Court of King's Bench of Alberta

Citation: JH Drilling Inc v Barsi Enterprises Ltd, 2025 ABKB 288

Date: 20250509
Docket: 1503 13709
Registry: Edmonton

Between:

JH Drilling Inc

Plaintiff

- and -

**Barsi Enterprises Ltd, Don Goulet,
and Darcy Underwood, carrying on business as Misty Valley Trucking**

Defendants

- and -

Barsi Enterprises Ltd

Plaintiff by Counterclaim

- and -

JH Drilling Inc and John Harms

Defendants by Counterclaim

Reasons for Decision
of the
Honourable Justice L.K. Harris

I. Introduction

[1] The Plaintiff, JH Drilling Inc. ("JHD"), has brought an action against the Defendants for breach of contract. The Defendants, Barsi Enterprises Ltd. ("Barsi") and Don Goulet ("Goulet"), have in turn issued a counterclaim against JHD for, *inter alia*, misrepresentation.

[2] After several years of litigation, the file was directed to case management. JHD applied for summary judgment and either striking or for summary dismissal of the counterclaim pursuant to the *Alberta Rules of Court*, A/R 124/2010 (the "*Rules*") which application I heard in my role as case management justice.

II. Overview

[3] JHD's sole director and shareholder is John Harms. JHD is a gravel prospecting company and is the registered holder of Surface Material Lease #070028 issued by Alberta Environment and Parks under the *Public Lands Act*, RSA 2000, c. P-40 (the "*PLA*") (the "Seal Lake Lease"). The land which the Seal Lake Lease relates to is located near Slave Lake, Alberta. Under the Seal Lake Lease, JHD is entitled to excavate sand and gravel from the land.

[4] In approximately January 2014, JHD and Barsi signed an "Assignment of SML #070028 and Royalty Agreement" whereby JHD purported to assign its rights under the Seal Lake Lease to Barsi (the "Royalty Agreement"). Under the Royalty Agreement, Barsi was entitled to excavate "aggregate or surface material" and sell it in exchange for certain royalty payments to be paid by Barsi to JHD.

[5] Between June and August 2014, Barsi excavated around 120,000 tonnes of material which yielded 20,000 tonnes of usable gravel from the Seal Lake Lease. Barsi says it removed 4,000 tonnes of usable gravel from the site and the remainder was left on or around the Seal Lake Lease.

[6] Barsi then concluded that the Seal Lake Lease was "exhausted" of usable gravel and considered the Royalty Agreement to be at an end pursuant to its terms.

[7] JHD disagrees that the Seal Lake Lease was exhausted or that Barsi was entitled to consider the Royalty Agreement at an end. JHD alleges that Barsi has never paid the amounts it owed to JHD under the Royalty Agreement.

[8] JHD issued a Statement of Claim in September 2015, claiming that Barsi has breached the Royalty Agreement and owes damages to JHD.

III. The Record

[9] The nature of the Record in relation to this application bears some commentary so that my approach to deciding the issues is clear.

[10] The application before me sets out 11 different issues to be determined. Some of the issues are not clearly articulated. Some appear to be duplicative. I have paid particular attention to the pleadings in this matter and whether JHD has adequately articulated the basis for its application in accordance with the *Rules*. To say the least, the application has been somewhat of a moving target.

[11] The Statement of Claim is lengthy – 27 pages and 22 paragraphs. However, the bulk of it is an extensive repetition of emails exchanged between the parties, the inclusion of the entirety of the Royalty Agreement, letters, invoices and spreadsheets. While I am not asked to rule on the validity of the contents of the Statement of Claim, I draw counsel's attention *Rule* 13.6(1)(a) which requires a pleading to be succinct, and *Rule* 13.6(2)(a) which requires a pleading to state facts, not evidence.

[12] The Statement of Claim can be summarized as pleading that the parties entered into the Royalty Agreement which provided that JHD was to assign the Seal Lake Lease to Barsi, and that Barsi has failed to comply with, *inter alia*, the payment, reclamation and reporting provisions. JHD claims specific performance of the Royalty Agreement, or alternatively, damages, interest and costs.

[13] The materials filed on behalf of JHD in support of the application for summary judgment are extremely voluminous, comprised of likely hundreds, if not thousands, of pages of affidavits, documents, transcripts, pleadings and written submissions. The size and complexity of the materials alone give rise to a concern that this matter is not amenable to summary disposition.

[14] I also note that each party has raised objections to the affidavit evidence presented by the other, arguing that I should not rely upon that evidence for various reasons, including that the affidavit evidence is not credible or reliable. While the presence of credibility or reliability issues is not an automatic bar to summary judgment, I highlight this issue for the purpose of demonstrating some the difficulties with this Application.

[15] Much of the material filed on behalf of JHD is irrelevant to the issues before me, and therefore, I will not specifically address much of it in this decision. I will address those portions of the record that are relevant to this application and necessary to explain my decision.

[16] Finally, I note that when the parties appeared before me to make oral submissions, JHD purported to make several "proposed concessions". I also received communication from counsel for JHD after the hearing had concluded, purporting to make further "concessions".

[17] Setting aside the impropriety of counsel contacting the Court after the hearing has concluded to make further uninvited submissions, it is unclear whether these "proposed concessions" are an attempt to negotiate a resolution, sanctioned by the Court, or whether they are intended to be admissions for the purposes of this application. If the former, it is not within my role hearing this application to consider them; this is not a JDR process. If the latter, it is not explicitly clear that they are admissions against interest, and therefore, I still decline to consider them.

[18] JHD has brought an application for summary judgment and striking or dismissal of the counterclaim on the basis set out in its application filed November 1, 2024. My decision considers the merits of that application on the evidence before me. While the "proposed concessions" put forward on behalf of JHD might be appropriate in the context of settlement discussions, it is not my role here to opine upon them.

IV. Issues

[19] The application herein raises the following issues:

(a) Has JHD established that there is no merit to Barsi's defence? In particular, has JHD proven that:

(i) Barsi breached the Royalty Agreement in the following ways:

- Barsi has failed to comply with the payment provisions;
- Barsi has failed to comply with the reclamation provisions;
- Barsi has failed to comply with the record-keeping and reporting requirements; and
- Barsi has failed to accept JHD's assignment of its rights under the Seal Lake Lease.

(ii) Is Barsi obligated under the Royalty Agreement to compensate JHD for "unpaid rent"?

(iii) Is Barsi obligated under the Royalty Agreement to indemnify JHD for any losses, and if so, in what amount?

(b) Has JHD proven that the Counterclaim should be struck for failing to comply with the *Rules* regarding the contents of pleadings, or should be summarily dismissed as having no merit?

V. Analysis

[20] I will begin my analysis by outlining the framework for deciding a summary judgment application in the context of an action for breach of contract.

a. The Test for Summary Judgment

[21] *Rule* 7.3(1) of the *Rules* provides for summary judgment in respect of all or part of a claim where there is no defence to a claim or no merit to a claim or part of it. Summary judgment "serves an important purpose in the litigation system", because it prevents claims or defences that have no chance of success from proceeding to trial: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 10. It is one tool the Court and parties may use to achieve the general purposes of the *Rules*, which include facilitating the quickest means of resolving a claim at the least expense: *Rule* 1.2(2)(b).

[22] This is consistent with the modern approach to summary judgment as described by the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7. This approach, characterized as a "shift in culture", favours summary judgment if it is, in the circumstances, a fair process that results in a just adjudication of a dispute: ***Stoney Tribal Council v Canadian Pacific Railway***,

2017 ABCA 432 at para 8. In Alberta, a full trial is not always the most proportionate way to resolve disputes. A Court may award summary judgment if the moving party establishes the facts in issue on a balance of probabilities and demonstrates that there is no genuine issue requiring trial: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.***, 2019 ABCA 49.

[23] The test requires the Court to examine the existing record to see if a disposition that is fair and just to both parties can be made on that record. As was explained in ***Maxwell v Wal-Mart***, 2014 ABCA 383 at para 12, using the language of the Supreme Court in ***Hryniak***:

> ...no genuine issue for trial exists where the judge is able to make a fair and just determination on the merits without a trial, because the summary judgment process allows him or her to make the necessary findings of fact, to apply the law to those facts and is a proportionate, more expeditious and just means to achieve a just result.

[24] Stated another way, for the non-moving party's case to have merit, there must be a genuine issue regarding a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the "fair and just process". The mere assertion of a position by the non-moving party in a pleading or otherwise, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require *viva voce* evidence to resolve the case: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at paras 10 to 11.

[25] A successful summary judgment application is a final judgment as it is a determination of the merits of a claim: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2022 ABCA 111 at para 88.

[26] As the moving party, JHD must prove on a balance of probabilities that there is no merit to the Defence or Counterclaim, and that there is no genuine issue requiring a trial. If JHD meets this threshold burden, the Defendants must demonstrate based on the record or the law that there cannot be a fair disposition of the action on a summary basis: ***Weir-Jones*** at para 32.

[27] Summary judgment is not limited to cases where the facts are not in dispute: ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587 at para 87. However, the evidence must be such that the Court is confident that the dispute can be fairly resolved: ***Weir-Jones*** at para 36.

[28] A party cannot create a genuine issue requiring trial by speculating as to what evidence might be identified in the future. To do so is inconsistent with the expectation that parties are to put their best case forward when pursuing or defending a summary judgment application. For that reason, "bald, conclusory, argumentative or self-serving statements, personal opinion, allegations, speculation, conjecture or assertions made in affidavits or questioning transcripts, in the absence of detailed facts and supporting evidence, should be given little or no weight and cannot establish a genuine issue requiring trial": ***McDonald*** at para 96.

[29] However, where the record supports a reasonable expectation that a better evidentiary record will be available at trial, or where there are issues of credibility that cannot be resolved summarily, trial may be necessary: ***Angus Partnership Inc v Salvation Army (Governing Council)***, 2018 ABCA 206 at para 44. Again, however, neither the anticipation of better evidence nor an alleged concern regarding the credibility of certain evidence can be based on speculation: ***Axcess Mortgage Fund Ltd v 1177620 Alberta Ltd***, 2018 ABQB 626 at para 43.

b. The Principles of Contractual Interpretation

[30] JHD argues that Barsi is in breach of the Royalty Agreement, which Barsi denies. Therefore, the outcome of this application rests upon my determination of the rights and obligations of the parties under the Royalty Agreement as revealed through the proper interpretation of its terms and provisions.

[31] In ***Sattva Capital Corp. v Creston Moly Corp***, 2014 SCC 53 at para 47, the Supreme Court of Canada describes the modern approach to contractual interpretation:

> ...the interpretation of contracts has evolved towards a more practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" ...To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning.

[32] No contract is made in a vacuum. There is always a context to consider, and the Court should know the commercial purpose of the contract, which requires some evidence about the genesis of the transaction, the background, the context and even the market in which the parties are operating. In ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157, the Court states at para 81 that ascertaining the "intent of the parties" means that the surrounding circumstances may be considered so long as it does not offend the parol evidence rule by admitting evidence outside of the contract that would add to, subtract from, vary, or contradict the contract. Instead, evidence of surrounding circumstances may serve as an objective aid to determine the meaning of the words that the parties used. Evidence of the surrounding circumstances must never be allowed to overtake the words of the agreement or effectively create a new agreement: ***Sattva*** at para 57.

[33] The goal in considering evidence regarding the context of a contract is to provide the judge with a greater understanding of the mutual and objective intentions of the parties as expressed in the contract. Trial judges must consider the surrounding circumstances when interpreting a contract regardless of whether the contract is ambiguous, but the interpretation of a contractual provision must be grounded in the text and read in light of the entire contract. This is because the terms of a written contract are presumed to express the parties' intentions: ***Columbos v QuinnCorp Holdings Inc***, 2019 ABQB 853 at para 10, citing ***Herron v Hunting Chase Inc***, 2003 ABCA 219 at para 15.

c. The Breaches Alleged by JHD

[34] Having established the legal framework for the issues raised by this Application I will move to the specific arguments advanced on behalf of JHD. As noted above, the issues raised within the application are not well-defined. For example, JHD appears to raise the "existence of the Contract of January 14, 2014" (i.e., the Royalty Agreement), as an issue, even though Barsi does not deny the existence of the Royalty Agreement in its Amended Statement of Defence. This issue is therefore moot.

[35] There are four other discernible allegations of breach of contract: breach of the payment obligations, breach of the reclamation obligations, breach of the record-keeping and reporting obligations, and finally, an allegation that Barsi has failed to accept the assignment of the Seal Lake Lease. I will deal with each of these allegations in turn. However, I conclude that JHD has not established the grounds for summary judgment against Barsi on any of the four allegations advanced because there are triable issues in relation to all of them.

1) Payment Obligations

[36] First, JHD alleges that Barsi is in default of its payment obligations under the Royalty Agreement.[1]

[37] The Royalty Agreement provides:

> 2. The assignee agrees to pay to the assignor
>
> $4.00 for each METRIC TONNE, for all aggregate or surface material taken from the SML on the following basis:
>
> Payment for aggregate or surface material carried away from the lands by or on behalf of assignee, is due and payable thirty days after the last day of the month in which it is taken. This price applies to aggregate lying on the surface of the lands and accessible by equipment suitable for extracting the aggregate.
>
> 3. The ASSIGNEE further covenants and agrees with the ASSIGNOR that:
>
> ...
>
> b) The ASSIGNEE agrees to purchase a minimum of 30,000 metric tonnes per annum or provide the ASSIGNOR THE SUM OF $120,000 as prepayment for aggregate to be taken. This payment is due no later than December 31st of each calendar year, UNTIL THE AGGREGATE RESERVE, EXCLUDING SAND, IS EXHAUSTED.
>
> ...
>
> 7. $20,000 is payable to JHD in advance each year until the pit is exhausted and reclaimed. (This $20,000 will reduce the $120,000 minimum payable for that year)

[38] The parties agree that upon signing the Royalty Agreement, Barsi paid JHD $20,000 as the advance payment contemplated in para 7. Beginning in June 2014, Barsi worked at the site, excavating 120,000 tonnes of material. From that material, Barsi was able to extract 20,000 tonnes of gravel. Barsi sold approximately 4,000 tonnes of gravel, which was removed from the site. The remaining 16,000 tonnes of gravel sits "on the land near the gravel pit". Barsi left the site after August 2014, having concluded that the pit was exhausted, and took no further steps to excavate any other materials.

[39] JHD's position is that first, there remains an abundance of gravel available for excavation at the Seal Lake Lease. It argues that the Seal Lake Lease is far from exhausted and accordingly,

[1] Paragraphs 2, 3 and 6 of "Remedy Claimed or Sought" within the Application

Barsi has no basis for considering the Royalty Agreement to be at an end. It relies upon a report titled "Summary of August 13, 2007 Field Visit". The report is not signed, nor is it clear from its contents who wrote it, but it appears to summarize findings regarding the size and quality of the gravel pit at the Seal Lake Lease (referred to as the "Carson Report").

[40] JHD has also produced an expert's report from Jim Greenhaigh, filed November 29, 2022. Mr. Greenhaigh is a power engineer, mine foreman and blaster. In his report, he states that he has reviewed certain pieces of evidence, including the Carson report and some of the discovery evidence of Craig Barsi, and he provides the opinion that the Seal Lake Lease is not exhausted of gravel.

[41] JHD argues that because the payment provisions remain in force, Barsi owes JHD $120,000 per year, as the minimum annual payment due, from January 2014 to today.

[42] Second, JHD also argues that Barsi has taken, or "carried away from the lands" "aggregate or surface material" totalling 120,000 metric tonnes. Aside from the 4,000 metric tonnes that Barsi sold, the remaining $116,000 metric tonnes were deposited just over the property line onto a site leased by Husky. Accordingly, Barsi owes JHD payment for those materials at the rate of $4.00 per metric tonne, or $480,000, not just payment for the 4,000 tonnes of gravel removed from the site.

[43] JHD says that all materials (as opposed to just gravel) removed from the site trigger payment obligations. It points to other provisions within the Royalty Agreement as defining what Barsi was obligated to pay for. For example, para 6 requires Barsi to "pre-arrange royalty parameters" if Barsi proposes to "produce 3" no minus or 1.5" no minus or other high-elimination products or sieved products or to sell riprap", saying that para 6 clarifies the overall intent of the Royalty Agreement to apply to all material removed from the site. Should Barsi only remove high-value material, such as gravel (leaving behind sand or similarly low value material), then para 6 requires a different royalty payment obligation to be established.

[44] On the other hand, Barsi argues that after extensive searches and the excavation of 120,000 tonnes of material, it was only able to locate approximately 20,000 tonnes of usable gravel. Of that, only 4,000 metric tonnes were removed from the site, and the remainder was left behind. Barsi has paid JHD for the 4,000 tonnes removed. Barsi says that the site is now exhausted, relying upon the evidence of Craig Barsi in his Affidavit of November 5, 2024, wherein he states at para 6:

> The term "exhausted" is commonly used in our industry. It doesn't necessarily mean that every bit of gravel has been removed from a gravel pit. It means all gravel which economically makes sense to remove has been removed. For example, if gravel was 100 feet deep, it would not make sense from an economic standpoint to dig that deep to obtain it.

[45] Barsi argues that the Royalty Agreement only requires payment for "aggregate" removed from the site, commonly defined within the industry as useable gravel, and says that only usable gravel removed from the site triggers payment obligations. When read as a whole, the Royalty Agreement shows that the parties' intentions were that Barsi was to pay only for usable gravel, or aggregate, and not waste material or sand. The remainder of the material was left behind on or near the site and Barsi is not liable to pay JHD for it.

[46] Barsi cannot say for certain that some of the materials may have been left outside of the property line but even if they were, that does not meet the requirement that the materials be "carried away" such that the payment obligations were triggered. Its obligation to pay JHD anything under the Royalty Agreement is at an end effective August 2014.

[47] The payment provisions of the Royalty Agreement are ambiguous. For example:

- While Barsi is obligated to pay JHD for certain materials taken from the Seal Lake Lease, there is a lack of clarity as to exactly what materials trigger that obligation as the Royalty Agreement does not define "aggregate" or "surface material" and in particular, does not explicitly state that waste material is subject to the payment provisions;
- The payment provisions refer to both aggregate and surface material but also appears to exclude sand;
- The term "exhausted" is not defined and it is not clear whether that means that the gravel pit must be entirely devoid of remaining material or whether some other standard is to be used;
- While the Royalty Agreement appears to require Barsi to purchase a minimum of $120,000 per year, with $20,000 payable in advance, there is a lack of clarity as to whether that minimum payment obligation ends as of the date the pit is exhausted.

[48] Because the payment provisions within the Royalty Agreement are ambiguous, ***Sattva*** requires me to consider evidence of the parties' intentions at the time of the formation of the Royalty Agreement. However, JHD has not provided any such evidence. In particular, JHD has not provided any evidence of what the terms "aggregate" or "surface material" are typically understood to mean within the industry or any evidence of what the parties' intentions were about whether Barsi was to pay for all material removed from the site, or just usable gravel.

[49] JHD has filed affidavits from a variety of individuals purporting to speak to the circumstances surrounding the negotiations of the Royalty Agreement, but none of those individuals have sworn to being directly involved in those negotiations. To the extent information contained within these affidavits speaks to the parties' intentions, that information appears to be hearsay.

[50] *Rule* 13.18(3) clearly provides that an affiant must support his or her sworn statements in a final application with "personal knowledge." This requirement embodies the common law rule against hearsay – an affiant must be capable of being tested by cross-examination on his or her own knowledge. This is not the case here, and I cannot rely upon the information contained as to the circumstances surrounding the Royalty Agreement to determining the meaning of the terms "aggregate" and "surface material" for the purposes of triggering Barsi's payment obligations.

[51] Mr. Harms himself has provided no evidence about JHD's intentions.

[52] On the other hand, Barsi has raised triable issues by providing some evidence as to how the term "exhausted" is commonly understood and used within the industry and by providing evidence of what it actually removed from the site and sold.

[53] The onus is on JHD to persuade me that the Royalty Agreement obliges Barsi to compensate JHD for all materials excavated from the site (as opposed to just usable gravel as argued by Barsi), and it has not done so on the evidence put before me.

[54] Similarly, I am not satisfied on the evidence before me that JHD has shown on a balance of probabilities that the Seal Lake Lease was not "exhausted" as argued by Barsi. The Carson Report is not, in my view, reliable evidence of there being aggregate available for excavation in 2014. The report was prepared at least 7 years prior to Barsi's involvement. It is not signed, and it is not clear who authored the report and there is no evidence as to the qualifications of the author to offer the report's concluding opinion that there was gravel on site. I therefore cannot rely upon this report to conclude that JHD's assertion is accurate.

[55] Similarly, I conclude that Mr. Greenhaigh's report carries little weight. There are two difficulties with his opinion; first, Mr. Greenhaigh is clear that he never attended the Seal Lake Lease in person to inspect it, and he relies heavily upon the Carson report as the basis for his opinion. I query how he can reach conclusions on the state of the Seal Lake Lease in 2014, having never attended the site. Second, he doesn't address the exact issue raised by Barsi, which is that "exhausted" does not necessarily mean that there is no gravel, but that it is no longer economically feasible to retrieve the gravel.

[56] Finally, I do not agree that Barsi's abandonment of waste material or unsold gravel just outside of the property line must be deemed to be materials taken from the Seal Lake Lease for the purposes of triggering the payment obligations under the Royalty Agreement. The circumstances suggest that if in fact the materials were deposited over the property line onto the Husky lease, it very well might be due to a misunderstanding on the part of Barsi as to where exactly the property line lay. In any event, there is no evidence that JHD is unable to retrieve the material or that it is otherwise unavailable to it to reclaim.

[57] In short, JHD has not established on a balance of probabilities that the payment provisions of the Royalty Agreement should be interpreted in the manner it argues. Having concluded that the payment provisions of the Royalty Agreement are ambiguous, and the only reliable evidence as to the parties' intentions in drafting those provisions being in favour of Barsi, JHD's motion for summary judgment on this point must fail.

2) Reclamation Obligations

[58] Second, JHD alleges that Barsi has not reclaimed the site to its satisfaction and that its payment obligations under the Royalty Agreement cannot be concluded until reclamation is complete.

[59] Paragraph 7 requires payment of $20,000 in advance each year until the pit is "exhausted and reclaimed". There is nothing further to explain what is meant by reclamation, or what standard is to be used to measure complete reclamation under the Royalty Agreement.

[60] JHD argues that reclamation required the burning of brush, reseeding to natural vegetation and then obtaining confirmation from the Provincial Government that the site has been reclaimed. However, none of those requirements are contained within the provisions of the Royalty Agreement. On the other hand, Barsi says that they reclaimed the site although the details of the steps taken are scarce.

[61] The principles for dealing with uncertainty in contracts are set out in ***Ko v Hillview Homes Ltd***., 2012 ABCA 245, leave to appeal ref'd [2012] SCCA No. 445. There, the Court of

Appeal noted that the test for interpreting contract terms is objective and that the subjective views of the parties as to the interpretation or operation of the contract are irrelevant: at para 27.

[62] The rule is far from a technicality. Uncertain material terms cannot constitute a contract, and such provisions are usually impossible to perform or enforce: at para 81. The essential terms must show, with a reasonable degree of certainty, what the parties meant: at paras 87, 101. If the parties considered a term to be necessary and they included it in the agreement, but the term is too vague to interpret, the contract will be void.

[63] The onus is on JHD to show that "reclamation" as contained in para 7 of the Royalty Agreement requires bush burning, reseeding and obtaining government approval. JHD has provided no evidence to support this conclusion. I query whether this provision might be void for uncertainty. JHD has not proven this allegation and therefore this ground of summary judgment cannot succeed.

3) Record-Keeping and Reporting Obligations

[64] Next, JHD argues that Barsi is in breach of its record-keeping and reporting obligations.[2]

[65] Paragraph 3(a) of the Royalty Agreement requires Barsi to:

> ...keep proper books of account, at its head office, wherein, shall be entered the quantities and date the product was carried away from the lands, and such other particulars as may be necessary or convenient for ascertaining the amount of the royalties to be paid, and shall permit the ASSIGNOR or his agents, at all reasonable times to inspect the said books of account, and to take copies thereof or extracts therefrom.

[66] Paragraph 12 states:

> Good comprehensive reporting with scale tickets, delivery tickets, invoices, weekly reports...along with daily digital crushing repots and ticket reports if there is internet available, and sales projections.

[67] Paragraph 21 of the Royalty Agreement provides that "required reporting includes 100% reporting and access, including crushing records, weekly summaries, trucker tickets, and sales summaries.

[68] The parties agree that Barsi sent a letter to JHD dated March 10, 2015, advising that the quantity of gravel hauled to December 31, 2014, was 4,000 metric tonnes.

[69] JHD argues that beyond this letter, it has received no reporting from Barsi. JHD claims $240,000 in "liquidated damages" for the failure of Barsi to report. On the other hand, Barsi says that this letter meets the reporting requirements. Even if some further reporting was required of it, JHD's claim for "liquidated damages" is not sustainable given that there is nothing within the Royalty Agreement that provides for liquidated damages, and JHD has provided no evidence of having sustained any damages caused by Barsi's failure to report.

[70] When the provisions are read together, the Royalty Agreement does seem to require two things of Barsi – first, to keep books of account, and second, to provide "good comprehensive reporting". It is not clear how the reporting requirement is to be met. There is no provision which

[2] Paragraph 4 of "Remedy Claimed or Sought" within the Application

explains how such reporting is to be delivered, provides a delivery schedule or sets any expectations as to the format in which the reporting is to be provided. Arguably, the Royalty Agreement only requires Barsi to keep reporting available should JHD request to inspect it, and there is no evidence before me to establish that JHD did make such a request or found that upon inspection the reporting was deficient.

[71] Again, I query whether the record-keeping and reporting obligations within the Royalty Agreement might be void for uncertainty pursuant to ***Ko***. There is no evidence produced by JHD which persuades me that the reporting provisions of the Royalty Agreement should be interpreted in such a way which leads to the conclusion that Barsi has breached them.

[72] Even if I had concluded that there was a breach, I agree with Barsi that there is no basis within the Royalty Agreement to award JHD liquidated damages in the amount claimed, or at all, in the event of such breach. JHD has been unable to point me to any evidence establishing whether JHD suffered any damages at all arising from any breach of the record-keeping and reporting obligations, or to establish the quantum of those damages.

[73] This ground for summary judgment must also fail.

4) Assignment of the Royalty Agreement

[74] Finally, JHD seeks "striking of the NAD (No Assignment Defence)" and "assignment of the lease as set out in the Contract".[3]

[75] Paragraph 1 of the Royalty Agreement provides:

> The parties agree, that upon execution of this agreement by both parties hereto, THE ASSIGNOR WILL ASSIGN ALL OF ITS RIGHTS TO THE SML TO THE ASSIGNEE.

[76] The Royalty Agreement goes on to provide at para 19 that the assignment documentation will be held in trust by Barsi's lawyer.

[77] In essence, JHD says that it, as assignor, was required to assign its rights to the Seal Lake Lease to Barsi, as assignee, and that it has taken all necessary steps to do so but was only prevented from delivering the assignment documentation to Barsi because Barsi would not advise JHD who its lawyer was to take delivery. Barsi has denied in its Statement of Defence that the assignment was completed as required by the Royalty Agreement.

[78] JHD says that it remains ready and able to deliver the assignment documentation, and that Barsi is in breach of these provisions by failing to facilitate this delivery of the assignment documentation.

[79] JHD's argument is problematic for two reasons. First, para 1 of the Royalty Agreement clearly puts the onus on JHD to assign its rights to Barsi. However, Barsi has produced a decision of the Alberta Public Lands Appeal Board (***JH Drilling Inc. v Director, Regional Compliance, Peace Region, Regulatory Assurance Division, Alberta Environment and Parks*** (15 October 2020) Appeal No. 19-0247-R (APLAB), 2020 ABPLAB 17) (the "Appeal Decision"). JHD had been issued an administrative penalty of $31,000 by the Director for contravening certain provisions within the *PLA* because of the unauthorized assignment of its rights under the Surface Material Lease for the Seal Lake Lease to Barsi pursuant to the Royalty

[3] Paragraphs 7 and 9 of "Remedy Claimed or Sought" within the Application

Agreement. JHD appealed that administrative penalty but ultimately resolved the matter by accepting a penalty in a lesser amount.

[80] Section 43(1) of the *PLA* requires JHD to obtain the written consent of the Director before assigning any rights under a Surface Materials Lease, and s 54.01(5) prohibits JHD from receiving money for the purpose of allowing access to public lands unless they hold an authorization under s 20 of the *PLA*. While the Appeal Decision reports that JHD's appeal was withdrawn in exchange for a reduction in the administrative penalty, it is readily apparent that JHD did not have, and never has had, the necessary approval from the Director to assign its rights to the Seal Lake Lease to Barsi.

[81] Since JHD never had the necessary authorization to assign its rights to the Seal Lake Lease to Barsi, Barsi's failure to advise as to the name of its lawyer to facilitate the delivery of the assignment documentation is a moot point. The evidence before me shows that JHD has likely been unable to comply with its obligation to assign its rights to the Seal Lake Lease all along.

[82] Additionally, JHD and Mr. Harms have known all along how and where to deliver the assignment documentation. The Royalty Agreement provides at para 5 that "any correspondence or notice shall be addressed to the parties at the following mailing addresses", listing Barsi's mailing address. Further, since at least October 2015, Barsi has been represented by counsel of record who would be able to accept delivery of any necessary notices.

[83] JHD's argument that they were awaiting Barsi's advice as to who their lawyer was so that delivery of the assignment documentation could be facilitated is nonsensical. This ground for summary judgment must also fail.

[84] In summary, JHD has advanced four allegations of breach of contract against Barsi and seeks summary judgment against Barsi for those breaches. However, the provisions of the Royalty Agreement are ambiguous, and either there is insufficient evidence to support JHD's interpretation of those provisions, or Barsi has satisfied me that there is a triable issue with respect to how those provisions ought to be interpreted.

5) Claim for "Overdue Rent"

[85] JHD's application also seeks summary judgment on the basis of a claim for "payment of overdue rent of $5,061.01", or "sale of $250,000 pile of gravel to pay the rent". JHD's written submissions clarify this somewhat as being a claim for "ten years of rent in the amount of $5,061.01, for "Preservation of Property so that the Seal Lease is not suddenly cancelled" and "selling the 16,000 metric tonnes of processed gravel for some $300,000 for Preservation of Property to pay that rent bill..."

[86] JHD has not provided any other clear explanation for why it is entitled to this relief. Certainly, there is nothing within the Royalty Agreement which explicitly sets out Barsi's contractual obligation to pay "overdue rent", or the amount which Barsi might be obligated to pay. Consequently, JHD's claim for summary judgment on this ground must fail.

6) JHD's Claim for Indemnification

[87] Paragraph 1(5) of the application sets out JHD's claim for an order for "indemnification under para 10 of the Contract...". Paragraph 10 of the Royalty Agreement requires Barsi to indemnify JHD for:

> ...any damages or loss suffered by JHD or caused by a breach of this agreement

[88] The application itself does not specify what it requires indemnification for. JHD's written submissions only mention indemnification in an oblique way as being required due to the loss of its branch office and employees. It appears to seek an admission from Barsi as to its liability to indemnify JHD and the quantum of the losses.

[89] Barsi is under no obligation to admit anything. Requiring one party to litigation to make an admission is not relief which I can grant.

[90] Further, JHD has not provided any evidence that a breach of the Royalty Agreement has caused any loss or damage to JHD, or the quantum of any such loss. Consequently, JHD's claim for summary judgment on this ground must also fail.

7) Application to Strike the Counterclaim

[91] In its Counterclaim, Barsi alleges that JHD, through John Harms, made false and negative statements about Barsi to Barsi's clients, and that JHD, through John Harms, misrepresented the amount of the aggregate reserves within the Seal Lake Lease. Barsi supports its allegations with an Affidavit from Craig Barsi which repeats statements made to Mr. Barsi by Don Goulet, who was the contractor dealing with Mr. Harms around the time Barsi was involved with the Seal Lake Lease.

[92] It is not clear from JHD's application as to whether JHD is seeking to have the Counterclaim struck under *Rule* 3.68 because it is deficient (the application later refers to *Rules* 13.6(3) and 13.7 requiring pleadings to include any statement and particulars of misrepresentation) or whether JHD is seeking summary dismissal of the Counterclaim under *Rule* 7.3. JHD's written submissions seem to focus on the credibility of Barsi's allegations, and JHD's oral submissions did not clarify the issue except by pointing out that Barsi's Affidavit evidence explaining the basis for the allegations was based upon information and belief and not personal knowledge and should not be given any weight.

[93] To the extent that JHD seeks to strike the Counterclaim under *Rule* 3.68 because it is deficient in failing to include any statement and particulars of misrepresentation, I note that the authority to strike pleadings granted pursuant to *Rule* 3.68 may be employed when "circumstances warrant and a condition under subrule (2) applies".

[94] I am of the view that the circumstances here do not warrant striking the Counterclaim as being deficient because, to the extent that the Counterclaim may not comply with *Rules* 13.6 or 13.7, the remedy for such deficiency at this stage is an amendment, not dismissal: ***Huff v Zuk***, 2019 ABQB 691 at para 118. I therefore decline to strike the Counterclaim on that basis.

[95] To the extent that JHD's application is to have the Counterclaim summarily dismissed under *Rule* 7.3, I also decline to grant that relief. As noted, the deficiencies in JHD's application and the other materials submitted on behalf of JHD do not identify with precision the exact basis for its application, making it exceptionally difficult for Barsi to respond to the application and to adjudicate. In my view, the proper approach here would be for Barsi to take whatever steps it deems necessary to amend its Counterclaim to comply with *Rule*s 13.6 and 13.7. JHD may then consider whether it wishes to bring an application for summary dismissal of the amended counterclaim, on an application which sufficiently articulates the grounds for that application.

[96] Therefore, JHD's application for striking or for summary dismissal of the Counterclaim fails.

VI. Conclusions

[97] JHD has not established any basis for summary judgment in its favour. It has not established a basis for the striking or summary dismissal of the Counterclaim. Its application is hereby dismissed.

[98] Barsi shall have its costs of the application. If the parties cannot agree on the amount of costs to be paid, they may make submissions to me in writing, no longer than 3 pages, within 30 days from the date of this decision.

[99] The parties are also further directed to schedule the next case management meeting before me forthwith with a view to discussing and making the necessary amendments to the existing Procedural Order.

Heard on the 7th day of April, 2025.
Dated at the City of Edmonton, Alberta this 9th day of May, 2025.

L.K. Harris
J.C.K.B.A.

Appearances:

John Harms
JH Drilling Inc
for the Plaintiff

Benito Guido
Odishaw & Guido
for the Defendants