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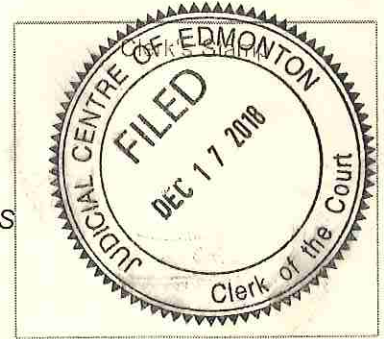
COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

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



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

DOCUMENT

**BOOK OF AUTHORITIES TO THE BRIEF OF THE MONITOR,
ERNST & YOUNG INC.**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

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COURT FILE NO.

1703 12327

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JUDICIAL CENTRE

EDMONTON

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Clerk's Stamp

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TAB 1



Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 13, 2016

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- (u.3) “futures customer” means a person for which a futures intermediary carries a futures contract on its books;
- (u.4) “futures exchange” means an association or organization operated to provide the facilities necessary for the trading of standardized futures or options on futures;
- (u.5) “futures intermediary” means a person that
 - (i) is registered as a dealer permitted to trade in futures contracts, whether as principal or agent, under the securities laws or commodity futures laws of a province or territory of Canada, or
 - (ii) is a clearing house recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority of another province or territory of Canada;
- (v) “goods” means tangible personal property other than chattel paper, a document of title, an instrument, investment property and money, and includes fixtures, growing crops and the unborn young of animals, but does not include trees that are not crops until they are severed or minerals until they are extracted;
- (w) “instrument” means
 - (i) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),
 - (ii) any other writing that evidences a right to the payment of money and is of a kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or
 - (iii) a letter of credit or an advice of credit if the letter or advice states that it must be surrendered on claiming payment under it,

but does not include

 - (iv) chattel paper, a document of title or investment property, or
 - (v) a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing;

- (x) "intangible" means personal property other than goods, chattel paper, investment property, a document of title, an instrument and money;
- (y) "inventory" means goods
 - (i) that are held by a person for sale or lease, or that have been leased by that person,
 - (ii) that are to be furnished by a person or have been furnished by that person under a contract of service,
 - (iii) that are raw materials or work in progress, or
 - (iv) that are materials used or consumed in a business;
- (y.1) "investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account;
- (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 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,

but does not include

 - (iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods,
 - (v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or
 - (vi) a lease of any prescribed goods, regardless of the length of the term of the lease;

household purposes and who takes and perfects security interests in consumer goods by taking possession of them, or who purchases consumer goods under agreements or undertakings, express or implied, that the goods may be repurchased by the sellers;

- (gg) "personal property" means goods, chattel paper, investment property, a document of title, an instrument, money or an intangible;
- (hh) "prescribed" means prescribed by the regulations;
- (ii) "prior security interest" means an interest created, reserved or provided for under a valid agreement or other transaction entered into before October 1, 1990, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the agreement or other transaction was entered into;
- (jj) "proceeds" means identifiable or traceable personal property, including fixtures and crops,
 - (i) derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and
 - (ii) in which the debtor acquires an interest,
 and includes
 - (iii) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral, and
 - (iv) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and
 - (v) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;
- (kk) "purchase" includes taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;
- (ll) "purchase-money security interest" means

information relates under circumstances in which a reasonable person would take cognizance of it.

(3) A lease referred to in subsection (1)(z)(ii) does not become a lease for a term of more than one year until the lessee's possession extends for more than one year.

(4) If the debtor and the owner of the collateral are not the same person, "debtor" means

- (a) in a provision of this Act dealing with the collateral, an owner of, or a person with an interest in, the collateral, or
- (b) in a provision of this Act dealing with the obligation, an obligor,

or both where the context permits.

(5) Unless otherwise provided in this Act, goods are "consumer goods", "inventory" or "equipment" if at the time the security interest in the goods attaches they are "consumer goods", "inventory" or "equipment".

(6) Proceeds are traceable whether or not there exists a fiduciary relationship between the person who has a security interest in the proceeds as provided in section 28 and the person who has rights in or has dealt with the proceeds.

RSA 2000 cP-7 s1;2006 cS-4.5 s108(2)

Part 1 General

The Crown is bound

2 The Crown is bound by this Act.

1988 cP-4.05 s2

Application of Act

3(1) Subject to section 4, this Act applies to

- (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, 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.

(2) Subject to sections 4 and 55, this Act applies to

- (a) a transfer of an account or chattel paper,
- (b) a lease of goods for a term of more than one year, and
- (c) a commercial consignment,

that does not secure payment or performance of an obligation.

1988 cP-4.05 s3;1991 c21 s29(3)

Non-application of Act

4 Except as otherwise provided under this Act, this Act does not apply to the following:

- (a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;
- (b) a security agreement governed by an Act of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, and any agreement governed by sections 425 to 436 of the *Bank Act* (Canada);
- (c) the creation or transfer of an interest or claim in or under any policy of insurance, except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;
- (c.1) a transfer of an interest in or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;
- (d) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services;
- (e) the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract;
- (f) the creation or transfer of an interest in land, including a lease;
- (g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by investment property or an instrument;

- (c) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

(2) For the purposes of sections 5, 6, 7 and 7.1, a security interest is perfected under the law of a jurisdiction when the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest, and the security interest has a status in relation to the interests of other secured parties, buyers, judgment creditors or a trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

RSA 2000 cP-7 s8;2006 cS-4.5 s108(7)

Law of a jurisdiction

8.1 For the purposes of section 7.1, a reference to the law of a jurisdiction means the internal law of that jurisdiction excluding its conflict of law rules.

2006 cS-4.5 s108(8)

Part 2

Validity of Security Agreements and Rights of Parties

Effectiveness of security agreement

9 Subject to this Act or any other Act, a security agreement is effective according to its terms.

1988 cP-4.05 s9

Enforceability of security interest

10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where

- (a) the collateral is not a certificated security and is in the possession of the secured party,
- (b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the *Securities Transfer Act* pursuant to the debtor's security agreement,
- (c) the collateral is investment property and the secured party has control under section 1(1.1) pursuant to the debtor's security agreement, or
- (d) the debtor has signed a security agreement that contains

- (i) a description of the collateral by item or kind or as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles",
 - (ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or futures contract,
 - (iii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or
 - (iv) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except personal property described as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles".
- (2) For the purposes of subsection (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.
- (3) A description is inadequate for the purposes of subsection (1)(d) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.
- (4) A description of collateral as inventory is adequate for the purposes of subsection (1)(d) only while it is held by the debtor as inventory.
- (5) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

RSA 2000 cP-7 s10;2006 cS-4.5 s108(9);2016 c18 s14

Delivery of copy of security agreement

11 Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor not later than 10 days after the execution of the security agreement, and if the secured party fails to do so after a request by the debtor the Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.

1988 cP-4.05 s11

Attachment of security interests

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 or power to transfer rights in the collateral to a secured party, and
- (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in

- (a) crops until they become growing crops,
- (b) the young of animals until they are conceived,
- (c) minerals until they are extracted, and
- (d) trees other than crops until they are severed.

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(5) The attachment of a security interest in a futures account is also attachment of a security interest in the futures contracts carried in the futures account.

RSA 2000 cP-7 s12;2006 cS-4.5 s108(10)

Securities intermediary

12.1(1) A security interest in favour of a securities intermediary attaches to a person's security entitlement if

- (a) the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and

Part 3 Perfection and Priorities

Perfection of security interest

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.

1988 cP-4.05 s19

Perfection of security interest - securities or futures account

19.1(1) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(2) Perfection of a security interest in a futures account also perfects a security interest in the futures contracts carried in the futures account.

2006 cS-4.5 s108(14)

Perfection on attachment

19.2(1) A security interest arising in the delivery of a financial asset under section 12.1(3) is perfected when it attaches.

(2) A security interest in investment property created by a broker or securities intermediary is perfected when it attaches.

(3) A security interest in a futures contract or a futures account created by a futures intermediary is perfected when it attaches.

2006 cS-4.5 s108(14)

Priority of unperfected and certain perfected security interests

20 A security interest

- (a) in collateral is not effective against
 - (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or
 - (ii) a liquidator appointed under the *Winding-up and Restructuring Act* (Canada) if the security interest is unperfected at the date the winding-up order is made;
- (b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

Perfection of security interest in investment property

24.1(1) Subject to section 19, a security interest in investment property may be perfected by control of the collateral under section 1(1.1).

(2) Subject to section 19, a security interest in investment property is perfected by control under section 1(1.1) from the time the secured party obtains control and remains perfected by control until

- (a) the secured party does not have control, and
- (b) one of the following occurs:
 - (i) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate,
 - (ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner, or
 - (iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

2006 cS-4.5 s108(17)

Perfection by registration

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

1988 cP-4.05 s25

Temporary perfection

26(1) A security interest perfected under section 24 in

- (a) an instrument or a certificated security that a secured party delivers to the debtor for the purpose of
 - (i) ultimate sale or exchange,
 - (ii) presentation, collection or renewal, or
 - (iii) registering a transfer,
 or
- (b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of
 - (i) ultimate sale or exchange,

Priority of liens

32 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority.

1988 cP-4.05 s32;1990 c31 s21

Alienation of rights of debtor

33(1) For the purposes of this section, "transfer" includes a sale, the creation of a security interest or a transfer under proceedings to enforce a judgment.

(2) The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer does not prejudice the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

1988 cP-4.05 s33;1990 c31 s22

Priority of purchase-money security interests

34(1) In this section, "non-proceeds security interest" or "non-proceeds purchase-money security interest" means a security interest or purchase-money security interest, as the case may be, in original collateral.

(2) A purchase-money security interest in

- (a)** collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or
- (b)** an intangible or, subject to section 28, its proceeds, that is perfected not later than 15 days after the day the security interest in the intangible attaches

has priority over any other security interest in the same collateral given by the same debtor.

(3) Subject to subsection (6), a purchase-money security interest in inventory or, subject to section 28, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if

- (a) the purchase-money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,
 - (b) the secured party gives a notice to any other secured party who has, before the registration of the purchase-money security interest, registered a financing statement containing a description that includes the same item or kind of collateral,
 - (c) the notice referred to in clause (b) states that the person giving the notice expects to acquire a purchase-money security interest in inventory of the debtor, and describes the inventory by item or kind, and
 - (d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.
- (4) A notice referred to in subsection (3) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the financing statement referred to in subsection (3)(b).
- (5) A purchase-money security interest in goods or, subject to section 28, its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected
- (a) in the case of inventory, at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and
 - (b) in the case of collateral other than inventory, not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,
- has priority over any other purchase-money security interest in the same collateral given by the same debtor.
- (6) A non-proceeds security interest in accounts given for new value has priority over a purchase-money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase-money security interest is perfected or a financing statement relating to it is registered.

(7) A non-proceeds purchase-money security interest has priority over a purchase-money security interest in the same collateral as proceeds if the non-proceeds purchase-money security interest,

- (a) in the case of inventory, is perfected at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and
- (b) in the case of collateral other than inventory, is perfected not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(8) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor is deemed not to have obtained possession of the goods until the debtor, or another person at the request of the debtor, has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

(9) A perfected security interest in crops or their proceeds, given for value to enable the debtor to produce or harvest the crops and given

- (a) while the crops are growing crops, or
- (b) during the 6-month period immediately prior to the time when the crops became growing crops,

has priority over any other security interest in the same collateral given by the same debtor.

(10) A perfected security interest in fowl, cattle, horses, sheep, swine, fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the fowl, animals or fish has priority over any other security interest in the same collateral given by the same debtor other than a perfected purchase-money security interest.

1988 cP-4.05 s34;1990 c31 s23

Residual priority rules

35(1) Where this Act provides no other method for determining priority between security interests,

- (a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:
 - (i) the registration of a financing statement, without regard to the date of attachment of the security interest,

- (ii) possession of the collateral under section 24, without regard to the date of attachment of the security interest, or
 - (iii) perfection under section 5, 7, 26, 29 or 77, whichever is earlier,
- (b) a perfected security interest has priority over an unperfected security interest, and
 - (c) priority between unperfected security interests is determined by the order of attachment of the security interests.
- (2) For the purposes of subsection (1), a continuously perfected security interest shall be treated at all times as having been perfected by the method by which it was originally perfected.
- (3) Subject to section 28, for the purposes of subsection (1), the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.
- (4) A security interest in goods that are equipment and are of a kind prescribed by the regulations as serial number goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (9) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.
- (5) Subject to subsection (6), the priority that a security interest has under subsection (1) applies to all advances, including future advances.
- (6) A perfected security interest that would otherwise have priority over a writ of enforcement issued under the *Civil Enforcement Act* has that priority only to the extent of
- (a) advances made before the secured party acquires knowledge of the writ within the meaning of section 32 of the *Civil Enforcement Act*,
 - (b) advances made pursuant to an obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in clause (a), and
 - (c) reasonable costs incurred and expenditures made by the secured party for the protection, preservation or repair of the collateral.

TAB 2



Province of Alberta

PERSONAL PROPERTY SECURITY ACT

PERSONAL PROPERTY SECURITY REGULATION

Alberta Regulation 95/2001

With amendments up to and including Alberta Regulation 158/2015

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- (iii) authorized under the *Garage Keepers' Lien Act*, a garage keeper under the *Garage Keepers' Lien Act*,
- (iv) in respect of a writ of enforcement, the enforcement creditor,
- (v) authorized to be registered under the *Matrimonial Property Act*, a spouse in whose favour an order is registered under section 23 or 26 of the *Matrimonial Property Act*,
- (vi) authorized to be registered under the *Workers' Compensation Act*, the Workers' Compensation Board,
- (vii) in respect of a Crown charge, the holder of the Crown charge,
- (viii) in respect of a charge on land, the person claiming the charge,
- (ix) in respect of a general property order, the person in whose favour the order is given,
- (x) in respect of a stay, the judgment creditor,
- (xi) in respect of a statutory charge, the person claiming the statutory charge,
- (xii) in respect of a receiver's report, the receiver, and
- (xiii) in respect of a maintenance order, the person in whose favour the maintenance order is given;
- (x) "secured party code" means a code assigned to a secured party by the Registrar pursuant to section 23;
- (y) "serial number goods" means,
 - (i) except in respect of a garage keeper's lien, a motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat, and
 - (ii) in respect of a garage keeper's lien, a motor vehicle or farm vehicle;
- (z) "status report" means a financing change statement that is used for the purposes of
 - (i) renewing or amending the registration of a writ of enforcement, or

TAB 3



Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of July 1, 2018

Office Consolidation

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financial year in which the financial plan or capital plan is prepared.

(5) Council may elect to include more than 3 financial years in a financial plan or more than 5 financial years in a capital plan.

(6) Council must annually review and update its financial plan and capital plan.

(7) The Minister may make regulations respecting financial plans and capital plans, including, without limitation, regulations

- (a) respecting the form and contents of financial plans and capital plans;
- (b) specifying the first financial year required to be reflected in a financial plan;
- (c) specifying the first financial year required to be reflected in a capital plan.

2015 c8 s40

Part 9 Assessment of Property

Interpretation provisions for Parts 9 to 12

284(1) In this Part and Parts 10, 11 and 12,

- (a) “assessed person” means a person who is named on an assessment roll in accordance with section 304;
- (b) “assessed property” means property in respect of which an assessment has been prepared;
- (c) “assessment” means a value of property determined in accordance with this Part and the regulations;
- (d) “assessor” means
 - (i) the provincial assessor, or
 - (ii) a municipal assessor,
 and includes any person to whom those duties and responsibilities are delegated by the person referred to in subclause (i) or (ii);
- (e) “council” includes

- (i) a collecting board that is authorized under section 180 of the *School Act* to impose and collect taxes in a district as defined in that Act, and
 - (ii) the Minister, in respect of an improvement district or special area;
- (f) "Crown" means the Crown in right of Alberta, and includes a Provincial agency as defined in the *Financial Administration Act* and an agent of the Crown in right of Alberta;
- (f.01) "designated industrial property" means
 - (i) facilities regulated by the Alberta Energy Regulator, the Alberta Utilities Commission or the National Energy Board,
 - (ii) linear property,
 - (iii) property designated as a major plant by the regulations,
 - (iv) land and improvements in respect of a parcel of land where that parcel of land contains property described in subclause (i) or (iii), and
 - (v) land and improvements in respect of land in which a leasehold interest is held where the land is not registered in a land titles office and contains property described in subclause (i) or (iii);
- (f.1) "designated manufactured home" means a manufactured home, mobile home, modular home or travel trailer;
- (g) repealed 2016 c24 s21;
- (g.1) "extended area network" has the meaning given to it in the regulations;
- (h) "farm building" has the meaning given to it in the regulations;
- (i) "farming operations" has the meaning given to it in the regulations;
- (j) "improvement" means
 - (i) a structure,

TAB 4

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Wells Fargo Foothill Canada ULC, Plaintiff and Big Eagle Hydro-Vac Inc., Big Eagle Limited Partnership, Big Eagle Hydro-Vac (North) Inc., and Big Eagle (North) Limited Partnership, Defendants

K.D. Yamauchi J.

Judgment: August 31, 2015
Docket: Calgary 1501-06320

Counsel: Caireen E. Hanert for Plaintiff / Applicant, Wells Fargo Foothill Canada ULC
Dean A. Hutchison for Respondent, Gator Frac Heating and Rental, LLC
Jeffrey Oliver for Receiver-Manager, Deloitte Restructuring Inc

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Personal property security

I Scope of legislation

I.11 Miscellaneous

Personal property security

IV Priority of security interest

IV.7 Miscellaneous

Headnote

Personal property security --- Scope of legislation --- Miscellaneous

Leases — Defendant group of companies entered into credit agreement with plaintiff administrative agent and certain lenders — Defendants granted plaintiff, as agent for lenders, continuing security interest in all of defendants' personal property, currently owned and after-acquired, including interests in goods, equipment and fixtures — Plaintiff registered notice of security agreement with provincial Personal Property Registry — Several years later, one defendant leased two pieces of equipment under lease agreements with rental company — Defendant terminated leases and indicated it was making arrangements to return equipment — Receiver was appointed over assets, property and undertaking of defendants — Receiver applied for advice on priority of plaintiff's security interest in equipment — Application granted — Act clearly applied to transactions involving rental company, given language of s. 3(2)(a) of Act — By using leases' termination provisions, defendant and rental company were attempting to contract out of Act to defeat plaintiff's interests — Allowing lessees and lessors to defeat interests of secured parties with perfected security interests by simply terminating leases was surely not intent of legislators who had deemed lease for term of more than one year as security interests — Termination of leases did not take matter out of priority and enforcement provisions contained in Personal Property Security Act.

Personal property security --- Priority of security interest --- Miscellaneous

Defendant group of companies entered into credit agreement with plaintiff administrative agent and certain lenders —

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Defendants granted plaintiff, as agent for lenders, continuing security interest in all of defendants' personal property, currently owned and after-acquired, including interests in goods, equipment and fixtures — Plaintiff registered notice of security agreement with provincial Personal Property Registry — Several years later, one defendant leased two pieces of equipment under lease agreements with rental company — Defendant terminated leases and indicated it was making arrangements to return equipment — Receiver was appointed over assets, property and undertaking of defendants — Receiver applied for advice on priority of plaintiff's security interest in equipment — Application granted — Plaintiff perfected its security interest, and registration of equipment in general terms was sufficient to maintain its priority position — Rental company did not perfect its security interest under Personal Property Security Act and so there was no competition between security interests that would bring into play equipment's arguable nature as "serial number goods" — Rental company did not perfect its security interest through possession, as equipment remained in defendant's and then receiver's position — Once defendant took possession of equipment, security interest of plaintiff attached — Anything that happened thereafter as between defendant and rental company, including termination of leases, could not affect plaintiff's security interest under Act — Rental company could have protected its position by taking purchase-money security interest in equipment or entering into priority and postponement agreement with plaintiff.

Table of Authorities**Cases considered by K.D. Yamauchi J.:**

Bodnard v. Capital Office Systems Inc. (1992), 3 P.P.S.A.C. (2d) 71, 1992 CarswellSask 77 (Sask. C.A.) — distinguished

Central Guaranty Trust Co. v. Bruncor Leasing Inc. (1992), 4 P.P.S.A.C. (2d) 229, 97 D.L.R. (4th) 133, 41 M.V.R. (2d) 297n, 1992 CarswellOnt 1732 (Ont. Gen. Div.) — referred to

Gauntlet Energy Corp., Re (2003), 2003 ABQB 718, 2003 CarswellAlta 1209, 36 B.L.R. (3d) 250, 45 C.B.R. (4th) 47, 5 P.P.S.A.C. (3d) 236, 20 Alta. L.R. (4th) 314, 336 A.R. 302, [2004] 4 W.W.R. 373 (Alta. Q.B.) — referred to

Giffen, Re (1998), 155 D.L.R. (4th) 332, 222 N.R. 29, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re*) 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re*) 164 W.A.C. 161, 45 B.C.L.R. (3d) 1, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — followed

Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of) (1998), 160 D.L.R. (4th) 373, 1998 CarswellAlta 441, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 219 A.R. 166, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 179 W.A.C. 166, 62 Alta. L.R. (3d) 40, [1999] 1 W.W.R. 459, 4 C.B.R. (4th) 254, 13 P.P.S.A.C. (2d) 378, 1998 ABCA 154 (Alta. C.A.) — considered

Royal Bank v. Sprung Instant Structures Ltd. (2000), 2000 ABCA 202, 2000 CarswellAlta 713, [2000] 10 W.W.R. 327, 83 Alta. L.R. (3d) 264, 266 A.R. 375, 228 W.A.C. 375 (Alta. C.A.) — considered

Sprung Instant Structures Ltd. v. Caswan Environmental Services Inc. (1997), 1997 CarswellAlta 1060, 57 Alta. L.R. (3d) 372, [1998] 6 W.W.R. 535, 1 C.B.R. (4th) 190, 219 A.R. 1, 179 W.A.C. 1, 13 P.P.S.A.C. (2d) 144, 1997 ABCA 411 (Alta. C.A.) — considered

Stoke Resources & Consulting Inc. v. Auto Body Services Red Deer Ltd. (2009), 2009 ABQB 569, 2009 CarswellAlta 1548, 59 C.B.R. (5th) 290, 15 P.P.S.A.C. (3d) 329 (Alta. Q.B.) — considered

Statutes considered by K.D. Yamauchi J.:

Personal Property Security Act, R.S.A. 2000, c. P-7

Generally — referred to

s. 1(1)(g) "collateral" — referred to

s. 1(1)(m) "debtor" — referred to

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s. 1(1)(tt) “security interest” — referred to

s. 3(2)(a) — considered

s. 10(1)(d) — considered

s. 10(2) — considered

s. 12(1) — considered

s. 12(2) — considered

s. 13(1) — considered

s. 19 — considered

s. 20(a)(i) — considered

s. 24(1)(a) — considered

s. 24(2) — considered

s. 25 — considered

Regulations considered by *K.D. Yamauchi J.*:

Personal Property Security Act, R.S.A. 2000, c. P-7

Personal Property Security Regulation, Alta. Reg. 95/2001

s. 1(1)(y) “serial number goods” — considered

APPLICATION by receiver of defendants for advice with respect to priority of plaintiff’s security interest in equipment leased by one defendant from rental company.

***K.D. Yamauchi J.*:**

I. Introduction

1 Deloitte Restructuring Inc (the “Receiver”), court-appointed receiver-manager of the assets, property and undertaking of Big Eagle Hydro-Vac Inc, Big Eagle Limited Partnership, Big Eagle Hydro-Vac (North) Inc, and Big Eagle (North) Limited Partnership (collectively, the “Big Eagle Group”) makes this application pursuant to the receivership order that Strekaf J granted on June 8, 2015 (the “Receivership Order”). The Receivership Order permits the Receiver to make applications for advice and direction in the discharge of its powers and duties pursuant to the Receivership Order.

2 This application involves a priority dispute between Wells Fargo Foothill Canada ULC (“Wells Fargo”) and Gator Frac Heating and Rentals LLC (“Gator Frac”).

3 For certain practical reasons, the Receiver has asked this Court to provide the reasons for its decision hastily. This Court has used its best efforts to comply with the Receiver’s request.

II. Background

A. Wells Fargo

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4 The Big Eagle Group entered into a credit agreement with certain lenders and Wells Fargo, as arranger and administrative agent (collectively, the "Lenders") on or about June 27, 2008. Pursuant to that credit agreement, the Lenders advanced loans and granted credit facilities to the Big Eagle Group. As security for these credit facilities, the Big Eagle Group granted to Wells Fargo, as agent for the Lenders, among other forms of security, a security agreement, which gave to Wells Fargo a continuing security interest in all of the Big Eagle Group's personal property "whether now owned or hereafter acquired or arising and wherever located," which included the Big Eagle Group's "right, title and interest in," among other things, goods, equipment and fixtures ("Security Agreement"). The Lenders have loaned the Big Eagle Group about \$51 million.

5 On or about June 23, 2008, Wells Fargo registered notice of the Security Agreement with the Alberta Personal Property Registry ("AB PPR").

6 Effective February 15, 2011, the Big Eagle Group and the Lenders entered into a second restated and amended credit agreement pursuant to which the parties confirmed the Security Agreement.

B. Gator Frac

7 On or about May 30, 2013, Big Eagle Limited Partnership ("BELP") entered into 2 equipment lease agreements with Gator Frac, in which BELP leased the following 2 pieces of equipment:

(a) a 44MBTU Trailer Mounted Frac Heater, serial number 13-201627, mounted on a trailer bearing the vehicle identification number 1TTE533S3E3765283 (collectively, the "RU-015 Unit"); and

(b) a 20MBTU Truck Mounted Frac Heater, serial number 13-201626, mounted on a 2014 Peterbilt truck bearing the vehicle identification number INPTX4TX1ED224007 (collectively, the "RU-016 Unit").

(the RU-015 Unit and the RU-016 Unit are collectively referred to as the "Units").

1. Lease One

8 The term of the RU-015 Unit lease agreement ("Lease One") was eighteen months, beginning on the "Commencement Date" and ending on the "Termination Date". "Commencement Date" is defined in Lease One as "the first day of the first month, following the Delivery Date and being the first day of the lease Term." "Delivery Date" is defined in Lease One as "the date on which the Lessee accepts delivery of the [the RU-015 Unit] from the Lessor." "Termination Date" is defined in Lease One as "the date upon which the Term ends through expiration, mutual agreement or default."

9 BELP accepted the RU-015 Unit for delivery on or about December 8, 2013, at Gator Frac's business premises in Levelland, Texas.

10 Lease One contains an early termination clause which states:

If, by mutual, written consent, the Lessee and the Lessor choose to terminate the agreement prior to the Termination Date or the last day of the Extension Period, they may do so. Acceptable forms of request and acceptance include fax, email or mail, authorized by signing officers of the Lessee and Lessor respectively, releasing both parties from all obligations (save Heater repairs and rents to that date) from all future obligations outlined herein.

11 In that clause, "Heater" refers to the RU-015 Unit.

12 By its terms, the "Term" as defined in Lease One expired on June 30, 2015.

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13 Gator Frac concedes that it did not make any registrations at the AB PPR with respect to Lease One before the parties terminated Lease One, the date of the Receivership Order, or the date of the expiry of the Lease One's "Term."

2. Lease Two

14 Gator Frac leased to BELP the RU-016 Unit pursuant to an equipment lease agreement made on May 30, 2015 ("Lease Two").

15 The term of Lease Two was thirty-six months, beginning on the "Commencement Date" and ending on the "Termination Date." The various definitions in Lease Two are the same as those in Lease One.

16 BELP accepted the RU-016 Unit for delivery in December of 2013, at Gator Frac's business premises in Levelland, Texas.

17 Lease Two contains an early termination clause identical to that contained in Lease One.

18 Gator Frac concedes that it did not make any registrations at the AB PPR with respect to Lease Two before the termination of Lease Two, the date of the Receivership Order, or the date of the expiry of the lease "Term" as defined in Lease Two.

3. Termination of Lease One and Lease Two

19 On April 29, 2015, BELP's material and procurement officer sent an e-mail to Gator Frac's president and manager confirming that BELP was terminating Lease One, and confirming that BELP would be returning the RU-015 Unit to Gator Frac in June of 2015.

20 Throughout May 2015, Gator Frac's president and manager had several telephone conversations with BELP's chief executive officer and chief financial officer. During those conversations, BELP indicated that it could not make any further payments with respect to Lease One or Lease Two and that it was making arrangements to return the Units to Gator Frac.

21 By e-mail of June 4, 2015 from BELP's chief financial officer to Gator Frac's president and manager, the mutual agreement to terminate Lease Two was confirmed in writing.

22 Gator Frac began making arrangements with a trucking company to retrieve the Units and have them transported from Alberta to Texas. BELP's material and procurement officer indicated to Gator Frac's president and manager that it was making arrangements to have the RU-015 Unit transported to Gator Frac in Texas. Thus, Gator Frac focused on making separate arrangements to have the RU-016 Unit returned.

23 The steps that BELP took from May 25, 2015, through June 8, 2015, to return the RU-015 Unit to Gator Frac, including the following:

- (a) having the RU-015 Unit prepared for transport to Texas;
- (b) having the RU-015 Unit weighed and measured;
- (c) obtaining a price quote from a transportation company for the costs of having the RU-015 Unit transported from Alberta to Texas;
- (d) arranging to have the propane from the RU-015 unit purged so that it could safely transported; and
- (e) inquiring of Gator Frac the address for delivery of the RU-015 Unit in Texas.

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24 On June 11, 2015, Gator Frac's president had email correspondence with both Belp's chief executive officer and chief financial officer in which Belp provided Gator Frac with the address where the Units were located. Belp's chief executive officer represented that there were no issues with Gator Frac picking up the Units. Belp's chief financial officer advised who Gator Frac could use to assist with obtaining the Units and transporting them to Texas.

25 By e-mail dated June 20, 2015, Belp's chief executive officer advised Gator Frac that it could "go get them [the Units]" from Belp's yard in Grande Prairie, Alberta.

C. The Receivership

26 Strekaf J granted the Receivership Order on June 8, 2015.

27 Following the Receiver's appointment, neither Belp nor Gator Frac involved the Receiver in their correspondence concerning Belp's return of the Units to Gator Frac.

28 Gator Frac's legal counsel sent letters to the Receiver's legal counsel dated July 22, 2015, and July 23, 2015. In those letters, Gator Frac's legal counsel requested the Receiver to return the Units to Gator Frac and provided documentation that showed the termination of Lease One and Lease Two.

29 On July 29, 2015, the Receiver's counsel advised Wells Fargo's counsel that Belp had leased the Units from Gator Frac, and that Gator Frac was claiming priority to the Units. At no time before being so advised did Wells Fargo know that Belp had leased the Units. As a result, on August 7, 2015, Wells Fargo amended its registration at the AB PPR to name Gator Frac as an additional debtor, as well as to identify the Units by their respective serial numbers. Wells Fargo concedes that there was an error in the serial number of one of the Units, which it corrected. No one argues that anyone was misled by that error.

30 Gator Frac registered notice of its interest in the Units with the AB PPR on August 10, 2015.

31 The Receiver's counsel conducted a review of the Security Agreement and registration of notice of the Security Agreement at the AB PPR. It concluded that the Security Agreement is "valid, enforceable and perfected."

32 On or about August 13, 2015, it was brought to the attention of the Receiver that the serial number listed in Lease Two does not match the serial number on the RU-016 Unit. Belp's former management advised the Receiver that there are no other lease agreements that could relate to the RU-016 Unit. As well, Gator Frac provided the Receiver with the same form of Lease Two that was in Belp's records. The Receiver is of the view that Lease Two is likely the operative lease governing the RU-016 Unit.

33 The Receiver has not returned the Units to Gator Frac. Instead, it has brought the within application.

III. Discussion

34 This Court must determine whether the Wells Fargo's security interest takes priority over Gator Frac's security interest. To do this, this Court must have resort to the Alberta *Personal Property Security Act*, RSA 2000, c P-7 [PPSA].

35 By virtue of the definitions in the PPSA, Lease One and Lease Two create security interests, as they are leases for a term of more than one year: PPSA ss 1(g), 1(tt) and 1(m). Gator Frac does not contest this. The other provision of importance to this discussion is PPSA s 3(2)(a), which provides that the PPSA applies to "every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral." There is no doubt that Gator Frac retained title to the Units, as it leased them to Belp. See also *Gauntlet Energy Corp., Re*, 2003 ABQB 718 (Alta. Q.B.) at para 21, citing *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) [*Giffen*] at paras 37 and 52.

36 The important policy provisions that govern priorities under the PPSA are articulated in *Giffen*, where Iacobucci J said the following for the court:

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... Provincial legislatures, faced with a policy choice involving the competing interests of the true owner and those of third parties dealing with the ostensible owner, have decided that the true owner must forfeit title, when faced with a competing interest, if she failed to register her interest as required.

Giffen at para 52 (emphasis added).

37 As well, in *Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)*, 1998 ABCA 154 (Alta. C.A.) [*Gimli*], Côté JA for the court said the following:

... The whole point of the *P.P.S.A.* is to overrule certain contractual or property rights: *Re Giffen, supra*. The lessor and lessee could not, by contracting that the lease would be valid even if not registered, bind others. This is legislation on priorities: *ibid*.

Gimli at para 9 (emphasis added).

38 Gator Frac does not argue that these important policy reasons underlie the *PPSA*. What is at issue is whether the termination of Lease One and Lease Two takes this matter out of the priority and enforcement provisions contained in the *PPSA*. It points to a part of a quotation that it took from Ronald CC Cuming, Catherine Walsh, Roderick J Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2012), 2 ed [Cuming] at 546 to 547. It paraphrased the authors and said in its brief, “when a true lease is terminated, at that point the former lessee no longer has any interest of any kind in the leased property.” This Court feels that it is important to provide the entire quotation to see the context within which the authors made that statement. They say the following:

Where a true lease (lease for a term of more than one year) is involved, the power of the trustee to defeat the lessor’s interest is terminated when the lease is terminated and the leased property has been repossessed by the lessor. At this point, the former lessee has no interest of any kind in the leased property. ... However, where a security agreement in the form of a lease ... is involved, repossession of the leased property does not terminate the interest of the lessee ... Since the transaction is a security agreement, the lessee’s interest is that of a debtor, and not a lessee, with all the rights that are protected by Part 5 of the *PPSA*. If, however, enforcement of a security interest has been completed pursuant to Part 5 before the debtor becomes a bankrupt, there is nothing for the trustee to attack. The security interest no longer exists.

[Citations excluded].

39 Why is the full quotation important? The authors were, quite correctly, speaking about a situation where a bankruptcy occurs, and not one where a receivership intervenes. The section that deals with the position of a secured party and a bankruptcy trustee is *PPSA* s 20(1)(a), which says:

20(1) A security interest

...

(c) in collateral is not effective against

(i) a trustee in bankruptcy if the security is unperfected at the date of bankruptcy ...

If the security is perfected, presumably, it is effective as against a bankruptcy trustee.

40 Furthermore, the authors say that the lease must not only be terminated, the leased property has been “repossessed by the lessor.” Why? Because the lessee still has possessory rights in the collateral before the lessor seizes the collateral.

41 They go on to say that where a security agreement in the form of a lease is involved, “repossession of the leased property does not terminate the interest of the lessee.” The debtor *qua* lessee has certain rights that are contained in the enforcement provisions of the *PPSA*. They go on to say, however, that if the lessor has completed its enforcement proceedings, the lessee’s rights are extinguished and the security interest no longer exists.

42 In this case, Gator Frac had not repossessed the Units before the ensuing *receivership*. It never completed, or even

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began, the enforcement of its security agreement under the *PPSA*, as it had not perfected its security interest. Furthermore, even had it repossessed the Units, BELP's rights would not be extinguished, as Gator Frac had not commenced enforcement proceedings much less completed them.

43 Gator Frac further cites the Saskatchewan Court of Appeal's decision in *Bodnard v. Capital Office Systems Inc.* (1992), 3 P.P.S.A.C. (2d) 71 (Sask. C.A.) [*Bodnard*] in support of its position that once a lease expires, the lessee has no further interest in the collateral. We must be very careful in applying this principle, as the contest in *Bodnard* involved what appears to be the debtor's unsecured creditors. It was not a contest between secured creditors. Arguably, the Saskatchewan personal property legislation had no effect on that decision. In the case at bar, the contest is between two secured parties, so the *PPSA* is the legislation on which this Court must rely. To that extent, *Bodnard* is distinguishable.

44 Gator Frac also asks this Court to rely on the decision of the Alberta Court of Appeal in *Sprung Instant Structures Ltd. v. Caswan Environmental Services Inc.*, 1997 ABCA 411, 57 Alta. L.R. (3d) 372, 219 A.R. 1 (Alta. C.A.). In that case, the debtor had leased goods before the debtor signed the general security agreement, which covered, among other things "acquired" goods. Côté JA for the court held that "acquired" referred to after-acquired goods and not those that existed before the debtor signed the security agreement. That finding alone distinguishes that case from the case at bar, as BELP acquired the Units *after* it had granted the security interest in favour of Wells Fargo.

45 Côté JA goes on to say that the even had the security agreement covered the lessee's interest in the goods, "that lessee's interest is worthless and was terminated." The facts that the court provided in its decision were sparse. When was the lease terminated? How was it terminated? Had the lessor taken possession of the leased goods? Had the lessor completed its enforcement? At the outset of the decision, Côté JA said that "no priority issues or Personal Property Security Act issues even arise in this case." That differentiates that case from this case. Those issues are squarely before this Court. It should also be noted that the Alberta Court of Appeal in its later decision, *Royal Bank v. Sprung Instant Structures Ltd.*, 2000 ABCA 202 (Alta. C.A.) at para 4, (2000), 266 A.R. 375, 83 Alta. L.R. (3d) 264 (Alta. C.A.), said the following:

In our view, *Caswan* is limited to an interpretation of the general security agreement between the appellant and Caswan. It does not purport to consider, let alone decide, the *Personal Property Security Act* priorities issues that were before the Supreme Court of Canada in *Giffen, Re*.

46 Gator Frac also argues that *Stoke Resources & Consulting Inc. v. Auto Body Services Red Deer Ltd.*, 2009 ABQB 569 (Alta. Q.B.) is applicable to the case at bar. That case is distinguishable from the case at bar, because, like *Bodnard*, it did not involve a priority dispute between competing security interests. It involved a competition between a holder of a writ of enforcement and a lease. Clackson J said "as long as an indefinite lease remains in effect, the lessor must register to protect itself from against the lessee's creditors." He makes no comment concerning any priority dispute under the *PPSA*, or the perfection and attachment involving a prior security interest. The facts in that case determine the result and has no application to the case at bar.

47 As mentioned earlier, *PPSA* s 3(2)(a) says the *PPSA* applies to "every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral." This means that the *PPSA* applies to the transactions involving Gator Frac. It is not for Gator Frac to say that the legislation does not apply, as *PPSA* itself says that it does.

48 The ways in which a party can gain, or retain, its priority in the debtor's personal property is through perfection. *PPSA* ss 19 and 25 provide as follows:

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.

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

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49 *PPSA* s 12 describes “attachment” as follows:

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 or power to transfer rights in the collateral to a secured party, and
- (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor ... when the debtor obtains possession of them in accordance with the lease ...

50 Finally, *PPSA* s 10 provides as follows:

10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where

...

(d) the debtor has signed a security agreement that contains

- (i) a description of the collateral by item or kind or as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”,
- (ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as “investment property” or if it describes the underlying financial asset or futures contract,
- (iii) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property, or
- (iv) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property except specified items or kinds of personal property or except personal property described as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”.

(2) For the purposes of subsection (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor’s agent.

...

51 In the case at bar, there can be no doubt that Wells Fargo took all steps to perfect its security interest, and it has become enforceable. There is attachment, because of the following:

- (a) BELP received value. See e.g. *Central Guaranty Trust Co. v. Bruncor Leasing Inc.* (1992), 4 P.P.S.A.C. (2d) 229 (Ont. Gen. Div.) at 234 ff, which held that value is given the moment the secured party makes a binding

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commitment to loan money or extend credit to the debtor;

(b) BLP had rights in the collateral, viz, its rights as a lessee pursuant to Lease One and Lease Two; and

(c) it had signed a security agreement in Wells Fargo's favour that described Wells Fargo's security interest in all BLP's personal property "whether now owned or hereafter acquired or arising and wherever located."

Furthermore, Wells Fargo registered notice of its security interest in the AB PPR. Perfection is complete.

52 Gator Frac argues that the Units are "serial number goods" as defined in the *Personal Property Security Regulation*, Alta Reg 95/2001, reg 1(1)(y), which provides as follows:

"serial number goods" means,

(i) except in respect of a garage keeper's lien, a motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat, and

(ii) in respect of a garage keeper's lien, a motor vehicle or farm vehicle;

53 Arguably, the Units fall within this definition. However, registration as serial number goods is not required for Wells Fargo to maintain its priority position. It can, instead, register the equipment in general terms, i.e. all BLP's personal property "whether now owned or hereafter acquired or arising and wherever located." Cuming says that "[t]here is no requirement that a secured party describe a motor vehicle held as equipment by serial number in order to obtain priority over another secured party": Cuming at 433. The authors go on to say the following:

If the secured party fails to describe the equipment by serial number, it will be considered perfected in respect of a competition with a trustee in bankruptcy or an enforcement creditor. However, it will be considered unperfected in competitions with other secured parties, and will risk subordination if the competing secured party has described the equipment by serial number. For this reason, a registering party will typically attempt to describe such collateral by serial number whenever possible.

Cuming at 433.

54 Gator Frac did not register notice of its security interest. Thus, it did not perfect its security interest by serial number or otherwise. Accordingly, there is no "competition." Thus, for Wells Fargo to maintain its priority, it did not have to register by serial number.

55 Wells Fargo eventually filed a financing change statement that included the serial numbers for the units. Gator Frac argues that by that time, Lease One and Lease Two had been terminated, and thus, BLP had no interest in the Units. For the reasons that follow, this Court finds otherwise, to that extent, Wells Fargo had perfected its security interest in the Units by filing its financing change statement. This was not entirely necessary, however, in the light of Gator Frac's failure to perfect its security interest.

56 As well, Gator Frac did not perfect its security interest through possession. *PPSA* s 24(1) provides as follows:

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) goods,

...

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but only while it is actually held as collateral and not while it is held as a result of a seizure or repossession.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

57 Gator Frac does not, and did not before the Receivership Order, have possession of the Units, or either of them. The Units were in BELP's possession and, thereafter, in the Receiver's possession. The reason why seizure and repossession is legislatively unacceptable is explained as follows:

The recognition of seizure or repossession as an appropriate perfection step gives rise to potential legal and factual problems the solutions to which may frustrate a central policy of the Act: to provide an orderly, predictable system for taking and enforcing security interests. In the great bulk of cases this form of perfection will be relied upon by a secured party who, for some reason, has failed to make use of the very accessible and inexpensive facilities for registration of security interests available in all jurisdictions ... It can be seen as encouraging precipitous action and potential breaches of the peace. In the context of a priority competition with the debtor's trustee in bankruptcy, it is very likely to involve difficult questions of proof as to exactly when the secured party took possession, requiring the courts to determine sequences of events that occurred a few hours apart.

Cuming at 310.

58 Gator Frac falls within the "great bulk of cases" that the authors describe.

59 BELP had "rights in the collateral" the moment it took possession of the Units. *PPSA* s 13(1) provides as follows:

13(1) Except as provided in subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12, without the need for specific appropriation.

60 It was at that moment that the Wells Fargo Security attached. Anything that happened thereafter as between BELP and Gator Frac could not affect Wells Fargo's security interest. Whether they terminated either of the lease agreements, or Lease One expired by its terms could not affect Wells Fargo's perfected security interest. This is confirmed by the following:

Since the "rights in the collateral" requirement must be satisfied before attachment can occur, a security interest covering after-acquired property will attach to each new asset acquired by the debtor only at the point of acquisition. It follows that two or more security interests covering after-acquired collateral will attach simultaneously on the acquisition of the collateral by the debtor. In general, this does not generate significant difficulties since priority between perfected security interests is determined by the order in which the perfecting steps for each were taken, and a perfected security interest has priority over an unperfected security interest.

Cuming at 262 (emphasis added).

61 This brings us back to *Gimli*, which said that the "lessor and lessee could not, by contracting that the lease would be valid even if not registered, bind others." By using the termination provisions contained in Lease One and Lease Two, BELP and Gator Frac were attempting defeat the interests of Wells Fargo and circumvent the provisions of the *PPSA*. This they cannot do. If this Court were to permit this type of "contracting out," it would allow lessees and lessors to defeat the interests of secured parties with perfected security interests by simply terminating their leases. Surely, that was not the intent of the legislators. They specifically deemed a lease for a term of more than one year as security interests for a reason. The parties to a lease may contract between themselves concerning *their* relationship, but any such contracting cannot affect the rights of third parties.

62 Is this fair to Gator Frac? Gator Frac could have protected its position by taking a purchase-money security interest in the Units. It could, in the alternative, have entered into a priority and postponement agreement with Wells Fargo. It did neither.

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IV. Conclusion

63 As a result of the foregoing, this Court orders that the Receiver is entitled to dispose of the Units in accordance with the Receivership Order and distribute the proceeds of sale in accordance with the terms of the distribution order that LoVecchio J granted on July 24, 2015.

Application granted.

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TAB 5

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1777575 Alberta Ltd., Applicant and Sprung Instant Structures Ltd., Respondent

J.B. Veit J.

Heard: June 9, 2014
 Judgment: June 10, 2014
 Docket: Edmonton 1403-05388

Counsel: Kentigern A. Rowan, Q.C. for Applicant
 Michael G. James, Smith Mack Lamarsh for Respondent

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Personal property security
 I Scope of legislation
 I.11 Miscellaneous

Headnote

Personal property security --- Scope of legislation --- Miscellaneous

In July 2011, as security for loans and advances from bank, K Ltd. and K Inc. executed general security agreements (GSA) mortgaging, charging and assigning all, present and after-acquired, personal property — K companies was then leasing portable hangar from respondent lessor under five-year lease expiring June 2014 — Bank registered GSAs with personal property registry — In October 2013, bank sold K companies' then \$2 million debt to assignee — Assignee demanded repayment of direct debt of \$200,000 — In November 2013, at K companies' request and without notice to assignee, lessor entered new lease for hangar, for period October 2013 to June 2014, with R Inc. — Majority owner of K companies was also majority owner of R Inc. — In January 2014, assignee demanded repayment of then \$1.8 million debt — Assignee brought application for declaration that GSA gave it security interest in hangar, with priority over lessor's purchase money security interest and unaffected by transfer of lease — Application granted — Provisions of Personal Property Security Act explicitly included leased goods as property capable of providing security — It was clear from wording that GSAs at issue covered all personal property, including leases, in which K companies had interest on date of execution — That included true leases and leases, such as this one, that gave lessee opportunity to acquire leased property — Transfer of unexpired lease could not defeat GSA.

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Gauntlet Energy Corp., Re (2003), 2003 ABQB 718, 2003 CarswellAlta 1209, 45 C.B.R. (4th) 47, [2004] 4 W.W.R. 373, 336 A.R. 302, 36 B.L.R. (3d) 250, 20 Alta. L.R. (4th) 314, 5 P.P.S.A.C. (3d) 236 (Alta. Q.B.) — referred to

Giffen, Re (1998), 45 B.C.L.R. (3d) 1, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re*) 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re*) 164 W.A.C. 161, 155 D.L.R. (4th) 332, 222 N.R. 29, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — followed

Innovation Credit Union v. Bank of Montreal (2010), 500 W.A.C. 1, (sub nom. *Bank of Montreal v. Innovation Credit Union*) [2010] 3 S.C.R. 3, 362 Sask. R. 1, 2010 SCC 47, 2010 CarswellSask 723, 2010 CarswellSask 724, 72 C.B.R. (5th) 23, 407 N.R. 294, 325 D.L.R. (4th) 605, 17 P.P.S.A.C. (3d) 1, [2011] 2 W.W.R. 581 (S.C.C.) — referred to

National Bank of Canada v. Merit Energy Ltd. (2001), 2001 CarswellAlta 966, 27 C.B.R. (4th) 283, 294 A.R. 1 (Alta. Q.B.) — referred to

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Personal Property Security Act, R.S.A. 2000, c. P-7
Generally — referred to

- s. 1(1)(a) “accessions” — considered
- s. 1(1)(f) “chattel paper” — considered
- s. 1(1)(o) “document of title” — considered
- s. 1(1)(p) “equipment” — considered
- s. 1(1)(v) “goods” — considered
- s. 1(1)(x) “intangible” — considered
- s. 1(1)(y) “inventory” — considered

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s. 1(1)(z) “lease for a term of more than one year” — considered

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s. 3 — referred to

s. 10(1) — referred to

s. 12 — referred to

s. 12.1 [en. 2006, c. S-4.5, s. 108(11)] — referred to

s. 13 — referred to

s. 19 — referred to

s. 28 — considered

s. 35(1)(b) — referred to

APPLICATION by assignee for declaration that it had security interest in hangar with priority.

J.B. Veit J.:

Summary

1 1777575 Alberta Ltd., the assignee of a general security agreement executed by Kananakis Mountain Helicopters Ltd. in favour of CIBC, asks the court to declare that: the GSA gives it a security interest in a portable hangar owned by Sprung Instant Structures Ltd. and leased to Kananakis Mountain Helicopters Ltd.; its security interest is in priority to Sprung’s purchase money security interest; and, Sprung’s transfer of the lease from Kananakis to a new company, Rockies Heli Tours Canada Inc., in which the majority owner of Kananakis was also the majority owner, does not affect the applicant’s security interest.

2 Relying on *Caswan Environmental Services Inc.*, Sprung argues that the GSA does not cover leased interests, and that the GSA only covered after-acquired goods whereas the hangar was acquired by Kananakis prior to signing the GSA.

3 The application is allowed.

4 The purpose of *PPSA* legislation in Alberta and elsewhere across Canada is to clarify and simplify secured lending on personal property by, among other mechanisms, eliminating the importance of title to property: *Innovation Credit Union*. Alberta’s *PPSA* includes long-term leases as potentially pledgeable security. By ignoring that legislation, Sprung has imperilled its ownership interest in its structure.

5 It is clear from the wording of this GSA that all personal property, including leases, in which the pledgor — Kananakis — had an interest on the date of execution of the GSA is subject to the pledge. In this context, personal property includes even “true” leases as well as leases such as this one where the lessee not only has the right to use property but also the right to acquire ownership of the leased property leased at a financial advantage.

Cases and authority cited

By the applicant: *Giffen, Re*, 1998 CarswellBC 147 (S.C.C.); *Gauntlet Energy Corp., Re*, 2003 ABQB 718 (Alta. Q.B.); *National Bank of Canada v. Merit Energy Ltd.*, 2001 CarswellAlta 966 (Alta. Q.B.); *Sprung Instant Structures*

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Ltd. v. Caswan Environmental Services Inc., 1997 CarswellAlta 151 (Alta. Q.B.); *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58 (S.C.C.).

By Sprung: *Sprung Instant Structures Ltd. v. Caswan Environmental Services Inc.*, 1997 CarswellAlta 1060 (Alta. C.A.); *Royal Bank v. Sprung Instant Structures Ltd.*, 2000 CarswellAlta 713 (Alta. C.A.)

By the court: *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47 (S.C.C.); *Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.*, 2002 ABCA 79 (Alta. C.A.)

Appendix A: Extracts from Alberta's *Personal Property Security Act*

1. Background

a) *Factual*

6 As security for loans and advances obtained from CIBC, on July 1, 2011, Kananaskis Mountain Helicopters Ltd. and Kananaskis Mountain Holdings Inc. each granted to CIBC general security agreements dated July 1, 2011. In those agreements, the Kananaskis companies "mortgaged, charged and assigned to CIBC and granted to CIBC a security interest in... All Personal Property: all of the [Kananaskis'] present and after-acquired undertaking and Personal Property". Clause 4 of the agreement stated that the Kananaskis companies would not, without CIBC's prior written consent, sell, lease or otherwise dispose of any of the collateral (other than Inventory, which may be sold, leased or otherwise disposed of in the ordinary course of the Customer's business). "Personal property" is defined in the agreement as "means personal property and includes among other things inventory, equipment, receivables, books and records, chattel paper, goods, documents of title, instruments, intangibles (including intellectual property), money and securities and includes all accessions to such property." "Accessions", "Documents of Title", "Equipment", "Inventory", "Intangible", "Goods", "Chattel Paper" are defined as having "the respective meanings given to them in the *PPSA*".

7 When they executed the GSAs, the Kananaskis companies were lessees in a 60 month lease, expiring in June 2014, with Sprung Instant Structures Inc. as lessor; the property leased was a portable hangar to be used as a hangar for helicopters.

8 CIBC registered its security instrument, the GSAs, in the personal property registry.

9 In October, 2013, CIBC sold the debt — the aggregate of which was by then of the order of \$2 million - and security owed to the applicant. By letter dated November 6, 2013, the applicant made demand on the Kananaskis companies for payment of the direct debt — in the approximate amount of \$200,000.00. At the request of Kananaskis, which was not in default on its lease, on November 22, 2013, Sprung entered into a new lease between itself and Rockies Heli Tours Canada Inc. for the period October 23, 2013 to June 22, 2014; the majority owner of the Kananaskis companies is also the majority owner of Rockies. The applicant was not advised of that new lease, or "transfer" of lease and did not consent to that new lease.

10 On January 29, 2014, the applicant made demand on Kananaskis Mountain for payment of the indebtedness of Kananaskis Holdings in the approximate amount of \$1.8 million. The applicant has registered its security interest in the hangar at the personal property registry against Rockies.

11 Sprung has never, up to and including the date of this special chambers application, registered its security interest in its portable hangar.

b) *Legislative*

12 Pertinent sections of Alberta's *Personal Property Security Act* are set out in Appendix A.

2. Purposive interpretation of Alberta's *Personal Property Security Act*

13 From the wording of the *Caswan* decision, it appears that the parties did not provide to that Court any materials concerning the context in which the Sprung lease should be interpreted in relation to the general security agreement which applied in that situation. It is unfortunate that the court was not referred, for example, to the *Donaghy* decision, mentioned below, which itself was approved by the Supreme Court of Canada in *Giffen, Re*, but, unfortunately one year after the Court of Appeal released its *Caswan* decision.

14 In *Giffen, Re*, the Supreme Court of Canada clarified the objective of PPSA legislation:

3.2 The Personal Property Security Act

...

18 The Saskatchewan PPSA, like all other provincial personal property security statutes, has greatly clarified, simplified, and rationalized the law of secured lending in personal property by essentially rendering irrelevant the distinctions between the wide variety of instruments which existed at common law and in equity for taking security interests in another person's personal property. It does so by employing a functional approach to determining what security interests are covered by its provisions. Section 3(1)(a) of the PPSA stipulates that the Act applies "to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral". "Security interest" is in turn defined at s. 2(1)(qq) to include "an interest in personal property that secures payment or performance of an obligation", subject to certain exceptions which are not relevant here. covered by its provisions. Section 3(1)(a) of the PPSA stipulates that the Act applies "to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral". "Security interest" is in turn defined at s. 2(1)(qq) to include "an interest in personal property that secures payment or performance of an obligation", subject to certain exceptions which are not relevant here. These provisions have the effect of extending the provisions of the PPSA to almost anything which serves the function of a security interest.

19 Contemporary personal property security statutes, such as the Saskatchewan PPSA at issue here, also employ a conceptual framework which is radically different from that employed by the Bank Act and common law mechanisms of secured lending. In contrast with the property-based regime in the Bank Act, contemporary personal property security statutes have followed what can be characterized as a priority-based approach. The PPSA does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity of redemption to resolve priority disputes. Rather, for those interests that come within the scope of the Act, the PPSA provides a compendium of rules establishing priority rankings both as between different security interests as well as between security interests and other interests in the collateral, with no regard to the question of who actually has title to the collateral.

...

21 A security interest that is attached to property will be either unperfected or perfected. Like attachment, perfection is also a concept central to the PPSA. The significance of perfection in the PPSA scheme is that a perfected security interest generally takes priority over an unperfected security interest: s. 35(1)(b). Indeed, subject to certain exceptions, the security interest in collateral that is perfected first in time generally gives the secured creditor the strongest possible claim a secured creditor can have under the PPSA. While there are myriad mechanisms for perfecting security interests that need not be discussed in any detail here, it suffices to note that the registration of a financing statement is one of the most important mechanisms of perfecting a security interest: s. 25. Unlike the Bank Act, however, the PPSA does not void a secured creditor's rights vis-à-vis third parties if the security interest is not registered.

22 The PPSA provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the debtor and against third parties, the PPSA recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to third parties' interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2), (3). Thus, within the domain of

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application of the Act, the PPSA provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property.

(Emphasis added)

15 In other words, *Giffen, Re* emphasized the revolutionary nature of personal property security legislation in Canada. Sprung has acted throughout these proceedings as if that revolution had not taken place; Sprung has ignored, at its peril, the fundamental changes effected by the statute in relation to ownership interests in personal property.

3. Can leased goods be pledged in a general security agreement?

16 In *Caswan*, our Court of Appeal did not state that leased goods could not be the subject of a security agreement. The court merely held that it was “doubtful” that such goods could provide security.

17 With respect, any doubt on that score is resolved in favour of leased goods being capable of providing security by the provisions of the *Personal Property Security Act* and its explicit reference to leases. The Court of Appeal appears not to have been referred to that statutory framework. This statutory inclusion of leases as personal property in which the lessee’s interest could be pledged was recognized by the Supreme Court of Canada in *Giffen, Re*: at para. 37: “From the perspective of *both* the PPSA and the BIA the bankrupt, as lessee, can be described as having a proprietary interest in the car.” (Emphasis added)

18 The *Giffen, Re* interpretation of the legislation in relation to leases was indirectly adopted by our Court of Appeal in its subsequent decision, *Sprung Instant Structures Ltd.*, which emphasizes that the original *Caswan* decision was limited to “a particular general security agreement” and was not attempting to establish general principles and certainly not principles that would go against the *Giffen* approach. Indeed, our Court of Appeal subsequently recognized the application of the *Giffen, Re* principles to leased goods in Alberta: see *Northwest Equipment Inc.* at para. 13, where approval is given to the status of even “true” leases as security interests in *Donaghy v. CSN Vehicle Leasing (1992)*, 132 A.R. 155 (Alta. Q.B.). In this context, “true” leases are those leases in which the lessee only obtains the right to the use of the leased property. Relatively early in the development of principles surrounding personal property security legislation, there were challenges to the inclusion of true leases in personal property security legislation; however, that dispute has been answered in favour of including even “true” leases in the definition of “lease for a term of more than one year” in the PPSA. The Alberta treatment of leases as personal property subject to the provisions of the PPSA comes full circle when the Supreme Court of Canada referred with approval to *Donaghy* in *Giffen, Re*: see para. 54 of the latter.

19 The approving reference by the Supreme Court of Canada to the decision in *Donaghy* is also important because it confirms the fact that the revolution in the concept of title created by PPSA legislation applies generally to property interests which come within the ambit of the legislation and not only to bankruptcy situations. Sprung has argued on this application that the loss of title to secured personal property may only be defensible in bankruptcy where the bankruptcy trustee has an obligation extending to all creditors. With respect, the reason why there is so much emphasis in *Giffen, Re* on the effects of PPSA legislation on bankruptcy is because that case dealt with a bankruptcy situation. Not only is there no language in the decision which restricts the title effects to bankruptcy, at para. 54 of the decision we find the following general language:

The court recognized that, for the purposes of priority, the PPSA replaces the common law principle that one cannot transfer better title than she possesses. It is a policy choice of the legislature that an unsecured creditor’s position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor.

This extract demonstrates that it is the PPSA, not the BIA, which has changed the common law relating to title; proceedings under the BIA can, of course, take advantage of that change.

20 Having concluded that leased goods can be pledged in a general security agreement, we must turn next to the issue of whether the Sprung lease in this case was pledged in the GSA.

4 Does the Sprung lease come within the GSA phrase “present...personal property”?

1777575 Alberta Ltd. v. Sprung Instant Structures Ltd., 2014 ABQB 354, 2014...

2014 ABQB 354, 2014 CarswellAlta 942, [2014] A.W.L.D. 3212, 14 C.B.R. (6th) 52...

21 In the original *Caswan* decision, our Court of Appeal stated: “But if the word ‘acquired’ in the General Security Agreement is broad enough to cover leased goods, the phrases containing that word ‘acquired’ refer to after-acquired goods”.

22 The difficulty of applying this portion of the *Caswan* decision to the facts here is that the plain wording of the GSA in the case before the court does not include only a reference to “after-acquired... personal property”, but a reference to “all.. present... personal property”. There is no doubt that, on the facts of this case, at the time the GSA was granted, Kananaskis had the benefit of the lease, which is, by definition, personal property. Therefore, at the time of executing the GSA, when Kananaskis granted a security interest to CIBC in all of Kananaskis’ “present and after-acquired undertaking and Personal Property”, it was certainly granting to CIBC a security interest in all of the leases which came within the definition of lease for a term of more than one year in which Kananaskis was a lessee.

23 The only explanation I can think of for the reference by our Court of Appeal to “acquired” and “after-acquired” is that, in the *Caswan* GSA, the reference was to present and after acquired... personal property”, with no hyphen between “after” and “acquired”. On one reading of the GSA in that agreement, therefore, the lessee was charging “present acquired personal property” and “after-acquired personal property”, which left the Court of Appeal in the quandary which it expressed. Fortunately, there is no possibility of such confusion here, where “present” personal property is clearly distinguished from “after-acquired” personal property.

5. Can the transfer of the lease from Kananaskis to Rockies defeat the GSA?

24 The transfer of the lease by Sprung from Kananaskis to Rockies cannot, of course, defeat the GSA.

25 The law clearly establishes that the interest of a lessee in a lease expires when the lease expires, subject to determination of the status of an overholding lessee. However, the factual situation here is not one where the lease expired prior to the applicant making its claim; here, the original lease terminated in June, 2014.

26 There was discussion at the hearing about whether Sprung’s “transfer” of the lease to Rockies attracted the provisions of s. 28 of the *PPSA*, particularly with respect to whether the “transfer” came within the ambit of the word “proceeds” in that section. With respect, I have concluded that it is not necessary to address that issue. Clause 4 of the GSAs clearly fixed the Kananaskis companies with the burden of obtaining written consent from CIBC, or its assignee, to any proposed disposition of the collateral, which, in this case included the Sprung lease. Because the Kananaskis companies did not obtain any such consent, it is obvious that the disposition to Rockies does not affect the security given.

6. Costs

27 If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Application granted.

Appendix A

s. 1 (f) “chattel paper” means one or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after — acquired goods other than accessions;

(x) “intangible” means personal property other than goods, chattel paper, investment property, a document of title, an instrument and money;

(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 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

TAB 6

2009 ABQB 94
Alberta Court of Queen's Bench

Schaus v. Mountain Ridge Developments Inc.

2009 CarswellAlta 1191, 2009 ABQB 94, [2010] A.W.L.D. 6, 188 A.C.W.S. (3d) 117, 64 B.L.R. (4th) 149

**David Schaus, Susan Schaus, Lynn Crichton and Ditech.Ca Ltd.
(Plaintiffs) and Mountain Ridge Developments Inc. (Defendant)**

Master K.R. Laycock

Heard: October 21, 2008
Judgment: February 12, 2009
Docket: Calgary 0801-09052

Counsel: Craig McMahon for Plaintiffs
Caireen E. Hanert for Defendant

Subject: Corporate and Commercial; Property

Headnote

Business associations --- Powers, rights and liabilities — Corporate borrowing — Power to borrow — Effect of irregularity — Indoor management rule

Mortgagor purchased two properties with \$370,000 loan from mortgagor's co-owner AW — Mortgagor's other co-owner RB arranged one-year \$650,000 mortgage on behalf of mortgagor — Mortgagee received opinion and supporting documents from mortgagor's solicitor indicating mortgagor was properly authorized to proceed — Mortgagee registered its mortgage before AW registered his mortgage — Cheques provided by RB's own company covered payments over term of first mortgage but mortgagor failed to pay balance when due — Mortgagee commenced foreclosure action, noted mortgagor in default, and commenced application for order nisi — AW contended his mortgage was supposed to be first mortgage and that RB did not have proper corporate authority to enter into any mortgage transactions — Mortgagor brought application for order setting aside praecipe to note in default and for leave to file statement of defence — Application dismissed — Mortgagor's argument that mortgage was void for lack of corporate authority was not reasonably arguable defence to claim — Circumstances raised by mortgagor were not such that mortgagee ought to have been alerted to impropriety — Absence of corporate seal on certain supporting documents was raised by mortgagee and corrected by mortgagor's solicitor — Mortgagee received assurance from mortgagor's solicitor that payment cheques from RB's company were intended to apply to mortgage — Funds from RB's company were properly credited against mortgage — AW did not suggest anything further mortgagee could have done by way of due diligence — Confirmations from mortgagor's solicitor should be sufficient — AW might have action against RB or mortgagor's solicitor, but mortgagee was entitled to rely on indoor management rule.

APPLICATION by mortgagor for order setting aside praecipe to note in default and for leave to file statement of defence.

Master K.R. Laycock:

1 This is a foreclosure action on two properties owned by the defendant. The plaintiffs served their statement of claim upon the manager of the corporate defendant, noted the defendant in default and commenced an application for an order nisi. At this time the defendant brings a cross application pursuant to rule 158 to set aside the Praecipe to Note in Default and for leave to file a statement of defence.

2 The defendant was incorporated on March 31, 2007. Rocco Bartolotti and Allen Waichenberg each hold 50% of the issued and outstanding shares and each is a director of the corporation. In the affidavit of Allen Waichenberg,

sworn in support of the application to set aside the noting in default, he states that it was agreed with Rocco Bartolotti that the defendant would purchase the lands now under foreclosure using \$370,000.00 loaned to the company by Allen Waichenberg. Allen Waichenberg was to receive a mortgage as a first charge against the properties.

3 Unit four was registered in the defendant's name on May 24, 2007 and unit six was registered in the defendant's name on July 9, 2007. On July 31, 2007 the plaintiffs' mortgage for a one-year term, with interest payments only, was registered against both properties in the amount of \$650,000.00. On October 26, 2007 a mortgage was registered for \$370,000.00 in favor of Allen Waichenberg.

4 The commitment letter and all mortgage documentation were signed by Rocco Bartolotti on behalf of the defendant. Allen Waichenberg complains that at no time was he aware of the application for financing or the execution of any documents on behalf of the corporation. Allen Waichenberg denies that Rocco Bartolotti had proper corporate authority to enter into any mortgage transactions.

5 I will assume for the sake of this application that Allen Waichenberg has authority to instruct counsel to represent the defendant on this application. The defendant argues that there is a good defence to the action on the basis that the plaintiffs' mortgage is granted without proper corporate authority, and this was readily apparent to the plaintiffs and their mortgage broker. Alternatively, the plaintiffs and their mortgage broker failed to take reasonable steps to do any due diligence examination of the authority of the defendant to grant mortgage security in the circumstances.

6 In response to this proposed defence the plaintiffs argue that it is bound to fail as a result of the provisions of the *Business Corporations Act* section 19 (the indoor management rule) which states in part:

A corporation, a guarantor of an obligation of the corporation or a person claiming through the corporation may not assert against a person dealing with the corporation or dealing with any person who has acquired rights from the corporation

(a) that the articles, bylaws or any unanimous shareholder agreement have not been complied with,

(e) that a person held out by the corporation as a director, an officer or an agent of the corporation

(i) has not been duly appointed, or

(ii) has no authority to exercise a power or perform a duty that the director, officer or agent may reasonably be expected to exercise or perform,

(f) that a document issued by any director, officer or agent of the corporation with actual or usual authority to issue the document is not valid or not genuine, unless the person has, or by virtue of the person's position with or relationship to the corporation ought to have, knowledge of those facts at the relevant time.

7 In order to determine whether the plaintiffs can rely on section 19 it is necessary to break down the various elements of the section. The defendant is attempting to allege that the articles or bylaws of the corporation were not complied with when mortgage security was granted to the plaintiff. Section 19 (a) does not allow the defendant to raise noncompliance with articles or bylaws against the plaintiff who has acquired rights from the defendant unless the plaintiff has knowledge of noncompliance at the relevant time or the plaintiff by virtue of its position with or relationship to the defendant ought to have known about the noncompliance. Firstly it is not alleged by the defendant that the plaintiff had actual knowledge of noncompliance with the articles or bylaws of the corporation. Their argument is that the plaintiffs, and the mortgage broker acting for the plaintiffs, ought to have known about the breach of the articles or bylaws of the defendant by virtue of the fact that there were two shareholders and directors involved in the defendant.

8 The defendant argues that the plaintiffs and their mortgage broker should have inquired further as to whether or not Allen Waichenberg was in agreement with the defendant accepting a mortgage commitment and granting mortgage security to the plaintiffs.

9 In opposition to this application an affidavit was sworn by William Hagel, an officer of the mortgage broker, who acts as the administrator of the plaintiffs' mortgage. He confirms that Rocco Bartolotti on behalf of the defendant accepted the mortgage commitment on June 27, 2007. On July 9, 2007 an Alberta Corporate Registry search confirmed that the defendant's two directors were Rocco Bartolotti and Allen Waichenberg.

10 By letter dated July 23, 2007 the defendant's lawyer Brian Hasset provided a written solicitor's opinion that he had examined all necessary corporate documents and confirmed that the defendant had the power and capacity to own assets, to execute, deliver and perform its obligation to the lender, had taken all necessary corporate action to authorize the execution and delivery of the security, and had duly executed and delivered the security.

11 Accompanying the opinion letter was a certificate signed by the president of the defendant certifying that all bylaws and regulations had been complied with and that all statements set out in the certificate were true.

12 The certificate of corporate authority, signed by the president of the defendant attached a copy of the defendant's bylaws and articles of incorporation which stated in clause 10 that the board of directors may at any time delegate to any director the power to make arrangements to borrow money. In addition the plaintiffs' lawyer was provided with a copy of a resolution purportedly passed by the directors of the defendant stating that any officer of the defendant is authorized to execute and deliver the security documents. In addition a statutory declaration was given by Rocco Bartolotti which stated, in part, that he was the president of the company, that the company was in good standing, and that no provision of the articles of incorporation, bylaws of the company or any unanimous shareholders agreement restricts the powers of the directors to borrow money on the credit of the company.

13 Mr. Hagel further swears that their solicitors advanced the mortgage funds to the defendant's lawyer in accordance with a direction to pay on July 24, 2007.

14 The plaintiffs argue that, based on all of the documentary materials provided to them by the defendant's lawyer, there was no reason to believe that there was any issue about the mortgage security being granted in breach of the defendant's articles and bylaws. The plaintiffs argue that they are entitled to rely upon the documents supplied by the defendant's solicitor to verify corporate authority to borrow, and borrow under the signature of the one director. The plaintiffs deny that by virtue of their position with or relationship to the defendant that they ought to have known that the articles and bylaws had not been complied with. The plaintiff states that the mere fact that the corporation had two shareholders and directors does not amount to evidence that they ought to have known that the articles and bylaws had not been complied with.

15 The question is what is the effect of the phrase "ought to have, knowledge of those facts at the relevant time." Counsel for the parties advised that they could not find any cases with respect to this section of the Alberta act. Assuming that to be true, it is necessary for me to determine the meaning and intent of the legislation. The Court of Appeal in *Yellowbird v. Samson Cree Nation No. 444*, 2008 ABCA 270 (Alta. C.A.) at paragraph 48 stated in part:

....that statutes are interpreted using their ordinary grammatical meaning, where it is in keeping with the statutory scheme and produces a workable result: see Pierre-Andre Cote, *Interpretation of Legislation in Canada* 3d ed. (ScaRocco Bartolottiorough: Thomson Canada Butterworths, 2000) at 308-09; Elmer A Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, cited with approval in *Rizzo Shoes & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.C. 27 at para. 21, 36 O.R. (Ed) 418; *CCH Canadian Ltd. v. LAllen Waichenberg Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at para. 9; *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 D.C.R. 865 at 36.

16 It is helpful to review decisions dealing other legislation with similar wording. The *Limitations Act* section 3(1)(a) has similar wording. The section prevents a claimant from seeking a remedial order within two years after the date on which the claimant first knew, or the circumstances *ought to have known* of an injury. The principle of discoverability

has been discussed in numerous cases. For example Martin J. in *Kristal Inc. v. Nicholl & Akers*, 2006 ABQB 168 (Alta. Q.B.) at paragraph 56 stated in part:

The test for "ought to have known" is that of "reasonable diligence".....

17 In *De Shazo v. Nations Energy Co.*, [2005] A.J. No. 856, 2005 ABCA 241 (Alta. C.A.) the Court of Appeal at paragraph 27 spoke of whether the plaintiff could "reasonably have discovered".

18 The defendant argues that there are factual issues in relation to whether the lenders ought to have known that there were some irregularity or impropriety in the loan transaction. Constructive notice may only be determined after a thorough examination of facts to determine the state of mind of the lender and its agent. The defendant argues that there are a number of circumstances that should have alerted the lender and its agent to the possibility that Rocco Bartolotti did not have proper corporate authority to enter into the loan agreement. The circumstances relied upon are:

(a) the defendant had two directors;

(b) only Rocco Bartolotti signed a commitment letter and mortgage documents;

(c) all the loan documents and corporate authority documents were prepared by the solicitor for the lender and its agent;

(d) the documents were only signed by Rocco Bartolotti;

(e) Allen Waichenberg's name did not appear on any of the documents, including the certificate of incumbency which listed all the officers of the defendant;

(f) many of the documents were completed without corporate seal;

(g) Rocco Bartolotti provided postdated cheques payable on his own company account rather than the defendants account.

19 Items (a), (b), (d) and (e) are matters that are generally immaterial because of the indoor management rule. In relation to item (c), residential or commercial mortgage forms are documents generally dictated by the lender. Dictating the form and content of the loan transaction documents in this case would not be a fact or circumstance to excite the imagination of the plaintiffs or their agent to inquire further into the lending authority of the defendant.

20 In relation to item (f), the defendant does not argue that the mortgage is void and unenforceable because on the absence of a corporate seal. They argue that the absence of a corporate seal on some of the supporting documents should have alerted the lenders to a problem. The absence of corporate seal was a concern to the lender's lawyer, and on July 24, 2007 the documents without corporate seal were returned to the defendant's solicitor along with the cheque for the mortgage advance. The funds were sent in trust that they not be released until all documents were corrected. On July 25, 2005, the documents were returned duly sealed. The initial absence of the corporate seal is not a circumstance that should have caused an investigation into the corporate borrowing authority. The lenders solicitor did what would be normally expected in the circumstances.

21 In relation to item (g), it is argued that the plaintiffs should have been put on inquiry when their solicitor received payment cheques from Rocco Bartolotti's own company rather than from the defendant. In fact the plaintiff's solicitor by letter of July 24, 2007, did inquire about the post dated cheques and asked for confirmation that they were intended to be used for the mortgage payment on the loan. The July 25, 2005 letter from Brian Hassett confirmed that the cheques were to be used to pay the monthly interest payments. All cheques were subsequently negotiated and credited against the mortgage. When the cheques ran out, the term of the mortgage had matured and the demand was made for a payout of the mortgage loan.

22 The balance of the circumstances relied on by the defendant are the absence of the participation of the second shareholder and director. Did the plaintiffs use reasonable diligence to determine if there was proper corporate authority for the loan transaction? Once the defendant's lawyer provided his legal opinion, supported by all the declarations and certificates, is the lender required to go behind the various documents and canvas all shareholders and directors? I doubt that the drafters of the legislation so intended. The purpose of the indoor management rule is to allow commerce to be conducted smoothly and efficiently. One of two directors of a small company being in charge of financing is not a circumstance which ought to lead the plaintiff to suspect the legitimacy of the mortgage transaction, particularly in light of the solicitor certificate and the corporate documents verifying his ability to enter into such a loan transaction on behalf of the corporation.

23 The defendant further argues that it was a term of the commitment letter that the plaintiffs or their agent would perform their own due diligence with respect to the granting of the mortgage. The defendant does not suggest what further due diligence would have been required other than that already undertaken. There is no evidence that it is common in the lending industry for the plaintiffs to have undertaken any broader investigation than was conducted in this matter. Had the plaintiffs failed to obtain the corporate assurances, certificates and solicitor's certificate, the defendants may well have reason to complain about the lack of an inquiry.

24 It is my conclusion that the circumstances raised by the defendant are not such that would indicate to the lender or its agent that there may have been some irregularity or impropriety or lack of authority of the defendant in relation to the loan transaction. The irregularity with the corporate seal was addressed and corrected. An inquiry was made about whether the correct payment cheques had been provided. Confirmations from the borrower's solicitor should be sufficient to satisfy the lender about the bona fides of the loan in these circumstances. Allen Waichenberg may have an action against his fellow shareholder for breach of their agreement, or an action against the defendant's corporate counsel, but in these circumstances the plaintiffs are entitled to rely on the indoor management rule and the diligence undertaken in the circumstances. I conclude that the defendant's argument that the mortgage is void for lack of corporate authority is not a reasonably arguable defence to the claim.

25 The second argument raised by the defendant deals with the legal argument that Allen Waichenberg was entitled to an equitable mortgage against the lands which takes priority over the plaintiffs' registered first mortgage.

26 This argument is wrong in law because an earlier unregistered (equitable) mortgage does not take priority over a subsequently registered mortgage: see *Wilkie v. Jellett* (1896), 26 S.C.R. 282 (S.C.C.). The general rule requires that the mortgage be acquired in good faith for value and without notice of the prior equitable mortgage. There is no evidence to support a defence argument that the exceptions apply. The equitable mortgagee can only succeed in a priority fight against other subsequent unregistered interests and writs of enforcement.

27 It is my conclusion that the defendant's proposed defence is hopeless and does not amount to a meritorious defence. The plaintiffs' application for an order nisi, which was adjourned sine die pending the hearing of this motion, may now proceed. The plaintiff will be entitled to costs of this application on a scale fixed in the order nisi.

Application granted.

TAB 7

Composite Technologies Inc. v. Shawcor Ltd., 2017 ABCA 160, 2017 CarswellAlta 871

2017 ABCA 160, 2017 CarswellAlta 871, [2017] 8 W.W.R. 427, [2017] A.W.L.D. 2226...

2017 ABCA 160
Alberta Court of Appeal

Composite Technologies Inc. v. Shawcor Ltd.

2017 CarswellAlta 871, 2017 ABCA 160, [2017] 8 W.W.R. 427, [2017] A.W.L.D. 2226, [2017] A.W.L.D. 2229, [2017] A.W.L.D. 2234, [2017] A.W.L.D. 2235, 100 C.P.C. (7th) 52, 279 A.C.W.S. (3d) 46, 51 Alta. L.R. (6th) 91

Composite Technologies Inc. and Proflex Pipe Corporation (Appellants / Plaintiffs) and Shawcor Ltd., Flexpipe Systems Inc., Sam Bouey, Kevin Gartner, David Budney, and ARC Financial Corporation (Respondents / Defendants)

Jack Watson, Thomas W. Wakeling, Frederica Schutz J.J.A.

Heard: May 2, 2017
Judgment: May 23, 2017
Docket: Edmonton Appeal 1603-0142-AC

Proceedings: affirming *Wolfe v. Shawcor Ltd.* (2016), 86 C.P.C. (7th) 97, 2016 CarswellAlta 834, 2016 ABQB 261, [2016] 11 W.W.R. 594, 35 Alta. L.R. (6th) 108, S.D. Hillier J. (Alta. Q.B.); affirming *Wolfe v. Shawcor Ltd.* (2015), 28 Alta. L.R. (6th) 183, 2015 ABQB 181, 2015 CarswellAlta 442, R.P. Wacowich, In Chambers Master (Alta. Q.B.)

Counsel: P.D. Kirwin, for Appellants
J.T. Neilson, Q.C., for Respondents, ShawCor Ltd., Flexpipe Systems Inc., Sam Bouey, Kevin Gartner and David Budney
M.E. Mestinsek, for Respondents, ARC Financial Corporation

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Related Abridgment Classifications

Business associations

VI Changes to corporate status

VI.2 Loss of corporate status

VI.2.c Dissolution

VI.2.c.i Property of dissolved corporation

Civil practice and procedure

XVI Disposition without trial

XVI.3 Stay or dismissal of action

XVI.3.c Grounds

XVI.3.c.iv Lack of capacity to sue or be sued

Civil practice and procedure

XVIII Summary judgment

XVIII.3 Availability of summary judgment

XVIII.3.b Miscellaneous

Contracts

VIII Rectification or reformation

VIII.2 Prerequisites

VIII.2.a Common intention

Composite Technologies Inc. v. Shawcor Ltd., 2017 ABCA 160, 2017 CarswellAlta 871

2017 ABCA 160, 2017 CarswellAlta 871, [2017] 8 W.W.R. 427, [2017] A.W.L.D. 2226...

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Lack of capacity to sue or be sued

Plaintiffs DW, C Inc. and P Corp. claimed to have developed certain technology that defendants used, along with confidential information, to make their product — Plaintiffs brought action against defendants for breach of confidentiality agreements, wrongful use of confidential information, unlawful or intentional interference with economic relations, breach of fiduciary duties and unjust enrichment — Master granted defendants' motion for summary judgment dismissing action on basis that none of plaintiffs had right to sue — Appeal judge dismissed plaintiffs' appeal — Appeal judge held that status of P Corp. rendered its own claim nullity, as dissolved corporation lacked capacity to sue, and that claims should not be stayed pending possible future legislative developments regarding revival of corporations — Appeal judge held that P Corp. owned technology after C Inc. transferred its interest in technology to P Corp. under technology transfer agreement — Appeal judge found no evidence that C Inc. had taken any steps to make claim under Unclaimed Personal Property and Vested Property Act (UPPVPA) — Appeal judge held that DW and C Inc. did not assert any personal damages that were not linked to their shareholder interests, so their assertions of separate breaches of confidentiality were without merit — Plaintiffs C Inc. and P Corp. appealed — Appeal dismissed — Plaintiffs never filed rectification application and if their application could be regarded as rectification application, agreement could not be rectified because requirements were not met — While some preconditions for claim under UPPVPA were met, C Inc. did not establish that it represented all shareholders and did not explain why it failed to take any steps to revive P Corp. — None of plaintiffs had case, as DW never had ownership interest in technology, P Corp. was not legal entity, and C Inc. had no legal interest in technology after entering into agreement — Section 17(3) of Business Corporations Act meant that C Inc. could not claim that sale of its interest in technology to P Corp. was invalid because it failed to secure approval of shareholders through special resolution.

Business associations --- Changes to corporate status — Loss of corporate status — Dissolution — Property of dissolved corporation

Plaintiffs DW, C Inc. and P Corp. claimed to have developed certain technology that defendants used, along with confidential information, to make their product — Master granted defendants' motion for summary judgment dismissing plaintiffs' action on basis that none of plaintiffs had right to sue — Master held that P Corp. was non-entity after being dissolved by registrar — Master held that C Inc. had assigned its interest in technology to P Corp. pursuant to technology transfer agreement, so it was not owner and could not maintain any claims — Appeal judge dismissed plaintiffs' appeal — Appeal judge found no evidence that P Corp.'s affairs were properly wound up so as to allow shareholders, including C Inc., to claim entitlement to intellectual property — By virtue of s. 229 of Business Corporations Act (BCA) and s. 15 of Unclaimed Personal Property and Vested Property Act (UPPVPA), corporation's property not disposed of at date of dissolution vested in Crown, subject to s. 227 of BCA — Plaintiffs C Inc. and P Corp. appealed — Appeal dismissed — Combined effect of s. 49(1)(b) of UPPVPA and s. 22 of UPPVPA's general regulation was to allow representative of all shareholders of P Corp. to claim ownership of vested property — While some preconditions for such claim were met, C Inc. did not establish that it represented all shareholders and did not explain why it failed to take any steps to revive P Corp. — C Inc. and other shareholders of P Corp. never submitted claim under UPPVPA — Section 34(1) of UPPVPA allowed dissolved corporation that had been revived within five years of date of dissolution to assert claim, but P Corp. had not been revived within five years of dissolution and could never be revived.

Contracts --- Rectification or reformation — Prerequisites — Common intention

Plaintiffs DW, C Inc. and P Corp. claimed to have developed certain technology that defendants used, along with confidential information, to make their product — Plaintiffs brought action against defendants for breach of confidentiality agreements, wrongful use of confidential information, unlawful or intentional interference with economic relations, breach of fiduciary duties and unjust enrichment — Master granted defendants' motion for summary judgment dismissing action on basis that none of plaintiffs had right to sue — Master held that P Corp.'s claim was abuse of process and nullity, as it was non-entity after being dissolved by registrar, and was incapable of revival as more than five years had passed — Master held that C Inc. had assigned its interest in technology to P Corp. pursuant to technology transfer agreement, so it was not owner and could not maintain any claims — Appeal judge dismissed plaintiffs' appeal — Plaintiffs C Inc. and P Corp. appealed on basis that appeal judge should have heard their rectification application before deciding appeal — Appeal dismissed — Plaintiffs never filed rectification application — Even if plaintiffs' application could be regarded as rectification application, appeal judge could not have rectified technology transfer agreement because requirements for rectification were not met — It was not enough that C Inc. and P Corp. failed to appreciate that terms of agreement would preclude C Inc. from commencing action to deny third parties from using technology it had role in developing — Plaintiffs did not present evidence that they had

Composite Technologies Inc. v. Shawcor Ltd., 2017 ABCA 160, 2017 CarswellAlta 871

2017 ABCA 160, 2017 CarswellAlta 871, [2017] 8 W.W.R. 427, [2017] A.W.L.D. 2226...

agreed upon definite and accountable terms different from those incorporated in agreement — While deponents swore that it was intention of parties that C Inc. would hold intellectual property relating to technology, they did not claim that anything more concrete than intention existed.

Civil practice and procedure --- Summary judgment — Availability of summary judgment — Miscellaneous
 Plaintiffs DW, C Inc. and P Corp. claimed to have developed technology for manufacture of flexible composite pipe and alleged that defendants used confidential information and technology to make their product — Plaintiffs brought action against defendants S Ltd., F Inc., SB, KG, A Corp. and DB for breach of confidentiality agreements, wrongful disclosure and use of confidential information relating to technology, unlawful or intentional interference with plaintiffs' economic relations, breach of fiduciary duties and unjust enrichment — Master granted defendants' motion for summary judgment dismissing action against them on basis that none of plaintiffs had right to sue — Master held that viva voce evidence was not required to properly resolve case, as there was no genuine issue of potentially decisive material fact, and concluded that it was fair and just to summarily dismiss action as abuse lacking merit within scope of R. 7.3 of Alberta Rules of Court — Plaintiffs' appeal was dismissed — Appeal judge held that Master did not err in determining that this was appropriate case for summary judgment based on status of each of plaintiffs in relation to claim and held that summary dismissal was justified — Plaintiffs C Inc. and P Corp. appealed on basis that summary dismissal was granted on argument that did not appear in statement of defence — Appeal dismissed — Argument in support of summary judgment application did not need to be in statement of defence — Plaintiffs could not argue that they were taken by surprise by defendants' argument that C Inc. had no interest in technology after entering into agreement with P Corp.

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Generally — referred to

s. 1(ii) “special resolution” — considered

s. 16 — considered

s. 16(1) — considered

s. 17 — considered

s. 17(3) — considered

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s. 26 — considered

s. 26(3)(c) — considered

s. 122(1) — considered

s. 122(2) — considered

s. 190 — considered

s. 190(1) — considered

s. 190(2) — considered

s. 190(6) — considered

s. 208 — considered

s. 208(1) — considered

s. 208(1.1) [en. 2007, c. U-1.5, s. 68(2)(b)] — considered

s. 208(1.2) [en. 2007, c. U-1.5, s. 68(2)(b)] — referred to

s. 208(4) — considered

s. 229 — considered

s. 229(1) — considered

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s. 1(aa) “property” — considered

s. 1(h) “corporation” — considered

- s. 1(ll) “tangible personal property” — considered
- s. 1(pp) “vested personal property” — considered
- s. 1(qq) “vested property” — considered
- s. 1(s) “intangible personal property” — considered
- s. 1(v) “owner” — considered
- s. 1(y) “personal property” — considered
- s. 3(1)(c) — considered
- s. 15(d) — considered
- s. 34(1) — considered
- s. 35(1) — considered
- s. 37(1) — considered
- s. 48(1) — considered
- s. 48(8) — considered
- s. 48(9) — considered
- s. 48(10) — considered
- s. 49(1)(b) — considered
- s. 49(9) — considered
- s. 49(10) — considered
- s. 77 — referred to

Rules considered:*Alberta Rules of Court*, Alta. Reg. 124/2010

R. 6.14(3) — considered

R. 7.3 — considered

R. 7.3(1) — considered

R. 9.13 — considered

R. 9.15 — considered

R. 9.15(1) — considered

Alberta Rules of Court, Alta. Reg. 390/68

R. 159 — considered

Regulations considered:

Unclaimed Personal Property and Vested Property Act, S.A. 2007, c. U-1.5
General Regulation, Alta. Reg. 104/2008

Generally — referred to

s. 22 — considered

s. 22(2) — considered

s. 22(2)(a) — referred to

s. 22(2)(b) — referred to

s. 22(2)(b)(ii) — referred to

s. 22(2)(c) — referred to

s. 22(2)(d)(i) — referred to

s. 22(2)(d)(ii) — referred to

s. 22(2)(d)(iii) — referred to

APPEAL by plaintiffs from judgment reported at *Wolfe v. Shawcor Ltd.* (2016), 2016 ABQB 261, 2016 CarswellAlta 834, 86 C.P.C. (7th) 97, 35 Alta. L.R. (6th) 108, [2016] 11 W.W.R. 594 (Alta. Q.B.), dismissing plaintiffs' appeal from order summarily dismissing their claim.

Per curiam:

I. Introduction

1 The appellants challenge a decision of Justice Hillier confirming Master Wacowich's order summarily dismissing their claim.

II. Questions Presented

2 Rule 7.3 of the *Alberta Rules of Court*¹ allows a court to summarily dismiss an action that is without merit. A nonmoving party's position is without merit if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low.

3 ShawCor Ltd. and the other defendants — the respondents here — successfully argued before Master Wacowich and Justice Hillier that Proflex Pipe had no legal existence and was unable to commence the action against the defendants. Both Master Wacowich and Justice Hillier concluded that an action commenced by a corporation that has been struck off the registry is a nullity. The Registrar of Corporations under the *Business Corporations Act*² dissolved Proflex Pipe effective July 2, 2006, approximately two years before Proflex Pipe commenced this action. Proflex Pipe has not been revived.³

4 The defendants also successfully argued that Composite Technologies Inc. sold its intellectual property in flexible composite pipe to Proflex Pipe before it commenced this action and has no property interest to protect. They claimed that a September 15, 1999 technology transfer agreement between Composite Technologies and Proflex Pipe had this effect.

5 Did Justice Hillier reasonably conclude that the plaintiffs' position was without merit and that their action should be dismissed? Is the strength of the moving parties' position so much greater than that of the nonmoving parties that it can be

said the moving parties' position is unassailable?

III. Brief Answers

6 Justice Hillier's conclusion that the position advanced by Composite Technologies and Proflex Pipe was without merit was not only reasonable but indisputably correct. Their actions have no prospects of success. Proflex Pipe is not a legal entity and had no right to commence this action. Composite Technologies has no legal interest in the intellectual property that it claims the defendants have wrongfully appropriated. In the September 15, 1999 technology transfer agreement Composite Technologies assigned its entire interest in the intellectual property under dispute to Proflex Pipe.

IV. Statement of Facts

A. Background Facts

7 Donald Wolfe is an Edmonton entrepreneur with a long-time interest in flexible composite pipe technology.

8 This technology provides advantages over traditional steel or rigid fiberglass pipe. It offers superior chemical resistance, structural flexibility, long continuous lengths and less expensive installation.

9 Mr. Wolfe owns forty-eight percent of the shares of Composite Technologies; his former wife owns thirty-two percent and thirty-three other shareholders own the remaining twenty percent.

10 Mr. Wolfe is the chief executive officer of Composite Technologies and was the chief executive officer of Proflex Pipe throughout its existence — 1993 to 2006.

11 Composite Technologies was the parent of Proflex Pipe as of the date of the dissolution of Proflex Pipe. It owned almost ninety percent of the shares of Proflex Pipe. Fifty other shareholders held the remaining shares.

12 Composite Technologies was the assignee of four United States patents issued between November 16, 1993 and March 23, 1999, valid for seventeen years, and was the assignee of two Canadian patents filed in 1992 and 1997 and one Mexican patent filed October 1, 1993. These issued and pending patents all related to flexible composite pipe technology.

13 Composite Technologies⁴ developed a flexible pipe product that is described in United States patent 5,261,462 issued November 16, 1993.

14 It produced this product in lengths less than twenty meters.

15 On August 31, 1996 Composite Technologies and Proflex Pipe entered into a licence agreement.⁵

16 On September 15, 1999 Composite Technologies, with the approval of the directors, and Proflex Pipe Corporation entered into a technology transfer agreement. The relevant segments are as follows:

This Agreement is made and entered into this 15th day of September, 1999 by . . . Composite Technologies Inc. ("CTI"), a private Alberta company, and Proflex Pipe Corporation ("Proflex"), a private Alberta company. .

Whereas CTI is the registered assignee of the issued patents, patents pending and patent applications in the United States, Canada and Mexico set out in Schedule A relating to flexible composite tubular structures, and methods of manufacture and connection of flexible composite tubular structures.

...

And whereas in accordance with a License Agreement between CTI and Proflex dated August 31, 1996, Proflex acquired an exclusive license under the patents issued, pending and applied for listed in Schedule A and an exclusive

protect an interest that Mr. Wolfe never had.

151 Proflex Pipe is not a legal entity so it has no standing to complain about the conduct of any body.

152 Composite Technologies had no legally recognizable interest in the flexible composite pipe technology after September 15, 1999. Any misuse of confidential information by Messrs. Bouey, Gartner and Budney or ShawCor about which Composite Technologies complains occurred after September 15, 1999. It follows that Composite Technologies no longer has any legally recognizable interest in this technology, including any breaches of any confidentiality agreement designed to protect it. Only Proflex Pipe had a legally recognizable interest after September 15, 1999 and it ceased to be a legal entity on July 2, 2006.

153 Notwithstanding the overwhelming problems that the September 15, 1999 technology transfer agreement and the July 2, 2006 dissolution of Proflex Pipe present for the appellants, there are equally insurmountable obstacles posed by the confidentiality agreements.

154 Even if we assume that the confidentiality agreement Mr. Wolfe entered into with ShawCor on December 15, 2006 was on behalf of Composite Technologies, the problems do not disappear.⁹⁵ There is no evidence that Mr. Wolfe or Composite Technologies disclosed any confidential information, as defined in the December 15, 2006 confidentiality agreement, to ShawCor. The confidentiality agreement states that confidential information “must be clearly marked”. Garry Graham, a former senior vice president of ShawCor, swore in his March 18, 2014 affidavit that ShawCor never received any documents marked confidential. Nor did ShawCor receive any confidential information delivered orally. Part of the December 15, 2006 confidentiality agreement reads as follows: “Any oral Confidential Information disclosed must be confirmed by the disclosing Party to the receiving Party in writing, clearly marked confidential, within thirty . . . days of such disclosure failing which such oral information shall no longer be considered Confidential Information hereunder”. Again, Mr. Graham swore that “no oral disclosures were confirmed to be confidential as referred to in the 2006 agreement”.

155 ARC Financial signed one confidentiality agreement with Proflex Pipe. It was dated December 15, 1999, and by its terms, expired on December 14, 2002. This is after ARC Financial made an investment in Flexpipe Systems.⁹⁶

156 Douglas Freel, a senior officer of ARC Financial, declared in his affidavit filed March 24, 2014, that ARC utilized the information Proflex Pipe delivered to it only “for the purpose of ARC’s evaluation of potential investment opportunity in Proflex or [Composite Technologies] . . .” The appellants presented no evidence to the contrary.

H. The Technology Transfer Agreement Is Not Invalid Because of Composite Technologies’ Failure To Give Shareholders Notice of the Proposed Transaction

157 Section 190(1) of the *Business Corporations Act* declares that “[a] sale . . . of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders . . . [by a special resolution — a two-thirds majority of the votes cast]”.

158 Based on the admissions in Mr. Wolfe’s May 26, 2016 affidavit⁹⁷ and the complaint made in Ms. Wolfe’s October 5, 2016 affidavit⁹⁸ it would appear that Composite Technologies sold all or substantially all its property when it executed the September 15, 1999 technology transfer agreement without a special resolution of its shareholders in contravention of s. 190(1) of the *Business Corporations Act*. These same facts would support an argument that the directors and officers of Composite Technologies also violated s. 122(1) of the *Business Corporations Act* — they acted without reasonable care, diligence and skill — and s. 122(2) of the *Business Corporations Act* — they failed to comply with the *Act*. Section 252 of the *Business Corporations Act* makes it an offence for a natural person to contravene a provision of the *Act* and imposes as a penalty a fine or imprisonment or both.

159 While the appellants argue that Composite Technologies failed to comply with s. 190 of the *Business Corporations Act*, they do so for another purpose unrelated to the offence and sanction provisions of the *Act*. They contend that Composite Technologies’ breach of s. 190 deprives the technology transfer agreement of any legal force and, as a result, that Composite Technologies, and not Proflex Pipe, is the legal owner of the intellectual property that is the subject of the technology transfer agreement.

160 We cannot accept this argument.

161 It flies in the face of s. 17(3) of the *Business Corporations Act*.⁹⁹ This provision expressly stipulates that “[n]o act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act”.

162 This statutory provision reflects a general consensus that the common law *ultra vires* doctrine¹⁰⁰ introduced undesirable consequences into the law. The *ultra vires* doctrine deprived a corporate act that was contrary to the specific limited powers of the corporation of any legal effect and adversely affected third parties who contracted with the corporation in good faith believing that the corporate act on which they relied to be one the corporation was legally authorized to undertake.¹⁰¹ This doctrine forced third parties to either conduct an investigation of the constating corporate documents or assume the risk that the corporation had no legal authority to discharge the promises on which the third party relied.

163 The *ultra vires* doctrine could be invoked by either a shareholder of a corporation,¹⁰² the corporation itself¹⁰³ or a third party doing business with the corporation.¹⁰⁴

164 Dr. McGuinness, in *Canadian Business Corporations Law*,¹⁰⁵ reports that

the doctrine was found to cause considerable inconvenience to the conduct of commerce, which led eventually to widespread calls for its abolition, not only in Canada, but across the common law world. Most such jurisdictions have now attempted to rid themselves of the doctrine. The general Canadian legislative approach towards the empowerment of a corporation begins by conferring upon the corporation the powers of a natural person.

165 Alberta followed this pattern.¹⁰⁶ Section 16(1) of the *Business Corporations Act* states that “[a] corporation has the capacity and subject to this Act, the rights, powers and privileges of a natural person”.

166 The impact of this statutory personification of a corporation is significant. “[I]t is implicit in the grant of the rights, powers and privileges of a natural person that corporations are unlimited in the powers, rights and privileges which they possess or may acquire, and like natural persons corporations will be presumed to possess or be capable of acquiring all right, powers and privileges except to the extent that such possession or acquisition is denied to them by law”.¹⁰⁷

167 Composite Technologies cannot assert that the sale of its entire interest in the flexible composite pipe technology to Proflex Pipe under the technology transfer agreement is invalid because it failed to secure the approval of its shareholders through a special resolution. Section 17(3) of the *Business Corporations Act* robs this *ultra vires* argument of any force.

168 Ms. Wolfe is not advancing any claim on her own behalf as a shareholder. She swears in her October 5, 2016 affidavit that she makes her affidavit “in support of an Application to have the Court consider the competence or ability of the directors of . . . [Composite Technologies] to effect a transfer of all of the assets of . . . [Composite Technologies] without notice to me as one of the shareholders of . . . [Composite Technologies]”. Ms. Wolfe has not commenced an oppression action under s. 242 of the *Business Corporations Act*.¹⁰⁸ Her reference to an “Application” must be to Composite Technologies’ application.

169 Proflex Pipe is not advancing such a claim. It cannot because it does not exist.

VII. Conclusion

170 This appeal is dismissed.

Appeal dismissed.

Footnotes

TAB 8

Dominion Fire Brick & Clay Products Ltd. v. Pollock, 1919 CarswellSask 82

1919 CarswellSask 82, [1919] 2 W.W.R. 245

1919 CarswellSask 82
Saskatchewan King's Bench, Trial

Dominion Fire Brick & Clay Products Ltd. v. Pollock

1919 CarswellSask 82, [1919] 2 W.W.R. 245

Dominion Fire-Brick & Clay Products Limited v. Pollock

Bigelow, J.

Judgment: April 4, 1919

Counsel: *H.J. Schull* , for plaintiff.

N.R. Craig , for defendant.

Subject: Corporate and Commercial; Property

Related Abridgment Classifications

Business associations

III Specific matters of corporate organization

III.1 Directors and officers

III.1.i Miscellaneous

Real property

II Registration of real property

II.2 Registration of land

II.2.b Land titles

II.2.b.iv Fraud

II.2.b.iv.A Definition in Land Titles Acts

Headnote

Corporations --- Directors and officers

Real Property --- Registration of land — Land titles — Fraud — Definition in Land Titles Acts

"Fraud" under The Land Titles Act, 1917, SS. 59, 174, 194.

"Fraud" under secs. 59, 174 and 194 of *The Land Titles Act* , 1917, means actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud. *Assets Company v. Mere Roihi*, [1905] A.C. 176 ; *Ross v. Stovall*, [1919] 1 W.W.R. 676 , cited.

Semble knowledge by directors of one company does not necessarily imply knowledge to another company of which they are also directors.

A verbal condition by defendant on his transferring land that he was to have the use of the land for farming purposes until the land was required for residential purposes was considered by the Court as merely a license which was revoked by a conveyance of the land without reserving the privilege to the licensee and knowledge of such agreement by one subsequently taking a transfer of the land could not be construed as fraud.

Dominion Fire Brick & Clay Products Ltd. v. Pollock, 1919 CarswellSask 82

1919 CarswellSask 82, [1919] 2 W.W.R. 245

Action for damages for trespass and for an injunction, Judgment for plaintiff with costs.

Bigelow, J. :

1 This is an action for damages for trespass and an injunction. Plaintiff is the registered owner of the land in question, having acquired same from the Saskatchewan Clay Products Company, Limited, January 1, 1917, who acquired same from John Henry Kern and Edward C. Mathews, May 15, 1914, who in turn acquired same from defendant June 7, 1913.

2 Defendant alleges that the transfer from him to Mathews and Kern was made on the condition that he, the defendant, was to have the use of the land for farming purposes until the lands were required for residential purposes. The evidence of the defendant to this effect is not denied, so, although there was no written agreement, I find that that was the verbal arrangement. The defendant attempts to justify the alleged trespass on the grounds that Mathews and Kern were trustees for the Saskatchewan Clay Products Company, Limited, and that they were directors of the said company and also of the plaintiff company, and their knowledge as directors of the one company must be knowledge of the other company, and that therefore it would be fraud on plaintiff's part to deny the agreement made between defendant and Mathews, under secs. 59, 174 and 194 of *The Land Titles Act, 1917*, Statutes of Sask. 1917 (2nd sess.), ch. 18.

3 I cannot find that plaintiff has participated in or colluded in any fraud. Fraud under these sections means actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud. *Assets Company v. Mere Roihi*, [1905] A.C. 176, 74 L.J.P.C. 49; *Ross v. Stovall*, [1919] 1 W.W.R. 676.

4 From the evidence I must find that Love, the managing director of plaintiff company, had no knowledge of defendant's claims until the spring of 1918, after plaintiff leased the land.

5 I cannot adopt defendant's argument that Mathews and Kern were trustees for the Saskatchewan Clay Products Company, Limited. The transfer from defendant to Mathews and Kern is dated June 7, 1913; the transfer from Kern and Mathews to the Saskatchewan Clay Products Company, Limited, is dated May 15, 1914. It is possible that Mathews and Kern were trustees for the Saskatchewan Clay Products Company, Limited, but there is no evidence to that effect on which to base any such finding. Even if they were trustees for Saskatchewan Clay Products Company, Limited, I cannot adopt defendant's argument that their knowledge as directors of one company is knowledge of the other company.

6 It seems to me that all that defendant ever had was a license, and that this would be revoked by a conveyance of the land, without reserving the privilege to the licensee. And even if plaintiff had notice or knowledge of this agreement with defendant, taking a transfer of the land could not possibly be construed as fraud.

7 Plaintiff will have judgment for \$200 damages, and an injunction restraining defendant and his servants and agents from entering on the land as described in the statement of claim, and costs on the King's Bench low scale.

End of Document

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TAB 9

Steel Service Ltd., Re, 1935 CarswellOnt 79

1935 CarswellOnt 79, 16 C.B.R. 231

1935 CarswellOnt 79
Ontario Supreme Court, In Bankruptcy

Steel Service Ltd., Re

1935 CarswellOnt 79, 16 C.B.R. 231

In re Steel Service Limited

George Jolly v. Trustee and H. Lunenfeld & Sons, Limited

F. G. Cook, Esq., Registrar

Judgment: January 21, 1935

Counsel: *E. G. Black*, for George Jolly, plaintiff.
J. M. Bullen, K.C., for H. Lunenfeld & Sons Limited, defendant.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[IX Proving claim](#)

[IX.1 Provable debts](#)

[IX.1.g Claims of director, officer or shareholder of bankrupt corporation](#)

Business associations

[III Specific matters of corporate organization](#)

[III.1 Directors and officers](#)

[III.1.i Miscellaneous](#)

Business associations

[III Specific matters of corporate organization](#)

[III.2 Shares](#)

[III.2.c Subscription for shares](#)

[III.2.c.i General principles](#)

Headnote

Bankruptcy --- Proving claim --- Provable debts --- Claims of director, officer or shareholder of bankrupt corporation

Corporations --- Directors and officers

Corporations --- Shares --- Subscription for shares

Creditor — Claim for Moneys Loaned to Debtor Company — Agreement by Creditor to Subscribe for Shares in Debtor Company Alleged — Issue — Onus — Facts — Issue Determined in Favour of Creditor.

An order was made on December 3, 1934, by J. A. McEvoy, J., directing the trial of an issue before the Registrar in Bankruptcy between one Jolly as plaintiff, and the trustee of the property of the debtor company and H. Lunenfeld & Sons, Limited as defendants to determine whether or not the defendant company was entitled to rank as a creditor of the estate of

Steel Service Ltd., Re, 1935 CarswellOnt 79

1935 CarswellOnt 79, 16 C.B.R. 231

the debtor company for the amount of its claim as filed, or for any other amount, and whether the defendant company was a shareholder in the debtor company to the extent of \$15,000. The plaintiff Jolly was a creditor of the debtor company and was one of its original directors. The plaintiff alleged that S. S. Lunenfeld entered into an agreement on behalf of the defendant company to subscribe for shares in the debtor company to the extent of \$15,000. Substantial sums of money were advanced to the debtor company from time to time by the defendant company. These sums were shown in the debtor company's books as loans from the defendant company. The defendant company signed no agreement to purchase shares in the debtor company, received no notice of allotment of shares and no dividends. There was no record in the debtor company's minute books of any allotment of shares to the defendant company.

Held, after reviewing the facts, that the plaintiff had not satisfied the onus upon him of showing that the defendant company was liable as a shareholder of the debtor company. There was no agreement entered into by the defendant company to subscribe for shares in the debtor company, and the defendant company was not a shareholder in the debtor company for any amount.

Held, further, that the defendant company was entitled to rank as a creditor of the estate of the debtor company for the amount of its claim as filed.

The issue was determined accordingly.

Cook, Esq. (Registrar):

1 This is an issue directed to be tried before me by order of J. A. McEvoy, J., dated December 3, 1934, in which one George Jolly is plaintiff and E. J. Howson, trustee of the property of the debtor company, and H. Lunenfeld & Sons Limited are joined as defendants. No counsel appeared at the hearing on behalf of the defendant trustee.

2 The question directed to be tried by me in the said issue is whether or not H. Lunenfeld & Sons Limited, the defendant company, is entitled to rank as a creditor of the estate of the debtor company for the amount of its claim filed with the defendant trustee, or for any other, and, if any, what other amount, and if the said company is a shareholder in the debtor company to the extent of \$15,000.

3 At the trial of the issue I heard oral evidence on behalf of the plaintiff and of the defendant company.

4 George Jolly, the plaintiff, stated in evidence that he is a creditor of the debtor company and was one of the original directors; that Samuel S. Lunenfeld, president of the defendant company, agreed on behalf of Lunenfeld & Sons Limited, the defendant company, that \$15,000 cash was to be put into the new firm (the debtor company) and stock held by the defendant company; that the plaintiff, and one Arthur Jacobs, who were interested in the incorporation of the debtor company, were not to put in capital and that eighty per cent. of the stock was to be divided between the said Arthur Jacobs and the defendant company; that twenty per cent. of the stock of the debtor company was to be held for the plaintiff and paid for out of profits; that the debtor company was incorporated about December, 1930, and that the plaintiff continued in the employ of the debtor company till August, 1932, when he was dismissed; that nothing was said about a change in the capital of the debtor company while he was employed by it; that his first intimation that the \$15,000 was treated as a loan was at the trial of an action brought by him against the debtor company and that all the books of the debtor company were kept in Galt by the defendant company.

5 In cross-examination the plaintiff stated that the arrangement was made by Samuel S. Lunenfeld with Jacobs and himself; that the arrangement was verbal and there was no written agreement; that a meeting was held in Galt at the solicitor's office; that according to the agreement Jacobs was to give Samuel S. Lunenfeld a note for half of the stock, namely, \$7,500.

6 The plaintiff admitted his signature to a certain agreement marked as Exhibit 3 and remembered signing it in the solicitor's office. He also stated in cross-examination that he did not know whether the debtor company made an allotment of stock to the defendant company or whether an application for \$15,000 of stock was received from the defendant company;

Steel Service Ltd., Re, 1935 CarswellOnt 79

1935 CarswellOnt 79, 16 C.B.R. 231

that he never saw any shares that were issued to the defendant company; that he does not know whether Samuel S. Lunenfeld presented a proxy at any meeting of the debtor company and did not hear of the defendant company getting any dividend; that he did no work as director of the debtor company and saw no annual statement; that he did not know that \$15,000 was shown on the books of the debtor company as a loan until the trial of his action against the debtor company for wrongful dismissal; that from December, 1930, to August, 1932, while he was with the debtor company, the defendant company advanced all moneys for merchandise that came in to the debtor company and that he never saw a record of any shares being issued to anyone; that he did not know of any dividends having been paid to anyone; that he was never at any meeting of directors or shareholders, except the first meeting held for the purposes of incorporation.

7 Arthur Jacobs, a shareholder and director of the debtor company, giving evidence on behalf of the plaintiff, stated that in July or August, 1930, Samuel S. Lunenfeld spoke to him about opening a business in Toronto; that Samuel S. Lunenfeld said that he would put up one-half of \$15,000 for Jacobs and take Jacobs' note for \$7,500 and hold the shares as collateral; that the defendant company would put up the money and the stock would be issued to them; that the plaintiff would receive twenty per cent. non-voting stock to be paid for out of the profits; that Samuel S. Lunenfeld did not ask for the note and so far as Jacobs knew, the stock was not issued; Jacobs corroborated the evidence of Jolly that there was no subscription in writing from the defendant company; that he did not know of any allotment of stock; that he never signed a note for \$7,500; that the debtor company received more than \$15,000 from the defendant company; that Samuel S. Lunenfeld presented an auditor's statement at the end of the year and a profit and loss statement at the end of each month after plaintiff was dismissed; that he discussed the statements with Samuel S. Lunenfeld and that it was shown in the statements that the defendant company was advancing money and Jacobs did not question the statements; that he received auditor's statements for the years 1932 and 1933 but did not discuss the question of the loan with anyone; that Samuel S. Lunenfeld and himself changed solicitors about May, 1931, and a new set of minutes was drawn up (Ex. 2); that his recollection is that these minutes were drawn up a short time before the trial of the plaintiff's action.

8 Counsel for the plaintiff also submitted as evidence the Statement or Return of Affairs of the debtor company as of December 31, 1930, and the Return of Allotment, dated January 28, 1931, on file in the office of the Provincial Secretary (Ex. 6).

9 Counsel for defendant company submitted that these documents (Ex. 6), were not admissible in evidence as against the defendant company. They were admitted subject to objection. The former document is verified by the affidavit of Samuel S. Lunenfeld President, and N. G. Liesemer, Secretary, and contains, *inter alia*, the following particulars:

- The number of shares issued and allotted, and the amount paid thereon: 155 — \$15,500.

10 The Return of Allotment is signed Steel Service Limited, by N. G. Liesemer, Secretary, and contains the following information:

Date of Allotment 1931	Name	Address	No. of Common shares allotted	Amount paid on each share.
Jan. 21,	H. Lunenfeld & Son Ltd.,	Galt, Ont.	150	\$15,000.00

11 W. T. Brickenden, a witness called by the defendant company, who had active charge of the administration of the estate of the debtor company on behalf of the trustee, stated in evidence that he had gone over the books of the debtor company and that there was no evidence in the books of any allotment of shares to the defendant company; that there was no evidence of the defendant company paying for stock but that loan account No. 35 in the debtor company's ledger (Ex. 10)

Steel Service Ltd., Re, 1935 CarswellOnt 79

1935 CarswellOnt 79, 16 C.B.R. 231

showed that the defendant company advanced money to the debtor company; that the said ledger shows \$22,000 advanced by the defendant company up to March 26, 1931, and \$29,500 up to June 24, 1931; that the said ledger shows \$15,000 as advanced up to January 27, 1931, made up as follows: December 30, 1930, \$5,000; January 5, 1931, \$2,500; January 14, \$2,000; January 15, \$1,500; January 27, \$2,500; and on January 28, \$1,500; that the advances made by the defendant company increased and on March 7, 1933, stood at the sum of \$23,620.83; that at no time was there a straight advance of \$15,000; that there is no record in the stock certificate books (Exhibits 8 and 9), to indicate the issue of any stock to the defendant company but that the books were under the control of the defendant company up to the time of bankruptcy.

12 It may be noted that the trustee is a member of the firm which acted as auditors of the debtor company.

13 Samuel S. Lunenfeld, the president of the defendant company, stated that he met the plaintiff and Jacobs about October or November, 1930, and that they discussed the incorporation of a new company; that the plaintiff and Jacobs said that \$15,000 capital would be ample and that Jacobs said he could not furnish any money; Samuel S. Lunenfeld said that he thought he could get the money from the bank and told Jacobs that he would try to get \$15,000 from the bank to subscribe for \$15,000 worth of stock and would thereupon give Jacobs \$7,500 in stock and that in return for the \$7,500 in stock Jacobs was to give him a note for this amount; that they went to a solicitor in Galt and Exhibit 3 was drawn up and signed and that draft agreements (Ex. 4) were drawn by the solicitor at the same time as Exhibit 3, but were not signed; that Jolly and Jacobs were present with him at the solicitor's office; that the defendant company had nothing to do with the matter and that Samuel S. Lunenfeld alone was concerned; that the defendant company at no time authorized him, Samuel S. Lunenfeld, to enter into a contract to purchase shares in the debtor company; that he went to the bank and the manager would not give the loan he required; that he assured Jacobs he would carry the company and would get money from the defendant company as shown in ledger account No. 35 (Ex. 10); that the defendant company never signed an agreement to purchase stock, received no notice of allotment and received no dividends; that his intention was to take 150 shares of which Jacobs was to receive half in return for the note; this arrangement he says was conditional upon his obtaining the loan of the money from the bank as he did not have it available himself; that the returns to the Government (Ex. 6) were made by the solicitor and that he relied on him and when he found out from the bank that he could not borrow the money he advised Jacobs; that the defendant company is a one man company and Samuel S. Lunenfeld is the owner. He stated there was no by-law of the debtor company authorizing the borrowing of money from the defendant company.

14 No objection was made by counsel for the plaintiff to the admission in evidence of Exhibits 4 and 5, three drafts of agreements unsigned. I am attaching no weight to the information therein contained as in my opinion they cannot properly be accepted as evidence, in the circumstances, to the prejudice of the plaintiff's case.

15 The onus of proof rests upon the plaintiff to show that the defendant company is liable as a shareholder of the debtor company.

16 Counsel for the plaintiff alleges that the defendant company entered into an agreement to take shares of the debtor company. It is admitted by the plaintiff, and by Jolly, who gave evidence for him, that the alleged agreement was not in writing. The ledger and cash book of the debtor company show the various amounts making up the \$15,000 in question, as advanced as loans to the debtor company by the defendant company. The auditor's state ments (Ex. 12) corroborate this. There is no record in the minute books of the debtor company (Exs. 1 and 2) of any allotment of shares to the defendant company, and there is no evidence of any notice of allotment given to the defendant company. There is no record in the stock certificate books (Exs. 8 and 9) of any shares having been issued to the defendant company. An agreement, dated December 22, 1930, (Ex. 3) between Samuel S. Lunenfeld, A. H. Jacobs and the plaintiff, and signed by all three parties, provides for the remuneration of the plaintiff and that he is to use his share of profits for the purchase of shares in the debtor company up to twenty per cent. of the issued capital stock. The said agreement also provides in paragraph (4) that Samuel S. Lunenfeld and A. H. Jacobs "are to own and control an even number of shares at all times in the company and in no case can either of said parties own or control more than forty per cent. of the issued capital stock." There is no reference in the said agreement (Ex. 3) to any shares held by the defendant company.

17 Counsel for plaintiff attaches considerable importance to the Statement or Return of Affairs as of December 31, 1930, and the Return of Allotment dated January 28, 1931, on file in the office of the Secretary and Registrar of the Province of Ontario (Ex. 6).

Steel Service Ltd., Re, 1935 CarswellOnt 79

1935 CarswellOnt 79, 16 C.B.R. 231

18 It appears from the evidence that Samuel S. Lunenfeld and N. G. Liesemer were president and secretary respectively of the defendant company at the time these returns were made and it is submitted by counsel for the plaintiff that their knowledge of the information contained in these returns should be imputed to the defendant company.

19 In the case of *In re Hampshire Land Co.*, [1896] 2 Ch. 743, at p. 748, 65 L.J. Ch. 860, the following principle is laid down by Vaughan Williams, J.:

It is quite plain, when one has read that passage, that the Lord Justice negatives the general proposition that the knowledge of the common officer is always the knowledge of the two companies. But the moment you have done that you have to ask yourself this: Where is the line to be drawn, or what is the test to be applied in order to say whether or not in each case the knowledge of the common officer is the knowledge of each company employing him? It seems to me that, broadly, the Lord Justices do draw the line thus, that the knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice.

20 See also *In re David Payne & Co.*, [1904] 2 Ch. 608, 73 L.J. Ch. 849; *In re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507, 71 L.J. Ch. 321.

21 In my opinion, applying the principle of law set out in the above cases, the knowledge of the information contained in the Statement or Return of Affairs and Return of Allotment cannot be imputed to the defendant company.

22 It also appears from the evidence of J. D. Law, of the Provincial Secretary's office, that the return made by the debtor company for December, 1931, sets out the same officers as in the returns (Ex. 6) but shows only five shares as allotted and issued and five shares as fully paid.

23 The plaintiff and Jacobs both allege that Samuel S. Lunenfeld entered into an agreement on behalf of the defendant company to subscribe for stock in the debtor company to the extent of \$15,000. Samuel S. Lunenfeld alleges that the agreement in contemplation was that he personally should subscribe for shares if he could arrange to borrow the \$15,000 from the bank, which he says he was unable to do. All are agreed that part of the agreement contemplated was that Jacobs should give a note to Samuel S. Lunenfeld for \$7,500. The fact that this note was never given by Jacobs is an indication that the agreement originally contemplated was abandoned.

24 There is no evidence to show exactly when the alleged agreement was made. If it is alleged that it was made before the incorporation of the debtor company there would be no company in existence to accept the subscriptions for shares and so to render the company liable. If it is alleged that an agreement was made after the incorporation of the company it is difficult to show, without evidence in writing, that Samuel S. Lunenfeld was authorized by the defendant company to subscribe for shares in another company, a transaction which would not be in the ordinary course of business of the defendant company.

25 The plaintiff specifically denies that he had any such authority. The evidence shows that \$15,000 was advanced in one lump sum and that the defendant company continued to advance substantial sums of money in addition.

26 Jacobs, a director of the defendant company, admits that he saw the financial statements from time to time and knew that these payments were shown as a loan from the defendant company. The auditor's statement for the period ending March 31, 1932, shows \$17,229.46 loaned; that for the period ending March 31, 1933, there was a loan outstanding due the defendant company of \$7,788.48. Jacobs never questioned the accuracy of these statements; he also never suggested to Samuel S. Lunenfeld that he should give a note for \$7,500.

27 After a careful consideration of the evidence and the argument of counsel, I have come to the conclusion that there was no agreement entered into by the defendant company to subscribe for shares in the debtor company and that the defendant company is not a shareholder in the debtor company for any amount. It therefore follows that the defendant company is entitled to rank as a creditor of the estate of the debtor company for the amount of its claim as filed, with costs.

Steel Service Ltd., Re, 1935 CarswellOnt 79

1935 CarswellOnt 79, 16 C.B.R. 231

TAB 10

Sumner v. PCL Constructors Inc., 2011 ABCA 326, 2011 CarswellAlta 1934

2011 ABCA 326, 2011 CarswellAlta 1934, [2012] 1 W.W.R. 649, [2012] A.W.L.D. 194...

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Lethbridge Industries Ltd. v. Alberta \(Human Rights Commission\)](#) | 2015 ABQB 760, 2015 CarswellAlta 2202, 261 A.C.W.S. (3d) 180, [2016] A.W.L.D. 282 | (Alta. Q.B., Dec 1, 2015)

2011 ABCA 326
Alberta Court of Appeal

Sumner v. PCL Constructors Inc.

2011 CarswellAlta 1934, 2011 ABCA 326, [2012] 1 W.W.R. 649, [2012] A.W.L.D. 194, [2012] A.W.L.D. 196, [2012] A.W.L.D. 197, [2012] A.W.L.D. 198, [2012] A.W.L.D. 238, [2012] A.W.L.D. 239, [2012] A.W.L.D. 240, [2012] A.W.L.D. 241, [2012] A.W.L.D. 242, 210 A.C.W.S. (3d) 117, 515 A.R. 231, 51 Alta. L.R. (5th) 266, 532 W.A.C. 231, 93 B.L.R. (4th) 138, 95 C.C.E.L. (3d) 255

Melvin Sumner, Respondent (Plaintiff) and PCL Constructors Inc. and PCL Employees Holdings Ltd., Appellants (Defendants)

Jack Watson, Frans Slatter, Myra Bielby J.J.A.

Heard: November 1, 2011

Judgment: November 22, 2011

Docket: Edmonton Appeal 1103-0032-AC

Proceedings: reversing in part *Sumner v. PCL Constructors Inc.* (2010), 2010 CarswellAlta 1637, 2010 ABQB 536, 76 B.L.R. (4th) 65, 32 Alta. L.R. (5th) 239, [2011] 2 W.W.R. 313, 2010 C.L.L.C. 210-046, 87 C.C.E.L. (3d) 1 (Alta. Q.B.); reversed *Sumner v. PCL Constructors Inc.* (2011), 2011 CarswellAlta 20, 2011 ABQB 20, 39 Alta. L.R. (5th) 249, 79 B.L.R. (4th) 300, [2011] 7 W.W.R. 184, [2011] A.J. No. 23 (Alta. Q.B.)

Counsel: F.S. Kozak, Q.C., J.D. Taitinger, for Appellants
D.G. Groh, Q.C., for Respondent

Subject: Employment; Public; Corporate and Commercial

Related Abridgment Classifications

Business associations

III Specific matters of corporate organization

III.2 Shares

III.2.a Share capital

III.2.a.iv Repurchase or redemption (decrease)

III.2.a.iv.C Miscellaneous

Business associations

III Specific matters of corporate organization

III.3 Shareholders

III.3.e Shareholders' remedies

III.3.e.ii Relief from oppression

III.3.e.ii.A General principles

Business associations

III Specific matters of corporate organization

III.3 Shareholders

Sumner v. PCL Constructors Inc., 2011 ABCA 326, 2011 CarswellAlta 1934

2011 ABCA 326, 2011 CarswellAlta 1934, [2012] 1 W.W.R. 649, [2012] A.W.L.D. 194...

III.3.e Shareholders' remedies

III.3.e.vi Miscellaneous

Business associations

III Specific matters of corporate organization

III.3 Shareholders

III.3.f Shareholder agreements

III.3.f.ii Breach

III.3.f.ii.B Miscellaneous

Labour and employment law

II Employment law

II.6 Termination and dismissal

II.6.c Remedies

II.6.c.i Damages

II.6.c.i.C Calculation of quantum

Labour and employment law

II Employment law

II.6 Termination and dismissal

II.6.c Remedies

II.6.c.i Damages

II.6.c.i.J Mitigation expenses

Labour and employment law

II Employment law

II.6 Termination and dismissal

II.6.c Remedies

II.6.c.i Damages

II.6.c.i.S Miscellaneous

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Miscellaneous
Lost income during notice period — Plaintiff employee was employed with defendant P Inc. for 28.5 years as superintendent and later, as general superintendent — Employee had been on disability at various times — P Inc. terminated employee's employment without cause at age of 63 — P Inc. paid employee his salary and benefits for three-month period — Employee brought successful claim for damages arising from wrongful dismissal — Trial judge awarded 22-month notice period — Employee was entitled to \$168,388.73 pay in lieu of notice — Trial judge calculated employee's lost income during notice period to determine appropriate amount of pay in lieu of notice — Employee's lost income came from number of sources, including base salary, benefits package, and overtime — Twenty per cent project uplift was included as employee would have been entitled to such supplement if still employed by P Inc. — Employee was entitled to be compensated for overtime he would have worked had P Inc. given him reasonable notice, on basis of average of last three years — P Inc. appealed — Appeal allowed in part — Appeal was dismissed as to calculation of overtime — Calculation of overtime was question of fact — Historic average of what employee earned in overtime when employed was 3.5 years out of date — Absent evidence of what overtime general superintendent would have worked during 22 month period, trial judge made no palpable and overriding error in measuring damages for lost overtime.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Mitigation expenses

Plaintiff employee was employed with defendant P Inc. for 28.5 years as superintendent and later, as general superintendent — P Inc. terminated employee's employment without cause at age of 63 — Employee incorporated H Ltd. soon after termination — Employee brought successful claim for damages arising from wrongful dismissal — Trial judge awarded employee \$168,388.73 pay in lieu of 22-month notice period — Incorporation of H Ltd. was reasonable given employee's

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trade, his termination and his age — Employee was entitled to deduct reasonable expenses from income generated by H Ltd. as mitigation expenses — Employee's wife's salary from H Ltd. was reasonable expense as her services provided value — Numerous other expenses were proper deductions, including repairs, meals, accommodation, utilities, rent, office supplies, bank charges, insurance, licenses, professional fees, advertising, WCB premiums, consultations, freight, and income taxes — P Inc. appealed — Appeal allowed in part — Appeal allowed as to deduction of income tax as expense in earning mitigation income — Amount of \$16,834.33 was deducted from damage award to represent mitigation income not recognized in trial judgment — When calculating damages, general rule was to treat income of corporation as income of employee — Any tax payable by corporation was likely tax that would otherwise have been payable by employee — Both damage award and mitigation amount should be calculated on pre-tax basis.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Calculation of quantum

Plaintiff employee was employed with defendant P Inc. for 28.5 years as superintendent and later, as general superintendent — P Inc. terminated employee's employment without cause at age of 63 — P Inc. paid employee his salary and benefits for three-month period — Employee incorporated H Ltd. soon after termination — Employee brought successful claim for damages arising from wrongful dismissal — Trial judge awarded employee \$168,388.73 pay in lieu of 22-month notice period — Employee's lost income from P Inc. totalled \$170,742.77 in first 12 months and \$170,817.40 in next 10 months of notice period — Lost income was reduced by \$21,851.22 that P Inc. paid employee after termination, income earned during notice period, and expenses claimed through H Ltd. that were disallowed — H Ltd. paid employee salary totalling \$46,578.12 in first 12 months and \$73,354 in next 10 months of notice period — Lost income was reduced by total of \$86,069.34 in first 12 months and \$87,102.10 in next 10 months of notice period — Employee's net income loss during notice period was \$84,673.43 in first 12 months and \$83,715.30 in next 10 months — P Inc. appealed — Appeal allowed in part — Appeal allowed to correct quantum of damages — Neither party could reconstruct mathematical calculations in trial judgment — Parties agreed base amount of damages was \$80,657.25 — Amount of \$16,834.33, representing income tax incorrectly deducted from mitigation income, was deducted from base amount of damages, leaving \$63,822.92 as net award.

Business associations --- Specific matters of corporate organization — Shares — Share capital — Repurchase or redemption (decrease) — Miscellaneous

Unanimous shareholder agreement — Plaintiff employee was employed with defendant P Inc. for 28.5 years — Employee-owned defendant P Ltd. was ultimate shareholder of P Inc. — Employee purchased shares of P Ltd. during his employment — Unanimous shareholder agreement ("USA") provided procedure to force repurchase of shares issued to former employees — While employee was on disability leave, P Ltd. purchased back all of employee's shares — Employee brought successful claim that P Ltd. was not entitled to require employee to sell his shares in P Ltd. — Trial judge found that P Ltd. breached terms of USA — P Ltd.'s repurchase of employee's shares was unauthorized, premature and done in procedurally unfair manner — USA was not contract — USA was constitutional document of corporation — In subsequently issued reasons, trial judge awarded employee \$1,493,100 in damages for breach of USA pursuant to s. 248 of Business Corporations Act — P Ltd. appealed — Appeal allowed in part — Appeal allowed as to share repurchase — Damage award made under s. 248 of Act was set aside — Trial judge erred in law by finding that USA was not contract — It was error for trial judge to find remedies in oppressive shareholder provisions of Act — Trial judge erred in treating employee as if he was entitled to both shares and purchase price.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — General principles

Plaintiff employee was employed with defendant P Inc. for 28.5 years Plaintiff employee was employed with defendant P Inc. for 28.5 years — Defendant P Ltd. was ultimate shareholder of P Inc. — P Ltd. was employee-owned — Employee purchased shares of P Ltd. during his employment — Unanimous shareholder agreement ("USA") provided procedure to force repurchase of shares issued to former employees — While employee was on disability leave, P Ltd. purchased back all of employee's shares — Employee brought successful claim that P Ltd. was not entitled to require employee to sell his shares in P Ltd. — Trial judge held that P Ltd. breached provisions of USA — Trial judge held that employee could not rely on oppression remedy pursuant to s. 242 of Business Corporations Act — Employee did not specifically plead oppression, unfairness or prejudicial conduct — In subsequently issued reasons, trial judge allowed post-trial amendment to plead relief under s. 248 of Business Corporations Act, and awarded employee \$1,493,100 in damages for breach of USA — P Ltd. appealed — Appeal allowed in part — Appeal allowed as to share repurchase — Damage award made under s. 248 of Act was set aside — Damage award was excessive — Trial judge erred in law by finding that USA was not contract — It was error for trial judge to find remedies in oppressive shareholder provisions of Act, especially when such relief had not been

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pleaded — It was questionable whether s. 248 of Act was intended to provide remedy in damages.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Miscellaneous

Compliance order — Plaintiff employee was employed with defendant P Inc. for 28.5 years — Employee-owned defendant P Ltd. was ultimate shareholder of P Inc. — Employee purchased shares of P Ltd. during his employment — Unanimous shareholder agreement ("USA") provided procedure to force repurchase of shares issued to former employees — While employee was on disability leave, P Ltd. purchased back all of employee's shares — Employee brought successful claim that P Ltd. was not entitled to require employee to sell his shares in P Ltd. — Trial judge held that P Ltd. breached provisions of USA — In subsequently issued reasons, trial judge allowed post-trial amendment to plead relief under s. 248 of Business Corporations Act, and awarded employee \$1,493,100 in damages for breach of USA — Trial judge held that employee's rights were clearly affected as he sold his shares where requirement to sell shares was not in compliance with provisions of USA — P Ltd. appealed — Appeal allowed in part — Appeal allowed as to share repurchase — Damage award made under s. 248 of Act was set aside — Trial judge erred in law by finding that USA was not contract — Trial judge erred in using oppressive shareholder provisions for remedy, especially when such relief had not been pleaded — It was questionable whether s. 248 of Act was intended to provide remedy in damages — Award of \$1.4 million in damages was disproportionate to breach as "any further order court thinks fit" because directors met their obligations in wrong order.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholder agreements — Breach — Miscellaneous

Unanimous shareholder agreement — Plaintiff employee was employed with defendant P Inc. for 28.5 years — Employee-owned defendant P Ltd. was ultimate shareholder of P Inc. — Employee purchased shares of P Ltd. during his employment — Unanimous shareholder agreement ("USA") provided procedure to force repurchase of shares issued to former employees — While employee was on disability leave, P Ltd. purchased back all of employee's shares — Employee brought successful claim that P Ltd. was not entitled to require employee to sell his shares in P Ltd. — Trial judge held that P Ltd. breached terms of USA — P Ltd.'s repurchase of employee's shares was unauthorized, premature and done in procedurally unfair manner — P Ltd. made demand for repurchase before declaring employee to be withdrawing shareholder — P Ltd. did not notify employee he had right to challenge conclusion he was disabled — In subsequently issued reasons, trial judge awarded employee \$1,493,100 in damages for breach of USA pursuant to s. 248 of Business Corporations Act — Appeal allowed in part — Appeal allowed as to share repurchase — Damage award was set aside — Trial judge erred in law by finding that USA was not contract — There were several breaches of USA, but none entitled employee to any remedy — Employee was unable to demonstrate any damage he suffered as result of procedural deficiency — P Ltd. did not owe any fiduciary duties as relationship was contractual — Employee initially asserted he was disabled so any challenge to that finding would have failed.

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Bell v. Lever Brothers Ltd. (1931), [1931] All E.R. Rep. 1, [1932] A.C. 161 (U.K. H.L.) — referred to

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Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

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Leaf v. International Galleries (1950), [1950] 2 K.B. 86, [1950] 1 All E.R. 693 (Eng. C.A.) — referred to

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P. (M.N.) (Next Friend of) v. Whitecourt General Hospital (2006), [2006] 12 W.W.R. 397, 397 A.R. 333, 384 W.A.C. 333, 2006 ABCA 245, 2006 CarswellAlta 1071, 64 Alta. L.R. (4th) 1 (Alta. C.A.) — referred to

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Statutes considered:

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Generally — referred to

s. 19 — considered

s. 19(a) — considered

s. 242 — referred to

s. 248 — considered

Corporations Act, R.S.M. 1987, c. C225
Generally — referred to

Labour Relations Code, R.S.A. 2000, c. L-1
Pt. 2, Div. 21 — referred to

s. 1(f) “collective agreement” — referred to

APPEAL by defendant employer from judgment reported at *Sumner v. PCL Constructors Inc.* (2010), 2010 CarswellAlta 1637, 2010 ABQB 536, 76 B.L.R. (4th) 65, 32 Alta. L.R. (5th) 239, [2011] 2 W.W.R. 313, 2010 C.L.L.C. 210-046, 87

C.C.E.L. (3d) 1 (Alta. Q.B.), allowing plaintiff employee's action for damages for wrongful dismissal and breach of unanimous shareholder agreement.

Per curiam:

1 The appellants challenge the trial judge's calculation of the damages due in a wrongful dismissal action. They also challenge his interpretation of a unanimous shareholders agreement, and the remedies he awarded with respect to it.

Facts

2 The appellant PCL Employees Holdings Ltd. owns the other appellant, PCL Constructors Inc., and a number of other companies in the construction business. PCL Employees Holdings Ltd. is itself owned by a number of the employees of the PCL group of companies. The rights of the shareholders of PCL Employees Holdings Ltd. are covered by a unanimous shareholders agreement. Among other things, the unanimous shareholders agreement includes provisions that enable PCL Employees Holdings Ltd. to buy back the shares held by individuals who cease to be employed by the PCL group of companies. In this way the PCL group continues to be owned at all times by its active employees.

3 The respondent commenced employment with one of the PCL companies in 1977. By the time his employment was terminated in July of 2005, he had worked for PCL for 28.5 years. During his employment he had purchased some shares of PCL Employees Holdings, and became a party to the unanimous shareholders agreement.

4 In November of 2001 the respondent went on sick leave due to a cardiac condition and other issues. On November 14, 2001 his doctor wrote a letter stating that he should not return to work for at least six months. He began receiving disability payments in January of 2002. His doctors did not provide him with medical clearance to return to work until July 5, 2005, after he had been off work for some three and half years. It was at that time that his employment was terminated.

5 On May 16, 2002, after the respondent had been away from work for six months, the appellant PCL Employees Holdings sent him a letter triggering the repurchase of his shares:

Enclosed please find a Notice to Sell issued pursuant to Section VI of the Unanimous Shareholder Agreement. Pursuant to the Agreement, you are required to deliver to the Corporation your share certificates endorsed in blank on the closing date. Please execute and return to us the enclosed transfer agreement and ensure that the share certificates are delivered to us prior to the closing date.

The enclosed Notice to Sell read in part:

Pursuant to Section VI of the Unanimous Shareholder Agreement, PCL Employees Holdings Ltd. (the "Corporation") hereby notifies you that it is exercising its option to purchase your shares in the Corporation.

Approximately one month later, on June 12, 2002, the directors of PCL Employees Holdings passed a resolution declaring that the respondent was a "Withdrawing Shareholder" under the unanimous shareholders agreement.

6 At the time, the respondent was involved in divorce proceedings. He took the share repurchase letter to his lawyer, who obtained and reviewed a copy of the unanimous shareholders agreement. The respondent's counsel had been in touch with counsel representing PCL Employees Holdings for the purposes of getting information about the shares. While other information about the shares had been requested, there was never any request to provide a copy of the directors' resolution authorizing the repurchase of the shares. Counsel subsequently wrote to the respondent's wife's lawyer advising that the repurchase of the shares had been triggered by PCL Employees Holdings. That letter stated in part: "It is my intention to review the Unanimous Shareholders' Agreement; however, a cursory review indicates that PCL has the right to exercise its option to purchase Mr. Sumner's shares." The respondent subsequently signed and returned the transfer agreement and the share certificates endorsed as directed, and his shares were purchased back effective July 16, 2002.

7 The respondent received medical clearance to return to work on July 5, 2005, some three years later. When the respondent was subsequently dismissed, he incorporated a private consulting company. In mitigation of his damages, he was able to obtain a number of contracts supervising construction projects on behalf of the owners of the projects. It was agreed that the income he earned, less appropriate expenses, should be deducted from the damage award to which he was entitled.

Key Provisions of the Unanimous Shareholders Agreement

8 The Unanimous Shareholders Agreement provides for a number of instances in which PCL Employees Holdings can purchase back its own shares, including a right to purchase them back from "Withdrawing Shareholders":

6.01.01 For the purposes of this Section VI:

(a) "Withdrawing Shareholder" means and includes any of the following:

.....
(iii) An Employed Shareholder who, or an Employee's Corporation whose Employed Representative, is as a result of sickness, accident or other mental or physical disability, unable, in the determination of the Directors, to substantially perform his regular duties as an Employee, and such inability has continued for a continuous period of at least six (6) months or for periods aggregating nine (9) months during any twelve (12) month period;

.....
(b) "Special Withdrawing Shareholder" means and includes any of the following:

- (i) An Employed Shareholder who dies while an Employee;
- (ii) An Employee's Corporation whose Employed Representative dies while an Employee; or
- (iii) A Shareholder described in sub-paragraph 6.01.01(a)(iii);

and includes the executor, administrator, guardian, committee, liquidator, trustee or other authorized representative of such Shareholder.

...

6.01.02 If a Shareholder disputes the existence of a disability described in subparagraph 6.01.01(a)(iii), such Shareholder shall submit, or, as the case may be, cause its employed Representative to submit, to an examination by a medical doctor (licensed in the jurisdiction in which the Shareholder resides) selected by the Directors, whose certificate as to the existence or non-existence of such disability shall be conclusive and binding upon both PCLEH and the Shareholder insofar as circumstances exist at the time of examination. The cost of such examination shall be borne by PCLEH.

...

6.03.01 (a) PCLEH may serve upon a Withdrawing Shareholder a notice in writing (the "Notice to Sell") setting forth the Shares to be purchased (the "Divested Shares"), the purchase price for the Divested Shares and the date (the "Closing Date") that such Shares are to be delivered to PCLEH, being not less than sixty (60) days and not more than one hundred and eighty (180) days from the date of service of the Notice to Sell. Subject to sub-paragraph 6.03.01(b), PCLEH may serve a Notice to Sell upon a Withdrawing Shareholder at any time. Upon service of the Notice to Sell the Notified Shareholder shall be obliged to sell and, subject to paragraph 6.04.03, PCLEH shall be bound to purchase the Divested Shares.

(b) PCLEH shall serve a Notice to Sell regarding all the Common Shares of a Special Withdrawing Shareholder within ninety (90) days following the date that such Special Withdrawing Shareholder, or its Employed

Representative as the case may be, died or, as the case may be, was determined by the Directors to be disabled.

It was under these provisions that PCL Employees Holdings asserted a right to buy the respondent's shares.

9 Since the respondent had been unable to work by reason of disability for six months, he qualified as a "Special Withdrawing Shareholder". The difference between such a "Special" withdrawing shareholder, and other types of withdrawing shareholders, is that PCL Employees Holdings must purchase back the shares of a "special" withdrawing shareholder, but has the option to purchase or not purchase the shares of an ordinary withdrawing shareholder. Accordingly, when PCL Employees Holdings sent the letter to the respondent requiring that he sell his shares, it was attempting to discharge a duty it had under the unanimous shareholders agreement.

10 As the trial judge correctly observed, Article VI of the unanimous shareholders agreement contemplates a particular order of proceeding. First, the employee must have been unable to work for six continuous months, to meet the definition of "disabled". Then the Directors must "determine" that he qualifies as a Special Withdrawing Shareholder. Within 90 days of that determination, PCL Employees Holdings "shall" serve a Notice to Sell on the employee. It was conceded that the proper sequence was not followed in this case.

The Decision at Trial

11 The trial proceeded as a standard wrongful dismissal and shareholder dispute action. After argument, and after the decision had been reserved, the trial judge wrote to counsel asking for further argument on a number of issues:

(a) Whether PCL Employees Holdings had an obligation to advise the respondent of his right to challenge the suggestion that he was disabled under Article 6.01.01(a)(iii), whether that included an obligation to advise him of his right to an independent medical examination under Article 6.01.02, and if so when those obligations arose.

(b) What are "the legal consequences of a breach of the USA?" The trial judge referred to some cases in his letter. He subsequently held that those cases stood for the proposition that a unanimous shareholders agreement is not a contract, an issue that he never directly put to the parties.

(c) Was the respondent entitled to any relief under the shareholder oppression sections of the *Business Corporations Act*, RSA 2000, c. B-9 as a result of breaches of the unanimous shareholders agreement?

None of these issues had been pleaded or raised by the parties.

12 It was agreed at trial that the respondent was not terminated for cause. The trial judge concluded that he was entitled to damages for 22-months pay and benefits in lieu of proper notice: *Sumner v. PCL Constructors Inc.*, 2010 ABQB 536, 32 Alta. L.R. (5th) 239, [2011] 2 W.W.R. 313 (Alta. Q.B.). He calculated the amount of damages the respondent was entitled to. The appellants only challenge three aspects of the damage award: the calculation of overtime pay, the deductibility of income tax, and the mathematical calculations of the trial judge leading up to the eventual damage award.

13 The trial judge concluded that the respondent was entitled to compensation for any overtime he would likely have worked during the 22-month notice period. The trial judge accepted that the usual method for calculating overtime during a notice period was to use an average of the overtime the employee had worked prior to termination. However, in this case the trial judge elected to use as a base the actual hours of overtime the respondent worked after he left PCL, and started his own consulting company. The trial judge concluded at para. 80 that the overtime he earned after his termination "occurred in a context that is equivalent to what the plaintiff would have encountered had he continued to work with PCL".

14 The respondent earned his mitigation income in his private holding company. That company paid tax on that income. An issue arose as to whether the tax so paid was properly deducted from the mitigated earnings of the respondent. The trial judge held that the income tax was a proper deduction, relying on *PCL Construction Management Inc. v. Holmes* (1994), 26 Alta. L.R. (3d) 1, 157 A.R. 306 (Alta. C.A.).

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15 The trial judge summarized his calculation of the damages due to the respondent in a table in [2010 ABQB 536](#) (Alta. Q.B.) at para. 150 (on p. 42) of his reasons. The appellants and respondent all state that they are unable to reconstruct the calculations of the trial judge, and that the final quantum calculated is in error.

16 The trial judge went on to deal with the shareholder dispute. He concluded ([2010 ABQB 536](#) (Alta. Q.B.) at paras. 160, 203) that PCL Employees Holdings was not a party to the unanimous shareholders agreement, but he nevertheless found ([2010 ABQB 536](#) (Alta. Q.B.) at paras. 177, 228) that PCL Employees Holdings was in breach of the unanimous shareholders agreement. The specific instances of breach were set out at [2010 ABQB 536](#) (Alta. Q.B.), paras. 178-81:

- (a) failing to pass the required directors' resolution prior to triggering the right to repurchase the shares, and failing to advise the respondent of the defects in the procedures;
- (b) failing to serve the resolution on the respondent, when the resolution expressly required that service;
- (c) failing to notify the respondent that he had a right to challenge the conclusion that he was disabled, particularly by requesting an independent medical examination;
- (d) alternatively, if a medical report of January 4, 2002 was such an independent medical examination, failing to wait the required six months before attempting to repurchase the shares.

Significantly, there was no finding that the respondent was not in fact disabled for six months prior to the time that the Notice to Sell was served on him.

17 The trial judge also concluded in [2010 ABQB 536](#) (Alta. Q.B.) at paras. 184-200 that a unanimous shareholders agreement is not a contract, and at paras. 201-4, 228 that a breach of a unanimous shareholders agreement did not result in ordinary contractual remedies. As noted, this issue was raised by the trial judge, not the parties. He concluded at paras. 202, 204 that since the unanimous shareholders agreement did not contain any internal method of enforcing its terms, and since he assumed that common law contractual remedies were not available, the only resulting remedy must be statutory. He concluded that the respondent was only entitled to a remedy under the *Alberta Business Corporations Act*. Possible sources of a remedy might be s. 242, the oppression section, or s. 248:

Compliance or restraining order

248. If a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation contravenes this Act, the regulations, the articles or bylaws or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right the complainant or creditor has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the Court may so order and make any further order it thinks fit.

The trial judge concluded that the power to make "any further order it considers fit" gave the Court jurisdiction to make an award of damages under s. 248. He invited the respondent to apply to him for a remedy under s. 248.

18 In subsequently issued reasons, the trial judge allowed a post-trial amendment to plead relief under s. 248 of the *Business Corporations Act*, but denied an application to plead oppression under s. 242. He then awarded the respondent \$1,493,100 in damages for breach of the unanimous shareholders agreement: *Sumner v. PCL Constructors Inc.*, 2011 ABQB 20, 39 Alta. L.R. (5th) 249, [2011] 7 W.W.R. 184 (Alta. Q.B.).

19 The trial judge opined that s. 248 did not limit the court to relief directing compliance with the constating corporate documents, or with procedures required thereby, but could also support a remedy in damages. He rejected an argument that the intention of PCL Employees Holdings was clear, and that if the irregularity had been noticed the respondent's shares would still have been purchased a mere 46 days later. The trial judge held at [2011 ABQB 20](#) (Alta. Q.B.), paras. 53-4 that a timely repurchase was not the "only" possible scenario, and that a share purchase was not a "certainty".

20 The trial judge also found at [2011 ABQB 20](#) (Alta. Q.B.), para. 58 that the officers of PCL Employees Holdings were "quite well aware the Sumner share purchase was not conducted properly. Those persons then failed to disclose that fact to the plaintiff." The trial judge made general references to "oppression", and to the equitable doctrine of "clean hands". He

suggested that the directors owed fiduciary duties to the respondent, even though that was never pleaded. He found that the directors “were dishonest and misled a minority shareholder”, even though neither dishonesty nor misrepresentation had ever been pleaded.

21 The trial judge rejected the argument that there was any unfairness to PCL Employees Holdings or its other shareholders by awarding the respondent a remedy. He concluded that PCL Employees Holdings was in possession of shares that belonged to the respondent, and that the respondent was entitled to all the dividends on the shares up until the date he turned 64, when he would have had to sell back the shares.

Standard of Review

22 The standard of review for questions of law is correctness. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 25, [2002] 2 S.C.R. 235 (S.C.C.). Inferences drawn from the facts are also reviewed for palpable and overriding error. If the inference drawn by the trial judge is reasonable, an appellate court should not intervene just because other inferences could also have been reasonably drawn: *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 S.C.R. 401 (S.C.C.).

23 The standard of palpable and overriding error is highly deferential, but it does not mean that decisions are immune from review: *L. (H.) v. Canada (Attorney General)* at paras. 73, 75; *R. v. Regan*, 2002 SCC 12 at para. 118, [2002] 1 S.C.R. 297 (S.C.C.); *Wilde v. Archean Energy Ltd.*, 2007 ABCA 385 at para. 102, 82 Alta. L.R. (4th) 203, 422 A.R. 41 (Alta. C.A.). As was stated in *H.L.* at para. 75: “... appellate courts not only may — but must — set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of ‘primary’ facts, or facts proved by direct evidence.”

24 The interpretation of the *Business Corporations Act*, and the determination of the legal nature of a unanimous shareholders agreement, are questions of law reviewed for correctness.

25 Once the exact terms and nature of the contract, and the surrounding facts, have been established, the interpretation of the words of the contract is a matter of law. The interpretation and application of contract principles to a settled set of facts is also a question of law reviewed for correctness: *Spartacus Holdings Ltd. v. Building 400 Ltd.*, 2011 ABCA 18 at para. 7, 100 R.P.R. (4th) 1 (Alta. C.A.); *Diegel v. Diegel*, 2008 ABCA 389 at para. 20, 100 Alta. L.R. (4th) 1 (Alta. C.A.); *Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd.*, 2008 ABCA 177 at para. 9, (sub nom *Alberta Importers and Distributors (1993) Inc. v. Phoenix Marble Ltd.*) 88 Alta. L.R. (4th) 225, 432 A.R. 173 (Alta. C.A.); *Ferri v. Wawanese Mutual Insurance Co.*, 2005 ABCA 199 at para. 6, 46 Alta. L.R. (4th) 207, 371 A.R. 53 (Alta. C.A.); *McDonald Crawford v. Morrow*, 2004 ABCA 150 at paras. 5, 43, (sub nom *McDonald Crawford v. Morrow*) 348 A.R. 118 (Alta. C.A.).

26 It is generally inappropriate for a trial judge to decide a case on a basis not pleaded by the parties: *Poulos v. Caravelle Homes Ltd.* (1997), 49 Alta. L.R. (3d) 385 at para. 2, 196 A.R. 138 (Alta. C.A.); *P. (M.N.) (Next Friend of) v. Whitecourt General Hospital*, 2006 ABCA 245, 64 Alta. L.R. (4th) 1 at paras. 7-10, 397 A.R. 333 (Alta. C.A.); *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345 at para. 25, 96 Alta. L.R. (4th) 247, 440 A.R. 35 (Alta. C.A.); *Peter Pond Holdings Ltd. v. Shragge*, 2003 ABCA 290 at para. 1, 22 Alta. L.R. (4th) 41 (Alta. C.A.); *McDonald v. Fellows*, [1979] 6 W.W.R. 544 at p. 549, 17 A.R. 330 (Alta. C.A.); *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.), at 93; *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528 (Ont. C.A.) at p. 533-5; *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637 at p. 639, 18 D.L.R. (3d) 641 (Ont. C.A.).

Overtime

27 The parties agree that the respondent is entitled to an award for the amount of overtime he would likely have worked during the 22-month notice period, but disagree on how it should be calculated. After the respondent left PCL, he commenced work in the construction business through his own company. During the 22-month notice period, he worked a considerable amount of overtime. The trial judge measured and awarded damages based on the average amount of overtime he actually worked for his own company. The appellants argue that he should only be entitled to the average amount of overtime he had worked during his employment with PCL.

28 The trial judge agreed in 2010 ABQB 536 (Alta. Q.B.) at para. 73 that the usual basis for awarding overtime was to calculate the average of what the employee received in the years immediately preceding his dismissal. The trial judge noted, however, that there was a factor that undermined the relevance of this data. By the time the respondent was dismissed he had been off work for 3.5 years. The historical average based on the last time he worked overtime was 3.5 years out of date: 2010 ABQB 536 (Alta. Q.B.) at para. 79.

29 Further, there was a gap in the evidence. Neither party provided evidence of what overtime a PCL employee in an equivalent position to the respondent (a “general superintendent”) would likely have worked during the 22-month notice period, given the state of the economy, the amount of work available to PCL, and other relevant factors. Accordingly, while it is arguable that the amount of overtime chosen by the respondent to be performed for his own firm after leaving the appellants’ employ would be of limited relevance to determining what a person holding the appellant’s former position might have worked, the trial judge had to make the best of the evidential record as it was.

30 Considering the record before him, the trial judge decided that the amount of overtime the respondent actually worked during the notice period, through his consulting company, was the best estimate of his damages. The appellants challenge the trial judge’s conclusion that the “context” in which this overtime was worked was equivalent to the “context” of a large employer like PCL. This observation has merit, and it would have been open to the trial judge to discount the overtime figure if he had found that to be appropriate, but that was not mandatory.

31 The calculation of the overtime award is largely a question of fact. An appellate court should not interfere unless there is palpable and overriding error in the calculation. Absent evidence of what overtime a PCL general superintendent would have worked during the 22 month period, the trial judge made no palpable and overriding error in measuring damages for lost overtime, and no appellate interference is warranted in this respect.

Income Tax

32 The parties agree that the respondent has to give credit for the amount he was able to earn in mitigation of his damages. It is also agreed that he is entitled to deduct from his gross earnings any reasonable expenses he incurred in generating those earnings. One disputed expense is the income tax he paid in his holding company.

33 The appellants argue that all the calculations (the damage award, and the amounts to be deducted for mitigation) should be made on a “gross”, or pretax basis. Essentially, they argue that the fact that the respondent had chosen to work through a corporation should be disregarded, and all the income earned by the corporation should be treated as income of the respondent. Otherwise, they argue, the two sides of the calculation (damages and mitigation) are being made on an inconsistent basis.

34 The trial judge accepted the respondent’s argument that the income taxes paid by the corporation were a legitimate expense, relying on *Holmes v PCL Construction Management Inc.*:

36 We return to the question posed by McDermid J.A.. Was income concealed? What was the real loss? Would the amount be paid out in salary? Undoubtedly, Stretton paid income taxes on its income. While this was not an expense incurred for the purpose of earning income, the tax obligation was legitimately incurred by it because the revenue was its property and was legally payable to it. The corporate vehicle was used for lawful purposes. We are not prepared to say that the existence of the company must be disregarded as a fraud or a sham. On this basis, we cannot disregard the tax liability as an obligation which Stretton had to pay, when we assess the real loss to Holmes. While the matter is not entirely free from doubt, in the circumstances of this case, we cannot say that the learned Trial Judge erred in using the after-tax retained earnings.

The trial judge provided no analysis with respect to the applicability of *Holmes*.

35 *Holmes* does not set out a general rule that income tax is to be deducted in cases of this kind. Indeed, *Holmes* cited a number of cases in which it was held that income tax is not to be deducted, particularly *Carrick v. Cooper Canada Ltd.* (1983), 2 C.C.E.L. 87 (Ont. H.C.) where it was stated at p. 105 that “since gross income is the basis for assessing damages ...

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gross earnings should be credited in mitigation". The Court in *Holmes* stated that "this line of reasoning was affirmed and applied" in *Jorgenson v. Jack Cewe Ltd.*, [1980] 1 S.C.R. 812 (S.C.C.). The Court referred to the "circumstances of this case" as justifying the deduction of income tax, while acknowledging that even in that case "the matter was not entirely free from doubt". The Court unfortunately did not elucidate the special circumstances that justified the result.

36 Mechanisms of employment are evolving, and the presence of "single person" corporations in the workplace is increasingly common. They have a number of income tax advantages, such as those relating to the deductibility of expenses, rates of taxation, and the ability to split income. They also limit the liability of their shareholders. These are legitimate considerations for an employee who is attempting to mitigate the damages of wrongful dismissal. On the other hand, some tax may be payable within the corporation, a disadvantage which the shareholder undoubtedly has concluded is outweighed by the advantages of incorporation. When calculating damages for wrongful dismissal, the general rule should be that the corporation should be disregarded for purposes of mitigation, and that the income of the corporation should be treated as that of the employee. Any tax payable by the corporation is likely just tax that would otherwise have been paid by the employee. In order to provide consistency in the calculations, both the damage award and the mitigation amount should generally be calculated on a pretax basis.

37 This aspect of the appeal should be allowed, and the further sum of \$16,834.33 should be deducted from the damage award, to represent further amounts of mitigation that were not recognized in the trial judgment.

The Calculation of Damages

38 Neither party is able to reconstruct the mathematical calculations in the trial judgment. They agree, however, that the base amount of damages for wrongful dismissal is \$80,657.25. The amount of \$16,834.33, representing income tax incorrectly deducted from the mitigation income, must be deducted from this amount, leaving a net amount of \$63,822.92. The appeal is allowed to correct the quantum of damages.

Nature of a Unanimous Shareholders Agreement

39 As noted, the trial judge concluded that a unanimous shareholders agreement is not a contract, and that ordinary contractual remedies are not available for its breach: 2010 ABQB 536 (Alta. Q.B.), at paras. 184-200. In so finding he relied on a number of cases that commented on the unique features of unanimous shareholders agreements: they can sometimes override the constitution of a corporation, and they can in some cases bind non-parties. He relied on a number of cases that describe unanimous shareholders agreements as "a unique species of agreement": *Duha Printers (Western) Ltd. v. R.*, [1998] 1 S.C.R. 795 (S.C.C.) at para. 58; *Piikani Investment Corp. v. Piikani First Nation*, 2008 ABQB 775 (Alta. Q.B.) at paras. 32-50.

40 The trial judge noted the observation in *Duha Printers* at para. 66 that a unanimous shareholders agreement "must take the form of a written contract" and meet the "general requirements for a lawful and valid contract", but characterized them in 2010 ABQB 536 (Alta. Q.B.) at para. 197 as "of limited relevance in Alberta" because of differences in the statutory wording. *Duha Printers* was decided under the *Manitoba Corporations Act*, RSM 1987, c. C-225, which defines a unanimous shareholders agreement as "a lawful written agreement". The *Alberta Business Corporations Act*, under which this dispute is to be decided, defines a unanimous shareholders agreement as "a written agreement". This minor difference does not mean that Albertan unanimous shareholders agreements are fundamentally any different from Manitoban unanimous shareholders agreements. This minor difference in the wording cannot mean that in Alberta an "unlawful" unanimous shareholders agreement is possible. The observations in *Duha Printers* that a unanimous shareholders agreement is a form of contract apply in Alberta.

41 A unanimous shareholders agreement may well be described as a specialized form of contract because of its unusual ability to bind non-parties, and to override the constating documents of the corporation. It is, however, at its core, a contract. There are other specialized types of contracts that have features unique to them. For example, collective agreements are negotiated between unions and employers, yet they can have a significant effect on the rights of employees. There are also special dispute resolution procedures and remedies available under collective agreements that are not available under other contracts. Collective agreements are, nevertheless, contracts at their core: *Labour Relations Code*, RSA 2000, c. L-1, s. 1(f);

Part 2, Div. 21; *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.), at pp. 717-8. Similar comments can be made about other specialized types of contracts: insurance policies, surety agreements, guarantees, etc.

42 The trial judge also concluded in 2010 ABQB 536 (Alta. Q.B.) at paras. 160, 203 of his reasons that PCL Employees Holdings “itself is not a party to the USA”. He based this conclusion on paragraph B of the preamble to the unanimous shareholders agreement:

The signatories hereto are all of the shareholders of PCLEH, and as such wish to define their relationship to one another and to PCLEH.

The unanimous shareholders agreement, however, has a place for the signature of PCL Employees Holdings, after the recitation “IN WITNESS WHEREOF the parties hereto have executed this agreement in counterparts under seal”. Article 1.01.01(m) of the USA defines “Parties” as “the Shareholders and PCLEH”. The trial judge’s finding that PCL Employees Holdings is not a party to the unanimous shareholders agreement is not supported by any party to this appeal, and cannot be sustained on a proper interpretation of the agreement.

43 The unanimous shareholders agreement in issue in this case is a contract, and the primary source of remedies for its breach is the law of contract. Further, PCL Employees Holdings is clearly a party to the unanimous shareholders agreement. In their pleadings, all the parties treated the unanimous shareholders agreement as a contract, and the pleadings all contemplate contractual remedies. It was an error of law for the trial judge to search for appropriate remedies in the oppressive shareholder provisions of the *Business Corporations Act*, especially when such relief had not been pleaded. If the action had been pleaded as seeking statutory relief, it is likely that the evidence introduced by the parties would have been different.

The Share Repurchase

44 In his original statement of claim issued in October of 2005, the respondent merely alleged that PCL Employees Holdings had “unduly, without colour of right and contrary to any contract or agreement between the parties” repurchased the respondent’s shares. No further particulars were provided. Rescission of the contract was not requested. Fraud was neither pleaded, nor is it now suggested.

45 The issue surrounding the timing of the directors’ resolution declaring the respondent to be a withdrawing shareholder was noticed during the discovery process. On June 12, 2009 the respondent filed a reply and joinder of issue, specifically pleading that the directors’ resolution had not been passed before the Notice to Sell was delivered to him. While the respondent “joined issue” with the appellants, he still did not request rescission of the agreement for the sale of the shares.

46 When the trial judge concluded that a unanimous shareholders agreement was not a contract, he invited the respondent to seek statutory remedies. It was on that basis that he came to grant relief under s. 248 of the *Business Corporations Act*. Even if the unanimous shareholders agreement was not a contract, the trial judge failed to observe that the agreement for the sale of the shares was clearly a second, freestanding contract. He did not direct a rescission of the share repurchase agreement, although the remedies he granted in some respects assumed that the contract was rescinded. The trial judge found the respondent was entitled to three years of dividends on shares which he had sold and for which he had received payment. In awarding that remedy, the trial judge did not take account of the fact that the respondent had been paid for his shares many years earlier, and was now being treated as if he was entitled to both the shares and the purchase price. The respondent was not called on to account for the income he earned on the sale proceeds.

47 It is questionable whether s. 248 is intended to provide a remedy in damages: *American Reserve Energy Corp. v. McDorman*, 2002 NFCA 57, 217 Nfld. & P.E.I.R. 7 (Nfld. C.A.) at paras. 28, 37. Under the unanimous shareholders agreement, PCL Employees Holdings was obligated to purchase the respondent’s shares once he was found to be disabled. It is perhaps ironic that s. 248 could well have been used to compel that purchase if PCL Employees Holdings had refused to buy him out. But in any event, it can be noted that to award \$1.4 million in damages as “any further order the court thinks fit”, because the directors did certain things they were obliged to do, albeit in the wrong order, is disproportionate to the breach. Even if one superimposes a duty to advise the respondent that he could challenge the finding that he was disabled, the

remedy is not warranted. The stubborn fact is that the respondent was unable to work for over three years, and he himself represented that he was unable to work; any challenge to the finding of disability would have been bound to fail. The respondent had been paid for his shares, yet was treated as if he was entitled to both the purchase price and the shares. As a remedy under s. 248, the damage award was excessive. It resulted in an unjustifiable windfall to the respondent, and was prejudicial to the interests of the other shareholders in PCL Employees Holdings.

Breach of the Terms of the Unanimous Shareholders Agreement

48 As previously found, a unanimous shareholders agreement is a contract, albeit one with some particular characteristics. The remedies for breach are primarily contractual. The trial judge made certain findings (see *supra*, para. 15) which, if he had realized he was dealing with a contract, he might have found were breaches of that contract. On a proper interpretation of the unanimous shareholders agreement they are not, however, breaches that now entitle the respondent to any remedy.

Failing to pass the required directors' resolution prior to triggering the right to repurchase the shares, and failing to advise the respondent of the defects in the procedures.

49 It was not disputed by the appellants that the steps involved in repurchasing the respondent's shares were done in the wrong order. In addition to that, the trial judge relied heavily in his reasons at 2011 ABQB 20 (Alta. Q.B.) on what he perceived to be an obligation of PCL Employees Holdings to advise the respondent of that deficiency:

62 In the present matter, PCLEH's directors and officers breached their fiduciary duty when they failed to promptly disclose that an incorrect procedure had been followed to repurchase Sumner's shares. They were dishonest and misled a minority shareholder. That alone is an adequate basis for me to conclude that I should not give effect to PCLEH's claimed intention.

63 To be clear, my conclusion would be very different had PCLEH simply taken steps to properly inform Sumner that his original notice to repurchase was premature, and make him aware of his rights. Had a defect occurred in that setting, then I would have no hesitation to give full effect to PCLEH's intentions.

64 I conclude that a fair and just result would not be obtained by giving effect to PCLEH's alleged intentions where PCLEH and its officers have breached their fiduciary duty to not mislead a shareholder, the Plaintiff. Accordingly, I will not value the repurchased shares on the basis of a procedurally and temporally correct application of the USA special withdrawing shareholder procedure.

It is clear that these findings are a linchpin in the conclusion of the trial judge (2011 ABQB 20 (Alta. Q.B.) at para. 80-2) that the respondent was entitled to all the dividends declared on the repurchased shares up until he turned 64. But neither fiduciary duty, misrepresentation, nor dishonesty were ever pleaded, nor is there any evidence on this record to justify those findings.

50 It should first be noted that the trial judge's findings cannot be reconciled with the evidence. The "claimed intention" and "alleged intention" of PCL Employees Holdings was an intention to repurchase the respondent's shares at the earliest opportunity. The appellants had argued at trial that PCL Employees Holdings was determined to repurchase the shares, and that if they had become aware that the respondent was relying on the procedural deficiencies, they simply would have restarted the process. The trial judge declined to accept this argument, even though the inference would appear to be overwhelming.

51 The trial judge concluded that repurchase was not the "only scenario", and that it was not a "certainty" that PCL Employees Holdings would have restarted the process if it became aware of the error. This misstates the burden of proof, because PCL Employees Holdings was only required to prove that it was the most probable scenario. PCL Employees Holdings triggered its right to repurchase the shares immediately after the respondent had been on sick leave for six months, and terminated its ties with the respondent as soon as he attempted to return to work. Repurchase was consistent with the philosophy of the unanimous shareholders agreement that the PCL group should be owned by its active employees. Further, once the directors later passed the resolution declaring the respondent to be a Withdrawing Shareholder, PCL Employees Holdings incurred a positive obligation under the unanimous shareholders agreement to repurchase his shares. The only

reasonable inference from the record is that if PCL Employees Holdings had been advised that the respondent was challenging its right to repurchase the shares, PCL Employees Holdings would have immediately recommenced the necessary procedures.

52 The trial judge's subsequent finding that PCL Employees Holdings' attempts to conceal the procedural defects were inconsistent with this "alleged intention" cannot stand. If anything, attempts to conceal procedural deficiencies support the inference that PCL Employees Holdings was determined to repurchase the shares. If it was indifferent to repurchase, or had changed its mind about repurchase, there would have been no reason why it would not disclose the procedural defects. This palpable and overriding error in drawing inferences from the facts is compounded by the assumption that PCL Employees Holdings owed duties to the respondent to advise him of his rights under the unanimous shareholders agreement.

53 Generally speaking, a contracting party that is exercising rights or options under a contract, or that is calling for performance of a contract, is not under any obligation to advise the other contracting party of its rights under the agreement. When one contracting party calls for performance of an agreement, there is no implied, actionable "representation" by that party that all the preconditions to performance have been met: *Bell v. Lever Brothers Ltd.* (1931), [1932] A.C. 161 (U.K. H.L.), at pp. 199, 227-8, 231-2. Any contracting party is entitled to call for performance; if the other party believes that performance is not yet due, it can say so.

54 It follows that when PCL Employees Holdings sent the Notice to Sell, it was not making any actionable representation that all the preconditions giving it the right to repurchase had been met. By sending the Notice to Sell, PCL Employees Holdings was asserting a legal right. If the respondent disagreed with the existence of that right, he had every opportunity to say so. Indeed, the letter from his lawyer indicates that he was aware of that; the letter stated in part: "... a cursory review indicates PCL has the right to exercise its option to purchase Mr. Sumner's shares". Whether this was correct or not, the respondent was aware that he had the ability to challenge PCL Employees Holdings' assertion of a right to buy back the shares.

55 There is no basis for saying that PCL Employees Holdings owed fiduciary duties to the respondent. Their relationship was contractual. The unanimous shareholders agreement itself had been drafted many years previously, and was one that applied to all the shareholder employees of the PCL group. There is no basis to suggest that its terms are inherently unfair. At the time that the right to repurchase the respondent's shares was triggered, he had independent legal advice. He had a copy of the unanimous shareholders agreement, which was all the "notice" of his rights he was legally entitled to. There was never any implied agreement that PCL Employees Holdings would subordinate its interests to those of the respondent: *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.) at paras. 74-6. Apart from the fact that fiduciary duty was never pleaded, there is no basis on this record to find such a duty.

56 Additionally, the equitable doctrine of "clean hands", which was also relied on by the trial judge, has no application. That doctrine might disentitle a party to equitable relief, but it does not create actionable rights that do not otherwise exist in the other party. Again, while it is clear that PCL Employees Holdings did things in the wrong order, there is no evidence on this record to support any findings of dishonesty, misrepresentation, or morally improper conduct.

57 The respondent argues that the "indoor management rule" entitled him to rely on PCL Employees Holdings having done all of the necessary things (such as passage of the directors' resolution) before repurchasing his shares. The common law indoor management rule is now set out in s. 19 of the *Business Corporations Act*, which reads in part:

19 A corporation, a guarantor of an obligation of the corporation or a person claiming through the corporation may not assert against a person dealing with the corporation or dealing with any person who has acquired rights from the corporation

(a) that the articles, bylaws or any unanimous shareholders agreement have not been complied with, ...

Section 19 essentially estops a corporation from asserting against a third party that the corporation has not complied with its internal management requirements. That, however, is not what is occurring in this case; it is the respondent who is asserting that the indoor procedural requirements were not met. PCL Employees Holdings is content to live with the flawed procedures used to repurchase the respondent's shares; s. 19 would prevent it from taking any other position. The indoor management rule prevents PCL Employees Holdings from relying on any such procedural flaws, but does not force it to allow third parties like the respondent to take advantage of those flaws. There was no corporate impediment to PCL Employees Holdings purchasing the respondent's shares even if the preconditions of a forced sale were not complied with, because Article

14.08.01 of the unanimous shareholders agreement allows PCL Employees Holdings to purchase its shares on any conditions it negotiates, notwithstanding any other provisions in the agreement.

58 Further, a contracting party has a limited ability to challenge a contract based on the nonexistence of a condition precedent (not amounting to a continuing covenant in the agreement) once the contract has been fully executed. Assume that two parties enter into a contract for the purchase and sale of a piece of equipment. One of the parties (it does not matter which one) stipulates as a condition precedent that it must get its minority shareholder to agree, and to sign a directors' resolution approving the contract. At the end of the month the contract closes, and the money and equipment change hands. Three years later the parties meet up, and the one asks the other: "By the way, did you ever get the approval of your minority shareholder." The other one replies: "No, he was in Hawaii, but he has known about the contract for several years now, and he is very happy with it." After the contract is fully executed, there is no basis upon which it can be rescinded by either party because of the failure to meet a condition of this nature, nor can there be any claim for damages because there is no breach of any continuing covenant.

59 Here the repurchase of the shares had been finalized for over three years before the respondent made this claim. PCL Employees Holdings had asserted a right to buy the shares, the respondent had agreed or acquiesced, the shares had been transferred to PCL Employees Holdings, and the respondent was paid the purchase price. Once that was done, any obligations that were conditional upon certain events were merged into the performance of the contract. It was then far too late for the respondent to observe that the directors of PCL Employees Holdings had not precisely followed the procedures called for by the unanimous shareholders agreement, for example because the directors resolution was only passed after the Notice to Sell was served.

60 In any event, even if there were breaches in the procedural provisions of the unanimous shareholders agreement, that does not automatically undermine the validity of any actions taken. The trial judge found that PCL Employees Holdings was "in possession of property that belongs to someone else [the respondent]", which essentially assumes that the share transfer never actually happened, or was legally ineffectual (see 2011 ABQB 20 (Alta. Q.B.), at paras. 70, 77, 82). Breaches of procedural provisions in private contracts do not render subsequent actions "null and void": *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, at paras. 81-2, [2008] 1 S.C.R. 190 (S.C.C.); *H.S.A.A. v. Alberta Health Services*, 2011 ABCA 306 (Alta. C.A.) at para. 22. The directors of PCL Employees Holdings should have passed the "withdrawing shareholder" resolution first, but their failure to do so does not mean that the subsequent purported (and successful) exercise of the option to purchase the shares was a nullity. The most the respondent was potentially entitled to was any damages he could prove from a breach of this provision, and on this record those damages would appear to be nominal. It was clear that the respondent had in fact been unable to work for six continuous months, and the directors were entitled to declare him a withdrawing shareholder. The fact that the declaration was made in the wrong order did not cause any damage to the respondent.

61 The trial judge's approach to calculating damages is also inconsistent with the principle that the least onerous method of performing a contract should be the basis for calculating damages. For example, if a contract is breached, but the contract has a 60 day termination provision in it, the innocent party is only entitled to damages for those 60 days. The assumption is that the breaching party would have selected the least onerous method of performing the contract, which would be to give the 60 days notice of termination: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 at paras. 15-8, [2004] 1 S.C.R. 303 (S.C.C.); *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at paras. 47-50, 106 O.R. (3d) 427 (Ont. C.A.). In this case (assuming the respondent had made a timely objection to the sequence of the directors' resolution and the Notice to Sell) the basis for calculating damages should be that PCL Employees Holdings would have adopted the least onerous method of performing its obligations. That would have been to restart the repurchase procedure, not to pay the respondent the price of his shares, plus all the dividends on the shares until age 64 as if he had never sold them.

62 As previously noted, it would be prejudicial to PCL Employees Holdings to allow the respondent to argue, at this late stage, that the directors' resolution was missing. If at the time the Notice to Sell was served the respondent had challenged the rights of PCL Employees Holdings because the directors' resolution had not been passed, then PCL Employees Holdings would have had an opportunity to protect its position. It could have immediately served a new Notice to Sell, and started the process all over again. By delaying in making this claim, the respondent has attempted to assert a right to the payment of dividends on the shares for three years after he transferred those shares, and was paid in full for them. This is a further illustration of why a fully executed contract cannot be lightly overturned. Rescission of a performed contract is not easily

available where prejudice would result to the other party. It is also not available where the complaining party has delayed or acquiesced: *Leaf v. International Galleries*, [1950] 2 K.B. 86 (Eng. C.A.), at pp. 90-1.

63 In summary, it is clear that the procedures followed in triggering the Notice to Sell were deficient. However, the respondent acquiesced in the demand, and closed the sale. After that point it was not open to him to challenge the validity of the transaction. The respondent is also unable to demonstrate any damage that accrued to him as a result of the procedural slip, assuming it amounted to a continuing covenant in the contract. The respondent is not entitled to any remedy on this account. The adverse findings of misconduct in the form of unlawful action or breach of fiduciary duty towards the respondent which appear in the second decision of the trial judge are not logically consistent with his findings in his first decision, and are unjustified on the record. It was, after all, the respondent who asserted he was disabled, and PCL Employees Holdings was entitled to rely on the share repurchase provisions in the unanimous shareholders agreement triggered by this situation.

Failing to serve the resolution on the respondent, when the resolution expressly required that service

64 In his reasons at 2010 ABQB 536 (Alta. Q.B.), para. 179, the trial judge described one breach of the unanimous shareholders agreement as follows: "Second, the June 12, 2002 resolution of the PCLEH Directors that designated the Plaintiff a special withdrawing employee stated that resolution was to be served on the Plaintiff".

65 The perceived breach of the unanimous shareholders agreement in failing to serve the directors' resolution on the respondent, assuming the resolution expressly required that service, can be shortly dealt with. The instructions from the Directors of PCL Employees Holdings to its staff to do certain things do not create rights in the respondent, even if those things are not done. The staff are accountable to the directors, not to the respondent. Unless there was a positive obligation in the unanimous shareholders agreement to serve the respondent with the resolution, there was no actionable breach. Article 6.03.01(b) requires the service of a "Notice to Sell", not any other document. There is no ambiguity in the unanimous shareholders agreement that would require the court to imply a term that the directors' resolution had to be served on the respondent. In any event, the respondent cannot demonstrate any incremental damage that arose as a result.

66 In fact, the June 12, 2002 resolution does not require that the *resolution* be served on the respondent; it requires that a Notice to Sell be served on him, which is in compliance with the unanimous shareholders agreement. The trial judge may have mis-spoken in para. 179 of his reasons. If the trial judge intended to say that the Notice to Sell should have been served on the respondent, this is merely another way of stating the argument that the repurchase procedures were done in the wrong order. This argument has been dealt with in the previous section of these reasons.

Failing to notify the respondent that he had a right to challenge the conclusion that he was disabled, particularly by requesting an independent medical examination

67 The trial judge found that PCL Employees Holdings had an obligation to advise the respondent that he could challenge the finding that he was disabled, and that he was entitled to an independent medical examination. There is no indication in the unanimous shareholders agreement that PCL Employees Holdings had such an obligation. The right to an independent medical examination was set out in the unanimous shareholders agreement for the respondent to see. The respondent gave all the necessary documents to his divorce counsel, and must be taken to have been well aware of his rights.

68 The unanimous shareholders agreement has detailed provisions about the steps that must be taken to trigger an exercise of the right to repurchase the shares. There is nothing in the contractual language that would support any obligation to give notice of the respondent's ability to challenge the purported exercise of the option to repurchase. It is inconsistent for the respondent to argue that the procedural provisions of the unanimous shareholders agreement must be strictly complied with, but then seek to read in additional procedural requirements.

69 Further, even if there was an implied obligation to advise the respondent of his right to an independent medical examination under Article 6.01.02 of the unanimous shareholders agreement, the failure to provide that advice does not automatically result in any remedy. Any remedy must depend on the plaintiff demonstrating that he was not, in fact, disabled at the relevant time. If he was disabled, any challenge would have failed. It was the respondent and his doctors who initially

asserted that the respondent was unable to work. It was on that basis that he qualified for sick leave, and then short-term and long-term disability payments. It was uncontested that the respondent was unable to work for three and half years, and he was clearly a "Special Withdrawing Shareholder". The failure to advise him of his right to an independent medical examination did not cause him any damage.

70 The trial judge found that it was not a "certainty" that an independent medical examination would have found the respondent to be disabled. But the medical opinions on which PCL Employees Holdings acted in 2002 were provided by the appellant himself. It is difficult to see what a further "independent" opinion initiated by the respondent would have done for him when he was in receipt of disability payments based on his own medical advice. It is not reasonable to infer that he would have sought another medical opinion aimed at challenging the repurchase of his shares, because that would require evidence that he was not disabled, which would have put his right to the receipt of disability benefits in jeopardy. In any event, at 2011 ABQB 20 (Alta. Q.B.), para. 54 the trial judge declined to "attempt to balance the probability of whether Sumner could have successfully resisted the share repurchase." That again misstates the burden of proof; civil cases are decided on a balance of probability. The uncontradicted evidence is that the respondent was off work for three and half years, and was only certified as being fit to return to work in July, 2005. The evidence was overwhelming that the Respondent met the test of being a "Withdrawing Shareholder".

71 To the extent that there was an obligation to advise him of his right to challenge the finding of disability *per se*, again the respondent suffered no damage. The letter from his lawyer to his wife's counsel disclosed that he was aware of the right to challenge the Notice to Sell. Again because the matter was not pleaded, the evidence is perhaps incomplete, but the logical inference from this record is that the respondent relied on his lawyer's advice, not on any implied representation by PCL Employees Holdings that it had an enforceable right to buy back his shares. Indeed, in the circumstances, PCL Employees Holdings had a positive obligation under the unanimous shareholders agreement to buy back the shares.

72 There was no obligation on PCL Employees Holdings to provide the respondent with legal advice about his options. In any event, since the respondent was subsequently off work for medical reasons for another three years, any assertion that he was not in fact disabled within the meaning of the unanimous shareholders agreement lacks any air of reality. It is disproportionate to suggest that he is entitled to any sort of remedy for failure to give him notice that he could challenge a fact for which no realistic challenge has been shown.

Alternatively, if a medical report of January 4, 2002 was such an independent medical examination, failing to wait the required six months before attempting to repurchase the shares

73 The trial judge found that the six-month period of disability, which would entitle and require PCL Employees Holdings to buy back the shares of a withdrawing shareholder, did not start to run until a medical certificate from an independent doctor was obtained. The unanimous shareholders agreement provides that the directors of PCL Employees Holdings are to "determine" if the employee shareholder is a "Withdrawing Shareholder". It does not require that the directors have any particular documentation, such as a medical opinion, before they make their determination. Specifically, if an employee is actually off work for six months due to illness, it is open to the directors to determine that he is disabled. The directors are also entitled, as in this case, to rely on a representation by the employee and his own doctor that he is unable to work.

74 Article 6.01.02 allows the employee shareholder to challenge the finding of disability by submitting to a medical examination. That provision is, however, only triggered "If a Shareholder disputes the existence of a disability". If the shareholder triggers that provision, then the certificate of the selected medical doctor "shall be conclusive and binding". However, there is nothing in the unanimous shareholders agreement that makes such a medical certificate a precondition to the directors determining that the shareholder is disabled. It follows that the trial judge was in error in thinking that the six months only started to run from the time that a medical certificate was provided.

75 In summary, the only breach of the unanimous shareholders agreement shown on this record is the failure of the directors of PCL Employees Holdings to proceed in the right order: they should have passed the resolution first, before serving the Notice to Sell. On that breach, the respondent was precluded from seeking a remedy, as he closed the contract without insisting on strict compliance with the condition precedent. The other breaches found by the trial judge are not breaches, on a proper interpretation of the unanimous shareholders agreement.

Sumner v. PCL Constructors Inc., 2011 ABCA 326, 2011 CarswellAlta 1934

2011 ABCA 326, 2011 CarswellAlta 1934, [2012] 1 W.W.R. 649, [2012] A.W.L.D. 194...

Conclusion

76 In conclusion, with respect to the share sale the respondent at best had contractual rights under the unanimous shareholders agreement. As such, he was only entitled to be put in the same position he would have been in if the contract had been performed. On this record it is clear that the respondent was disabled at all times. The fact that the directors' resolution came after the Notice to Sell did not have any substantive effect on the price the respondent received for his shares, or his other entitlements. In any event, whatever remedies he might have been entitled to from a failure to follow the procedure set out in the unanimous shareholders agreement were overtaken by his acquiescence in PCL Employees Holdings' demand that he sell his shares, and the subsequent closing of the transaction.

77 The appeal with respect to the share repurchase is allowed. The damage award made under s. 248 of the *Business Corporations Act* is set aside.

78 The appeal with respect to the overtime calculations is dismissed. The further amount of \$16,834.33 must be deducted from the damage award to reflect the income tax that was incorrectly deducted from the mitigation amount. The mathematical calculation of the damage award for wrongful dismissal is to be corrected to \$63,822.92.

Appeal allowed in part.

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TAB 11

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2014 BCSC 1259
British Columbia Supreme Court

Accra Wood Products Ltd., Re

2014 CarswellBC 1987, 2014 BCSC 1259, [2014] B.C.W.L.D. 5224, [2014] B.C.W.L.D. 5229, [2014] B.C.W.L.D. 5256, 16 C.B.R. (6th) 109, 242 A.C.W.S. (3d) 513

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Accra Wood Products Ltd.

D.M. Masuhara J., In Chambers

Heard: June 17, 2014

Judgment: July 9, 2014

Docket: Vancouver B140289, Estate No. 11-1835904

Counsel: J.L. Williams for Boale, Wood & Company Ltd., Trustee in Bankruptcy of Accra Wood Products Ltd
K. Jackson for Formations Inc.

Subject: Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[IX Proving claim](#)

[IX.2 Disallowance of claim](#)

[IX.2.c Appeal from disallowance](#)

[IX.2.c.ii Grounds](#)

Business associations

[IV Powers, rights and liabilities](#)

[IV.9 Contracts by corporations](#)

[IV.9.a General principles](#)

[IV.9.a.v Indoor management rule](#)

Contracts

[III Formation of contract](#)

[III.4 Communication and acceptance of specific terms](#)

Headnote

Business associations --- Powers, rights and liabilities — Contracts by corporations — General principles — Indoor management rule

G, office manager of A Ltd. for 23 years, signed credit application granting security interest in all of A Ltd.'s present and after-acquired personal property to creditor F Inc. — Trustee in bankruptcy disallowed F Inc.'s proof of claim in A Ltd.'s proposal on basis that G lacked authority to enter into credit agreement, and that term in credit application was in "fine print" and was not brought to her attention — F Inc. appealed — Appeal allowed — Disallowance of claim set aside; declaration granted that F Inc.'s claim was — secured by security interest as set out in credit application — Trustee was not justified in departing from indoor management rule and disallowing claim on basis that G lacked authority to sign credit application — There was no internal documentation produced to substantiate limits on G's authority — Credit applications were normal

Accra Wood Products Ltd., Re, 2014 BCSC 1259, 2014 CarswellBC 1987

2014 BCSC 1259, 2014 CarswellBC 1987, [2014] B.C.W.L.D. 5224...

transactions for A Ltd. and it was normal for G to execute such agreements on behalf of A Ltd. — G's assertion that she did not read "fine print" in credit application was eroded by her actions regarding several other credit applications where G was careful to stroke out wording which exposed her to personal liability; certain of those agreements contained clauses granting some form of security — This was not case where F Inc. had duty to bring security clause to A Ltd.'s attention.

Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — Grounds
G, office manager of A Ltd., signed credit application granting security interest in all of A Ltd.'s present and after-acquired personal property to creditor F Inc. — Trustee in bankruptcy disallowed F Inc.'s proof of claim in A Ltd.'s proposal on basis that G lacked authority to enter into credit agreement, and term in credit application was in fine print and was not brought to her attention — F Inc. appealed — Appeal allowed — Disallowance of claim set aside; declaration granted that F Inc.'s claim was — secured by security interest as set out in credit application — Trustee was not justified in departing from indoor management rule and disallowing claim on basis that G lacked authority to sign credit application — G's assertion that she did not read "fine print" in credit application was eroded by her actions regarding several other credit applications where G was careful to stroke out wording which exposed her to personal liability; certain of those agreements contained clauses granting some form of security — This was not case where F Inc. had duty to bring security clause to A Ltd.'s attention — Departure by trustee from general principle that party who has signed is assumed to have intended to be bound by agreement was not justified.

Contracts --- Formation of contract — Communication and acceptance of specific terms

G, office manager of A Ltd., signed credit application granting security interest in all of A Ltd.'s present and after-acquired personal property to F Inc. — Trustee in bankruptcy disallowed F Inc.'s proof of claim in A Ltd.'s proposal on bases that G lacked authority to enter into credit agreement, and term in credit application was in fine print and was not brought to attention of person signing application — F Inc. appealed — Appeal allowed — Disallowance of claim set aside; declaration granted that claim was secured by security interest as set out in credit application — Review and execution of credit application went through normal internal processes — There was nothing unusual about document's print size or clarity — There was clear statement just above section where A Ltd.'s representative was to sign that agreement contained grant of security to F Inc. — By putting clear statement in such location, reasonable step was made to bring attention to signing party of presence of security-granting clause in agreement — A Ltd. had at least two other credit agreements (which were not said to have been signed without authority) signed by G that granted some form of security — Circumstances did not give rise to onus on F Inc. to bring security clause to A Ltd.'s attention — Departure by trustee from general principle that party who has signed is assumed to have intended to be bound by agreement was not justified.

Table of Authorities**Cases considered by D.M. Masuhara J., In Chambers:**

Arndt v. Ruskin Slo Pitch Assn. (2011), 2011 BCSC 1530, 2011 CarswellBC 2939, 92 C.C.L.T. (3d) 160, 343 D.L.R. (4th) 356 (B.C. S.C.) — considered

Drayton v. W.C.W. Western Canada Water Enterprises Inc. (1991), 36 C.C.E.L. 157, 1991 CarswellBC 858 (B.C. S.C.) — followed

Galaxy Sports Inc., Re (2004), 2004 BCCA 284, 2004 CarswellBC 1112, 20 R.P.R. (4th) 1, 240 D.L.R. (4th) 301, 1 C.B.R. (5th) 20, 29 B.C.L.R. (4th) 362, 200 B.C.A.C. 184 (B.C. C.A.) — referred to

Karroll v. Silver Star Mountain Resorts Ltd. (1988), 47 C.C.L.T. 269, 33 B.C.L.R. (2d) 160, 1988 CarswellBC 439, 40 B.L.R. 212 (B.C. S.C.) — followed

Pacific National Leasing Corp. v. Brian Jessel Toyota Ltd. (1991), 1991 CarswellBC 2291 (B.C. S.C. [In Chambers]) — followed

Tilden Rent-A-Car Co. v. Clendenning (1978), 1978 CarswellOnt 125, 18 O.R. (2d) 601, 83 D.L.R. (3d) 400, 4 B.L.R. 50 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 135(2) — referred to

Business Corporations Act, S.B.C. 2002, c. 57
s. 146(1)(c) — considered

s. 146(2) — considered

APPEAL by creditor from disallowance of claim.

D.M. Masuhara J., In Chambers:

Introduction

1 On April 25, 2014 the trustee in bankruptcy disallowed Formations Inc.'s ("Formations") proof of claim in Accra Wood Products Ltd.'s ("Accra") proposal process. Formations had asserted a secured claim over the amount of \$155,298.19 which had arisen from Formations supplies of wood products to Accra under a credit agreement executed April 23, 2012 (the "Credit Application") which granted Formations a security interest in all of Accra's present and after acquired personal property (the "Property"). The Trustee disallowed Formations' claim on the bases that:

(a) Lisa Golding, the Office Manager of Accra, did not have the authority to enter into the Credit Application granting Formations a security interest in the Property and that Formations knew or ought to have known she did not have such authorization; and

(b) The term of the Credit Application granting Formations a security interest in the Property was inconspicuously included in the fine print of the [Credit Application] and was not drawn to the attention of the person signing the Credit Application. Accra had no intention to grant the security interest in the Property.

2 This is the appeal of that decision.

3 Formations seeks:

(a) An order that Trustee's disallowance be set aside; and

(b) A declaration that Formations' claim against Accra is secured by way of a security interest in all present and after-acquired property of Accra in accordance with the terms of Credit Application.

Issues

4 The issues distill to the following:

1. Whether Formations was entitled to rely on the indoor management rule in assuming that Ms. Golding had authority to sign the Credit Application on behalf of Accra.

2. Whether there was an obligation on the part of Formations to ensure that the security interest in the Credit Application was brought to the attention of Ms. Golding.

3. Whether, in any event, Accra was estopped from denying the claim given its conduct of ordering and receiving

product from Formations for approximately two years.

5 The appeal is of a decision by a Trustee under s. 135(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 (the “BIA”). The standard of review of such an appeal is correctness: *Galaxy Sports Inc., Re*, 2004 BCCA 284 (B.C. C.A.).

Background

6 Accra operated a wood moulding manufacturing business which was founded in 1985. Formations is a wholesale distributor of raw wood, materials to cabinet makers, moulding manufacturers, furniture makers and millworkers.

7 In early 2012, Mr. Hill, general manager of Formations, and Mr. Kent, purchasing agent for Accra, entered into discussions concerning the supply by Formations of wood products to Accra. Mr. Kent advised Mr. Hill to provide him a credit application for completion by Accra which Formations did.

8 On or about April 23, 2012, Accra’s office manager, Lisa Golding, executed the Credit Application and sent it back to Formations.

9 The Credit Application is two pages in length and includes 17 numbered terms all in the same font size. Number 10 reads as follows:

The Customer transfers, mortgages, grants and assigns to Formations Inc. a security interest in all of the Customer’s present and after acquired personal property, and all proceeds therefore, as security for the due payment and satisfaction of any and all obligations and liabilities whatsoever, liquidated or unliquidated, from the Customer to Formations Inc., present or future, direct or indirect and howsoever arising.

10 The Credit Application included provisions which would cause the person executing it to be jointly and severally liable with the customer, Accra, for any obligations of the customer to Formations. However, those provisions were crossed out by Ms. Golding before she executed Credit Application to Formations. In the same section the words not crossed out includes the following:

the undersigned individual is authorized to execute this application on behalf of the Customer.

11 The provision immediately above the customer signature portion of the Credit Application includes the following:

The Customer agrees to be bound by all the terms whether they have been read or not and whether or not they are typical for an agreement of this nature. The Customer recognizes that this agreement contains various credit terms designed to protect Formations Inc. including clauses which grant Formations Inc. security.

12 After receiving the completed Credit Application, Formations supplied wood products to Accra on credit and invoiced Accra upon delivery of such wood products. The parties operated under the contract for two years.

13 On or about February 3, 2014, Formations registered a financing statement in the British Columbia Personal Property Registry under base registration number 783464H, thereby perfecting its security interest in property described in the Credit Application.

14 As of February 7, 2014, the date on which Accra filed its proposal to its creditors, Accra was indebted to Formations in the amount of \$155,298.19 in respect of wood products supplied by Formations. Accra had only paid approximately \$35,000 for product delivered to it under the agreement.

15 As mentioned at the outset, Formations filed its Proof of Claim on March 17, 2014 and the Trustee disallowed

Formations claim by Notice of Disallowance dated April 25, 2014 on the bases as indicated above.

Discussion

16 The information upon which the Trustee relied in reaching its disallowance determination is unclear. The Notice of Disallowance does not state the information relied upon. In this appeal the affidavits of Ms. Golding and Mr. Laniado, former president of Accra, have been filed and have been used to support the Trustee's conclusions; however, nowhere has it been indicated that this information or any portion thereof was before the Trustee at the time of its decision. I have however, proceeded on the basis that the information in the filed affidavits was before the Trustee at the time of its decision based on the submissions of counsel.

17 I start by noting that the Trustee has not asserted its disallowance is based upon misrepresentation, fraud, or *non est factum*.

18 On the question of Ms. Golding's authority, Formations submits that it was entitled to rely on the indoor management rule in that Ms. Golding was held out by Accra as having the authority to enter into that agreement. The indoor management rule holds that parties dealing with a corporation are entitled to assume that a corporation's internal policies have been followed. The policy rationale for this rule was succinctly explained by Justice Hutchinson in *Drayton v. W.C.W. Western Canada Water Enterprises Inc.*, [1991] B.C.J. No. 1047 (B.C. S.C.) as follows:

If nothing else, this is to protect innocent third parties who rely on the authority of the agent. And it might be noted that this is the least the business world can expect in so far as a standard of care in business transactions is concerned.

19 The indoor management rule is largely codified by section 146 of the *Business Corporations Act*, S.B.C. 2002, c. 57, s. 146, which reads in part as follows:

146(1) Subject to subsection (2), a company, a guarantor of an obligation of a company or a person claiming through a company may not assert against a person dealing with the company, or dealing with any person who has acquired rights from the company, that...

...

(c) a person held out by the company as a director, officer or agent

(i) is not, in fact, a director, officer or agent of the company, as the case may be, or

(ii) has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,

...

(2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

20 Formations also submits that the present case is indistinguishable from *Pacific National Leasing Corp. v. Brian Jessel Toyota Ltd.*, [1991] B.C.J. No. 177 (B.C. S.C. [In Chambers]), where a business manager executing an agreement for the defendant company did not possess the actual authority to enter into a lease with the plaintiff and asserted that he had not read the documents and was not aware that one of two documents he signed was a lease; he assumed it was an acknowledgement of delivery. In upholding the agreement, the court considered, among other things, that the business manager clearly held himself out by the terms of the agreement as having the requisite authority, including by his title, i.e. "business manager".

21 The Trustee says it is neither typical for a supply credit application to contain a clause granting the supplier a security interest over all present and after acquired personal property of the customer; nor is it typical that an "office manager" or "accounts payable contact" would have the authority to grant such a security interest. The Trustee argues that Formations either knew or should have known this. The Trustee further submits that in lending practice, it is standard to obtain directors' resolutions from a company when obtaining a security interest from that company, to ensure that the security interest has been duly authorized and granted.

22 The Trustee also points out that on or about April 23, 2004 Accra executed a security agreement with the Royal Bank of Canada (the "RBC Security Agreement") pursuant to which Accra agreed to keep all of its personal property free of other encumbrances, including security interests, unless Accra obtained the prior approval of RBC for such encumbrances. Mr. Laniado deposes that he was aware of this restriction and that had he known of the Credit Application and been made aware of the security interest in it he would not have authorized or instructed anyone at Accra to enter into the agreement.

23 The Trustee submits that in the circumstances it was unreasonable for Formations to believe that Ms. Golding had the authority to grant it a security interest and cannot rely upon the indoor management rule.

24 In my view, the Trustee placed undue reliance upon the statements of Ms. Golding and Mr. Laniado as to Ms. Golding's limited authority. There was no internal documentation produced to substantiate the limits on Ms. Golding's authority. There was no evidence of Accra notifying Formations as to any limitations on Ms. Golding's authority to enter into an agreement with Formations. It is also apparent that credit applications were normal transactions for Accra and that it was normal for Ms. Golding to execute such agreements on behalf of Accra. Ms. Golding has been office manager of Accra for approximately 23 years; it is fair that she would be knowledgeable as to the internal processes of Accra. The agreement itself states in italics, in the section just above where the document was signed by Ms. Golding and in the same section where she was careful to stroke out wording which exposed her to personal liability, that the person signing the agreement was "authorized to execute this application on behalf of the Customer." Following that wording is the section which states that the agreement includes "clauses which grant Formations Inc. security." The font size of the terms of the Credit Application does not change - the print of the term is consistent and clear in the entire document. It is hard to accept that this wording regarding her authority and the grant of security would have escaped Ms. Golding's attention. Ms. Golding's assertion that she did not read the "fine print" in the Credit Application is eroded by her actions regarding several other credit applications where it is clear that Ms. Golding was careful to stroke out wording which exposed her to personal liability and did so in places which are not at the end of the document but rather at various locations in the document. Moreover, certain of those agreements contained clauses granting some form of security. Those agreements are not asserted as being unauthorized. Ms. Golding's recall may also be limited as the Credit Application that she said she signed was the original - not a facsimile as she deposed.

25 There is no suggestion that Formations placed pressure on Accra to have the document signed. There is no evidence to suggest that Accra dealt with the agreement in any other way than in its normal way. Moreover, the relationship was an ongoing one where considerable supplies of product having significant value were provided to Accra. Until receiving the Notice of Disallowance, Formations had never been advised that Accra or anyone else was taking the position that Ms. Golding did not have authority to execute the Credit Application.

26 Though the security clause is broad in this case, it cannot be said that it would be unreasonable for a credit agreement to contain a security provision; after all, Accra was seeking the extension of credit for supplies it was procuring. As already noted, other credit applications executed by Ms. Golding contained security provisions.

27 In regard to the reference that it is standard practice that directors' resolutions are usually required when security is granted, this may be the case in many circumstances, but not in all. There was no evidence presented that this is the case here. Further, I note the RBC Security Agreement in the materials does not appear to have been approved through a directors' resolution.

28 As I have determined below, this is not a case where Formations had a duty to bring the security clause to the attention of Accra. What is applicable here is the general principle that a party who signs an agreement which is known to affect one's legal rights is bound by the agreement in the absence of fraud or misrepresentation.

29 I was not taken to any similar case supporting the proposition that Formations was not entitled to assume that the internal governance processes of Accra were properly followed and that further steps were required of it to determine authority. I was taken to no law which supports the proposition that an employee who is an office manager, who is responsible for accounts payable and other administrative duties, is presumed not to have authority to execute an agreement on behalf her employer, including the granting of security, particularly when the document they signed clearly confirms that authority.

30 Given the foregoing, I find that the Trustee was not justified in departing from the indoor management rule and disallowing the claim on the basis that Ms. Golding did not have authority to sign the Credit Application.

31 On the second question, Accra says that no one at the company knew that the agreement contained a clause transferring to Formations a security interest in all of Accra's present and after acquired personal property. Moreover, that the security clause is atypical and onerous and as such, there was a duty on Formations to have taken reasonable measures to draw the attention of Accra to that clause. Accra relies upon *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (Ont. C.A.) and *Arndt v. Ruskin Slo Pitch Assn.*, 2011 BCSC 1530 (B.C. S.C.).

32 The general principles applicable to this issue are summarized in *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (B.C. S.C.), at 166:

[T]here is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that the signing party reads and understand the terms. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

33 The case notes that it is in special circumstances when the aforementioned obligation arises. Except in those limited circumstances, a party who signs a document is assumed to have intended to be bound by its terms.

34 Whether the departure from the general principle is justified is to be determined on the specific circumstances of each case. *Karroll* identifies certain factors for consideration as the effect of the impugned provision in relation to the nature of the contract, i.e. does it run contrary to the party's normal expectations; is the clause inconsistent with the overall purpose of the agreement; the length and format of the contract; and the time available for reading and understanding it as being relevant to the determination.

35 In my view, the Trustee appears to have overweighed the breadth of the security grant, its location in the Credit Application, and the size of the print; and failed to consider other factors in the broader context before departing from the general rule that a party who signs an agreement, regardless of whether they read the document or not, is assumed to have intended to be bound by its terms.

36 The present case is a transaction between two businesses involving matters at the core of their businesses, i.e. the sale and purchase of wood products on credit. The review and execution of the Credit Application went through the normal internal processes within Accra. The initial contact was through Accra's purchasing agent, which is the usual route. There is no suggestion that Accra was not provided reasonable time to review and assess whether the terms in the Credit Application were acceptable. There is nothing unusual about the document's print - its size or clarity. There is a clear statement just above the section where Accra's representative was to sign that the agreement contained a grant of security to Formations. By putting this clear statement in such a location, it can be said that a reasonable step was made to bring attention to the signing party the presence of a security-granting clause in the agreement. Further, it is apparent that Ms. Golding had signed many credit applications on behalf of Accra, some of which granted some form of security. It is apparent that Ms. Golding was careful to review such agreements and delete terms which would expose her to personal liability, including the subject agreement. It is difficult to accept her statement that she did not read all of the terms, given that she would review the documents for any exposure of personal liability and in so doing not notice the term granting security or the provision advising a clause granting security was contained in the agreement. I also am of the view that the granting of security in a credit application is not outside of reasonable expectations in a commercial context where goods and credit are being

extended; and indeed, Accra had at least in two other credit agreements (which are not said to have been signed without authority) signed by Ms. Golding that granted some form of security. While the security in the subject credit application is broad, it is the presence a security provision as opposed to its scope which is relevant.

37 The cases relied upon by the Trustee are quite distinguishable. *Tilden* and *Ruskin* were not commercial transactions. The impugned provisions in both cases involved the limitation or waiver of liability. In *Tilden*, it was known by the car rental company that the customer would be in a hurried state when reading the agreement. In *Ruskin* there were time pressures to sign the document. The impugned provisions were, in each case, on the back of the document, in small print and faint or barely legible and were inconsistent with the overall purpose of the contract. In *Ruskin*, the waiver was mixed in with the roster list for the softball team and the court found that the document had a dual purpose and that reasonable steps were not taken to bring the waiver to the attention of the signor. In *Tilden* the court found that the impugned provision was completely inconsistent with the express terms which purported to provide complete coverage for damage to the vehicle in exchange for an additional premium. In the present case, the impugned term is not a limitation or waiver but rather the provision of security for goods provided on credit. It cannot be said that this provision runs contrary to the overall purpose of the transaction; rather, security for the extension of credit would seem entirely consistent with the overall purpose.

38 The circumstances were not so special as to have given rise to an onus on Formations to bring the security clause to the attention of Accra. They do not support the conclusion that Formations ought to have known that Accra was not consenting to the terms in the Credit Application. As a result, the departure by the Trustee from the general principle that a party who has signed is assumed to have intended to be bound by the agreement was not justified.

39 Given my determinations above, it is unnecessary for me to address the question of estoppel.

Conclusion

40 The Trustee's disallowance of Formations' claim to a security interest is set aside and Formations' application for a declaration that its claim against Accra is secured by a security interest as set out in the Credit Application is granted.

Appeal allowed.

TAB 12

Harris v. Tong, 1930 CarswellOnt 126

1930 CarswellOnt 126, [1930] 3 D.L.R. 32, 65 O.L.R. 133

1930 CarswellOnt 126
Ontario Court of Appeal

Harris v. Tong

1930 CarswellOnt 126, [1930] 3 D.L.R. 32, 65 O.L.R. 133

Harris v. Tong

Latchford, C.J., Riddell, Masten and Orde, JJ.A.

Judgment: January 31, 1930
Docket: None given.Counsel: *J. W. Pickup*, for appellant
R. L. Kellock, for respondent

Subject: Corporate and Commercial

Related Abridgment Classifications

Commercial law

III Conditional sales**III.7** Rights and liabilities of parties**III.7.f** Vendor's remedies on default**III.7.f.iii** Resale**III.7.f.iii.D** Action for deficiency**III.7.f.iii.D.1** General principles

Commercial law

IV Agricultural products**IV.6** Liens and security on animals**IV.6.b** Entitlement to possession

Commercial law

V Sale of goods**V.1** General principles**V.1.a** Historical evolution

Commercial law

V Sale of goods**V.8** Seller's remedies**V.8.d** Lien**V.8.d.i** Seller in possession

Commercial law

V Sale of goods**V.8** Seller's remedies**V.8.e** Resale**V.8.e.ii** When notice not required

Harris v. Tong, 1930 CarswellOnt 126

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Latchford, C.J.:

I agree in the result.

Riddell, J.A., (dissenting):

The plaintiff being a horse dealer, the defendant and one Hume wanting a team for immediate use, they bought from him a team, giving a note in the following terms (as set out in the judgment of Orde, J.A., at pp. 36-7).

The purchasers making default, the plaintiff — who had given immediate delivery — took possession of the team, on October 17, under this lien note; and in October sent to the defendant, the following notice: —

Oct. 26, 1928.

Mr. Harry LeTong,

Restaurant Keeper

Main Street, Hailcybury, Ont.

Dear Sir: — I hereby give you notice of an auction sale to be held by me, which will take place at Wellington Street, New Liskeard, at 2 p.m. on Saturday, November 10, 1928, of team of horses which were repossessed by us about November (October) 17, on a lien note for which you together with Percy Humes made in my favour.

I herewith enclose copy of sale bill.

The sale bill was as follows: —

Auction Sale.

One team of horses

— at —

Harris Sale Stables.

Wellington St., Town of New Liskeard,

at 2 o'clock in the afternoon on

Saturday, Nov. 10th,

1928.

By virtue of the powers contained in a certain lien note, which will be produced at time of sale, there will be offered for sale by public auction one team horses, serviceably sound, weighing thirty hundred pounds.

W. D. Harris.

He went on and sold the team; and, after deducting expenses, credited the net proceeds on the note and sued for the balance. The District Court Judge of Temiskaming gave him judgment, and the defendant now appeals.

On the argument, an attempt was made to establish that the sale was actually made under a verbal arrangement with the defendant; but this wholly failed, there being no legal evidence to support such a finding. It is abundantly evident from the documents signed by the plaintiff himself that he was acting under the lien note.

It is plain, I think, that the word "possession" at the beginning of the special provision of the note is really intended for "property:" as it seems to me, any other interpretation would be wholly inconsistent with the later provisions of the note as to taking possession on default etc.

That being the case, we are bound by the decision of the Court of Appeal in *Sawyer v. Pringle* (1891), 18 A.R. (Ont.) 218, to hold that the plaintiff cannot succeed. I would therefore allow the appeal and dismiss the action, both with costs.

Masten, J.A.:

Appeal by the defendant from the judgment of the District Court of Temiskaming, dated October 9, 1929, in favour of the plaintiff for \$274.73 and costs in an action to recover the balance of the purchase-price of a team of horses.

I agree in the result proposed by my brother Orde, but the grounds on which I reach that conclusion vary in some respects from his. I adopt his statement of facts, and for the reasons stated by him I agree with his conclusion that the parties did not intend that possession of the horses should be retained by the plaintiff. From the internal evidence of the document itself and from the undisputed facts detailed in evidence it seems plain that the word "possession" must be disregarded. It may be that it was a slip of the pen of the plaintiff, who seems to have prepared the document in question, and that he meant to say "property," and not "possession." But this Court cannot, in the face of the evidence given by the defendant and without any reference in the evidence to the terms of the agreement, make a new contract for the parties and hold that where the agreement says "possession" it means "property." As my brother Orde says, it would be impossible, as against the defendant Tong, to reform the document. It is not what the plaintiff Harris intended when he wrote the agreement, but what the written document says, that governs, and I find nothing in the context or in the evidence to warrant our altering the word from "possession" to "property." See Leake on Contracts, 7th ed., pp. 150-2, and 2 Williston on Contracts, 1920, pp. 1175-7, para. 610, and cases cited in these two text books.

Then, in the statement of defence of the defendant, para. 4 reads as follows: —

The defendant alleges that the note or document referred to in the plaintiff's statement of claim and in the writ of summons is a conditional sales agreement or lien note purporting to be signed by the said Percy Hume and the defendant.

I do not think that paragraph above quoted is an admission of fact, but rather that it is an incorrect assertion of law.

On the face of the agreement as written, there was a sale of a specific article to the buyers without any reservation to the seller of the property in the horses sold. An incorrect statement of the legal effect of the document cannot operate as an admission of fact that the property in the horses which, under the terms of the agreement as written, vested in the purchasers, did not so vest but remained in the plaintiff.

If I am right in that opinion, the document signed does not operate as a conditional sale agreement. The property in the horses passed to the purchasers and the Conditional Sales Act, R.S.O. 1927, c. 165, has no application.

Whether s. 7 of the Conditional Sales Act is to be construed as giving by implication a power of sale to the vendor, when no such power is expressly provided either by the agreement or by the statute, is a question of wide and general importance as to which I prefer to reserve my opinion until it falls necessarily to be determined.

I am however of opinion that the plaintiff had power to sell and to sue for the balance. I feel a little doubt as to whether the evidence as to the terms on which Harris repossessed the horses is sufficient to bring the matter within the terms of the rule stated in Benjamin on Sales, 6th ed., p. 968, in the following terms: —

A lien once lost is not re-vested by the mere fact that the seller afterwards obtains possession of the goods. Possession must be obtained with an intention on the part of the buyer that the right of lien shall re-vest.

Also it seems to me somewhat doubtful whether the cases referred to in support of the above statement warrant the text.

But, whether the rule applies or not, I think that when the horses were repossessed by Harris there was a plain implication that he took them to secure the balance of his claim, and that such was the understanding of the parties. Up to this point the course of events was as follows: first, the possession and the property in the horses passed to the buyers; secondly, the buyers being in default under the terms of the agreement of purchase, the seller resumed possession, whether by consent or under the terms of the agreement is immaterial, but upon such resumption of possession the property in the horses still remained vested in the buyers. Under these circumstances I think that the seller, the plaintiff, held the horses as a pledge to secure the balance due him, and as a pledgee had an implied power to sell and also to sue for any balance: *Prete v. Lauzon & Fensom*, [1923] 3 D.L.R. 1152, 52 O.L.R. 334; *Pigot v. Cubley* (1864), 15 C.B.N.S. 701, 143 E.R. 960; *Stubbs v. Slater*, [1910] 1 Ch. 632.

If this is the true view of the situation after repossession by the plaintiff, the right of sale arises at common law and not under the Sale of Goods Act, R.S.O. 1927, c. 163, s. 57(3).

The appeal should be dismissed with costs, with the variation proposed by my brother Orde.

Orde, J.A.:

On August 27, 1928, the defendant, together with one Hume, purchased a team of horses from the plaintiff for the sum of \$300, to be paid in twelve consecutive weekly instalments, commencing one week after the date of the sale. The terms of the bargain were embodied in the following document which was signed by the defendant: —

Given for one chestnut team geldings, Hennessy horse and Carr horse.

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No. 30.**Instalment List**

1	week	after	date \$25.00
2	weeks	after	date \$25.00
3	"	\$25.00	
4	"	\$25.00	
5	"	\$25.00	
6	"	\$25.00	
7	"	\$25.00	
8	"	\$25.00	
9	"	\$25.00	
10	"	\$25.00	
11	"	\$25.00	
12	"	\$25.00	

Total \$

1

Reg. No. _____

Due _____

New Liskeard, Ont.,

Aug. 27th, 1928.

For value received I promise to pay W. D. Harris or order the sum of three hundred dollars, at New Liskeard, Ont., at the time or times stated in schedule of instalments hereon with interest at 8 per cent. per annum before and after maturity until paid.

Possession of the said property

stated hereon shall not pass from the said W. D. Harris until this note is paid in full, and the said W. D. Harris has full power to declare this note due and take possession of said property at any time he deems himself unsecure, even before the maturity of this note.

Percy Hume.

Harry Tong.

Witnessed: W. H. Lowery.

Notwithstanding the written stipulation that "possession" was not to pass from the plaintiff until the note was paid in full, possession was in fact immediately given to the purchasers. The purchasers failed to pay any of the instalments as they became due, and up to October 17, 1928, all that the plaintiff had received from either purchaser was \$19, which was paid him by the defendant on September 28, 1928.

On October 8, 1928, the plaintiff wrote the purchasers demanding payment of the arrears and threatening proceedings to recover. On October 13 the plaintiff received a reply from Mr. Tuer, the defendant's solicitor, asking for information and suggesting that the plaintiff should call at his office and discuss a possible settlement.

The plaintiff thereupon had an interview with Mr. Tuer, at which was also present Mr. Lowery who had acted as the plaintiff's agent in effecting the sale.

Both the plaintiff and Lowery say that Mr. Tuer suggested that the plaintiff should retake possession of the horses, and this is not contradicted. It is not so clear that Mr. Tuer authorised the plaintiff to resell the horses, and if he did it is very doubtful, if he had any authority from the defendant to do so.

The defendant not only denies having given any such authority to his solicitor, but denies having purchased the horses at all. He gives a version of the transaction which, if true, seems a reasonable one, namely, that the real purchaser was Hume, who wanted the horses so that he might draw in wood for the defendant, and that the only obligation which the defendant was entering into was to withhold the moneys due Hume for the wood and to pay the same to the plaintiff in reduction of Hume's liability, and that he thought that was the nature of the document he signed. But the trial Judge has believed Lowery's evidence as to that, and it would be impossible without some more convincing evidence than that of the defendant himself to hold that his signature was procured by fraud.

On October 17, 1928, the plaintiff retook possession of the horses, and on October 26, notified the defendant by letter that the horses would be sold by auction at 2 p.m. on November 10, 1928. The horses were sold and realised only \$90. After deducting the cost of retaking possession and of the sale, and giving credit for what was left, the plaintiff claimed from the defendant \$274.73, and for this sum judgment was given the plaintiff at the trial.

The only grounds of appeal are: —

- (1) That the judgment of the Judge at the trial was contrary to the evidence.
- (2) That the conditional sale agreement or lien note relied upon by the plaintiff in this action, and under which the plaintiff acted, contained no provision empowering the plaintiff to re-sell the horses referred to in the said conditional sale agreement or lien note, and make the original purchaser, the defendant in this action, liable for payment of any deficiency remaining upon such resale; and that the plaintiff, by reselling the said horses, abandoned any claim or claims which he might have had against the defendant.
- (3) That the said horses were resold by the plaintiff without the authority of the defendant.

The first ground may be disregarded. The third ground presumably refers to the contention that the defendant, through Mr. Tuer, gave express authority to resell at the interview with the plaintiff above mentioned, and not to the absence of any express power in the sale agreement. If the plaintiff's right to recover depended upon any such subsequent authority given by Mr. Tuer on behalf of the defendant, the action would fail, not only because it is not clearly proved that Mr. Tuer ever went that far at the interview, but because there is no evidence whatever that the defendant ever authorised Mr. Tuer to consent to a resale.

The second ground, however, raises some questions which require careful consideration, especially because of the contention that the case comes within the decision of the Court of Appeal in *Sawyer v. Pringle*, 18 A.R. (Ont.) 218.

The exact rights of an unpaid vendor to recover the deficiency from a defaulting purchaser, after the vendor has resold at a loss, have in the past been the subject of much doubt and difficulty, the divergent views of the Judges both in the Court of Appeal and below in *Sawyer v. Pringle* are evidence of that. The problem in each case was rendered difficult by the number of factors involved. For example, the property in the goods sold might have passed to the purchaser, but the possession remained with the owner, in which case the latter had his vendor's lien as security for the price. Or the possession had passed to the purchaser, but the property was expressly retained by the vendor; this was of course a "conditional sale," as we now term it. Or both property and possession passed to the purchaser; this would, if the contract gave no express right to the vendor to re-possess, be a simple sale on credit from which no possible right of resale on default could arise. The matter might, however, be further complicated in any of the above cases by some express provision in the contract, giving the vendor the right either to retake the goods, or to resell the goods, or both, and the presence or absence of one or other of such provisions has had a bearing upon the result in many cases. Then there was the further question in some cases whether the vendor's retaking of possession was tortious, and therefore itself a breach of the contract on his part, or was permitted either by the terms of the contract or otherwise by the purchaser, and the further question whether such retaking of possession restored the vendor to his lien or to any rights arising therefrom.

I think that many of the former difficulties have been set at rest by certain provisions of the Sale of Goods Act, which was first enacted in Ontario by 1920 (Ont.), c. 40, and of the Conditional Sales Act, which in its original form was first enacted by 1888 (Ont.), c. 19. The important provision in s. 7(2) of the Conditional Sales Act, as to the right of the vendor to look to the purchaser or hirer for any deficiency on a resale of the goods, was first enacted by 1911 (Ont.), c. 30, s. 8.

In applying the provisions of these two Acts to the present case, it may be useful to keep in mind, a matter of some importance. It is a constant and perhaps not unnatural tendency, when considering a so-called codifying statute, to seek for the law as it was, or was believed to be, before the statute, and then to apply the relevant statutory provisions as confirmatory thereof. Now, no one will deny that the reasoning and conclusions of the Judges in the past often serve to illuminate the codifying statute, but they cannot be resorted to for the purpose either of nullifying or cutting down the effect of the direct and positive language of the Act, or of adding to the Act something which is not there. And it may not be amiss to quote in this respect the emphatic words of the late Lord Halsbury in *Bk. England v. Vagliano Bros.*, [1891] A.C. 107, where the effect of the Bills of Exchange Act, 1882 (Imp.), c. 61 (a codifying Act) was under discussion. At p. 120 he says: —

It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.

An apparent difficulty arises in the present case from the extraordinary stipulation in the contract that "possession" of the horses was not to pass from the vendor, followed by the provision that he had full power to take possession if he deemed himself "unsecure." That the parties did not intend that possession should be retained by the plaintiff is quite evident from the fact that possession was immediately given to the purchasers. And I have no doubt that the vendor really meant to provide that the property in the horses should not pass until the note was paid in full. But, if the question whether the property was not

to pass to the purchasers is of importance as affecting the vendor's rights in the present case, I would find myself unable to accede to the argument that by the word "possession," where it first appears, both vendor and purchasers meant "property." There is no evidence whatever that in the course of the negotiations there was any stipulation that the property should not pass; and, in the absence of some such stipulation, the law is clear that, where the bargain is completed for the sale of a particular article, the property will immediately pass to the purchaser. I quite agree that the stipulation that the possession shall not pass from the vendor cannot have been intended, because it was never in fact put into effect, and must therefore be ignored. But it is one thing to hold that the stipulation, either by reason of its being contradicted by the later provision or because it was disregarded or waived, is to be ignored and quite another thing to read it as introducing into the contract a term which was never in fact a part of the oral bargain, and which, so far as any evidence shows, was not explained by the vendor or his agent as intended to be the meaning of the word. If we were called upon to reform the written contract, upon the evidence, I cannot see upon what theory we could do it. It is not what the vendor intended but what both parties intended that would govern in such case. The word "possession" does not mean "property;" and, when the sale of goods is concerned, the two terms express entirely distinct and in some essential respects quite opposite concepts, one affecting the physical destination of the goods, the other the abstract principle of ownership.

The action is brought for the balance of the purchase-price of the horses, and there is nothing in the statement of claim to indicate that the plaintiff treated the sale as a conditional one. That he so regarded it is fairly plain from the evidence and the fact that he held the horses for 20 days after the 5 days' notice of sale, as required by s. 7 of the Conditional Sales Act. And the defendant, both in his statement of defence and in the second ground of his appeal above quoted, treats the transaction, if binding on him, as a conditional sale. His statement of defence refers to the agreement as a "conditional sales agreement," and alleges, among other things, in effect, that, as it did not expressly give the plaintiff the right to resell and look to the purchasers for any deficiency, the plaintiff had no legal or contractual right to resell and claim the deficiency, and that by reselling he had abandoned his claim against the purchasers. In other words he sets up substantially the defence that succeeded in *Sawyer v. Pringle*.

Notwithstanding the attitude of both plaintiff and defendant, it may be that neither has done anything to prejudice his rights, if upon a true construction of the contract it was not a conditional sale at all.

If it was in fact a term of the contract here that the property was not to pass from the vendor until the purchase-price was fully paid, then the contract was in substance the same as that in *Sawyer v. Pringle*, because in each case there was a provision for repossession but none for a resale by the vendor. So that, unless the Conditional Sales Act entitles the vendor to resell and recover the deficiency from the purchaser, we would be bound by that decision.

Whether *Sawyer v. Pringle* was rightly or wrongly decided, as the law then stood, may be a nice question for lawyers to discuss. The opinions of the majority of the Court of Appeal were opposed to that of the late Boyd, C., in the Chancery Divisional Court, and it is evident from the latter's judgment in the later case of *Arnold v. Playter* (1892), 22 O.R. 608, that he was not satisfied with the decision and that he followed it reluctantly. But, whether right or wrong, the theory of the opinion in the Court of Appeal is quite logical. The property not having passed, and there being no express power to resell, the vendors by reselling had put it out of their own power to perform the contract. They could not, therefore, enforce the contract by suing for the price, when they were no longer able to give the purchaser what he had bought. The three Judges who composed the majority of the Court were indeed all of the opinion that the transaction was not a sale at all. Hagarty, C.J.O., says, 18 A.R. (Ont.), at p. 221: — "This agreement cannot properly be called 'a contract of sale.' It is an executory agreement for a future sale on performance of certain named-conditions by the defendant." Burton, J.A., at p. 227, says: — "Here there was no sale strictly so called; there was an executory and conditional contract of sale — that sale would become absolute and the property pass only on fulfilment of the conditions." And Osier, J.A., at p. 230, says: — "Here the agreement between the parties is an executory one; merely a contract, as Lord Blackburn says, to transfer the property in consideration of the purchaser actually paying the price and not merely of his engagement to do so."

Sawyer v. Pringle was tried shortly after the Conditional Sales Act, 1888 (Ont.), c. 19, came into force, but the cause of action had arisen before the Act, and the trial Judge, Armour, C.J., held that the Act was not retroactive and did not apply; (1890), 20 O.R. 111, at p. 113. But one thing is clear, that the contract there, as described by each of the three Judges mentioned, constituted what we now term a "conditional sale." Whether the provisions of the Act as it then stood would have assisted the plaintiffs might be a nice question if it were necessary to determine it. But, if the transaction here was in fact a conditional sale, the question is, what effect has the Conditional Sales Act in its present form, and especially the provision enacted first in 1911 as to the vendor's right upon a resale to look to the purchaser for any deficiency, upon the respective rights of the parties?

If we are to construe this contract as embodying a term that the property was not to pass until the price was fully paid, the contract was clearly a "conditional sale" within the meaning of the Conditional Sales Act. The Act does not in terms define a "conditional sale." That term is a comprehensive one, and probably includes contracts for the conditional sale of goods which

do not come within the Act at all. But for the purpose of the Act the definition is in effect contained in s. 2, which opens with the words: — “Where possession of goods is delivered to a purchaser, or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it.” The contract here comes within that description.

That being the case, what are the respective rights of the vendor and of the purchasers when the vendor retakes possession upon default? Whatever they might have been before the Act, they are quite clearly affected by the provisions of s. 7, which reads as follows: —

(1) Where the seller or lender retakes possession of the goods for breach of condition he shall retain them for twenty days, and the purchaser or hirer or his successor in interest may redeem the same within that period on payment of the amount then in arrear, together with interest and the actual costs and expenses of taking and keeping possession.

(2) Where the purchase price of the goods exceeds \$30, and the seller or lender intends to look to the purchaser or hirer for any deficiency on a resale of the goods, they shall not be resold until after notice in writing of the intended sale has been given to the purchaser or hirer or his successor in interest.

(3) The notice shall be served personally upon or left at the residence or last known place of abode in Ontario of the purchaser or hirer or his successor in interest at least five days before the sale, or may be sent by registered post at least seven days before the sale addressed to the purchaser or hirer or his successor in interest at his last known post office address.

(4) The notice may be given during the twenty days mentioned in subsection 1.

(5) This section shall apply notwithstanding any agreement to the contrary.

That this section has altered the law is clear, and it was distinctly so held by the Appellate Division in *Stock v. Meyers & Cook* (1919), 51 D.L.R. 328, at p. 339, 46 O.L.R. 420, per Meredith, C.J.O. The precise limits of the change may not be apparent, but this much is plain, that where by a contract of sale the property is to remain in the vendor until the performance of some condition, but the possession of the goods is given to the purchaser, the latter gets in addition to his right to acquire an absolute title by performing the condition, a qualified title or interest, by virtue of the statute, which enables him, notwithstanding his default, to redeem the goods at any time within 20 days after the vendor retakes possession. And the statute clearly requires the vendor to retain the goods during that period in order that the purchaser may redeem them if he sees fit.

The radical change in the law governing the rights of the parties under that section is exemplified in the judgment of the Supreme Court of Canada in *C. C. Motor Sales Ltd. v. Chan*, [1926] 3 D.L.R. 712, The British Columbia Conditional Sales Act, R.S.B.C. 1924, c. 44, was there under consideration, and the question was whether or not, when the vendor had retaken possession and sold at a profit, the surplus proceeds belonged to the purchaser, notwithstanding his default. The British Columbia Act is more elaborate than ours, and s. 10, which is in many respects the same as our s. 7, contains some provisions which are not in ours. The British Columbia section opens with the words, “Where the seller retakes possession of the goods pursuant to any condition in the contract,” which may mean an express condition entitling the vendor to retake possession upon default. Our section begins: — “Where the seller or lender retakes possession of the goods for breach of condition.” And, while s-s. (3) of the British Columbia section corresponds with s-s. (2) of our section, s-s. (2) of the British Columbia section gives to the vendor an express power to sell the goods if not redeemed within the 20 days, while our Act contains no such express provision.

The Supreme Court of Canada in that case held that the relationship of the parties did not differ essentially from that of mortgagor and mortgagee. The contract there contained an express power to retake possession and to resell and an express undertaking by the purchaser to pay any deficiency.

While, therefore, neither the British Columbia Act, nor the contract in that case is on all fours with our Act, or the contract here, the Supreme Court judgment is, in my opinion, far-reaching in that it lays down a broad principle as to the effect of statutes of this character upon the true relationship of the parties under a contract of this type. It is argued here that the absence of an express power to resell in the contract excludes the transaction from the operation of s. 7, and that *Sawyer v. Pringle* therefore applies. But there is nothing in s. 7 which makes its operation dependent upon contractual rights at all. and its terms are so obligatory upon the parties that s-s. (5) prohibits any agreement to the contrary.

The provision in s-s. (1) that the seller must keep the goods for 20 days after retaking possession, in order to give the purchaser an opportunity to redeem, is not expressed to be dependent upon any express power to retake possession, and is, I think, applicable to every conditional sale to which the Act applies even though the contract contains no express provision for repossession. Whether or not there is a right to retake possession upon breach of a condition inherent in every case where the property in the goods remains in the vendor, as a necessary incident of ownership, does not seem to have been decided, though on principle it ought to be so. It is not necessary here to decide that. But, where the vendor has in fact retaken possession, it seems to me that he must retain the goods for 20 days under s. 7(1), whether he regained that possession under the contract or not. That, I think, is the effect of *Stock v. Meyers & Cook*, *supra*.

Then as to the operation of s-s. (2). Is the right to look to the purchaser for any deficiency under that subsection confined to those cases where the contract expressly empowers the vendor to resell? If it is, then this anomaly results. The vendor, though holding the goods as owner, is nevertheless bound to retain them for 20 days, during which the purchaser has an equitable interest entitling him to redeem; but, if he sells after the 20 days, he sells the goods as his own and not merely to realize his security for the debt, and on the authority of *Sawyer v. Pringle* has no further recourse against the purchaser. The consequences might in many cases be disastrous. During the 20 days there might be an advantageous market for the goods or an opportunity to sell without loss, but the vendor's hands are tied. He must retain the goods for the benefit of the purchaser. I am inclined to the view that s-s. (2) supplies for the vendor the compensating benefit for the restriction imposed by s-s. (1), and is intended to entitle him in every case, whether a right of resale is expressly given by the contract or not, to look to the purchaser for any deficiency.

That would be the only consistent conclusion to be drawn from the judgment of the Supreme Court in *C.C. Motors Sales Ltd. v. Chan*, *supra*. The statute has created, as between the conditional purchaser and the conditional vendor, when possession has been given to the purchaser, the relationship of mortgagor and mortgagee, so that the retention by the vendor of the property in the goods is to be regarded solely as a security for the payment of the purchase-price, for which the purchaser is still liable, with an absolute right to the purchaser, for 20 days after the vendor has retaken possession, to enforce the contract by payment and thereby to redeem and get back the goods, and with the corresponding right to the vendor, upon giving notice, to compel the purchaser to make good his default.

Section 7, in my judgment, has swept away most of the difficulties and refinements which gave the Court so much trouble in *Sawyer v. Pringle*. It has destroyed some of the fictions surrounding conditional contracts of sale and made the law conform to the realities thereof. When a man enters into a binding contract to buy some chattel, but agrees that, notwithstanding the immediate delivery of possession to himself, the vendor shall retain the ownership until the price is fully paid, the retention of ownership is unquestionably intended as a mere security for the payment of the price. Whatever the technical distinctions may be, the transaction is hardly to be distinguished from that of an absolute sale to the purchaser and a mortgage or reconveyance of the legal estate back to the vendor to secure the purchase-money.

If we apply the plain language of the section to the transaction, unhampered in construing it by the subtleties and refinements that entered into so many of the decisions before the Act, the situation is greatly simplified and the respective rights of the parties easily determined. And I am supported in this view of the effect of the section by the two cases of *C.C. Motor Sales Ltd. v. Chan* and *Stock v. Meyers & Cook*.

If the transaction is to be treated as a conditional sale, the plaintiff, having retained the goods for 20 days and given the defendant the required notice of the sale, is entitled to recover the deficiency from the defendant, notwithstanding the absence of any express power to resell in the contract.

If, however, upon a proper construction of the contract, there was no provision that the property should remain in the vendor and as already explained that is my view — what was the effect of the retaking of possession by the vendor and his sale of the goods after notice to the defendant?

This case now falls to be determined under the Sale of Goods Act. Where goods are sold, and the property passes to the purchaser but possession is retained by the vendor, he has of course his vendor's lien thereon for the price. If the vendor also gives up possession, he loses his lien. He waives it by giving up possession. But, according to Benjamin, the lien may be restored if possession is regained by the vendor with an intention on the part of the buyer that the right of lien shall revert: Benjamin on Sale, 6th ed., p. 968. The authorities given for this statement are not very satisfactory, but the statement seems sound in principle. In the present case not only were the horses voluntarily given up to the plaintiff, but the contract contained an express power to retake possession. I cannot interpret such a provision in a contract otherwise than as having the effect upon the restoration of possession to the vendor, of reviving his lien. What other purpose could it serve, and of what practical value would possession be if it did not carry with it the right to hold the goods as security for payment, and what else is that right but a right of lien?

In what way may an unpaid vendor exercise his right of lien? It is unnecessary to discuss the difficulties involved in that question as they existed at common law. They are dealt with exhaustively in the earlier editions of Benjamin on Sale in the

Harris v. Tong, 1930 CarswellOnt 126

1930 CarswellOnt 126, [1930] 3 D.L.R. 32, 65 O.L.R. 133

chapter dealing with "Remedies against the Goods — Resale," and to some extent in the same chapter (v.) in the 6th edition. But there can be no doubt that, whether we regard the Sale of Goods Act as merely embodying the law as it then stood, or as having changed it, some of its provisions, if applied, as they should be applied, in the way indicated by Lord Halsbury in *Bk. England v. Vagliano Bros.*, [1891] A.C. 107, have clarified the situation and removed some of the previous difficulties. By s. 38(1) (a) the seller has by implication of law "a lien on the goods or right to retain them for the price while he is in possession of them."

Section 46 provides by s-s. (3) that: — "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not, within a reasonable time, pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

Nothing could be plainer than this language. And the editors of Benjamin on Sale sum up the propositions deducible from the authorities and the Act (p. 1089) in such a way, as to make it quite plain that the vendor may (p. 1090) "resell the goods without express power . . . where he gives notice of the intended resale," and may recover the deficiency from the purchaser. In the present case notice was given on October 26 of the intended sale on November 10, 15 days in all, which, having regard to this contract, gave the defendant a reasonable time for payment.

So that, in whichever way we look at this contract, the plaintiff is, in my opinion, entitled to recover.

As to the amount of the judgment, there is an odd discrepancy between the total claimed, namely \$274.73, for which judgment was entered, and the statement of the account in para. 2 of the statement of claim. This sets forth five items of \$15, \$1.50, \$48, \$2.75, and \$2, as comprising the expenses connected with the retaking of possession and the resale. The total is made to be \$83.73, but is in fact \$69.25. There is nothing in the evidence to explain the mistake, and no further item of expense was proved. The judgment below should be varied by reducing the amount thereof from \$274.73 to \$260.25.

As so varied, the judgment should be affirmed and the appeal dismissed with costs.

End of Document

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TAB 13

Heritage Village Holdings Ltd. v. Moviestar CD & Video..., 1995 CarswellAlta 216

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1995 CarswellAlta 216
Alberta Court of Queen's Bench

Heritage Village Holdings Ltd. v. Moviestar CD & Video Entertainment Inc.

1995 CarswellAlta 216, [1995] A.W.L.D. 626, 171 A.R. 36, 30 Alta. L.R. (3d) 414, 55 A.C.W.S. (3d) 190

**HERITAGE VILLAGE HOLDINGS LTD. v. MOVIESTAR CD & VIDEO
ENTERTAINMENT INC.**

Master Funduk [in Chambers]

Judgment: May 17, 1995
Docket: Doc. Edmonton 9503 07821

Counsel: *B. Maruyama*, for applicant.
P.A. Shenher, for TSC Shannock Corp.

Subject: Property

Related Abridgment Classifications

Real property

V Landlord and tenant

V.18 Distress

V.18.o Effect of conditional sales agreement

Headnote

Landlord and Tenant --- Distress — Effect of conditional sales agreement

Landlord and tenant — Distress — Property subject to distress — Property subject to security interests — Landlord prohibited from distraining against conditional vendor's interest in chattels on premises by s. 19 of Seizures Act — Personal Property Security Act being irrelevant in situation.

Personal property security — Security interests under Personal Property Security Acts — Transactions subject to legislation — Landlord prohibited from distraining against conditional vendor's interest in chattels on premises by s. 19 of Seizures Act — Personal Property Security Act being irrelevant in situation.

Personal property security — Conditional sales — Formal requirements — Undisputed evidence of supplier being that it had oral agreement with tenant that property in merchandise to remain in supplier until paid for in full — Conditional sale contract being established as against distraining landlord.

The tenant bought merchandise from the supplier, under an oral agreement whereby title to the merchandise would not pass to the tenant until the merchandise was paid for. The landlord distrained for rent, seizing all of the merchandise on the premises. The supplier claimed ownership of some of the merchandise. The parties applied for a summary decision of ownership of that merchandise.

Held:

Supplier entitled to merchandise.

Heritage Village Holdings Ltd. v. Moviestar CD & Video..., 1995 CarswellAlta 216

1995 CarswellAlta 216, [1995] A.W.L.D. 626, 171 A.R. 36, 30 Alta. L.R. (3d) 414...

Although there was no written contract to that effect, the uncontradicted evidence of the supplier was that the parties had agreed that title to merchandise sold to the tenant would remain in the supplier until the supplier was paid in full. A conditional sales contract had therefore been established. Under s. 19 of the *Seizures Act*, a landlord is prohibited from distraining against a conditional vendor's interest in chattels on the premises. There was no priority issue and the *Personal Property Security Act* did not apply as between the supplier and the landlord.

Table of Authorities**Cases considered:**

Atlas Industries v. Federal Business Development Bank (1983), 3 P.P.S.A.C. 39, 50 C.B.R. (N.S.) 14 (Sask. Q.B.) — considered

Bank of Montreal v. Unit Liner Western Ltd. (1984), 33 R.P.R. 113, 12 D.L.R. (4th) 470, 54 A.R. 114 (C.A.) — referred to

Dexleigh Corp. v. O'Toole's Realty (Alberta) Ltd. (1986), 72 A.R. 144 (Master) [affirmed (1986), 52 Alta. L.R. (2d) 284 (Q.B.)] — considered

National Trailer Convoy of Canada Ltd. v. Bank of Montreal (1980), 1 P.P.S.A.C. 87, 10 B.L.R. 196 (Ont. H.C.) — distinguished

Pickles Tents & Awnings Ltd. v. Joseph Group of Cos., [1981] 6 W.W.R. 300, 10 Man. R. (2d) 19, 127 D.L.R. (3d) 176 (C.A.) — distinguished

Royal Trust Corp. of Canada v. No. 7 Honda Sales Ltd. (1987), 7 P.P.S.A.C. 51, 35 B.L.R. 286 (Ont. Dist. Ct.) [reversed (1988), 40 B.L.R. 109, 8 P.P.S.A.C. 238, 31 O.A.C. 235, 15 M.V.R. (2d) 122 (Div. Ct.)] — distinguished

Sheckter v. 338445 Alberta Ltd. (1990), 109 A.R. 260 (Master) — referred to

W.C. Fast Enterprises Ltd. v. All-Power Sports (1973) Ltd. (1981), 16 Alta. L.R. (2d) 47, 40 C.B.R. (N.S.) 182, 126 D.L.R. (3d) 27, 29 A.R. 483 (C.A.) — distinguished

Statutes considered:

Conditional Sales Act, R.S.A. 1970, c. 61 — referred to

Personal Property Security Act, S.A. 1988, c. P-4.05

s. 10(1) [am. 1990, c. 31, s. 7; 1991, c. 21, s. 29(4)] considered

s. 72(1) referred to

Sale of Goods Act, R.S.A. 1980, c. S-2

s. 6(1) considered

s. 20 referred to

s. 24-27 referred to

Seizures Act, R.S.A. 1980, c. S-11

s. 1(g.2) "purchase-money security interest" referred to

s. 2(a) [re-en. 1988, c. P-4.05, s. 97(a.1) (which was en. 1990, c. 31, s. 69)] considered

s. 19 *considered*

s. 19(1) *considered*

s. 19(2)(b.1) [en. 1988, c. P-4.05, s. 97] *considered*

s. 29(8) *referred to*

Application to determine ownership of merchandise supplied by unpaid supplier and seized by landlord under distress for rent.

Master Funduk:

1 This is a contest between the Applicant, a distraining landlord, and TSC Shannock Corporation, an unpaid vendor of merchandise to the Respondent, a tenant.

Facts

2 The Respondent was a tenant of the Applicant.

3 The Respondent bought merchandise from TSC. TSC's witness says that there was an agreement between it and the Respondent that title to the merchandise would not pass to the Respondent until the merchandise was paid for. There is no written agreement between TSC and the Respondent.

4 The purchases are spread over a number of months starting in December 1994. There are no written purchase orders. TSC would invoice the Respondent for each purchase. Other than two invoices none of them are signed by the Respondent.

5 Each invoice has at the bottom of it the following:

TITLE TO THE PRODUCTS LISTED ABOVE SHALL REMAIN IN TCS [sic] SHANNOCK CORPORATION UNTIL THE TOTAL AMOUNT HAS BEEN PAID IN FULL

6 TSC did not register a financing statement at the Personal Property Security Registry. It did not have a security agreement that could fit into s. 10(1) PPSA if that Act applies in this contest.

7 When the Applicant distrained for rent it seized whatever merchandise was on the premises. TSC claimed ownership of some of the merchandise. The contestants decided to jump over a Sheriff's interpleader and have the issue decided on a removal and sale application. Section 29(8) *Seizures Act* allows the court to summarily decide issues of ownership.

8 The Applicant does not dispute that TSC sold merchandise as listed in the invoices to the Respondent or that TSC is owed the purchase price by the Respondent.

Issues

One

9 Without more, a conditional sale contract need not be in writing. It can be "in writing ... or by word of mouth or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties": s. 6(1) *Sale of Goods Act*. Property in goods passes when the parties intend it to be transferred: s. 20 *Sale of Goods Act*. Sections 24-27 deal with transfers of title in certain situations but none of them apply here. In this contest the Applicant is solely a distraining landlord.

Heritage Village Holdings Ltd. v. Moviestar CD & Video..., 1995 CarswellAlta 216

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10 In any event, there is no real distinction between reservation of title to goods and reservation of property in goods: *W.C. Fast Enterprises v. All-Power Sports (1973) Ltd.* (1981), 16 Alta. L.R. (2d) 47 (C.A.). So the sections should be read together.

11 Whether there is a conditional sale contract between TSC and the Respondent is a question of fact so other cases which find that there was or was not a conditional sale contract have no value as precedents. A finding of fact in a lawsuit has no value outside the lawsuit.

12 *Pickles Tents & Awnings Ltd. v. Joseph Group of Cos.* (1981), 127 D.L.R. (3d) 176 [[1981] 6 W.W.R. 300] (Man. C.A.), cited by counsel for the Applicant, is a case where the vendor sold merchandise to the purchaser and the invoices said that "Title and interest in the merchandise ... shall remain in ... [the vendor] ... until fully and finally paid for in cash ..." [p. 178]. The court (including the dissenting judge) found that there was a conditional sale.

13 That is just a finding of fact.

14 *Atlas Industries v. Federal Business Development Bank* (1983), 3 P.P.S.A.C. 39 (Sask. Q.B.), is a case where there was nothing signed by the purchaser. The vendor's invoices had the following stamped on them [p. 40]:

Title to property described on this invoice retained by vendor until payment in full. Vendor has right of repossession on default. Power to forcibly retake. This is a security agreement.

The court held that there was not a conditional sale contract. It said that there was not an intention by the purchaser to enter into a conditional purchase and what happened was an after the fact creation by the vendor after it became apparent that a lender to the purchaser was about to swallow up the purchaser's equipment under its debenture.

15 That also is a finding of fact.

16 The uncontradicted and unimpeached evidence of TSC is that there was an agreement between it and the Respondent that title to merchandise sold to the Respondent would remain in TSC until the purchase prices were paid in full. I find that to be the case.

17 The main argument is whether the *Personal Property Security Act* applies. I deal with that next.

Two

18 Counsel for the Applicant says that there is not a purchase-money security agreement which is enforceable against the Applicant because there is nothing signed by the Respondent. The Applicant relies on s. 10 PPSA which says:

10(1)... a security interest is enforceable against a third party only where

(a) the collateral is in the possession of the secured party, or

(b) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind or as "goods", "chattel paper", "securities", "documents of title", "instruments", "money" or "intangibles".

19 The Act does not define "third party".

20 *Joseph Group of Cos.* was a contest between a conditional vendor and a receiver appointed by a debenture holder. The court held that the vendor's security agreement was not enforceable against the receiver, pp. 186-87:

Section 10 of the *Security Act* reads in part:

10.A security interest is not enforceable against a third party unless

(b) the debtor has signed a security agreement that contains a description of the collateral sufficient to enable it to be identified.

Absent the signature of the debtor, *i.e.*, Pickles, Colonial would not have a security agreement enforceable against a third party. The *Security Act* does not require the entire security agreement to be encompassed in one document. Nor does it stipulate when the agreement is to be signed (*Rogerson Lumber, supra*). But the first shipment is not covered at all by the letter signed by Mr. Clark. As far as the second shipment is concerned, the letter is insufficient to constitute an essential component of a security agreement. I would expect that an agreement signed on behalf of a company would be signed by a duly authorized officer. Here, we have an informal document signed by a "controlling shareholder". No explanation was given by Colonial or Pickles for the absence of a properly executed document. While undue formality is not to be imposed under the *Security Act*, I would expect minimum compliance with general requirements in respect of documents executed by a corporation. In this case, the letter falls short of the minimum.

The effect of s. 10 of the *Security Act* is that Colonial cannot enforce its claim, as the holder of a purchase-money security interest, against a third party. The receiver, in this case, qualifies as a third party within the meaning of the *Security Act* (see s. 22(1)(a)(iii), *infra*).

Colonial cannot overcome another fundamental impediment to its claim, *i.e.*, its omission to register under the *Security Act*. Sections 34 and 35 set out the rules for determining priority between interests over the same collateral, and provide a mechanism for a conditional vendor to protect its interests. If Colonial had searched, it would have found a registration of a security interest from its intended purchaser in favour of the bank. Section 25 provides that, subject to s. 21, registration perfects a security interest in goods. Section 21 stipulates when a security interest is perfected. Under s. 22, an unperfected security interest is subordinate to the other interests set out in the section. The section reads in part:

22(1) Except as provided in subsection (3), [providing for registration of a purchase-money security interest, and so not applicable here] an unperfected security interest is subordinate to

(a) the interest of a person

(iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver;

Colonial, because it did not register under the *Security Act*, is a holder of an unperfected security interest. It would not have prior rights to the goods as against a receiver within the meaning of the *Security Act* (*Re Hillstead Ltd.* (1979), 103 D.L.R. (3d) 347, 26 O.R. (2d) 289, 9 B.L.R. 74 (Ont. S.C.), and *National Trailer Convoy, supra*).

21 I would not disagree with that. But that is a contest between an unregistered conditional vendor and a receiver under a debenture so it is a contest between two secured creditors. The Act does apply to that fact situation. The case is not at all helpful where the contest is between a distraining landlord and an unregistered conditional vendor.

22 In that case the unregistered conditional vendor sought to evade the lack of registration by sheltering behind the *Sale of Goods Act*. The court makes that clear at p. 180:

This is an appeal from an order of P. Ferg Co. Ct. J. signed March 4, 1981, granting the plaintiff, Joseph Group of Companies Inc., trading as Colonial Jute Products (Colonial), a replevin order against the defendant, Pickles Tents and Awnings Ltd. (Pickles) [9 Man. R. (2d) 204]. At issue in this case is the efficacy of the *Personal Property Security Act*, 1973 (Man.), c. 5 (C.C.S.M., c. P35) (the *Security Act*), and the relation of that Act to the *Sale of Goods Act*, R.S.M. 1970, c. S10.

23 What the case does decide is that in a case where the PPSA applies the unregistered conditional vendor cannot shelter

TAB 14

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herself from the operation of this rule by registering pursuant to section 27(1.1) of the *Sale of Goods Act*.¹⁶

(d) *A statutory security interest:* The Act contains elaborate provisions dealing with situations where goods that are collateral under a security agreement or the subject matter of a lease that is transferred as chattel paper are returned to or repossessed by the seller or lessor.¹⁷ These provisions are examined in detail elsewhere in this work. For the purposes of this segment, it is relevant to note that the Act provides that, upon return of the goods, the transferee of the chattel paper¹⁸ is given a statutory security interest in the returned or repossessed goods. This is so even though the goods were not identified as collateral in a security agreement between the transferor and transferee of the chattel paper and even though the transferor (debtor) does not have rights in the returned or repossessed goods.¹⁹

¶12[4] Attachment under Security Agreements in the Form of Conditional Sales Contracts

Some conceptual difficulties have been encountered by courts when attempting to apply section 12 in the context of a security agreement under which a seller "retains title and ownership" of goods sold as security for payment of part or all of the purchase price of the goods. If one were to apply common law property notions to this type of situation, the conclusion would be that the buyer gets only a possessory interest, since title and ownership remain with the seller. If this conclusion were to be applied in a situation where there is a priority competition between the seller and a person who acquired a security interest in the goods from the debtor, the result would be that the seller would always win because of her ownership and because the debtor could only give to the competing secured party a security interest in his possessory interest in the collateral. However, what this approach ignores is that under the Act the seller is a "secured party" and not an owner. The owner of the collateral is the debtor. Consequently,

16 R.S.A. 1980, c. S-2, s. 27(1.1) [en. 1988, c. P-4.05, s. 95(b)(i) (which was am. 1990, c. 31, s. 68)].

17 Section 29.

18 Section 29(3), (4). The provision gives the same rights to an assignee of an account arising out of the initial sale or lease of the goods and to an inventory financier with a security interest in the goods at the date of the sale or lease.

19 The second situation in which a statutory security interest arises in the absence of specific provision for it in a security agreement is where collateral is dealt with so as to create proceeds. See ss. 10(5) and 28(1). However, in this situation, the security interest can attach only when the debtor acquires rights in the proceeds. See s. 1(1)(gg)(ii).

the competition between the seller and the other secured party is governed by the priority rules of the Act and not by common law property rules.²⁰

¶12[5] Postponement of Attachment

Attachment occurs automatically as soon as the prerequisites for attachment have been met. However, the parties to the security agreement providing for the security interest may agree that it will attach at a later time. For example, a guarantor may provide that a security interest will not attach to his assets unless and until the primary debtor fails to satisfy certain liquidity tests. The intention of the parties that attachment be postponed must be clearly expressed. The agreement need not be set out as a term in the security agreement, but it must be in writing.

There is pre-PPSA judicial authority holding that a letter from a debtor to a creditor which states that the debtor agrees to provide security over specified property upon demand creates an equitable mortgage in favour of the creditor at the time the creditor makes the demand.²¹ Likely the best method of explaining the effect of such a "letter of comfort" under the PPSA is to view the letter as manifesting an intention that the security interest attach when the creditor makes the demand. If, however, the letter evidences an intention to grant a present security interest over specified property and is not preconditioned by the need for a demand, then the security interest should be viewed as attaching as soon as the prerequisites of section 12(1) have been satisfied. This corresponds to the pre-PPSA view that such a letter would create an immediate equitable mortgage.²²

20 This feature of the Act was not fully appreciated by the Ontario Court of Appeal in *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985), 4 P.P.S.A.C. 271, and the British Columbia Supreme Court in *Haibeck v. No. 40 Taurus Ventures Ltd.* (1991), 2 P.P.S.A.C. (2d) 171 (B.C. S.C. [In Chambers]). In both cases, the courts concluded that the buyer had possessory rights sufficient to support a security interest. They assumed that it was not necessary to inquire further as to the nature of the conditional seller's interest.

21 *Bank of British Columbia v. Davis* (1982), [1983] 1 W.W.R. 185 (Alta. Q.B.); *Groat v. Canadian Imperial Bank of Commerce*, [1985] 6 W.W.R. 698 (Sask. Q.B.).

22 *Canadian Imperial Bank of Commerce v. Wicijowski, Wenaus & Co.* (1980), 1 Sask. R. 63 (Q.B.). But if the document is referred to as a "proposal" and contains a notation, stating "if a conditional sales contract is desired the information required on the reverse side of the form must be supplied", and the parties never reach that state in their negotiations, a court may conclude that the parties never reached an agreement and that therefore there was no intention to create a security interest. See *Manning v. Furnasman Heating Ltd.*, [1985] 6 W.W.R. 1 (Man. C.A.). The document must identify the subject matter of the security interest: a mere promise to grant "collateral mortgage security" is not sufficient. See *Vancouver (City) v. Smith* (1984), 52 B.C.L.R. 99 (S.C.), affirmed 63 B.C.L.R. 180 (C.A.).

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**GENERAL MOTORS ACCEPTANCE CORPORATION OF CANADA, LIMITED v.
CLAYTON WILLIAM OWENS**

Master Funduk [in Chambers]

Judgment: July 9, 1993
Docket: Doc. Edmonton 9303 03157

Counsel: *L. Diane Young* and *P. Frederiksen*, for applicant.
R.T. Keswick, for respondent.

Subject: Insolvency; Property; Corporate and Commercial

Related Abridgment Classifications

Personal property security

III Perfection of security interest

III.2 Possession

Personal property security

V Disposition of collateral by debtor

V.3 Sale in ordinary course of business

Headnote

Personal Property Security --- Perfection of security interest --- Possession

Personal Property Security --- Disposition of collateral by debtor --- Sale in ordinary course of business

Personal property security — Conditional sales — Disposition of subject property — Purchasers buying truck from dealer under conditional sales contract — Contract being assigned to applicant — Purchasers selling truck back to dealer and respondent purchasing truck through dealer without knowledge of prior interest — Applicant unaware of sale by purchasers until later — Security interest being given by purchaser, not seller under conditional sales contracts — Section 30(2) of Personal Property Security Act therefore not applying in such cases — Dealer not “continuing” in possession or “in possession” under s. 8(1) of Factors Act because possession was given to purchasers at time of first sale — Section 9(1) of Factors Act and s. 27(2) of Sale of Goods Act excluding situation where purchaser in possession obtaining possession pursuant to security agreement.

Personal property security — Conditional sales — Priorities — Purchasers buying truck from dealer under conditional sales contract — Contract being assigned to applicant — Purchasers selling truck back to dealer and respondent purchasing truck through dealer without knowledge of prior interest — Applicant unaware of sale by purchasers until later — Security interest being given by purchaser, not seller under conditional sales contracts — Section 30(2) of Personal Property Security Act therefore not applying in such cases — Dealer not “continuing” in possession or “in possession” under s. 8(1) of Factors Act because possession was given to purchasers at time of first sale — Section 9(1) of Factors Act and s. 27(2) of Sale of Goods Act

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Act excluding situation where purchaser in possession obtaining possession pursuant to security agreement.

Personal property security — Security interests under Personal Property Security Acts — Validity and enforceability — Purchasers buying truck from dealer under conditional sales contract — Contract being assigned to applicant — Purchasers selling truck back to dealer and respondent purchasing truck through dealer without knowledge of prior interest — Applicant unaware of sale by purchasers until later — Security interest being given by purchaser, not seller under conditional sales contracts — Section 30(2) of Personal Property Security Act therefore not applying in such cases — Dealer not “continuing” in possession or “in possession” under s. 8(1) of Factors Act because possession was given to purchasers at time of first sale — Section 9(1) of Factors Act and s. 27(2) of Sale of Goods Act excluding situation where purchaser in possession obtaining possession pursuant to security agreement.

Certain purchasers bought a truck from a dealer under a conditional sale contract, which was assigned to the applicant and duly registered. The purchasers defaulted on their payments. The dealer went into receivership. A verification statement obtained by the applicant revealed that the purchasers were no longer in possession of the truck; it had been sold “through” the dealer. In fact, the respondent had bought the truck from the dealer eight months earlier. The respondent was not informed of any prior interests in the truck. The applicant claimed the truck as a secured creditor.

Held:

Application allowed.

There was no doubt that the sale to the original purchasers was bona fide, that the applicant was not aware the purchasers had sold the truck until it got the verification statement, and that the respondent believed he was buying a truck with clear title. However, under the circumstances, s. 30(2) of the *Personal Property Security Act* could not assist the respondent. That section protects an innocent third party purchaser from prior security interests in goods given by the seller of the goods. The conditional sale contract between the dealer and the purchasers was not a security interest “given by the seller.” In a conditional sale contract, it is the purchaser who gives the security interest. Section 30(2) does not shield a buyer from a security interest in the goods given by someone other than the seller.

Section 8(1) of the *Factors Act* was also of no assistance to the respondent. That section provides that where a seller has sold goods but continues or is in possession of the goods, he or she can pass clear title to an innocent third party purchaser. Here, the dealer gave possession to the purchasers when it first sold the truck and assigned the contract to the applicant. The dealer did not “continue” in possession. Nor was it “in possession” under s. 8(1). The words “in possession” are not to be taken literally. They apply only where a seller did not have possession when he sold to the first purchaser and later gets possession.

Both s. 9(1) of the *Factors Act* and s. 27(2) of the *Sale of Goods Act* were inapplicable because the respondent did not buy the truck from the purchasers and because both sections exclude from their ambit situations in which the purchaser in possession obtained possession pursuant to a security agreement.

If the respondent chose to redeem the truck or if the applicant seized and sold the truck, it would be entitled to costs on a solicitor-and-own-client basis, as provided under the conditional sales contract. The applicant was, however, entitled to costs of the application in any event against the respondent.

Table of Authorities**Cases considered:**

Allis-Chalmers Credit Corp. of Canada v. Leon's Manufacturing Co., 25 Alta. L.R. (2d) 271, [1983] 4 W.W.R. 230, 45 A.R. 175, 147 D.L.R. (3d) 473 (C.A.) — referred to

Bender v. National Acceptance Corp. (1928), 63 O.L.R. 215, [1929] 1 D.L.R. 222 (C.A.) — considered

Camco Inc. v. Frances Olson Realty (1979) Ltd., [1986] 6 W.W.R. 258, 6 P.P.S.A.C. 167, 50 Sask. R. 161 (C.A.) — distinguished

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Eastern Distributors v. Goldring, [1957] 2 Q.B. 600, [1957] 2 All E.R. 525 (C.A.) — referred to*General Motors Acceptance Corp. v. Hubbard* (1977), 18 N.B.R. (2d) 248, affirmed (1978), 21 N.B.R. (2d) 49, 37 A.P.R. 49, 87 D.L.R. (3d) 39 (C.A.) — distinguished*Johnson v. Credit Lyonnais Co.* (1877), 3 C.P.D. 32 (C.A.) — referred to*Mitchell v. Jones* (1905), 24 N.Z.L.R. 932 — applied*National Shawmut Bank of Boston v. Jones*, 236 A. 2d 484 (New Hamp. S.C., 1967) — not followed*Olds Discount Co. v. Krett*, [1940] 2 K.B. 117, [1940] 3 All E.R. 36 — considered*Paccar Financial Services Ltd. v. Chubey*, [1992] 2 W.W.R. 751, 79 Man. R. (2d) 193 (Q.B.) — distinguished*Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.*, [1965] A.C. 867, [1965] 2 All E.R. 105 (P.C.) — applied*Staffs Motor Guarantee Ltd. v. British Wagon Co.*, [1934] 2 K.B. 305 — not followed*Union Transport Finance Ltd. v. Ballardie*, [1937] 1 K.B. 510, [1937] 1 All E.R. 420 — considered*Vowles v. Island Finances Ltd.*, [1940] 3 W.W.R. 177, 55 B.C.R. 362, [1940] 4 D.L.R. 337 (C.A.) — distinguished*Willi v. Don Shearer Ltd.* (1992), 3 P.P.S.A.C. (2d) 188 (B.C.S.C.) — distinguished*Worcester Works Finance v. Cooden Engineering Co.*, [1972] 1 Q.B. 210, [1971] 3 All E.R. 708 (C.A.) — considered**Statutes considered:**

An Act to Amend the Factors Act, 1877 (U.K.), 40 & 41 Vict., c. 39

s. 3 *considered*

Factors Act, R.S.A. 1980, c. F-1

s. 2 *referred to*s. 8(1) [renumbered 1988, c. P-4.05, s. 81] *considered*s. 8(2) *referred to*s. 9(1) *considered*s. 9(2) *considered*

Factors Act, 1889 (U.K.), 52 & 53 Vict., c. 45

s. 8 *referred to*

Personal Property Security Act, S.A. 1988, c. P-4.05

s. 30(2) *considered*

Personal Property Security Act, S.S. 1979-80, c. P-6.1

s. 30(1) *referred to*

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Sale of Goods Act, 1893 (U.K.), 56 & 57 Vict., c. 71

s. 25(1)*referred to*

Sale of Goods Act, 1923 (New South Wales) (No. 1 of 1923)

s. 28(1)*referred to*

Sale of Goods Act, R.S.A. 1980, c. S-2

s. 27(1)*considered*

s. 27(2)*considered*

s. 27(2.1) [en. 1988, c. P-4.05, s. 95]*considered*

s. 27(3)*considered*

Sale of Goods Act, R.S.O. 1927, c. 163

s. 27(1)*referred to*

Uniform Commercial Code, RSA 382-A

art. 9-307(1)*considered*

Words and phrases considered:

in possession

Application by secured creditor for possession of truck purchased by third party purchaser.

Master Funduk:

1 This is a contest between a secured creditor, the Applicant, and a third party purchaser of the collateral, the Respondent.

Facts

2 In June 1981 Diacom (Canada) Inc. and J.L.V. Industries Ltd. bought a truck from a dealer under a conditional sale contract.

3 At the relevant times the dealer was a dealer in General Motors vehicles.

4 The dealer assigned the contract to the Applicant and it registered a financing statement at the PPSA registry on June 20, 1991.

5 It is not disputed that the financing statement is accurate in describing the purchasers and the collateral. Searches by either name or collateral reveal the financing statement.

6 The contract requires the purchasers to make 36 monthly payments starting July, 1991.

7 The last payment made to the Applicant was December 7, 1992.

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8 Two other facts occurred in December 1992.

9 First, on December 18, 1992 a secured creditor of the dealer appointed a receiver of all the property of the dealer.

10 Second, on December 21, 1992 the Applicant sent a "verification statement" to one of the co-purchasers asking it to verify:

11 (a) the date of the last payment and the amount still owing, and

12 (b) that it still had possession of the truck.

13 The co-purchaser sent back the statement showing the following:

1. Does above information agree with your record?	Yes	No [x]
2. Are you now in possession of the financed motor vehicle	Yes	No [x]
If "No" is checked for either of above questions, please explain.		

VEHICLE WAS SOLD THRU COUNTRY CHEVROLET

14 Country Chevrolet is the dealer in question.

15 The Applicant's witness was cross-examined. His uncontradicted evidence is that in December 1992 the Applicant became aware that the dealer might be having financial problems and its practice is to send out verification statements on all retail accounts originating from the dealer to ensure that the purchasers still had the vehicles: p. 8.

16 The uncontradicted evidence of the witness is that the Applicant did not become aware that the purchasers did not still have possession of the truck until it got back the verification statement from the co-purchaser.

17 The uncontradicted evidence of the witness is that there was no contact between the Applicant and the purchasers during the time that the Applicant was receiving payments, other than the payments themselves.

18 Finally, on the cross-examination, the witness testifies that the Applicant does not keep a record of *who* makes a payment on an account. It records the payment. This reflects the Applicant's lack of knowledge prior to December 1992.

19 The cryptic note by the co-purchaser on the verification statement leaves the impression that the purchasers sold the truck to a third party through the agency of the dealer. The note does not say that the truck was sold "to" the dealer, rather that it was sold "thru" the dealer.

20 What is known is that the truck did end up in the possession of the dealer because in April 1992 the Respondent bought the truck from the dealer. The contract shows the dealer to be the vendor.

21 The Respondent testifies:

5. When I purchased the Vehicle, I was acting strictly as an ordinary customer. I had no knowledge of any prior interests in the Vehicle, and assumed that Country Chevrolet, as an authorized Chevrolet dealer, would not sell vehicles to which it did not have full and complete ownership rights.

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22 Nobody paid the Applicant what was still owing to it.

23 The Applicant eventually tracked down the truck, which brings us to the issues.

One

24 Counsel for the Respondent concedes that when the purchasers bought the truck from the dealer that they took possession of it. It is not disputed that the sale to the purchasers was a bona fide sale.

25 Second, counsel for the Respondent does not dispute that the Applicant was not aware that the purchasers had disposed of the truck until it got the verification statement, which is almost eight months after the Respondent bought the truck.

26 Third, counsel for the Applicant does not dispute that the Respondent believed he was buying a clear title truck.

Two

27 Counsel for the Respondent relies on s. 30(2) PPSA to argue that the Respondent takes title clear of the Applicant's security interest. That subsection says:

(2) A buyer ... of goods sold ... in the ordinary course of business of the seller ... *takes free of any perfected or unperfected security interest in the goods given by the seller* ... or arising under section 28 or 29, whether or not the buyer ... has knowledge of it, unless the buyer ... also has knowledge that the sale ... constitutes a breach of the security agreement under which the security interest was created. (emphasis mine)

28 The argument by counsel for the Respondent is predicated on the position that the "seller" to the Respondent is the dealer, not the purchasers through the agency of the dealer.

29 If the seller is the purchasers, merely using the dealer as their agent, s. 30(2) could not assist the Respondent because there is no evidence that the purchasers sold the truck in the ordinary course of their business.

30 In any event, both counsel proceed on the basis that the dealer was the seller to the Respondent so the issues are to be confined to that common understanding.

31 On a plain reading of s. 30(2) one must say that it does not assist the Respondent.

32 The conditional sale contract between the dealer and the purchasers is not a security interest "given by the seller". In a conditional sale contract the person who sells the goods is the vendor and the person who buys the goods is the purchaser.

33 No one denies that a conditional sale contract creates a security interest, but who gives the security interest, the vendor or the purchaser? Of course it is the purchaser who gives the security interest.

34 The gurus on the PPSA, Cumming and Wood, identify the proper approach to the section in their *Alberta Personal Property Security Act Handbook*, pp. 174-75:

Section 30(2) ensures that a buyer who acquires an interest in goods from a seller under a transaction carried out in the ordinary course of the seller's business need not be concerned about prior security interests in those goods *created by the seller*. The purpose of the provision 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.

The fact that the buyer is aware of the existence of a security interest in the goods of the seller does not disqualify the

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buyer from seeking the protection of the section. Many buyers are aware that the wholesale or retail sellers with whom they deal may have given security interests in their inventory. It makes no commercial sense to require these buyers to contact the secured party to get a release of the security interest in the goods. However, if the buyer is aware that the seller is selling in violation of the security agreement between the seller and the secured party, the buyer does not get the protection of the section.

The protection of ordinary course buyers at common law was effected by implying in the security agreement between the seller and the secured party a term allowing the seller to sell the goods in the ordinary course of business. Section 30(2) does not take this approach. It states a statutory priority rule which, unlike an implied term, cannot be displaced by agreement between the secured party and the seller. Accordingly, even if the security agreement limits the right of the seller to sell the goods, a buyer in the ordinary course of business of the seller takes free from the security interest even though the sale has been made in violation of the limitation in the agreement so long as the buyer is unaware that the sale was in violation of the security agreement.

Section 30(2) provides that an ordinary course buyer of goods takes free from any security interest in the goods "given by the seller". *It does not shield the buyer from a security interest in the goods given by someone other than the seller. Accordingly, if the goods are subject to a perfected security interest when they were acquired by the seller, the buyer cannot rely on section 30(2) as a basis for asserting priority over the holder of such interest.* It follows from this that buyers of goods, particularly used goods, must take alternative measures to protect themselves even when they are buying from a seller who is in the business of selling such goods. In some cases, these measures may involve checking the source of the seller's title. If the goods fall into one of the categories of goods prescribed by the regulations as serial number goods, the buyer has an effective method of protection. A search result can be obtained from the registry using the serial number of the goods. This search result will disclose prior perfected security interests in the goods. (emphasis mine) [footnotes omitted]

35 Cuming and Wood cite *National Shawmut Bank of Boston v. Jones*, 236 A. 2d 484 (New Hamp. S.C., 1967), for the last paragraph quoted.

36 In *National Shawmut Bank* the legislation provided [art. 9-307(1) of the *Uniform Commercial Code*, RSA 382-A]:

A buyer in ordinary course of business (subsection (9) of Section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

37 Wever bought a car from Wentworth, a dealer, under a conditional sale contract which Wentworth assigned to the plaintiff. The contract was filed by the plaintiff.

38 Wever then sold or traded the car to Hanson-Rock, also a dealer. Hanson-Rock then sold the car to the defendant who bought it in good faith and without knowledge of the conditional sale contract.

39 In deciding that the Defendant took the car subject to the plaintiff's interest the court states, pp. 485-86:

Since defendant purchased in good faith without knowledge that the sale to him was in violation of the security interest of another and bought in the ordinary course from a person in the business of selling automobiles, he was a "buyer in the ordinary course of business." RSA 382-A:1-201(9). However, s. 307(1) permits him to take free only of "a security interest created by his seller." The security interest of the plaintiff was not created by Hanson-Rock, Inc., the defendant's seller, but by Wentworth Motor Co., Inc. Defendant, therefore, does not take free of the plaintiff's security interest under this section.

40 The legislation is fundamentally the same on the critical point, that the legislation protects a purchaser from a security interest given by his seller, not by someone other than the seller.

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41 To that extent I agree with *National Shawmut Bank* and the result.

42 However, I do not agree that the security interest was created by Wentworth, the first dealer. That is wrong in law.

43 A **conditional sale contract** is a **contract** between a vendor and a purchaser. However, the security interest is not given by the vendor. It is given by the purchaser. To say that a dealer who sells a car to a purchaser is giving a security interest in the car is not sensible. Security interests are not given in a vacuum. There must be a recipient. Who does the dealer under a **conditional sale contract** give a security interest to — the purchaser?

44 Of course that is not logical. It is the other way round, the purchaser gives a security interest to secure payment of the balance of the purchase price.

45 If Wentworth gave the security interest, as the court says, then Wever, the original purchaser, should be the one to register the contract to protect his “security interest”. That of course is also not logical.

46 I do not think that *Willi v. Don Shearer Ltd.* (1992), 3 P.P.S.A.C. (2d) 188 (B.C.S.C.), assists the Respondent.

47 The facts in *Willi* are as follows.

48 Don Shearer Ltd. gave a chattel mortgage on a truck to Ford Credit.

49 Later Don Shearer sold the truck to Connaught Auto Sales, a dealer. Connaught was aware of the chattel mortgage and the agreement between them was that Don Shearer would pay out the chattel mortgage.

50 Connaught then sold the truck to Willi who was not aware of the chattel mortgage.

51 When Don Shearer was not paid by Connaught (the post-dated cheque by Connaught bounced) Don Shearer paid Ford Credit, took an assignment of the chattel mortgage from Ford Credit and then advanced a claim to the truck against Willi.

52 The court applied s. 30(2) to find that Willi took the truck free of the chattel mortgage. The conclusion is based on the following findings of fact, p. 191:

Whether or not the sale from Don Shearer Ltd. to Connaught was in the ordinary course of business is a question of fact. The fact is, as deposed to by Mr. Shearer in his affidavit “from time to time the company purchases vehicles and at other times sells vehicles from its rental fleet in order to maintain a proper inventory of vehicles for hire.” In other words, it is ordinary and usual for Don Shearer Ltd., carrying on business as Canuck Truck Rental, to sell vehicles such as the one in question. I find nothing in the statute which suggests that interpreting “ordinary course of business” to include transactions which are usual and ordinary for the business in question is not appropriate. The sale of the vehicle by Don Shearer Ltd. to Connaught was in the ordinary course of business.

Applying the words of s. 30(2) [of the P.P.S.A.] Connaught, as buyer of the vehicle, in the ordinary course of business took the vehicle free of any perfected security whether or not Connaught knew of the security interest in it given by Don Shearer Ltd., the seller, unless Connaught knew that the sale constituted a breach of the agreement under which the chattel mortgage was created. There is no evidence that Connaught knew of such a breach. Under the terms of the statute Connaught bought the truck free of the chattel mortgage given by Don Shearer Ltd.

53 Once those two critical finds of facts are made, that:

(a) the sale by Don Shearer to Connaught was made by Don Shearer in the ordinary course of its business, and

(b) Connaught did not know that the sale to it constituted a breach of the chattel mortgage,

the necessary result is that Connaught got title to the truck free of the chattel mortgage.

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54 What Don Shearer later did, paying out Ford Credit and getting an assignment of the chattel mortgage, could not "revive" the mortgage.

55 Connaught had clear title so Willi also got clear title because he bought from Connaught. The court states that the sale by Connaught to Willi did not "revive" the chattel mortgage, p. 192:

The chattel mortgage, having been extinguished by the sale to Connaught, is not revived by the subsequent sale to Mr. Willi. It would make no sense to revive the security to the prejudice of a party even further removed from the transaction in which it was extinguished.

56 I do not have any difficulty with *Willi*, but it does not help the Respondent.

57 First, the security interest in the case before me was not given by the dealer. It was given by the purchasers Diacom and J.L.V.

58 Assuming, without deciding, that the purchasers later sold the truck to the dealer (as opposed to selling it themselves through the agency of the dealer) there is no evidence that the purchasers sold it to the dealer "in the ordinary course of their business" (Diacom's and J.L.V.'s). The Respondent cannot even get past the first critical fact, fact (a) above, found in *Willi*.

59 Second, on the evidence the Respondent also cannot make it on fact (b).

60 The conditional sale contract provides in part:

You agree not to sell or transfer ... the vehicle ...

61 The purchasers were in breach of the contract when they sold the truck to the dealer.

62 In this case the dealer had to know that the re-sale by the purchasers to it was a breach of the contract. The dealer was a G.M. dealer, the contract is a form contract prepared by the Applicant and supplied to G.M. dealers and the dealer was aware of this particular contract and its terms because it was the one that sold the truck to the purchasers *under this contract*.

63 It is not without significance that the Respondent bought the truck in April yet someone continued to make payments to the Applicant until December. The Respondent clearly did not make the payments. It is also not without significance that payments to the Applicant stopped immediately after the dealer was put into receivership by a secured lender. The logical inference is that the dealer made the payments after it sold the truck to the Respondent.

64 Counsel for the Respondent also relies on *Camco Inc. v. Frances Olson Realty (1979) Ltd.*, [1986] 6 W.W.R. 258 (Sask. C.A.). In that case a security interest in household appliances was given by the seller to the supplier of the appliances. The seller later sold the appliances to buyers who were not aware of the security interest.

65 The case is just the classic case of a seller selling goods from inventory he bought from a supplier and which the supplier had security on.

66 The court held that the buyers bought the goods free of the security interest in favour of the supplier. Even under the prior law that would have been the case because of the implied term in the contract between the seller and the supplier that the seller could sell the goods in the ordinary course of business to bona fide purchasers for value and they would take title free of the security agreement: *Cuming and Wood*, p. 174.

67 Section 30(1) of the Saskatchewan PPSA is the same as s. 30(2) of the Alberta PPSA. In commenting on that section the court in *Camco Inc.* states, pp. 271-72:

Speaking generally in the context of this case, this provision is an exception to the priority rules under the Act. It protects such a buyer from a security interest *created by his seller* even though the security interest is perfected and the

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buyer knows of its existence, unless the buyer also knows that the sale was in violation of the security agreement. Thus, the protective value of “perfection” of a security interest is subject to an important qualification: the security interest remains good against the debtor himself and various third party claimants but not good against certain bona fide purchasers — the buyer of goods sold in the ordinary course of business of the seller. In this case the respondent buyers were not aware of the appellant’s security interest. As their good faith is not in issue, I do not need to consider the scope of any such limitation. Furthermore, this case is limited to a consideration of a perfected security interest.

In my opinion s. 30(1) represents an outgrowth of the notion that a “buyer in the ordinary course of trade” should take free of a security interest. In our commercial law the holder in due course of negotiable instruments, the bona fide purchaser of negotiable instruments, the bona fide purchaser of investment securities and various other bona fide purchasers have been accorded privileges — with the result that they sometimes acquire rights better than the rights of some kinds of claimants who did not authorize or approve of the sale or transfer. Thus a special kind of bona fide purchaser of goods is described in s. 30(1) — he must buy goods sold in the ordinary course of business of the seller. Under such circumstances the secured party has no claim against the buyer: he must look to the seller only for satisfaction. The statutory protection extended to such a buyer undoubtedly rests on principles of justice and commercial utility. In many cases the collateral involved is of such a kind that the debtor’s ability to dispose of it in the usual course of business may be important so that he can continue his business as a going concern and thereby pay his indebtedness to the secured party. Such a consideration would apply with equal force to authorized sales. But even if this is not so — the security agreement may stipulate to the contrary — the secured party who permits a businessman to have possession of the goods runs the risk that the buyer taking from the businessman may qualify as a “buyer of goods sold in the ordinary course of business of the seller”.

Furthermore, one can discern a public policy consideration in the legislation which favours the safeguarding of sales transactions over the safeguarding of secured transactions in such a case. In most cases the seller will pay the secured party but whether he does or does not is of no concern to a person with the status of buyer under s. 30(1). This result is desirable where the buyer is an uninformed consumer buyer. (emphasis in original)

68 I agree with that, but it does not help the Respondent. It is against him.

69 *Paccar Financial Services Ltd. v. Chubey*, [1992] 2 W.W.R. 751 (Man. Q.B.), cited by counsel for the Applicant, does not assist the Respondent. Like *Willi* and *Camco Inc.* it is a fact driven decision. The court found that the *securing* party (the one which had *given* the security) was not acting in the ordinary course of business when it sold the collateral to a third party so the third party could not rely on s. 30(2).

70 The meaning of s. 30(2) is clear. Decisions where it is brought into argument are usually fact driven decisions, that is, are the facts necessary to trigger its protection present.

71 There is a fundamental flaw to the Respondent’s position which is set out in his written brief as follows:

14. Given the above, and turning to the facts at hand, it is clear that the security interest at issue in the Vehicle was created by Country Chevrolet, upon execution of the conditional sales contract with Diacom. The conditional Sales agreement between Country Chevrolet and Diacom created the security interest and constitutes the only security agreement relevant to this matter.

15. Country Chevrolet ‘gave’ this security interest to GMAC in a manner fulfilling the purposes of s. 30(2). Diacom never gave a security interest in the property directly to GMAC; rather, GMAC’s interest exists solely due to the assignment by Country Chevrolet. There is no practical difference between the present situation, where the seller created a security interest against property and then assigned that interest to a finance company, and a situation where the seller directly granted the security interest against property to a finance company. In both cases, the financier holds the security interest purely as a result of the seller’s actions. Differentiating between the two situation would offend the main purpose of s. 30(2), which is to prevent prejudice to *bona fide* purchasers with respect to security interests for which the seller was responsible.

TAB 16

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Alberta Court of Appeal

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402 D.L.R. (4th) 725, 40 C.B.R. (6th) 169, 41 Alta. L.R. (6th) 7, 6 P.P.S.A.C. (4th) 117

**Fast Labour Solutions (Edmonton) Limited (Respondent / Plaintiff) and
Kramer's Technical Services Inc. (Appellant / Defendant)**

Alberta Diluent Terminal Ltd. (Not a Party to the Appeal / Applicant) and Fast Labour Solutions (Edmonton)
Limited (Respondent / Respondent) and Kramer's Technical Services Inc. (Appellant / Respondent) and George
Kramer (Appellant by Order)

Frans Slatter, J.D. Bruce McDonald, Sheila Greckol JJ.A.

Heard: September 7, 2016

Judgment: September 15, 2016

Docket: Edmonton Appeal 1503-0245-AC, 1503-0261-AC

Counsel: B.S. Sussman, Q.C., for Respondent
N. Fennä, for Appellant, Kramer's Technical Services Inc.
J.R. Pawlyk, for Appellant, George Kramer

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Personal property security

IV Priority of security interest

IV.5 Subordination and postponement

Headnote

Personal property security --- Priority of security interest --- Subordination and postponement

KT Inc. was Iowa demolition company that incorporated Alberta subsidiary KTA — KT Inc. leased crane to KTA to facilitate performance of contract — KT Inc. did not register interest in crane in Personal Property Registry — Crane was in KTA's possession for more than one year and KTA made payments to KT Inc. — KT Inc. asserted that it was not regularly engaged in business of leasing goods — FL Ltd. was judgment creditor of KTA and attempted to seize crane to satisfy writ — KTA filed objection to seizure asserting crane was property of KT Inc. — Judge concluded that KT Inc. was regularly engaged in business of leasing goods and having failed to register security interest was subordinate to those writ holders — When crane was seized it was located on land owned by AD Ltd. — AD Ltd. brought application to have crane removed and order was made requiring FL Ltd. to remove crane — Order was made granting priority to FL Ltd.'s claim for costs of removing crane over GK's prior perfected security interest — KT Inc. appealed order finding it was subordinate to writ holders — GK appealed order granting priority to FL Ltd. — Appeals dismissed — Record supported finding that KT Inc. was regularly engaged in business of leasing goods — Arrangement between KT Inc. and KTA was that KTA would provide all equipment needed for project including seized crane — Fact that crane was bought by KT Inc. but immediately delivered to KTA was indicative of involvement in business of financing acquisition of equipment for third party — Invoices showed that KT Inc. was leasing variety of equipment to KTA on regular basis in order to facilitate project — There was no error in holding that FL Ltd. was entitled to recover costs of removing crane in priority to claim of prior secured creditor — Where

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subordinate claimant had, in good faith, incurred expenses in realizing on collateral that would otherwise have been incurred by prior secured party, those reasonable expenses should receive priority contemplated by s. 60(1)(a) of Personal Property Security Act.

Table of Authorities**Cases considered:**

David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of) (1996), 38 Alta. L.R. (3d) 428, 11 P.P.S.A.C. (2d) 142, 39 C.B.R. (3d) 284, [1996] 7 W.W.R. 332, (sub nom. *North Sky Trading Inc. (Bankrupt), Re*) 184 A.R. 291, (sub nom. *North Sky Trading Inc. (Bankrupt), Re*) 122 W.A.C. 291, 1996 CarswellAlta 334, 1996 ABCA 134 (Alta. C.A.) — referred to

Father & Son Investments Inc. v. Maverick Brewing Corp. (2007), 2007 ABQB 651, 2007 CarswellAlta 1452, 37 C.B.R. (5th) 74, 82 Alta. L.R. (4th) 157, [2008] 3 W.W.R. 177, 12 P.P.S.A.C. (3d) 102, 290 D.L.R. (4th) 175, 436 A.R. 130 (Alta. Q.B.) — considered

National Bank of Canada v. Merit Energy Ltd. (2001), 2001 CarswellAlta 966, 27 C.B.R. (4th) 283, 294 A.R. 1 (Alta. Q.B.) — referred to

Ramsay v. Pioneer Machinery Co. (1981), 15 Alta. L.R. (2d) 140, (sub nom. *Pioneer Machinery Co. v. M.E.L. Industries Ltd.*) 28 A.R. 429, 37 C.B.R. (N.S.) 193, (sub nom. *M.E.L. Industries Ltd., Re*) 121 D.L.R. (3d) 103, 1981 CarswellAlta 184, 1981 ABCA 56 (Alta. C.A.) — referred to

Statutes considered:

Assignment of Book Debts Act, R.S.A. 1980, c. A-47
Generally — referred to

Bills of Sale Act, R.S.A. 1980, c. B-5
Generally — referred to

Civil Enforcement Act, R.S.A. 2000, c. C-15
Generally — referred to

s. 35 — considered

s. 96(3) — considered

s. 96(4) — considered

s. 99(3) — considered

Conditional Sales Act, R.S.A. 1980, c. C-21
Generally — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7
Generally — referred to

s. 1(1)(z) "lease for a term of more than one year" (iv) — considered

s. 1(1)(tt) "security interest" (ii)(C) — considered

s. 35 — considered

s. 60(1) — considered

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s. 60(1)(a) — considered

Authorities considered:

MacDougall, Bruce, *Canadian Personal Property Security Law* (Markham, Ont.: LexisNexis, 2014).

p. 422 — considered

APPEAL by KT Inc. from order finding it was subordinate to writ holders; APPEAL by GK from order granting priority to FL Ltd.

Per curiam:

1 The issue on appeal #1503-0245AC is whether a construction crane is an exigible asset of the appellant, which depends on whether the owner of the crane was required to register its interest under the *Personal Property Security Act*, RSA 2000, c. P-7.

2 The issue on appeal #1503-0261AC is whether a writ holder that has seized property, and must move that property to preserve it, is entitled to priority for the seizure and removal costs.

Facts

3 Kramer's Technical Services, Inc. (Kramer's Iowa) is an Iowa company in the demolition business. It obtained a contract in Alberta, and in order to perform that contract it incorporated an Alberta subsidiary with a similar name, Kramer's Technical Services Inc. (Kramer's Alberta). Kramer's Iowa then leased a crane and other equipment to Kramer's Alberta to facilitate the performance of the contract. The respondent Fast Labour Solutions, a judgment creditor of Kramer's Alberta, attempted to seize the crane to satisfy its writ. Kramer's Alberta filed an objection to the seizure, taking the position that the crane was really the property of Kramer's Iowa.

4 As noted, Kramer's Iowa was awarded a contract to dismantle facilities in Edmonton so that they could be shipped to China. In November 2008 it engaged Kramer's Alberta to perform all the work for a fee, and represented that Kramer's Iowa "will provide all equipment necessary for completion of the work". Kramer's Iowa bought the crane on March 12, 2010, and had it delivered directly to the Edmonton facilities being dismantled. There was evidence showing that Kramer's Iowa sent Kramer's Alberta monthly invoices for \$55,000 for rental of a variety of pieces of equipment. Henry Kramer, the officer of Kramer's Iowa, deposed, however, that it was not in the business of renting equipment to arm's-length parties.

5 Kramer's Iowa did not register its interest in the crane in the Personal Property Registry. The crane was in the possession of Kramer's Alberta for more than one year, meaning that the lease potentially required registration because it was a deemed security interest under s. 1(1)(tt) of the *Act*, even though it did not necessarily secure payment or performance of an obligation:

(tt) "security interest" means ...

(ii) the interest of ...

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

Kramer's Iowa argues that it falls within the exception under s. 1(1)(z) of the *Act*:

(z) "lease for a term of more than one year" ... does not include ...

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

Kramer's Iowa argues that it is a demolition company, and not "regularly engaged in the business of leasing goods".

6 On January 15, 2012 George Kramer registered a security interest in the crane. George Kramer is the father of Henry Kramer, who is a co-owner of Kramer's Iowa and Kramer's Alberta. When Henry Kramer was examined on his affidavit he said that he "wasn't aware" of that security agreement. In an answer to an undertaking to provide a copy of the security agreement he responded: "A copy of the agreement cannot be located", and that the amount claimed under the security agreement was "unknown". George Kramer subsequently asserted, however, that he had a security interest in all of the equipment for US\$1.2 million.

7 Nielsen J. concluded that Kramer's Iowa was regularly engaged in the business of leasing goods, and having failed to register its security interest that interest was subordinate to those of the writ holders. He noted that monthly invoices were sent for the rental of equipment for several years, showing a regularity in the activity of leasing. That order resulted in appeal #1503-0245AC.

8 When the crane was seized it was located on land owned by Alberta Diluent Terminal Ltd., where the facilities being dismantled were located. It brought an application to have the crane removed, and an order was made requiring Fast Labour Solutions (the seizing creditor) to remove it within 30 days. Faced with the competing claim of George Kramer, Fast Labour applied for an order confirming that the costs of removing the crane would have priority over any claim that George Kramer could establish. Little J. granted that order, which resulted in appeal #1503-0261AC.

Registration of the Interest in the Crane

9 The *Personal Property Security Act* is designed to create a public registry showing the interests of various claimants in assets possessed by another person. The background is that the common law would slavishly respect the legal title to an asset. If the owner of an asset allowed someone else (the "debtor") to have possession of that asset, no third party could seize that asset to satisfy the debts of the debtor, and the debtor could not give an interest in that asset to anyone else: *nemo dat quod non habet*. This has the potential for mischief, if not outright fraud. Third parties could deal in good faith with a debtor, assuming that because it was in possession of the asset, it also had title.

10 Many centuries ago it was realized that the common law's infatuation with legal title could be used to create effective security interests by *separating possession from title*. Title to an asset could be placed in one person (the lender), while possession of the asset could be left with another (the borrower). The lender would have the security of having title to the asset, whereas the borrower would be allowed to use the asset on a day-to-day basis, which was the whole point of the transaction. This security arrangement would be effective because the common law would always respect the legal title. These security arrangements had enormous advantages over the common law pledge, which required the lender to have both a legal interest in *and* possession of the asset being used as security.

11 Many legislative attempts were made to require disclosure of these invisible security arrangements through a public registry: the *Bills of Sale Act*, the *Conditional Sales Act*, the *Assignment of Book Debts Act*, some provisions of the *Business Corporations Act*, etc. However, each time a registration requirement was imposed, solicitors would find a new arrangement which did not require registration. For example, partly in order to avoid having to register chattel mortgages or conditional sales contracts, the "financing lease" was developed. A considerable amount of case law then developed on whether a particular lease was a "true lease" which did not require registration, or merely a "financing lease" which did: see for example *Ramsay v. Pioneer Machinery Co.*, 1981 ABCA 56, 15 Alta. L.R. (2d) 140, 28 A.R. 429 (Alta. C.A.).

12 The *Personal Property Security Act* was designed to sweep away these technicalities, and to provide one universal regime, and one universal registry, in which all security interests had to be registered. Its ultimate purpose is to define all of those arrangements where registration is required in the public interest because possession has been separated from title. At the highest level of generality, the *Act* should be interpreted having regard to that objective.

13 In drafting the *Personal Property Security Act* there were many borderline situations that had to be considered. True

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financing leases that secure payment or performance of an obligation must be registered. Short term or temporary leases do not warrant registration. For example, a company renting cars for a few days could not reasonably be required to register its interest every time a new renter came along. But longer leases were within the mischief of the statute, because they create false impressions about the ownership of the collateral. The line was drawn at leases over one year; s. 1(1)(tt) of the *Act* deems them to be security interests whether or not they secure payment or performance of an obligation. An exception was then made in s. 1(1)(z) for occasional lessors who are not regularly engaged in the business of leasing goods. The statute, essentially, places the risks arising from leases over one year by parties not generally in the business of leasing assets on the third party dealing with the debtor in possession of those assets. Those are the provisions engaged by this appeal.

14 The core issue then is whether Kramer's Iowa "regularly engaged in the business of leasing goods". The *Act* does not require that the owner of the goods only be in the business of leasing goods, or that it primarily be in the business of leasing goods. So long as the owner "regularly engages" in the leasing of goods, the section is engaged. The case law establishes that the frequency of leasing is not determinative of whether the claimant is in the business of leasing. As long as leasing is a regular part of the business, it will be caught by the statute, even if leasing is not the predominant or a significant part of the business: *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)*, 1996 ABCA 134 (Alta. C.A.) at para. 12, (1996), 38 Alta. L.R. (3d) 428, 184 A.R. 291 (Alta. C.A.).

15 A company can be in the "business" of leasing goods even if it never makes a profit, and perhaps never intends to make a profit out of the leasing transaction itself: *National Bank of Canada v. Merit Energy Ltd.* (2001), 294 A.R. 1 (Alta. Q.B.) at para. 55, (2001), 27 C.B.R. (4th) 283 (Alta. Q.B.). Having regard to the overall purposes of the *Act*, one indicia of a "business" is that the lease is for a commercial purpose, and is part of an overall business strategy. Thus, the common scenario of having a "holding company" which owns all the assets of the enterprise, and then leases them to an associated "operating company" would fall within the provision, even if the lease rates were set on a "flow-through" basis, without any expectation of profit. This sort of "creditor proofing" is a legitimate business strategy, but it requires registration to be effective against third parties. Indeed, this is exactly the kind of situation where third parties dealing with the operating company might be misled because possession of the assets has been separated from title to those assets.

16 It follows that it does not matter if the owner of the property only leases property to non-arm's-length persons, if only because the statute draws no such distinction. This, in fact, is directly within the mischief at which the *Act* is aimed. For example, in the common holding company/operating company corporate structure, many persons dealing with the operating company could be misled by the fact that it is in possession of numerous assets. The mischief is magnified where the two companies have very similar names, as in the present case. The *Act* is designed to require the non-arm's-length holding company to register its interest to disclose the true state of affairs.

17 In this case it is not determinative that Kramer's Iowa is primarily in the demolition business. That does not foreclose leasing being a regular part of its operations. The arrangement between Kramer's Iowa and Kramer's Alberta was that the former would provide "all equipment" needed for the project, including the seized crane. The fact that the crane was bought by Kramer's Iowa, but immediately delivered to Kramer's Alberta is also indicative of involvement in the business of financing the acquisition of equipment for a third party. The invoices demonstrated that Kramer's Iowa was leasing a variety of equipment to Kramer's Alberta on a regular basis in order to facilitate the project in Edmonton. The record amply supports the chambers judge's finding that Kramer's Iowa was regularly engaged in the business of leasing goods.

Costs of Removing the Seized Goods

18 As things presently stand, the prior perfected security interest of George Kramer would have priority over subsequent writs under s. 35 of the *Personal Property Security Act* and s. 35 of the *Civil Enforcement Act*, RSA 2000, c. C-15, assuming that the underlying security is valid and enforceable. George Kramer argues that to allow the writ holders to recover removal costs would displace the statutory priority regime.

19 It will be apparent that costs would be incurred to remove the crane, no matter which creditor had to remove it. If it ultimately turns out that George Kramer has the prior security interest, he would have had to remove the crane in order to realize on his security. If he is now able to download that cost on the writ holders, he would receive a windfall.

20 Both the *Personal Property Security Act* and the *Civil Enforcement Act* recognize that expenses will be incurred in the

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enforcement of claims against debtors, and provide a level of priority for those expenses:

Personal Property Security Act, s. 60(1) (with respect to true security interests):

60(1) Collateral may be disposed of in accordance with this Part in its existing condition or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order to

- (a) the reasonable expenses of enforcing the security agreement, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and
- (b) the satisfaction of the obligations secured by the security interest of the party disposing of the collateral,

and the surplus, if any, shall be dealt with in accordance with section 61.

Civil Enforcement Act, s. 99(3):

99(3) Where the total amount of the eligible claims exceeds the amount of a distributable fund, the distributing authority must apply the distributable fund toward the claims in the following order of priority:

- (a) repealed 2002 c17 s1(20);
- (b) first, to other fees and expenses of a distributing authority that may be claimed against the enforcement debtor that were earned or incurred in connection with the enforcement measures that have produced the fund
- (c) second, to other costs that may be claimed against the enforcement debtor that were incurred by the instructing creditor in connection with the enforcement measures that have produced the fund and any other costs that the Court has directed to be paid out of the fund; ...

These sections do not clearly deal with the situation present in this appeal, where a subordinate claimant has in good faith and in accordance with a court order incurred expenses to realize on the collateral, when those expenses should likely have been incurred in the first instance by the creditor with priority.

21 In addition to the general priority provisions found in ss. 35 of each of the two statutes, the appellant points to s. 96(4) of the *Civil Enforcement Act*:

96(4) Where a distributing authority receives money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors, the distributing authority must pay to that person the money to which the person is entitled, and any money paid under this section does not form part of a distributable fund.

(emphasis added)

The appellant argues that this section confirms the general priority of the prior secured creditor, but also removes from the “distributable fund” the proceeds received from the collateral. Thus, those funds to which the prior creditor is entitled never fall within the provisions of s. 99(3), and so never attract the priority for realization expenses found there.

22 In addition, at this stage of the proceedings the crane has not been sold so there are no “proceeds of disposition” under s. 60(1) of the *Personal Property Security Act*, nor any “money received by the distributing authority” under the *Civil Enforcement Act*. Further, on a strict reading, s. 96(4) of the *Civil Enforcement Act* states that “any money paid” to the secured creditor does not form a part of the distributable fund, which somewhat begs the question of what money the secured creditor is entitled to be paid. Is that only the surplus funds remaining after the costs of realization have been covered?

23 The problem is discussed in B. MacDougall, *Canadian Personal Property Security Law* (LexisNexis Canada: Markham, Ont, 2014) at p. 422:

Whether the expenses a junior creditor incurs in proceeding against the collateral upon default by the debtor can affect

the priority or the extent of the priority of the senior secured party's interest is the subject of mixed authority. ... It has also been held, however, that a junior secured party who incurs expenses associated with its remedial actions, including appointment of a receiver, can claim to be paid first for such expenses even if its junior position does not allow it to use the proceeds from the collateral to reduce its obligation secured. In order for such expenses to be given priority against the claims of senior creditors, the action taken by the junior secured party must be said to be beneficial to those senior creditors, and not simply an expense for the benefit of the junior creditor.

In this case the actions of First Labour are beneficial to George Kramer, because they saved the latter from expending funds to remove the crane. If George Kramer is successful in proving the validity of his security, the expenses will be of no benefit to First Labour.

24 MacDougall cites *Father & Son Investments Inc. v. Maverick Brewing Corp.*, 2007 ABQB 651, 82 Alta. L.R. (4th) 157, 436 A.R. 130 (Alta. Q.B.). In that case a junior creditor had a receiver appointed, but ultimately there were no funds available to satisfy its claims. It was nevertheless allowed to recover the costs it had incurred:

48 While it is true that a creditor has an active interest in the resolution of outstanding debts, the equitable position of a creditor is somewhat different and distinct from that of a receiver, trustee or lawyer because the creditor is a potential beneficiary of its own activities. That said, where the actions of a creditor result in a benefit for others and the size of the recovery ultimately results in the creditor receiving no recovery, the traditional principles of equity would appear to demand that the creditor be entitled to be compensated for its efforts: ... To do otherwise would result in injury to the low-ranked creditor who has expended effort and funds. ...

52 Synthesizing these principles, a creditor may logically receive super-priority for its costs, when the costs:

- a) are incurred while a creditor takes actions that increase the recovery from a debtor,
- b) the increased recovery provides a benefit to higher ranked creditors, and
- c) the actions of the creditor are not a consequence of a separate legal duty.

No higher priority will result for the costs of activities that fail to provide a benefit, or are incurred in an unrelated matter.

In *Father & Son Investments* the receivership had generated funds which benefited the senior creditor, and accordingly the junior creditor was entitled to recover the expenses.

25 Having regard to the windfall that would accrue to the secured creditor, the appropriate analysis is under or by analogy to s. 60(1)(a) of the *Personal Property Security Act*. Section 96(3) of the *Civil Enforcement Act* confirms that the provisions of the *Personal Property Security Act* prevail. The principles in s. 60(1)(a) should be applied here in light of the analysis in *Father & Son Investments*. The costs incurred by Fast Labour in removing the crane are part of "the reasonable expenses of ... disposing of the collateral". The provision "any other reasonable expenses incurred by the secured party" found at the end of that subsection should be interpreted such that the "other reasonable expenses" mentioned earlier in this subsection need not be incurred directly by the secured party. Where a subordinate claimant has, in good faith, incurred expenses in realizing on the collateral that would otherwise have been incurred by the prior secured party, those reasonable expenses should receive the priority contemplated by s. 60(1)(a). This is particularly so where the expenses arose from execution of a court order.

26 In summary, the chambers judge did not err in holding that Fast Labour was entitled to recover the costs of removing the crane in priority to the claim of the prior secured creditor.

Conclusion

27 In conclusion, there was ample evidence to support the chambers judge's finding that Kramer's Iowa was regularly involved in the business of leasing goods. No reviewable error has been shown, and appeal #1503-0245AC is dismissed.

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28 The expenses incurred by Fast Labour in removing the crane were properly treated as having a priority over the prior secured claim, and appeal #1503-0261AC is also dismissed.

Appeals dismissed.

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TAB 17

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2016 ABQB 719
Alberta Court of Queen's Bench

Sprung Instant Structures Ltd. v. 1064391 Alberta Ltd.

2016 CarswellAlta 2479, 2016 ABQB 719, [2017] A.W.L.D. 718, 274 A.C.W.S. (3d) 423, 44 C.B.R. (6th) 162, 6 P.P.S.A.C. (4th) 296

Sprung Instant Structures Ltd. (Plaintiff) 1064391 Alberta Ltd., 1401900 Alberta Ltd., 1466051 Alberta Ltd., 1777575 Alberta Ltd., Kananaskis Mountain Helicopters Ltd., Kananaskis Mountain Holdings Inc., Rejean Lavoie, Romeo Lavoie, John McLeod, Rockies Heli Tours Canada Inc., Ralph Sliger, Sliger Family Trust and Gerry Weber (Defendants)

Master A.R. Robertson, In Chambers

Heard: October 31, 2016
Judgment: December 22, 2016
Docket: Calgary 1601-00042

Counsel: Kentigern A. Rowan, Q.C., for Applicants, Defendants, Rejean Lavoie, Romeo Lavoie, 1064391 Alberta Ltd., 1466051 Alberta Ltd., and 1777575 Alberta Ltd.

Michael G. James, for Respondent, Plaintiff

No one, for Remaining Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Restitution; Torts

Related Abridgment Classifications

Personal property security

IV Priority of security interest

IV.1 Competing perfected interests

IV.1.a First to perfect

Headnote

Personal property security --- Priority of security interest --- Competing perfected interests --- First to perfect
Plaintiff leased mobile building structure to K Inc. --- Lease was for more than one year and therefore subject to provisions of Personal Property Security Act (PPSA) --- Plaintiff did not register its claim with Personal Property Registry --- K Inc. entered into financing arrangements with bank --- Bank registered general security agreement --- K Inc. defaulted on loan while continuing to pay rent to plaintiff --- Bank seized assets of K Inc. including structure --- Bank sold security interest and loan to defendant 177 Ltd. --- In ensuing priority dispute, court found 177 Ltd. had priority over plaintiff's interest as successor to bank --- 177 Ltd. sold structure but not until lease between plaintiff and K Inc. expired --- Plaintiff commenced action against 177 Ltd. and others for return of structure or proceeds of sale --- Defendants brought application for summary dismissal of action --- Application granted --- Interest taken by bank and assigned to 177 Ltd. was superior to plaintiff's interest --- Although lease may have expired, that did not affect prior superior security interest held by 177 Ltd. or good title taken by purchaser of structure --- 177 Ltd.'s proper reliance on PPSA precluded plaintiff's claims in conversion and unjust enrichment --- There was no evidence of oppression, unfairness, or conspiracy.

Table of Authorities

Sprung Instant Structures Ltd. v. 1064391 Alberta Ltd., 2016 ABQB 719, 2016...

2016 ABQB 719, 2016 CarswellAlta 2479, [2017] A.W.L.D. 718, 274 A.C.W.S. (3d) 423...

Cases considered by Master A.R. Robertson, In Chambers:

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 406, 2015 CarswellAlta 2342, 609 A.R. 313, 656 W.A.C. 313, 52 C.L.R. (4th) 17 (Alta. C.A.) — followed

Condominium Corp. No. 0321365 v. Cuthbert (2016), 2016 ABCA 46, 2016 CarswellAlta 222, 612 A.R. 284, 662 W.A.C. 284, 33 Alta. L.R. (6th) 209 (Alta. C.A.) — followed

Giffen, Re (1998), 155 D.L.R. (4th) 332, 222 N.R. 29, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re*) 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re*) 164 W.A.C. 161, 45 B.C.L.R. (3d) 1, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — considered

McDonald v. Brookfield Asset Management Inc. (2016), 2016 ABCA 375, 2016 CarswellAlta 2308 (Alta. C.A.) — referred to

Royal Bank v. Sprung Instant Structures Ltd. (2000), 2000 ABCA 202, 2000 CarswellAlta 713, [2000] 10 W.W.R. 327, 83 Alta. L.R. (3d) 264, 266 A.R. 375, 228 W.A.C. 375 (Alta. C.A.) — considered

Sprung Instant Structures Ltd. v. Caswan Environmental Services Inc. (1997), [1997] 5 W.W.R. 280, 47 Alta. L.R. (3d) 356, 45 C.B.R. (3d) 47, 198 A.R. 41, 12 P.P.S.A.C. (2d) 148, 1997 CarswellAlta 151 (Alta. Q.B.) — distinguished

Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc. (2015), 2015 ABQB 546, 2015 CarswellAlta 1580, [2015] 11 W.W.R. 627, 29 C.B.R. (6th) 40, 21 Alta. L.R. (6th) 236, 4 P.P.S.A.C. (4th) 258 (Alta. Q.B.) — followed

1777575 Alberta Ltd. v. Sprung Instant Structures Ltd. (2014), 2014 ABQB 354, 2014 CarswellAlta 942, 14 C.B.R. (6th) 52, 2 P.P.S.A.C. (4th) 215 (Alta. Q.B.) — followed

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

s. 239(b) — considered

s. 242(2) — considered

s. 242(3) — considered

Personal Property Security Act, R.S.A. 2000, c. P-7

Generally — referred to

s. 1(1)(tt) “security interest” (ii)(C) — considered

s. 3(1) — referred to

s. 3(2)(b) — referred to

s. 60 — referred to

s. 60(12) — considered

APPLICATION by defendants for summary dismissal of action.

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2016 ABQB 719, 2016 CarswellAlta 2479, [2017] A.W.L.D. 718, 274 A.C.W.S. (3d) 423...

Master A.R. Robertson, In Chambers:

Overview

1 This summary dismissal application relates to a priority dispute about personal property. The property, a structure that had been leased by Sprung Instant Structures Ltd., the plaintiff, was seized by a registered secured creditor and later sold by its assignee. The dispute is between the assignee of the original registered secured creditor and the Sprung as lessor of the property. Sprung had not registered its interest at the Personal Property Registry.

2 In addition, Sprung sues for oppression, conspiracy, conversion and unjust enrichment. The applicants (who are not all of the defendants) ask for summary dismissal of all the claims against them.

3 The test for summary judgment has been set out in many appellate decisions, but recently in *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 406 (Alta. C.A.), at para. 15 and in *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, 2016 CarswellAlta 222 (Alta. C.A.), at para. 25 to 29.

4 The first issue is not the priority issue itself — that has already been decided in other proceedings — but whether the resolution of the priority dispute meant that Sprung, as lessor in a long-term lease, no longer has any interest in the personal property that was the subject of the lease.

5 I have concluded that the legal issues involving the priority/ownership dispute have already been decided in the earlier application. The remaining issues revolve around whether there is a basis in law, or a basis in fact, for the other claims against these defendants.

6 The record here is not materially conflicting, and it allows a decision that is fair and just to both parties; there are no issues of merit that genuinely require a trial as between the plaintiff and the defendants who have applied for dismissal.

7 Accordingly, I have concluded that the claims against these applicants must be dismissed. There is no merit to them and there is no genuine issue for trial.

Background to the Dispute

8 Sprung Instant Structures Ltd. leased a mobile building structure to Kananaskis Mountain Holdings Inc., used in Kananaskis' helicopter business. It was for a fixed term, longer than one year, and it provided for an option to purchase the structure.

9 The lease was for more than one year and therefore it was subject to the provisions of the *Personal Property Security Act*, RSA 2000 chap. P-7 (the "PPSA"), section 1(1)(tt)(ii)(C). As the lessor of such a lease, Sprung could have (and should have) registered its claim with the Personal Property Registry (the "PPR"). Unfortunately for Sprung, it did not.

10 Kananaskis paid the rent on the structure, but before the term expired Kananaskis approached Sprung to arrange to "transfer" the lease to Rockies Heli Tours Canada Inc. Not long after the lease was either "transferred" to Rockies, or a new lease agreement was made with Rockies (this issue has not yet been determined), Rockies defaulted on the lease.

11 After the lease commenced, but before the "transfer" to Rockies, Kananaskis entered into financing arrangements with the Canadian Imperial Bank of Commerce. The CIBC took a general security agreement (a "GSA") and it did register with the PPR. Kananaskis defaulted on its loan to the CIBC, while continuing to pay rent to Sprung. Sprung was unaware of the default on the CIBC loan.

12 CIBC seized the assets of Kananaskis, including the building structure that had been leased by Sprung.

13 A priority dispute ensued, but along the way CIBC sold its security interest and loan to 1777575 Alberta Ltd., a company that had been created for the purpose by Romeo Lavoie, who was, indirectly, an owner of Kananaskis. I am told that Mr. Romeo Lavoie had given a guarantee to the CIBC of the Kananaskis debt, and accordingly he acted in his own

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self-interest by making sure that the CIBC was paid. When he did so, he used 177 to make the payment and 177 took an assignment of CIBC's position.

14 Some of the defendants apply for summary dismissal of the claim as against them. The defendants who apply are individuals with varying degrees of separation between them and Helicopters or Rockies. Rejean Lavoie, for example, signed the Sprung lease as a director of Helicopters. Both Romeo and Rejean Lavoie, who are applicants here asking for the claim as against them to be dismissed, are directors of 1466051 Alberta Ltd., which is a shareholder of Helicopters. Romeo Lavoie is a shareholder and director of 1064391 Alberta Ltd., which is a shareholder of 1466051. Therefore, either directly or through ownership of an intervening corporation both Rejean and Romeo Lavoie are owners of a corporation which is a part owner of Helicopters. Furthermore, Romeo Lavoie is a director of 177, the corporation that bought the CIBC position and ended up selling the structure to the third party.

15 But Sprung's main contact with Helicopters was with neither of them, but instead with the other director (besides Rejean Lavoie), Ralph Sliger. He is a defendant in this action, but Mr. Sliger has not asked to be summarily removed.

Personal Property Security Act Issue

16 The priority dispute was resolved by Veit, J., who found that 177, as successor to CIBC, had priority ahead of Sprung's interest over the structure due to the operation of the *PPSA*. That decision is reported at *1777575 Alberta Ltd. v. Sprung Instant Structures Ltd.*, 2014 ABQB 354 (Alta. Q.B.).

17 177 then sold the structure to another corporation, but before the structure was sold, the lease from Sprung terminated. No one had exercised the option to purchase. Sprung argues that this is a significant factor, because although the lease was for in excess of one year and its interest could have been registered at the PPR, it remained a lease and option. Sprung argues that the lease simply expired and the option was not exercised. Accordingly, Sprung argues that although 177 as successor to CIBC had priority over the lease, the lease no longer exists. Sprung says that it still owns the structure itself, which is no longer subject to a lease. Sprung argues that the dispute was about the priority over its lease.

18 Therefore, Sprung wants either its building back (it has now been lost by the sale to a third party), or the proceeds of sale.

19 In addition, as discussed below, it sues the various individuals and corporations that were involved in the history of events. Sprung invokes the oppression remedies under the *Business Corporations Act* (Alberta), RSA 2000 chap. B-4 (the "ABCA"), and it also claims in conspiracy, conversion and unjust enrichment.

20 The reversionary interest in the lease of the structure was a security interest in personal property: *PPSA*, sections 1(tt)(ii)(C), 3(1) and (2)(b). Section 60(12) makes it clear that when a secured party disposes of the collateral to a good faith purchaser for value who takes possession of it, the purchaser acquires the collateral free from the interest of the subordinate creditors. Madam Justice Veit found that the CIBC/177 general security interest had priority over the Sprung lease. She clearly held that this led to a claim over the ownership of the structure, consistent with section 60. Therefore, what was sold was the ownership of the personal property, *i.e.*, the structure. In her summary of the decision at paragraph 4, she said, "By ignoring that legislation [the *PPSA*] Sprung has imperilled its ownership interest in its structure." (Emphasis added.)

21 She clarified that the *PPSA* has this effect regardless of whether the lease is a "true" lease or one where the lessee has an option to acquire ownership of the leased property: para. 5. It is clear that the fact that there was an option to purchase the lease, which was not exercised, was not relevant.

22 The *PPSA* was intended to take advantage of computer registration and search capabilities so as to coordinate those claims that various lenders, vendors and lessors had that bore similar characteristics, and to provide clarity in relation to competing rights. The *PPSA* established a consistent system for registration and searching, regardless of how the security interest was held. In addition to more traditional loan security agreements, the system also applied to long-term chattel leases, which were defined as being leases for more than one year.

23 It if had been followed, the registration system would not have jeopardized Sprung's security interest. As it happened

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here, the failure to register can create an ownership interest that the debtor or lessor did not have, and one that could not have been given at common law. The rule sometimes cited as *nemo dat qui non habet* (no one gives who possesses not) and sometimes as *nemo dat quod non habet* (one does not give what one does not possess) does not apply. The common law rule has been overruled by the legislation in an effort to create a workable commercial registration system.

24 Sprung places great emphasis on *Sprung Instant Structures Ltd. v. Caswan Environmental Services Inc.*, 1997 CarswellAlta 151, [1997] 5 W.W.R. 280 (Alta. Q.B.), which was specifically considered in 177757 *Alberta Ltd v. Sprung* at para. 13, where Madam Justice Veit noted that the Court of Appeal appears not to have been referred to an earlier decision that was later approved by the Supreme Court of Canada, *Giffen, Re*, 1998 CarswellBC 147 (S.C.C.). She quoted extensively from *Giffen* to demonstrate the Supreme Court's directions on how the PPSA must be understood to apply.

25 At paragraph 15, she stated this:

In other words, *Giffen (Re)* emphasized the revolutionary nature of personal property security legislation in Canada. Sprung has acted throughout these proceedings as if that revolution had not taken place; Sprung has ignored, at its peril, the fundamental changes effected by the statute in relation to ownership interests in personal property.

26 As to the fact that the lease eventually expired according to its terms, she specifically addressed this at paragraph 25: the lease did not expire before 177 made its claim. At paragraph 22, Madam Justice Veit made it clear that in her view that the later expiry did not matter. She said:

There is no doubt that . . . at the time the GSA was granted, Kananaskis had the benefit of the lease, which is, by definition, personal property. Therefore, at the time of executing the GSA, when Kananaskis granted a security interest to CIBC in all of Kananaskis' "present and after-acquired undertaking and Personal Property", it was certainly granting to CIBC a security interest in all of the leases which came within the definition of lease for a term of more than one year in which Kananaskis was a lessee.

27 As mentioned above, she specifically said that this registration by CIBC, and the non-registration by Sprung, imperilled Sprung's ownership interest in the structure.

28 She distinguished *Caswan* based on the specific words that must have been in the security agreement there, as contrasted what are clearly in the agreement here.

29 The Alberta Court of Appeal specifically discussed *Caswan* in *Royal Bank v. Sprung Instant Structures Ltd.*, 2000 ABCA 202, [2000] 10 W.W.R. 327 (Alta. C.A.), and confined it to its facts (at para. 4):

In our view, *Re Caswan* is limited to an interpretation of the general security agreement between the appellant and Caswan. It does not purport to consider, let alone decide, the *Personal Property Security Act* priorities issues that were before the Supreme Court of Canada in *Re Giffen*.

30 Although *Caswan* is limited to its particular facts, as noted in *Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc.*, 2015 ABQB 546, 2015 CarswellAlta 1580 (Alta. Q.B.), at para. 45, the facts provided by the Court in *Caswan* were "sparse".

31 In the result, *Caswan* offers no assistance here in determining applicable legal principles, and it was expressly disregarded by Veit, J.

32 This analysis makes it clear that the interest taken by CIBC, and then assigned to 177, was superior to the interest of Sprung. Although the lease may have, on its face, expired later, that does not affect the prior superior security interest held by 177, just as it does not affect the good title taken by the purchaser. This result was also made clear in *Wells Fargo* at para. 60, where the Court concluded that even if either the lessor with an unregistered lease in excess of one year terminated the lease, or the lease expire on its own terms, the lease termination could not affect the prior perfected security interest of the lender that had registered its interest and thus perfected its security interest.

33 Under the PPSA, 177 was entitled to sell the structure. 177 is not required to account to Sprung for any proceeds of that sale - so long as there was no excess beyond the debt, which there was not.

Oppression, Conspiracy, Conversion and Unjust Enrichment

34 This leaves for analysis the remaining claims against the applicants for oppression, conspiracy, conversion and unjust enrichment.

Conversion

35 It is clear that the proper reliance on the *PPSA* and registration at the PPR does not expose a creditor who has sold the security liable for conversion. 177 did not unlawfully convert for its use something that it lawfully sold, which I have already found.

Unjust Enrichment

36 As to unjust enrichment, there was a juridical reason for the sale of the structure and the taking of the proceeds by 177.

Oppression and Conspiracy

37 The argument for summary dismissal was substantially to the effect that Sprung's claim is against the party (or parties, if Rockies is included here) that it contracted with, not against the individuals behind it (or them) and the other applicants are not liable for Helicopters' or Rockies' obligations. That argument might apply where the plaintiff tries to "lift the corporate veil" and there is no basis for doing that here.

38 However, an oppression claim does not involve "lifting the corporate veil". It is a personal claim created by statute, allowing for a wide variety of forms of relief. A complainant advancing an oppression claim can be a creditor, if the Court exercises its discretion and concludes that the creditor is "a proper person to make an application": *ABCA* section 239(b). Section 242(2) says that where the actions of individuals are "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any . . . creditor, . . . the Court may make an order to rectify the matters complained of." Subsection (3) gives the Court jurisdiction to make "any interim or final order it thinks fit including, without the generality of the foregoing, any or all of the following" - and thereafter the subsection lists 17 different kinds of orders that might be made.

39 The nature of the claim here, to be successful, would have to demonstrate that the affairs of Helicopter were managed so as to take advantage of Sprung, such that defined actions could be said to be unfair or oppressive. The conduct here that is said to have been oppressive or unfair was the failure to return the structure to Sprung, or to compensate it for its loss of use following the termination of the leases.

40 A similar argument of allegedly improper conduct is made to support the claim of conspiracy.

41 There is not any evidence of oppression, unfairness, or conspiracy. 177 and the individuals and the corporations they control (other than Helicopters) did not improperly fail to return to Sprung the structure or fail to compensate it. 177 relied on its rights under the *PPSA*. No one stopped Sprung from registering its lease at the PPR. Had it done so, the CIBC might either have refused its loan to Helicopters, or it might have advanced the funds anyway and simply stood behind Sprung's priority over the structure.

42 The facts clearly indicate that CIBC did what a large established lender does, which is take a GSA over the assets of its commercial borrower, and then if the borrower defaults, it takes steps to realize on its security. In this case, Romeo Lavoie apparently acted to protect himself on his guarantee by paying out the CIBC (through 177) and assuming their secured position.

43 None of this suggests any unfairness or oppressive behaviour, or any conspiracy. In oral argument I questioned whether there might have been a pre-conceived plan to take advantage of Sprung by getting the lease, then pledging the assets

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to the CIBC in order to take advantage of Sprung, but there is simply no evidence that there was any such malice aforethought that might give rise to a claim either under the *ABCA* or in conspiracy. The best the evidence discloses is a suspicion, and even that is weak.

44 Each party is to put their best foot forward on a summary judgment application: *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (Alta. C.A.) at para. 15. With no evidence at all of personal wrongdoing by either Romeo or Rejean Lavoie to the disadvantage of Sprung, the claim must be summarily dismissed as against them. Since the remaining applicants are corporations they control, with no evidence against the individuals there is no evidence against them nor is there anything for which the corporations would be vicariously liable, and the result is therefore the same.

Conclusion

45 Accordingly, the application is allowed.

46 The applicant defendants are entitled to costs. If the parties are unable to agree on the quantum, they may contact the chambers clerk to address the Court.

Application granted.

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TAB 18



Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of June 13, 2016

Office Consolidation

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Warning on certificate

15.9(1) An unlimited liability corporation must ensure that each share certificate issued by it displays in a prominent position on the face of the certificate the information that the liability of an owner of the share or shares represented by the certificate for any liability, act or default of the unlimited liability corporation is unlimited in extent and joint and several in nature.

(2) The liability of a shareholder of an unlimited liability corporation is unaffected by any failure of the unlimited liability corporation to comply with subsection (1).

2005 c8 s9

Part 3

Capacity and Powers

Capacity of a corporation

16(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

(2) A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Alberta to the extent that the laws of that jurisdiction permit.

1981 cB-15 s15

Restriction on powers

17(1) It is not necessary for a bylaw to be passed in order to confer any particular power on the corporation or its directors.

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

(3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

1981 cB-15 s16

No constructive notice

18 No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Registrar or is available for inspection at an office of the corporation.

1981 cB-15 s17

Authority of directors, officers and agents

19 A corporation, a guarantor of an obligation of the corporation or a person claiming through the corporation may not assert against

a person dealing with the corporation or dealing with any person who has acquired rights from the corporation

- (a) that the articles, bylaws or any unanimous shareholder agreement have not been complied with,
- (b) that the persons named in the most recent notice filed by the Registrar under section 106 or 113 are not the directors of the corporation,
- (c) that the place named as the registered office in the most recent notice filed by the Registrar under section 20 is not the registered office of the corporation,
- (d) that the post office box designated as the address for service by mail in the most recent notice filed by the Registrar under section 20 is not the address for service by mail of the corporation,
- (e) that a person held out by the corporation as a director, an officer or an agent of the corporation
 - (i) has not been duly appointed, or
 - (ii) has no authority to exercise a power or perform a duty that the director, officer or agent might reasonably be expected to exercise or perform,
- (f) that a document issued by any director, officer or agent of the corporation with actual or usual authority to issue the document is not valid or not genuine, or
- (g) that financial assistance referred to in section 45 or a sale, lease or exchange of property referred to in section 190 was not authorized,

unless the person has, or by virtue of the person's position with or relationship to the corporation ought to have, knowledge of those facts at the relevant time.

1981 cB-15 s18

Part 4

Registered Office, Records and Seal

Registered office, records office, address for service by mail

20(1) A corporation shall at all times have a registered office within Alberta.

(2) A notice of