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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C36, AS AMENDED

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

DOCUMENT

SUPPLEMENTARY BRIEF OF CANADIAN WESTERN BANK IN REBUTTAL TO THE "BRIEF OF GREAT WHITE SAND TIGER LODGING. (RESPONDING TO MONITOR'S APPLICATION RETURNABLE JANUARY 10 AND 11, 2019)" AND THE "BRIEF OF ARGUMENT OF THE APPLICANTS, 726 REMOTE ACCOMMODATIONS LTD., 726 MODULAR FINANCE LTD., AND RELIANT ASSET MANAGEMENT LLC".

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Charles P. Russell, Q.C. Telephone: (780) 482-9115 Fax: (780) 733-9757 Email: crussell@mross.com File No.: 165813

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PART 1 STATEMENT OF FACTS

1. This Brief is filed by Canadian Western Bank ("**CWB**") in rebuttal to the "Brief of Great White Sand Tiger Lodging Ltd. (responding to Monitor's Application returnable January 10 and 11, 2019)" filed on December 20, 2018, and the "Brief of Argument of the Applicants, 726 Remote Accommodations Ltd., 726 Modular Finance Ltd., and Reliant Asset Management LLC".

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

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

<u>Issues Raised by 726</u>

4. In the 726 Brief, certain issues are raised which require clarification, including:

(a) CWB already had Assignments of Book Debts from the LPs, as security for the revolving operating line CWB provided to CNC which was utilized to fund operations at the LPs. As such, the suggestion by Paul McCracken that the CNC GSA's were only taken to charge accounts receivable, and not "all present and after acquired personal property" as stated therein, is discredited – CWB already had a first charge on those accounts receivable. A second charge over the accounts receivable in favour of CNC would be entirely unnecessary and superfluous;

Taha Affidavit #7, para 4

(b) As is evident from the transcript of the September 6, 2018 Application before Mr. Justice Hillier and the September 6, 2018 Order, combined with Taha Affidavit #6, CWB had raised the issue of entitlement to assets claimed by 726, but did not at that time have sufficient clarity of the 726 claim to postulate its position. This only occurred upon cross-examination on Affidavits conducted December 4-5, 2018 and the answers to undertakings, following receipt of which CWB filed a formal application seeking a Declaration that its security interest in the Bonnyville Equipment and Sand Tiger Wares had not been released;

Affidavits of Gulnara Machitova, and
Affidavit of Krisztina E. Kiss

(c) The additional security required by CWB in the Forbearance Agreement entered into just prior to the issuance of the CNC GSAs, did not include a requirement for delivery of the CNC GSAs, contrary to the evidence of Mr. McCracken;

Taha Affidavit #1, Exhibit "Q"

PART 2 ISSUES

5. The following issues are raised in the application:

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

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

PART 3 ARGUMENT

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

6. The Sand Tiger Wares are subject to the section of 1(1)(z) of the *Personal Property Security Act*, RSA 2000, c P-7 ("PPSA"), a lease for a term of more than one year. This section provides that leases are subject to the registration requirements of the PPSA unless the lease for a term of more than one year falls under the one of the exemptions listed at subsections 1(1)(z)(iv-vi).

7. Sand Tiger seeks to rely on subsection 1(1)(z)(iv) which exempts leases for a term of more than one year where the lessor is not regularly engaged in the business of leasing goods and have cited the decision of *Planwest Consultants Ltd v Milltimber Holdings Ltd.*, 1995 CanLii 9135 ("Planwest") in support of their claim.

> *Personal Property Security Act*, RSA 2000, c P-7, s 1(1)(z)(iv) **TAB 1**
>
> *Planwest Consultants Ltd v Milltimber Holdings Ltd.*, 1995 CanLii 9135 **TAB 2**

8. Planwest was considered in the decision of *Bank of Montreal v Patchrite Inc.*, ("BMO") wherein the respondent Patchrite Inc. sought to rely on the same exemption provisions of the Saskatchewan PPSA. The Court in BMO correctly summarized the question as to the applicability of those provisions as whether the lessor is regularly engaged in leasing goods and not the number or frequency of the leases.

> *Bank of Montreal v Patchrite Inc*, 2006 SKQB 519 at paras 23& 24 **TAB 3**

9. In reviewing existing jurisprudence, the Court in BMO noted that the only authority that had come to a contrary result was the Planwest decision, which appears to be driven by a unique set of facts. The Court in BMO addressed the Planwest case and commented:

> 24…That case involved a mortgagee who became owner of the land, building and restaurant equipment in the building as a result of a foreclosure upon its mortgage. The mortgagee, now owner, leased the land, building and the restaurant equipment in the building to a tenant who operated the business as a restaurant (as was previously the case). The court concluded that in these unique circumstances the mortgagee, now owner and landlord, was entitled to the exemption from the registration requirements of the PPSA. The owner/landlord was found to be primarily engaged in the purchase, sale and financing of commercial properties, and investment consulting and not regularly engaged in the business of leasing chattels which was only incidental to and not a regular part of the business of the lessor on this singular occasion.

Bank of Montreal v Patchrite Inc., 2006 SKQB 519 at para 24 **TAB 3**

In that case, the Court found the exemption applied, and the lease was not subject to the PPSA.

10. Our Court of Appeal confirmed that so long as the owner of the goods regularly engages in the leasing of goods, the section of the PPSA regarding leases is engaged:

> The Act does not require that the owner of the goods only be in the business of leasing goods, or that it primarily be in the business of leasing goods. So long as the owner "regularly engages" in the leasing of goods, the section is engaged. The case law establishes that the frequency of leasing is not determinative of whether the claimant is in the business of leasing. As long as leasing is a regular part of the business, it will be caught by the statute, even if leasing is not the predominant or a significant part of the business: *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)*, 1996 ABCA 134 (Alta. C.A.) at para. 12, (1996), 38 Alta. L.R. (3d) 428, 184 A.R. 291 (Alta. C.A.)…
>
> A company can be in the "business" of leasing goods even if it never makes a profit, and perhaps never intends to make a profit out of the leasing transaction itself: *National Bank of Canada v. Merit Energy Ltd.* (2001), 294 A.R. 1 (Alta. Q.B.) at para. 55, (2001), 27 C.B.R. (4th) 283 (Alta. Q.B.). Having regard to the overall purposes of the Act, one indicia of a "business" is that the lease is for a commercial purpose, and is part of an overall business strategy.

Fast Labour Solutions (Edmonton) Ltd. v Kramer's Technical Services Inc., 2016 ABCA 266 at paras 14 &15 **TAB 4**

11. While Sand Tiger submits that they provide temporary accommodations for workers employed at oil sands camps, and that only one aspect of its business is leasing dorms to operators of camps to accommodate their workers on site, the authorities show that this does not exempt the requirement to comply with the PPSA by registering appropriately.

12. Sand Tiger states that the dorms would be less comfortable and useful as living accommodations if they were not furnished with certain chattels. CWB submits that this demonstrates that Sand Tiger does "regularly engage" in leasing chattels that are found present in their Dorms, and as a result the PPSA is engaged and Sand Tiger was required to register their interest in the Sand Tiger Wares to protect their interest.

13. Sand Tiger further submits that the Sand Tiger Wares are accessions or appurtenances to the Dorms themselves. However, appurtenances are not specifically mentioned in the PPSA.

14. The specifications of the Dorms indicate each of the furnishings/appliances that they come equipped with, such as the Sand Tiger Wares in question, some of which were purchased separately from the Dorms (e.g. the 38 TVs).

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

15. If the Sand Tiger Wares were truly appurtenances to the Dorms they would not need to be separately listed in the lease or the specifications of the Dorms, as they would be of one and the same unit.

16. Sand Tiger also submits that they should be protected by the exemption listed in subjection 1(1)(z)(v) of the PPSA which exempts leases of household furnishings or

appliances as part of a lease of <u>land</u> where the goods are incidental to the use and enjoyment of the land.

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

17. Sand Tiger submits that the present situation is analogous to the one contemplated in the exemption. However, there is no authority for this. When interpreting the exemptions listed in section 1(1)(z) of the PPSA the underlying purpose of the PPSA should be considered:

> 12 The *Personal Property Security Act* was designed to sweep away these technicalities, and to provide one universal regime, and one universal registry, in which all security interests had to be registered. Its ultimate purpose is to define all of those arrangements where registration is required in the public interest because possession has been separated from title. At the highest level of generality, the Act should be interpreted having regard to that objective.

Fast Labour Solutions (Edmonton) Ltd. v Kramer's Technical Services Inc., 2016 ABCA 266 at para 12 **TAB 4**

18. If the legislature wanted the exemption to be as broad as Sand Tiger suggests, language other than the word "land" would have had to have been used.

19. CWB submits that Sand Tiger's submissions regarding commercial reasonableness should fail. It is patently evident that CNC could have leased the Dorms without the Sand Tiger Wares. There is nothing stopping lessees from providing their own small wares such as TVs. For example, if CNC had extra TVs in their inventory, Sand Tiger would not have has to purchase TVs to include with the Dorms.

b) ***Did the security interest held by CWB over the personal property of CNC, remain attached to the assets transferred by CNC to 726 Remote in or about December 2014, such that those assets remain subject to the security interest of CWB?***

20. In CWB's brief filed December 20, 2018, CWB argues that 726 Remote has failed to meet the onus to show that CWB provided a release of its security interest over the assets transferred by CNC to 726 Remote in or about December 2014.

21. In its amended application filed thereafter, 726 Remote seeks both relief from forfeiture and rectification of the CNC GSAs.

Relief from Forfeiture

22. The power of the Alberta Courts to grant relief from forfeiture is codified in section 10 of the *Judicature Act*, RSA 2000, c J-2.

> Relief against forfeiture
>
> 10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

Judicature Act, RSA 2000, c J-2 at s 10
TAB 5

23. Relief from forfeiture is an equitable and discretionary remedy granted to the courts to protect a party against the loss of an interest or right because of a failure to perform a covenant or condition in an agreement or contract. It should be granted sparingly and the party seeking the relief bears the onus of establishing the case for relief. When considering when to grant relief from forfeiture, the court must consider three factors: (i) the conduct of the applicant; (ii) the gravity of the breach; and (iii) the disparity between the value of what has been forfeited and the damage caused by the breach.

Voortman v SPCVC Investments Inc, 2018 ONSC 3602 at paras 10, 24 – 26, 32 and 37
TAB 6

Lakshmi Enterprises Ltd. v Edleun Inc, 2014 ABQB 610 at paras 3-4 **TAB 7**

24. Forfeiture has been judicially defined as:

> …the loss, by reason of some specified conduct, of a right, property or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party. See 869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership 2005 CarswellOnt 2782 at paragraph 22.

St. Anne-Nackawic Pulp Company Ltd. (Bankruptcy of); Re Forest Products Marketing Boards v. Green Jain Wedlake. 2005 NBQB 291 at para. 79 **TAB 8**

25. Relief from forfeiture "is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although called for by the terms of the contract breached, causes substantial inequity." Also, relief from forfeiture "is particularly appropriate where the interests of the other party can be met without resorting to forfeiture." Finally, relief from forfeiture may be granted where the party seeking such relief demonstrates that forfeiture would be "inequitable and unjust" or "harsh and unconscionable".

Alberta (Minister of Justice and Attorney General) v. Sykes, 2011 ABCA 191 at paras 40 and 41. **TAB 9**

26. Relief from forfeiture will not be granted when there is a failure to satisfy a condition precedent of a contract.

Sturm v Sprott Resource Lending Corp, 2014 BCSC 190 at paras 162-163, 166, 168-169 **TAB 10**

27. Granting relief from forfeiture to 726 Remote will cause CWB a "substantial inequity" in that CWB's security interest in the assets transferred by CNC to 726 Remote, "<u>cannot</u> be met without resorting to forfeiture". CWB received only some $3.5 million of the $20

million of proceeds paid by 726 Remote to CNC for the assets. Even that $3.5 million was an illusory payment, as the monies were deposited into the CNC operating line account with CWB and subsequently re-advanced by CWB and used in CNC operations. In effect, CWB received nothing from the sale of these assets.

28. Granting 726 Remote relief from forfeiture based on their failure to obtain a release of the CWB security interest in the transferred assets, would result in CWB suffering an "inequitable and unjust", and a "harsh and unconscionable" loss.

Rectification

29. 726 submits that the CNC GSAs should be rectified to conform to the original intention of the parties.

30. However, the underlying purpose of the stay provisions in the CCAA is to maintain the status quo amongst creditors and prevent their maneuvering for position. Rectification of security documents affecting priorities made after a CCAA stay would defeat that intent.

Sharp-Rite Technologies Ltd., Re, 2000 BCSC 414 at paras 34-39 **TAB 11**

Redstone Investment Corp., Re, 2015 ONSC 533 at para 57 **TAB 12**

31. As of commencement of the CCAA proceedings, CWB's first security interest over all of CNC's present and after acquired personal property, captured the CNC GSAs. To now rectify those CNC GSAs in the manner proposed by 726, would deprive CWB of a vested interest therein.

PART 4 REMEDY SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 2nd day of January, 2019.

MCLENNAN ROSS LLP

for Per: ______________________

Charles P. Russell, Q.C.
Solicitor for the Canadian Western Bank

TABLE OF AUTHORITIES

TAB 1

Alberta Statutes
Personal Property Security Act

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

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

s 1. Interpretation

Currency

1.Interpretation

1(1) In this Act,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) nursery stock,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) where the context permits,

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

(B) a financing change statement,

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

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

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

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

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

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

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

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

(u.3) **"futures customer"** means a person for which a futures intermediary carries a futures contract on its books;

(u.4) **"futures exchange"** means an association or organization operated to provide the facilities necessary for the trading of standardized futures or options on futures;

(u.5) **"futures intermediary"** means a person that

(i) is registered as a dealer permitted to trade in futures contracts, whether as principal or agent, under the securities laws or commodity futures laws of a province or territory of Canada, or

(ii) is a clearing house recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority of another province or territory of Canada;

(v) **"goods"** means tangible personal property other than chattel paper, a document of title, an instrument, investment property and money, and includes fixtures, growing crops and the unborn young of animals, but does not include trees that are not crops until they are severed or minerals until they are extracted;

(w) **"instrument"** means

(i) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(ii) any other writing that evidences a right to the payment of money and is of a kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(iii) a letter of credit or an advice of credit if the letter or advice states that it must be surrendered on claiming payment under it,

but does not include

(iv) chattel paper, a document of title or investment property, or

(v) a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing;

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

(y) **"inventory"** means goods

(i) that are held by a person for sale or lease, or that have been leased by that person,

(ii) that are to be furnished by a person or have been furnished by that person under a contract of service,

(iii) that are raw materials or work in progress, or

(iv) that are materials used or consumed in a business;

(y.1) **"investment property"** means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account;

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

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

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

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

but does not include

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

(v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or

(vi) a lease of any prescribed goods, regardless of the length of the term of the lease;

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

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

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

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

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

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

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

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

less any amount paid prior to the determination;

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

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

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

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

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

(ff) **"pawnbroker"** means a person who engages in the business of granting credit to individuals for personal, family or household purposes and who takes and perfects security interests in consumer goods by taking possession of them, or who purchases consumer goods under agreements or undertakings, express or implied, that the goods may be repurchased by the sellers;

(gg) **"personal property"** means goods, chattel paper, investment property, a document of title, an instrument, money or an intangible;

(hh) **"prescribed"** means prescribed by the regulations;

(ii) **"prior security interest"** means an interest created, reserved or provided for under a valid agreement or other transaction entered into before October 1, 1990, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the agreement or other transaction was entered into;

(jj) **"proceeds"** means identifiable or traceable personal property, including fixtures and crops,

(i) derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and

(ii) in which the debtor acquires an interest,

and includes

(iii) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral,

(iv) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and

(v) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

(kk) **"purchase"** includes taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;

(ll) **"purchase-money security interest"** means

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

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

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

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

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

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

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

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

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

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

(i) a person who has a security interest,

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

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

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

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

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

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

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

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

(ii) a writing that evidences a security agreement;

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

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

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

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

(ii) the interest of

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

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

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

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

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

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

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

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

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

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

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

1(1.1) For the purposes of this Act,

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

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

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

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

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

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

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

1(2) For the purposes of this Act,

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

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

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

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

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

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

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

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

(iii) all the members

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

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

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

1(4) If the debtor and the owner of the collateral are not the same person, **"debtor"** means

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

(b) in a provision of this Act dealing with the obligation, an obligor,

or both where the context permits.

1(5) Unless otherwise provided in this Act, goods are "consumer goods", "inventory" or "equipment" if at the time the security interest in the goods attaches they are "consumer goods", "inventory" or "equipment".

1(6) Proceeds are traceable whether or not there exists a fiduciary relationship between the person who has a security interest in the proceeds as provided in section 28 and the person who has rights in or has dealt with the proceeds.

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

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

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

End of Document

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Montreal v. Patchrite Inc. | 2006 SKQB 519, 2006 CarswellSask 780, 290 Sask. R. 132, 11 P.P.S.A.C. (3d) 67, 154 A.C.W.S. (3d) 718 | (Sask. Q.B., Dec 8, 2006)

1995 CarswellAlta 373
Alberta Court of Queen's Bench

Planwest Consultants Ltd. v. Milltimber Holdings Ltd.

1995 CarswellAlta 373, [1995] 10 W.W.R. 334, [1995] A.W.L.D. 860, 10 P.P.S.A.C. (2d) 116, 172 A.R. 237, 32 Alta. L.R. (3d) 397, 56 A.C.W.S. (3d) 1303

Re Bankruptcy of CAFE BOARDWALK INC.

Re Application Pursuant to BANKRUPTCY AND INSOLVENCY ACT, REVISED STATUTES OF CANADA, 1985, CHAPTER B-3

PLANWEST CONSULTANTS LTD. v. MILLTIMBER HOLDINGS LTD.

Lefsrud J.

Judgment: July 28, 1995
Docket: Doc. Edmonton 46663

Counsel: *Harry A. Bridges, Q.C.*, for applicant.
Patrick D. Kirwin, for respondent.

Subject: Insolvency; Property; Corporate and Commercial

Appeal from order of Master Breitkreuz with respect to application of *Personal Property Security Act* to lease.

***Lefsrud J.*:**

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

Factual Background

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

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

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

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

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

Section 1.00 — Definitions

k) "Premises" — the Land, Building and those chattels and equipment as listed in Schedule "A" hereto

Section .03 — Equipment, Fixtures and Chattels

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

Section 2.04 — Tenant's Improvements

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

Section 5.06 — Goods, Chattels and Fixtures Not to Be Removed

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

Section 5.07 — Peaceful Surrender

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

Section 8.02 — Removal of Fixtures

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

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

1(1) ...

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

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

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

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

but does not include

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

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

20(1) A security interest

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

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

(ii) gives value, and

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

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

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

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

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

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

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

Appeal allowed in part.

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TAB 3

2006 SKQB 519
Saskatchewan Court of Queen's Bench

Bank of Montreal v. Patchrite Inc.

2006 CarswellSask 780, 2006 SKQB 519, 11 P.P.S.A.C. (3d) 67, 154 A.C.W.S. (3d) 718, 290 Sask. R. 132

Bank of Montreal, Applicant and Patchrite Inc., Respondent

T.C. Zarzeczny J.

Judgment: December 8, 2006
Docket: Regina Q.B.G. 1690/06

Counsel: Rick M. Van Beselaere, for Applicant
Michael J. Morris, for Respondent

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

MOTION by bank for determination of priority security interest.

T.C. Zarzeczny J.:

Introduction

1 The Bank of Montreal (the "Bank") presents a motion to the Court to determine the priority position of the Bank and the respondent Patchrite Inc. ("Patchrite") respecting assets leased by Patchrite to Sweeprite Mfg. Inc. ("Sweeprite"). The applications are brought pursuant to ss. 63 and 66 of *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2 (the "*PPSA*").

2 Counsel for the parties have cooperated in having this motion heard and decided by filing an Agreed Statement of Facts ("Agreed Statement") with attached exhibits. A photocopy of the Agreed Statement (without exhibits) is attached as Schedule "A" to this judgment. The whole of the Agreed Statement with exhibits is incorporated by reference into this judgment.

Background Facts and Circumstances

3 Sweeprite was incorporated by Leslie Hulickso in January of 1985 and it commenced business as an equipment manufacturing company specializing in the manufacture of commercial street and parking lot sweepers. Patchrite was also incorporated by Mr. Hulickso, in May of 1990, for the purpose of manufacturing and marketing pothole patching machines. It never commenced that business.

4 A third company involved in these circumstances is Gateway Capital Corp. ("Gateway") incorporated as a capital pool company.

5 In 2000 Mr. Hulickso began negotiating the sale of Sweeprite to Gateway. Although the sale was initially hoped to include Sweeprite's land, building and equipment located at 1891 Albert Street North in Regina, Saskatchewan, the deal ultimately concluded was for Sweeprite's business only. Its land, building and equipment assets were not included in the sale. Rather, these assets were transferred by Sweeprite to Patchrite by virtue of a "Rollover Agreement" dated May 1, 2001. Sweeprite maintained possession and use of the land, building and equipment throughout. Patchrite obtained a mortgage over the real property and Sweeprite made the mortgage payments. Amounts paid by Sweeprite to Patchrite were treated by both companies as rental expenses and income.

6 In February of 2002, Sweeprite and Gateway signed a Letter of Intent whereby Gateway agreed to acquire Sweeprite by a share purchase to close May of 2002. A formal agreement was signed April 11, 2002, however, for various reasons, the closing date for the sale transaction was extended and it did not close until January 31, 2003. Upon closing Sweeprite and Gateway amalgamated and continued as Sweeprite.

7 An equipment lease (the "Equipment Lease") covering the equipment that is the subject of the application before the Court (the "leased equipment") was signed by Sweeprite as lessee and Patchrite as lessor on May 23, 2002 (exhibit "B" to the Agreed Statement). The leased equipment was the equipment that had been used and continued to be used by Sweeprite in its manufacturing processes. It is listed as Schedule "A" to the Equipment Lease. The total book value of the leased equipment was $331,738.00.

8 The Equipment Lease was for a term of three years. By its provisions the lease term was not to begin until after the closing date of the agreement between Sweeprite and Gateway January 31, 2003. The lease provided for the payment of a minimum annual rental of $24,000.00 and it includes an offer to purchase the leased equipment for $212,000.00. The first monthly rental payment under the lease of $2,000.00 was made by Sweeprite to Patchrite in February of 2003.

9 In June of 2005, Patchrite and Sweeprite executed a Lease Extension and Amending Agreement. It provided that the Equipment Lease's term would be extended to May 1, 2007. Patchrite never registered an interest at the personal property security registry as lessor of the equipment leased to Sweeprite either of the original Equipment Lease or the extension or renewal agreement.

10 The parties have agreed that this Equipment Lease is the only written lease of equipment (personal property) by Patchrite to any lessee. Patchrite has no other personal property leases.

11 After the land, building and equipment Rollover Agreement of May 2001, in December of 2001 Patchrite became actively engaged in and has since earned income from a contract with Rite Way Mfg. Co. Ltd. ("Rite Way"). The work for Rite Way involves research, design and development work for the "python" grain harvesting combine. It has not yet entered production.

12 Patchrite is not and has never been a wholesaler or retailer of any kind of goods (personal property).

13 In April of 2004, Sweeprite granted the Bank a security interest in all of its present and after-acquired personal property (Appendix "C" to the Agreed Statement) in support of loan facilities provided to Patchrite by the Bank. The Bank registered a financing statement in the personal property registry on April 6, 2004.

14 Sweeprite ran into financial difficulty in the fall of 2005 and was unable to meet all of its obligations. The Bank appointed a receiver and manager. Subsequently Sweeprite was deemed to have made an assignment in bankruptcy in January of 2006. In the course of the administration of the bankruptcy of Sweeprite, this dispute has now arisen between Patchrite and the Bank regarding priority to the leased equipment.

15 By agreement between the Bank and Patchrite, the leased equipment has now been sold and the sum of $100,000.00, the amount the parties have agreed represents the value of the equipment, has been placed in trust to be paid out in accordance with the determination by this Court of the legal priorities to the leased equipment in issue between these parties.

The Issue

16 By their agreed statement the parties have agreed to and stated the issue for determination by this Court as follows at paragraph 31:

31. The issue to be decided by the Court is which of the Bank of Montreal or Patchrite has priority to, or entitlement to, the equipment subject to the Lease. That issue requires a determination on whether the Lease was a "lease for a term of more than one year" as defined in s. 2(1)(y) of *The Personal Property Security Act, 1993*...

Analysis

17 Subsections 3(2) and 2(1)(y) of the *PPSA* define and apply to leases of personal property for a term of more than one year. They provide as follows:

3(2) Subject to section 4 and section 55, this Act applies to a transfer of an account or chattel paper, **to a lease for a term of more than one year** and to a commercial consignment, that does not secure payment or performance of an obligation.

2(1) In this Act:

. . .

(y) **"lease for a term of more than one year"** includes:

(i) a lease for an indefinite term, including a lease for an indefinite term that is determinable by one or both of the parties not later than one year after the day of its execution;

(ii) a lease initially for a term of one year or less than one year, where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period of more than one year after the day on which the lessee, with the consent of the lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year; and

(iii) a lease for a term of one year or less where:

(A) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms; and

(B) the total of the terms, including the original term, may exceed one year;

but does not include:

(iv) **a lease involving a lessor who is not regularly engaged in the business of leasing goods,**

(v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land; or

(vi) a lease of prescribed goods, regardless of the length of the lease term.

[Emphasis added]

18 Patchrite argues that, by virtue of subclause 2(1)(y)(iv), a "lease for a term of more than one year" does not include "a lease involving a lessor who is not regularly engaged in the business of leasing goods ..." Patchrite claims that it is "not regularly engaged" in the business of leasing goods. This lease of equipment to Sweeprite was the only lease transaction which it ever has or ever expects to engage in. Leasing is not part of the business Patchrite regularly engages in. It sees its business as consisting of research and development in particular for the python combine by virtue of its contract with Rite Way.

19 The phrase "regularly engaged in the business of leasing goods" appears in the *PPSA* legislation of most provinces. A number of decisions have been rendered interpreting and applying this phrase to the circumstances of companies that find themselves with an unregistered lease interest in personal property that is also subject to a competing claim of a registered security holder. Often this is in the context of a bankruptcy and/or security enforcement proceedings taken by the registered interest holder.

20 In the case of *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481, 74 Sask. R. 181 (Sask. C.A.), Paccar had leased certain vehicles to Sinco who subsequently made a bankruptcy assignment. The trustee in bankruptcy claimed the trucks relying upon s. 20(1)(d) of the *PPSA*. The trustee asserted that Paccar was required to register a financing statement in respect of its lease which was for a term of more than one year. Paccar argued it was not regularly engaged in the business of leasing goods and therefore did not need to register a financing statement. Paccar claimed the exception provided for by subclause 2(1)(y)(iv) of the *PPSA*.

21 Paccar argued that the four trucks in question were leased for the first time and that it was the first time that it had carried on business in that fashion. Its general business involved selling trucks upon conditional sales contracts or financing leases with options to purchase.

22 The trial judge held that the exemption claimed by Paccar did not apply. On appeal the Court of Appeal stated at p. 496:

> ... Paccar did not fit the description because it was a large financial institution regularly engaged in financing the purchase of Kenworth trucks, and that while lease transactions were rarely used, they were in fact used for financing and as a result the exemption did not apply....

23 Similar conclusions were reached by Gunn J. of this Court in the case of *East Central Development Corp. v. Freightliner Truck Sales (Regina) Ltd.*, [1997] 5 W.W.R. 231, 153 Sask. R. 161 (Sask. Q.B.) and by Ball J. in *Karkoulas v. Farm Credit Canada*, 2005 SKQB 367, 270 Sask. R. 291 (Sask. Q.B.) . In the latter case, Ball J. focussed upon the substantial nature of the personal property lease and observed at para. 20, "... it is not the number or frequency of the leases that determines the application of the *PPSA*; it is whether the lease involved a lessor who was regularly engaged in leasing the goods."

24 The only authority which appears to come to a contrary result is the case of *Planwest Consultants Ltd. v. Milltimber Holdings Ltd.*, [1995] 10 W.W.R. 334 (Alta. Q.B.); aff'd (1997), [1998] 3 W.W.R. 214 (Alta. C.A.). That case involved a mortgagee who became owner of the land, building and restaurant equipment in the building as a result of a foreclosure upon its mortgage. The mortgagee, now owner, leased the land, building and the restaurant equipment in the building to a tenant who operated the business as a restaurant (as was previously the case). The court concluded that in these unique circumstances the mortgagee, now owner and landlord, was entitled to the exemption from the registration requirements of the *PPSA*. The owner/landlord was found to be primarily engaged in the purchase, sale and financing of commercial properties, and investment consulting and not regularly engaged in the business of leasing chattels which was only incidental to and not a regular part of the business of the lessor on this singular occasion.

25 The situation of Patchrite is quite different and distinguishable from that of Milltimber, the lessor in the *Planwest*, case, *supra*.

26 There is no evidence of any business activity at all that Patchrite engaged in until May of 2001 when it had transferred to it Sweeprite's land, building and equipment. Patchrite in turn rented back the building, land and equipment, none of which ever left Sweeprite's possession, to Sweeprite under the terms of a non-written agreement. Sweeprite paid Patchrite a rental for the fiscal period from July 1, 2000 to June 20, 2001 of $22,500.00, for the fiscal period July 1, 2001 to June 30, 2002, $69,659.53, and from July 1, 2002 to January 31, 2003, $23,701.71.

27 Ultimately Patchrite and Sweeprite entered into the equipment lease dated May 23, 2002, for a term of three years, a term which, by virtue of the agreement, began running January 31, 2003. The equipment lease required Sweeprite pay Patchrite an annual rent of $24,000.00 and recognized that the equipment leased had a book value of $331,738.00. Patchrite granted Sweeprite an option to purchase the leased equipment for a purchase price of $212,000.00.

28 In 2001 when the non-written lease/rental agreement first began, Patchrite had no other business except the ownership and lease to and/or rental of the land, building and equipment to Sweeprite. It was not until December of 2001 when it obtained the research and development contract with Rite Way.

29 The business of leasing which had started in the spring of 2001 under the non-written arrangement and which continued thereafter by virtue of the equipment lease until the bankruptcy of Sweeprite, was, from May to December of 2001, the only business of Patchrite and thereafter continued to be a significant part of Patchrite's business.

30 In these facts and circumstances, I find and conclude that Patchrite was "regularly engaged in the business of leasing" within the meaning of subsection 2(1)(y)(iv) of the *PPSA* and therefore it is not entitled to the exemption from the registration requirements of s. 3. The lease in question was therefore "a lease for a term of more than one year" within the meaning of the *PPSA* and it required registration. Having failed to register its leasehold interest at the personal property registry Patchrite's claim to the equipment is subordinate to the registered and first priority claim of the Bank.

31 Orders reflecting this judgment of the Court may issue.

Order accordingly.

APPENDIX "A" — to 2006 SKQB 519

CANADA) Q.B.G. No. 1690 of 2006
PROVINCE OF SASKATCHEWAN)

IN THE QUEEN'S BENCH
JUDICIAL CENTRE
OF REGINA

BETWEEN:

BANK OF MONTREAL

APPLICANT

-and-

PATCHRITE INC.

RESPONDENT

Agreed Statement of Facts

1. Sweeprite Mfg. Inc. ("Sweeprite") was incorporated by Leslie Hulickso ("*Hulickso*") on January 31, 1985 under *The Business Corporations Act* (Saskatchewan).

2. Sweeprite commenced business in 1985 as an equipment manufacturing company in Regina, specializing in the manufacture of commercial street and parking lot sweepers.

3. Patchrite Inc. ("*Patchrite*") was incorporated by Hulickso on May 24, 1990 under *The Business Corporations Act* (Saskatchewan). Hulickso remains as the sole shareholder and director of Patchrite.

4. Patchrite was created in 1990 for the purpose of manufacturing and marketing pothole patching machines to the public and private sector but never commenced business as such.

5. Gateway Capital Corp. ("*Gateway*") was incorporated under *The Business Corporations Act* (Saskatchewan). Gateway was a capital pool company listed to publicly trade shares on the CDNX Exchange, but which needed to purchase shares in a corporation as a "qualifying transaction" to do so.

6. Hulickso was a director and majority shareholder of Sweeprite until the shares were sold to Gateway.

7. In 2000 Hulickso, on behalf of Sweeprite, began negotiating the sale of Sweeprite to Gateway.

8. At the time, Hulickso's intention was to include Sweeprite's land, building and equipment, civically located at 1891 Albert Street North, in Regina, Saskatchewan, in the sale to Gateway.

9. As the negotiations progressed, Gateway indicated that it was not interested in acquiring Sweeprite's land, building and equipment.

10. Due to Gateway's position, Hulickso completed a corporate restructure whereby on May 1, 2001 Sweeprite's land, building and equipment were transferred to Patchrite while negotiations with Gateway continued for the acquisition of Sweeprite. A copy of the Rollover Agreement dated May 1, 2001 which dealt with these transfers and a copy of a letter from Patchrite's solicitors to its accountant dated April 29, 2002 are attached as Appendix "A".

11. Patchite obtained a mortgage over the real property that had been transferred to it (and a mortgage made by Sweeprite was repaid and discharged). Sweeprite made the payments that were due on Patchrite's mortgage to Patchrite's mortgagee and the amounts paid by Sweeprite were treated as rental income by Patchrite for income tax purposes. The total amount paid as rent by Sweeprite for the fiscal period from July 1 2000 to June 30, 2001 was $22,500.00. The total amount paid by Sweeprite as rent for the fiscal period from July 1, 2001 to June 30, 2002 was $69,659.53 (which amount was the total amount paid by Sweeprite towards the Patchrite mortgage referred to above during that time period). The total amount paid as rent by Sweeprite from July 1, 2002 to January 31, 2003 was $23,701.71 (which was the amount paid by Sweeprite on the Patchrite mortgage during that time period).

12. On February 8, 2002, after lengthy negotiations, Sweeprite and Gateway executed a letter of intent whereby Gateway was to acquire Sweeprite through a share purchase which was to close May 1, 2002 as a qualifying transaction.

13. Following further negotiations, Sweeprite and Gateway executed a formal Qualifying Transaction Agreement on April 11, 2002. For various reasons the closing date of the Qualifying Transaction Agreement was extended and ultimately the transaction did not close until January 31, 2003, Upon the closing, Sweeprite and Gateway amalgamated to continue as Sweeprite.

14. The equipment lease which is the subject of this application was executed by Hulickso on behalf of Sweeprite, as lessee, and on behalf of Patchrite, as lessor, on May 23, 2002 ("*the Lease*"). A copy of the Lease is attached as Appendix "B".

15. The Lease was entered into as part of, and was designed to facilitate, the sale of the shares of Sweeprite to Gateway since Gateway did not wish to acquire the land, building and equipment located at 1891 Albert Street North, but it was nonetheless required to continue Sweeprite's business.

16. The Lease was for a term of three years but its term was not to begin until the closing date of the Qualifying Transaction Agreement between Sweeprite and Gateway, which ultimately was January 31, 2003. The Lease provides for minimum annual rent of $24,000 and includes an option to purchase the leased equipment for $212,000. The first monthly rental payment of $2,000 under the Lease was made to Patchrite in February of 2003.

17. The Lease was the first and only transaction where Patchrite had entered into a written lease of personal property to a lessee.

18. Patchrite has not engaged in any other leases of personal property as lessor.

19. Patchrite owns other personal property which is not leased. This property includes a vehicle and computer system. Since December of 2001 Patchrite has also owned inventory and equipment which it has used in its research, design and development work.

20. Since December of 2001 Patchrite has been actively engaged in and has earned income from research, design and development work for Rite Way Mfg. Co. Ltd. ("*Rite Way*"). The majority of Patchrite's work has involved research design and development work for the "python" combine, which has not yet entered production.

21. Patchrite is not, and has never been, a wholesaler or a retailer of any kind of goods.

22. Pursuant to a General Security Agreement dated April 1, 2004 Sweeprite granted to the Bank of Montreal a security interest in all of its present and after-acquired personal property. A copy of the General Security Agreement is attached as Appendix "C".

23. The Bank of Montreal registered a financing statement respecting the said security agreement in the Personal Property Registry on April 6, 2004 as Registration Number 120624304. Attached as Appendix "D" is a copy of a Personal Property Registry (Saskatchewan) search dated April 8, 2005 obtained by the Bank of Montreal's solicitors and evidencing registration of the financing statement.

24. On June 28, 2005 Patchrite and Sweeprite executed a Lease Extension and Amending Agreement providing that the Lease's term would be extended to May 1, 2007. Attached as Appendix "E" is a copy of the Lease Extension and Amending Agreement.

25. Sweeprite ran into financial difficulty in the fall of 2005 and was unable to meet all of its obligations.

26. The Bank of Montreal appointed Sullivan & Associates Inc. ("*Sullivan*") as receiver and manager of Sweeprite under the said security agreement.

27. Sweeprite attempted to proceed with a proposal under the *Bankruptcy and Insolvency Act* but was unable to present a proposal acceptable to its creditors. As a result it was deemed to have made an assignment in bankruptcy on January 25, 2006. Sullivan was appointed as Sweeprite's Trustee in Bankruptcy.

28. During the course of the bankruptcy proceedings a dispute arose between Patchrite and the Bank of Montreal regarding priority to the equipment subject to the Lease.

29. Sullivan solicited offers for Sweeprite's assets (not including the equipment subject to the Lease) and eventually sold this other equipment to Patchrite.

30. Patchrite and the Bank of Montreal have agreed that the value of the equipment subject to the Lease is $100,000.00. Patchrite and the Bank of Montreal further agreed that that amount would be placed into a trust account by Patchrite, and that the funds would follow the result of the determination of the issues between Patchrite and Bank of Montreal. This sum is presently being held in trust by Robertson Stromberg Pedersen LLP pending the Court's decision in this application.

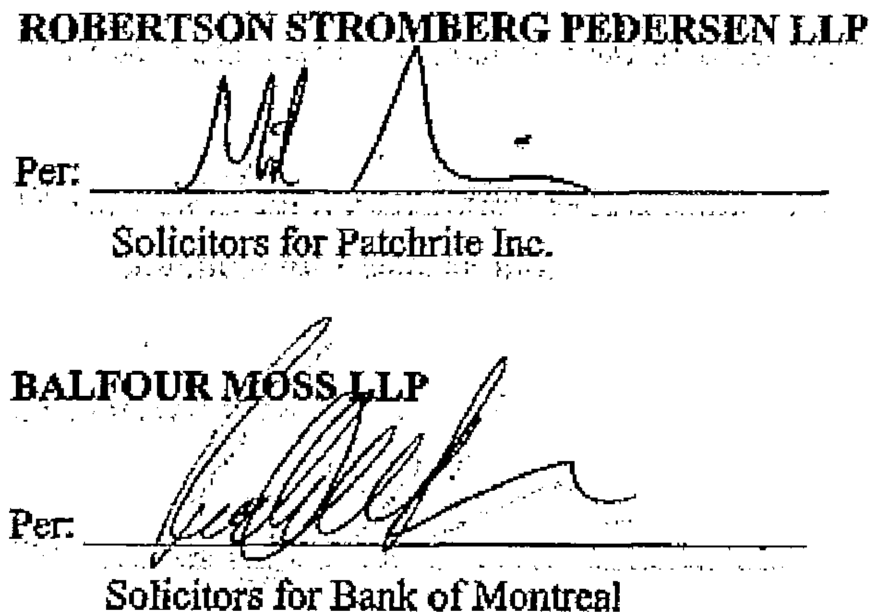
31. The issue to be decided by the Court is which of the Bank of Montreal or Patchrite has priority to, or entitlement to, the equipment subject to the Lease. That issue requires a determination on whether the Lease was a "lease" for a term of more than one year" as defined in s.2(1)(y) of *The Personal Property Security Act, 1993* (Saskatchewan) ("*the Act*").

32. The Bank of Montreal's position is that the Lease was a lease for a term of more than one year under the Act, and that as a result, Patchrite was obligated to register a financing statement in respect of its interest as lessor, and because it did not do so, Bank of Montreal has priority due to perfection of its security interest by registering a financing statement in the Personal Property Registry.

33. Patchrite's position is that the Lease was not subject to the Act because Patchrite was a "lessor who is not regularly engaged in the business of leasing goods" pursuant to section 2(1)(y)(iv) of the Act. As such, there was no obligation on Patchrite to register a financing statement and Patchrite is entitled to the equipment due to its ownership interest in it.

34. The Parties have agreed that these agreed facts may be utilized by the Court in respect of the application made under the Act to determine the respect rights, entitlement and priority to the equipment as between Bank of Montreal and Patchrite.

Dated at the City of Regina, this *1st* day of December, 2006.



Graphic 1

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TAB 4

2016 ABCA 266
Alberta Court of Appeal

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

2016 CarswellAlta 1703, 2016 ABCA 266, [2016] 11 W.W.R. 485, [2016] A.W.L.D. 4125, 270 A.C.W.S. (3d) 204, 402 D.L.R. (4th) 725, 40 C.B.R. (6th) 169, 41 Alta. L.R. (6th) 7, 6 P.P.S.A.C. (4th) 117

Fast Labour Solutions (Edmonton) Limited (Respondent / Plaintiff) and Kramer's Technical Services Inc. (Appellant / Defendant)

Alberta Diluent Terminal Ltd. (Not a Party to the Appeal / Applicant) and Fast Labour Solutions (Edmonton) Limited (Respondent / Respondent) and Kramer's Technical Services Inc. (Appellant / Respondent) and George Kramer (Appellant by Order)

Frans Slatter, J.D. Bruce McDonald, Sheila Greckol JJ.A.

Heard: September 7, 2016
Judgment: September 15, 2016
Docket: Edmonton Appeal 1503-0245-AC, 1503-0261-AC

Counsel: B.S. Sussman, Q.C., for Respondent
N. Fenna, for Appellant, Kramer's Technical Services Inc.
J.R. Pawlyk, for Appellant, George Kramer

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

APPEAL by KT Inc. from order finding it was subordinate to writ holders; APPEAL by GK from order granting priority to FL Ltd.

***Per curiam*:**

1 The issue on appeal #1503-0245AC is whether a construction crane is an exigible asset of the appellant, which depends on whether the owner of the crane was required to register its interest under the *Personal Property Security Act*, RSA 2000, c. P-7.

2 The issue on appeal #1503-0261AC is whether a writ holder that has seized property, and must move that property to preserve it, is entitled to priority for the seizure and removal costs.

Facts

3 Kramer's Technical Services, Inc. (Kramer's Iowa) is an Iowa company in the demolition business. It obtained a contract in Alberta, and in order to perform that contract it incorporated an Alberta subsidiary with a similar name, Kramer's Technical Services Inc. (Kramer's Alberta). Kramer's Iowa then leased a crane and other equipment to Kramer's Alberta to facilitate the performance of the contract. The respondent Fast Labour Solutions, a judgment creditor of Kramer's Alberta, attempted to seize the crane to satisfy its writ. Kramer's Alberta filed an objection to the seizure, taking the position that the crane was really the property of Kramer's Iowa.

4 As noted, Kramer's Iowa was awarded a contract to dismantle facilities in Edmonton so that they could be shipped to China. In November 2008 it engaged Kramer's Alberta to perform all the work for a fee, and represented that Kramer's Iowa "will provide all equipment necessary for completion of the work". Kramer's Iowa bought the crane on March 12, 2010, and had it delivered directly to the Edmonton facilities being dismantled. There was evidence showing that

Kramer's Iowa sent Kramer's Alberta monthly invoices for $55,000 for rental of a variety of pieces of equipment. Henry Kramer, the officer of Kramer's Iowa, deposed, however, that it was not in the business of renting equipment to arm's-length parties.

5 Kramer's Iowa did not register its interest in the crane in the Personal Property Registry. The crane was in the possession of Kramer's Alberta for more than one year, meaning that the lease potentially required registration because it was a deemed security interest under s. 1(1)(tt) of the *Act*, even though it did not necessarily secure payment or performance of an obligation:

> (tt) "security interest" means ...
>
> (ii) the interest of ...
>
> (C) a lessor under a lease for a term of more than one year, ...

Kramer's Iowa argues that it falls within the exception under s. 1(1)(z) of the *Act*:

> (z) "lease for a term of more than one year" ... does not include ...
>
> (iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods, ...

Kramer's Iowa argues that it is a demolition company, and not "regularly engaged in the business of leasing goods".

6 On January 15, 2012 George Kramer registered a security interest in the crane. George Kramer is the father of Henry Kramer, who is a co-owner of Kramer's Iowa and Kramer's Alberta. When Henry Kramer was examined on his affidavit he said that he "wasn't aware" of that security agreement. In an answer to an undertaking to provide a copy of the security agreement he responded: "A copy of the agreement cannot be located", and that the amount claimed under the security agreement was "unknown". George Kramer subsequently asserted, however, that he had a security interest in all of the equipment for US$1.2 million.

7 Nielsen J. concluded that Kramer's Iowa was regularly engaged in the business of leasing goods, and having failed to register its security interest that interest was subordinate to those of the writ holders. He noted that monthly invoices were sent for the rental of equipment for several years, showing a regularity in the activity of leasing. That order resulted in appeal #1503-0245AC.

8 When the crane was seized it was located on land owned by Alberta Diluent Terminal Ltd., where the facilities being dismantled were located. It brought an application to have the crane removed, and an order was made requiring Fast Labour Solutions (the seizing creditor) to remove it within 30 days. Faced with the competing claim of George Kramer, Fast Labour applied for an order confirming that the costs of removing the crane would have priority over any claim that George Kramer could establish. Little J. granted that order, which resulted in appeal #1503-0261AC.

Registration of the Interest in the Crane

9 The *Personal Property Security Act* is designed to create a public registry showing the interests of various claimants in assets possessed by another person. The background is that the common law would slavishly respect the legal title to an asset. If the owner of an asset allowed someone else (the "debtor") to have possession of that asset, no third party could seize that asset to satisfy the debts of the debtor, and the debtor could not give an interest in that asset to anyone else: *nemo dat quod non habet*. This has the potential for mischief, if not outright fraud. Third parties could deal in good faith with a debtor, assuming that because it was in possession of the asset, it also had title.

10 Many centuries ago it was realized that the common law's infatuation with legal title could be used to create effective security interests by *separating possession from title*. Title to an asset could be placed in one person (the lender), while possession of the asset could be left with another (the borrower). The lender would have the security of having title to

the asset, whereas the borrower would be allowed to use the asset on a day-to-day basis, which was the whole point of the transaction. This security arrangement would be effective because the common law would always respect the legal title. These security arrangements had enormous advantages over the common law pledge, which required the lender to have both a legal interest in *and* possession of the asset being used as security.

11 Many legislative attempts were made to require disclosure of these invisible security arrangements through a public registry: the *Bills of Sale Act*, the *Conditional Sales Act*, the *Assignment of Book Debts Act*, some provisions of the *Business Corporations Act*, etc. However, each time a registration requirement was imposed, solicitors would find a new arrangement which did not require registration. For example, partly in order to avoid having to register chattel mortgages or conditional sales contracts, the "financing lease" was developed. A considerable amount of case law then developed on whether a particular lease was a "true lease" which did not require registration, or merely a "financing lease" which did: see for example *Ramsay v. Pioneer Machinery Co.*, 1981 ABCA 56, 15 Alta. L.R. (2d) 140, 28 A.R. 429 (Alta. C.A.).

12 The *Personal Property Security Act* was designed to sweep away these technicalities, and to provide one universal regime, and one universal registry, in which all security interests had to be registered. Its ultimate purpose is to define all of those arrangements where registration is required in the public interest because possession has been separated from title. At the highest level of generality, the *Act* should be interpreted having regard to that objective.

13 In drafting the *Personal Property Security Act* there were many borderline situations that had to be considered. True financing leases that secure payment or performance of an obligation must be registered. Short term or temporary leases do not warrant registration. For example, a company renting cars for a few days could not reasonably be required to register its interest every time a new renter came along. But longer leases were within the mischief of the statute, because they create false impressions about the ownership of the collateral. The line was drawn at leases over one year; s. 1(1)(tt) of the *Act* deems them to be security interests whether or not they secure payment or performance of an obligation. An exception was then made in s. 1(1)(z) for occasional lessors who are not regularly engaged in the business of leasing goods. The statute, essentially, places the risks arising from leases over one year by parties not generally in the business of leasing assets on the third party dealing with the debtor in possession of those assets. Those are the provisions engaged by this appeal.

14 The core issue then is whether Kramer's Iowa "regularly engaged in the business of leasing goods". The *Act* does not require that the owner of the goods only be in the business of leasing goods, or that it primarily be in the business of leasing goods. So long as the owner "regularly engages" in the leasing of goods, the section is engaged. The case law establishes that the frequency of leasing is not determinative of whether the claimant is in the business of leasing. As long as leasing is a regular part of the business, it will be caught by the statute, even if leasing is not the predominant or a significant part of the business: *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)*, 1996 ABCA 134 (Alta. C.A.) at para. 12, (1996), 38 Alta. L.R. (3d) 428, 184 A.R. 291 (Alta. C.A.).

15 A company can be in the "business" of leasing goods even if it never makes a profit, and perhaps never intends to make a profit out of the leasing transaction itself: *National Bank of Canada v. Merit Energy Ltd.* (2001), 294 A.R. 1 (Alta. Q.B.) at para. 55, (2001), 27 C.B.R. (4th) 283 (Alta. Q.B.). Having regard to the overall purposes of the *Act*, one indicia of a "business" is that the lease is for a commercial purpose, and is part of an overall business strategy. Thus, the common scenario of having a "holding company" which owns all the assets of the enterprise, and then leases them to an associated "operating company" would fall within the provision, even if the lease rates were set on a "flow-through" basis, without any expectation of profit. This sort of "creditor proofing" is a legitimate business strategy, but it requires registration to be effective against third parties. Indeed, this is exactly the kind of situation where third parties dealing with the operating company might be misled because possession of the assets has been separated from title to those assets.

16 It follows that it does not matter if the owner of the property only leases property to non-arm's-length persons, if only because the statute draws no such distinction. This, in fact, is directly within the mischief at which the *Act* is aimed. For example, in the common holding company/operating company corporate structure, many persons dealing with the

operating company could be misled by the fact that it is in possession of numerous assets. The mischief is magnified where the two companies have very similar names, as in the present case. The *Act* is designed to require the non-arm's-length holding company to register its interest to disclose the true state of affairs.

17 In this case it is not determinative that Kramer's Iowa is primarily in the demolition business. That does not foreclose leasing being a regular part of its operations. The arrangement between Kramer's Iowa and Kramer's Alberta was that the former would provide "all equipment" needed for the project, including the seized crane. The fact that the crane was bought by Kramer's Iowa, but immediately delivered to Kramer's Alberta is also indicative of involvement in the business of financing the acquisition of equipment for a third party. The invoices demonstrated that Kramer's Iowa was leasing a variety of equipment to Kramer's Alberta on a regular basis in order to facilitate the project in Edmonton. The record amply supports the chambers judge's finding that Kramer's Iowa was regularly engaged in the business of leasing goods.

Costs of Removing the Seized Goods

18 As things presently stand, the prior perfected security interest of George Kramer would have priority over subsequent writs under s. 35 of the *Personal Property Security Act* and s. 35 of the *Civil Enforcement Act*, RSA 2000, c. C-15, assuming that the underlying security is valid and enforceable. George Kramer argues that to allow the writ holders to recover removal costs would displace the statutory priority regime.

19 It will be apparent that costs would be incurred to remove the crane, no matter which creditor had to remove it. If it ultimately turns out that George Kramer has the prior security interest, he would have had to remove the crane in order to realize on his security. If he is now able to download that cost on the writ holders, he would receive a windfall.

20 Both the *Personal Property Security Act* and the *Civil Enforcement Act* recognize that expenses will be incurred in the enforcement of claims against debtors, and provide a level of priority for those expenses:

Personal Property Security Act, s. 60(1) (with respect to true security interests):

60(1) Collateral may be disposed of in accordance with this Part in its existing condition or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order to

(a) the reasonable expenses of enforcing the security agreement, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the party disposing of the collateral,

and the surplus, if any, shall be dealt with in accordance with section 61.

Civil Enforcement Act, s. 99(3):

99(3) Where the total amount of the eligible claims exceeds the amount of a distributable fund, the distributing authority must apply the distributable fund toward the claims in the following order of priority:

(a) repealed 2002 c17 s1(20);

(b) first, to other fees and expenses of a distributing authority that may be claimed against the enforcement debtor that were earned or incurred in connection with the enforcement measures that have produced the fund

(c) second, to other costs that may be claimed against the enforcement debtor that were incurred by the instructing creditor in connection with the enforcement measures that have produced the fund and any other costs that the Court has directed to be paid out of the fund; ...

These sections do not clearly deal with the situation present in this appeal, where a subordinate claimant has in good faith and in accordance with a court order incurred expenses to realize on the collateral, when those expenses should likely have been incurred in the first instance by the creditor with priority.

21 In addition to the general priority provisions found in ss. 35 of each of the two statutes, the appellant points to s. 96(4) of the *Civil Enforcement Act:*

> 96(4) Where a distributing authority receives money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors, the distributing authority must pay to that person the money to which the person is entitled, and any money paid under this section does not form part of a distributable fund.
>
> (emphasis added)

The appellant argues that this section confirms the general priority of the prior secured creditor, but also removes from the "distributable fund" the proceeds received from the collateral. Thus, those funds to which the prior creditor is entitled never fall within the provisions of s. 99(3), and so never attract the priority for realization expenses found there.

22 In addition, at this stage of the proceedings the crane has not been sold so there are no "proceeds of disposition" under s. 60(1) of the *Personal Property Security Act*, nor any "money received by the distributing authority" under the *Civil Enforcement Act*. Further, on a strict reading, s. 96(4) of the *Civil Enforcement Act* states that "any money paid" to the secured creditor does not form a part of the distributable fund, which somewhat begs the question of what money the secured creditor is entitled to be paid. Is that only the surplus funds remaining after the costs of realization have been covered?

23 The problem is discussed in B. MacDougall, *Canadian Personal Property Security Law* (LexisNexis Canada: Markham, Ont, 2014) at p. 422:

> Whether the expenses a junior creditor incurs in proceeding against the collateral upon default by the debtor can affect the priority or the extent of the priority of the senior secured party's interest is the subject of mixed authority. ... It has also been held, however, that a junior secured party who incurs expenses associated with its remedial actions, including appointment of a receiver, can claim to be paid first for such expenses even if its junior position does not allow it to use the proceeds from the collateral to reduce its obligation secured. In order for such expenses to be given priority against the claims of senior creditors, the action taken by the junior secured party must be said to be beneficial to those senior creditors, and not simply an expense for the benefit of the junior creditor.

In this case the actions of First Labour are beneficial to George Kramer, because they saved the latter from expending funds to remove the crane. If George Kramer is successful in proving the validity of his security, the expenses will be of no benefit to First Labour.

24 MacDougall cites *Father & Son Investments Inc. v. Maverick Brewing Corp.*, 2007 ABQB 651, 82 Alta. L.R. (4th) 157, 436 A.R. 130 (Alta. Q.B.). In that case a junior creditor had a receiver appointed, but ultimately there were no funds available to satisfy its claims. It was nevertheless allowed to recover the costs it had incurred:

> 48 While it is true that a creditor has an active interest in the resolution of outstanding debts, the equitable position of a creditor is somewhat different and distinct from that of a receiver, trustee or lawyer because the creditor is a potential beneficiary of its own activities. That said, where the actions of a creditor result in a benefit for others and the size of the recovery ultimately results in the creditor receiving no recovery, the traditional principles of equity would appear to demand that the creditor be entitled to be compensated for its efforts: ... To do otherwise would result in injury to the low-ranked creditor who has expended effort and funds. ...
>
> 52 Synthesizing these principles, a creditor may logically receive super-priority for its costs, when the costs:

a) are incurred while a creditor takes actions that increase the recovery from a debtor,

b) the increased recovery provides a benefit to higher ranked creditors, and

c) the actions of the creditor are not a consequence of a separate legal duty.

No higher priority will result for the costs of activities that fail to provide a benefit, or are incurred in an unrelated matter.

In *Father & Son Investments* the receivership had generated funds which benefited the senior creditor, and accordingly the junior creditor was entitled to recover the expenses.

25 Having regard to the windfall that would accrue to the secured creditor, the appropriate analysis is under or by analogy to s. 60(1)(a) of the *Personal Property Security Act*. Section 96(3) of the *Civil Enforcement Act* confirms that the provisions of the *Personal Property Security Act* prevail. The principles in s. 60(1)(a) should be applied here in light of the analysis in *Father & Son Investments*. The costs incurred by Fast Labour in removing the crane are part of "the reasonable expenses of ... disposing of the collateral". The provision "any other reasonable expenses incurred by the secured party" found at the end of that subsection should be interpreted such that the "other reasonable expenses" mentioned earlier in this subsection need not be incurred directly by the secured party. Where a subordinate claimant has, in good faith, incurred expenses in realizing on the collateral that would otherwise have been incurred by the prior secured party, those reasonable expenses should receive the priority contemplated by s. 60(1)(a). This is particularly so where the expenses arose from execution of a court order.

26 In summary, the chambers judge did not err in holding that Fast Labour was entitled to recover the costs of removing the crane in priority to the claim of the prior secured creditor.

Conclusion

27 In conclusion, there was ample evidence to support the chambers judge's finding that Kramer's Iowa was regularly involved in the business of leasing goods. No reviewable error has been shown, and appeal #1503-0245AC is dismissed.

28 The expenses incurred by Fast Labour in removing the crane were properly treated as having a priority over the prior secured claim, and appeal #1503-0261AC is also dismissed.

Appeals dismissed.

End of Document

TAB 5

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

Most Recently Cited in: Vanmaele Estate (Re) , 2018 ABQB 840, 2018 CarswellAlta 2265 | (Alta. Q.B., Oct 5, 2018)

R.S.A. 2000, c. J-2, s. 10

s 10. Relief against forfeiture

Currency

10.Relief against forfeiture
Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

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

End of Document

TAB 6

2018 ONSC 3602
Ontario Superior Court of Justice

Voortman v. SPCVC Investments Inc.

2018 CarswellOnt 9632, 2018 ONSC 3602, 293 A.C.W.S. (3d) 767

Harry Voortman and Voortman Enterprises Trust (Applicants) and Voortman Cookies Ltd. (Formerly SPCVC Acquisition Inc.) and SPCV Investments Inc. (Respondents)

H. McArthur J.

Heard: April 30, 2018
Judgment: June 8, 2018
Docket: CV-17-588951

Counsel: Sean Dewart, Lindsay Beck, for Applicants
Alex Rose, Zev Smith, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

APPLICATION by business sellers pursuant to s. 98 of *Courts of Justice Act* for relief from forfeiture.

H. McArthur J.:

Introduction

1 When sophisticated parties enter into an agreement, where "time is of the essence", what happens if one party misses a deadline? Is a deal always a deal? Or, in certain circumstances, can the court provide equitable relief? That is the issue in the present case.

2 Harry Voortman sold his cookie company to SPCVC Investments Inc. for $182.5 million. [1] The agreement provided that on closing, $1 million of the purchase price was to be paid into an escrow account to secure any claim by the "purchasers for breaches of the sellers' representations and warranties." The agreement stipulated that SPCVC had 18 months during which to make any such claim. If the claim exceeded $1.825 million, then Mr. Voortman would become liable for damages not exceeding the $1 million in the escrow account.

3 The agreement further provided that Mr. Voortman had 30 days to file a written objection to the claim. If Mr. Voortman failed to provide a written objection, he was deemed to have admitted the claim and given up his rights to the $1 million in escrow. The agreement stipulated that time was to be of the essence.

4 SPCVC filed a claim. Mr. Voortman's lawyer, Paul Grespan, wrote to SPCVC and asked for more particulars. After receiving particulars, Mr. Voortman met with Mr. Grespan and instructed him to file a written objection to the claim. Mr. Voortman's lawyer, however, missed the 30-day deadline by seven days. Why? In the week leading up to the deadline, Mr. Grespan was told he required open heart surgery. Further, an associate at his firm suffered serious injury in an accident and was unable to return to work on an indefinite basis. In the midst of these troubling circumstances, Mr. Grespan inadvertently missed the deadline.

5 Mr. Voortman now brings an application pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990. c. C.43, seeking relief from forfeiture. He argues that he acted reasonably in relying on his lawyer, that the breach was minor and that

there is a significant disparity between the value of the property to be forfeited and the damage caused by the breach. This is a case, he argues, that cries out for equitable relief.

6 SPCVC counters that relief from forfeiture is not available in this case, as Mr. Voortman did not breach the contract; rather, he failed to exercise an option. SPCVC further argues that in the event that forfeiture is found to be an available remedy, it should not be granted in this case as time was to be of the essence. If relief from forfeiture is granted, SPCVC argues that it should be given an extension and allowed to make claim for any amounts discovered within two months of the end of the 18-month period stipulated in the agreement.

7 For the reasons that follow, I have determined that relief from forfeiture is an available remedy on the facts of this case. I have further concluded that given the unique facts of this case, relief from forfeiture should be granted. Finally, I have determined that a two-month extension for SPCVC to file a claim is not warranted.

8 I do not propose to detail the facts, but will refer to them as necessary in my analysis, to which I now turn.

Analysis

1) Issue One: Is relief from forfeiture an available remedy in this case?

9 The power of the Ontario Courts to grant relief from forfeiture is codified in s. 98 of the *Courts of Justice Act*. Section 98 provides:

> A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

10 Relief from forfeiture refers to the power of the court to protect a party against the loss of an interest or a right because of a failure to perform a covenant or condition in an agreement or contract. The remedy is equitable and purely discretionary. Relief from forfeiture should be granted sparingly and the party seeking the relief bears the onus of establishing the case for relief: *Kozel v. Personal Insurance Co.*, 2014 ONCA 130 (Ont. C.A.) , at paras. 28-29; *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363 (Ont. C.A.) , at para 87.

11 SPCVC argues that relief from forfeiture is not available in this case, as there has been no breach of contract. Mr. Voortman had an option to either; a) object to the claim notice within 30 days, or b) remain silent and be deemed to consent to indemnity claims. SPCVC argues that Mr Voortman's failure to exercise an option "does not create an actionable breach of contract that can support a claim for relief from forfeiture."

12 In making this argument, SPCVC relies on *Canadian Superior Oil of California Ltd. v. Kanstrup* (1964), [1965] S.C.R. 92 (S.C.C.) . SPCVC argues that Mr. Voortman's position was expressly rejected by the Supreme Court in *Kanstrup* and that he is asking for a "novel expansion" of the law by asking the court to apply the doctrine of relief from forfeiture to cases where there has been no breach of contract, but rather, a failure to exercise an option.

13 I cannot agree with this argument for three reasons. First, in my view the reasoning in *Kanstrup* does not stand for the general proposition that in the absence of a breach of contract relief from forfeiture is not available. Second, the facts in the present case are distinguishable from *Kanstrup* and lead to a different analysis. Third, the argument advanced by SPCVC is inconsistent with Ontario Court of Appeal authorities. I will address each point in turn.

(i) The reasoning in Kanstrup does not stand for the general proposition that in the absence of a breach of contract, relief from forfeiture is not available

14 SPCVC argues that *Kanstrup* stands for the broad and binding proposition that in the absence of a breach of contract, relief from forfeiture is not available. In my view, however, the comments in *Kanstrup* with respect to breach of contract were narrowly tailored to the facts in that case.

15 *Kanstrup* involved a gas lease. Canadian Superior Oil had a 10-year lease. At the end of the 10 years, the lease would continue, so long as Canadian Superior Oil either produced gas or paid $100 annually. The company did not produce gas, and instead provided a cheque for $100. The cheque, however, was not provided until after the 10-year lease had already expired. Kanstrup thus took the position that the lease had been terminated.

16 Canadian Superior Oil advanced a number of arguments as to why the lease should not be terminated. In particular, it pointed to a provision in the agreement which stipulated that if Canadian Superior Oil breached any terms of the agreement, such breach would not lead to forfeiture or termination of the lease.

17 The court held at para. 37 that the provision did not assist Canadian Superior Oil, as the company did not breach the contract, rather it failed to take advantage of an opportunity to renew the lease. It is clear that the court's comments about breach of contract and forfeiture were limited to an assessment of the impact of the particular provision being considered in that case. Contrary to the submission of SPCVC, the court in *Kanstrup* did not articulate a general principle that a breach of contract is always required before relief from forfeiture is available.

(ii) The facts in the present case are distinguishable from Kanstrup

18 Moreover, the present case is distinguishable from *Kanstrup*. Canadian Superior Oil only had claim to the property because of the lease. The lease provided for a specified term, which would terminate automatically at the end of the term unless Canadian Superior Oil produced gas or paid $100. The company failed to take either action. The lease thus terminated. In this situation, the court found at para. 40 that there was simply "no forfeiture to relieve against."

19 In contrast, in the present case the $1 million in escrow belonged to Mr. Voortman. That money continued to be his unless SPCVC established a claim in excess of $1.825 million. By missing the deadline, Mr. Voortman was deemed to have admitted the claim. Thus, Mr. Voortman lost his right to the money because of his failure to perform a covenant in the agreement. Unlike in*Kanstrup*, Mr. Voortman clearly forfeited money in which he had an interest: there is forfeiture to relieve against.

(iii) The position of SPCVC is inconsistent with Ontario Court of Appeal authorities

20 Finally, the position of SPCVC is inconsistent with Ontario Court of Appeal authorities. For example, in *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, [1993] O.J. No. 2801 (Ont. C.A.), the court found that it had jurisdiction to grant relief from forfeiture in cases where an optionee has failed to exercise an option. The court noted that while the jurisdiction to grant equitable relief in such cases is limited, it is available. (See also *Ross v. T. Eaton Co.*, [1992] O.J. No. 2239 (Ont. C.A.))

21 In *PDM Entertainment Inc. v. Three Pines Creations Inc.*, 2015 ONCA 488 (Ont. C.A.), at paras. 61-62, the Court of Appeal rejected the argument that relief from forfeiture can only be granted where the party seeking relief has breached a contract and the breach gives rise to a right to forfeiture essentially to secure payment of money. Macpherson J.A. made clear at para. 63 that relief from forfeiture is available in a wide range of cases.

22 More recently, in *Poplar Point First Nation Development Corp. v. Thunder Bay (City)*, 2016 ONCA 934 (Ont. C.A.), the court held that relief from forfeiture was available, even though there had been no breach of contract. In that case, the appellant had failed to pay municipal taxes on his property, and the property was sold by the Municipality. The money from the sale exceeded the amount owed for taxes and the money was paid into court. Under the *Municipal Act*, the appellant then had one year to make a claim for the money. He missed the deadline by three weeks, thus he was deemed to have forfeited the money. In finding that relief from forfeiture was warranted, van Rensburg J.A. noted at para. 36 that s. 98 provides the court with "what appears to be broad and unlimited authority" to grant relief from forfeiture.

(iv) Conclusion on whether relief from forfeiture is an available remedy in this case

23 SPCVC relies on *Kanstrup* in arguing that relief from forfeiture is not available in the present case since there was no breach of contract. *Kanstrup*, however, does not stand for such a general proposition and, in any event, the facts in the present case are distinguishable. Moreover, SPCV's position is inconsistent with Ontario Court of Appeal authorities. I find that I have jurisdiction to grant relief from forfeiture in this case. I turn now to consider whether relief from forfeiture should be granted.

2) Issue Two: Should relief from forfeiture be granted in this case?

24 In considering whether to grant relief from forfeiture, the court must consider three factors: i) the conduct of the applicant; ii) the gravity of the breach; and iii) the disparity between the value of what has been forfeited and the damage caused by the breach: *Kozel* , at para. 31; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.) , at para. 32.

25 As Paciocco J.A. recently explained in *Scicluna v. Solstice Two Limited*, 2018 ONCA 176 (Ont. C.A.) , at para. 29, these factors do not create a three-part test requiring satisfaction of each; they are elements to guide the court in the exercise of its discretion. I will consider each factor in turn.

i) The Conduct of the Applicant

26 The first factor requires an examination of the reasonableness of the breaching party's conduct as it relates to "all facets of the contractual relationship, including the breach in issue and the aftermath of the breach": *8477 Darlington Crescent* , at para. 89. As Osborne J.A. explained in *Williams v. Paul Revere Life Insurance Co.*, [1997] O.J. No. 2773 (Ont. C.A.) , at para. 49, the court should consider the nature of the breach, what caused it and anything that the party tried to do about it. All of the circumstances should be taken into account, including anything that tends to explain the act or omission that led to the forfeiture.

27 In my view, the circumstances in the present case establish that Mr. Voortman acted reasonably. Mr. Voortman met with his lawyer after particulars had been provided and instructed him to file the required objection. Mr. Voortman reasonably relied on his long-time lawyer to follow his instructions and comply with the 30-day time frame in which to file an objection. This is similar to the case of *Buurman v. Dominion of Canada General Insurance Co.*, 2015 ONSC 6444 (Ont. S.C.J.) . There, at para. 43, the court found that it was reasonable for the plaintiffs to believe that their lawyers would attend to the time limit for claiming accident benefits coverage under an insurance policy. (See also, *Niagara Falls (City) v. Diodati*, 2011 ONSC 2180 (Ont. S.C.J.) , at para. 26)

28 Mr. Voortman could not reasonably have anticipated that his long-time lawyer would suffer personal difficulties that would lead him to miss an important deadline contrary to his explicit instructions. Moreover, while it is Mr. Voortman's conduct that must be assessed, when considering whether an equitable remedy is appropriate, the reason that Mr. Grespan missed the deadline is a relevant circumstance to consider. The lawyer missed the deadline because of inadvertence stemming from personal issues.

29 It is true, as pointed out by SPCVC, that there were other lawyers at the firm. But in my view that does assist SPCVC for two reasons. First, the fact that there were other lawyers at the firm underscores that it was reasonable for Mr. Voortman to believe that his instructions to file a written objection would be followed. Second, other lawyers could not be expected to take over from Mr. Grespan unless they were aware of the need to do so. Mr. Grespan could not instruct other lawyers to take over unless he adverted to the deadline. But in the week leading up to the deadline, an associate at the firm had suffered serious injury and was unable to return to work. And Mr. Grespan had been told he required open heart surgery. The uncontroverted evidence is that Mr. Grespan did not advert to the deadline because of the challenging circumstances that arose in the week leading to the deadline.

30 The context supports that the deadline was missed inadvertently. The day he received the claim, Mr. Grespan advised SPCVC that he was seeking particulars of the claim. Mr. Grespan's uncontested evidence is that he was diligently

engaged in reviewing and considering the Damages Claim Notice. The news that he would require open heart surgery and the injuries suffered by his associate led him to miss the deadline. The failure to comply did not arise because of indifference.

31 Further, as soon as Mr. Grespan realized that the 30-day deadline had passed, he notified SPCVC of the objection. The rapidity with which he moved to address the missed deadline supports the conclusion that the failure to comply with the deadline did not stem from indifference. It also highlights that Mr. Voortman instructed his lawyer to file an objection. Again, it was reasonable for Mr. Voortman to rely on his lawyer to follow his instructions.

ii) The Gravity of the Breach

32 When considering the gravity of the breach, the court should look at both the nature of the breach itself and the impact of that breach on the contractual rights of the other party: *8477 Darlington Crescent* , at para. 19; *Kozell*, at para. 67.

33 Mr. Voortman argues that the breach was minor; he was only seven days late in filing the objection and courts have granted relief from forfeiture where the breach was graver: *Buurman* , at para. 43-44. Mr. Voortman also argues that SPCVC has failed to articulate any actual prejudice flowing from the delay.

34 SPCVC counters that since the contract stipulated time was of the essence, it is a serious breach; Ontario Courts have strictly enforced time is of the essence clauses: *2181050 Ontario Ltd. v. Strong et al.*, 2018 ONSC 442 (Ont. S.C.J.) , at paras. 17-18; *1473587 Ontario Inc. v. Jackson*, [2005] O.J. No. 710 (Ont. S.C.J.) , at para. 19. SPCVC has been prejudiced by Mr. Voortman's failure to comply with the time is of the essence provision.

35 In my view, the fact that there was a time is of the essence provision renders the breach in this matter more serious than it would have been in the absence of any such clause. While SPCVC could not articulate any specific prejudice it suffered from the seven-day delay, prejudice can be inferred because of the time is of the essence clause. The need for certainty in commercial contracts militates in favour of finding prejudice in this type of situation.

36 On the other hand, SPCVC could point to no actual prejudice it suffered as a result of the delay in filing the objection. No steps it took that it would not have, but for the seven-day delay. No steps it failed to take that it would have, but for the delay. No missed opportunities. No unnecessary expenditures. Thus, overall I find the seven-day delay in filing the objection to be a relatively minor breach.

iii) Any Disparity Between the Value of the Property Forfeited and the Damage Caused by the Breach

37 The third factor requires the court to consider the disparity between the value of the property forfeited and the damage caused by the breach. This entails a "kind of proportionality analysis": *8477 Darlington Crescent* , at para. 92.

38 Mr. Voortman points to the fact that SPCVC has failed to articulate any real damage caused by the breach. In contrast, he will forfeit $1 million if relief is not granted. He argues that there is a substantial disparity between the value of the property he will have to forfeit and any damage caused to SPCVC.

39 SPCVC counters that Mr. Voortman is not required to pay $1 million as the money was already in the escrow account; Mr. Voortman is not required to "pay anything out of pocket". Thus, SPCVC argues that Mr. Voortman has not suffered any real loss. This argument ignores the reality that the money paid into escrow belongs to Mr. Voortman unless and until SPCVC establishes a claim in excess of $1.825 million. Since Mr. Voortman did not file a written objection within 30 days, he is deemed to have admitted the claim and to have given up his right to that money. Contrary to the submission of SPCVC, Mr. Voortman has clearly forfeited $1 million.

40 SPCVC has suffered some prejudice, as noted above. That said, the only prejudice is inferred because the contract specified that time was to be of the essence. SPCVC failed to articulate any actual prejudice suffered because Mr. Voortman was seven days late in filing the written objection. I find that there is a significant disparity between the money

forfeited by Mr. Voortman and the prejudice suffered by SPCVC. The loss suffered by Mr. Voortman is disproportionate to the damages suffered by SPCVC.

iv) Conclusion on Whether Relief from Forfeiture Should be Granted

41 Mr. Voortman acted reasonably in relying on his lawyer. He met with his lawyer and instructed him to file the objection. He could not reasonably have anticipated that his lawyer would have troubling personal circumstances that would lead him to inadvertently miss the 30-day deadline. The breach is not particularly grave. While SPCVC has suffered some prejudice, it is minimal. There is a significant disparity between the $1 million forfeited and minimal prejudice suffered by the seven-day delay in filing the objection. Balancing all three factors, I find that Mr. Voortman should be granted relief from forfeiture.

42 The next issue is whether, as a result, SPCVC should correspondingly receive a two-month extension to file its claim. I turn to that issue now.

3) Issue Three: Should SPCVC receive a two-month extension to file its claim?

43 Section 98 allows for relief from forfeiture "on such terms as to compensation or otherwise as are considered just." SPCVC argues that if I grant relief from forfeiture to Mr. Voortman, it is just and equitable to grant SPCVC a two-month extension to file its claim.

44 Mr. Voortman counters that for any additional terms to be just, they must relate to prejudice flowing from the seven-day delay. For example, if SPCVC had incurred expenses as a result of the seven-day delay, it would be a just and appropriate term to order that Mr. Voortman pay those expenses. Here, SPCVC has no losses to point to; instead, SPCVC is asking for a remedy in the absence of any damage.

45 I agree. If SPCVC had been able to articulate any specific prejudice it suffered as a result of the delay, I would be prepared to impose a term to address that prejudice. In the absence of any articulable prejudice, however, I find that the remedy being sought by SPCVC is unjustified.

Conclusion

46 Relief from forfeiture is an available remedy in this matter. While such relief should be granted sparingly, it is justified in this case; Mr. Voortman acted reasonably, the breach was minor, and the forfeiture of $1 million by Mr. Voortman is disproportionate to the damages suffered by SPCVC because of the seven-day delay. Finally, I find that SPCVC is not entitled to a two-month extension to file its claim.

Costs on this Application

47 I encourage the parties to see if they can agree on costs. If the parties are unable to agree on costs, Mr. Voortman shall serve and file with my office written costs submissions within 15 days. SPCVC shall serve and file with my office any responding costs submissions within 15 days thereafter. The written submissions shall not exceed three pages in length, excluding the Costs Outline.

Application granted.

Footnotes

1 The applicants are Harry Voortman and Voortman Enterprises Trust. For ease of reference, I will generally refer to the applicants as Mr. Voortman. The respondents are Voortman Cookies Ltd. (formerly SPCVC Acquisition Inc.) and SPCVC Investment Inc. I will generally refer to the respondents as SPCVC.

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TAB 7

2014 ABQB 610
Alberta Court of Queen's Bench

Lakshmi Enterprises Ltd. v. Edleun Inc.

2014 CarswellAlta 1784, 2014 ABQB 610, [2014] A.W.L.D. 4824, 245 A.C.W.S. (3d) 683

Lakshmi Enterprises Ltd., Plaintiff and Edleun Inc., and Brightpath Kids Corp., Defendants

Master W.S. Schlosser, In Chambers

Heard: August 28, 2014
Judgment: October 3, 2014
Docket: Edmonton 1303-14920

Counsel: Erin Berney, for Plaintiff
Catherine Crang, for Defendants

Subject: Civil Practice and Procedure; Property

APPLICATION by landlord to terminate tenancy.

***Master W.S. Schlosser, In Chambers*:**

1 This is a landlord's application to terminate the tenancy of a daycare.

2 The tenant made a number of changes to the leasehold premises without getting the landlord's approval in advance, as the lease requires. Making changes to the premises without prior approval amounts to a breach of the lease. The breaches were not seriously contested. The central issue is whether relief from forfeiture ought to be granted.

Relief from Forfeiture

3 The power comes from section 10 of the *Judicature Act*, RSA 2000 C. J-2:

> Relief against forfeiture
>
> 10. Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

4 In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), (an insurance case), Mr. Justice Major said (at p. 503-504):

> B. Relief Against Forfeiture
>
> The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damages caused by the breach: *Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691; *Snell's Equity* (29th ed. 1990), at pp. 541-42.

5 Mr. Justice Major's comments arise from Lord Wilberforce's opinion in *Shiloh Spinners Ltd. v. Harding* (1972), [1973] 1 All E.R. 90 (U.K. H.L.), at 101. That case had to do with a right of entry. Relief from forfeiture was denied.

The breaches there were chronic and deliberate. There was no evidence of how the default could be cured and the court could not balance the cost of cure with the value of the interest harmed. Potential hardship could not be weighed.

6 Instances of the application of these principles abound.

7 The starting point is that contracts should be enforced as written. Relief from forfeiture is extraordinary. It is a discretionary equitable remedy and the considerations that apply to the exercise of this jurisdiction, sometimes expressed as the 'maxims of equity' apply in this context.

8 As a general principle, it can be said that when the breach in question involves potential harm to the demised premises, the Court, when deciding whether to grant relief from forfeiture, should balance the potential of harm to the reversion with the tenant's right to use and enjoyment of the premises during the currency of the lease. Relief is often granted on terms and if any lasting harm arising from a breach can be erased, that is a factor that ought to be considered.

9 Courts are reluctant to allow a party to buy its way out of a breach. Expenditure has to be aligned with securing the object of the bargain between the parties. Deliberate conduct starts a party out with an overdraft and, in a manner of speaking, equity does not do 'deficit financing'.

Issues

10 The central issue is that water is coming into the building. The landlord says that it comes from a number of sources:

(1) Ice damming on the roof;

(2) Damaged eavestrough spouts;

(3) An unapproved kitchen renovation with deficient plumbing;

(4) A deck addition with a negative slope; and

(5) Outdoor deck carpeting with a pile height that is not consistent with good drainage.

11 Moisture was observed in the basement crawlspace. There were damp storage boxes and mold growth.

12 As at the date of the application the deck carpet had been removed. The crawlspace had been cleaned up and the mold had been remediated to some unknown extent.

Evidence

13 This is an application for summary determination of a lease. As such, Rule 13.18 (3) applies which provides:

> 13.18(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

The evidence has to be first hand.

14 The application founders on several of the six steps set out in *1214777 Alberta Ltd. v. 480955 Alberta Ltd.*, 2014 ABQB 301 (Alta. Q.B.) at para 17.

15 The evidence was reviewed in detail at the hearing. All of the opinion evidence about the source and cause of water ingress consisted of letters from contractors attached as exhibits to party Affidavits. This 'evidence' consists of factual observations, which necessarily becomes second-hand when it is an exhibit to an Affidavit, and opinions based on the observations. No qualifications of the experts, other than company names which suggested a business in the subject area in which the opinion was tendered was given, which is really no basis for qualification at all.

16 If we were, for the sake of argument, to accept this evidence at face value, there are no grounds for concluding that the moisture in the crawlspace was definitively attributable to anything the tenant did or did not do. The opinions about cause are ambiguous and equivocal.

Disposition

17 I take notice that ice damming is caused by inadequate attic insulation and ventilation issues, (which conforms to one of the unqualified opinions), and which is not a tenant's issue.

18 Water in the foundation is a combination of landscaping, the integrity of the foundation and such things as whether weeping tile is present and functioning. It is possible that the activities of the tenant might contribute to water in the basement if the foundation is not sound or if the weeping tile does not do its job, but even this is in doubt.

19 There was evidence that the downspouts were damaged, though there was no established relationship of cause-and-effect between a damaged waterspout and water in the crawlspace location.

20 There was no evidence that the plumbing renovations were near where there were moisture issues. There was no evidence whether plumbing issues already there, or added later, were the cause of the problem.

21 The evidence is equally ambiguous about the deck. It is not clear whether the existing deck built by the landlord or the deck addition, built by the tenant, has the negative slope and could be the source of water in the building.

22 In short, the evidence does not provide a basis for concluding that there is any relation between the breaches and harm to the reversion. And even if such a link had been proved, curing the harm involves relatively nominal expense. The irony is that the unapproved leasehold improvements may even have increased the value of the premises, though this is conjecture and it too is not proved

Conclusion

23 Relief from forfeiture is granted on the following terms:

1. The tenant is to repair damaged downspouts forthwith, at its own expense, and maintain them in a state of good repair for the currency of the lease;

2. The tenant is to allow reasonable access for inspection of the plumbing and that any deficiencies be brought to Code within 30 days of the landlord's inspection report. The cost of plumbing remediation is to be borne by the party that occasioned the deficiencies.

3. Children and mold are not a good mix. Mold in the crawlspace is to be satisfactorily remediated within 60 days of the date of this decision.

4. The tenant is to grant the landlord reasonable access to address and repair the source of ice damming.

Costs

24 Tenants should not be encouraged to breach their leases. Even though relief from forfeiture was granted each side will bear its own costs. The parties may return to regular chambers to address any residual issues within 30 days.

Order accordingly.

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TAB 8

2005 NBBR 291, 2005 NBQB 291
New Brunswick Court of Queen's Bench

St. Anne-Nackawic Pulp Co., Re

2005 CarswellNB 449, 2005 CarswellNB 912, 2005 NBBR 291, 2005 NBQB 291, [2005] N.B.J. No. 329, 141 A.C.W.S. (3d) 704, 14 C.B.R. (5th) 291, 291 N.B.R. (2d) 179, 758 A.P.R. 179

In the Matter of the Receivership of St. Anne-Nackawic Pulp Company Ltd.

In the Matter of the Bankruptcy of St. Anne-Nackawic Pulp Company Ltd.

The York-Sunbury-Charlotte Forest Products Marketing Board; the Carleton-Victoria Forest Products Marketing Board; the Madawaska Forest Products Marketing Board; and the Members of the Respective Marketing Boards Who Have Delivered Wood to the Bankrupt and Who Remain Unpaid (Applicants) and Green Jain Wedlake Inc., Receiver of St. Anne-Nackawic Pulp Company Ltd. (Respondent)

Glennie J.

Heard: March 23, 2005
Judgment: August 19, 2005
Docket: NB 10985

Counsel: Joseph J. Wilby for Applicants
D. Leslie Smith, Q.C. for Respondent

Subject: Insolvency; Natural Resources; Corporate and Commercial; Civil Practice and Procedure; Contracts

APPLICATION for declaration that forest products marketing boards were "farmers" pursuant to s. 81.2 of *Bankruptcy and Insolvency Act*.

Glennie J. **(orally):**

1 The Applicants seek a declaration that the York-Sunbury-Charlotte Forest Products Marketing Board, the Carleton-Victoria Forest Products Marketing Board and the Madawaska Forest Products Marketing Board (collectively, the "Boards") qualify as farmers as defined in section 81.2(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and as a consequence are entitled to the rights conferred thereby.

Overview

2 St. Anne-Nackawic Pulp Company Ltd. ("St. Anne Pulp") operated a kraft pulp mill in Nackawic, New Brunswick. The Boards supplied pulpwood to St. Anne Pulp during the first fifteen days of September 2004. On September 15, 2004, St. Anne Pulp made an Assignment in Bankruptcy under the *BIA* with Green Jain Wedlake Inc. named as Trustee (the "Trustee"). On the same day as the bankruptcy, Green Jain Wedlake Inc. was appointed receiver (the "Receiver") of certain assets of St. Anne Pulp by St. Anne Industries Ltd., a secured creditor. Pursuant to the security held by St. Anne Industries Ltd., the Receiver took possession of tree length logs, eight foot logs and wood chips located at or near the site of the St. Anne Pulp mill.

3 Subsequently, by Order of this Court, Green Jain Wedlake Inc. was replaced as Trustee in Bankruptcy as of October 25th, 2004 by A. C. Poirier & Associates Inc.

4 By a facsimile message dated October 8, 2004, the Receiver advised the Boards that it was the receiver of certain assets of St. Anne Pulp including the wood inventory. The fax message went on to say:

> The Company's records indicate you are a supplier of wood for which you have not been paid. Under the Bankruptcy and Insolvency Act and Regulations ("the Act"), wood delivered directly by "tree farmers" during the 15 days prior to the date of receivership (September 15, 2004) must be returned to those farmers if they have not been paid and if they have filed proper claim documents with the Receiver in accordance with the Act. "Tree farmers" are defined by the Act as suppliers of wood who own or lease the land on which the wood is harvested. Wood harvested under a Crown license does not qualify.
>
> If you are a "tree farmer" please mail or fax to our attention on or before October 15, 2004 the following documents:
>
> (1) A completed and signed copy of the attached "Proof of Claim" form.
>
> (2) A properly executed affidavit confirming proof of land ownership or land lease. We have attached an affidavit form for your use.
>
> (3) A signed release in the form attached.

5 The Boards responded by filing various documents with the Receiver.

6 Subsequently, the Boards say they were informed verbally that the Receiver had denied their claims on the ground that the Boards did not constitute a farmer/owner as was required under the provisions of section 81.2 of the *BIA*. The Boards assert that by virtue of that decision, the Boards and the woodlot owner/supplier's claim to the unpaid trees lost all priority.

7 The Boards now want the Receiver's decision set aside pursuant to section 81.1(8) of the *BIA*.

8 The Boards have asserted a claim that they qualify as "farmers" as that term is used in section 81.2 of the *BIA*. They argue that they are "the exclusive agents of the unpaid farmers/marketers of trees" listed in the Notice of Motion. Based on the fact that it was not satisfied that the Boards qualified as an owner, occupier, landlord or tenant of a farm from which the wood was supplied, the Receiver refused to accept that claim by the Boards. In substance, the Boards claim to qualify as farmers, or, in the alternative they suggest that the individual private woodlot owners from whose land the wood was cut should be permitted to file late claims as farmers under section 81.2 of the *BIA*, or, in the further alternative the Boards be entitled to file late claims to be entitled to recover the wood as thirty day goods under s. 81.1 of the *BIA*.

Regulatory Framework

9 The Boards were originally created by Regulations 83-220, 83-221 and 83-226 under the *Farm Products Marketing Act* (since repealed). In connection with the repeal of the *Farm Products Marketing Act*, the Boards were continued under section 105(1) of the *Natural Products Act*, S.N.B. 1999, c. I.2 and the specific regulations delineating their powers were continued under s. 112(1)(a) of the *Natural Products Act*. Those regulations give the Boards the power to market forest products, but not the exclusive power. The Boards are also given the specific power under section 25 of the *Natural Products Act* to enter into contracts for sale of forest products.

10 Under Regulation 98-62 made under the *Forest Products Boards and Marketing Agencies Act*, the Boards were given powers to assess levies to pay the costs of the services they provide, including in section 3(c)(ii) "the payment of expenses and losses resulting from the sale or disposal of the regulated product". Clearly, in the case of the Boards, the regulated product is forest products. Although the *Farm Products Marketing Act* was repealed, Regulation 98-62 was continued in effect by section 111(a) of the *Natural Products Act*. Regulation 98-62 imposes an obligation on the person receiving the regulated product to pay the levy assessed by the Boards and deduct the levy from the person from whom

it received the regulated product. Regulation 98-62 also makes similar provision for imposing and collecting a levy in relation to the development, conservation and management of forestry resources.

11 Consistent with this regulatory scheme, the Managers of the Boards have confirmed on cross-examination of their affidavits filed with this motion that private woodlot owners are not forced to sell through the Boards. One of the Board's General Managers testified, "although we understand that we have the ... power to regulate that, we have not prevented those transactions from taking place" (Transcript, page 7, lines 7-10).

12 Section 27 of the *Natural Products Act* grants the Boards the power to negotiate contracts with forest product consumers on behalf of the private woodlot owners. The Boards can negotiate price, delivery schedules, receive payment for the wood delivered by the woodlot owners from the purchaser, collect fees for their services from the woodlot owners, pay the woodlot owners for wood delivered to the purchasers, and assign quotas to the woodlot owners. Pursuant to that authority the Boards negotiated contracts for the delivery of trees to St. Anne Pulp.

13 Pursuant to the *Natural Products Act*, Marketing Boards established for trees harvested on private woodlots have a wide range of powers, including:

(i) to market the regulated product (s. 27(1)(b));

(ii) to regulate the manner in which trees from private woodlots may be marketed or produced and marketed (s. 27(1)(d));

(iii) to require all persons marketing or producing and marketing trees to register with the Board and to obtain a licence (s. 27(1)(e));

(iv) to fix and collect periodic licence fees or charges for services rendered by the Board from any and all persons marketing or producing and marketing trees (s. 27(1)(f));

(v) to require that trees be marketed or produced and marketed on a quota basis (s. 27(1)(h));

(vi) to fix and allot to persons quotas for the marketing or the production and marketing of trees on such basis as the Board considers proper and to establish such quotas with respect to designated land and premises (s. 27(1)(i));

(vii) to fix the price or prices, maximum price or prices and minimum prices at which trees can be sold (s. 27(1)(s));

(viii) to require the price or prices payable or owing to persons for the trees to be paid to or through the Board and to recover such price or prices in a court of competent jurisdiction (s. 27(1)(t));

(ix) to require any person who produces trees to offer to sell and to sell the trees to or through the Board (s. 27(1)(u));

(x) to require any person who receives a regulated product [trees] to deduct from the money payable for the regulated product any licence fee or charge referred to in paragraph (f) that is payable to the Board by the person marketing or producing and marketing the regulated product received and to forward that licence fee or charge to the Board or its agent designated for that purpose (s. 27(1)(x));

(xi) to make such orders as are considered necessary or advisable to regulate effectively the marketing or the production and marketing of trees (s. 27(1)(cc)).

14 However, an individual woodlot owner does not have to sell its product through the Board. Such woodlot owner can sell directly to a mill provided the levy is paid to the Board, even though section 27(1)(u) gives a Board the power to require the producer of the regulated product to offer to sell and to sell through a Board. But, as mentioned, the Boards have not prevented direct sales from taking place.

The St. Anne Pulp Pulpwood Supply Agreements

70 The Applicants also argue waiver/estoppel by convention. Estoppel by convention is manifested when the parties to a contract agree and assume certain facts to be true. Subsequently, one of the parties may dispute the validity of the contract on the ground of mistake, etc.

71 The Boards' argument in this regard is as follows. The Boards assert that by their dealing, both the Boards and St. Anne Pulp had established a convention that the Boards were more than agents for the farmers, but in fact stood in the place of the farmer/owners becoming the new farmer/owner. If that was their position through the term of their dealings, then the Boards submit that the Receiver is estopped from denying the Boards' claims on the ground that they are mere agents and not farmer/owners within the meaning of section 81.2 of the *BIA*.

72 There is no evidence before this Court establishing a convention that the Boards stood in place of the farmer/owners thus actually becoming the farmer/owner.

73 If that was supposed to be the legal position of the parties throughout the term of their dealings, the Boards should have so stated in their Pulpwood Supply Agreements. As well, they could have drafted an agreement with the individual woodlot owners reflecting this arrangement.

Waiver/Estoppel by Conduct

74 The Boards also argue that by St. Anne Pulp's conduct it is estopped from claiming that the Boards are mere agents and that they have not supplanted the original farmer/owner as stated in the contract. They argue that St. Anne Pulp knew that the Boards had the sole right to market the farmers' wood and could enforce payment. The Boards say they were led to believe that for the purpose of their dealings the Boards were the farmer/owners even though at law they were not.

75 There is no documentation or other evidence to support this claim and, accordingly, it is rejected. There is no doubt that the Boards could enforce payment of the amounts due and owing to them under the Pulpwood Supply Agreements because that is the way they are drafted. However, that is why the Boards cannot attract the rights and privileges bestowed by section 81.2 of the *BIA*. The monies the Boards are trying to recover are the Boards' own monies, their own accounts receivables, not those of the woodlot owners. The woodlot owners, thanks to the Boards, have been paid in full for the wood supplied to St. Anne Pulp and the Boards have no recourse to recover those funds from the woodlot owners. That is the way the process was structured by the Boards and the woodlot owners.

Relief from Forfeiture

76 Finally, the Applicants also ask this Court to exercise its "auxiliary and ancillary" powers in equity under section 183(1)(d) of the *BIA* as well as the equitable power contained in section 26(3) of the *Judicature Act*, R.S.N.B. 1973, c. J-2, to grant the Boards relief from forfeiture.

77 In support of their relief against forfeiture argument, the Applicants rely upon the decision of the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CarswellAlta 769, [1994] 2 S.C.R. 490 (S.C.C.), where an insured's widow applied for relief from forfeiture with respect to her late husband's insurance policy where the premium remained unpaid after the expiration of the grace period. In rejecting the widow's request, Justice Major writes at paragraph 32:

> The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.); **Snell's Equity** (29 th Ed., 1990), at pp. 541-542.

78 In the present case, the Boards chose and put in place the procedure to deal with the sale of wood to St. Anne Pulp. It was not mandatory for the woodlot owners to sell to the Boards. They had the right to sell directly to St. Anne Pulp. The Boards could have implemented a procedure where the woodlot owners would only be paid when the Boards got paid. But instead, the process was for the Boards to sell to St. Anne Pulp and then to pay the woodlot owners against delivery of a scale slip to the Boards' office without recourse and then for the Boards to seek direct payment for its own accounts receivable from St. Anne Pulp. The rights the Boards now seek to rely upon are an exception to the general policy under the *BIA* of a pari passu sharing among unsecured creditors of a bankrupt. Accordingly, the Court is required to narrowly construe such an exception to the fundamental policy of the *BIA*.

79 In any event, I am of the view that relief against forfeiture is not a remedy available to the Applicants in this case. A forfeiture is the loss, by reason of some specified conduct, of a right, property or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party. See *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership*, 2005 CarswellOnt 2782 (Ont. C.A.) at paragraph 22.

80 The equitable rule is to the effect that forfeitures will be relieved against where their enforcement would be inequitable and unconscionable. But in this case, the Boards are not forfeiting a right or a benefit because of a breach of a contract or agreement. They are not forfeiting the right to anything because the Boards do not have any special rights or privileges pursuant to section 81.2 of the *BIA*.

81 I accordingly deny the Applicants' claim for relief against forfeiture.

Disposition

82 For these reasons, all of the relief sought by the Applicants is denied. I make no order as to costs.

Application dismissed.

End of Document

TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: British Columbia (Director of Civil Forfeiture) v. Wolff | 2012 BCSC 501, 2012 CarswellBC 954, 215 A.C.W.S. (3d) 376, 100 W.C.B. (2d) 713, [2012] B.C.W.L.D. 7934 | (B.C. S.C., Apr 4, 2012)

2011 ABCA 191
Alberta Court of Appeal

Alberta (Minister of Justice) v. Sykes

2011 CarswellAlta 1007, 2011 ABCA 191, [2011] A.W.L.D. 3206, [2011] A.W.L.D. 3224, [2011] A.J. No. 678, 203 A.C.W.S. (3d) 760, 270 C.C.C. (3d) 74, 334 D.L.R. (4th) 193, 505 A.R. 380, 522 W.A.C. 380, 54 Alta. L.R. (5th) 132, 95 W.C.B. (2d) 635

Minister of Justice and Attorney General for Alberta (Appellant / Applicant) and Stephen Jordan Sykes and Willie's 24 Hour Towing Ltd. (Respondent / Respondent)

Keith Ritter, Myra Bielby JJ.A., Carolyn Phillips J. (ad hoc)

Heard: April 7, 2011
Judgment: June 24, 2011
Docket: Calgary Appeal 1001-0165-AC

Counsel: C.R. Hykaway for Appellant / Applicant
Stephen Jordan Sykes, Respondent for himself

Subject: Criminal; Civil Practice and Procedure; Public

APPEAL by Crown from judgment disallowing seizure of accused's vehicle.

Keith Ritter J.A.:

1 The issues in this appeal include: (a) the interpretation of the term "used in carrying out an illegal act" found in s. 1 (3.1) of the *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V-3.5 ("*VRCPA*"); and (b) whether a reviewing judge has any discretion to refuse an order of forfeiture if the Crown establishes that property was used in committing an illegal act.

2 This appeal arises from a property disposal hearing under the *VRCPA* before a Court of Queen's Bench judge. The reviewing judge held that a single sale of illicit drugs from the vehicle that the appellant Crown sought to seize was not a pattern of conduct, involved mere happenstance in the use of the vehicle, and lacked any paraphernalia associated with drug sales. On these findings, he concluded that the Crown had not established that the vehicle was used in carrying out an illegal act.

3 The Crown argues that the Queen's Bench judge erred in law in his analysis by:

(a) considering the respondent's "pattern of conduct" when determining whether or not the Province had met its onus of proof;

(b) considering that the respondent's use of the vehicle was "preparatory to him continuing on to his place of work" when determining whether the Province had met its onus of proof;

(c) considering the absence of drug paraphernalia in the vehicle when seized by police when determining whether the Province had met its onus of proof; and

(d) awarding the respondent solicitor- client costs.

Background

4 The vehicle at issue was seized by the Crown pursuant to a restraint order granted under the provisions of the *VRCPA*. The restraint order was granted after the Medicine Hat police received information from a confidential source that the respondent was selling illicit drugs. Thereafter, an undercover constable contacted the respondent and arranged to purchase drugs from him. On January 7 and January 12, 2010, the respondent sold the illicit drug Ketamine to the undercover constable. These transactions were done on foot. The Crown does not allege that the vehicle was involved in any aspect of this illegal conduct.

5 On January 19, 2010, the undercover constable arranged a third purchase of illicit drugs from the respondent. The sale concluded when the respondent drove a short distance from his home to a pre-arranged location in Medicine Hat to meet the constable. The respondent handed the drugs to the constable through the open driver's side window and the constable handed the purchase price ($110.00) to the respondent through the same window while the respondent was seated in the driver's seat. The constable then inquired about purchasing a quarter pound of marihuana and entered the passenger side of the vehicle to discuss that proposed purchase with the respondent. No sale resulted from that discussion.

6 The Medicine Hat Police Service seized the respondent's vehicle on February 11, 2010 and stored it in yards belonging to Willie's 24 Hour Towing Ltd. located in Medicine Hat. The vehicle remained in storage until the reviewing judge ordered its release to the respondent.

7 The respondent's evidence (which was to some extent supported by the constable's evidence and was accepted by the reviewing judge) was that he normally sold drugs "on foot". On the one occasion that he sold out of his car, he was on his way to work and was using the car for that purpose and only sold from the car because of convenience. The reviewing judge accepted this evidence, holding that the respondent did not use his vehicle in effecting sales except for the one occasion at issue.

Legislation

8 This appeal involves the interpretation of several provisions of the *VRCPA* including ss. 1(3.1)(a), 19.93(1)(a), 19.94 and 19.95 which provide:

1(3.1) A reference in this Act to an instrument of illegal activity is a reference to property that

(a) was used in carrying out an illegal act that, in turn, resulted in or was likely to or was intended to result in the acquisition of other property or in bodily harm to any person,

19.93(1) At a property disposal hearing

(a) the onus is on the Minister to establish that the restrained property is an instrument of illegal activity;

19.94 If at the conclusion of a property disposal hearing the Court determines, based on a balance of probabilities, that the restrained property

(a) was not used and is not likely to be used in carrying out an illegal act, the Court

(i) is to revoke the restraint order and direct that the restrained property be returned to the person against whom the restraint order was made or to any other person that the Court considers appropriate or as otherwise directed by the Court, and

(ii) may provide for compensation for actual loss, if any, resulting directly from the restraint of the property,

or

(b) was used or is likely to be used in carrying out an illegal act, the Court may grant a property disposal order and in the property disposal order

(i) provide under section 19.95 for the return of the restrained property to the respondents or otherwise dispose of the restrained property or the proceeds from the restrained property among the respondents;

(ii) provide under section 19.96 for the disposal or other utilization of the restrained property for the purposes of providing compensation to victims who do not qualify for compensation under section 19.95;

(iii) provide under section 19.97 for the disposal of the restrained property and for payment to the Crown of the proceeds from the disposal to be used for the purposes of making payments or grants or as otherwise provided for under Division 2 of Part 3;

(iv) where the Court determines that the restrained property may present a danger to the public or is illegal, direct that the restrained property be modified or destroyed.

19.95 On determining that the restrained property is an instrument of illegal activity, the Court may, with respect to the respondents who are victims and who have discharged the onuses set out in section 19.93(1)(b)(i) to (iii), declare the nature and extent of the respondents' interests in the restrained property and do one or more of the following:

(a) direct the return of restrained property to one or more of the respondents;

(b) direct that the restrained property be disposed of and give directions as to the distribution of the proceeds from the disposal to one or more of the respondents;

(c) if 2 or more respondents have established a claim to restrained property, direct that the restrained property be disposed of and give directions as to the distribution of the proceeds from the disposal among those respondents and the proportion, if any, to which each respondent is entitled;

(d) if, in respect of restrained property, any income, increase in value or other gain was derived, give directions as to which respondents are entitled to that income, increase or gain and the proportion, if any, to which each respondent is entitled;

(e) if the Court is satisfied that, as a result of restrained property being used in carrying out an illegal act, the respondent's interest in that property or the value of that interest has been reduced or otherwise diminished, direct that any restrained property that has not been disposed of under clauses (a) to (d) be utilized, through being disposed of or otherwise, to provide compensation to the respondent with respect to the reduction or diminishment in that interest or in the value of that interest;

(f) give any directions with respect to restrained property that appear just and equitable with respect to the claims of the respondents.

Standard of Review

9 In *Alberta (Minister of Justice & Attorney General) v. Pazder*, 2010 ABCA 183at para. 21, (2010), 487 A.R. 267 (Alta. C.A.), this Court set out the applicable standard of review respecting the *VRCPA* as follows:

> The interpretation of a statute is a question of law. The standard of review for questions of law is correctness. The legal standard is a question of law, but whether that standard has been met is a mixed question of fact and law reviewable for palpable and overriding error. The findings of fact of the trial judge, and inferences drawn from the facts, will only be reversed on appeal if they disclose palpable and overriding error: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33.

10 In this case, the interpretation of ss. 1(3.1), 19.93(1)(a), and 19.94 of the *VRCPA* involves questions of law and the standard of review is correctness. Whether or not the Queen's Bench judge misapplied the facts is a question of mixed fact and law, and the standard of review is palpable and overriding error.

Analysis

1. Property Used to Commit Crime

11 The trial judge did not analyse the specific statutory provisions at issue. Rather, he held that the Crown had to establish more than convenient usage of a vehicle before a forfeiture order could be granted. He noted that there was no pattern of use of the vehicle for drug sales, no paraphernalia associated with drug trafficking in the vehicle, and that the respondent was on his way to work. Finally, he considered that the third sale to the undercover agent being from the vehicle was just a matter of happenstance. He concluded that this did not meet the criteria set out in the *VRCPA*. He never stated what those criteria were, but I assume he was of the view that it included consideration of the factors he relied on in reaching his conclusion. Finally, his analysis appeared to focus on whether the Crown established that the property was used in criminal activity, rather than whether the factors he considered in concluding it was not were relevant to his exercise of discretion.

12 With respect to issues of statutory interpretation, the Supreme Court has adopted the following approach in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, (1998), 221 N.R. 241 (S.C.C.):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary senseharmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.
>
> [Emphasis added.]

13 According to this Court in ***Pazder***, the basic objective of the *VCRPA* is "to allow for the seizure and disposition of property that has been implicated in criminal activity": at para. 9. Restraint orders may be obtained by the Crown on an *ex parte* application (ss. 4(2) and 19.3(2)) provided that the Minister shows reasonable and probable grounds to believe that the property is associated with crime.

14 Thereafter, if the Minister wants to seek to have the property forfeited, a property disposal hearing is held on notice to the property owner. If that owner objects to forfeiture, he or she is required to file an affidavit and to submit to cross examination on it. The affidavit may set out that the owner did not participate in any illegality or know that the property was being used for illegal purposes.

15 The *VCRPA* identifies two routes to forfeiture. The first is with respect to property that was acquired as a consequence of illegal activity. The second is with respect to property that was used in the course of committing illegal activity. This second type of property is called "instrument(s) of illegal activity". The Crown seeks a forfeiture order of the vehicle under this category.

16 Part 1.1 of the *VCRPA* deals with instruments of illegal activity, which are defined in s. 1(3.1) as property that "was used in carrying out an illegal act that, in turn, resulted in or was likely to or was intended to result in the acquisition of other property or in bodily harm to any person." In this appeal the Crown argues that, once the reviewing judge held that the motor vehicle at issue fell within this definition, he was compelled to grant a forfeiture order. Indeed, the reviewing

judge seems to have both concluded that the vehicle was used for criminal activity and, because it did not fit a pattern and because its use was minimal, the Crown did not establish its use at all.

17 Under the *VCRPA*, if a judge determines that the property was not used to carry out an illegal act, then the judge must lift the restraint order and return the property (s. 19.94(a)(i)). The *VCRPA* then appears to give a reviewing judge discretion where the judge finds that the property was used in carrying out an illegal act, stating that the judge *may* grant a disposal order (s. 19.94(b)). Further, the *VCRPA* continues to grant wide discretion in s. 19.98 where it states that a judge, in granting an property disposal order, *may* include various orders, including one subject to any terms and conditions he or she considers appropriate, or direct that the property be returned to or turned over to a respondent (s. 19.98(1)).

18 The Crown argues against any discretion and in support of its proposed interpretation, the Crown cites *Pazder* and *Alberta (Justice and Attorney General) v. Munro* (20 May 2010), Medicine Hat 0908 00437, where vehicles were used to transport drugs and drug components (AF, page 10 para. 31). In *Munro*, the criminal act was possession for the purpose of trafficking and the respondent was apprehended while trafficking, using the vehicle, over $20,000 worth of illegal drugs between Medicine Hat and Calgary. Similarly in *Pazder*, the respondent's vehicle was used to transport ingredients for ecstasy from Edmonton to British Columbia and then transport empty containers which contained traces of ecstasy from British Columbia back to Edmonton. In both those situations, the vehicle was directly used to facilitate the crime and was central to its commission; the 'use' of the property to commit the crime is clear. These cases offer little assistance in establishing the boundaries of what the court should accept as a sufficient level to which the property needs to have been employed in the commission of a crime.

19 In *Alberta (Minister of Justice) v. Chan*, 2009 ABQB 311, 472 A.R. 349 (Alta. Q.B.), which the Crown suggests is analogous to the current facts, a vehicle used to traffic cocaine and other drugs was forfeited. The reasons for judgment contain no facts regarding the use of the vehicle beyond that it was "identified by police as being used by Mr. Chan during the course of the undercover drug investigation which subsequently lead to his arrest": at para 11. There is also no analysis of the requirement that the vehicle be used for illegal activity.

20 In *Alberta (Minister of Justice & Attorney General) v. Yousif*, 2010 ABQB 81, 488 A.R. 335 (Alta. Q.B.), Macleod J. considered the provisions dealing with property used as an instrument of illegal activity. In that case, an elderly woman's Alberta home was restrained due to her son's fraudulent activities in British Columbia. The connections between the fraud and the home were tenuous. The address of the home had been used by an associate of her son to register a corporation and list it with a bank. Macleod J. held that there were no grounds for concluding that the house itself, as opposed to the address, was used in carrying out an illegal act and therefore the property was not "used" for criminal activity. At paragraph 18, he expressed concern about the connection between the property and the crime:

> It is critical for the courts to be vigilant in requiring the Crown to discharge its onus and show that there is a sufficient connection between the alleged criminal activity and the home in this case.

Justice Macleod implied that the Crown must establish a requisite level of connection between the criminal activity and the property.

21 The use of the word "instrument" in the provisions also suggests that a connection, beyond an incidental use, is required. The *Canadian Oxford Dictionary*, 2nd ed. (Toronto: Oxford University Press, 2004) defines "instrument" as a "tool or implement" and as "a thing used in performing an action; a means." "Use" is defined in *Black's Law Dictionary*, 9th ed. (St. Paul, MN: West, 2009) as:

> the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary and occasional.

Both these definitions suggest a link between the individual object and a larger action or goal. This interpretation is consistent with the purpose of the *VCRPA*. Property which is meaningfully associated with committing crimes should be forfeited to the government.

22 In this case, the use of the vehicle was more than merely incidental, such as the use of clothing or a purse worn or carried during the commission of a crime. The use of vehicles in the trafficking of drugs is well known and, even though the evidence revealed this use to be isolated in this case, it nevertheless facilitated the sale. If isolated uses are to be exempted from the reach of the legislation, then the use of a firearm during a robbery would not subject it to forfeiture if the robber had always used a knife in his other robberies or if this was the robber's first attempt at that form of crime. In my view, if the object subject to seizure was more than incidentally involved in the commission of the crime, it was used for criminal activity under this legislation. Therefore, the Respondent's vehicle was an instrument of illegal activity, which made it subject to the possible granting of a disposal order pursuant to s. 19.94(b) of the *VCRPA*.

2. The Reviewing Judge's Discretion

23 At the hearing of this appeal the panel raised the issue of whether the reviewing judge nonetheless had the discretion to refuse to grant a forfeiture order even if the Crown established that property was used in the commission of crime (i.e. it was an instrument of illegal activity). The panel also asked for input regarding factors that would go to such discretion. After the hearing, the parties were given the opportunity to file further submissions regarding these issues.

24 The issue of discretion arises because s. 19.94(b) of the *VCRPA* provides that if the property was used in carrying out an illegal act the Court "*may*" grant a forfeiture order. Notwithstanding this provision, the Crown argues that the granting of a forfeiture order is usually mandatory once the Crown has established that the property was used in committing an illegal act. The Crown acknowledges that although the word "may" is not defined in the *VCRPA*, it is defined in the *Interpretation Act*, R.S.A. 2000, c. I-8 as being "permissive and empowering". The same Act defines both the words "must" and "shall" as being imperative. From this distinction I conclude that normally, "may" permits an order but does not compel it.

25 The Crown argues against the normal meaning of "may" relying on section 3(1) of the *Interpretation Act* which provides:

> 3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act.

26 In support of its argument, the Crown relies on *Julius v. Bishop of Oxford* (1880), (1879-80) L.R. 5 App. Cas. 214 (U.K. H.L.); *Brown v. Metropolitan Authority* (1996), 150 N.S.R. (2d) 43 (N.S. C.A.); *Bates v. Bates* (2000), 49 O.R. (3d) 1 (Ont. C.A.); R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008). These authorities say that, regardless of the use of the word "may", the interpreter must determine whether there is anything in the statute that expressly or impliedly obliges the exercise of the power.

27 The Crown argues that s. 19.94(b) must be read in the context that, although it permits an order, the order granted must be limited to the subcategories that follow, which include turning the restrained property over to a respondent who meets the requirements set out in s. 19.95. Finally, the Crown concedes that the respondent from whom the property was seized will sometimes meet the onus of showing that the property was not used in the commission of an illegal act and the use of "may" permits return of the property to that respondent in those circumstances only.

28 I will deal with this latter argument first. It is without merit. When a respondent from whom the property was seized meets his or her onus and shows that the property was not used in the commission of an illegal act, the property must be returned to that respondent under the requirements of s. 19.94(a).

29 Therefore, s. 19.94(b) has no role to play with respect to return of property to persons from whom the property was seized in circumstances where the initial seizure turns out to be unjustified. It is also noteworthy that s. 19.94(a) contains clear mandatory language. It would be unlikely that a legislator would state one subsection of a provision in clear mandatory language, and then state the immediately following subsection in what is normally permissive or discretion granting language, but mean both to be mandatory.

30 Moreover, the *VRCPA* contains other provisions that would potentially result in unfairness and injustice, if the word "may" were interpreted as meaning "must". For example, s. 19.93(3) provides that if during a forfeiture hearing other property is identified as being used in the commission of an illegal act, that property "may" also be ordered forfeited. It is obvious that the word "may" is used in its permissive sense here because, even if the judge hearing the matter determined that the other property was "used", that judge would not be compelled to grant a forfeiture order if he believed that lack of notice or other process concerns would make the granting of the order unfair. With respect to the list of possible outcomes, it is obvious that the legislature can express a discretion and then state some alternatives that can be considered in exercising that discretion without limiting the discretion to only those alternatives.

31 I also note that the Alberta Legislature regularly employs the words "must" and "shall" when it wants to compel conduct. That is the reason it has defined these words along with the word "may" in the *Interpretation Act*. Doing so avoids the need to repeat defining these words again and again in various enactments. Although the word "may" can denote compulsion, those instances must be rare as persons affected by legislation must be able to take the normal meaning of that legislation as governing their conduct. In this case, the Crown asks the Court to give an inverse meaning to language. That should only be done in the clearest of cases.

32 Finally, after having provided the requisite notice, the respondent argued at the forfeiture hearing that granting the requested order would breach his right not to be deprived of property without compensation as provided for in the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 1(a). I need not consider whether the grant of property rights in that *Act* overrides what is set out in the *VRCPA*. However, the *Alberta Bill of Rights* has been repeatedly considered a valid interpretive tool when interpreting ambiguous legislation: see *Goddard v. Day*, 2000 ABQB 942, 282 A.R. 349 (Alta. Q.B.); *T. (P.) v. B. (R.)*, 2001 ABQB 739, 296 A.R. 232 (Alta. Q.B.); and *R. v. Raine* (1994), 149 A.R. 263, 90 C.C.C. (3d) 364 (Alta. C.A.). In this respect, I cannot think of a more ambiguous interpretation request than one which seeks to give a meaning opposite to the normal meaning of a word. Use of the property rights provision of the *Alberta Bill of Rights* in interpreting s. 19.94(b) of the *VRCPA* points to maintaining the normal meaning of the word "may" as being a discretion-granting provision.

33 I therefore conclude that the judge who hears a forfeiture application retains a discretion to refuse the order even if the Crown establishes that the property at issue was used in the commission of an illegal act.

34 Determining that the legislation gives the reviewing judge discretion as to whether the circumstances warrant the granting of a forfeiture order does not end the matter. When the language of the *VCRPA* is read for its plain and ordinary meaning, no clear test is discerned as to how that discretion is to be exercised. It is not obvious whether the legislature intended forfeiture of property that had only a cursory relationship to a crime (such as the shoes worn during a robbery carried out on foot or a purse used to carry a fake identification or deliver fraudulent documents), or whether the legislature intended forfeiture of property that was directly used to commit a crime (such as the vehicle used in a drive-by shooting). In my view, merely giving discretion implies that the degree of connection between the property at issue and the commission of the underlying crime is a relevant factor in the exercise of that discretion.

35 In this case, the delivery of the drugs occurred one block from the respondent's residence and, because the quantity involved was small, the method of delivery was not a central feature of the underlying crime. The respondent could just as easily have gone on foot, but he used his vehicle since he was on his way to work. Moreover, the value of the vehicle is vastly greater than the amount of money involved in the underlying criminal act. The respondent's evidence was that he dealt drugs on a small scale and that he used the minimal profits he derived to support his own drug use. The constable's

evidence confirmed that this was a low level trafficking operation. The underlying crime was not like using a firearm once to commit a murder or a bank robbery. The crime here is street level drug trafficking that the respondent normally accomplished on foot.

36 Section 19.2 of the *VCRPA* also gives some guidance on the appropriate factors to consider. This provision outlines the purposes of a forfeiture order, which include compensating victims of crime, removing financial incentives from the commission of crime, including the disgorging of financial gains from illegal acts, and preventing the continued use of property in the further commission of crime.

37 Therefore, it is a relevant factor that the loss of the vehicle is disproportionate to the value of the drugs involved in the criminal act. It is also a relevant factor that the respondent here did not acquire the vehicle at issue with drug profits, but with a loan being repaid through employment earnings. In this case, the respondent's evidence showed that he was employed and that his earnings from employment easily met his loan payments for the vehicle. On the other hand, if the record had shown that the respondent was not gainfully employed, or used a vehicle which cost well beyond what his legitimate income could support, the conclusion that the vehicle was owned as a result of crime may be logical and may support a forfeiture order. That result, in such a case, would achieve the stated objective of disgorging profit from crime.

38 Another factor that the reviewing judge can consider is the likelihood that the respondent would continue to use the property at issue in committing crimes. In this case, the reviewing judge believed the respondent's assertion that the use of the vehicle was not a part of his drug dealing. Since the police constable confirmed that the first two transactions were conducted on foot, this determination was reasonable.

39 The role the property played in the commission of the underlying crime is also a relevant consideration. If the property has an integral role in the commission of the crime, that is a significant factor supporting a forfeiture order. For example, a vehicle is often integral to the transportation of illicit drugs over long distances. Drug couriers should expect that their vehicles will be forfeited if they are caught using their vehicles for transporting drugs. Similarly, typical dial-a-doper operations involve the continuous use of both cell phones and vehicles. The use of both is integral to the crime being committed. This factor strongly suggests that the reviewing judge should exercise his or her discretion towards granting a forfeiture order. On the other hand, if someone used a car to go to a shopping centre where that person committed theft in the form of petty shoplifting, it would not likely mean that the car is integral to the crime. This would particularly be the case where the shopping centre was one block from the person's residence, the person could walk to the shopping centre and often did so, and the item(s) stolen could easily have been transported without using the car.

40 The Ontario Court of Appeal recently considered the nature of discretion in similar circumstances involving the equivalent Ontario legislation in *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363, 2011 CarswellOnt 3107 (Ont. C.A.). It regarded the discretion as similar to that given by relief from forfeiture provisions found in many provincial judicature acts. The court noted that the power to relieve from forfeiture is discretionary and fact-specific, as set out in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.). It is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although called for by the terms of the contract breached, causes substantial inequity. Relief from forfeiture is particularly appropriate where the interests of the other party can be met without resorting to forfeiture.

41 Factors to be considered when determining whether to grant relief from forfeiture include the conduct of the party seeking relief, the gravity of the breach(es), and the damage caused by the breach(es): *Saskatchewan River Bungalows* at 504. Relief from forfeiture is very much the exception and will not be routinely exercised. It is only to be granted where the party seeking relief clearly makes a case that forfeiture would be inequitable and unjust.

42 In *Ontario (Attorney General) v. McDougall* the court recognized that there is a difference between the purely private rights at play when seeking relief from forfeiture in the contractual context, as those rights are often quantifiable in economic terms, versus a forfeiture order under the equivalent Ontario legislation which encompasses both public and private interests. The forfeiture called for by the *VRCPA* also engages important public concerns. In exercising

their discretion, judges dealing with forfeiture applications are required to consider the effect of granting relief on the implementation of the purposes of the *VRCPA*. If granting the order would subvert the purposes of the legislation then the discretion should be exercised in favor of not granting the requested order.

43 The court in *Ontario (Attorney General) v. McDougall* then addressed some factors that are often relevant to determining which direction the discretion should go. The first factor to consider is the closeness of the connection between the property and the illegal activity. Second is the value of the property at issue; if the value is so great that reasonable persons would perceive its forfeiture as unfair, that is a factor favoring relief. The conduct of the wrongdoer is also relevant. Any violence associated with the illegal use of the property would obviously favor the granting of the order requested by the Crown.

44 Importantly, relief orders should rarely be granted. Given the broad purposes of the *VCRPA*, few applications for relief should succeed. Those who live a life of criminal activity should expect to forfeit all property used in furthering that activity. Drug couriers and dial-a-dopers should always expect to have the discretion exercised against them. The use of the word "discretion" does not mean that judges should routinely refuse to grant forfeiture orders respecting seized property that was used to commit illegal acts; the discretion permitted is not unfettered but, in fact, is narrow. It does not permit untrammeled personal choice. The narrow parameters within which the discretion may be exercised are established by the legislation's purposes. If the refusal to grant a forfeiture order defeats or subverts those purposes, the refusal will be unreasonable.

45 As the case law develops, reviewing courts will undoubtedly encounter other circumstances which give rise to factors not at play in this case. As with other areas of law involving the exercise of judicial discretion, the exercise must be reasonable and will meet this test so long as the reviewing judge considers appropriate factors and does not under or over emphasize a factor. In this case, that was not done as, while the reviewing judge did consider some things that would have been relevant to his discretion, he never directly considered his discretion.

46 I also conclude that it will almost always be incumbent on the person whose property is subject to forfeiture to show that the factors support the return of the property despite the fact that it was an instrument of illegal activity. That is because the Crown's only obligation under the *VCRPA* is to show that the property was used as an instrument of illegal activity. Moreover, the property owner will most often have the requisite knowledge of the relevant factors. For example, in this case the respondent provided evidence of the value of the property and its role in his drug dealing. He also showed that he was paying for the property with his legitimate employment earnings rather than his criminal activity. Some of what he put forward was supported by the constable's evidence and the reviewing judge relied on both what the respondent said and what the constable said in his factual analysis.

47 Therefore, had the reviewing judge considered the issue of his discretion to order the respondent's vehicle forfeited, he could have properly exercised that discretion to achieve the same result for the reasons he in fact outlined (i.e. that the use of the vehicle was incidental to the offence, that there was no drug paraphernalia found, and no pattern of use for the vehicle in relation to other drug sales existed). In terms of remedy, this panel could remit this matter back to the reviewing judge or another Queen's Bench judge to consider whether the discretion afforded in the *VCRPA* should be exercised one way or the other. However, it is obvious from his decision what the reviewing judge would have done had he considered the discretion issue. I therefore decline to return the matter to Queen's Bench, and dismiss the appeal in so far as it relates to the forfeiture issue.

Costs

48 However, I am of the view that the Queen's Bench judge erred in his conclusions regarding costs and storage of the vehicle. The seizure of the vehicle was authorized by the initial *ex parte* order. Once it was seized, it had to be stored somewhere secure. Barring exceptional circumstances, the responsibility for reasonable storage costs should be covered by the sale of the item seized whenever a lawful seizure occurs. Where the item seized is returned to the owner

only because of the residual discretion to refuse a forfeiture order even though the Crown has met its burden of proof regarding use of the item seized, the owner of the item should be responsible for reasonable storage charges.

49 In this case, the Crown agreed to the storage fees for just over four months which came to about $3,300.00. The vehicle was stored in the storage operator's open yard and, under an agreement with the operator, the Crown agreed that the operator would receive enhanced fees if the vehicle was returned to the owner. Although the respondent can be called upon to pay reasonable fees when property is legitimately seized and stored, the arrangement between the Crown and the storage company results in an excessive fee. Accordingly, I would direct the respondent to pay the storage costs in the sum of $750.00. All other storage costs are to be born by the Crown.

50 The reviewing judge also directed the Crown to pay the respondent's costs for the forfeiture hearing. Again, when a seizure under the *VCRPA* was lawful and the only basis for returning the seized item is the exercise of the residual discretion, no costs should be awarded to the owner. I therefore set aside this award as well. Each party will bear its own costs in relation to the forfeiture hearing.

51 Given the mixed result with respect to this appeal I decline to award costs for it to either the appellant or the respondent.

Myra Bielby J.A.:

I concur:

Carolyn Phillips Phillips J. (ad hoc):

I concur:

Appeal allowed in part.

End of Document

TAB 10

2014 BCSC 190
British Columbia Supreme Court

Sturm v. Sprott Resource Lending Corp.

2014 CarswellBC 302, 2014 BCSC 190, [2014] B.C.W.L.D. 2507, [2014] B.C.W.L.D. 2511, 237 A.C.W.S. (3d) 923, 23 B.L.R. (5th) 295

Hans Sturm and Arroyo Seco Holdings Ltd., Plaintiffs and Sprott Resource Lending Corporation previously doing business as Quest Capital Corp., Yamana Gold Inc. and Novagold Resources Inc., Defendants

Fitzpatrick J.

Heard: August 22, 2013
Judgment: February 6, 2014 *
Docket: Vancouver S116867

Counsel: T.M. Tomchak, L. Awlasiewicz, for Plaintiffs
K. McEwan, Q.C., H.E. Cochran, for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Property; Restitution; Torts

APPLICATION by plaintiffs for judgment by way of summary trial in action to enforce exchange of shares.

***Fitzpatrick J.*:**

Introduction

1 The plaintiff Hans Sturm is an investor who, in the past, purchased shares either directly or through his company, the plaintiff Arroyo Seco Holdings Ltd. ("Arroyo").

2 Some years ago, the companies whose shares were held by Mr. Sturm and Arroyo were subject to certain corporate transactions, including mergers and plans of arrangement. The result of those transactions was that Mr. Sturm was required to take certain steps to exchange his and Arroyo's shares for other shares. Despite receiving written notice of the need to do so, Mr. Sturm did not take those steps and as a result of a deadline imposed by those arrangements, his and Arroyo's entitlement to these new shares has since expired.

3 Mr. Sturm now brings this summary trial application to recover the value of these new shares and related benefits in the reorganized respondent companies.

Background Facts

4 Between 1990 and 1993, Mr. Sturm acquired 203,500 shares in Loki Gold Corporation ("Loki").

5 In May 1996, Loki, Viceroy Resource Corporation ("Viceroy") and Baja Gold Inc. merged pursuant to a statutory plan of arrangement. By reason of that arrangement, Loki shareholders were to exchange their shares in the amalgamated company and eventually receive 0.426 Viceroy shares for every Loki share. Accordingly, Mr. Sturm's Loki shares were equivalent to 86,691 Viceroy shares. Once Loki shares were exchanged for Viceroy shares, the Loki shares were cancelled.

6 Mr. Sturm received notice of the Loki/Viceroy transaction and he was aware that the transaction provided for him to exchange his Loki shares for shares in Viceroy. Nevertheless, Mr. Sturm did not exchange or even attempt to exchange

his Loki shares for Viceroy shares at any time between 1996 and 2010. He was aware that if he did not exchange the shares as contemplated, he would not become a registered shareholder of Viceroy.

7 In 2002, Arroyo acquired 4,260 Viceroy shares.

8 In May 2003, Viceroy, Quest Investment Corporation ("Quest Investment"), Avatar Petroleum Inc. ("Avatar") and Arapaho Capital Corp. ("Arapaho") entered into an agreement by which they were to complete a reorganization through a plan of arrangement pursuant to s. 252 of the legislation then in force, the *Company Act*, R.S.B.C. 1996, c. 62.

9 As part of those arrangement proceedings, Viceroy incorporated Viceroy Exploration Ltd. ("ViceroyEx") and SpectrumGold Inc. ("SpectrumGold"). The arrangement transactions can be summarized as follows: Viceroy was to transfer certain mineral holdings from Viceroy to ViceroyEx and SpectrumGold; Viceroy would then acquire all of the shares of Avatar, Quest Investment and Arapaho; Quest Investment and Avatar would then be wound up into Viceroy (described as "Mergeco" in the plan of arrangement); and Mergeco would change its name to "Quest Capital Corporation", which would carry on business as a merchant bank ("Quest Capital").

10 Article 2.02 of the plan of arrangement provided that certain corporate actions would occur or would be deemed to occur "without any act or formality" in order to implement the plan. Article 2.02(6) provided in particular that Viceroy shareholders would receive one Quest Capital share for every three Viceroy shares, one ViceroyEx share for every ten Viceroy shares, and one SpectrumGold share for every thirty Viceroy shares.

11 Based on these provisions, Mr. Sturm's Loki/Viceroy shares were equivalent to 28,897 Quest Capital shares, 8,669 ViceroyEx shares and 2,889 SpectrumGold shares. Arroyo's Viceroy shares were equivalent to 1,420 Quest Capital shares, 426 ViceroyEx shares and 142 SpectrumGold shares.

12 Article 4.01 of the plan of arrangement provided for certain communications to the Viceroy shareholders so that the proposed share exchange could be completed:

> 4.01 As soon as practicable after the Effective Date, Computershare Trust Company of Canada (the "Depositary") ...on behalf of Mergeco in accordance with the terms of this Plan of Arrangement, shall forward a letter of transmittal and instructions:
>
> > (a) to each holder of Viceroy Shares to which Section 2.02(6) applies, at the address of each Shareholder as it appeared in the register of Viceroy, instructions for obtaining delivery of certificates representing the Mergeco Class A Shares, ViceroyEx Shares and SpectrumGold Shares;

13 As of 2003, only Arroyo was a shareholder on the register of Viceroy, since Mr. Sturm had not yet arranged to exchange his Loki shares for Viceroy shares in accordance with the 1996 arrangement.

14 The critical provisions of the 2003 plan of arrangement, and the source of the controversy on this application, are Sections 4.02 and 4.07 and have been described as the "Sunset Clauses". These provisions set out a six year deadline by which the Viceroy shareholders must tender their shares in order to complete the share exchanges:

> **Entitlement to Share Certificates**
>
> 4.02 In order to receive such certificates which a Shareholder, which is not a Small Lot Shareholder (other than a Small Lot Shareholder who has elected to receive shares in accordance with Section 4.04), is entitled to receive pursuant to Section 2.02(6), former Shareholders of Viceroy, Quest and Avatar must deliver (1) the certificate formerly representing such holder's Shares to the Depositary, or as the Depositary may otherwise direct, in accordance with the instructions contained in the said letter of transmittal, (2) the duly completed letter of transmittal and (3) such other documents as the Depositary may reasonably require to the Depositary within six (6) years of the closing of the Arrangement. Certificates for the Mergeco Shares and, if applicable, SpinOutCo Shares, issuable or exchangeable to such holder shall be registered in such name or names and will be delivered, by first

class mail, postage paid, or, in the case of postal disruption, by such other means as the Depositary deems prudent, to such address or addresses as such holder may direct in the letter of transmittal as soon as practicable after the receipt by the Depository [sic] of the required documents.

. . .

Termination of Rights

4.07 Any certificate formerly representing Viceroy Shares, Quest Shares and Avatar Shares that is not deposited with all other documents as provided in Section 4.02 or 4.04 on or before the sixth (6th) anniversary of the Effective Date shall cease to represent a right or claim of any kind or nature and the right of the holder of such Viceroy Shares, Quest Shares and Avatar Shares to receive Mergeco Shares or SpinOutCo Shares or, in the case of Small Lot Shareholders a cash payment or Mergeco Shares or SpinOutCo Shares, shall be deemed to be surrendered to Mergeco together with all dividends or distributions thereon held for such holder.

[Emphasis added]

15 In the usual fashion, the arranging parties were required to provide notice to affected shareholders of the proposed plan of arrangement.

16 Although the participating companies prepared an Information Circular describing the proposed arrangement as required by the legislation, Quest Investment and Viceroy obtained orders from various securities regulators, including in Alberta (where Mr. Sturm lives) and in British Columbia, exempting them from the requirement to deliver printed copies of the complete Information Circular to their respective shareholders. The exemption was sought because the printed version of the Information Circular was lengthy and the majority of the 11,000 shareholders held a limited number of shares, such that the cost of printing and mailing the Information Circular would in many cases exceed the then current value of the shares held by those shareholders.

17 A condition of the exemption which was granted was that printed copies of a Summary Circular be mailed to the shareholders of Viceroy and Quest Investment. The Summary Circular included:

a) Information on how to access the full Information Circular electronically and how to request, by telephone, that a full printed Information Circular be sent free of charge to the shareholder;

b) A notice of the annual general and extraordinary general meetings of the arranging companies set for June 18, 2003 and the resolutions to be proposed at those meetings;

c) A summary of the proposed transaction, including the proposed exchange of shares;

d) A summary of the fairness opinions received in respect of the transactions;

e) Notice of the exemptions obtained from various securities regulators from the requirement to mail a full Information Circular to the Viceroy and Quest Investment shareholders;

f) Notice to the shareholders advising of their right to dissent to the arrangement pursuant to s. 207 of the *Company Act*, with such right exercisable prior to Tuesday, June 17, 2003;

g) Notice of the procedure for exchange of Viceroy, Quest Investment and Avatar shares; and

h) Notice of the time, date, and location of the hearing in respect of the final order approving the plan of arrangement (9:45 a.m. on June 20, 2003 at the Courthouse in Vancouver, B.C.) and directions to shareholders of the arranging companies as to how to appear and make representations at that hearing.

157 Similarly in this case, the arranging parties also fulfilled their responsibilities to Mr. Sturm and Arroyo by sending out the necessary documentation regarding the plan of arrangement which clearly identified how they were affected and what they must do in order to secure the new shares to which they were entitled. Mr. Sturm does not argue that the materials were in any way deficient, misleading or inaccurate nor, to the extent that it is relevant, that the procedure to exchange the shares was onerous. Nor does he challenge the adequacy of the content of that material in the sense of raising the importance of the Sunset Clauses.

158 There is no basis upon which to impose a duty of care on the arranging parties, let alone their successors' defendants, to do more than what they did as required by the *Company Act* and the Interim Order. In particular, there was no obligation to send a reminder letter as Quest Capital did and certainly no obligation to phone Mr. Sturm to beseech him to do what he was advised he had to do some six years earlier.

159 As in *Altschuler* and *Crew Gold*, the loss of the entitlement to these shares came about only by reason of the inaction and/or inattention of Mr. Sturm; thus, in my view, the result cannot be laid at the feet of the defendants.

(e) Are the Sunset Clauses a Penalty/Should the Plaintiffs obtain Relief from Forfeiture?

160 Mr. Sturm and Arroyo argue that the effect of the Sunset Clauses operates as a penalty since it deprives them as shareholders of their right to the shares of the defendants and any accumulated dividends. Further, they say they should obtain relief from forfeiture or the strict application of the Sunset Clauses arising from the result of them not tendering their shares.

161 Section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 provides for equitable relief:

> The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

162 The concepts of penalty and relief from forfeiture are distinct but overlap in their application: *Pope v. Potter*, 2011 BCSC 697 (B.C. S.C. [In Chambers]) para. 23. Both of these concepts arise in the context of a contractual relationship between the parties.

163 In the bankruptcy context, when a debtor makes a proposal to its creditors and the creditors approve that proposal in accordance with the legislation, a contract is formed between the debtor and creditors. Once the debtor complies with the required formalities, such as obtaining court approval, that contract binds all the creditors including any dissenting minority: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.), at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage*, [2000] O.J. No. 3993 (Ont. C.A.) at para. 11. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 337 (S.C.C.), the court applied this concept in the related context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), finding at para. 62 that:

> a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract.
>
> [Emphasis added]

164 The scheme under the *Company Act* is analogous to the cases cited above and similar principles are applicable. While not in the bankruptcy or *CCAA* context, that scheme provides that the arranging companies can make a proposal by which shareholders rights are to be affected. In addition, providing that the shareholders approve that proposal in accordance with the legislation, and providing that the court also approves the proposal, the plan of arrangement becomes a "binding" contract on all parties, including Mr. Sturm and Arroyo.

165 Dealing first with the penalty issue, *Pope*, cited by Mr. Sturm, discusses penalty in the context of considering whether the consequences of a *breach of contract* amount to punishment or a "genuine pre-estimate of damages": see paras. 21-22.

166 To similar effect, relief from forfeiture is addressed in relation to a forfeiture arising from a *breach of contract* which then invites a consideration of whether the value of the forfeited property is in proportion to the loss suffered by reason of the breach: *Pope* at para. 25. As noted in *Pope*, relief from forfeiture is applied where firstly, there is great disparity between the value of the property forfeited and the damages caused by the breach, and secondly, it would be unconscionable to retain the amount forfeited: *Pope* at para. 23, see also *British Columbia Development Corp. v. NAB Holdings Ltd.* (1986), 30 D.L.R. (4th) 560 (B.C. C.A.), at 570-72.

167 The difficulty in applying either concept in this case is that there is no contract between Mr. Sturm and Arroyo and the defendants which has been *breached* by Mr. Sturm/Arroyo giving rise to any contractual remedy of the defendants to recover losses which could be described as a "penalty" or a "forfeiture of property". As the defendants argue, to the contrary, Mr. Sturm and Arroyo simply had the opportunity to exchange their shares and they failed to do so within the required time due to their own inaction.

168 In analogous circumstances, the courts have held that the failure by a person to take steps to secure certain contractual rights did not amount to a relief from forfeiture. In the insurance context, the failure of an employee to apply for insurance benefits was not a forfeiture of any rights since the employee had not breached any covenant or condition by which he was deprived of insurance benefits: *Grams v. Maple Leaf Metal Industries Ltd.*, 2006 ABQB 146 (Alta. Q.B.) at paras. 183-192, citing *Yao v. Exide Canada Inc.* (1987), 44 Man. R. (2d) 287 (Man. C.A.), leave to appeal to S.C.C. granted and discontinued, [1987] S.C.C.A. No. 158 (S.C.C.), where an employee's failure to apply to convert his insurance policies within a certain time frame was held to be neither a penalty nor a forfeiture.

169 In a similar vein, the court will not intervene if rather than a breach of a contractual covenant, there is simply a failure to satisfy a condition precedent to the exercise of a contractual right. This distinction was made in relation to the exercise of an option to extend a lease in *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24 (B.C. C.A.):

> [30] In my opinion, it is essential to distinguish between the court's equitable jurisdiction to grant relief from forfeiture for the non-observance of covenants in an existing lease and from the failure to comply with conditions precedent to the exercise of an option to renew a lease. In the former, equity recognizes that a tenant may be permitted to cure its default and be relieved from forfeiture to allow it to retain the balance of the term of the lease. In the latter, there is no compulsion on the tenant to exercise the renewal option, but if it does so, the tenant must comply with the conditions precedent. If the tenant fails to comply, it does not suffer a penalty or forfeiture of an existing tenancy. Equity will not intervene.

170 Mr. Sturm and Arroyo were entitled to obtain the new shares in accordance with the plan of arrangement. A condition precedent to doing so was that they deliver the share certificates and letters of transmittal within the six year time frame. Their failure to do so was not a breach of these new arrangements, but simply a failure to take steps that would allow them to exercise their entitlement to obtain these new shares. As such, no issue of penalty or relief from forfeiture arises.

171 Further, even if such equitable relief was available in the abstract, in my view, the circumstances of Mr. Sturm and Arroyo's inaction dictate that the court should not intervene.

172 Relief against forfeiture is a discretionary equitable remedy arising from the disproportionate consequences of a breach of contract. When exercising that discretion, courts will consider "the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach": *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), at 504. In that case,

relief from forfeiture was rejected by reason of the conduct of the applicant since it did not act reasonably in ensuring that payments under the insurance policy were made and that it received timely notice of matters arising under the policy, including that the policy was about to be cancelled for nonpayment.

173 The reasoning in *River Bungalow* is squarely raised here as Mr. Sturm either did not read his mail or if he did read his mail, he disregarded the clearly worded requirements. The requirement to act within the deadline was communicated to Mr. Sturm a number of times, beginning in the spring/summer of 2003 and again in October 2007, all well before the deadline. In all these communications, the existence and effect of the Sunset Clauses were specifically highlighted. All these communications included a request that Mr. Sturm take action as he was required to do to ensure that he received the new shares in accordance with the plan of arrangement. Yet Mr. Sturm did nothing.

174 In these circumstances, there is no principled basis upon which this court should exercise its discretion to save Mr. Sturm from the consequences of the choices that he freely made.

175 Nor do these circumstances raise any issue of unconscionability where an unfair advantage is gained by a stronger party against a weaker: *Pope* at para. 23-24. No one, least of all Mr. Sturm, has suggested that the requirement to forward the share certificates and transmittal letters was unfair. Rather, he simply failed to take these basic steps. While Mr. Sturm views the loss of his and Arroyo's shareholdings as harsh, he has only himself to blame for that result.

Conclusion

176 The action is dismissed with costs.

Application dismissed.

Footnotes

* A corrigendum issued by the court on February 27, 2014 has been incorporated herein.

End of Document

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: PSINET Ltd., Re | 2002 CarswellOnt 211, 3 P.P.S.A.C. (3d) 208, 30 C.B.R. (4th) 226, [2002] O.J. No. 271, 110 A.C.W.S. (3d) 965 | (Ont. S.C.J. [Commercial List], Jan 14, 2002)

2000 BCSC 414
British Columbia Supreme Court [In Chambers]

Sharp-Rite Technologies Ltd., Re

2000 CarswellBC 507, 2000 BCSC 414, [2000] B.C.W.L.D. 525,
[2000] B.C.J. No. 477, [2000] B.C.T.C. 76, 95 A.C.W.S. (3d) 298

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36 and In the Matter of the Company Act, R.S.B.C. 1996, C.62 and In the Matter of Sharp-Rite Technologies Ltd.

Holmes J.

Heard: February 25, 2000
Judgment: March 7, 2000
Docket: Vancouver A993276

Counsel: *Heather M.B. Ferris*, for Company.
Ben J. Ingram, for RoyNat Inc.

Subject: Corporate and Commercial; Insolvency

APPLICATION for declaration that debenture unenforceable or for order discharging debenture.

Holmes J.:

1 The Petitioner's application pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 ("PPSA") and the inherent jurisdiction of the Court is for a declaration that a $2,000,000 Debenture executed January 7, 1998 by Sharp-Rite in favour of RoyNat [the "Debenture"] is unenforceable against the assets of Sharp-Rite.

2 Alternatively, the Petitioner seeks a declaration there are no monies owing under and secured by the Debenture and Sharp-Rite is entitled to its full release and discharge.

3 RoyNat opposes the application and seeks an order the issue as to the validity and enforceability of the Debenture be referred to the trial list.

The Issues:

4 Sharp-Rite entered into a lease with RoyNat August 21, 1998 for the acquisition and financing of a Toshiba CNC Boring Machine ("the equipment"). RoyNat asserts the Debenture is security generally for the performance by Sharp-Rite of its lease obligations.

5 The application raises questions of whether any money is owing under the Debenture and, if so, whether the Debenture is enforceable against Sharp-Rite's fixed or current assets. There is also an issue as to whether the Debenture may be rectified.

Transaction:

6 Sharp-Rite acquired the equipment by lease from RoyNat in what appears from the documentation a typical commercial leasing arrangement which paralleled a loan secured by the impugned Debenture.

7 It appears a Debenture, envisaged as collateral security for the performance by Sharp-Rite of its lease obligations, was in error inappropriately documented as if it was a separate principal loan transaction.

8 Sharp-Rite's position is that the Debenture loan documents reflect an entirely fictitious transaction that is not related to the equipment lease arrangement. They have that appearance.

9 It is common ground no monies were ever advanced under the Debenture.

10 The Debenture states it is pursuant to an Offer Letter agreement of September 29, 1997 regarding the equipment acquisition. That letter refers to a lease arrangement and "a security deposit consisting of a subordinated charge on all *fixed* assets". [Emphasis added].

11 The Letter offers no explanation of the term "security deposit".

12 A reading of the Debenture clearly evidences a term loan of $2,000,000 to be funded with monthly interest payments at 14% commencing February 15, 1998 and principal repayment February 15, 2003.

13 RoyNat prepared all the documents in connection with the Debenture loan. They are consistent with the intent to represent a direct term loan. The documents include a Directors Resolution of Sharp-Rite accepting the terms of financing in the Offer Letter, borrowing $2,000,000 and the issuance of a Debenture, together with a Direction and Acknowledgement that authorizes the distribution of loan proceeds.

14 The Debenture provides the Offer Letter remains in effect except to the extent that it is inconsistent with the Debenture. [Affidavit of Jonni Fox sworn February 16, 2000; Ex. C, Clause 10].

Analysis:

15 I do not accept the argument of counsel for RoyNat that this application may not properly be tried summarily in the CCAA proceeding and that it should be referred to the trial list with an order as to pleadings and discovery.

16 The matter concerns interpretation of the impugned Debenture and other contractual documents comprising the equipment lease and loan transaction.

17 The matter relates directly to issues in the CCAA; in particular, the status and priorities to be accorded creditors.

18 Counsel could not suggest any documents bearing upon the issues that were not before the Court on this application. In my view, parol evidence is not admissible in respect of the interpretation of the relevant documents here in issue.

19 The Debenture contains no express language identifying an intention that it was to be collateral security to the lease transaction.

20 The Debenture language should be accorded a plain, literal and ordinary meaning, unless an absurdity would result. [*The Law of Contract in Canada*, G.H.L. Fridman, 3rd Ed. (Carswell, 1994) p.454].

21 The "plain, literal and ordinary meaning" of the words of the Debenture are those of a direct term loan.

22 If an ambiguity does arise from the words of the contract documents, the *contra proferentum* principle of construction would apply against the lender RoyNat who authored all the relevant contract documents. [*The Law of Contract in Canada*, ibid, p.454; *Manulife Bank of Canada v. Conlin* (1996), 139 D.L.R. (4th) 426 (S.C.C.) at pp.432-433].

23 The Court of Appeal has on several occasions considered and applied the *contra proferentum* principle in rejecting the existence of an equitable mortgage or charge arising despite ambiguity in the contractual documents. [*Royal Bank v. Mesa Estates Ltd.* (1985), 70 B.C.L.R. 7 (B.C. C.A.); *Bank of Montreal v. Orr* (1986), 4 B.C.L.R. (2d) 1 (B.C. C.A.); *Bank of Montreal v. Aitken* (1989), 38 B.C.L.R. (2d) 377 (B.C. S.C.) affirmed (1990), 52 B.C.L.R. (2d) 211 (B.C. C.A.)].

24 The Lease Agreement on the equipment postdated by some seven months the creation of the Debenture. The lease contains an Entire Agreement clause, and is devoid of reference to the existence of additional security by way of Debenture.

25 It is clear no term loan was ever funded under the Debenture, no monthly interest payments were made, and that there is no balance outstanding.

26 RoyNat, prior to this application, never requested nor required an amendment of the Debenture to reflect a security for indebtedness and obligation of Sharp-Rite either generally or specifically in regard to its obligation to RoyNat under the lease.

27 In the alternative any Debenture security that may be said to arise from the provisions of the Offer Letter must be interpreted as intending to charge *fixed* assets but registration was made in respect of *current* assets.

28 The Debenture's registration against current assets is unenforceable and a new registration now prevented by virtue of the CCAA stay.

29 I agree with counsel for the Petitioner that the extent of "implied terms" that counsel for RoyNat suggests should be read into the Debenture document would change that document completely. It would amount to rewriting the Debenture.

30 RoyNat argues it is entitled to an equitable charge because the Offer Letter contained a promise by Sharp-Rite it would provide a charge on its fixed assets. I do not consider the Offer Letter creates a charge. It does not provide for any of the terms of a security document.

31 RoyNat argues that Sharp-Rite should be estopped from challenging the validity of the Debenture. The declaration sought however is only that there is nothing owing under the Debenture. It is sought in the context of a reorganization under the protection of a stay in the CCAA. It is necessary to a determination of voting rights on any proposal to be advanced and it affects rights of the other creditors.

32 I do not see how an alleged debtor can be estopped from seeking to know what debt, if any, it owes.

33 I am compelled to the view that the ambiguity RoyNat seeks to raise is not an ambiguity arising from a reading of the words of the document. The words of the document are clear. The ambiguity must be that the entire Debenture document package was chosen inappropriately, and presumably in error, to effect a limited type of collateral Debenture security related to the Lease Agreement.

34 The Debenture security of Sharp-Rite was defective and impaired at the time the stay under the CCAA was granted. Any form of rectification elevating the registration from an unsecured to a secured claim during the stay would affect the status and entitlement of other creditors during the stay period. [*Halpenny v. Context Systems Inc.*, [1982] 1 S.C.R. 559, 133 D.L.R. (3d) 257 (S.C.C.); *Shipman Boxboards Ltd., RE* (1940), [1942] O.R. 118 (Ont. H.C.)].

35 The essence of the stay provision of the CCAA is to maintain a *status quo* amongst creditors and prevent their manoeuvring for position. Rectification of security documents affecting priorities made after a CCAA stay would defeat that intent.

36 In any event a basis for rectification of the lending documents by RoyNat appears tenuous. The terms of the agreement between Sharp-Rite and RoyNat derives from the Offer Letter and the Debenture appears contrary to those terms.

37 It is not contracts that are rectified. Instruments made pursuant to contracts may be rectified. [*Juliar v. Canada (Attorney General)* (1999), 49 B.L.R. (2d) 243 (Ont. S.C.J. [Commercial List])]

38 There is no evidence to suggest there was ever a contract by which a charge against current assets, as opposed to fixed assets, would be granted. RoyNat is entirely without foundation to seek rectification to have the Debenture cover current assets or have its registration rectified to that result.

39 I do not however find it necessary to determine whether grounds existed that would have permitted rectification of the Debenture prior to the CCAA stay, or that there might be a possibility of a future rectification. I do find it is inappropriate to apply for a determination as to rectification of a security document during the currency of the CCAA proceeding.

40 The Petitioner has shown entitlement to a declaration there are no monies owing under and secured by the Debenture pursuant to Clause 14 of Schedule "A" and it is therefore entitled to a full release and discharge of the Debenture.

Application granted.

TAB 12

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Peerenboom v. Peerenboom | 2018 ONSC 5796, 2018 CarswellOnt 16323 | (Ont. S.C.J., Oct 1, 2018)

2015 ONSC 533
Ontario Superior Court of Justice

Redstone Investment Corp., Re

2015 CarswellOnt 3286, 2015 ONSC 533, 251 A.C.W.S. (3d) 552, 26 C.B.R. (6th) 272, 3 P.P.S.A.C. (4th) 402

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Redstone Investment Corporation and Redstone Capital Corporation

Morawetz R.S.J.

Heard: October 31, 2014; November 12, 2014
Judgment: January 30, 2015
Docket: CV-14-10495-00CL

Counsel: Aubrey Kauffman, Zohaib Maladwala for Maplebrook Capital Corp.
Steven Graff, Ian Aversa for Grant Thornton Ltd., in its capacity as Receiver and Manager of Redstone Investment Corporation, Redstone Capital Corporation and 1710814 Ontario Inc. o/a Redstone Management Services
Geoff R. Hall for Warner Sulz Family Trust and Gino Martone (Investors in Maplebrook)

Subject: Estates and Trusts; Insolvency

MOTION by company to compel receiver to pay amounts owed by debtor pursuant to loan assignment arrangement.

Morawetz R.S.J.:

Introduction

1 Maplebrook Capital Corp. ("Maplebrook") brought this motion to compel Grant Thornton Ltd. ("GTL"), in its capacity as the Court appointed Receiver and Manager (the "Receiver") of Redstone Investment Corporation ("RIC"), Redstone Capital Corporation ("RCC") and 1710814 Ontario Inc. o/a Redstone Management Services ("RMS") to pay the following amounts to Maplebrook:

a) $750,000 advanced by Maplebrook to fund the Pro-Hairlines transaction (as defined below), less 37.5% of the legal fees ($13,189.12) incurred by RIC;

b) $150,000 that was received on April 7, 2014 in full satisfaction of the outstanding principal owed under the CFT Properties Loan (as defined below) and any interest payments collected under the CFT Properties Loan after March 28, 2014;

c) $311,400 that was received on March 31, 2014 in full satisfaction of the outstanding interest and principal owed under the Chiu Chow Loan (as defined below); and

d) $28,494 that was collected after March 28, 2014 in satisfaction of interest payments owed under the AG Loans (as defined below).

2 The Receiver opposed the relief requested by Maplebrook. The Receiver took the position that all funds in which Maplebrook claimed an ownership interest formed part of the property of RIC and ought not to be paid to Maplebrook in priority to RIC's other creditors.

3 On March 28, 2014, RIC and a related company RCC, made an application to commence proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings"). An order (the "Initial Order") was granted which appointed GTL as Monitor in the CCAA.

4 On August 8, 2014, an order was made (the "Receivership Order") appointing GTL as the Receiver and Manager of all of the assets, undertakings and properties of RIC and RCC.

5 On September 17, 2014, the Receivership Order was amended to include RMS as a party subject to the Receivership Order.

6 At the outset, it is noted that Maplebrook accepted and agreed to GTL's recommendation to terminate the Agency Agreements in respect of the AG Loans and the Quality Contract Loan (as defined below). This relief was granted by order dated November 12, 2014. The AG Loans and the Quality Contract Loan were declared to be the property of Maplebrook and the stay of proceedings was lifted in order to allow Maplebrook to terminate its Agency Agreements with RIC effective as of November 12, 2014.

Facts

7 Maplebrook is an Ontario corporation established in May 2013. Its President and sole Officer and Director is Mr. John Pizzacalla. Maplebrook carries on business as a short-term lender to small and medium sized Canadian businesses.

8 In the fall of 2013, Maplebrook advanced five loans to borrowers through RIC (the "Assigned Loans"). The Assigned Loans are comprised of:

a) A $500,000 loan to CFT Properties Inc. ("CFT Properties");

b) A $650,000 to AG Yonge Street Investments Inc. ("AG Investments");

c) A further $350,000 loan to AG Investments;

d) A $300,000 loan to Chiu Chow Koon Chinese Restaurant Inc. ("Chiu Chow"); and

e) A $400,000 loan to Quality Contract Manufacturing Ltd. ("Quality Contract").

9 The general structure of the Assigned Loans was such that RIC would obtain an assignable promissory note from the borrower, which RIC would assign to Maplebrook. Maplebrook would irrevocably appoint RIC as its agent to collect and enforce the Assigned Loans and the related security. Maplebrook would advance the funds to RIC. The loan proceeds would be advanced to the borrowers. RIC would collect and remit payments of principal and interest in respect of the loan to Maplebrook.

10 RIC has not remitted any payments of interest and principal that it has received with respect to the Assigned Loans since February 22, 2014 (when RIC remitted payments to Maplebrook in respect of interest and principal collected in January 2014).

11 On March 31, 2014, RIC received $311,000 from Chiu Chow in full satisfaction of the Chiu Chow Loan that had been assigned to Maplebrook.

12 On April 7, 2014, RIC received $150,000 from CFT Properties in full satisfaction of the CFT Properties Loan that had been assigned to Maplebrook.

13 After the Initial Order, RIC also received $28,494 in interest payments from AG Investments in respect of the AG Loans that had been assigned to Maplebrook.

14 RIC deposited these post-CCAA collections in its general account rather than remitting them to Maplebrook or keeping them segregated from RIC's other assets.

15 Since its appointment, the Receiver has not remitted any payments to Maplebrook in respect of the Assigned Loans.

16 With respect to the AG Loans and the Quality Contract Loan, the Receiver acknowledges that, pursuant to the assignments entered into between Maplebrook and RIC, these loans are Maplebrook property.

17 With respect to the Chiu Chow Loan and the CFT Properties Loan, the Receiver also appears to acknowledge that these loans were Maplebrook Property and that RIC acted as Maplebrook's agent to collect and enforce these loans. However, as noted above, the Receiver takes the position that the interest and principal that RIC collected on these loans does not belong to Maplebrook and should not be returned to Maplebrook, ahead of RIC's other creditors.

18 The Receiver's position is based on its assertion that the funds collected by RIC in respect of the assigned loans are not trust funds. The Assignment Agreements for the Assigned Loans do not explicitly state that the proceeds of the Assigned Loans are to be held in "trust" for Maplebrook. Further, the Receiver relies upon the fact that the proceeds of the Chiu Chow and CFT Properties Loans were deposited to RIC's general account.

19 Maplebrook takes the position that RIC has no beneficial entitlement to the funds, and neither the Receiver nor RIC's creditors can have any higher claim. Accordingly, a constructive trust in Maplebrook's favour is necessary to prevent this unjust result.

20 In addition to the Assigned Loans, Maplebrook also agreed to participate in a sixth loan through RIC in late February 2014. The loan to 2234241 Ontario Inc. c.b.a. Pro-Hairlines ("Pro-Hairlines"), was to be for $2 million, with RIC advancing $1.25 million of the total loan and Maplebrook advancing the remaining $750,000 of the loan. The Maplebrook portion of the loan was to have been structured in the same manner as the Assigned Loans (the "Pro-Hairlines Transaction").

21 In anticipation of closing, Maplebrook transferred $750,000 to RIC on March 4, 2014 (the "Pro-Hairlines Advance") to acquire its portion of the loan. The Pro-Hairlines Advance was subsequently transferred by RIC to its lawyers trust account in anticipation of closing.

22 The Pro-Hairlines Transaction did not close. On March 25, 2014 RIC informed Maplebrook that it would not participate in the Pro-Hairlines Transaction. Maplebrook decided not to participate and requested that RIC return the Pro-Hairlines funds.

23 On March 25, 2014, Mr. Karim Habib, the RIC consultant who was in charge of the Pro-Hairlines Transaction informed Mr. Eric Hansen, the sole director and officer of RIC, and Mr. Chris Shaule, a consultant of RIC, that the Pro-Hairlines Advance should "immediately" be returned to Maplebrook after RIC's lawyer transferred it back to RIC.

24 The funds were returned by RIC's lawyer to RIC on April 1, 2014, which post-dated the commencement of CCAA Proceedings.

25 The Receiver takes the position that Maplebrook did not transfer the Pro-Hairlines Advance to a trust account (instead, transferring the funds directly to RIC) and the funds were transferred in the absence of any executed agreement. Consequently, as no trust was created, there is no basis upon which to repay the Maplebrook Advance to Maplebrook.

26 Maplebrook takes the position that RIC received the Pro-Hairlines Advance in trust and that the Pro-Hairlines Advance remains subject to that trust obligation in the Receiver's hands.

27 The Receiver asserts that Mr. Pizzacalla acknowledged that Maplebrook had a close relationship with RIC and RMS. For example, RIC (presumably through RMS, since RIC had no employees) would carry out the bookkeeping and accounting functions for Maplebrook. RMS's and RIC's bookkeeper has signing authority on Maplebrook's accounts, but was required to seek Mr. Pizzacalla's instructions before dealing with Maplebrook's funds. The Receiver also suggested that RIC and/or RMS did not appear to have received any compensation for the performance of these management functions. The Receiver also suggests that Mr. Pizzacalla appeared to have acted as a representative of RIC, RCC and RMS for the purpose of soliciting investments in these entities from various individual third parties.

28 Additionally, the Receiver pointed out that there may be funds owing to RMS from Maplebrook.

29 During oral argument on October 31, 2014, I raised questions with respect to the apparent lack of formal documentation in respect of the Assigned Loans. I also raised questions as to whether there was any type of a relationship as between Maplebrook and RIC that was not fully explained in the materials.

30 Prior to the continuation of oral argument on November 12, 2014, a supplementary affidavit of Mr. Pizzacalla was filed.

31 In the supplementary affidavit, Mr. Pizzacalla provided additional information concerning:

1. A step-by-step explanation of the Loan Purchase Transactions;

2. Maplebrook's financial statements;

3. Maplebrook/Pizzacalla's relationship with RIC/RMS/RCC; and

4. Details with respect to other transactions.

32 Mr. Pizzacalla stated the following at paragraph 3 of the supplementary affidavit as follows:

> **1. A STEP BY STEP EXPLANATION OF THE LOAN PURCHASE TRANSACTIONS**
>
> 3. As explained in paragraph 23 of the First Pizzacalla Affidavit, all of the Assigned Loans were structured in essentially the same way. In connection with RIC's loan to the ultimate borrower (the "Borrower"), RIC would obtain an assignable promissory note from the Borrower. RIC would, in turn, absolutely assign the promissory note and related security to Maplebrook in consideration for Maplebrook's investment (which was in the same amount as the assigned promissory note). Maplebrook would, in the assignment agreement, appoint RIC as its agent to collect and enforce the promissory note and security on its behalf. RIC would then collect the lender fees, interest and principal in respect of the Assigned Loans and deposit those amounts, in full, into Maplebrook's account. Thereafter, Maplebrook would remit RIC's share of the lender fees and interest spread.

33 On the issue of the interest split in the Lender Fees Split Arrangement, when Maplebrook was interested in a potential transaction, it would offer the transaction to its investors at a lower interest rate than would be paid by the Borrower. The difference between the interest rate paid by the Borrower and the interest rate paid to investors would be split equally between RIC and Maplebrook (the "Interest Split"). The Interest Split for the Assigned Loans varied between 4% and 8%.

34 The Borrowers of the Assigned Loans paid lender fees ("Lender Fees") in addition to interest. With the exception of the CFT Transaction, Lender Fees were split equally between Maplebrook and RIC.

35 Mr. Pizzacalla acknowledged there was no written formal agreement with regard to the Interest Split and Lender Fees. The oral agreement was the same for each transaction, which was reflected in the loan schedules for the Assigned Loans. Mr. Pizzacalla did acknowledge that with respect to the CFT Transaction, which had been sourced by Mr. Habib, the parties agreed that Mr. Habib would receive a 1% "Finders Fee".

36 Mr. Pizzacalla also elaborated on the method by which RIC would collect the interest, principal and Lender Fees owing under the Loans and remit these amounts to Maplebrook.

37 Specifically, after Maplebrook purchased the Loan, RIC, as Maplebrook's agent, would collect all interest, Lender Fees and principal payments due from the Borrower and remit those amounts, in full, to Maplebrook.

38 Mr. Pizzacalla would meet Ms. D'Leon, usually on a monthly basis to confirm the interest, principal and Lender Fees due to Maplebrook on each of the Assigned Loans. Ms. D'Leon would cause these amounts to be transferred from RIC's bank account to Maplebrook.

39 On a monthly basis, Maplebrook would pay its investors the interest and principal owed to them on any transactions that the investors had participated in, including the Assigned Loans.

40 After RIC collected and remitted to Maplebrook all interest and Lender Fees due under the Assigned Loans, Ms. D'Leon would then calculate the Interest Split and Lender Fees Split that Maplebrook owed.

41 Ms. D'Leon also maintained a loan schedule for every loan that Maplebrook was involved in. The Loan Schedules included all the pertinent details for each transaction that Maplebrook was involved in.

42 During the October 31, 2014 hearing, I requested copies of Maplebrook's financial statements in order to review how the Assigned Loans were recorded. The financial statements were produced. The Assigned Loans were individually recorded and the Borrowers set out.

43 With respect to the relationship as between Maplebrook and RIC/RMS and RCC, Mr. Pizzacalla stated that neither he, nor Maplebrook, has ever had an interest in, or control of RIC/RCC or RMS.

44 With respect to other transactions, Mr. Pizzacalla acknowledged that, in light of RIC's refusal to pay certain amounts owing to Maplebrook, Maplebrook was retaining certain funds due to RMS on account of potential set-off claims.

45 The evidence of Mr. Pizzacalla was not challenged.

Issues

46 From the standpoint of Maplebrook, the following issues have to be addressed:

a) Who owned the loans in issue?

b) Is Maplebrook entitled to the post-CCAA collections?

c) Is Maplebrook entitled to a return of the Pro-Hairlines Advance?

47 The Receiver submits that the issues to be resolved on the motion are:

a) Are the proceeds of the RIC/Maplebrook loans subject to a constructive trust in favour of Maplebrook?

b) Is the Maplebrook advance subject to a specific purpose or *Quistclose* Trust in favour of Maplebrook?

c) Should Maplebrook be denied the equitable relief it seeks on the basis that it does not come to court with clean hands.

48 Maplebrook submits that, in each of the Assigned Loans, RIC obtained from the Borrower an assignable promissory note and, in each case, that promissory note and related security was absolutely assigned to Maplebrook. In each assignment document, Maplebrook also engaged RIC as its agent with authority to, on Maplebrook's behalf and for Maplebrook's benefit, collect any payment under the promissory note and enforce the security.

49 The Receiver submits that the facts give rise to a debtor-creditor relationship between RIC and Maplebrook and do not give Maplebrook any proprietary interest in the Assigned Loans proceeds.

50 The Receiver takes the position that the agency relationship pursuant to which RIC collected the Assigned Loan proceeds was created as part of the assignments executed in respect of each of the Assigned Loans. The Receiver points out that these assignments to do not impose any obligations on RIC with respect to how the funds are to be collected, how they are to be held by RIC on Maplebrook's behalf, nor how they are to be paid to Maplebrook.

51 The Receiver submits that it is well established that, in the absence of an agreement to hold funds collected on a principal's behalf in a separate account, an agent and its principal are in a debtor/creditor relationship. In support of this proposition, the Receiver relies on *General Publishing Co., Re*, [2002] O.J. No. 2270 (Ont. C.A.) and *M.A. Hanna Co. v. Provincial Bank of Canada* (1934), [1935] S.C.R. 144 (S.C.C.).

Analysis

52 With respect to the AG Loans and the Quality Contract Loan, the Receiver acknowledged that these are the property of Maplebrook and that RIC was acting as Maplebrook's agent in administering the Loans and even recommended terminating the agency relationship in order to allow Maplebrook to enforce its security. In my view, there is no material difference between the structure, documentation, and administration of the AG Loans and the Quality Contract Loans and the CFT Property Loans and the Chiu Chow Loan. These loans were also the subject of absolute equitable assignments to Maplebrook.

53 The documentation establishes RIC's intention to covey the debts to Maplebrook, thereby transferring all credit risks to Maplebrook, retaining only the administrative role of Maplebrook's agent for collection purposes. The evidence also establishes that the parties conducted themselves in a manner consistent with the assignment documentation.

54 Counsel to Maplebrook submits that where there has been an assignment of a debt, and the assignor becomes bankrupt or otherwise seeks protection from its creditors, the debt will no longer form part of the bankrupt's estate. Insofar as the assignor receives repayments of interest or principal of such an assigned debt, these receipts are held in trust for the assignee and are not available for distribution among the assignors' creditors (see *Pythe Navis Adjusters Corp. v. Columbus Hotel Co. (1991) Ltd.*, 2014 BCCA 262 (B.C. C.A.)).

55 In this case, prior to RIC and RMS seeking protection in the CCAA Proceedings on March 28, 2014, agreed upon amounts were forwarded by RIC to Maplebrook in accordance with the terms of the Assigned Loans.

56 Upon the commencement of CCAA Proceedings, the Court issued a stay order. RIC remained a debtor-in-possession (under the supervision of the Court and GTL as Monitor, carrying on RIC's business). As a consequence of the stay order, Maplebrook was precluded from terminating its agency arrangements with RIC, revoking RIC's authority as agent and retaking its property (that is, the Assigned Loans).

57 The purpose of a CCAA stay order is to maintain the status quo amongst creditors and prevent their maneuvering for position. While the stay order prevents secured creditors and other parties from exercising and confirming their security for proprietary rights, it should not be used to prejudice those rights or to reorder the priorities as they existed

on the date that the stay is granted (see: *Sharp-Rite Technologies Ltd., Re*, 2000 BCSC 414 (B.C. S.C. [In Chambers]) and *Windsor Machine & Stamping Ltd., Re* [2009 CarswellOnt 4471 (Ont. S.C.J. [Commercial List])], 2009 CanLII 39771).

58 The stay order effectively prevented Maplebrook from terminating RIC's agency agreement so as to take over the administration of the loans and ensure that it receive the post-CCAA collections directly from the debtors, CFT Properties, Chiu Chow and AG Properties. Counsel to Maplebrook submitted that RIC was not at liberty — during the status quo period — to negate these propriety rights by receiving the post-CCAA collections and depositing them in its general account. I agree

59 The Receiver relies on general statements as set out in *General Publishing* and *Hanna*, to the effect that the absence of an agreement to hold funds in a separate account results in a legal conclusion that the parties are in a debtor/creditor relationship. These statements have to be considered in the context of the facts in *General Publishing* and *Hanna* and also subsequent jurisprudence. *Hanna* involved a priority dispute as between a secured creditor bank and a supplier who sought to establish the foundations for a consignment agreement that, if demonstrated, would result in a proprietary right. *General Publishing* involved a priority dispute between the secured creditor (Bank of Nova Scotia) and publishers who claimed a proprietary right and resulting priority over the Bank with respect to accounts billed to and collected by the distributor, General Distribution Services. In both cases, *Hanna* and *General Publishing* collections were deposited into the general account of the debtor.

60 This case does not involve a priority dispute between a secured creditor and a third party. Rather, it involves a dispute between the Receiver and Maplebrook, with Maplebrook asserting a proprietary right to the loans, a right that the Receiver has acknowledged with respect to the AG Investments and Quality Contract loans.

61 The Chiu Chow and CFT Properties loans were structured in the same way as the AG Investors and Quality Contract loans. In my view, it is surprising that the Receiver maintains that the interest and principal that RIC collected on the Chiu Chow and CFT Properties loans does not belong to Maplebrook and should be available to RIC's other creditors. The explanation for and the flaw in the Receiver's position can be found in a review and analysis of the authorities relied upon by Maplebrook.

62 The Receiver submits that, in the absence of an agreement to hold funds collected on a principal's behalf in a separate account, an agent and its principal are in a debtor/creditor relationship which would defeat the property claim of Maplebrook. However, the cases relied upon by the Receiver to support its submissions, predate the controlling authority and do not consider cases relied upon by Maplebrook, which address whether the absence of a separate account determines the issue.

63 In *Shenzhen City Luohu Industrial Development Co. v. Yao*, 2000 BCSC 677 (B.C. S.C.), the Court enumerated a number of factors that should be considered in deciding whether a party receiving funds does so as a mere debtor, or as a trustee:

> [T]he presence of comingling, while a factor to be weighted in favour of a debtor-creditor relationship is not necessarily determinative. The nature of the relationship depends on whether the certainties which constitute a trust are present. Factors to consider include: whether there was an obligation to keep the funds separate; whether the terms of the agreement clearly set out an obligation to keep the funds separate; whether it was intended that, should the funds be comingled, the trustee could do as he pleased with the money; whether the trustee was required to fulfil a specific purpose; whether the recipient could use the funds for any other purpose before making payment for the specific purpose; and whether the settlor had any direct supervision or control over the financial dealings of the recipient.

64 *Shenzhen City* followed the decision of the Alberta Court of Appeal in *R. v. Lowden*, 1981 ABCA 79 (Alta. C.A.), where the Court held that a travel agent receiving funds from a customer for the specific purpose of purchasing

