

CANADA / JUDGMENT

Metro-Can Construction (PE) Ltd. v. Escobar

2022 BCSC 1042

COURT

Supreme Court of British Columbia

DECIDED

22 June 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1042 Metro-Can Construction (PE) Ltd. v. Escobar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Metro-Can Construction (PE) Ltd. v. Escobar,

2022 BCSC 1042

Date: 20220622

Docket: S219813

Registry: Vancouver

Between:

Metro-Can Construction (PE) Ltd.

Petitioner

And

Jose Roberto Escobar doing business as JR Cement Finishing, Arquez Csonka Contracting Ltd., Madness Forming & Construction Inc., Francisco Cardenas doing business as Redo Contracting Inc., Griff Building Supplies Ltd., Atlas Concrete Pumping Ltd., El Duque General Construction Inc., D7G General Labour Ltd., Transca Vancouver W33 Ave Ltd. and Jarguet Concrete Forming Ltd.

Respondents

Before: Master Bilawich

Reasons for Judgment

Counsel for the Petitioner:

D. Lehrer

Counsel for the Respondent, Madness Forming & Construction Services Inc.:

M. Magaril

Place and Date of Hearing:

Vancouver, B.C.

January 14, 21 and 24, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2022

[1] The petitioner ("Metro-Can") applies for orders pursuant to s. 23 of the Builders Lien Act, S.B.C. 1997, c. 45 ["BLA" or the "Act"] that:

- a) It be permitted to deposit into court the sum of \$309,043.52 and upon doing so:
 - i. Metro-Can's liability with respect to those funds is extinguished, and
 - ii. the subject property's owner, Transca Vancouver W33 Ave Ltd. and Metro-Can are both discharged from liability in respect of 10 specified claims of builders' lien which have been filed in the New Westminster Land Title Office.
- b) Upon Metro-Can depositing the \$309,043.52 into court, three lien bonds currently held in trust as security by counsel for Metro-Can pursuant to orders made in three related proceedings be returned to it, including:
 - i. Action S1913455 - \$188,759.70;
 - ii. Action S1914220 - \$151,086.86; and
 - iii. Action S1914258 - \$186,679.53.

[2] The respondent Madness Forming & Construction Inc. ("Madness") opposes all of the relief sought. The other respondent lien claimants did not file responses to the petition.

[3] I originally concluded that I did not have jurisdiction to decide this matter because the petitioner was seeking a final order and directed the parties bring this application before a judge. An appeal was taken from my ruling and the matter remitted back to me to render judgment, by order of Justice Mayer made on March 24, 2022.

Background

- [4] At the material times, Transca Vancouver W33 Ave Ltd. ("Transca") was registered owner of the development property (the "Property") that is the subject of this action.
- [5] On September 28, 2018, Metro-Can and Transca entered into a contract (the "Head Contract") for construction and general contracting services for an strata development called "Primrose" (the "Improvement") on the Property.
- [6] On October 15, 2018, Metro-Can and Jarguet Concrete General Labour Ltd. ("Jarguet") entered into a subcontract (the "Jarguet Subcontract") to provide materials and labour for concrete formwork and associated works (the "Jarguet Work") for the Improvement. The original contract price was \$4,700,000 plus \$235,000 in GST, for a total of \$4,935,000.
- [7] On September 11, 2019 and November 13, 2019, Metro-Can delivered notices of default to Jarguet. The former notice raised issues regarding supervision, quality and failure to meet the schedule. The latter notice indicated Jarguet had not provided any manpower to the project since November 12, 2019 and indicated that on November 13, 2019, Jarguet advised it was not able to continue fulfilling its contractual obligations. Metro-Can gave notice it would proceed with the work in accordance with section 7.1.4. and 7.1.5 of their agreement. Those sections authorized Metro-Can to either correct defaults or terminate Jarguet's right to continue the subcontract work and finish the work itself and allowed it to withhold further payments from Jarguet.
- [8] On December 9, 2019, counsel for Metro-Can wrote counsel for Jarguet taking the position that as of November 15, 2019 (the "Repudiation Date"), Jarguet had abandoned the Jarguet Work. The abandonment constituted a default under the Jarguet Subcontract. Metro-Can demanded Jarguet return and continue work within 3 days, failing which it would complete the Jarguet Work and seek to recover any additional costs and damages.
- [9] Metro-Can says as of the Repudiation Date, the adjusted contract price under the Jarguet Subcontract was \$4,779,821.65 + GST. Madness does not take issue with this figure.
- [10] Metro-Can's vice-president, Mr. Macaulay states in his affidavit #1 that Metro-Can has paid Jarguet a total of \$2,781,400.21 (including GST) on account of the Jarguet Subcontract. Metro-Can's last payment for Progress Claim #13, which was for the period ending September 30, 2019. It also has a statutory holdback of \$309,043.52.
- [11] Metro-Can tendered in evidence spreadsheets generated by its Explorer accounting software, which it used to track costs incurred on the Primrose project. The spreadsheets are limited to cost codes 3100 and 20006, both of which relate to supply and installation of concrete formwork. Mr. Macaulay says these cost codes were only capture costs on account of the Jarguet Work.

- [12] A subsequent affidavit of Mr. Plotnikoff, a chartered professional accountant and Metro-Can's controller, states that it was Metro-Can's general practice during the Primrose project to track costs by assigning them a code when they were entered using the Explorer program. The code originally assigned for the Jarguet Work was 3100. After Jarguet abandoned the project, code 20005 was created to track costs associated with the abandonment and Metro-Can's completion of the Jarguet Work.
- [13] On March 6, 2020, Metro-Can started an action against Jarguet (Vancouver action S202744), claiming damages for breach of the Jarguet Subcontract. Jarguet filed a response to civil claim and counterclaim in which it denies there were any defects or deficiencies that it had not addressed. It also alleges it rendered a final invoice dated October 25, 2019 for \$205,242.76 which Metro-Can had refused to pay. In its counterclaim, Jarguet seeks judgment for that amount, amongst other relief.
- [14] Metro-Can says it ended up paying \$1,193,782.12 + GST in excess of the adjusted price [\$4,779,821.65 + GST] under the Jarguet Subcontract to complete the Jarguet Work and address deficiencies. This includes the amounts paid to Jarguet and all post-repudiation expenses. As such, Metro-Can denies it owes anything further to Jarguet.
- [15] On September 21, 2021, a Certificate of Completion was issued certifying the Head Contract was completed as of September 3, 2021.
- [16] The respondents each filed claims of builders' lien on title to the subject property. Metro-Can asserts in the petition that, to the best of its knowledge the respondents were subcontractors or materials suppliers under Jarguet in respect of the Improvement. These include:

Lien Claimant

Reg. #

Reg. Date

Amount

Jose Escobar dba JR Cement Finishing

BB3059927

2019-11-14

\$64,748.00

Arquez Csonka Contracting Ltd.

BB3060017

2019-11-22

19,168.00

Madness Forming and Construction Services Inc.

CA7881200

2019-11-21

55,004.00

Francisco Cardenas dba Redo Contracting Inc.

CA7884991

2019-11-22

49,803.70

Griff Building Supplies Ltd.

CA7903375

2019-12-02

17,837.15

Atlas Scaffolding Ltd.

CA7905566

2019-12-03

133,249.71

Xcellence Concrete Pumping Ltd.

CA7918583

2019-12-09

12,222.03

El Duque (sp?) General Construction Inc.

CA7918197

2019-12-09

149,101.05

Medina Concrete Services Ltd.

CA7915635

2019-12-06

25,356.45

D&G General Labour Ltd.

CA8159697

2020-04-28

14,907.90

Total

\$541,433.99

- [17] Because the total amount Metro-Can has paid on account of the Jarguet Subcontract and additional amounts it paid to complete the Jarguet Work exceed the adjusted contract price of the Jarguet Subcontract, it says the amount payable under s. 23(b) of the Act is limited to the holdback, which it says is \$309,043.52. If Metro-Can's position is correct, it will mean the amount Metro-Can proposes to pay into court is substantially less than what is allegedly owed to the respondent lien claimants.
- [18] Madness tendered an affidavit of its director, Mr. Tsonev. He says that on January 20, 2020, Madness started an action against Jarguet, Metro-Can and Transca, claiming Madness issued invoices to Jarguet of \$81,003.65 and that \$55,004.00 of this was still due and owing. He attaches copies of correspondence that counsel for Madness sent to other respondents asking who they contracted with. No substantive responses were received.

Applicable Law

- [19] Section 23 of the BLA is as follows:

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.

[20] Section 4 of the Act sets out the holdback requirement:

Holdback

4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

- (a) the value of the work or material as they are actually provided under the contract or subcontract, and
- (b) the amount of any payment made on account of the contract or subcontract price.

- (2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.
- (3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.
- (9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

Analysis

Preliminary Issue - Notice of Hearing

- [21] Madness raises several issues relating to the notice of hearing filed by Metro-Can.
- [22] On November 9, 2021, Metro-Can filed its petition, supporting affidavits and notice of hearing returnable December 3, 2021. On the notice of hearing form, counsel indicated that the parties had been unable to agree as to the date of the hearing but notice of the hearing would be given to the petition respondents in accordance with Rule 16-1(8)(b). Madness says it was not served with the materials until November 19, 2021.
- [23] One issue arises from Rule 16-1(8), which deals with setting an application for hearing:

Setting application for hearing

- (8) A petitioner wishing to set a petition down for hearing must,
 - (a) in the case of a petition to which no response to petition has been served under subrule (4) (c), file a notice of hearing in Form 68 at any time before the hearing of the petition, or
 - (b) in the case of a petition to which a response to petition has been filed and served under subrule (4) (c), file a notice of hearing in Form 68, and serve a copy of the filed notice of hearing on each petition respondent, at least 7 days before the date set for the hearing of the petition.
- [24] Madness says that following service of the petition and supporting materials, it was entitled to 21 days to file and serve its response to petition and supporting materials, after which Metro-Can was obliged to serve the notice of hearing on it at least 7 days before the hearing of the petition. In this instance, there were less than 28 days between November 9, 2021 (the date the petition was filed) and December 3, 2021 (the unilaterally set hearing date) so Metro-Can failed to give Madness proper notice.

- [25] A second issue is that Metro-Can asserted in the notice of hearing that the parties were unable to agree on the hearing date. Madness says this was false, as it was never consulted about the original hearing date.
- [26] A third issue is that Metro-Can tendered two reply affidavits in response to issues Madness raised in its response to petition. Rule 16-1(7) provides that unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under (3), (4) and (6). The relevant subsections are as follows:

Service

- (3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.

Response to petition

- (4) A person who has been served with a copy of a filed petition under subrule (3) of this rule must, if the person wishes to receive notice of the time and date of the hearing of the petition, do the following:
- (a) file a response to petition in accordance with subrule (5);
 - (b) file, with the response to petition, all affidavits that have not already been filed and on which the person intends to rely at the hearing of the petition;
 - (c) unless the court otherwise orders, serve on the petitioner 2 copies and on every other party of record one copy of each document filed under paragraph (a) or (b) as follows:
 - (i) if the petition respondent was served with the petition anywhere in Canada, within 21 days after that service;
 - (ii) if the petition respondent was served with the petition anywhere in the United States of America, within 35 days after that service;
 - (iii) if the petition respondent was served with the petition anywhere else, within 49 days after that service.

Petitioner may respond

- (6) A petitioner may file affidavits in response to any document served on the petitioner under subrule (4) (c) and, in that event, must serve copies of those filed responding affidavits on each petition respondent no later than the date on which the notice of hearing is served on that petition respondent under subrule (8) (b).

No additional affidavits

- (7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).
- [27] Metro-Can tendered two affidavits after Madness filed its responding material, including affidavit #1 of Mr. Plotnikoff and affidavit #2 of Mr. Macaulay. Mr. Plotnikoff's affidavit does provide new evidence expanding on Mr. Macaulay's explanation regarding the accounting evidence and the two cost codes relating to the Jarguet Work. He also provides summary responses regarding specific issues Madness identified with the cost summaries attached to Mr. Macaulay's affidavit #1. Mr. Macaulay's affidavit #2 simply corrects exhibit errors made in his affidavit #1, but does not address new topics beyond this.
- [28] Madness argues that Metro-Can serving the notice of hearing prematurely should have consequences, namely these two reply affidavits should not be accepted in evidence.
- [29] A typical remedy to Madness' objection in these circumstances would be to either not allow Metro-Can to rely on the late-delivered affidavits or to adjourn the hearing to allow Madness time to respond to them. Madness did not request an adjournment.
- [30] I agree it was not appropriate for Metro-Can to file a notice of hearing at the same time that it filed its petition and supporting affidavits. The rules contemplate that these be served on the respondents and they have 21 days to file and serve responding material before a hearing date is scheduled. Rule 16-1(8)(a) and (b) contemplate two different timing options for serving the notice of hearing, depending on whether a response to petition has been filed and served. Which path is appropriate cannot be determined until after the 21 days for respondents to file their response to petition has expired. If they have filed a petition response, the petitioner is required to serve the notice of hearing at least 7 days before the hearing date.
- [31] I also agree it was not accurate for Metro-Can to indicate the parties had been unable to agree to a hearing date when counsel had not made efforts consult the respondents about a hearing date. Ideally, counsel for any respondents opposing the relief sought should have been consulted about the hearing date before it was scheduled. If there was urgency involved which made an urgent hearing necessary or appropriate, the petitioner had the option of making a short notice application. It did not do so here.
- [32] All of that said, the original December 3, 2021 hearing date was adjourned generally by consent and eventually reset for January 14, 2022.
- [33] In the absence of an adjournment request or some indication that Madness would suffer significant prejudice due to the late delivered affidavit material, in these circumstances I exercise my discretion to allow Metro-Can to rely on the reply affidavits of Mr. Plotnikoff and Mr. Macaulay.

Evidentiary Issues

- [34] Madness notes that in Mr. Macaulay's affidavit #1, he says he has read the petition and that the defined terms used in his affidavit have the same meaning as those used in the petition. He does not say that the facts set out in the petition, or some sub-set of them, are true. This latter approach is commonly followed in petition proceedings. Where the facts set in the petition are also addressed in the supporting affidavit material, failure to do so is generally not a cause for concern.
- [35] Madness says there is a discrepancy in that Mr. Macaulay says in his affidavit that Jarguet provided no work after November 15, 2019, but he also says Metro-Can's last payment to Jarguet was for Progress Claim #13. That progress claim was for the period which ended September 30, 2019. This means that Jarguet must have carried out work between October 1, 2019 and November 12, 2019 for which it was not paid. If so, this would mean that a corresponding increase in holdback is appropriate.
- [36] Madness also disputes whether Mr. Macaulay has personal knowledge of the matters set out in his affidavits. He does not set out what his involvement was with this particular project. He was not a signatory on the deficiency notices issued to Jarguet and he was not included as a recipient of certain email chains that are in evidence. He does assert that the contents of the default notices are true to the best of his knowledge, but the basis and scope of his knowledge is not defined beyond a general assertion of his position within Metro-Can.
- [37] I agree that Mr. Macaulay's affidavit is lacking in terms of detail regarding what if any involvement he had with the Primrose project generally and Jarguet and the Jarguet Work in particular. For some issues, personal knowledge does not appear to be critical. For example, personal knowledge of shortcomings which led to the deficiency notices being issued to Jarguet is not critical for purposes of this application. There is no dispute that Jarguet exited the Primrose project by November 15, 2019. The financial information in his affidavit is taken from Metro-Can's accounting records and these are put forward as business records under s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124.
- [38] Madness says there is no evidence regarding what election Metro-Can made as between terminating the Jarguet Subcontract or affirming it. Metro-Can points out that clause 7.1.4 of the Jarguet Subcontract allows Metro-Can to either correct defaults and deduct the cost from any payment due to Jarguet, or terminate its right to continue with the Jarguet Work or terminate the subcontract. Clause 7.1.5 provides that if Metro-Can terminates the right to continue work, it can take possession of the Jarguet Work, withhold further payments to Jarguet until a final certificate of payment is issued and charge Jarguet the full cost of finishing the Jarguet Work and a reasonable allowance to cover the cost of corrections to work performed by Jarguet that are required.

[39] Madness argues there is no evidence that all of the respondent lien claimants were engaged exclusively through Jarguet. Several of the liens filed do identify parties in addition to or other than Jarguet as "the person who engaged them, or to whom they supplied material and who is or will become indebted to them" on the lien form. These include:

Respondent

Person engaging them as per claim of lien

Jose Escobar dba JR Cement Finishing

Jarguet and Metro-Can

Francisco Cardenas dba Redo Contracting Inc.

Jonathan Argueta dba Jarguet

Griff Building Supplies Ltd.

One or more of Jarguet, Cassandra Argueta and Transca

Xcellence Concrete Pumping Ltd.

Jarguet and Transca

El Duque General Construction Ltd.

Transca

[40] All of the lien claims do include a reference to Jarguet, except the one filed by El Duque (sp?) General Construction Ltd.- it refers only to the owner, Transca. I suspect that may be an error, considering that Transca hired Metro-Can as general contractor for the project. Circumstantially, all lien claims refer to amounts that are alleged to be due around the time of Jarguet's exit from the Primrose project.

[41] Metro-Can's petition does assert at para. 17 of Part 2 that to the best of its knowledge, each of the respondent lien claimants were subcontractors or materials suppliers to or under Jarguet in respect of the Improvement. Unfortunately, neither Mr. Macaulay nor Mr. Plotnikoff address this issue in the body of their affidavits. Mr. Macaulay simply attaches a copy of the claims of lien as an exhibit to his affidavit without further exposition.

[42] Metro-Can notes that all the respondents were served with the petition and supporting material, so all are presumably aware Metro-Can asserts they fall under the Jarguet Subcontract. None has filed opposition to that. This issue is material for purposes of Madness' lien claim as well, because the amount Metro-Can is proposing to pay into court would leave Madness with a significant shortfall if El Duque's claim of lien is also included in order sought. Unfortunately, the evidence Metro-Can has tendered is insufficient to address this issue.

- [43] Madness argues there are deficiencies regarding evidence of value tendered by Metro-Can. One is a lack of evidence indicating that Mr. Macaulay input the costs data used in the accounting spreadsheets attached to his affidavit. I do not agree it is necessary that Mr. Macaulay input the financial data himself for the spreadsheets to be admissible as business records. Mr. Plotnikoff states in his affidavit that project costs were recorded in Metro-Can's Explorer software and assigned a cost code at that time. In my view, this is adequate foundation for the spreadsheets for cost codes 3100 and 20005 to qualify as business records under s. 42 of the Evidence Act.
- [44] Madness raises a number of specific concerns about individual entries under codes 20005 and 3100. For each of these, Madness raises a question, to which Mr. Plotnikoff responds. There was a general complaint that the spreadsheet entries list payees, dates and amounts, but do not provide background information that would allow the court and Madness to assess whether they fall within the scope of Jarguet Work. On this point, there is sworn evidence that the entries were input using these codes based on them being related to the Jarguet Work and correction of deficiencies. Madness had the option of pursuing cross-examination on affidavits, but did not pursue this. For specific entries, he does not indicate on what he bases his answer. These include:
- a) There is an entry for Alpha Drywall LP, but Madness notes Jarguet was not responsible for installing drywall. Mr. Plotnikoff states this related to work required to accommodate misaligned concrete;
 - b) There is an entry for Casca Roofing & Exteriors Inc. that is questionable because Jarguet was not responsible for the roof. Mr. Plotnikoff says this related to work required to accommodate misaligned concrete;
 - c) An amount paid to Insight Insurance & Risk Management was questioned. Mr. Plotnikoff indicates this related to a bond premium to secure claims of lien filed by concrete subcontractors;
 - d) Amounts paid to Metro Surveys were questioned. Mr. Plotnikoff says this related to surveys required to repair concrete defects;
 - e) Amounts paid to New York Painting & Coating were questioned. Mr. Plotnikoff says this relates to repainting of soffits due to concrete issues;
 - f) Amounts paid to Employment Specialists were questioned. Mr. Plotnikoff indicates these relate to third party labour hired to perform concrete work;
 - g) Amounts paid to Shield Masonry were questioned. Mr. Plotnikoff indicates this related to work required to accommodate concrete issues;
 - h) There is a payment to a lawyer, Robert J. Bayliss in trust, for \$72,380.95 dated November 6, 2019. It is not clear how this relates to the Jarguet Work. Mr. Plotnikoff says this relates to settlement of a claim of lien of a subcontractor engaged in completion of the Jarguet Work;

- i) The term "P/R Costs" appears but is not defined. Mr. Plotnikoff advises this relates to payroll costs for Metro-Can employees who performed concrete-related work.
- [45] I agree that where Mr. Plotnikoff gives detailed answers which appear to require project-specific answers, this suggests he either has personal knowledge, is relying on information from someone else within the organization, or is repeating information on project accounting records. This should be clarified and if there are is a document he is relying on for his answer, it should be produced.
- [46] Madness argues some entries are confusing, including that Jarguet made a progress claim #14 for \$1,836,541.00 on October 31, 2019, then progress claim #14 for -\$1,836,541.00 on January 1, 2020 and progress claim #15 for -\$294,328.07 on July 1, 2020. Mr. Plotnikoff responds that progress claim #14 relates to closeout of the balance of the Jarguet Subcontract and progress claim #15 refers to the holdback that Metro-Can retained from Jarguet for the Jarguet Work.
- [47] There are also transfers from code 2900 ST for \$2,500.00 and from code 20005 LA for - \$4,090.00 that Madness says are not explained. Mr. Plotnikoff indicates these relate to amounts transferred between cost codes for various reasons. In the circumstances, the amounts involved are sufficiently small that they do not have a material impact on the analysis for purposes of this application.
- [48] The total paid under code 20005 is \$2,526,510.26 and under code 3100 is \$3,447,093.48. Code 3100 includes amounts that Metro-Can paid to Jarguet, which was \$2,943,280.65 including GST, less the 10% holdback. Based on an adjusted contract price of \$4,779,821.65, this indicates Metro-Can experienced a cost overrun of \$1,193,782.09 to complete the Jarguet Work.
- [49] Madness disputes the veracity of the over-runs, but the overall figure is so far in excess of the adjusted contract price that I do not consider it necessary or a productive exercise to engage in a detailed examination of the areas of concern Madness has highlighted.

Quantum of Discharge

- [50] In the event to court determines that all lien claimants were engaged under Jarguet, the amount required for a s. 32 discharge is the lesser of the total amount of the liens filed (s. 23(1)(a)) and the amount owing as the holdback between Metro-Can and Jarguet.
- [51] The holdback amount is 10 percent of the greater of the value the work or material as they are actually provided under the contract or subcontract (s. 4(1)(a)) and the amount of any payment made on account of the contract or subcontract price (s. 4(1)(b)).
- [52] Metro-Can's position is that the appropriate amount is the holdback, which it says is \$309,043.52. This is based on amounts it paid to Jarguet for work done prior to the Repudiation Date.

- [53] Madness does not dispute the amount of the payment Metro-Can says it has made to Jarguet, which Mr. Macaulay indicates is \$2,781,400.21, not including the holdback fund of \$309,043.52.
- [54] Madness does take issue with the value of the work and material actually provided by Jarguet prior to the Repudiation Date. It notes the above figure is for progress draw #13, which is for the period ending September 30, 2019. The evidence suggests that Jarguet continued working between October 1, 2019 and November 12, 2019, and presumably that has some additional value. Madness says this must be determined before the proper holdback amount can be calculated.
- [55] Madness notes there is evidence that some amounts were paid to certain lien claimants and vendors prior to November 15, 2019. One example of this is the payment to Mr. Bayliss in trust to resolve a lien claim.
- [56] It argues there is no evidence of whether Metro-Can exercised its option to terminate the Jarguet Subcontract under clause 7.1.4.2, as opposed to affirming the agreement and stepping into Jarguet's shoes and completing the contract under 7.1.4.1. If the latter, the holdback should be 10 percent of the adjusted contract price (\$4,779,821.65) or possibly the total of the code 3001 and 20005 summaries (\$5,973,603.74).
- [57] Madness argues there is no evidence Metro-Can entered into separate contracts with the various vendors after Jarguet's termination on the Repudiation Date, so the court should assume Metro-Can stepped into Jarguet's shoes and that all subsequent work it did to complete the Jarguet Work was on account of the Jarguet Subcontract. From this approach, Madness' primary position is that the appropriate amount to post is the face amount of all the liens (\$541,433.99), based on this being less than 10% of the total cost of the Jarguet Work based on the code 3001 and 20005 summaries. Its secondary position is that the appropriate amount is 10 percent of the adjusted contract price + GST (\$501,433.99).
- [58] I do not agree that the court can or should assume Metro-Can stepped into Jarguet's shoes and completed the Jarguet Work on account of the Jarguet Subcontract, with an attendant obligation to continue increasing the holdback credited to Jarguet. I also do not agree that basing the holdback on the full adjusted contract price of the Jarguet Subcontract is reasonable given that Jarguet exited the project long before work was completed. Madness does not take issue with the amounts Metro-Can says it paid Jarguet (\$2,781,400.21).
- [59] Metro-Can says it has retained a holdback of \$309,043.52 based on payments to and including September 30, 2019. Madness argues this is insufficient because it does not include an amount for work provided between October 1, 2019 and November 12, 2019. Section 4 of Act specifies that the holdback is based on 10 percent of the greater of (a) the value of the work or material as they are actually provided under the contract or subcontract, and (b) the amount of any payment made on account of the contract or subcontract price.

[60] The only indication I have of the value of the work Jarguet did following progress claim #13 is the fact that Jarguet is counterclaiming against Metro-Can based on a final unpaid invoice dated October 25, 2019 for \$205,242.76 in Vancouver action S-202744. Valuing this work based on the amount Jarguet invoiced for the period October 1, 2019 to November 12, 2019 does appear to be a logical approach to resolving this issue. The added holdback would be 10% of that amount. However, Jarguet's final invoice is not in evidence on this application. This issue will need to be addressed before a final decision can be made regarding the appropriate holdback.

Referral to the Trial List

[61] Madness argues that all it has to do to have this petition converted into an action is raise a bona fide triable issue and that Madness is not bound to lose, relying on *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saptuo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 ["Saputo"]. It qualifies this by saying if the court accepts its primary position and is satisfied it has sufficient facts to order the full amount of the claims of lien (\$541,433.99) be paid into court, there is no need to convert the petition to an action, as all claimants would be paid 100 cents on the dollar for their lien claim. Likewise, if its secondary position is accepted and the court finds the appropriate amount to post is \$501,881.27, Madness would not seek conversion to an action. Madness suspects some lien claimants have not pursued their claims, such that it will recover close to 100 cents on the dollar in this case as well.

[62] Shortly after this application was heard, a five-judge bench of the court of appeal overturned the test in *Saputo* and adopted a more flexible approach. Judges hearing petitions that raise triable issues now have greater discretion to proceed and are not required to refer the matter to trial. See *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160:

160 To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[63] The concerns I have identified regarding Metro-Can's petition relate to gaps in the evidence it has presented rather than Madness having raised triable issues that require a full viva voce trial to resolve. In my view the evidentiary issues appear to be relatively narrow and discrete. It appears they can be adequately addressed through the parties revisiting and supplementing the evidence each has tendered, supplemented by an order that Metro-Can provide limited discovery of documents relating to the specific issues that Madness has identified in its petition response.

- [64] I do not consider it necessary or appropriate to order that the petition be referred to the trial list.
- [65] I have not addressed some other legal arguments advanced by Madness, as in my view consideration of these should be deferred until the evidentiary gaps I have noted above are addressed.

Conclusion

- [66] I am not able to decide the issues raised on this petition based on the incomplete evidentiary record before the court. I adjourn this application generally. Metro-Can has leave to re-set the hearing of its petition on better evidence which addresses the issues I have identified in these reasons.
- [67] I order that Metro-Can provide Madness a limited discovery of documents relating to the following specific issues Madness has identified in its petition response, namely:
- Issues raised in Part 4, para. 46. vi, vii, viii, ix;
 - Issues raised in Part 4, para. 47 xii and xiii; and
 - Value of work and materials that Jarguet provided in the period after progress draw #13, namely October 1, 2019 to November 12, 2019.
- [68] It is not necessary or appropriate to order that the petition be referred to the trial list. This matter will continue as a petition proceeding.
- [69] Costs of this application are reserved to the presider who eventually hears the petition on its merits. I am not seized.

"Master Bilawich"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/10/2022BCSC1042.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/metro-can-construction-pe-ltd-v-escobar-2022>

Prepared on 25 October 2026 · Esheria