COURT FILE NO.	1703-12327	Clerk's Stamp JUDICIAL CENTRE OF EDMONTON FILED AUG 09 2019 Clerk of the Court of Queen's Bench
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT , R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD

DOCUMENT	**BRIEF OF THE RESPONDENTS JEFF and JACKIE HADFIELD**	
ADDRESS FOR SERVIC AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	VERHAEGHE LAW OFFICE #203 Mayfield Business Centre 10525 170 Street Edmonton, AB T5P 4W2	Lawyer: Bradley J. Smith Telephone: 587-404-1204 Fax: 587-410-2555 Email: bradley@freedomlaw.ca File No.: 18-08-087

BRIEF OF THE RESPONDENTS JEFF AND JACKIE HADFIELD
For a commercial hearing before Justice Hillier on August 22-23, 2019

TABLE OF CONTENTS

RELEVANT DOCUMENTS

1. Statement of Claim, filed April 17, 2019;
2. Statement of Defence, filed May 10, 2019;
3. Affidavit of Jeff Hadfield, filed October 4, 2018.
4. Affidavit of Jeff Hadfield, filed January 9, 2019.
5. Affidavit of Jeff Hadfield, filed August 9, 2019.
6. Monitor's Twenty-First Report, filed January 4, 2019.

AUTHORITIES

1. *Municipal Government Act*, RSA 2000, c M-26 (Excerpts)..TAB 1
2. *Northern Sunrise County v Virginia Hills Oil Corp,* 2019 ABCA 61 [*Virginia Hills*].TAB 2

BACKGROUND

1. This Brief specifically responds to the Brief of the Town of Bonnyville, Athabasca County and Municipal District of Opportunity No. 17, filed August 2, 2019 **(the "Applicant's Brief")**.

2. The Respondents, Jeff and Jackie Hadfield, were once registered owners of the **"Athabasca Lands"** as described in paragraph 11 of the Applicant's Brief. The Athabasca Lands have often been referred to as the "Wandering River Property" in these proceedings.

3. The Respondents originally purchased the Athabasca Lands for $46,000.00 in 1996 and began farming it at that time. In the Spring of 2014, the Respondents were approached by a representative of Canada North Group Ltd.. After negotiations, 1371047 Alberta Ltd. (**"137"**) and Wandering River Properties Ltd. (**"WRP"**) **(collectively, "The Land Owners")** purchased the property in July, 2014 for $1,400,000.00. As part of that transaction, a Vendor Take Back Mortgage in favour of the Respondents was registered on the Land Owners' title to the property in the amount of $1,340,000.00. The Mortgage originally required payments of $23,500.00 per month; however, around December 201, the Land Owners indicated to the Respondents that they were struggling financially and it was agreed that mortgage payments would be reduced to $8,500.00 until the Land Owners recovered financially. However, in June, 2017 the Respondents stopped receiving any payments at all. The remaining principle on the Mortgage at that time was $811,000.00, which remains unpaid to this day.[1]

4. The Respondents submitted a Proof of Claim in these proceedings in regard to their mortgage. The Proof of Claim was not disputed by the Monitor.

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[1] Affidavit of Jeff Hadfield, filed October 4, 2018.

POSITION OF THE RESPONDENTS

5. The Respondents do not dispute that the Applicant is owed municipal taxes in the amounts claimed in paragraph 10 of its Brief, but the Respondents strongly disagree with the Applicant's position that the Applicant holds a "special lien" pursuant to the *Municipal Government Act* ("***MGA***") over the Athabasca Lands for <u>all</u> the taxes that they claim are owing from the Athabasca Lands and the Wandering River Operation (**the "Athabasca Taxes"**). It is the Respondent's position that the Applicant only holds a "special lien" over the Athabasca Lands for only the portion of the Athabasca Taxes for which the owner of the Athabasca Lands is the properly "assessed person" pursuant to the *MGA* (**the "Land Taxes"**). A "special lien" does not attach to the remaining portion of the Athabasca Taxes. It is the Respondent's understanding that the lease holders mainly comprised of the entities described in paragraph 19 of the Applicant's Brief (**the "Lease Holders"**). The Lease Holders are the properly "assessed person" for the majority of the Athabasca Taxes (**the "Lease Taxes"**).

6. Because it is only the Land Taxes are subject to a "special lien" that has priority over the Respondent's mortgage, it is the Respondent's position that once the Land Taxes have been paid, the Respondent's secured mortgage has priority over all other creditors claiming against the Athabasca Lands.

FACTS

7. When the Respondents purchased the Land, it came with a subsisting lease with Suncor, who leased the Athabasca Land from the Respondents for Suncor to construct a maintenance area for Suncor's Wandering River gas field pipeline operation.[2]

8. Suncor built the following permanent structures on the Land, which are still there today:

   a. 4,800 Sq. Ft. Administrative Service Warehouse, built approximately 1985.

   b. 952 Sq. Ft. Welding Shop, built approximately 1977.

   c. 800 Sq. Ft. 3-sided metal clad warehouse, built approximately 1995.

   d. 1,600 Sq. Ft. warehouse, built approximately 1992.[3]

   (the "Permanent Structures").

9. Prior to the Respondents selling the Land to the Land owners, the municipal taxes the Respondents paid on the Athabasca Land were approximately $246.00 per year.[4]

10. During the time Suncor was operating on the Land, Suncor also paid taxes to the municipality through a separate tax assessment in the amount of approximately $275,000.00 per year. The Respondents never received any of Suncor's assessments, and Suncor paid the taxes directly to the municipality themselves.[5] Apparently, Suncor was the "assessed person" in that case.

11. After the purchase, the Lease Holders entered into a lease with the Land Owners for the purposes of constructing a work camp and service yard for servicing a nearby oil pipeline owned by Trans-Canada Pipeline Ltd. (now known as TC Energy) **(the "Pipeline Operation")**. The oil pipeline that the Pipeline Operation serviced was approximately 10 kilometers away.[6]

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[2] Affidavit of Jeff Hadfield filed August 9, 2019.
[3] Affidavit of Jeff Hadfield filed August 9, 2019.
[4] Affidavit of Jeff Hadfield filed August 9, 2019.
[5] Affidavit of Jeff Hadfield filed August 9, 2019.
[6] Affidavit of Jeff Hadfield filed August 9, 2019.

12. The Lease Holders cleared the parts of the Athabasca Land and brought numerous mobile structures onto the Athabasca Land. Other than the existing Permanent Structures, no other structure placed by the Lease Holders were permanent structures, save for perhaps some gravel roads and some gravel pads.[7]

13. The work camp was a large operation as it was outfitted for approximately 890 workers. There were mobile dorms, executive trailers, mobile kitchens, mobile recreational facilities, and mobile laundry facilities, along with a parts warehouse, repair shops, and a mobile fuel station.[8] The Pipeline Operation operated from 2014 to 2017. Since 2017, the Pipeline Operation ceased operating and was essentially abandoned. The workers left and most of the structures and other assets (**the "Camp Assets"**) that the Lease Holders placed on the Lands have been removed from the Lands and most of the assets sold. It is the Respondent's understanding that the proceeds of the sale of the Camp Assets are currently being held in trust with the Monitor.

14. The yearly municipal tax levy assessed by Athabasca County in regard to the Lease Holder were as follows:[9]

YEAR	LAND	IMPROVEMENTS	TOTAL
2015 -	$1,634.49	$219,801.24	$221,435.73
2016 -	$1,665.51	$160,525.80	$162,191.31
2017 -	$1,689.00	$145,206.31	$146,895.31
2018 -	$1,783.81	$16,006.75	$17,790.56
2019	$1,798.23	$16,422.88	$18,221.11
TOTAL	**$8,571.04**	**$557,962.98**	**$566,534.02**

15. Although there may be other assets that were located on the Athabasca Lands and have been removed, the Respondent is aware of the following assets that have been removed from the Athabasca Lands:

a. Unit 43 - Well Site Executive Double Ender #104[10]
b. Unit 44 - Well Site Executive Double Ender #106[11].
c. Unit 45 - Well Site Executive Double Ender #108[12].
d. Unit 50 - Well Site Executive Double Ender #119[13].

e. Well Site Executive Double Ender #111[14].
f. Well Site Executive Double Ender #117[15].
g. Unit 125- Six Recreation Units - #FXGUR201319001 to 006[16].
h. Unit 125- Three Recreation Units - #FSLF3UR201315001 to 003.[17]
i. Dorms for approximately 700 workers[18].
j. Water treatment plant[19].
k. Electrical generation building[20].

16. The following assets are likely now removed from the Athabasca Lands:

a. 4 Freshwater tanks[21]
b. 4 Blackwater tanks[22]
c. 3 Kitchen Units composed of approx. 60 separate structures[23]
d. 4 dorms composed of approximately 40 separate structures[24]
e. Approximately 12 light stands[25]
f. Approximately 6 sewage lift stations[26]
g. 3 smoking shacks[27]
h. One guard shack[28]
i. Approximately 20,000 litre propane truck tank[29]
j. Approximately 10 1000-gallon propane tanks[30]
k. Camp support equipment, including 3 sea containers full of same[31]
l. Approximately 20 electrical transformers[32]

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[7] Affidavit of Jeff Hadfield filed August 9, 2019.
[8] Affidavit of Jeff Hadfield filed August 9, 2019.
[9] Affidavit of Jeff Hadfield, filed August 9, 2019, Exhibit C
[10] Monitor's 21st Report.
[11] Monitor's 21st Report.
[12] Monitor's 21st Report.
[13] Monitor's 21st Report.
[14] Monitor's 21st Report.
[15] Monitor's 21st Report.
[16] Monitor's 21st Report.
[17] Monitor's 21st Report.
[18] Affidavit of Jeff Hadfield, filed January 9, 2019.
[19] Affidavit of Jeff Hadfield, filed January 9, 2019.
[20] Affidavit of Jeff Hadfield, filed January 9, 2019.
[21] Affidavit of Jeff Hadfield, filed January 9, 2019.
[22] Affidavit of Jeff Hadfield, filed January 9, 2019.
[23] Affidavit of Jeff Hadfield, filed January 9, 2019.
[24] Affidavit of Jeff Hadfield, filed January 9, 2019.
[25] Affidavit of Jeff Hadfield, filed January 9, 2019.
[26] Affidavit of Jeff Hadfield, filed January 9, 2019.
[27] Affidavit of Jeff Hadfield, filed January 9, 2019.
[28] Affidavit of Jeff Hadfield, filed January 9, 2019.
[29] Affidavit of Jeff Hadfield, filed January 9, 2019.
[30] Affidavit of Jeff Hadfield, filed January 9, 2019.
[31] Affidavit of Jeff Hadfield, filed January 9, 2019.
[32] Affidavit of Jeff Hadfield, filed January 9, 2019.

LAW AND ARGUMENT

17. The Respondent strongly disagrees with the Applicant's argument that a "special lien" exists for all "improvements" to a parcel of land. Contrary to the Applicant's Argument, not all "improvements" are treated the same under the *MGA*, nor do all "improvements" attract a "special lien" pursuant to section 348 of the *Municipal Government Act*, RSA 2000, c M-26[33].

18. Section 304(1) of the *MGA* contains two columns: Column 1 describes the "Assessed property" and Column 2 describes the "Assessed person".[34] The Applicant only partially reproduced this section in Paragraph 40.of its Brief to only include the parts where the "Assessed person" was "the owner of the parcel of land". The rest of section 304(1) describes other potential "assessed persons", which include holders of leases (subsections c, d, e, and f,), owners of railway property (subsection d.1), owners of machinery and equipment (subsection g), and operators of linear property (subsection i).

19. Part 10, Division 9, of the *MGA* is headed as "Recovery of Taxes Not Related to Land. Section 437(c)(iii) specifically states:

> **In this Division,**
>
> (a) "distress warrant" means a written instruction to seize goods of the person named in the warrant;
>
> (b) "period for payment" means
>
> (i) if the person liable to pay the tax is a resident of the municipality, the 14 days following the sending of the tax notice by the municipality, or
>
> (ii) if the person liable to pay the tax is not a resident of the municipality, the 30 days following the sending of the tax notice by the municipality;
>
> (c) **"tax" means**
>
> (i) a business tax,
>
> (ii) a well drilling equipment tax,
>
> (ii.1) a community aggregate payment levy, or
>
> **(iii) a property tax or community revitalization levy imposed in respect of property**

[33] *Municipal Government Act*, RSA 2000, c M-26, s 348 [TAB 1].
[34] *Municipal Government Act*, RSA 2000, c M-26, s 304 [TAB 1].

referred to in section 304(1)(c), (f), (g), (h), (i), (j)(i) or (k);

(d) "tax arrears" means taxes that remain unpaid after the expiry of the period for payment.[35]

[emphasis added]

20. Because the remedies available to a municipality for non-payment of tax arrears pertaining to property falling under Division 9 are clearly delineated within that Division, no remedies beyond what are contained in Division 9, specifically sections 438 and 439[36] are available to a municipality in regard to that property. As such, property referred to in section 304(1)(c), (f), (g), (h), (i), (j)(i) or (k) are not subject to a "special lien" created by section 348.

21. The above points were specifically discussed in the recent case of *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61.[37] In *Virginia Hills,* it was determined that "linear property" fell under 304(l)(f) and was therefore not subject to the "special lien" afforded by section 348, as the taxes for "linear property" are imposed on the operator of linear property by operation of Section 304(1)(i). The court found that the singular remedy for non-payment of linear property taxes was is a right of distress and seizure of the debtor's goods under section 439(1).[38]

22. To summarize *Virginia Hills,* any tax liability that attaches to someone other than an owner of a "parcel of land", as delineated in section 304, does not give rise to a "special lien" pursuant to section 348. As the Court states in paragraph 46:

> When section 348(d)(i) is read in its grammatical and ordinary sense and in harmony with the scheme of the MGA, its reference to "property tax" does not include linear property tax arrears. The provision therefore does not create a special lien "on land and any improvements to the land" with respect to those arrears. When the provision is considered in the context of the entire scheme of the MGA, including the specific provisions for remedies regarding linear property taxes set out in Division 9, and the fact that the operator (who is not necessarily connected to the land on which the property is situated) is designated as the person liable for linear property taxes, it is apparent that section 348(d)(i), which applies to land and its improvements, does not encompass linear property.[39]

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[35] *Municipal Government Act*, RSA 2000, c M-26, s 437 [TAB 1].
[36] *Municipal Government Act*, RSA 2000, c M-26, s 438 439 [TAB 1].
[37] *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 [TAB 2].
[38] *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 at paras 40-43 [TAB 2].
[39] *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 at para 46 [TAB 2].

23. The Court in *Virginia Hills* pointed out that it would be "manifestly unjust" if the person from whom the taxes are due is not also the person who controls the property that is being taxed.[40] This runs opposite to what the Applicant is urging in this case. The Applicant wishes that the Land Owner be liable for taxes incurred by the Lease Holder, who is not the same person.

24. The *MGA* does not allow discretion as to who the "assessed person" is. If the Applicant has improperly named a person as the assessed person, the error cannot stand. Section 304 states:

> The name of the person described in column 2 <u>must</u> be recorded on the assessment roll as the assessed person in respect of the assessed property described in column 1.
>
> [emphasis added]

25. As the Court in *Virginia Hills* points out, municipal taxes are not recoverable as a debt at common law. Any power to do so must come from "unambiguous" statutory authority to do so. As such, any ambiguity in the *MGA* must be resolved against depriving a properly secured creditor of all or part of its security without compensation.[41]

26. Section 304(1)(f) deals with improvements held under a lease where the improvements are used for "drilling, treating, separating, refining or processing" oil and natural gas, where the proper assessed person is the lease holder. 304(1)(f) applies in the present case as the Pipeline Operation falls under this category. It is clear that the intention of this section is to ensure that the persons who benefit the considerable economic activity generated by oil and gas operations on leased land are the persons who are ultimately responsible for the greatly increased municipal taxes that result.

27. In this case, it would create an absurd result to have a bare land owner left unsecured and liable for the taxes generated by the Lease Holder, particularly when there was the remedy of seizure of the Lease Holder's property available to the Applicant.

[40] *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 at para 48 [TAB 2}.
[41] *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 at paras 34-39 [TAB 2].

REMEDY SOUGHT

28. The Respondent seeks:

1. Dismissal of the Applicant's Application;

2. A declaration that the proper "assessed person" for the Lease Taxes are the Lease Holders; and,

3. Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this Ninth day of August, 2019.

Verhaeghe Law Office

Per: ______________________

BRADLEY J. SMITH
Solicitor for the Respondents, Jeff and Jackie Hadfield

TAB

1

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of February 1, 2019

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Recording assessed persons

304(1) The name of the person described in column 2 must be recorded on the assessment roll as the assessed person in respect of the assessed property described in column 1.

	Column 1 Assessed property		Column 2 Assessed person
(a)	a parcel of land, unless otherwise dealt with in this subsection;	(a)	the owner of the parcel of land;
(b)	a parcel of land and the improvements to it, unless otherwise dealt with in this subsection;	(b)	the owner of the parcel of land;
(c)	a parcel of land, an improvement or a parcel of land and the improvements to it held under a lease, licence or permit from the Crown in right of Alberta or Canada or a municipality;	(c)	the holder of the lease, licence or permit or, in the case of a parcel of land or a parcel of land and the improvements to it, the person who occupies the land with the consent of that holder or, if the land that was the subject of a lease, licence or permit has been sold under an agreement for sale, the purchaser under that agreement;

	Column 1 Assessed property		Column 2 Assessed person
(d)	a parcel of land forming part of the station grounds of, or of a right of way for, a railway other than railway property, or a right of way for, irrigation works as defined in the *Irrigation Districts Act* or drainage works as defined in the *Drainage Districts Act*, that is held under a lease, licence or permit from the person who operates the railway, or from the irrigation district or the board of trustees of the drainage district;	(d)	the holder of the lease, licence or permit or the person who occupies the land with the consent of that holder;
(d.1)	railway property;	(d.1)	the owner of the railway property;
(e)	a parcel of land and the improvements to it held under a lease, licence or permit from a regional airports authority, where the land and improvements are used in connection with the operation of an airport;	(e)	the holder of the lease, licence or permit or the person who occupies the land with the consent of that holder;
(f)	a parcel of land, or a part of a parcel of land, and the improvements to it held under a lease, licence or permit from the owner of the land where the land and the improvements are used for	(f)	the holder of the lease, licence or permit;

	Column 1 Assessed property		Column 2 Assessed person
	(i) drilling, treating, separating, refining or processing of natural gas, oil, coal, salt, brine or any combination, product or by-product of any of them,		
	(ii) pipeline pumping or compressing, or		
	(iii) working, excavating, transporting or storing any minerals in or under the land referred to in the lease, licence or permit or under land in the vicinity of that land.		
(g)	machinery and equipment used in the excavation or transportation of coal or oil sands as defined in the *Oil Sands Conservation Act*;	(g)	the owner of the machinery and equipment;
(h)	improvements to a parcel of land listed in section 298 for which no assessment is to be prepared;	(h)	the person who owns or has exclusive use of the improvements;
(i)	linear property;	(i)	the operator of the linear property;

Tax becomes debt to municipality

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 clean energy improvement 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.

RSA 2000 cM-26 s348;2005 c14 s12;2018 c6 s5

Fire insurance proceeds

349(1) Taxes that have been imposed in respect of improvements are a first charge on any money payable under a fire insurance policy for loss or damage to those improvements.

(2) Taxes that have been imposed in respect of a business are a first charge on any money payable under a fire insurance policy for loss or damage to any personal property

(a) that is located on the premises occupied for the purposes of the business, and

(b) that is used in connection with the business and belongs to the taxpayer.

1994 cM-26.1 s349

Tax certificates

350 On request, a designated officer must issue a tax certificate showing

(a) the amount of taxes imposed in the year in respect of the property or business specified on the certificate and the amount of taxes owing,

(a) respecting the rights and obligations of a municipality in relation to its possession of a designated manufactured home under this Division;

(b) respecting any other matter related to the recovery of taxes under this Division that the Minister considers necessary to carry out the intent of this Division.

1998 c24 s40

Reporting requirements

436.24(1) Unless a municipality passes a bylaw to the contrary, the owner of a manufactured home community must provide monthly reports to the chief administrative officer or a designated officer of the municipality regarding

(a) the ownership of all designated manufactured homes in the manufactured home community, including the serial numbers of the designated manufactured homes, and

(b) the movement of all designated manufactured homes in and out of the manufactured home community.

(2) Despite subsection (1), a municipality may pass a bylaw requiring the owner of the manufactured home community to provide the reports required under subsection (1) to the municipality on the dates specified by the municipality, but not more than once a month.

1998 c24 s40

Division 9
Recovery of Taxes Not Related to Land

Definitions

437 In this Division,

(a) "distress warrant" means a written instruction to seize goods of the person named in the warrant;

(b) "period for payment" means

(i) if the person liable to pay the tax is a resident of the municipality, the 14 days following the sending of the tax notice by the municipality, or

(ii) if the person liable to pay the tax is not a resident of the municipality, the 30 days following the sending of the tax notice by the municipality;

(c) "tax" means

(i) a business tax,

(ii) a well drilling equipment tax,

(ii.1) a community aggregate payment levy, or

(iii) a property tax or community revitalization levy imposed in respect of property referred to in section 304(1)(c), (f), (g), (h), (i), (j)(i) or (k);

(d) "tax arrears" means taxes that remain unpaid after the expiry of the period for payment.

RSA 2000 cM-26 s437;2005 c14 s18

Methods of recovering taxes in arrears

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.

1994 cM-26.1 s438

Right to issue distress warrant

439(1) A municipality wishing to recover tax arrears pursuant to this Division may issue a distress warrant.

(2) Each municipality may, in writing, authorize a designated officer or appoint a person to the position of designated officer to prepare and issue distress warrants and seize goods pursuant to distress warrants on behalf of the municipality.

1994 cM-26.1 s439

Seizure of goods

440(1) When a distress warrant has been issued, a civil enforcement agency or a person referred to in section 439(2) must place sufficient goods under seizure to satisfy the amount of the claim shown in the warrant.

(2) The person placing goods under seizure may ask the person who owns or has possession of the seized goods to sign a bailee's undertaking agreeing to hold the seized goods for the municipality.

(3) If a person refuses to sign a bailee's undertaking, the person placing goods under seizure may remove the goods from the premises.

(4) When a bailee's undertaking has been signed under subsection (2), the goods specified in it are deemed to have been seized.

(5) A seizure under this section continues until the municipality

(a) abandons the seizure by written notice, or

(b) sells the goods.

(6) The municipality is not liable for wrongful or illegal seizure or for loss of or damage to goods held under a seizure under this section if a bailee's undertaking relating to the seized goods has been signed pursuant to subsection (2).

1994 cM-26.1 s440;1994 cC-10.5 s146;1997 c19 s3

Goods affected by distress warrant

441(1) A person may seize the following goods pursuant to a distress warrant:

(a) goods belonging to the person who is liable to pay the tax arrears or in which that person has an interest;

(b) goods of a business that is liable to pay business tax arrears, even if the goods have been sold to a purchaser of the business;

(c) goods of a corporation that are in the hands of

(i) a receiver appointed for the benefit of creditors,

(ii) an authorized trustee in bankruptcy, or

(iii) a liquidator appointed under a winding-up order.

(2) If a person who is liable to pay tax arrears is in possession of goods belonging to others for the purpose of storing the goods, those goods must not be seized pursuant to the distress warrant.

1994 cM-26.1 s441

Date for issuing distress warrant

442(1) A distress warrant must not be issued until the period for payment expires, unless subsection (2) applies.

(2) If, before the period for payment expires, a municipality has reason to believe that a person is about to move out of the municipality goods that are to be seized under a distress warrant, the municipality may apply to a justice of the peace for an order authorizing the municipality to issue the distress warrant before the period for payment expires.

1994 cM-26.1 s442

TAB

2

In the Court of Appeal of Alberta

Citation: Northern Sunrise County v Virginia Hills Oil Corp, 2019 ABCA 61

Date: 20190212
Docket: 1701-0221AC
Registry: Calgary

Between:

The Bank of Nova Scotia and Alberta Treasury Branches

Respondents
(Plaintiffs)

\- and -

Virginia Hills Oil Corp. and Dolomite Energy Inc.

Respondents
(Defendants)

\- and -

Alvarez & Marsal Canada Inc. in capacity of Court-appointed Receiver and Manager of the assets, undertakings and property of Virginia Hills Oil Corp. and Dolomite Energy Inc.

Respondent
(Applicant)

\- and -

Northern Sunrise County and the Municipal District of Opportunity No. 17 and Lamont County

Appellants
(Not Parties at the Trial Court)

The Court:

The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved

Appeal from the Order by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 20th day of June, 2017
Filed on the 20th day of June, 2017
(Docket: 1701-02184)

Reasons for Judgment Reserved

The Court:

I. Introduction

[1] The substantive issue on this appeal is whether the taxation provisions of the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*) grant priority in bankruptcy proceedings to municipalities for tax arrears related to linear property. The appellant municipalities (Northern Sunrise County, Municipal District of Opportunity No 17, and Lamont County; collectively the Municipalities) seek to collect tax arrears on the linear property of two insolvent energy companies, namely a pipeline and related equipment.

[2] The respondents, Alvarez & Marsal Canada Inc (the Receiver) and Bank of Nova Scotia (BNS), say that we should not address that substantive issue. They say, first, that an appeal of a distribution order in a receivership action is moot after funds have been distributed; and, second, that the Municipalities failed to attend the hearing at which the distribution order was made, despite having received notice, and this appeal is therefore an abuse of process.

[3] For the reasons that follow, we have decided to address the substantive issue on appeal. With respect to that issue, we agree with the interpretation of the *MGA* put forward by the Receiver, and dismiss the appeal.

II. Background

[4] Virginia Hills Oil Corp. and Dolomite Energy Inc. (Debtors) are insolvent energy companies that were placed into receivership on February 13, 2017, and subsequently declared bankrupt on May 3, 2017. The respondent Receiver is the court-appointed receiver and manager and trustee in bankruptcy of the Debtors. The Debtors owed linear property tax arrears to the appellant Municipalities.

[5] The appellants are three of the six municipalities through which a pipeline operated by the Debtors passes. Municipal taxes on the pipeline proper remained unpaid by the Debtors as of the dates of their receivership and bankruptcy. The appellants did not advance claims as secured creditors in the receivership or bankruptcy, although served with notice of same, at any time prior to the granting on June 20, 2017 of an Order for Advice and Directions and Distribution of Funds (Order).

[6] After the Order was granted the Receiver distributed all recovered funds to the secured creditors, BNS and Alberta Treasury Branches (ATB), with the result that no funds remained in the Receiver's hands to pay the appellants' claims, even if it were determined that they have claims that rank equal to or ahead of the BNS or ATB secured claims. After the distribution Northern

Sunrise appealed the Order. The remaining Municipalities were added as appellants by order dated November 8, 2017.

[7] The Municipalities appeal part of the Order:

> 3. It is hereby ordered and declared that the pre-receivership linear tax claims of the Municipalities ... form unsecured claims only as against the Debtors, and do not form secured claims against the Debtors' Property, including for greater certainty the Property sold to the Purchaser .., nor are Permitted Encumbrances ..., and the Municipalities have no further claims or remedies as against the Transaction Properties, the Purchaser or the funds held by the Receiver from the sale of the Debtors' Property.

[8] Although the Municipalities were given notice of the proceeding that led to the Order (including the above paragraph in draft form), they did not appear at the hearing, and made no submissions. They now argue for the first time on appeal that their claims for linear property tax arrears are secured claims pursuant to section 348 of the *MGA* and the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[9] The Receiver and BNS ask that the appeal be dismissed because it is an abuse of process and moot. They point out that the Municipalities did not provide proofs of claim indicating that the linear property tax arrears were secured claims, attend the hearing that led to the Order despite being given notice that the Receiver would be seeking an order declaring their claims to be unsecured, seek a stay of the Order, or notify the Receiver of their intention to appeal until after the distribution was made. In short, the respondents say they should not be prejudiced by the Municipalities' failure to act in a timely manner. The respondents also submit the appeal is moot because the funds originally held back for the linear property tax arrears have been distributed. In the alternative, they argue that the appeal should be dismissed because section 348(d)(i) of the *MGA* does not apply to linear property tax arrears. Further, the tax claims would not have priority by virtue of sections 87 and 73(4) of the *BIA*.

[10] The Municipalities acknowledge that they ought to have, at minimum, attended before the chambers judge on June 20, 2017 and advanced arguments about why their claims for linear property tax arrears are secured claims. However, at the relevant time they had not secured legal counsel and, they contend, the issue is a live controversy and of public importance, and should be heard.

III. Chronology

February 13, 2017	Consent Receivership Order appointed Alvarez & Marsal Canada Inc receiver of the assets and property of the Debtors. BNS and ATB are secured creditors (Secured Lenders) and owed approximately $108 million. The Debtors' secured and unsecured creditors' total claims were approximately $115 million.

March 14, 2017	The Receiver's First Report was filed. It stated that the Debtors owed approximately $1.1 million in municipal property taxes for the 2016 calendar year and that "the Receiver is uncertain as to the priority of the Property Taxes and is researching that issue".
March 21, 2017	An Approval and Vesting Order permitted the Debtors' property to be sold by the Receiver for $41 million. It also authorized a distribution to the Secured Lenders of the sale proceeds less amounts for the Receiver's professional and counsel fees, <u>retained to cover potential priority claim against the sales proceeds including municipal claims</u>, and other costs related to the administration of the estate.
April 24, 2017	The Receiver made a first distribution to the Secured Lenders of $37.5 million to BNS and $1 million to ATB.
April 27, 2017	The Receiver's Second Report advised that it was in the best interests of the estate to obtain a bankruptcy order.
May 3, 2017	A bankruptcy order was granted against the Debtors and appointed the Receiver as Trustee.
June 14, 2017	The Receiver's Third Report was filed. It stated that: i. the Debtors owed approximately $1.12 million (plus accrued interest and penalties) in municipal taxes for 2016, of which $838,339 was for 2016 linear property taxes; ii. the Receiver took the position that pre-receivership municipal linear property tax claims were unsecured claims and explained its rationale for its conclusion; iii. the Trustee had sent each municipality the statutory creditor proof of claim package and contacted them requesting them to file a proof of claim; iv. the Trustee received two unsecured proof of claims from Northern Sunrise County indicating it was owed an <u>unsecured</u> amount of approximately $1.2 million as at May 3, 2017; v. the Trustee received written communication from the Municipality of Opportunity No 17 that it would not be filing a proof of claim at this time; vi. the Receiver would be applying for an order approving a further distribution to the Secured Lenders and a declaration that the pre-receivership linear property taxes owed to the Municipalities were unsecured claims.
June 20, 2017	The Receiver's application for advice and directions was heard. The Municipalities were served with notice of the application and the draft form

	of order prepared by counsel for the Receiver which indicated that pre-receivership linear tax claims of the Municipalities form unsecured claims only as against the Debtors, and do not form secured claims against the Debtors' Property and the Municipalities have no further claims or remedies as against the Receiver. None of the Municipalities attended or opposed the application. An Order (Advice and Directions, Distribution of Funds) was granted declaring that the pre-receivership linear tax claims owed to the Municipalities were unsecured claims only as against the Debtors and not secured claims against the Debtors' property. It also provided for further interim distributions to BNS and ATB. This is the appealed order (Order).
July 14, 2017	The Receiver distributed $2 million to BNS and held back funds to cover professional fees and other administration costs. There was no holdback for pre-receivership linear tax claims.
July 19, 2017	Northern Sunrise County appealed the Order.
November 8, 2017	The Municipal District of Opportunity No 17 and Lamont County were added as appellants by order. Lamont County had not filed a proof of claim in the receivership/bankruptcy proceedings.
January 22, 2018	The Receiver's Fourth Report was filed.

IV. Issues and Standards of Review

[11] This appeal raises the following issues:

A. Should the Receiver be permitted to adduce the Receiver's Fourth Report as new evidence?

B. Should the appeal be dismissed because it is moot?

C. Should the appeal be dismissed as an abuse of process?

D. Does a municipality acquire a special lien on linear property tax arrears pursuant to section 348(d)(i) of the *MGA* and, if so, is it a secured claim for the purposes of the BIA?

E. If the answers to the questions in (D) are "yes", does that special lien lose its status if it is not registered "under a prescribed system of registration before the date of the initial bankruptcy event" pursuant to section 87 of the *BIA*?

F. Is a municipality precluded from enforcing a special lien post-receivership by section 73(4) of the *BIA*?

[12] The first three issues are raised for the first time on appeal and therefore the standard of review does not arise.

[13] The remaining issues concern statutory interpretation and are questions of law, reviewable on a correctness standard: *Balancing Pool v TransAlta Corporation*, 2013 ABCA 409 at para 9, 566 AR 116.

V. Analysis

A. The New Evidence Application

[14] The Receiver wants to adduce the Receiver's Fourth Report dated January 22, 2018 as new evidence in support of its submission that the appeal is moot. The Fourth Report outlines the steps taken by the Receiver in the administration of the Debtors' estate since the Order was granted. The substance of the new evidence is that $2 million, which had been held back from the first distribution to the Secured Lenders, was distributed to BNS on July 14, 2017 pursuant to the Order. This occurred before the appeal was filed on July 19, 2017, and the Receiver no longer holds any funds for linear property tax arrears.

[15] New evidence may be admitted if it could not have been obtained for use at trial even with the exercise of reasonable diligence and the evidence, if introduced, would be practically conclusive: *Xerex Exploration v Petro-Canada*, 2005 ABCA 224 at paras 116-17, 367 AR 201. The test is flexible and can be "departed from in the appropriate case": *Xerex Exploration* at para 117.

[16] This evidence was not available at the hearing because the final distribution occurred after the hearing was concluded. It provides the factual underpinning necessary to address the respondents' submission that the appeal should be dismissed because it is moot or otherwise an abuse of process.

[17] The application to admit the Receiver's Fourth Report is granted.

B. Is the Appeal Moot?

[18] An appeal is moot if a tangible and concrete dispute has disappeared and the issues it once raised have become hypothetical or academic: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 16, 57 DLR (4th) 231. The court considers three factors in determining whether to exercise its discretion to hear an appeal even though it is moot: the presence of an adversarial context, the concern for judicial resources and the awareness of the court's proper law-making function: see *Borowski* at paras 31-42; *Graff v Alberta (Energy and Utilities Board)*, 2007 ABCA 363 at para 4.

[19] The Municipalities submit that the appeal is not moot because it presents a live issue: are linear property tax arrears secured claims. If so, the distributed funds can be traced to BNS and may be recovered. They also contend that even if the appeal is moot, the question of how to treat the linear property tax arrears for the purposes of the *MGA* and the *BIA* is a question of public importance and the ruling would be of precedential value.

[20] The Receiver submits that the issue of whether the Municipalities' claims qualify as secured claims is academic as the funds have already been distributed to the secured lenders. It relies on *Lucid RV Parks Inc v Lucid Capital Fort McMurray Inc*, 2012 ABCA 317. In *Lucid*, which involved bankruptcy proceedings of an RV Park, an order granted on April 12, 2012 directed that all persons (including the appellants) in receipt of rents for May 2012 pay those funds into court. That order was appealed. After the appeal was filed, the case management judge ordered the funds paid into court be released to the Trustee, who was authorized to pay the RV Park's operating expenses. That order was not appealed. The funds in court were released to the Trustee and used to pay expenses. This court held that the appeal of the first order was moot to the extent that the funds had been distributed and noted that the second order, the distribution order, was not appealed. *Lucid* is distinguishable from the present case because here the order under appeal is the distribution order.

[21] BNS submits that a distribution order is a final decision that cannot be undone. The effect of its argument is that such an order cannot be appealed once it has been implemented. It relies on *Ernst & Young Inc v Central Guaranty Trust Co*, 2006 ABCA 337, 397 AR 225. That case is also distinguishable. *Ernst* involved a receivership of a business that sold extended car warranties on vehicles purchased from various automobile importers. The receiver was authorized to bring an action against Central Guaranty Trust, which had been holding some of the warranty monies in trust. On the eve of trial, Central Guaranty Trust amended its defence to allege that the trust was invalid. The receiver submitted that many of the orders granted in the course of the eight-year receivership had been made on the assumption that the trusts were valid and that it was too late for Central Guaranty Trust to raise the invalidity defence. The trial judge found that the validity of the trusts was not settled, and found them invalid. On appeal, this court concluded that Central Guaranty Trust was precluded from attacking the validity of the trusts. The receiver's March 1988 Report made recommendations based upon the explicit assumption that the trust was valid. In July 1988, the court directed Central Guaranty Trust to pay virtually all the trust funds it held to the receiver, and directed the receiver to pay those funds to the automobile importers. The trust funds were distributed pursuant to the July 1988 Order. Central Guaranty Trust appealed the July 1988 Order and later abandoned its appeal. Like *Lucid*, the key distinction between *Ernst* and the present case is that the order under appeal here is the order that directed the distribution, unlike in *Ernst* where the appeal of the distribution order had been abandoned.

[22] The fact that monies were paid to BNS pursuant to the Order (which the Municipalities did not apply to have stayed) does not preclude it from being reviewed on appeal. There may be circumstances when recovery of monies distributed by a receiver pursuant to a court order may not be appropriate or practicable. However, there is nothing on this record that would indicate that is the case here. The British Columbia Court of Appeal recognized in *obiter* that funds paid out by a

receiver to a bank "could, if it became necessary, be traced into the Bank's hands or the Bank could be declared a constructive trustee of the funds, assuming the conditions for such remedies are met": *Bank of Montreal v Peri Formwork Systems Inc*, 2012 BCCA 252 at para 35, 324 BCAC 152.

[23] For the purpose of this appeal, we need not decide whether, and if so how or to what extent, the funds distributed by the Receiver could be recovered. It is enough to conclude that the mere fact that the funds have been distributed by the Receiver does not render moot an appeal of the order authorizing the distribution.

C. *Is the Appeal an Abuse of Process?*

[24] The doctrine of abuse of process "is a compendious principle that the courts use to control misuses of the judicial system. Abuses of process can arise in many different contexts, and there is no universal test or statement of law that encompasses all of the examples": *Reece v Edmonton (City)*, 2011 ABCA 238 at para 16, 513 AR 199. It engages the "inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute"; *Reece* at para 17, citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 and *Canam Enterprises v Coles* (2000), 51 OR (3d) 481 (ONCA). Rule 14.74(f) of the *Rules of Court* permits an appeal to be struck for abuse of process.

[25] The Municipalities submit that the appeal is not an abuse of process; it does not re-open litigation, but is a continuation of the litigation. They submit that even if the chambers judge had the benefit of their arguments, it is highly likely that the matter would have come before this court given the importance of the legal question and the parties' positions.

[26] We recognize that the Municipalities are litigating the question of whether they are secured creditors for the purposes of the linear property tax arrears for the first time in this court. BNS submits that the appeal should be dismissed because the abuse of process threshold has been crossed. It also submits that the Municipalities took no action and wasted limited court resources by not raising with the Receiver the claim that they are secured creditors and by not participating in the hearing that led to the Order or applying for a stay of the Order. The Municipalities were well aware that the priority of linear property tax arrears was an issue from at least as early as the Receiver's First Report dated March 14, 2017, which identified those concerns.

[27] The Receiver's position that the linear property tax claims were unsecured and the underlying rationale for that position was outlined in detail in the Receiver's Third Report dated June 14, 2017. The statutory 'creditor proof of claim' package was sent to each municipality (six in total) that was owed municipal taxes and the Receiver contacted each of them asking that they file a proof of claim in the bankruptcy. Northern Sunrise County was the only municipality that did so and its proofs of claim characterized its claims as <u>unsecured</u>. The Municipal District of Opportunity No 17 advised the Trustee that it did not intend to file a proof of claim. Lamont County did not file a proof of claim. The affidavits of the Municipal District of Opportunity No 17

and Lamont County in respect of their application to be added as appellants stated that they did not participate previously because they had not yet retained counsel.

[28] Despite having been served with the Receiver's Third Report (which outlined the relief that the Receiver would be seeking at the June 20, 2017 hearing, including a determination that linear property tax arrears were unsecured claims and approval to make a further distribution to the secured lenders), none of the Municipalities attended the hearing or took steps to oppose the Receiver's position or make their position known. No stay of the Order was sought, and the appeal of the Order was not filed until July 19, 2017, after the distribution contemplated in the Order was made on July 14, 2017.

[29] BNS also submits that the appellants are estopped from taking the position on appeal that the linear property tax claims are secured by issue estoppel *(res judicata)* and estoppel by conduct or representation. In our view, neither of these legal principles apply. *Res judicata* applies when a party attempts to re-litigate an issue decided in a prior final judicial decision which involved the same parties, or their privies: *Ernst* at para 30. This doctrine is not applicable here. Although the Order was final, there is a right of appeal and the Order is the subject of this appeal.

[30] Estoppel by conduct is also not available. A party seeking to establish estoppel by conduct must demonstrate a representation, reliance and detriment (*Scotsburn Co-operative Services Ltd v. WT Goodwin Ltd.*, [1985] 1 SCR 54 at para 26), all of which require evidence. No evidence was tendered by the BNS beyond the assertions of counsel.

[31] Taking a position on appeal that is contrary to the proof of claim filed without participating in the hearing can be extremely problematic in the insolvency context where certainty, speed and efficiency are necessary to maximize recovery for everyone. We are concerned with the Municipalities' failure to file proofs of claim in the receivership/bankruptcy proceeding indicating they were taking the position they had a secured claim. We are also troubled by their failure to attend or advance a position at the hearing opposing the Receiver's position, of which they had clear notice. The explanation for their failure to take these steps is unsatisfactory. That said, this court's decision in *Boyd v JBS Foods Canada Inc*, 2015 ABCA 120, provides the Municipalities with some assistance. This court found no support for a rule that a party's quiescence in the court of first instance bars an appeal, although in that case the issues raised on appeal had been advanced below by another party: *Boyd* at paras 3 and 9. Where a party's failure to file documents in a timely fashion or participate in a hearing results in extra costs being incurred by another party, they may also face cost consequences.

[32] Although there is support for the respondents' position that this appeal is an abuse of process, we are persuaded that the questions raised by the appeal are important for municipalities and receivers alike. Accordingly, in these exceptional circumstances we will consider the merits of the Municipalities' appeal.

D. Does section 348(d)(i) of the MGA create a special lien for linear property tax arrears? If so, is that special lien a secured claim for the purposes of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (BIA)?

[33] The taxes at issue on this appeal are taxes on linear property. The *MGA* defines linear property to mean: electric power systems; street light systems; telecommunication systems; pipelines; railway property; and wells: s 284(k). The linear property involved in this application are pipelines and related equipment.

[34] Historically, municipal taxes were "not recoverable as a debt at common law and ... absent a statutory power to do so, a municipality would be without authority to recover tax arrears from a taxpayer by an action in the courts": *Wallace (Rural Municipality) v Mead Petroleums & Farms ltd*, 2005 MBCA 3 at para 24, 248 DLR (4th) 224. The *MGA* grants such authority to municipalities in Alberta.

[35] This appeal involves the interpretation of s 348 of the *MGA*, which grants to municipalities the statutory authority to recover municipal taxes, and particularly paragraph 348(d)(i), which creates a special lien "on land and any improvements to the land". Section 348 provides:

> 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]

[36] The Municipalities argue that "property tax" in s 348(d)(i) includes "linear property tax", and that the provision grants them a special lien on "land and any improvements to the land" with respect to linear property tax arrears. That special lien, they say, gives them priority over all creditors other than the Crown. On this basis they claim priority in the receivership.

[37] The interpretation of s 348(d)(i), like any statutory interpretation exercise, requires that we begin with Driedger's modern principle: "... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament": E.A. Driedger, *Construction of Statutes*, 2nd ed (Butterworths: Toronto, 1983) at 87; *Balancing Pool v TransAlta Corporation* at para 17.

[38] A provincial legislature can create a statutory lien that takes precedence over the interests of secured creditors. However, to do so "the plain and unambiguous meaning of the section must be that it deprives a properly secured creditor....of all or part of its security without compensation, for the purpose of paying another debt entirely unrelated to the security": *Lloyds Bank Canada v International Warranty Company Limited*, 1989 ABCA 155 at para 10. For example, the special lien on a mobile home created under the *Municipal Taxation Act*, RSA 1980, c. M-31 (which was the predecessor legislation to the taxing provisions now contained in the *MGA*) was found to be a statutory lien against the real property on which the mobile home was located and the mobile home itself, which took precedence over the secured claims of a bank: *Donalda (Village) v Toronto Dominion Bank* (1990), 75 DLR (4th)178, 111 AR 389 (ABQB).

[39] The Receiver's position (adopted by BNS) is that s 348(d)(i) is too ambiguous to create a statutory lien in respect of linear property taxes because it is unclear whose or what land is caught by the special lien. The Receiver points out that even the Municipalities do not agree what land would be subject to the special lien. Northern Sunrise argues that the lien applies to all of the debtor's land in Alberta, or the assessed land in the alternative. Opportunity and Lamont argue that the wording is broad enough that "land and any improvements to the land" includes, at a minimum, the linear property itself.

[40] In construing the intended reach of s 348(d)(i), it is instructive to consider the context of the *MGA* taxation scheme as a whole, and in particular other provisions of the *MGA* that govern the ability of municipalities to collect arrears of taxes. Particularly relevant are the special remedies set out in Division 8 and Division 9 of Part 10 of the *MGA*. As will be seen, the *MGA* provides different remedies for the collection of different types of property tax.

[41] Division 8 is headed "Recovery of Taxes Related to Land". It sets out a mechanism for municipalities "to recover tax arrears in respect of a parcel of land" (s 411(1)), which is defined as "a parcel of land and the improvements on it" (s 410(b.1)). The tax arrears to which Division 8 applies are defined as "a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy": s 410(e). It is to be noted that this language essentially mirrors the language of s 348(d)(i). The collection remedy provided by Division 8 permits a tax notification to be endorsed on the certificate of title for a parcel of land. If arrears remain unpaid, the land can be offered for sale at public auction and, if not sold, may be transferred to the municipality: ss 412 – 424.

[42] Division 8 does not apply to linear property tax arrears, which are covered by the collection remedy set out in Division 9 of the *MGA*.

[43] Division 9 is headed "Recovery of Taxes Not Related to Land". For purposes of Division 9, "tax" is defined to include "(i) a business tax; (ii) a well drilling equipment tax; (ii.1) a community aggregate payment levy" (s 437(c)(iii)). The definition also includes certain types of property tax, including "property tax ... imposed in respect of property referred to in section ... 304(1)(i)" – linear property. Section 304(1)(i) identifies the assessed person with respect to linear property as "the operator of the linear property". Accordingly, unlike under Division 8, where tax recovery can

include the sale of the related "parcel of land", the person responsible for arrears of linear property tax is the "operator", and the remedy for arrears of linear property tax is a right of distress and seizure of the debtor's goods: s 439(1).

[44] Importantly for this analysis, linear property taxes are imposed on the operator, not on the owner of the linear property, and not on the owner of the land on which the linear property is situated; likewise, linear property tax arrears are an obligation of the operator. It may be that the operator and the owner of the linear property, or even the owner of the parcel of land on which the linear property is situated, are one and the same, but that is not necessarily the case. In the energy sector, it often is not the case. For these purposes, "operator" is defined to include licensees under the *Pipeline Act* or the *Oil and Gas Conservation Act.* Each of the Debtors here was such a "licensee", and therefore was an operator responsible for linear property tax arrears under the *MGA*.

[45] That the remedies set out in Division 9, which apply to the taxation of linear property, are categorized as not related to land suggests that the special lien "on land and any improvements to the land" created by s 348(d)(i) does not apply to linear property taxes. Rather, the language of s 348(d)(i) more closely mirrors that of Division 8, which expressly refers to remedies against parcels of land, and which do not apply to linear property tax arrears.

[46] When section 348(d)(i) is read in its grammatical and ordinary sense and in harmony with the scheme of the *MGA*, its reference to "property tax" does not include linear property tax arrears. The provision therefore does not create a special lien "on land and any improvements to the land" with respect to those arrears. When the provision is considered in the context of the entire scheme of the *MGA*, including the specific provisions for remedies regarding linear property taxes set out in Division 9, and the fact that the operator (who is not necessarily connected to the land on which the property is situated) is designated as the person liable for linear property taxes, it is apparent that section 348(d)(i), which applies to land and its improvements, does not encompass linear property.

[47] The Municipalities urge a different interpretation, arguing that Division 8 and Division 9 deal with different subject matter and should not be used to interpret s 348. Opportunity and Lamont submit that Division 9 deals with recovery and enforcement of tax arrears, whereas s 348 concerns security for debts owed and priorities over other debt claims. They submit that, on a plain reading of s 348(d)(i), "property tax" includes linear property tax and the linear property is an "improvement" on the land; they say there is no reason to resort to other parts of the *MGA* to interpret the provision. They say there is no "gap" in the *MGA*, as was found by the chambers judge, and in any event this court should prefer an interpretation that avoids the gap, as noted by Sullivan in her text on construction of statutes:

> Although courts normally do not fill gaps in legislative schemes, if there is a choice between two plausible explanations, they ordinarily prefer the interpretation that avoids creating a gap: Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed. (Markham, LexisNexis, 2014) at 384-85.

[48] The result of this submission would be that a special lien would attach to the linear property as security. However, when one considers the whole taxation scheme under the MGA, it becomes apparent that result would be manifestly unjust if the owner of the linear property is not also the operator, from whom the arrears are due.

[49] For its part, Northern Sunrise submits there are two remedies available to a municipality to collect tax arrears: the "special remedies" set out in Divisions 8 and 9, and the "special lien" created by s 348. Northern Sunrise argues that Division 8 and s 348 are coextensive, in that both permit the municipality to offer the land for sale to recover tax arrears. The special remedy in Division 9 is the right of distress and, while related to the recovery of tax, the distress available applies to all of the debtors' goods wherever situated (in Alberta). In other words, unless the debtor is also the linear property's owner, there is no right of distress against the linear property.

[50] The difficulty with the interpretation proposed by the Municipalities is that the *MGA* is a comprehensive statute, and s 348 must be read harmoniously with other sections of the Act. As set out above, doing so leads to the conclusion that the mechanisms associated with property tax assessment and collection distinguish between taxes related to land and those not related to land. In general terms, excluding manufactured homes which have a division to themselves, Division 8 (taxes related to land) equates to s 348(d)(i) whereas Division 9 (taxes not related to land) equates to s 348(d)(ii). These two - very different - regimes cannot be ignored and they must inform the interpretation of s 348(d).

[51] We also agree with the Receiver that difficulties would arise if the provision were construed otherwise due to the ambiguity it would create: to what "land and any improvements to the land" would the lien attach? There is no justification for attaching to the parcel of land on which the linear property is situated, and none for attaching to the linear property itself unless the operator and linear property owner happen to be the same person, which is not necessarily the case under the legislative scheme.

[52] We note parenthetically that the interpretation we have adopted is consistent with the relief sought in a resolution filed by the Alberta Association of Municipal Districts and Counties ("AAMDC") in 2016, requesting that the Government of Alberta amend the *MGA* to broaden the tax recovery power of municipalities to collect linear property taxes. This was identified as a pressing issue for rural municipalities because of "significant tax arrears from numerous oil and gas companies". In the same resolution, the AAMDC also requested that the Government of Canada amend the *BIA* to recognize municipal linear property taxes and other municipal non-property taxes as a secured interest in priority to other unsecured interests: AAMDC Resolution 3-16S, "Recovery of Linear Property, Commercial Property, and Education Requisition Tax Arrears" [Resolution]. The background to the Resolution stated in part:

> While section 348 of the MGA may state that tax arrears have priority over other debt obligations, this priority is limited by the BIA. The BIA does not affect municipal claims for property tax arrears with respect to land as those arrears give rise to an interest that can be registered pursuant to the *Land Titles Act*.

> Contrastingly, linear property tax arrears do not give rise to a similar interest and therefore do not constitute a secured interest pursuant to the BIA.

[53] Although the Alberta legislature has made changes to the *MGA* (most recently in *An Act to Strengthen Municipal Government*, SA 2017, c 13), the changes called for by the Resolution were not made. This history does not enter into our interpretation of s 348(d)(i), but it is consistent with it.

[54] Counsel provided us with the decision in *Re Regent Resources Ltd*, 2018 ABQB 669, released after the appeal was argued. That decision deals with different issues and has not impacted our decision.

[55] Our conclusion on this issue makes it unnecessary to consider the *BIA* implications, and unnecessary to consider the remaining issues on the appeal.

VI. Conclusion

[56] The appeal is dismissed.

Appeal heard on June 12, 2018

Reasons for Judgment Reserved filed at Calgary, Alberta
this 12th day of February, 2019

Authorized to sign for: Bielby J.A.

Veldhuis J.A.

Strekaf J.A.

Appearances:

M.J. McCabe Q.C. / S.N. Finlay
for the Appellant Northern Sunrise County

G.G. Plester
for the Appellants Municipal District of Opportunity No. 17 and Lamont County

P. Saini / C.R. Jones
for the Respondent The Bank of Nova Scotia

D.M. Pontin (No appearance)
for the Respondent Alberta Treasury Branches

G. Bruni / K.D. Kashuba
for the Respondent Alvarez & Marsal Canada Inc