COURT FILE NO.	1703 12327	Clerk's Stamp JUDICIAL CENTRE OF EDMONTON FILED FEB 28 2019 Clerk of the Court
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.	
DOCUMENT	**SUPPLEMENTAL REPLY BRIEF OF THE MONITOR, ERNST & YOUNG INC., FOR MARCH 14-15, 2019 HEARING DATES**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DARREN R. BIEGANEK Q.C./ RYAN F.T. QUINLAN Barrister & Solicitor Phone: (780) 441-4336 Fax: (780) 428-9683 File No.: 196164	**DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta, Canada, T5J 3V9

I. INTRODUCTION

1. This supplemental reply brief is in response to the supplemental brief of 726 Remote Accommodations, Ltd. ("**726 Remote**"), 726 Modular Finance Ltd. ("**726 Modular**") and Reliant Asset Management, LLC ("**RAM**") filed on February 19, 2019 (the "**726 Supplemental Brief**") in advance of the hearings scheduled for March 14-15, 2019 in these proceedings on the "Bonnyville Issues" (as defined in the 726 Supplemental Brief).

2. 726 Remote, 726 Modular and RAM will, where appropriate, collectively be called "**726**".

3. This brief is supplemental to the Monitor's primary submissions which are located in its main brief filed on December 17, 2018 (the "**Main Brief**") and its first reply brief filed on January 3, 2019 (the "**First Reply Brief**").

4. Unless otherwise defined herein, all capitalized terms shall have the same meaning ascribed to them as are set out in the Main Brief.

5. The Monitor respectfully submits that the appropriate analysis and relief in respect of the Bonnyville Issues is set out by the Monitor in its Main Brief, as supplemented by its First Reply Brief and this brief.

II. ISSUES

6. This brief will address Issue 1, Issue 2 and Issue 3, as they are referred to and set out in the 726 Supplemental Brief. The Monitor has no additional submissions respecting Issue 4 and Issue 5.

III. LAW AND ARGUMENT

Issue 1: 726's Purchase of the Bonnyville Assets

7. In response to the combination of paragraphs 5-6 of the 726 Supplemental Brief, the Monitor again submits that there is no evidence in any of the purchase documents, or in writing at all, evidencing that any of the Bonnyville Ancillary Equipment or applicable small wares were included in the sale. 726 has not produced any further documentation in that regard.

8. In respect of paragraph 15 of the 726 Supplemental Brief, the Monitor respectfully submits that neither of the applicable small wares, nor in particular the Bonnyville Ancillary Equipment, are "accessions," within the meaning of the *PPSA*, to the Bonnyville Equipment.

9. Under s. 1(1)(a) of the *PPSA*, "accessions" means goods that are installed in or affixed to other goods. The Bonnyville Ancillary Equipment are completely, stand alone items. None, or at least most, of the applicable small wares are affixed or installed directly into the Bonnyville Equipment.

10. In respect of paragraph 16 of the 726 Supplemental Brief, the Monitor again submits that the parole evidence rule applies to the issues involving the Bonnyville Ancillary Equipment and small wares. As noted in paragraph 40 of the First Reply Brief, external evidence will only be allowed to resolve ambiguity that arises from the language of a document itself, not from external circumstances. The Invoice and Bill of Sale in respect of the Bonnyville Equipment contains no ambiguity in terms of what items are included in the sale. 726 does not identify any portions of the Invoice and Bill of Sale for the Bonnyville Equipment that are ambiguous such that parole evidence would be permissible to consider.

11. Rather, 726 asks this Court to amend the documents to include not only small wares but walkways, electrical panels, waste water systems, potable water systems, lights, lift stations, and car plugs. They ask that the Court draft their list of purchased assets.

12. Even if Mr. Roman and Mr. McCracken's evidence regarding the assets included in purchase of the Bonnyville Equipment constituted evidence of surrounding circumstances and/or industry custom, and not parole evidence, 726 does not identify any portions of the Invoice and Bill of Sale for the Bonnyville Equipment that would bear the interpretation it seeks to have this Court make even if such surrounding circumstances or industry custom were considered in interpreting these purchase documents. It is also worth noting that Mr. McCracken, for whatever very limited weight his evidence is worth, never provided any evidence of there being an industry custom that items like the Bonnyville Ancillary Equipment would be unidentified, but included, items in sales of assets like the Bonnyville Equipment in the industry.

Issue 2: 726's Purchase of the Bonnyville Assets

13. There are a few points to address as part of this analysis:

   a. Whether the sale was in the "ordinary business of the seller", CNC; and

   b. Whether:

      i. 726 acquired the assets without knowledge of the CWB security interest; and

      ii. The assets were not described by serial number to the extent that they were required to be so described under the *PPSA* and its regulations.

14. In respect of paragraph 22 of the 726 Supplemental Brief, the Monitor respectfully submits that 726 bears the onus of establishing its claims in respect of the Bonnyville Equipment, Bonnyville Ancillary Equipment, small wares (and all other assets at other camps claimed), in terms of both ownership and priority. This includes establishing that the transaction between 726 and CNC for the Bonnyville Equipment was in the ordinary course of business of CNC and that 726 did not have the knowledge of the CWB's security interest and the potential breach thereof.

Transcript of Proceedings on January 11, 2019 at p. 16, ll. 16-17 **[TAB 1]**

<u>a) Ordinary Course</u>

15. There is no comprehensive definition of the term "ordinary course of business" under *PPSA*. It is an inclusive definition open to interpretation. It is a question of fact that is based on all of the circumstances of each case.

Pacific Mobile Corp., Re, [1985] 1 S.C.R. 290, at para. 3 **[TAB 2]**

16. In *Alberta Pacific Leasing Inc. v. Petro Equipment Sales Ltd.*, the Court outlined the following (non-exclusive) factors in respect of whether a transaction was is in the ordinary course of business:

   a. transaction type: the transaction should be one that is a normal part of the seller's business;

   b. place of sale: "If it is at the business premises of the seller it is more likely to be in the ordinary course of business. If it is away from the business premises of the seller, in suspicious circumstances for example, a court may hold that it is not in the ordinary course of business";

   c. parties to the transaction: "If the buyer is an ordinary, everyday consumer, the likelihood of his being involved in a sale in the ordinary course of business is greater.

If the buyer is not an ordinary consumer, but a dealer or a financial institution, then the Court may take this out of the ordinary course of business";

d. quantity of the goods sold: "If there is only one or a few articles sold in the ordinary way, the Court is more likely to hold this to be a sale in the ordinary course of business. On the other hand, if a large quantity of items are sold, many more than are sold in the ordinary course of business and perhaps forming a substantial proportion of the stock of the seller, then the Court is less likely to consider it to be in the ordinary course of business";

e. price charged: "if the price charged is in the range of the usual market price, courts are more likely to consider the sale in the ordinary course of business, whereas if the price is unduly low, the courts may hold that this is not a transaction in the ordinary course of business";

f. advertising: if the seller advertises to the public, holding itself out as conducting a certain business, then the transaction is more likely one held to be in the ordinary course of business; and

g. percentage of overall volume of sales: even if the sale forms a small percentage of the overall business, and is indirect and incidental to the main business it may still be in the ordinary course of business.

Alberta Pacific Leasing Inc. v. Petro Equipment Sales Ltd., 1995 CarswellAlta 418 at pars. 19-25 **[TAB 3]**

17. Whether or not the items were anticipated to be replaced by the seller, and whether it was a sale of all, or a substantial portion, of the inventory or equipment of the seller are also factors for this Honourable Court's consideration.

85956 Holdings Ltd. v. Fayerman Bros. Ltd., 1986 CarswellSask 191 para. 12 **[TAB 4]**; *Fairline Boats Ltd. v. Leger*,1980 CarswellOnt 607 at para. 15 **[TAB 5]**; *Royal Bank v. Gatekeeper Leasing Ltd.*, 1993 CarswellBC 441 at para. 28 **[TAB 6]**

18. In this case:

a. there is no evidence that the sale of dorms or alike units by CNC specifically, as opposed to other members of the Canada North Group, was in the normal course of its business for CNC, as CNC's business was providing and operating these camps, as opposed to manufacturing or selling them. Further, it is the Monitor's submission that the sale of the Bonnyville Equipment has to be looked at in the broader context of what was happening in the fall and winter of 2014 between 726 and CNC, which was that Mr. Roman and Mr. McCracken entered into a boarder business arrangement (which resulted in all of the limited partnerships taking over the various camps), and the sale of the Bonnyville Equipment and the equipment referenced at paragraph 21(e) of the 726 Supplemental Brief were related transactions as part of this broader transaction. As such, the equipment sales referenced at para. 21(e) of the of the 726 Supplemental Brief cannot be said to show that CNC was in the business of selling dorms and alike units as at December 2014. That is a boat strap exercise;

b. the place of sale is not a relevant factor in the circumstances of this case;

c. 726 was not an ordinary everyday consumer of the services or equipment provided by CNC. It was a financier of CNC within the broader business arrangement referenced above. CNC typically sold its services to end-users;

d. even excluding the $7.2 million worth of assets referenced at para. 21(e) of the 726 Supplemental Brief that could be considered as part of this larger sale transaction, the sale of the Bonnyville Equipment constituted the sale of $20,000,000.00 worth of CNC's approximately $56,000,000.00 in equipment at that time, according to CNC's audited financial statements. The purchase included more than 80 actual units. If the Bonnyville Ancillary Equipment and applicable small wares were also included, then the transaction essentially constituted (with the exception of the Sand Tiger and Aurora units that were/are on-site) the sale of the entirety of the Bonnyville camp, which was already in place at the time of the transaction;

e. the price charged was obviously very significant;

f. CNC did not hold itself out to the public as a seller of dorms or alike units, and this transaction was not advertised; and

g. As discussed above, this sale formed a very significant percentage of CNC's existing equipment, and CNC did not appear to previously engage in the business of sales. Further, it does not appear that CNC ever replaced the Bonnyville Equipment with new items.

19. In all of the circumstances, the Monitor respectfully submits that the evidence shows that this sale was not in the ordinary course of business, and 726 has not met its onus in this respect.

b) Knowledge and Registration

20. As noted in the Monitor's earlier briefs, serial numbered registration in respect of the serial numbered units (largely the camp units) is not an issue. CWB did not effect a registration by serial number. However, that is only one part of the test and only applies to the serial numbered items. It does not apply in respect of the small wares or the Bonnyville Ancillary Equipment, none of which were required to be registered by way of serial number.

21. In respect of the applicable knowledge elements in section 30(2) and 30(6) of the *PPSA*, "knowledge" has a specific meaning. Pursuant to section 1(2), for the purposes of the *PPSA*, a corporation knows or has knowledge when information has come to the attention of a managing director or officer of the corporation, or a senior employee of the corporation with responsibility for matters, 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.

22. As a result, knowledge under the *PPSA* can be "constructive knowledge" since parties can be said to have the requisite knowledge of a fact even where they have no actual conscious knowledge of it, where a reasonable person would take cognizance of it.

23. Mr. Roman is an experienced businessman. He has an undergraduate degree in economics, a Masters in finance from Northeastern University in Boston, worked as a commercial loan officer at the Bank of Boston, started a national modular building company in the United States, now known as Mod Space, and is President and founder of Reliant Asset Management in 2010.

Roman Transcript, pg. 6, ll. 14 to 20

24. In this case, Mr. Roman first met Mr. McCracken sometime in the mid-summer of 2014. Initial discussions between the two entailed one of the 726 entities leasing assets to the Applicants or one of their entities to then turn around and sublease to companies for part of a camp. As part of the intended arrangements, Mr. Roman did due diligence on the various entities of the Canada North Group, which included reviewing their financial statements. He acknowledges having seen financial statements for year-ends September 30, 2013, 2014 and 2015.

Roman Transcript, pg. 11, ll. 2 to 12; pg. 12, ll. 14 to 16

25. As part of his Answers to Undertakings, Mr. Roman produced each of the financial statements in question. They are consolidated, for CNG and are audited.

Answer to Undertaking No. 1 of Barry Roman **[TAB 2-B, Transcript Book]**

26. Notes 5 and 6 to the Audited Consolidated Financial Statements for CNG for the year-ended September 30, 2013 confirmed on their face that short and long-term borrowings with CWB. Note 5 specifically indicates that the borrowings were then authorized to $19,000,000.00 and that these loans, in addition to the term debt outlined in Note 6 of the Financial Statements, were secured by a General Security Agreement.

CNG Consolidated Financial Statement, September 30, 2013, Notes 5 and 6 **[TAB 2-B, Transcript Book];** Roman Affidavit at Exhibit B; Roman Transcript at p. 17, ll. 9-15; Answer to Undertaking #1 of Barry Roman **[TAB 2-B, Transcript Book]**

27. It is the Monitor's submission that 726 has not met its onus to establish a lack of "knowledge" of the pre-existing CWB security interest for the following reasons:

a. 726 evaluated CNC's financial position at the time of entering into the transaction with CNC by virtue of having reviewed their financial statements;

Roman Transcript, p. 11, l. 24 to p. 12, l. 21

b. regardless of what is said in respect of the 2014 and 2015 financial statements, notes 5 and 6 of the 2013 statements make it clear that:

i. CWB had significant advances outstanding to the CNG on a consolidated basis; and
ii. CWB had security agreement in place securing the assets of the Group in favour of the Bank for the outstanding loans.

Answer to Undertaking #1 of Barry Roman **[TAB 2-B, Transcript Book]**

28. The Bill of Sale (Answer to McCracken Undertaking No. 20), the internal credit evaluation report (Answer to Roman Undertaking No. 9 and 12) make it clear that 726 intended to acquire the assets free and clear. The financial statements confirmed they were not. The financial statements were in the possession of 726 Remote at the relevant time.

Answer to Undertaking #20 of Paul McCracken **[TAB 1-B, Transcript Book]**
Answer to Undertaking #9 and #12 of Barry Roman **[TAB 2-G and 2-I, Transcript Book]**

29. The Courts have been clear that where there is a purchase of a large portion of the seller's stock, at least between one-third and half of the seller's stock, a purchaser should have reasonable alarm about whether the transaction was in the ordinary course of business and whether the assets are subject to prior security interests, such that the purchaser ought to have checked the Personal Property Registry to determine if there were prior security interests, and a purchaser's failure to do so does not relieve it of its constructive knowledge.

Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp., 2002 ABCA 79 at para. 16 **[TAB 7]**; *Spencer v. Jacques*, 2000 SKQB 321 at paras. 3 and 9 **[TAB 8]**

30. Accordingly, in this case, information about CWB's prior security interest came to the attention of 726 managing director or officer, Mr. Roman, under circumstances in which a reasonable person,

especially of his background and experience, would take cognizance of it. 726 reasonably ought to have consulted the Alberta Personal Property Registry, but did not do so. As such, 726 had the requisite knowledge of CWB's prior security interest in the Bonnyville Equipment, and did not take the Bonnyville Equipment free and clear pursuant to section 30 of the *PPSA*.

31. In respect of paragraph 31 of the 726 Supplemental Brief, the Monitor is unclear what is being argued. It was not the purchase of the Bonnyville Equipment that triggered 726's obligation to register in the PPR, but rather it was 726 entering into what in substance was a conditional sale that was subject to the *PPSA* with Bonnyville Lodge LP. At no point was 726 prevented from registering its interests in the PPR in respect of the Bonnyville Equipment.

32. The Monitor submits that the content of footnote 19 in the 726 Supplemental Brief is inappropriate. The arguments again raised in this footnote where extensively argued by this Honourable Court on January 10 and 11, 2019, and were rejected by the Court. Essentially, this argument is an improper attack on the Orders of January 10 and 11, 2019 granted by the Honourable Justice Hillier. The Monitor submits that this improper attack ought to be considered in respect of costs of these proceedings.

Issue 3: Bonnyville Lodge LP did acquire an interest in the Bonnyville Assets

33. The *PPSA* applies to "security interests", which are defined to mean interests in various named categories of collateral, including all types of personal property which secure "payment or performance" of an obligation.

34. Further, the *PPSA* applies to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, including without limitation conditional sales where they secure payment or performance of an obligation.

35. Thus, this Honourable Court is tasked to determine with the Bonnyville LPA creates, in substance, without regard to form or retention of title, creates a conditional sale or conditional sales between the Bonnyville Lodge LP and 726 (and Holdings).

36. Under Article 14 of the Bonnyville LPA:

   a. Holdings, or an affiliate of Holdings, was to provide the real property lands to Bonnyville Lodge LP "for a term" beginning on the "Effective Date" until such time as an aggregate profit distribution equal to $28,000,000.00 has been paid, at an aggregate cost of $1.00;

   b. 726 was to provide the Bonnyville Equipment to Bonnyville Lodge LP "for a period" until Bonnyville Lodge LP has made distributions to 726 of $20,000,000.00 (which the Monitor notes is the same as principal purchase price paid by 726 to CNC), followed by distributions to Holdings of $8,000,000.00; and

   c. At such time as Bonnyville Lodge LP made distributions to 726 of $20,000,000.00, followed by distributions to Holdings of $8,000,000.00, 726 "shall" transfer the Bonnyville Equipment and Holdings "shall" transfer the lands to Bonnyville Lodge LP free and clear of any encumbrances.

37. The fact that the Bonnyville LPA uses the phrase "distributions," as opposed to payments, does not mean that, in substance, the Bonnyville LPA does not effectively create a conditional sale, or conditional sales, of the Bonnyville Camp land and the Bonnyville Equipment. Nor does the fact that the Bonnyville LPA does not use the stereotypical purchase and sale language in its content or title change the substance of the agreement. The fact is that possession of the lands and Bonnyville Equipment were provided to Bonnyville Lodge LP immediately, and upon the satisfaction

of certain obligations, in this case $28,000,000.00 in total distributions between 726 and Holdings, 726 "shall" transfer the Bonnyville Equipment and Holdings "shall" transfer the lands to Bonnyville Lodge LP. The Bonnyville LPA is mandatory that title will transfer upon the distributions being made. That is, in substance, a conditional sale.

38. Bills of Sale are typically not provided in conditional sales until all payments are made, if ever.

39. The fact that Bonnyville Lodge LP might not ever actually end up paying that amount because there was never enough profit generated is, again in substance, not different from a more stereotypical form of conditional sale where the purchaser equally may not pay all amounts required and title is never changed from the vendor, who retakes possession.

40. The obligation secured by the Bonnyville LPA was to pay the sum of $20,000,000.00 to 726 and $8,000,000.00 to Holdings. Article 16.9 of the Bonnyville LPA does not, by language and terms, make such payments conditional, as suggested by 726. Rather, the obligation to make such distributions is present and mandatory by the terms of Article 16.9. Indeed, the opening provision in Article 16.9 states that all monies received by the general partner "shall be applied and disbursed as follows..."

41. Additionally:

a. in Article 16.10, the parties again confirmed that "all distributions shall be made" in accordance with Article 16.9; and

b. in Article 16.13, the parties agreed that the general partner "shall" within 120 days of the end of each fiscal year distribute to the partners cash in accordance with Article 16.9.

42. The Monitor agrees that ultimate timing of when such necessary distributions to 726 and Holdings will be completed is not certain pursuant to the Bonnyville LPA's terms, but that does not make the partnership's obligation to make such distributions conditional in any manner.

43. As such, the Bonnyville LPA secures the performance of Bonnyville Lodge LP's obligation to make distributions of $20,000,000.00 to 726 (the same amount as 726 paid for the Bonnyville Equipment) and $8,000,000.00 to Holdings, and upon such performance, the Bonnyville Equipment and lands were to be transferred to the partnership free and clear. This constitutes a conditional sale that is subject to the *PPSA*.

V. CONCLUSION AND RELIEF SOUGHT

44. The Monitor seeks the Court's advice and direction and confirmation to the effect that:

a. With respect to the entirety of the Bonnyville Transaction, the Assets purchased and claimed by the 726 Group remain subject to the security interest of CWB pursuant to the CWB CNC GSA and as such, CWB enjoys priority to the entirety of the Bonnyville Assets;

b. Alternatively, and on the facts, CNC appears to have priority to:

i. The Bonnyville Equipment;

ii. CNC still owns, or other has priority to all of the 726 Ancillary Equipment, and if not otherwise subject to the prior existing CWB security, the Farm Dorms and small wares claimed by 726; and

iii. CNC is the proper owner of at least the bidding claimed by Sand Tiger but seeks the Court's direction in respect to the priority to the remaining accessions in the Sand Tiger Dorms as being subject to CWB's priority.

45. The Monitor also respectfully reserves its right to request costs against 726 with respect to this application on a solicitor/client basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2019.

DUNCAN CRAIG LLP

Per: ______________________________

DARREN R. BIEGANEK Q.C./RYAN F.T. QUINLAN
Counsel for Ernst & Young Inc., in its capacity as Monitor of 667402 Alberta Ltd., 18512398 Alberta Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd.,1919209 Alberta Ltd., and Canada North Group LP Holdings Ltd., and not in its personal or corporate capacity

LIST OF AUTHORITIES

Tab

1. Transcript of Proceedings on January 11, 2019
2. *Pacific Mobile Corp., Re*, [1985] 1 S.C.R. 290
3. *Alberta Pacific Leasing Inc. v. Petro Equipment Sales Ltd.*, 1995 CarswellAlta 418
4. *85956 Holdings Ltd. v. Fayerman Bros. Ltd.*, 1986 CarswellSask 191
5. *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218
6. *Royal Bank v. Gatekeeper Leasing Ltd.*, 1993 CarswellBC 441
7. *Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.*, 2002 ABCA 79
8. *Spencer v. Jacques*, 2000 SKQB 321

TAB 1

Action No.: 1703-12327
E-File No.: EVQ19COMPANIES
Appeal No.: ________________

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

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

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

P R O C E E D I N G S

Edmonton, Alberta
January 11, 2019

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 403-7392   Fax: (403) 297-7034

The positions taken by the Monitor and by CWB, remain consistent with the earlier expressions by them as to uncertainty as to what the nature of the claim, as supported by documents would be, by 726. Each counsel expressly reserved the right, based on further clarification of evidence, as to the import and effect of the GSA's on ownership and priorities.

The questions that were put to witnesses as to the steps taken by legal counsel, were always relevant to the admittedly broad application of the Monitor, to deal with ownership, priorities and risks including in relation to municipal tax claims. I find nothing to be gained in asking Mr. McCracken about the ordinary course of business of CNC, regardless of which corporate entity might be used. As reported to CWB, Canada North Camps owned the equipment. The sale was for $20 million. The Court is satisfied that it has sufficient evidence to allow it to deal with the criteria set out in the legislation.

As to onus, it has always been for 726 to establish it's claim in these proceedings, on ownership and priority, and that's not changed since 2017. I'm in a position to hear your respective submissions on the remaining issues that have been presented to the Court for determination. Have you discussed how you're going to proceed?

MR. BIEGANEK: I think the -- consistent with how we've done it in the past, I haven't heard any objection, I would -- I would start and (INDISCERNIBLE) Monitor's position on everything, then you would likely hear from Canadian Western Bank, then 726, and hopefully we can get through that today.

THE COURT: Thank you, I'd be grateful for your submissions.

Submissions by Mr. Bieganek

MR. BIEGANEK: Right. Sir, I should have outlined this yesterday, but in terms of the material that the Court has, we've provided -- the Monitor has provided and I've actually put it on a buff-coloured material just for discrepancy purposes, a brief and a book of authorities. We also provided the Court with three binders, a book of documents which is largely, My Lord -- I've pulled exhibits from the various affidavits or -- or documents to try and make it a little easier to deal with, because as you can appreciate, there is a large volume. I don't think I captured all of them, but we've got most of them; a binder of exhibits including -- well not including two confidential exhibits which were provided in an envelope, I -- I trust Your Lordship has those, and then the binder of transcripts which appended to them, the answers to undertakings, in each; and then there's the further, obviously, the Monitor's reply brief.

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Heather Park Properties Ltd., Re | 2013 BCSC 2175, 2013 CarswellBC 3627, 236 A.C.W.S. (3d) 19, [2014] B.C.W.L.D. 522 | (B.C. S.C., Nov 29, 2013)

1985 CarswellQue 30
Supreme Court of Canada

Pacific Mobile Corp., Re

1985 CarswellQue 106, 1985 CarswellQue 30, [1985] 1 S.C.R. 290, [1985] S.C.J. No. 15, 16 D.L.R. (4th) 319, 30 A.C.W.S. (2d) 367, 55 C.B.R. (N.S.) 32, 57 N.R. 63, J.E. 85-368

Re PACIFIC MOBILE CORPORATION; ROBITAILLE v. AMERICAN BILTRITE (CANADA) LTEE

Dickson C.J.C., Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest JJ.

Heard: March 27 and 28, 1985
Judgment: April 4, 1985
Docket: No. 17286

Counsel: *L. Dorion* and *C. Fontaine*, for appellant.
D.B. Campbell and *G. Dumas*, for respondent.

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

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.d Time within which avoidable
XI.2.d.i General principles

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.e View to prefer
XI.2.e.iii Intention other than to prefer
XI.2.e.iii.C Transaction in ordinary course of business

Bills of exchange and negotiable instruments
III Cheques
III.9 Date of cheques
III.9.a General principles

Headnote

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — View to prefer — Intention other than to prefer — Transaction in ordinary course of business

Fraudulent preferences — Payment within three months before bankruptcy — Payment made after due date — Late payment normal for companies involved and standard within their industry — Payment made "in ordinary course of business".

The trustee sought to recover from the respondent creditor a payment to it with respect to an account which was overdue at the time payment was received. The payment was made within the three-month statutory period. At trial the trustee obtained an order annulling the payment as constituting fraudulent preference. The Court of Appeal (Lajoie J.A. dissenting) reversed the trial judgment. The trustee appealed.

Held:

Appeal dismissed.

In order to determine whether a certain transaction takes place in the "ordinary course of business", it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor. In this case the late payment made was not only normal in the context of the business relationship of the parties but was also standard for the particular industry.

Table of Authorities

Cases considered:

Hudson v. Benallack, [1976] 2 S.C.R. 168, 21 C.B.R. (N.S.) 111, [1975] 6 W.W.R. 109, 59 D.L.R. (3d) 1, 7 N.R. 19 — *distinguished*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73.

Words and phrases considered:

ORDINARY COURSE OF BUSINESS

It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" [in s. 73 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3] for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on between the debtor and creditor.

We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business" at p. 205 [44 C.B.R. (N.S.) 190 (Que. C.A.)]:

It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact. With all due respect, however, I do not thick that it can be said that a payment that is not made when due cannot be regarded as having been made in the ordinary course of business.

Appeal from judgment of Quebec Court of Appeal, [1982] C.A. 501, 44 C.B.R. (N.S.) 190, 141 D.L.R. (3d) 696, allowing appeal from judgment of Jacques J. (1979), 34 C.B.R. (N.S.) 8, requiring creditor to pay proceeds of preferential payment to trustee.

***Per curiam*:**

1 This appeal raises two narrow questions in the area of bankruptcy law. First, what is meant by the term "ordinary course of business" in the context of s. 73 of the Bankruptcy Act R.S.C. 1970, c. B-3. Second, was the overdue payment in this case

made in the "ordinary course of business".

2 We are all of the view, for the reasons set out by Monet J.A. of the Quebec Court of Appeal [44 C.B.R. (N.S.) 190, 141 D.L.R. (3d) 696, reversing 34 C.B.R. (N.S.) 8], that this appeal must fail.

3 It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on between the debtor and creditor.

4 We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business" at p. 205:

> Il ressort de ces autorités, me semble-t-il, que, d'une part, la notion qui nous concerne est une notion abstraite et que, d'autre part, les tribunaux ont pour mission d'apprécier les circonstances propres à chaque espèce afin de déterminer la *qualification* d'une transaction donnée. C'est, en somme, le va-et-vient perpétuel entre le droit et le fait. Mais, avec égards, je crois qu'on ne peut pas affirmer qu'un paiement qui n'est pas fait à échéance ne peut être considéré comme ayant été fait dans le cours ordinaire des affaires.

5 In this case, it is clear, based on the evidence adduced, that the payment was made in the ordinary course of business. The late payment by Pacific Mobile to American Biltrite was not only normal in the context of their business relationship, but was also standard for their particular industry.

6 In his factum, as well as in oral argument, the appellant relied upon this court's decision in *Hudson v. Benallack*, [1976] 2 S.C.R. 168, 21 C.B.R. (N.S.) 111, [1975] 6 W.W.R. 109, 59 D.L.R. (3d) 1, 7 N.R. 119, to interpret the term "ordinary course of business". He placed particular emphasis on the following passage at pp. 175-76:

> The object of the bankruptcy law is to ensure the division of the property of the debtor rateably among all his creditors in the event of his bankruptcy. Section 112 of the Act provides that, subject to the Act, all claims proved in the bankruptcy shall be paid *pari passu*. The Act is intended to put all creditors upon an equal footing. Generally, until a debtor is insolvent or has an act of bankruptcy in contemplation, he is quite free to deal with his property as he wills and he may prefer one creditor over another but, upon becoming insolvent, he can no longer do any act out of the ordinary course of business which has the effect of preferring a particular creditor over other creditors. If one creditor receives a preference over other creditors as a result of the debtor acting intentionally and in fraud of the law, this defeats the equality of the bankruptcy laws.

7 In our view, the appellant has incorrectly interpreted the above passage. *Hudson*, dealt with one point only: whether the words "with a view to giving such creditor a preference", contained in s. 73(1) of the Bankruptcy Act, require an intention on the part of the insolvent debtor alone to prefer or a concurrent intent on the part of both the debtor and creditor. The court held that only the intention of the debtor was relevant. That case did not, in any way, consider or determine the meaning of the term "ordinary course of business" and is, therefore, not helpful in the resolution of the issues at hand.

Conclusion

8 For the reasons set out by Monet J.A. of the Quebec Court of Appeal, the payment made by Pacific Mobile to American Biltrite was a payment made in the "ordinary course of business". Therefore, the payment is not void as against the appellant under s. 73 of the Bankruptcy Act. The appeal is accordingly dismissed with costs.

Appeal dismissed.

TAB 3

1995 CarswellAlta 418
Alberta Court of Queen's Bench

Alberta Pacific Leasing Inc. v. Petro Equipment Sales Ltd.

1995 CarswellAlta 418, [1995] A.W.L.D. 1029, [1996] 1 W.W.R. 552, 10 P.P.S.A.C. (2d) 69, 175 A.R. 175, 34 Alta. L.R. (3d) 66, 58 A.C.W.S. (3d) 143

ALBERTA PACIFIC LEASING INC. v. PETRO EQUIPMENT SALES LTD.

Master Quinn [in Chambers]

Judgment: September 29, 1995
Docket: Doc. Edmonton 9503 14442

Counsel: *M.D. Roberts*, for Alberta Pacific Leasing Inc.
I.W. Reynolds, for Petro Equipment Sales Ltd.

Subject: Insolvency; Corporate and Commercial; Property

Related Abridgment Classifications

Personal property security
IV Priority of security interest
IV.2 Perfected versus unperfected interest

Personal property security
V Disposition of collateral by debtor
V.3 Sale in ordinary course of business

Headnote

Personal Property Security --- Disposition of collateral by debtor — Sale in ordinary course of business

Personal Property Security --- Priority of security interest — Perfected versus unperfected interest

Personal property security — Security interests under Personal Property Security Acts — Priorities — Vendor being in business of renting, repairing and rebuilding cranes but occasionally selling crane if becoming obsolete or no one wanting to rent it — Others in crane rental business doing same thing — Vendor selling crane to purchaser — Purchaser unaware of prior registered security interest — Sale of cranes in circumstances being sales in ordinary course of business of vendor — Purchaser being entitled to priority.

The vendor was in the business of renting, repairing and rebuilding cranes. Occasionally, it would sell a crane that it normally rented out if the crane became obsolete or deteriorated beyond its useful life or if there ceased to be an interest in renting it. Others in the crane rental business did the same thing. The vendor sold such a crane to the purchaser. Unknown to the purchaser, the crane was subject to a registered security interest. The secured party applied for a declaration confirming its priority over the crane.

Held:

Application dismissed.

While it was apparent that the sale of cranes was a small part of the vendor's business, that did not mean that the sale of the crane to the purchaser was not made in the ordinary course of business. While the vendor preferred to rent cranes, it would also sell them, if it was deemed to be in its best economic interests to do so. The sale of cranes under those circumstances were sales in the ordinary course of business of the vendor. Accordingly, the purchaser was entitled to priority over the crane, since it had no knowledge of the prior security interest.

Table of Authorities

Cases considered:

Camco Inc. v. Frances Olson Realty (1979) Ltd., [1986] 6 W.W.R. 258, 6 P.P.S.A.C. 167, 50 Sask. R. 161 (C.A.) — *considered*

David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of), 21 Alta. L.R. (3d) 107, [1994] 9 W.W.R. 680, 27 C.B.R. (3d) 252, 8 P.P.S.A.C. (2d) 112, (sub nom. *Re North Sky Trading Inc. (Bankrupt))* 158 A.R. 117 (Q.B.) — *referred to*

Fairline Boats Ltd. v. Leger (1980), 1 P.P.S.A.C. 218 (Ont. H.C.) — *considered*

Statutes considered:

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

s. 30(2)*considered*

Personal Property Security Act, S.S. 1979-80, c. P-6.1

s. 30(1)*referred to*

Words and phrases considered:

sale in the ordinary course of business

Application by secured creditor for declaration confirming priority over secured item.

***Master Quinn*:**

1 This case involves s. 30(2) of P.P.S.A. [*Personal Property Security Act*] which is as follows:

(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.

2 Universal Crane Service Ltd. ("Universal") sold a crane to Petro Equipment Sales Ltd. ("Petro").

3 There is now a contest between Alberta Pacific Leasing Inc. ("Pacific") and Petro as to which of them has priority in respect to the crane. Pacific had a perfected security agreement on the crane. The uncontested evidence of Petro is that it had no knowledge of Pacific's security interest or that the sale from Universal to Petro constituted a breach of such security agreement.

4 Was the sale from Universal to Petro a sale in the ordinary course of business of the seller, Universal? The answer to

that question will determine the outcome of this application.

5 In the Cuming and Wood, *Alberta Personal Property Security Act Handbook* (second edition), at pp. 221-22 the learned authors say:

> Sales in the ordinary course of business include sales to the public at large. They are of the type normally made by vendors in the business of selling goods of that kind where the business dealings between the buyers and sellers are carried out under normal terms and consistent with general commercial practices. It does not include private sales between individuals. It can, however, include sale between sellers who ordinarily do not sell to each other but to the general public. Although section 30(2) will in practice apply primarily to sales of inventory, it is not as a matter of law so limited.
>
> Section 30(2) protects a buyer of goods sold in the ordinary course of business "of the seller". Section 30(2) focuses on the business of the seller and not the manner in which goods of the kind involved are generally sold. A sale of the goods by a contractor who, as part of her business, sells houses equipped with appliances falls within section 30(2). Household appliances are ordinarily sold in retail stores. However, this does not prevent the section from applying, since the sale is part of the ordinary business of the particular seller in question. [Footnotes omitted.]

6 Affidavits of Richard Woroschuk, the secretary of Pacific, and of Luke LaCoursiere, president of Universal, are filed in support of the Pacific application for a declaration that Pacific has a valid and subsisting security interest in the crane and that Pacific has an interest in the crane prior to any interest of Petro.

7 Woroschuk deposes that lease payments owed by Universal to Pacific were in arrears in early 1995. In February 1995 he was informed by LaCoursiere that the crane had been sold to Petro.

8 In his affidavit LaCoursiere deposes to the following facts:

9 (a) That Universal was engaged in the business of renting, repairing and rebuilding cranes.

10 (b) That Universal owned ten cranes in 1994 which were available for rental.

11 (c) That Universal would sell a crane if it became obsolete or had deteriorated beyond its useful life or if Universal experienced difficulty in renting it out and that others in the crane rental business did the same thing.

12 (d) That an advertisement for sale of the crane was placed in the *Bargain Finder Press*.

13 (e) That the crane was leased to Petro with an option to purchase, and that Petro exercised the option.

14 (g) That the sale to Petro was the only sale of a crane he made in 1994.

15 (h) That 1994 was the last year of operation of Universal.

16 On cross-examination on his affidavit he admits another sale may have been made by someone else at Universal.

17 In *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.), Linden J. said at p. 222:

> Thus in deciding whether a transaction is one that is in the ordinary course of business, the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact. (See the Ziegel article, supra, at p. 86.) The usual, or regular type of transaction that people in the seller's business engage in must be evaluated. If the transaction is one that is not normally entered into by people in the seller's business, then it is not in the ordinary course of business. If those in the seller's business ordinarily do enter into such agreements, then, even though it may not be the most common type of contract, it may still be one in the ordinary course of business.

18 Linden J. goes on to identify a number of factors which can usefully be considered in determining whether a sale is a sale in the ordinary course of business, i.e.:

19 i) Transaction type: the transaction should be one that is a normal part of the seller's business;

20 ii) Place of Sale: "If it is at the business premises of the seller it is more likely to be in the ordinary course of business. If it is away from the business premises of the seller, in suspicious circumstances for example, a court may hold that it is not in the ordinary course of business";

21 iii) Parties to the Transaction: "If the buyer is an ordinary, everyday consumer, the likelihood of his being involved in a sale in the ordinary course of business is greater. If the buyer is not an ordinary consumer, but a dealer or a financial institution, then the Court may take this out of the ordinary course of business";

22 iv) Quantity of the Goods Sold: "If there is only one or a few articles sold in the ordinary way, the Court is more likely to hold this to be a sale in the ordinary course of business. On the other hand, if a large quantity of items are sold, many more than are sold in the ordinary course of business and perhaps forming a substantial proportion of the stock of the seller, then the Court is less likely to consider it to be in the ordinary course of business";

23 v) Price Charged: "if the price charged is in the range of the usual market price, courts are more likely to consider the sale in the ordinary course of business, whereas if the price is unduly low, the courts may hold that this is not a transaction in the ordinary course of business";

24 vi) Advertising: if the seller advertises to the public, holding itself out as conducting a certain business, then the transaction is more likely one held to be in the ordinary course of business; and

25 vii) Percentage of Overall Volume of Sales: even if the sale forms a small percentage of the overall business, and is indirect and incidental to the main business it may still be in the ordinary course of business.

26 This list is not intended to be exhaustive and other criteria may also be useful.

27 All of these criteria when applied to the facts of this case point toward the sale being one made in the ordinary course of business.

28 Counsel for Pacific submits that the sale of cranes was not part of the business of Universal, but that contradicts the evidence of LaCoursiere who said that Universal did sometimes sell cranes and that others in the crane rental business did so as well. That the sale of cranes was a small part of Universal's business does not support the conclusion that the sale of the crane in question was not a sale in the ordinary course of its business. See *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)* (1994), 21 Alta. L.R. (3d) 107 [[1994] 9 W.W.R. 680] (Q.B.), para. 19 on p. 113.

29 Counsel have referred me to certain parts of the cross-examination on the affidavit of Luke LaCoursiere. At p. 13 line 22 to p. 16 line 6 the following questions and answers appear:

Q. Well I am going to show you, sir, a copy of that advertisement right there, sir, of Universal and it's from the Edmonton Yellow Pages. Could you tell me whether that advertisement depicts what Universal does? This is an ad for Universal, is it not? So this is your company that you were president and —

A. That's right.

Q. — the director of.

And this ad would have been placed in, let's say, let's assume for the simple sake of only 1994, for the moment.

A. 1994. And that's all we did was certifications, rebuilding cranes and crane service.

Q. So you were involved in certification of the cranes, is that right?

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Martin v. F.P. Bourgault Industries Air Seeder Division Ltd. | 1987 CarswellSask 40, [1987] C.L.D. 1465, 45 D.L.R. (4th) 296, 62 Sask. R. 297, 7 A.C.W.S. (3d) 77, 38 B.L.R. 90 | (Sask. C.A., Sep 17, 1987)

1986 CarswellSask 191
Saskatchewan Court of Appeal

85956 Holdings Ltd. v. Fayerman Bros. Ltd.

1986 CarswellSask 191, [1986] 2 W.W.R. 754, 25 D.L.R. (4th) 119, 32 B.L.R. 204, 36 A.C.W.S. (2d) 258, 46 Sask. R. 75

85956 HOLDINGS LTD. v. FAYERMAN BROTHERS LIMITED

Brownridge, Tallis and Vancise JJ.A.

Judgment: January 17, 1986
Docket: No. 8739

Counsel: *J. Sanderson, Q.C.*, for appellant.
J. Beckman, for respondent.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
  III.3 Shareholders
    III.3.e Shareholders' remedies
      III.3.e.iv Dissenting shareholders
        III.3.e.iv.A Appraisal remedy

Headnote

Corporations — Actions by and against corporations — Shareholders' actions — Dissenting shareholders — Majority of shareholders resolving to sell inventory in normal manner and to purchase no replacement inventory — Purpose of sales being to discontinue business operations — Court to determine on qualitative basis whether company selling substantially all its assets — Sale of inventory outside normal course of business and effectively destroying business — Shareholder disagreeing with resolution being a dissenting shareholder within meaning of s. 184 of Saskatchewan Business Corporations Act.

The corporate respondent was a wholesale-retail merchant. A majority of its shareholders resolved to carry on the sale operations in a normal manner, but to purchase no further inventory. The company's inventory was approximately one third of its total assets. The company's real estate was to be retained until the real estate market recovered. The ultimate goal was to dispose of all inventory and discontinue business operations. The applicant shareholder obtained an order fixing a value for its shares as a dissenting shareholder. The company appealed.

Held:

Appeal dismissed.

The applicant was a dissenting shareholder within the meaning of ss. 183(2) and 184 of the Saskatchewan Business Corporations Act because the company resolved to sell, lease or exchange all or substantially all of its property other than in the ordinary course of business. For a transaction to be in the ordinary course of business under s. 183(2) it must have no unusual or special features and be such that a manager of the business might reasonably be expected to be permitted to carry it out on his own initiative. In this case, although the sale was to occur in the usual manner and over time, it was not in the regular course of business because the inventory was not to be replaced. As the sale would result in the liquidation of the company's operations, it had unusual features and was conduct for which a manager would require approval. Whether a sale is of all or substantially all of the company's assets is a question that must be determined on a qualitative rather than a quantitative basis. As sale of the inventory would destroy the corporate business, it was a sale of substantially all of the company's assets.

Table of Authorities

Cases considered:

Bradford Roofing Indust. Property Ltd., Re, [1966] 1 N.S.W.R. 674, 84 W.N. (N.S.W.) 276 (S.C.) — *applied*

Campbell v. Vose, 515 F. 2d 256 (U.S.C.A., 10th Circ., 1975) — *applied*

Cotton v. Imp. & Foreign Agency & Invt. Corp., [1892] 3 Ch. 454 — *referred to*

Good v. Lackawanna Leather Co., 233 A. 2d 201 (N.J. Superior Ct., 1967) — *applied*

Stiles v. Aluminum Product Co., 338 Ill. App. 48, 86 N.E. 2d 887 (C.A., 1949) [rehearing denied 1st July 1949]*applied*

Statutes considered:

Business Corporations Act, R.S.S. 1978, c. B-10, ss. 183(2), (7), 184 [am. 1979, c. 6, s. 47; 1983, c. 37, s. 15].

Companies Act, 1961 (New South Wales).

Words and phrases considered:

SALE IN ORDINARY COURSE OF BUSINESS

The sale contemplated here was not a sale in the regular course of business. It was a sale in the normal way, that is, a sale by the corporation to its customers of merchandise it regularly stocked but with the difference that the merchandise was not to be replaced. It was not a sale in the ordinary course of its business [within the meaning of s. 183 of the *Business Corporations Act*, R.S.S. 1878, c. B-10] but a liquidation sale — a sale of all the inventory . . . What is important is that the sale was not an ordinary sale; it was a sale with unusual features, i.e., the liquidation of inventory which would result in the liquidation of the operating arm of the company.

SUBSTANTIALLY ALL

If one examines the sale from a purely quantitative perspective, that is, a percentage of the total assets of the company which have been sold, it is obvious that "substantially all of the assets" have not been sold. In my opinion, the issue cannot be determined on a quantitative basis. The purpose of the statutes like the one under consideration was to protect the shareholders from a fundamental change in the corporation and to ensure that the means to accomplish the object of the corporation were not impaired . . . The phrase "substantially all" [in s. 184(1)(e) of the *Business Corporations Act*, R.S.S. 1978, c. B-10] is . . . intended to mean a sale which would effectively destroy the corporate business.

Appeal by company from order of Geatros J., [1985] 2 W.W.R. 647, 38 Sask. R. 64, fixing value for shares of dissenting shareholder.

The judgment of the court was delivered by *Vancise J.A.*:

1 The appellant appeals a fiat of Geatros J., wherein he found the respondent was a dissenting shareholder as contemplated by s. 184 of the Business Corporations Act, R.S.S. 1978, c. B-10, and that it was entitled to be paid the face value of the shares it owned in the appellant company [reported at [1985] 2 W.W.R. 647, 38 Sask. R. 64].

2 The facts are straightforward and not in dispute. The appellant is a wholesale-retail merchant carrying on business in the city of Prince Albert. The business was operated for many years by Sidney and Joseph Fayerman. Their health was failing and they were finding it increasingly difficult to compete with the chain stores and lumberyards which had entered the market-place in direct competition with Fayerman Brothers Limited.

3 A notice of the annual meeting of the appellant company was sent to all shareholders. That notice contained a notification that the shareholders would be invited to consider the recommendation of the directors of the company to discontinue its business operations and effect a liquidation of its inventory and to adopt said recommendations. A management position outline accompanied the notice of the meeting. At the annual meeting of the shareholders held on 24th June 1984, management recommended that the business continue to operate but that no further inventory be purchased. That item was discussed and the following resolution adopted by a majority of shareholders:

> Item 3 of the notice of meeting was discussed and it was decided to continue to operate the business as to sales in the normal manner, but no further inventory to be purchased unless for a special order. If the business is unable to eventually dispose of all of the inventory [such inventory shall] be disposed of by the managers in whatever way will generate the best return. The real estate of the Company should be retained at least until the real estate market recovers, and then the shareholders to decide what to do with the real estate.

4 The respondent opposed the motion to discontinue buying inventory. When the motion passed, the respondent through its authorized representative requested that the appellant consider buying its shares. After discussion by the other shareholders during which time the respondent's representative was not present, the respondent was informed that the appellant was not prepared to buy its shares.

5 The respondent instructed its solicitors to file the notice contemplated by s. 184(7) demanding payment of the fair value of its shares. It is admitted by the appellant that all notices required to be served by the respondent pursuant to s. 184 were served within the time frames required.

Issue

6 The sole issue on this appeal is whether the respondent is a dissenting shareholder. If the appellant has resolved to sell all or substantially all of its business other than in the ordinary course of business, such a sale requires approval of the shareholders pursuant to s. 183(2) of the Act. If the course of action contemplated by the appellant corporation is a sale in the ordinary course of business, the respondent is not a dissenting shareholder and not entitled to be bought out at fair value. The relevant sections of the Business Corporations Act are:

> 183. — (1) ...
>
> (2) A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (3) to (7) ...
>
> (7) A sale, lease or exchange referred to in subsection (2) is adopted when the holders of each class or series entitled to vote thereon have approved of the sale, lease or exchange by a special resolution ...
>
> 184. — (1) ... a holder of shares of any class of a corporation may dissent if the corporation ... resolves to ...
>
> (*e*) sell, lease or exchange all or substantially all its property under subsection 183(2) ...
>
> (16) If a corporation fails to apply to a court under subsection (15), a dissenting shareholder may apply to a court for the

same purpose within a further period of twenty days or within any further period of time that the court may allow.

7 In order to determine whether the respondent is a dissenting shareholder, one must answer a number of questions:

1. Is this a sale of all or substantially all of the appellant's property?

2. Is this a sale in the ordinary course of business?

I will consider those matters in reverse order.

1. Sale in the ordinary course of business

8 Before a shareholder has a right to dissent as contemplated by s. 184 of the Act, the corporation must resolve, inter alia, to do one of the things enumerated in s. 1(*a*) to (*e*) inclusive. For our purposes there must be a resolution to sell all or substantially all of the corporation's property.

9 Historically, the sale of all of the assets of an ongoing business required the consent of all the shareholders. That was based on the theory of implied contract between the shareholders to pursue the business for which the corporation was formed. A sale of the assets would destroy that corporate purpose and therefore could not be consummated without mutual agreement to cancel the contract: see *Cotton v. Imp. & Foreign Agency & Invt. Corp.*, [1892] 3 Ch. 454.

10 A dissenting shareholder could demand an exorbitant price for his concurring vote and exercise influence on the company beyond the extent of his interest. The common law rule was altered to allow disposition in certain circumstances, and a sale of all or substantially all of the property of the corporation made in the ordinary course of business did not require shareholder approval.

11 Before determining whether this transaction is a sale of substantially all of the property of the corporation, it is necessary to determine whether the sale is outside the regular course of business. In order to answer this question, which is a question of fact, one must determine what the corporation's regular business is. The evidence does not contain a certificate of incorporation or a certificate of continuance which describes the kind and type of business the corporation was engaged in. In order to determine what business the corporation was engaged in, one must examine the actual operation of the corporation as opposed to relying on how the corporation styled itself. Here the company was engaged in the business of a wholesale distributor of hardware, plumbing and electrical supplies. It operated a contract division which supplied finishing and architectural hardware. Normally, the corporation would purchase inventory and stock and resell it to its customers. The business was an ongoing operation selling merchandise of a particular kind at both wholesale and retail.

12 The sale contemplated here was not a sale in the regular course of business. It was a sale in the normal way, that is, a sale by the corporation to its customers of merchandise it regularly stocked but with the difference that the merchandise was not to be replaced. It was not a sale in the regular course of its business but a liquidation sale — a sale of all the inventory. It matters not, in my opinion, that the sale took place over time and involved a large number of sales as opposed to one massive sale of inventory. What is important is that the sale was not an ordinary sale; it was a sale with unusual features, i.e., the liquidation of the inventory which would result in the liquidation of the operating arm of the company.

13 A similar question was considered in *Re Bradford Roofing Indust. Property Ltd.*, [1966] 1 N.S.W.R. 674, 84 W.N. (N.S.W.) 276 (S.C.). There the court had to consider a section of the New South Wales Companies Act, 1961, which prohibited managers from disposing of any of a company's assets without leave of a court, "save in the ordinary course of the company's business". The court defined that phrase as follows:

> Perhaps a satisfactory working phrase to describe the particular concept enacted in S. 207(1) is that the transaction must be one of the ordinary day-to-day business activities, having no unusual or special features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities such as, for example, to his board of directors.

TAB 5

1980 CarswellOnt 607
Ontario Supreme Court, High Court of Justice

Fairline Boats Ltd. v. Leger

1980 CarswellOnt 607, [1980] O.J. No. 216, 1 P.P.S.A.C. 218

FAIRLINE BOATS LTD. v. LEGER et al.

Linden J.

Judgment: November 10, 1980

Counsel: *R.G. Renzini*, for plaintiff.
M.G. Woods, for defendants.

Subject: Insolvency; Property; Corporate and Commercial

Related Abridgment Classifications

Personal property security
V Disposition of collateral by debtor
V.3 Sale in ordinary course of business

Headnote

Personal Property Security --- Disposition of collateral by debtor — Sale in ordinary course of business

Linden J. **(orally):**

1 This is an action in which the plaintiff, a boat manufacturer, seeks possession of a 22-foot cabin cruiser from the defendant boating dealer who claims to have purchased it "in the ordinary course of business" from a third person, Blair, who was the original purchaser of the boat.

2 The plaintiff contends that The Personal Property Security Act, R.S.O. 1970, c. 344, provisions were complied with and that the defendant purchased the boat from Blair subject to the interests of the plaintiff, notice of which was duly registered, and that Leger must therefore return it. The Fairline Holiday 22-foot silvergray cabin cruiser which is the subject of this litigation was built by the plaintiff in the spring of 1979 and sold to Blair Mower Marine and Cycle for $24,379.99, including many accessories. A conditional sales contract dated July 5, 1979 was entered into and this contract was assigned to Finance America Private Brands Limited, which is a financing organization that deals in such matters.

3 The purchaser, Blair, had earlier entered into a security agreement dated December 7, 1978 with Finance America, which covered all Fairline boats located at Blair's place of business, 6595 Drummond Road in Niagara Falls, Ontario. A financing statement was registered pursuant to The Personal Property Security Act against the inventory of Blair Mower and against Blair personally on December 13, 1978, and this was amended slightly on December 18, 1978 in a document registered on that day. In the fall of 1979 Blair Mower went into default on its obligation to Finance America. Finance America, in a letter dated September 26, 1979 recommended to Fairline that they repossess the cabin cruiser. This was done immediately by Fairline, who took the boat away from Blair and placed it at Dawson's Marina at Keswick, Ontario, on

September 8, 1979, in the hope that it could be sold by Mr. Dawson for a 10 per cent commission during a sale of boats that was taking place there at that time.

4 John Blair somehow retrieved the cabin cruiser from Dawson's Marina in early October and purported to sell it to the defendant, Leger. The boat was placed on Leger's business premises in St. Charles, Ontario, near Sudbury. When this was discovered by Finance America, they attended, along with an officer of Fairline, at Leger's place of business and tried to repossess the boat. Leger refused to deliver it up, insisting that he had legally purchased it from Blair for $15,000 and that he was entitled to keep it.

5 Following this, an assignment agreement was entered into on October 16, 1979, whereby Finance America assigned its rights under the conditional sales agreement back to Fairline in return for payment in full of the amount owing, $25,494.01, which was the full price of the boat including interest charges until that date. This action was commenced on October 26, 1979, by Fairline to retrieve the cabin cruiser, or in the alternative, for damages, but counsel has elected to seek the return of the boat rather than any damage award.

6 Although the defendant made some technical arguments in relation to the validity of the security under The Personal Property Security Act, I find that there were no irregularities such as to render invalid the claim of the plaintiff. I also find that the security was perfected in accordance with The Personal Property Security Act, and that the interest of Finance America was properly transferred to the plaintiff to enable it to bring this action.

7 The key issue in the case then is whether the sale to Leger by Blair was **one** which was "in the ordinary course of business" so as to come within s. 30, subs. (**1**) of The Personal Property Security Act, which reads as follows:

> 30. — (**1**) A purchaser of goods from a seller who sells the goods in the ordinary course of business takes them free from any security interest therein given by his seller even though it is perfected and the purchaser actually knows of it.

If the sale was in the ordinary course of business, then Leger received clear title, even though the security interest was registered. If it was not in the ordinary course of business, then Leger took subject to the interest of the plaintiff, since the registration of the document took place on December 13, 1978, and December 18, 1978, long before the date of this sale to Leger on October 3, 1979, or such other date in that period as the sale actually took place upon.

8 The objective of this section, as I understand it, is to permit commerce to proceed expeditiously without the need for purchasers of goods to check into the titles of sellers in the ordinary course of their business. Purchasers are allowed by our law to rely on sellers using the proceeds of sales to repay any liens on the property sold. In these days inventory is almost invariably financed, and as a result is almost invariably subject to liens of **one** kind or another. To require searches and other measures to protect lenders in every transaction would stultify commercial dealings, and so the Legislature exempts buyers in the ordinary course of business from these onerous provisions, even where they know that a lien is in existence. The risk is placed on lenders of an occasional dishonest dealer who may sell some of his goods in the ordinary course of business and then fail to repay the debt because "he is in a much better position than the buyer to weigh the risks." (See the monumental article by Professor Jacob Ziegel, *The Legal Problems of Wholesale Financing of Durable Goods in Canada* (1963), 41 Can. Bar Rev. 54 at 85.) Some protection is given to security holders by denying reliance on this section to those who do not buy in the ordinary course of business.

9 What then is a sale "in the ordinary course of business"? Mr. Fred Catzman et al. in the book, Personal Property Security Law in Ontario (1976), explains that this language was taken from the older predecessor legislation and from the jurisprudence based thereon which used such language as "ordinary" or "regular" or "usual" course of business. Catzman suggests at p. 144-45:

> The person whose conduct is claimed to come under the description must be engaged in carrying on a business, that business must involve as subjects of traffic things of the class in which the item dealt in falls, and the basis of dealing must be on the normal terms of dealing with that class of items in that type of business. General commercial practice rather than the dealer's particular operating methods is the criterion.
>
> . . . . .
>
> The market for goods is the public at large buying for a variety of purposes, non-business as well as business, and a buyer should not be called on to show more than what he bought in the same way as the seller's customers generally.

10 The authorities on the new Act are non-existent, and even the older authorities are slim indeed, but cases decided before the new Personal Property Security Act have held that there is an implied authority to sell encumbered goods as long as it is in the ordinary course of business. (See McRuer C.J.H.C. in *Ins. & Discount Corp. v. Motorville Car Sales*, [1953] O.R. 16, [1953] 1 D.L.R. 560, affirmed [1953] O.W.N. 828, [1953] 4 D.L.R. 576 (C.A.). If sales are made in fraudulent circumstances in order to abscond with the proceeds, a court may hold that this is not within the implied authority of the seller (*ibid.*). Similarly, if a car dealer sells five cars to another car dealer for the express purpose of raising money to lessen the financial pressure that he was under at the time, this was held not to be a sale in the ordinary course of business and a search must be made by the buyer to protect himself. (See *McDonald v. Can. Accept. Corp.*, [1955] O.R. 874, [1955] 5 D.L.R. 344 (C.A.).) The Court felt that:

> ... a few such sales for such purpose would be materially to impair the mortgage security if not to destroy it altogether. A licence calculated to bring about such a devastating result is not to be imported into the instruments in derogation of the terms creating the security.

(See Aylesworth J.A. at p. 882 [O.R.].) So too, when a car is sold without delivery of a transfer of the ownership permit at the time, or shortly thereafter, this has been held not to be a sale in the ordinary course of business. (See *Rider v. Bank of Montreal; Hunt v. Bank of Montreal; Partridge v. Bank of Montreal*, [1965] 1 O.R. 69.)

11 On the other hand cases have held that the pledging of goods by a factor can be in the ordinary course of business. (*Peoples' Credit Jewellers Ltd. v. Melvin*, [1933] O.W.N. 76, 59 C.C.C. 161, [1933] 1 D.L.R. 598.) Furthermore, a sale of a car by **one** used car dealer to another can also be a sale in the ordinary course of business. (See *Lipman v. Traders Finance Corp.*, [1951] O.R. 838, [1952] 1 D.L.R. 326.) This may be so even if the purchase is after hours and is also for a substantial quantity sold to another dealer with whom the seller had previous dealings. (See also *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.*, [1965] A.C. 867, [1965] 2 All E.R. 105 (P.C.): 29 cars sold, but under a different statutory regime.)

12 Thus in deciding whether a transaction is **one** that is in the ordinary course of business, the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact. (See the Ziegel article, supra, at p. 86.) The usual, or regular type of transaction that people in the seller's business engage in must be evaluated. If the transaction is **one** that is not normally entered into by people in the seller's business, then it is not in the ordinary course of business. If those in the seller's business ordinarily do enter into such agreements, then, even though it may not be the most common type of contract, it may still be **one** in the ordinary course of business.

13 **One** factor that must be examined is where the agreement is made. If it is at the business premises of the seller it is more likely to be in the ordinary course of business. If it is away from the business premises of the seller, in suspicious circumstances for example, a court may hold that it is not in the ordinary course of business.

14 The parties to the sale may also be significant, although certainly not controlling. If the buyer is an ordinary, everyday consumer, the likelihood of his being involved in a sale in the ordinary course of business is greater. If the buyer is not an ordinary consumer, but a dealer or financial institution, then the Court may take this out of the ordinary course of business, but not necessarily so because dealers and others too may, in proper circumstances, receive the benefit of the provision.

15 The quantity of the goods sold must also be considered, although this too is not definitive. If there is only **one** or a few articles sold in the ordinary way, the Court is more likely to hold this to be a sale in the ordinary course of business. On the other hand, if a large quantity of items are sold, many more than are sold in the ordinary course of business, and perhaps forming a substantial proportion of the stock of the seller, then the Court is less likely to consider it to be in the ordinary course of business.

16 The price charged for the goods must also be examined, thus if the price charged is in the range of the usual market price, courts are more likely to consider the sale in the ordinary course of business, whereas if the price is unduly low, the courts may hold that this is not a transaction in the ordinary course of business.

17 There are other circumstances and factors in each sale that may also be viewed by the Court in determining whether, on all of the facts of the case, the sale in question is in the ordinary course of business.

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Wheatland Industries (1990) Ltd. v. Baschuk | 1994 CarswellSask 89, 127 Sask. R. 178, 8 P.P.S.A.C. (2d) 247, 52 A.C.W.S. (3d) 662 | (Sask. Q.B., Dec 5, 1994)

1993 CarswellBC 441
British Columbia Supreme Court

Royal Bank v. Gatekeeper Leasing Ltd.

1993 CarswellBC 441, [1994] 6 W.W.R. 706, [1994] B.C.W.L.D. 201, 43 A.C.W.S. (3d) 851, 6 P.P.S.A.C. (2d) 92, 91 B.C.L.R. (2d) 357

ROYAL BANK OF CANADA v. GATEKEEPER LEASING LTD., JEETY BHALLA, HARRY DOWN, LLOYD JORDAN, C. ROBERT PEARSON and CHRISTOPER STEWART

Dorgan J.

Heard: September 1, 1993
Judgment: October 21, 1993
Docket: Doc. Victoria 93 2381

Counsel: *Dorothy J. Stout*, for petitioner.
Timothy E. Dunford, for respondent.

Subject: Insolvency; Property; Corporate and Commercial

Related Abridgment Classifications

Personal property security
IV Priority of security interest
IV.3 Purchase money security interest

Personal property security
IV Priority of security interest
IV.6 Security interests versus other interests
IV.6.b Under provincial law
IV.6.b.iv Miscellaneous

Personal property security
V Disposition of collateral by debtor
V.1 Authorized disposition

Headnote

Personal Property Security --- Priority of security interest — Purchase money security interest

Personal Property Security --- Priority of security interest — Security interests versus other interests — Under provincial law — Miscellaneous interests

Personal Property Security --- Disposition of collateral by debtor — Authorized disposition

Personal property security — Security interests under Personal Property Security Acts — Disposition of subject property — Bank loaning money to company for equipment purchase — Bank's security agreement covering equipment and proceeds thereof — Shareholders of company selling equipment to company and leasing it back — Bank's security interest not constituting purchase money security interest in light of sale, buy and lease back arrangement — Bank nevertheless holding perfected security interest having priority over sale to shareholder.

The respondent G. Ltd. borrowed money from the petitioner bank to purchase office equipment. The security agreement executed by G. Ltd. at the time described the collateral as "all goods and equipment and proceeds thereof" of G. Ltd. The shareholders of G. Ltd. sold the equipment to the company and some or all of the sellers leased the equipment back from the company. When the loan was in default, the bank agreed that the equipment could be sold provided it received the proceeds. The company sold some of the equipment to one of its shareholders without forwarding the sale proceeds to the bank. The bank applied for a declaration that its security agreement was a purchase money security interest and for an order that the respondent deliver possession of the collateral to the bank.

Held:

Application allowed.

Section 1 of the *Personal Property Security Act* in its definition specifically excludes a transaction of sale, buy and lease back to the seller. Accordingly, the bank's security interest could not be a purchase money security interest. However, the bank still held a perfected security interest which gave it rights to collateral and proceeds subject to the provisions of the Act. While the bank may have consented to a sale of the equipment, provided it received the proceeds, that conditional authorization did not cause the security interest in the collateral to cease, because all conditions of the authorization had not been met. The sale proceeds were not paid to the bank and it had not approved of the sale to the shareholder, who was also a solicitor. On the authorities, and in the circumstances, the obligation of that shareholder was to ensure that the bank's interest was discharged if he wanted to take the equipment free of that interest. There was no basis for a finding that the company was the agent of the bank so that payment to it discharged the bank's security interest. Finally, the sale was not made in the ordinary course of business so as to give the purchaser priority over the bank.

Table of Authorities

Cases considered:

Canadian Commercial Bank v. Tisdale Farm Equipment Ltd., [1984] 6 W.W.R. 122, 35 Sask. R. 166, affirmed [1987] 1 W.W.R. 574 (C.A.) — *applied*

Canadian Imperial Bank of Commerce v. Marathon Realty Co., [1987] 5 W.W.R. 236, 7 P.P.S.A.C. 230, 57 Sask R. 88, 40 D.L.R. (4th) 326 (C.A.) [leave to appeal to S.C.C. refused [1988] 2 W.W.R. lxvi, 8 P.P.S.A.C. xxxiv, 87 N.R. 399] — *considered*

Paccar Financial Services Ltd. v. Chubey, [1992] 2 W.W.R. 751, 79 Man. R. (2d) 193 (Q.B.) — *referred to*

Statutes considered:

Personal Property Security Act, S.B.C. 1989, c. 36

s. 1 "security interest"*considered*

s. 28(1)*considered*

s. 30*considered*

Small Businesses Loans Act, R.S.C. 1985, c. S-11 — referred to.

Application for relief under *Personal Property Security Act*.

26 On the evidence the Bank did not hold out directly to Pearson that Down and/or Gatekeeper were acting as its agents to receive money from the sale of the furniture. Pearson, as a shareholder of Gatekeeper, was aware that Gatekeeper was not able to meet its financial obligations to the Bank. A sophisticated and prudent purchaser such as Pearson, having knowledge of the financial distress of Gatekeeper, and the security interest of the Bank, ought to have dealt directly with the Bank to obtain a discharge of its security prior to purchasing the disputed furniture. It does not appear reasonable to me that Pearson should accept Down's alleged representation to him that he was acting as the Bank's agent in these circumstances.

4. Does S. 30 of the Act Apply, to Permit Pearson, a Buyer of the Goods, to Have Priority over the Bank?

27 Section 30(2) of the Act reads as follows:

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

28 In this case the disputed furniture was sold by Gatekeeper in liquidation circumstances to a shareholder of the same company. In my view, this is not a sale in the ordinary course of business. I find it is reasonable to infer that Pearson, as a director and shareholder of Gatekeeper at the time the security agreements with the Bank were entered into, knew or ought to have known that the agreements required written approval before assets which were subject to the security agreements could be disposed of. Pearson does not depose that he understood the Bank had given a written approval; his affidavit material is silent and in my view leads to a reasonable finding that Pearson knew there was no written approval of the sale given by the Bank. The balance of the provisions of s. 30 of the Act do not apply to the circumstances of this case.

29 In the result, the security interest of the Bank provides rights against third parties subject to the application of the Act. The disputed furniture is collateral under the security agreement and the Bank is entitled to an order for possession. I order that the Bank has a valid security interest in the disputed furniture described in the Small Business Loan application and in Sched. A to the security agreement. The respondent Pearson shall deliver possession of the furniture and equipment constituting part of the petitioner's collateral forthwith.

30 On the question of costs, while the Bank has been successful it is my view that had the Bank shown greater care and diligence in dealing with its security it is likely this application would not have been necessary. Consequently, the petitioner and the respondent Pearson will each bear their own costs.

Application allowed.

End of Document

TAB 7

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

Related Abridgment Classifications

Conflict of laws
IX Personal property and security
IX.1 Determining jurisdiction

Personal property security
IV Priority of security interest
IV.2 Perfected versus unperfected interest

Personal property security
V Disposition of collateral by debtor
V.3 Sale in ordinary course of business

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).

Table of Authorities

Cases considered by *Fruman J.A.*:

Bank of Montreal v. Kalatzis (1984), 37 Sask. R. 300 (Sask. Q.B.) — referred to

Bronson, Re, 34 C.B.R. (3d) 255, 10 P.P.S.A.C. (2d) 164, 1995 CarswellBC 374 (B.C. Master) — referred to

Bronson, Re, 39 C.B.R. (3d) 33, 18 B.C.L.R. (3d) 195, 10 P.P.S.A.C. (2d) 270, 1996 CarswellBC 241 (B.C. S.C.) — referred to

Burton v. Petrone, Hatherly, Hornak & Associates, 53 O.R. (2d) 110, 23 D.L.R. (4th) 408, 1985 CarswellOnt 1429 (Ont. H.C.) — referred to

Canadian Imperial Bank of Commerce v. A.K. Construction (1988) Ltd., 39 Alta. L.R. (3d) 216, 11 P.P.S.A.C. (2d) 280, 186 A.R. 1, 1996 CarswellAlta 392 (Alta. Master) — referred to

Canadian Imperial Bank of Commerce v. A.K. Construction (1988) Ltd., 223 A.R. 115, 183 W.A.C. 115, 1998 CarswellAlta 837 (Alta. C.A.) — referred to

Couiyk v. Couiyk, 1999 CarswellBC 2676 (B.C. S.C.) — referred to

Donaghy v. CSN Vehicle Leasing, 4 Alta. L.R. (3d) 40, 4 P.P.S.A.C. (2d) 37, [1992] 6 W.W.R. 70, 14 C.B.R. (3d) 256, (sub nom. *Donaghy (Bankrupt), Re*) 132 A.R. 155, 1992 CarswellAlta 292 (Alta. Q.B.) — referred to

Fairline Boats Ltd. v. Leger, 1 P.P.S.A.C. 218, 1980 CarswellOnt 607 (Ont. H.C.) — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — referred to

s. 1(1) "collateral" — referred to

s. 1(1) "security interest" — referred to

s. 5(1)(a) — referred to

s. 7 — referred to

s. 7(2) — referred to

s. 7(2)(a) — considered

s. 7(2)(a)(ii) — referred to

s. 7(3) — considered

s. 12(1) — referred to

s. 19 — referred to

s. 20(a) — referred to

s. 20(b) — referred to

s. 20(c) — referred to

s. 24(1) — referred to

s. 25 — referred to

s. 28(1) — referred to

s. 28(1)(a) — considered

s. 30(2) — referred to

s. 35 — referred to

s. 35(1)(b) — considered

s. 35(1)(c) — referred to

s. 68(2) — referred to

s. 68(3) — referred to

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

TAB 8

2000 SKQB 321
Saskatchewan Court of Queen's Bench

Spencer v. Jacques

2000 CarswellSask 469, 2000 SKQB 321, [2000] S.J. No. 459

William Spencer, Brenda Spencer, Bartley Spender and Blair Spencer, all of Carnduff, in the Province of Saskatchewan, Applicants and Adrien Jacques and Jackie Jacques, both of Carnduff, Wawota Cattle Producers Co-Op Ltd., of Maryfield and Moosomin Savings and Credit Union Ltd., of Moosomin, and Estevan Credit Union Ltd., of Estevan, all in the Province of Saskatchewan, Respondents

Kraus J.

Judgment: July 11, 2000
Docket: Estevan Q.B. 12/00

Counsel: *T.R. McGeough*, for Spencers.
Jacques for themselves.
D.J. Osman, for Wawota Cattle Producers Co-Op Ltd.
R.M. Sandbeck, for Moosomin Savings and Credit Union Ltd.
J.J. Billesberger, for Estevan Credit Union Ltd.

Subject: Corporate and Commercial; Insolvency; Property; Torts

Related Abridgment Classifications

Commercial law
IV Agricultural products
IV.6 Liens and security on animals
IV.6.a Conditional sales
IV.6.a.iii Description of animals

Commercial law
IV Agricultural products
IV.6 Liens and security on animals
IV.6.d Miscellaneous

Personal property security
II Attachment of security interest
II.1 Elements
II.1.c Enforceability
II.1.c.ii Security agreements
II.1.c.ii.B Intention to attach

Headnote

Personal property security --- Attachment of security interest — General rules — Security agreements — Intention to attach
Corporate respondent arranged to finance individual respondents' acquisition of cattle — Under terms of contract, individual

respondents possessed cattle while corporate respondent retained ownership — Individual respondents sold cattle to applicant — Individual respondents later declared bankruptcy and corporation claimed return of cattle — Applicant had sold some of cattle and argued that it need not return other cattle — Transaction between individual and corporate respondents was security agreement as its purpose was to secure payment of loan — Applicant should have known cattle were not owned by individual respondents as cattle were branded with brand of corporation — Applicant ordered to return cattle that were branded minus amounts for sheltering of cattle.

Animals --- Property in animals — Liens and security on animals — Conditional sales — Description of animals
Applicant purchaser bought cattle from respondent farmers — Cattle were subject to security interest in favour of co-op — Farmers made assignment in bankruptcy — Co-op sought return of cattle from purchasers — Purchaser ordered to return cattle that were branded minus amounts for sheltering of cattle — Cattle were branded with name of someone other than respondent — Purchaser either knew or should have known that cattle were not owned by respondent as branding was time honoured way of signifying ownership — Purchasers had notice of unperfected security interest and sale was not in ordinary course of business due to size of sale and price.

Table of Authorities

Statutes considered:

Animal Identification Act, R.S.S. 1978, c. A-20.1
s. 15 — referred to

Farm Financial Stability Act, S.S. 1989-90, c. F-8.001
Generally — considered

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2
Generally — referred to

s. 20(3) — considered

s. 30(2) — considered

Sale of Goods Act, R.S.S. 1978, c. S-1
s. 23 — referred to

Regulations considered:

Animal Products Act, R.S.S. 1978, c. A-20.2 (Supp.)
Livestock Dealer Regulations, 1995, R.R.S., c. A-20.2, Reg. 9

Generally

Farm Financial Stability Act, S.S. 1989-90, c. F-8.001
Cattle Breeder Associations Loan Guarantee Regulations, 1991, R.R.S., c. F-8.001, Reg. 5

s. 9.1(2) [en. Sask. Reg. 45/95]

APPLICATION for declaration that applicant's property interests protected by Personal Property Security Act.

***Kraus J.*:**

1 A cattle producer, who is a member of a producer association formed under *The Farm Financial Stability Act*, S.S. 1989-90, c. F-8.001, may apply to the association for assistance in the acquisition of cattle. Upon approval, the association arranges financing to cover the acquisition cost, the loan being guaranteed by the province. By agreement between the

producer and her association, the association is the owner of the cattle and the producer has possession with obligations to feed, maintain health, notify the association of death, disease and intention to sell, to ensure payment of sales proceeds to the association, and to indemnify the association for the loan. In the event of default in obligation, it is agreed that the association may enter upon the producer's land, take possession, and sell the cattle. The first question to be determined is whether the agreement between Jackie Jacques and the Wawota Cattle Producers Co-Operative Ltd., and the acquisition of certain cattle, is a transaction that in substance creates a security and is subject to *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2, ("the PPSA") or whether it is a lien, charge or other interest given by statute or rule of law and thereby exempt from application of the PPSA.

2 The evidence is overwhelming that the transaction is a security agreement since its function is to secure payment of the loan arranged by the Wawota Cattle Producers Co-op Ltd. with the Moosomin Savings and Credit Union Ltd., notwithstanding the labels of "owner" and "feeder" used by Wawota Cattle Producers Co-op Ltd. and Jackie Jacques in their agreement:

- the cattle were branded to secure payment of the loan;
- the Wawota Cattle Producers Co-op Ltd. and Jackie Jacques entered into three Breeder Agreements;
- the final Breeder Agreement on July 9, 1998, was not for acquisition of cattle, but for refinancing of existing indebtedness;
- the Wawota Cattle Producers Co-op Ltd. treated the cattle as security by ensuring branding;
- in all respects, Jackie Jacques treated the cattle as her own, including selling them without notice to the Wawota Cattle Producers Co-op Ltd.;
- the loan arranged by Wawota Cattle Producers Co-op Ltd. with Moosomin Savings and Credit Union Ltd. is guaranteed by the province; Moosomin Savings and Credit Union Ltd. took a security agreement from Wawota Cattle Producers Co-op Ltd. and registered it. Jackie Jacques agreed to indemnify any loss; in essence, her agreement to indemnify is a guarantee.

3 I do not afford the Spencers the protection of ss. 30(2) nor 20(3) of the PPSA. There is no doubt that the Jacques were in the business of selling cattle. The issue, however, is whether the transaction from the Jacques to the Spencers took place in the ordinary course of the Jacques business. The transaction by the Jacques was outside of the normal flow of commerce in their business and in the industry generally. The fresh WC (shelter) brand on 35 calves delivered to the Spencers in May, 1999, was extraordinary since the brand was not that of the Jacques, and it had been placed on the calves between mid-April (the time of viewing them by the Spencers) and the time of delivery. The industry norm is to be reasonably cautious in such circumstances. As well, the sale was for a large part of the Jacques herd, perhaps one-half, and such an extraordinary disposition of cattle by a dealer should reasonably have raised alarm. Further, although they may have been acquired as commercial cattle, the price of $1,250.00 per pair (if it was a price) was inordinately low. It should also have been apparent to the Spencers that the Jacques were overly anxious to sell; within several months, rumours of their insolvency were widespread in the community and, indeed, they made assignments in bankruptcy. (Their trustee has consented to this proceeding continuing.) The WC (shelter) brand could easily have been identified as that of the Wawota Cattle Producers Co-op Ltd. In all of the circumstances, I determine that the Spencers had knowledge of the unperfected security interest of Wawota Cattle Producers Co-op Ltd. and that the transaction by the Jacques to the Spencers is not a sale in the ordinary course of business of the Jacques. Ergo, the Spencers did not take the cattle free of the security interests of the Wawota Cattle Producers Co-op Ltd.

4 Further, the legislative interests created by *The Animal Identification Act*, R.S.S. 1978 (Supp.), c. A-20.1 (particularly s. 15) and *The Cattle Breeders Associations Loan Guarantee Regulations, 1991*, c. F-8.001, Reg. 5 (particularly s. 9.1(2)) protect interests of ownership and in sales proceeds. Branding is a time honoured notice to buyers and is enshrined in *The Animal Identification Act*.

5 I do not accept the evidence of the Spencers that they believed the brand on some of the cattle purchased from the

Jacques was that of William Carnduff, the deceased father of Jackie Jacques. Mr. Carnduff had owned land, sold by his widow (to the Jacques), who was owed $100,000.00 for the land, the unpaid purchase price. Their evidence on that issue is not credible, particularly in light of their further evidence that she was unconcerned about the balance owing and, indeed, returned the only payment of $10,000.00 because she knew the Jacques were having financial trouble.

6 If I am in error in that the breeder agreement between the Jacques and the Wawota Cattle Producers Co-op Ltd. is not subject to the PPSA, then the common law principal of *nemo dat quod non habet*, as codified in s. 23 of *The Sale of Goods Act*, R.S.S. 1978, c. S-1, applies to the sale of some of the 80 cattle (40 cow/calf pairs) by Jackie Jacques (and her husband and business partner Adrien Jacques) to the Spencers in the spring of last year. The uncontradicted facts and circumstances of that transaction are as follows:

- In 1998, the Spencers decided to get into the cattle business. They were naturally interested in pricing and talked to producers and looked at their cattle. They also arrange financing to fund intended acquisitions.

- They had various discussions with the Jacques and ultimately acquired 80 cattle (40 cow/calf pairs) and one bull in the spring of 1998. They paid $53,000.00 cash to the Jacques in mid-April and took possession in mid-May. Mr. Jacques selected the cattle at his discretion but subject to the general agreement that the cattle would be of good quality.

- The deal between William Spencer and Adrien Jacques was done on a handshake. I was impressed with the evidence of James McMillen, a cattleman with 30 years experience, who testified that "the cattle industry goes on a handshake". No doubt, that must be so to ensure utility, speed and simplicity in the commerce of the cattle industry. Although it is not evidence, I take it as an assumption, however, that the essential ingredient throughout is honesty.

7 The version of the Spencers is that the $53,000.00 paid to the Jacques represented the entire purchase price for the 80 cattle and one bull. The Jacques were to have the right to buy back up to 20 calves: they were free to take possession of the calves in the fall and to pay $625.00 per head in the spring of this year. The Spencers' version is that they intended to carry on a commercial livestock business and the Jacques were purebred breeders who wanted to preserve the genetic progeny by buying back some of the calves.

8 According to the Jacques, purebred Charolais dealers, the $53,000.00 was the down payment on the full price of $103,000.00 with the balance of $50,000.00 by delivery to the Jacques of 30 purebred Charolais calves, being the offspring of the subject cattle, in the fall of 1999, 20 purebred Charolais calves in the fall of 2000 and 10 purebred Charolais calves in the fall of 2001.

9 I determine that the Spencers did have actual notice of the brand of the Wawota Cattle Producers Co-op Ltd. in the branded cattle, or they had constructive notice in that they were negligent in not ascertaining that the brand was that of the Wawota Cattle Producers Co-op Ltd., in the circumstances, when they should have made inquiries about the registered brand, if they did not do so. They had constructive knowledge that the sale of the branded cattle constituted a breach of the Wawota Cattle Producers Co-op Ltd. security agreement.

10 The minister paid into court the sum of $15,202.74, pursuant to *The Livestock Dealer Regulations, 1995*, c. A-20.2, Reg. 9, being the auction sales proceeds of 21 calves delivered to auction by the Spencers. The brand inspector determined that 16 calves bore the brand registered to the Wawota Cattle Producers Co-op Ltd., and I direct that 16/21 of $15,202.74, being $11,503.04, be paid to the Wawota Cattle Producers Co-op Ltd. However, from the funds payable to Wawota Cattle Producers Co-op Ltd., the Spencers must be paid $2,000.00: $125.00 for each of the 16 calves in their possession from the spring of last year until last fall representing the cost of feeding and care of the calves, based on the uncontradicted evidence of Lloyd Thompson, which I find as fact.

11 As to the 19 calves and five cows bearing the brand of the Wawota Cattle Producers Co-op Ltd. in the possession of the Spencers, I determine that they are also subject to the security interests of Wawota Cattle Producers Co-op Ltd. and must be forthwith delivered up to Wawota Cattle Producers Co-op Ltd., FOB the Spencer land. However, the Spencers must be paid $6,000.00 which I determine is fair reimbursement for the cost of keeping those 24 cattle since the spring of last year ($125.00 × 24 × 2).