

COURT FILE NUMBER 1401-13215
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
APPLICANT **SPRAGUE-ROSSER CONTRACTING CO. LTD.**
RESPONDENTS **E CONSTRUCTION LTD. and REGIONAL MUNICIPALITY OF WOOD BUFFALO**
DOCUMENT **APPLICATION**



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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NOTICE TO RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard, as shown below:

Date	June 28, 2016
Time	10:00 am
Where	Edmonton Law Courts
Before Whom	The Honourable Madam Justice J.M. Ross

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought: Alvarez & Marsal Canada Inc. (the “**Receiver**”) in its capacity as the court-appointed receiver and manager of Sprague-Rosser Contracting Co. Ltd. (“**Contracting**”) pursuant to the receivership order issued by this Honourable Court on July 31, 2014, as subsequently amended and restated on August 7, 2014 (collectively,

the “**Receivership Order**”) under the *Bankruptcy and Insolvency Act* (Canada) in Court File No. 1403-10990 (the “**Receivership Proceedings**”), applies for an Order, substantially in the form attached as Schedule “**A**” hereto:

Defined Terms

1. All capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the consent order issued by the Honourable Madam Justice J.M. Ross in the within proceedings on May 5, 2016 (the “**Consent Order**”).

Relief Sought

2. A declaration that this application (the “**Application**”) is properly returnable on June 28, 2016 and that service of the Application and the Eighth Report of the Receiver (the “**Eighth Receiver’s Report**”) is validated and declared to be good and sufficient.

3. A declaration that the Abasand Contract was not substantially performed for the purposes of the *Builders’ Lien Act* (Alberta) (the “**BLA**”) as at October 31, 2013, and that the purported certificate of substantial performance issued by Contracting and dated October 31, 2013 in respect of the Abasand Contract (the “**Abasand CSP**”) is of no force or effect.

4. In the alternative, and to the extent that the Abasand CSP is a valid certificate of substantial performance for the purposes of the BLA, a declaration that any trust arising under section 22 of the BLA is inoperative due to Contracting having made an assignment for the benefit of its creditors pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) on September 3, 2014.

5. An order authorizing and empowering the Receiver to distribute the \$1,135,691 that is held by it pursuant to paragraph 5(b) of the Consent Order in accordance with the terms of the July 17 Order.

6. A declaration that the Bridge Contract was not substantially performed for the purposes of the BLA as at October 31, 2013, and that the purported certificate of substantial performance dated October 31, 2013 in respect of the Bridge Contract (the “**Bridge CSP**”) is of no force or effect.

7. In the alternative, and to the extent that the Bridge CSP is a valid certificate of substantial performance for the purposes of the BLA, a declaration that any trust arising under

section 22 of the BLA is inoperative due to Contracting having made an assignment for the benefit of its creditors pursuant to the BIA on September 3, 2014.

8. A declaration that the Wilco Lien is invalid and unenforceable and an order authorizing and empowering the Receiver to distribute the Wilco Lien Funds (in the amount of \$148,029) currently held by it pursuant to paragraph 19 of the Consent Order in accordance with the terms of the July 17 Order.

9. Advice and directions with respect to determining the validity and enforceability of the E Construction Lien and the subsequent disbursement of the E Construction Lien Funds (in the amount of \$4,432,455) currently held by the Receiver pursuant to paragraph 29 of the Consent Order in accordance with the terms of the July 17 Order.

10. Such further and other relief as counsel for the Receiver may advise.

Grounds for making this application

The BLA

11. Pursuant to section 2 of the BLA, a contract is substantially performed when 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 when the work to be done under the contract or subcontract is capable of completion or correction at a cost of not more than:

- (a) 3% of the first \$500,000 of the contract or subcontract price;
- (b) 2% of the next \$500,000 of the contract or subcontract price; and
- (c) 1% of the balance of the contract or subcontract price.

12. Pursuant to section 3 of the BLA, if the work under a contract is ready for use or being used for the purpose intended and the work under the contract cannot be completed expeditiously, 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.

13. Pursuant to section 42 of the BLA, if a lien is not registered within the time limited by section 41 of the BLA, the lien ceases to exist. Section 41 of the BLA provides that a lien may be registered at any time within the period commencing when the lien arises and terminating

forty-five days from the day that the performance of services is completed or the contract to provide the services is abandoned.

The Abasand CSP

14. On or about June 21, 2011, Contracting entered into the Abasand Contract with RMWB pursuant to which Contracting, as contractor, agreed to provide certain materials and services to RMWB, as owner, in accordance with the terms of the Abasand Contract.

15. On or about October 31, 2013, Contracting issued the purported Abasand CSP.

16. As at October 31, 2013, Contracting's progress claim materials show that the total projected contract value for the Abasand Contract was approximately \$27,998,000 and that Contracting had approximately \$5,396,000 worth of work remaining (representing 19% of the total Abasand Contract value) to complete the Abasand Contract.

17. On or about March 19, 2014, RMWB terminated the Abasand Contract for convenience and in accordance with the terms and conditions of the Abasand Contract.

18. After the termination of the Abasand Contract by the RMWB, the RMWB retained H. Wilson Industries (2010) Ltd. ("**H. Wilson**") to complete the remaining scope of work for the Abasand Contract (the "**Abasand Completion Contract**"). The total value of the Abasand Completion Contract was \$2,240,623 and H. Wilson reached substantial completion of the Abasand Completion Contract on or about September 15, 2015.

19. As the Abasand Contract was not substantially performed when Contracting issued the purported Abasand CSP on or about October 31, 2013, the Abasand CSP is invalid and of no force and effect.

20. On September 3, 2014, the Receiver caused Contracting to make an assignment in bankruptcy pursuant to section 49 of the BIA. In the alternative, and as a result of Contracting's assignment in bankruptcy, any statutory trust that might arise pursuant to section 22 of the BIA has been rendered inoperative by section 67(1)(a) of the BIA.

21. It is appropriate to permit the Receiver to distribute the \$1,135,691 that is held by it pursuant to paragraph 5(b) of the Consent Order in accordance with the terms of the July 17 Order.

The Bridge CSP

22. On or about May 9, 2012, Contracting entered into the Bridge Contract with RMWB, dated June 6, 2012, pursuant to which Contracting, as contractor, agreed to provide certain materials and services to RMWB, as owner, in accordance with the terms of the Bridge Contract.

23. On or about October 31, 2013, Contracting purported to issue the Bridge CSP.

24. As at October 31, 2013, Contracting's progress claim materials show that the total projected contract value for the Bridge Contract was approximately \$54,274,000 and that Contracting had \$38,660,000 worth of work remaining (representing 29% of the total Bridge Contract value) to complete the Bridge Contract.

25. On or about March 19, 2014, RMWB terminated the Bridge Contract for convenience and in accordance with the terms and conditions of the Bridge Contract.

26. After the termination of the Bridge Contract by the RMWB, the RMWB retained E Construction to complete the remaining scope of work for the Bridge Contract (the "**Bridge Completion Contract**"). The total value of the Bridge Completion Contract was, as of January 31, 2016, approximately \$21,635,677 and E Construction issued certificates of substantial performance in respect of the Bridge Completion Contract on or about November 18, 2015.

27. As the Bridge Contract was not substantially performed when Contracting purported to issue the Bridge CSP, the Bridge CSP is invalid and of no force and effect.

28. In the alternative, and as a result of Contracting's assignment in bankruptcy, any statutory trust that might arise pursuant to section 22 of the BLA has been rendered inoperative by section 67(1)(a) of the BIA.

The Wilco Lien

29. The Wilco Lien was registered on September 26, 2014, more than forty-five days after subcontract number 212005-4-2-022200 between Wilco and Contracting, dated May 9, 2012 (the "**Wilco Subcontract**") was completed or abandoned.

30. In the alternative, any work performed by Wilco related to lands other than the Wilco Lands. Wilco did not perform any work or supply any materials in respect of an improvement occurring on the Wilco Lands, and the Wilco Lien is therefore invalid and unenforceable.

31. Accordingly, it is appropriate to permit the Receiver to distribute the Wilco Lien Funds (in the amount of \$148,029) currently held by it pursuant to paragraph 19 of the Consent Order in accordance with the terms of the July 17 Order.

32. Such further and other grounds as counsel for the Receiver may advise.

The E Construction Lien

33. There are significant issues in dispute between the Receiver and E Construction pertaining to the validity and enforceability of the E Construction Lien.

34. A scheduling order in respect of the E Construction Lien will allow for the resolution of the issues in respect of the E Construction Lien and the disbursement of the E Construction Lien Funds (in the amount of \$4,432,455) currently held by it pursuant to paragraph 29 of the Consent Order to the creditors entitled thereto.

Material or evidence to be relied on:

35. The Eighth Receiver's Report, filed, and all previous reports filed by the Receiver in the Edmonton Receivership Proceedings or the Calgary Receivership Proceedings.

36. The First Written Interrogatories, the Second Written Interrogatories and the Confidential Written Interrogatories.

37. The Affidavit of Jack Farrar, sworn on July 10, 2014, and filed in Alberta Court of Queen's Bench Court File No. 1403-08959 on July 16, 2014, and any cross-examination occurring thereon.

38. The Affidavit of Troy Moskal, sworn on January 14, 2016, and the cross-examination thereon.

39. The Affidavit of J. Paul Bourassa, sworn January 14, 2016 and the cross examination thereon.

40. The Application Record, the Supplemental Application Record and the Confidential Application Record previously filed in the within proceedings.

41. Such further and other material as counsel for the Receiver may advise and this Honourable Court may permit.

Applicable Rules:

42. Rule 6.3, 6.9, and 11.27 of the *Alberta Rules of Court*, Alta. Reg. 124/2010.

43. Such further and other rules as counsel for the Receiver may advise and this Honourable Court may permit.

Applicable acts and regulations:

44. The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

45. The *Builders' Lien Act*, R.S.A. 2000, c B-7.

46. Such further and other acts and regulations as counsel for the Receiver may advise or this Honourable Court may permit.

Any irregularity complained of or objection relied on:

47. There are no irregularities complained of or objections relied on.

How the application is proposed to be heard or considered:

48. The Receiver proposes that the Application be heard in person with one, some, or all of the parties present.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

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COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
APPLICANT **SPRAGUE-ROSSER CONTRACTING CO. LTD.**
RESPONDENTS **E CONSTRUCTION LTD. and REGIONAL MUNICIPALITY OF WOOD BUFFALO**
DOCUMENT **ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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DATE ON WHICH ORDER WAS PRONOUNCED: June 28, 2016
LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER: Justice J.M. Ross

UPON THE APPLICATION of Alvarez & Marsal Canada Inc., in its capacity as the court-appointed receiver and manager (the “**Receiver**”) of Contracting pursuant to the Receivership Order; **AND UPON** noting the order issued by the Honourable Justice J. M. Ross, dated May 5, 2016, in the within proceedings (the “**Consent Order**”); **AND UPON** having read the First Written Interrogatories, the Second Written Interrogatories, and the Confidential Written Interrogatories; **AND UPON** having read the Affidavit of J. Paul Bourassa, sworn January 14, 2016 and the cross-examination thereon; **AND UPON** having read the Affidavit of Troy Moskal, sworn January 14, 2016, and the cross-examination thereon; **AND UPON** having read the Affidavit of ●, sworn on July ●, and filed in Alberta Court of Queen’s Bench Court File No. 1503-03599, and the cross-examination thereon; **AND UPON** having read the Affidavit of Jack Farrar, sworn on July 10, 2014, and filed in Alberta Court of Queen’s Bench Court File No. 1403-08959;

AND UPON having read the written brief of law and argument of the Receiver, filed and served; **AND UPON** hearing submission from the Receiver, RBC, the RMWB, E Construction Ltd. and Wilco; **AND UPON** having read the Affidavit of Service of Marcia Smith, sworn •, 2015 (the “**Service Affidavit**”); **AND UPON** hearing counsel for the Receiver and any other persons present;

IT IS HEREBY ORDERED AND DECLARED THAT:

Service

1. The Notice of Application in respect of this Order (the “**Application**”) is properly returnable on June 28, 2016, service of the Application and all supporting materials in respect thereof, in the manner described in the Service Affidavit, is validated and declared to be good and sufficient, and no other persons are entitled to be served with or given notice of the Application.

Defined Terms

2. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Consent Order.

The Abasand CSP

3. The Abasand Contract was not substantially performed for the purposes of the *Builders’ Lien Act* (Alberta) (the “**BLA**”) as at October 31, 2013, and the purported certificate of substantial performance dated October 31, 2013 in respect of the Abasand Contract (the “**Abasand CSP**”) is of no force or effect.

4. The Receiver is expressly authorized and empowered to distribute the \$1,135,691 that is held by it pursuant to paragraph 5(b) of the Consent Order in accordance with the terms of the July 17 Order.

The Bridge CSP

5. The Bridge Contract was not substantially performed for the purposes of the BLA as at October 31, 2013, and the purported certificate of substantial performance dated October 31, 2013 in respect of the Bridge Contract (the “**Bridge CSP**”) is of no force or effect.

6. The Receiver is expressly authorized and empowered to distribute all amounts paid to it by BWZ pursuant to paragraph 39 of the Consent Order in accordance with the terms of the July 17 Order.

The Wilco Lien

7. The Wilco Lien is declared to be invalid and unenforceable.

8. The Receiver is expressly authorized and empowered to distribute the Wilco Lien Funds (in the amount of \$148,029) currently held by it pursuant to paragraph 19 of the Consent Order in accordance with the terms of the July 17 Order.

Further Assistance and Service

9. The Receiver and any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order.

10. This Order must be served only upon those interested parties attending or represented at the within Application and service may be effected by facsimile, electronic mail, personal delivery or courier.

11. Service of this Order on any party not attending this Application is hereby dispensed with.

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