

Court of King's Bench of Alberta

**Citation: Opabin Sand and Gravel Inc. v. Tsuu T'ina Contracting Limited Partnership,
2025 ABKB 623**

Date: 20251029
Docket: 2403-04577
Registry: Edmonton

2025 ABKB 623 (CanLII)

Between:

Opabin Sand and Gravel Inc,

Plaintiff

- and -

**Tsuu T'ina Contracting Limited Partnership, Tsuu T'ina Contracting GP Inc., ABC Corp,
ABC LP,
Sarcee Gravel Products Limited Partnership, Sarcee Gravel Products Ltd., SGPLP
Management Ltd., Def Corp., Def LP,
Vinci Geoinfrastructure Canada Limited, His Majesty the King in Right of Alberta**

Defendants

**Reasons for Decision
of the
Honourable Justice S.N. Mandziuk**

Introduction

[1] This is an appeal of a November 20, 2024 Applications Judge decision (**Decision**) which, on the Respondent's application, struck the Appellant's Counterclaim under Rule 3.68(2)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010 (**Rules of Court**) for disclosing no cause of action.

Parties to the Appeal

[2] The parties participating in the appeal are:

Vinci Geoinfrastructure Canada Limited, Appellant/Defendant and Plaintiff by Counterclaim.

Opabin Sand and Gravel Inc., Sarcee Gravel Products Limited Partnership, Sarcee Gravel Products Ltd., Tsuu T'ina Contracting Limited Partnership and Tsuu T'ina Contracting GP Inc., Respondents/Plaintiffs and Defendants by Counterclaim

[3] The parties who are not participating in the appeal are:

ABC Corp, ABC LP, SGPLP Management Ltd., Def Corp, Def LP and His Majesty the King in Right of Alberta.

Facts & Procedural History

Facts

[4] The Springbank Off-Stream Reservoir (the **SR1 Project**) is an initiative undertaken by the Government of Alberta to protect the City of Calgary and surrounding areas from flooding and to reduce its potential effects on this urban area.

[5] The SR1 Project is a "public work" under s 1(g) of the *Public Works Act*, RSA 2000, c P-46 (**PWA**).

[6] The Appellant, Vinci Geoinfrastructure Canada Limited (**Vinci**) was retained by His Majesty the King in Right of Alberta (**Crown**) as the general contractor for the construction work on the SR1 Project. Vinci was required to work with subcontractors pre-selected by the Crown, including Sarcee Sand and Gravel Products Limited Partnership (**Sarcee**).

[7] In the summer of 2022, Sarcee had difficulty meeting its aggregate supply obligations for the SR1 Project.

[8] Vinci instructed Sarcee to implement a recovery plan to address aggregate delivery delays.

[9] Sarcee retained the Respondent, Opabin Sand and Gravel Inc (**Opabin**), as a sub-subcontractor to assist Sarcee in fulfilling its supply obligations. Opabin delivered materials to Sarcee under a series of purchase orders issued by Sarcee between August 9, 2022 and September 8, 2022.

[10] Opabin was paid in full for those deliveries. Sarcee did not issue any further purchase orders to Opabin.

[11] On July 28, 2023, Opabin submitted a notice of claim under s 14 of the *PWA* seeking \$9,059,579.58 for “costs related to material processing, site setup, mobilization, permitting, agreements, royalties, labour, equipment, financing, management and damages that are extra and are currently unrecoverable” (the **PWA Claim**). The Crown then withheld progress payments from Vinci in an amount equal to the PWA Claim.

[12] Vinci, at the Crown’s request, investigated the PWA Claim and advised Opabin that: (1) they were not a recognized claimant under the *PWA*; (2) the PWA Claim was submitted late; and (3) the PWA Claim sought damages not permitted under the statute.

Procedural History

[13] On March 6, 2024, Opabin filed a Statement of Claim against Vinci and others, alleging that, *inter alia*, it had relied on representations that further work would be assigned and, as a result, incurred damages of \$9,059,579.58 (the **Civil Claim**). The Civil Claim states that Opabin also filed a claim for these damages under the *PWA*.

[14] On September 24, 2024, Vinci filed its Statement of Defence and Counterclaim, denying liability and asserting, among other things, it had no contractual relationship with Opabin, and Opabin’s conduct constituted an abuse of process and conversion.

[15] On October 10, 2024, Opabin applied to strike the Counterclaim pursuant to Rule 3.68(2)(b) for disclosing no reasonable cause of action.

[16] Vinci filed an Amended Counterclaim on October 25, 2024. The impugned provisions of the Amended Counterclaim allege that:

- (a) the PWA Claim and Civil Claim constitute an “abuse of process,” brought “for the improper purpose of using the economic pressures caused by withheld progress payments that result from the Opabin PWA Claim to improperly pressure Sarcee to acquiesce to Opabin’s claims for compensation or, alternatively, to obtain further supply agreements, for the SR1 Project or otherwise”;
- (b) Opabin “abused the procedures [...] under the [*PWA*], with the collateral purpose of illegitimately creating economic pressure on Vinci and Sarcee [...] by creating economic hardship for Vinci, in the form of the withheld progress payments, [i]nvestigation [c]osts and [f]inancing [c]osts;”
- (c) Opabin “commenced this unreasonable and vexatious Claim for the sole purpose of increasing pressure on Sarcee and/or Vinci for collateral or ulterior purpose” and “[b]y maintaining the Opabin PWA Claim after having commenced this Action, Opabin has demonstrated its willingness to abuse this Honourable Court’s time and resources to further its improper goals, including by unnecessarily multiplying proceedings”;
- (d) the PWA Claim “constitutes conversion” as it “interfere[d] with Vinci’s right to receive [p]rogress [p]ayments from the [Crown]” to which Vinci is “legally entitled.” As a result of “Opabin’s deliberate action” Vinci has been “deprived of the [p]rogress [p]ayments, and has had to occur significant [f]inancing [c]osts;” and
- (e) Vinci incurred damages for the cost of financing (\$400,000) and for the costs of investigating the PWA Claim (\$200,000). These damages “are caused directly by Opabin’s frivolous and vexatious claim under the [*PWA*].”

[17] Opabin’s application to strike the Amended Counterclaim was heard on October 29, 2024, in Morning Chambers. Opabin argued that neither abuse of process nor conversion are reasonable claims and consequently must be struck (*Decision*, para 8).

[18] On November 6, 2024, Opabin filed a Statement of Defence to the Amended Counterclaim.

[19] The Applications Judge released his written Decision on November 20, 2024, striking the Amended Counterclaim. This is summarized below.

[20] On March 3, 2025, Opabin filed an amended Civil Claim, decreasing its damages claim to \$4,924,690.62.

[21] On March 21, 2025, Vinci filed an Amended Statement of Defence.

The Decision

[22] In the Decision, the Applications Judge considered the elements of the tort of abuse of process set out in *3058354 Nova Scotia Co v On*Site Equipment Ltd*, 2011 ABCA 168 at para 57 [*3058354 Nova Scotia Co*], *Harris v Glaxosmithkline Inc*, 2010 ONCA 872 at para 27 [*Harris*], leave to appeal to SCC refused, 2011 CanLII 43420, and *Abt Estate v Cold Lake Industrial Park GP Ltd*, 2019 ABCA 16 at para 38 [*Abt Estate*].

[23] The Applications Judge held that the first part of the test, which requires the plaintiff to be a party to a legal process initiated by the defendant, was met.

[24] However, the Applications Judge concluded that Vinci failed to meet the second part of the test:

[12] As for part 2 of the test, the Amended CC certainly asserts that Opabin had an indirect, collateral and improper purpose for its actions. Paragraph 22 of the Amended CC states, in part:

22. In particular, as articulated in Vinci’s Statement of Defence, the Claim is meritless as against Vinci. Opabin filed the Opabin PWA Claim and the within Action against Vinci and the [Crown] for the improper purpose of using economic pressures caused by withheld progress payments that result from the Opabin PWA Claim to improperly pressure Sarcee to acquiesce to Opabin’s claims for compensation or, alternatively, to obtain further supply agreements, for the SR1 Project or otherwise....

[13] Although this paragraph of the Amended CC references “the Action”, it is very clear from a reading of the entire pleading that the process undertaken by Opabin that is the basis for the abuse of process claim is Opabin filing the PWA Claim with the Crown. The pleading indicates that it is the filing of that claim by Opabin under the PWA that held up the [p]rogress [p]ayments and resulted in Vinci incurring investigation costs and financing costs.

(*Decision*, paras 12 to 13)

[25] The Applications Judge proceeded to find that the PWA Claim was “not ‘a legal process’ within the meaning of that term as it is used by the Courts in describing the tort of abuse of process” (*Decision*, para 14) and “[o]nce the PWA Claim was filed, it became incumbent on the Crown to deal with the claim. How the Crown decides to deal with a claim filed under the PWA is not a legal process. It is an administrative process” (*Decision*, para 19).

[26] The Applications Judge struck Vinci's abuse of process claim in the Amended Counterclaim under Rule 3.68(2)(b).

[27] The Applications Judge also struck the conversion claim in the Amended Counterclaim, which is grounded on the position that "the PWA Claim was a 'weaponization' to prevent Vinci from receiving its property, being the [p]rogress [p]ayments", concluding that [t]he Crown has not decided that Vinci is entitled to the [p]rogress [p]ayments. It is premature for Vinci to say that the [p]rogress [p]ayments are its property" (*Decision*, paras 22-23).

[28] In other words, if the progress payments are not Vinci's property, they could not be converted by Opabin.

Issues & Positions of the Parties

[29] Vinci filed its Notice of Appeal on January 2, 2025.

[30] Vinci argues the Amended Counterclaim clearly bears some prospect of success and requests the Decision be set aside. Alternatively, Vinci seeks direction from the Court as to what would sufficiently particularize the abuse of process and conversion claims and, flowing from that, an opportunity to amend the Amended Counterclaim based on those directions.

[31] Opabin takes the position the Applications Judge was correct, and this appeal should be dismissed.

Standard of Review

[32] The parties agree the applicable standard of review can be characterized as correctness and no deference is owed to the Applications Judge. This is a hearing *de novo*.

[33] In *Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333 at para 15 [*Lesenko*], Feasby J held:

I agree that where there is no new evidence on appeal it is more accurate to describe the proceeding as a correctness review. Nevertheless, in these Reasons I use the term *de novo* to describe the current approach to appeals of Applications Judge decisions because that is how the Court of Appeal sometimes still refers to them: see *Agrium v Orbis Engineering Field Services*, 2022 ABCA 266, leave to appeal refused [2022] SCCA No 346 at para 30 and *Gouthro v Kubicki*, 2023 ABCA 108 at para 4. In my view, the use of the term *de novo* for convenience instead of correctness review is appropriate given that new evidence may be adduced and new arguments may be made on appeals of Applications Judge decisions. My use of the term *de novo* should not be construed as a failure to appreciate that the correctness standard is often applied: *Singh v Noce*, 2019 ABCA 55 at para 8.

[34] There is no new evidence being advanced given the nature of the matters at bar.

[35] I state parenthetically that I wholeheartedly agree with Justice Feasby's *obiter dicta* in *Lesenko* concerning "the incongruity of the continued use of *de novo* or correctness review for appeals of Applications Judge decisions in the twenty-first century and the inefficiencies that such an approach imposes on the Court" and his "hope that, in due course, this matter will be considered again by the Court of Appeal and the Rules of Court Committee": *Lesenko* at para 84.

Analysis

[36] I will now address the specific issues on appeal.

Rule 3.68

[37] Rule 3.68(2)(b) of the *Rules of Court* permits this Court to strike all or part of a pleading if it is plain and obvious it discloses no reasonable cause of action: ***RK v GSG***, 2024 ABKB 121 at para 12.

[38] To succeed under this Rule, “it must be beyond doubt that the claim will fail”: ***Clark v Hunka***, 2017 ABCA 346 at para 20 [***Hunka***]. The onus on the applicant is “extremely high”: ***Alberta Adolescent Recovery Centre v Canadian Broadcasting Corporation***, 2012 ABQB 48 at para 29 [***Alberta Adolescent***].

[39] A properly pleaded claim requires all essential elements to be pled. It should not be struck simply because the party cannot yet prove those elements: ***Gay v Alberta (Workers’ Compensation Board)***, 2023 ABCA 351 at para 13 [***Gay***]. In ***Alberta Adolescent***, Martin J (as she then was) refused to strike a claim, noting that “complex issues are best left to trial to be decided after full evidence and argument”: paras 2 and 75.

[40] No evidence is permitted on an application to strike brought under Rule 3.68(2)(b): Rule 3.68(3). The Court must make its decision on the face of the pleading alone: ***Shodunke v Alberta***, 2025 ABKB 250 at para 26 [***Shodunke***]. In doing so, the Court must accept the pleaded facts as true unless they are based on assumptions or speculation, are patently ridiculous, or incapable of proof: ***Shodunke*** at para 25.

[41] Pleadings are to be read generously. If a pleading can bear more than one interpretation, the Court should prefer the interpretation that supports the pleading: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para 74 [***PricewaterhouseCoopers***].

[42] If the deficiency lies in a lack of particulars rather than the absence of a cause of action, the proper remedy is to order particulars, not to strike the claim: ***PricewaterhouseCoopers*** at para 74.

Abuse of Process

[43] Abuse of process is a circumscribed tort. Its purpose is to address situations where the legal process is used “to gain an end which the legal process does not entitle the plaintiff to obtain”: ***Hunt Oil Company of Canada, Inc v Galleon Energy Inc***, 2010 ABQB 212 at para 18 [***Hunt***].

[44] The tort of abuse of process has four elements:

- (1) the plaintiff is a party to a legal process initiated by the defendant;
- (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral, and improper purpose;
- (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and
- (4) some measure of special damage has resulted.

3058354 Nova Scotia Co at para 57, citing ***Harris*** at para 27.

[45] Although “legal process” is not precisely defined, it has generally been interpreted to mean a “process of the court”: *Rocky Mountain Rail Society v H & D Hobby Distributing Ltd*, 1995 CanLII 9029 (AB KB) at para 13 [*Rocky Mountain*]. Courts have, on some occasions, extended this term to include regulatory tribunal proceedings: *Hunt* at para 20; see also *Grenon v Canada Revenue Agency*, 2016 ABQB 260 at para 112 [*Grenon*], rev’d on other grounds 2017 ABCA 96, leave to appeal to SCC refused, 2017 CanLII 61800. However, investigations conducted by administrative tribunals are not considered a legal process: *Thmbran v The British Columbia College of Nurses and Midwives (BCCNM)*, 2024 BCSC 441 at para 89.

[46] The terms “indirect, collateral and improper purpose” are not established merely because a party brings a groundless action, even if it has the effect of “antagonizing, impoverishing or intimidating” the opposing party, or encouraging settlement: *Rocky Mountain* at para 20. Unreasonable litigation conduct is addressed through costs, not through the abuse of process tort: *Rowe v Unum Life Insurance Company of America*, 2006 CanLII 15772 (ON SC) at para 257 [*Rowe*].

[47] To qualify as an “improper purpose,” the proceeding must be brought for a purpose “outside the ambit of the litigation” that the party knew or ought to have known was unfounded: *Abt Estate* at paras 38 and 40. For that reason, bringing an abuse of process action before the merits of the underlying action are resolved may be premature: *Abt Estate* at para 38.

[48] The “definite act or threat” must occur outside the legal process in question: *Grenon* at para 118; *Harris* at para 37. In *McKerracher v Neustater*, 2022 BCSC 389 [*McKerracher*], a report made to the Ministry of Forests that led to the issuance of a trespass notice did not constitute an “act or threat” because the decision to issue the trespass notice rested solely with the Ministry: para 195.

[49] The fourth element of the tort requires some measure of “special damages” to have occurred. Some courts have required a direct causal link between those damages and the alleged abuse of process: *Thunder Bay Multi-Trades Inc v Hupe Manufacturing Ltd*, 2021 ONSC 1316 at paras 32 to 34 [*Thunder Bay*]. Alternatively, other courts have observed these damages are often caused by the overt act or threat itself: *Bank of Montreal v Basant Motors Ltd*, 2019 BCSC 748 at para 44 [*Basant Motors*].

Vinci’s Position

[50] Vinci’s submits the Amended Counterclaim pleads all four elements of the abuse of process tort:

- (1) the Civil Claim is the “legal process;”
- (2) it was brought for the purpose of creating inappropriate settlement leverage in order to compel acquiescence to Opabin’s position or to obtain further supply agreements;
- (3) the PWA Claim is the “definite act;” and
- (4) Vinci incurred “special damages” associated with investigating and responding to the PWA Claim as well financing costs connected to the withheld progress payments.

[51] Vinci submits the Applications Judge correctly identified the Civil Claim as the “legal process” under the first element. Vinci argues, however, the Applications Judge erred in his interpretation and application of the second element and then failed to address the third and fourth elements.

[52] Vinci asserts the Applications Judge incorrectly required the “improper purpose” to relate solely or predominately to the “legal process,” and not the “definite act.” Vinci argues the law only requires the legal process be commenced to *further* the improper purpose. Here, Opabin’s improper purpose was to exert illegitimate financial pressure through the PWA Claim, and the Civil Claim served to increase that pressure by seeking enforcement of the PWA Claim.

[53] Vinci relies on *Guilford Industries Ltd v Hankinson Management Services Ltd*, 1973 CanLII 1065 (BC SC) [*Guilford*] and *Goldman, Sachs & Co v Sessions et al*, 2000 BCCA 326 [*Goldman, Sachs*], where the improper purpose arose from a definite act that stood outside the litigation (a lien and a garnishment order, respectively) and the legal action was used to bolster that purpose. Vinci argues the Applications Judge erred in distinguishing these cases on the basis the PWA Claim is an administrative process, not a legal one. Vinci maintains that though the “definite act” need not be a legal process, the PWA Claim is now, in any event, before the Court pursuant to s 15(4) of the *PWA*.

[54] Vinci also argues the Minister’s discretion under s 15 of the *PWA* is limited to specific statutory options, all of which necessarily disrupt the flow of funds from the Crown to the contractor. As this consequence was specifically pled, the Court must, at this stage, accept the allegation that Opabin intended the result.

[55] With respect to the final element, Vinci argues the test does not require special damages to arise solely from the legal process: the damages pled resulted from the financial pressure created by the Civil Claim and the PWA Claim.

Opabin’s Position

[56] Opabin maintains the Applications Judge reached the correct result in striking the abuse of process claim in the Amended Counterclaim but erred in finding the first element of abuse of process was met. Opabin submits the “legal process” alleged to have been abused is the PWA Claim, not the Civil Claim, as all of the relief sought by Vinci is in relation to the PWA Claim.

[57] Opabin argues the abuse of process claim cannot succeed for three reasons.

[58] First, the tort applies only to misuse of court processes, not administrative processes under statutes.

[59] Second, the damages alleged arise solely from Opabin giving notice under s 14 of the *PWA*, which grants no substantive rights beyond the ability to send notice to the Minister. Relying on *Alberta Social Housing Corporation v Dawson Wallace Construction Ltd*, 2025 ABKB 124 at para 33, Opabin argues it is the Minister alone who determines, under s 15, whether to pay the claim, access security, pay funds into court, or take no action at all. Opabin further submits the *PWA* contains no express remedy for the wrongful use of its processes, and that this Court should be reluctant to expand the tort of abuse of process to statutory mechanisms where the legislature has not provided such a remedy.

[60] Third, the damages pled are common incidents of litigation and do not fall within the “special damage” element.

Analysis

[61] The threshold for striking a claim under Rule 3.68(2)(b), as it has been interpreted and applied in Alberta, is “extremely high”: *Alberta Adolescent* at para 29. It must be “beyond doubt”

the claim will fail: **Hunka** at para 20. For the following reasons, that threshold has not been met with respect to the abuse of process claim.

[62] Of course, no substantive comment concerning the viability of this cause of action on the evidence is made. All of the elements have been pleaded with sufficient detail: **Gay** at para 16. In applying Rule 3.68(2)(b), the Court must assume the facts pled are true on their face “without resort to evidence and without considering the merits of the claim except to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof”: **Shodunke** at para 26.

[63] With respect to the first element of abuse of process, Opabin argues the Amended Counterclaim *in essence* pleads that the PWA Claim is the process being abused. The question of whether the Civil Action or the PWA Claim is the legal process for the purposes of the abuse of process test is certainly arguable under the standard of proof applicable here. There is mixed case law on the question of whether the tort applies to administrative proceedings, but that question does not have to be decided on this application: **Hunt; Grenon**. As directed by **PricewaterhouseCoopers**, where a pleading is capable of multiple interpretations, I should adopt the interpretation that supports the pleading: para 74. Vinci’s pleadings allege that the “[Civil] Claim is an abuse of process.” It is clear Vinci, a named Defendant, is a party to the Civil Claim brought by Opabin. Therefore, the first element of the abuse of process tort is present.

[64] The Amended Counterclaim states the Civil Claim was brought “for the improper purpose of using economic pressures caused by withheld progress payments” to obtain acquiescence to Opabin’s “claims for compensation” or obtain “further supply agreements.”

[65] Bringing a claim for the sole purpose of inducing settlement does not *ipso facto* constitute an improper purpose, as settlement is within the ambit of litigation: **Rowe** at para 255. Demands and settlement proposals exchanged with opposing parties are a normal incident of litigation and are not “clearly collateral”: **Pirooz v Levi**, 2022 BCSC 644 at para 32. Further, as noted in **Rocky Mountain**, it is not enough the action be “groundless,” even where the opposing party is subject to “antagonizing, impoverishing or intimidating” effects: para 20.

[66] On its face, the Civil Claim seeks compensation for goods and services allegedly procured in reliance on representations by Vinci and others concerning further work on the SR1 Project. A claim seeking payment for “claims for compensation,” or to obtain “further supply arrangements,” does not *per se* indicate a purpose outside the litigation process: **Oei v Hui**, 2020 BCCA 214 at para 26.

[67] Vinci, however, pleads that the Civil Claim was not commenced in order to resolve a *bona fide* dispute, but instead to increase the economic pressure already initiated through the PWA Claim. Vinci relies on **Goldman Sachs** and **Guilford**, where the courts found an abuse of process arose when legal proceedings were used to amplify improper financial leverage created by the definite act (a lien and a garnishment order, respectively). Framed this way, it is *not* plain and obvious on the face of the pleadings that the Civil Claim was *not* brought for an improper purpose.

[68] With respect to the third element, Vinci identifies the PWA Claim as the “definite act” that occurred outside the legal process. There is some merit to the argument that the filing of the PWA

Claim does not constitute an “act or threat,” given the Minister’s discretion under s 15 the PWA: See e.g., *McKerracher*. However, Vinci’s pleadings state the PWA Claim was used to disrupt payment flows and “harm Vinci’s financial interests.” Whether the PWA Claim qualifies as a “definite act” is arguable and should be determined on a full evidentiary record.

[69] In terms of special damages, I again must accept the pleadings as true for the purposes of this application. Vinci argues its costs associated with investigating and responding to the PWA Claim (including the costs associated with a letter of credit) constitute special damages. The caselaw is unsettled as to whether there must be a causal link between the special damages and the legal process, or if the damages can occur from the “definite act”: *Thunder Bay; Basant Motors*. Accordingly, though the special damages pled may not be directly related to the supply of goods and services, which are at the heart of the dispute, they do relate to the PWA Claim (i.e., the “definite act”).

[70] The abuse of process tort may not ultimately succeed on the evidence, but it has been adequately pleaded, and it cannot be said at this point that success is “beyond doubt,” a phrase that leaves no room for uncertainty. I note the standard of proof on this application is, as with all civil actions, a balance of probabilities.

[71] Therefore, the Amended Counterclaim provisions concerning the abuse of process claim are permitted.

Conversion

[72] The tort of conversion “involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner’s right of possession”: *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC) at para 31 [*Boma*].

[73] The Court of Appeal of Alberta recently explained that there is no universal test for the tort of conversion, but the essential elements include:

- (1) a wrongful act;
- (2) involving a chattel;
- (3) consisting of handling, disposing or destruction of the chattel;
- (4) with the intention or effect of denying or negating the title of another person to such chattel.

Driving Force Inc v I Spy-Eagle Eyes Safety Inc, 2022 ABCA 25 at paras 30 to 31 [*Driving Force*]

[74] A “chattel” includes funds or money: *BMO v 2761387 Ontario Inc et al*, 2024 ONSC 6281 at para 24; *Pang v Zhang*, 2021 BCSC 591 at para 42. To establish conversion, the owner must prove it had possession of the chattel, or an immediate right of possession to it, at the relevant time: *Sprung Instant Structures Ltd v Royal Bank of Canada*, 2008 ABQB 30 at para 16 [*Sprung*].

[75] Simply put, conversion is a “positive wrongful act or dealing with the [chattels] in a manner, and with an intention, inconsistent with the owner’s rights”: *Sprung* at para 13, citing

Professor Emeritus Fridman et al, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 1989) at 95. It should be noted that the tort of conversion is one of strict liability: *Driving Force* at para 33.

Vinci's Position

[76] Vinci submits Opabin committed conversion by filing the “wrongful” PWA Claim which led the Crown to withhold Vinci’s progress payments for over a year. Vinci characterizes the PWA Claim as a “wrongful act” because Opabin: (1) was not a recognized claimant under the PWA; (2) filed it outside the prescribed timelines; and (3) sought expectation damages not properly recoverable under a PWA Claim.

[77] Vinci submits the Applications Judge’s finding that the Crown had not determined whether Vinci was entitled to the progress payments is incorrect for three reasons. First, the Amended Counterclaim pleads that Vinci is legally entitled to the progress payments and on an application to strike, the pleadings must be accepted as true. Second, by their nature, the progress payments are sums the contractor has earned under the contract. Third, s 15 of the PWA indicates that monies paid in respect of a claim are deducted from the money “due and payable to the contractor”.

Opabin's Position

[78] Opabin argues the alleged facts do not establish any element of the tort of conversion. Sending notice of a claim under the PWA is not a wrongful act involving a chattel, nor did Opabin handle, dispose of, or destroy any chattel, or attempt to deny Vinci’s title. Further, sending notice to the Minister under the PWA conferred no rights on Opabin.

Analysis

[79] The conversion question is not quite as easily resolved. It is best approached by considering the *Driving Force* criteria and, in turn, recognizing that the manner in which this tort is described in the jurisprudence can vary, and is not universally settled.

[80] First, was the filing of the PWA Claim a wrongful act? Again, assuming the pleadings to be correct as directed in *Shodunke* and giving it a generous interpretation (per *Price Waterhouse Coopers*), it is arguable Opabin was not in the class of claimants contemplated by the PWA, filed its claim out of time, and the damages sought do not fit within the parameters of the statute. These actions or defects arguably render the action wrongful. Notably, it is not a defence that the wrongful act was committed “in all innocence”: *Driving Force* at para 6,

[81] Second, Vinci must have had “possession, or an immediate right of possession, at the relevant time” to the withheld progress payments: *Sprung* at para 16. The Amended Counterclaim pleads that Vinci is “legally entitled” to the progress payments. Further, s 15 of the PWA indicates that monies paid in respect of a claim are deducted from the money “due and payable to the contractor”. It is, in my view, not hopeless that Vinci could show it had a right of possession to the amount withheld by the Minister pursuant to the PWA Claim.

[82] The more contentious question is whether Opabin’s filing of the PWA Claim meets the definition of “handling, disposing or destruction of the chattel” or is a “wrongful interference . . . inconsistent with the owner’s right of possession”: *Driving Force* at paras 30 to 31; *Boma* at para 31. Filing the PWA Claim did not bestow any rights on Opabin with respect to the progress payments. Rather, it is the Minister who has discretion over the progress payments. That discretion

is limited to the options outlined in s 15 of the *PWA*. Accordingly, it is foreseeable that filing the *PWA* Claim would have resulted in the progress payments due to Vinci being withheld. In any event, Vinci has pled this was the intended consequence of the *PWA* Claim.

[83] There is also an argument the wrongful act resulted in Vinci losing access to property to which it was otherwise entitled. The filing of the *PWA* Claim had the “effect of denying” Vinci’s access to the funds. The funds were no longer due and payable *at the relevant time*, which is when the alleged conversion occurred.

[84] Again, whether the conversion argument will be successful at trial, based on the evidence, is not the question; the question, is whether the conversion argument, per the pleadings, is hopeless. Assuming the pleadings to be true, I cannot reach that conclusion on a balance of probabilities.

[85] The Amended Counterclaim provisions concerning conversion are permitted. They are sufficiently pled.

Disposition

[86] The appeal is allowed. The proposed amendments are permitted.

[87] Vinci will have its costs of this application under Schedule “C.”

Heard on the 30th day of June, 2025.

Dated at the City of Edmonton, Alberta this 29th day of October, 2025.

S.N. Mandziuk
J.C.K.B.A.

Appearances:

J. Bierkos
McCarthy Tetrault LLP
for the Appellant

L. Belzil, K.C.
for the Respondent