IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lonsdale Quay Market Corporation v. Klondike Contracting Corporation,* 2024 BCSC 1605

Date: 20240830
Docket: S241041
Registry: Vancouver

Between:

Lonsdale Quay Market Corporation

Petitioner

And:

Klondike Contracting Corporation, J.A.W. Fabricators Co. Ltd., Austin Metal Fabricators Limited Partnership, H.Y. Engineering Ltd., HCL Steel & Coatings Ltd., Centerline Traffic Management Ltd., Buhler Painting Ltd., Walter Silva, as General Partner of Silva Mechanical Services, Keith and Son Civil (2023) Ltd., FBS Fairview Builder Services Incorporated, Bridge Electric Corp., Mega Cranes Ltd., CMDT Concrete Ltd., Ange's Plumbing Ltd., Geometrix Glass & Design Inc., Retro Specialty Contractors Inc., Brent Neal Janzen, and All Roads Construction Ltd.

Respondents

Before: The Honourable Justice Warren

Reasons for Judgment

Counsel for the Petitioner:	J. Virgin J. Clark
Counsel for the Respondents FBS Fairview Builder Services Incorporated and Klondike Contracting Corporation:	M. Lisanti
Counsel for the Respondent J.A.W. Fabricators Co. Ltd.:	S. Streat
Place and Date of Hearing:	Vancouver, B.C. August 15, 2024
Place and Date of Judgment:	Vancouver, B.C. August 30, 2024

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INTRODUCTION

[1] Lonsdale Quay Market Corporation ("Lonsdale") seeks orders, pursuant to s. 23 of the *Builders Lien Act*, S.B.C. 1997, c. 45 (the "*BLA*"), discharging its liability in respect of lien claims filed against its lands and cancelling the liens and related certificates of pending litigation, on paying $521,008.12 into court. The parties agree (at least for the purpose of this proceeding) this is the amount of Lonsdale's statutory holdback under the *BLA*. The lien claims were filed by subcontractors of Klondike Contracting Corporation ("Klondike"), the general contractor Lonsdale retained to carry out a construction project on its lands.

[2] The respondents to the petition are Klondike (now in receivership) and the various subcontractors who have filed lien claims. While most of the respondents are taking no position, J.A.W. Fabricators Co. Ltd. ("J.A.W."), one of the lien holders, opposes the orders sought. MNP Ltd., the court-appointed receiver for Klondike, takes no position with respect to the orders sought, but submits that the payment into court should be made to the credit of BCSC Action No. S-235790, Vancouver Registry (the "Receivership Proceeding"), rather than the within petition proceeding.

BACKGROUND

[3] The facts are largely undisputed.

[4] Lonsdale is the registered owner of lands with a civic address at 123 Carrie Cates Court, North Vancouver, British Columbia ("the Lands").

[5] Lonsdale entered into a CCDC2 contract (the "Contract") with Klondike dated December 2021, whereby Klondike agreed to act as the general contractor for the construction of various renovations on the Lands (the "Project").

[6] The final adjusted price for the work to be performed under the Contract was $5,210,081.17, including GST (the "Contract Price"). The amount that Lonsdale is seeking to pay into court in this proceeding ($521,008.12) is 10 percent of the Contract Price. As mentioned, there is no dispute that this is the holdback Lonsdale was required to retain under s. 4 of the *BLA*.

[7] Klondike engaged various subcontractors to complete work in relation to the Project, including J.A.W. and the other named respondents.

[8] In or around the early spring of 2023, Klondike fell behind on paying invoices issued by J.A.W.

[9] In or about March 2023, J.A.W. had discussions with Klondike about its unpaid invoices. Klondike's representative advised J.A.W.'s representative that J.A.W. would be paid once Klondike was paid by Lonsdale. During the same period, J.A.W.'s representative had telephone discussions with Lonsdale's representative regarding Klondike being overdue in payments to J.A.W.

[10] On or about April 21, 2023, Klondike's representative advised J.A.W.'s representative that Klondike had received part payment from Lonsdale, and that payment to J.A.W. would be forthcoming. Despite this assurance, J.A.W. did not receive payment from Klondike.

[11] On or about May 12, 2023, J.A.W. filed a claim of lien pursuant to the *BLA* alleging that the sum of $428,353.01 was due and owing to it (the "J.A.W. Lien"). On or about May 29, 2023, counsel for J.A.W. served the J.A.W. Lien on Lonsdale's registered and records office via registered mail.

[12] Other subcontractors of Klondike filed lien claims against title to the Lands in the months that followed. Below is a list of those claims, which total $2,110,861.15 (collectively, the "Lien Claims"):

Lien Claim Number	**Lien Claimant**	**Date**	**Lien Claimed**
CB615379	J.A.W. Fabricators Co. Ltd.	2023-05-05	$428,353.01
CB739272	Austin Metal Fabricators Limited Partnership	2023-07-06	$85,188.88
CB789904	H.Y. Engineering Ltd.	2023-07-27	$6,592.03
CB857637	HCL Steel & Coatings Ltd.	2023-08-28	$103,845.00
CB861696	Centerline Traffic Management Ltd.	2023-08-30	$15,709.34

CB861786	Buhler Painting Ltd.	2023-08-30	$83,913.02
CB882691	Walter Silva, as general partner of Silva Mechanical Services	2023-09-08	$3,475.86
CB923204	Keith and Son Civil (2023) Ltd.	2023-09-29	$284,051.32
CB923205	FBS Fairview Builder Services Incorporated	2023-09-29	$371,610.35
CB985763	Bridge Electric Corp.	2023-10-25	$315,704.63
BB1550857	Mega Cranes Ltd.	2023-11-09	$2,820.26
CB1004320	CMDT Concrete Ltd.	2023-09-25	$51,466.05
CB1007382	Ange's Plumbing Ltd.	2023-11-03	$217,757.18
HB2637	Geometrix Glass & Design Inc.	2023-06-07	$13,331.70
CB1016974	Retro Specialty Contractors Inc.	2023-11-09	$19,149.90
HB2769	Brent Neal Janzen	2023-10-13	$8,350.80
CB1022751	All Roads Construction Ltd.	2023-11-14	$83,832.48
CB1065834	Centerline Traffic Management Ltd.	2023-08-16	$15,709.34
Total of Liens Claimed			**$2,110,861.15**

[13] On or about August 24, 2023, Justice Ahmad granted an order in the Receivership Proceeding appointing MNP Ltd. the receiver of Klondike (the "Receivership Order"). J.A.W. did not learn of the Receivership Order until November 2023.

[14] Klondike eventually became insolvent, an event of default under the Contract. On or about October 20, 2023, Lonsdale terminated the Contract as a result of Klondike's insolvency.

[15] Lonsdale has adduced evidence that it has incurred, or will incur, more than $1,428,144.13 in costs and other damages due to Klondike's default. This figure includes $967,623.86 in additional costs to complete the work that Klondike was to perform under the Contract, and more than $29,958.00 to repair deficiencies in Klondike's work.

[16] J.A.W.'s opposition to the orders sought by Lonsdale is based on Lonsdale having paid a significant amount ($807,535.67) to Klondike after Lonsdale had actual knowledge of the J.A.W. Lien.

[17] Again, Lonsdale was served with the J.A.W. Lien on or about May 29, 2023. On September 20, 2023, J.A.W. filed an amended notice of civil claim to enforce the J.A.W. Lien, which was served on Lonsdale on September 25, 2025.

[18] At various points between July 31, 2023 and October 6, 2023, J.A.W.'s representative exchanged emails with Lonsdale's representative in which they discussed the amounts owing from Klondike to J.A.W., the J.A.W. Lien, and the amended notice of civil claim filed by J.A.W.

[19] On October 6, 2023, Lonsdale's representative advised J.A.W.'s representative that Lonsdale had just made a further payment to Klondike's lawyer. As noted above, shortly after this date, on October 20, 2023, the Contract between Klondike and Lonsdale was terminated as a result of Klondike's insolvency.

[20] In or about December 2023, counsel for J.A.W. made a demand under s. 41 of the *BLA* for information and particulars regarding the status of the Contract, the statutory holdback, and payments made to Klondike.

[21] In or about January 2023, J.A.W., through its counsel, received Lonsdale's response to the s. 41 demand. The information provided showed that after Lonsdale had notice of the J.A.W. Lien and the action commenced by J.A.W., Lonsdale paid $807,535.67 to Klondike.

[22] There is no sworn evidence from Lonsdale explaining why a further $807,535.67 was paid by Lonsdale to Klondike at a time when Lonsdale was aware of the J.A.W. Lien. Nevertheless, Lonsdale does not dispute that it paid a further $807,535.67 to Klondike after it had actual knowledge of the J.A.W. Lien.

[23] Lonsdale paid Klondike a total of $4,694,323.03 plus GST on account of the Contract Price, leaving $515,758.14 of the Contract Price outstanding.

ISSUES

[24] The primary issue is whether Lonsdale is entitled to a discharge of its liability in respect of the Lien Claims and an order that the Lien Claims and related certificates of pending litigation be removed from title to the Lands, on payment into court of only the amount of the statutory 10 percent holdback – in this case, $521,008.12. Lonsdale and J.A.W. agree that the resolution of that issue turns on the interpretation of ss. 23 and 34 of the *BLA*, but their views as to the proper interpretation of those provisions differ.

[25] The parties have raised three subsidiary issues that I will deal with later in these reasons:

a) J.A.W. challenges the sufficiency of Lonsdale's evidence regarding its additional costs resulting from Klondike's default;

b) J.A.W. submits that of the funds paid into court by Lonsdale, $428,353.01 must secure the J.A.W. Lien in full (i.e. be paid into court for the sole benefit of J.A.W.); and

c) MNP Ltd. submits that any amount paid into court by Lonsdale should be paid to the credit of the Receivership Proceeding rather than to the credit of this proceeding.

LEGAL PRINCIPLES

[26] The guiding principle of statutory interpretation, the modern rule, is well-settled. The words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837.

[27] The principle and its application were discussed and explained by Justice Horsman (dissenting, but not on this point) in *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101:

> [40] As the Supreme Court of Canada has stated on a number of occasions, the grammatical and ordinary sense of a provision is not, on its own, determinative. A statutory interpretation analysis is incomplete without consideration of context and purpose, no manner how plain the meaning might appear when the provision is viewed in isolation: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 48; *R. v. Alex*, 2017 SCC 37 at para. 31. As explained by the Court in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para. 10:
>
> > Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to statutory interpretation…
>
> [41] Thus, it is necessary in every case for the court to undertake the contextual and purposive approach mandated by the modern rule, and thereafter determine whether there is ambiguity in the wording of a statute. There is a genuine ambiguity only where the words of a provision are capable of more than one meaning when read in light of the entire context of a provision, which includes the statutory purpose: *Bell ExpressVu* at paras. 29–30.

[28] Our Court of Appeal has confirmed that the modern rule of purposive construction is to be used in interpreting the *Builders Lien Act*: *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2022 BCCA 81 at para. 34 [*JVD*].

[29] Counsel for J.A.W. relied on the Saskatchewan Court of Appeal's articulation of the purpose of builders lien legislation in *PricewaterhouseCoopers Inc., Trustee in Bankruptcy for D & K Horizontal Drilling (1998) v. Alliance Pipeline Ltd.*, 2002 SKCA 145 [*PricewaterhouseCoopers Inc.*]. While that decision concerned Saskatchewan's equivalent to the *BLA*, J.A.W. submits that both statutory schemes have the same general purpose.

[30] At para. 14 of *PricewaterhouseCoopers Inc.*, the Saskatchewan Court of Appeal adopted Cameron J.A.'s articulation of the purpose of Saskatchewan's equivalent scheme in *Town-N-Country Plumbing & Heating (1985) Ltd. et al v. Schmidt et al* (1992), 93 Sask. R. 278 at 286-287, 1991 CanLII 7989 (S.K.C.A.):

> [26] The statute is primarily concerned with the commercial interests of persons who, under contract and on credit, contribute service or material to the improvement of real property, whether under contract to the owner, to the contractor engaged by the owner, or to any subcontractor. According to the law of contract, such persons have no recourse against the property should they go unpaid, and no recourse against anyone except the party with whom

> they have contracted. Limited as they are in those ways, the rights and remedies afforded by contract law were seen by the legislature as inadequate in this context, and so an elaborate scheme of supplementary rights and remedies was enacted, all with the purpose of better enabling such persons to recover the amounts owing to them. This is the primary purpose of the Act, and to the end of achieving that purpose, trusts were constituted in relation to amounts payable in connection with the improvement; liens and charges of various kinds were created; holdbacks and retentions of monies payable were provided for, and so on.
>
> [27] This, however, is not the only concern or purpose of the Act. It is also concerned with the commercial interests of others, including the owner and the financier, if any, of the improvement. In their interests, as well as in the interests of the contractor and the subcontractors, extensive provision was made allowing for monies to flow down the contractual chain without risk of liability to those providing the materials or services. The purpose of these provisions--and hence the secondary purpose of the Act--is to ensure business efficacy.

[31] Lonsdale emphasizes the Supreme Court of Canada's articulation of the purpose of what was then the *Mechanics Lien Act*, R.S.B.C. 1960, c. 238, in *Noranda Exploration Co. Ltd. v. Sigurdson*, 1975 CanLII 140, [1976] 1 S.C.R. 296 at 301: "to protect the claims of those who supply work and materials so long as the owner is not prejudiced" (emphasis added).

[32] In *JVD*, the Court summarized the application of the purposive approach to construing the *BLA* in terms that highlighted the balancing of interests that is reflected in the *BLA*:

> [40] The interpretation of the [*BLA*] requires consideration of its purposes, and of its balancing of the interests of various players in the construction industry. The statute is designed to provide security for contractors, subcontractors, workers and material suppliers who contribute to improvements to land. To the extent that the security is provided by a lien, it is given at the expense of the landowner. Generally, the *Act* places the onus of providing security on the landowner, who is the person benefitted by an improvement.

[33] This balancing of interests was also noted by Justice Griffin in *Pinnacle Living (Capstan Village) Lands Inc. v. Fairway Recycle Group Inc*., 2024 BCCA 172, where she articulated the purpose of the *BLA* as follows:

> [51] The purpose of the *Act* is to offer some protection to persons who provide work or materials contributing to an improvement to land. It does so by providing some security for payment for the work and materials supplied to

> an improvement, through holdback obligations and the lien process. This prevents owners from taking the benefit of improvements to their land without paying for them. However, the *Act* also balances these protections against the rights of owners of the land, by providing owners with a means to clear their title of liens, if the owners provide some partial payment for the work and materials supplied, in the amounts provided for under the *Act*[.]

[34] In summary, the overarching purpose of the *BLA* is to offer protection to persons who provide work or materials contributing to an improvement to land, but in a manner that balances that protection against the interests of owners by making specific provision for monies to flow to ensure business efficacy, and by providing a specific mechanism for owners to clear their title.

RELEVANT STATUTORY PROVISIONS

[35] Again, the primary issue, whether Lonsdale is entitled to the relief it seeks on payment into court of only the amount of the statutory 10 percent holdback, turns on the interpretation of ss. 23 and 34 of the *BLA*. Those sections are reproduced below, but it is helpful to begin by summarizing the aspects of them that are in dispute.

[36] Section 23(1) is the mechanism by which an owner can apply to discharge its liability in respect of lien claims and have the lien claims cleared from its title. In summary, these forms of relief are available to an owner on paying into court the lesser of the total amount of the lien claims and “the amount owing” by the owner to the person engaged by the owner through whom the liens are claimed (which, for ease, I will refer to as the “Contractor”), provided that amount is at least equal to the “required holdback”.

[37] It is agreed that in this case, on any calculation, the total amount of the Lien Claims exceeds “the amount owing” by Lonsdale to Klondike. Accordingly, the amount Lonsdale must pay into court is the greater of “the amount owing” by Lonsdale to Klondike and the amount of the required holdback. The dispute concerns the manner in which “the amount owing” is determined.

[38] Section 23(5) provides, in summary, that if the Contractor has defaulted in completing the contract and “the amount held back by the [owner] from the

[Contractor] exceeds the required holdback", then "the amount owing" does not include any amount that the owner "is entitled to apply to remedy the default or complete the contract".

[39] Section 34 also contains rules for determining "the amount owing". The specific rules in issue are those set out in ss. 34(2)(c) and 34(3). In summary, s. 34(2)(c) provides that a payment made after the owner has actual notice of a filed lien claim that has not been cancelled does not, to the extent of the lien, reduce the amount owing, while s. 34(3) provides that, despite subsection (2), "on the default" of the Contractor, an owner may apply money held by the owner "in excess of the required holdback" in order to remedy that default.

[40] For ease of reference, I have reproduced ss. 23 and 34 below in their entirety:

> **Removal of claims of lien by payment of total amount recoverable**
>
> **23** (1) If a claim of lien is filed by one or more members of a class of lien claimants, other than a class of lien claimants engaged by an owner, the owner, contractor, subcontractor or mortgagee authorized by the owner to disburse money secured by a mortgage may, on application, pay into court the lesser of
>
> (a) the total amount of the claim or claims filed, and
>
> (b) the amount owing by the payor to the person engaged by the payor through whom the liens are claimed provided the amount is at least equal to the required holdback in relation to the contract or subcontract between the payor and that person or, if the payment is made by a purchaser to whom section 35 applies, 10% of the purchase price of the improvement.
>
> (2) Payment into court under an order made under subsection (1) discharges the owner from liability in respect of the claims of lien filed and
>
> (a) the money paid into court stands in place of the improvement and the land or mineral title, and
>
> (b) the order must provide that the claims of lien be removed from the title to the land or mineral title.
>
> (3) If an application has been made under subsection (1) and the claims of lien have been removed under subsection (2), and if additional claims of lien are filed by persons claiming through the same person engaged by the payor with respect to the lien claimants whose claims of lien were removed under subsection (2), application may be made under subsection (1) to have the additional claims of lien removed under subsection (2) on payment into court of whatever additional sum is necessary to bring the amount in court up to the

amount that would have been paid into court if the additional claims of lien had been filed at the time of the prior application.

(4) An application under subsection (1) or (3) may be brought by an application in proceedings that have been commenced to enforce a claim of lien, or by petition, and the court may

> (a) hear and receive evidence, by affidavit or orally or otherwise, that it considers necessary in order to determine the proper amount to be paid into court,
>
> (b) direct the trial of an issue to determine the amount to be paid into court, and
>
> (c) refuse the application if it is of the opinion that the determination of the total amount that may be recovered by lien claimants should be made at the trial of the action.

(5) If the amount held back by the payor from the person engaged by the payor through whom the liens are claimed exceeds the required holdback in relation to the contract or subcontract between the payor and that person, and that person has defaulted in completing or carrying out the contract or subcontract with the payor, for the purposes of subsections (1) and (3) the amount owing by the payor to that person does not include any amount that the payor is entitled to apply to remedy the default or complete the contract or subcontract.

…

Limit of claims

34 (1) The maximum aggregate amount that may be recovered under this Act by all lien holders who claim under the same contractor or subcontractor is equal to the greater of

> (a) the amount owing to the contractor or subcontractor by the person who engaged the contractor or subcontractor, and
>
> (b) the amount of the required holdback in relation to the contract between the contractor or subcontractor and the person who engaged the contractor or subcontractor.

(2) For the purposes of subsection (1) (a),

> (a) an amount claimed by way of counterclaim against a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person,
>
> (b) a payment that is made in bad faith to a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person, and
>
> (c) a payment to a contractor or subcontractor by the person who engaged the contractor or subcontractor that is made

> (i) after a claim of lien has been filed by a lien holder claiming under the contractor or subcontractor,
>
> (ii) if the person has actual notice of the claim of lien, and
>
> (iii) if the claim of lien has not been removed or cancelled from the title to the land, under section 23 or 24 or otherwise, at the time the payment was made,
>
> does not, to the extent of the lien, reduce the amount owing to the contractor or subcontractor by that person.
>
> (3) Despite subsection (2), a person may, on the default of another person that the first person engaged, apply money held by the first person in excess of the required holdback in order to remedy that default or compensate for damage caused by the default.

POSITIONS OF THE PARTIES

[41] Lonsdale submits that it is entitled to the relief it seeks on paying into court the amount of the statutory 10 percent holdback ($521,008.12), because that amount is greater than the "amount owing" by Lonsdale to Klondike. Essentially, its position is as follows:

a) Klondike's insolvency was an event of default by Klondike under the Contract, which allowed Lonsdale to terminate the Contract and claim all damages resulting from the default;

b) As a result of Klondike's default, Lonsdale was required to complete the work that was to be completed by Klondike under the Contract;

c) Lonsdale paid Klondike a total of $4,694,323.03 plus GST on account of the Contract Price, leaving $515,758.14 of the Contract Price outstanding, an amount that is less than the statutory 10 percent holdback of $521,008.12. Further, as a result of Klondike's default, there is no "amount owing" from Lonsdale to Klondike under the Contract, because the costs Lonsdale has incurred or will incur to complete Klondike's work under the Contract (more than $1,428,144.13) exceed the outstanding balance on the Contract Price; and

d) As the "amount owing" by Lonsdale to Klondike under the Contract is nil, pursuant to ss. 23(1) and (2), Lonsdale is only obliged to pay an amount that is "at least equal to the required holdback" to be discharged from liability in respect of the Lien Claims.

[42] As mentioned, J.A.W. challenged the sufficiency of the evidence adduced by Lonsdale to support its claim that it has incurred or will incur, more than $1,428,144.13 in costs and other damages due to Klondike's default.

[43] However, even if that evidence is accepted, J.A.W. submits that in light of s. 34(2)(c), which states that a payment made by an owner to a contractor after the owner has actual notice of a filed claim of lien does not reduce the "amount owing" to the extent of the lien, Lonsdale's liability for the Lien Claims can only be extinguished under s. 23(2) if Lonsdale pays into court the amount of the required statutory holdback ($521,008.12) plus the amount of the J.A.W. Lien ($428,353.01); in other words, $949,361.13.

[44] In response to J.A.W.'s submissions regarding s. 34(2)(c), Lonsdale says J.A.W. has ignored ss. 23(5) and 34(3) of the *BLA,* which Lonsdale argues permit it to deduct the costs of remedying Klondike's default from any amount owing to Klondike, even though Lonsdale did not holdback funds in excess of the statutory 10 percent holdback and instead made substantial payments to Klondike after it had notice of the J.A.W. Lien. As I understand it, Lonsdale's position is that if I accept that it will incur costs of at least $807,535.67 (the amount it paid Klondike after receiving notice of the J.A.W. Lien) to remedy Klondike's default, then s. 34(2)(c) does not apply to the amount it paid Klondike after receiving notice of the J.A.W. Lien.

DISCUSSION

A. How much money must Lonsdale pay into court to discharge its liability for the Lien Claims?

[45] As discussed, I must start by identifying the grammatical and ordinary meaning of the words used in the provisions in question, and then determine

whether there is ambiguity in the wording; that is, whether the words are capable of more than one meaning when read in light of the entire context of the provisions, including the overarching purpose of the *BLA*.

[46] Pursuant to ss. 23(1) and (2), Lonsdale is entitled to the relief it seeks on paying into court the lesser of the total amount of the Lien Claims (s.23(1)(a)) and "the amount owing" by Lonsdale to Klondike, provided that amount is at least equal to the "required holdback" (s. 23(1)(b)). As noted, there is no dispute that, on any calculation, the total amount of the Lien Claims exceeds "the amount owing" by Lonsdale to Klondike.

[47] It is necessary to determine "the amount owing" by Lonsdale to Klondike for purposes of s. 23(1)(b) because it is the greater of "the amount owing" and the amount of the required holdback that must be paid into court by Lonsdale to engage s. 23(2) which, in turn, provides for the discharge of Lonsdale's liability.

[48] It is agreed for the purpose of this proceeding that $521,008.12 is the "amount of the required holdback". The question, then, is whether the "amount owing", as that term is used in s. 23(1)(b), exceeds $521,008.12. If it does, Lonsdale must pay the greater amount (that is, the "amount owing") into court to obtain the relief it seeks.

[49] As discussed, the *BLA* contains rules for determining "the amount owing". Those that are potentially engaged in this case are in ss. 23(5), 34(2), and 34(3).

[50] Section 23(5) provides:

> (5) If the amount held back by the payor from the person engaged by the payor through whom the liens are claimed exceeds the required holdback in relation to the contract or subcontract between the payor and that person, and that person has defaulted in completing or carrying out the contract or subcontract with the payor, for the purposes of subsections (1) and (3) the amount owing by the payor to that person does not include any amount that the payor is entitled to apply to remedy the default or complete the contract or subcontract.

[51] The grammatical and ordinary meaning of the words used in s. 23(5) is plain and obvious. “If the amount held back by the [owner] from the [contractor] exceeds the required holdback” and if the “[contractor] has defaulted in completing or carrying out the contract …”, the “amount owing … does not include any amount that the [owner] is entitled to apply to remedy the default or complete the contract …”.

[52] According to the grammatical and ordinary meaning of the words used, there are two preconditions to the application of s. 23(5): (1) the amount held back must exceed the required holdback, and (2) the contractor must have defaulted. Klondike defaulted but the amount Lonsdale actually held back ($515,758.14) does not exceed the required holdback ($521,008.12). Only one of the two preconditions is met. As such, according to the grammatical and ordinary meaning of the words used, s. 23(5) has no application.

[53] Section 34(2) provides:

> (2) For the purposes of subsection (1) (a),
>
> > (a) an amount claimed by way of counterclaim against a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person,
> >
> > (b) a payment that is made in bad faith to a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person, and
> >
> > (c) a payment to a contractor or subcontractor by the person who engaged the contractor or subcontractor that is made
> >
> > > (i) after a claim of lien has been filed by a lien holder claiming under the contractor or subcontractor,
> > >
> > > (ii) if the person has actual notice of the claim of lien, and
> > >
> > > (iii) if the claim of lien has not been removed or cancelled from the title to the land, under section 23 or 24 or otherwise, at the time the payment was made,
> >
> > does not, to the extent of the lien, reduce the amount owing to the contractor or subcontractor by that person.

[54] J.A.W. relies on s. 34(2)(c). The grammatical and ordinary meaning of s. 34(2)(c) is also plain and obvious: a payment made after the owner has actual notice of a filed lien claim does not, to the extent of the lien, reduce the amount owing.

[55] Lonsdale paid Klondike $807,535.67 after receiving notice of the J.A.W. Lien in the amount of $428,353.01. The amount Lonsdale actually held back from Klondike was $515,758.14. This is the amount owing before application of s. 34(2)(c). If the $807,535.67 payment does not reduce the amount owing to the extent of the J.A.W. Lien, then, to this point, according to the grammatical and ordinary meaning of the words used in s. 34(2)(c), the amount owing is $944,111.15 (the sum of the amount actually held back ($515,758.14) and the amount of the J.A.W. Lien ($428,353.01)).

[56] Section 34(3) provides:

> (3) Despite subsection (2), a person may, on the default of another person that the first person engaged, apply money held by the first person in excess of the required holdback in order to remedy that default or compensate for damage caused by the default.

[57] The grammatical and ordinary meaning of the words used in s. 34(3) are also plain and obvious: on the default of a contractor, an owner may “apply money held by the [owner] in excess of the required holdback in order to remedy that default or compensate for damage caused by the default”. Again, the amount Lonsdale actually held back ($515,758.14) does not exceed the required holdback ($521,008.12). As such, according to the grammatical and ordinary meaning of the words used, s. 34(3) has no application.

[58] In summary, according to the grammatical and ordinary meaning of the words used in the provisions in question, the amount owing for the purpose of s. 23(1) is $944,111.15.

[59] The next question is whether the words are capable of a different meaning when read in light of the entire context of the provisions, including the overarching purpose of the *BLA*. In my view, they are not.

[60] I start with the context. Lonsdale emphasizes the opening words of s. 34(3): "[d]espite subsection (2)". Lonsdale submits that these words expressly limit the application of s. 34(2), including the application of s. 34(2)(c) which would otherwise disincentivize an owner from making payments to a contractor once the owner is aware that a lien claim has been filed.

[61] Although not necessary to resolve this case, it seems to me that the words "[d]espite subsection (2)" in s. 34(3), actually serve to qualify only s. 34(2)(a). Section 34(2)(a) provides that an amount claimed by way of counterclaim against contractor does not reduce the amount owing to that contractor. Section 34(3) makes clear that this does not prevent an owner from applying money held back from a contractor, in excess of the required holdback, to complete the contractor's contract. In other words, when s. 34(2)(a) and 34(3) are read together, s. 34(2)(a) appears to prevent an owner from making deductions only "for items not arising under the terms of the contract": *Noranda Exploration Co. Ltd.* at para. 16, albeit with respect to somewhat different language in predecessor legislation.

[62] I cannot discern any legitimate purpose for construing s. 34(3) to effectively cancel the application of either ss. 34(2)(b) or (c). Section 34(2)(b) prevents an owner from deducting payments made in bad faith. What purpose would be served in allowing bad faith payments to be made to a contractor in circumstances where the contractor has defaulted and the owner must expend funds to remedy the default? Similarly, s. 34(2)(b) prevents an owner from deducting payments made after the owner has actual notice of lien claims. What purpose would be served in allowing such payments to be made in circumstances where a contractor has defaulted and the owner must expend funds to remedy the default?

[63] As I said, it is not necessary to decide whether s. 34(3) qualifies all of s. 34(2) or only s. 34(2)(a), because s. 34(3) is simply not engaged in this case for the

reasons I have already discussed. Even if s. 34(3) does qualify s. 34(2)(c) in some way, it is clear from the plain meaning of the words used in it that s. 34(3) only permits an owner to "apply money held … in excess of the required holdback" to remedy the contractor's default and Lonsdale did not hold any money in excess of the required holdback.

[64] As I understood it, Lonsdale suggests that the payments it made to Klondike after it had notice of the J.A.W. Lien can be treated as a notional sum that it withheld from Klondike, and that ss. 23(5) and/or 34(3) permit it to apply that notional sum to remedy Klondike's default. I have been unable to find any words in the *BLA* that support that view. A payment made is the opposite of a payment withheld. To find that the legislature intended that a payment made be treated as a payment withheld (a construction that appears illogical on its face) would require clear and specific language.

[65] Lonsdale emphasizes that if it had withheld payments to Klondike after receiving notice of the J.A.W. Lien, s. 34(3) would have clearly permitted it to apply those amounts in excess of the required holdback to remedy Klondike's default and those amounts would not then have been available to the lien claimants. Lonsdale argues that there is no logical difference between the excess funds having been paid to Klondike and the excess funds remaining with Lonsdale, and emphasizes that the purpose of the *BLA* is to protect the claims of those who supply work and materials so long as the owner is not prejudiced [Lonsdale's emphasis].

[66] This is an argument that, properly construed, the *BLA* allows an owner to escape the consequences of s. 34(2)(c) by showing that instead of paying the amount in question to the contractor, it could have applied that amount to remedy the contractor's default. Again, I have been unable to find any words in the *BLA* that support that interpretation.

[67] Lonsdale paid Klondike in the circumstances set out in s. 34(2)(c). The consequences for doing that are expressed plainly in that provision. There are simply no words in the *BLA* that can be read as providing that, in certain

circumstances, an owner will be excused from those consequences. To the contrary, the interpretation Lonsdale urges would deprive the words “[i]f the amount held back … exceeds the required holdback” in s. 23(5) and the words “held … in excess of the required holdback” in s. 34(4) of meaning.

[68] I return to the overarching purpose of the *BLA*: to offer protection to persons who provide work or materials contributing to an improvement to land, but in a manner that balances that protection against the interests of owners by making specific provision for monies to flow to ensure business efficacy and by providing a specific mechanism for owners to clear their title.

[69] The mechanism created by the *BLA* for owners to clear title consists of a series of specific and precise rules. The rules (s. 23(5) and 34(3), in particular) protect an owner in circumstances where a contractor has defaulted, by allowing the owner to apply amounts owing in excess of the required holdback to remedy the default. The owner maintains control over all such excess funds. It cannot be said that an owner is prejudiced by a construction of the *BLA* that imposes consequences on the owner if the owner chooses to pay the excess funds to the contractor instead of applying them to remedy the contractor’s default.

[70] In summary, the grammatical and ordinary meaning of the words used in the provisions in issue is clear and unambiguous. Sections 23(5) and 34(3) apply where, among other things, the owner has held back an amount that exceeds the required holdback. Lonsdale did not hold back an amount that exceeds the required holdback. A payment made after the owner has actual notice of a persisting lien claim does not, to the extent of the lien, reduce the “amount owing” for purposes of s. 23(1). No different meaning emerges when the words are read in light of the entire context, including the purpose of the *BLA*.

[71] In conclusion, the “amount owing” by Lonsdale to Klondike, for the purpose of s. 23(1) of the *BLA,* is $944,111.15. That is the amount that Lonsdale must pay into court to obtain the relief available under s. 23(2).

B. Other issues raised in the proceeding

[72] Given my conclusion concerning the amount owing for the purpose of s. 23(1) of the *BLA*, it is not necessary for me to address the sufficiency of Lonsdale's evidence regarding the costs it has or will incur to remedy Klondike's default.

[73] I am not in a position to declare that of the funds paid into court by Lonsdale, $428,353.01 must secure the J.A.W. Lien in full (i.e. be paid into court of the sole benefit of J.A.W.). I was provided with no authority for that proposition, and no submissions on the effect of the provisions of the *BLA* that deal with the distribution of funds among claimants. If the interested parties cannot agree on the distribution of any funds paid into court by Lonsdale, any one or more of them, including J.A.W., may apply in this proceeding for orders in that regard.

[74] Similarly, I am not in a position to direct that any amount paid into court by Lonsdale should be paid to the credit of the Receivership Proceeding rather than to the credit of this proceeding. The Receivership Order appoints MNP Ltd. as receiver of the "Property" of the "Debtors", as defined therein. The "Debtors" are Klondike and FBS Fairview Builder Services Incorporated ("FBS"). "Property" is the property of the Debtors. I was provided with no authority for the proposition that money paid into court under s. 23 of the *BLA* is the property of Klondike or FBS. Again, if there is a dispute about the distribution of any funds paid into court by Lonsdale, any interested party may apply in this proceeding for orders in that regard.

CONCLUSION

[75] Upon Lonsdale paying into court, to the credit of this proceeding, the amount of $944,111.15, the relief sought by Lonsdale at paragraphs 2(b), 2(c), and 2(d) of Part 1 of the Petition is granted.

"Warren J."