CCAA* and in some instances, a liquidation may turn out to be the best way to avoid the "social and economic cost" attendant upon an insolvency. In the case at bar, the fact that a liquidation was undertaken led to the 'innovation' that the Monitor was given the task of deciding not the *values* of *creditors'* claims, but the *ownership of assets* claimed by other persons. To some extent, then, we are in unchartered territory under the statute.

[46] Finally, I note the time-pressured environment in which decisions must be made in *CCAA* proceedings – perhaps more so than under the *BIA*. As Yamamuchi J. observed in *Re Transglobal Communications Group Inc.* 2009 ABQB 195:

> Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, have come to be known as "real-time litigation" because, as the Ontario Court of Appeal noted in *Re Androscoggin Energy LLC*, 2005 CarswellOnt 589; 8 C.B.R. (5th) 11 at para. 1, "Parties depend on the court system to be able to respond, as it has here, despite the inevitable time pressures." Bankruptcy liquidation proceedings have come to be known as

> "autopsy litigation." Proposal proceedings under the *BIA* are no less real-time litigation than proceedings under the *CCAA*. As Justice Farley, who was the individual who coined the phrase in the first instance, said in *Re Royal Oak Mines Inc.*, 1999 CarswellOnt 792; 7 C.B.R. (4th) 293 at para. 5 (Ont. Ct. Just. Gen. Div.):
>
>> Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests.
>
> [At para. 48.]

There is no reason to suggest that liquidations are any less time-sensitive than the more usual compromises or restructurings under the *CCAA.*

The Role of the Monitor

[47] The use of court-appointed monitors has also been an innovation in the courts' treatment of *CCAA* cases. Prior to 1997, monitors were appointed pursuant to the inherent jurisdiction of the superior courts. They reviewed the financial and business affairs of the debtor, provided independent information to the court on the progress of the proceedings, and assisted in administrative matters such as notifying creditors and organizing and managing meetings of creditors: see Sarra, *Rescue* at 257.

[48] The professionalism and impartiality of the monitor's role were codified in 1997 following the recommendations of a task force that reported in 1994: see Sarra at 258. Section 11.7(1) now requires that a monitor be appointed by a court on the initial application and that the person so appointed be a trustee within the meaning of s. 2(1) of the *BIA*. Section 11.7(2) disqualifies certain persons who would have an interest in the debtor or would not be seen to be impartial. As officers of the court, monitors must remain impartial and "objectively look out for be concerned for the interests of all stakeholders": see *Re Laidlaw Inc.* (2002) 34 C.B.R. (4th) 72 (Ont. S.C.J.), *per* Farley J.

[49] Section 23 sets out the various duties of monitors, which apply unless the court orders otherwise. Generally, these are duties of monitoring the company's

2018 BCCA 93 (CanLII)

business affairs and reporting to the court thereon, carrying out appraisals or investigations considered necessary by the monitor, assisting the company's creditors in certain respects, advising the court on the "reasonableness and fairness" of any proposed compromise or arrangement, making certain documents publicly available and carrying out "any other functions in relation to the company that the court may direct." Courts have used s. 23(1)(k) liberally to assign additional functions to monitors that go beyond investigating and reporting to the court. As noted by Yaad Rotem in "Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada", (2008) 3 *Va. L.& Bus. Rev*. 125, monitors have been authorized to act as financial advisors to the parties or the court, to facilitate or mediate between management and creditors, and to fulfill certain functions of directors or managers. (At 148.) The monitor may even effectively replace the board of directors and senior management of a corporation: see *Re Royal Oak Mines Inc.* (1999) 11 C.B.R. (4th) 122 (Ont. Gen. Div.) Thus Professor Sarra writes:

> Long gone are the days when the monitor acted as a passive observer, reporting to the court. Monitors now play a range of roles, including mediator or facilitator in the negotiations, debtor advisor, creditor assuager and officer of the court. The recent amendments bolster this authority, requiring in a number of instances, such as DIP Financing and the sale of assets to related parties, that the court consider the views of the monitor. However, the court has observed that while the support or approval of the monitor is an important factor, it is not decisive in and of itself. The courts continue to stress the need for independence and impartiality of the monitor. In approving a series of agreements that provided the debtors with certainty with respect to ongoing funding, the resolution of inter-company issues, and a settlement with taxing authorities, <u>the court held it was appropriate to place reliance on the views of the monitor who had the benefit of intensive involvement for over a year and was active in the negotiations leading up to the proposed settlement</u>. [*Evolution, supra* at 234–5; emphasis added.]

In this case, it will be recalled, the April order 'enhanced' the Monitor's powers: it contemplated that the Monitor would carry out the day-to-day management of the petitioners' operations.

[50] In recent years, Canadian courts have also adopted the practice of appointing claims officers to assist in determining the "amount represented by a claim of any

2018 BCCA 93 (CanLII)

2018 BCCA 93 (CanLII)

secured or unsecured creditor" under s. 20 of the *CCAA*. Various provinces have developed model claims process orders, but these vary widely across Canada. Where the order provides for the appointment of a claims officer, that officer may be given the authority to determine the procedure for adjudicating such claims and may reach a determination of the value that is often stated to be final and binding on the company or creditor, subject to any further order of the court.

[51] The general role of a claims officer was dealt with in *Abitibi*, which as we have seen was cited with approval by the chambers judge in the case at bar. As noted, *Abitibi* involved a motion to vary the determination of a claims officer who had in accordance with a claims procedure order valued a claim at $24 million (U.S.) The creditor contended that the value was much greater and that in ruling upon the motion, the Court owed no deference to the claims officer's determination. It urged the Court to reassess the evidence, and to consider new evidence that had not been before the officer, and thus to make its own determination of the correct value of the claim. (At paras. 6-7.) Abitibi responded that Woodbridge had failed to establish "any error in law or any palpable and overriding error in fact" in the claims officer's determination.

[52] The Court in *Abitibi* formulated the first of three series of questions before it as follows:

> What is the standard of review of the Claims Officer's Determination? Should the Court proceed on the basis of a true appeal or *de novo*? What are the applicable criteria for the Court's intervention?

[53] Beginning its analysis at para. 66, the Court noted that a "thorough adversarial proceeding" had taken place before the claims officer at which both sides presented affidavit evidence, including expert reports. *Viva voce* testimony with cross-examination had also been allowed and counsel had made oral and written submissions. In the circumstances, the role of the Court was not to "conduct a trial *de novo* and plainly set aside the findings of the claims officer, reassess the matter and substitute its own discretion." (At para. 67.) This conclusion was found to be supported by case law, including the decision of Morawetz J. in *Re Tiercon*

Industries Inc. (2009) 62 C.B.R. (5th) 90 (Ont. S.C.J.), *aff'd* 2010 ONCA 666 and *Triton Tubular* (2005) 14 C.B.R. (5th) 264 (Ont. S.C.J.), which also involved a "full blown trial-like proceeding" before a claims officer under the *CCAA*. Lederman J. noted in the latter case that:

> By seeking a hearing *de novo* on this file, Steelcase is requesting a second trial. If the threshold for permitting appeals to be heard on a *de novo* basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings which are inconsistent with the fundamental purposes of the *CCAA* and the Commercial List practice. [At para. 14.]

(Cf. *J.J. Lacey in re Bankruptcy and Insolvency Act*, 2008 NSTD 9 at paras.14-8.)

[54] As was noted in *Abitibi*, the Court in *Re Canadian Airlines Corp.* 2001 ABQB 146 had reached the opposite conclusion, but the appeal in that case had been "solely concerned with matters of law," and it had been decided prior to *Tiercon* and *Triton*. (At para. 76.) The *Abitibi* Court also found guidance in the decision of the Ontario Court of Appeal in *Re Creditfinance Securities Ltd.* 2011 ONCA 160, where LaForme J.A. had stated for the Court:

> At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance will first decide the issue of whether the matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise would result in an injustice to the creditor: *Charleston Residential School (Re)* (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.
>
> I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the *BIA* is not intended to be a trial *de novo* but rather a true appeal: *Galaxy Sports Inc. (Re)* (2004) 1 C.B.R. (5th) 20 (B.C.C.A.) at para. 40. The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency.
>
> This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency and the operation of the bankruptcy scheme would be lost. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. This, it seems to me, would impact on the objective implicit in the *BIA*, which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality: *Galaxy Sports* at para. 41. [At paras. 24–6; emphasis added.]

2018 BCCA 93 (CanLII)

[55] With respect to standard of review, the Court in *Abitibi* also adopted the conclusions of Morawetz J. in *Tiercon*, who had summarized the standard of review applicable to a claims officer under a *receivership* order, essentially in the terms used in the seminal case of *Housen v. Nikolaisen* 2002 SCC 33, as follows:

> The Claims Procedure Order provides that a party may appeal a final determination of the claims officer.
>
> The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:
>
> > a. With respect of pure questions of law, the standard of review is correctness.
> >
> > b. With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.
> >
> > c. With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.
> >
> > d. With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.
>
> . . .
>
> The role of the court on … appeal is to review the decision of the Claims Officer. It is not to conduct a trial *de novo*. [*Tiercon,* at paras. 11–12.]

(See also Morawetz J.'s comments in *Re Target Inc.* 2017 ONSC 2595 regarding a claims officer's determination of the value of claims under the *CCAA*, at paras. 11–13; and *Triton Tubular* at para. 15, adopting the *Housen* standards.)

[56] In the result in *Abitibi*, the Court rejected the possibility of a *de novo* hearing, observing an "appeal process" was "perfectly acceptable" given that the final say remained with the Court and not with the claims officer. (At para. 104.) The Court applied the standard of palpable and overriding error to the questions of *fact* that had been analyzed by the claims officer, finding that no such error had been shown. The appeal was dismissed. (Paras. 138, 145, 160.)

2018 BCCA 93 (CanLII)

2018 BCCA 93 (CanLII)

[57] As mentioned earlier, the chambers judge in the case at bar followed *Abitibi* to the extent that he viewed the matter before him as a "true appeal" in which the appellants had the onus to demonstrate that the Monitor had fallen into overriding and palpable error. (At para. 15, quoted earlier in these reasons.) At the same time, he rejected the proposition advanced by counsel for the appellants that the governing authority in British Columbia was *Re Galaxy Sports*. That case involved various decisions made by a trustee under s. 135 of the *BIA*, which provides that a trustee shall determine whether an unliquidated claim is provable and if so, the value thereof. As this court noted, s. 135(4) provides that a trustee's decision as to the value of such a claim or the disallowance of any claim under s. 135(2) is "final and conclusive" unless it is appealed within 30 days. (At para. 31.)

[58] The first issue raised in *Galax*y that is relevant to this appeal concerned whether the hearing in the Supreme Court was a trial *de novo* in which the Court was entitled, without recourse to the *Palmer* criteria for the admissibility of "fresh evidence", to consider evidence that was not before the trustee. This court noted that *Re Eskasoni Fisheries Ltd.* (2000) 16 C.B.R. (4th) 173 (N.S.S.C.) and *Re Port Chevrolet Oldsmobile Ltd.* 2004 BCCA 37 had proceeded on the basis that the chambers judge could consider, *as a matter of course*, material that had not been before the trustee in deciding whether the proof of claim had complied with s. 124 of the *BIA*. (See para. 36.) In *Galaxy,* however, we held that the Supreme Court's hearing of an appeal under s. 135(4) was not intended to be a trial *de novo* but a "true appeal", citing *McKenzie v. Mason* (1992) 72 B.C.L.R. (2d) 53 (C.A.) and *Dupras v. Mason* (1994) 120 D.L.R. (4th) 127 (C.A.), both of which dealt with appeal proceedings under the *Mineral Tenure Act*. The Court stated in *Galaxy:*

> … similar considerations apply in this case with respect to the expertise of trustees in bankruptcy. As I have already mentioned, they can be expected to have considerable experience and expertise in the area of business financing, restructurings and insolvency. If "fresh evidence" — i.e., evidence not before the trustee or chair at the time of his or her decision — were to be adduced in Supreme Court on appeal *as a matter of course*, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up" their

> proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality. [At para. 41]

As I read *Abitibi*, the Court agreed with this conclusion, as did the chambers judge in the case at bar.

2018 BCCA 93 (CanLII)

[59] With respect to standard of review, we were referred by counsel in *Galaxy* to the standard of review analysis in administrative law and in particular "the pragmatic and functional" approach that was applied to decisions of administrative tribunals at that time. On a consideration of the "contextual" factors mandated by that approach, this court saw:

> … no reason to disagree with the longstanding principle enunciated in *Re McCoubrey* [(1924) 5 C.B.R. 248 (Alta. T.D.)] which requires the application of a "correctness" standard where compliance with a "mandatory provision" (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. [At para. 39; emphasis added.]

Into the former category, the Court placed a decision of the chair of the creditors' meeting rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, the Court placed the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). (At para. 39.)

[60] Since *Galaxy* was decided, administrative law has changed substantially and the standards of review in ordinary civil appeals have solidified, beginning with *Housen*. Matters of mixed fact and law are now subject to the same standard as purely factual matters. I am doubtful that administrative law considerations should be injected into the analysis of standard of review in this case – except for the fact that the chambers judge appears to have conflated the "palpable and overriding error" standard (adopted at para. 15 of his reasons) with that of "reasonableness" (referred to in para. 13.) Although he purported to agree with *Abitibi*, the *Housen* standard – *not* reasonableness – was held to apply to the findings of fact or mixed fact and law

at issue in that case. (That said, the two are probably not far apart: where a palpable and overriding error as to a factual matter is made, it would be difficult to say the analysis is nonetheless reasonable.)

Application to this Case

[61] What then is the standard of review applicable to the determinations made by the Monitor in this instance as to the saleability (i.e., ownership) of the Disputed Assets in the course of determining the appellants' proofs of claims? As Teliphone Corp. observed in its factum, the *CCAA* does not expressly contemplate property ownership disputes. There appears to be no decision of an appellate court that establishes an appropriate process to determine *ownership* issues, or determines the applicable standard of review. Nevertheless, since the *CCAA* and *BIA* are to be regarded as parts of a larger scheme of insolvency legislation it is useful to consider comparable decision-makers under the *BIA. Galaxy* determined the decision of a trustee concerning compliance with a 'mandatory' provision under the *BIA* – an issue of law – was reviewable on a correctness standard. Subsequent lower court decisions have adopted similar reasoning with respect to decisions of trustees allowing or rejecting proofs of claim under s. 81(2): see *Sran v. Sands & Associates* 2010 BCSC 937 at paras. 46-7; and *Hertz v. 1593658 Ontario Inc.* 2011 SKQB 379 at para. 38.

[62] The process followed by the Monitor in the case at bar was not the creature of any statute but of the Supreme Court's order of September 2017. As the Monitor states in its factum:

> The Disputed Property Claims Process was customized for the purpose of these *CCAA* proceedings. The Monitor was authorized to fulfill the function of the arbiter, as it had developed considerable knowledge of this factually complex *CCAA* matter, was less costly than involving an outside party, and was unable to do so to meet the urgency of the circumstances. An extremely compressed timeline was involved, and no outside party could realistically fulfill the role in the circumstances. [At para. 53.]

2018 BCCA 93 (CanLII)

As mentioned earlier, the order specified that any Claiming Party dissatisfied with the Monitor's decision could appeal to the court; as well, s. 13 of the *CCAA* provided an appeal with leave.

[63] The Process followed by the Monitor did not entail a formal hearing of witnesses' testimony, but clearly involved the examination of many documents, public and private, and lengthy affidavits of representatives of interested persons. The Monitor asserts that by making it the "arbiter" of the parties' disputes regarding assets, those parties could be taken to have understood that the Monitor would consider the information, documents and evidence it had amassed over the previous nine months, as well as any further evidence that the Claiming Persons were invited to file if they wished. Thus, the Monitor says, there was never any expectation of a "record" in the sense of a formal body of evidence to be considered by it. The Monitor analogizes the process it followed to the "reasonable investigations" normally conducted by trustees in bankruptcy in reviewing claims, citing paras. 39 and 42 of *Re Sran*. It goes on to assert that without a "record", it was "frankly impossible for the *CCAA* judge to consider the Monitor's factual determination on the basis of correctness." (My emphasis.)

[64] I agree that *factual* determinations and those of *mixed fact and law* are not subject to a correctness standard, but should now be subject to a standard of palpable and overriding error. However, in this case, the fact a sale of assets was being proposed made it necessary for the Monitor to determine exactly what assets were property of the petitioners or TNW Networks – a decision likely to involve issues of law not usually made by monitors under the *CCAA*. This court's decision of August 17, 2017 leaves no doubt, for example, that the Monitor here did not have the authority, as a matter of law, to approve the sale of assets belonging to entities other than the Petitioners and TNW Networks. Obviously, this court regarded this principle as one of law, and indeed of jurisdiction.

2018 BCCA 93 (CanLII)

[65] In my view, these considerations all support the conclusion that the appeal contemplated by the September order was correctly regarded as a "true appeal" (at least in the absence of any determination that a *de novo* hearing was required to avoid a miscarriage of justice); and that the standard of review, on *extricable* questions of *law,* was correctness. To the extent that questions of law – for example the question of whether the assets of a company that is not in *CCAA* proceedings may be sold by reason of the fact that its *parent company* is in *CCAA* proceedings – can be 'extricated', the correctness standard applies. But obviously, not all issues entailed in determining a proof of claim will be extricable issues of law. Indeed, *most* such issues (including the valuation of creditors' claims) will be ones of fact or mixed fact and law, to which the applicable standard will be that of palpable and overriding error.

[66] This result recognizes that although a formal adversarial process did not take place before the Monitor, the Monitor considered a great deal of evidence and *viva voce* testimony as well as taking advantage of his pre-existing familiarity with the factual background of the matters before him. Indeed, this is one of the reasons the Monitor was chosen to conduct the disputed claims process. Given that the Monitor is an officer of the Court, that it is expected to be 'above the fray' and that it is qualified to act as a trustee under the *BIA* and thus has some special expertise, it seems to me that its decisions of fact or mixed fact and law made in the course of ruling on proofs of claim are appropriately assessed on the deferential standard of 'palpable and overriding error'. This conclusion is also consistent with the objectives of efficiency, certainty and cost-saving that underlie *CCAA* proceedings.

2018 BCCA 93 (CanLII)

Disposition

[67] I would therefore allow the appeal, set aside the chambers judge's order and answer the question posed on this appeal as indicated in these reasons. I would also remit the matter of the Monitor's rejection of the proof of claim to the Supreme Court of British Columbia to be dealt with in accordance with these reasons.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice Fisher"

2018 BCCA 93 (CanLII)