

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY**

**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 COMPROMISE OR
ARRANGEMENT OF BRUTE FORCE OIL FIELD HAULING INC.**

**AFFIDAVIT OF STEVEN MUXLOW
(SWORN THE 18TH DAY OF NOVEMBER, 2009)**

I, Steven Muxlow, of the City of Aurora, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am a Senior Surety Claims Adjuster at The Guarantee Company of North America ("GCNA") and as such, I have knowledge of the matters to which I hereafter depose, except where I expressly indicate that I have obtained information from others, in which case I believe such information to be true and correct.
2. This Affidavit is made in response to the motion brought by Brute Force Oil Field Hauling Inc. ("Brute Force") and in support of the motion brought by GCNA, each of which are scheduled for November 20, 2009 (the "November 20th Hearing") in the proceedings commenced by Brute Force in the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "Court") pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings"). I am advised by Craig J. Hill, a partner with Borden Ladner Gervais LLP ("BLG"), counsel for GCNA, that the November 20th Hearing is for, *inter alia*, the purpose of

extending the terms of the Initial Order in the CCAA proceedings and obtaining certain relief related to the payment to Brute Force of certain funds claimed to be owing by Brute Force on, *inter alia*, certain GCNA Bonded Projects.

Contracts on GCNA Bonded Projects

3. Attached hereto and marked **Exhibit "A"** are certain extracted pages of the contract between the Town of Slave Lake and Brute Force with respect to the "2008 Water Distribution Rehabilitation Program" (the "**Slave Lake Contract**"). The pages contain the following articles:

Article 33. PAYMENT WITHHELD

Owner may withhold or nullify, on written notice to Contractor specifying the grounds or grounds relied on, the whole or part of any progress payment to the extent Owner deems reasonably necessary to protect Owner from claim or loss. The right hereby provided is dependent on either:

- (a) receipt of a certificate in writing from Engineer stating Engineer's opinion that justification exists for withholding payment on account of (1) or more of the following:
 - (i) that Contractor is not making satisfactory progress in the opinion of the Engineer;
 - (ii) that defective work is not being remedied at all or in a manner satisfactory to Engineer;
 - (iii) that Contractor is failing to make prompt payments as they become due to Subcontractors or for material or labour;
 - (iv) that there exist unsatisfied claims for damages caused by Contractor to anyone employed on Site or in connection with the Work.

Where subcontractors or suppliers of material are not receiving prompt payment and the Builders Lien Legislation does not provide for an exclusive procedure, Owner may make payment to such Subcontractors or suppliers directly and deduct the amount of such payments from amounts otherwise due to Contractor.

Article 35. COMPLETION CERTIFICATE

When Contractor is of the opinion that Work has been completely performed, Contractor shall inspect the Work to ensure that all work has in fact been performed, that it is in a clean and tidy

condition and that it is ready in all respects for acceptance by Owner. Contractor shall then submit a written request to Engineer for a final inspection. Engineer will make an inspection and will notify Contractor in writing of any defects or deficiencies, which require to be corrected before all the Work has been performed. When the defects or deficiencies, if any, have been corrected and Contractor has submitted to Engineer a written statement that all claims and demands of contractors for extra work or otherwise in connection with the contract have been presented in writing to Engineer, Engineer will recommend to Owner that a Completion Certificate be issued to Contractor.

Owner, subject to Owner's acceptance of this recommendation, will issue the Completion Certificate.

Article 40. GUARANTEE PERIOD

Neither the Completion Certificate nor a Certificate of Substantial Performance nor any payment by Owner shall relieve Contractor of responsibility for faulty materials or defective workmanship. Contractor guarantees to maintain the Work against any defects arising from faulty installation, faulty materials supplied under the Contract or faulty workmanship which may appear within (2) years of the date of the Completion Certificate [as amended by the Supplementary Conditions]. If a Certificate of Substantial Performance has been issued, the guarantee period shall begin from the day of such notice except for the Work still to be performed and the defects and deficiencies still to be corrected which are listed on such notice.

...

All costs resulting from a necessity to do work under the guarantee requirement, whether it be done by Contractor, Contractor's representative, or Owner, as provided herein, shall be borne by Contractor. Contractor shall, in addition, be liable to Owner for all expenses, losses or damages incurred by Owner as a result of such faulty materials and defective workmanship as are referred to in the first paragraph of this Article, or as a result of Contractor's failure to meet the guarantee requirements as specified herein including but not limiting the generality hereof, all costs of engineering, inspection and testing work.

4. Attached hereto and marked as **Exhibit "B"** are certain extracted pages from the Contract between Newell Regional Services Corporation ("**Newell**") and Brute Force. The extracts provide:

6.8 SUBSTANTIAL PERFORMANCE OF THE WORK

.1 When the whole of the Work has been substantially performed and any pre-requisites to substantial performance of the Work prescribed by the Contract have been met, the Contractor may so submit to the Owner a Substantial Performance Certificate, accompanied by a written undertaking to finish without delay any outstanding work during the warranty period. Such notice and undertaking shall be deemed to be a request by the Contractor for the Owner to accept or reject the Substantial Performance Certificate.

7.1 WARRANTY PERIOD (subject to Supplementary Conditions, below)

.1 In the Contract the term "warranty period" shall mean a period of one (1) year, or such longer period as may be provided elsewhere in the Contract, calculated from:

.1 the date of Substantial Performance of the Work, certified by the Owner in accordance with clause 6.8, or ...

10.5 OBLIGATIONS TO AND CLAIMS OF THIRD PARTIES

.1 The Contractor shall, with respect to lawful obligations of and lawful claims against the Contractor or any Subcontractor arising from the Contract:

.1 discharge such obligations of and satisfy such claims against the Contractor, and

.2 ensure the discharge of such obligations of and the satisfaction of such claims against Subcontractors;

.2 The Contractor shall, when requested by the Owner, make a statutory declaration deposing to the existence and condition of any obligations and claims referred to in clause 10.5.1.

.3 If a third party sends written notice to the Owner of an undischarged obligation or unsatisfied claim referred to in clause 10.5.1, the Owner may, 30 days after giving written notice to the Contractor, and surety where applicable:

.1 pay any amount that is due and payable to the Contractor pursuant to the Contract directly to the obligees of and claimants against the Contractor or the Subcontractor, ...

.4 Clause 10.5.3 shall apply only when written notice of the obligation or claim is sent to Owner as set out in Builders Lien Act.

10. WARRANTY PERIOD (Supplementary Conditions)

.1 The Warranty Period for all work s One (1) Year, except for roads, lanes, sidewalks, valve and manhole adjustments, for which the Warranty Period is Two (2) Years.

.2 Thirty to sixty days prior to the end of the Warranty Period the Contractor shall apply to the Owner for acceptance of the Warranty Performance of the Work. The Owner will review the work and advise the Contractor of any defects that require remedy under the Contract. The Owner will issue a certificate of Warranty Performance of the Work, after all defects have been remedied.

.3 No extra payment will be made for these required maintenance items.

5. Attached hereto and marked as **Exhibit "C"** are certain extracted pages of the contract between Yellowhead County and Brute Force with respect to the Muskeg Diesel Road Contract. Similar contractual provisions are in place with respect to the contracts between Brute Force and Yellowhead with respect to the Wolf Lake and Summer Gravel Contract. The extracts provide:

6.2.2 General Specifications

The Contractor is advised that, except for the changes and amendments as detailed in the section "Special Provisions", the specifications for work performed under this Contract shall be as detailed in the Alberta Transportation manual of "**Standard Specifications for High Construction**", Edition 13, 2009 in conjunction with the "**Specification Amendments and Supplemental Specifications for Highway and Bridge Construction**", Edition 13, 2009 (the "Standard Specifications").

6. Attached hereto and marked as **Exhibit "D"** are certain extracted pages of the Standard Specifications. The extracts provide:

1.2.28.3 DEFECTIVE WORK

The Consultant will have authority to reject work which in his opinion does not confirm to the requirements of the Contract Documents. Whenever he considers it necessary or advisable, he will have authority to require special inspection or testing of work whether or not such work then be fabricated, installed or completed. However, neither the Consultant's authority to act nor any decision made by him either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the Consultant to the Contractor, his subcontractors, any manufacturer, fabricator, supplier or fabricator, or their agents, employees or other persons performing any of the Work.

When any defective work, whether the result of poor workmanship, damage through the Contractor's carelessness or use of defective material supplied by the Contractor, is found to exist prior to the date of Construction Completion, the Contractor at his expense, shall promptly remove, replace or otherwise remedy the defective work, to conform to the Specifications in a manner acceptable to the Consultant.

Should the Contractor fail to comply promptly with any order given by the Consultant under this Section, the Department may cause the defective work or material to be remedied, removed or replaced, and deduct the costs incurred from any money due or to become due to the Contractor.

1.2.35 PAYMENT FOR LABOUR AND MATERIAL

The Contractor shall promptly pay, or ensure that prompt payment is made, for all labour, services, equipment, supplies and material used for, on or about the Work, including any sum due from the Contractor, any subcontractor or any person, for the labour or services of any subcontractor, foreman, worker or other person, or for the use of plants, machinery or camp supplies. In the event of failure by the Contractor at any time to do so, or if the Department has reason to believe that such payments will not be promptly made, the Department may retain out of any money due on any account to the Contractor from the Department such amount as the Department may deem sufficient to satisfy the same, giving him notice of such claims, requesting him to settle them directly and withholding the balance until the claims are satisfied. The Department may pay directly to any claimant such amount as the Department determines is owing, rendering to the Contractor the balance due after deducting the payments so made.

7. Attached hereto and marked as **Exhibit "E"** are certain extracted pages of the contract between Yellowhead County and Brute Force with respect to the Wolf Lake and Summer Gravel Contract. The extracts provide:

6.8 HOLDBACK

The County will retain a 10% holdback from payment made for completed Work for a period of 45 days from the completion of the Work. The County reserves the right to retain holdback in the total amount of any outstanding third-party claims, deficiencies in the Work, overpayment, or any other items identified.

6.8.1 Release of Holdback

Where a holdback has been taken, the County will release the holdback to the Contractor upon written notice from the contractor provided that the reasons for retaining the holdback are no longer applicable and the following have occurred:

- a) The outstanding third-party claims filed with the County have been removed.
- b) There is no recovery required from the Contractor on any account, including overpayment, or penalty.
- c) The County has received the Workers' Compensation Board clearance and a statutory declaration, satisfactory to the Engineer, indicating "No Exceptions."

If the Contractor fails to meet his obligations with respect to any of these items, the County may use holdback funds to rectify the deficiency, in accordance with the terms and conditions of the Contract and the Public Works Act.

8. Attached hereto and marked as **Exhibit "F"** is a copy of the agreement between Brute Force and E Construction Ltd. dated May 29, 2009. The contract provides:

SC13 - WARRANTY

13.1 The subcontractor warrants the Work in accordance with the contract document. ... The Subcontractor shall promptly replace and re-execute such defective or condemned Work. The Subcontractor agrees to pay for damage resulting from corrections made under this requirement.

SC23 - STATUTORY DECLARATION

23.1 Before payment of the balance payable pursuant to Article 2 hereof is made, the subcontractor must execute and deliver a statutory declaration to the Contractor certifying that the subcontractor has paid all accounts incurred in the performance of the Work, in a form reasonably acceptable to the Contractor.

SC24 - PAYMENT OF BILLS

24.1 The Subcontractor shall promptly and satisfactorily settle and pay for all accounts, claims or liens with respect to the Work. If, after having received (2) working days written notice from the Contractor to settle and pay such accounts, claims or liens, the Subcontractor fails or refuses to settle or pay same, the Contractor shall have the right to settle or pay such accounts, claims, and/or liens for the account of the Subcontractor and the receipt issued to the Contractor with respect to such accounts, claims or liens shall be conclusive evidence as to such payment and the amount thereof. Notwithstanding the foregoing provision, the Subcontractor shall not be required to pay any such accounts, claims or liens if it has reasonable grounds for disputing same and the Contractor in these circumstances will only have the right to pay or settle such accounts, claims or liens in such matter as in its opinion, will not prejudice the Subcontractor's right to dispute same.

9. Attached hereto and marked as **Exhibit "G"** is a copy of the agreement between Brute Force and La Farge Canada Inc. dated May 13, 2009. The agreement provides:

SC13 - WARRANTY

13.1 The subcontractor warrants the Work in accordance with the contract document. ... The Subcontractor shall promptly replace and re-execute such defective or condemned Work. The Subcontractor agrees to pay for damage resulting from corrections made under this requirement.

10. Attached hereto and marked as **Exhibit "H"** is a copy of the Contract and Specifications between Saddle Hills County and Brute Force dated June 2008. The Contract provides as follows:

6.6 RE: CONTRACTOR WARRANTY AND FINAL ACCEPTANCE

Modification to Specification 1.2.53, Contractor Warranty and Final Acceptance

Further to specification 1.2.53, Contractors Warranty and Final Acceptance, **the warranty period for the grading portion of this contract shall be one year.**

The first bullet under Specification 1.2.53 "grade construction (with the exception of areas directly over culvert installation) which is not receiving granular base course or pavement surfacing under the Contract," shall be deleted in its entirety.

5.1.4 Standard Specifications for Highway Construction and Bridge Construction Work

The specifications for highway and bridge construction work, which shall form part of the Contract Agreement, are published in the following Alberta Transportation manuals:

- Standard Specifications for Highway Construction – Edition 13, 2007;
- Specifications for Bridge Construction – 2007.

11. Attached hereto and marked as **Exhibit "I"** is a copy of Article 1.2.53 of the General Specifications which provide:

1.2.53 CONTRACTOR'S WARRANTY AND FINAL ACCEPTANCE

During the warranty period, the Contractor shall warrant the Work to be free from any defect or failure and to withstand climatic, maintenance and normal operational conditions. Generally, the warranty period shall be two years for bridge structures and one year for other Work, and shall commence on the date of Construction Completion as determined by the Department. Unless otherwise shown in the special provisions, the following contract work will not require a warranty:

- Grade construction (with the exception of areas directly over culvert installations) which is not receiving granular base course or pavement surfacing under the Contract;

- Stand alone crushing contracts;
- Stand alone clearing contracts; or
- Permanent erosion control devices.

Work requiring warranty periods different from the above, will be identified in the special provisions.

12. Attached hereto and marked as **Exhibit "J"** is a copy of certain extracts from the Contract between Lafarge (as Prime Contractor) and Brute Force (as Subcontractor) dated May 25, 2009. The Contract provides as follows:

The Subcontractor assumes toward the Contractor all the obligations and responsibilities that the Contractor assumes towards the Owner as set forth in the Prime Contract insofar as they relate to the work to be performed by the Subcontractor. Any bonds required must provide for extended guarantees/warranties as noted in the Prime Contract.

13. Attached hereto and marked as **Exhibit K"** is a copy of the Lafarge Prime Contract with the City of Spruce Grove. The Contract provides:

40. GUARANTEE PERIOD

Neither the final payment nor the Construction Completion Certificate shall relieve the Contractor of responsibility for faulty materials or defective workmanship. The Contractor, unless specifically stated otherwise herein, guarantees to maintain the work against any defects arising from faulty installation, faulty material supplied under the Contract or faulty workmanship, which may appear within the guarantee period specified on the Construction Completion Certificate. Faulty materials shall be replaced and defects discovered or failures which occur during the guarantee period shall be rectified to the satisfaction of the Engineer and in accordance with the Contract documents, including, if deemed necessary, replacement of all or a portion of the work.

The Guarantee Period, unless otherwise stated herein, shall be as follows:

- (a) One (1) year from the date of the Construction Completion Certificate for all underground utilities and appurtenances.
- (b) Two (2) years from the date of Construction Completion Certificate for all sidewalks, curbs and gutters, catch basins, paved roads, paved lanes and concrete walkways, including settlements or breakage which is not a result of third party damage.

If the Owner observes through use of the works, or if it is discovered by tests or inspection of the works prior to the end of the guarantee period, that a deficiency or defect exists in the materials or workmanship in respect to the specified works, the

Owner shall immediately notify the Contractor, by whatever means are available, of the defect or deficiency and instruct him to rectify the fault. Such notification shall be confirmed by the Owner in writing to the Contractor. In the event that this work, in the opinion of the Owner, must be done immediately to prevent serious damage, injury or loss of life, the Owner may perform or cause to be performed the necessary work and shall notify the Contractor accordingly. Work required under guarantee shall, except as otherwise provided herein for emergencies, be carried out by the Contractor or his representative within the ten (10) day period, or such period as approved by the Engineer, the Owner may take whatever action is necessary to have the work done.

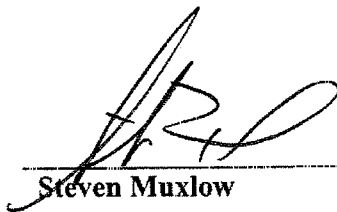
All costs resulting from the necessity to do work under the guarantee requirement, whether it be done by the Contractor, his representative, or the Owner, as provided herein, shall be borne by the Contractor. The Contractor shall, in addition, be liable to the Owner for all expenses, losses or damages incurred by the workmanship as are referred to in this article, or as a result of the Contractor's failure to meet the guarantee requirements as specified herein, including, but without the generality hereof, all costs of engineering, inspection and testing work.

14. Attached hereto and marked as **Exhibit "L"** is a copy of a letter received from CRA with respect to the position of CRA on its deemed trust claim relating to unremitted GST and the payment to certain subcontractors on Brute Force jobs.

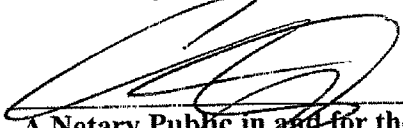
Claims on the Bonds

15. In my affidavit sworn November 10, 2009 (paragraph 8), I indicated that as of that date GCNA has received claims in the approximate amount of \$67,410.67 under the L&M Bonds issued by GCNA as a result of Brute Force's alleged failure to pay its subcontractors and suppliers on the GCNA Bonded Projects. In addition, GCNA has received claims in the approximate amount of \$107,359 under the L&M Bonds issued by GCNA as a result of Brute Force's alleged failure to pay its subcontractors and suppliers on the Saddle Hills Project.

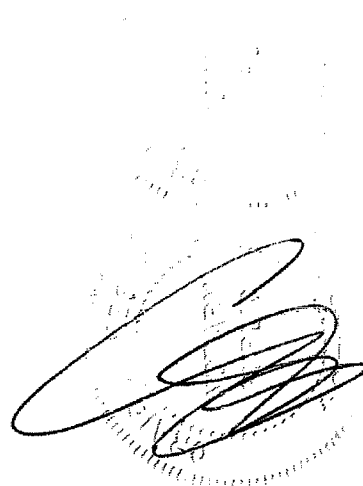
SWORN BEFORE ME at the City)
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of Toronto, in the Province of Ontario)
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this 18th day of November, 2009.)
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Steven Muxlow



A Notary Public in and for the
Province of Ontario
Craig J. Hill
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