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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. C36, AS AMENDED

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

DOCUMENT: **BRIEF OF CANADIAN WESTERN BANK FOR APPLICATION RETURNABLE JANUARY 10 & 11, 2019**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART 1 STATEMENT OF FACTS

1. This Brief is filed by Canadian Western Bank ("**CWB**") in support of its application for an order declaring that it retains a security interest in the Collateral transferred to 726 Remote Accommodations, Ltd. ("**726 Remote**") in or about December 2014, and in answer to the claim of Sand Tiger to the Sand Tiger Wares.

2. All capitalized terms used herein have the same meanings as are ascribed thereto in the Brief of the Monitor Ernst & Young Inc. dated December 14, 2018 (the "**Monitor's Brief**").

3. The facts relevant to this application are fairly set out in the Monitor's Brief.

PART 2 ISSUES

4. The following issues are raised in the application:

   (i) ***Did the security interest held by CWB over the personal property of CNC, remain attached to the assets transferred by Canada North Camps Inc. ("CNC") to 726 Remote in or about December 2014, such that those assets remain subject to the security interest of CWB?***

   (ii) ***Does CWB have a prior charge over the Sand Tiger Wares notwithstanding registration by serial number by Sand Tiger of its interest in the Sand Tiger Dorms?***

PART 3 ARGUMENT

(i) Did the security interest held by CWB over the personal property of CNC, remain attached to the assets transferred by Canada North Camps Inc. ("CNC") to 726 Remote in or about December 2014, such that those assets remain subject to the security interest of CWB?

5. CWB concurs with the analysis undertaken by the Monitor at pages 15-17 of the Monitor's Brief, with respect to the continued security interest maintained by CWB in the assets described therein.

6. CWB submits that the CWB CNC GSA provides to CWB a security interest which was attached to the Bonnyville Equipment at the time of the sale by CNC to 726 Remote, and the Bonnyville Equipment remains charged in favour of CWB as security for CNC's debts, the sale of the Bonnyville Equipment not being in the ordinary course of business for CNC. The relevant sections of the *Personal Property Security Act*, RSA 2000, c P-7 ("PPSA") are seen below:

> **Perfection re proceeds**
>
> 28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest
>
> (a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and
>
> (b) extends to the proceeds,
>
> but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing. [*Emphasis added.*]
>
> **Buyer or lessee takes free of security interest**
>
> 30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has

knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under section 25 if

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and

(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed by the regulations as serial number goods. [*Emphasis added.*]

Personal Property Security Act, RSA 2000, c. P-7 at ss 28(1), 28(1.1), 28(2), 28(3), 30(2), 30(6) & 30(7) **TAB 1**

7. The CWB CNC GSAs found at Exhibits H and I to the Affidavit of Jessie Taha sworn June 29, 2017, contain prohibitions on sale of Collateral as follows:

6. **COVENANTS OF THE DEBTOR**

The Debtor covenants:

(b) except as expressly permitted herein, not to sell, exchange, transfer, assign, destroy, lease or otherwise dispose of the Collateral or any interest therein without the prior written consent of the Bank;

11. **USE OF COLLATERAL**

Subject to compliance with the Debtor's covenants contained herein and to the provisions of this Section 11, until Default the Debtor may:

(a) in the case of Equipment, dispose of the same for the purpose of immediately replacing it by other equipment of a similar nature or of a more useful or convenient character and of at least equal value;

(b) in the case of Inventory and Money, dispose of the same in the ordinary course of the business of the

Debtor and for the sole purpose of carrying on the same; and

(c) otherwise possess, collect, use, enjoy and deal with the Collateral in the ordinary course of the Debtor's business in any manner not expressly or impliedly prohibited herein or otherwise inconsistent with the provisions of this Agreement.

General Security Agreement by Canada North Camps Inc. to CWB dated November 30, 2011 **TAB 2**

8. 726 Remote has the onus of establishing that CWB expressly or impliedly authorized the sale of the Bonnyville Equipment.

Northwest Equipment Inc v Daewoo Heavy Industries America Corp, 2002 ABCA 79 at para 22. **TAB 3**

9. Some of the proceeds of sale by CNC to 726 Remote of the Bonnyville Equipment appear to have been used to reduce CNC's obligations to CWB then outstanding, although the revolving nature of the CNC operating line resulted in those proceeds being utilized by CNC in its business operations through re-advances by CWB under the operating line. In any event, the evidence is that only some $3.5 million of the proceeds of sale of the Bonnyville Equipment was deposited into CWB accounts, and CWB retains a security interest in the Bonnyville Equipment for the remaining $16.5 million of value in the Bonnyville Equipment sold to 726 Remote.

Personal Property Security Act, RSA 2000, c. P-7 at s. 28(1) **TAB 1**

Answer to Undertaking by Paul McCracken by email dated December 14, 2018 **TAB 4**

10. With respect to the adverse inference raised at paragraph 99 of the Monitor's Brief:

(a) A party under examination has a the simple choice to either answer a question under objection, or refuse to answer a question. However, if a trial judge concludes that the refusal to answer the question was improper, and as a result relevant information is withheld, then the trial judge should draw an adverse inference against the refusing party.

Indcondo Building Corp v Sloan, 2013 ONSC 2645, at para 5. **TAB 5**

Blatherwick v Blatherwick, 2015 ONSC 2606 at paras 104-107. **TAB 6**

(b) The principles of law on adverse inference are well known:

> The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.
>
> ... The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavourable to the party's cause ...

Richards v Richards, 2013 ABQB 484 at para 64. **TAB 7**

Walek v Guardian Storage Inc, 2010 BCSC 365 at para 46 [*Walek*]. **TAB 8**

(c) An adverse inference may be drawn against a party who fails to adduce material evidence without a satisfactory explanation.

Walek v Guardian Storage Inc, 2010 BCSC 365 at para 46. **TAB 8**

(d) Specifically, a representative of a corporation will have an adverse inference drawn against them if they fail to testify their knowledge of the affairs of the corporation.

Fine Art Painting and Decorating Inc v Rob Piroli Construction Inc, 2013 CarswellOnt 4681 at paras 42-43. **TAB 9**

11. As a result, CWB concurs with the Monitor's submissions that the refusal of Mr. Roman to respond to the questions regarding whether 726 Remote's legal counsel had conducted PPR search in respect to CNC, and whether CWB was asked for a letter of release and whether such letter of release was received, must result in an adverse inference being drawn against 726 Remote.

(ii) Does CWB have a prior charge over the Sand Tiger Wares notwithstanding registration by serial number by Sand Tiger of its interest in the Sand Tiger Dorms?

12. The Sand Tiger Lease Agreement was executed July 8, 2013, and contains a "Minimum Lease Term" with "Extension Periods". Although the Minimum Lease Term is said to be defined in the Sand Tiger Lease Agreement, it does not appear to be so defined, although CNC and Sand Tiger agreed that "after four Extension Periods, or twelve months for the avoidance of doubt, Sand Tiger has the right to, on thirty (30) days notice, increase the Rental Rate per month to Sand Tiger's then prevailing rate…".

Affidavit of Wayne Sluice on behalf of Great White Sand Tiger Lodging Ltd., Exhibit "B"

13. Section 1(1)(z) of the PPSA defines a "lease for a term of more than one year" as follows:

Interpretation

1(1) In this Act,

(z) "lease for a term of more than one year" includes

> (i) a lease for an indefinite term even though the lease is determinable by one or both parties within one year after its execution,
>
> (ii) subject to subsection (3), a lease initially for 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;

Personal Property Security Act, RSA 2000,
c. P-7 at s 1(1)(z) **TAB 1**

14. A lease which fits into this definition, is deemed to be a security interest under the PPSA. Nowhere in the Sand Tiger Lease Agreement is there reference to the Sand Tiger Wares, although Sand Tiger has claimed entitlement to a security interest therein.

15. The Sand Tiger PPR registration does not contain a description of the Sand Tiger Wares as general collateral, although there is a reference in the Sand Tiger Lease Agreement to "any accessories and additions to the returned units shall be deemed to be part of the units and the property of Sand Tiger". CWB submits that this deeming provision is not binding on CWB, or determinate of the priority issue between CWB and Sand Tiger.

Affidavit of Wayne Sluice on behalf of Great White Sand Tiger Lodging Ltd., Exhibits "B" & "C"

16. The invoices submitted by Sand Tiger do not reference the Sand Tiger Wares.

17. Section 67(5) of the PPSA provides:

> (5) Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act, or that purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge a duty or obligation imposed on the person by this Act is void.

Personal Property Security Act, RSA 2000, c. P-7 at s 67(5) **TAB 1**

18. This section declares that provisions of a contract that purport to waive the protection of the PPSA are void.

Alberta Opportunity Co v Hartnell Estate, 2001 ABQB 167 **TAB 10**

19. One of the purposes of the PPSA is to provide certainty and protection under one universal regime.

> 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.

Fast Labour Solutions (Edmonton) Ltd. v Kramer's Technical Services Inc., 2016 ABCA 266 at para 12. **TAB 11**

20. If parties to contracts were allow to alter the effects of the PPSA the integrity of the legislation would be compromised. Allowing Sand Tiger to alter the classifications of the

Sand Tiger Wares by a deeming provision in their lease with CNC would cause uncertainty for secured parties such as CWB by altering the classification structure imported by the PPSA.

21. At all material times, CWB had a prior registration over all of CNC's present and after acquired personal property.

22. CWB submits that the Sand Tiger Wares do not constitute "fixtures or appurtenances" of the dorm units leased to CNC. The PPSA defines an accession as:

> 1(1) In this Act,
>
> (a) "accessions" means goods that are installed in or affixed to other goods;
>
> *Personal Property Security Act*, RSA 2000, c. P-7 at s 1(1)(a) **TAB 1**

23. CWB submits that the Sand Tiger Wares do not fit within the description of accession, and are personal property separate and apart from the Sand Tiger Dorms themselves.

24. Section 34(2) of the PPSA provides:

> Priority of purchase-money security interests
>
> (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.

Personal Property Security Act, RSA 2000, c. P-7 at s 34(2) **TAB 1**

25. Therefore, a failure to register at the PPR by Sand Tiger would not afford them priority over CWB's security interest.

26. It is evident that the Sand Tiger Wares are easily removed from the Sand Tiger Dorms, that Sand Tiger failed to register any security interest in the Sand Tiger Wares at the PPR, and CWB's prior general security interest registration prevails over Sand Tiger to the Sand Tiger Wares.

PART 4 REMEDY SOUGHT

27. CWB seeks a declaration that CWB has a prior security interest in the Bonnyville Equipment and the Sand Tiger Wares.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 20th day of December, 2018.

MCLENNAN ROSS LLP

Per: ______________________________
Charles P. Russell, Q.C.
Solicitor for Canadian Western Bank

TABLE OF AUTHORITIES

TAB 1

Alberta Statutes
Personal Property Security Act

Most Recently Cited in: E Dehr Delivery Ltd v. Dehr, 2018 ABQB 846, 2018 CarswellAlta 2288, 297 A.C.W.S. (3d) 202, 75 Alta. L.R. (6th) 380, 64 C.B.R. (6th) 39, [2018] A.W.L.D. 4382, [2018] A.W.L.D. 4383, [2018] A.W.L.D. 4436, [2018] A.W.L.D. 4437 | (Alta. Q.B., Oct 10, 2018)

R.S.A. 2000, c. P-7, s. 1

s 1. Interpretation

Currency

1. Interpretation
1(1) In this Act,

(a) **"accessions"** means goods that are installed in or affixed to other goods;

(b) **"account"** means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance, but does not include investment property;

(c) **"advance"** means the payment of money, the provision of credit or the giving of value and includes any liability of the debtor to pay interest, credit or other charges or costs, in connection with an advance or the enforcement of the security interest securing an advance;

(c.1) **"broker"** means a broker as defined in the *Securities Transfer Act*;

(d) **"building"** includes a structure, erection, mine or work built, erected, constructed or opened on or in land;

(e) **"building materials"** means materials that are incorporated into a building and includes goods attached to a building so that their removal

(i) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or

(ii) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include heating, air conditioning or conveyancing devices or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

(e.1) **"certificated security"** means a certificated security as defined in the *Securities Transfer Act*;

(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;

(f.1) **"clearing house"** means an organization through which trades in options or standardized futures are cleared or settled;

(f.2) **"clearing house option"** means an option, other than an option on futures, issued by a clearing house to its participants;

(g) **"collateral"** means personal property that is subject to a security interest;

(h) **"commercial consignment"** means a consignment under which goods are delivered for sale, lease or other disposition to a consignee who, in the ordinary course of the consignee's business, deals in goods of that description, by a consignor who,

(i) in the ordinary course of the consignor's business, deals in goods of that description, and

(ii) reserves an interest in the goods after they have been delivered,

but does not include an agreement under which goods are delivered to an auctioneer for sale or to a consignee for sale, lease or other disposition if it is generally known to the creditors of the consignee that the consignee is in the business of selling or leasing goods of others;

(i) **"consumer goods"** means goods that are used or acquired for use primarily for personal, family or household purposes;

(j) **"Court"** means the Court of Queen's Bench;

(k) **"creditor"** includes an assignee for the benefit of creditors, an executor, an administrator or a committee of a creditor;

(l) **"crops"** means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, but includes trees only if they are

(i) nursery stock,

(ii) trees being grown for uses other than the production of lumber or wood products, or

(iii) trees being grown for use in reforestation of land other than the land on which the trees are growing;

(m) **"debtor"** means, subject to subsection (4), a person who owes payment or other performance of the obligation secured, whether or not that person owns or has rights in the collateral, and includes any one or more of the following:

(i) a person who receives goods from another person under a commercial consignment;

(ii) a lessee under a lease for a term of more than one year;

(iii) a transferor of an account or chattel paper;

(iv) in sections 17, 24, 26, 58, 59, 60(12), 62(7), 65(2)(b), 65(3) and 67, a transferee of or a successor to a debtor's interest in collateral;

(n) **"default"** means the failure to pay or otherwise perform the obligation secured when due, or the occurrence of any event or set of circumstances on which under the terms of the security agreement the security interest becomes enforceable;

(o) **"document of title"** means a writing issued by or addressed to a bailee

(i) that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and

(ii) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of the person, to bearer or to the order of a named person;

(o.1) **"entitlement holder"** means an entitlement holder as defined in the *Securities Transfer Act*;

(o.2) **"entitlement order"** means an entitlement order as defined in the *Securities Transfer Act*;

(p) **"equipment"** means goods that are held by a debtor other than as inventory or consumer goods;

(p.1) **"financial asset"** means a financial asset as defined in the *Securities Transfer Act*;

(q) **"financial institution"** means a bank, a trust company, a credit union and a treasury branch;

(r) **"financing change statement"** means a financing change statement in the form authorized under the regulations and, where the context permits, data authorized under the regulations to be transmitted to an office of the Registry to amend a registration;

(s) **"financing statement"** means

(i) a printed financing statement in the form authorized under the regulations and required or permitted to be registered under this Act, and

(ii) where the context permits,

(A) data authorized under the regulations to be transmitted to an office of the Registry to effect a registration,

(B) a financing change statement,

(C) a security agreement registered before October 1, 1990, and

(D) a financial interest statement or amending financial interest statement under the *Chattel Security Registries Act*, S.A. 1983, c. C-7.1, accompanying a security agreement registered before October 1, 1990, if there is a conflict between the financial interest statement or amending financial interest statement and the security agreement;

(t) **"fixture"** does not include building materials;

(u) **"future advance"** means an advance whether or not made pursuant to an obligation and includes reasonable costs incurred and expenditures made for the protection, maintenance, preservation or repair of collateral;

(u.1) **"futures account"** means an account maintained by a futures intermediary in which a futures contract is carried for a futures customer;

(u.2) **"futures contract"** means a standardized future or an option on futures, other than a clearing house option, that is

(i) traded on or subject to the rules of a futures exchange recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority of another province or territory of Canada, or

(ii) traded on a foreign futures exchange and carried on the books of a futures intermediary for a futures customer;

(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 substantiallyuninterrupted, 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;

(aa) **"minerals"** means minerals as defined in the *Mines and Minerals Act;*

(bb) **"Minister"** means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(cc) **"money"** means a medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency;

(dd) **"new value"** means value other than an antecedent debt or antecedent liability;

(ee) **"obligation secured"** means, when determining the amount payable under a lease that secures payment or performance of an obligation,

(i) the amount originally contracted to be paid under the lease,

(ii) any other amounts payable pursuant to the terms of the lease, and

(iii) any other amount required to be paid by the lessee to obtain full ownership of the collateral,

less any amount paid prior to the determination;

(ee.1) **"option"** means an agreement that provides the holder with the right, but not the obligation, to do one or more of the following on terms or at a price established by or determinable by reference to the agreement at or by a time established by the agreement:

(i) receive an amount of cash determinable by reference to a specified quantity of the underlying interest of the option;

(ii) purchase a specified quantity of the underlying interest of the option;

(iii) sell a specified quantity of the underlying interest of the option;

(ee.2) **"option on futures"** means an option the underlying interest of which is a standardized future;

(ff) **"pawnbroker"** means a person who engages in the business of granting credit to individuals for personal, family or 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,

(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

(i) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price,

(ii) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights,

(iii) the interest of a lessor of goods under a lease for a term of more than one year, or

(iv) the interest of a person who delivers goods to another person under a commercial consignment,

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, **"purchase price"** and **"value"** include credit charges or interest payable in respect of the purchase or loan;

(mm) **"purchaser"** means a person who takes by purchase;

(nn) **"receiver"** includes a receiver-manager;

(oo) **"Registrar"** means the Registrar of Personal Property designated under section 42;

(pp) **"Registry"** means the Personal Property Registry continued under Part 4;

(qq) **"secured party"** means

(i) a person who has a security interest,

(ii) a person who holds a security interest for the benefit of another person, and

(iii) the trustee, if a security agreement is embodied or evidenced by a trust indenture,

and, for the purposes of sections 17, 36, 38, 55, 56, 57, 58(1), 60(1), (3), (12) and (14), 61, 63(1)(a), 64 and 67, includes a receiver;

(qq.1) **"securities account"** means a securities account as defined in the *Securities Transfer Act*;

(qq.2) **"securities intermediary"** means a securities intermediary as defined in the *Securities Transfer Act*;

(rr) **"security"** means a security as defined in the *Securities Transfer Act*;

(ss) **"security agreement"** means an agreement that creates or provides for a security interest, and, if the context permits, includes

(i) an agreement that creates or provides for a prior security interest, and

(ii) a writing that evidences a security agreement;

(ss.1) **"security certificate"** means a security certificate as defined in the *Securities Transfer Act*;

(ss.2) **"security entitlement"** means a security entitlement as defined in the *Securities Transfer Act*;

(tt) **"security interest"** means

(i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods, and

(ii) the interest of

(A) a transferee arising from the transfer of an account or a transfer of chattel paper,

(B) a person who delivers goods to another person under a commercial consignment, and

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

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

(uu) **"specific goods"** means goods identified and agreed on at the time a security agreement in respect of those goods is made;

(uu.1) **"standardized future"** means an agreement traded on a futures exchange pursuant to standardized conditions contained in the bylaws, rules or regulations of the futures exchange, and cleared and settled by a clearing house, to do one or more of the following at a price established by or determinable by reference to the agreement and at or by a time established by or determinable by reference to the agreement:

(i) make or take delivery of the underlying interest of the agreement;

(ii) settle the obligation in cash instead of delivery of the underlying interest;

(vv) **"trust indenture"** means any deed, indenture or document, however designated, including any supplement or amendment to it, by the terms of which a person issues or guarantees, or provides for the issue or guarantee of debt obligations secured by a security interest and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for under it;

(vv.1) **"uncertificated security"** means an uncertificated security as defined in the *Securities Transfer Act*;

(ww) **"value"** means any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability.

1(1.1) For the purposes of this Act,

(a) a secured party has control of a certificated security if the secured party has control in the manner provided for in section 23 of the *Securities Transfer Act*;

(b) a secured party has control of an uncertificated security if the secured party has control in the manner provided for in section 24 of the *Securities Transfer Act*;

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided for in section 25 or 26 of the *Securities Transfer Act*;

(d) a secured party has control of a futures contract if

(i) the secured party is the futures intermediary with which the futures contract is carried, or

(ii) the futures customer, the secured party and the futures intermediary have agreed that the futures intermediary will apply any value distributed on account of the futures contract as directed by the secured party without further consent by the futures customer;

(e) a secured party having control of all security entitlements or futures contracts carried in a securities account or futures account has control over the securities account or futures account.

1(2) For the purposes of this Act,

(a) an individual knows or has knowledge when information is acquired by the individual under circumstances in which a reasonable person would take cognizance of it;

(b) a partnership knows or has knowledge when information has come to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) a corporation knows or has knowledge when information has come to the attention of

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates, under circumstances in which a reasonable person would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for service for the corporation;

(d) the members of an association know or have knowledge when information has come to the attention of

(i) a managing director or officer of the association,

(ii) a senior employee of the association with responsibility for matters to which the information relates, or

(iii) all the members

under circumstances in which a reasonable person would take cognizance of it;

(e) the Government knows or has knowledge when information has come to the attention of a senior employee of the Government with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it.

1(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.

1(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.

1(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".

1(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.

Amendment History
2006, c. S-4.5, s. 108(2)

Currency
Alberta Current to Gazette Vol. 114:21 (November 15, 2018)

Concordance References
Personal Property Security Act Concordance 2, Definitions
Personal Property Security Act Concordance 3, Determination of control
Personal Property Security Act Concordance 4, Knowledge imputed, where
Personal Property Security Act Concordance 5, Lease of goods for a term of one year or less extended by possession
Personal Property Security Act Concordance 6, Determination of type of goods
Personal Property Security Act Concordance 7, Traceable proceeds
Personal Property Security Act Concordance CABYCONCORD1, Table of Concordance

End of Document

Alberta Statutes
Personal Property Security Act
Part 3 — Perfection and Priorities (ss. 19-41)

Most Recently Cited in: Kroontje v. Q Private Jets Limited Partnership, 2015 ABCA 158, 2015 CarswellAlta 812, [2015] A.W.L.D. 2277, 600 A.R. 229, 645 W.A.C. 229, 253 A.C.W.S. (3d) 522 | (Alta. C.A., May 8, 2015)

R.S.A. 2000, c. P-7, s. 28

s 28. Perfection re proceeds

Currency

28.Perfection re proceeds
28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

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

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

28(1.1) The limitation of the amount secured by a security interest as provided in subsection (1) does not apply where the collateral is investment property.

28(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected

(a) by the registration of a financing statement that contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) by the registration of a financing statement that covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) by the registration of a financing statement that covers the original collateral, if the proceeds consist of money, cheques or deposit accounts in a financial institution.

28(3) Where the security interest in the original collateral was perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.

Amendment History
2006, c. S-4.5, s. 108(19)

Currency

Alberta Statutes
Personal Property Security Act
Part 3 — Perfection and Priorities (ss. 19-41)

Most Recently Cited in: Bank of Montreal v. Mason, 2018 ABQB 161, 2018 CarswellAlta 363, [2018] A.W.L.D. 1038, 8 P.P.S.A.C. (4th) 136, 288 A.C.W.S. (3d) 785 | (Alta. Q.B., Mar 2, 2018)

R.S.A. 2000, c. P-7, s. 30

s 30. Buyer or lessee takes free of security interest

Currency

30.Buyer or lessee takes free of security interest

30(1) For the purposes of this section,

(a) **"buyer of goods"** includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods' becoming a fixture or accession to property in which the person has an interest;

(b) **"ordinary course of business of the seller"** includes the supply of goods in the ordinary course of business as part of a contract for services and materials;

(c) **"seller"** includes a person who supplies goods that become a fixture or accession

(i) under a contract with a buyer of goods, or

(ii) under a contract with a person who is a party to a contract with a buyer of goods.

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

30(3) A buyer or lessee of goods that are acquired as consumer goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

30(4) Subsection (3) does not apply to a security interest in

(a) a fixture, or

(b) goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000.

30(5) A buyer or lessee of goods takes free from a security interest that is temporarily perfected under section 26, 28(3) or 29(4) or a security interest the perfection of which is continued under section 51 during any of the 15-day periods referred to in those sections, if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

30(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under section 25 if

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and

(b) the goods were not described by serial number in the registration relating to the security interest.

30(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed by the regulations as serial number goods.

30(8) A sale or lease under subsections (2), (3), (5) and (6) may be

(a) for cash,

(b) by exchange for other property, or

(c) on credit,

and includes delivering goods or a document of title to goods under a pre-existing contract for sale but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

30(9) A purchaser of a security, other than a secured party, who

(a) gives value,

(b) does not know that the transaction constitutes a breach of a security agreement granting a security interest in the security to a secured party that does not have control of the security, and

(c) obtains control of the security,

acquires the security free from the security interest.

30(10) A purchaser referred to in subsection (9) is not required to determine whether a security interest has been granted in the security or whether the transaction constitutes a breach of a security agreement.

30(11) An action based on a security agreement creating a security interest in a financial asset, however framed, may not be brought against a person who acquires a security entitlement under section 95 of the *Securities Transfer Act* for value and did not know that there has been a breach of the security agreement.

30(12) A person who acquires a security entitlement under section 95 of the *Securities Transfer Act* is not required to determine whether a security interest has been granted in a financial asset or whether there has been a breach of the security agreement.

30(13) If an action based on a security agreement creating a security interest in a financial asset could not be brought against an entitlement holder under subsection (11), it may not be asserted against a person who purchases a security entitlement, or an interest in it, from the entitlement holder.

Alberta Statutes
Personal Property Security Act
Part 3 — Perfection and Priorities (ss. 19-41)

Most Recently Cited in: Champion Feed Services Ltd. v. Hospers, 2015 ABCA 262, 2015 CarswellAlta 1486, 257 A.C.W.S. (3d) 12, [2015] A.W.L.D. 3696 | (Alta. C.A., Aug 14, 2015)

R.S.A. 2000, c. P-7, s. 34

s 34. Priority of purchase-money security interests

Currency

34.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.

34(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.

34(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.

34(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).

34(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.

34(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.

34(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.

34(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.

34(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.

34(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.

Currency
Alberta Current to Gazette Vol. 114:21 (November 15, 2018)

Concordance References
Personal Property Security Act Concordance 50, Crops/Purchase-money, security interest
Personal Property Security Act Concordance CABYCONCORD1, Table of Concordance

End of Document

Alberta Statutes
Personal Property Security Act
Part 6 — Miscellaneous (ss. 66-78)

Most Recently Cited in: Edmonton Kenworth Ltd. v. Kos, 2018 ABQB 439, 2018 CarswellAlta 1088, 293 A.C.W.S. (3d) 169, [2018] A.W.L.D. 2508, [2018] A.W.L.D. 2531, [2018] A.W.L.D. 2546, [2018] A.W.L.D. 2547, 71 Alta. L.R. (6th) 306, 8 P.P.S.A.C. (4th) 362 | (Alta. Q.B., Jun 6, 2018)

R.S.A. 2000, c. P-7, s. 67

s 67. Deemed damages

Currency

67.Deemed damages

67(1) If a person fails, without reasonable excuse, to discharge any duties or obligations imposed on the person by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

67(2) Where a secured party, without reasonable excuse, fails to comply with obligations or limitations

(a) in section 43(11), 49 or 50, or

(b) in section 17, 18, 60, 61 or 62 and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 43(11), 49 or 50, the person disclosed as the debtor in a registration, is deemed to have suffered damages not less than the amount prescribed.

67(3) In an action for a deficiency, the defendant may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 60 or 61, but non-compliance shall limit the right to the deficiency only to the extent that it has affected the right of the defendant to protect the defendant's interest in the collateral or has made the accurate determination of the deficiency impracticable.

67(4) Where a secured party fails to comply with obligations in section 17, 18, 60 or 61, the onus is on the secured party to show that the failure,

(a) where the collateral is consumer goods, did not affect the debtor's ability to protect the debtor's interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, or

(b) did not make the accurate determination of the deficiency impracticable.

67(5) Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act, or that purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge a duty or obligation imposed on the person by this Act is void.

Currency
Alberta Current to Gazette Vol. 114:21 (November 15, 2018)

Concordance References

TAB 2

Form 1100 (11/08)

CANADIAN WESTERN BANK

THIS GENERAL SECURITY AGREEMENT DATED November 30, 2011

BRANCH ADDRESS: 11350 Jasper Avenue, Edmonton, AB, T5K 0L8

1. DEFINITIONS

The following definitions shall apply herein:

(a) "Act" means the Personal Property Security Act of the Province/Territory of Alberta in effect on the date hereof;

(b) "Accessions", "Account", "Chattel Paper", "Consumer Goods", "Document of Title", "Equipment", "Financing Change Statement", "Financing Statement", "Goods", "Instrument", "Intangible", "Inventory", "Money", "Purchase Money Security Interest", "Security", "Securities Account" and "Security Entitlement" shall have the meanings ascribed to them in the Act and shall be deemed to include both the singular and plural of such terms. All other capitalized words or terms used herein, unless otherwise defined herein, shall have the meanings ascribed to them in the Act and the Regulations passed pursuant thereto:

(c) "Agreement", "herein", and similar expressions refer to the whole of this Security Agreement and not to any particular section or other portion thereof and extend to and include every instrument which amends or supplements this Agreement;

(d) "Bank" means **CANADIAN WESTERN BANK;**

(e) "Collateral" means all present and after-acquired personal property and Real Property of the Debtor of whatever kind and wherever situate, including, without limiting the generality of the foregoing, those specific items, if any, described on the attached Schedule "A", together with all documents, writings, papers, books of account and records relating to the foregoing and all rights and interests therein, but shall not include:

(i) the last day of any term of years reserved by any lease, verbal or written, or any agreement therefor now or hereafter held by the Debtor, it being the intention that the Debtor shall stand possessed of the reversion remaining in respect of any leasehold interest forming part of the Collateral upon trust to assign and dispose thereof as the Bank may after default direct;

(ii) Consumer Goods, or

(iii) those specific items, if any, described on the attached Schedule "B";

(f) "Debtor" means Canada North Camps Inc.

(g) "Default" means the happening of any one or more of the events or conditions described in section 7 and such term shall be deemed to include each, any, or all such events or conditions, whether any such event is voluntary or involuntary or is effected by operation of law or pursuant to or in compliance with any judgement, decree or order of any Court or any order, rule or regulation of any administrative or governmental body;

(h) "Indebtedness" means and includes any and all obligations, indebtedness and liability of the Debtor to the Bank, (including but not limited to principal, interest and all costs on a full indemnity basis) present or future, direct or indirect, absolute or contingent, matured or not, extended or renewed, wherever and however incurred, together with any ultimate unpaid balance thereof, whether the same is from time to time reduced and thereafter increased or entirely extinguished and thereafter incurred again, and whether the Debtor is bound alone or with another or others and whether as principal or surety;

(i) "Permitted Encumbrances" means those specific security interests, if any, whether by way of mortgage, lien, claim, charge or otherwise, listed on Schedule "A" or hereafter approved in writing by the Bank prior to their creation or assumption:

(j) "Proceeds" shall have the meaning ascribed to it in the Act and shall be interpreted to include bank accounts, cash, trade-ins, Equipment, notes, Chattel Paper, Goods, contractual rights, Accounts and any other personal property or obligation received when Collateral or Proceeds thereof are sold, exchanged, collected or otherwise disposed of;

(k) "Real Property" means all of the Debtor's right, title and interest in and to all its presently owned or held and after acquired or held real, immovable and leasehold property and all interests therein, and all easements, right-of-way, privileges, benefits, licenses, improvements and rights whether connected therewith or appurtenant thereto or separately owned or held, including all structures, plant and other fixtures;

(l) "Receiver" means any one or more persons (whether officers of the Bank or not), firms or corporations appointed pursuant to subsection 9(f) and shall be deemed to include a receiver, manager, receiver-manager, or receiver and manager;

(m) "Security Interest" means the security interest and the floating charge granted by the Debtor to the Bank pursuant to this Agreement; and

(n) "Specifically Described Collateral" means those items, if any, described in Schedule "A" which comprise part of the Collateral.

2. GRANT OF SECURITY INTEREST

For value received (the receipt and sufficiency of which is hereby acknowledged):

(a) the Debtor hereby grants, assigns, conveys, mortgages, pledges and charges, as and by way of a specific mortgage, pledge and charge and grants a continuing Security Interest to and in favor of the Bank in the Collateral (other than Real Property); and

(b) the Debtor hereby charges the Real Property as and by way of a floating charge.

3. INDEBTEDNESS SECURED

The Security Interest secures payment and satisfaction of the Indebtedness; provided however, that if the Security Interest in the Collateral is not sufficient to satisfy the Indebtedness of the Debtor in full, the debtor agrees that the Debtor shall continue to be liable for any Indebtedness remaining outstanding and the Bank shall be entitled to pursue full payment and satisfaction thereof.

4. ATTACHMENT OF SECURITY INTEREST

The Security Interest shall attach to the Collateral at the earliest possible moment in accordance with the Act, there being no intention on the part of the Debtor and the Bank that it attach at any later time.

5. REPRESENTATIONS AND WARRANTIES OF THE DEBTOR

The Debtor represents and warrants, and as long as this Agreement remains in effect shall be deemed to continuously represent and warrant, that:

(a) the Debtor, if a natural person, is of legal age and, if a corporation, is duly organized, existing and in good standing under the laws of its incorporating jurisdiction and of each other jurisdiction in which the nature of its activities make such necessary;

(b) the Debtor has the right, power and authority to enter into this Agreement and to grant the Security Interest;

(c) the execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action and are not in contravention of any instrument by which the Debtor has been incorporated or continued, any instrument amending any such instrument, any internal regulation of the Debtor, any law, or any indenture, agreement or undertaking to which the Debtor is a party or by which it is bound;

(d) the Debtor has not previously carried on business, does not currently carry on business, and shall not, without the prior written consent of the Bank, in the future carry on business under any name other than the name set forth in paragraph 1(f);

(e) the Collateral is genuine and is legally and beneficially owned by the Debtor free of all security interests except for the Security Interest and the Permitted Encumbrances;

(f) the description of the Specifically Described Collateral, whether contained herein or provided elsewhere the Debtor to the Bank, is complete and accurate and all serial numbers affixed or ascribed to any of the Collateral have been provided to the Bank;

(g) each Chattel Paper, Intangible and Instrument constituting Collateral is enforceable in accordance with its terms against the party obligated to pay the same ("Account Debtor"), the amount represented by the Debtor to the Bank from time to time as owing by each Account Debtor shall be the correct amount owing unconditionally by such Account Debtor, and no Account Debtor shall have any defence, set-off, claim or counterclaim against the Debtor which can be asserted against the Bank, whether in any proceedings to enforce the Collateral or otherwise;

(h) the locations specified in the attached Schedule "C" as to business operations and records are accurate and complete and, except for Goods in transit to such locations and Inventory on lease or consignment, all Collateral shall be situate at one of such locations;

(i) all financial statements,certificates and other information concerning the Debtor's financial condition or otherwise from time to time furnished by the Debtor to the Bank are and shall be in all respects complete, correct and fair representations of the affairs of the Debtor stated in accordance with generally accepted accounting principles applied on a consistent basis;

(j) there has not been and shall not be a material adverse change in the Debtor's position, financial or otherwise, from that indicated by the financial statements which have been delivered to the Bank;

(k) there are no actions, suits or proceedings pending or, to the knowledge of the Debtor, threatened against the Debtor except as have been disclosed in writing to and approved by the Bank; and

(l) none of the Collateral is or shall be Consumer Goods.

6. COVENANTS OF THE DEBTOR

The Debtor covenants:

(a) to defend the Collateral against the claims and demands of all other parties claiming the same or an interest therein and to keep the Collateral free from all security interests except for the Security Interest and the Permitted Encumbrances:

(b) except as expressly permitted herein, not to sell, exchange, transfer, assign, destroy, lease or otherwise dispose of the Collateral or any interest therein without the prior written consent of the Bank;

(c) except as expressly permitted herein, not to move the Collateral from its current location, as indicated on Schedule "C", without the prior written consent of the Bank;

(d) to assemble and deliver the Collateral to the Bank at such location as the Bank may direct;

(e) to notify the Bank promptly in writing of:

(i) any change in the information contained in this Agreement including any information relating to the Debtor (including its name), the Debtor's business, the Collateral, or the locations of the Collateral or the records of the Debtor, so that the Bank shall be constantly advised of all places where the Debtor conducts its business, maintains the Collateral and maintains its records,

(ii) the details of any significant acquisition of Collateral (including serial numbers where required under the Act in connection with registration or as otherwise requested by the Bank), and for the purposes of this Agreement "significant" shall mean any item or items the value of which exceeds in the aggregate $250,000.00,

(iii) the removal of any of the Collateral to any jurisdiction in which any registration of, or in respect of, this Agreement may not be effective to protect the Security Interest, and in the case of such removal to provide the Bank with a written certificate stating the time of removal, what is being removed and the intended new locality of such Collateral, and to assist the Bank in effecting such further registrations as may be required by the Bank to protect its Security Interest; provided however that this provision shall not be construed as a waiver of any prohibition against removal or relocation of Collateral contained elsewhere in this Agreement, nor shall it be construed as permission to do so,

(iv) the details of any claims or litigation affecting the Debtor or the Collateral,

(v) any loss or damage to the Collateral,

(vi) any Default by an Account Debtor in payment or other performance of its obligations with respect to any Collateral, and

(vii) the return to or repossession by the Debtor of any Collateral;

(f) to keep all of its property, including the Collateral, in good order, condition and repair and not to use the Collateral in violation of the provisions of this Agreement or any other agreement relating to the Collateral or any policy insuring the Collateral or any applicable statute, law, by-law, rule, regulation or ordinance having jurisdiction over the same;

(g) to execute, acknowledge and deliver such further agreements and documents supplemental hereto (including financing statements, further schedules to this Agreement, assignments and transfers) and to do all acts, matters and things as may be requested by the Bank in order to give effect to this Agreement and to perfect the Security Interest, including but not limited to any of the same which may be requried to correct or amplify the description of any Collateral or for any other purpose not inconsistent with the terms of this Agreement;

(h) to pay all costs and expenses on a full indemnity basis (including legal fees as between a solicitor and his own client) incidental to:

(i) the preparation, execution and filing of this Agreement,

(ii) maintaining, protecting and defending the Collateral, the Security Interest, and all of the Bank's rights and interest arising pursuant to this Agreement, and

(iii) the exercise of any rights or remedies of the Bank pursuant to this Agreement, including but not limited to the costs of the appointment of a Receiver and all expenditures incurred by such Receiver, the cost of any sale proceedings (whether the same prove abortive or not), and all costs of inspection, and all other costs and expenses incurred by the Bank in connection with or arising out of, directly or indirectly, this Agreement, all without limitation. All such costs and expenses shall be payable by the Debtor immediately upon demand from the Bank and until paid shall bear interest from the date incurred by the Bank at the highest rate of interest then chargeable by the Bank to the Debtor on any of the Indebtedness. The amount of all such costs and expenses shall be added to the Indebtedness and shall be secured by this Agreement;

(i) to punctually pay and discharge all taxes, rates, levies, assessments and other charges of every nature which might result in any lien, encumbrance, right of distress, forfeiture or termination or sale, or any other remedy being enforced against the Collateral and to provide to the Bank satisfactory evidence of such payment and discharge;

(j) to maintain its corporate existence, and to diligently preserve all its rights, licenses, powers, privileges, franchises and goodwill;

(k) to observe and perform all of its obligations and comply with all conditions under leases, licenses and other agreements to which it is a party or pursuant to which any of the Collateral is held;

(l) to carry on and conduct its business in an efficient and proper manner so as to preserve and protect the Collateral and income therefrom;

(m) to keep, in accordance with generally accepted accounting principles consistently applied, proper books of account and records of all transaction in relation to its business and the Collateral;

(n) to observe and conform to all valid requirements of law and of any governmental or municipal authority relating to the Collateral or the carrying on by the Debtor of its business;

(o) at all reasonable times, to allow the Bank access to its premises in order to view the state and condition of its property and to inspect its books and records and make extracts therefrom;

(p) to insure the Collateral for such periods, in such amounts, on such terms, with such insurers and against such loss or damage by fire and other such risks as the Bank reasonably directs, with loss payable to the Bank and the Debtor as insureds, as their respective interests may appear, to pay all premiums therefor, to deliver evidence of the same on request, and to do all acts necessary to obtain payment to the Bank of any insurance proceeds;

(q) to prevent the Collateral from being or becoming an Accession or a fixture to other property not covered by this Agreement or other security granted by the Debtor in favor of the Bank;

(r) to deliver to the Bank from time to time promptly upon request:

(i) any Documents of Title, Instruments, Securities, Security Entitlements, Securities Account and Chattel Paper constituting the Collateral,

(ii) all books of account and all records, ledgers, reports, correspondence, schedules, documents, statements, lists and other writings relating to the Collateral,

(iii) all financial statements prepared by or for the Debtor regarding its business, or, where the Debtor is an individual, all tax returns and such personal financial statements as the Bank may request,

(iv) all policies and certificates of insurance relating to the Collateral, and

(v) such further information concerning the Collateral, the Debtor and the Debtor's business and affairs as the Bank may request;

(s) not to change the present use of the Collateral; and

(t) to comply with all other requirements of the Bank, whether in the nature of positive or negative covenants, as may be communicated by the Bank to the Debtor from time to time, including but not limited to those additional covenants, terms and conditions, if any, contained on the attached Schedule "D".

7. EVENTS OF DEFAULT

The following constitute Default:

(a) non-payment when due, whether by acceleration or otherwise, of any principal or interest forming part of the Indebtedness;

(b) failure of the Debtor to perform or observe any obligation, covenant, term, provision or condition contained in this Agreement or any other agreement, security instrument or other document made by the Debtor with or in favor of the Bank or any other person, firm or corporation;

(c) the death of or declaration of incompetency by a Court of competent jurisdiction with respect to the Debtor, if an individual;

(d) the Debtor becomes insolvent or makes a voluntary assignment or proposal in bankruptcy or otherwise acknowledges its insolvency, a bankruptcy petition is filed or presented against the Debtor, the making of an authorized assignment for the benefit of the creditors of the Debtor, the appointment of a receiver, receiver-manager, receiver and manager or trustee for the Debtor or any assets of the Debtor, or the institution by or against the Debtor of any other type of insolvency proceeding under the Bankruptcy and Insolvency Act, Companies Creditors Arrangement Act or similar legislation in any jurisdiction;

(e) any act, matter or thing being done toward, or the commencement of any action or proceeding for, terminating the corporate existence of the Debtor, or if the Debtor is a partnership, the existence of the partnership, whether by way of winding-up, surrender of charter or otherwise;

(f) any encumbrance or security interest affecting the Collateral becomes enforceable;

(g) the Debtor ceases or threatens to cease to carry on its business or makes or proposes to make a bulk sale of its assets or any sale of the Collateral other than as expressly permitted herein;

(h) any execution or other process of any Court becomes enforceable against the Debtor or a distress or analogous process is levied upon the assets of the Debtor or any part thereof (whether or not forming part of the Collateral);

(i) the Debtor permits any amount which has been admitted as due by it or is not disputed to be due by it and which forms, or is capable of being made, a charge upon the Collateral in priority to, or pari passu with, the charge created by this Agreement to remain unpaid for 30 days after proceedings have been taken to enforce the same;

(j) the Debtor allows any amount outstanding from it to the Crown pursuant to any federal, provincial or territorial statute to remain unpaid for 30 days or more;

(k) a corporate dispute occurs within the Debtor, if a corporation, (whether between or among its shareholders, directors, officers, employees or otherwise) which may hamper the business operations of the Debtor or otherwise adversely affect, in the sole opinion of the Bank, the Debtor's business assets or the Collateral;

(l) any representation or warranty furnished by or on behalf of the Debtor pursuant to or in connection with this Agreement (regardless of the form thereof or whether contained herein or elsewhere), whether as an inducement to the Bank to extend any credit to or to enter into this or any other agreement with the Debtor or otherwise proves to have been false or misleading as of the day made in any material respect or to have omitted any substantial contingent or unliquidated liability or claim against the Debtor;

(m) there is any material adverse change in any of the facts disclosed to the Bank, in the Debtor's position (financial or otherwise), or in the nature and value of the Collateral; or

(n) the Bank considers or deems, in its sole opinion, that the Security Interest and the Collateral are not sufficient security in relation to the extent of the Indebtedness.

For the purposes of Section 198.1 of the Land Title Act (British Columbia), the floating charge created by this Security Agreement over Real Property shall become a fixed charge thereon upon the earlier of:

(a) the occurrence of an event described in clause 7(d), (e), (f), (g), or (h); or

(b) the Bank taking any action pursuant to clause 9 to enforce and realize on the Security Interests created by this Security Agreement.

8. ACCELERATION/DEFAULT

(a) In the event of Default the Bank, in its sole discretion, may declare all or any part of the Indebtedness which is not by its terms payable on demand to be immediately due and payable, without demand or notice of any kind. The provisions of this clause shall not in any way affect any rights of the Bank with respect to any Indebtedness which may now or hereafter be payable on demand.

(b) In the event of early payout, in whole or in part, the Debtor shall pay the Bank a prepayment charge equal to the greater of three months interest on the amount of the prepayment calculated at the rate of interest payable on the loan or the Bank's unwinding costs consisting of the interest rate differential calculated by the Bank based on the difference between the interest rate on the loan being prepaid and the bid side yield on Government of Canada securities for a comparable term.

9. REMEDIES

Upon Default the Bank shall have the following rights and powers, which the Bank may exercise immediately:

(a) to enter upon the premises of the Debtor or any other premises where the Collateral may be situated and to take possession of all or any part of the Collateral, by any method permitted by law, to the exclusion of all others, including the Debtor, its directors, officers, agents and employees, and the Debtor hereby waives and releases the Bank and any Receiver from all claims in connection therewith or arising therefrom;

(b) to remove all or any part of the Collateral to such place as the Bank deems advisable;

(c) to preserve and maintain the Collateral and to do all such acts incidental thereto as the Bank considers advisable, including but not limited to making replacements and additions to the Collateral;

(d) to collect, demand, sue on, enforce, recover and receive Collateral and give receipts and discharges therefor, and may do any such act and take any proceedings related thereto in the name of the Debtor or otherwise as the Bank considers appropriate;

(e) to sell, lease, or otherwise dispose of the Collateral in such manner, at such time or times and place or places, for such consideration and upon such terms and conditions as the Bank deems reasonable (including without limitation, by deferred payment) all in the Bank's absolute discretion and without the concurrence of the Debtor; provided however, that the Bank shall not be required to do so and it shall be lawful for the Bank to use and posses the Collateral for any and all purposes and in any manner the Bank sees fit, all without hindrance or interruption by the Debtor or any other person or persons, provided however that none of the foregoing shall prejudice the Bank's right to pursue the Debtor for recovery in full of the amount of the Indebtedness, including the amount of any deficiency owing after the application of the proceeds of realization (and to the extent permitted by laws, the Debtor waives its rights to the protection afforded by any rule of law or legislation respecting such deficiency);

(f) to appoint by instrument in writing, with or without bond, or by application to any Court of competent jurisdiction, a Receiver of the Collateral and to remove any Receiver so appointed and appoint another or others in his stead. Any such Receiver shall, so far as concerns responsibility for his acts, be deemed the agent of the Debtor and not of the Bank and the Bank shall not be in any way responsible for any misconduct, negligence or non-feasance on the part of any such Receiver, his agents, servants or employees. Subject to the provisions of the instrument appointing him, any such Receiver shall have the power to take possession of the Collateral, to preserve the Collateral or its value, to carry on or concur in carrying on all or any part of the business of the Debtor and to sell, lease or otherwise dispose of or concur in selling, leasing or otherwise disposing of the Collateral (including disposition by way of deferred payment). To facilitate the foregoing powers, any such Receiver may, to the exclusion of all others including the Debtor, enter upon, use and occupy all premises owned or occupied by the Debtor where Collateral may be situate, to employ and discharge such employees, agents or professional advisors as the Receiver deems advisable, to enter into such compromises, arrangements or settlements as the Receiver deems advisable, to borrow or otherwise raise money on the security of the Collateral and to issue Receiver's certificates and do all such other acts as the Receiver deems advisable in connection with any of the powers referred to herein. Except as may be otherwise directed by the Bank, all monies received from time to time by the Receiver in carrying out his appointment shall be received in trust for and paid over to the Bank. In addition, every Receiver may, in the discretion of the Bank, be vested with all or any of the rights and powers of the Bank under the Act or any other applicable legislation or under this Agreement or any other agreement;

(g) to rescind or vary any contract for sale, lease or other disposition that the Debtor or the Bank may have entered into and to resell, release or redispose of the Collateral;

(h) to deliver to any purchasers of the Collateral good and sufficient conveyances or deeds for the same free and clear of any claim by the Debtor. For such purposes, the purchaser or lessee receiving any disposition of the Collateral need not inquire whether Default under this Agreement has actually occurred but may as to this and all other matters rely upon a statutory declaration of an officer of the Bank, which declaration shall be conclusive evidence as between the Debtor and such purchaser or lessee, and any such disposition shall not be affected by any irregularity of any nature or kind relating to the enforcement of this Agreement or the exercise of the rights and remedies of the Bank;

(i) to exercise any of the powers and rights given to a Receiver pursuant to this Agreement;

(j) to provide written notice to the Debtor that all the powers, functions, rights and privileges of the directors and officers of the Debtor with respect to the Collateral, business and undertaking of the Debtor have or shall cease as of the date notified therein, except to the extent specifically continued at any time by the Bank in writing; and

(k) to take the benefit of or to exercise any other right, proceeding or remedy authorized or permitted at law or in equity, whether as a secured party pursuant to the Act as the same is in force from time to time or otherwise.

All rights and remedies of the Bank are cumulative and may be exercised at any time and from time to time independently or in combination. No delay or omission by the Bank in exercising any right or remedy shall operate as a waiver thereof or of any other right or remedy, and no singular partial exercise thereof shall preclude any other or further exercise thereof or the exercise of any other right or remedy. Provided always that the Bank shall not be liable or accountable for any failure to exercise its remedies, take possession of, collect, enforce, realize, sell, maintain, lease or otherwise dispose of the Collateral, or to institute any proceedings for such purposes. The Bank shall have no obligation to take any steps to preserve rights against other parties, shall have no obligation to exercise any of the rights and remedies available to it on Default and shall not be liable or accountable for not exercising any such rights and remedies.

The Bank may waive any Default but no such waiver shall be effective unless made in writing and signed by an authorized officer of the Bank. Any such waiver shall not extend to, or be taken in any manner whatsoever to affect, any subsequent Default or the rights resulting therefrom.

By its acceptance of this Agreement, the Bank acknowledges that it shall not, except in the case of the bankruptcy of the Debtor, enforce this Security Agreement against any personal property of the Debtor used solely for the personal or household use and enjoyment of the Debtor or the Debtor's immediate family.

10. BANK MAY REMEDY DEFAULT

The Bank shall have the right, but shall not be obliged to, remedy any default of the Debtor and all sums thereby expended by the Bank shall be payable immediately by the Debtor, together with interest thereon at the highest rate of interest then chargeable by the Bank to the Debtor on any portion of the Indebtedness. All such sums shall be added to the Indebtedness and shall be secured by this Agreement.

In no case shall the exercise of the Bank's rights pursuant to this Section 10 be deemed to relieve the Debtor from such Default or be deemed a waiver of such Default or of any other prior or subsequent Default.

11. USE OF COLLATERAL

Subject to compliance with the Debtor's covenants contained herein and to the following provisions of this Section 11, until Default the Debtor may:

(a) in the case of Equipment, dispose of the same for the purpose of immediately replacing it by other Equipment of a similar nature or of a more useful or convenient character and of at least equal value;

(b) in the case of Inventory and Money, dispose of the same in the ordinary course of the business of the Debtor and for the sole purpose of carrying on the same; and

(c) otherwise possess, collect, use, enjoy and deal with the Collateral in the ordinary course of the Debtor's business in any manner not expressly or impliedly prohibited herein or otherwise inconsistent with the provisions of this Agreement.

Notwithstanding the foregoing:

(a) before or after Default the Bank may notify all or any Account Debtors and may direct such Account Debtors to make all payments owed in respect of the Collateral directly to the Bank; and

(b) the Debtor agrees that any payments on or other Proceeds of Collateral received by the Debtor, whether before or after Default, shall be received and held by the Debtor in trust for the Bank and shall be turned over to the Bank upon request.

If the Collateral at any time includes Securities, the Debtor authorizes the Bank to transfer the same or any part thereof into its own name or that of its nominees so that the Bank or its nominees may appear on record as the sole owner thereof; provided however that until Default the Bank shall deliver to the Debtor all notices or other communications received by it or its nominees as registered owner and upon demand and receipt of payment of any necessary expenses shall issue to the Debtor or its order a proxy to vote and take all action with respect to such Securities. However, after Default the Debtor waives all rights to receive any notices or communications in respect of such Securities and agrees that no proxy issued by the Bank to the Debtor or its order as aforesaid shall thereafter be effective.

12. APPROPRIATION OF PAYMENTS

All payments made at any time in respect of the Indebtedness and all Proceeds realized from any Securities held therefor may be applied (and reapplied from time to time notwithstanding any previous application) in such manner as the Bank sees fit or, at the option of the Bank, may be held unappropriated in a collateral account or released to the Debtor all without prejudice to the rights of the Bank hereunder, including the Bank's right to collect from the Debtor the amount of any deficiency remaining after application of all such payments and Proceeds.

13. POWER OF ATTORNEY AND AUTHORIZATION TO FILE

The Debtor hereby authorizes the Bank to file such Financing Statements and other documents and do such acts, matters and things (including completing and adding schedules to this Agreement indentifying Collateral or location) as the Bank from time to time deems appropriate to perfect, continue and realize upon the Security Interest and to protect and preserve the Collateral. In addition, for valuable consideration, the Debtor hereby irrevocably appoints the Bank and its officers from time to time, or any one or more of them, to be the true and lawful attorney of the Debtor, with full power of substitution, in the name of and on behalf of the Debtor to execute and to do all deeds, transfers, conveyances, assignments, assurances, and other things which the Debtor ought to execute and do under the covenants and provisions contained in this Agreement and generally to use the name of the Debtor in the exercise of all or any of the rights, remedies and powers of the Bank.

14. MISCELLANEOUS

(a) The Bank may grant extensions of time and other indulgences, take and give up security, accept compositions, compound, comprise, settle, grant releases and discharges and otherwise deal with the Debtor, debtors of the Debtor, sureties and others and with the Collateral and other securities as the Bank sees fit, all without prejudice to the liability of the Debtor to the Bank or to the Bank's rights in respect thereof. In addition, the Bank may demand, collect, and sue on the Collateral in either the Debtor's or the Bank's name, all at the Bank's option, and may endorse the Debtor's name on any and all cheques, commercial paper and other Instruments pertaining to or constituting the Collateral.

(b) Neither the execution or registration of this Agreement, nor the advance or readvance of part of the monies hereby intended to be secured, shall bind the Bank to advance or readvance the said monies or any unadvanced part thereof. The advance or readvance of the said monies or any part thereof from time to time shall be in the sole discretion of the Bank.

(c) The Debtor hereby waives protest of any Instrument constituting Collateral at any time held by the Bank on which the Debtor is in any way liable and, except as expressly prohibited by law, waives notice of any other action taken by the Bank.

(d) Without limiting any other right of the Bank, whenever the Indebtedness is due and payable or the Bank has the right to declare it to be due and payable (whether or not it has been so declared), the Bank may, in its sole discretion, set off against the Indebtedness any and all monies then owed to the Debtor by the Bank in any capacity, whether or not due, and the Bank shall be deemed to have exercised such right to set-off immediately at the time of making its decision to do so even though any charge therefor is made or entered on the Bank's records subsequent thereto.

(e) In any action brought by an assignee of this Agreement and the Security Interest or any part thereof to enforce any rights hereunder, the Debtor shall not assert against such assignee any claim or defence which the Debtor now has or may hereafter have against the Bank.

15. NOTICE

In addition to the notice provisions contained in the Act, whenever the Debtor or the Bank is required or entitled to notify or direct the other or to make a demand or request upon the other, such notice, direction, demand or request shall be in writing and shall be sufficiently given only if delivered, transmitted by facsimile, or sent by prepaid registered mail addressed to the party for whom it is intended at the Branch Address, in the case of the bank, and at the Debtor Address, in the case of the Debtor, as set out herein or as changed pursuant hereto. Either party may notify the other of any change in such party's address to be used for the purposes hereof. All such communications shall, in the case of delivery or facsimile, be deemed received on the date of delivery and, if mailed as aforesaid, shall be deemed received on the third business day following the date of posting. In the case of a disruption in postal service all such communications shall be delivered or transmitted by facsimile.

16. INTERPRETATION

(a) This Agreement shall be governed by and construed in accordance with the laws of the Province/ Territory of ______Alberta______.

(b) This Agreement and the security afforded by it is in addition to and not in substitution for any other security now or hereafter held by the Bank and is intended to be a continuing security agreement and shall remain in full force and effect until released in writing by the Bank. The Bank shall have no obligation to provide such release unless and until the full amount of the Indebtedness has been paid in full.

(c) If any provision of this Agreement is held invalid, in whole or in part, by any Court of competent jurisdiction, the remaining terms and provisions of this Agreement shall remain in full force and effect and this Agreement shall be enforced to the fullest extent permitted by law.

(d) The Debtor hereby waives the benefit of all statutory, common law and equitable rights, benefits and provisions which in any way limit or restrict the Bank's rights and remedies, to the extent that such waiver is not expressly prohibited by law. The Debtor acknowledges and agrees that the Bank shall have the right to recover the full amount of the indebtedness by all lawful means, including the right to seek recovery of any deficiency remaining after the sale of the Collateral, including any sale thereof to the Bank.

(e) The headings of the sections of this Agreement are inserted for convenience of reference only and shall not affect or limit the construction or interpretation of this Agreement.

(f) All schedules, whether attached hereto on the date hereof or subsequently attached pursuant to the provisions of this Agreement, form part of this Agreement. With the exception of any schedules which may be added hereafter by the Bank without the concurrence of the Debtor pursuant to the provisions of this Agreement, no modification, variation or amendment of this Agreement shall be made except by a written agreement executed by the Debtor and the Bank.

(g) When the context so requires, words importing the singular number shall be read to include the plural and vice versa, and words importing gender shall be read with all grammatical changes necessary to reflect the identity of the parties.

(h) This Agreement shall enure to the benefit of the Bank, its successors and assigns and shall be binding upon the Debtor, its personal representatives, administrators, successors and permitted assigns. If more than one Debtor executes this Agreement, the obligations of the Debtor shall be joint and several.

(i) Time shall be in all respects of the essence of this Agreement.

17. RECEIPT OF DOCUMENTS

(a) The Debtor hereby acknowledges receiving a copy of this Agreement.

(b) The Debtor hereby waives its right to receive a copy of any Financing Statement, Financing Change Statement or verification statement which may be filed by or issued to the Bank pursuant to the Act.

IN WITNESS WHEREOF the Debtor has executed this Agreement as of the day and year first above written.

Canada North Camps Inc.

Per: ______________________________
(Seal) if applicable

Per: ______________________________
(Seal) if applicable

AUTHORIZED SIGNATORY(S)

IF DEBTOR IS AN INDIVIDUAL

____
Witness

Name of Individual:

____
Witness

Name of Individual:

DEBTOR ADDRESS:
(Chief Executive Office, if Corporation, or residence if Individual)

Facsimile:

If Debtor is an individual:

State full given names and surname, in order, with surname last.

____

Indicate Date of Birth (Day, Month, Year): ____________________ M ☐ F ☐

SCHEDULE "A"

1. **SPECIFICALLY DESCRIBED COLLATERAL**

(a) Serial Number Goods

<u>Make, Model, Year of Manufacture, Serial Number</u>

(b) Other

2. **PURCHASE MONEY SECURITY INTERESTS**

3. **PERMITTED ENCUMBRANCES**

SCHEDULE "B"

PERSONAL PROPERTY NOT INCLUDED IN COLLATERAL

SCHEDULE "C"

1. **LOCATIONS OF DEBTOR'S BUSINESS OPERATIONS**

(a) Chief Executive Office

14238 - 134 Avenue
Edmonton, AB T5L 5V8

(b) Other Locations:

2. **LOCATIONS OF RECORDS RELATING TO COLLATERAL**

3. **LOCATIONS OF COLLATERAL**

SCHEDULE "D"

ADDITIONAL COVENANTS, TERMS AND CONDITIONS

TAB 3

2002 ABCA 79
Alberta Court of Appeal

Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.

2002 CarswellAlta 397, 2002 ABCA 79, [2002] 6 W.W.R. 444, [2002] A.W.L.D. 198, [2002] A.J. No. 372, 112 A.C.W.S. (3d) 776, 1 Alta. L.R. (4th) 14, 266 W.A.C. 250, 299 A.R. 250, 3 P.P.S.A.C. (3d) 101

Northwest Equipment Inc., Appellant and Daewoo Heavy Industries America Corporation, Respondent

Fruman, Wittmann JJ.A., Brooker J. (ad hoc)

Heard: April 20, 2001
Judgment: March 19, 2002
Docket: Calgary Appeal 0019094

Counsel: *A.G. Bell*, for Appellant
K.T. Lenz, for Respondent

Subject: Corporate and Commercial; Insolvency; Contracts

Headnote

Personal property security --- Disposition of collateral by debtor — Sale in ordinary course of business

Secured creditor sold excavator to equipment dealer in B.C. and registered financing statement to secure purchase price — Dealer did not pay purchase price but sold excavator to Washington based U.S. company along with other assets as part of share purchase agreement without notice to creditor — Dealer represented that excavator was unencumbered — Excavator was type of property used in more than one jurisdiction and creditor should have registered security interest in Washington to maintain perfection under s. 7 of Personal Property Security Act (PPSA) — Dealer went bankrupt and creditor eventually seized excavator — On application by U.S. company for return of excavator, chambers judge held that U.S. company took excavator subject to security interest of creditor — Chambers judge held that creditor had not expressly or impliedly consented to sale of excavator, as required under s. 28(1)(a) of PPSA — U.S. company appealed — Appeal dismissed — Section 30(2) of PPSA did not apply as sale of excavator was not in ordinary course of dealer's business — U.S. company should have consulted B.C. personal property registry before buying equipment — Loss of perfection of creditor's security interest by failing to meet requirements of s. 7(3) of PPSA did not extinguish creditor's security interest — Purpose of perfection is to provide notice to third parties — U.S. company's interest in excavator remained subject to creditor's security interest while excavator was in U.S. — Personal Property Security Act, R.S.B.C. 1996, c. 359, ss. 7, 7(3), 28(1)(a), 30(2).

Personal property security --- Priority of security interest — Perfected versus unperfected interest

Secured creditor sold excavator to equipment dealer in B.C. and registered financing statement to secure purchase price — Dealer did not pay purchase price but sold excavator to Washington based U.S. company along with other assets as part of share purchase agreement without notice to creditor — Dealer represented that excavator was unencumbered — U.S. company leased excavator to third party and registered financing statement in Alberta — Dealer went bankrupt and creditor eventually seized excavator — On application by U.S. company for return of excavator, chambers judge held that U.S. company took excavator subject to security interest of creditor — Chambers judge held that creditor had not expressly or impliedly consented to sale of excavator, as required under s. 28(1)(a) of PPSA — U.S. company appealed — Appeal dismissed — U.S. company did not perfect security interest in excavator by registering financing statement because agreement with third party was not security interest — U.S. company's interest in excavator remained subject to creditor's security interest — U.S. company did not have competing priority with creditor since it did not have security interest — U.S. company could have learned of creditor's secured interest by searching personal property registry in B.C.

when it purchased excavator — No public policy or disclosure reason justified overriding s. 28(1)(a) by applying s. 35(1)(b) of PPSA to give U.S. company priority — Personal Property Security Act, R.S.B.C. 1996, c. 359, ss. 28(1)(a), 35(1)(b).
Personal property security --- Conflict of laws — Determining jurisdiction
Secured creditor sold excavator to equipment dealer in B.C. and registered financing statement to secure purchase price — Dealer did not pay purchase price but sold excavator to Washington based U.S. company along with other assets as part of share purchase agreement, without notice to creditor — Dealer represented that excavator was unencumbered — U.S. company leased excavator to third party and registered financing statement in Alberta — Dealer went bankrupt and creditor eventually seized excavator — On application by U.S. company for return of excavator, chambers judge held that U.S. company took excavator subject to security interest of creditor — Chambers judge held that creditor had not expressly or impliedly consented to sale of excavator — U.S. company appealed — Appeal dismissed — B.C. law applied because personal property security laws of B.C. and Alberta provided that perfection in this type of equipment was governed by law of jurisdiction where debtor was located when security interest attached — Debtor was located in B.C. when creditor acquired security interest — Section 7(2)(a) of Personal Property Security Act applied — Personal Property Security Act, R.S.B.C. 1996, c. 359, s. 7(2)(a).

APPEAL by U.S. owner of excavator from judgment which determined that equipment was purchased subject to security interest of creditor.

Fruman J.A.:

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

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

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

British Columbia

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

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

Bros.' business. Trainer Bros. also undertook to notify Daewoo about any change in the location of the equipment (AB IV at 363). On September 25, 1996, Daewoo registered a financing statement at the British Columbia Personal Property Registry.

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

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

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

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

10 Northwest appeals both findings.

Ordinary Course of Business

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

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

13 But s. 28(1)(a) does not always apply. In certain circumstances the *PPSA* has specifically replaced the *nemo dat* rule, permitting a transferee to receive greater rights in property than the transferor possessed. See *Giffen (Re)*, [1998] 1 S.C.R. 91 (S.C.C.) and *Donaghy v. CSN Vehicle Leasing* (1992), 132 A.R. 155 (Alta. Q.B.) (trustee in bankruptcy obtained better title to a leased good than the bankrupt possessed by virtue of s. 20((b)). Sales in the ordinary course of business under s. 30(2) [4] and transfers with consent under s. 28(1)(a) are exceptions to the *nemo dat* rule.

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

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

• the transaction was a component of a share purchase arrangement, not a cash sale; Trainer Bros. ordinarily sold and leased inventory for cash;

• the form of transaction — shares and a loan back to the purchaser — was unusual; there had been no prior transactions by Trainer Bros. of a similar type;

• the purchaser was a dealer, not a construction company; Trainer Bros. ordinarily sold products to end users;

• the sale, which involved one-quarter of Trainer Bros.' inventory, constituted a comparatively large portion of overall sales;

• the transaction was not advertised;

• the transaction was concluded on the eve of insolvency; and

• the consideration was never tendered.

16 Because the chambers judge heard the appeal from the master's order *de novo*, this court reviews the chambers judge's decision as a judgment of a court of first instance. Provided a first instance judge considers the appropriate factors in deciding whether a transaction is in the ordinary course of business, a reviewing court will defer to the judge's findings: *369413 Alberta Ltd. v. Pocklington* (2000), 271 A.R. 280 (Alta. C.A.), at 289. The factors considered by the chambers judge were appropriate and provide ample evidence upon which he could conclude that the sale of the equipment by Trainer Bros. to Northwest was outside Trainer Bros.' ordinary course of business. This transaction was sufficiently unusual that Northwest should have consulted the British Columbia Personal Property Registry before buying the equipment.

Consent

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

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

• the corporate restructuring proposal contemplated revenue from sales, but the consideration for the actual transaction was a share deal, with no cash compensation;

• the proposal contemplated a location in Abbotsford, British Columbia, and did not mention transferring the equipment to Washington; and

• the proposal contemplated a rental arrangement, not an outright sale.

19 Additional evidence before the trial judge included:

• the affidavit evidence of Daewoo's Vice President and Regional Sales Manager specifically denied that Daewoo consented to or approved the transaction;

• no evidence of any written consent was tendered; and

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

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

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

Washington

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

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

Perfection

26 Northwest's arguments in this section, and in the Alberta section that follows, are based upon a misunderstanding of the consequences that flow from a loss of perfection. To give these arguments context, it is necessary to delve into the purpose of perfection. Perfection is nothing more than a method of providing disclosure of prior security interests to third parties to enable them to protect themselves against loss. With some types of property, such as share certificates, it is best achieved by possession of the encumbered property. [5] But perfection is usually accomplished by registering a financing statement in a personal property registry. [6] A prudent third party who conducts a personal property registry search will be able to determine whether the property is encumbered, and decide what steps to take to prevent loss.

TAB 4

Chuck Russell

From:	Stefan Delblanc <sldelblanc@bryanco.com>
Sent:	Friday, December 14, 2018 1:19 PM
To:	Darren Bieganek
Cc:	Darcy McAllister; Chuck Russell; nicholsonc@jssbarristers.ca; Ryan Quinlan; Sigurd Delblanc; Zao Han (hanz@jssbarristers.ca)
Subject:	RE: Paul McCracken Answers to Undertakings
Attachments:	RBC Chequing Account Summary (E2564652).pdf; EY Info Request - Royal Bank Transacation Detail Dec 14 (2) (E2564557).pdf; EY Info Request - CWB Transacation Detail Dec 14 (2) (E2564696).pdf

Good afternoon, all.

In further response to Mr. Bieganek's letter of December 13, 2018, I have attached for your review the RBC Chequing Account ledger detailing that account's activity after the $21 Million deposit from 726. I have also attached a table which summarizes, in brief, the withdrawals contained in the ledger. Please note that the table is not exhaustive and is not intended to represent a forensic accounting by any means. It is intended only as a quick reference to provide a general idea of what the ledger contains.

A bank statement was requested for the payment of roughly $3,084,000 toward the Canada North operating line. I have attached the CNC ledger detailing the CWB account cash flows. The $3,084,000.00 referred to in the previous answer refers to the amount that the CWB account was overdrawn as of December 15, 2014. Further review of the CWB ledger showed an additional deposit of $1,150,000.77 on December 12, 2014, also while the CWB account was overdrawn.

You will notice various numbers written on the CWB Ledger. Those correspond to the following table:

20	Equipment Payment J7490	(235,200.00)
21	Equipment Payment J7588	(346,500.00)
26	BDC Equipment Payment J9486	(137,236.30)
22	CWB Loan 14 Payout	(1,292,600.75)
23	Loan Payout 11 CWB	(610,701.86)
24	CWB CWB Loan 2	(1,021,004.62)
25	CWB CWB Loan 2	(425,000.77)
26	CWB CWB Loan 2	(230,000.00)
	Total Loan Payouts paid CWB	(3,579,308.00)
	Total Equipment Rental paid CWB	(718,936.30)

Please note that we would ask that the CNC ledgers remain strictly confidential as they contain commercially sensitive information as well as the payroll information and names of individual employees.

Thank you,

From: Darren Bieganek [mailto:dbieganek@dcllp.com]
Sent: Wednesday, December 12, 2018 5:23 PM
To: Stefan Delblanc

Cc: Darcy McAllister; crussell@mross.com; nicholsonc@jssbarristers.ca; ryan.flewelling@regentlaw.ca; krowan@ogilvielaw.com; hfrydenlund@parlee.com; thamelin@bmllp.ca; Ryan Quinlan; 'Dan McCulloch'; Matt McCulloch; scottchimuk@burstall.com; Sigurd Delblanc
Subject: RE: Paul McCracken Answers to Undertakings

Thanks Stefan.

From: Stefan Delblanc <sldelblanc@bryanco.com>
Sent: December-12-18 5:09 PM
To: Darren Bieganek <dbieganek@dcllp.com>
Cc: Darcy McAllister <dmcallister@mcallisterllp.com>; crussell@mross.com; nicholsonc@jssbarristers.ca; ryan.flewelling@regentlaw.ca; krowan@ogilvielaw.com; hfrydenlund@parlee.com; thamelin@bmllp.ca; Ryan Quinlan <rquinlan@dcllp.com>; 'Dan McCulloch' <Dan.McCulloch@ca.ey.com>; Matt McCulloch <Matt.McCulloch@ca.ey.com>; scottchimuk@burstall.com; Sigurd Delblanc <sdelblanc@bryanco.com>
Subject: RE: Paul McCracken Answers to Undertakings

Hello, Darren.

I expect that we will be able to provide Paul McCracken's Answers to Undertaking later tonight as they are very nearly complete. I will deliver them as soon as I receive them.

Sincerely,

Stefan L. Delblanc

EMAIL sldelblanc@bryanco.com

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Direct 780-420-4703 | Toll free 1 800 357 9265 | Fax 780 428 6324
Web **www.bryanco.com**

From: Darren Bieganek [mailto:dbieganek@dcllp.com]
Sent: Wednesday, December 12, 2018 11:52 AM
To: Sigurd Delblanc; Stefan Delblanc
Cc: Darcy McAllister; crussell@mross.com; nicholsonc@jssbarristers.ca; ryan.flewelling@regentlaw.ca; krowan@ogilvielaw.com; hfrydenlund@parlee.com; thamelin@bmllp.ca; Ryan Quinlan; 'Dan McCulloch'; Matt McCulloch; scottchimuk@burstall.com
Subject: Paul McCracken Answers to Undertakings

Sigurd & Stefan,

Under the terms of the Order that came out of Case Management (which I am still waiting on from Justice Hillier), the parties agreed to provide Answers to Undertakings by December 10th. We received Mr. Roman's yesterday.

We really do need Mr. McCracken's Answers to Undertakings immediately. Please advise as to the status of their provision.

Yours truly,

Darren Bieganek, LLB, QC
Partner, Insolvency, Restructuring and Commercial Litigation
Duncan Craig LLP
2800 Scotia Place, 10060 Jasper Ave
Edmonton, Alberta, T5J 3V9

Tel: +1 780.441.4386
Toll-free: 1.800.782.9409
Fax: 780.969.6381
Email: dbieganek@dcllp.com
Web: dcllp.com

Summary of Flow of Funds in RBC Chequing Ledger after $21 Million Deposit from 726

Note, many of these numbers are rounded rather than exact. There are also numerous line items not included as they did not clearly fit within these categories. Consider the numbers below as close approximations.

Item Description	**Amount**
Employee Visas	($340,000)
Office Visas	($1,260,000)
Dec 29 Payroll	($553,333.54)
To CWB	(11,350,000)
From CWB	600,000
Shareholders Loans (ShL)	($250,000)
Kingdom Properties	($500,000)
To Campcorp Canada	($400,000)
Element Equipment Payout	($2,050,340.42)
Bonnyville Mortgage Payout	($2,354,098.65)
CRA	($2,368,441.55)
TOTAL	**($20,826,214.16)**

TAB 5

2013 ONSC 2645
Ontario Superior Court of Justice [Commercial List]

Indcondo Building Corp. v. Sloan

2013 CarswellOnt 5602, 2013 ONSC 2645, 228 A.C.W.S. (3d) 27

Indcondo Building Corporation, Plaintiff and David Robin Sloan, Valerie Frances Sloan and Cave Hill Properties Ltd., Defendants

D.M. Brown J.

Heard: April 30, 2013
Judgment: May 6, 2013
Docket: CV-008-7586-00CL

Counsel: T. Nguyen, for Plaintiff
P. Healey, for Defendants

Subject: Civil Practice and Procedure; Insolvency

CASE CONFERENCE on adjudication timetable.

***D.M. Brown J.*:**

1 The plaintiff, Indcondo Building Corporation, commenced this action on June 20, 2008, pursuant to s. 38 of the *Bankruptcy and Insolvency Act*. The defendants filed a Statement of Defence dated August 8, 2008. Almost five years later this action has not yet proceeded to discovery.

2 By endorsement made March 18, 2013, Morawetz J. directed that a case conference be held before me. He also ordered that the motions proposed by the defendants are "to be heard by Brown J. in July 2013 depending on schedule of Brown J."

3 The case conference was held on April 30, 2013. As I indicated to counsel, the decisions of the Court of Appeal that this action was not statute-barred (2010 ONCA 890 (Ont. C.A.)) nor was it an abuse of process or barred by *res judicata* or issue estoppel (2012 ONCA 502 (Ont. C.A.), leave to appeal to the Supreme Court of Canada dismissed January 10, 2013, No. 35013 [2013 CarswellOnt 8 (S.C.C.)]) signal to me that the time has come to put in place a timetable which pushes this action to a reasonably quick adjudication on the merits.

4 Both parties agreed that this matter should go to trial in the first half of 2014. Numerous affidavits have been filed to date in this proceeding and a number of cross-examinations have been held. That background suggests to me that a hybrid trial would be appropriate and, to my ear, it sounds like 5-7 days would be sufficient for this trial which, in essence, is a fraudulent conveyance action. Therefore, my case management goal is to send this action to trial in the second quarter of 2014, with examinations for discovery to be completed by the end of November, 2013. I will hold a further case conference in September, 2013. Following that conference I will send the parties to Morawetz J. to set a trial date. I will order that the scheduled trial date be carved in stone and can only be altered by some direction from a judge of an appellate court. As far as the Commercial List is concerned, this matter must proceed to trial.

5 In terms of the reasonable expectations which the parties should have about this case management process, I advise the parties as follows:

(i) No motion can be scheduled without my permission given at a 9:30 appointment;

(ii) There will be no refusals motions scheduled. As I wrote in a recent paper delivered at The Advocates' Society Spring Symposium:

> If a party under examination has reservations about answering a question, it should have a simple choice. Either answer the question under objection as permitted by Rule 34.12(2), or refuse to answer but risk certain trial-related consequences. Those consequences would be that in the event the issue refused arises at trial and the trial judge concludes the refusal was proper, then neither party would be the worse for the wear. However, if the trial judge concludes that the refusal was improper, then the trial judge should draw an adverse inference against the refusing party - i.e. the refusal was made to hide evidence which would hurt the case of the examined party. [1]

That is the approach which will apply to any refusals made on the examinations conducted in this proceeding;

(iii) One of the main purposes of the case management of civil cases is to deal with process-related problems without resorting to formal motions. In this action Morawetz J. has already directed that a motion be scheduled before me. To assist the parties in developing reasonable expectations about their potential costs exposure for any motions they might think of bringing, let me explain that:

a. Should a party bring a motion on an issue previously dealt with by the Court without the existence of new facts justifying a further motion, they risk exposing themselves to an award of elevated costs;

b. Should a party bring a series of motions and fail to succeed on them, they risk exposing themselves to awards of elevated costs on the second and following motions;

(iv) In the event either party appeals an order made in this case management process, the process of preparing this case for trial will continue absent an express statutory stay of the order or an order of an appellate court staying the case management order;

(v) Some changes of counsel have occurred over the life of this action. Parties should appreciate that orders and directions made during the case management process bind them regardless of whether they continue to have counsel or whether they elect to appoint new counsel. I will not delay any ordered step because new counsel has been appointed; any new counsel must be prepared to accept the brief on the basis of the set timetable. Also, if a party becomes self-represented at some point, then the party must continue to comply with any timetable I set.

I am addressing the issue of reasonable expectations early in this case management process because of the unusual circumstance that this action already has been to the Court of Appeal twice before discoveries have even started. My goal is to case manage this action to a final adjudication on the merits, not to entertain a series of process-related motions.

6 The defendants have prepared a motion record in which they seek the following relief:

(i) Leave to amend their August 8, 2008 Statement of Defence;

(ii) Leave to issue a third party claim against Enzo DiIorio, Steeles-Jane Properties Inc., Conleo Holdings Limited, CIFU Safe Investments Limited, Carlo Rotundo, Leo Rinomato, Peter Czapka, executor of the estate of Anton Czapka, J.L. DiPaola Real Estate Limited and Semanon Investments Limited; and,

(iii) Orders discharging certificates of pending litigation registered in 2008 against the Hill "N" Dale Farms Property and the Riverside Property.

Both parties have now filed their respective motion records. I have reviewed the motion record and the responding motion record, including the proposed amended pleading and the proposed third party claim. In my view only two hours is required for the hearing of the motion; the extensive written materials will tell most of the story from what I can see.

7 At the case conference the parties agreed that any cross-examinations on the motion materials would take place on either May 8, 23 or 28, 2013. I ordered that all cross-examinations must not exceed one day, with a maximum of 3 hours for cross-examination by each side. In light of the interlocutory proceedings to date, I suspect that most questioning on material issues has already occurred.

8 In terms of motion dates, the parties shall select two hours on one of the following dates: (i) June 18, 19, 20, 21, 24 or 27; (ii) Week of July 8; or (iii) Week of July 15. I appreciate that we are moving into vacation time, but this motion must be heard in that time frame. I would repeat that on March 18, 2013, Morawetz J. directed a July hearing date, so the parties have had ample notice from the Court about when it wishes to hear the motion.

9 Counsel shall inform me by 5 p.m., Wednesday, May 8, 2013, of the date which they have selected for the hearing of the motion. If counsel cannot agree on a date by that time, counsel must appear before me this Friday, May 10, 2013, at a 9:30 appointment at which time I will set the hearing date.

10 Counsel shall book a 9:30 appointment before me for some day during the week of May 27, 2013 so that I can obtain an update on the status of preparations for the motion.

Order accordingly.

Footnotes

1 *One Trial Judge's Manifesto: Recall! Change! Discard!*, The Advocates' Society Spring Symposium, April 26, 2013, para. 25.

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2015 ONSC 2606
Ontario Superior Court of Justice

Blatherwick v. Blatherwick

2015 CarswellOnt 6124, 2015 ONSC 2606, [2015] W.D.F.L. 3133, [2015] W.D.F.L. 3146, [2015] W.D.F.L. 3177, [2015] W.D.F.L. 3183, 255 A.C.W.S. (3d) 437, 8 E.T.R. (4th) 30

Barbara Ann Blatherwick, Applicant and Brian Earl Blatherwick, Respondent

Seasons (H.K.) Limited, Applicant and Rockwood Landco Inc., Respondent

In the Matter of the Bankruptcy of Brian Earl Blatherwick of the City of Guelph, in the Province of Ontario

Ricchetti J.

Heard: February 2-6, 9-13, 17-20, 23-26, 2015
Judgment: April 27, 2015
Docket: Guelph 810/10, CV-13-44774, London 1738020

Counsel: J. Cox, for Mrs. Blatherwick
Brian Earl Blatherwick, for himself
J. Ormston, H. Weir, for Seasons (H.K.) Limited
No one for Trustee in Bankruptcy

Subject: Civil Practice and Procedure; Estates and Trusts; Evidence; Family; Insolvency; Property; Restitution

APPLICATION by wife for spousal support, equalization and related relief; APPLICATION by company for trust declarations or restitution; MOTION by wife for annulment of husband's bankruptcy.

Ricchetti J.:

Overview

1 Mr. and Mrs. Blatherwick were married for approximately 39 years. They started a business in Canada selling Halloween costumes and related products in approximately 1999. This business did very well. Eventually, the Halloween business was moved to China to take advantage of manufacturing in China. This Halloween business became operated and managed through offshore companies located primarily in Hong Kong and Macao. Eventually, companies in the British Virgin Islands (BVI) were also incorporated and used in the Seasons Halloween Business. The Seasons Halloween Business products are sold in many countries throughout the world. Eventually, other persons were brought into the Halloween business as partners. I call this related group of companies, the Seasons Halloween Business.

2 In November 2010, Mr. and Mr. Blatherwick separated. Their children were adults. The only issues to be resolved were financial issues: spousal support and equalization. By the time this matter got to trial, these issues were reduced to two highly contentious issues: What is Mr. Blatherwick's income? What was the value of his corporate interests at the time of separation?

3 Four and a half years of litigation, over $2,000,000 in legal and expert fees, and the answer to these two questions are not capable of precise determination. Why?

by someone in the Seasons Halloween Business and it showed Mr. Blatherwick as a 55% owner of the Seasons Halloween Business. Of course, Mr. Blatherwick did not know who completed this and said the shareholding in this document was wrong.

101 I recognize that Ms. Speight was unhappy with the way the business arrangements with Mr. Blatherwick and the Seasons Halloween Business worked out. However, considering her entire evidence, including the fact much of it was confirmed by documentation prepared by the Seasons Halloween Business, I accept Ms. Speight's evidence. It was clear and, essentially, un-contradicted.

The Failure to Produce Documentation

102 Given the statements made by Mr. Blatherwick to Mrs. Blatherwick that, in a divorce, she would not be able to access his offshore holdings because he had "arranged" things, Mrs. Blatherwick obtained the Mareva/Freezing Order. This turned out to be fortuitous since, Mr. Blatherwick's computers were seized. Mr. Blatherwick's computers contained a number of financial and other documents, which provided the best glimpse into the actual operations of the Seasons Halloween Business. In particular, the seized documents were the only documents which showed some of the movement of monies in Discovery Bay for some years.

103 There were certain provisions in the Mareva/Freezing Order for preservation and disclosure. These were ignored by Mr. Blatherwick. His failure to produce documents includes:

a) the deletion of all communications contained on Mr. Blatherwick's email: brianblatherwick@me.com. This email account contained Mr. Blatherwick's dealings with Discovery Bay. Mr. Blatherwick testified this deletion occurred automatically after a period of time. However, even if true, he failed to explain why he didn't "preserve" the information before they were deleted automatically;

b) the failure to provide the account numbers of Mr. Blatherwick's personal HSBC accounts in advance of accessing them and provide a tracing of significant expenditures made through these account. No explanation was ever given by Mr. Blatherwick for this failure;

c) the failure to produce documentation from the Seasons Halloween Business meeting in Denver Colorado in September/October 2010. Mr. Blatherwick's explanation was that there was no agenda, no presentation, no notes — nothing — from this "partner's" meeting despite the fact there was a detailed presentation for the February 2010 partners meeting.

104 There were six days of questioning under oath of Mr. Blatherwick. Many undertakings were given by Mr. Blatherwick for production of documents. Many questions were refused. There were many disclosure requests in writing by Mrs. Blatherwick's counsel. There was a consent order for the production of documents. Yet, many documents, primarily financial documents, have not been produced and the absence of highly relevant documents became a significant and recurring issue throughout the trial.

105 The Comprehensive Disclosure Brief, Exhibit 11, is a lengthy brief which includes demands for disclosure and productions by Mrs. Blatherwick's counsel. It also includes the responses from Mr. Blatherwick's counsel or Mr. Blatherwick, if any, to the disclosure requests. The contents of the Disclosure Brief (except for a few highlighted items) were accepted by both parties as accurately reflecting what disclosure/production was requested and what was produced/ not produced. It is a scathing compendium of non-disclosure and non-production of highly relevant documentation.

106 Examples of highly relevant documentation not produced by Mr. Blatherwick include:

a) For a period of 11 years, only five pages of minutes for Seasons Macao were produced. No director/shareholder resolutions were produced. Only the certified corporate documents, obtained by Mrs. Blatherwick, were produced at trial;

b) There are no minutes or resolutions for Seasons HK;

c) There are no documents from Capitalrich. No financial statements. No minutes. No resolutions. No agreements. No bank statements. Nothing. This made it easy for Mr. Blatherwick, after four and a half years of admitting he had shares in Capitalrich, to advise this court that he had learned the week before trial that he had and has no shares in Capitalrich. Without documents, he could say whatever he wanted to regardless of what he had admitted for four and a half years. There was no documentary proof to the contrary;

d) There are no documents from Seasons Capital. No minutes. No resolutions. No agreements. No bank statements. As a result, it was easy for Mr. Blatherwick to deny for four and a half years that he had any shares in Seasons Capital and then testify that he found out a month ago that he in fact did hold 25% of the shares Seasons Capital. At trial, it was admitted by Mr. Blatherwick that the Seasons' partners had met and decided not to produce documents with respect to Seasons Capital. The response to the questioning of Mr. Blatherwick to produce Seasons Capital documentation was: "Mr. Cox was advised on March 7, 2013 that Seasons Capital will not disclose this information since Mr. Blatherwick does not own any part of it."

e) Despite Mr. Blatherwick admitting he had authority to transfer money from Discovery Bay's bank account and had used his authority to transfer approximately $8,900,000 USD (based on the documents available), absolutely no documents were produced from Discovery Bay. No bank statements, no authorizations, no documents regarding who owns, controls or directs this Company. Nothing. Yet, the transfer statements found on Mr. Blatherwick's computer showed that reporting and instructions for the Discovery Bay's bank account, remained with Mr. Blatherwick until at least December 18, 2012. As a result, it is easy for Mr. Blatherwick to say that he no longer has signing authority or that he no longer receives no money, he receives a limited amount of money from Discovery Bay, or that he owes Discovery Bay "loans". There are no documents to establish or confirm this allegation by Mr. Blatherwick;

f) MY Commercial Services are the accountants for: Capitalrich, Seasons HK, Seasons Capital, Discovery Bay, and Concept Marketing. Aside from some financial statements for Seasons HK and Seasons Macao, no other documents were produced from MY Commercial by Mr. Blatherwick. Only a few MY Commercial documents were found on Mr. Blatherwick's seized hard drive. MY Commercial, the accountants for the Seasons Halloween Business, advised it refused to produce any information or documentation regarding Discovery Bay. As accountants that would not have been its decision but that of the person instructing it — who for years was and likely continues to be Mr. Blatherwick;

g) Mr. Blatherwick admitted that the partners of the Seasons Halloween Business met for business meetings from time to time each year. As a result of the seizure of Mr. Blatherwick's computer, a copy of the February 22, 2010 Business Plan presented in Las Vegas was available to this court. The Las Vegas Business Plan contained information regarding sales, profit, ownership structure, customers and so forth. This singular document provides the best evidence as to the details of the ownership and business of the Seasons Halloween Business. A further business meeting was held by the partners in Denver, Colorado in September or October 2010. Despite a court order to produce documents from this meeting, no business plan, no agenda, no notes were produced for this or any other business meeting prior to or subsequent to the Las Vegas meeting;

h) And then there were the Seasons Halloween Business investments. Some of the documents found on Mr. Blatherwick's hard drive showed a number of investments. Two such investments were entitled "Barclay's Funds". Despite repeated requests, no specific documents regarding these funds were produced until trial. Eventually, Mr. Blatherwick produced them during the trial. The two Barclay Funds had a value of $7,400,000 HKD (just over $1,000,000 USD);

i) At times during his questioning under oath, Mr. Blatherwick admitted he had accounts with his fiancées. However, he produced none of those banking documents. Interestingly after lunch, on the same day of questioning when he admitted having these bank accounts, he returned and denied having any such bank accounts. In the end, none of the bank accounts were produced; and

j) At approximately the time of separation, there were some discussions about a sale of the Seasons Halloween Business for a price of $42,000,000. Mrs. Blatherwick testified that she heard of this. She also heard that the transaction didn't close. She didn't know what happened. Mrs. Blatherwick's evidence was confirmed when the evidence established that Mr. Blatherwick told his expert, Ms. Russell, about these sale discussions but he didn't produce any documents or provide any detailed information to Ms. Russell about what had occurred with respect to the possible sale. This was significant as a value had been placed on the Seasons Halloween Business by a third party of $42,000,000 USD. When asked under oath, Mr. Blatherwick said nothing happened with respect to this discussion. Cross-examination of Mr. Blatherwick produced nothing more.

107 In conclusion, there were serious limitations on financial statements, bank statements, corporate documents and many other documents which were relevant to the determination of Mr. Blatherwick's income and the value of his assets and corporate interests on separation. I conclude that Mr. Blatherwick's failure to produce many documents was because they would not assist his case. An adverse inference is drawn by this court arising from this failure.

108 The evidence also satisfies me that this failure to produce relevant documents was a *deliberate effort* to deny Mrs. Blatherwick's counsel and expert full and meaningful disclosure of all relevant documentation. The reasons for my reaching the conclusion include:

a) despite an obligation to produce relevant documents and orders of this court, when Mr. Blatherwick felt it was to his advantage he was able to produce additional documents. For example when additional documentation was requested by Ms. Russell, Mr. Blatherwick was able to produce, on short notice, almost a full box of new and additional financial documentation;

b) During the course of Mr. Blatherwick's cross examination, he admitted that he had a certain previously undisclosed financial document. He connected his laptop to the projector in the courtroom and the previously unproduced financial document was viewed by all; and

c) During the course of Mr. Blatherwick's closing he produced an additional statement of Discovery Bay despite having testified that he didn't have access to any other Discovery Bay documents other than those seized on his computer. Clearly, when Mr. Blatherwick wants to produce Seasons financial documentation which he thinks will help him, he can produce the documentation.

The Reliability of Seasons' Documentation

109 Let me now turn to the reliability of what little documentation has been produced by Mr. Blatherwick.

110 With respect to the corporate documents, Mr. Blatherwick testified that the documentation is completely unreliable and that an "outsider" would not be able to accurately understand the corporate information. It was unclear to me whether this related to all the corporate documentation or simply to the non-financial documentation — a position urged upon this court by Seasons HK's counsel.

111 Giving Mr. Blatherwick the benefit of the doubt that he was not suggesting all corporate documentation is unreliable, let me go on to deal with the reliability of the financial documentation disclosed.

112 As the discussion above indicates, the failure to produce a substantial number of highly relevant Seasons Halloween Business' documentation, which includes financial documents, leads to the irresistible inference that what

TAB 7

2013 ABQB 484
Alberta Court of Queen's Bench

Richards v. Richards

2013 CarswellAlta 1581, 2013 ABQB 484, [2013] A.W.L.D. 4781, [2013] A.W.L.D. 4792, [2013] A.W.L.D. 4794, [2013] W.D.F.L. 5308, [2013] W.D.F.L. 5400, [2013] W.D.F.L. 5411, 232 A.C.W.S. (3d) 1043, 568 A.R. 302

Linda Jean Richards, Plaintiff and Timothy Owen Richards, Defendant

C.S. Phillips J.

Heard: May 6, 2013; May 7, 2013; May 8, 2013; May 9, 2013; May 10, 2013
Judgment: August 23, 2013
Docket: Calgary 4801-145709

Counsel: Mr. N. Makins, Ms E. Kruger, for Plaintiff
Mr. T. Richards, Defendant, for himself

Subject: Family; Civil Practice and Procedure; Contracts; Evidence; Insolvency; Property

ACTION by wife for spousal support and to find husband in contempt of court.

C.S. Phillips J.:

I. Introduction

1 Linda and Timothy Richards were married on October 8, 1988. After 21 years of marriage, the Richards separated on August 29, 2009. Linda Richards (the "Plaintiff") filed a Statement of Claim for Divorce and Division of Matrimonial Property on September 20, 2010. The Statement of Defence was filed by Timothy Richards (the "Defendant") in respect of this matter on November 17, 2011 and a Counterclaim for Divorce and Division of Matrimonial Property was filed by him on November 17, 2011. The parties are not yet divorced.

2 The matter came to trial almost three and three quarters years after the parties separated.

3 As the Defendant is now bankrupt and a Trustee in Bankruptcy (the "Trustee") has been appointed, I am unable to deal with the property issues and have therefore stayed that part of the Plaintiff's application, such that the matter with respect to all property issues is effectively adjourned *sine die*.

4 Furthermore, the Plaintiff has filed a claim with the Trustee and is taking the position that the assignment of the Calgary West Campground (the "Campground") lease from the Defendant's company 333582 Alberta Inc. in favour of Mr. Frederick (Fred) Richards' company, Stardust Ranching Ltd. on January 17, 2013 was done to defeat his creditors' claims and the Plaintiff's claimed interest in 333582 Alberta Inc. and in the operation of the Campground and to defeat her claim for spousal support.

II. Issues

5 The Plaintiff filed a Statement of Claim for: (1) a Divorce Judgment; (2) an Order for Spousal Support; and (3) an Order directing that the Defendant pay costs of the action on a solicitor and client basis.

6 On May 2, 2013, the Plaintiff made an Application: (1) that the division of matrimonial property be adjourned *sine die*; (2) that a declaration be made at trial that the Plaintiff has an interest in the Campground lease previously

meaningful amount of spousal support to the Plaintiff, to which she is entitled. Consequently, it is simply not clear to this Court what the Defendant's true financial picture is.

58 The Defendant's own testimony has been that, despite not being known to gamble during the entirety of his more than twenty-year relationship with the Plaintiff, after separation money in excess of at least $500,000.00 was spent on gambling in the range of anywhere between $15,000.00 to $30,000.00 per month and $500.00 per day was spent on his cocaine drug habit over a six month period in 2012. Given the Defendant's lack of transparency and the general dearth of financial evidence before me, I cannot ascertain if this is in fact the case, as he claims. As the Plaintiff herself testified, anything could have happened to the money.

59 Since the separation, the Defendant has frittered away his money and intentionally disposed of financial assets and has not been forthright about his income. For example, the Defendant himself admitted that at some point in 2012 (the exact date of which is not clear to me), he sold all of his stocks in his RRSP accounts because he had been told by his then-lawyer that his accounts may be frozen, so as he said he "decided to take care of business and clear it all out" and that he did. I also accept the Plaintiff's assertion on the evidence before me that the Campground business accumulated payables in the amount alleged to be owing as at December 31, 2012 because revenue from that business was siphoned off by the Defendant. In fact, the Defendant's own testimony speaks to this as he admitted at trial to using the incoming cash from the Campground as his own personal income. The Defendant alone was responsible for collecting and depositing the incoming cash at the Campground. The Plaintiff testified, and I accept, that approximately 25 percent of the incoming revenue from the Campground was received as cash. During peak season, this could be as much as $5,000.00 per day.

60 Another example of the Defendant intentionally diverting revenue from the Campground for his own personal use is the fact that when he ought to have been paying spousal support to the Plaintiff, he instead made loans to his friends of approximately $40,000.00 in total over a period of the past four to six years. The most recent of these loans, which the Defendant testified to were not disclosed to the Trustee as receivables, were made in 2012.

61 The Plaintiff testified, and I accept, that the Defendant stated to her in 2008 before the parties' separation that he would "destroy her financially". His spending habits, his use of Campground cash for his own personal spending, his dissipation of assets, and lending considerable amounts of money to friends instead of paying spousal support to the Plaintiff, demonstrate this intention.

V. Credibility

A. Mr. Tim Richards

62 The behaviour of the Defendant described above, and the continued and deliberate lack of honesty, transparency and cooperation on his part with this Court, demonstrates his lack of credibility. I am conscious of this lack of credibility in reviewing his financial disclosure (what little we have), his testimony and the evidence he has provided. The Defendant has not been forthright nor honest with this Court, which reflects directly on his lack of credibility.

63 As I stated in *Campbell v. Campbell*, 2007 ABQB 637 (Alta. Q.B.) at para 77 ("*Campbell*"), the Defendant's reluctance to cooperate does not reflect well on his credibility. As in *Campbell*, where the evidence of the Defendant differs from that of the Plaintiff, I accept and prefer the evidence of the Plaintiff.

64 I similarly draw an adverse inference against the Defendant from his consistent failure to provide a thorough and accurate record of financial disclosure to this Court. As Justice Kryczka stated in *Kamitomo v. Pasula* (1983), 50 A.R. 280 (Alta. Q.B.) at para 69, (1983), 29 Alta. L.R. (2d) 375 (Alta. Q.B.):

> The principles of law on adverse inference are well known. The leading statement is to be found in Wigmore, *Evidence in Trials at Common Law*, 1979 (Chadbourn Rev.) at vol. 2, 285, page 192.

> The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

65 The Defendant's behaviour and conduct towards the Plaintiff and this Court adversely affects his credibility. The record includes a multitude of examples of his clandestine behaviour, of which I will mention a few significant examples. These include his direct contravention of Court Orders on numerous occasions (and one of particular importance not to further dissipate any assets or matrimonial assets, as ordered by Justice Bensler on December 6, 2011), as well as his lack of honesty testifying on certain points. His responses at times veered towards being flippant, disingenuous, and disrespectful, including such explanations for his conduct as spending all of his money because he thought the world was going to end, and that he thought the Campground business was slow because of the Aztec calendar, despite the fact he was aware the Campground's telephone service may have been shut off in November and December 2012 due to the bill not having been paid and therefore, it was unable to take bookings. Further, he stated that he neither read nor understood the significance of Court Orders. His explanation for this unbelievably was that although represented by legal counsel until January 15, 2013, there was so much material "After a while, I just got tired of looking at it."

66 His conduct also lacked transparency and honesty towards the Plaintiff concerning the proposed addition of her as a shareholder and director of the company that became Darkhorse Capital Incorporated, and why he failed to effect that change when quite opposite representations were made to her in September 2005 and documents had been drafted to effect that change. Similarly, the underhanded way that he sought to terminate the Plaintiff from her employment at the Campground without her knowledge, and attempted to prevent her from receiving a physical copy of her Record of Employment, speak to his lack of honesty and credibility. This latter action by the Defendant served to prejudice the Plaintiff, who was not eligible to receive any substantial employment insurance benefits until September 2009 because she had not filed for such Employment Insurance benefits until nearly eleven months after her actual termination of employment. This is because she was not made aware of her termination on October 15, 2008 until she first received a copy of her Record of Employment in early September 2009 — nearly a year after the fact. Furthermore, the Record of Employment the Plaintiff did receive in early September 2009 was dated January 28, 2009, when it should have been issued and delivered to her within five calendar days after the end of the pay period in which an employee's interruption of earnings occurs.

B. Mr. Fred Richards

67 The Fred Richards Affidavit and the testimony provided by the Defendant's brother, Fred Richards is generally of limited value, as I found him to similarly lack credibility. His testimony, although polished, ultimately lacked candour and honesty. He chose his words carefully and was at times evasive in his responses (example: "[Stardust] has assumed the obligations [of 333582] as required") in order to present facts in a way he clearly intended they be portrayed. That is to present a version of events to this Court to have it believe that the Assignment of Lease and Business in respect of the Campground made effective January 1, 2013 was necessary in order to save the Campground from impending financial ruin. On cross-examination, Fred Richards had difficulty recollecting facts to questions put to him that did not seem to advance "his version of events" in any way. For example, clearly a successful business man, Fred Richards suddenly for the most part became non-responsive and almost clueless when asked what the value of the Campground business would be if listed for sale as at May 2013. He admitted that he did not know what the Campground business was worth but that he would not have taken it over, if he didn't think it was something worth saving. He suggested that the business may not be financially successful in 2013, full well knowing that the Campground virtually has a monopoly within the city limits of Calgary, and that he would save between $200,000.00 and $300,00.00 in income by not paying his brother,

TAB 8

2010 BCSC 365
British Columbia Supreme Court

Walek v. Guardian Storage Inc.

2010 CarswellBC 654, 2010 BCSC 365, [2010] B.C.W.L.D. 4073, [2010] B.C.W.L.D. 4075, [2010] B.C.W.L.D. 4078, [2010] B.C.J. No. 491, 188 A.C.W.S. (3d) 428, 65 C.B.R. (5th) 132

Marek Walek (Plaintiff) and Guardian Storage Inc., Angela Mainardi and Greg Samek (Defendants)

L.A. Fenlon J.

Heard: June 22-26, 2009; July 29-31, 2009; January 26, 2010
Judgment: March 19, 2010
Docket: Vancouver S056199

Counsel: D.J. Taylor for Plaintiff
M.T.L. Blaxland for Defendant

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

ACTION by shareholder seeking remedies for oppression and breach of contract.

***L.A. Fenlon J.*:**

Introduction

1 The plaintiff Marek Walek, and the defendant Angela Mainardi, joined forces through the defendant Guardian Storage Inc. ("Guardian") to develop a mini storage facility in Vancouver. They did not put this arrangement in writing. The plaintiff now sues in breach of contract and for oppression under the *Business Corporations Act*, S.B.C. 2002, c. 57. The defendants deny the contract on the terms alleged. In the alternative, the defendants argue that the contract should not be enforced by the court because it was entered into with the intent to avoid the plaintiff's obligations to his creditors in bankruptcy.

Issues

2 There are five main issues to be addressed:

1. What are the terms of the parties' agreement?

2. Has the prerequisite repayment to Ms. Mainardi been made?

3. Should an adverse inference be drawn against the defendants?

4. Should the Court refuse to enforce the agreement on public policy grounds?

5. Is the agreement a nullity?

Analysis

1. What are the terms of the parties' agreement?

38 It was a term of the agreement that the plaintiff was to hold the position of part-time manager and was to have access to Guardian's financial records, but the defendant terminated Mr. Walek's position in September 2005 and thereafter refused to provide him with any information about the company's financial affairs.

39 Ms. Mainardi explained her decision to terminate Mr. Walek's employment on the basis that she asked him to loan more money to the company to cover expenses and "he did not respond" to her request. But Mr. Walek was not obliged to loan further funds to Guardian. Under the agreement, he was to provide a significant part of the management of the company on a deferred compensation basis. The evidence established that Ms. Mainardi, who continued to work full-time at her travel agency business, was only infrequently in the Guardian office. There was no evidence to suggest that Mr. Walek failed to perform the services he contracted to perform. Ms. Mainardi's termination of the plaintiff's involvement in the company, and her refusal to provide him with information about the company's finances was oppressive, particularly because payment for his work and repayment of his construction loan depended on the financial performance of the company. Without that information, he had no way of knowing whether he was entitled to repayment. In addition, I note that, quite apart from the express term of the agreement entitling Mr. Walek to access to financial information about the company, Mr. Walek, as a beneficial shareholder, should have been provided with that information: *Business Corporations Act*, s. 196(4).

40 Further, Ms. Mainardi by her own admission failed to record cash sales, failed to report all of Guardian's earnings on corporate tax returns, and has not kept records as required under s. 196 of the *Business Corporations Act*.

41 In summary on this point, I am of the view that Ms. Mainardi's termination of Mr. Walek's management role with the company without cause, her failure to maintain adequate records, her refusal to provide Mr. Walek with information about the company's finances, and her refusal to return his 20% shareholding to him, constitute oppression as that term is used in s. 248 of the *Business Corporations Act*.

42 I am also satisfied that the plaintiff has exhausted all other remedies available to him through discovery and pre-trial orders to obtain financial information from Guardian: *Rosemont Enterprises Ltd. v. Mercury Industrial Inc.*, 2005 BCSC 1339, 9 B.L.R. (4th) 285 (B.C. S.C.), at para. 64.

43 The plaintiff has therefore met the conditions precedent to appointment of an accountant to inspect and audit the defendant Guardian's financial records under s. 248 of the *Business Corporations Act*.

(b) Should the court exercise its discretion to appoint a receiver?

44 In exercising my discretion under s. 248(1) of the *Business Corporations Act*, I must consider whether appointment of an inspector is an appropriate remedy in the most basic sense, i.e., is it likely to remedy the situation complained of? In my view it will not, because an accountant cannot inspect and audit documents that both parties acknowledge do not exist. The case at bar is, therefore, unlike the case of *Fedel v. Tan* (2008), 93 O.R. (3d) 274, 50 B.L.R. (4th) 117 (Ont. S.C.J.) (paras. 13-21, 22 and 98) relied on by the plaintiff in which the Court found the defendant director had failed to produce meticulous records he had kept in his possession. In this case, if an inspector is appointed, an audit would be expensive, time consuming, ultimately futile, and would almost certainly result in further litigation. The cost of the exercise, if borne by the defendant company, would erode profits and further delay repayment of the plaintiff. It is also probable that the cost of an audit would be disproportionate to the amount in issue between the parties.

45 Defendants' counsel submits that in these circumstances it is preferable for the court to determine the amount due to Ms. Mainardi based on the admittedly incomplete evidentiary record. Plaintiff's counsel argues, in the alternative, that based on the defendants' failure to prepare and produce financial records, the court should draw an adverse inference against the defendants and find that Ms. Mainardi's loans to the company have been repaid in full.

3. Should an adverse inference be drawn against the defendants?

46 An adverse inference may be drawn against a party who fails to adduce material evidence without a satisfactory explanation: *Wigmore on Evidence*, 3rd ed., Vol. II, p. 162:

> ... The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted
>
> ... The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavourable to the party's cause ...

47 How do the defendants explain their failure to produce financial records? Ms. Mainardi acknowledged that she was responsible for, and in control of, the financial record keeping of the company. She said electronic financial records were kept but were lost because her computer "crashed". She said she also kept paper records for Guardian but moved them from the locker facility to her travel agency, where they were lost in a flood. Despite being asked to disclose documents to prove the insurance claim she said she made in relation to that flood, she failed to do so. David Suprunec testified that he kept receipts for all of the items paid for by the plaintiff and by Ms. Mainardi. When he left the project in May 2004, he said he gave all those documents to Ms. Mainardi. Ms. Mainardi acknowledged receiving those financial records from Mr. Suprunec, but said that they too had been lost.

48 Bogden Latkiewicz worked as the manager at Guardian from January 2006 until August 2007 and said he kept detailed records in a journal and on his computer of payments made by customers by credit card, cash, or cheque, setting out the amount paid, customer name, the date and the storage locker number. Mr. Latkiewicz said the records he kept "disappeared" in June of 2007. He then started a new set which also disappeared. The journal created by Mr. Latkiewicz was not disclosed by Ms. Mainardi until she became aware that counsel for the plaintiff had knowledge of its existence, despite two earlier court orders in this action compelling her to produce documents.

49 In assessing Ms. Mainardi's explanation for failing to produce relevant financial documents, I also take into account the following. First, Mr. Latkiewicz's evidence that Ms. Mainardi paid him for overtime in cash and paid other employees in cash including a number who were collecting unemployment insurance. Second, Ms. Mainardi withheld information about cash revenues from the accountants preparing Guardian's income tax returns in 2004, 2005, 2006, and 2007. Those tax returns were amended only when she was confronted with that wrongdoing at her examination for discovery in this action.

50 Third, the records that were produced show a tally of Ms. Mainardi's loans to the company without supporting documentation or receipts. For example, payments she claimed to have made to the company from her personal bank accounts were not supported by bank statements. This action was commenced in November 2005, immediately after the defendants terminated the plaintiff's management position and shut him out of the company. Ms. Mainardi acknowledged that she knew it was important to properly record the income of Guardian because her obligation to pay Mr. Samek and Mr. Walek was contingent on the financial performance of Guardian. She admitted that she knew from the time the agreement was made in January 2004, and certainly after the lawsuit was commenced in November 2005, that what she had loaned the company, what the company earned, and amounts it repaid her, were all squarely in issue. Despite this, Ms. Mainardi testified that she did nothing to request bank statements, cancelled cheques, or any other documents to support her loans to the company.

51 Fourth, the summary Ms. Mainardi put into evidence to support her shareholder's loans contains obvious errors such as an entry for the lease deposit of $31,425 — there was clear documentary evidence to show that Mr. Samek paid

that sum. Ms. Mainardi also included the $110,000 she paid Dave Suprunec to purchase his 40% shareholding, although as the trial progressed, Ms. Mainardi withdrew that claim, acknowledging that it could not be a shareholder's loan.

52 The defendants argue that an adverse inference should not be drawn based on the inadequacy of Guardian's records because the plaintiff failed to call expert evidence to establish that the accounting records fell below the standard to be expected of "a privately held British Columbia company where all shares are registered to one person". The defendants also submit that it would be improper to draw an adverse inference because the plaintiff failed to subpoena the defendants' accountant "to prove that the financial records were unreliable". I do not accept these submissions. Ms. Mainardi's testimony established the lack of reliability of the financial documents produced, and expert evidence is not necessary to establish the standard of record keeping required under the *Business Corporations Act*. At a minimum, a company must accurately report its expenses and revenues.

53 Nor do I accept Ms. Mainardi's evidence that she caused Guardian to keep adequate records that were subsequently lost in a flood and a computer failure. Instead, I find that Ms. Mainardi failed to keep adequate records of the loans she made to the company, the payments she received from the company, and the company's earnings. In these circumstances, it is appropriate for the court to draw an adverse inference and to conclude that, had financial records been properly kept and produced, they would confirm that Guardian owes Ms. Mainardi less than the $178,977 she claims remains outstanding.

54 Mr. Walek argues that the inference should be drawn that *all* of Ms. Mainardi's loans have been repaid. But in my view, to do so would work an injustice. The evidence as a whole suggests that Ms. Mainardi loaned significant sums to Guardian, which I find probably exceeded $200,000. I also find that the company struggled financially in 2004 and for much of 2005, only earning a profit in 2006. I therefore find it unlikely that Ms. Mainardi's loans have been repaid in full. While the evidentiary record is sparse, in these circumstances, if the plaintiff is to have a remedy, I must do my best to determine the amount remaining due to Ms. Mainardi.

55 Ms. Mainardi insisted that to this day, Guardian "is barely making money". But cash payments were not recorded in company revenues, and these were a significant component of Guardian's earnings: Bogden Latkiewicz testified that the fragment of records he retained for 2007 showed the company received cash payments of $1,851 in January, $1,740 in February, and $2,330 in March.

56 Mr. Walek testified that Guardian had begun to turn a slight profit in September 2005 when it had 200 lockers rented out. Mr. Latkiewicz said 265 lockers had been rented by 2007. Customers paid fees ranging from $32 to $132 per month, depending on the size of the locker rented. Using $50 per month per locker, an additional 65 lockers would bring in $3,250 per month above the "break even" costs of the company or $39,000 per year in profit. Discounting that sum by $1,250 per month to reflect non-payment of accounts by some customers, increased costs associated with additional customers, fluctuations in the number of lockers in use over the years, and the payment of some expenses by cash, I find it likely that Ms. Mainardi drew out on average $24,000 per year, or $72,000 over the last three years. Ms. Mainardi made no claim to be entitled to a salary or compensation from Guardian; accordingly, payments she received are properly characterized as repayment of her loans to Guardian.

57 Deducting the sum of $72,000 from the amount Ms. Mainardi claims is due ($179,000) and deducting the $31,500 she says she loaned the company to pay for the lease (which I have found was paid by another investor), I estimate that Ms. Mainardi's shareholder's loan stands at about $75,500.

4. Should the court refuse to enforce the agreement on public policy grounds?

58 The court may refuse to enforce a contract on grounds of "public policy", which includes illegal agreements. A distinction is drawn in the authorities between common law and statutory illegality, both of which may lead a court to refuse to enforce a contract or provide a remedy to a party who has advanced property under such an agreement: S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at ¶558.

TAB 9

2013 CarswellOnt 4681
Ontario Superior Court of Justice

Fine Art Painting and Decorating Inc. v. Rob Piroli Construction Inc.

2013 CarswellOnt 4681, [2013] O.J. No. 1789, 227 A.C.W.S. (3d) 388, 29 C.L.R. (4th) 329

Fine Art Painting and Decorating Inc., Plaintiff and Rob Piroli Construction Inc., Rob Piroli, Mario Piroli and 1544951 Ontario Inc., Defendants

J. Sebastian Winny D.J.

Heard: April 17, 2013
Judgment: April 20, 2013
Docket: Kitchener 1463/11

Counsel: Mr. Douglas E. Snider, for Plaintiff
Ms Corinne M. Sutherland-Nikota, for Defendants

Subject: Contracts; Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency

CLAIM by plaintiff subcontractor for payment for painting and decorating services rendered.

***J. Sebastian Winny D.J.*:**

1 At the conclusion of this trial, a judgment was granted for the plaintiff, with reasons to follow which are provided below.

Nature of the Dispute

2 The plaintiff claims damages of $15,660.75 for painting and decorating services rendered. The initial claim was against the corporation believed to have contracted for those services, along with its director based on an allegation he was personally liable for breach of trust under s. 13(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

3 The defence pleaded that the plaintiff had sued the wrong parties and that its contract was with a numbered company. The claim was then amended to add the numbered company along with a breach of trust claim against its director, who is the brother of the other corporation's director. All of the defendants denied liability and there were allegations of deficiencies in the work performed by the plaintiff.

Motion for Non-Suit

4 After the plaintiff completed its case, the defence moved for a non-suit. Defence counsel took the position that her clients were not required to be put to their election before obtaining a decision on such a motion. She cited no authority for that proposition.

5 Based on *Consumers' Gas Co. and Pierce (c.o.b. Beard Bulldozing and Grading), Re*, [1980] O.J. No. 1326 (Ont. Div. Ct.), it is my view that the procedure on a non-suit motion in Small Claims Court is the same as in other civil courts in Ontario. That is, the defence must formally elect or undertake that it will call no evidence if the motion is dismissed. If the defendant declines to so elect, it is not entitled to a decision on the motion until after its case is presented - by which point (i) the motion may be seen as redundant since the court can decide the case on its merits based on all the evidence, and (ii) the evidentiary record may be materially different by virtue of the evidence of any defence witnesses and cross-examination thereon.

6 After I put the defence to its election, the defence declined and the motion was effectively withdrawn. The defence case proceeded.

Issue 1: Damages

7 I find it perfectly clear that the plaintiff is entitled to be paid the full amount of the five invoices on which it claims, in the total amount of $15,660.75 (Exhibit 1, Tab 31), dated from May 25, 2010 to June 15, 2010.

8 I accept the evidence of the plaintiff's principal, Mr. Paul Rocha, that all of the work was ordered by Mr. Paul Caruana, pursuant to a written quote in the case of invoice number 10-154, and pursuant to verbal discussions and emails as to the other four invoices.

9 I accept Mr. Rocha's evidence that after he bid on the job involving a Winners store at 659 Erb Street, Waterloo, Mr. Caruana contacted him to negotiate some changes to the terms of contract. Mr. Caruana wanted to bring the price down to $10,000 plus GST and the change to the scope of work that was agreed to accomplish that was to omit fire retardant paint to the roof and deck of the loading area. Instead, a cheaper product was used: acrylic enamel.

10 It is obvious that the change which Mr. Caruana solicited had the effect of reducing the general contractor's expense, in a way that was inconsistent with the project's plans and specifications. This would have put the general contractor in a breach of contract position with the owner, so it is unsurprising to observe Mr. Piroli's evidence that there is ongoing litigation in that regard involving issues which are worth approximately $250,000 to $300,000 to the general contractor.

11 Because the change to the scope of work agreed between the plaintiff and the general contractor called for work not in accordance with the plans and specifications, Mr. Rocha was careful to not only revise his written quote (Exhibit 1, Tab 3), but also to make deletions to the description of the scope of work as it appeared in the general contractor's purchase order (Exhibit 1, Tab 2). He deleted two references suggesting the work would be consistent with the plans and specifications, and a reference to "misc items".

12 I accept Mr. Rocha's evidence that he faxed those materials back to Mr. Caruana's office. That was on March 16, 2010 (Exhibit 1, Tabs 1, 2 & 3).

13 As he fairly acknowledged on cross-examination, Mr. Rocha mistakenly signed the revised purchase order in the area intended for Mr. Caruana's signature. I find that nothing turns on that error, since in any event the revisions to the purchase order were either an acceptance by the plaintiff of revised terms proposed by Mr. Caruana, or they were themselves a counter-offer or a fresh offer in which case it would have been for the general contractor to accept that offer. As I see it that distinction has no effect on the outcome.

14 Mr. Rocha testified that there was no specific communication from Mr. Caruana expressly accepting the revisions which had been faxed on March 16, 2010. He did however receive communications from Mr. Caruana advising that the work had been awarded to the plaintiff and was going ahead. I have no difficulty in finding that the parties agreed to the terms of the revised quote and revised purchase order. The general contractor had specifically requested the changes, and in any event accepted them by its words and conduct after Mr. Rocha fixed the written revisions back on March 16, 2010.

15 I accept Mr. Rocha's evidence that Winners job was changed by adding an installation of wallcoverings supplied by Winners. That extra is reflected in invoice 10-167.

16 I accept Mr. Rocha's evidence that there was no complaint about his company's work until after the litigation was commenced. There had been some very minor deficiencies which Mr. Caruana asked him to attend to by July 1, 2010, and that request was satisfied.

17 I note that Mr. Caruana was not called as a witness and so there is nothing to contradict Mr. Rocha's evidence concerning communications between them nor is there any evidence that Mr. Caruana did not receive the written revisions or that he disagreed with their effect.

18 Consistent with Mr. Rocha's evidence of the lack of contemporaneous complaint regarding the work, Mr. Caruana wrote an email to the plaintiff and to other subcontractors dated October 1, 2010, in which he sought to excuse and explain the general contractor's failure to pay these subcontractors. The only excuse given was that the owner had failed to pay what was then owed to the general contractor (Exhibit 1, Tab 29).

19 It is interesting to observe that Mr. Caruana's email dated October 1, 2010 was referenced as dealing with "Legal Stuff" and that his emails starting from as early as April 15, 2010 were referenced the same way (see Exhibit 1, Tab 20). If the general contractor was treating this matter as a legal issue, one would have expected some attempt to document any complaints about the plaintiff's work - if indeed such complaints existed and if they were genuine and not spurious. I find there were no complaints at all prior to litigation other than the trivial alleged deficiencies which were promptly addressed to the satisfaction of the general contractor prior to July 1, 2010.

20 Mr. Rob Piroli testified that the plaintiff's work was disappointing and unsatisfactory. I found his evidence in that regard to be vague and self-serving. The defence made no attempt to suggest any remedial cost of alleged deficiencies. Quite frankly I found the defence allegations of substandard work to be a model of spuriousness.

21 I concluded that the plaintiff was entitled to payment in full of its five invoices. The question was which party or parties were liable for such payment.

Issue 2: Liability of Rob Piroli Construction Inc. and Rob Piroli

22 As to invoice 10-135 in the amount of $435.75, I found Rob Piroli Construction Inc. and Rob Piroli personally, to be jointly and severally liable for that amount on the following basis.

23 In the communications between Mr. Rocha and Mr. Caruana, the general contractor was described on letterhead as "Piroli Construction". Mr. Caruana's email address was at "piroliconstruction.com". As it turns out, Piroli Construction is not a legal entity.

24 Mr. Rob Piroli testified that "Piroli Construction" is a trade name which, as he put it, "can cover all of the general contractor companies we work under."

25 As to the largest invoice, for the Winners job, the general contractor's purchase order identified the general contractor as "Piroli Construction" and the signature line called for a signature on behalf of that supposed entity. However the purchase order also contains a small note stating:

> All invoices to: 1544951 ONT INC

26 It would appear that the ambiguity in that expression and in the legal entities which might later turn out to be alleged to have entered into contracts on behalf of "Piroli Construction" is as deliberate as it is palpable.

27 In the case of the small invoice for the Best Buy job in Milton, Mr. Piroli conceded in his evidence that the general contractor for that job was Rob Piroli Construction Inc. and it was paid in full by the owner. For this invoice, the plaintiff asked for judgment against only Rob Piroli Construction Inc. and Rob Piroli.

28 Based on the evidence I find that Rob Piroli is the sole officer, director and person in control of Rob Piroli Construction Inc., and in particular that he was responsible for writing the company's cheques. There is no explanation at all for the company's failure to pay the plaintiff's invoice for painting services on that project. I rely on the findings below

concerning the breach of trust by 1544951 Ontario Inc. as similar fact evidence concerning the dealings of Rob Piroli Construction Inc. and I find as a fact that Rob Piroli knowingly participated in a breach of trust by that corporation.

29 I conclude that Rob Piroli is jointly and several liable with his corporation for payment of that account, by virtue of his breach of trust under s. 13(1) of the *Construction Lien Act*.

Issue 3: Liability of 1544951 Ontario Inc. and Rob Piroli and Mario Piroli

30 The defence submits and I accept that the onus to prove an individual's liability for breach of statutory trust under s. 13(1) of the *Construction Lien Act* is on the plaintiff: *Belmont Concrete Finishing Co. v. Marshall* (2012), 353 D.L.R. (4th) 755 (Ont. C.A.), at para. 10.

31 Section 13(1) provides as follows:

> 13(1) In addition to the persons who are otherwise liable in an action for a breach of trust under this Part,
>
> (a) every director or officer of a corporation; and
>
> (b) every person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,
>
> who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

32 The defence submits that the entity which hired the plaintiff (except for invoice 10-153) was 1544951 Ontario Inc., based on the note contained in the purchase order (Exhibit 1, Tab 2). That is, despite the purchase order stating in bold large letters at the top left of the page "PIROLI CONSTRUCTION" and despite the signature box indicating that it calls for a signature on behalf of "PIROLI CONSTRUCTION", in fact the contracting entity was 1544951 Ontario Inc. The submission is based on the note stating "All invoices to: 1544951 ONT INC".

33 I find that note is materially ambiguous. I could mean simply to deliver invoices to that entity, or to make invoices out to that entity for accounting or tax purposes. "1544951 ONT INC" is not a legal entity or trade name, but is close to the correct legal name of 1544951 Ontario Inc.

34 Based on the evidence of Mr. Piroli that "Piroli Construction" "can cover all of the general contractor companies we work under", it appears entirely possible that the use of that trade name in the manner indicated here could as a matter of contract law support a finding that any or all of those "contractor companies" could be liable for a particular contract. But in submissions the plaintiff effectively conceded that 1544951 Ontario Inc. was the contracting entity here, by asking for a judgment only against it for these four invoices, subject to its claim for personal liability against both Rob and Mario Piroli.

35 Based on that concession by the plaintiff and my finding that all of the invoices are payable, the plaintiff was entitled to a judgment in contract against 1544951 Ontario Inc., for the amount of $15,225.00. The real issue is the claim for personal liability under s. 13(1).

36 The total price of the contract between 1544951 Ontario Inc. and the owner, Waterloo Developments (2008) Inc., was just under $4 million (Exhibit 2, Tab 3). These invoices were due and payable to the plaintiff in late May to early June 2010. The defence evidence is that approximately $2.8 million was paid for this project on August 31, 2010 to another corporation controlled by Rob Piroli, which had provided financing for this design-build project for Winners (Exhibit 2, Tab 5).

37 Mr. Piroli also testified that in the outstanding litigation between 1544951 Ontario Inc. and Waterloo Developments (2008) Inc., the balance of the contract price owed to his company was $250,000 to $300,000.

38 No meaningful accounting for the project finances is offered by the defence. This despite the allegations of breach of trust, disbursement of funds contrary to the *Construction Lien Act* and an allegation that particulars of receipts and disbursements of funds were withheld by the defendants: see Plaintiff's Claim, para. 9-11.

39 There is also the stark fact that Mario Piroli did not testify. Rob Piroli testified that although Mario is the owner, president and sole director of 1544951 Ontario Inc., his involvement with that corporation was "very limited". It is hard to accept that the owner of a single-purpose corporation involved in a $4 million project and who has taken on the responsibilities of its director and president would remain ignorant of its affairs. And there is no suggestion that the brothers are estranged or uncooperative in their business relationship with each other.

40 I found above that one aspect of the manner in which this general contractor conducted its business was to negotiate a contract with the plaintiff on terms which failed to honour the general contractor's contract with the owner respecting the project plans and specifications. Equally, the general contractor made empty promises of payment, made empty promises that it would paid the unpaid subcontractors when it was paid by the owner, and followed up by later denying payment based on spurious allegations of deficient work. Such dealings lend a certain fragrance to the matter.

41 It is clear that the onus of proof of a claim under s. 13(1) is on the plaintiff, based on the authority cited by defence counsel: *Belmont Concrete*, *supra*. To the extent that earlier authority cited by the plaintiff suggests a kind of shifting onus requiring only that the plaintiff establish the fact that monies were received which were not used to satisfy the plaintiff's account, they appear to be inconsistent with that authority: *Commdoor Aluminum v. Solar Sunrooms Inc.* (2003), 25 C.L.R. (3d) 179 (Ont. S.C.J.), at para. 19-22, affirmed on other grounds [1] (2004), 41 C.L.R. (3d) 217 (Ont. C.A.). [2]

42 But the fact that the onus is on the plaintiff does not displace the potential application of the adverse inference doctrine, where evidence that is peculiarly available to a party is not presented by that party: *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.). In my view the failure of Mario Piroli to testify concerning his actual involvement in and knowledge of the affairs of the corporation warrants an inference that his evidence would not have supported the defence. Recall that based on the above-mentioned figures, this was a $4 million contract, of which $2.8 million was paid on August 31, 2010 and only $300,000 or less remains outstanding at present. Where has the other $900,000 gone? Why was it not used to pay this subcontractor's claim for $15,660.75?

43 The plaintiff cites authority in which, in similar circumstances, an adverse inference was drawn from the failure of a director to testify: *Don Park Inc. v. S.E. Mechanical Engineering Ltd.* (1997), 43 C.L.R. (2d) 1 (Ont. Gen. Div.), at para. 10, affirmed (1998), 43 C.L.R. (2d) 7 (Ont. C.A.).

44 In a nice contrast, the defence cites *1000728 Ontario Ltd. v. Corbar Contracting Inc.* (2012), 289 O.A.C. 274 (Ont. Div. Ct.). In that case, DiTomaso J. upheld the trial judge's dismissal of a claim for personal liability under s. 13(1) where the corporation's bookkeeper had testified but the sole officer and director did not. The evidence of the bookkeeper was found to support the finding at trial that there was no breach of trust by the corporation and so there was no basis for individual liability. In my view that result simply turned on the facts.

45 An adverse inference is simply one instrument in the judicial fact-finding toolbox. The fact that one of several defendants does not testify does not in itself warrant a judgment against that defendant if the facts as found by the court do not otherwise support such a judgment.

46 In the case at bar, I am satisfied that the plaintiff has established on a balance of probabilities that both Rob Piroli and Mario Piroli are liable under s. 13(1) for the breach of trust by 1544951 Ontario Inc. I find that Rob Piroli had relevant effective control in accordance with his own evidence. I find that Mario Piroli was a director and officer, also based on Rob Piroli's evidence. I find, with the support of adverse inferences from the failure of Mario Piroli to testify and otherwise from the evidence as reviewed above, that both of them either committed or assented to or acquiesced in a breach of trust. This closely-held corporation's closely-held associated corporation received $2.8 million for this project,

on August 31, 2010. This closely-held corporation subsequently received a further $900,000 to $950,000. None of those funds was used to pay the plaintiff's accounts. I find that trust funds were used for a purpose or purposes inconsistent with the trust, contrary to s. 8(2).

47 This case appears to be a classic type of situation which s. 13 of the *Construction Lien Act* is designed to protect against. A corporate shell-game has been played in a way which appears designed to deprive a small subcontractor of the payment to which it is entitled from this larger general contractor. Section 13(2) specifically entitles the court to "disregard the form of any transaction and the separate corporate existence of any participant." Certainly the court is inclined to do just that with respect to the $2.8 million paid to the financing entity controlled by Rob Piroli. It is unnecessary to decide whether the defence is entitled to rely on s. 11(2) to justify payment out of that sum to the finance company, because in any event there was a further $900,000 received by the corporation and used contrary to s. 8(2), which itself is dramatically in excess of the plaintiff's accounts.

48 For these reasons, I granted a judgment against 1544951 Ontario Inc., and Rob Piroli and Mario Piroli, jointly and severally, for $15,225.00

Costs

49 Costs follow the event. There were no relevant offers. It was a one-day trial with senior counsel for the successful plaintiff. The issues were important and possessed some complexity requiring legal research and presentation of authorities. A representation fee was fixed at $2,000 as requested, plus disbursements of $225, for an all-inclusive award of $2,225 payable jointly and severally by all four defendants.

Claim allowed.

Footnotes

1 The issue addressed in the Court of Appeal's brief endorsement was whether the claim against the individual survived his bankruptcy.

2 There is a similar tension in the authorities dealing with the personal liability of directors of corporate load brokers: see *4 Star Courier & Logistics Inc. v. Domino's Pizza Canadian Distribution ULC*, [2012] O.J. No. 3661 (Ont. S.C.J.).

End of Document

TAB 10

2001 ABQB 167
Alberta Court of Queen's Bench

Alberta Opportunity Co. v. Hartell Estate

2001 CarswellAlta 343, 2001 ABQB 167, 104 A.C.W.S. (3d) 156, 283 A.R. 292

ALBERTA OPPORTUNITY COMPANY (Plaintiff) and ROBERT HARTELL, EXECUTOR OF THE ESTATE OF JOHN ROBERT HARTELL, DECEASED (Defendant / Plaintiff by Counterclaim) and ALBERTA OPPORTUNITY COMPANY AND ARTHUR ANDERSEN INC. (Defendants by Counterclaim)

Sirrs J.

Heard: January 29-31, 2001
Judgment: March 2, 2001
Docket: Calgary 9701-14252

Counsel: *J. McCarthy, Q.C.*, for Plaintiff
L. Heald, for Defendant

Subject: Corporate and Commercial; Insolvency

ACTION by creditor for amount in guarantee; COUNTERCLAIM by guarantor regarding conduct of sale of security.

***Sirrs J.*:**

1 Times were good in Alberta in 1978 and a group of Strathmore residents formed White Weyel Enterprises Ltd. (the corporation) to construct a new hotel. The Wheatland Country Inn (Wheatland or Inn) consisted of 31 rooms, tavern, banquet hall, coffee shop, dining room and cocktail lounge. Mr. Hartell did not get involved with the operation until 1986 at which time his long time friend and fellow W.W. II veteran, Mr. Whitely, who was now the sole owner of the Wheatland, was faced with losing the Inn because Credit Union Central had called their loan.

2 In return for a 10% interest in the Wheatland, Mr. Hartell provided his $250,000 guarantee secured by a mortgage on one-half section of land to the Alberta Opportunity Company (A.O.C.). A.O.C. then advanced a loan for 1.35 million dollars, the result of which Mr. Hartell's friend, Mr. Whitely, was able to carry on operating the Wheatland.

3 On March 10, 1992, A.O.C. renewed the terms of their loan for an additional five years. A problem involving overdue 1991 property taxes was dealt with in the renewal agreement by four months' mortgage payments being forestalled so that the income could be used to pay the back taxes.

4 On August 4, 1993, Mr. Nakuma by memorandum alerts A.O.C. to the fact that the 1992 and 1993 property taxes were not paid with $74,169.72 outstanding. Also that the Town had discontinued supplying water to the hotel because of the apparent unwillingness of the hotel to pay the overdue accounts.

5 By a memorandum dated February 8, 1995, A.O.C. notified the corporation of its intent to exercise its security. On March 1, 1995, A.O.C., by memorandum to the then Minister of Economics Development and Tourism, advised that the corporation owed $290,000 for outstanding property taxes, hotel taxes and G.S.T. and that the Town of Strathmore was threatening to offer the Wheatland for tax sale.

6 A.O.C. appointed Arthur Andersen (A.A.) as receiver-manager of the Wheatland on March 13, 1995. A.A. immediately took possession of the Wheatland and operated the Inn until the beginning of April when A.A. hired Four

Winds Hotel Management Corp. (4 Winds) to operate the Wheatland. 4 Winds operated the Inn until it was sold in April 1998. A.O.C. prepared a summary of debts (Tab 32) showing the corporation owing in excess of 2 million dollars. A.A. obtained an appraisal from Colliers MacAuley Nichols which valued the Wheatland at 2.2 million dollars. An A.O.C. memo (Tab 34) indicates that Mr. Whitely did not want the Wheatland sold for less than 2.5 million dollars. The estimated replacement cost of the Inn was 2.45 million dollars (Exhibit 2).

7 An offer to purchase the Wheatland for 1.5 million dollars was received from Richard and Denyse Lentsch (Lentsches) on May 18, 1995. At this time A.A. and A.O.C. have an appraisal which states that the Wheatland is worth 2.2 million dollars and the Wheatland has creditors in excess of 2 million dollars. Thus, this offer is rejected.

8 There is some evidence that A.O.C. intimated to at least three people that they had a standing offer to buy the motel for 1.8 million dollars and that the result of this statement was to discourage potential buyers from making any counteroffers. This evidence is not accepted and I find that between the months of May and October 1995 that A.O.C. at best intimated that they were hoping to get 2.2 million dollars for the Wheatland but would consider offers of 1.8 million dollars or more.

9 The Lentsches' offer is significant because it seems to indicate that the corporation, Mr. Hartell and Mr. Whitely had reduced their expectations concerning the value of the Wheatland to 1.5 million dollars; however, this inference is premised upon Mr. Hartell's son being a part owner and Greg Whitely continuing to operate the motel.

10 When the corporation made application to remove A.A. as receiver on August 23, 1995, the corporation did not indicate they would seriously consider any offer over 1.5 million dollars.

11 There is no clear indication that Mr. Hartell and Mr. Whitely were prepared to accept a sale price of 1.5 million dollars from bonafide third party purchasers on May 18, 1995 or anytime thereafter.

12 In the latter part of July, 1995, A.A. unsuccessfully attempted to sell the Wheatland by the tender process.

13 By a letter dated September 25, 1995 (Tab 121) Colliers MacAuley Nichols discovered a large error in their appraisal that resulted in their estimate of the market value of the Wheatland being reduced to 1.55 million dollars. They attributed their error to the fact that they did not realize that the corporation's accountant had included the 90% of the Alberta Government's share of Video Lottery Terminal income in its calculations of gross sales. As one year's gross sales is a method of measuring the value of a hotel, they thus grossly overstated the Wheatland's worth. The primary cause of this error was the 1993-1994 financial statement (Tab 129) prepared by the corporation's accountant.

14 Between September, 1995 and February, 1996, four prospective purchasers are located who make offers that approach the appraisers' value of 1.55 million dollars, RSM Holdings Ltd. (RSM), Savi Management Corp. (Savi), S. Park and Dae Yoo Enterprises Ltd. (Dae Yoo).

1. On October 13, 1995 RSM offered 1.445 million dollars net of real estate commissions or approximately 1.5028 million dollars gross (Tab 53). This offer was countered by A.A. at 1.6 million dollars but RSM did not return to the negotiating table as they determined that the Inn required too much refurbishing (an analysis of this offer by A.O.C. (Tab 56) suggests a call on the guarantors for only approximately $13,000 if this offer were accepted, but this analysis shows nothing being paid to other creditors).

2. Also on October 13, Savi made an offer and counteroffers were exchanged until on January 30, 1996 Savi offered 1.5 million dollars (Tab 79) which was countered on February 5, 1996 by A.A. at 1.65 million dollars at which time Savi stopped negotiating.

3. S. Park left the negotiating table on January 10, 1996 when A.A. countered S. Park's offer of 1.39 million dollars with 1.6 million dollars (Tabs 70 and 71).

4. The only explanation for the counter of 1.65 million dollars on February 5, 1996 to Savi when A.A. had countered at 1.6 million dollars to S. Park on January 10, 1996 was that A.O.C.'s costs now exceeded 1.6 million dollars and that they were hoping to get $100,000 more than the appraisal value of the Inn.

5. On February 2, 1996 Dae Yoo offered 1.55 million to purchase the Wheatland. This offer contained a request for financing of 1.2 million dollars at an interest rate of 3% below what the corporation was paying and numerous other conditions. The offer was not countered but was rejected by A.O.C. (Tab 80).

15 A.O.C. obtained an order putting the corporation in bankruptcy on February 20, 1996.

16 Foreclosure proceedings were commenced on November 19, 1996 and a RICE order was granted on July 21, 1997 whereby A.O.C. purchased the Wheatland for 1.51 million dollars and judgment was granted against the corporation for $261,854.50.

17 Approximately one year later the Wheatland was sold by A.O.C. for 1.25 million dollars.

DECISION

18 Guarantors place themselves at significant risk when, as in this case, they sign a comprehensive guarantee that waives rights to claim legal defences that might otherwise limit their liability.

19 Generally guarantors in Alberta are at liberty to contract as they see fit, no matter how much the contract is to their detriment.

20 In the event that the *Personal Property Security Act* (P.P.S.A.) applies to a guarantee, there are some restrictions on that liberty.

21 Section 66 of the P.P.S.A. provides a debtor with a defence if a creditor and/or their agents fail to conduct themselves in a commercially reasonable manner when dealing with a debtor's assets.

22 Section 67(5) of the P.P.S.A. declares that provisions of a contract that purport to waive the protection of the P.P.S.A. are void.

23 As a result of A.O.C. realizing upon its security, the floating charge debenture, and the appointment of A.A. as receiver, the P.P.S.A. is applicable to this case.

24 I find that the Hartell estate is a debtor as defined by the P.P.S.A. and is entitled to the protection of Sections 66 and 67 of the P.P.S.A.

25 Also, I find that so far as the guarantee waives protection provided by the P.P.S.A., the guarantee is void as being contrary to public policy. Thus, A.O.C. and A.A. owed a duty to the Hartell estate to conduct themselves in a commercially reasonable manner.

26 With the benefit of hindsight, it is easy to conclude that A.O.C. and A.A. set their sights too high for the value of the Inn; but considering the market factors present in 1995 and the evidence provided by the Hartell estate to substantiate their complaint, I cannot find that A.O.C. or A.A. were doing other than their duty to attempt to achieve the best possible price for the Inn, and thus conducted themselves in a commercially reasonable manner.

27 Thus, the counterclaim of the Hartell estate is dismissed and the claim of A.O.C. for judgment against the Hartell estate in the sum of $250,000 is granted. A.O.C. is entitled to their costs in the appropriate column of Schedule C.

REASONS AND ANALYSIS

28 Mr. Hartell complains that A.O.C. and their agent owed them a duty and that their behaviour did not meet the standards required to satisfy that duty. In short, they were commercially unreasonable and thus Mr. Hartell should be entitled to damages.

[1]

29 The parties have agreed that both Mr. Hartell's guarantee and mortgage were valid and enforceable contracts and that as of January 29, 2001, the corporation owed A.O.C. in excess of $250,000.

30 But for the commercially unreasonable actions of A.O.C. and A.A., the Hartell estate alleges that A.O.C. would have suffered losses of only $29,593 if the Wheatland had been sold in late 1995 or early 1996 to one of the potential purchasers.

31 A.O.C. takes the position that the law in Canada is settled and that parties are entitled to contract out of duties to meet certain standards. The guarantor in effect cannot raise as a defence or by counterclaim that A.O.C. or their agent, A.A., misbehaved, were negligent, or breached their statutory duty to conduct their affairs in a commercially reasonable manner.

32 Our Court of Appeal in *Alberta Opportunity Co. v. Moulton* (1990), [1991] 2 W.W.R. 624 (Alta. C.A.), determined that the parties could contract out of any requirement for A.O.C. to meet a standard of care in relation to the administration of a loan.

33 Also, Master Funduk in *Alberta Opportunity Co. v. Wilson* (1994), 158 A.R. 1 (Alta. Master) , granted summary judgment to the plaintiffs, rejecting the defendants' complaints of impropriety because the complaints raised no issue as the defendants had by agreement contracted away their rights to raise such a complaint.

34 Although the wording in the case at bar is not the same as in *Alberta Opportunity Co. v. Wilson*, the wording is also very comprehensive.

35 Clause 3 of the guarantee is "This guarantee is absolute and unconditional . . ."

36 Clause 5 "The liability of the guarantor hereunder shall not be . . . limited by any of the following:

. . .

(f) any other event or act, which otherwise might terminate or limit liability of the guarantor hereunder."

37 It is clear that in Alberta parties to a guarantee may contract out of the protection of alleging that some act of the creditor caused the loss or part of the loss. It is also clear that Mr. Hartell contracted out of complaining about how A.O.C. and A.A. handled the sale of the Wheatland by agreeing that his liability under the guarantee would not be limited by any act or event which might otherwise limit Mr. Hartell's liability. Thus, unless the Hartell estate can establish that its case is an exception to the general rule, it is bound by the broad terms of his guarantee contract.

38 Section 94 of the *Alberta Business Corporations Act* (A.B.C.A.) in part states:

a receiver or receiver-manager of a corporation appointed under an instrument shall . . .

(b) deal with any property of the corporation in a commercially reasonable manner.

39 There are no provisions in the A.B.C.A. that make a receiver liable for not acting in a commercially reasonable way nor does the A.B.C.A. contain any clause that prevents the parties from contracting out of the A.B.C.A. Thus, the A.B.C.A. does not assist the Hartell estate in its argument that his case is an exception to the general rule.

40 The Hartell estate alleges that if A.O.C. can contract out of its common-law duty to Mr. Hartell and the A.B.C.A., then it is owed a duty pursuant to the provisions of the P.P.S.A. R.S.A. 1988 c. 4.05.

41 The statutory duty is set out in s. 66 of the P.P.S.A:

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

42 Can Mr. Hartell, a guarantor, avail himself of the protection of the P.P.S.A. as it deals with secured transactions?

43 Although lending institutions who seek guarantees often use terminology that they will grant the loan provided it is secured by someone's personal guarantee, a guarantee is not generally considered to be a secured transaction.

44 A guarantee is not included in the examples of secured transactions in s. 3(1)(b) of the P.P.S.A.

45 Section 3(2) of the P.P.S.A. indicates the Act applies to certain commercial transactions that do not secure payment but it does not specify a guarantee.

46 Section 1(1)(l) of the P.P.S.A. defines "debtor" in part as . . . "a person who owes payment . . ., whether or not that person owns or has rights in the collateral . . ." By literal interpretation the wording seems to include a guarantor.

47 The *Alberta Personal Property Security Act* Handbook 4th edition by Ronald Cumming Q.C. and Roderick J. Wood, at page 26, agrees that the definition of debtor is broad and "The definition also covers a person who has contractually guaranteed the repayment of the obligation but has not given a security interest in her (sic) property;"

48 However, s. 1(4) qualifies the broad definition in some regards and the text warns that each section of the P.P.S.A. must be examined carefully to determine which types of debtors are covered.

49 In this regard Mr. Cumming and Mr. Wood refer to s. 60(4) of the P.P.S.A. suggesting that a debtor in this regard includes both the principal debtor and a guarantor. This section deals with the notice requirements required when property is about to be sold.

50 Section 60(4) of the P.P.S.A. does not assist the Hartell estate. It is not their complaint that the Wheatland should not have been sold for 1.51 million dollars in July 1997 or that they did not get proper notice of the sale. Their complaint is that it should have been sold for 1.5 million in December 1995 or January 1996 if A.O.C. and A.A. had acted in a commercially reasonable manner.

51 Even if in law, a guarantee is not a secured transaction, the P.P.S.A. contemplates the protection of guarantors under sections 1(1)(l) and 60(4). Thus, because of this and the broad wording of s. 66, I find that A.O.C. and A.A. owed a duty to Mr. Hartell as guarantor, to conduct the business operations and sale of the Wheatland in a commercially reasonable manner.

52 Also, as Section 3 of the P.P.S.A. includes floating charges as secured transactions to which the provisions of the P.P.S.A. apply and A.O.C. used the provisions of their fixed and floating charge debenture to appoint A.A. as receiver-manager, I have thus found that Mr. Hartell is entitled to such protection as s. 66 of the P.P.S.A. might provide.

53 Section 67(5) of the P.P.S.A. provides "Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act or purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge a duty or obligation imposed upon him by this Act is void." I have found that Mr. Hartell is entitled to the protection of the P.P.S.A. I also find that Mr. Hartell's guarantee is included in this case as "any other agreement" and that it would be contrary to public policy to

permit A.O.C. and Mr. Hartell to contract out of the statutory duty whereby A.O.C. must discharge their duties in a commercially reasonable manner.

54 Thus, Mr. Hartell is legally entitled to set up a counterclaim for damages suffered alleging that A.O.C. and A.A. did not conduct themselves in a commercially reasonable manner.

55 Did A.A. and A.O.C. behave in a commercially reasonable manner?

56 The Hartell estate has not taken issue with the time frame from notice of intent to exercise their security on February 8, 1995 to the appointment of A.A. on March 13, 1995, as was the case in the *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* case (Alta. Q.B.).

57 A.A. operated the Wheatland for about 3 weeks during which period it engaged and hired 4 Winds to manage the hotel and Colliers MacAuley Nichols to prepare an appraisal. Also they arranged to advertise the Wheatland for sale.

58 From April to September of 1995 both A.A. and A.O.C. were justified in trying to market the Wheatland for a price between 1.8 million dollars and 2.5 million dollars because of the error in the appraisal and Mr. Whitely's comment that the Wheatland should not be sold for less than 2.5 million dollars.

59 The offer from the Lentsches was in my opinion a front for an attempt to allow the Whitelys and the Hartells to maintain both control and ownership of the Wheatland. It was not a bonafide third party offer. It was an attempt to retain ownership, reduce the debts, with A.O.C. continuing to finance the Inn. The offer was only open for acceptance for one-half hour.

60 During the time frame of May to September 1995, A.A. and A.O.C. owed a duty to the other creditors to seek a price in excess of the range of 2.2 million dollars. In September of 1995 when the appraisal provided a reduced value of 1.55 million dollars, A.A. and A.O.C. were within the limits of commercial reasonableness not to ask the Lentsches to return to the table to negotiate because the Lentsches had explicitly indicated in August that they were no longer interested in buying the Wheatland (Tab 48).

61 Of further note, there is no evidence that Mr. Hartell, Mr. Lentsch or Mr. Whitely were interested in buying the Wheatland at the 1.51 million dollar amount in July of 1997.

62 It was also commercially reasonable for A.O.C. not to want to continue financing the Wheatland when Mr. Whitely and Mr. Hartell would continue to have an interest in the Inn after most of the other creditors of the corporation were forced to write off their accounts.

63 The complaint in this case is not so much that A.O.C. and/or A.A. failed to use normal marketing procedures in exposing the Inn for sale but that they bungled certain offers by making inappropriate counteroffers or by failing to make counteroffers. The result was to expose the guarantor to additional receiver and interest expense caused by delay in selling the Inn.

64 The complaint of Mr. Hartell is based upon the following incidents:

1. MR. E. ANDERSON OF A.O.C. NOTIFYING SOME PROSPECTIVE PURCHASERS BETWEEN APRIL AND SEPTEMBER 1995 THAT A.O.C. "HAD A STANDING OFFER TO PURCHASE THE INN FOR 1.8 MILLION DOLLARS"

65 I have already found that Mr. E. Anderson did not make this comment. Only Mr. Leroy Flamond gave evidence that the statement was made. The evidence was not expected by Mr. Hartell's counsel. Mr. Flamond was relying totally on his recollection of one phone call for his evidence. Mr. Flamond is in my opinion mistaken about what Mr. Anderson told him.

2. FAILURE TO PROVIDE MR. HARTELL WITH COPIES OF OFFERS TO PURCHASE WITHOUT DELAY AS REQUIRED BY JUSTICE PHILLIPS' ORDER OF AUGUST 23, 1995

66 Madam Justice Phillips' order was for offers to be communicated between the parties and to permit either party to apply to the Court to have an offer accepted.

67 Problems arose because time constraints required A.O.C. to counter offers before they could be considered by Mr. Hartell.

68 Madam Justice Phillips' order did not require that all offers be submitted for Mr. Hartell's approval or that all offers be open for acceptance for 14 days and be subject to Court approval and nor should it have.

69 Justice Martin in *Corpfinance International Ltd. v. Brinkerhoff Drilling General Partnership*, [1999] A.J. No. 337 (Alta. Q.B.) denied Brinkeroff's request for particulars of any potential offer in private versus court-appointed receiver situation. He found it was not for Brinkeroff to complain of any act of the receiver provided the receiver was empowered to do something by a contract and that Brinkeroff was limited to raising the issue of whether a sale was conducted in a reasonably commercial manner after the fact.

70 Justice Phillips seems to have permitted Mr. Hartell the leeway to force A.O.C. to complete a sale and thus, in effect, to complain before the fact. In my opinion this leeway would require very compelling circumstances and Justice Phillips did not intend to interfere with A.O.C.'s powers to sell the corporation's assets. Justice Phillips did not give Mr. Hartell the power to require his approval of any sales.

71 Thus barring compelling circumstances, I find that Madam Justice Phillips' order consisted only of a right to be informed of offers received, and thus A.O.C. was in no way required to delay making counteroffers until Mr. Hartell had the opportunity of reviewing the offer. Justice Martin suggested that disclosure of sale information could disturb the integrity and efficacy of the sale process. In this vein, I find that Justice Phillips' order permitted Mr. Hartell more information than usual in cases of privately appointed receivers but little else, except in compelling circumstances. Thus, Mr. Hartell has no basis for an argument that A.O.C. was conducting itself in a commercially unreasonable manner by making untimely counteroffers or in untimely delivery of the offers to Mr. Hartell.

3. GENERALLY IN FAILING TO SET A POLICY CONCERNING WHETHER A BUYER COULD ASSUME THE APPROXIMATE 1.2 MILLION LOAN OWING TO A.O.C.

72 In 1995, A.O.C. had reduced its lending limits to $1,000,000. There appeared to be an exception to this rule so far as the assumption of existing loans that exceeded $1,000,000. A.O.C. in this case at the administration level rejected proposals that called for A.O.C. to finance the Wheatland for more than $1,000,000. It seems to me that it was commercially reasonable for A.O.C. to take the position that they would not provide any financing to assist a purchaser to buy the Wheatland. Thus, it was commercially reasonable to take the initial position that A.O.C. would not finance any more than $1,000,000. It was also commercially reasonable for A.O.C. to weigh each offer to decide whether to exceed the $1,000,000 loan amount. It was not commercially unreasonable for A.O.C. not to have a set policy for the assumption of loans in excess of $1,000,000.

4. IN FAILING TO COUNTER THE 1.55 MILLION DOLLAR OFFER TO PURCHASE FROM MR. DAE YOO

73 Mr. Dae Yoo offered the appraisal market value for the Wheatland. The offer asked to be permitted to assume the existing A.O.C. loan or to assume less upon Mr. Dae Yoo selling some other property. A.O.C. chose to reject this offer without countering it. In this regard, Mr. Hartell refers to a decision of the Ontario Court of Justice, *Royal Trust Corp. of Canada v. 502759 Ontario Ltd.* [17 R.P.R. (3d) 260 (Ont. Gen. Div.)] Court File #95-CT-66059 in which Justice Ground at page 32 found ***Royal Trust*** to be unreasonable in failing to respond to an offer even though ***Royal Trust*** considered it to be unreasonably low and ***Royal Trust*** had not had time to test the market.

74 At page 33, Justice Ground states:

> It would appear from the evidence that the transaction might have been salvageable and ***Royal Trust*** would have realized $75,000.

75 The Ontario Court of Appeal at (Ont. C.A.) at paragraph 18 reversed this finding of Justice Ground. The Court of Appeal at paragraph 16 states:

> The buyer's bank was not enthusiastic about lending the money and Royal was given two days to approve the assumption of its mortgage. By the time it got the buyer's net worth statement, the offer had expired. The buyer refused to produce any further information and there the matter sat.

76 In Mr. Dae Yoo's case, there is no evidence before the Court that the offer might have been salvageable. The offer was only open for acceptance for three days, Mr. Dae Yoo had not completed an application for financing from A.O.C., Mr. Dae Yoo had not used an offer to purchase form requested by the receiver, the offer contained some fundamental conditions precedent, no deposit was included in the offer, and Mr. Dae Yoo wanted an interest rate set for ten years that was 3% lower than that being paid by the corporation.

77 In negotiations for the purchase of an Inn, I cannot accept that it is commercially reasonable for a receiver to counter every unacceptable offer. In the give and take of negotiations, it is not reasonable to think that the rejection of an offer will result in a prospective purchaser failing to make a follow-up offer if the purchaser is seriously interested in buying a hotel. The receiver's time is too costly to insist that they counter every offer. The receiver should be entitled to weigh an offer, make a decision on the value of making a counteroffer, and if the value is not there in the opinion of the receiver, to reject the offer. In Mr. Dae Yoo's case, A.A. and A.O.C. were justified in simply rejecting the offer.

5. IN FAILING TO ADJUST THEIR EXPECTATIONS IN LATE 1995 AND EARLY 1996 WHEN THEY BECAME AWARE OF THE RUMOURS OF A NEW MOTEL, THE REPAIRS TO THE ROOF OF APPROXIMATELY $70,000 AND THE FACT THAT THE NUMBER OF VLT'S IN THE INN WOULD BE REDUCED UPON SALE IN THE OFFERS OF RSM HOLDINGS, SAVI AND S. PARK

IN FAILING TO APPRECIATE THAT THE RSM HOLDINGS'OFFER WAS NET OF REAL ESTATE COMMISSIONS

IN COUNTERING SAVI'S OFFER AT 1.65 MILLION DOLLARS WHEN ONLY 25 DAYS EARLIER THEY HAD COUNTERED S. PARK'S OFFER AT 1.6 MILLION DOLLARS

78 The appraisal for 1.55 million contains a reference to a rumour of another motel being built in Strathmore and thus must have been considered in the 1.55 million dollar value but there is no reference in the appraisal to the necessity for an expensive roof job or the loss of revenue that would result from the government policy in place that would reduce the number of VLT's in the Inn upon sale to a third party. If these two matters had been taken up with the appraiser, the market value appraisal of the Wheatland may have been reduced to 1.45 million dollars or less. There is good logic to this reasoning but it is a reduction from one appraiser's opinion which again has a margin of error. Thus, although A.O.C. and A.A. could justify a reduction in the price they were seeking for the Wheatland, it was not commercially unreasonable to continue to seek 1.6 to 1.65 million dollars.

79 The suggestion by Mr. Hartell is that if A.O.C. and A.A. had conducted themselves in a commercially reasonable manner, they would have realized that the Wheatland was only worth 1.45 million dollars and sold it to RSM Holdings Ltd. for 1.445 million dollars or to Savi Management for 1.5 million dollars. If this had been done, according to Mr. Anderson's memo (Tab 56), the Hartell estate may have only been liable for $12,000 on its guarantee.

80 This suggestion is the antithesis of the usual complaint concerning the conduct of a receiver, i.e. the receiver failed to do what was necessary to get the best price.

81 It is not difficult to speculate that had A.A. and A.O.C. chose to follow this course of conduct, the other creditors would have attacked A.A. and A.O.C. for failing to get the best price.

82 Justice Dilks of the Ontario Court of Justice in *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) , in a case where assets were sold by tender and the purchaser resold the assets at a substantial profit, states at page 216, paragraph 45:

> A receiver is under a particular duty to make sufficient effort to get the best possible price for the assets. This duty is not to obtain the best price but to do everything reasonably possible with a view to getting the best possible price.

83 Justice Lee of the Alberta Court of Queen's Bench in *Cobrico Developments Inc. v. Tucker Industries Inc.* (Alta. Q.B.) considers with favour the decision of Justice Farley of the Ontario Court of Justice in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List])at paragraphs 6 and 7:

> Although the interests of the debtor and purchaser are also relevant, the receiver's primary concern is to protect the interests of the debtor's creditors . . .
>
> Provided that a receiver has acted reasonably, prudently, and not arbitrarily, a court should not sit in appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision . . . To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation would take place on a motion for approval.

84 At paragraph 28, Justice Lee quotes from Justice Paperny's decision in *Royal Bank v. Fracmaster Ltd* [(1999), 209 W.A.C. 93 (Alta. C.A.)]:

> . . . It is the receiver's function to do the business analysis necessary to develop a disposition strategy, to analyse the proposed offers . . . The Court ought not "enter the market place" . . . the Court ought not to sit as on an appeal from the decision of the receiver.

85 Justice Lee suggests that the Court should not use its inherent supervisory jurisdiction except in clear-cut cases. In this case, there was good interest in 1995 and early 1996 from potential purchasers of the Wheatland. There is no evidence to suggest that this was an anomaly, that there would not be other and better offers to buy the Inn. There is no evidence that it was the counteroffers or lack thereof that was the reason that the potential purchasers did not pursue the purchase of the Inn. There is no evidence of a poor economy that might suggest there would be limited interest in a rural hotel. The onus is upon the Hartell estate to substantiate their counterclaim, i.e. that they suffered damages as a result of A.O.C. and A.A. being commercially unreasonable. The Hartell estate seems to rely upon the principle that "things speak for themselves," as to why the potential purchasers stopped pursuing the Inn and no other serious buyers were located for 2 years until the price for the Inn was significantly reduced. In my opinion, the Hartell estate has not met the onus required of it to prove that A.O.C. acted in a commercially unreasonable manner.

86 In hindsight, because no better offers were received, it is easy to suggest that A.O.C. and A.A. were commercially unreasonable because no better offers were forthcoming.

87 A.O.C. and A.A. in late 1995 had a sales strategy of attempting to achieve a sale price of between $50,000 and $100,000 above the market price set out in an appraisal they had obtained. Appraisals are not definitive. A.O.C. and A.A. were seeking a price 6-7% above the appraisal market value. Appraisals have a margin of error. If one considers that the Inn eventually sold for $1,250,000, the actual margin of error here was approximately 19%.

88 The appraisal of the Wheatland was done with financial data provided by the corporation which was at best incomplete. No comparables were used in determining the value of the Inn. The replacement cost of the Inn was in excess of 2 million dollars. A.A. through its agent Four Winds Management was generating proper financial statements which indicated that the Wheatland could be profitable.

89 Notwithstanding the appraisal, the roof repairs and the potential loss of VLT's, A.A. and A.O.C. were not being commercially unreasonable in December 1995 and January 1996 in setting 1.6 million to 1.65 million dollars as the best possible price for the Wheatland.

90 Their failure to achieve this price, and the establishment of 1.51 million as the value in the RICE order and the ultimate sale of the Wheatland for 1.25 million dollars do not provide evidence to assist the Hartell estate in establishing that the conduct of A.O.C. and A.A. was commercially unreasonable. To do so would be to sit on appeal of the actions of the receiver having the benefit of hindsight of the actual difficulties that arose in finding a buyer for the Inn. A.A. and A.O.C.'s refusal to sell to the prospective buyers in early 1996 was the direct result of their attempts to meet their duty to the creditors of the Inn in trying to get the best possible price.

Action allowed; counterclaim dismissed.

End of Document

TAB 11

2016 ABCA 266
Alberta Court of Appeal

Fast Labour Solutions (Edmonton) Ltd. v. Kramer's Technical Services Inc.

2016 CarswellAlta 1703, 2016 ABCA 266, [2016] 11 W.W.R. 485, [2016] A.W.L.D. 4125, 270 A.C.W.S. (3d) 204, 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. Fenna, for Appellant, Kramer's Technical Services Inc.
J.R. Pawlyk, for Appellant, George Kramer

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

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 ...
>
> > (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 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 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 <u>must apply the distributable fund</u> 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.

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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