COURT FILE NUMBER	1703-12327
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 HOLDINGS LTD.
DOCUMENT	**BRIEF OF GREAT WHITE SAND TIGER LODGING LTD. (responding to Monitor's Application returnable January 10 and 11, 2019)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Regent Law Professional Corporation 1401-150 Metcalfe Street Ottawa, ON K2P 1P1

JUDICIAL CENTRE OF EDMONTON
FAX
DEC 20 2018
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Clerk of the Court

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I. INTRODUCTION

1. This Brief is submitted on behalf of Great White Sand Tiger Lodging Ltd. ("Sand Tiger") as a summary of the argument that it intends to supplement verbally at the hearing of the application currently scheduled for January 10 and 11, 2019.

II. FACTS

Sand Tiger's Dorms

2. Sand Tiger provides temporary accommodations for workers employed at oil sands camps. One aspect of its business is leasing portable trailers ("Dorms") to operators of camps for use on-site as accommodation for workers.

Affidavit of Wayne Sluice sworn October 4, 2018 ("Sluice Affidavit") at para. 3

3. Sand Tiger owns the following Dorms that are at issue in these proceedings:

1	NHAF4251	2012	Alta-Fab, 30 bed dorm
2	NHAF4252	2012	Alta-Fab, 30 bed dorm
3	NHAF4253	2012	Alta-Fab, 30 bed dorm
4	NHAF4254	2012	Alta-Fab, 30 bed dorm
5	NHAF4255	2012	Alta-Fab, 30 bed dorm
6	NHAF4256	2012	Alta-Fab, 30 bed dorm
7	NHAF4257	2012	Alta-Fab, 30 bed dorm
8	NHAF4258	2012	Alta-Fab, 30 bed dorm
9	NHAF4261	2012	Alta-Fab, 30 bed dorm
10	NHAF4262	2012	Alta-Fab, 30 bed dorm
11	NHAF4263	2012	Alta-Fab, 30 bed dorm
12	NHAF4264	2012	Alta-Fab, 30 bed dorm
13	NHAF4265	2012	Alta-Fab, 30 bed dorm
14	NHAF4266	2012	Alta-Fab, 30 bed dorm
15	NHAF4267	2012	Alta-Fab, 30 bed dorm

Sluice Affidavit at para. 4

4. Sand Tiger purchased the Dorms from Alta-Fab Structures Ltd.

   Sluice Affidavit at para. 5
   Sluice Affidavit, Exhibit "A"

Sand Tiger-Canada North Agreement

5. On July 8, 2013, Sand Tiger and Canada North Camps Inc. ("Canada North") signed a lease agreement (the "Lease") pursuant to which Sand Tiger leased four (4) Dorms to Canada North at a rate of $33,000.00 per month per Dorm plus GST.

   Sluice Affidavit at para. 6
   Sluice Affidavit, Exhibit "B"

6. Pursuant to the April 15, 2014 Amending Agreement, the initial term of the Lease was extended to July 31, 2015, and the rental rate was reduced to $28,000.00 per month per Dorm plus GST.

   Sluice Affidavit at para. 7

7. The parties also confirmed in the Amending Agreement that the Dorms were located at 4506 – 68th Street (Lot 2), Bonnyville, Alberta ("Gateway Industrial Park"), but it has since come to Sand Tiger's attention that three of the Dorms are located entirely on Lot 2 of Gateway Industrial Park, and the fourth Dorm straddles Lots 2 and 3 of Gateway Industrial Park but is located mostly on Lot 3. Sand Tiger's information is that the Dorms were located there immediately prior to the commencement of these proceedings and continue to be so located to the present day.

   Sluice Affidavit at para. 8

8. Canada North retained the Dorms beyond July 31, 2015 subject to the automatic quarterly extension provision contained in paragraph 2 of the Lease.

   Sluice Affidavit at para. 9

9. The preamble to the Lease confirms that the parties intended it to be a "true lease" and not a sale. Ownership of the Dorms was to remain at all times with Sand Tiger regardless of the degree to which Canada North affixed them to its property.

Sluice Affidavit at para. 10
Sluice Affidavit, Exhibit "B"

10. Paragraph 5 and 6 of Appendix "A" to the Lease contain "no lien" and indemnity provisions, whereby Canada North agreed to keep the Dorms free and clear of all lien claims and other such encumbrances and to indemnify Sand Tiger from all claims, liens, security interests, encumbrances or attachments not arising from Sand Tiger's actions.

Sluice Affidavit at para. 11
Sluice Affidavit, Exhibit "B"

11. The Dorms are temporary structures. They are meant to be set up on a site, hooked up to utilities (electrical, gas and sewer/septic) and used as temporary dwellings for as long as the site is active. After that time, the trailers are to be removed at Sand Tiger's direction and taken to the next site. This was the intention of Sand Tiger and Canada North for these Dorms and to the best of my knowledge, Canada North put the Dorms on concrete slabs resting on their own weight and only connected them to utilities and nothing else on site.

Sluice Affidavit at para. 12

Sand Tiger's Security

12. When it delivered the Dorms to Canada North's possession, Sand Tiger registered a security interest over them pursuant to the Alberta *Personal Property Security Act* ("PPSA") and renewed said interest when required.

Sluice Affidavit at para. 13
Sluice Affidavit, Exhibit "C"

Default of Lease by Canada North

13. Canada North defaulted in making lease payments and entered into a settlement agreement with Sand Tiger effective September 7, 2016 (the "Settlement Agreement").

Sluice Affidavit at para. 14

14. As of the date of the Settlement Agreement, Canada North owed Sand Tiger the sum of $435,680.00 (the "Debt").

Sluice Affidavit at para. 15

15. It was a term of the Settlement Agreement that Canada North would make monthly payments of $36,306.67 until the Debt was paid in full. Canada North also provided Sand Tiger with a Consent Judgment in the amount of the Debt as a further term of settlement.

Sluice Affidavit at para. 16

CCAA Proceedings

16. On July 5, 2017, Canada North was granted creditor protection and permission to restructure its business under the Companies' Creditors Arrangement Act ("CCAA"), pursuant to an order of this Court made by the Honourable Justice K.G. Nielsen (the "Order").

Sluice Affidavit at para. 17

17. Sand Tiger filed a Proof of Claim in the Canada North CCAA proceedings. The Monitor subsequently rejected the Proof of Claim on account of it being late.

Sluice Affidavit at para. 18
Sluice Affidavit, Exhibit "D"

18. As of the date of the Order, Canada North owed Sand Tiger $155,373.33 pursuant to the Settlement Agreement, which amount Sand Tiger put forward to the Monitor in its Proof of Claim.

Sluice Affidavit at para. 19

Monitor's Initial Position

19. After receiving notice of the CCAA Order, Sand Tiger's President, Wayne Sluice, communicated with the Monitor and requested the release of the Dorms from Canada North's property in Bonnyville.

Sluice Affidavit at para. 20

20. Initially, the Monitor indicated it would release the Dorms upon receiving proof of Sand Tiger's ownership, which Sand Tiger provided to the Monitor's satisfaction.

Sluice Affidavit at para. 21
Sluice Affidavit, Exhibit "E"

21. It took many months for the Monitor to confirm that it was satisfied with Sand Tiger's claim to ownership of the Dorms. Sand Tiger first requested their return in August 2017. It wasn't until June 2018 that the Monitor confirmed that it accepted Sand Tiger as the owner of the Dorms.

Sluice Affidavit at para. 22

22. As there was no demand for the Dorms in June 2018, Sand Tiger decided to leave them at the Bonnyville site to avoid incurring unnecessary relocation expenses. There was also difficulty in sourcing qualified personnel to dismantle the Dorms in June 2018.

Sluice Affidavit at para. 23

Town of Bonnyville's Claim for Special Lien

23. On July 5, 2018, the Monitor e-mailed Sand Tiger's President to advise that, contrary to what it had initially indicated, it would not agree to Sand Tiger removing the Dorms form the Gateway Industrial Park.

Sluice Affidavit at para. 24
Sluice Affidavit, Exhibit "F"

24. The Monitor explained that, because the Dorms were connected to water, sewer and electricity when in service, the Town of Bonnyville took the position that the Dorms

constituted "improvements" on the Property subject to a special lien pursuant to section 348 of the Municipal Government Act. As a result, the Town was looking to the Dorms to satisfy part of Canada North's property tax liability to Bonnyville.

Sluice Affidavit at para. 25

Chattels Located in Dorms

25. The Monitor intends to sell "small wares" located inside dorms at the Property if they are not claimed by their rightful owners.

Sluice Affidavit at para. 26

26. The following is a list of Sand Tiger's "small wares" located inside its Dorms:

   a. 38 TVs (*as per Invoices at Exhibit "G"*);

   b. 2 washing machines and 3 dryers in each 30-person Dorm (there are three 30-person Dorms), and 3 washing machines and 3 dryers in the one 38-person Dorm), for a total of 5 washing machines and 6 dryers (*these are identified in the Specs at Exhibit "H"*);

   c. Mattresses (*these are identified in the Specs at Exhibit "H"*);; and,

   d. bedroom furniture (*identified in the Specs at Exhibit "H"*).

   Sluice Affidavit at para. 28
   Sluice Affidavit, Exhibit "G"
   Sluice Affidavit, Exhibit "H"

III. ISSUES

27. The question of whether the Town of Bonnyville's special lien under the *Municipal Government Act* attaches to the Sand Tiger Dorms has been reserved pending the Court of Appeal's decision in the *Virginia Hills* case. As a result, the only issues to be argued on January 10-11, 2019 that concern Sand Tiger are:

a. whether the "small wares" in the Sand Tiger Dorms are the property of Sand Tiger;

b. whether Sand Tiger's ownership of the small wares is subject to the PPSA, such that Sand Tiger had to register a PPR for them, failing which they are subject to the claims of other secured creditors;

c. if the small wares are subject to the PPSA, whether they constitute fixtures or appurtenances of the Dorms themselves, such that Sand Tiger's PPR registration for the Dorms will suffice as a PPR registration for the small wares as well; and,

d. if the small wares are subject to the PPSA and Sand Tiger's PPR registration for the Dorms does not suffice as a PPR registration for the small wares as well, would the result (i.e., that the small wares are subject to Canadian Western Bank's security interest) be one that is commercially reasonable?

IV. LAW AND ARGUMENT

A. Are the Small Wares the Property of Sand Tiger?

28. The Monitor appears to concede (at paras. 214 and 216 of its Brief) that the following small wares located in the Sand Tiger Dorms are the property of Sand Tiger:

a. TV's
b. Washing machines
c. Dryers
d. Mattresses
e. Bedroom furniture

29. Canada North's President, Paul McCracken, also conceded Sand Tiger's ownership of the above-listed items.

Transcript of Questioning of Paul Mccracken ("McCracken Transcript") at p. 5, l. 3 – p. 6, l. 18

30. The Monitor and Mr. McCracken assert that Sand Tiger is not the owner of the bedding in the Sand Tiger Dorms.

Brief of the Monitor at paras. 214 and 224(b)(iii)

McCracken Transcript") at p. 5, l. 3 – p. 6, l. 18

31. Sand Tiger is prepared to concede that the bedding in the Dorms is not its property, as it was likely placed in the Dorms by Canada North and/or Canada North's employees.

B. Are the Small Wares Subject to the PPSA and the Claims of Other Secured Creditors?

32. Notwithstanding its concession that Sand Tiger is the apparent owner of the small wares (save for the bedding), the Monitor has opined that Canadian Western Bank likely enjoys priority over the small wares because Sand Tiger failed to register and perfect a security interest in those items.

Brief of the Monitor at para. 223

33. Sand Tiger submits that its lease of the small wares to Canada North, which was implicit in the express written lease for the Dorms, is exempt from the application of the PPSA because Sand Tiger is not regularly engaged in the business of leasing goods like the small wares, and therefore the small wares fall under the exemption found at subsection 1(1) (z)(iv) of the PPSA.

34. Subsection 1(1)(z) of the PPSA defines "lease for a term of more than one year", such leases being generally subject to the PPSA except for several listed exceptions.

***PPSA*, subsection 1(1)(z)**

35. Subsection 1(1)(z)(iv) of the PPSA is one of the listed exceptions. It exempts leases that are for longer than one year from the PPSA's application if it is "a lease involving a lessor who is not regularly engaged in the business of leasing goods."

***PPSA*, subsection 1(1)(z)(iv)**

36. In *Planwest Consultants Ltd. v. Milltimber Holdings Ltd.*, the Court of Appeal applied the subsection 1(1)(z)(iv) exemption in favour of a mortgagee that had became owner of land, a building and restaurant equipment in the building as a result of it forecloing on its mortgage. The mortgagee, now owner, leased the land, building and the restaurant equipment in the building to a tenant who operated the business as a restaurant (as was previously the case). The court concluded that in these unique circumstances the mortgagee, now owner and landlord, was entitled to the exemption from the registration requirements of the PPSA. The owner/landlord was found to be primarily engaged in the purchase, sale and financing of commercial properties, and investment consulting and not regularly engaged in the business of leasing chattels which was only incidental to and not a regular part of the business of the lessor on this singular occasion.

> ***Planwest Consultants Ltd. v. Milltimber Holdings Ltd.*, 1995 CanLII 9153 (AB QB) at TAB 1, [1995] 10 W.W.R. 334 (Alta. Q.B.); aff'd 1997 ABCA 318 (CanLII), [1998] 3 W.W.R. 214 (Alta. C.A.) at TAB 2**

37. Sand Tiger submits that it is not regularly engaged in the business of leasing chattels such as the small wares. While it leases Dorms (living accommodations), it includes certain appliances and furnishings with said Dorms and does not consider them separate property (as argued below, it considers said appliances and furnishings as appurtenances to the Units themselves). It can therefore be said that Sand Tiger is not in the business of leasing TVs, washers, dryers, mattresses or bedroom furniture, and therefore was not required to register its lease for the small wares under the PPSA.

C. Are the Small Wares Accessions or Appurtenances to the Dorms?

38. Subsection 1(1)(z)(v) of the PPSA exempts leases of household furnishings or appliances as part of a lease of land where the goods are incidental to the use of the land.

***PPSA*, subsection 1(1) (z)(v)**

39. While the lease in question is a lease of trailers (Dorms) and not land, Sand Tiger submits that its situation is analogous to what is contemplated by subsection 1(1)(z)(v) of the

PPSA. Put another way, the small wares in its Dorms are accessions or appurtenance to the Dorms themselves, placed in the Dorms for the better enjoyment of the Dorms.

40. The term "appurtenant" is defined in *Black's Law Dictionary* as follows:

> Appurtenant. Belonging to; accessory or incident to; adjunct, appended, or annexed to;. . . A thing is "appurtenant" to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another.
>
> ***Black's Law Dictionary*, 5th ed., cited in *American Piledriving Equipment, Inc. v. Manitoba Hydro*, 2018 MBQB 27 (CanLII) at para. 31 at TAB 2**

41. Section 1(1)(a) of the PPSA defines "accessions" as "goods that are installed in or affixed to other goods."

42. Sand Tiger's PPR does not list the mention the small wares themselves, but the small wares are accessions or appurtenances to the dorms themselves, such that Sand Tiger's PPR registration for the dorms also constitutes a PPR registration for the small wares located in the dorms because they have essentially become part of those units.

43. An examination of the Lease reveals that Sand Tiger (lessor) and Canada North (lessee) intended there to be "accessories" to the Dorms (referred to as "Units" in the lease). For example:

- "[lessee] shall not … make any changes, alterations or improvements in or to the Units or remove any parts, accessories or attachments from it. [Lessee] assumes full responsibility for any stairs, railings, furniture, accessories, attachments or other items missing from the Units upon return" (Paragraph 3 of Appendix "A" to Lease)
- Paragraph 7 of Appendix "A" to the Lease requires the lessee to pay, in the event of a total loss of the Units, the value of the Units "plus the value of all accessories less all insurance proceeds actually paid…".

- Paragraph 8 of Appendix "A' to Lease requires the lessee to keep property insurance of $4,000,000.00 as the estimated replacement cost of the Units and "accessories".
- Paragraph 10 of Lease states that "[a]ny accessories and additions to the returned Units shall be deemed to be part of the Units and the property of Sand Tiger."

Sluice Affidavit, Exhibit "B"

44. The specifications ("Specs") for the Dorms appended to the affidavit submitted by Sand Tiger in this proceeding note that they come equipped with the following furnishings/appliances (this list is not complete and is limited to those furnishings/appliances at issue in this application):

- Bedframe with spring mattress and headboard
- Clothes closet
- Desk
- Chair
- Shelving
- Wall mounted mirror
- Full size front load washing machine
- Full size front load clothes dryer

Sluice Affidavit, Exhibit "H"

45. Sand Tiger submits that the Dorms would be spartan and less useful as living accommodations if they did not come furnished and supplied with washing/drying facilities. The small wares are therefore accessions or appurtenances to the Dorms that were put there for the better enjoyment of the Dorms by the lessee.

D. Commercial Reasonableness

46. Sand Tiger requests that this Court take notice of the concept of commercial reality when considering the question of priority over the small wares. A finding that the small wares are subject to the PPSA and Sand Tiger's claim as owner is subordinate to other security

holders would fly in the face of the realities of the industry of portable accommodation rental, whereby Dorms are provided with certain chattels to make them more useful and comfortable and lessors do not necessarily list or register a security interest in the chattels.

47. Section 66(1) of the PPSA imports the concept of commercial reasonableness into the regime of secured transactions:

> All rights, duties or obligations arising under a security agreement, under this Act or any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

48. The Court of Appeal made the following remark about commercial reasonableness:

> …there is also the question of commercial practicality. Because secured transactions do not occur in an economic vacuum, the PPSA imports a requirement for commercial reasonableness and good faith. Technical compliance will not suffice if the result is not commercially reasonable, judged by "what can reasonably be expected of participants in the market in which the particular transaction took place": Cuming and Wood, supra, at 436002E
>
> ***Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.*, 2002 ABCA 79 (CanLII) at para. 56 at TAB 3**

49. If the small wares are subject to the PPSA and Sand Tiger's PPR registration for the Dorms does not suffice as a PPR registration for the small wares as well, the result (i.e., that the small wares are subject to Canadian Western Bank's security interest) would not be one that is commercially reasonable. It would defy the expectations of participants in this market (note that 726 is itself advancing an argument, based on industry custom, that small wares are included with dorms without small wares being individually described).

50. What is more, can it really be said that secured lenders like GWB advanced credit to Canada North on the strength of the debtor having title to, or pledging as security, the small wares in the Dorms? There was a valid and perfected registration of Sand Tiger's

Dorms, and that is what GWB would have had notice of when it advanced. It would be implicit that the Dorms would include sundry chattels appurtenant to the Dorms themselves. A conclusion that the small wares are accessions or appurtenances to the Dorms themselves, such that the PPR for the Dorms also covers the small wares, would not be one that would undermine the expectations of the other secured creditors in this proceeding.

V. CONCLUSIONS AND RELIEF SOUGHT

51. Sand Tiger submits that, for the reasons aforesaid, the Court's advice, direction and confirmation to the Monitor in response to the Monitor's application should be that, as far as the small wares in the Sand Tiger Dorms are concerned, the small wares are the property of Sand Tiger and are not subject to any secured creditor's priority.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December 2018.

REGENT LAW PROF. CORPORATION

Per: ______________________

RYAN E. FLEWELLING/SCOTT CHIMUK
Counsel for Great White Sand Tiger Lodgings Ltd.

TAB 1

Alberta Court of Queen's Bench
Planwest Consultants Ltd. v. Milltimber Holdings Ltd.
Date 1995-07-28

Harry A. Bridges, Q.C., for applicant.

Patrick D. Kirwin, for respondent.

(Edmonton 46663)

July 28, 1995.

1995 CanLII 9153 (AB QB)

[1] LEFSRUD J.:– This is an appeal from the Order made by Master Breitkreuz on April 26, 1995 in which he found that the Respondent's lease was not subject to the provisions of the *Personal Property Security Act* (PPSA) and that at the expiration or sooner termination of the lease, Cafe Boardwalk Inc. (the "Tenant") was required to surrender to the Respondent not only all fixtures and improvements, but also all chattels and equipment other than inventory located on the premises.

Factual Background

[2] The Respondent is a body corporate and its sole business is that of owning real properties and managing financial investments. It was previously the mortgagee of the subject lands and premises (the "lands") and following a default under the mortgage and subsequent settlement, it became the owner not only of said lands but also the chattels located thereon.

[3] The Applicant claims as a secured creditor of the Tenant on the basis of a debenture purportedly signed on September 21, 1993 but not registered at the Personal Property Registry until February 21, 1994.

[4] When the Respondent took over the property, its preference would have been to have sold the lands; however, by reason of a depressed real estate market, it decided to lease the lands as a restaurant as this was its previous use and those chattels referred to in Sched. A of the lease, to which I will refer later, were incidental to that purpose.

[5] After extensive negotiations, a lease was entered into between the Respondent and the Tenant. It commenced December 1, 1993 and carried a term of 60 months unless sooner terminated.

[6] The lease contains specific provisions that are relevant to these considerations including:

> SECTION 1.00 - DEFINITIONS
>
> k) "Premises" - the Land, Building and those chattels and equipment as listed in Schedule "A" hereto

SECTION 2.03 - EQUIPMENT, FIXTURES AND CHATTELS

The Landlord agrees to leave on the Premises those chattels, fixtures and equipment as more particularly described in Schedule "A" attached hereto.

SECTION 2.04 - TENANT'S IMPROVEMENTS

The Tenant agrees to do or cause to be done those improvements to the Premises as set out in Schedule "C" hereto (the "tenant's improvements").

SECTION 5.06 - GOODS, CHATTELS AND FIXTURES NOT TO BE REMOVED

The Tenant agrees that all goods, chattels, equipment and fixtures on the Premises as listed in Schedule "A" shall not be removed from the Premises and shall form part of the Premises and accede to the Landlord at the termination of the Lease.

SECTION 5.07 - PEACEFUL SURRENDER

a) The Tenant shall, at the expiration or sooner termination of the Term, peaceably surrender and yield up unto the Landlord the Premises, together with all fixtures and improvements which at any time during the Term, shall be made therein or thereon ...

SECTION 8.02 - REMOVAL OF FIXTURES

The Tenant shall not take, remove and carry away from the Premises any of its fixtures, fittings, shelving, counters or other articles upon the Premises in the nature of trade or tenants' fixtures ... Any installations, alterations, additions, partitions and fixtures and anything in the nature of the leasehold improvements not required to be removed by the Landlord, shall become the absolute property of the Landlord without any cost to the Landlord or compensation to the Tenant, any subtenant or occupant of the Premises, free and clear of all liens, charges and encumbrances whatsoever.

[7] To determine priority, I considered whether or not the lease was a security agreement which created a security interest. In this regard, it is noted that under s. 1(*1*)(*qq*), a security interest means inter alia the interest of a lessor under a lease for a term of more than one year, whether or not the interest secures payment or performance of the obligation. However, the Act also states:

1(1) ...

(y) "lease for a term of more than 1 year" includes

(i) a lease for an indefinite term even though the lease is determinable by 1 or both parties within 1 year after its execution,

(ii) subject to subsection (3), a lease initially for 1 year or less than 1 year if the lessee, with the consent of the lessor, retains uninterrupted, or substantially uninterrupted, possession of the leased goods for a period in excess of 1 year after the date the lessee first acquired possession of the goods, and

(iii) a lease for a term of 1 year or less that is automatically renewable or that is renewable at the option of one of the parties, or by agreement, for 1 or more terms, the total of which, including the original term, may exceed 1 year,

but does not include

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods. (my emphasis)

[8] As to a security interest, the Act also provides as follows:

1995 CanLII 9153 (AB QB)

20(1) A security interest

(c) in goods, chattel paper, a security, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value, and

(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

[9] Having regard to the particulars hereinbefore referred to, I agree with Master Breitkreuz that the Respondent is a lessor who is not regularly engaged in the business of leasing goods as a result of which the lease is not required to be registered under the PPSA. In addition, I agree with the Respondent that it acquired its various interest under a transaction that was not a security agreement, that it gave value by way of a rent-free period under the lease and that it acquired its interest in the Sched. C chattels on the date that the lease was signed, namely May 21, 1993, without knowledge of and prior to the registration of the Applicant's debenture on February 21, 1994.

[10] However, I find that I am unable to agree with the decision of Master Breitkreuz that all of the chattels located on the property at the time that the lease was terminated have become fixtures and the property of the Respondent.

[11] There is no question that the chattels, fixtures and equipment referred to in Sched. A were at the time that the lease was entered into and thereafter remained the property of the Respondent. That position is confirmed when one notes the provisions of ss. 100(k), 203 and 506.

[12] In addition, the Tenant's improvements referred to in s. 204 and listed in Sched. C became, at the termination of the lease, the absolute property of the Respondent.

[13] What did not become the property of the Respondent are those chattels and any equipment that the Applicant brought to and which presently remain upon the premises, but which are not those described in Sched. C. It is my view that said chattels and equipment should be returned forthwith to the Applicant.

[14] The Respondent shall have the costs of this application which may be spoken to if required.

Appeal allowed in part.

1995 CanLII 9153 (AB QB)

TAB 2

In the Court of Appeal of Alberta

Citation: Planwest Consultants Limited v. Milltimber Holdings Ltd., 1997 ABCA 318

Date: 19971009
Docket: 9603-0006-AC
Registry: Edmonton

1997 ABCA 318 (CanLII)

Between:

Planwest Consultants Limited

Appellant

- and -

Milltimber Holdings Limited

Respondent

The Court:

The Honourable Mr. Justice McClung
The Honourable Mr. Justice O'Leary
The Honourable Madam Justice Russell

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

H.A. Bridges, Esq. Q.C., for the Appellant

P.D. Kirwin, Esq., for the Respondent

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

McCLUNG, J.A. (for the Court):

[1] The judgment is unanimous in this case. Regrettably, we can be of no help to Mr. Bridges, a respected officer of the Court, or his client. The directions of the chambers judge that are now under appeal were included in the judgment of the Court at the appellant's request. They were in dispute at no material time. Their inclusion in the overall order was basically under the consent of both parties. No attempt was made to return to the chambers judge under the slips and errors rule or any other remedial process when

the alleged discrepancy in the directions came to light. Instead an appeal against the consent provisions of the order was taken. Even now Mr. Kirwm disputes Planwest's claimed entitlement to many of the items in any event.

[2] It is agreed that the chambers judge made no error in crafting his directions from what counsel had apparently agreed to. So we do not think that this Court has any jurisdiction to deal, on an appellate basis, with Mr. Bridges' concerns, especially in the light of Mr. Kirwin's objections. In consequence, the appeal must be dismissed, no reviewable error having been disclosed.

(Discussion with counsel re: costs.)

McCLUNG, J.A.:

[3] We will not fix the column under which costs should be taxed. Representations can be made to the taxing officer, thereby preserving any appeal from whatever directions he may make.

1997 ABCA 318 (CanLII)

TAB 3

Date: 20180206
Docket: CI 16-01-03851
(Winnipeg Centre)
Indexed as: American Piledriving Equipment, Inc. v. Manitoba Hydro
Cited as: 2018 MBQB 27

2018 MBQB 27 (CanLII)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

AMERICAN PILEDRIVING EQUIPMENT, INC., plaintiff,	)	Counsel:
	)	ROBERT P. SOKALSKI ROHITH C. MASCARENHAS for the plaintiff
- and -	)	
MANITOBA HYDRO and MORTENSON CANADA CORPORATION trading under the firm name and style of MORTENSON CONSTRUCTION OF MANITOBA and MORTENSON CONSTRUCTION and the said MORTENSON CONSTRUCTION OF MANITOBA and MORTENSON CONSTRUCTION, defendants.	)	THOMAS W. TURNER for the defendants JUDGMENT DELIVERED: FEBRUARY 6, 2018

KROFT J.

I. INTRODUCTION

[1] The context for this action and the motion brought by the plaintiff American Piledriving Equipment, Inc. (APE) is the Bipole III mega project of the defendant Manitoba Hydro (Hydro) and, in particular, the Keewatinohk Converter Station component (Project).

[2] The genesis of the action and APE's motion is an alleged failure by a Project sub-contractor to pay APE more than US$3 million for the use of APE's equipment.

[3] The issue on this motion is whether subsection 3(3) of ***The Builders' Liens Act***, C.C.S.M. c. B91 (***BLA***), exempts Hydro from the provisions of the ***BLA*** with respect to contracts entered into for construction of the Project.

[4] The motion is brought pursuant to Manitoba Court of Queen's Bench Rule 21, which permits the determination of an issue before trial where that determination may dispose of all or part of the action.

II. FACTS

[5] Hydro is building Bipole III to enhance the transmission of electricity from its northern generating stations to southern Manitoba. The Project is a component of Bipole III.

[6] Once built, the Project will receive alternating electrical current from generating stations and convert it to direct current so it can be transmitted long distances southward. Upon reaching its destination, the electricity will be converted back to alternating current for consumer use.

[7] The defendants Mortenson Canada Corporation trading under the firm name and style of Mortenson Construction of Manitoba and Mortenson Construction and the said Mortenson Construction of Manitoba and Mortenson

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Construction (Mortenson) are Hydro's general contractor for the Project. APE supplied equipment to one of Mortenson's sub-contractors. That sub-contractor sought creditor protection on March 18, 2016, and ultimately became bankrupt.

[8] On April 12, 2016, APE served a notice of lien on Hydro pursuant to section 45 of the ***BLA***. The notice of lien asserts a lien of US$3,013,010. The current action was filed September 19, 2016.

[9] Relying on subsection 3(3) of the ***BLA***, Hydro and Mortenson maintain the ***BLA*** *does not* apply to contracts or work related to the Project. Section 3 of the ***BLA*** provides:

> **Crown, etc. bound**
> **3(1)** Subject to subsection (2), the Crown, all Crown agencies, and all boards, commissions and bodies performing any duties or functions under an Act of the Legislature on behalf of the Crown, are bound by this Act.
>
> **Act not to apply to provincial highways, etc.**
> **3(2)** This Act does not apply to or in respect of work relating to or contracts of the Crown with respect to the construction, repair or maintenance of highways, bridges, air strips, docks and ferry terminals under the control and management of the Crown.
>
> **Act not to apply to certain Manitoba Hydro contracts**
> **3(3)** *This Act does not apply to contracts, or work related to contracts, entered into by Manitoba Hydro with respect to or in any way associated with the construction, repair or maintenance of hydro-electric generating stations or facilities, and plant appurtenant thereto.* [Emphasis added.]

[10] APE maintains that, when properly interpreted, the ***BLA*** *does* apply to contracts or work related to the Project.

[11] Which position is correct?

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III. ANALYSIS

[12] There is no real disagreement among the parties about the applicable principles of statutory interpretation. Words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament: ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27 at para. 21; ***Bell ExpressVu Inc. v. Winnipeg (City)***, 2010 MBQB 26, 250 Man. R. (2d) 57 at para. 26. Other principles of interpretation, which the law might otherwise recognize, come into play only when the ordinary principles do not resolve the issue: ***Bell ExpressVu Inc.*** at para. 26; ***Zacharias v. Zurich Insurance Co.***, 2012 ONSC 4209, 111 O.R. (3d) 611 at para. 26.

[13] Section 3 of the ***BLA*** is reproduced in paragraph 9 of these reasons.

[14] Subsection 3(1) provides that, subject to subsection 3(2), the ***BLA*** applies to the Crown and all Crown agencies. Hydro is a Crown agency. See subsection 1(1) of the ***BLA***.

[15] Subsection 3(2) of the ***BLA*** exempts Crown contracts with respect to the construction, repair or maintenance of highways, bridges, air strips, and other enumerated public works.

[16] Subsection 3(3) of the ***BLA*** exempts contracts, or work related to contracts, entered into by Hydro in any way associated with the construction,

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repair or maintenance of Hydro generating stations or facilities, and plant appurtenant thereto.

[17] Subsection 3(3) is not referenced in subsection 3(1) of the ***BLA***. It was added to section 3 by ***The Statute Law Amendment Act (1985)***, S.M. 1985-86, c. 51.

A. APE'S POSITION

[18] APE's principal submission is, when the words of subsection 3(3) are read in context, harmoniously with the object of the ***BLA*** and the intention of the Legislature, Hydro is not exempt from the provisions of the ***BLA*** with respect to the Project.

[19] As to the overall object of the ***BLA***, APE submits it is to ensure a person contributing to the improvement of land is paid for his contribution in accordance with his contractual entitlement. See ***Canotech Consultants Ltd. v. 5994731 Manitoba Ltd.***, 2017 MBCA 48, [2017] M.J. No. 130 (QL) at para. 21, quoting from the Manitoba, Law Reform Commission, ***Report on Mechanics' Liens Legislation in Manitoba***, (13 August 1979), online: <www.manitobalawreform.ca/pubs/pdf/archives/32-full_report.pdf>. Hydro and Mortenson describe the object in a similar fashion: to prevent landowners from benefitting from work, services and materials provided by others without paying for that work, those services and materials. See ***Budyk v. Walter (Ernie H.A.) Architect Inc.***, 2009 MBQB 144, 241 Man. R. (2d) 7 at para. 16.

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[20] As to the intention of the Legislature at the time it enacted subsection 3(3), APE relies on extracts from the Manitoba, Legislative Assembly, ***Debates and Proceedings (Hansard)***, 32nd Leg., 4th Sess., Vol. 85A (8 July 1985) at 3652, 3660-3661, attached to the affidavit of Janice Finnson, sworn April 6, 2017. First, in ***Hansard*** at page 3652:

> **MR. SPEAKER:** The Honourable Member for St. Norbert.
>
> **MR. G. MERCIER:** Mr. Speaker, to the Minister of Energy and Mines. Could he explain why, in The Statute Law Amendment Act just distributed, The Builders' Liens Act is not to apply to Manitoba Hydro contracts?
>
> **HON. W. PARASIUK:** Mr. Speaker, that's a matter that is up for debate and we will certainly provide the explanation at the appropriate time.

Second, in ***Hansard*** at pages 3660-3661:

> **MR. DEPUTY SPEAKER:** The Honourable Attorney-General.
>
> **HON. R. PENNER:** A question was asked about The Builders' Liens Act. *At the time that the amendments to The Builders' Liens Act were last passed, exemptions were made with respect to the construction of airports and highways and by oversight, that was not extended to Hydro. Hydro has a mechanism for protecting people in quite the same way that The Builders' Liens Act does, so it is not a question of denying anyone protection.* However, there is, in fact, and this is very specific, a $4 million saving to be made by allowing the Hydro mechanism to operate rather than the builders' lien mechanism to operate in this type of construction. [Emphasis added.]
>
> . . .
>
> **MR. DEPUTY SPEAKER:** The Member for St. Norbert.
>
> **MR. G. MERCIER:** Mr. Speaker, there is of course an amendment to this section that is interesting, that happens to come up on the same day when the Minister responsible for Energy and Mines is talking about tenders to Manitoba Hydro. There is an amendment in this Statute Law Amendment Act which makes The Builders' Liens Act inapplicable, Mr. Speaker, to Manitoba Hydro projects. There is an explanation contained

> in the notes which would appear to indicate there is a cost saving to Manitoba Hydro if this is done. *But certainly the Minister should give some assurance that everyone will be protected even if this is done.* [Emphasis added.]

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[21] Based on these excerpts, APE submits that when the exemption in subsection 3(3) of the ***BLA*** was introduced, the legislative intention was that an existing mechanism existed elsewhere to protect unpaid Hydro contractors and sub-contractors. APE submits that the Crown work exemption in subsection 3(2) of the ***BLA*** was enacted with the same intention as evidenced by certain protections afforded to Crown sub-contractors in section 2 of ***The Highways and Transportation Construction Contracts Disbursement Act***, C.C.S.M. c. H65 (***HTCCDA***):

> **Definitions**
> **1** In this Act
> **"contract"** means a contract between the department and a contractor for the construction or improvement of a transportation facility including a highway, bridge, airstrip, dock and ferry terminal;
>
> **Action by department when sub-contractor unpaid**
> **2(1)** Where the department is notified prior to paying out the holdback to the contractor that a sub-contractor claims that monies are owing to him under the sub-contract, the minister shall not pay the holdback to the contractor but shall either
>
> (a) retain the holdback or enough thereof to satisfy the claim of the sub-contractor until the contractor and sub-contractor direct the department in writing how to pay the holdback; or
>
> (b) take interpleader proceedings before the proper court; or
>
> (c) appoint a trustee to act under this Act.

[22] APE also relies on ***RBC Life Insurance Co. v. Manitoba (Minister of Consumer and Corporate Affairs)***, 2001 MBQB 243, 158 Man. R. (2d) 234, a decision of this court. RBC Life Insurance and Toronto Dominion Life Insurance appealed orders to cease promotional campaigns offering inducements (a phone card and a draw) to consumers. Neither insurer required the consumer to make a purchase as a condition of receiving the incentive. The basis for the order was ***The Insurance Act***, R.S.M. 1987, c. I40 prohibition against unfair or deceptive acts or practices. An "unfair or deceptive act or practice" was defined in ***The Insurance Act*** as "any payment, allowance or gift, or any offer to pay, allow or give, directly or indirectly, any money or thing of value as an inducement to any prospective insured to insure".

[23] Justice Morse agreed that both insurers breached the literal wording of ***The Insurance Act***. However, after considering ***Hansard***, he concluded the Legislature did not intend to prohibit the type of inducements used by the two insurers. The purpose of the inducements was not to obtain an application for insurance but to establish contact with a potential insured with a view to having that person apply for insurance. In the course of his reasons, Morse J. referred to the principles of statutory interpretation summarized in paragraph 12 of these reasons. He also cautioned about the reliability and weight of ***Hansard*** evidence: ***RBC Life Insurance Co.*** at paras. 28, 34. See also ***Canadian National Railway Co. v. Canada (Attorney General)***, 2014 SCC 40, [2014] 2 S.C.R. 135 at para. 47.

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[24] Comparing the present case with ***RBC Life Insurance Co.***, APE argues that when enacting subsection 3(3) of the ***BLA***, the intention of the Legislature, as expressed in ***Hansard***, was to exclude work related to the Project only if protections quite the same as those in the ***BLA*** existed elsewhere (such as the ***HTCCDA*** in the case of Crown contracts for highways, etc.). This intention should prevail *even if* a literal interpretation of subsection 3(3) of the ***BLA*** results in the exclusion of the Project. In other words, since Hydro and Mortenson have not identified such alternative statutory protections for Project sub-contractors, the Project is not excluded by subsection 3(3) of the ***BLA***. Subsection 3(1), which otherwise binds Hydro to the ***BLA***, should prevail. APE submits its position also is supported by the fact that subsection 3(1) of the ***BLA*** specifically is made subject to subsection 3(2) but makes no reference to subsection 3(3).

[25] Alternatively, there is ambiguity and, again relying on ***RBC Life Insurance Co.***, APE says subsection 3(3) of the ***BLA*** should be construed narrowly. In so doing, I should find that the Project is not a plant "appurtenant" to a Hydro generating station or facility. In support of that position, APE notes the Project is located 120 kilometers from the nearest generating station on its own site. To conclude that the Project is "appurtenant" to the generating facilities would be unreasonable and could lead to the conclusion that anything along Hydro's grid, including private homes and office buildings, is "appurtenant".

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[26] APE also submits that subsection 3(3) of the ***BLA*** is restricted to contracts entered into with Hydro and not a contractor such as Mortenson. APE relies on the words, "This Act does not apply to contracts, or *work related to contracts, entered into by Manitoba Hydro*" (emphasis added). It also submits that the word "work" as used in that phrase be narrowly interpreted to exclude the supply of equipment by APE.

B. HYDRO AND MORTENSON'S POSITION

[27] It is the defendants' position that when section 3 of the ***BLA*** is read in context and in its grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament, the Project is excluded. There is no ambiguity.

[28] The defendants agree that subsection 3(1) of the ***BLA*** binds the Crown and Hydro (a Crown agency) except for work of a specific category. In their submissions, the defendants described the excluded work as essential infrastructure. Where the Crown is concerned, the excluded essential infrastructure work is enumerated in subsection 3(2) of the ***BLA***. Where Hydro is concerned, the excluded essential infrastructure work is enumerated in subsection 3(3) of the ***BLA***. The defendants underscored that Hydro engages in work beyond that caught by subsection 3(3). One example would be office building construction. That other work *is* caught by the ***BLA***.

[29] The defendants acknowledge subsection 3(1) of the ***BLA*** references subsection 3(2) but not 3(3). Whereas APE suggests the omission results in ambiguity, the defendants argue it simply reflects the history of the legislation. As noted in the ***Hansard*** extracts in paragraph 20 of these reasons, the Hydro exemption in subsection 3(3) was added to section 3 of the ***BLA*** several years after the preceding subsections were enacted. According to then Minister Penner, the Legislature's failure to include the Hydro exemption from the beginning was an "oversight".

[30] What is the defendants' response to APE's argument that, based on ***Hansard***, it was the Legislature's intention to exclude the work identified in subsection 3(3) of the ***BLA*** only if protections similar to those in the ***BLA*** were provided elsewhere (such as the ***HTCCDA*** in the case of Crown contracts for highways, etc.)? The defendants submit:

- So far as Hydro is concerned, Hydro's enabling legislation creates an obligation to pay for new construction undertaken by it. See section 39 of ***The Manitoba Hydro Act***, C.C.S.M. c. H190.

- When Minister Penner's comments are read in their entirety, the overriding intention for adding subsection 3(3) was to correct the omission of the Hydro exemption from the last round of amendments and to save costs.

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- The provisions of the ***HTCCDA*** serve a specific purpose for a specific department of the Manitoba government. It is not relevant to how subsection 3(3) of the ***BLA*** should be interpreted. Moreover, the ***HTCCDA*** provisions are permissive (not mandatory) identifying protections that also are otherwise generally available at law to Hydro.

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[31] As to APE's assertion that the Project is not captured by the phrase "generating stations or facilities, and plant appurtenant thereto", simply put, electricity generated at a Hydro station cannot be transmitted to the intended market without first converting it through the Project. It is essential infrastructure, necessarily connected with the use of the generators. The defendants rely on the definition of "appurtenant" found in ***Black's Law Dictionary***, 5th ed.:

> **Appurtenant.** Belonging to; accessory or incident to; adjunct, appended, or annexed to;. . . A thing is "appurtenant" to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another.

[32] For further context, they also referred me to the following definitions in ***The Manitoba Hydro Act***:

> **Definitions**
> **1** In this Act,
>
> **"power plant"** includes all land and works, constructed, acquired, used or adapted, or that might be used or adapted, for or in connection with the development or generation of power;

"power project" includes any charter, franchise, privilege, or other right, or land, or works, acquired, or proposed to be acquired, by any person with a view to the development or generation of power, or any plans, surveys, or data made or assembled with a view to the development or generation of power;

"works" includes all roads, railroads, plant, machinery, buildings, structures, erections, constructions, installations, materials, devices, fittings, apparatus, appliances, equipment, and other property for the development, generation, transmission, distribution, or supply of power.

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C. DECISION

[33] Having considered the submissions of the parties, I find that the ***BLA*** exempts Hydro with respect to the Project.

[34] The interpretation urged by the defendants is consistent with the grammatical and ordinary meaning of words in section 3 of the ***BLA***. As noted in paragraphs 13 to 16 of these reasons, subsection 3(1) clearly binds the Crown and Hydro (a Crown agency), except for the work described in subsections 3(2) and 3(3). It is accurate to describe that work as essential infrastructure. I agree that the Project is necessarily connected to the use of the generating stations and encompassed by the ordinary meaning of "plant appurtenant thereto".

[35] This interpretation is also consistent with the definitions in ***The Manitoba Hydro Act*** referenced in paragraph 32 of these reasons. I also reject APE's suggestion that the exemption relates only to contracts with Hydro per se. Following the reference to contracts entered into by Hydro, subsection 3(3) of the ***BLA*** provides "or in any way associated with the construction, repair or

maintenance of hydro-electric generating stations or facilities, and plant appurtenant thereto." In my opinion, this encompasses more than contracts entered into with Hydro.

[36] Perhaps at the time of enacting ***The Statute Law Amendment Act (1985)***, the Legislature could have amended subsection 3(1) to include a reference to the new subsection 3(3); however, its absence from subsection 3(1) does not render section 3 of the ***BLA*** ambiguous when read as a whole.

[37] Section 3 of the ***BLA*** must also be considered in the context of the object of the statute and the intention of the Legislature.

[38] The overall object of the ***BLA*** is not disputed and is set out in paragraph 19 of these reasons: to ensure payment to people contributing to the improvement of land. Notwithstanding that important object, there also is no dispute that there are specific carve-outs. As noted, the mechanism in the ***BLA*** is not available where the work involves Crown contracts for highways, bridges, air strips, docks and ferry terminals. It cannot be said that the ***BLA***'s object precludes the exclusion of the Project, especially given my finding that the wording of section 3 of the ***BLA*** is otherwise unambiguous.

[39] The central question on this motion is whether, *despite my other findings* in paragraphs 33 and 34 of these reasons, the ***Hansard*** evidence establishes a legislative intention that Hydro (and presumably any Hydro work referenced in subsection 3(3)) is nevertheless bound by the ***BLA*** with respect to the Project.

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In other words, in light of the ***Hansard*** evidence, should I give no effect to subsection 3(3) of the ***BLA***?

[40] The circumstances before me are different from those in ***RBC Life Insurance Co.*** In that case, relying on ***Hansard***, Morse J. found that an otherwise enforceable prohibition against unfair or deceptive practices in ***The Insurance Act*** was not intended to extend to the particular promotions undertaken by the insurers in question. In the present case, APE is not asking me simply to read down the wording of subsection 3(3) of the ***BLA***. Relying on ***Hansard***, APE is asking me to find that the provision should be given no meaning.

[41] I must bear in mind the judicial caution against the reliability and weight to be given to ***Hansard*** evidence. In my opinion, the ***Hansard*** excerpt reproduced in paragraph 20 of these reasons does not establish a sufficiently reliable foundation to conclude subsection 3(3) of the ***BLA*** has no application.

[42] APE correctly points out that in response to a question about the Hydro exemption, Minister Penner expressed that protections "quite the same" as those in the ***BLA*** existed. It is also correct that over and above the statutory payment obligations identified (referenced in paragraph 30 of these reasons) and other protections that may exist at common law, defendants' counsel identified no formal statutory mechanism that is "quite the same" as the ***BLA***. Notwithstanding these observations, in my view it is too great a leap to conclude,

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based on the ***Hansard*** evidence, that the legislative intention was for the Hydro exemption to apply only if a mechanism akin to the ***BLA*** is in place.

[43] First, when the ***Hansard*** evidence is read as a whole, it is not clear to me that the legislative intention when enacting subsection 3(3) was that the Hydro exemption was conditional on the existence of any mechanism other than what existed at the time. The Minister's language is current (as at 1985), not prospective. In contrast, the one legislative intention that is clear is to enact the exemption because it previously was overlooked when the Crown exemption was enacted. It is also clear that the Legislature was attempting to achieve cost savings by excluding those essential projects identified in subsections 3(2) and 3(3).

[44] Second, I have been asked to interpret subsection 3(3) in the context of section 3 as a whole. Throughout its submissions, APE invited me to compare and contrast subsections 3(1) and 3(2) with subsection 3(3). However, I was provided with no ***Hansard*** evidence in respect of the enactment of subsections 3(1) and 3(2). That legislative history is relevant and would have been of value.

[45] Third, and related to my second point, APE accepts the subsection 3(2) Crown exemption because of the provisions in the ***HTCCDA*** referenced in paragraph 21 of these reasons. Although we may never know precisely what the Minister meant by the phrase "a mechanism for protecting people in quite the same way that The Builders' Liens Act does", I would not describe the permissive

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HTCCDA provisions as a mechanism protecting "in quite the same way" as the ***BLA***. They are quite different. In other words, to me, APE's apparent acceptance of the Crown exemption but rejection of the Hydro exemption is inconsistent. The inconsistency also is underscored by the defendants' submission that the mechanism identified in the ***HTCCDA*** is available to Hydro quite apart from legislation.

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[46] Fourth, notwithstanding the rule that statutes are to be given a fair, large and liberal interpretation that best achieves their objects, the court should not overstep. If a statutory regime is deficient, it is for the Legislature to correct the deficiency. See ***Bell ExpressVu*** at para. 64; ***The Interpretation Act***, C.C.S.M. c. I80, section 6. To the extent APE argues that the Hydro exemption in subsection 3(3) cannot be given effect because of a deficiency in statutory protections afforded elsewhere to contractors and sub-contractors, that is a matter for the Legislature to address.

IV. CONCLUSION

[47] In the circumstances, I find that the ***BLA*** exempts Hydro with respect to the Project.

[48] If the parties cannot agree to costs, they may come back before me.

_________________________ J.

TAB 4

Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp., 2002 ABCA 79

Date: 20020319
Docket: 0019094

2002 ABCA 79 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE WITTMANN
THE HONOURABLE MR. JUSTICE BROOKER

BETWEEN:

NORTHWEST EQUIPMENT INC.

Appellant

- and -

DAEWOO HEAVY INDUSTRIES AMERICA CORPORATION

Respondent

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE LOMAS
DATED NOVEMBER 8, 2001

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE FRUMAN
CONCURRED IN BY THE HONOURABLE MR. JUSTICE WITTMANN
CONCURRED IN BY THE HONOURABLE MR. JUSTICE BROOKER

COUNSEL:

A. G. Bell
For the Appellant

K. T. Lenz
For the Respondent

2002 ABCA 79 (CanLII)

REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE FRUMAN

2002 ABCA 79 (CanLII)

[1] Both Daewoo Heavy Industries America Corporation, the secured party, and Northwest Equipment Inc., the owner, claim priority over an excavator. The equipment was originally purchased by a British Columbia company, and a security interest was granted to Daewoo in that province. But the excavator had a taste for travel. It was sold to Northwest, and without Daewoo's knowledge, moved from British Columbia to Washington State. Later, again without Daewoo's knowledge, it was relocated to Alberta. There it was leased to a third party, and was ultimately seized by Daewoo. Northwest contests the seizure and Daewoo's claim to the excavator.

[2] This judgment attempts to unearth the rudiments of priorities, unperfected security interests and interjurisdictional rules. As the excavator's sojourn in each location gives rise to different legal issues and analyses, each jurisdiction will be examined separately. The unifying factor is the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359.

[3] British Columbia law applies because the personal property security laws of both British Columbia and Alberta provide that "the validity, perfection and effect of perfection or non-perfection of a security interest" in this type of equipment is governed by the law of the jurisdiction where the debtor was located when the security interest attached: (British Columbia *Personal Property Security Act*, *supra*, s. 7(2)(a); Alberta *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 7(2)(a)). The debtor was located in British Columbia when Daewoo acquired its security interest. Washington law has a similar, though not identical provision (*Uniform Commercial Code - Secured Transactions*, RCW 62A.9A-301(1)), but in any event, counsel did not provide expert evidence of Washington law, and relied on British Columbia law in respect of the Washington analysis. Therefore, British Columbia law generally applies to all three jurisdictions. Except as otherwise noted, references in this judgment are to the British Columbia statute, which is referred to as the *PPSA*.

BRITISH COLUMBIA

[4] Daewoo supplies heavy equipment, including excavators. Trainer Bros., a British Columbia corporation, sold and leased Daewoo's equipment, as well as heavy equipment manufactured by other companies.

[5] In 1996, Daewoo began supplying equipment to Trainer Bros. in British Columbia. Trainer Bros. signed a security agreement, granting Daewoo a security interest in the inventory Daewoo had already supplied, as well as inventory to be supplied in the future. Among other clauses, the security agreement provided that Trainer Bros. would not sell any of the inventory supplied by Daewoo without Daewoo's written consent, unless the sale was in the ordinary course of Trainer Bros.' business. Trainer Bros. also undertook to notify Daewoo about any

change in the location of the equipment (AB IV at 363). On September 25, 1996, Daewoo registered a financing statement at the British Columbia Personal Property Registry.

[6] In 1997, Daewoo sold Trainer Bros. the excavator that is the subject of this dispute. The purchase price of approximately US$150,000 was due on November 30, 1997, but was never paid. This was one of many defaults under the security agreement. The total outstanding debt owed to Daewoo is approximately US$1.5 million. Trainer Bros. has since declared bankruptcy.

[7] Northwest is a Washington-based corporation that sells and leases construction equipment. In May 1998, prior to Trainer Bros.' bankruptcy, Northwest purchased the excavator from it as part of a larger asset purchase. According to Northwest, Trainer Bros.' negotiator, William Trainer, represented that the excavator was unencumbered (AB III at 149). The misrepresentation was repeated in writing in the Bill of Sale (AB V at 402). Although it was Northwest's usual practice to conduct encumbrance searches when it purchased earthmoving equipment, it did not search the British Columbia Personal Property Registry to determine if any security interests were registered against the excavator (AB III at 149-50).

[8] Under the terms of the sale, Northwest was to receive seven pieces of equipment and a $300,000 loan from Trainer Bros., and Trainer Bros. was to receive 49% of the shares of Northwest. The loan was never made and the shares were never issued. Trainer Bros.' receiver eventually assigned all claims against Northwest to William Trainer's sister-in-law.

[9] Northwest contends that the sale of the excavator was in the ordinary course of Trainer Bros.' business, and therefore, it took the excavator free from Daewoo's security interest. A master in chambers agreed. But on appeal *de novo* to the Court of Queen's Bench, a chambers judge decided that the sale of the excavator and other machinery for a minority interest in a U.S. corporation was not in the ordinary course of Trainer Bros.' business (AB I at 34). The chambers judge also decided that Daewoo had not expressly or impliedly consented to the sale of the excavator (AB I at 39). Accordingly, Northwest took the excavator subject to Daewoo's security interest.

[10] Northwest appeals both findings.

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Ordinary course of business

[11] Section 28(1)(a)[1] of the *PPSA* states the general rule that a security interest continues if the collateral is dealt with. It is "not affected by a sale and can be enforced against the buyer": R. C. C. Cuming and R. J. Wood, *British Columbia Personal Property Security Act Handbook*, 4th ed. (Scarborough: Carswell, 1998) at 182. The section is a statutory formulation of the *nemo dat* rule, a common law and common sense principle that one cannot give away more than one possesses. See D. A. Dukelow & B. Nuse, eds., *Dictionary of Canadian Law*, 2nd ed. (Scarborough: Carswell, 1995), *s.v. "nemo dat quod non habet"*.

[12] Daewoo's security interest in the excavator attached when Trainer Bros. took possession of it in 1997.[2] Because a financing statement had already been registered, Daewoo then had a perfected security interest in the excavator.[3] The security interest was still perfected when Northwest purchased the excavator in 1998. Applying s. 28(1)(a), Trainer Bros. could not convey a greater interest in the excavator to Northwest than Trainer Bros. actually had. Because Trainer Bros.' interest was subject to Daewoo's perfected security interest, Northwest's interest would be similarly encumbered.

[13] But s. 28(1)(a) does not always apply. In certain circumstances the *PPSA* has specifically replaced the *nemo dat* rule, permitting a transferee to receive greater rights in property than the

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[1] 28(1) Subject to this Act, if collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing, and

(b) extends to the proceeds,

[...]

[2] 12(1) A security interest, including a security interest in the nature of a floating charge, attaches when

(a) value is given,

(b) the debtor has rights in the collateral, and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under section 10,

[...]

[3] 19 A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

transferor possessed. See ***Giffen (Re)***, [1998] 1 S.C.R. 91 and ***Donaghy (Bankrupt), Re*** (1992), 132 A.R. 155 (Q.B.) (trustee in bankruptcy obtained better title to a leased good than the bankrupt possessed by virtue of s. 20(b)). Sales in the ordinary course of business under s. 30(2)[4] and transfers with consent under s. 28(1)(a) are exceptions to the *nemo dat* rule.

[14] Under s. 30(2), a buyer of goods sold in the ordinary course of the seller's business takes the goods free from any perfected or unperfected security interest given by the seller. Its purpose "is to avoid disruption to commerce and injustice to unsuspecting ordinary course buyers which would otherwise result if such buyers were required in every case to conduct a search of the Personal Property Registry before buying goods": Cuming and Wood, *supra*, at 213. The focus is on commercial practicality: ***Fairline Boats Ltd.*** v. ***Leger*** (1980), 1 P.P.S.A.C. 218 at 220-21 (Ont. H.C.J.). The ordinary course exception applies whether or not the buyer knew of the security interest, and even though the security agreement limited the seller's rights to dispose of the goods. The exception does not apply if the buyer was aware that the transaction was in breach of the security agreement.

[15] Accordingly, if Trainer Bros. sold the excavator in the ordinary course of its business, Northwest would acquire it free from Daewoo's security interest. Sales in the ordinary course of business are usually "carried out under normal terms and consistent with general commercial practices": Cuming and Wood, *supra*, at 215. The chambers judge decided the sale of equipment to Northwest was sufficiently unusual that it was outside the ordinary course of Trainer Bros.' business. He considered several factors, including:

- the transaction was a component of a share purchase arrangement, not a cash sale; Trainer Bros. ordinarily sold and leased inventory for cash;
- the form of transaction - shares and a loan back to the purchaser - was unusual; there had been no prior transactions by Trainer Bros. of a similar type;
- the purchaser was a dealer, not a construction company; Trainer Bros. ordinarily sold products to end users;
- the sale, which involved one-quarter of Trainer Bros.' inventory, constituted a comparatively large portion of overall sales;
- the transaction was not advertised;

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[4] 30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

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- the transaction was concluded on the eve of insolvency; and
- the consideration was never tendered.

[16] Because the chambers judge heard the appeal from the master's order *de novo*, this court reviews the chambers judge's decision as a judgment of a court of first instance. Provided a first instance judge considers the appropriate factors in deciding whether a transaction is in the ordinary course of business, a reviewing court will defer to the judge's findings: ***Gainers Inc. v. Pocklington Holdings Inc.*** (2000), 271 A.R. 280 at 289 (C.A.). The factors considered by the chambers judge were appropriate and provide ample evidence upon which he could conclude that the sale of the equipment by Trainer Bros. to Northwest was outside Trainer Bros.' ordinary course of business. This transaction was sufficiently unusual that Northwest should have consulted the British Columbia Personal Property Registry before buying the equipment.

Consent

[17] The *PPSA* contains a second exception that permits a purchaser to acquire goods free from a secured charge. Under s. 28(1)(a), a security interest in collateral does not continue if the secured party expressly or impliedly authorized the transfer.

[18] Northwest alleges that Daewoo consented to the sale of the excavator because Trainer Bros. discussed the restructuring of its business operations with Daewoo. The chambers judge decided that the discussions did not provide adequate or accurate disclosure of the arrangement between Trainer Bros. and Northwest (AB I at 37). Consequently, Daewoo neither expressly nor impliedly authorized the transaction. In reaching this conclusion, he considered the following factors:

- the corporate restructuring proposal contemplated revenue from sales, but the consideration for the actual transaction was a share deal, with no cash compensation;
- the proposal contemplated a location in Abbotsford, British Columbia, and did not mention transferring the equipment to Washington; and
- the proposal contemplated a rental arrangement, not an outright sale.

[19] Additional evidence before the trial judge included:

- the affidavit evidence of Daewoo's Vice President and Regional Sales Manager specifically denied that Daewoo consented to or approved the transaction;
- no evidence of any written consent was tendered; and

- Northwest failed to establish that Daewoo knew of the transaction until some months after it occurred.

[22] The chambers judge correctly noted that Northwest had the onus to prove Daewoo expressly or impliedly authorized the transaction, but was not satisfied on the evidence that Northwest had met this onus (AB I at 39). Appellate courts defer to fact findings of courts of first instance, even when they are based on conflicting affidavit evidence: ***Toneguzzo-Norvell* v. *Burnaby Hospital***, [1994] 1 S.C.R. 114 at 121. The chambers judge had ample evidence on which to conclude that Daewoo had not consented to the transaction.

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[23] In summary, Trainer Bros. did not sell the excavator to Northwest in the ordinary course of its business, nor did Daewoo expressly or impliedly authorize the sale. Neither the ordinary course exception in s.30(2) nor the consent exception in s. 28(1)(a) apply. Therefore, Northwest acquired the excavator in British Columbia subject to Daewoo's perfected security interest.

WASHINGTON

[24] Northwest agreed to purchase the equipment from Trainer Bros. in early May, 1998. On May 20, 1998, the excavator was moved from British Columbia to Washington. Trainer Bros. did not advise Daewoo about the relocation of the excavator, although it was required to do so under Daewoo's security agreement. As a result, Daewoo did not learn of the transfer until September, 1998. On September 22, 1998, it registered its security interest in Washington, and immediately attempted to repossess the excavator in summary proceedings. The Washington court denied Daewoo's summary application, instead referring the matter to a full evidentiary hearing (AB III at 113-14).

[25] Northwest asserts that the transfer of the excavator to Washington defeated Daewoo's security interest because it became unperfected through late registration in Washington. The chambers judge made a general finding that the transfer of the excavator to Washington did not affect Daewoo's security interest.

Perfection

[26] Northwest's arguments in this section, and in the Alberta section that follows, are based upon a misunderstanding of the consequences that flow from a loss of perfection. To give these arguments context, it is necessary to delve into the purpose of perfection. Perfection is nothing more than a method of providing disclosure of prior security interests to third parties to enable them to protect themselves against loss. With some types of property, such as share certificates,

it is best achieved by possession of the encumbered property.[5] But perfection is usually accomplished by registering a financing statement in a personal property registry.[6] A prudent third party who conducts a personal property registry search will be able to determine whether the property is encumbered, and decide what steps to take to prevent loss.

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[27] As a general rule, the validity and perfection of a security interest are governed by the law of the jurisdiction in which the goods were situated at the time the security interest attached,[7] and that is the location in which a third party would conduct its search. However, the *PPSA* recognizes that certain types of property are frequently used in more than one jurisdiction. Because the goods move around, a third party who wishes to determine whether any encumbrances have been registered against them cannot rely on their current location as the appropriate jurisdiction in which to search. Instead, the *PPSA* provides that the validity of security interests in these types of itinerant property is governed by the law of the jurisdiction in which the debtor, not the property, was located at the time the security interest attached.[8] A third

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[5] 24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in
(a) chattel paper,

(b) goods,

(c) an instrument,

(d) a security,

(e) a negotiable document of title, and

(f) money

unless possession is a result of seizure or repossession.

[6] 25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

[7] 5(1) Subject to sections 6 to 8, the validity, perfection and effect of perfection or non-perfection of
(a) a security interest in goods,
[...]

is governed by the law of the jurisdiction where the collateral is located when the security interest attaches.

[8] 7 (2) The validity, perfection and effect of perfection or non-perfection of
(a) a security interest in
[...]

(ii) goods [...] that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or are inventory leased or held for lease by the debtor to others, [...]

party who wishes to determine whether any security interests have been registered against this kind of property would therefore conduct searches in the jurisdiction in which the debtor is located.

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[28] But occasionally debtors move, and sometimes they transfer encumbered property to parties located in other jurisdictions. In order to fully protect third parties, who "would reasonably assume that the public records of the jurisdiction where the transferee is located would disclose the existence of the security interest given by the debtor", security interests must also be publicly disclosed in the new jurisdiction: Cuming and Wood, *supra*, at 91. See also ***Canadian Imperial Bank of Commerce* v. *A.K. Construction (1988) Ltd.*** (1996), 186 A.R. 1 at 6 (Alta. Master); aff'd. (1998), 223 A.R. 115 (C.A.). Under s. 7(3),[9] a transfer by a debtor of an interest in these types of itinerant property to someone located in another jurisdiction triggers a perfection requirement in the new jurisdiction. If the security interest is perfected in the new jurisdiction within the time deadlines set out in the section, it is deemed to be continuously perfected in British Columbia, despite the delay in registration. If it is not, the security interest becomes unperfected.

[29] The perfection requirement in s. 7(3) applies in this case if the excavator (i) is the type of goods that are "normally used in more than one jurisdiction" and (ii) is "inventory leased or held for lease" by Trainer Bros., the original debtor (s. 7(2)). The first part of the test is a generic categorization of various types of goods; the second part is specific to Trainer Bros.' actual use of the excavator.

[30] The *PPSA* does not provide additional clarification about what goods "are of a type that are normally used in more than one jurisdiction". In ***Gimli Auto Ltd.* v. *Canada Campers Inc.*** (1998), 219 A.R. 166 at 169 (C.A.), the court noted the "paucity of authority in Canada" and

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is governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located when the security interest attaches.

[9] 7(3) If the debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a security interest perfected in accordance with the law applicable as provided in subsection (2) continues perfected in British Columbia if it is perfected in the other jurisdiction

(a) not later than 60 days after the day the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated or has transferred an interest in the collateral to a person located in the other jurisdiction, or

(c) before the date that perfection ceases under the law of the first jurisdiction,

whichever is the earliest.

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suggested that the term should be interpreted in a manner consistent with the United States Uniform Commercial Code, which uses similar wording. Article 9 of the U.C.C. contains a description of "goods of a type which are normally used in more than one jurisdiction", including "road building and construction machinery [...] and the like" (s. 9-103(3)(a)). The excavator clearly fits within this category. Accordingly, it is the type of property that is used in more than one jurisdiction and, because the excavator was inventory held for lease by Trainer Bros., it meets the threshold requirements for the application of s. 7.

[31] Trainer Bros. transferred the excavator to Northwest, a Washington-based company, and "a person located in another jurisdiction" under s. 7(3). In order for Daewoo's security interest in the excavator to remain continuously perfected in British Columbia, it had to perfect its interest in Washington within the time set out in s. 7(3). Daewoo had at most 60 days in which to register but did not meet this deadline. Accordingly, Daewoo's security interest became unperfected in British Columbia.

Loss of Perfection

[32] Northwest contends that the loss of perfection had a dramatic impact on Daewoo's previously registered security interest. It alleges that by taking possession of the excavator Northwest perfected a security interest that had priority over Daewoo's unperfected security interest. Alternatively, it argues that when a security interest becomes unperfected, a prior perfected charge is either extinguished entirely, or becomes invalid against parties who previously took the property subject to the perfected security interest.

[33] Getting to the bottom of the first argument, Northwest did not acquire a security interest when it took possession of the excavator. A "security interest" is "an interest in goods [...] that secures payment or performance of an obligation" (s. 1(1)). When Northwest purchased the excavator from Trainer Bros., it acquired an ownership interest in the collateral,[10] not a competing security interest. There is no issue of priority between Northwest and Daewoo.

[34] Northwest incorrectly asserts that a loss of perfection extinguishes a security interest. Perfection is a method of third party notification, not a precondition to validity. The *PPSA* states that, subject to its provisions, "a security agreement is effective according to its terms" (s. 9). "[Lack] of perfection does not affect the legal quality of the transaction but results in a lesser bundle of statutory rights under the Act": R. H. McLaren, *Secured Transactions in Personal Property in Canada*, 2nd ed. (Toronto: Carswell, 1989) at 5-149. See also ***Re Burton and Petrone, Hatherly, Hornak & Associates*** (1985), 53 O.R. (2d) 110 at 114 (Ont. Dist. Ct.); ***Coutyk* v. *Coutyk***, [1999] B.C.J. No. 2737 at para. 10 (Sup. Ct.), online: QL (BCJ).

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[10] 1(1) In this Act:
[...]

"collateral" means personal property that is subject to a security interest;

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[35] The *PPSA* provides a few specific instances in which unperfected security interests are ineffective against specified parties (s. 20(b)) or subordinate to other interests that arise at the time the security is unperfected (s. 20(a); s. 20(c)). Even in these special circumstances, the *PPSA* does not extinguish unperfected charges. In fact, it contemplates enforcement of both perfected and unperfected security interests, and provides for priorities between them (s. 35(1)(b) and (c)). Accordingly, neither failure to initially perfect a security interest nor a subsequent loss of perfection extinguishes a security interest.

[36] Northwest's argument that a loss of perfection invalidates existing priorities is equally flawed. As a general rule, a security interest continues if the collateral is dealt with (s.28(1)(a)). Sales in the ordinary course of business and transfers with consent are exceptions but, as explained above, they are not applicable in this case.

[37] The *PPSA* contains another exception to the *nemo dat* rule that applies to an acquisition of goods that are subject to an unperfected security interest. A transferee for value who acquires an interest other than a security interest in goods, without knowledge of the prior security interest and before it is perfected, acquires the goods free from the unperfected security interest (s. 20(c)).[11]

[38] Section 20(c) contains a number of conditions, each of which must be met at the time the interest is acquired. In particular, the transferee must acquire the goods before the security interest is perfected. If the security interest has already been perfected, s. 20(c) does not apply and the prior security interest retains its priority. The transferee takes the goods subject to it under s. 28(1)(a); a subsequent loss of perfection does not improve the transferee's title. See ***Bank of Montreal* v. *Kalatzis*** (1984), 37 Sask. R. 300 (Q.B.); Cuming and Wood, *supra*, at 157.

[39] In this case, Northwest acquired the excavator after Daewoo had perfected its security interest. The exception in s. 20(c) does not apply. Northwest acquired the excavator subject to Daewoo's security interest, and continues to hold it subject to that interest despite the subsequent loss of perfection.

[40] This result is consistent with the purpose of perfection. When Northwest acquired the excavator, Trainer Bros. was located in British Columbia. To protect itself, Northwest should have conducted a search in the British Columbia Personal Property Registry. Had it done so, it would have become aware of Daewoo's perfected security interest. The transfer of the excavator

[11] 20 A security interest
(c) in [...] goods is subordinate to the interest of a transferee who
(i) acquires an interest under a transaction that is not a security agreement,
(ii) gives value, and
(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

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to Washington triggered a perfection requirement, not to protect Northwest, but to provide disclosure to third parties dealing with Northwest.

[41] In summary, a loss of perfection neither extinguishes a security interest nor invalidates existing priorities. Lack of perfection might, in some circumstances, lead to a priority battle with a third party who acquired a security interest while the earlier interest was unperfected. It does not improve the title of a party who acquired the goods subject to the perfected charge. Accordingly, while the excavator was in Washington, Northwest's interest in it remained subject to Daewoo's security interest.

ALBERTA

[42] Northwest hired Solar Heavy Equipment Rental Ltd. as its Alberta leasing agent. Solar's president, William Trainer, was the former employee of Trainer Bros. who originally negotiated the sale of the excavator to Northwest. In May 1999, Northwest moved the excavator into Alberta and, with Solar's assistance, leased it to Win Management. On May 13, 1999, Northwest registered a financing statement in the Alberta Personal Property Registry.

[43] Once again, Daewoo was not notified of the transfer. It learned that the excavator had been relocated in January, 2000, and registered its security interest at the Alberta Personal Property Registry on January 18, 2000. Daewoo seized the excavator on February 4, 2000. Northwest contested Daewoo's claim to the excavator and made an application for its return. That application was dismissed by a Queen's Bench judge and is the subject of this appeal.

[44] Northwest contends that it perfected a security interest in the excavator by registering the financing statement. It argues that Daewoo's security interest was unperfected at that time, and therefore its perfected security interest has priority. The chambers judge decided that Northwest could not "perfect an alleged security interest in the property by leasing the goods [...] to Win Management and registering as a secured party under the Alberta PPSA" (AB 1 at 40). He held that Daewoo had priority over the excavator, subject only to the security interest of Win Management under the lease with Northwest (*id.*)

Security Interest

[45] Northwest's priority argument is based on its assertion that it perfected a security interest in the excavator by registering a financing statement. Northwest provides no analysis to support this conclusion; Daewoo argues that because the Win Management lease is for a term of less than one year, it did not create a security interest. As Win Management, the debtor, is located in

Alberta, Alberta law applies to a determination whether Northwest had a perfected security interest in Alberta.[12]

[46] Registration of a financing statement does not perfect anything unless the underlying agreement created a security interest. The Alberta *Personal Property Security Act, supra,* restricts its application to transactions that secure payment or performance of an obligation, including a lease and a conditional sale, regardless of their form.[13] It is also deemed to apply to a lease for a term of more than one year, even if it does not secure payment or performance of an

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[12] The Alberta *Personal Property Security Act, supra,* provides:

7(2) The validity, perfection and effect of perfection or non-perfection of
(a) a security interest in
[...]

(ii) goods that are of a kind that are normally used in more than one jurisdiction, if the goods are equipment or are inventory leased or held for lease by the debtor to others
[...]

must be governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located at the time the security interest attaches.

[13] 3(1) Subject to section 4, this Act applies to
(a) every transaction that in substances creates a security interest, without regard to its form [...], and

(b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.
[...]

obligation.[14] The definition of "security interest" incorporates these concepts.[15] A "security agreement" is one "that creates or provides for a security interest" (s. 1(1)(ss)).

[47] The issue, then, is whether the agreement between Northwest and Win Management created a security interest that could be perfected by registration. Because "a lease for a term of more than one year"[16] is deemed to create a security interest, the term of the agreement is the logical starting point for this analysis.

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[14] 3(3) Subject to sections 4 and 55, this Act applies to
[...]

(b) a lease of goods for a term of more than one year,
[...]

that does not secure payment or performance of an obligation.

[15] 1(1) In this Act,
[...]

(tt) "security interest" means
(i) an interest in goods [...] that secures payment or performance of an obligation [...]

(ii) the interest of [...]

(C) a lessor under a lease for a term of more than one year,

whether or not the interest secures payment or performance of the obligation;

[16] 1(1) In this Act,
[...]

(z) "lease for a term of more than one year" includes
(i) a lease for an indefinite term even though the lease is determinable by one or both parties within one year after its execution,

(ii) subject to subsection (3), a lease initially for a term of one year or less than one year if the lessee, with the consent of the lessor, retains uninterrupted, or substantially uninterrupted, possession of the leased goods for a period in excess of one year after the date the lessee first acquired possession of the goods, and

(iii) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties, or by agreement, for one or more terms, the total of which, including the original term, may exceed one year,
[...]

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[48] The Win Management agreement is entitled "Equipment Rental Agreement" with the words "Option To Purchase" handwritten beside the printed title (AB V at 436). The agreement contains 18 brief clauses. The term is for a "guaranteed rental period" of "monthly" (*id.* at 439). There is no provision for the lease to continue from month to month; for renewal, either automatic or on notice; or for termination by the lessee. The lease provides that overdue rental payments bear no interest and that payments are "due at end of season"(*id.* at 437). "Season" is not defined, but is bound to be less than a year. Given the rental payment provision, and the absence of a renewal provision, this lease is most likely a lease for a single season that is less than a year. Such a lease could still qualify as a security interest if "the lessee's possession extends for more than one year" (s. 1(3)). However, Win Management's actual possession was interrupted by Daewoo's seizure. Accordingly, the agreement is not a "lease for a term of more than one year" and did not create a security interest.

[49] But it is necessary to dig deeper. Even a short-term lease may in substance create a security interest if, for example, it contains an option to purchase that can be construed to be a conditional sale agreement. Many factors may be considered in characterizing an agreement, no less than 16 of which are identified in ***Bronson, Re*** (1995), 34 C.B.R. (3d) 255 at 262-63 (B.C. S.C. Registrar); aff'd (1996), 39 C.B.R. (3d) 33 (B.C.S.C.). One of the most important indicators is the option price. An option price that is nominal or less than market value suggests that the lessee pays, as rental, the lessor's capital investment plus a credit charge. In that situation the transaction is really a conditional sale and the agreement creates a security interest. An option price that is close to fair market value suggests that the lease payments are really rental payments for use of the equipment, not payments towards the purchase price. In that case the lease is a true lease, not a security agreement. See Cuming and Wood, *supra*, at 35-36; ***Bronson, Re***, 34 C.B.R. (3d) at 259.

[50] The option to purchase in the Win Management agreement is succinct, to say the least. It consists of the handwritten words "100% of rental pd to apply againest [*sic*] purchase" (AB V at 440). The purchase price for the excavator, option exercise price and term of the option are neither specified nor calculable. The other provisions of the agreement are too sparse to be of assistance.

[51] Although Northwest and Win Management filed affidavits in these proceedings, they provided no additional evidence that would assist in construing the substance of the option to purchase. The only evidence is the written agreement and it does not support the creation of a security interest.

[52] As Northwest does not have a security interest in the excavator, it does not have a competing priority with Daewoo, and its argument fails. But even if Northwest had a perfected security interest, and even if that interest were perfected at a time that Daewoo's security interest were unperfected, Northwest would not have priority over the excavator.

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Competing Priorities

[53] Northwest's claim to priority over the excavator on the basis of a competing security interest breaks new ground. It is based on s. 35(1)(b)[17] of the *PPSA*, which ranks a perfected security interest ahead of an unperfected security interest. Section 35 contains residual priority rules that only apply when the *PPSA* "does not provide another method for determining priority between security interests." Under s. 28(1)(a), Northwest acquired its interest in the excavator subject to Daewoo's security interest. Northwest asserts that the residual priority rules in s. 35(1)(b) should override s.28(1)(a), catapulting Northwest's interest ahead of Daewoo's.

[54] Perfection is based on public policy that requires disclosure of the existence of security interests to "[give] third parties the ability to take the necessary prophylactic measures when dealing with debtors to avoid loss that would otherwise result from the application of the principle of *nemo dat quod non habet*": Cuming and Wood, *supra* at 145. Perfection may therefore be relevant to a determination of priorities between third parties with competing claims.

[55] But Northwest is not a third party that would need protection through additional disclosure. It could have learned of Daewoo's secured interest by checking the British Columbia Personal Property Registry when it purchased the excavator. Moreover, by the time Northwest registered in Alberta, it had actual knowledge of Daewoo's security interest. In the Washington proceedings seven months earlier, Northwest was not only aware of Daewoo's claim, but took the position that Daewoo had an unperfected security interest in the excavator (AB III at 82).

[56] No public policy or disclosure reason justifies overriding s. 28(1)(a). And there is also the question of commercial practicality. Because secured transactions do not occur in an economic vacuum, the *PPSA* imports a requirement for commercial reasonableness and good faith.[18] Technical compliance will not suffice if the result is not commercially reasonable, judged by "what can reasonably be expected of participants in the market in which the particular transaction took place": Cuming and Wood, *supra*, at 436.

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[17] 35(1) If this Act does not provide another method for determining priority between security interests, [...]

(b) a perfected security interest has priority over an unperfected security interest, [...]

[18] 68(2) All rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests must be exercised or discharged in good faith and in a commercially reasonable manner.

(3) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

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[57] Market participants want certainty. They do not favour leap-frogging priorities. Creditors would be hard pressed to lend money if a valid charge could be defeated by a surreptitious removal of the collateral to another jurisdiction, and the creation by the collateral holder of a secured interest in its own favour. Applying s. 35(1)(b) to give Northwest priority in these circumstances would not be commercially reasonable.

[58] In summary, even if Northwest had a perfected security interest in Alberta, the priority dispute between Daewoo and Northwest would be determined by s.28(1)(a) of the *PPSA* and there would be no need to resort to the residual priority rules in s. 35(1)(b). When Northwest purchased the excavator, it took it subject to Daewoo's perfected security interest. Neither a loss of perfection nor the subsequent creation by Northwest of a perfected security interest in its favour would change that.

CONCLUSION

[59] Northwest has not shown any error in the chambers judge's decision. The appeal is dismissed.

APPEAL HEARD on April 20, 2001

REASONS FILED at Calgary, Alberta,
this 19th day of March, 2002

FRUMAN J.A.

I concur:
Authorized to sign for: WITTMANN J.A.

I concur:
Authorized to sign for: BROOKER J