

Court of King's Bench of Alberta

Citation: Buffalo Spirit Ventures Ltd v Varsteel Ltd, 2026 ABKB 416

Date: 20260616
Docket: 2403 07481
Registry: Edmonton

Between:

Buffalo Spirit Ventures Ltd

Plaintiff

- and -

**Varsteel Ltd, Dominion Pipe and Piling Ltd, 242855 Alberta Ltd and
OCTG Protectors Ltd**

Defendants

Reasons for Decision of Applications Judge L.A. Smart

Introduction

[1] Buffalo Spirit Ventures Ltd, formerly 92386 Canada Ltd, (Buffalo) owns a parcel of land from which a 2.2 to 2.5 acre portion (the Land) was leased by M&D Pipe Sales (1980) Ltd (M&D) to use for storage of pipe and other items. The terms of that lease were agreed upon by the “principals” of those two companies (Ronald Williamson of Buffalo and Raymond Flanagan of M&D) in July, 1985. Nothing more about the details of the lease is known and nothing was reduced to writing. Both of the principals have passed. It doesn't seem to be disputed that M&D was invoiced by someone annually for rent and M&D would pay it while it occupied the Land. At no time during the occupation of the Land by M&D and Varsteel was any agreement formalized or reduced to writing.

[2] At the time of the agreement, the Lands were described as “grassed, uneven, hilly”. While the Land was occupied, it is not disputed that a significant amount of fill was placed on

top of it. On termination of the lease, Buffalo incurred costs to remove the fill and otherwise remediate the Land at a purported cost of \$955,272.60 and it seeks full recovery of those costs from the Defendants.

Background

[3] Buffalo moved out of its office/shop located on the parcel immediately east of the Land sometime around 2000. A historical copy of title produced as an undertaking by the representative of Varsteel discloses a caveat Re: Lease registered by FMC of Canada Limited on March 5, 1999 and a second caveat Re: Lease, Etc. registered on May 10, 2001. The first caveat was discharged on June 5, 2012 and the second on March 7, 2013. Blowertech Ltd registered a caveat Re: Lease Interest on June 11, 2013.

[4] M&D sold its assets to Varsteel Ltd (Varsteel) on September 1, 2006. In the closing documents there was a Statement of Earnings and Costs to September 30, 2004 which included as a line item “Rental Adjacent Property 5,000.00” ostensibly being the rent paid for the use of the Buffalo lands that year. On August 30, 2006 Raymond Flanagan and OCTG Protectors Ltd each sold a parcel of land adjacent to the Land to Varzani Trading Ltd and on which M&D had been conducting its business. Varzani Trading Ltd is owned by Gerald Varzani and that company is a shareholder of Varsteel. Gerald Varzani is the sole director of Varsteel. Although there are no titles to these adjoining lands in evidence showing the current owner, they have been referred to as the Varsteel lands.

[5] In the asset purchase agreement of September 1, 2006 between M&D and Varsteel under the heading **6.5 Certain Relationships**, the first sentence starts “The Vendor and Purchaser acknowledge there are no formal contracts currently in place between: 1) The Vendor and FMC Technologies Canada Company with respect to the lease by the Vendor of approximately 2.2 acres of land, . . .” The second and last sentence of this paragraph states: “The Vendor hereby covenants to use its best efforts and take all commercially reasonable steps necessary to ensure that the Purchaser enjoys the benefits of such arrangements currently enjoyed by the Vendor.” When asked by the Plaintiff on cross examination if this refers to the 2.2 acres leased from Buffalo, the answer was to provide the historical copy of title mentioned above. While I agree this did not properly respond to the undertaking, no application was made to compel a better answer. Regardless, it strikes me that it can be safely concluded that they are the same lands but this does create certainty issues as to why reference is made to the Lessee FMC in the apparent context as “landlord”.

[6] Buffalo says it wasn’t aware of the sale by M&D until 2008. Thereafter, Varsteel was invoiced instead of M&D and it paid those invoices. The only copies of invoices in evidence were for 2014 to 2018 sent by Buffalo for varying amounts but significantly greater than the \$5000 referenced in the document attached to the asset sale agreement. No one has produced any other invoices nor is any explanation given as to why they haven’t been, nor is evidence provided as to the amount of rent charged and collected from 1985 to 2004 nor from 2005 to 2013. Indeed, no evidence is provided as to who sent the invoices, to who, and who paid them.

[7] Buffalo’s witness, Ronald Douglas (Douglas) says when he went to the office building on the parcel adjacent to the Land on March 25, 2015 to change the locks, he observed that the grade of the leased area had been dramatically changed by the addition of a minimum of 5 feet of fill on its surface. Ostensibly, this is the first time that Buffalo became aware of this dramatic

change. In 2000, when the building was vacated the lands were level with the building and the concrete pad surrounding it in the same manner as shown in a photograph taken by Douglas in July, 1987.

[8] No one knows when the fill was added other than at least some (probably a significant amount) was there when Varsteel purchased the M&D assets. Varsteel provided evidence that it added a top layer to the grade to reduce the risk of the pipe being stored there from sinking into the ground and potentially creating a hazard. It is clear that sometime between 2000 and 2006 about “5 feet of fill” was added. No one knows, nor do any of the parties have any documents evidencing, who added the fill.

[9] On July 31, 2018 Buffalo sent Varsteel a letter providing notice of its intent to terminate the lease and requiring vacant possession on January 31, 2019. The letter described the agreement as being from year to year subject to renewal on an annual basis. The letter also specified “that per the terms of the Lease, that Varsteel was to restore the Lands to their original grade, and remove all non-native material, by the date of termination.” Varsteel vacated the Land on or about January 31, 2019 without taking any steps to return the Land to its original condition.

[10] Since then, Buffalo removed the fill and restored the Land. During this process, it was discovered that the fill had quantities of concrete (blocks), wooden timbers and miscellaneous waste such as pop cans. A copy of an engineering report was attached to Douglas’s affidavit that identified the existence of concrete. Although the report is hearsay, it does not appear that anyone seriously disputes that the fill had debris in it.

Summary Judgment/Dismissal

[11] Buffalo seeks Summary Judgment against Varsteel, Dominion Pipe and Piling Ltd, OCTG Protectors Ltd, and 242855 Alberta Ltd. Each of the Defendants, in turn, seek Summary Dismissal. The test for granting Summary Judgment is set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at para 21- can the Court reach a fair and just determination based on the record before it?

Dominion Pipe and Piling Ltd

[12] With respect to Dominion, Varsteel has operated under the registered trade name of Dominion Pipe and Piling. The Dominion “Corporation” is a separate entity and the uncontroverted evidence is that it has never conducted any business in relation to the Land. It follows, based on these facts, that Summary Judgment against the Dominion “Corporation” cannot succeed. The cross-application for Summary Dismissal by the “Corporation” is granted.

OCTG

[13] Following its sale of its assets to Varsteel, M&D ceased using that name and became 242855. OCTG amalgamated with 242855 in February, 2011 and on that basis is now the entity potentially liable for the claim.

[14] For ease of reference I will refer to OCTG as the party to the “lease” throughout. Buffalo says that OCTG has not disputed that the lease contained the necessary basic elements of a valid contract. I am inclined to agree. The lease to anyone’s knowledge did not contain any other express covenants. The rental amount increased by Buffalo over time but there is no evidence

that other than sending an invoice that there was any discussion in that regard. The recipient of the invoice apparently just paid it. There was no right of renewal and there seems there was no dispute that either party could terminate the lease unilaterally. Based on the facts and circumstances the “lease” was for a one-year term and continued on that basis from year to year until Buffalo in 2018 advised it did not want to continue the lease into the next year.

[15] Regardless, the evidence shows that someone added a layer of fill between 2000 and 2006 when Varsteel bought the assets of OCTG. Apparently, it took a couple of years for Buffalo to learn of Varsteel’s purchase but once it found out it happily sent invoices to Varsteel. The sale agreement between OCTG and Varsteel does not purport to assign any interest in the lease although the documents disclose some kind arrangement with Buffalo’s then tenant of the office building and possibly the Land though there is no evidence of the latter. A provision in the agreement for Varsteel to assume accounts payable is of no assistance nor is the provision that recites there is no formal contract with the then tenant of the adjoining lands but OCTG would take reasonable steps to ensure that Varsteel would enjoy the benefits of the arrangement. There is no evidence that OCTG did anything to satisfy this provision. OCTG ceased using the Land and Buffalo accepted Varsteel in its place and stead. The arrangement with OCTG came to an end and then continued with the new parties.

[16] The inability to provide any evidence as to who added the fill between 2000 and 2006 in my view is fatal to the claim against OCTG. While one is easily drawn to the conclusion that it was OCTG that is not sufficient. It is possible FMC the tenant/landlord of the adjoining parcel and buildings caused the fill to be added or possibly the previous Owners of the “Varsteel” lands.

[17] Of no surprise, OCTG says that Buffalo’s claim against it is limitation barred. It vacated the land in September, 2006. At that point, some and probably the most substantial part of the fill had been placed on the Land. Buffalo argues there was one continuous lease from 1985 until its termination in 2018. This simply doesn’t accord with the facts. OCTG vacated the Land and stopped paying rent. It didn’t communicate this to Buffalo but Buffalo also, apparently without expressly communicating such to Varsteel, accepted Varsteel as the tenant and invoiced accordingly. Whether Buffalo could rely on covenants in the Sale Agreement between OCTG and Varsteel as a non-party is doubtful but regardless there was nothing in that Agreement to assist Buffalo to support its argument.

[18] This action was amended to include 242855 on July 31, 2020 with OCTG being added by further amendment on April 6, 2021. As noted, OCTG vacated the Land in 2006. More than 14 years passed before the Statement of Claim was issued. Buffalo argues that the grade change was fraudulently concealed so as to suspend the ultimate limitation period until March 2015 when it observed the grade change. The concealment was the failure to advise Buffalo of the grade change “with active or reckless knowledge of their wrongdoing, or through other unconscionable conduct”. While there was no advice given by OCTG, the change was plain and obvious once someone from Buffalo attended at the Land. Accepting without necessarily agreeing that the injury was the failure to restore, it had two years to make a demand on OCTG which it never did.

[19] Buffalo further argues that because the fill incorporated concrete scraps and slabs, large timbers, pieces of pipe and other materials that could not be seen as they were compacted and covered up it constituted unconscionable conduct akin to fraudulent concealment. While the material might be considered undesirable from some perspectives there is no evidence to suggest that other than that, it has caused any harm per se. The injury was the increase in grade or failure

to remove it, not what the fill consisted of. It may be that disposal of this type of fill would be more costly but there is no evidence of that. There is no concealment that would extend the limitation period.

[20] Whether considering the 10-year ultimate limitation period or “the 2 Year Rule”, OCTG has established its limitations defence and immunity from prosecution. The cross-application for Summary Dismissal by OCTG/242855 is granted.

Varsteel

[21] As noted Varsteel acquired the assets of OCTG in 2006. Tacitly an agreement was entered into between Varsteel and Buffalo when Varsteel continued to store pipe on the Land and Buffalo invoiced Varsteel for that occupation in 2008. The parties and the property were established albeit the price could and apparently did vary from year to year. As a practical matter the acceptance of an increase in rent was the payment made by Varsteel. Regardless, the agreement was determinable at either party's instance.

[22] Varsteel has raised the failure of complying with the *Statute of Frauds*, 1677 (U.K.), 29 Car. 2, c.3 and therefore the lease is void. Buffalo argues the duration of the agreement is not to be conflated with the term and the agreement was from year to year. I agree. Since the value of the land in relation to the rent has not been established, the agreement by virtue of Section 1 of the *Statute* would be characterized as a tenancy at will. (See *Shamac Country Inns Ltd v 412765 Alberta Ltd*, 1994 CanLII 8951 (ABQB)).

[23] The evidence is that Varsteel placed a layer of fill material possibly crushed concrete on top of the fill that had been added prior to 2006, then graded it and covered it with gravel perhaps around 2010. It is characterized by Varsteel as maintenance of the Land to prevent pipe and machinery from sinking into the ground and potentially causing a safety hazard. The amount of the fill added is unknown and was thought not to be a basic grade change. This evidence all seems to be somewhat anecdotal with no records apparently being available to assist. The hearsay engineering report might contain some information in that regard.

[24] Buffalo says that two distinct implied duties were breached in relation to the Land: (i) the duty not to make significant alterations to the Land without consent, and (ii) the separate duty to restore the Land to its original grade at its cost. It also says that it was always understood by Buffalo that Varsteel would restore the Land to its original grade. Quite apart from the apparent lack of relevance of such an understanding, it is difficult to understand how and when it arrived at such a conclusion. The grade was changed sometime after 2000 more than 15 years after the original handshake and wasn't even discovered by Buffalo until 2015 some 15 years after that. There is no evidence on the point but I am hard pressed to conclude that changing the grade was even contemplated in 1985 if indeed that is the relevant time at all. In 2008, Buffalo discovered that Varsteel was the company storing the pipe. The reaction of Buffalo was apparently to change the name and address on the annual invoice and nothing more. When someone from Buffalo decided to actually go to the property in 2015, still nothing happened. In an answer to undertaking Douglas provided an August, 2018 email from a Jeff Williamson saying he tried to initiate contact with Varsteel in 2010 but never got any correspondence from them. The purpose of the contact isn't stated but it could not have been in relation to the grade or fill as Buffalo's evidence is that it didn't know about it until 2015. He went on to say starting in 2015 “we” reached out to Varsteel to begin a conversation around entering into a Raw Land Lease

agreement. At some point registered mail was sent to Varsteel containing a draft version of a lease but Buffalo never heard back. This is also all hearsay. Furthermore, no documents, no correspondence, and no records of how contact was made were put into evidence.

[25] There is no evidence that when Varsteel purchased the OCTG assets, it had any knowledge with respect to the original grade nor adding of fill to the Land. Although not relevant in my view, it would also have no knowledge as to the undesirable material that had been incorporated in the fill.

[26] There is no evidence as to who paid the 2006 and 2007 rent for the Land. Regardless, when Buffalo invoiced Varsteel for 2008, it effectively offered to lease the Land to Varsteel who paid the rent which as I have indicated above amounted to acceptance of the agreement. Unbeknownst to Buffalo it was offering to lease a pipe storage yard with an extra 4 to 5 feet of fill on it and Varsteel agreed to lease that pipe storage yard. Varsteel added a further “layer of fill” which it says was maintenance that any prudent operator of a pipe storage yard would do. How much fill and the depth added is unknown.

[27] Buffalo makes a claim against Varsteel based on an implied covenant to restore the Land to its original condition, negligence and waste. In my view, if there is such an implied covenant Varsteel would be responsible for removal of what it had added to Land and not to effectively restore the grade to a pre-1985 condition. In light of the opinion expressed by Varsteel and the other uncertainties, Buffalo has failed to establish that the implied covenant would require even that level of restoration by Varsteel and makes most precarious the likelihood of establishing negligence and even more so waste. Having said that I hasten to add that Varsteel’s opinion is not from a qualified expert and without more is not determinative of that issue.

[28] In sum, my view is that Buffalo has failed to meet the requirements for Summary Judgment but neither has Varsteel established entitlement to Summary Dismissal. Both applications should be dismissed.

Third Party Claim by Varsteel Against OCTG

[29] Varsteel has sought leave to proceed with a third party claim for any liability it may have for the actions of OCTG. Based on the facts and circumstances, and my conclusions above, Varsteel has no liability arising from the original change in grade and addition of fill making it unnecessary to decide that issue.

Summary of Disposition and Costs

[30] The application for Summary Judgment against Dominion Pipe and Piling Ltd is dismissed. The Summary Dismissal application by Dominion Pipe and Piling Ltd is granted. Unless there are other considerations not brought to my attention, Dominion shall have its costs on the appropriate Column of Schedule C. The applications by Buffalo and Varsteel for Summary Judgment and Dismissal, respectively, are dismissed with each bearing their own costs. The application for Summary Judgment against OCTG is dismissed. The application for Summary Dismissal by OCTG is granted. Again, unless there are other considerations not brought to my attention, OCTG shall have its costs on the appropriate Column of Schedule C. The application for leave to proceed with a third party claim by Varsteel against OCTG is dismissed. OCTG shall have its costs against Varsteel on the appropriate Column of Schedule C.

In all cases where costs have been awarded, the successful party shall have its reasonable disbursements.

Heard on the 30th day of July, 2025 and the 31st day of July, 2025.

Dated at the City of Edmonton, Alberta this 16th day of June, 2026.

L.A. Smart
A.J.C.K.B.A.

Appearances:

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