

# Court of King's Bench of Alberta

**Citation: Dowcar Metals Inc v Arrow Reload Systems Inc, 2023 ABKB 415**

**Date:** 20230711

**Docket:** 1503 10708, 1503 17177

**Registry:** Edmonton

1503 10708

Between:

**Dowcar Metals Inc.**

Plaintiff

- and -

**Arrow Reload Systems Inc. and Albert Fairclough and 1832067 Alberta Ltd.**

Defendants

-and-

1503 17177

Between:

**1832067 Alberta Ltd. carrying on business under the firm name and style of AB Logistics**

Plaintiff

- and -

**Dowcar Metals Inc.**

Defendants

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**Endorsement  
of the  
Honourable Justice Douglas R. Mah**

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**A. Background**

[1] This matter was before me in civil chambers on May 23, 2023. The applicant Dowcar Metals Inc seeks release of a quantity of its pipe currently detained by the respondent 1832067 Alberta Ltd (dba AB Logistics) under a putative possessory lien. Dowcar says there is a sale of that pipe for a good price in the offing. AB says ‘no’ to any release.

[2] The lien claim was quantified by then Master (now Applications Judge) Schlosser at \$127,000 USD or \$150,000 CDN in *Dowcar Metals Inc v Arrow Reload Systems*, 2018 ABQB 549 at para 14.

[3] Dowcar says it now has a purchaser for a quantity of the pipe. It says that based on the price the purchaser (Precision Pipe & Piling) proposes to pay, if AB retains 17 pieces out of the 69 in total, then AB will remain whole for the \$150,000 CDN pending determination of the lien claim. Accordingly, Dowcar requests the release of 69 minus 17 = 52 pieces for sale.

[4] For reasons of expediency, I adjourned the application and asked counsel to provide me with written submissions with respect to valuation of the pipe. I advised that I would either select a valuation method, or just decide the application. I received those written submissions, and more, on June 22 and June 23, 2023.

[5] In reviewing those submissions, I saw Dowcar had stated in its brief that Precision’s offer to purchase the pipe (in the form of a purchase order or PO) had been withdrawn. I asked for clarity from counsel on the point. Mr. Pruski (for Dowcar) advised on July 4, 2023 that Precision had indeed withdrawn that PO. The reason for that was because of ‘interference and harassment’ from Curtis Fairclough, the son of the principal of AB (Albert Fairclough) and a practicing lawyer in California. The younger Fairclough had purportedly scuttled the original transaction between Dowcar and Precision by contacting Precision and making certain negative statements about Dowcar and its principal, resulting in delay that ultimately made the transaction untenable.

[6] However, Mr. Pruski also reported that Precision was prepared to extend a second PO for the same pipe at the same price for resale to a different customer and, moreover, Dowcar had another customer willing to purchase additional pipe at even a higher price. This new information was not in affidavit form but Mr. Pruski advised that his client’s principal (Mr. Downie) was prepared to swear an affidavit with those facts, if required. Dowcar was now asking for an Order to release the quantity of pipe conditional upon production of a PO from Precision showing the stated price.

[7] Counsel for AB, Mr. Bullock, took the position on July 5, 2023 that the younger Mr. Fairclough did nothing more than alert Precision that the transaction with Dowcar was potentially illegal under the law of one state or another because of an unsatisfied judgment against Dowcar in the US. Mr. Bullock also referred me again to an email of May 16, 2023 from

Precision's counsel to the younger Mr. Fairclough (found in AB's original court submissions) disavowing, on behalf of Precision, the original PO issued by Precision to Dowcar. The inference I am being asked to draw is that Precision, because of revelations about Dowcar disclosed by the younger Mr. Fairclough, is now scared off from doing business with Dowcar, and therefore any reports of further transactions between Dowcar and Precision should be viewed with suspicion.

## **B. Litigation History**

[8] There is a complicated history of two related actions that bring us to this stage:

- Dowcar obtained a replevin order in July 2015 for its pipe stored at premises controlled by AB, as part of its action against AB for wrongful retention of the pipe.
- Shortly thereafter, AB commenced its action for possessory lien and debt against Dowcar. Master Schlosser then made his decision, requiring sequestration of \$150,000 worth of pipe, pending resolution of the competing claims, and ordering release of the balance of the pipe.
- On April 22, 2022, the action of AB was struck for long delay by Master Birkett. She ordered release of all the pipe to Dowcar.
- AB appealed the Birkett decision and obtained a stay pending appeal from Justice Henderson on May 26, 2022. That Order also directed the appeal to be heard together with other applications brought by AB: its own long delay application seeking dismissal of Dowcar's action, and a contempt application against Dowcar and Mr. Downie. The consolidated appeal/applications were directed by Justice Henderson to be heard at a two-day special application, now scheduled for April 10 & 11, 2024.

[9] At the application before me, Dowcar took the position that Justice Henderson's Order stayed Master Birkett's Order, leaving in place Master Schlosser's Order requiring sequestration of only \$150,000 worth of pipe. Accordingly, the issue left to me is to determine what \$150,000 worth of pipe looks like, and the method for arriving at that.

## **C. Positions**

[10] AB says 'no' to any release of pipe for these reasons:

- Precision's offer (in the form of a purchase order or PO) was not real or at best was suspect. It says that Dowcar would have the court believe that the value of the pipe has increased by orders of magnitude in a short period of time. That is not realistic. It is a ruse to defeat AB's claim. AB could never realize such a price for the pipe.
- Furthermore, Precision has now withdrawn the PO and, as recently asserted, the prospects of Dowcar doing further business with Precision are dubious.

- The claim of AB is *in rem* or in the pipe itself. Even if its debt claim, on which the possessory lien is premised, is ultimately struck by the court for long delay, AB still has a claim to the pipe itself.
- In order to arrive at a correct valuation of the pipe, and therefore the correct quantity to be retained, the court should direct an appraisal by either a liquidator such as Century Services or by a qualified expert appraiser familiar with the industry and the product.
- Justice Henderson’s Order of May 26, 2022 in effect stays the release of any pipe until a two-day special application is heard to deal with all outstanding litigation matters. Justice Henderson’s comments during the hearing indicate a concern that the Order made to release all of the pipe (by then Master now Applications Judge Birkett) was made without jurisdiction.

[11] Dowcar says:

- An email from Precision (Mr. Rayfield) dated May 1, 2023 included in the evidence shows that Precision’s offer was *bona fide* and real. It was only because of interference and harassment by Curtis Fairclough that Precision’s offer was withdrawn.
- Nonetheless, the price that Precision was willing to pay represents the best evidence of the current value of the pipe. The Century Services valuation done in 2015, on which AB relies, was conducted without Dowcar’s knowledge and by an unqualified person.
- Albert Fairclough, the principal of AB and his son, Curtis Fairclough, have engaged in character assassination of Dowcar and its principal Thomas Downie, in an attempt to obfuscate the issues. The allegations raised by the Faircloughs are denied and they are irrelevant. (Dowcar suggests that Curtis Fairclough is person of disreputable character, who resigned in the face of discipline from the Law Society of Alberta because of certain conduct, and was therefore effectively disbarred in this province. The Resignation Committee Report of December 14, 2014 was included in Dowcar’s materials.)
- Justice Henderson’s Order stands on its own. There is no need to speculate about his motivations.
- There is no reason for AB to retain more, in pipe, than the value of its claim. There is a willing market for the excess pipe.

#### **D. Ruling**

[12] Ultimately, the question of whether AB still has a possessory lien, notwithstanding that its debt claim is struck for long delay, will be decided at the two-day special application.

[13] Justice Henderson’s Stay Order stays Master Birkett’s Order, not Master Schlosser’s. So, I must decide whether Precision’s proposed price is a valid representation of the pipe’s value,

whether the 2015 Century Services valuation is a true valuation or whether I should direct some other method.

[14] I am prepared to accept that the offer (or PO) from Precision was *bona fide* and real. That was confirmed in the May 1, 2023 email from Mr. Rayfield. However, that PO is no longer extant and I have insufficient information about the marketplace to be confident that a valuation based on that PO is sustainable. It may have been a price based on a particular opportunity and certain other factors of which I am not aware.

[15] The same would be true of other offers to purchase that Dowcar says it has in hand. I have no assurance that any quantity of pipe that is retained by AB would yield the price that Dowcar says the pipe now has. The determination of the debt claim and the possessory lien claim by the court is still some nine months away in the least and, in the meantime, AB must remain protected for the full value of its claim.

[16] I am also not prepared to rely on the Century Services valuation, which is eight years old and which Dowcar disputes as valid.

[17] One thing I am sure about is that AB does not have a claim, whether it is against Dowcar or against the pipe, in excess of the \$150,000 CDN declared by Master Schlosser. That decision on the quantum of the claim was never appealed.

[18] A possessory lien can be maintained until the debt is paid: section 8, *Possessory Liens Act*. If the asset being detained is sold by the lienholder, the sale costs are first paid and then the debt, and the balance is paid according to law: s 13(1), *Possessory Liens Act*. In either case, the lienholder gets the amount of its claim.

[19] During the hearing before Master Schlosser in 2018, AB was looking for cash to stand as security for its claim. I asked the same question in the hearing with me about cash being substituted but neither side really had an answer for me.

[20] It is not necessary for a possessory lien claimant to be protected for more than its claim. Dowcar has a right to deal with its property in excess of the claim. I am looking for a way to achieve both.

[21] Accordingly, I make the following Order:

- In order to obtain the release of all of its pipe, Dowcar will deposit the sum of \$150,000 in its counsel's trust account to the credit of AB's possessory lien and debt claims. The funds will stand in place of the pipe. Those funds will remain in trust until settlement or court Order directing the disposition of those funds. All of the pipe may be removed by Dowcar at its cost and disposed of as it sees fit.
- In the alternative, Dowcar may secure release of all of the pipe by obtaining a letter of credit in favour of AB in the amount of \$150,000.
  - AB may draw upon the letter of credit if it obtains a judgment or Order of the court declaring Dowcar is indebted to it in the sum of \$150,000 or is entitled to \$150,000 worth of pipe.

- The granting of the letter of credit will stand in place of the pipe currently detained. All of the pipe may be removed by Dowcar at its cost and disposed of as it sees fit.
- If, from the proceeds of the sale of the pipe, the sum of \$150,000 is deposited into the trust account of Dowcar's counsel to the credit of AB's claim as above, then the letter of credit may be discharged.
- The \$150,000 will remain in trust until settlement of AB's claim or further court Order, as above.

[22] If Dowcar is unable to post either cash or the letter of credit, then the Dowcar and AB shall, within 15 days of this decision:

- agree to a person or entity to carry out an appraisal of the pipe, and the report of that person or entity shall be the report of both parties and shall be submitted to me for consideration;
- failing agreement, each party shall submit to me the name of a person or entity, along with qualifications, to carry out an appraisal of the pipe;
- in the latter event, I shall select the person or entity to do the appraisal;
- in either event, upon receipt of the appraisal report by me, I will decide how much of the pipe should be retained pending the outcome of the two-day special application;
- in either event, the cost of the appraisal shall be borne equally by the parties.

[23] My only concern here is finding a balance between the interests of the parties, under the circumstances that presently exist. I make no finding about the allegations against Mr. Downie and Dowcar that were raised by the younger Mr. Fairclough. I further make no finding about the effect that any US judgment against Dowcar may have on its ability to sell the pipe to a US customer. That is between Dowcar, its customer and its creditor. Whether the younger Mr. Fairclough has done anything improper by getting in the way of the transaction between Dowcar and Precision is also an issue for another day.

#### **E. Costs**

Costs of this application will be determined by the judge hearing the two-day special application.

Heard on the 23<sup>rd</sup> day of May, 2023.

**Dated** at the City of Edmonton, Alberta this 11<sup>th</sup> day of July, 2023.

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**Douglas R. Mah**  
**J.C.K.B.A.**

**Appearances:**

Matt A. Pruski, Rackel & Company LLP  
for the Applicant, Dowcar Metals Inc

Matthew D. Bullock, Huckvale LLP  
For the Respondents, Alberta Fairclough & 1832067