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November 20, 2019

Via Email (Joy.Jarvis@albertacourts.ca)

The Honorable Justice J.T. Henderson
Court of Queen's Bench of Alberta
Law Courts Bldg., 1A Sir Winston Churchill Sq.
Edmonton, Alberta T5J 0R2

Dear Justice J.T. Henderson:

Re: Re: 1985 Sawridge Trust
Application Scheduled for November 27, 2019

As your Lordship is aware, we act for Catherine Twinn. We are writing in furtherance to the upcoming case management meeting scheduled for November 27, 2019 that will address the issues pertaining to the Consent Order of August 24, 2016 ("Consent Order") and more particularly as they relate to the transfer of assets from the 1982 to the 1985 Sawridge Trust.

The response submissions of the OPGT, our client and the intervenors were filed on November 15, 2019. The litigation plan for this application permits reply submissions to be filed by November 20, 2019. Given the brevity of our submissions, we are submitting our client's reply in letter format.

It has become apparent from reading the response submissions that there is not a common understanding of the issues to be addressed on November 27, 2019. More particularly, the submissions of the OPGT and Ms. Twinn address the proper interpretation of the Consent Order and whether the Consent Order confirms that the assets transferred are held pursuant

to the terms of the 1985 Trust Deed. These parties assert that the answer to this question is "yes".

In contrast, the submissions of the intervenor, Sawridge First Nation, presume that the Consent Order does not provide any direction in this regard and instead focus on which trust properly holds beneficial interest in the transferred assets. Their submissions go on to challenge the validity of the Consent Order itself, and argue that the transfer approved by the Consent Order was "an unpermitted transfer"[1] and seek *in rem* and proprietary relief[2]. With respect, there is not an application before the Court seeking to overturn the Consent Order. Advancing such positions is not permitted under the limited role the SFN has been given as an intervenor. The SFN is not entitled to define the issues or seek relief that is not sought by the parties[3]. The parties are not seeking to set aside the Consent Order.

It was our understanding from the October 30, 2019 case management meeting that the Court intended the transfer issue to be addressed in two stages -- namely, the November 27, 2019 case management meeting would determine the proper interpretation of the Consent Order and if, and only if, the determination flowing was that the Consent Order did not confirm the beneficial ownership of the transferred assets, was a subsequent application to be scheduled to address this matter. We refer the Court to the transcript of the October 30, 2019 case management meeting in this regard, see pages 56-58.

At this time, our client is not intending to respond to the arguments of the SFN as we believe them to be outside the scope of and irrelevant to the upcoming application. Further, as set out in our client's November 15, 2019 submissions, the evidentiary record for an application to determine the beneficial ownership of the transferred assets is incomplete and further production and questioning will need to occur. This process will likely require direction from your Lordship. In addition, this process will be moot if your Lordship determines that the Consent Order resolves the issue of beneficial ownership.

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[1] Submissions of the SFN filed November 15, 2019 at para. 102

[2] Submissions of the SFN filed November 15, 2019 at para. 102-104

[3] *Stratum Projects v Aman Building,* 2017 ABQB 351 at para. 25.

In light of this lack of commonality on the issues that are to be addressed on November 27, 2019, and if helpful to your Lordship, our office is available to attend case management in advance of November 27, 2019 to ensure the application on November 27, 2019 proceeds efficiently.

Yours truly,

CRISTA OSUALDINI

CCO/pmd

cc/ Janet Hutchinson (JHutchison@jlhlaw.ca)

cc/ Jonathan Faulds, QC (jfaulds@fieldlaw.com)

cc/ Doris Bonora (doris.bonora@dentons.com)

cc/ Michael Sestito (michael.sestito@dentons.com)

cc/ Ed Molstad, QC (emolstad@parlee.com)

cc/ Shelby Twinn (s.twinn@live.ca)

00144194 - 4158-9503-9008 v.1

Action No.: 1103-14112
E-File No.: EVQ19SAWRIDGE
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A. 2000, c. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIROS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO, 19, now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")

ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
October 30, 2019

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Submissions by Ms. Osualdini

MS. OSUALDINI: Thank you, My Lord. For the record, Osualdini, first initial 'C.' We're counsel to Catherine Twinn. Sir, my submissions in terms of the SFN's application for intervention are going to be brief. Simply put, we are supportive of the OPGT's position. We agree that in terms of the test, the SFN does not have a direct interest in the outcome of this application, they are not a beneficiary of the Trust, and they do not bring any special expertise or perspective to this matter, and they've certainly demonstrated that their information is unreliable in terms of these issues.

Now, turning to the issue that's re -- that we've been discussing in terms of the order -- the transfer order, the Court's directed us in November to ask what is the effect of that order? And I would submit to you, My Lord, that is a legal question. What the parties are speaking to now is Step 2, that if the Court says that the effect of that order is not to confirm that the '85 Trust is the Trust with which to deal, now that becomes a factual question.

THE COURT: Well, that's a very good point. And --

MS. OSUALDINI: And --

THE COURT: -- and so to go back to Mr. Faulds' position, maybe we ought to be considering these applications separately, deal with the legal -- lee -- deal with whether or not intervention should be given for the legal issue, depending on the outcome of that, entertain another application if necessary. That might involve something that might require documents like --

MS. OSUALDINI: Right. Because -- and that was going to be my point about Mr. Cullity's files --

THE COURT: Yes.

MS. OSUALDINI: -- frankly at this point Mr. Cullity, as far as I'm aware from my client, he's still alive. He's with us. He's a person who could really speak to these issues. And we're speaking about privilege over Mr. Cullity's files because he's both counsel to the Trustees and to the First Nation at the relevant time. And we have never been given an opportunity to challenge whether there is privilege over that file, because we want to have the best information before the Court in the event that we do get to Step 2 in this process.

THE COURT: Well, was -- he was acting as counsel for Sawridge First Nation.

MS. OSUALDINI: And the Trustees.

THE COURT: And the Trustees?

MS. OSUALDINI: Yeah, sorry, the -- the letter from Ms. Bonora that was referred to by my --

THE COURT: If he's --

MS. OSUALDINI: -- friend --

THE COURT: -- acting for two clients, both clients are going to have to waive privilege in order for --

MS. OSUALDINI: Right.

THE COURT: -- permission to be waived.

MS. OSUALDINI: Because in Shelby's affidavit we have the letter from the Trustee's counsel taking position on this issue.

THE COURT: Affidavit of Shelby Twinn?

MS. OSUALDINI: Yeah, it's the -- oh, sorry, it's the responding brief of the Office of the Public Guardian and Trustee, and it's tab N.

THE COURT: Okay.

MS. OSUALDINI: Because at tab N you can see the correspondence that was provided to our office --

THE COURT: Yes.

MS. OSUALDINI: -- where the Trustees are saying that, No, they're asserting solicitor-client privilege over Mr. Cullity. Because initially, as I had raised at the prior case management meeting, we were considering calling viva voce evidence, you can hear from the man himself on what happened. The Trustees are objecting to that. And then they also alerted us to the fact that --

THE COURT: Well, isn't that the end of it, then?

MS. OSUALDINI: Well, I think we might -- if we get to Step 2, because, frankly, if Step 1 says, No, this order means what we all thought it meant at the time, this all becomes a moot point.

THE COURT: Okay.

MS. OSUALDINI: Because we -- as of right now, we have an unchallenged order. Nobody's here suggesting that it was an improperly granted order of the Court. We're simply defining what it means.

THE COURT: That's right. No, I -- the order was there.

MS. OSUALDINI: Right.

THE COURT: It hasn't been taken away.

MS. OSUALDINI: Right. But I think we need to have a process that in the event we have to get to Step 2 to be challenging these positions on privilege, because it appears that there is information that potentially is relevant. We aren't going to decide that today, but we need to have that process from the Court.

THE COURT: Okay.

MS. OSUALDINI: So in terms of the -- of the SFN's intervention application, in terms of direct interest in the outcome, they weren't a signatory to the order, they specifically didn't want to be. Did they bring any special expertise to the legal question of what the order means? I submit not.

THE COURT: Okay.

MS. OSUALDINI: But I won't belabour that point. I wanted to focus on the application of Shelby for intervention status. So, Sir, it will probably come to you as no surprise that we're very supportive of Shelby's application for intervention status. My client would like to see the beneficiaries have a voice before the Court given that the outcome of these matters could be very prejudicial to their address.

I would draw to the Court's attention that the necessity for beneficiary participation in these proceedings was recognized by the Court of Appeal in their December 2017

2017 ABQB 351
Alberta Court of Queen's Bench

Stratum Projects Alberta Inc. v. Aman Building Corp.

2017 CarswellAlta 895, 2017 ABQB 351, [2017] 12 W.W.R. 833, [2017] A.W.L.D. 2963, [2017] A.W.L.D. 3021, 280 A.C.W.S. (3d) 729, 56 Alta. L.R. (6th) 404, 67 C.L.R. (4th) 188, 8 C.P.C. (8th) 163

Stratum Projects Alberta Inc. (Plaintiff) and Aman Building Corporation and 1050999 Alberta Ltd. (Defendants) and The Guarantee Company of North America (Applicant) (Not yet a Party)

In the Matter of the Bankruptcy of Aman Building Corporation

Master W.S. Schlosser

Heard: April 27, 2017
Judgment: May 26, 2017
Docket: Edmonton 1003-04941, B203-014155

Counsel: Robert MacKay, Adam Persi, Nicholas Clarke, for Plaintiff
G.L. Sonny Ingram, for The Guarantee Company of North America

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Headnote

Civil practice and procedure --- Parties — Adding or substituting parties — Adding party on own motion
Lien claimant performed construction work for builder on condominium project — Liens were filed and then replaced by lien bond issued by surety — Lien claim was filed — Builder defended claim and counterclaimed for deficiencies and damages for delay — Builder made assignment into bankruptcy and trustee refused to defend action — Surety brought application for addition as party to lien claim — Application granted — Decision would affect surety's rights — Surety did not bring special expertise, insight, or fresh information and did not satisfy test for intervenor status — There was risk surety's interest would not be fully protected or argued — Surety was permitted to step into shoes of builder to promote defence and counterclaim but only to extent that counterclaim provided set-off — Surety was directly liable to claimant for judgment given by court.
Guarantee and indemnity --- Practice and procedure — Guarantee — Standing
Lien claimant performed construction work for builder on condominium project — Liens were filed and then replaced by lien bond issued by surety — Lien claim was filed — Builder defended claim and counterclaimed for deficiencies and damages for delay — Builder made assignment into bankruptcy and trustee refused to defend action — Surety brought application for addition as party to lien claim — Application granted — Decision would affect surety's rights — Surety did not bring special expertise, insight, or fresh information and did not satisfy test for intervenor status — There was risk surety's interest would not be fully protected or argued — Surety was permitted to step into shoes of builder to promote defence and counterclaim but only to extent that counterclaim provided set-off — Surety was directly liable to claimant for judgment given by court.

APPLICATION by surety for addition as party to claim for lien.

Master W.S. Schlosser:

Introduction

1 The narrow question here is whether a Surety can intervene, or be added to a Builders' Lien lawsuit when the principal, or in this case, the principal's trustee in bankruptcy, has declined to defend. The wider question is whether there is a general power to permit a Surety to participate in the lawsuit when the principal is disabled from doing so. This case is at the confluence of

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the *Rules of Court*, the *Builders' Lien Act* and the *Bankruptcy and Insolvency Act*. It is a relatively simple legal problem made complex by a labyrinth of tributaries and watershed involving different provinces, especially Ontario.

Facts

2 Stratum did some construction work for Aman on a large condominium project in Canmore. They were mostly paid. Liens were filed and then replaced by Guarantee's lien bond in the amount of $1,218,868.70, in October 2009.

3 The Statement of Claim was filed in March 2010. The Statement of Defence and Counterclaim followed in May of that year.

4 The Counterclaim alleges deficiencies and damages for delay. The Counterclaim approaches the value of the claim. I note that the pleadings were filed under the "old" *Rules* and at that point set-off could only be claimed by way of Counterclaim (old Rule 93(2)). Now set-off can be claimed in a Defence (Rule 3.59) and this may become a consideration later. It is important because, when considering what role the Surety might play in this lawsuit, it is one thing to permit it to assert a defence, or to defend *quantum*, but quite another to permit it to enjoy the benefit of a cause of action, especially without a section 38 *BIA* Order.

5 The s 69 Stay of Pleadings under the *Bankruptcy and Insolvency Act* was lifted by Registrar Schulz. The Order provided (in part):

> 2. Nothing in this Order shall in any way affect or interfere with any rights The Guarantee may have with respect to the Action, including without limitation, its ability to pursue, in its own name, the rights, counterclaims and defences of Aman with Respect to the Action which rights if any are not admitted by Stratum.

6 Stratum wants Summary Judgment. Guarantee wants to be heard; at least to the extent that it can advance Aman's defence. The application was originally brought under Rule 2.10 (the Intervenor Rule) and then expanded to include the general powers under s 53(3)(d) of the *Builders' Lien Act*, which provides:

> (d) the court may make *any further order* or direction *that it considers necessary or desirable* including, among other things, an order that the property be sold pursuant to this Act and an order that the action be entered for trial,
>
> (*Emphasis added*)

7 Lienholders are secured creditors for the purposes of the *Bankruptcy and Insolvency Act* (s 2). The Surety has at least a potentially provable claim in bankruptcy (on analogy with the guarantee cases: e.g. *Maple City Ford*, *AC Poirier*, below). None of the creditors seem to want the Counterclaim advanced by Aman — or a s 38 *Bankruptcy and Insolvency Act* Order — presumably because the Counterclaim is really only a defence.

List of Authorities

By the Parties:

1. *Royal Windsor Mechanical Inc. v. Toronto Catholic District School Board*, 2010 ONSC 1849 (Ont. S.C.J.);

2. *Carbon Development Partnership v. Alberta (Energy & Utilities Board)*, 2007 ABCA 231 (Alta. C.A. [In Chambers]);

3. *Smyth v. Edmonton (City) Police Service*, 2005 ABQB 652 (Alta. Q.B.);

4. *Lil Dude Ranch Ltd. v. 1229122 Alberta Inc.*, 2014 ABQB 39 (Alta. Q.B.);

5. *Decore v. Decore*, 2016 ABQB 246 (Alta. Q.B.);

6. *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.* [1993 CarswellAlta 32 (Alta. Q.B.)], 1993 CanLII 7084;

7. *Saskatchewan Power Corp. v. Alberta (Utilities Commission)*, 2014 ABCA 318 (Alta. C.A.);

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8. *Suncor Energy Inc. v. Unifor, Local 707 A*, 2014 ABQB 555 (Alta. Q.B.);

9. *Athabasca Tribal Council v. Alberta (Minister of Environmental Protection)*, 1998 ABQB 875 (Alta. Q.B.);

10. *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320 (Alta. C.A.);

11. *Knox v. Conservative Party of Canada*, 2007 ABCA 141 (Alta. C.A.);

12. *Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*, 2005 ABCA 143 (Alta. C.A.);

13. *R. v. Finta*, [1993] 1 S.C.R. 1138 (S.C.C.);

14. *University of Alberta v. Alberta (Information & Privacy Commissioner)*, 2011 ABQB 389 (Alta. Q.B.);

15. *Goudreau v. Falher Consolidated School District No. 69*, 1993 ABCA 72 (Alta. C.A.);

16. *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2002 ABCA 243 (Alta. C.A.);

17. *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*, 2008 ABCA 391 (Alta. C.A.);

18. *DeGroote v. Canadian Imperial Bank of Commerce* [1996 CarswellOnt 4712 (Ont. Bktcy.)], 1996 CanLII 8227;

19. *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.*, 1994 ABCA 261 (Alta. C.A.);

20. *Apotex Inc. v. Canada (Attorney General)*, [1986] 2 F.C. 233 (Fed. T.D.);

21. *Coulson v. Secure Holdings Ltd.*, 1976 CarswellOnt 282 (Ont. C.A.);

22. *Maple City Ford Sales (1986) Ltd., Re* [1998 CarswellOnt 2775 (Ont. Bktcy.)], 1998 CanLII 14833;

23. *Royal Bank v. Profor Kedgwick Ltée/Ltd.* [2008 CarswellNB 463 (N.B. C.A.)], 2008 Can LII 69 [hereinafter AC Poirier];

24. Sarna, Lazar, *The Law of Declaratory Judgments*, 4th ed, (Toronto: Thomson Carswell, 2016);

25. *Judicature Act*, RSA 2000, c J-2, as amended, s 8;

26. *Builders' Lien Act*, RSA 2000, c B-7, ss 53, 64;

27. *Interpretation Act*, RSA 2000, c I-8, as amended, ss 9, 10;

28. *Alberta Rules of Court*, Alta Reg 124/2010, rr 1.2, 1.3, 2.10;

29. *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12, [2016] A.J. No. 129 (Alta. C.A.);

30. *3S Resources Inc. v. Improvisions Inc.*, 2014 ABQB 746, [2014] A.J. No. 1374 (Alta. Q.B.);

31. *Lee v. Yoo*, 2015 ABQB 522, [2015] A.J. No. 908 (Alta. Q.B.);

32. *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280, [1972] O.J. No. 1713 (Ont. C.A.);

33. *Alberta Treasury Branches v. Ghermezian*, 2000 ABCA 228, [2000] A.J. No. 963 (Alta. C.A.);

34. *Stewart Estate v. TAQA North Ltd.*, 2013 ABQB 691, [2013] A.J. No. 1310 (Alta. Q.B.);

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35. *UPA Construction Group Ltd. Partnership v. Lake Placid Properties (Park) Inc.*, 2010 ABQB 675, [2010] A.J. No. 1247 (Alta. Q.B.);

36. *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (S.C.C.);

37. *Lansdowne Equity Ventures Ltd. v. Alsa Road Construction Ltd.*, 2009 ABQB 273, [2009] A.J. No. 482 (Alta. Q.B.);

38. McGuinnes, Kevin, *The Law of Guarantee*, 3rd ed (LexisNexis Canada: Markham 2013;

39. *S & K Restoration Inc. v. 1389978 Alberta Ltd.*, 2015 ABQB 73 (Alta. Q.B.) (M);

40. *Guenard v. Coe* (1914), 17 D.L.R. 47 (Alta. C.A.);

41. *Scott and Reynolds on Surety Bonds*, Thomson Reuters 2016 12.6;

42. *Paul D'Aoust Construction Ltd. v. Markel Insurance Co. of Canada*, [1999] O.J. No. 1837 (Ont. C.A.);

43. *Eastown Electric Co Ltd v Gregman Construction Ltd*, Unreported, September 22, 1995.

By the Court:

1. Alberta Law Reform Institute, Consultative Memorandum No 12.9, *"Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions"*, February 2004;

2. *Bova Steel Inc. v. Constructions Beauce-Atlas Inc.*, 2016 ABQB 589 (Alta. Q.B.) per Robertson M.;

3. *Enterprise Realty Ltd. v. Barnes Lake Cattle Co.* (1979), 10 C.P.C. 211 (B.C. C.A.);

4. *Gone Hollywood Video Ltd. v. Skrabek* (1997), 199 A.R. 318 (Alta. Q.B.);

5. *Save The Eaton's Building Coalition v. Winnipeg (City)* (2001), 13 C.P.C. (5th) 263 (Man. C.A.) (leave denied SCC 2002 [2002 CarswellMan 121 (S.C.C.)]);

6. *CPCS Ltd. v. Western Industrial Clay Products Ltd.*, 1995 ABCA 224 (Alta. C.A.);

7. *Schubert v. A-S4 Steel Ltd.*, 2010 ABCA 62 (Alta. C.A.) at para 35;

8. *Construction Lien Act*, RSO 1990, c C30, s 57(2);

9. Stevenson & Côté's, "*Civil Procedure Encyclopedia*" Juriliber Vol 1 Ch 8, 0, 10 (Adding Defendants without Plaintiff's request): and Ch 10 C 2, 5 (Interveners): D, S (Insurers);

10. *Zentil Plumbing & Heating Co. v. Q-Sons Construction Co.* [1986 CarswellOnt 3770 (Ont. S.C.)], May 28 1986 (Unreported);

11. *Dominion Dewatering Ltd v Q-Sons Construction Company Ltd and Her Majesty the Queen in Right of the Province of Ontario*, July 17, 1986 (Unreported);

12. *Q Sons Construction Ltd and Dominion Dewatering Ltd*, April 23, 1987 (Unreported);

13. *Wabco Standard Trane Inc. v. Inter Wide Mechanical & Contracting Ltd.*, [1998] O.J. No. 616 (Ont. Gen. Div.).

Analysis

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8 This is fundamentally a lien action. The *Rules of Court* apply, except where they are inconsistent with the *Builders' Lien Act* (s 64 *BLA*). Let me begin with the *Rules*. Some context is necessary.

i) The Old Rules

9 Under the old *Rules* there was a wide and general power to add parties. Old Rule 38 provided:

> (3) The Court may, either upon or without the application of any party and with or without terms order that the name of any party improperly joined be struck out and that any person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.
>
> . . .
>
> (6) the court may, upon being satisfied by any person not a party to an action;
>
> (a) that he is interested in the subject matter or result of the action, and
>
> (b) that he should be allowed to defend the action or any issue therein, order the person to be added as a defendant and make all necessary directions.

10 There was no rule dealing with interveners (per se). If someone wished to intervene in a lawsuit, they had to fit themselves within the joinder *Rule*, excerpted above.

11 The test for adding parties was considered by Virtue J. in the *Amoco* case. He said:

> [13] The addition of parties to actions by order of the Court is a subject which has been dealt with more extensively in the Courts of England than Canada. Some controversy still exists as to whether the proper test is a narrow or a broad one. The narrow test is best exemplified in *Anion v. Raphael Tuck & Sons Ltd.*, [1956] 1 QB 357. In that case Devlin J., with painstaking thoroughness, traces the cases dealing with the English rule, and concludes that what he describes as the narrow test, is the correct interpretation of the rule. My understanding of the test enunciated by Devlin J., which, for the reasons set out below, I respectfully adopt, is this: Would the order for which the Plaintiff was asking directly affect the intervenor, not in his commercial interests, but in the enjoyment of his legal rights. And secondly, the only reason which makes it necessary that a party be added is that the question to be settled cannot be effectually and completely settled unless he is a party. Unless these tests are met the Court has no jurisdiction to add a party within the rule.
>
> [14] For those who are interested in tracing the history of English legal analysis and application of the rule the whole of Devlin J.'s reasons are commended, but I refer in particular to the expression adopted by him at pp. 378-79:
>
> > " . . . that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court."
>
> (And also see ***Enterprise Realty*** for a review of the authorities.)

12 The lawsuit will certainly affect Guarantee's commercial interests. It will not affect the 'enjoyment of Guarantee's legal rights', in the sense that they did not bargain for the right to defend, as an insurer might. In a manner of speaking, judgment against Aman and indemnification under the bond is merely the crystallization of Guarantee's obligations and the commercial risk they bargained for.

13 The matter would not be defeated without the presence of Guarantee. The Court does not need its involvement to oversee the assessment of damages. (There is a well established pecking order for that). Without them, Stratum's application for judgment will be *ex parte*; obliging Stratum to adopt more of a prosecutorial role than an adversarial one.

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14 However, the decided cases are not consistent. Some suggest you should not add a party against whom a plaintiff has no direct cause of action (like an insurer, or the bonding company in this case). Other cases permit it. The authorities are reviewed in the *Civil Procedure Encyclopedia* as noted above. Whether the test is narrow or wide, the overriding consideration is whether adding the party is in the interests of justice.

15 I acknowledge that Guarantee has the cooperation of Aman. But Stratum has no direct right of action (or cause of action) against Guarantee; much in the same way that an injured plaintiff has no direct right of action against a tort-feasors' insurer; at least until judgment and then the right is statutory. *Stratum* could not require that Guarantee be added. A number of cases suggest that this precludes using even the old joinder rules to add the bonding company.

16 However, I note that an insurer was permitted to be joined under the old Alberta *Rules* as a party defendant for the limited purpose of opposing interlocutory applications (*CPCS Ltd. v. Western Industrial Clay Products Ltd.*, 1995 ABCA 224 (Alta. C.A.)). Guarantee may well have met the broad test under the old *Rules* but the matter is discretionary and the cases are divided.

ii) The New Rules

17 Much of the foregoing is now academic. The Joinder rules were substantially changed when the *Rules* were revised. The Alberta Law Reform Institute recommended:

> [89] . . . The narrow, limited application of Rule 38, together with its problematic gaps, just cause too many problems of application. Our rules also do not clearly deal with misnomer or substitution of defendants (for example, in a "John Doe" law suit). The Committee believes that if Alberta simply had a clear, open-ended discretionary provision giving the court discretion to add, delete and substitute parties where necessary without causing prejudice, then that power could be used equally well in all situations (whether the situation is a classic "necessary parties" situation or otherwise).
>
> [90] Therefore, the Committee recommends that we should retain the saving effect of Rule 38(1) but delete the rest of Rule 38. In its place, Alberta should have a Rule equivalent to Ontario's Rule 5.04(2) and (3). At any stage of a proceeding the court should be able by order to add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or by an adjournment. No person should be added as a plaintiff or applicant without that person's consent.

18 Ontario Rules 5.04(2) and (3) are wide and general. They provide:

> *Adding, Deleting or Substituting Parties*
>
> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 5.04 (2).
>
> *Adding Plaintiff or Applicant*
>
> (3) No person shall be added as a plaintiff or applicant unless the person's consent is filed. R.R.O. 1990, Reg. 194, r. 5.04 (3).

19 Despite advocating this broad and general power, we ended up with two somewhat more specialized rules: Rules 3.74 and 2.10, when the *Rules of Court* were revised in 2010.

> Rule 3.74 provides:
>
> 3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.
>
> (2) On application, the Court may order that a person be added, removed or substituted as a party to an action if

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> (a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;
>
> (b) in the case of an application *to add* or substitute *any other party*, or to remove or to correct the name of a party, *the application is made by a party* and the Court is satisfied the order should be made.
>
> (3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.
>
> (*Emphasis added*)

20 The applicable rule in this case would be 3.74(2)(b). But this rule restricts the power found in old Rule 38 by requiring that the application be made *by a party*; which is not the case here. The Trustee might have applied but there is no incentive to do so. While Guarantee's application might have satisfied the wider test under the old Rule, the current Rule creates a technical bar to Guarantee's application.

iii) Intervenors

21 We now also have Rule 2.10, which reads:

> Intervenor Status
>
> 2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

22 'Intervenor' (if we continue with the American spelling adopted by the Rules Committee) is not defined (or redefined) by the new *Rules*. Although it sometimes appears informally, in a non-technical sense, (eg *Guenard*), it has taken on a technical meaning, determined by a long line of decided cases. (See, for example, the cases at Ch 10 in the *Civil Procedure Encyclopedia* noted above). In a manner of speaking, Rule 2.10 did not begin with a clean slate.

23 Chief Justice Wittman summarized the law in *Suncor Energy*. Virtually all of the leading cases predate the rule:

> [7] Although the *Alberta Rules of Court* ("ARC") in ARC 2.10 provide that a Court may grant status to a person to intervene subject to any terms and conditions and with the rights and privileges specified by the Court, no test is set forth to guide the Court in intervention applications. The common law governs.
>
> [8] None of the parties disputes the test to guide judicial discretion. As set forth in the Applicants' brief, the considerations are as follows:
>
> > 1. Will the proposed interveners be specially or directly affected by the decision of the Court: *Papaschase Indian Band v Canada (Attorney General)*, [2005] AJ No 1273 at paragraph 2; *Knox v. Conservative Party of Canada*, 2007 ABCA 141at paragraph 5; *Alberta (Minister of Justice) v Metis Settlements Appeals Tribunal*, 2005 ABCA 143 at paragraph 4; *R v Finta*, [1993] 1 SCR 1138 at 1143; *Carbon Development Partnership v Alberta (Energy and Utilities Board)*, 2007 ABCA 231, [2007] AJ No 727 at paragraph 10.
> >
> > 2. Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court: *Papaschase* at paragraph 2; *Goudreau v Falher Consolidated School District No 69*, 1993 ABCA 72 at paragraph 17. This question is akin to whether an intervener would provide "fresh information or fresh perspective". *Reference Re Workers' Compensation Act*, 1983 (Nfld), [1989] 2 SCR 335 at 340; *Stewart Estate (Re)*, 2014 ABCA 222 at paragraph 7.
> >
> > 3. Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties: *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 202 ABCA 243 at paragraph 2; *Gift Lake*

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> *Metis Settlement v. Canadian Natural Resources Limited*, 2008 ABCA 391 at paragraph 6; Metis Settlements Appeal Tribunal at paragraph 4.
>
> 4. Will the interveners presence "provide the Court with fresh information or a fresh perspective on a constitutional or public issue" *Reference Re Workers' Compensation Act* at 340; *Papaschase* at paragraph 9.

Another factor is whether granting a right to intervene would unduly prejudice a party.

24 There is no doubt Guarantee's rights will be affected by the decision. Guarantee will not likely bring special expertise, insight, or fresh information. There is a risk (noted below) that their interest will not be fully protected or argued.

25 Intervenors are not typically full parties. It is not clear that the latter part of Rule 2.10 was intended to give the Court the power to make them so. A new definition could have signalled an intention to turn them from interested bystanders into full parties. Typically, the role of an intervenor is to present a unique perspective to assist the Court in coming to the best decision. They take the record as they find it. A mere financial interest usually isn't enough.

26 Ontario Rule 13.01 has a somewhat different emphasis; specifically allowing a person to intervene *as an added party*. This is subtly but importantly different from the Alberta Rule which preserves the common law role and status of an intervenor. It is important that the Ontario cases be read in that context.

27 Guarantee is not obliged to indemnify Stratum directly. It is to indemnify the Clerk of the Court. Its liability is strictly limited by the bond. The bond provides:

> . . . that we, AMAN BUILDING CORPORATION (hereinafter called the Principal) and THE GUARANTEE COMPANY OF NORTH AMERICA, (hereinafter called the Surety), are jointly and severally bound *unto the Clerk of the Court of Queen's Bench of Alberta* (hereinafter called the Obligee), ...
>
> To the Intent and condition that, if the said Aman Building Corporation shall pay or cause to be paid into the Court of Queen's Bench of ALBERTA as may be directed or provided by Judgment or Order in any action in the said Court, any amount or amounts not exceeding in the aggregate sum of ONE MILLION, TWO HUNDRED AND EIGHTEEN THOUSAND, EIGHT HUNDRED AND SIXTY-EIGHT — 70/100 Dollars ($1,218,868.70), including costs, . . .
>
> Provided that in *no event shall the Surety be liable for a greater sum than the penalty of this Bond*, and any payments under this Bond shall reduce the Surety's liability by the amount of such payments.
>
> (*Emphasis added*)

28 The circumstances here appear to be unique — at least in this jurisdiction under the present Rules. I acknowledge that Guarantee is volunteering to be added out of its own self-interest. It seems willing essentially to rewrite the bond, at least to the extent that it would be directly exposed to liability from Stratum. However their application is not a good fit for Rule 2.10 and the common law definition of intervenor. I am disinclined to use Rule 2.10 for these purposes.

Look East

29 Section 53(d) of the *Builders' Lien Act* is worth repeating for ease of reference. It provides:

> (d) the court may make *any further order or direction that it considers necessary or desirable* including, among other things, an order that the property be sold pursuant to this Act and an order that the action be entered for trial,
>
> *(Emphasis added)*

30 It, too, is somewhat less explicit than its Ontario counterpart; which simply provides that, (with some exceptions), the Court 'may at any time add or join any person as a party to the [construction lien] action'. (*Construction Lien Act*, RSO 1990, c C 30, s 57(2).)

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31 A bonding company was added (though hesitantly) by Master Sischy in *Zentil Plumbing & Heating Co. v. Q-Sons Construction Co.*, May 28 1986 (Unreported), when the bankruptcy of the contractor caused the contractor and its counsel to drop out of the picture. The Surety wished to 'intervene' in the nontechnical sense to promote the defence of the construction company and to protect its (the Surety's) monetary interest. The Surety, as here, had the construction company's cooperation (as well as their records) and also agreed to be personally liable for costs. (see also *Dominion Dewatering Ltd v Q-Sons Construction Company Ltd and Her Majesty the Queen in Right of the Province of Ontario*, July 17, 1986 (Unreported) per Shearer J, *Q Sons Construction Ltd and Dominion Dewatering Ltd*, April 23, 1987 (Unreported) per Fedak J. and *Wabco Standard Trane Inc. v. Inter Wide Mechanical & Contracting Ltd.*, [1998] O.J. No. 616 (Ont. Gen. Div.) per Master Sandler, (which permitted Canadian General to intervene following Inter Wide's assignment into bankruptcy). In the latter case the Surety was permitted to oppose motions. Typically, the cases permit the Surety to step into the shoes of the contractor but not to claim any independent relief.

32 The Ontario cases are summarized in *Scott on Reynolds on Surety Bonds* at 12.6. The learned authors conclude that the Ontario cases favour adding a Surety as a party in the type of circumstances we have here (I note from reading the unreported decisions, reproduced in Appendix B to that text, that the Guarantee Company of North America and the learned authors of the text (both as authors and as counsel) have been pioneers in this regard.).

33 I am persuaded that Ontario has shown us the way forward, despite the less explicit wording of the Alberta *Builders' Lien Act*. First of all there is a natural justice component that would remain unfulfilled if Aman's position was not given voice. Secondly, there is also no real prejudice. The pragmatic approach to parties in builders' lien litigation taken by Master Robertson in *Bova Steel Inc. v. Constructions Beauce-Atlas Inc.*, 2016 ABQB 589 (Alta. Q.B.) also supports this approach.

34 Perhaps the irony of the situation is that a person in Stratum's position starts out with a playing field that is not entirely level in the sense that there are typically more defences (or set-offs) available than claims (see for example *Enerkem Alberta Biofuels LP v. Produits Metalliques Pouliot Machinerie Inc.*, 2016 ABQB 524 (Alta. Q.B.), at paras 13 and following, outlining the *Peter Kiewit* line of cases). However, fairness, in the present state of construction law, demands that the Surety be given a voice. The Surety's participation will assist the Court in coming to a proper result. I endorse Master Sischy's comments in the *Zentil* case that it would have been preferable for the Surety to have created a contractual right to defend.

Defendant or Third Party?

35 The choice is suggested in *Schubert v. A-S4 Steel Ltd.*, 2010 ABCA 62 (Alta. C.A.), at para 35. However, allowing Guarantee to participate as a Third Party would be somewhat like permitting it to have its cake and eat it too. If it is to enter the fray it should do so with personal exposure and it should not gain better rights than Aman had before it.

Disposition

36 The application is allowed. Guarantee is permitted to step into the shoes of Aman to promote the defence and Counterclaim but only to the extent that the Counterclaim provides a set-off. The defence is to be prosecuted without undue delay. Guarantee is required to produce or comply with all things that could be demanded of Aman. Guarantee will be directly liable to Stratum for any judgment given by the Court and its personal liability for costs is not limited to the contractual amount stated in the bond.

37 If the parties are unable to agree on the terms of the Order they may appear within 30 days and also, if necessary, for directions under section 53 of the *Builders' Lien Act*. Costs of this application and the action are in the cause.

Application granted.

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