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COURT FILE NUMBER	1501-12220
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ALBERTA TREASURY BRANCHES
DEFENDANT	COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC., CONSERVE OIL GROUP INC. and CONSERVE OIL FIRST CORPORATION
APPLICANT	**DEL CANADA GP LTD**
DOCUMENT	**BRIEF OF KNEEHILL COUNTY, MUNICIPAL DISTRICT OF BONNEYVILLE NO. 87, RED DEER COUNTY, MUNICIPAL DISTRICT OF TABER, and MUNICIPAL DISTRICT OF GREENVIEW NO. 16**
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PART I: ISSUE AND BACKGROUND

A. Introduction

1. This Brief is filed on behalf of Kneehill County, ("Kneehill"), Red Deer County ("Red Deer"), the Municipal District of Taber ("Taber"), the Municipal District of Greenview No. 16 ("Greenview"), and the Municipal District of Bonnyville No. 87 ("Bonnyville") (collectively, the "Municipalities"). The Municipalities oppose the application filed by DEL Canada GP Ltd. ("DEL") to reduce the value of the Municipal Tax Fund established by paragraph 8 of the Approving and Vesting Order dated June 6, 2018.[1]

B. Issue

2. This Application concerns the scope of the special liens asserted by the Municipalities pursuant to s. 348(d)(i) of the *Municipal Government Act* R.S.A. 2000. c. M-26[2], as amended (the "***MGA***"), against certain properties purchased by DEL from COGI and related corporations in the within receivership proceedings.

3. DEL urges this Court to adopt a restrictive reading of s. 348(d)(i) that would limit a municipality's special lien to the interests in land and improvements of a debtor within the taxing municipality's municipal boundary.

4. The Municipalities submit this interpretation is incorrect and inconsistent with the language and purpose of s. 348(d)(i) as interpreted within its broader statutory context. Rather, the Municipalities argue that the special lien arising under s. 348(d)(i) attaches to all of the interests in land and improvements to those lands held by the debtor in the Province of Alberta.

C. Background to Application

5. On June 6, 2018, the Honourable Justice B. Romaine granted an Approval and Vesting Order approving the sale of certain assets owned by Canadian Oil & Gas International Inc.

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[1] Appendix A to the Brief of the Applicant DEL Canada GP Ltd. filed January 8, 2019.
[2] *Municipal Government Act,* RSA 2000, c. M-26, s.348 attached. **Tab 1**

and other related companies in receivership, as contemplated in an asset purchase and sale agreement ("Sale Agreement") between DEL and the Receiver, dated January 18, 2018.

6. Paragraph 8 of the Approval and Vesting Order required the Receiver to establish a holdback sufficient to fully fund and satisfy all proven claims for municipal taxes to a maximum of $3,000,000 ("Municipal Taxes Fund").

7. On November 21, 2018, Charles Chapman, a consultant to DEL, sent letters to a number of municipalities requesting a waiver of all tax arrears and penalties owed by COGI. These letters stated that if the municipality did not respond to the letter by December 7th, 2018, the Purchaser would conclude there was "no claim against the documented arrears."[3]

8. On December 12, 2018, DEL filed an application for direction concerning the claims process for the Municipal Taxes Fund. It sought to reduce the amount of the Municipal Taxes Fund to $1,474,474.31 on the basis that certain amounts were improperly asserted by municipalities as special liens because no assets were being sold from within those municipalities.[4]

9. In the Affidavit of Mr. Chapman supporting the application, he indicated he had confirmed with municipalities in which assets were being purchased, the total value of their claims.[5] We note that, in fact, Mr. Chapman had asked those municipalities to confirm his calculations of the amounts outstanding for taxes and arrears and respond within a certain period of time, after which he would *assume* that his numbers were correct. The Municipalities have provided evidence of what amounts are actually outstanding in their respective sworn affidavits. These differ from amounts set out by Mr. Chapman in his affidavit. The following chart provides a summary:

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[3] See the Affidavits of Greenview, Bonnyville, and Taber at Exhibit C, Red Deer County at Exhibit D and Kneehill County at Exhibit E.
[4] Paragraphs 12 and 13 from the Affidavit of Charles W. Chapman sworn December 12, 2018, filed December 12, 2018.
[5] Paragraph 6 of the Affidavit of Charles W. Chapman sworn December 12, 2018, filed December 12, 2018.

Municipality	**Outstanding Tax Amounts Calculated by DEL Canada GP Ltd.**[6]	**Outstanding Amounts Claimed by Municipality**
Kneehill County	$279,983.40	$380,648.51[7]
M.D. of Bonnyville No. 87	$213,438.83	$353,777.54[8]
M.D. of Greenview No. 16	$133,742.80	$176,776.66[9]
Red Deer County	$291,313.44	$379,880.92[10]
Total	**$918,478.47**	**$1,291,083.63**

10. Mr. Chapman did not include any amounts for the Municipal District of Taber as no assets located in the Municipal District of Taber were being acquired by DEL.

11. DEL's application was heard before Justice Eidsvik on December 18th, 2018, resulting in an order setting out the claim process.[11] The issue of whether the municipalities' claims were properly asserted as special liens was adjourned to be heard before Justice Romaine in the week of January 21st, 2019.

12. On December 20th, 2018, the Municipalities received an email (the "Proposal Email") from Chapman on behalf of DEL that contained an offer for consideration by council to settle COGI's outstanding tax accounts for less than was outstanding.

PART II: ARGUMENT

A. Overview

13. S. 348 of the *MGA* provides:

> *348* *Taxes due to a municipality*
>
> *(a)* *are an amount owing to the municipality,*

[6] Affidavit of Charles W. Chapman, filed December 12, 2018;
[7] Affidavit of Kneehill County, filed January 10, 2019 (Affidavit of Kneehill");
[8] Affidavit of M.D. of Bonnyville No. 87, filed January 10, 2019 (Affidavit of Bonnyville");
[9] Affidavit of M.D. of Greenview No. 16, filed January 10, 2019; (Affidavit of Greenview");
[10] Affidavit of Red Deer County, filed January 10, 2019 (Affidavit of Red Deer County");
[11] Order of Justice Eidsvik on December 18, 2018, filed December 18, 2018, **Tab 2**

(b) are recoverable as a debt due to the municipality,

(c) take priority over the claims of every person except the Crown, and

(d) are a special lien

(i) ***on land and any improvements to the land, if the tax is a property tax****, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy, or*

(ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.

(emphasis added)

14. The Municipalities submit that "land" under s. 348(d)(i) of the *MGA* means *all the debtor's land or interest in land along with the improvements thereon.*

15. This brief will address:

a. Applicable principles of statutory interpretation;

b. The proper interpretation of s. 348(d)(i); and

c. The *Regent Resources* case relied upon by the Applicant.

B. Applicable Principles of Statutory Interpretation

16. The following principles of statutory interpretation are particularly relevant to the determination of this issue:

a. As in all cases, the words of a statute 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.*[12]

b. Individual sections must be interpreted in relation, not only to the entirety of the Act in which they arise, but also in relation to the overarching body of law of which they form a part and from which they derive their meaning.[13]

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[12] *Rizzo & Rizzo Shoes Ltd., Re.*, [1998] 1 S.C.R. 27, 1998 CarswellOnt 1 at para 21. **Tab 3**
[13] *Canada North,* 2017 ABQB 550, 2017 CarswellAlta 1631, at paras 90, 97. **Tab 4**

c. Consistent expression is to be presumed, both within and across statutes, so that the same words are presumed to intend the same meaning and different words are presumed to have different meanings.[14]

d. Municipal legislation, and the municipal powers and authority granted therein, are to be interpreted broadly and purposively.[15]

17. Additionally, s. 10 of the *Interpretation Act* requires that every statute:

> *...be construed as being remedial, and shall be given the fair, large, and liberal construction and interpretation that best ensures the attainment of its objects.*[16]

18. Given the narrow interpretation of s. 348(d)(i) of the *MGA* that the Applicant urges this Court to adopt, one must examine the evolution of statutory interpretation principles as it relates to taxing statutes.

C. Evolution of the Modern Approach to Statutory Interpretation

19. Previously, legislation was to be interpreted so as to avoid interfering with pre-existing property rights, including security rights, unless there was no alternative. This history was reviewed in the *Lloyds Bank Canada v. International Warranty* decision[17].

20. The Court, in *Lloyds Bank*, quoted from *AG v. Horner*, an 1884 English Queen's Bench decision, where the Court said:

> *It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it.* [18]

21. *Horner* was cited in the 1963 text, *Craies on Statute Law*, 6th edition which said:

> *It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it.' Therefore rights, whether public or private, are not to be taken away, or even hampered, by mere implication from the language used in a statute, unless, as Fry, J. said in Mayor, etc. of Yarmouth v. Simmons (1879) 10 Ch.D. 518, 527, 'the Legislature clearly and*

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[14] Sullivan, Ruth, *Sullivan on the Construction of Statutes 6th ed.*, at p. 217 at para. 8.32. **Tab 5**
[15] *United Taxi Driver's Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19, 2004 CarswellAlta 355 at paras 6-8. **Tab 6**
[16] *Interpretation Act,* R.S.A. 2000, c I-8. **Tab 7**
[17] *Lloyds Bank Canada v. International Warranty Company Limited,* 1989 ABCA 155 **Tab 8**
[18] *Supra* para.11, Tab 8

distinctly authorises the doing of something which is physically inconsistent with the continuance of an existing right.[19]

22. The Court also cited the 1962 text Maxwell, Interpretation of Statutes, 11th edition to the same effect:

Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the Legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly if not in express words at least by clear implication and beyond reasonable doubt.[20]

23. The Court, in *Lloyd's Bank*, concluded:

With the greatest respect we disagree. In particular we do not agree that the section has the "plain meaning that is unambiguous" attributed to it by the learned chambers judge. For Revenue Canada to succeed the plain and unambiguous meaning of the section must be that it deprives a properly secured creditor, in this case Lloyds, of all or part of its security without compensation, for the purpose of paying another debt entirely unrelated to the security. It is surely equivalent to the transfer of proprietary rights without compensation.[21]

24. *Royal Bank v. Sparrow Electric*[22] is a 1997 decision of the Supreme Court of Canada. Iacobucci, J. speaking for the majority, said at paragraph 106:

...To hold otherwise would be to eviscerate the respondent's security interest. This is not to say, however, that Parliament could not legislate otherwise. Parliament has shown that it knows how to assert priority over rival security interests. See Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R., 1996 CanLII 244 (SCC), [1996] 1 S.C.R. 963, at p. 975. All that is needed to overtake a fixed and specific charge is clear language to that effect.

25. Carrying on, Justice Iacobucci said at paragraph 110:

Accordingly, the possibility is real that my colleague's proposed rule would effectively obliterate the PPSA charge against inventory. As insurance against this outcome, the costs of financing would presumably increase. I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal.

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[19] *Supra* para.11, Tab 8
[20] *Supra* para.12, Tab 8
[21] *Supra* para 10., Tab 8
[22] *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 SCR 411, 1997 CanLII 377 (SCC) **Tab 9**

26. Gonthier, J. wrote the minority decision. At paragraph 30 on page 441, he quoted from Driedger, *Construction of Statutes*, 2nd edition:

> *Today there is only one principle or approach, namely, 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.*
>
> emphasis added

27. Gonthier, J. said that the language in s. 227(5) of the *Income Tax Act*[23] was clear and unambiguous and that it was to be given its ordinary and grammatical meaning.

28. As can be seen from the dissent in *Sparrow Electric*, a move was afoot to adopt the modern approach espoused by Driedger in the case of all statutory interpretation, including statutes providing priority of pre-existing rights. That move crystalized with *Rizzo Shoes*. There Iacobucci, J., who wrote the majority decision in *Sparrow Electric*, cites, among other things, *Sparrow Electric* and the minorities reliance upon the quote from Driedger and says:

> *Although much has been written about the interpretation of legislation... Elmer Driedger in* Construction of Statutes *(2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:*
>
> *Today there is only one principle or approach, namely, 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.*[24]
>
> emphasis added

29. That the principles from *Rizzo* are firmly established as being the law in Canada is clear. It has been followed in, literally, thousands of cases. It is submitted that the modern approach to statutory interpretation is that proposed proffered by Driedger and is the law, as it is today.

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[23] *Income Tax Act*, RSC 1985, c 1 (5th Supp) **Tab 10**
[24] *Rizzo Shoes*, Supra, para. 21, Tab 3

D. Reviewing the Statute as a Whole

30. The importance of reviewing the statute as whole in the interpretation of particular provision, is vividly described in Sullivan on the *Construction of Statutes Sixth Edition* ("Sullivan"); some of the cases cited therein are worth repeating:

> *In* A.G. v. Prince Ernest Augustus of Hanover, *Viscount Simonds wrote:*
>
> *... the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.*
>
> *In* Canada (Attorney General) v. Xuan, Robertson *J.A. wrote:*
>
> *... a statutory word or expression can be fully grasped only in relation to the whole of which it is constituent part.*
>
> *In* Greenshield v. The Queen, *Locke J. wrote:*
>
> *... the broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.*
>
> *In* Burchill v. Canada, *speaking of the federal Income Tax Act, Stratas J.A. wrote:*
>
> *Subsection 56(1)(a)(i) does not stand in splendid isolation in the Act; rather, it is part of an interconnected, harmonious web of provisions.*[25]

31. These principles were recently affirmed in *Re Canada North Group*, 2017 ABQB 550 at paras. 90-97.[26] As noted therein, quoting from *ATCO Gas & Pipelines Ltd v Alberta Energy & Utilities Board*, 2006 SCC 4, [2006] 1 SCR 140:

> *The ultimate goal is to discover the clear intent of the Legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme* Bell ExpressVu, *at para. 27; see also* Interpretation Act, *R.S.A. 2000, c. I-8, s. 10*

32. So, s. 348(d)(i) must be interpreted in the context of the entire portion of the *MGA* that deals with taxes, the deal with the assessment and collection of taxes. Any interpretation must

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[25] *Sullivan* Supra, page 403-404, Tab 5
[26] *Re Canada North Group*, 2017 ABQB 550 at paras. 90-97, Tab 4

consider the intent of the provisions and the objectives behind the entire legislative scheme. The importance of doing so in the interpretation of s. 348 of the *MGA* is described below.

E. Municipality is an Involuntary Creditor

33. In determining the objective of the taxation provisions of the *MGA* and, specifically, the policy objectives served by s. 348(d)(i), the Municipalities submit this is informed by the fact that a municipality is an involuntary creditor. In this way, the position of a municipality under the *MGA* is virtually identical to the position of the Canada Revenue Agency ("CRA") in terms of the collection of taxes.

34. Like the CRA, a municipality cannot select its debtor, it does not get to review the debtor's financial circumstances and it does not get to take security in guarantees. It can only look to its statutory remedies. For judicial comment on this topic as it relates to the CRA, one can review *AG Can v. Caisse Populaire De La Vallee De L'or*[27], citing the Supreme Court of Canada in the *First Vancouver Finance v. MNR* case and saying, in paragraph 31:

> *This, together with the fact that where SDs* [Source Deductions] *are concerned the plaintiff is an involuntary creditor of a tax debtor and, unlike a financial institution, cannot familiarize herself with the debtor's affairs and financial situation, justifies the vehicle of the deemed trust by which the Act gives the plaintiff, that is to say the Agency, special priority when the Agency and secured creditors concurrently assert a right to the property of a tax debtor.*

35. And, in paragraph 31:

> *It has also been noted that, in contrast to a tax debtor's bank which is familiar with the tax debtor's business and finances, the Minister does not have the same level of knowledge of the tax debtor or its creditors, and cannot structure its affairs with the tax debtor accordingly. Thus, as an "involuntary creditor", the Minister must rely on its ability to collect source deductions under the ITA: Pembina on the Red Development, supra, at pp. 33-34, per Scott C.J.M., approved by Cory J. in Alberta (Treasury Branches), supra, at paras. 16-18. For the above reasons, under the terms of the ITA, the Minister has been given special priority over other creditors to collect unremitted taxes.*
>
> (Emphasis in original)

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[27] *AG Can v. Caisse Populaire De La Vallee De L'or*, 20FC 119 (CanLII) **Tab 11**

36. Municipalities, like the CRA, are in precisely the same situation in that they must rely on their statutory rights and remedies.

37. As noted above, the *International Warranty* decision was the one dealing with CRA's (then the Minister of National Revenue) enhanced garnishment provision. *International Warranty* dealt with the first version of s. 224(1.2). That section was later amended and the Supreme Court of Canada, in *ATB v. MNR*[28], citing the Manitoba Court of Appeal in in *Pembina on the Red* said:

> *There can be no doubt of the importance of levying taxation. The ITA entrusts to employers the duty of deducting income tax from the wages of employees and remitting it on their behalf. Similarly the ETA imposes on those who provide goods and services to others the duty to collect and remit the GST which is payable. In essence, companies collect taxes which they hold in trust for the government.*
>
> *The purpose of the 1987 legislation, which I think is even more appropriately applied to the 1990 legislation, was very clearly and forcefully set forth in* Pembina on the Red Development Corp. v. Triman Industries Ltd., 1991 CanLII 2699 (MB CA), [1991] 6 W.W.R. 481 (Man. C.A.). *There, at pp. 488-89, Scott C.J.M. observed:*
>
> *To determine the dominant characteristic of the legislation, it is important to know the governmental policy behind the section. The tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly. Revenue Canada, on the other hand, does not have the same opportunity to become acquainted with the affairs of the tax debtor or its creditors. It must therefore rely solely on the provisions of the legislation to mandate the employer to remit the employee income tax deductions as required by the [Income Tax] Act, and to establish its collectability in the event of default.*
>
> . . .
>
> *The purpose of the Act is not only to levy tax, but to collect it. There is a strong public duty on employers to remit; indeed, this is central to the scheme of self-assessment under the Act.*

38. The taxation provisions of the *MGA* reflect this same statutory objective. Municipalities are given statutory authority to utilize "special remedies" or pursue the collection of a secured debt or any other remedy available to them. The importance of municipalities receiving such funds is reflected in the priority granted to tax debts over the paid claims of any person except the Crown.

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[28] *Alberta (Treasury Branches) c. M.R.N* 1996 CanLII 244 (SCC) **Tab 12**

F. Interpreting S. 348(d)(i) of the *MGA*

39. There are 3 potential interpretations of the application of the special lien, s. 38:
    a. It is restricted to the taxed land.
    b. It is restricted to land in the municipality.
    c. It is on all land.

40. Taxes are necessary for municipalities to carry out their functions which benefit both rate payers and businesses in a municipality. The building and maintaining of roads is one example. Without the revenue generated by taxes, municipalities cannot provide those functions.[29]

41. As municipalities are involuntary creditors, they have no ability to select or examine the credit worthiness of their debtors. As discussed above, that is why legislation is passed both for the assessment, and the collection, of those taxes. As noted above, one must look to, not just the section being interpreted, but to the whole of the Act and book of statutes generally. When one does so, the intention of the legislator seems clear.

42. Municipalities, in Division 8, 8.1 and 9 are authorized to collect taxes in accordance with those Divisions (or a combination thereof), or any other Act or common law right. One means of collecting such taxes is through debt enforcement proceedings (see s. 348(b)). That the collection of such amounts is paramount is reflected by the granting of special statutory remedies to collect the tax and the creation of the debt, secured by a special lien, which is granted priority.

[29] The *MGA* provides municipalities with a principal means of raising the required revenue to generally fund the expenditures and transfers set out in the budget of the municipality, this by levying of property taxes. See s. 353 of the *MGA*. Tab 1

43. It is also apparent that the Legislature had options open to it in terms of what would secure the special lien. For instance, the Legislature could have given the municipalities' special lien priority over all of the assets and properties of the debtor. It is of interest that the Legislature has done exactly that in connection with the *Workers Compensation Act* in s. 129[30]. S. 129 of the *Workers' Compensation Act* confers:

> *a fixed, specific, and continuing charge in favour of the Board... on the property or proceeds of property, whether real or personal ... and on any other property or proceeds of property, whether real or personal, in Alberta that is used by the employer in or in connection with, or produced by the employer...*

44. This is an extraordinarily broad charge on land and personal property that, as expressly stated in s. 129 "may" be registered at the Personal Property Registry, but need not be; registration does affect priority. The only connection between the Workers Compensation Board premiums in default and the property to which the charge applies is the debtor him or herself.

45. But with the Municipalities, Legislature gave a special lien, having priority, over goods in respect of certain types of tax and over land and any improvements to the land in respect of other types of tax (a community aggregate payment levy gets a special lien on both goods and land and improvements).

46. The scope of the special lien in s. 348(d)(i) and what it covers is easy to understand from a quick look at s. 348(d)(ii). As an example, unpaid business taxes result in a special lien on goods. That is notable for a number of reasons:

    a) The business tax is not a tax on the goods in question. There is no correlation between the assessment of the business tax and the special lien given to collect that tax.

    b) The Legislature has not restricted the scope of the special lien, it applies to goods. It applies to all goods. This shows that the assessment of the tax and he collection of the tax are not correlative. That this is the case clearly evidenced in Division 9 of the *MGA*, which is discussed below.

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[30] *Workers Compensation Act*, RSA 2000, c W-15 **Tab 13**

c) There is no limitation on the goods located in the municipality. That there is no restriction to the location of the assets can also be seen in Division 9 of the *MGA*. It allows a right of distress upon personal property.

47. The phraseology of ss. 348(d)(i) is the same as that in (ii) except that the special lien is on *land and any improvements to the land* instead of *goods*.

48. Another principle of statutory interpretation is that:

> *it is presumed that the Legislature uses language carefully and consistently so that within a statute or other legislative instrument, the same words have the same meaning and different words have different meanings.*[31]

49. So, just as with the goods, the collection of the tax is not co-related to the assessment of the tax.

50. Just as in ss. (ii), ss. (i) is not limited to location. The Legislature did not connect the assessment of the tax with the collection of the tax and, just as with the goods, there is nothing to connect the collection of the tax to assets located only in the municipality in question. Had Legislature wished to make such limitation, it could easily have done so. But it did not.

51. It is of note that, at one time, the special lien *was* restricted to *the property subject to the tax*.

52. In 1986, the Alberta Court of Queen's Bench's decision in *CMHC v. Calgary*[32] (upheld by the Alberta Court of Appeal) looked at s. 124 of the *Municipal Taxation Act* then in force[33]. That section provided:

> *124(1) The taxes and cost due in respect of any land or any improvement are recoverable with interest as a debt due the municipality from any person*

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[31] Sullivan, *Supra* p.217 para. 8.3, Tab 5
[32] *CMHC v. Calgary*, 1986 CanLII 1648 (AB QB); 27 DLR (4th) 284. **Tab 14**
[33] See s. 124 of the *Municipal Taxation Act*, R.S.A. 1980, c.- m-31, and, for interest, see s. 120 of the *Municipal Taxation Act*, R.S.A. 1970 as amended **Tab 15**

> *a)* *who was the owner, purchaser, lessee, licensee or permittee of it at the time of its assessment, or*
>
> *b)* *who subsequently became the owner, purchaser, lessee, licensee or permittee of the whole or any part thereof, (saving his recourse against any other person) and* ***are a special lien on his estate or interest***
>
> ***c)*** ***in the land in respect of which the taxes are due and the improvements on it, or***
>
> ***d)*** ***in the improvement of which the taxes are due and the land on which it is situated, as the case may be, except in so far as the land is exempt from taxation, in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and priority are not lost or impaired by any neglect, omission or error.***
>
> (emphasis added)

53. The *Municipal Taxation Act*, cited in *CMHC*, can be compared to the *Town Act*, cited in *Royal Bank v. Hodgson.*[34] They are similar in that they both refer to a special lien in respect of particular land.

54. The language of the special lien in the *Municipal Taxation Act* provision was altered when the new (at the time) omnibus *MGA* came into force in 1995. The original s. 348 and today's s. 348 are the same in that they each reference a special lien *in land* which is to be contrasted with the earlier legislation which referred to a special lien *in* ***the*** *land* or in ***the*** *improvement and* ***the*** *land on which it is situated.* In the earliest legislation, the special lien was co-extensive with the property that was subject to the tax. The use of such different language in the newer special lien provisions suggests that the Legislature intended the special lien to be broadened. Otherwise, it could have used the same or similar language as it has used in the past. The Municipalities suggest that the change in use of more specific language to the broader language in the current legislation must be given meaning in any interpretation. That is the requirement of s. 10 of the *Interpretation Act* quoted in paragraph 17, above.

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[34] *Royal Bank of Canada v. Hodgson*, 1917 CanLII 384 (AB CA) at paras **Tab 16**

55. Returning to the 3 possible interpretations outlined in paragraph 36:

a) Had Legislature wished to restrict the special lien to the taxed land or improvement, it could have said so as it had in the past. But it didn't.

b) Had Legislature wished to restrict the special lien to land in the municipality, it could have said so. But it didn't.

c) Had Legislature wished to provide that the special lien *on land* meant any land, it could have said so. And for reasons that follow, it is submitted that it did.

G. The Standalone Nature of the Special Lien

56. The special lien conferred under s. 348 is one of two distinct sets of remedies available to municipalities under the *MGA* in relation to the recovery of taxes and is intended to provide a standalone remedy for municipalities. The other category consists of the so-called "special remedies" found in Divisions 8, 8.1 and 9.

57. To fully appreciate the standalone nature of the special lien, one must first look to the "special remedies" given to a municipality by other provisions of the *MGA*. As will be seen, certain of those special remedies are tied to the assessment process and the assessed property. This intention is clearly indicated in the language of those provisions. However, others are not tied to the assessed property at all.

H. Division 8

58. Division 8 of Part 10 of the *MGA* deals with a type of tax well known to homeowners in Alberta. It is the *property tax* for which a homeowner gets assessed and billed every year.

59. In Division 8, "tax" is defined to mean . . . *a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy.*

60. Section 411 provides:

411(1) *A municipality may attempt to recover tax arrears* ***in respect of*** *a parcel of land*

> *(a) in accordance with this Division, and*
> *(b) subject to subsection (2), in accordance with any other Act or common law right.*
> ***(2)*** *A municipality may start an action under subsection (1)(b) at any time before*
> *(a) the parcel is sold at a public auction under section 418, or*
> *(b) the parcel is disposed of in accordance with section 425,*
> *whichever occurs first.*
>
> (emphasis added)

The emphasized words clearly illustrate that the special remedy is for the collection of the tax on the tax roll because of the use of the phrase "in respect of" in both.

61. The remedy given by Division 8 is that a tax notification can be endorsed on the certificate of title for a parcel of land (s. 415(1)) and, in accordance with the procedures set out in Division 8, the land can be put up for a tax sale.

62. Sections 423 and 424 contemplate that if the land is sold at public auction or the municipality becomes the owner, they acquire the land free of all encumbrances except certain stated ones. Together, all of these sections clearly provide a mechanism that a municipality may, not must, pursue to collect tax assessed in respect of a particular parcel of land by a sale process in respect of that same parcel of land. As will be illustrated, below, this is a remedy separate and apart from reliance by a municipality on the special lien created by section 348.

63. Although not as clear as it could be, it is submitted that a proper reading of s. 411(2) means that a municipality may not commence an action if the taxed property has been sold under section 418 or disposed of in accordance with s. 425 (which contemplates a municipality having become the owner of the parcel of land). It is submitted that the completion of this process is akin to the effect of a final order of foreclosure and that by a municipality taking its remedy against the parcel of land, the debt is unenforceable.

64. In this particular instance, the property subject to the tax is the same property in which the municipality has the special lien, and is the same property the municipality may sell in a tax

sale. As will be illustrated below, this is the only instance where the property subject to the tax, the property in which there is a special lien and the additional remedy are coextensive.

I. Division 8.1

65. Division 8.1 of Part 10 of the *MGA* relates, specifically, to designated manufactured homes. While tax on designated manufactured homes has nothing to do with the facts currently before the Court, the treatment of the tax on designated manufactured homes is illustrative of the proper interpretation of s. 348 of the *MGA*.

66. A designated manufactured home is defined to be a manufactured home, mobile home, modular home or travel trailer.

67. The definition of "tax" in Division 8.1 is as follows:

> *436.01 In this Division,*
>
> . . .
>
> *(g) "tax" means a property tax or a community revitalization levy imposed in respect of property referred to in section 304(1)(j)(i) or (k);*

68. The reference to "s. 304(1)(j), (i) or (k)" is, on its face, confusing because it seems to transpose the alphabetical order of the (j) and the (i). That is because s. 304(j) of the *MGA* appears to have two elements to it. Under column 2, the "assessed person", ss. (i) contemplates the owner of the designated manufactured home whereas ss. (ii) contemplates a manufactured home community if the municipality passes a by-law to that effect.

69. It is important to note that Division 8.1 is applicable only to a very narrow type of tax.

70. The special remedy given is in s. 436.02:

> ***436.02(1)*** *A municipality may attempt to recover tax arrears* ***in respect of*** *a designated manufactured home*
>
> *(a) in accordance with this Division, or*

> *(b) subject to subsection (2), in accordance with Division 9 or with any other Act or common law right.*
>
> ***(2)*** *A municipality may start an action under subsection (1)(b) at any time before*
>
> *(a) the designated manufactured home is sold at a public auction under section 436.09, or*
>
> *(b) the designated manufactured home is disposed of in accordance with section 436.15(a),*
>
> *whichever occurs first.*
>
> (emphasis added)

The emphasized words clearly illustrate that the special remedy is for the collection of the tax shown on the tax roll.

71. One special remedy given in s. 436.02(1)(a) is to register the tax notice at the Personal Property Registry and proceed with a public sale process similar to that contained in Division 8.

72. Another special remedy is given in Division 8.1. That is to distrain in accordance with Division 9, discussed below. In the case of Division 9, as will be discussed below, the property which can be distrained is <u>not</u> coextensive with the property subject to the tax.

73. As with Division 8, Division 8.1 (s. 436.06(2)) seems to say that if a municipality exercises its special remedy under that Division by sale of the manufactured home at public auction or disposition of it by the municipality, the municipality cannot later pursue another remedy.

J. <u>Division 9</u>

74. In Division 9 of Part 10 of the *MGA*, s. 438 provides:

> *438(1) A municipality may attempt to recover tax arrears*
>
> *(a) in accordance with this Division, and*
>
> *(b) subject to subsection (2), in accordance with any other Act or common law right.*

> *(2) A municipality may start an action under subsection (1)(b) at any time before the goods are sold at a public auction or the municipality becomes the owner of the goods under section 448, whichever occurs first.*

75. The special remedy, itself, is a right of distress: s. 439(1).

76. While this special remedy is related to the recovery of tax, it is not "in respect of" any particular property.

77. Applied to the facts before this Honourable Court, the Municipalities could have issued a distress warrant for the property taxes owing in northern Alberta and seized all of COGI's desks and office equipment at its offices in Calgary. In this case, the property subject to the assessment of tax is not coextensive with the property that is subject to the collection of tax.

78. Once again, the municipality appears to be prevented from taking other steps to pursue another remedy where it has pursued the special remedy to the point of sale at public auction or the municipality having become the owner of the goods seized.

79. Each of Divisions 8, 8.1 and 9 provide special remedies for the collection of tax. Each of the Divisions also preserve to a municipality its right to pursue a remedy under any other Act or common law right.

80. If the type of tax owing is one set forth in any one or more of Divisions 8, 8.1 or 9 (they are not mutually exclusive), the municipality can, but does not have to, take advantage of that special remedy made available to it. That is because the municipalities are empowered to exercise the special remedy in these Divisions by the use of the word "may" contained in each of Divisions 8, 8.1 or 9. So, it is empowered, but not mandated, to take advantage of the special remedy. S. 28(2)(c) of the *Interpretation Act*[35] makes that clear; the word "may" is to be construed as permissive and empowering and can be contrasted with the word "shall" which is construed as imperative.

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[35] *Ibid* at note 5., Tab 7

81. Section 348 is quite different in that it provides a special lien in priority for the collection of a debt.

K. The Effect of the Special Lien

82. A tax roll and a tax certificate are "in respect of" the taxed property. The special remedies in Division 8 and 8.1 also contain remedies "in respect of" the taxed asset.[36] However, the special lien arising from s. 348 is not co-related to the assessed property.

83. S. 348 is situated in Division 1, among Part 10's General Provisions, and reads:

> **348** Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) take priority over the claims of every person except the Crown, and
>
> (d) are a special lien
>
> (i) **on land and any improvements to the land**, if the tax is a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy, or
>
> (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.
>
> (emphasis added)

84. To be accorded a special lien by s. 348(d)(i) of the *MGA* the debt must be associated with a particular type of tax; however, unlike some of the special remedies, the lien is not coextensive with the assessed property.

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[36] See Division 8 and 8.1 of the *MGA*, Tab 1

85. S. 348(a) of the *MGA* provides that taxes due to a municipality are an amount owing to the municipality. S. 348(b) provides that they are recoverable as a debt. So, one remedy available to a municipality is to sue for the recovery of that debt.

86. While the Act does not say so, it is unreasonable to contemplate that the special lien could be on anything other than the Debtors' land.

87. In any event, the main contention for this application, however, is not whose land the special lien attaches to, but what land.

L. Land

88. "Land" is not defined in the *MGA*.

89. Looking to the broader statutory and common law context, however, there is a clear tendency toward a broad definition of land. For example:

a. The *Land Titles Act* defines "land" in s. 1(m).[37] That definition is very broad and catches every interest in land.
b. The *Civil Enforcement Act* is in *pari passu* with the *MGA* in respect of the collection of debts provisions of the *MGA*. The *Civil Enforcement Act* defines land to include "any interest in land but does not include growing crops."[38]
c. At common law, mines and minerals and interests therein, form part of the land.[39]

90. Another resource that assists in interpreting the use of the word "land" in s. 348(d)(i) is the use of the word "goods" in s. s. 348(d)(ii).

91. S. 348(d)(ii) gives a special lien on goods, but it does not apply to a property tax except in the very narrow instance of a designated manufactured home in a manufactured home community.

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[37] *Land Titles Act*, RSA 2000, c L-4, s. 1(m).**Tab 17**
[38] *Civil Enforcement Act*, RSA 2000, c C-15, s. 1(1)(bb). **Tab 18**
[39] *Berkheiser v Berkheiser*, 1957 CanLII 56 (SCC); 7 DLR (2d) 721; *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 (CanLII); [2002] 1 SCR 146. **Tab 19**

92. But, the section illustrates, clearly, that the property subject to the tax collection process is not coextensive to the property that is subject to the tax assessment.

93. S. 348(d)(i), relating to a special lien on land, is worded the same way except that, of course, a special lien on land is given in respect of different categories of tax. The concept is the same; if the special lien is created, it applies to all land or all goods or, in two instances, both.

94. Had the Legislature wished to restrict the special lien created by s. 348 to the assessed land or goods, it could have said so, but it did not.

95. The *MGA* employs specific language to indicate that the special remedies discussed above are restricted to the assessed property in question. That same language is not used in relation to the special lien under s. 348.

96. One presumption in statutory construction is the presumption of consistent expression. This principle provides that:

> *[i]t is presumed that the Legislature uses language carefully and consistently so that within a statute or other legislative instrument, the same words have the same meaning and different words have different meanings.*[40]

95. While this sounds obvious, what this means is that when similar but different language is used, it is presumed to have a different meaning. This presumption exists not only within the statute, but across statutes as well, especially statutes or provisions dealing with the same subject matter. This would also apply to regulations promulgated under the same statute. Ruth Sullivan, author of *Sullivan on the Construction of Statutes,* describes at para. 8.36 of her text the case of different words implying a different meaning:

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[40] Sullivan, Ruth, *Ibid.* at p. 217 at para. 8.32., Tab 5

> *Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in Jabel Image Concepts Inc. v. Canada:*
>
> > *"When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning." [references excluded]*

97. When applying the forgoing in comparing the provisions of the modern day *MGA* to the predecessor statutes, one is drawn to the conclusion that the Legislature has intentionally expanded the scope of the special lien from applying only to the taxed land of the debtor to applying to all land of the debtor. This intention is evident in the language of s. 348(d)(i) and is consistent with the other remedies for tax recovery under the *MGA*, such as the distress remedy in Division 9[41], which are similarly detached from the assessed property.

98. The scope of the special lien set forth here already has analogs in the marketplace by operation of other statutes. These include the provisions, discussed above, namely s. 227 and 224(1.2) of the *Income Tax Act* and s. 129 of the *Workers Compensation Act*.

99. S. 348 provides that unpaid property taxes are a debt. It goes on, further, to provide that it is a secured debt and that the secured debt has priority. It is restricted to land and improvements to land. It is not restricted to any particular land or any particular location in Alberta.

M. The *Regent Resources* Decision

100. DEL relies heavily in its Application in the recent decision of *Regent Resources Ltd (Re)*[42] (*"Regent Resources"*).

101. The Municipalities acknowledge that, while not bound to follow a decision of a fellow Justice, decisions by Justices of the Court of Queen's Bench are highly persuasive when dealing with the same issue. The Municipalities were not parties to the proceedings in *Regent Resources* and did not have the opportunity to make submissions. In any event, the

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[41] See Division 9 of the *MGA*, Tab 1
[42] *Regent Resources Ltd (Re),* 2018 ABQB 669 (CanLII), Applicant's Authorities

Municipalities have reviewed this decision and are placed in the position of having to question its correctness. It is submitted that this decision is not correctly decided for the reasons that follow.

102. It is submitted, with respect, that, generally, the Court in *Regent Resources* failed to look to the appropriate principles of statutory interpretation when giving reasons. For example, in paragraph 15, the Court refused to look to a comparison to the wording in ss. (i) and (ii). The Court stated:

> *The interpretation of s. 248(d)(ii) is not before me and I do not agree that I am so constrained in interpreting s. 348(d)(i).*

103. With respect, that is a serious error. Ss. 348(d)(ii) was before the Court as, indeed, was the whole of the statute. As a matter of law and as discussed earlier in this Brief, a Court cannot interpret s. 348(d)(i) in a vacuum, although from the reasons, that is what appears to have occurred.

104. At paragraph 16, the Court should have looked to the *Land Titles Act, ("land includes all interest in land",* the *Civil Enforcement Act ("land includes all interest in land but crops")*, and the common law (mineral interests are real property i.e. *land*) for assistance. As a matter of law, the Court is bound to look to the whole statute book. However, in *Regent Resources,* the Court refused to do so.[43]

105. At paragraph 25, the Court says that the municipality's interpretation would result in the special lien *being "an invisible super priority charge" of which purchasers and lenders would not have notice.*

106. The so called *invisible super priority charge* is exactly what arises with respect to monies not paid to CRA. That is the effect of both s. 227 and s. 224(1.2) of the *Income Tax Act*.

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[43] See excerpts from the *Land Titles Act*, Tab 17 and the *Civil Enforcement Act*, Tab 18

107. But as the Courts, up to and including the Supreme Court of Canada have pointed out, the tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly.

108. The banks regularly inquire of their customers with respect to the status and currency of potential super priority claims. The largest is usually the potential claim of CRA. But there are others. Workers compensation assessment is an example. This is the standard margining process at work.

109. Further, as has been pointed out in the Affidavit of Kneehill and Red Deer County, any party can inquire and obtain a tax certificate in respect of taxes owing to a municipality. [44]

110. The Court in *Regent Resources* seems to have given credence to the *anywhere in the world* argument noted in paragraph 24. In *Regent Resources,* the Receiver argued that this was absurd. With respect, what is absurd, is the argument itself. It is trite law that where one legislating body, such as a Province, passes a collection remedy such as a special lien or a deemed trust, the question of enforcement of that remedy in a foreign jurisdiction is up to the foreign jurisdiction.

111. Paragraph 26 of the *Regent Resources* decision speaks in terms of unsecured remedies and says that they could be pursued outside Alberta *if the judgment is extra-provincially registered.* That is not so, unless the foreign jurisdiction has legislation similar to the *Reciprocal Enforcement of Judgment Act.* So it is up to the legislation of the foreign jurisdiction whether any judgment in Alberta can be enforced extra-provincially.

112. In paragraph 26 the Court seems to say that while the debt is not limited in where it can be collected, the *super priority* is. That this is not the case is readily seen by looking at other sections of the *MGA*. Again it is emphasized that s. 348 creates a debt. It is that debt that is being collected. While that debt may exist because taxes were unpaid, it is not a collection

[44] See para. 17 of the Affidavit of Kneehill and para. 15 of the Affidavit of Red Deer County.

of the taxes; it is a collection of a debt. That debt is simply not co-located with the asset taxed.

113. With respect, the Court failed to look to the whole scheme of the *MGA*. The purpose of the Act is to empower a municipality to assess taxes, and to collect those taxes. And, to repeat, one of the ways of collecting those taxes is to state that the taxes are a debt, give that debt priority and secure it with a special lien.

114. Legislature could have given the municipalities a *super priority* over all of the assets of the debtor. But it did not. It gave one form of *super priority*, i.e. it gave a special lien on goods, in respect of one set of types of taxes. It gave another *super priority*, on land and improvements, with respect to another set of types of taxes.

115. Legislature could have further limited the scope of the super priority created by the special lien by saying that the special lien was only on the taxed asset or only within the municipality's boundaries. It did neither.

116. With respect, it appears that the learned Justice in *Regent Resources,* failed to look to totality of the Act to determine scheme and object of the Act.

117. The object of the Act is to empower the municipalities to assess tax and to provide a mechanism to collect that tax.

118. Courts are required to give fair, large, and liberal construction and interpretation which best ensures the object of the Act.

119. A fair, large and liberal interpretation of s. 348(d)(i) is that it has provided a special lien on all land, and not just either the taxed land or land in the municipality.

PART III: REQUEST FOR RELIEF

120. We respectfully request that the Application of DEL be denied with costs.

ALL OF WHICH is respectfully submitted this ___ day of January, 2019.

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Per: _____
Michael J. McCabe, Q.C.

Per: _____
Shauna N. Finlay