
Court of Appeal for Saskatchewan

Citation: *JV&M Civil Constructors Inc. v Farnham, 2025 SKCA 72*

Docket: CACV4237

Date: 2025-08-06

Between:

JV&M Civil Constructors Inc.

*Appellant
(Defendant (Plaintiff by Counterclaim,
Defendant by Cross-Claim))*

And

Brian Farnham

*Respondent
(Defendant by Counterclaim)*

And

Black & McDonald Limited

*Respondent
(Plaintiff (Defendant by Counterclaim))*

And

Ministikwan Lake Cree Nation

*Respondent
(Defendant (Plaintiff by Counterclaim,
Plaintiff by Cross-Claim))*

And

Jan Ursel and Louis Ursel

*Respondents
(Defendants (Defendants by Cross-Claim))*

Before: Tholl, Kalmakoff and McCreary JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Meghan R. McCreary
In concurrence: The Honourable Justice Jerome A. Tholl
The Honourable Justice Jeffery D. Kalmakoff

On appeal from: QBG-SA-00222-2022 (Sask KB), Saskatoon
Appeal heard: June 3, 2025

Counsel: Clayton Barry for JV&M Civil Constructors Inc.
Marek Coutu for Brian Farnham and Black & McDonald Limited
No one appearing for Ministikwan Lake Cree Nation
No one appearing for Jan Ursel and Louis Ursel

McCreary J.A.

I. INTRODUCTION

[1] The primary question in this appeal is whether a person other than a lien claimant may be sued in respect of a grossly exaggerated lien claim. The answer to that question is no.

[2] The appeal arises from a construction dispute in which Ministikwan Lake Cree Nation [Ministikwan] contracted with JV&M Civil Constructors Inc. [JV&M] to complete work on the Ministikwan Lake Water Treatment Plant and the Mudie Lake Pumpstation. JV&M hired Black & McDonald Limited [B&M] as a subcontractor to perform mechanical and electrical aspects of the project. This arrangement was made through two fixed-price subcontracts.

[3] At some point, a disagreement arose between JV&M and B&M as to the quality and timeliness of the work completed under the subcontracts. JV&M signed Certificates of Substantial Performance but did not pay B&M the full price of the subcontracts. In response, B&M filed a written notice of lien and claim of lien for JV&M's alleged indebtedness, pursuant to *The Builders' Lien Act*, SS 1984-85-86, c B-7.1 [BLA]. Brian Farnham, in his role as a division manager for B&M, caused the claim of lien to be served on JV&M on behalf of B&M, the lien claimant. He also verified the amount of the lien claimed by swearing the necessary affidavit pursuant to s. 50(3) of the *BLA*.

[4] B&M then issued a statement of claim against JV&M, Ministikwan, Jan Ursel, and Louis Ursel, seeking to recover against them for breach of contract and unjust enrichment, as well as breach of trust. In response, JV&M defended the claim by alleging, broadly speaking, that B&M was indebted to JV&M. It also counterclaimed against B&M and Mr. Farnham, alleging, among other things, that each of them was in breach of the *BLA* because they knew, or ought to have known, that the lien was grossly exaggerated, and they had failed to take into account an alleged set-off when calculating the indebtedness that triggered the lien. JV&M took the position that it is entitled to recover against Mr. Farnham in his personal capacity, in addition to recovering against B&M. JV&M also claimed solicitor-client costs against Mr. Farnham.

[5] Mr. Farnham and B&M applied to have the claim against Mr. Farnham struck out, on the basis that it disclosed no reasonable cause of action against Mr. Farnham and amounted to an abuse of process. In a decision of June 27, 2023, a judge of the Court of King's Bench for Saskatchewan, sitting in Chambers [Chambers judge] struck out the portions of JV&M's counterclaim that sought relief against Mr. Farnham. She found that it disclosed no reasonable cause of action as against Mr. Farnham and was an abuse of process (*B&M v JV&M, Ministikwan, Ursel, and Farnham* (27 June 2023) Saskatoon, QBG-SA-00222-2022 (Sask KB) [*Decision*]). It is from this result that JV&M appeals.

[6] For the reasons that follow, I would dismiss the appeal. The Chambers judge was correct in determining that the counterclaim discloses no reasonable cause of action against Mr. Farnham.

II. THE CHAMBERS DECISION

[7] As I noted, B&M and Mr. Farnham applied to strike JV&M's counterclaim insofar as it sought relief against Mr. Farnham personally. Pursuant to Rule 7-9(2)(a) of *The King's Bench Rules* [*Rules*], the Chambers judge struck the paragraphs pertaining to Mr. Farnham because it disclosed no reasonable claim against him. In addition, she held that the counterclaim against Mr. Farnham could otherwise be struck pursuant to Rule 7-9(2)(e) as an abuse of process.

[8] Rule 7-9 of the *Rules* governs applications to strike out or amend pleadings and provides as follows:

7-9(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:

- (a) that all or any part of a pleading or other document be struck out;
- (b) that a pleading or other document be amended or set aside;
- (c) that a judgment or an order be entered;
- (d) that the proceeding be stayed or dismissed.

(2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:

- (a) discloses no reasonable claim or defence, as the case may be;
- (b) is scandalous, frivolous or vexatious;
- (c) is immaterial, redundant or unnecessarily lengthy;
- (d) may prejudice or delay the fair trial or hearing of the proceeding; or

(e) is otherwise an abuse of process of the Court.

(3) No evidence is admissible on an application pursuant to clause (2)(a).

[9] In her analysis of whether the counterclaim against Mr. Farnham should be struck, the Chambers judge acknowledged that the test for considering whether a reasonable cause of action has been established in a pleading pursuant to Rule 7-9(2)(a) was set out in this Court's decision in *Reisinger v J.C. Akin Architect Ltd.*, 2017 SKCA 11 at para 19, 411 DLR (4th) 687 [*Reisinger*]. Applying Rule 7-9(2)(a), a claim should only be struck where, viewing the claim in its best possible light (i.e., presuming everything claimed to be true), it is plain and obvious that there is no reasonable chance of success.

[10] JV&M relied on s. 53 of the *BLA* as the foundation of its claim against Mr. Farnham. It alleged that Mr. Farnham knew, or ought to have known, that the claim of lien was without foundation or was grossly exaggerated, particularly in light of what JV&M alleged was its contractual right to set-off. It therefore contended that Mr. Farnham was liable for causing a grossly exaggerated claim to be served on it.

[11] Section 53 of the *BLA* provides that a person who registers a claim of lien or who gives written notice of a lien that is grossly exaggerated may be liable to any person who suffers loss as a result. The section reads:

53 In addition to any other ground on which he may be liable, any person who registers a claim of lien or who gives written notice of a lien:

(a) for an amount which he knows or ought to know is grossly in excess of the amount which he is owed; or

(b) where he knows or ought to know that he does not have a lien;

is liable to any person who suffers loss or damage as a result.

[12] The Chambers judge interpreted the language of s. 53 of the *BLA* by considering that the provision refers to potential liability for any “person who registers a claim of lien or who gives written notice of a lien”. She noted that “person” can mean an individual or a corporation and/or the heirs, executors, administrators or other legal representatives of that individual or corporation, pursuant to s. 27(1) of *The Interpretation Act*, 1995, SS 1995, c I-11.2 (now s. 2-29 of *The Legislation Act*, SS 2019, c L-10.2). She then considered the purpose of the *BLA*, and specifically s. 53, concluding that s. 53 was intended to penalize a lien claimant who registers an exaggerated claim—not of an individual who registers the claim of lien on behalf of the lien claimant. The

Chambers judge relied on *MHA Contracting Inc. v Christie Mechanical Contractors Ltd.* (2005), 42 CLR (3d) 185 (WL) (Ont Sup Ct J) [*Christie Mechanical*], in which the Ontario Superior Court of Justice concluded that the term “person” in equivalent legislation to s. 53 of the *BLA*, this being s. 35 of the *Construction Lien Act*, RSO 1990, c C.30 [since renamed the *Construction Act*, RSO 1990, c C.30]) was not intended to “extend so far as to fix an individual with personal liability for an excessive lien he has caused to be filed by a corporation” (*Christie Mechanical* at para 36). Thus, the Chambers judge concluded that because B&M was the lien claimant, any claim for a grossly exaggerated lien could only be against B&M, not against Mr. Farnham in his personal capacity. For that reason, she found it to be plain and obvious that such a claim against Mr. Farnham would fail, and there was no reasonable cause of action against Mr. Farnham.

[13] The Chambers judge also considered whether the claim against Mr. Farnham was an abuse of process pursuant to Rule 7-9(2)(e). Relying, among other things, on *Walker v Mitchell*, 2020 SKCA 127 at para 24, [2021] 4 WWR 555, she noted that the doctrine of abuse of process is highly flexible. She concluded that because liability could not attach to Mr. Farnham personally, the claim against him was an abuse of process.

[14] In the result, the Chambers judge dismissed the impugned paragraphs of JV&M’s counterclaim, excising Mr. Farnham from the litigation entirely, and ordered costs payable by JV&M of \$5,000.

III. ISSUES AND STANDARD OF REVIEW

[15] The issues in this appeal are:

- (a) Did the Chambers judge err in law by striking the counterclaim as against Mr. Farnham on the basis that it disclosed no reasonable cause of action pursuant to Rule 7-9(2)(a) and was an abuse of process pursuant to Rule 7-9(2)(e)?
- (b) Did the Chambers judge err in law by failing to consider JV&M’s application to amend the counterclaim, including failing to consider whether JV&M had a cause of action against Mr. Farnham in negligence and for solicitor-client costs pursuant to s. 97 of the *BLA*?

[16] Whether the Chambers judge erred by striking the counterclaim on the ground that it disclosed no reasonable cause of action is a question of law, reviewable on a correctness standard: *Sawatzky v Prince Albert Golf and Curling Club Inc.*, 2025 SKCA 16 at para 23; *Merchant Law Group LLP v Slusar*, 2022 SKCA 75 at para 24; *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 at para 21 [*Harpold*]; *Filson v Canada (Attorney General)*, 2015 SKCA 80 at para 22, 388 DLR (4th) 66; and *Aecon Mining Construction Services v K+S Potash Canada GP*, 2024 SKCA 48 at para 16.

[17] Similarly, insofar as the Chambers judge engaged in statutory interpretation in her application of the *BLA*, any determination that she made is a question of law reviewable on a correctness standard: see *Regina Bypass Design Builders v Supreme Steel LP*, 2021 SKCA 82 at para 22 [*Regina Bypass*].

[18] Finally, the question of whether the Chambers judge erred in her decision to refuse to allow JV&M to amend its counterclaim is also reviewable on a correctness standard, as the live question in this case was whether or not it was plain and obvious that the proposed amendments constitute no reasonable cause of action against Mr. Farnham (*Boart Longyear Inc. v Mudjatik Enterprises Inc.*, 2016 SKCA 22 at paras 23–26, [2016] 5 WWR 40; see also *Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16 at para 21, 478 DLR (4th) 170). In that vein, the legal test is the same regardless of whether the Chambers judge refused to allow the amendments or allowed the amendments and then struck them.

IV. ANALYSIS

A. Reasonable cause of action

[19] JV&M argues the Chambers judge erred in her interpretation of s. 53 of the *BLA* and therefore erred in striking the claim against Mr. Farnham for disclosing no reasonable cause of action. It contends that, correctly interpreted, s. 53 of the *BLA* provides that any individual who causes a grossly exaggerated lien claim to be filed, or notice of that lien to be given, may be held liable for doing so, regardless of whether the individual is the lien claimant.

[20] I am not persuaded by this argument. Whether a person other than a lien claimant may be sued in respect of a grossly exaggerated lien claim is an issue of statutory interpretation. Employing the modern approach to statutory interpretation, s. 53 of the *BLA* intends that only the lien claimant be liable for a grossly exaggerated lien claim.

[21] The modern approach to statutory interpretation adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, instructs 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”, quoting Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983). These principles of statutory interpretation have been codified in s. 2-10(1) of *The Legislation Act* and s. 2-10(2) of that Act requires that every enactment be interpreted in a remedial way and given a “fair, large and liberal interpretation” that best attains the objects of the legislation. See also *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para 37, [2006] 1 SCR 140, and *Regina Bypass* at paras 23–28, which set out the modern approach to be taken to issues of statutory interpretation.

[22] Section 53 of the *BLA* provides that liability for damages may attach to a person who registers a claim of lien, or gives written notice of a lien, the amount of which is knowingly exaggerated. For ease of reference, s. 53 (again) states:

53 In addition to any other ground on which he may be liable, any person who registers a claim of lien or who gives written notice of a lien:

(a) for an amount which he knows or ought to know is grossly in excess of the amount which he is owed; or

(b) where he knows or ought to know that he does not have a lien;

is liable to any person who suffers loss or damage as a result.

[23] A modern reading of this provision reveals that the liability contemplated under s. 53 attaches only to a lien claimant. The section refers to “any person who registers a claim of lien or who gives written notice of a lien”. It then uses the singular pronoun *he* to signify that person, making reference to each of “he [who] may be liable”, “he [who] knows or ought to know [the amount claimed] is grossly in excess” and “he [who] is owed” an amount. The use of gender-specific words refers to any gender and includes corporations: *The Legislation Act*, s. 2-23. Thus,

in this section, all these persons are the one and the same: *he* who may be liable is the same person as *he* who is owed an amount pursuant to a claim of lien – namely, *he* who is the lien claimant.

[24] This interpretation makes sense because it is presumed that the legislature uses language in a careful and consistent manner. The same words and phrases have the same meaning within a statute. Conversely, different words and phrases have different meanings. Unless the context clearly indicates otherwise, words and phrases used more than once in a statute must be assigned the same meaning: for each of these propositions, see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at §3.01. The *he* in s. 53 must therefore consistently refer to the same person – the lien claimant – since the context does not clearly indicate a contrary intention.

[25] It follows that, in s. 53, the Legislature intended that “any person who registers a claim of lien” is the same person as “*he* [who] knows or ought to know [the lien claimed] is grossly in excess of the amount which *he* is owed” (emphasis added). That person – *he* who says he is owed an amount – is the lien claimant, and no one else.

[26] This interpretation is consistent with the objects and purpose of the *BLA*. The Act’s primary purpose is to provide financial protection for those who provide services and materials on credit, with the secondary purpose being the protection of the owner/financier of the improvement. The overall focus is on ensuring that people are paid for the work and material they contribute to improvements of real property. As noted by this Court in *PCL Construction Management Inc. v Saskatoon (City)*, 2020 SKCA 12 at paras 45–47, 444 DLR (4th) 433 [*PCL*], the Court has had many occasions to consider the objects and purposes of the *BLA*, and to apply the modern approach to statutory interpretation in the builders’ lien context. In *PCL*, Schwann J.A. followed this Court’s application of the modern approach to the *BLA* and its findings regarding the *BLA*’s objects and purposes, stating:

[46] In *Axcess Capital Partners Inc. v Allsteel Builders (2) Ltd.*, 2015 SKCA 33, 383 DLR (4th) 334 [*Axcess Capital*], Jackson J.A. commented on and applied the modern principle in a builders’ lien context:

[56] There are three dimensions of the Modern Principle: (i) textual meaning; (ii) legislative intent, which encompasses the scheme and object of the statute and Parliament’s intention; and (iii) “compliance with established legislative norms”, which are part of the whole context in which the statute’s words are to be read and part of the legislature’s

intention (*Sullivan*, p. 8 at para. 2.5). For example, rules regarding textual analysis assist in the determination of the meaning of the text, the rules regarding extrinsic aids help interpreters identify what they may look at for determining legislative intent, and strict and liberal construction and presumptions of legislative intent contribute to determining the purpose of the statute and to evaluating whether an outcome is acceptable (*Sullivan* p. 10 at para. 2.8).

[47] Speaking specifically to construction lien legislation, this Court in *Access Capital* discussed the factors that help orient an understanding of this type of legislation:

[57] Two factors dictate the Legislature’s approach to construction lien legislation. The first factor is that, unlike any other commercial endeavour, the work, services and materials supplied to an improvement are provided on credit. The second factor is that the ordinary law of contract does not provide sufficient remedies to ensure that (i) funds flow from the top of the construction pyramid; and (ii) work, services and materials flow from the bottom. The statute supplements the law of contract and fosters the provision of credit in a complex piece of legislation designed to assist and facilitate construction.

[58] With respect to purpose, the statute has two concerns: (i) the protection of those who provide services and materials on credit, and (ii) the protection of the commercial interests of others, including the owner and the financier of the improvement. This Court has, however, consistently emphasized that “the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so” (see *Hansen v Canadian National Railway Co.* (1983), 1983 CanLII 2071 (SK CA), 22 Sask R 126 at para 30).

See also *Town-N-Country Plumbing & Heating (1985) Ltd. v Schmidt* (1991), 93 Sask R 278 at para 27 [*Town-N-Country*]; *BWV Investments Ltd v Saskferco Products Inc.* (1994), 125 Sask R 286 at para 31; *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v Alliance Pipeline Ltd.*, 2002 SKCA 145 at para 14, [2003] 4 WWR 29; *Agrium* at paras 26–28; *Grey Owl Engineering Ltd. v Propak Systems Ltd.*, 2015 SKCA 108 at paras 26–32, 392 DLR (4th) 64 [*Grey Owl*]; and *Mainline Industrial* at paras 30–32.

[27] Thus, the *BLA* was enacted to grant protection (mainly, but not solely, through collections mechanisms) to those who provide their services and materials on credit, while also safeguarding the commercial interests of the owner and the financier of the improvement. It is difficult to see how conferring personal liability on an agent who stands to gain nothing through a claim of lien engages with this purpose. Corporations require agents to act for them. When an agent files a claim of lien on a corporation’s behalf, it is the corporation, and not the agent, that becomes the lien claimant. The corporation, as the lien claimant, enjoys the benefits of the claim of lien and not its agents. On *JV&M*’s interpretation, the agent would bear all possible liability personally, while sharing in none of the benefits, while the principal would receive all potential benefits but bear no

potential liability. Such an interpretation discourages agents from filing claims of lien, effectively preventing corporate entities from availing themselves of the *BLA*'s protections. This cannot be what the Legislature intended when it enacted s. 53 of the *BLA*.

[28] In this case, B&M used the mechanisms of the *BLA* to attempt to collect what it alleges it is owed by JV&M. While Mr. Farnham swore the affidavit which verified the lien claim, he is merely an agent of B&M. He is not a party to the contract between B&M and JV&M, from which this dispute arises, nor is he the party who alleges he is owed an amount from JV&M. He stands to gain nothing from the claim of lien.

[29] Nevertheless, JV&M asserts that because Mr. Farnham is the individual who verified B&M's lien claim, he should be personally liable if the amount of the lien claimed is proven to be grossly exaggerated. JV&M argues that the terms "registered", "registering" and "registration" in s. 2(1)(o) of *BLA*, which speak to the act of registering or giving notice of a claim of lien, indicate that s. 53 should be interpreted so broadly as to capture the specific individual who causes the claim of lien to be registered or who causes notice of the lien claim to be given.

[30] JV&M also points to s. 22 of the *BLA*, which expressly limits the value of a lien that may be claimed to the "price of the services or materials as remains owing to *him*" (emphasis added), *him* being a "person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor", or in other words, a potential lien claimant. JV&M argues that because the *BLA* requires that the lien be limited in value to the actual amount owing between the parties under the applicable contract, this requires an assessment of any set-off claims between the parties prior to finalizing a claim of lien. It further contends that the affiant agent who verifies a lien claim is statutorily required to make some assessment of the value of the claim, taking into consideration the set-off claims. JV&M concludes that this requirement – to verify the accuracy of the lien claim, taking into account any set-off – is why an individual who is not the lien claimant, but who verifies the lien, can be held liable pursuant to s. 53.

[31] Respectfully, these arguments are not consistent with a modern reading of the *BLA*, nor with the objects and purpose of the legislation. Again, the legislation exists to provide protections and relief vis-à-vis the contractual relationship between subcontractors/contractors and owners and financiers, not the non-party employees or agents who act for them. Further, s. 22 provides that

the only person who can have a claim of lien is one who provides services or materials on credit and, thereafter, is not paid the amount that was advanced and is owed. In this litigation, that person is B&M. Whether anything remains owing to B&M is exactly what is being litigated in the underlying action, and the Chambers judge was alive to this. The amount owing, if any, is between JV&M and B&M, not between JV&M and Mr. Farnham. By excising Mr. Farnham from this litigation, the Court is not precluding JV&M from defending the lawsuit against it, nor is the Court preventing JV&M from bringing its counterclaim against B&M. Even if it is true that the claim of lien was exaggerated, the liability for that will attach to B&M—not to Mr. Farnham.

[32] In that regard, I agree with the Chambers judge when she said:

[10] Section 53 is intended to penalize those who register an exaggerated lien claim, not the specific individual who registers on behalf of the corporation. Based on the pleadings, there is no reasonable cause of action against a person in their individual capacity, pursuant to s. 53 of the *BLA* when it is the corporate entity that registered the claim of lien and the corporate entity that is the legal party to the contract.

[33] This interpretation accords with the objects and purposes of the *BLA*: the *BLA* affords protection to persons who supply labour and materials on credit and prevents the owner or contractor from obtaining the benefit of such labour and capital without compensation: *PCL* at para 132. The lien claimant stands to gain financially from the registration of the lien and therefore bears the attendant risk of a claim for damages under s. 53 of the *BLA*. It follows that a non-party who can acquire no benefit from the processes proscribed by the *BLA* should not be included in litigation derived from it.

[34] As such, the Chambers judge's conclusion that JV&M has no cause of action against Mr. Farnham pursuant to s. 53 is correct and, accordingly, this ground of appeal must fail.

B. Abuse of process

[35] Because I have concluded that the entirety of the counterclaim against Mr. Farnham was correctly struck for failing to disclose a reasonable cause of action, it is unnecessary for me to determine if the counterclaim was also an abuse of process and I decline to do so.

C. Application to amend the counterclaim

[36] JV&M also argues that the Chambers judge failed to properly consider its proposed amendments to the counterclaim, which provided that JV&M claimed against Mr. Farnham for negligence and also for solicitor-client costs pursuant to s. 97 of the *BLA*. It contends that its claim in negligence and for costs disclosed a reasonable cause of action and, therefore, the Chambers judge erred by striking the counterclaim without allowing the amendments.

[37] The Chambers judge acknowledged that the counterclaim included claims against Mr. Farnham in negligence and for solicitor-client costs (which claims were only introduced in the amended counterclaim). However, she did not address directly JV&M's application to amend its counterclaim, or the legitimacy of its proposed amendments vis-à-vis its claim against Mr. Farnham. In my view, if this was an error, it is of no legal consequence because JV&M has no cause of action against Mr. Farnham in negligence, nor does it have a stand-alone claim against him for solicitor-client costs.

1. Negligence

[38] JV&M contends that it has a claim in negligence against Mr. Farnham arising from a statutory duty of care Mr. Farnham owed to it pursuant to the *BLA* arising from Mr. Farnham's participation in the preparation, filing, registration and provision of an affidavit verifying a claim of lien. It argues that its claim in negligence is properly founded because the *BLA* establishes and defines a requisite standard of care for a lien claimant's agent by setting out specific responsibilities and obligations of the agent in ss. 22, 28, 50(3) and 83, including a duty to inform oneself of the actual value of the lien.

[39] Respectfully, I do not accept that the *BLA* creates a duty of care for an agent of a lien claimant, which is then owed to a contractor or owner against whom the lien is claimed. As I have already discussed, under s. 53, no liability attaches to an agent as a result of a grossly exaggerated lien claim. Further, no other provision of the *BLA* delineates a duty of care to be owed by an agent of a lien claimant.

[40] The *BLA* is a comprehensive statute. If the Legislature intended to recognize that an agent of a lien claimant owed a duty of care to the contractor or owner against whom a lien is claimed,

it would have done so explicitly. None of ss. 22, 28, 50(3) or 83 speak directly to any obligation giving rise to a tortious duty of care on the part of an agent. I do not accept that these provisions establish that there is any sort of close and direct relationship sufficient to impose a duty of care upon the agent of the lien claimant in respect of the contractor or owner against whom the lien is claimed. Further, the fact that there is no contract between the agent for the lien claimant and the contractor or owner demonstrates a clear lack of proximity between the parties in the context of a statute that provides protections for those who enter into contractual relationships for goods and services on credit. While s. 50(3) requires that the affiant who verifies a lien claim must inform himself of the facts set out in the claim, and must state that he believes them to be true – this is a far cry from creating a *legal obligation* to adhere to a standard of care that protects the contractor or owner against whom a lien may be claimed from foreseeable risks of loss or damage. Indeed, the only section of the *BLA* which creates liability in respect of a wrongful lien claim is s. 53 – and I have already determined that this provision does not apply to the agent of a lien claimant.

[41] It follows that JV&M can have no reasonable claim in negligence arising from a statutory duty under the *BLA* on the part of Mr. Farnham.

2. Costs as a cause of action

[42] JV&M also argues that Mr. Farnham is liable to it for costs under the *BLA*. JV&M argues further that its claim for solicitor-client costs is a reasonable cause of action, such that the counterclaim against Mr. Farnham cannot be struck. I disagree.

[43] The Legislature did turn its mind to what liability an agent who participates in the registration of a builders' lien can face in s. 97(1) of the *BLA*. Section 97(1) restricts the potential liability of an agent to legal costs. It states:

97(1) Subject to subsection (2), an order as to costs may be made against:

- (a) any party to the action or application;
- (b) the solicitor or agent of any party to the action or application, where the solicitor or agent has:
 - (i) knowingly participated in the registration of a claim of lien, or represented a party in the commencement of or the trial of an action, where it is clear that the claim of lien is without foundation or is for a grossly excessive amount; or
 - (ii) by his conduct prejudiced or delayed the conduct of the action;

and any order as to costs may be made on a solicitor and client basis.

[44] Pursuant to s. 97(1), a court has the authority to make an order for costs against a party to the litigation, *or against an agent of a party*. This wording expressly authorizes the court to order costs against a non-party. It is therefore unnecessary to name an agent as a party in order to be able to secure costs against them.

[45] However, potential liability for costs is not equivalent to potential liability for damages. A claim for costs is not a cause of action. The term “cause of action” was defined by Diplock L.J. in *Letang v Cooper* (1964), [1965] 1 QB 232 (CA) at 242–243 (a definition adopted by the Ontario Court of Appeal in *Consumers Glass Co. v Foundation Co. of Canada* (1985), 20 DLR (4th) 126 (Ont CA) at 131), as “a factual situation the existence of which entitles one person to obtain from the court a remedy against another”. *Black’s Law Dictionary* defines “cause of action” as a “group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”: Bryan A. Garner, ed, *Black’s Law Dictionary*, 12th ed (Thomson Reuters, 2024) “cause of action”. The matter of costs does not fall within that definition. As Ross J. noted in *Coulter v Ball*, 2003 BCSC 1629 at para 24, a statement with which I agree, “[costs] is an incident of the litigation process but not a cause of action” (upheld on this point in *Coulter (Guardian ad litem) v Leduc*, 2005 BCCA 199 at para 93, [2005] 9 WWR 14 (leave to appeal to SCC refused, 2006 CanLII 1102)).

[46] It follows that JV&M is not entitled to pursue its counterclaim against Mr. Farnham on the sole basis that he may be liable for a cost award at the conclusion of the action.

[47] There are other contexts in which costs may be awarded against persons who are not parties to an action. For instance, under Rule 13-30 of the *Rules*, costs may be awarded against a lawyer, personally, for drafting and filing an affidavit that sets forth unnecessary hearsay or argumentative matters. While lawyers have been ordered to pay costs personally under this Rule (see, for example, *S.S. v S.H.S.*, 2000 SKQB 108, 192 Sask R 56 [*S.H.S.*]), the lawyer is not added as a defendant to an action when costs are claimed against them. As an example, the solicitor for the petitioner in *S.H.S.*, was ordered to personally pay costs to the respondent but was not a party to the action. As a further example, in *Christie Mechanical*, the plaintiff’s principal, who was not a

party to the action, was ordered to pay costs under Ontario’s equivalent of s. 97 of the *BLA* for filing an improper builders’ lien.

[48] Thus, while JV&M may be entitled to seek costs against Mr. Farnham as an agent of B&M at the conclusion of the action, it has no stand-alone claim against Mr. Farnham for costs and its counterclaim against him cannot stand on the basis of a claim for costs alone.

[49] In the result, the Chambers judge made no error of legal consequence by not expressly considering JV&M’s proposed amendments to its counterclaim against Mr. Farnham because those proposed amendments did not disclose any reasonable cause of action against him.

V. CONCLUSION

[50] In conclusion, I would dismiss the appeal. B&M requested elevated costs. On the record, I am not satisfied elevated costs are justified. Therefore, I would instead order one set of costs for this appeal, and one set of costs for the application to perfect the appeal, to B&M and Mr. Farnham, in the usual manner.

“McCreary J.A.”

McCreary J.A.

I concur.

“Tholl J.A.”

Tholl J.A.

I concur.

“Kalmakoff J.A.”

Kalmakoff J.A.