

CANADA / JUDGMENT

Century Group GP Co. Ltd. v. KRS Excavating Ltd.

2022 BCSC 357

COURT

Supreme Court of British Columbia

DECIDED

7 March 2022

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2022 BCSC 357 Century Group GP Co. Ltd. v. KRS Excavating Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Century Group GP Co. Ltd. v. KRS Excavating Ltd.,

2022 BCSC 357

Date: 20220307

Docket: S206619

Registry: Vancouver

Between:

Century Group GP Co. Ltd. and Century Group Lands Corporation

Plaintiffs

And

KRS Excavating Ltd.

Defendant

And

Century Industries Ltd.

Defendant by Counterclaim

Corrected Judgment: The text of the judgment was corrected at paragraphs 62, 63 and 70 on March 17, 2022.

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

(Hearing proceeded via teleconference)

Counsel for the Plaintiffs:

R.A. Shaw

Counsel for the Defendant:

C.D. Rodocker

Place and Date of Hearing:

Vancouver, B.C.

December 10, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 7, 2022

INTRODUCTION

- [1] The plaintiffs, Century Group GP Co. Ltd. and Century Group Lands Corporation (collectively, "Century Group"), seek an order that the defendant, KRS Excavating Ltd. ("KRS"), pay certain costs and damages in the amount of \$124,860.52. They also seek actual legal expenses to the date of this application.
- [2] The dispute between the parties arose in relation to a builder's lien filed by KRS on April 3, 2020. Century Group objected to the filing of the lien, claiming it was wrongfully filed. The lien was released with the delivery of replacement security and later still, cancelled by this Court. The crux of the issue is what financial consequences flow from the cancellation of the lien.
- [3] Century Group takes the position that it is entitled to be compensated for all of its costs and damages arising from the filing of the lien, including its legal expenses on an indemnity basis. KRS does not take issue with certain costs, but it takes the position that Century Group is only entitled to its legal costs under the Supreme Court Civil Rules [Rules] and specifically, party-and-party costs under Appendix B. If indemnity costs are awarded, KRS also applies for the production of Century Group's solicitor's legal files and that it be allowed to cross-examine Century Group's solicitor.
- [4] The parties agree that the preliminary issue to be decided lies in the interpretation of s. 19 of the Builders Lien Act, S.B.C. 1997, c. 45 [BLA]. In addition, the parties agree that a determination of that issue is suitable to be heard as a summary trial.

BACKGROUND FACTS

- [5] On April 3, 2020, KRS filed a claim of builder's lien in the amount of \$2,085,088.82 against lands registered in Century Group's name (the "Lien").
- [6] On April 23, 2020, Century Group and KRS entered into a security letter agreement. Pursuant to that agreement, the parties agreed that the Lien would be discharged from title to the property pursuant to s. 24 of the BLA in exchange for Century Group posting a letter of credit from the Royal Bank of Canada (RBC) in the amount of the Lien (the "LOC"). On April 27, 2020, the LOC was subsequently deposited into trust and the Lien was, either on that date or later, discharged from title to the lands.
- [7] On June 19, 2020, Century Group commenced this action. They claimed damages for the wrongful filing of the Lien, as well as damages arising from a breach of a construction contract and conversion of fees collected by KRS on behalf of Century Group.
- [8] On March 17, 2021, KRS filed a response to civil claim and counterclaim. KRS denied Century Group's allegations and claimed damages against Century Group and Century Industries Ltd. for breach of contract and for enforcement of the Lien. KRS alleged that it was owed monies for certain excavation services it provided.
- [9] On May 20, 2021, Century Group filed an application in this Court seeking an order that the Lien be cancelled pursuant to s. 25(1)(a) of the BLA (the "Cancellation Application"). Century Group argued that the Lien had been filed out of time. On June 22, 2021, the Cancellation Application was heard by Justice Crerar.
- [10] In his unpublished reasons for judgment at paras. 15-18, Crerar J. found that KRS was a head contractor as defined in s. 1 of the BLA, as it was a contractor engaged to do substantially all of the work on the project, specifically excavating, filling, altering and adding to the property. As a head contractor, KRS was obligated under the BLA to file its lien within 45 days of December 15, 2019, the date the head contract was terminated. As the Lien was not filed until April 3, 2020, the Court found that it was filed beyond the required time limits.
- [11] As a result, on June 22, 2021, Crerar J. ordered that the Lien be cancelled pursuant to s. 25(1)(a) of the BLA and that the LOC be returned to Century Group. In addition, Crerar J. ordered that the costs of the Cancellation Application were payable by KRS to Century Group forthwith and in any event of the cause.
- [12] Following the June 22, 2021 order, Century Group and KRS agreed to settle Century Group's bill of costs in respect of the Cancellation Application for the amount of \$1,853.13. KRS then paid that amount to Century Group. The LOC was returned and cancelled by RBC.
- [13] The litigation between the parties continued. Century Group have produced a list of documents; KRS has yet to do so. No examinations for discovery have taken place. An eight-day trial is scheduled to commence in November 2022.

- [14] Century Group now claims and seeks recovery of the following costs and damages they say were incurred as a result of the wrongful filing of the Lien:
- a) premiums and fees paid to RBC in respect of the LOC of \$28,844.25; and
 - b) actual legal expenses to the date of this application of \$97,869.40. Century Group seeks an immediate judgment against KRS in that amount, irrespective of the other issues engaged in the action.
- [15] In support of its position in relation to the legal expenses, Century Group has filed the Affidavit #1 of Alex L. Eged, a lawyer at Richards Buell Sutton LLP ("RBS"). Century Group engaged RBS in respect of this litigation generally. In his affidavit, Mr. Eged sets out substantial details of the RBS invoices rendered to Century Group from April 2020 (when the Lien was filed) to September 2021 (when this application was being prepared). Mr. Eged's evidence includes the actual invoices. In addition, Mr. Eged provides some assessment of the overall time and legal expense incurred so as to arrive at a net amount, said to be the specific time and legal expense directed solely toward "challenging the Lien claim". It is that net amount that Century Group claims as part of its "costs and damages" incurred as a result of the filing of the Lien.
- [16] In addition to \$97,869.40 for past legal expenses, Century Group seeks their additional legal expenses in relation to preparing for and attending the hearing of this application, also on a full indemnity basis.
- [17] KRS points out that Mr. Eged's evidence does not include any "work product" that would allow KRS to determine whether the claimed legal expenses were reasonable or necessary in relation to challenging the Lien or the accuracy of Mr. Eged's assessment of whether the expenses are relevant to challenging the Lien. Century Group has not produced this further material despite request, as they assert privilege in light of the ongoing litigation.

DISCUSSION

- [18] Section 19 of the BLA provides:
19. A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.
- [19] There is no disagreement that Century Group has established that KRS was not entitled to file the Lien against the lands, such that it was improperly filed, all arising as determined at the Cancellation Application.
- [20] In addition, there is no disagreement that Century Group incurred certain out-of-pocket "costs" that were "as a result of the wrongful filing" of the Lien, being the LOC expenses of \$28,844.25 and also, legal fees to address the Lien initially and to bring this action and specifically, the Cancellation Application.

- [21] Century Group submits that the LOC expenses and all of its legal expenses are recoverable. KRS does not take issue with Century Group's entitlement to recovery of the LOC expenses; however, KRS takes the position that only party-and-party costs are recoverable in respect of all of Century Group's legal expenses that related to its efforts to get the Lien cancelled, including those expenses incurred because of this application.
- [22] The dispute between the parties engages the question as to the meaning of "costs and damages" in terms of what is recoverable pursuant to s. 19 of the BLA.
- [23] Counsel advise that they have been unable to find any judicial interpretation of s. 19 of the BLA that would assist in determining the issue before the Court.
- [24] Section 19 of the BLA was first introduced in the most recent version of the BLA which came into force on February 1, 1998.
- [25] The proper approach to statutory interpretation is well-settled. In *HMTQ v. Philip Morris International, Inc.*, 2017 BCCA 69, rev'd on a separate point 2018 SCC 36, the Court summarized those principles:
- [23] This is a case of statutory interpretation. The correct approach to statutory interpretation is long settled. It was recently expressed in *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6:
- [21] This follows from the application of our long-accepted approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both *E. A. Driedger, Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
- [24] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, the Court said at para. 10:
- [10] The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[Emphasis added.]

- [26] Accordingly, the provisions of the BLA are to be read in their grammatical and ordinary sense harmoniously with the scheme of the BLA, the object of the BLA and the intention of the Legislature. The ordinary meaning of the words is a "dominant" consideration: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at §2.20.
- [27] The interpretation of s. 19 is also assisted by the Interpretation Act, R.S.B.C. 1996, c. 238, which provides:
8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
- [28] A builder's lien is strictly a creature of statute. The underlying object and purpose of the BLA was described in *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 at para. 62:
- [62] The purposes of the Builders Lien Act are pursued through a legislative scheme that employs three main mechanisms: the right to a lien, holdback provisions and the creation of a trust (*Marbella Pacific Construction Ltd.* at para. 29). These mechanisms create rights unknown to common law. The jurisprudence is clear that because the Act creates new rights, the threshold question of entitlement is strictly construed: it is only once entitlement is established that the Act is to be construed liberally and with consideration to its remedial purpose. This principle is consistent with concern for certainty and fairness to all stakeholders in the construction industry.
- [Emphasis added; citations omitted.]
- [29] Accordingly, the threshold issue of entitlement--whether a contractor is entitled to the benefits accorded under the BLA to file a lien--is to be strictly construed. This is consistent with the balance between stakeholders, inherent in the BLA, arising from the different objectives of the BLA, including ensuring commercial certainty in construction projects: *Peri Formwork Systems* at paras. 59-61.
- [30] As indicated in *Castillo v. Castillo*, 2005 SCC 83 at para. 23, citing *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 17, "legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight". More recently, see *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 47.
- [31] Century Group point to the July 1997 comments made in the Legislature in the period of time leading to the amendment by which s. 19 was introduced into the BLA: *British Columbia, Official Report of Debates of the Legislative Assembly (Hansard)*, 36th Parl, 2nd Sess, Vol 7, No 10, Part 1 (28 July 1997) at 6430 (Hon. D. Miller).
- [32] Century Group submits that these comments provide some insight into the background and purpose of s. 19 of the BLA:

R. Neufeld: On just a point of clarification, the section says: "A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien."

Would that section -- maybe the minister would like to explain that a little further for me -- apply to the issue that we were speaking about earlier in relation to a pipeline? The lien is against a pipeline, not the pipeline right-of-way. So if someone liened the pipeline and a person actually lost the sale of their land, as I read this section they could sue as a result of the wrongful filing of the claim of lien. Would it be correct to interpret that section to read that?

Hon. D. Miller: Again, going back, I'm not in a position to offer even a layperson's legal opinion about this. The wording of the section is very clear in that the principle embodied is that if you file a wrongful claim, there is a penalty attached for doing that. Now, in the cases you're talking about, presumably any liens that may be filed would be by contractors or workers who had not been paid what they felt was owing, etc., not by the landowner. So I don't know that it necessarily presents any more complications at all to the situation we discussed earlier in the definitions section of the bill. I think it's fairly straightforward. And again, going back to that section, it's clearly an issue that has to be pursued.

Sections 19 to 55 inclusive approved.

[Emphasis added.]

- [33] I consider that the Hon. D. Miller's reference to a "penalty" was made in the colloquial sense and not in the legal sense, as he acknowledges in the above quote.
- [34] A lien is an extraordinary right granted only by statute: *M.H. Rent-a-Rod Ltd. v. Cooper*, 2016 BCSC 927 at paras. 27-31. Entitlement to file a lien is strictly construed and it is available only if certain pre-conditions are satisfied. This provides certainty to the contractor in terms of outlining the basis upon which this remedy may be sought, which is balanced against the rights of a landowner whose land is consequently negatively affected by the filing of a lien.
- [35] I agree with Century Group that this legislative scheme provides an important deterrent to contractors if they do not comply with the BLA requirements. In addition, in my view, the plain reading of s. 19 is that, if the contractor does not satisfy those clear pre-conditions so as to be entitled to file a lien, consequences follow to compensate the landowner for any "costs and damages" that an innocent owner of any estate or interest in land may incur as a result. In short, if such a person is harmed by the filing, the contractor will pay for the full consequences that follow.
- [36] This reading of s. 19 in terms of providing a compensatory remedy for an aggrieved owner can be contrasted with the remedy found in s. 45 of the BLA. Section 45 provides for a punitive sanction in that a fine or penalty can be imposed on a lien claimant who knowingly files a false claim. Section 45(2) provides that a person can be liable for a fine:

not exceeding the greater of \$2,000 and the amount by which the stated claim exceeds the actual claim.

- [37] The few BC Supreme Court decisions that address s. 19 of the BLA provide little assistance here, as none directly address the issue as to whether the legal expenses recoverable under s. 19 were intended to be actual expenses as opposed to party-and-party costs under the Rules.
- [38] In *Tuscany Village Holdings Ltd. v. Conquest Development Corporation*, 2005 BCSC 1392, the plaintiff successfully applied to cancel a lien as being invalid. The plaintiff also applied under s. 19 of the BLA for solicitor and own client costs, or alternatively, special costs plus damages. Justice Burnyeat found that the lien was "vexatious, frivolous and an abuse of process", a test applied under s. 25(2)(b) of the BLA. However, Burnyeat J. could not find that the defendants' conduct was deserving of rebuke based on normal principles applied to special costs awards, referring to *Garcia v. Crestbrook Forest Products Industries Ltd.* (1994), 199 D.L.R. (4th) 740 (B.C.C.A.). He refused to order special costs on that basis and instead he ordered party-and-party costs. He dismissed the damage claim as no evidence was before the Court on that issue.
- [39] Here, Crerar J. cancelled the Lien pursuant to s. 25(1)(a) of the BLA on the basis that it had been filed out of time. He made no finding under s. 25(2)(b) that the Lien was "vexatious, frivolous and an abuse of process". I can only surmise that his award of party-and-party costs for the Cancellation Application reflected that no issues arose that attracted a different cost award under the Rules, such as special costs. At the time, Century Group did not seek any award of full indemnity costs, as they do now.
- [40] In *Omnique Construction Inc. v. Xu*, 2017 BCSC 208, the Court found the lien was invalidly filed and should be cancelled pursuant to s. 25(1) of the BLA. At paras. 44-48, Justice Sharma addressed the application to determine the costs and damages that arose under s. 19, however, she was unable to make any determination as the defendant had not provided any evidence. No specific issue arose in relation to any legal fees that may have been claimed.
- [41] In *Sandhu v. New Western Plumbing & Lighting Supplies Ltd.*, 2018 BCSC 1930, the receiver of the defendant sought to discharge a lien as being invalid. The receiver claimed its own fees relating to the action as well as its actual legal costs in defending the lien claim: para. 219. In the result, and after an extensive discussion of the submissions, the Court seemingly chose to mostly focus on relief under s. 45, leading to the imposition of a \$3,000 fine. The analysis relating to s. 45 is itself curious, in that the Court refers to s. 45 as not being a "penal provision" (para. 247), yet later imposed a "penalty" under s. 45 (para. 249).
- [42] The only brief mention of s. 19 in *Sandhu* is found at para. 250, where the Court found that the receiver had incurred legal fees in the claimed amount and declined to address the receiver's fees given the practicalities of the receivership.

- [43] With all due respect, I find it difficult to discern the reasoning and final result in Sandhu in relation to s. 19. I have been unable to find any entered order that might assist. In any event, the Court in Sandhu did not engage in any analysis of the issue raised here, in terms of the tension between awarding full legal costs as "costs" under s. 19 as opposed to a costs award under the Rules.
- [44] The final decision is *Outback Developments Inc. v. Hare*, 2019 BCSC 2404. After trial, at paras. 74-75, Justice Matthews found that the defendant had filed an invalid lien. As here, the lien had been earlier released since Outback had paid the lien amount into trust. Outback sought recovery of its legal costs to negotiate and draft replacement security. The defendant argued that damages were only available if the lien was proven to be frivolous, vexatious or an abuse of process: para. 79.
- [45] At para. 80 in *Outback Developments*, Matthews J. rejected the defendant's argument and stated that s. 19 was triggered by the wrongful filing alone. She awarded the actual legal invoice amount as damages under s. 19 of the BLA, before turning to Outback's arguments that a penalty should be imposed on the defendant, either under s. 45 of the BLA, or as exemplary damages or punitive damages.
- [46] As stated above, KRS seemingly does not dispute that legal expenses toward that end can come within the term "costs". However, KRS disputes that costs within the litigation were intended to be actual costs. KRS' counsel points to other legislation where a clear legislative intention is stated as to the level of costs, other than those under the Rules: for example, *Protection of Public Participation Act*, S.B.C. 109, c. 3, s. 7 (referring to recovery of "full indemnity costs").
- [47] I agree with Century Group that the concept of "costs" and "damages" are distinct.
- [48] The term "damages" suggests a wider meaning that would encompass not only out-of-pocket "costs" but also other consequences arising from the wrongful filing of the lien. An example of damages that might arise would include lost profits on a sale that was prevented by the filing of a lien.
- [49] Section 19 provides that the owner of an estate or interest in land can claim any "costs and damages" that are incurred "as a result of" the wrongful filing of the lien. I accept that any person who asserted a lien would reasonably contemplate that the owner of the estate or interest would be required to incur legal expenses to advance arguments against the filing of the lien. Alternatively, I also accept that expenses could arise as a result of the filing. The wording of s. 19 speaks of damages "as a result of" the wrongful filing, suggesting the application of causation principles in tort (the "but for" test) that are well-known.
- [50] The principled approach to resolving this issue requires a return to a consideration of the objectives that underlie the BLA and specifically, s. 19. Again, I accept that one of the objectives is to compensate the owner of an estate or interest in land whose land has been unreasonably encumbered by the filing of a wrongful lien and that the person filing that

wrongful lien should pay the consequences. In addition, the BLA provides that a penalty can be imposed under s. 45 in certain circumstances to punish a person who makes a false statement in the lien, including asserting an inflated claim.

- [51] In a general sense, there is no contest here that legal expenses are included within the term "costs" under s. 19. The crux of the issue is to determine just what legal expenses were intended by the Legislature to be compensable under that provision.
- [52] Other court decisions have wrestled with this or similar questions as to the recoverability of legal costs under other BC legislation.
- [53] For example, the court in *The Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377 addressed the question of whether a reference to a strata corporation recovering "reasonable legal fees" in s. 118 of the *Strata Property Act*, S.B.C. 1998, c. 43 (relating to the registration and enforcement of a lien) meant actual legal costs as opposed to court costs at a scale under the Rules. In that case, the court accepted an interpretation that the actual reasonable legal fees were recovered.
- [54] In contrast, in the BLA, there is a more general reference to "costs", rather than to the specific "legal fees".
- [55] Other cases have considered the issue in the context of the environment legislation: for example, *Canadian National Railway Company et al. v. A.B.C. Recycling Ltd.*, 2005 BCSC 647, rev'd on other grounds 2006 BCCA 429 [CNR]. CNR addressed the meaning of whether "costs of remediation" under the *Waste Management Act*, R.S.B.C. 1996, c. 482 (now the *Environmental Management Act*, S.B.C. 2003, c. 53 [EMA]) included full indemnification for legal costs, or party-and-party costs. The issue was framed in a similar fashion to that here, in that the applicable principle was "polluter pays", akin to the "wrongful lienholder pays".
- [56] The analysis of this issue under the environment legislation was recently revisited in *Victory Motors (Abbotsford) Ltd. v. Acton Super-Save Gas Stations Ltd.*, 2021 BCCA 129. After discussing CNR, Bauman C.J.B.C. found that ss. 47(1) and (3) of the EMA could be interpreted as distinguishing between "remediation legal costs" and "litigation legal costs".
- [57] Following *Victory Motors*, "costs" in the present context can be separated into two categories.
- [58] Firstly, legal expenses relating to the investigation of the lien, and the facts and law relevant to it, advising the client contemplating the discharge of the lien, and possibly including negotiating replacement security, are one category: *Victory Motors* at para. 94. This is not an exhaustive list. I find that these tasks were undertaken in the negotiations concerning the release of the Lien and its replacement with the LOC.
- [59] These types of legal costs - "lien investigation/removal costs", analogous to what Bauman C.J.B.C. called "remediation legal costs" in *Victory Motors* at paras. 72, 94 - are not items that could be addressed under party-and-party costs:

- [102] A further observation may be made. If legal costs were broadly construed to include both remediation and litigation legal costs, the usual party and party costs rule (Rule 14-1) would yield very little in respect of legal costs incurred in effecting the remediation of the site. The tariff items in Appendix B of the Rules are very specific and almost all are intimately associated with the steps in the litigation. Yet remediation legal costs cover quite a different set of tasks as I have discussed.
- [60] In *Victory Motors*, Bauman C.J.B.C. also found that "remediation legal costs" were not to be assessed as special costs (para. 106). Rather, he found these types of remediation costs were to be assessed by the Court based on the evidence and in a manner similar to a review of a legal account and akin to solicitor-and-own client costs:
- [107] The wording of s. 47(1) contemplates the liability "for reasonably incurred costs of remediation"; and s. 47(3) defines "costs of remediation" as "all costs of remediation". On its face, the section allows recovery for reasonably incurred legal costs. I will take the Legislature at its word. In my view, "reasonably incurred remediation legal costs" should be assessed by the trial judge on a proper evidentiary basis. The considerations informing the reasonableness assessment of remediation legal costs will vary based on the circumstances and are at the discretion of the trial judge. However, in so far as they are relevant to the matter before the trial judge, the considerations set out at s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9, and in the common law as articulated in cases like *Yule v. Saskatoon (City)* (1955), 1 D.L.R. (2d) 540 (Sask. C.A.), may be of assistance in conducting this analysis. The judge, of course, is not conducting a Legal Profession Act review of the costs, but the considerations relevant to such a review may be appropriate for the purposes of assessing the costs on a quantum meruit basis.
- [61] Secondly, legal expenses can arise in respect of legal proceedings taken to challenge a lien, as represented by this action commenced by Century Group ("lien litigation legal costs"). Regarding this type of legal costs, Bauman C.J.B.C. commented:
- [104] To summarize, in my view, "costs of remediation" for the purposes of ss. 47(1) and (3) of the EMA includes remediation legal costs as I have discussed them. They do not include a party's litigation legal costs which are awarded and assessed in the usual way under the Rules.
- [62] I conclude that such an approach is equally consistent with the statutory scheme of the BLA. In particular, the "polluter pays" principle underlying the EMA that was instrumental in the distinction between remediation legal costs and litigation legal costs in *Victory Motors* (see para. 105) has its parallel here in the fact that s. 19 was intended to at least deter, if not punish, wrongfully filed liens (see paras. 32 and 55, above). Moreover, here as in *Victory Motors*, an expansive interpretation of "costs" that would include all legal costs and not just costs that deal with the subject matter of the legislation or the relevant part thereof (viz., builders' liens in the BLA, contaminated site remediation in Part 4 of the EMA) would render the usual court cost rules under Rule 14-1 of the Rules redundant: *Victory Motors* at para.

100. It is also equally true here as it was in *Victoria Motors* that the costs that are contemplated by the legislation concern a very different set of tasks, namely those concerning wrongfully filed liens, from the tasks contemplated by the tariff items under Appendix B that are "almost all are intimately associated with the steps in the litigation": para. 102 of *Victory Motors*. It would make no sense to use a statutory provision bearing on a very particular set of tasks to assess costs in relation to a wider and more general set of tasks, when the Rules already furnish a fine-tuned toolset with which to do so: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at §§10.13 and 10.24.

- [63] As a result, under s. 19, an owner of any estate or interest in land, over which a lien that does not attach to that land has been filed, is to be compensated for its out-of-pocket legal expenses in addressing the lien, for example, by having their counsel negotiate replacement security (see para. 58, above), i.e., what I have termed "lien investigation/removal costs". Damages may also be recoverable. This is also consonant with *Outback Developments*, where Matthews J. at para. 80 awarded the plaintiff's actual legal costs of negotiating and drafting a security arrangement.
- [64] For costs incurred to challenge the validity of a lien--what I have termed "lien litigation legal costs"--the parties are at liberty to elect for the appropriate scale of costs and how those costs should be assessed, as governed by the Rules. The circumstances may justify an award of special costs if they are deserving of rebuke (under *Garcia*), or may attract a consideration of punitive or exemplary damages (as in *Outback Developments*).
- [65] My conclusion concerning the separation of these two types of costs leads to the issue as to what should be the next steps.
- [66] The matter of the lien litigation legal costs may be addressed at the conclusion of this proceeding in the usual course. At that time, the parties can set-off \$1,853.13 that Century Group has already received in respect of the Cancellation Application pursuant to Crerar J.'s Order.
- [67] With respect to the lien investigation/removal costs, I have not conducted a review of RBS's legal accounts to attempt to discern what those are. Based on my cursory review, they would seemingly appear to be a minor amount from the overall legal accounts claimed. Although s. 19 does not contain the qualifier "reasonable" as did the relevant provision in *Victory Motors*, any lien investigation/removal costs must be shown to be reasonable. Although I have held that lien investigation/removal costs are not to be assessed under the Rules, this is necessitated by the principles of natural justice that underlie the usual costs rules, and can only be varied by statute: *Gichuru v. Smith*, 2014 BCCA 414 at paras. 101, 111, leave to appeal ref'd [2015] 2 S.C.R. vi (note).

- [68] I consider that the practical approach is to request that the parties attempt to arrive at some form of agreement on the amount of these costs given the circumstances. If they are unable to agree, I accept KRS' counsel's submission that KRS is entitled to investigate and possibly challenge whether those costs are reasonable, including reviewing RBS' legal files and possibly examining Mr. Eged: Gichuru at paras. 104 and 111.
- [69] In the latter case, Century Group must also waive privilege over RBS' legal files for the relevant portions in order to provide KRS an opportunity to assess the reasonableness of the claimed amount: *Canadian National Railway Company et al. v. A.B.C. Recycling Ltd.*, 2005 BCSC 1559 at paras. 30 and 35, underlying judgment on liability rev'd but not on this point in reasons indexed at 2006 BCCA 429. I make no order as to whether KRS is entitled to examine Mr. Eged on his affidavit pending that decision.
- [70] If Century Group does not wish to waive privilege, the matter is to be deferred to the conclusion of the litigation and can be assessed by the trial judge or another judge if the matter is not concluded at trial. While a reference to the Registrar remains a possibility in respect of any assessment of the lien investigation/removal costs, I suspect that the amount involved would not justify that step on the basis of proportionality: Gichuru at paras. 106-107.

CONCLUSION

- [71] Century Group is awarded judgment against KRS in the sum of \$28,844.25, plus court ordered interest on the various amounts paid in respect of the LOC from April 27, 2020 to April 27, 2021. The entire amount is payable forthwith.
- [72] Century Group is also awarded its reasonable legal fees arising in relation to the Lien that I have described as "lien investigation/removal costs". Failing waiver of privilege by Century Group in respect of RBS' legal files, or failing agreement of the parties as to the amount of those costs, they are to be assessed by the trial judge following the trial, or by a judge of this Court at the conclusion of this proceeding.
- [73] Century Group is awarded its costs of this application against KRS on a party-and-party basis, payable forthwith and in any event of the cause.

"Fitzpatrick J."

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