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COURT FILE NUMBER	1801-09188
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**THIRD EYE CAPITAL CORPORATION**
DEFENDANTS	**RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC., AIR DALLAIRE LTD., and K.L. CAPITAL CORP.**
DOCUMENT	**BRIEF OF ECN AVIATION INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855 – 2 Street SW Calgary, AB T2P 4K7 Attention: Kelsey Meyer Telephone No.: 403-298-3323 Fax No.: 403-265-7219 Client File No.: 78704.1

Application Scheduled on the Commercial List for the 28th day of November, 2018
before The Honourable Madam Justice B. E. C. Romaine

Other Counsel:

Borden Ladner Gervais LLP
1900 520 3rd Avenue SW
Calgary, Alberta T2P 0R3
Attention: Jösef Kruger, Q.C. / Robyn Gurofsky
Telephone No.: 403-232-9563 / 403-232-9774
Fax No.: 403-266-1395
Counsel for the Receiver, Ernst & Young Inc.

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I. INTRODUCTION

1. ECN Aviation Inc. ("**ECN**") is a secured creditor of one of the debtors in these receivership proceedings, OpsMobil Group Inc. ("**OMGI**"). ECN provided financing and refinancing, respectively, over two helicopters owned by OMGI, and OMGI granted ECN a first-priority security interest over each of those helicopters.

2. As a result of a number of events of default by OMGI pursuant to the loan agreement entered into between it and ECN, on May 11, 2018 (prior to the granting of the Receivership Order in these proceedings on July 19, 2018, and prior to the granting of the initial Interim Stay Order in favour of OMGI and other debtors on July 4, 2018 (the "**Interim Stay Order**") pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, as amended (the "**CCAA**")), ECN, by its civil enforcement agent, seized each of the two helicopters on a bailee's undertaking. The seized helicopters have remained seized, pursuant to the bailee's undertakings, since May 11, 2018.

3. Upon attending at the locations of the seized helicopters on July 6, 2018 to take possession of the same and to serve a Notice of Intention of Disposition of the seized helicopters, ECN's civil enforcement agents were provided with a copy of the Interim Stay Order, and were advised by OMGI or its agents that ECN was stayed from taking possession of the two seized helicopters as a result.

4. Pursuant to both the *Personal Property Security Act*, RSA 2000 c P-7 (the "**PPSA**") and the *International Interests in Mobile Equipment (aircraft equipment) Act*, SC 2005, c 3 (the "***Aircraft Objects Act***"),[1] and consistent with the interpretation and provisions of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 as amended (the "**BIA**"), ECN is entitled to take possession of the two helicopters (including all component parts thereof), immediately, and to market and sell the same. ECN respectfully seeks an Order confirming its rights to do so.

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[1] The *Aircraft Objects Act* (and specifically section 4 thereof) adopts and gives force and effect in Canada to the *Convention on International Interests In Mobile Equipment* (the "**Convention**") and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the "**Protocol**" and, together with the Convention, the "**Cape Town Convention**").

II. STATEMENT OF FACTS

5. All evidence referenced herein is as set out in the Affidavit of Algis Vaitonis of ECN, sworn November 18, 2018, unless otherwise stated.

> Affidavit of Algis Vaitonis sworn November 18, 2018 (the "**Vaitonis Affidavit**").

The Parties

6. ECN is the successor in interest to Element Financial Corporation.

> Vaitonis Affidavit, para 3, Exhibits "1" and "2".

7. OMGI is the amalgamation successor to OpsMobil Group Inc., Lynn's Helicopter Leasing Ltd., and 810807 Alberta Ltd. The previous entity known as OpsMobil Group Inc. was previously known as Gemini Helicopters Inc.

> Vaitonis Affidavit, para 4, Exhibits "3" and "4".

The Agreements

8. On March 28, 2014, Element Financial Corporation, the predecessor in interest to ECN (the "**Lender**") entered into an aircraft loan agreement (the "**Loan Agreement**") with Gemini Helicopters Inc., the predecessor to OMGI (the "**Borrower**"). Under the Loan Agreement, the Lender provided the Borrower with a loan of up to CDN $1,600,000 to be used by the Borrower exclusively for the purposes of:

(a) financing the acquisition of the following aircraft:

> 1998 Eurocopter model AS350BA-FX-2 aircraft bearing manufacturer's serial number 3100 (described on the International Registry by free text entry as Eurocopter model AS350-BA manufacturer's serial number 3100) and Canadian registration marks C-FXHP, including one (1) Lycoming (Honeywell) model LTS101-700D2 engine installed on the airframe bearing manufacturer's serial number LE-43005C
>
> ("**C-FXHP**"); and

(b) refinancing the following aircraft:

2000 Eurocopter model EC120B aircraft bearing manufacturer's serial number 1057 (described on the International Registry by free text entry as Eurocopter model EC120B manufacturer's serial number 1057) and Canadian registration marks C-GEMU, including one (1) Turbomeca model Arrius 2F engine installed on the airframe bearing manufacturer's serial number 34069

("**C-GEMU**", and, together with C-FXHP, the "**Aircraft**").

Vaitonis Affidavit, para 5, Exhibit 5.

9. On March 28, 2014, the Lender entered in an agreement (the "**Guarantee**") with Lynn's Helicopter Leasing Ltd., 810807 Alberta Ltd., OpsMobil Inc., and Air Dallaire Ltd. (collectively, the "**Guarantors**"). Under the Guarantee, the Guarantors provided a guarantee to the Lender for all the Borrower's indebtedness, liabilities, and obligations under the Loan Agreement.

Vaitonis Affidavit, para 6, Exhibit "6"

10. On March 28, 2014, the Lender entered into an aircraft security agreement (the "**Security Agreement**") with the Borrower. Under the Security Agreement, the Borrower granted the Lender a secured interest in the following property, described collectively in the Security Agreement as the "**Collateral**":

(a) **Aircraft:** the Aircraft described in Schedule "A" to the Security Agreement, including, without limitation, all improvements, additions, replacements and substitutions and includes all present and future Parts, replacement Parts and accessories of any kind whatsoever;

(b) **Associated Rights**: all Associated Rights related to the Collateral;

(c) **International Interests**: All International Interests related to the Collateral;

(d) **Leases**: all Leases and all rentals and other amounts due under any Lease;

(e) **Warranties:** [*as set out in the Security Agreement, but for the sake of brevity, not reproduced here*]

(f) **Other Rights:** the benefit of any agreement, right, franchise, licence or permit relating to the aircraft and the operation thereof including, without limitation, a purchase agreement, bill or sale and operating agreement together with the Debtor's rights to receive, either directly or indirectly, from any party or Person, any payments due under such agreements;

(g) **Other Related Personal Property:** all personal property related to the Aircraft including, without limitation, any and all accounts, intangibles, contract rights, inventory, equipment, money, drafts, instruments, deposit accounts or other tangible and intangible property;

(h) **Proceeds, Replacements, etc.:** all proceeds and property in any form derived directly or indirectly from any dealing with any of the items set forth in paragraphs (a) and (g) above including, without limitation, any insurance proceeds, and Debtor's right to receive such proceeds, and any other property that indemnifies or compensates for such property or undertaking destroyed, damaged, expropriated, stolen or lost and proceeds of proceeds whether of the same type, class or kind as the original proceeds, proceeds in the form of goods, accounts, notes, instruments, securities, money, trade-ins, chattel paper, documents of title, contract rights, rental payments, licences, instruments and general intangibles incorporeal including all substitutions and replacements thereof, and the proceeds thereof, in whatever form, of any sale, charter, lease or disposition thereof and all substitutions and replacements of such items and any increases, additions and accessions thereto.

The "Aircraft" are defined in Schedule "A" to the Security Agreement in the same manner as defined herein.

Vaitonis Affidavit, para 7, Exhibit "7", s 2.1 and Schedule "A".

11. On March 28, 2014, the Lender entered into a lease subordination agreement (the "**Lease Subordination Agreement**") with OpsMobil Inc. (to whom the Aircraft had been and were then leased by the Borrower). Under the Lease Subordination Agreement, OpsMobil Inc.

agreed to subordinate all of its rights, title, and interest in and to the Aircraft, pursuant to the Lease or otherwise arising, to the right, security interests, title, and interest therein of the Lender.

Vaitonis Affidavit, para 8, Exhibit "8".

The Loan

12. In or about March 2014, the Lender advanced funds to the Borrower in accordance with the Loan Agreement, to finance C-FXHP and to refinance C-GEMU.

Vaitonis Affidavit, para 9.

The Security Registrations

13. ECN has registered its security interest against each of the Aircraft at the Alberta Personal Property Registry on March 27, 2014 and at the International Registry established pursuant to the *Convention on International Interests In Mobile Equipment* (the "**Convention**") and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the "**Protocol**" and, together with the Convention, the "**Cape Town Convention**"), as adopted pursuant to the *Aircraft Objects Act*, on April 1, 2014. ECN has also registered its security interest in the engines for each of the Aircraft at the International Registry on April 1, 2014.

> *International Interests in Mobile Equipment (aircraft equipment) Act*, SC 2005, c 3 (the "***Aircraft Objects Act***"), s 4, which adopts and gives force and effect in Canada (as set out therein) to the *Convention on International Interests In Mobile Equipment* (the "**Convention**") and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the "**Protocol**" and, together with the Convention, the "**Cape Town Convention**"). **[TAB 1]**

Vaitonis Affidavit, para 10, Exhibits "9"-"14".

14. Third Eye Capital Corporation ("**Third Eye**") is also a creditor of OMGI with security over the Aircraft, but its security over the Aircraft is subordinate to that of ECN. Third Eye

amended its registrations at the PPR as against OMGI and other debtors to add the Aircraft as serial number goods on December 11, 2014. As such, in accordance with the *Aircraft Objects Act*, ECN's security interest in the Aircraft (registered at the International Registry on April 1, 2014) takes priority to Third Eye's security interest in the Aircraft. There is no registration over the Aircraft in favour of Third Eye at the International Registry (nor in favour of any other creditor of OMGI).

> *Aircraft Objects Act*, *supra*, Schedule 1 (the Convention), Chapter VIII, Article 29, sections 1, 2 and 6. **[TAB 1]**

> Vaitonis Affidavit, para 11, Exhibits "9"-"14".

15. As such, ECN has a perfected security interest over each of the Aircraft, in first priority to any other creditors of the Borrower.[2]

The Loan Agreement

16. The material terms of the Loan Agreement include (but are not limited to) obligations on the part of the Borrower with respect to:

(a) Payments (section 5.1);

(b) Reorganization (section 10.1.11);

(c) Maintenance of the Aircraft (section 10.1.14);

(d) Use of the Aircraft (section 10.1.20);

(e) Replacement of Parts (section 10.1.21);

(f) Alterations, Modifications and Additions (section 10.1.22); and

(g) Accounting, Financial Statements and other Information (section 10.6).

> Vaitonis Affidavit, para 13, Exhibit "5".

[2] As is set out herein, Rilpa Enterprises Ltd. asserts a garage keeper's lien claim, pursuant to the *Garage Keeper's Lien Act*, RSA 2000 c G-2, over the engine of C-FXHP; however, that claim is limited to the C-FXHP Engine, and ECN disputes the validity of the claim of Rilpa Enterprises Ltd. Rilpa Enterprises Ltd. has brought an application for an Order on this issue, scheduled to be heard December 17, 2018 on the Commercial List.

17. Section 4.2 of the Loan Agreement sets out a default interest rate of twelve percent (12%) per annum, calculated and compounded daily for any amount which is not paid when due.

Vaitonis Affidavit, Exhibit "5".

18. Section 10.1.13 of the Loan Agreement gives the Lender the right to carry out inspections of the Aircraft and of the manuals and technical records for the Aircraft.

Vaitonis Affidavit, Exhibit "5".

19. The Loan Agreement sets out the circumstances in which the Lender is entitled to cancel the loan and declare all indebtedness of the Borrower to the Lender under the Loan Agreement or any related agreement to be immediately due and payable (the "**Events of Default**" and each, an "**Event of Default**"). Situations where Events of Default will occur include, but are not limited to:

(a) if the Borrower fails to pay when due any outstanding principal amount owing under the Loan Agreement (section 11.1.1);

(b) if the Borrower fails to pay when due any other amount payable under the Loan Agreement or any related documents within five (5) business days of its due date (section 11.1.2);

(c) if the Borrower fails to duly perform any other term, condition, or covenant under the Loan Agreement or any other agreement between the Borrower and the Lender not otherwise specified in the Loan Agreement as an immediate Event of Default (a "**Default**"), and fails to remedy any such failure within thirty (30) days after having received written notice from the Lender (section 11.1.3);

(d) if without the prior written consent of Lender there occurs any change in the control of the Borrower (section 11.1.13); and

(e) if without the prior written consent of Lender the Borrower effects or authorizes any consolidation, merger, or amalgamation, unless the resulting entity assumes in writing all of the obligations of the Borrower to the Lender and unless that entity is, in the opinion of the Lender, no less creditworthy than the Borrower (section 11.1.14).

Vaitonis Affidavit, para 13, Exhibit "5".

20. Pursuant to section 11.2 of the Loan Agreement the Lender has certain rights and remedies upon the occurrence of an Event of Default, including but not limited to: (i) any remedy available to the Lender under law or the Cape Town Convention; (ii) declaring the indebtedness immediately due and payable; (iii) pursuing and enforcing any of the Lender's rights and remedies under the Loan Agreement, the Security Agreement, or otherwise provided under or pursuant to any applicable law or agreement; and (iv) availing itself of the benefits of Cape Town Alternative A (as is discussed below) and all other remedies under the Cape Town Convention with respect to the right to take possession of the Aircraft, Airframe or Engine (as those terms are defined in the Loan Agreement).

Vaitonis Affidavit, para 14, Exhibit "5".

21. Section 11.5 of the Loan Agreement expressly stipulates that no failure or delay by the Lender in exercising any right, remedy, or option under the Loan Agreement, the Guarantee, the Security Agreement, the Lease Subordination Agreement, or any other agreement between the Lender and the Defendants constitutes a waiver of its rights under the Loan Agreement, the Guarantee, the Security Agreement, the Lease Subordination Agreement, or any other agreement between the Lender and the Defendants. No waiver of any right, remedy, or option by the Lender is valid unless in writing and then only to the extent specifically stated. There has been no waiver of any right, remedy or option of the Borrower by the Lender.

Vaitonis Affidavit, para 15, Exhibit "5".

Initial Events of Default

22. On or about June 22 and 23, 2017, Heli Appraisals International, a Division of Heli Connections Aviation Inc. ("**Heli Connections**") carried out inspections of the Aircraft for ECN ("**Inspection 1**"), which ECN is permitted to do pursuant to the Loan Agreement.

Vaitonis Affidavit, para 16, Exhibit "15".

23. Inspection 1 indicated extensive discrepancies in the condition of C-FXHP, including, without limitation, that:

(a) the engine was not mounted on the airframe and was missing;

(b) C-FXHP was partially disassembled with parts taken from C-FXHP and installed in other aircraft;

(c) numerous parts belonging to C-FXHP were missing; and

(d) the main rotor blades and gearbox had been removed.

Vaitonis Affidavit, para 17, Exhibit "15".

24. Inspection 1 also indicated that C-FXHP had not flown since September 21, 2016.

Vaitonis Affidavit, para 18, Exhibit "15".

25. As a result of Inspection 1, ECN became aware that the engine for C-FXHP described as a Lycoming (Honeywell) model LTS101-700D2 engine bearing manufacturer's serial number LE-43005C (the "**C-FXHP Engine**") had been removed from C-FXHP.

Vaitonis Affidavit, para 19.

26. At or around the same time in the summer of 2017 that ECN learned of the state of disrepair of C-FXHP, the Borrower confirmed that its annual consolidated financial statements for 2016 had not yet been prepared. Upon ECN's request for the Borrower's quarterly financial statements for 2017 as required under the Loan Agreement, the Borrower refused to provide the statements.

Vaitonis Affidavit, para "20".

First Notice

27. By letter dated August 8, 2017, ECN provided notice to the Defendants of the occurrence and continuation of multiple Defaults and Events of Default under the Loan Agreement, specifically pursuant to sections 10.1.14, 10.1.20, 10.1.21, 10.1.22, and 10.6,

relating to the state of the Aircraft and to the Borrower's refusal to provide the required financial statements. The letter gave the Borrower thirty (30) days from receipt thereof to remedy these and any other continuing Defaults and Events of Default of which ECN may have been unaware.

Vaitonis Affidavit, para 21, Exhibit "16".

Subsequent and Continuing Events of Default

28. In accordance with the Loan Agreement, ECN arranged for additional inspections of the Aircraft, which took place in October 2017 ("**Inspection 2**") and March 2018 ("**Inspection 3**"). The inspections were carried out by Sean Kennedy, a Technical Representative at ECN.

Vaitonis Affidavit, para 28, Exhibits "17", "18".

29. Mr. Kennedy's inspection of C-FXHP led ECN to understand that the Events of Default from the summer of 2017 relating to the state of C-FXHP were not remedied and were continuing, and that further Defaults or Events of Default relating to the state of C-FXHP had occurred. The inspection reports from Inspection 3 indicated that the C-FXHP Engine had been removed in January 2016 and transported to Intermountain Turbine Services, Inc. ("**Intermountain**") in Utah for repair, and that two other engines had subsequently been installed, but that the most recently installed engine had been removed on September 26, 2016.

Vaitonis Affidavit, para 23, Exhibit "18".

30. Mr. Kennedy's March 2018 inspection report on C-GEMU and subsequent discussions with Mr. Kennedy led ECN to understand that the corporate organization and management of the Borrower had changed, and that certain parts on C-GEMU required repair, service or replacement, all of which constituted further Defaults or Events of Default pursuant to the Loan Agreement.

Vaitonis Affidavit, para 24, Exhibit "30".

31. The Borrower failed to make its April 1, 2018 loan payment in the amount of CDN $17,981.00 until April 30, 2018. The Borrower subsequently failed to make its May 1, 2018 loan payment, although ECN ultimately obtained the amount of the May 1, 2018 loan

payment by debiting a deposit account belonging to the Borrower, as permitted under the Loan Agreement. The Borrower has since failed to make both its June 1, 2018 and July 1, 2018 loan payments, and the Receivership Order in these proceedings was granted in relation to the Borrower (and others) on July 19, 2018. No further loan payments have been made pursuant to the Loan Agreement, notwithstanding that OMGI or its agents prevented ECN's civil enforcement agents from taking possession of the Aircraft on July 6, 2018 (having seized the Aircraft on May 11, 2018) as a result of the Interim Stay Order as is defined and discussed below. ECN has not been permitted to take possession of the Aircraft since that time.

Vaitonis Affidavit, paras 25, 35, Exhibit "23".

32. The Borrower has undergone amalgamations without the prior knowledge or written authorization of the Lender and without having assumed in writing all of the obligations of the Borrower under the Loan Agreement. This has resulted in the Guarantors being amalgamated into OMGI, the successor to the Borrower. This also constitutes an Event of Default under the Loan Agreement.

Vaitonis Affidavit, para 26, Exhibits "3", "4".

Second Notice

33. By letter sent April 17, 2018, ECN, through its counsel, Bennett Jones LLP, advised OMGI and the Guarantors:

(a) that the Events of Default set out in the letter of August 8, 2017 had not been remedied and were continuing;

(b) that the Borrower had failed to make its April 1, 2018 loan payment, which constituted an additional Event of Default under the Loan Agreement and the Security Agreement;

(c) that, as a result of its failure to make its April 1, 2018 loan payment and other Events of Default, ECN declared the Borrower's entire indebtedness immediately due and payable; and

(d) that, absent payment, counsel was instructed to enforce the security and collect the indebtedness from the Borrower and the Guarantors, in accordance with their agreements with the Lender.

Vaitonis Affidavit, para 27, Exhibit "19".

34. The Events of Default set out in the letter of August 8, 2017 still have not been remedied, and the Borrower has not paid the outstanding indebtedness to ECN, payment of which was demanded in the letter sent April 17, 2018.

Vaitonis Affidavit, Exhibit "19".

Seizure of Collateral

35. As a result of the Events of Default and the failure of the Borrower to pay the outstanding indebtedness ECN instructed Allied Shortridge Civil Enforcement Agency Inc. ("**Allied Shortridge**") to seize the Aircraft and parts belonging to the Aircraft on a bailee's undertaking, and the journey log books and component log cards (for which instruction was given to take physical possession).

Vaitonis Affidavit, para 29.

36. On or about May 11, 2018, bailiffs from Allied Shortridge attended at the locations of C-FXHP (in Whitecourt, Alberta), C-GEMU (in Grande Prairie, Alberta), and the books and records relating to the Aircraft, including journey log books and component log cards (in Calgary, Alberta), and seized the same. In particular, Allied Shortridge seized:

(a) C-FXHP and all of its component parts, on a bailee's undertaking;

(b) C-GEMU and all of its component parts, save and except a new windshield that had not been installed on C-GEMU and accordingly was not considered to be a component part of C-GEMU, on a bailee's undertaking; and

(c) All books and records relating to the Aircraft, including journey log books and component log cards, by taking physical possession of the same. Many of those records were sent by OMGI to Allied Shortridge electronically over the next several days.

Vaitonis Affidavit, para 30, Exhibit "20".

37. The seizures of C-FXHP and of C-GEMU and each of their component parts included seizure of the goods described in Appendix "A" to the Notice of Seizure. Appendix "A" to the Notice of Seizure for C-FXHP references the complete engine with serial number LE43005C (the C-FXHP Engine) with accessories. ECN's civil enforcement agent gave the Notice of Seizure of C-GEMU to OMGI.

Vaitonis Affidavit, para 31, Exhibit "20".

Statement of Claim

38. On May 11, 2018, ECN filed a Statement of Claim in relation to the indebtedness owed to ECN by OMGI and the Guarantors, and served the same upon OMGI and the Guarantors (which have amalgamated to form OMGI) shortly thereafter. ECN was hopeful that the seizures of the Aircraft and the service of a Statement of Claim would prompt resolution of the dispute between ECN and OMGI, such that ECN could avoid the further enforcement steps of taking possession of, marketing and selling the seized Aircraft. That did not occur.

Vaitonis Affidavit, para 32, Exhibit "21".

Incomplete Records

39. On June 14, 2018, ECN's civil enforcement agency, Allied Shortridge, released the seized books and records in relation to the Aircraft to ECN. Upon reviewing the said books and records, ECN's agents determined that they were incomplete. In particular, the log books and component log cards for C-FXHP were not included in the books and records provided by OMGI to the civil enforcement agency. On July 17, 2018, ECN wrote to counsel for OMGI and to the Ernst & Young Inc. (**"EYI"**, in its capacity at that time as the Monitor in the CCAA proceedings in relation to OMGI) to request that the complete books and records related to C-FXHP be delivered to ECN. No response has been received to that request.

Vaitonis Affidavit, paras 33-34, Exhibits "22", "26".

Attempt to Take Possession

40. On July 6, 2018, ECN, by way of its civil enforcement agents, attended at the locations of each of the Aircraft, each of which remained seized on a bailee's undertaking, to take possession of the Aircraft and to serve a Notice of Intention of Disposition of Collateral with respect to each of the Aircraft. At that time, the Borrower or its agents provided the civil enforcement agents with a copy of an Interim Stay Order that had been granted by this Honourable Court in Court File No. 1801-09424 on July 4, 2018 pursuant to the *Companies' Creditors Arrangement Act*, in relation to OMGI and others (the "**Interim Stay Order**") and the Borrower or its agents took the position that the civil enforcement agents were stayed from taking possession of the seized Aircraft. As a result, the civil enforcement agents refrained from taking possession of the seized Aircraft.

Vaitonis Affidavit, para 35, Exhibit "23".

Reservation of Rights

41. On July 6, 2018, upon learning of the Interim Stay Order, ECN's counsel contacted counsel for OMGI, and then contacted counsel for Third Eye on July 9, 2018, to discuss ECN's claim over the seized Aircraft.

Vaitonis Affidavit, para 36, Exhibit "24".

42. On July 10, 2018, ECN requested, and OMGI, Third Eye and this Honourable Court agreed to include the following paragraph in the Initial Order granted pursuant to the CCAA on that date (the "**CCAA Initial Order**"):

> This Order is without prejudice to the right of ECN Aviation Inc. to apply to this Court for an Order declaring that (i) the assets of OpsMobil Group Inc. that were seized on May 11, 2018 on behalf of ECN Aviation Inc. are not subject to the provisions of this Order, and (ii) ECN Aviation Inc. is entitled to take possession and dispose of the said assets in accordance with the *Personal Property Security Act*, RSA 2000, c P-7.

Vaitonis Affidavit, para 37, Exhibit "25", para 49.

43. The same wording was included at paragraph 38 of the Receivership Order granted July 19, 2018, and at paragraph 38 of the Amended Receivership Order granted August 7, 2018.

Receivership Order filed July 19, 2018, para 38.

Amended Receivership Order filed August 7, 2018, para 38.

Requests for Possession

44. ECN's counsel wrote to counsel for OMGI, counsel for Third Eye and to EYI (at that time, in its capacity as Monitor pursuant to the CCAA proceedings in relation to OMGI) on July 17, 2018 to request their consent to an Order directing that ECN and the Aircraft are not subject to the Order granted on July 10, 2018 in the CCAA proceedings in relation to OMGI or any subsequent order granted in those proceedings, and that ECN is permitted to take possession of the Aircraft (including all of their component parts and specifically the C-FXHP Engine) for the purpose of marketing and selling the same, in accordance with the PPSA, and that OMGI deliver up the log books and component log cards for C-FXHP which were not provided to the civil enforcement agency at the time of seizure of the same on May 11, 2018.

Vaitonis Affidavit, para 39, Exhibit "26".

45. On August 9, 2018, Gemini Heli Ltd. emailed ECN an invoice in the amount of $48,825.00 for "parking, storage, hangarage and security of aircraft C-GEMU (Ser #1057) as per Warrant dated May 9, 2018," at an apparent rate of $500 per day for 93 days. On August 15, 2018, ECN's counsel wrote to Gemini Heli Ltd. (with a copy to the Receiver and its counsel) in response to the emailed invoice, noting the obligations pursuant to the bailee's undertaking given at the time of seizure of C-GEMU, that personnel on site at the location of C-GEMU had prevented ECN's civil enforcement agent from taking possession of C-GEMU on July 6, 2018, that it had written to the Receiver to request that ECN be permitted to take possession of C-GEMU, and that ECN would not be paying the invoice.

Vaitonis Affidavit, para 40, Exhibits "27", "28".

46. ECN's counsel followed up again on ECN's request to EYI (by that time, in its capacity as the court-appointed receiver and manager of OMGI and other debtors (the "**Receiver**")) to take possession of the Aircraft, by phone, and by email on August 23, 2018.

Vaitonis Affidavit, para 41, Exhibit "29".

47. The Receiver's counsel sent a letter to ECN's counsel on September 12, 2018, regarding a garage keeper's lien claim asserted over the C-FXHP Engine, as is set out in further detail below. That letter did not respond to ECN's request to take possession of and market and sell the Aircraft.

Vaitonis Affidavit, para 42, Exhibit "30".

48. ECN's counsel wrote to counsel for EYI, by that time, in its capacity as the court-appointed receiver and manager of OMGI and other debtors (the "**Receiver**") on September 14, 2018 to follow up on its letter of July 17, 2018, and noted the following:

> Our client is concerned that as time passes, the value of C-FXHP and C-GEMU and all component parts thereof deteriorates, not just due to the passage of time, but also due to the fact that the Aircraft have been left dormant since their seizure, and may not be properly maintained by the debtor. Leaving helicopters dormant and failing to maintain them can lead to condemnation of the engine or decertification of aircraft.

Vaitonis Affidavit, para 43, Exhibit "31".

49. ECN's counsel phoned and again wrote to the Receiver's counsel on October 31, 2018 to follow up on ECN's request to take possession of the Aircraft.

Vaitonis Affidavit, para 44, Exhibit "32".

50. To date, other than the September 12, 2018 letter regarding the C-FXHP Engine, ECN has not received any response to its requests as set out in its letters to the Receiver and/or its counsel.

Vaitonis Affidavit, para 45.

The C-FXHP Engine

51. In or about March 2018, ECN learned that in January 2016, without the knowledge or consent of ECN, OMGI removed the C-FXHP Engine from C-FXHP and transported it to Intermountain in Utah for repair.

Vaitonis Affidavit, para 46, Exhibit "18".

52. Intermountain disassembled the C-FXHP Engine and has been in continuous possession of the same at its facility in Utah since receiving the C-FXHP Engine from OMGI in February 2016.

Vaitonis Affidavit, para 47.

53. ECN has a first priority security registration over C-FXHP and the C-FXHP Engine, and has made Intermountain aware of the same.

Vaitonis Affidavit, para 48.

54. Intermountain advised ECN's U.S. legal counsel in early July 2018 that upon receipt of payment in the amount of US $10,000 for Intermountain's work disassembling the C-FXHP Engine, Intermountain was willing to release possession of the C-FXHP Engine to ECN. ECN has not received any subsequent indications to the contrary from Intermountain.

Vaitonis Affidavit, para 49.

55. On or about July 11, 2018, ECN became aware that Rilpa Enterprises Ltd. ("**Rilpa**") had contacted Intermountain and was seeking to take possession of the C-FXHP Engine from Intermountain, on the basis that it owned the C-FXHP Engine. On or about July 16, 2018, counsel for ECN wrote to Rilpa to request that it cease and desist from attempting to take possession of the C-FXHP Engine, over which ECN held a security interest. On July 19, 2018, counsel for Rilpa provided counsel for ECN with a copy of an Alberta Personal Property Registry search result, showing a garage keepers' lien registered July 6, 2018 against the C-FXHP Engine in favour of Rilpa pursuant to the *Garage Keepers' Lien Act*, RSA 2000, c G-2 for the amount of $42,150.00 (the same day that ECN sought to take possession of the seized

Aircraft), listing OpsMobil Inc. (rather than OMGI) as the owner of the C-FXHP Engine, and claiming that Rilpa was currently in possession of the C-FXHP Engine.

Vaitonis Affidavit, para 50, Exhibits "33", "34".

56. On or about July 25, 2018, having been made aware of Rilpa's attempt to take possession of the C-FXHP Engine from Intermountain, counsel for the Receiver wrote to counsel for Rilpa and counsel for ECN to advise that it was analyzing the security interests of Rilpa and of ECN to the C-FXHP Engine, and requested that ECN and Rilpa refrain in the meantime from taking any steps with respect to the C-FXHP Engine or any of the receivership debtors or their property.

Vaitonis Affidavit, para 51, Exhibit "35".

57. On or about September 12, 2018, counsel for the Receiver wrote to counsel for Rilpa and counsel for ECN and advised that based on the information provided to the Receiver to date, the validity and enforceability of Rilpa's claim to a garage keepers' lien claim could not be confirmed, and as a result, that the Receiver's view was that the ECN security interest in the C-FXHP Engine had priority over Rilpa's claim.

Vaitonis Affidavit, para 53, Exhibit "37".

58. On September 25, 2018, counsel for ECN wrote to Rilpa and its counsel pursuant to section 10(2) of the *Garage Keepers' Lien Act* and demanded that Rilpa register a financing statement to discharge its garage keepers' lien registered at the Alberta Personal Property Registry over the C-FXHP Engine and that Rilpa confirm that it had no claim over the C-FXHP Engine.

Garage Keepers' Lien Act, RSA 2000 c G-2, s 10. **[TAB 2]**

Vaitonis Affidavit, para 54, Exhibit "38".

59. Rilpa failed to discharge its registration of a garage keepers' lien by October 25, 2018 and failed to obtain an Order of this Honourable Court confirming that the registration need not be amended or discharged by October 25, 2018, as required pursuant to section 10(3) of the *Garage Keepers' Lien Act*. As such, in accordance with sections 10(3) and 10(4), ECN

wrote to the Registrar of the Personal Property Registry on October 26, 2018 and provided proof of delivery of its September 25, 2018 letter to Rilpa and its counsel demanding the discharge of the said garage keepers' lien. The Registrar discharged the said garage keepers' lien. As such, there are no valid garage keepers' lien claims nor any other claims in favour of Rilpa that take priority to ECN's secured claim over the C-FXHP Engine.

> *Garage Keepers' Lien Act*, *supra*, s 10, including specifically ss 10(2) and (3). **[TAB 2]**

Vaitonis Affidavit, para 55, Exhibits "39", "40".

60. Alberta Courts have interpreted the *Garage Keepers' Lien Act* to require strict compliance in order for a garage keeper to maintain a lien. As stated by Master Funduk in *Landlink Freight Inc v Timberland Forest Products Ltd*, "What is unrealistic about garagemen being required to do it right?" Here, Rilpa has lost any right that it had to a garage keepers' lien.

> *Landlink Freight Inc v Timberland Forest Products Ltd*, 1998 ABQB 648 at para 21. **[TAB 3]**

> *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 112 at paras 38-39 and 50. **[TAB 4]**

61. In addition to the above, ECN has several other grounds for its position that the garage keepers' lien claimed by Rilpa is invalid and has no merit. ECN will raise those grounds in relation to the application to be heard by this Honourable Court on December 17, 2018, should that be necessary. However, ECN submits that where Rilpa's lien has been discharged in accordance with the provisions of the *Garage Keepers' Lien Act*, Rilpa has no lien claim and that the application on December 17, 2018 is unnecessary.

> *Garage Keepers' Lien Act*, *supra*, s 10, including specifically ss 10(2) and (3). **[TAB 2]**

Next Steps

62. Upon gaining possession of the Aircraft, including all component parts thereof (and including the C-FXHP Engine) and all books and records, ECN intends to market and sell the Aircraft, in a commercially reasonable manner, so as to realize upon its security.

Vaitonis Affidavit, para 57.

63. ECN has gained no benefit as a result of the receivership of OMGI. To the contrary, ECN had already seized the Aircraft long before the receivership of OMGI or any court-ordered stay of proceedings in favour of OMGI, and as a result of the court-ordered stays of proceedings and the receivership, ECN has been prevented from taking possession of the seized assets over which it hold security, in first priority. In the meantime, the value of the Aircraft has likely deteriorated, particularly if the Aircraft are not being properly maintained.

Vaitonis Affidavit, para 58.

III. DISCUSSION

A. ECN's Security is in First Priority Pursuant to The Cape Town Convention

64. The Cape Town Convention came into force in Canada on April 1, 2013 as is reflected in the *Aircraft Objects Act*.

Aircraft Objects Act, *supra*, s 4. **[TAB 1]**

Declarations Lodged by Canada Under the Aircraft Protocol at the time of the deposit of its instrument of ratification And Subsequent Declaration.[3] **[TAB 5]**

65. As of April 1, 2013, any registration over the Aircraft at the International Registry takes priority to any registration at the Alberta Personal Property Registry (the "**PPR**") made after that date, regardless of the date of the registration at the International Registry. Pursuant to Schedule 1, Article 29, section 1 of the *Aircraft Objects Act*, a registered interest pursuant to the Cape Town Convention has priority over any other interest subsequently registered and over an unregistered interest. As such, ECN's security interest over the Aircraft at the

[3] The Declarations Lodged by Canada Under the Aircraft Protocol at the time of the deposit of its instrument of ratification And Subsequent Declaration are available online at https://www.unidroit.org/status-2001capetown-aircraft?id=1565.

International Registry on April 1, 2014 takes priority to the December 11, 2014 amendment of the PPR registration of the security interest of Third Eye to include the Aircraft.

> *Aircraft Objects Act*, *supra*, section 6 and Schedule 1 (the Convention), Article 29, section 1. **[TAB 1]**

> Vaitonis Affidavit, paras 10-11, Exhibits "9"-"14".

B. ECN was Entitled to Seize the Aircraft Pursuant to the PPSA

66. ECN, by its civil enforcement agent, seized the Aircraft on May 11, 2018. Pursuant to section 58 of the PPSA, where ECN had perfected its security interest by registration, ECN was permitted to seize the Aircraft on a bailee's undertaking.

> *Personal Property Security Act*, RSA 2000 c P-7 ("**PPSA**"), s 58, including in particular ss 58(1) and (3). **[TAB 6]**

> Vaitonis Affidavit, paras 9-11, 29-31, Exhibits "9"-"14", "20".

67. The Notice of Seizure for C-FXHP indicates that the goods seized include the C-FXHP Engine. Appendix "A" to the Notice of Seizure for C-FXHP references the complete engine with serial number LE43005C with accessories. ECN's civil enforcement agent gave the Notice of Seizure of C-GEMU to OMGI at the time of the seizure on May 11, 2018. Pursuant to subsection 58(2)(b) of the PPSA, ECN has effectively seized the C-FXHP Engine.

> PPSA, *supra*, s 58(2)(b). **[TAB 6]**

> Vaitonis Affidavit, para 31, Exhibit "20".

C. ECN was Entitled to Seize the Aircraft pursuant to the Cape Town Convention

68. The *Aircraft Objects Act* creates an exception so that creditors with security on aircraft objects are not subject to the stay of proceedings under the CCAA if the debtor fails to protect or maintain the object in accordance with the agreement. Clearly, where OMGI has cannibalized one of the Aircraft, OMGI has failed to protect or maintain the Aircraft as required pursuant to the Loan Agreement and the Security Agreement, and as such, pursuant to the

Aircraft Objects Act, ECN was not subject to the stay of proceedings in favour of OMGI as a result of the CCAA proceedings.

> L. W. Houlden, G. B. Morawetz and J. P. Sarra, *The 2018 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018) at N§74 ("**Houlden, Morawetz & Sarra**"). **[TAB 7]**

> Vaitonis Affidavit, paras 16-24, Exhibits "15"-"18".

69. The Cape Town Convention includes a number of provisions that protect secured creditors over aircraft and permit those secured creditors to enforce their security interests over aircraft. The Cape Town Convention also includes specific provisions that address the rights of such creditors in the context of insolvency proceedings of a debtor. These are set out at Article XI, Alternative A of the Protocol (which is Schedule 2 to the *Aircraft Objects Act*).

> *Aircraft Objects Act, supra,* Schedule 2 (the Protocol), Article XI, Alternative A. **[TAB 1]**

70. With respect to remedies available to a creditor generally (not specifically in the context of insolvency of a debtor), the Cape Town Convention provides that in the event of a default under the agreements between debtors and creditors, the creditor may take possession or control of the secured aircraft object, sell or grant a lease of that aircraft object, collect or receive income or profits arising from the management or use of such aircraft object (all to be exercised in a commercially reasonable manner), apply for a court order authorizing or directing any of those acts, and obtain from a court speedy relief by way of orders granting, *inter alia*, preservation of the aircraft object and its value and/or possession, control or custody of the aircraft object.

> *Aircraft Objects Act*, *supra*, Schedule 1 (the Convention), Chapter III, Article 8 sections 1-3 and Article 13 section 1, and Schedule 2 (the Protocol), Article IX, section 3. **[TAB 1]**

71. The Convention provides that in insolvency proceedings against a debtor, an international interest is effective if the creditor's international interest was registered in

accordance with the Convention. ECN has done this, by way of its registrations at the International Registry.

> *Aircraft Objects Act*, *supra*, Schedule 1 (the Convention), Chapter VIII, section 1. **[TAB 1]**

Vaitonis Affidavit, para 10, Exhibits "9"-"12".

72. As noted, the Protocol (Schedule 2 to the *Aircraft Objects Act*) provides certain remedies to a creditor with security registered in accordance with to the Cape Town Convention in the context of an insolvency of a debtor. Article XI, Alternative A of the Protocol includes (but is not limited to) the following provisions:

> *Alternative A*
>
> 2 Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:
>
> (a) the end of the waiting period; and
>
> (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.
>
> 3 For the purposes of this Article, the "waiting period" shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
>
> 4 References in this Article to the "insolvency administrator" shall be to that person in its official, not in its personal, capacity.
>
> 5 Unless and until the creditor is given the opportunity to take possession under paragraph 2:
>
> (a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and
>
> (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

…

7 The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

…

9 No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

…

12 No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

Aircraft Objects Act, supra, Schedule 2 (the Protocol), Article XI, Alternative A, sections 2-5, 7, 9, 12. **[TAB 1]**

73. Canada has declared that it will apply Article XI Alternative A of the Protocol in its entirety to all types of insolvency proceedings and all insolvency-related events and that the "waiting period" is 60 days.

Declarations Lodged by Canada Under the Aircraft Protocol at the time of the deposit of its instrument of ratification And Subsequent Declaration. **[TAB 5]**

74. The Protocol defines "insolvency-related event" to mean (i) the commencement of the insolvency proceedings; or (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action. There can be no doubt that the Interim Stay Order was an insolvency-related event. Even if it were not, each of the subsequent CCAA Initial Order, the Receivership Order, and the Amended Receivership Order would constitute an insolvency-related event, absent the Order(s) that preceded them.

Aircraft Objects Act, supra, Schedule 2 (the Protocol), Article I, section 2(m). **[TAB 1]**

Vaitonis Affidavit, paras 35, 37, Exhibits "23", "25".

Receivership Order filed July 19, 2018.

Amended Receivership Order filed August 7, 2018.

75. As such, pursuant to Schedule 2 (the Protocol), Article XI, Alternative A of the *Aircraft Objects Act*, <u>if</u> ECN had <u>not</u> seized the Aircraft prior to the granting of the Interim Stay Order on July 4, 2018, ECN as creditor was permitted, by statute, to seize the Aircraft 60 days following the date of that Interim Stay Order. However, in the present case where ECN <u>had</u> already seized the Aircraft on May 11, 2018, prior to the granting of the Interim Stay Order on July 4, 2018, ECN was entitled to <u>immediate</u> possession of the Aircraft pursuant to section 2(b) of Article XI, Alternative A of the Protocol.

Aircraft Objects Act, supra, Schedule 2 (the Protocol), Article XI, Alternative A, section 2. **[TAB 1]**

Houlden, Morawetz & Sarra, *supra,* at N§74. **[TAB 7]**

Vaitonis Affidavit, paras 29-31, Exhibit "20".

76. Pursuant to the *Aircraft Objects Act* and the Cape Town Convention adopted pursuant thereto:

(a) the stay of proceedings in favour of OMGI pursuant to the Interim Stay Order, or any subsequent Order of this Honourable Court granting a stay of proceedings in favour of OMGI, does not apply to the Aircraft secured in favour of ECN or to ECN's ability to take possession of the Aircraft in accordance with its security;

(b) upon the occurrence of an insolvency-related event, including in this case the granting of the Interim Stay Order, EYI as insolvency administrator is required to give possession of the Aircraft to ECN as creditor no later than the earlier of:

(i) the end of 60 calendar days; and (ii) the date on which ECN would be entitled to possession of the Aircraft if Article XI of the Cape Town Convention did not apply (in other words, immediately, in the circumstances where ECN had already seized the Aircraft prior to any insolvency-related event of OMGI);

(c) unless and until ECN is given the opportunity to take possession of the Aircraft, the Receiver is required to preserve the Aircraft and maintain them and their value in accordance with the Loan Agreement and the Security Agreement. ECN has expressed its concern to counsel for the Receiver that the value of these Aircraft deteriorates over time, particularly if left dormant;

(d) ECN can take possession or control of or sell the Aircraft upon an event of default, as agreed upon between the parties in their agreements, and also provides that ECN can apply for a court order authorizing or directing this relief. Article 13 of the Convention provides for speedy relief from a court for an order allowing ECN to obtain possession, custody or control, and preservation of the Aircraft.

Aircraft Objects Act, *supra*, Schedule 1 (the Convention), Chapter III, Article 13, sections 1 and 2 and Schedule 2 (the Protocol), Article XI, Alternative A, sections 2, 3, 4, 5, 6, 9, and 12. **[TAB 1]**

D. ECN Seized the Aircraft Prior to Any Stay of Proceedings

77. ECN seized the Aircraft on a bailee's undertaking on May 11, 2018. No stay of proceedings was granted in relation to OMGI until the Interim Stay Order, granted July 4, 2018. ECN became aware of the Interim Stay Order upon its civil enforcement agents attending at the locations of the seized Aircraft on July 6, 2018 for the purpose of taking possession of the same. OMGI or its agents took the position that the civil enforcement agents were stayed from taking possession of the seized Aircraft. In those circumstances, the civil enforcement agents refrained from taking possession of the seized Aircraft.

Vaitonis Affidavit, paras 30, 35, Exhibits "20", "23".

E. <u>ECN Served a Notice of Intention of Disposition of Collateral</u>

78. ECN instructed its civil enforcement agents to serve a Notice of Intention of Disposition of Collateral upon OMGI or its agents with respect to each of C-FXHP and C-GEMU in accordance with section 60 of the PPSA, when the civil enforcement agents attended at the locations of the seized Aircraft on July 6, 2018 to take possession of the same. ECN also couriered a Notice of Intention of Disposition of Collateral with respect to the Aircraft to each of OMGI and Third Eye (also a secured creditor with respect to the Aircraft, although subordinate to ECN's secured claim) on July 5, 2018 (prior to learning of the Interim Stay Order).

PPSA, *supra*, s 60. **[TAB 6]**

Vaitonis Affidavit, para 35.

F. <u>ECN Has Not Benefitted from the CCAA Proceedings or these Receivership Proceedings</u>

79. ECN seized the Aircraft (including all component parts thereof) on a bailee's undertaking, in each case, on May 11, 2018, long before any stay of proceedings had been granted in relation to OMGI or any of the other debtors to these receivership proceedings. The first stay of proceedings was granted pursuant to the Interim Stay Order granted July 4, 2018.

Vaitonis Affidavit, paras 30, 35, Exhibits "20", "23".

80. Upon learning of the Interim Stay Order on July 6, 2018, ECN immediately took steps to reserve its right to apply to this Court for an Order declaring that (i) the assets of OMGI that were seized on May 11, 2018 on behalf of ECN are not subject to the provisions of the CCAA Initial Order, the Receivership Order, or the Amended Receivership Order, and (ii) ECN is entitled to take possession and dispose of the said assets.

Vaitonis Affidavit, paras 36-38, Exhibit "25", para 49.

Receivership Order filed July 19, 2018, para 38.

Amended Receivership Order filed August 7, 2018, para 38.

81. Notwithstanding the *Aircraft Objects Act* and the Cape Town Convention adopted pursuant thereto, the Receiver has not responded to ECN's requests to take possession of the Aircraft secured in its favour and seized by it, other than the Rilpa lien. ECN has been seeking to take possession of the Aircraft for the purpose of marketing and selling the same in order to realize upon ECN's security, since July 6, 2018 when it first sought to take possession of the Aircraft, and was prevented from doing so by OMGI or its agents, due to the Interim Stay Order.

Vaitonis Affidavit, paras 35-36, 39, 41-45, Exhibits "24", "26", "29"-"32".

82. ECN has not benefitted in any way from the CCAA proceedings or these receivership proceedings in relation to OMGI. In fact, the receivership proceedings have hindered ECN from taking possession of and marketing and selling the Aircraft, as it was permitted to do pursuant to the PPSA prior to any stay of proceedings being granted in favour of OMGI, and as it was and continues to be permitted to do pursuant to the *Aircraft Objects Act* and the Cape Town Convention, even during the insolvency proceedings and stay of proceedings in favour of OMGI. The value of the Aircraft has likely deteriorated in the meantime, particularly if they are not being properly maintained.

Vaitonis Affidavit, paras 43, 58, Exhibit "31".

83. ECN respectfully seeks an Order declaring that the Aircraft are not subject to the Interim Stay Order, the CCAA Initial Order, the Receivership Order or the Amended Receivership Order, including but not limited to: (i) the stay of proceedings imposed by any of those Orders; (ii) the Receiver's Charge and the Receiver's Borrowings Charge (each as defined in the Receivership Order); and (iii) the Interim Lenders' Charge, the Administration Charge and the Directors' Charge (each as defined in the CCAA Initial Order).

Vaitonis Affidavit, para 59.

84. Canadian courts, including this Honourable Court, have recognized that a receiver's charges may only be charged against the security held by secured creditors of the debtor: (i) if

a receiver has been appointed with the approval of the holders of security; (b) if a receiver has been appointed, on notice to the creditors, to preserve and realize assets for the benefit of all interested parties, including secured creditors; or (c) if a receiver has expended money for the necessary preservation or improvement of the property.

> *Robert F Kowal Investments Ltd v Deeder Electric Ltd* (1975), 21 CBR (NS) 201, 9 OR (2d) 84, 59 DLR (3d) 492 (CA) at paras 13-25. **[TAB 8]**
>
> *Royal Bank v Vulcan Machinery & Equipment Ltd*, 13 CBR (3d) 69, 3 Alta LR (3d) 358, [1992] 6 WWR 307 (QB) at paras 41-44. **[TAB 9]**
>
> Houlden, Morawetz & Sarra, *supra,* at L§51. **[TAB 7]**

85. In the present case, with respect to ECN as a secured creditor, none of the above-noted circumstances apply. Further:

(a) ECN had already seized the assets secured in its favour prior to any stay of proceedings being granted;

(b) upon learning of the Interim Stay Order, ECN immediately took steps to reserve its right to apply to this Court for an Order declaring that (i) the assets of OMGI that were seized on May 11, 2018 on behalf of ECN are not subject to the provisions of the CCAA Initial Order, the Receivership Order, or the Amended Receivership Order, and that (ii) ECN is entitled to take possession and dispose of the said assets; and

(c) neither the CCAA proceedings nor the receivership proceedings have been of any benefit to ECN, and in fact have hindered ECN in taking possession of assets that it had already seized, and over which it holds first-priority security.

> Vaitonis Affidavit, paras 29-31, 36-39, 41, 43-44, Exhibits "20", "24", "25", "26", "29", "31", "32".

G. Claims of Other Parties to the Aircraft, or Parts or Proceeds Thereof

1. Claim of Rilpa Enterprises Ltd.

86. Rilpa Enterprises Ltd. ("**Rilpa**") claims a garage keepers' lien over the C-FXHP Engine, which is currently located at Intermountain in Utah (and has been continuously located there since February 2016).

Vaitonis Affidavit, para 50, Exhibit "34".

87. ECN disputes Rilpa's entitlement to a garage keepers' lien over the C-FXHP Engine. That issue is scheduled to be addressed by this Honourable Court on December 17, 2018 in relation to an application filed by Rilpa on October 25, 2018.

88. ECN sent a demand to Rilpa pursuant to section 10 of the *Garage Keepers' Lien Act*, RSA 2000 c G-2 on September 25, 2018. As Rilpa failed to discharge the registration of its garage keepers' lien or obtain an Order of this Honourable Court confirming that the registration need not be amended or discharged within thirty days after the demand was given on September 25, 2018, Rilpa's garage keepers' lien was discharged on October 26, 2018, in accordance with subsection 10(3) of the *Garage Keepers' Lien Act*.

Vaitonis Affidavit, paras 54-55, Exhibits "38"-"40".

Garage Keepers' Lien Act, *supra*, s 10. **[TAB 2]**

89. Rilpa's claim pursuant to the *Garage Keepers' Lien Act* is over the C-FXHP Engine alone. That claim, and Rilpa's application to be argued on December 17, 2018, should not stand in the way of this Honourable Court granting an Order permitting ECN to take possession of and market and sell the Aircraft (with the exception of the C-FXHP Engine).

90. Considering that Rilpa's lien has been discharged in accordance with section 10 of the *Garage Keepers' Lien Act*, ECN submits that Rilpa has lost any garage keepers' lien that it may have had over the C-FXHP Engine, and that this Honourable Court could grant an Order confirming the same at this time. Alternatively, that issue can be addressed by this Honourable Court after the application on December 17, 2018.

Vaitonis Affidavit, paras 54-55, Exhibits "38"-"40".

Garage Keepers' Lien Act, supra, s 10. **[TAB 2]**

2. Claim of Canada Revenue Agency

91. ECN understands that Canada Revenue Agency ("**CRA**") claims a deemed trust for unremitted source deductions against OMGI pursuant to subsections 227(4) and (4.1) of the *Income Tax Act*, RSC 1985 c 1 (5th Supp.), in the amount of $360,919.73.

92. ECN understands that the Receiver anticipates that CRA's deemed trust claim against OMGI will be paid in full.

93. In the circumstances where CRA has not received payment of its deemed trust claim at this time, ECN is prepared to consent to an Order requiring that the proceeds of sale of the Aircraft (to be marketed and sold by ECN in a commercially reasonable manner, assuming that the within application is granted) be held in trust by counsel for ECN, pending (i) payment in full by the Receiver of CRA's deemed trust claim; (ii) agreement between ECN and CRA as to the disposition of the proceeds of sale of the Aircraft; or (iii) an Order of this Court determining whether CRA is entitled to any of the proceeds of sale of the Aircraft and if so, in what amount, provided that ECN reserves all rights to make submissions on those issues.

94. As such, ECN submits that CRA's deemed trust claim should not prevent ECN from proceeding with taking possession of and marketing and selling the Aircraft. ECN notes that delay in selling the Aircraft causes significant prejudice to ECN, as the value of the Aircraft erodes over time, particularly if the Aircraft have not been properly maintained or used.

Vaitonis Affidavit, para 58.

3. Claim of Third Eye Capital Corporation

95. Third Eye has asserted to ECN that a "power train" belonging to Third Eye is installed in C-GEMU. No evidence has been provided to support this assertion.

96. ECN initially understood that Third Eye was claiming that the engine installed in C-GEMU belonged to Third Eye. The engine installed in C-GEMU is the same engine that has

been installed in C-GEMU throughout ECN's financing of the same, described as "One (1) Turbomeca model Arrius 2F engine installed on the airframe bearing manufacturer's serial number 34069" (the "**C-GEMU Engine**"). ECN's civil enforcement agent took photographs of the C-GEMU Engine (installed in C-GEMU) on October 24, 2018 confirming this.

97. ECN now understands that Third Eye asserts that its claim is over the power train installed on C-GEMU, including the transmission, the rotor, and rotor blades.

98. Third Eye has not provided ECN with any information other than the above, nor has it put forth any evidence whatsoever to support Third Eye's claim that any equipment installed on C-GEMU belongs to or is secured in favour of Third Eye.

99. Further, even if any parts or equipment installed on C-GEMU have been removed and replaced with other parts or equipment, pursuant to the Loan Agreement and the Security Agreement, ECN's security extends to such replacement parts and equipment.

Vaitonis Affidavit, paras 5, 7, 10-12, Exhibits "5", "7", "9"-"14".

100. Section 2.1 of the Security Agreement defines the "Collateral" securing the loan granted by ECN to OMGI (by their respective predecessors), which expressly includes "all improvements, additions, replacements and substitutions and includes all present and future Parts, replacement Parts and accessories of any kind whatsoever." Further, the "Collateral" also includes "Aircraft", which is defined to mean "(i) the Airframe(s), together with (ii) the Engines, (iii) the Major Components, and (iv) the Manuals and Technical Records." As can be seen in the Security Agreement itself, each of the capitalized terms "Parts", "Engine" and "Major Components" are defined to include those items after removal of the same from the Airframe and upon installation onto another airframe or aircraft. For example: "Engine" is defined to mean:

> (i) each of the engines described in Schedule "A" and all other engines financed with the Airframe in accordance with the Loan Agreement whether or not from time to time installed on the Airframe or removed from the Airframe and installed on any other airframe or aircraft so long as such removed Engine shall remain subject to the Security in accordance with the terms of the Loan Agreement,

> (ii) any replacement Engine or any engine which may from time to time be substituted for an Engine, and
>
> (iii) any and all Parts incorporated in, installed on, or attached to, an Engine at the time of delivery hereunder or at any time thereafter, and any and all Parts removed from an Engine so long as such Parts shall remain subject to the Security in accordance with the terms of the Loan Agreement.

"Parts" is defined to mean:

> all appliances, parts, instruments, appurtenances, accessories, furnishings and other equipment of whatever nature (other than complete Engines or engines) which may from time to time be incorporated or installed in or attached to the airframe or any Engine (and "Part" means any of the foregoing) or, after removal therefrom, so long as such Parts remain subject to the Security in favour of the Secured Party.
>
> [*emphasis added*]

As such, the Parts, Engines and Major Components of the Aircraft (and in particular, C-FXHP) that have been removed from the Aircraft remain subject to the security interest of ECN, and any and all Parts (including the "power train" incorporated in, installed on or attached to the C-GEMU Engine at any time) are secured in favour of ECN.

Vaitonis Affidavit, para 7, Exhibit "7", sections 1.1 ("Aircraft", "Airframe", "Collateral", "Engine", "Major Components", "Manuals and Technical Records", "Parts"), 2.1

IV. RELIEF SOUGHT

101. The Applicant, ECN, respectfully seeks an Order:

(a) declaring that ECN has a first-priority security interest in the Aircraft;

(b) declaring that ECN was entitled to seize the Aircraft on May 11, 2018 and that ECN's seizure of the Aircraft on May 11, 2018 is authorized and valid;

(c) authorizing ECN to immediately take possession of the Aircraft;

(d) directing the Receiver, the debtors (being the Respondents to this Action), the bailees of the Aircraft and all other persons and entities to cooperate in permitting ECN to take possession of the Aircraft, forthwith, without delay or disruption, and to immediately provide possession to ECN of all books and records relating to the Aircraft, including but not limited to all journey log books and component log cards for the Aircraft;

(e) declaring that the Aircraft that were seized on May 11, 2018 on behalf of ECN are not subject to the provisions of the Interim Stay Order filed July 4, 2018, the CCAA Initial Order filed July 6, 2018, the Receivership Order filed July 19, 2018, or the Amended Receivership Order filed August 7, 2018, including but not limited to the stays of proceedings imposed by those Orders and the court-ordered priority charges against the assets of the debtors (the Respondents to this Action); and

(f) declaring that ECN is authorized to take possession of and market and sell the Aircraft in a commercially reasonable manner without further Order of this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 19th day of November, 2018.

BENNETT JONES LLP

Per: ______________________
Kelsey Meyer
Counsel for the Applicant, ECN Aviation Inc.

V. TABLE OF AUTHORITIES

<u>TAB</u>

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

International Interests in Mobile Equipment (aircraft equipment) Act

Loi sur les garanties internationales portant sur des matériels d’équipement mobiles (matériels d’équipement aéronautiques)

S.C. 2005, c. 3

L.C. 2005, ch. 3

Current to November 8, 2018

Last amended on October 17, 2018

À jour au 8 novembre 2018

Dernière modification le 17 octobre 2018

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to November 8, 2018. The last amendments came into force on October 17, 2018. Any amendments that were not in force as of November 8, 2018 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 8 novembre 2018. Les dernières modifications sont entrées en vigueur le 17 octobre 2018. Toutes modifications qui n'étaient pas en vigueur au 8 novembre 2018 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment

TABLE ANALYTIQUE

Loi de mise en œuvre de la Convention relative aux garanties internationales portant sur des matériels d’équipement mobiles et du Protocole portant sur les questions spécifiques aux matériels d’équipement aéronautiques à la Convention relative aux garanties internationales portant sur des matériels d’équipement mobiles

S.C. 2005, c. 3

An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment

[*Assented to 24th February 2005*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the *International Interests in Mobile Equipment (aircraft equipment) Act*.

Interpretation

Definitions

2 (1) The following definitions apply in this Act.

aircraft objects has the same meaning as in Article I(2)(c) of the Aircraft Protocol. (*biens aéronautiques*)

Aircraft Protocol means the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* set out in Schedule 2. (*Protocole aéronautique*)

Convention means the *Convention on International Interests in Mobile Equipment* set out in Schedule 1. (*Convention*)

L.C. 2005, ch. 3

Loi de mise en œuvre de la Convention relative aux garanties internationales portant sur des matériels d’équipement mobiles et du Protocole portant sur les questions spécifiques aux matériels d’équipement aéronautiques à la Convention relative aux garanties internationales portant sur des matériels d’équipement mobiles

[*Sanctionnée le 24 février 2005*]

Sa Majesté, sur l’avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

Titre abrégé

Titre abrégé

1 *Loi sur les garanties internationales portant sur des matériels d’équipement mobiles (matériels d’équipement aéronautiques)*.

Définitions et interprétation

Définitions

2 (1) Les définitions qui suivent s’appliquent à la présente loi.

biens aéronautiques S’entend au sens de l’alinéa c) du paragraphe 2 de l’article I du Protocole aéronautique. (*aircraft objects*)

Convention La *Convention relative aux garanties internationales portant sur des matériels d’équipement mobiles*, dont le texte est reproduit à l’annexe 1. (*Convention*)

declaration means a declaration or designation made by Canada under the Convention or the Aircraft Protocol. (*déclaration*)

Same meaning

(2) Unless a contrary intention appears, words and expressions used in this Act have the same meaning as in the Convention and the Aircraft Protocol.

Interpretation

(3) In interpreting the Convention and the Aircraft Protocol, recourse may be had to

(a) the *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment*, as approved for distribution by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT); and

(b) the *Consolidated Text of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* set out in Schedule 3.

Purpose

Purpose

3 The purpose of this Act is to implement the provisions of the Convention and the Aircraft Protocol with respect to aircraft objects.

Force of Law

Force of law

4 (1) Subject to subsection (2), to the extent that they apply to Canada as described in declarations, the Convention and the Aircraft Protocol have the force of law with respect to aircraft objects during the period that the Aircraft Protocol is, by its terms, in force in respect of Canada.

déclaration Toute déclaration ou désignation faite par le Canada en vertu de la Convention ou du Protocole aéronautique. (*declaration*)

Protocole aéronautique Le *Protocole portant sur les questions spécifiques aux matériels d'équipement aéronautiques à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles*, dont le texte est reproduit à l'annexe 2. (*Aircraft Protocol*)

Identité de sens

(2) Sauf indication contraire, les termes de la présente loi s'entendent au sens de la Convention et du Protocole aéronautique.

Interprétation

(3) Peuvent servir à l'interprétation de la Convention et du Protocole aéronautique :

a) le *Commentaire officiel sur la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles et le Protocole y relatif portant sur les questions spécifiques aux matériels d'équipement aéronautiques*, dans sa version approuvée pour distribution par le Conseil de Direction de l'Institut international pour l'unification du droit privé (UNIDROIT);

b) le *Texte refondu de la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles et de son Protocole portant sur les questions spécifiques aux matériels d'équipement aéronautiques*, dont le texte est reproduit à l'annexe 3.

Objet

Objet

3 La présente loi a pour objet la mise en œuvre, relativement aux biens aéronautiques, des dispositions de la Convention et du Protocole aéronautique.

Force de loi

Force de loi

4 (1) Dans la mesure de leur application au Canada aux termes des déclarations, la Convention et le Protocole aéronautique ont force de loi relativement aux biens aéronautiques pendant la durée de validité prévue par le dispositif du Protocole pour le Canada.

Exception

(2) Subsection (1) does not apply in respect of Articles 47 to 62 of the Convention and Articles XXVI to XXXVII of the Aircraft Protocol.

2005, c. 3, s. 4; 2012, c. 31, s. 411.

Her Majesty

Binding on Her Majesty

5 This Act is binding on Her Majesty in right of Canada or a province.

Inconsistent Laws

Inconsistent laws

6 (1) Subject to subsection (2), a provision of this Act or of the regulations, or a provision of the Convention or Aircraft Protocol given force of law by section 4, that is inconsistent with any other law prevails over the other law to the extent of the inconsistency.

Exception

(2) A provision referred to in any of the following paragraphs (a) to (f) that is inconsistent with a provision of this Act or of the regulations, or with a provision of the Convention or Aircraft Protocol given force of law by section 4, prevails over the provision of this Act, the regulations, the Convention or the Aircraft Protocol to the extent of the inconsistency:

(a) a provision of the *Controlled Drugs and Substances Act*;

(a.1) a provision of the *Cannabis Act*;

(b) a provision of Part II.1 or XII.2 or any of sections 487 to 490.01 and 490.1 to 490.9 of the *Criminal Code*;

(c) a provision of the *Export and Import Permits Act*;

(d) a provision of the *Special Economic Measures Act*;

(e) a provision of the *United Nations Act*;

(f) a provision of any regulations made for the purposes of a provision referred to in any of paragraphs (a) to (e).

2005, c. 3, s. 6; 2012, c. 31, s. 412; 2018, c. 16, s. 185.

Exception

(2) Le paragraphe (1) ne s'applique pas toutefois aux articles 47 à 62 de la Convention et aux articles XXVI à XXXVII du Protocole aéronautique.

2005, ch. 3, art. 4; 2012, ch. 31, art. 411.

Sa Majesté

Obligation de Sa Majesté

5 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

Incompatibilité

Incompatibilité

6 (1) Sous réserve du paragraphe (2), les dispositions de la présente loi et des règlements, ainsi que les dispositions de la Convention et du Protocole aéronautique auxquelles l'article 4 donne force de loi, l'emportent sur toute règle de droit incompatible.

Exception

(2) Les dispositions de la *Loi réglementant certaines drogues et autres substances*, de la *Loi sur le cannabis*, des parties II.1 et XII.2 et des articles 487 à 490.01 et 490.1 à 490.9 du *Code criminel*, de la *Loi sur les licences d'exportation et d'importation*, de la *Loi sur les mesures économiques spéciales* et de la *Loi sur les Nations Unies*, ainsi que de leurs règlements d'application, l'emportent sur toute disposition incompatible de la présente loi ou des règlements ainsi que sur toute disposition incompatible de la Convention ou du Protocole aéronautique à laquelle l'article 4 donne force de loi.

2005, ch. 3, art. 6; 2012, ch. 31, art. 412; 2018, ch. 16, art. 185.

Courts

Courts

7 The superior courts of the provinces are courts of competent jurisdiction for the purpose of the enforcement of the provisions of this Act, including provisions given force of law by section 4.

Requests for Declarations

Ministerial requests

8 (1) Requests from ministers of the Crown in right of Canada for declarations must be directed to the Minister of Foreign Affairs.

Provincial requests

(2) The Minister of Justice must forward to the Minister of Foreign Affairs requests received from the provinces for declarations.

Regulations

Regulations

9 The Governor in Council may make any regulations that are necessary for carrying out any of the provisions of this Act, including the provisions given force of law by section 4.

Transitional Provision

Article XI of Aircraft Protocol

9.1 Article XI of the Aircraft Protocol does not apply to an insolvency-related event that occurs before the day on which subsection 4(1) comes into force.

2012, c. 31, s. 413.

Amendments to Certain Acts

Bank Act

10 [Amendment]

Bankruptcy and Insolvency Act

11 [Amendment]

12 [Amendment]

13 [Amendment]

Tribunaux

Compétence

7 Les juridictions supérieures des provinces sont compétentes pour tout ce qui touche au contrôle d'application des dispositions de la présente loi, notamment de celles auxquelles l'article 4 donne force de loi.

Demandes de déclaration

Demandes fédérales

8 (1) Toute demande de déclaration présentée par un ministre fédéral est adressée au ministre des Affaires étrangères.

Demandes provinciales

(2) Le ministre de la Justice envoie au ministre des Affaires étrangères toute demande de déclaration reçue d'une province.

Règlements

Règlements

9 Le gouverneur en conseil peut prendre les règlements nécessaires à l'application des dispositions de la présente loi, notamment de celles auxquelles l'article 4 donne force de loi.

Disposition transitoire

Article XI du Protocole aéronautique

9.1 L'article XI du Protocole aéronautique ne s'applique pas à une situation d'insolvabilité qui survient avant la date d'entrée en vigueur du paragraphe 4(1).

2012, ch. 31, art. 413.

Modifications à certaines lois

Loi sur les banques

10 [Modification]

Loi sur la faillite et l'insolvabilité

11 [Modification]

12 [Modification]

13 [Modification]

14 [Amendments]

Companies' Creditors Arrangement Act

15 [Amendment]

16 [Amendment]

Winding-up and Restructuring Act

17 [Amendment]

18 [Amendment]

Coming into Force

Order in council

***19 The provisions of this Act, and the provisions of any Act as enacted by this Act, come into force on a day or days to be fixed by order of the Governor in Council.**

*** [Note: Sections 11 to 18 in force September 28, 2005, *see* SI/2005-89; section 10 in force April 14, 2008, *see* SI/2008-36; the heading before section 1, sections 1 to 9.1 and Schedules 1 to 3 in force April 1, 2013, *see* SI/2013-26.]**

14 [Modifications]

Loi sur les arrangements avec les créanciers des compagnies

15 [Modification]

16 [Modification]

Loi sur les liquidations et les restructurations

17 [Modification]

18 [Modification]

Entrée en vigueur

Décret

***19 Les dispositions de la présente loi ou celles de toute autre loi édictées par elle entrent en vigueur à la date ou aux dates fixées par décret.**

*** [Note : Articles 11 à 18 en vigueur le 28 septembre 2005, *voir* TR/2005-89; article 10 en vigueur le 14 avril 2008, *voir* TR/2008-36; l'intertitre précédant l'article 1, articles 1 à 9.1 et annexes 1 à 3 en vigueur le 1er avril 2013, *voir* TR/2013-26.]**

SCHEDULE 1

(Subsection 2(1))

Convention on International Interests in Mobile Equipment

THE STATES PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,

HAVE AGREED upon the following provisions:

CHAPTER I

Sphere of Application and General Provisions

ARTICLE 1

Definitions

In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:

(a) ***agreement*** means a security agreement, a title reservation agreement or a leasing agreement;

ANNEXE 1

(paragraphe 2(1))

Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles

LES ÉTATS PARTIES À LA PRÉSENTE CONVENTION,

CONSCIENTS des besoins concernant l'acquisition et l'utilisation des matériels d'équipement mobiles de grande valeur ou d'une importance économique particulière et de la nécessité de faciliter le financement de leur acquisition et utilisation d'une façon efficace,

RECONNAISSANT les avantages du bail et du financement garanti par un actif, et soucieux de faciliter ces types d'opérations en établissant des règles claires qui leur seront applicables,

CONSCIENTS du besoin d'assurer que les garanties portant sur de tels matériels d'équipement soient reconnues et protégées de façon universelle,

DÉSIRANT procurer des avantages économiques réciproques importants à toutes les parties intéressées,

CONVAINCUS de la nécessité que de telles règles tiennent compte des principes sur lesquels reposent le bail et le financement garanti par un actif et respectent le principe de l'autonomie de la volonté des parties nécessaire à ce type d'opérations,

CONSCIENTS de la nécessité d'établir un régime juridique propre aux garanties internationales portant sur de tels matériels d'équipement et, à cette fin, de créer un système international d'inscription destiné à protéger ces garanties,

TENANT COMPTE des objectifs et des principes énoncés dans les Conventions existantes relatives à de tels matériels d'équipement,

SONT CONVENUS des dispositions suivantes :

CHAPITRE I

Champ d'application et dispositions générales

ARTICLE PREMIER

Définitions

Dans la présente Convention, à moins que le contexte ne s'y oppose, les termes suivants sont employés dans le sens indiqué ci-dessous :

a) ***contrat*** désigne un contrat constitutif de sûreté, un contrat réservant un droit de propriété ou un contrat de bail;

(b) ***assignment*** means a contract which, whether by way of security or otherwise, confers on the assignee associated rights with or without a transfer of the related international interest;

(c) ***associated rights*** means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object;

(d) ***commencement of the insolvency proceedings*** means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;

(e) ***conditional buyer*** means a buyer under a title reservation agreement;

(f) ***conditional seller*** means a seller under a title reservation agreement;

(g) ***contract of sale*** means a contract for the sale of an object by a seller to a buyer which is not an agreement as defined in (a) above;

(h) ***court*** means a court of law or an administrative or arbitral tribunal established by a Contracting State;

(i) ***creditor*** means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;

(j) ***debtor*** means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest;

(k) ***insolvency administrator*** means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;

(l) ***insolvency proceedings*** means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation;

(m) ***interested persons*** means:

(i) the debtor;

(ii) any person who, for the purpose of assuring performance of any of the obligations in favour of the creditor, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

(iii) any other person having rights in or over the object;

(n) ***internal transaction*** means a transaction of a type listed in Article 2(2)(a) to (c) where the centre of the main interests of all parties to such transaction is situated, and the relevant object located (as specified in the Protocol), in the same Contracting State at the time of the conclusion of the contract and where the interest created by the transaction has been registered in a national registry in that Contracting State which has made a declaration under Article 50(1);

b) ***cession*** désigne une convention qui confère au cessionnaire, en garantie ou à un autre titre, des droits accessoires, avec ou sans transfert de la garantie internationale correspondante;

c) ***droits accessoires*** désigne tous les droits au paiement ou à toute autre forme d'exécution auxquels est tenu un débiteur en vertu d'un contrat, qui sont garantis par le bien ou liés à celui-ci;

d) ***ouverture des procédures d'insolvabilité*** désigne le moment auquel les procédures d'insolvabilité sont réputées commencer en vertu de la loi applicable en matière d'insolvabilité;

e) ***acheteur conditionnel*** désigne un acheteur en vertu d'un contrat réservant un droit de propriété;

f) ***vendeur conditionnel*** désigne un vendeur en vertu d'un contrat réservant un droit de propriété;

g) ***contrat de vente*** désigne une convention prévoyant la vente d'un bien par un vendeur à un acheteur qui n'est pas un contrat tel que défini au paragraphe a) ci-dessus;

h) ***tribunal*** désigne une juridiction judiciaire, administrative ou arbitrale établie par un État contractant;

i) ***créancier*** désigne un créancier garanti en vertu d'un contrat constitutif de sûreté, un vendeur conditionnel en vertu d'un contrat réservant un droit de propriété ou un bailleur en vertu d'un contrat de bail;

j) ***débiteur*** désigne un constituant en vertu d'un contrat constitutif de sûreté, un acheteur conditionnel en vertu d'un contrat réservant un droit de propriété, un preneur en vertu d'un contrat de bail ou une personne dont le droit sur un bien est grevé par un droit ou une garantie non conventionnel susceptible d'inscription;

k) ***administrateur d'insolvabilité*** désigne une personne qui est autorisée à administrer le redressement ou la liquidation, y compris à titre provisoire, et comprend un débiteur en possession du bien si la loi applicable en matière d'insolvabilité le permet;

l) ***procédures d'insolvabilité*** désigne la faillite, la liquidation ou d'autres procédures collectives judiciaires ou administratives, y compris des procédures provisoires, dans le cadre desquelles les biens et les affaires du débiteur sont soumis au contrôle ou à la surveillance d'un tribunal aux fins de redressement ou de liquidation;

m) ***personnes intéressées*** désigne :

i) le débiteur;

ii) toute personne qui, en vue d'assurer l'exécution de l'une quelconque des obligations au bénéfice du créancier, s'est portée caution, a donné ou émis une garantie sur demande ou une lettre de crédit stand-by ou toute autre forme d'assurance-crédit;

iii) toute autre personne ayant des droits sur le bien;

n) ***opération interne*** désigne une opération d'un type indiqué aux alinéas a) à c) du paragraphe 2 de l'article 2 lorsque le centre des intérêts principaux de toutes les parties à cette opération et le bien (dont le lieu de situation est déterminé conformément aux dispositions du Protocole) se trouvent dans le même État contractant au moment de

(o) ***international interest*** means an interest held by a creditor to which Article 2 applies;

(p) ***International Registry*** means the international registration facilities established for the purposes of this Convention or the Protocol;

(q) ***leasing agreement*** means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment;

(r) ***national interest*** means an interest held by a creditor in an object and created by an internal transaction covered by a declaration under Article 50(1);

(s) ***non-consensual right or interest*** means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation;

(t) ***notice of a national interest*** means notice registered or to be registered in the International Registry that a national interest has been created;

(u) ***object*** means an object of a category to which Article 2 applies;

(v) ***pre-existing right or interest*** means a right or interest of any kind in or over an object created or arising before the effective date of this Convention as defined by Article 60(2)(a);

(w) ***proceeds*** means money or non-money proceeds of an object arising from the total or partial loss or physical destruction of the object or its total or partial confiscation, condemnation or requisition;

(x) ***prospective assignment*** means an assignment that is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;

(y) ***prospective international interest*** means an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor's acquisition of an interest in the object), whether or not the occurrence of the event is certain;

(z) ***prospective sale*** means a sale which is intended to be made in the future, upon the occurrence of a stated event, whether or not the occurrence of the event is certain;

(aa) ***Protocol*** means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;

(bb) ***registered*** means registered in the International Registry pursuant to Chapter V;

(cc) ***registered interest*** means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V;

la conclusion du contrat et lorsque la garantie créée par l'opération a été inscrite dans un registre national dans cet État contractant s'il a fait une déclaration en vertu du paragraphe 1 de l'article 50;

o) ***garantie internationale*** désigne une garantie détenue par un créancier à laquelle l'article 2 s'applique;

p) ***Registre international*** désigne le service international d'inscription établi aux fins de la présente Convention ou du Protocole;

q) ***contrat de bail*** désigne un contrat par lequel une personne (le bailleur) confère un droit de possession ou de contrôle d'un bien (avec ou sans option d'achat) à une autre personne (le preneur) moyennant le paiement d'un loyer ou toute autre forme de paiement;

r) ***garantie nationale*** désigne une garantie détenue par un créancier sur un bien et créée par une opération interne couverte par une déclaration faite en vertu du paragraphe 1 de l'article 50;

s) ***droit ou garantie non conventionnel*** désigne un droit ou une garantie conféré en vertu de la loi d'un État contractant qui a fait une déclaration en vertu de l'article 39 en vue de garantir l'exécution d'une obligation, y compris une obligation envers un État, une entité étatique ou une organisation intergouvernementale ou privée;

t) ***avis d'une garantie nationale*** désigne un avis inscrit ou à inscrire dans le Registre international qui indique qu'une garantie nationale a été créée;

u) ***bien*** désigne un bien appartenant à l'une des catégories auxquelles l'article 2 s'applique;

v) ***droit ou garantie préexistant*** désigne un droit ou une garantie de toute nature sur un bien, né ou créé avant la date de prise d'effet de la présente Convention telle qu'elle est définie à l'alinéa a) du paragraphe 2 de l'article 60;

w) ***produits d'indemnisation*** désigne les produits d'indemnisation, monétaires ou non monétaires, d'un bien résultant de sa perte ou de sa destruction physique, de sa confiscation ou de sa réquisition ou d'une expropriation portant sur ce bien, qu'elles soient totales ou partielles;

x) ***cession future*** désigne une cession que l'on entend réaliser dans le futur, lors de la survenance, que celle-ci soit certaine ou non, d'un événement déterminé;

y) ***garantie internationale future*** désigne une garantie que l'on entend créer dans le futur ou prévoir sur un bien en tant que garantie internationale, lors de la survenance, que celle-ci soit certaine ou non, d'un événement déterminé (notamment l'acquisition par le débiteur d'un droit sur le bien);

z) ***vente future*** désigne une vente que l'on entend réaliser dans le futur, lors de la survenance, que celle-ci soit certaine ou non, d'un événement déterminé;

aa) ***Protocole*** désigne, pour toute catégorie de biens et de droits accessoires à laquelle la présente Convention s'applique, le Protocole pour cette catégorie de biens et de droits accessoires;

bb) ***inscrit*** signifie inscrit dans le Registre international en application du Chapitre V;

(dd) ***registrable non-consensual right or interest*** means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40;

(ee) ***Registrar*** means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(2)(b);

(ff) ***regulations*** means regulations made or approved by the Supervisory Authority pursuant to the Protocol;

(gg) ***sale*** means a transfer of ownership of an object pursuant to a contract of sale;

(hh) ***secured obligation*** means an obligation secured by a security interest;

(ii) ***security agreement*** means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;

(jj) ***security interest*** means an interest created by a security agreement;

(kk) ***Supervisory Authority*** means, in respect of the Protocol, the Supervisory Authority referred to in Article 17(1);

(ll) ***title reservation agreement*** means an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement;

(mm) ***unregistered interest*** means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention; and

(nn) ***writing*** means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.

cc) ***garantie inscrite*** désigne une garantie internationale, un droit ou une garantie non conventionnel susceptible d'inscription ou une garantie nationale indiquée dans un avis de garantie nationale, qui a été inscrite en application du Chapitre V;

dd) ***droit ou garantie non conventionnel susceptible d'inscription*** désigne un droit ou une garantie non conventionnel susceptible d'inscription en application d'une déclaration déposée conformément à l'article 40;

ee) ***Conservateur*** désigne, relativement au Protocole, la personne ou l'organe désigné par ce Protocole ou nommé en vertu de l'alinéa b) du paragraphe 2 de l'article 17;

ff) ***règlement*** désigne le règlement établi ou approuvé par l'Autorité de surveillance en application du Protocole;

gg) ***vente*** désigne le transfert de la propriété d'un bien en vertu d'un contrat de vente;

hh) ***obligation garantie*** désigne une obligation garantie par une sûreté;

ii) ***contrat constitutif de sûreté*** désigne un contrat par lequel un constituant confère ou s'engage à conférer à un créancier garanti un droit (y compris le droit de propriété) sur un bien en vue de garantir l'exécution de toute obligation actuelle ou future du constituant lui-même ou d'une autre personne;

jj) ***sûreté*** désigne une garantie créée par un contrat constitutif de sûreté;

kk) ***Autorité de surveillance*** désigne, relativement au Protocole, l'Autorité de surveillance visée au paragraphe 1 de l'article 17;

ll) ***contrat réservant un droit de propriété*** désigne un contrat de vente portant sur un bien aux termes duquel la propriété n'est pas transférée aussi longtemps que les conditions prévues par le contrat ne sont pas satisfaites;

mm) ***garantie non inscrite*** désigne un droit ou une garantie conventionnel ou non conventionnel (autre qu'une garantie ou un droit auquel l'article 39 s'applique) qui n'a pas été inscrit, qu'il soit susceptible ou non d'inscription en vertu de la présente Convention; et

nn) ***écrit*** désigne une information (y compris communiquée par télétransmission) qui se présente sur un support matériel ou sous une autre forme de support, qui peut être reproduite ultérieurement sur un support matériel, ce support indiquant par un moyen raisonnable l'approbation de l'information par une personne.

ARTICLE 2

The International Interest

1 This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

ARTICLE 2

La garantie internationale

1 La présente Convention institue un régime pour la constitution et les effets d'une garantie internationale portant sur certaines catégories de matériels d'équipement mobiles et les droits accessoires.

2 For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

(a) granted by the chargor under a security agreement;

(b) vested in a person who is the conditional seller under a title reservation agreement; or

(c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

2 Aux fins de la présente Convention, une garantie internationale portant sur des matériels d'équipement mobiles est une garantie, constituée conformément à l'article 7, portant sur un bien qui relève d'une catégorie de biens visée au paragraphe 3 et désignée dans le Protocole, dont chacun est susceptible d'individualisation :

a) conférée par le constituant en vertu d'un contrat constitutif de sûreté;

b) détenue par une personne qui est le vendeur conditionnel en vertu d'un contrat réservant un droit de propriété; ou

c) détenue par une personne qui est le bailleur en vertu d'un contrat de bail.

Une garantie relevant de l'alinéa a) du présent paragraphe ne peut relever également de l'alinéa b) ou c).

3 The categories referred to in the preceding paragraphs are:

(a) airframes, aircraft engines and helicopters;

(b) railway rolling stock; and

(c) space assets.

3 Les catégories visées aux paragraphes précédents sont :

a) les cellules d'aéronefs, les moteurs d'avion et les hélicoptères;

b) le matériel roulant ferroviaire; et

c) les biens spatiaux.

4 The applicable law determines whether an interest to which paragraph 2 applies falls within sub-paragraph (a), (b) or (c) of that paragraph.

4 La loi applicable détermine la question de savoir si une garantie visée au paragraphe 2 relève de l'alinéa a), b) ou c) de ce paragraphe.

5 An international interest in an object extends to proceeds of that object.

5 Une garantie internationale sur un bien porte sur les produits d'indemnisation relatifs à ce bien.

ARTICLE 3

Sphere of Application

1 This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.

2 The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

ARTICLE 3

Champ d'application

1 La présente Convention s'applique lorsque, au moment de la conclusion du contrat qui crée ou prévoit la garantie internationale, le débiteur est situé dans un État contractant.

2 Le fait que le créancier soit situé dans un État non contractant est sans effet sur l'applicabilité de la présente Convention.

ARTICLE 4

Where Debtor Is Situated

1 For the purposes of Article 3(1), the debtor is situated in any Contracting State:

(a) under the law of which it is incorporated or formed;

(b) where it has its registered office or statutory seat;

(c) where it has its centre of administration; or

(d) where it has its place of business.

2 A reference in sub-paragraph (d) of the preceding paragraph to the debtor's place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence.

ARTICLE 4

Situation du débiteur

1 Aux fins du paragraphe 1 de l'article 3, le débiteur est situé dans tout État contractant :

a) selon la loi duquel il a été constitué;

b) dans lequel se trouve son siège statutaire;

c) dans lequel se trouve le lieu de son administration centrale; ou

d) dans lequel se trouve son établissement.

2 L'établissement auquel il est fait référence à l'alinéa d) du paragraphe précédent désigne, si le débiteur a plus d'un établissement, son principal établissement ou, au cas où il n'a pas d'établissement, sa résidence habituelle.

ARTICLE 5

Interpretation and Applicable Law

1 In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

2 Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3 References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4 Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

ARTICLE 6

Relationship Between the Convention and the Protocol

1 This Convention and the Protocol shall be read and interpreted together as a single instrument.

2 To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.

CHAPTER II

Constitution of An International Interest

ARTICLE 7

Formal Requirements

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:

- **(a)** is in writing;
- **(b)** relates to an object of which the chargor, conditional seller or lessor has power to dispose;
- **(c)** enables the object to be identified in conformity with the Protocol; and

ARTICLE 5

Interprétation et droit applicable

1 Pour l'interprétation de la présente Convention, il sera tenu compte de ses objectifs tels qu'ils sont énoncés dans le préambule, de son caractère international et de la nécessité de promouvoir l'uniformité et la prévisibilité de son application.

2 Les questions concernant les matières régies par la présente Convention et qui ne sont pas expressément tranchées par elle seront réglées selon les principes généraux dont elle s'inspire ou, à défaut, conformément à la loi ou au droit applicable.

3 Les références à la loi ou au droit applicable visent la loi ou le droit interne qui s'applique en vertu des règles de droit international privé de l'État du tribunal saisi.

4 Lorsqu'un État comprend plusieurs unités territoriales ayant chacune ses propres règles de droit s'appliquant à la question à régler, et à défaut d'indication de l'unité territoriale pertinente, le droit de cet État décide quelle est l'unité territoriale dont les règles s'appliquent. À défaut de telles règles, le droit de l'unité territoriale avec laquelle l'affaire présente le lien le plus étroit s'applique.

ARTICLE 6

Relations entre la Convention et le Protocole

1 La présente Convention et le Protocole doivent être lus et interprétés ensemble comme constituant un seul instrument.

2 En cas d'incompatibilité entre la présente Convention et le Protocole, le Protocole l'emporte.

CHAPITRE II

Constitution d'une garantie internationale

ARTICLE 7

Conditions de forme

Une garantie est constituée en tant que garantie internationale conformément à la présente Convention si le contrat qui la crée ou la prévoit :

- **a)** est conclu par écrit;
- **b)** porte sur un bien dont le constituant, le vendeur conditionnel ou le bailleur a le pouvoir de disposer;
- **c)** rend possible l'identification du bien conformément au Protocole; et,
- **d)** s'il s'agit d'un contrat constitutif de sûreté, rend possible la détermination des obligations garanties, sans qu'il

(d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

CHAPTER III

Default Remedies

ARTICLE 8

Remedies of Chargee

1 In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

(a) take possession or control of any object charged to it;

(b) sell or grant a lease of any such object;

(c) collect or receive any income or profits arising from the management or use of any such object.

2 The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.

3 Any remedy set out in sub-paragraph (a), (b) or (c) of paragraph 1 or by Article 13 shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.

4 A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:

(a) interested persons specified in Article 1(m)(i) and (ii); and

(b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.

5 Any sum collected or received by the chargee as a result of exercise of any of the remedies set out in paragraph 1 or 2 shall be applied towards discharge of the amount of the secured obligations.

6 Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking

soit nécessaire de fixer une somme ou une somme maximum garantie.

CHAPITRE III

Mesures en cas d'inexécution des obligations

ARTICLE 8

Mesures à la disposition du créancier garanti

1 En cas d'inexécution au sens de l'article 11, le créancier garanti peut, pour autant que le constituant y ait consenti, ledit consentement pouvant être donné à tout moment, et sous réserve de toute déclaration qui pourrait être faite par un État contractant en vertu de l'article 54, mettre en œuvre une ou plusieurs des mesures suivantes :

a) prendre possession de tout bien grevé à son profit ou en prendre le contrôle;

b) vendre ou donner à bail un tel bien;

c) percevoir tout revenu ou bénéfice produit par la gestion ou l'utilisation d'un tel bien.

2 Le créancier garanti peut également demander une décision d'un tribunal autorisant ou ordonnant l'une des mesures énoncées au paragraphe précédent.

3 Toute mesure prévue par l'alinéa a), b) ou c) du paragraphe 1 ou par l'article 13 doit être mise en œuvre d'une manière commercialement raisonnable. Une mesure est réputée mise en œuvre d'une manière commercialement raisonnable lorsqu'elle est mise en œuvre conformément à une disposition du contrat constitutif de sûreté, sauf lorsqu'une telle disposition est manifestement déraisonnable.

4 Tout créancier garanti qui se propose de vendre ou de donner à bail un bien en vertu du paragraphe 1 doit en informer par écrit avec un préavis raisonnable :

a) les personnes intéressées visées aux alinéas i) et ii) du paragraphe m) de l'article premier; et

b) les personnes intéressées visées à l'alinéa iii) du paragraphe m) de l'article premier ayant informé le créancier garanti de leurs droits avec un préavis raisonnable avant la vente ou le bail.

5 Toute somme perçue par le créancier garanti par suite de la mise en œuvre de l'une quelconque des mesures prévues au paragraphe 1 ou 2 est imputée sur le montant des obligations garanties.

6 Lorsque les sommes perçues par le créancier garanti par suite de la mise en œuvre de l'une quelconque des mesures prévues au paragraphe 1 ou 2 excèdent le montant garanti par la sûreté et les frais raisonnables engagés au titre de l'une quelconque de ces mesures, le créancier garanti doit distribuer l'excédent, par ordre de priorité, parmi les titulaires de interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.

garanties de rang inférieur qui ont été inscrites ou dont le créancier garanti a été informé et doit payer le solde éventuel au constituant.

ARTICLE 9

Vesting of Object in Satisfaction; Redemption

1 At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2 The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

3 The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.

4 At any time after default as provided in Article 11 and before sale of the charged object or the making of an order under paragraph 2, the chargor or any interested person may discharge the security interest by paying in full the amount secured, subject to any lease granted by the chargee under Article 8(1)(b) or ordered under Article 8(2). Where, after such default, the payment of the amount secured is made in full by an interested person other than the debtor, that person is subrogated to the rights of the chargee.

5 Ownership or any other interest of the chargor passing on a sale under Article 8(1)(b) or passing under paragraph 1 or 2 of this Article is free from any other interest over which the chargee's security interest has priority under the provisions of Article 29.

ARTICLE 9

Transfert de la propriété en règlement; libération

1 À tout moment après l'inexécution au sens de l'article 11, le créancier garanti et toutes les personnes intéressées peuvent convenir que la propriété de tout bien grevé (ou tout autre droit du constituant sur ce bien) sera transférée à ce créancier en règlement de tout ou partie des obligations garanties.

2 Le tribunal peut, à la demande du créancier garanti, ordonner que la propriété de tout bien grevé (ou tout autre droit du constituant sur ce bien) sera transférée au créancier garanti en règlement de tout ou partie des obligations garanties.

3 Le tribunal ne fait droit à la demande du créancier garanti visée au paragraphe précédent que si le montant des obligations garanties qui seront réglées par cette attribution correspond à la valeur du bien, compte tenu de tout paiement à effectuer par le créancier garanti à l'une quelconque des personnes intéressées.

4 À tout moment après l'inexécution au sens de l'article 11 et avant la vente du bien grevé ou avant le prononcé de la décision visée au paragraphe 2, le constituant ou toute personne intéressée peut obtenir la mainlevée de la sûreté en payant intégralement les sommes garanties, sous réserve d'un bail qui aurait été consenti par le créancier garanti en vertu de l'alinéa b) du paragraphe 1 de l'article 8 ou prononcé par un tribunal en vertu du paragraphe 2 de l'article 8. Lorsque, après une telle inexécution, le paiement de la somme garantie est effectué intégralement par une personne intéressée autre que le débiteur, celle-ci est subrogée dans les droits du créancier garanti.

5 La propriété ou tout autre droit du constituant transféré par l'effet d'une vente en vertu de l'alinéa b) du paragraphe 1 de l'article 8, ou conformément au paragraphe 1 ou 2 du présent article, est libéré de tout autre droit ou garantie primé par la sûreté du créancier garanti en vertu des dispositions de l'article 29.

ARTICLE 10

Remedies of Conditional Seller or Lessor

In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may:

- **(a)** subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or
- **(b)** apply for a court order authorising or directing either of these acts.

ARTICLE 10

Mesures à la disposition du vendeur conditionnel ou du bailleur

En cas d'inexécution dans un contrat réservant un droit de propriété ou dans un contrat de bail au sens de l'article 11, le vendeur conditionnel ou le bailleur, selon le cas, peut :

- **a)** sous réserve de toute déclaration qui pourrait être faite par un État contractant en vertu de l'article 54, mettre fin au contrat et prendre possession de tout bien faisant l'objet de ce contrat ou en prendre le contrôle; ou
- **b)** demander une décision d'un tribunal autorisant ou ordonnant l'une des mesures énoncées ci-dessus.

ARTICLE 11

Meaning of Default

1 The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.

2 Where the debtor and the creditor have not so agreed, "default" for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

ARTICLE 12

Additional Remedies

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

ARTICLE 13

Relief Pending Final Determination

1 Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:

(a) preservation of the object and its value;

(b) possession, control or custody of the object;

(c) immobilisation of the object; and

(d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

2 In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:

(a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or

(b) fails to establish its claim, wholly or in part, on the final determination of that claim.

3 Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.

4 Nothing in this Article affects the application of Article 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1.

ARTICLE 11

Portée de l'inexécution

1 Le créancier et le débiteur peuvent convenir à tout moment par écrit des circonstances qui constituent une inexécution, ou de toute autre circonstance de nature à permettre l'exercice des droits et la mise en œuvre des mesures énoncées aux articles 8 à 10 et 13.

2 En l'absence d'une telle convention, le terme ***inexécution*** désigne, aux fins des articles 8 à 10 et 13, une inexécution qui prive de façon substantielle le créancier de ce qu'il est en droit d'attendre du contrat.

ARTICLE 12

Mesures supplémentaires

Toutes les mesures supplémentaires admises par la loi applicable, y compris toutes les mesures dont sont convenues les parties, peuvent être mises en œuvre pour autant qu'elles ne sont pas incompatibles avec les dispositions impératives du présent Chapitre visées à l'article 15.

ARTICLE 13

Mesures provisoires

1 Sous réserve de toute déclaration qui pourrait être faite en vertu de l'article 55, tout État contractant veille à ce qu'un créancier qui apporte la preuve de l'inexécution des obligations par le débiteur puisse, avant le règlement au fond du litige et pour autant qu'il y ait consenti, ledit consentement pouvant être donné à tout moment, obtenir dans un bref délai du tribunal une ou plusieurs des mesures suivantes demandées par le créancier :

a) la conservation du bien et de sa valeur;

b) la mise en possession, le contrôle ou la garde du bien;

c) l'immobilisation du bien; et

d) le bail ou, à l'exception des cas visés aux alinéas a) à c), la gestion du bien et les revenus du bien.

2 En ordonnant toute mesure visée au paragraphe précédent, le tribunal peut la subordonner aux conditions qu'il estime nécessaires afin de protéger les personnes intéressées lorsque :

a) le créancier n'exécute pas, dans la mise en œuvre de cette mesure, l'une de ses obligations à l'égard du débiteur en vertu de la présente Convention ou du Protocole; ou

b) le créancier est débouté de ses prétentions, en tout ou partie, au moment du règlement au fond du litige.

3 Avant d'ordonner toute mesure en vertu du paragraphe 1, le tribunal peut exiger que toute personne intéressée soit informée de la demande.

4 Aucune disposition du présent article ne porte atteinte ni à l'application du paragraphe 3 de l'article 8, ni au pouvoir du tribunal de prononcer des mesures provisoires autres que celles visées au paragraphe 1 du présent article.

ARTICLE 14

Procedural Requirements

Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

ARTICLE 14

Conditions de procédure

Sous réserve du paragraphe 2 de l'article 54, la mise en œuvre des mesures prévues par le présent Chapitre est soumise aux règles de procédure prescrites par le droit du lieu de leur mise en œuvre.

ARTICLE 15

Derogation

In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.

ARTICLE 15

Dérogation

Dans leurs relations mutuelles, deux ou plusieurs des parties visées au présent Chapitre peuvent à tout moment, dans un accord écrit, déroger à l'une quelconque des dispositions précédentes du présent Chapitre, ou en modifier les effets, à l'exception des paragraphes 3 à 6 de l'article 8, des paragraphes 3 et 4 de l'article 9, du paragraphe 2 de l'article 13 et de l'article 14.

CHAPTER IV

The International Registration System

CHAPITRE IV

Le système international d'inscription

ARTICLE 16

The International Registry

1 An International Registry shall be established for registrations of:

- **(a)** international interests, prospective international interests and registrable non-consensual rights and interests;
- **(b)** assignments and prospective assignments of international interests;
- **(c)** acquisitions of international interests by legal or contractual subrogations under the applicable law;
- **(d)** notices of national interests; and
- **(e)** subordinations of interests referred to in any of the preceding sub-paragraphs.

2 Different international registries may be established for different categories of object and associated rights.

3 For the purposes of this Chapter and Chapter V, the term "registration" includes, where appropriate, an amendment, extension or discharge of a registration.

ARTICLE 16

Le Registre international

1 Un Registre international est établi pour l'inscription :

- **a)** des garanties internationales, des garanties internationales futures et des droits et des garanties non conventionnels susceptibles d'inscription;
- **b)** des cessions et des cessions futures de garanties internationales;
- **c)** des acquisitions de garanties internationales par l'effet d'une subrogation légale ou conventionnelle en vertu de la loi applicable;
- **d)** des avis de garanties nationales; et
- **e)** des subordinations de rang des garanties visées dans l'un des alinéas précédents.

2 Des registres internationaux distincts pourront être établis pour les différentes catégories de biens et les droits accessoires.

3 Aux fins du présent Chapitre et du Chapitre V, le terme « inscription » comprend, selon le cas, la modification, la prorogation ou la mainlevée d'une inscription.

ARTICLE 17

The Supervisory Authority and the Registrar

1 There shall be a Supervisory Authority as provided by the Protocol.

2 The Supervisory Authority shall:

(a) establish or provide for the establishment of the International Registry;

(b) except as otherwise provided by the Protocol, appoint and dismiss the Registrar;

(c) ensure that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;

(d) after consultation with the Contracting States, make or approve and ensure the publication of regulations pursuant to the Protocol dealing with the operation of the International Registry;

(e) establish administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;

(f) supervise the Registrar and the operation of the International Registry;

(g) at the request of the Registrar, provide such guidance to the Registrar as the Supervisory Authority thinks fit;

(h) set and periodically review the structure of fees to be charged for the services and facilities of the International Registry;

(i) do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of this Convention and the Protocol; and

(j) report periodically to Contracting States concerning the discharge of its obligations under this Convention and the Protocol.

3 The Supervisory Authority may enter into any agreement requisite for the performance of its functions, including any agreement referred to in Article 27(3).

4 The Supervisory Authority shall own all proprietary rights in the data bases and archives of the International Registry.

5 The Registrar shall ensure the efficient operation of the International Registry and perform the functions assigned to it by this Convention, the Protocol and the regulations.

ARTICLE 17

L'Autorité de surveillance et le Conservateur

1 Une Autorité de surveillance est désignée conformément au Protocole.

2 L'Autorité de surveillance doit :

a) établir ou faire établir le Registre international;

b) sous réserve des dispositions du Protocole, nommer le Conservateur et mettre fin à ses fonctions;

c) veiller à ce que, en cas de changement de Conservateur, les droits nécessaires à la poursuite du fonctionnement efficace du Registre international soient transférés ou susceptibles d'être cédés au nouveau Conservateur;

d) après avoir consulté les États contractants, établir ou approuver un règlement en application du Protocole portant sur le fonctionnement du Registre international et veiller à sa publication;

e) établir des procédures administratives par lesquelles les réclamations relatives au fonctionnement du Registre international peuvent être effectuées auprès de l'Autorité de surveillance;

f) surveiller les activités du Conservateur et le fonctionnement du Registre international;

g) à la demande du Conservateur, lui donner les directives qu'elle estime appropriées;

h) fixer et revoir périodiquement la structure tarifaire des services du Registre international;

i) faire le nécessaire pour assurer l'existence d'un système électronique déclaratif d'inscription efficace, pour la réalisation des objectifs de la présente Convention et du Protocole; et

j) faire rapport périodiquement aux États contractants sur l'exécution de ses obligations en vertu de la présente Convention et du Protocole.

3 L'Autorité de surveillance peut conclure tout accord nécessaire à l'exercice de ses fonctions, notamment l'accord visé au paragraphe 3 de l'article 27.

4 L'Autorité de surveillance détient tous les droits de propriété sur les bases de données et sur les archives du Registre international.

5 Le Conservateur assure le fonctionnement efficace du Registre international et s'acquitte des fonctions qui lui sont confiées en vertu de la présente Convention, du Protocole et du règlement.

CHAPTER V

Other Matters Relating to Registration

ARTICLE 18

Registration Requirements

1 The Protocol and regulations shall specify the requirements, including the criteria for the identification of the object:

(a) for effecting a registration (which shall include provision for prior electronic transmission of any consent from any person whose consent is required under Article 20);

(b) for making searches and issuing search certificates, and, subject thereto;

(c) for ensuring the confidentiality of information and documents of the International Registry other than information and documents relating to a registration.

2 The Registrar shall not be under a duty to enquire whether a consent to registration under Article 20 has in fact been given or is valid.

3 Where an interest registered as a prospective international interest becomes an international interest, no further registration shall be required provided that the registration information is sufficient for a registration of an international interest.

4 The Registrar shall arrange for registrations to be entered into the International Registry data base and made searchable in chronological order of receipt, and the file shall record the date and time of receipt.

5 The Protocol may provide that a Contracting State may designate an entity or entities in its territory as the entry point or entry points through which the information required for registration shall or may be transmitted to the International Registry. A Contracting State making such a designation may specify the requirements, if any, to be satisfied before such information is transmitted to the International Registry.

ARTICLE 19

Validity and Time of Registration

1 A registration shall be valid only if made in conformity with Article 20.

2 A registration, if valid, shall be complete upon entry of the required information into the International Registry data base so as to be searchable.

3 A registration shall be searchable for the purposes of the preceding paragraph at the time when:

CHAPITRE V

Autres questions relatives à l’inscription

ARTICLE 18

Conditions d’inscription

1 Le Protocole et le règlement précisent les conditions, y compris les critères d’identification du bien, pour :

a) effectuer une inscription (étant entendu que le consentement exigé à l’article 20 peut être donné préalablement par voie électronique);

b) effectuer des consultations et émettre des certificats de consultation et, sous réserve de ce qui précède;

c) garantir la confidentialité des informations et des documents du Registre international, autres que les informations et documents relatifs à une inscription.

2 Le Conservateur n’a pas l’obligation de vérifier si un consentement à l’inscription prévu à l’article 20 a effectivement été donné ou est valable.

3 Lorsqu’une garantie inscrite en tant que garantie internationale future devient une garantie internationale, aucune autre inscription n’est requise à condition que les informations relatives à l’inscription soient suffisantes pour l’inscription d’une garantie internationale.

4 Le Conservateur s’assure que les inscriptions sont introduites dans la base de données du Registre international et peuvent être consultées selon l’ordre chronologique de réception, et que le fichier enregistre la date et l’heure de réception.

5 Le Protocole peut disposer qu’un État contractant peut désigner sur son territoire un ou plusieurs organismes qui seront le ou les points d’entrée chargés, exclusivement ou non, de la transmission au Registre international des informations requises pour l’inscription. Un État contractant qui procède à une telle désignation peut préciser les conditions à satisfaire, le cas échéant, avant que ces informations ne soient transmises au Registre international.

ARTICLE 19

Validité et moment de l’inscription

1 Une inscription est valable seulement si elle est effectuée conformément aux dispositions de l’article 20.

2 Une inscription, si elle est valable, est complète lorsque les informations requises ont été introduites dans la base de données du Registre international de façon à ce qu’elle puisse être consultée.

3 Une inscription peut être consultée aux fins du paragraphe précédent dès que :

(a) the International Registry has assigned to it a sequentially ordered file number; and

(b) the registration information, including the file number, is stored in durable form and may be accessed at the International Registry.

4 If an interest first registered as a prospective international interest becomes an international interest, that international interest shall be treated as registered from the time of registration of the prospective international interest provided that the registration was still current immediately before the international interest was constituted as provided by Article 7.

5 The preceding paragraph applies with necessary modifications to the registration of a prospective assignment of an international interest.

6 A registration shall be searchable in the International Registry data base according to the criteria prescribed by the Protocol.

ARTICLE 20

Consent to Registration

1 An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.

2 The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.

3 A registration may be discharged by or with the consent in writing of the party in whose favour it was made.

4 The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee.

5 A registrable non-consensual right or interest may be registered by the holder thereof.

6 A notice of a national interest may be registered by the holder thereof.

ARTICLE 21

Duration of Registration

Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

a) le Registre international lui a assigné un numéro de fichier suivant un ordre séquentiel; et que

b) les informations relatives à l’inscription, y compris le numéro de fichier, sont conservées sous une forme durable et peuvent être obtenues auprès du Registre international.

4 Lorsqu’une garantie initialement inscrite en tant que garantie internationale future devient une garantie internationale, celle-ci est réputée avoir été inscrite lors de l’inscription de la garantie internationale future, à condition que cette inscription ait été encore présente immédiatement avant que la garantie internationale ait été constituée en vertu de l’article 7.

5 Le paragraphe précédent s’applique, avec les adaptations nécessaires, à l’inscription d’une cession future d’une garantie internationale.

6 Une inscription peut être consultée dans la base de données du Registre international conformément aux critères établis par le Protocole.

ARTICLE 20

Consentement à l’inscription

1 Une garantie internationale, une garantie internationale future, une cession ou une cession future d’une garantie internationale peut être inscrite, et cette inscription peut être modifiée ou prorogée avant son expiration, par l’une quelconque des deux parties avec le consentement écrit de l’autre.

2 La subordination d’une garantie internationale à une autre garantie internationale peut être inscrite par la personne dont la garantie a été subordonnée ou avec son consentement écrit donné à tout moment.

3 Une inscription peut faire l’objet d’une mainlevée par son bénéficiaire ou avec son consentement écrit.

4 L’acquisition d’une garantie internationale par l’effet d’une subrogation légale ou conventionnelle peut être inscrite par le subrogé.

5 Un droit ou une garantie non conventionnel susceptible d’inscription peut être inscrit par son titulaire.

6 Un avis de garantie nationale peut être inscrit par le titulaire de la garantie.

ARTICLE 21

Durée de l’inscription

L’inscription d’une garantie internationale demeure efficace jusqu’à ce qu’elle fasse l’objet d’une mainlevée ou jusqu’à l’expiration de la durée précisée dans l’inscription.

ARTICLE 22

Searches

1 Any person may, in the manner prescribed by the Protocol and regulations, make or request a search of the International Registry by electronic means concerning interests or prospective international interests registered therein.

2 Upon receipt of a request therefor, the Registrar, in the manner prescribed by the Protocol and regulations, shall issue a registry search certificate by electronic means with respect to any object:

(a) stating all registered information relating thereto, together with a statement indicating the date and time of registration of such information; or

(b) stating that there is no information in the International Registry relating thereto.

3 A search certificate issued under the preceding paragraph shall indicate that the creditor named in the registration information has acquired or intends to acquire an international interest in the object but shall not indicate whether what is registered is an international interest or a prospective international interest, even if this is ascertainable from the relevant registration information.

ARTICLE 22

Consultations

1 Toute personne peut, selon les modalités prévues par le Protocole et le règlement, par des moyens électroniques, consulter le Registre international ou demander une consultation au sujet de toute garantie ou garantie internationale future qui y serait inscrite.

2 Lorsqu'il reçoit une demande de consultation relative à un bien, le Conservateur, selon les modalités prévues par le Protocole et le règlement, émet par des moyens électroniques un certificat de consultation du Registre :

a) reproduisant toutes les informations inscrites relatives à ce bien, ainsi qu'un relevé de la date et de l'heure d'inscription de ces informations; ou

b) attestant qu'il n'existe dans le Registre international aucune information relative à ce bien.

3 Un certificat de consultation émis en vertu du paragraphe précédent indique que le créancier dont le nom figure dans les informations relatives à l'inscription a acquis ou entend acquérir une garantie internationale portant sur le bien, mais n'indique pas si l'inscription concerne une garantie internationale ou une garantie internationale future, même si cela peut être établi sur la base des informations pertinentes relatives à l'inscription.

ARTICLE 23

List of Declarations and Declared Non-consensual Rights or Interests

The Registrar shall maintain a list of declarations, withdrawals of declaration and of the categories of non-consensual right or interest communicated to the Registrar by the Depositary as having been declared by Contracting States in conformity with Articles 39 and 40 and the date of each such declaration or withdrawal of declaration. Such list shall be recorded and searchable in the name of the declaring State and shall be made available as provided in the Protocol and regulations to any person requesting it.

ARTICLE 23

Liste des déclarations et droits ou garanties non conventionnels

Le Conservateur dresse une liste des déclarations, des retraits de déclarations et des catégories de droits ou garanties non conventionnels qui lui sont communiqués par le Dépositaire comme ayant été déclarés par les États contractants en vertu des articles 39 et 40 avec la date de chaque déclaration ou du retrait de la déclaration. Cette liste doit être enregistrée et être consultable d'après le nom de l'État qui a fait la déclaration et doit être mise à la disposition de toute personne qui en fait la demande, selon les modalités prévues par le Protocole et le règlement.

ARTICLE 24

Evidentiary Value of Certificates

A document in the form prescribed by the regulations which purports to be a certificate issued by the International Registry is prima facie proof:

(a) that it has been so issued; and

(b) of the facts recited in it, including the date and time of a registration.

ARTICLE 24

Valeur probatoire des certificats

Un document qui satisfait aux conditions de forme prévues par le règlement et qui se présente comme un certificat émis par le Registre international, constitue une présomption simple :

a) du fait qu'il a été émis par le Registre international; et

b) des mentions portées sur ce document, y compris la date et l'heure de l'inscription.

ARTICLE 25

Discharge of Registration

1 Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, or where the conditions of transfer of title under a registered title reservation agreement have been fulfilled, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

2 Where a prospective international interest or a prospective assignment of an international interest has been registered, the intending creditor or intending assignee shall, without undue delay, procure the discharge of the registration after written demand by the intending debtor or assignor which is delivered to or received at its address stated in the registration before the intending creditor or assignee has given value or incurred a commitment to give value.

3 Where the obligations secured by a national interest specified in a registered notice of a national interest have been discharged, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at its address stated in the registration.

4 Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor delivered to or received at its address stated in the registration.

ARTICLE 25

Mainlevée de l'inscription

1 Lorsque les obligations garanties par une sûreté inscrite ou les obligations sur lesquelles porte un droit ou une garantie non conventionnel inscrit sont éteintes, ou lorsque les conditions du transfert de la propriété en vertu d'un contrat réservant un droit de propriété inscrit sont satisfaites, le titulaire d'une telle garantie donne sans retard mainlevée de l'inscription, sur demande écrite du débiteur remise ou reçue à l'adresse indiquée dans l'inscription.

2 Lorsqu'une garantie internationale future ou une cession future d'une garantie internationale a été inscrite, le futur créancier ou cessionnaire donne sans retard mainlevée de l'inscription, sur demande écrite du futur débiteur ou cédant, remise ou reçue à l'adresse indiquée dans l'inscription avant que le futur créancier ou cessionnaire avance des fonds ou s'engage à le faire.

3 Lorsque les obligations garanties par une garantie nationale précisées dans un avis de garantie nationale inscrit sont éteintes, le titulaire de cette garantie donne sans retard mainlevée de l'inscription, sur demande écrite du débiteur remise ou reçue à l'adresse indiquée dans l'inscription.

4 Lorsqu'une inscription n'aurait pas dû être faite ou est incorrecte, la personne en faveur de qui l'inscription a été faite en donne sans retard mainlevée ou la modifie, sur demande écrite du débiteur remise ou reçue à l'adresse indiquée dans l'inscription.

ARTICLE 26

Access to the International Registration Facilities

No person shall be denied access to the registration and search facilities of the International Registry on any ground other than its failure to comply with the procedures prescribed by this Chapter.

ARTICLE 26

Accès au service international d'inscription

L'accès aux services d'inscription ou de consultation du Registre international ne peut être refusé à une personne que si elle ne se conforme pas aux procédures prévues par le présent Chapitre.

CHAPTER VI

Privileges and Immunities of the Supervisory Authority and the Registrar

CHAPITRE VI

Privilèges et immunités de l'autorité de surveillance et du conservateur

ARTICLE 27

Legal Personality; Immunity

1 The Supervisory Authority shall have international legal personality where not already possessing such personality.

ARTICLE 27

Personnalité juridique; immunité

1 L'Autorité de surveillance aura la personnalité juridique internationale si elle n'en est pas déjà dotée.

2 The Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative process as is specified in the Protocol.

3. (a) The Supervisory Authority shall enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State.

(b) For the purposes of this paragraph, "host State" means the State in which the Supervisory Authority is situated.

4 The assets, documents, data bases and archives of the International Registry shall be inviolable and immune from seizure or other legal or administrative process.

5 For the purposes of any claim against the Registrar under Article 28(1) or Article 44, the claimant shall be entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim.

6 The Supervisory Authority may waive the inviolability and immunity conferred by paragraph 4.

2 L'Autorité de surveillance ainsi que ses responsables et employés jouissent de l'immunité contre toute action judiciaire ou administrative conformément aux dispositions du Protocole.

3. a) L'Autorité de surveillance jouit d'exemptions fiscales et des autres privilèges prévus dans l'accord conclu avec l'État hôte.

b) Aux fins du présent paragraphe, ***État hôte*** désigne l'État dans lequel l'Autorité de surveillance est située.

4 Les biens, documents, bases de données et archives du Registre international sont inviolables et ne peuvent faire l'objet d'une saisie ou d'une autre action judiciaire ou administrative.

5 Aux fins de toute action intentée à l'encontre du Conservateur en vertu du paragraphe 1 de l'article 28 ou de l'article 44, le demandeur a le droit d'accéder aux informations et aux documents nécessaires pour lui permettre d'exercer son action.

6 L'Autorité de surveillance peut lever l'inviolabilité et l'immunité conférées au paragraphe 4.

CHAPTER VII

Liability of the Registrar

ARTICLE 28

Liability and Financial Assurances

1 The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system except where the malfunction is caused by an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those related to back-up and systems security and networking.

2 The Registrar shall not be liable under the preceding paragraph for factual inaccuracy of registration information received by the Registrar or transmitted by the Registrar in the form in which it received that information nor for acts or circumstances for which the Registrar and its officers and employees are not responsible and arising prior to receipt of registration information at the International Registry.

3 Compensation under paragraph 1 may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.

4 The Registrar shall procure insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority, in accordance with the Protocol.

CHAPITRE VII

Responsabilité du conservateur

ARTICLE 28

Responsabilité et assurances financières

1 Le Conservateur est tenu au paiement de dommages-intérêts compensatoires pour les pertes subies par une personne lorsque le préjudice découle directement d'une erreur ou omission du Conservateur ainsi que de ses responsables et employés ou d'un dysfonctionnement du système international d'inscription, sauf lorsque le dysfonctionnement a pour cause un événement de nature inévitable et irrésistible que l'on n'aurait pas pu prévenir en utilisant les meilleures pratiques généralement mises en œuvre dans le domaine de la conception et du fonctionnement des registres électroniques, y compris celles qui concernent les sauvegardes ainsi que les systèmes de sécurité et de réseautage.

2 Le Conservateur n'est pas responsable en vertu du paragraphe précédent des inexactitudes de fait dans les informations relatives à l'inscription qu'il a reçues ou qu'il a transmises dans la forme dans laquelle il les a reçues; de même, le Conservateur n'est pas responsable des actes et circonstances dont ni lui ni ses responsables et employés ne sont chargés et qui précèdent la réception des informations relatives à l'inscription au Registre international.

3 L'indemnisation visée au paragraphe 1 peut être réduite dans la mesure où la personne qui a subi le dommage l'a causé ou y a contribué.

4 Le Conservateur contracte une assurance ou se procure une garantie financière couvrant la responsabilité visée dans le présent article dans la mesure fixée par l'Autorité de surveillance, conformément aux dispositions du Protocole.

CHAPTER VIII

Effects of an International Interest as Against Third Parties

ARTICLE 29

Priority of Competing Interests

1 A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

2 The priority of the first-mentioned interest under the preceding paragraph applies:

(a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and

(b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

3 The buyer of an object acquires its interest in it:

(a) subject to an interest registered at the time of its acquisition of that interest; and

(b) free from an unregistered interest even if it has actual knowledge of such an interest.

4 The conditional buyer or lessee acquires its interest in or right over that object:

(a) subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor; and

(b) free from an interest not so registered at that time even if it has actual knowledge of that interest.

5 The priority of competing interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

6 Any priority given by this Article to an interest in an object extends to proceeds.

7 This Convention:

(a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation; and

(b) does not prevent the creation of rights in an item, other than an object, which has previously been installed on an object where under the applicable law those rights are created.

CHAPITRE VIII

Effets d'une garantie internationale à l'égard des tiers

ARTICLE 29

Rang des garanties concurrentes

1 Une garantie inscrite prime toute autre garantie inscrite postérieurement et toute garantie non inscrite.

2 La priorité de la garantie première inscrite en vertu du paragraphe précédent s'applique :

a) même si, lors de la constitution ou de l'inscription de la garantie première inscrite, la seconde garantie était connue; et

b) même pour toute avance de fonds que le titulaire de la garantie première inscrite accorderait tout en ayant connaissance de la seconde garantie.

3 L'acheteur acquiert des droits sur le bien :

a) sous réserve de toute garantie inscrite au moment de l'acquisition de ces droits; et

b) libres de toute garantie non inscrite, même s'il avait connaissance d'une telle garantie.

4 L'acheteur conditionnel ou le preneur acquiert des droits sur le bien :

a) sous réserve de toute garantie inscrite avant l'inscription de la garantie internationale détenue par le vendeur conditionnel ou le bailleur; et

b) libres de toute garantie non ainsi inscrite à ce moment, même s'il avait connaissance d'une telle garantie.

5 Les titulaires de garanties ou de droits concurrents peuvent convenir d'en modifier les rangs respectifs tels qu'ils résultent du présent article. Toutefois, le cessionnaire d'une garantie subordonnée n'est pas lié par un accord de subordination, à moins que, lors de la cession, la subordination résultant dudit accord ait été inscrite.

6 Le rang d'une garantie tel qu'il résulte du présent article vaut également pour les produits d'indemnisation.

7 La présente Convention :

a) ne porte pas atteinte aux droits qu'une personne détenait sur un objet, autre qu'un bien, avant son installation sur un bien si, en vertu de la loi applicable, ces droits continuent d'exister après l'installation; et

b) n'empêche pas la création de droits sur un objet, autre qu'un bien, qui a été préalablement installé sur un bien lorsque, en vertu de la loi applicable, ces droits sont créés.

ARTICLE 30

Effects of Insolvency

1 In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

2 Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.

3 Nothing in this Article affects:

(a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or

(b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

ARTICLE 30

Effets de l'insolvabilité

1 Une garantie internationale est opposable dans les procédures d'insolvabilité dont le débiteur fait l'objet lorsque, antérieurement à l'ouverture des procédures d'insolvabilité, cette garantie a été inscrite conformément à la présente Convention.

2 Aucune disposition du présent article ne porte atteinte à l'opposabilité d'une garantie internationale dans des procédures d'insolvabilité lorsque cette garantie est opposable en vertu de la loi applicable.

3 Aucune disposition du présent article ne porte atteinte :

a) à toute règle du droit applicable dans les procédures d'insolvabilité relative à l'annulation d'une opération, soit parce qu'elle accorde une préférence, soit parce qu'elle constitue un transfert en fraude des droits des créanciers; ou

b) à toute règle de procédure relative à l'exercice des droits de propriété soumis au contrôle ou à la surveillance de l'administrateur d'insolvabilité.

CHAPTER IX

Assignments of Associated Rights and International Interests; Rights of Subrogation

ARTICLE 31

Effects of Assignment

1 Except as otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 also transfers to the assignee:

(a) the related international interest; and

(b) all the interests and priorities of the assignor under this Convention.

2 Nothing in this Convention prevents a partial assignment of the assignor's associated rights. In the case of such a partial assignment the assignor and assignee may agree as to their respective rights concerning the related international interest assigned under the preceding paragraph but not so as adversely to affect the debtor without its consent.

3 Subject to paragraph 4, the applicable law shall determine the defences and rights of set-off available to the debtor against the assignee.

4 The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.

CHAPITRE IX

Cession de droits accessoires et de garanties internationales; droits de subrogation

ARTICLE 31

Effets de la cession

1 Sauf accord contraire des parties, la cession des droits accessoires, effectuée conformément aux dispositions de l'article 32, transfère également au cessionnaire :

a) la garantie internationale correspondante; et

b) tous les droits du cédant ainsi que son rang en vertu de la présente Convention.

2 Aucune disposition de la présente Convention ne fait obstacle à une cession partielle des droits accessoires du cédant. En cas d'une telle cession partielle, le cédant et le cessionnaire peuvent s'entendre sur leurs droits respectifs concernant la garantie internationale correspondante cédée en vertu du paragraphe précédent, sans toutefois compromettre la position du débiteur sans son consentement.

3 Sous réserve du paragraphe 4, la loi applicable détermine les exceptions et les droits à compensation dont dispose le débiteur contre le cessionnaire.

4 Le débiteur peut à tout moment renoncer par écrit à tout ou partie des exceptions ou des droits à compensation visés au paragraphe précédent, sauf aux exceptions qui ont trait aux manœuvres frauduleuses du cessionnaire.

CHAPTER X

Rights or Interests Subject to Declarations by Contracting States

ARTICLE 39

Rights Having Priority Without Registration

1 A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically:

- **(a)** those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and
- **(b)** that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

2 A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3 A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

4 Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession.

ARTICLE 40

Registrable Non-consensual Rights or Interests

A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable

CHAPITRE X

Droits ou garanties pouvant faire l'objet de déclarations par les États contractants

ARTICLE 39

Droits ayant priorité sans inscription

1 Dans une déclaration déposée auprès du Dépositaire du Protocole, un État contractant peut à tout moment indiquer, de façon générale ou spécifique :

- **a)** les catégories de droits ou garanties non conventionnels (autres qu'un droit ou une garantie qui relève de l'article 40) qui, en vertu du droit de cet État, primeraient une garantie portant sur le bien équivalente à celle du titulaire d'une garantie internationale et qui primeront une garantie internationale inscrite, que ce soit ou non en cas de procédure d'insolvabilité;
- **b)** qu'aucune disposition de la présente Convention ne porte atteinte au droit d'un État, d'une entité étatique, d'une organisation intergouvernementale ou d'un autre fournisseur privé de services publics, de saisir ou de retenir un bien en vertu des lois de cet État pour le paiement des redevances dues à cette entité, cette organisation ou ce fournisseur qui sont directement liées aux services fournis concernant ce bien ou un autre bien.

2 Une déclaration faite en vertu du paragraphe précédent peut indiquer des catégories créées après le dépôt de la déclaration.

3 Un droit ou une garantie non conventionnel prime une garantie internationale si et seulement si le droit ou la garantie non conventionnel relève d'une catégorie couverte par une déclaration déposée avant l'inscription de la garantie internationale.

4 Nonobstant le paragraphe précédent, un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du Protocole, ou de l'adhésion, qu'un droit ou une garantie d'une catégorie couverte par une déclaration faite en vertu de l'alinéa a) du paragraphe 1 prime une garantie internationale inscrite avant la date de cette ratification, acceptation, approbation ou adhésion.

ARTICLE 40

Droits ou garanties non conventionnels susceptibles d'inscription

Dans une déclaration déposée auprès du Dépositaire du Protocole, un État contractant peut à tout moment et pour toute catégorie de biens dresser une liste de catégories des droits ou

ARTICLE 53

Determination of Courts

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant "court" or "courts" for the purposes of Article 1 and Chapter XII of this Convention.

ARTICLE 53

Détermination des tribunaux

Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du Protocole ou de l'adhésion, quel sera le « tribunal » ou les « tribunaux » pertinents aux fins de l'application de l'article premier et du Chapitre XII de la présente Convention.

ARTICLE 54

Declarations Regarding Remedies

1 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.

2 A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

ARTICLE 54

Déclarations concernant les mesures

1 Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du Protocole ou de l'adhésion, que, lorsque le bien grevé est situé sur son territoire ou est contrôlé à partir de celui-ci, le créancier garanti ne doit pas le donner à bail sur ce territoire.

2 Un État contractant doit déclarer, au moment de la ratification, de l'acceptation, de l'approbation du Protocole ou de l'adhésion, si une mesure ouverte au créancier en vertu d'une disposition de la présente Convention et dont la mise en œuvre n'est pas subordonnée en vertu de ces dispositions à une demande à un tribunal, ne peut être exercée qu'avec une intervention du tribunal.

ARTICLE 55

Declarations Regarding Relief Pending Final Determination

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.

ARTICLE 55

Déclarations concernant les mesures provisoires avant le règlement au fond du litige

Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du Protocole ou de l'adhésion, qu'il n'appliquera pas tout ou partie des dispositions de l'article 13 ou de l'article 43, ou encore des deux. La déclaration doit indiquer dans quelles conditions l'article pertinent sera appliqué, au cas où il ne serait appliqué que partiellement, ou quelles autres mesures provisoires seront appliquées.

ARTICLE 56

Reservations and Declarations

1 No reservations may be made to this Convention but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.

2 Any declaration or subsequent declaration or any withdrawal of a declaration made under this Convention shall be notified in writing to the Depositary.

ARTICLE 56

Réserves et déclarations

1 Aucune réserve ne peut être faite à la présente Convention, mais des déclarations autorisées par les articles 39, 40, 50, 52, 53, 54, 55, 57, 58 et 60 peuvent être faites conformément à ces dispositions.

2 Toute déclaration ou déclaration subséquente ou tout retrait d'une déclaration faite en vertu de la présente Convention est notifiée par écrit au Dépositaire.

ARTICLE 57

Subsequent Declarations

1 A State Party may make a subsequent declaration, other than a declaration authorised under Article 60, at any time after the date on which this Convention has entered into force for it, by notifying the Depositary to that effect.

2 Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3 Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

ARTICLE 57

Déclarations subséquentes

1 Un État partie peut faire une déclaration subséquente, à l'exception d'une déclaration autorisée par l'article 60, à tout moment à compter de la date d'entrée en vigueur de la présente Convention à l'égard de cet État, par une notification à cet effet au Dépositaire.

2 Une telle déclaration subséquente prend effet le premier jour du mois suivant l'expiration d'une période de six mois à compter de la date de réception de la notification par le Dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la déclaration est précisée dans la notification, la déclaration prend effet à l'expiration de la période ainsi précisée après réception de la notification par le Dépositaire.

3 Nonobstant les paragraphes précédents, la présente Convention continue de s'appliquer comme si une telle déclaration subséquente n'avait pas été faite, à l'égard de tous les droits et garanties nés avant la date de prise d'effet d'une telle déclaration subséquente.

ARTICLE 58

Withdrawal of Declarations

1 Any State Party having made a declaration under this Convention, other than a declaration authorised under Article 60, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

2 Notwithstanding the previous paragraph, this Convention shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

ARTICLE 58

Retrait des déclarations

1 Tout État partie qui a fait une déclaration en vertu de la présente Convention, à l'exception d'une déclaration autorisée par l'article 60, peut à tout moment la retirer par une notification à cet effet au Dépositaire. Un tel retrait prend effet le premier jour du mois suivant l'expiration d'une période de six mois à compter de la date de réception de la notification par le Dépositaire.

2 Nonobstant le paragraphe précédent, la présente Convention continue de s'appliquer comme si un tel retrait de déclaration n'avait pas été fait, à l'égard de tous les droits et garanties nés avant la date de prise d'effet d'un tel retrait.

ARTICLE 59

Denunciations

1 Any State Party may denounce this Convention by notification in writing to the Depositary.

2 Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which notification is received by the Depositary.

3 Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

ARTICLE 59

Dénonciations

1 Tout État partie peut dénoncer la présente Convention par une notification adressée par écrit au Dépositaire.

2 Une telle dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de douze mois à compter de la date de réception de la notification par le Dépositaire.

3 Nonobstant les paragraphes précédents, la présente Convention continue de s'appliquer comme si une telle dénonciation n'avait pas été faite, à l'égard de tous les droits et garanties nés avant la date de prise d'effet d'une telle dénonciation.

ARTICLE 60

Transitional Provisions

1 Unless otherwise declared by a Contracting State at any time, the Convention does not apply to a pre-existing right or interest, which retains the priority it enjoyed under the applicable law before the effective date of this Convention.

2 For the purposes of Article 1(v) and of determining priority under this Convention:

(a) ***effective date of this Convention*** means in relation to a debtor the time when this Convention enters into force or the time when the State in which the debtor is situated becomes a Contracting State, whichever is the later; and

(b) the debtor is situated in a State where it has its centre of administration or, if it has no centre of administration, its place of business or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

3 A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when this Convention and the Protocol will become applicable, for the purpose of determining priority, including the protection of any existing priority, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in a State referred to in sub-paragraph (b) of the preceding paragraph but only to the extent and in the manner specified in its declaration.

ARTICLE 61

Review Conferences, Amendments and Related Matters

1 The Depositary shall prepare reports yearly or at such other time as the circumstances may require for the States Parties as to the manner in which the international regimen established in this Convention has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.

2 At the request of not less than twenty-five per cent of the States Parties, Review Conferences of States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:

(a) the practical operation of this Convention and its effectiveness in facilitating the asset-based financing and leasing of the objects covered by its terms;

(b) the judicial interpretation given to, and the application made of the terms of this Convention and the regulations;

(c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and

ARTICLE 60

Dispositions transitoires

1 Sauf déclaration contraire d'un État contractant à tout moment, la présente Convention ne s'applique pas à un droit ou garantie préexistant, qui conserve la priorité qu'il avait en vertu de la loi applicable avant la date de prise d'effet de la présente Convention.

2 Aux fins du paragraphe v) de l'article premier et de la détermination des priorités en vertu de la présente Convention :

a) ***date de prise d'effet de la présente Convention*** désigne, à l'égard d'un débiteur, soit le moment où la présente Convention entre en vigueur, soit le moment où l'État dans lequel le débiteur est situé devient un État contractant, la date postérieure étant celle considérée; et

b) le débiteur est situé dans un État dans lequel se trouve le lieu de son administration centrale ou, s'il n'a pas d'administration centrale, son établissement ou, s'il a plus d'un établissement, son établissement principal ou, s'il n'a pas d'établissement, sa résidence habituelle.

3 Dans sa déclaration faite en vertu du paragraphe 1, un État contractant peut préciser une date fixée au plus tôt trois ans à compter de la date de prise d'effet de la déclaration, à partir de laquelle la présente Convention et le Protocole deviendront applicables, en ce qui concerne la détermination des priorités y compris la protection de toute priorité existante, aux droits et garanties préexistants nés en vertu d'un contrat conclu lorsque le débiteur était situé dans un État visé à l'alinéa b) du paragraphe précédent, mais seulement dans la mesure et la manière précisée dans sa déclaration.

ARTICLE 61

Conférences d'évaluation, amendements et questions connexes

1 Le Dépositaire prépare chaque année ou à tout autre intervalle pertinent, des rapports à l'intention des États parties concernant la manière dont fonctionne dans la pratique le régime international établi dans la présente Convention. En préparant de tels rapports, le Dépositaire tient compte des rapports de l'Autorité de surveillance concernant le fonctionnement du système international d'inscription.

2 À la demande d'au moins vingt-cinq pour cent des États parties, des Conférences d'évaluation des États parties sont organisées de temps à autre par le Dépositaire en consultation avec l'Autorité de surveillance pour examiner :

a) l'application pratique de la présente Convention et la mesure dans laquelle elle facilite effectivement le financement garanti par un actif et le crédit-bail des biens relevant de son champ d'application;

b) l'interprétation judiciaire et l'application des dispositions de la présente Convention, ainsi que du règlement;

(d) whether any modifications to this Convention or the arrangements relating to the International Registry are desirable.

3 Subject to paragraph 4, any amendment to this Convention shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of Article 49 relating to its entry into force.

4 Where the proposed amendment to this Convention is intended to apply to more than one category of equipment, such amendment shall also be approved by at least a two-thirds majority of States Parties to each Protocol that are participating in the Conference referred to in paragraph 2.

ARTICLE 62

Depositary and its Functions

1 Instruments of ratification, acceptance, approval or accession shall be deposited with the International Institute for the Unification of Private Law (UNIDROIT), which is hereby designated the Depositary.

2 The Depositary shall:

(a) inform all Contracting States of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) the date of entry into force of this Convention;

(iii) each declaration made in accordance with this Convention, together with the date thereof;

(iv) the withdrawal or amendment of any declaration, together with the date thereof; and

(v) the notification of any denunciation of this Convention together with the date thereof and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all Contracting States;

(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and

(d) perform such other functions customary for depositaries.

c) le fonctionnement du système international d'inscription, les activités du Conservateur et la supervision de celui-ci par l'Autorité de surveillance, sur la base des rapports soumis par l'Autorité de surveillance; et

d) l'opportunité d'apporter des modifications à la Convention ou aux dispositions concernant le Registre international.

3 Sous réserve du paragraphe 4, tout amendement à la présente Convention doit être approuvé à la majorité des deux tiers au moins des États parties participant à la Conférence visée au paragraphe précédent, et entre ensuite en vigueur à l'égard des États qui ont ratifié ledit amendement, accepté ou approuvé, après sa ratification, son acceptation ou son approbation par trois États conformément aux dispositions de l'article 49 relatives à son entrée en vigueur.

4 Lorsque l'amendement proposé à la présente Convention est destiné à s'appliquer à plus d'une catégorie de matériels d'équipement, un tel amendement doit aussi être approuvé par la majorité des deux tiers au moins des États parties à chaque Protocole qui participent à la Conférence visée au paragraphe 2.

ARTICLE 62

Le Dépositaire et ses fonctions

1 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion seront déposés auprès de l'Institut international pour l'unification du droit privé (UNIDROIT) ci-après dénommé le Dépositaire.

2 Le Dépositaire :

a) informe tous les États contractants :

i) de toute signature nouvelle ou de tout dépôt d'instrument de ratification, d'acceptation, d'approbation ou d'adhésion, et de la date de cette signature ou de ce dépôt;

ii) de la date d'entrée en vigueur de la présente Convention;

iii) de toute déclaration effectuée en vertu de la présente Convention, ainsi que de la date de cette déclaration;

iv) du retrait ou de l'amendement de toute déclaration, ainsi que de la date de ce retrait ou de cet amendement; et

v) de la notification de toute dénonciation de la présente Convention ainsi que de la date de cette dénonciation et de la date à laquelle elle prend effet;

b) transmet des copies certifiées de la présente Convention à tous les États contractants;

c) fournit à l'Autorité de surveillance et au Conservateur copie de tout instrument de ratification, d'acceptation, d'approbation ou d'adhésion, les informe de la date de leur dépôt, de toute déclaration ou retrait ou amendement d'une déclaration et de toute notification de dénonciation, IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

DONE at Cape Town, this sixteenth day of November, two thousand and one, in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Joint Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another.

et les informe de la date cette notification, afin que les informations qui y sont contenues puissent être aisément et totalement disponibles; et

d) s'acquitte des autres fonctions usuelles des dépositaires.

EN FOI DE QUOI, les plénipotentiaires soussignés, dûment autorisés, ont signé la présente Convention.

FAIT au Cap, le seize novembre de l'an deux mille un, en un seul exemplaire dont les textes français, anglais, arabe, chinois, espagnol et russe, feront également foi, à l'issue de la vérification effectuée par le Secrétariat conjoint de la Conférence, sous l'autorité du Président de la Conférence, dans la période de quatre-vingt-dix jours à compter de la date du présent Acte, pour ce qui est de la concordance des textes entre eux.

SCHEDULE 2

(Subsection 2(1))

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING it necessary to implement the *Convention on International Interests in Mobile Equipment* (hereinafter referred to as "the Convention") as it relates to aircraft equipment, in the light of the purposes set out in the preamble to the Convention,

MINDFUL of the need to adapt the Convention to meet the particular requirements of aircraft finance and to extend the sphere of application of the Convention to include contracts of sale of aircraft equipment,

MINDFUL of the principles and objectives of the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944,

HAVE AGREED upon the following provisions relating to aircraft equipment:

CHAPTER I

Sphere of Application and General Provisions

ARTICLE I

Defined Terms

1 In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2 In this Protocol the following terms are employed with the meanings set out below:

(a) ***aircraft*** means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters;

(b) ***aircraft engines*** means aircraft engines (other than those used in military, customs or police services) powered by jet propulsion or turbine or piston technology and:

ANNEXE 2

(paragraphe 2(1))

Protocole portant sur les questions spécifiques aux matériels d'équipement aéronautiques à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles

LES ÉTATS PARTIES AU PRÉSENT PROTOCOLE,

CONSIDÉRANT qu'il est nécessaire de mettre en œuvre la *Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles* (ci-après dénommée « la Convention ») pour autant qu'elle s'applique aux matériels d'équipement aéronautiques, à la lumière des buts énoncés dans le préambule de la Convention,

CONSCIENTS de la nécessité d'adapter la Convention pour répondre aux exigences particulières du financement aéronautique et d'étendre le champ d'application de la Convention aux contrats de vente portant sur des matériels d'équipement aéronautiques,

AYANT À L'ESPRIT les principes et les objectifs de la *Convention relative à l'aviation civile internationale*, signée à Chicago le 7 décembre 1944,

SONT CONVENUS des dispositions suivantes relatives aux matériels d'équipement aéronautiques :

CHAPITRE I

Champ d'application et dispositions générales

ARTICLE I

Définitions

1 Dans le présent Protocole, à moins que le contexte ne s'y oppose, les termes qui y figurent sont utilisés au sens donné dans la Convention.

2 Dans le présent Protocole, les termes suivants sont employés dans le sens indiqué ci-dessous :

a) ***aéronef*** désigne un aéronef tel que défini aux fins de la Convention de Chicago, qui est soit une cellule d'aéronef avec les moteurs d'avion qui y sont posés, soit un hélicoptère;

b) ***moteurs d'avion*** désigne des moteurs d'avion (à l'exception de ceux utilisés par les services militaires, de la

(i) in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent; and

(ii) in the case of turbine-powered or piston-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent,

together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto;

(c) ***aircraft objects*** means airframes, aircraft engines and helicopters;

(d) ***aircraft register*** means a register maintained by a State or a common mark registering authority for the purposes of the Chicago Convention;

(e) ***airframes*** means airframes (other than those used in military, customs or police services) that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport:

(i) at least eight (8) persons including crew; or

(ii) goods in excess of 2750 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto;

(f) ***authorised party*** means the party referred to in Article XIII(3);

(g) ***Chicago Convention*** means the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944, as amended, and its Annexes;

(h) ***common mark registering authority*** means the authority maintaining a register in accordance with Article 77 of the Chicago Convention as implemented by the Resolution adopted on 14 December 1967 by the Council of the International Civil Aviation Organization on nationality and registration of aircraft operated by international operating agencies;

(i) ***de-registration of the aircraft*** means deletion or removal of the registration of the aircraft from its aircraft register in accordance with the Chicago Convention;

(j) ***guarantee contract*** means a contract entered into by a person as guarantor;

(k) ***guarantor*** means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or a standby letter of credit or any other form of credit insurance;

(l) ***helicopters*** means heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes and which are type certified by the competent aviation authority to transport:

(i) at least five (5) persons including crew; or

(ii) goods in excess of 450 kilograms,

douane ou de la police) à réacteurs, à turbines ou à pistons qui :

i) dans le cas des moteurs à réacteurs, développent chacun une poussée d'au moins 1 750 livres ou une valeur équivalente; et

ii) dans le cas des moteurs à turbines ou à pistons, développent chacun une poussée nominale sur arbre au décollage d'au moins 550 chevaux-vapeurs ou une valeur équivalente,

et s'entend en outre de tous modules et autres accessoires, pièces et équipements qui y sont posés, intégrés ou fixés, ainsi que de tous les manuels, les données et les registres y afférents;

c) ***biens aéronautiques*** désigne des cellules d'aéronef, des moteurs d'avion et des hélicoptères;

d) ***registre d'aéronefs*** désigne tout registre tenu par un État ou une autorité d'enregistrement d'exploitation en commun aux fins de la Convention de Chicago;

e) ***cellules d'aéronef*** désigne les cellules d'avion (à l'exception de celles utilisées par les services militaires, de la douane ou de la police) qui, lorsqu'elles sont dotées de moteurs d'avion appropriés, sont de modèle certifié par l'autorité aéronautique compétente, comme pouvant transporter :

i) au moins huit (8) personnes y compris l'équipage; ou

ii) des biens pesant plus de 2 750 kilogrammes,

et s'entend en outre de tous les accessoires, pièces et équipements (à l'exclusion des moteurs d'avion) qui y sont posés, intégrés ou fixés, ainsi que de tous les manuels, les données et les registres y afférents;

f) ***partie autorisée*** désigne la partie visée au paragraphe 3 de l'article XIII;

g) ***Convention de Chicago*** désigne la *Convention relative à l'aviation civile internationale*, signée à Chicago le 7 décembre 1944, telle qu'amendée, et ses Annexes;

h) ***autorité d'enregistrement d'exploitation en commun*** désigne l'autorité chargée de la tenue d'un registre conformément à l'article 77 de la Convention de Chicago telle que mise en œuvre par la Résolution adoptée par le Conseil de l'Organisation de l'aviation civile internationale le 14 décembre 1967 sur la nationalité et l'immatriculation des aéronefs exploités par des organisations internationales d'exploitation;

i) ***radiation de l'immatriculation de l'aéronef*** désigne la radiation ou la suppression de l'immatriculation de l'aéronef de son registre d'aéronefs conformément à la Convention de Chicago;

j) ***contrat conférant une garantie*** désigne une convention en vertu de laquelle une personne s'engage comme garant;

k) ***garant*** désigne une personne qui, aux fins d'assurer l'exécution de toute obligation en faveur d'un créancier garanti par un contrat constitutif de sûreté ou en vertu d'un contrat, se porte caution ou donne ou émet une garantie à première demande ou une lettre de crédit stand-by ou toute autre forme d'assurance-crédit;

together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto;

(m) ***insolvency-related event*** means:

(i) the commencement of the insolvency proceedings; or

(ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

(n) ***primary insolvency jurisdiction*** means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;

(o) ***registry authority*** means the national authority or the common mark registering authority, maintaining an aircraft register in a Contracting State and responsible for the registration and de-registration of an aircraft in accordance with the Chicago Convention; and

(p) ***State of registry*** means, in respect of an aircraft, the State on the national register of which an aircraft is entered or the State of location of the common mark registering authority maintaining the aircraft register.

ARTICLE II

Application of Convention as Regards Aircraft Objects

1 The Convention shall apply in relation to aircraft objects as provided by the terms of this Protocol.

2 The Convention and this Protocol shall be known as the *Convention on International Interests in Mobile Equipment* as applied to aircraft objects.

l) ***hélicoptère*** désigne un aérodyne plus lourd que l'air (à l'exception de ceux utilisés par les services militaires, de la douane ou de la police) dont la sustentation en vol est assurée principalement par la portance engendrée par un ou plusieurs rotors sur des axes, en grande partie verticaux, et qui est de modèle certifié par l'autorité aéronautique compétente comme pouvant transporter :

i) au moins cinq (5) personnes y compris l'équipage; ou

ii) des biens pesant plus de 450 kilogrammes,

et s'entend en outre de tous les accessoires, pièces et équipements (y compris les rotors) qui y sont posés, intégrés ou fixés, ainsi que de tous les manuels, les données et les registres y afférents;

m) ***situation d'insolvabilité*** désigne :

i) l'ouverture des procédures d'insolvabilité; ou

ii) l'intention déclarée du débiteur de suspendre ses paiements ou leur suspension effective, lorsque la loi ou une action de l'État interdit ou suspend le droit du créancier d'introduire une procédure d'insolvabilité à l'encontre du débiteur ou de mettre en œuvre des mesures en vertu de la Convention;

n) ***ressort principal de l'insolvabilité*** désigne l'État contractant où le débiteur a le centre de ses intérêts principaux qui, à cette fin et sous réserve de preuve contraire, est considéré comme le lieu où le débiteur a son siège statutaire ou, à défaut, le lieu où il a été constitué;

o) ***autorité du registre*** désigne l'autorité nationale ou l'autorité d'enregistrement d'exploitation en commun chargée de la tenue d'un registre d'aéronefs dans un État contractant et responsable de l'immatriculation et de la radiation de l'immatriculation d'un aéronef conformément à la Convention de Chicago; et

p) ***État d'immatriculation*** désigne, en ce qui concerne un aéronef, l'État dont le registre national d'aéronefs est utilisé pour l'immatriculation d'un aéronef ou l'État où est située l'autorité d'enregistrement d'exploitation en commun chargée de la tenue du registre d'aéronefs.

ARTICLE II

Application de la Convention à l'égard des biens aéronautiques

1 La Convention s'applique aux biens aéronautiques tel que prévu par les dispositions du présent Protocole.

2 La Convention et le présent Protocole sont connus sous le nom de la *Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles* telle qu'elle s'applique aux biens aéronautiques.

ARTICLE III

Application of Convention to Sales

The following provisions of the Convention apply as if references to an agreement creating or providing for an international interest were references to a contract of sale and as if references to an international interest, a prospective international interest, the debtor and the creditor were references to a sale, a prospective sale, the seller and the buyer respectively:

Articles 3 and 4;

Article 16(1)(a);

Article 19(4);

Article 20(1) (as regards registration of a contract of sale or a prospective sale);

Article 25(2) (as regards a prospective sale); and

Article 30.

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 29 (other than Article 29(3) which is replaced by Article XIV(1) and (2)), Chapter X, Chapter XII (other than Article 43), Chapter XIII and Chapter XIV (other than Article 60) shall apply to contracts of sale and prospective sales.

ARTICLE III

Application de la Convention aux ventes

Les dispositions suivantes de la Convention s’appliquent comme si les références à un contrat créant ou prévoyant une garantie internationale étaient des références à un contrat de vente et comme si les références à une garantie internationale, à une garantie internationale future, au débiteur et au créancier étaient des références à une vente, à une vente future, au vendeur et à l’acheteur respectivement :

les articles 3 et 4;

l’alinéa a) du paragraphe 1 de l’article 16;

le paragraphe 4 de l’article 19;

le paragraphe 1 de l’article 20 (en ce qui concerne l’inscription d’un contrat de vente ou d’une vente future);

le paragraphe 2 de l’article 25 (en ce qui concerne une vente future); et

l’article 30.

En outre, les dispositions générales de l’article premier, de l’article 5, des Chapitres IV à VII, de l’article 29 (à l’exception du paragraphe 3 qui est remplacé par les paragraphes 1 et 2 de l’article XIV), du Chapitre X, du Chapitre XII (à l’exception de l’article 43), du Chapitre XIII et du Chapitre XIV (à l’exception de l’article 60) s’appliquent aux contrats de vente et aux ventes futures.

ARTICLE IV

Sphere of Application

1 Without prejudice to Article 3(1) of the Convention, the Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry, and where such registration is made pursuant to an agreement for registration of the aircraft it is deemed to have been effected at the time of the agreement.

2 For the purposes of the definition of ***internal transaction*** in Article 1 of the Convention:

(a) an airframe is located in the State of registry of the aircraft of which it is a part;

(b) an aircraft engine is located in the State of registry of the aircraft on which it is installed or, if it is not installed on an aircraft, where it is physically located; and

(c) a helicopter is located in its State of registry,

at the time of the conclusion of the agreement creating or providing for the interest.

3 The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other,

ARTICLE IV

Champ d’application

1 Sans préjudice du paragraphe 1 de l’article 3 de la Convention, la Convention s’applique aussi à l’égard d’un hélicoptère ou une cellule d’aéronef appartenant à un aéronef, immatriculés dans un registre d’aéronefs d’un État contractant qui est l’État d’immatriculation et, lorsqu’une telle immatriculation est faite conformément à un accord relatif à l’immatriculation de l’aéronef, elle est réputée avoir été effectuée au moment de cet accord.

2 Aux fins de la définition d’***opération interne*** à l’article premier de la Convention :

a) une cellule d’aéronef est située dans l’État d’immatriculation de l’aéronef auquel elle appartient;

b) un moteur d’avion est situé dans l’État d’immatriculation de l’aéronef sur lequel il est posé ou, s’il n’est pas posé sur un aéronef, dans l’État où il se trouve matériellement; et

c) un hélicoptère est situé dans l’État où il est immatriculé,

au moment de la conclusion du contrat qui crée ou prévoit la garantie.

3 Dans leurs relations mutuelles, les parties peuvent, dans un accord écrit, déroger aux dispositions du présent Protocole ou en modifier les effets, à l’exception des paragraphes 2 à 4 derogate from or vary the effect of any of the provisions of this Protocol except Article IX (2)-(4).

ARTICLE V

Formalities, Effects and Registration of Contracts of Sale

1 For the purposes of this Protocol, a contract of sale is one which:

(a) is in writing;

(b) relates to an aircraft object of which the seller has power to dispose; and

(c) enables the aircraft object to be identified in conformity with this Protocol.

2 A contract of sale transfers the interest of the seller in the aircraft object to the buyer according to its terms.

3 Registration of a contract of sale remains effective indefinitely. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.

ARTICLE VI

Representative Capacities

A person may enter into an agreement or a sale, and register an international interest in, or a sale of, an aircraft object, in an agency, trust or other representative capacity. In such case, that person is entitled to assert rights and interests under the Convention.

ARTICLE VII

Description of Aircraft Objects

A description of an aircraft object that contains its manufacturer's serial number, the name of the manufacturer and its model designation is necessary and sufficient to identify the object for the purposes of Article 7(c) of the Convention and Article V(1)(c) of this Protocol.

ARTICLE VIII

Choice of Law

1 This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

2 The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may

de l'article IX. Les parties peuvent exclure, dans un accord écrit, l'application de l'article XI.

ARTICLE V

Formalités, effets et inscription des contrats de vente

1 Aux fins du présent Protocole, un contrat de vente est un contrat qui :

a) est conclu par écrit;

b) porte sur un bien aéronautique dont le vendeur a le pouvoir de disposer; et

c) rend possible l'identification du bien aéronautique conformément au présent Protocole.

2 Un contrat de vente transfère les droits du vendeur sur le bien aéronautique à l'acheteur conformément aux termes du contrat.

3 L'inscription d'un contrat de vente demeure efficace indéfiniment. L'inscription d'une vente future demeure efficace à moins qu'elle ne fasse l'objet d'une mainlevée ou jusqu'à l'expiration de la durée précisée, le cas échéant, dans l'inscription.

ARTICLE VI

Pouvoirs des représentants

Une personne peut conclure un contrat ou une vente et inscrire une garantie internationale ou une vente portant sur un bien aéronautique en qualité de mandataire, de fiduciaire, ou à tout autre titre de représentant. Dans ce cas, cette partie est habilitée à faire valoir les droits et les garanties découlant de la Convention.

ARTICLE VII

Description des biens aéronautiques

Une description d'un bien aéronautique, qui comporte le numéro de série assigné par le constructeur, le nom du constructeur et la désignation du modèle, est nécessaire et suffit à identifier le bien aux fins du paragraphe c) de l'article 7 de la Convention et de l'alinéa c) du paragraphe 1 de l'article V du présent Protocole.

ARTICLE VIII

Choix de la loi applicable

1 Le présent article ne s'applique que lorsqu'un État contractant a fait une déclaration en vertu du paragraphe 1 de l'article XXX.

2 Les parties à un contrat, à un contrat de vente, à un contrat conférant une garantie ou à un accord de subordination agree on the law which is to govern their contractual rights and obligations, wholly or in part.

3 Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

CHAPTER II

Default Remedies, Priorities and Assignments

ARTICLE IX

Modification of Default Remedies Provisions

1 In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

- **(a)** procure the de-registration of the aircraft; and
- **(b)** procure the export and physical transfer of the aircraft object from the territory in which it is situated.

2 The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3 Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4 A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

5 The registry authority in a Contracting State shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:

- **(a)** the request is properly submitted by the authorised party under a recorded irrevocable de-registration and export request authorisation; and

peuvent convenir de la loi qui régira tout ou partie de leurs droits et obligations contractuels.

3 Sauf stipulation contraire, la référence au paragraphe précédent à la loi choisie par les parties vise les règles de droit nationales de l'État désigné ou, lorsque cet État comprend plusieurs unités territoriales, la loi de l'unité territoriale désignée.

CHAPITRE II

Mesures en cas d'inexécution des obligations, priorités et cessions

ARTICLE IX

Modification des dispositions relatives aux mesures en cas d'inexécution des obligations

1 Outre les mesures prévues au Chapitre III de la Convention, et pour autant que le débiteur y ait consenti, ledit consentement pouvant être donné à tout moment, le créancier peut, dans les cas visés au Chapitre III :

- **a)** faire radier l'immatriculation de l'aéronef; et
- **b)** faire exporter et faire transférer physiquement le bien aéronautique du territoire où il se trouve.

2 Le créancier ne peut mettre en œuvre les mesures prévues au paragraphe précédent sans le consentement écrit et préalable du titulaire de toute garantie inscrite primant celle du créancier.

3 Le paragraphe 3 de l'article 8 de la Convention ne s'applique pas aux biens aéronautiques. Toute mesure prévue par la Convention à l'égard d'un bien aéronautique doit être mise en œuvre d'une manière commercialement raisonnable. Une mesure est réputée mise en œuvre d'une façon commercialement raisonnable lorsqu'elle est mise en œuvre conformément à une disposition du contrat, sauf lorsqu'une telle disposition est manifestement déraisonnable.

4 Un créancier garanti accordant aux personnes intéressées un préavis écrit d'au moins dix jours ouvrables d'une vente ou d'un bail projetés est réputé avoir satisfait l'exigence de fournir un « préavis raisonnable », prévue au paragraphe 4 de l'article 8 de la Convention. Le présent paragraphe n'a cependant pas pour effet d'empêcher un créancier garanti et un constituant ou un garant de fixer par contrat un préavis plus long.

5 Sous réserve de toute loi et réglementation applicables en matière de sécurité aérienne, l'autorité du registre dans un État contractant fait droit à une demande de radiation et d'exportation si :

- **a)** la demande est soumise en bonne et due forme par la partie autorisée, en vertu d'une autorisation enregistrée

(b) the authorised party certifies to the registry authority, if required by that authority, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.

6 A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed de-registration and export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and

(b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.

irrévocable de radiation de l'immatriculation et de demande de permis d'exportation; et si

b) la partie autorisée certifie à l'autorité du registre, si cette dernière le requiert, que toutes les garanties inscrites ayant un rang préférable à celui du créancier en faveur duquel l'autorisation a été délivrée ont fait l'objet d'une mainlevée ou que les titulaires de telles garanties ont consenti à la radiation et à l'exportation.

6 Un créancier garanti proposant la radiation de l'immatriculation et l'exportation d'un aéronef en vertu du paragraphe 1 autrement qu'en exécution d'une décision du tribunal, doit informer par écrit avec un préavis raisonnable de la radiation de l'immatriculation et de l'exportation proposée :

a) les personnes intéressées visées aux alinéas i) et ii) du paragraphe m) de l'article premier de la Convention; et

b) les personnes intéressées visées à l'alinéa (iii) du paragraphe m) de l'article premier de la Convention qui ont informé le créancier garanti de leurs droits avec un préavis raisonnable avant la radiation de l'immatriculation et l'exportation.

ARTICLE X

Modification of Provisions Regarding Relief Pending Final Determination

1 This Article applies only where a Contracting State has made a declaration under Article XXX(2) and to the extent stated in such declaration.

2 For the purposes of Article 13(1) of the Convention, "speedy" in the context of obtaining relief means within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

3 Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

"(e) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom",

and Article 43(2) applies with the insertion after the words "Article 13(1)(d)" of the words "and (e)".

4 Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor's international interest has priority under the provisions of Article 29 of the Convention.

5 The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.

6 With regard to the remedies in Article IX(1):

(a) they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State no later than five working days after the creditor notifies such authorities that the relief specified in

ARTICLE X

Modification des dispositions relatives aux mesures provisoires

1 Le présent article ne s'applique que lorsqu'un État contractant a fait une déclaration en vertu du paragraphe 2 de l'article XXX et dans la mesure prévue dans cette déclaration.

2 Aux fins du paragraphe 1 de l'article 13 de la Convention, dans le cadre de l'obtention de mesures, l'expression ***bref délai*** doit s'entendre comme le nombre de jours ouvrables à compter de la date de dépôt de la demande indiqué dans la déclaration faite par l'État contractant dans lequel la demande est introduite.

3 Le paragraphe 1 de l'article 13 de la Convention s'applique en insérant la disposition suivante immédiatement après l'alinéa d) :

« e) si, à tout moment, le débiteur et le créancier en conviennent expressément ainsi, la vente et l'attribution des produits de la vente »,

et le paragraphe 2) de l'article 43 s'applique en remplaçant les mots « l'alinéa d) » par les mots « les alinéas d) et e) ».

4 Le droit de propriété ou tout autre droit du débiteur transféré par l'effet de la vente visée au paragraphe précédent est libéré de toute autre garantie ou tout autre droit que prime la garantie internationale du créancier en vertu des dispositions de l'article 29 de la Convention.

5 Le créancier et le débiteur ou toute autre personne intéressée peuvent convenir par écrit d'exclure l'application du paragraphe 2 de l'article 13 de la Convention.

6 Les mesures visées au paragraphe 1 de l'article IX :

a) doivent être rendues disponibles dans un État contractant par l'autorité du registre et les autres autorités administratives compétentes, selon le cas, dans les cinq jours ouvrables suivant la date à laquelle le créancier a notifié à

Article IX(1) is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

7 Paragraphs 2 and 6 shall not affect any applicable aviation safety laws and regulations.

ARTICLE XI

Remedies on Insolvency

1 This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).

Alternative A

2 Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3 For the purposes of this Article, the "waiting period" shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

4 References in this Article to the "insolvency administrator" shall be to that person in its official, not in its personal, capacity.

5 Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6 Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

7 The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8 With regard to the remedies in Article IX(1):

ces autorités que la mesure prévue au paragraphe 1 de l'article IX a été accordée ou, lorsque la mesure est accordée par un tribunal étranger, après qu'elle soit reconnue par un tribunal de cet État contractant, et qu'il est autorisé à obtenir ces mesures conformément à la Convention; et

b) les autorités compétentes doivent fournir rapidement coopération et assistance au créancier dans la mise en œuvre des mesures conformément aux lois et aux réglementations applicables en matière de sécurité aérienne.

7 Les paragraphes 2 et 6 ne portent pas atteinte à toute loi et réglementation applicables en matière de sécurité aérienne.

ARTICLE XI

Mesures en cas d'insolvabilité

1 Le présent article ne s'applique que lorsqu'un État contractant qui est le ressort principal de l'insolvabilité a fait une déclaration en vertu du paragraphe 3 de l'article XXX.

Variante A

2 Lorsque survient une situation d'insolvabilité et sous réserve du paragraphe 7, l'administrateur d'insolvabilité ou le débiteur, selon le cas, restitue, le bien aéronautique au créancier au plus tard à la première des deux dates suivantes :

a) la fin du délai d'attente; ou

b) la date à laquelle le créancier aurait droit à la possession du bien aéronautique si le présent article ne s'appliquait pas.

3 Aux fins du présent article, le ***délai d'attente*** désigne le délai qui est précisé dans la déclaration de l'État contractant du ressort principal de l'insolvabilité.

4 Les références faites au présent article à l'***administrateur d'insolvabilité*** concernent cette personne, en sa qualité officielle et non personnelle.

5 Aussi longtemps que le créancier n'a pas eu la possibilité d'obtenir la possession du bien en vertu du paragraphe 2 :

a) l'administrateur d'insolvabilité ou le débiteur, selon le cas, préserve et entretient le bien aéronautique et en conserve sa valeur conformément au contrat; et

b) le créancier peut demander toute autre mesure provisoire disponible en vertu de la loi applicable.

6 Les dispositions de l'alinéa a) du paragraphe précédent n'excluent pas l'utilisation du bien aéronautique en vertu d'accords conclus en vue de préserver et entretenir le bien aéronautique et d'en conserver sa valeur.

7 L'administrateur d'insolvabilité ou le débiteur, selon le cas, peut garder la possession du bien aéronautique lorsque, au plus tard à la date fixée au paragraphe 2, il a remédié aux manquements, autres que ceux dus à l'ouverture des procédures d'insolvabilité, et s'est engagé à exécuter toutes les obligations à venir, conformément au contrat. Un second délai d'attente ne s'applique pas en cas de manquement dans l'exécution de ces obligations à venir.

8 Les mesures visées au paragraphe 1 de l'article IX :

(a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

9 No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10 No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11 Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

12 No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

13 The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

Alternative B

2 Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXX(3) whether it will:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law.

3 The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4 The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5 If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

a) doivent être rendues disponibles dans un État contractant par l'autorité du registre et les autorités administratives compétentes, selon le cas, dans les cinq jours ouvrables suivant la date à laquelle le créancier a notifié à ces autorités qu'il est autorisé à obtenir ces mesures conformément à la Convention; et

b) les autorités compétentes doivent fournir rapidement coopération et assistance au créancier dans la mise en œuvre des mesures conformément aux lois et aux réglementations applicables en matière de sécurité aérienne.

9 Il est interdit d'empêcher ou de retarder la mise en œuvre des mesures permises par la Convention ou le présent Protocole après la date fixée au paragraphe 2.

10 Aucune des obligations du débiteur en vertu du contrat ne peut être modifiée sans le consentement du créancier.

11 Aucune disposition du paragraphe précédent ne peut être interprétée comme portant atteinte au pouvoir, le cas échéant, de l'administrateur d'insolvabilité en vertu de la loi applicable de mettre fin au contrat.

12 Aucun droit et aucune garantie, exception faite des droits et garanties non conventionnels appartenant à une catégorie couverte par une déclaration faite en vertu du paragraphe 1 de l'article 39 de la Convention, ne priment les garanties inscrites dans les procédures d'insolvabilité.

13 La Convention, telle que modifiée par l'article IX du présent Protocole, s'applique à la mise en œuvre des mesures en vertu du présent article.

Variante B

2 Lorsque survient une situation d'insolvabilité, l'administrateur d'insolvabilité ou le débiteur selon le cas, à la demande du créancier, doit informer le créancier dans le délai précisé dans une déclaration d'un État contractant faite en vertu du paragraphe 3 de l'article XXX si :

a) il remédiera aux manquements autres que ceux dus à l'ouverture des procédures d'insolvabilité, et s'engagera à exécuter toutes les obligations à venir, conformément au contrat et aux documents y relatifs; ou si

b) il donnera au créancier la possibilité de prendre possession du bien aéronautique conformément à la loi applicable.

3 La loi applicable visée à l'alinéa b) du paragraphe précédent peut autoriser le tribunal à exiger la prise de toute mesure complémentaire ou la production de toute garantie complémentaire.

4 Le créancier doit établir sa créance et justifier de l'inscription de sa garantie internationale.

5 Lorsque l'administrateur d'insolvabilité ou le débiteur, selon le cas, n'informe pas le créancier conformément au paragraphe 2 ou lorsque l'administrateur d'insolvabilité ou le débiteur a déclaré qu'il fournira au créancier la possibilité de prendre possession du bien aéronautique mais ne le fait pas, le tribunal peut autoriser le créancier à prendre possession du bien aéronautique aux conditions fixées par le tribunal et peut exiger la prise de toute mesure complémentaire ou la production de toute garantie complémentaire.

6 The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.

ARTICLE XII

Insolvency Assistance

1 This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

2 The courts of a Contracting State in which an aircraft object is situated shall, in accordance with the law of the Contracting State, co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.

ARTICLE XIII

De-registration and Export Request Authorisation

1 This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

2 Where the debtor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the registry authority, that authorisation shall be so recorded.

3 The person in whose favour the authorisation has been issued (the "authorised party") or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.

4 The registry authority and other administrative authorities in Contracting States shall expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX.

ARTICLE XIV

Modification of Priority Provisions

1 A buyer of an aircraft object under a registered sale acquires its interest in that object free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.

6 Le bien aéronautique ne peut être vendu tant qu'un tribunal n'a pas statué sur la créance et la garantie internationale.

ARTICLE XII

Assistance en cas d'insolvabilité

1 Le présent article ne s'applique que lorsqu'un État contractant a fait une déclaration en vertu du paragraphe 1 de l'article XXX.

2 Les tribunaux d'un État contractant où se trouve un bien aéronautique coopèrent, conformément à la loi de l'État contractant, dans toute la mesure possible avec les tribunaux et les administrateurs d'insolvabilité étrangers pour l'application des dispositions de l'article XI.

ARTICLE XIII

Autorisation de demande de radiation de l'immatriculation et de permis d'exportation

1 Le présent article ne s'applique que lorsqu'un État contractant a fait une déclaration en vertu du paragraphe 1 de l'article XXX.

2 Lorsque le débiteur a délivré une autorisation irrévocable de demande de radiation de l'immatriculation et de permis d'exportation suivant pour l'essentiel le formulaire annexé au présent Protocole et l'a soumise pour inscription à l'autorité du registre, cette autorisation doit être inscrite ainsi.

3 Le bénéficiaire de l'autorisation (la « partie autorisée ») ou la personne qu'elle certifie être désignée à cet effet est la seule personne habilitée à mettre en œuvre les mesures prévues au paragraphe 1 de l'article IX; il ne peut mettre en œuvre ces mesures qu'en conformité avec l'autorisation et les lois et réglementations applicables en matière de sécurité aérienne. Le débiteur ne peut révoquer cette autorisation sans le consentement écrit de la partie autorisée. L'autorité du registre radie une autorisation inscrite dans le registre à la demande de la partie autorisée.

4 L'autorité du registre et les autres autorités administratives dans les États contractants devront prêter promptement leur concours et leur aide à la partie autorisée pour mettre en œuvre les mesures prévues à l'article IX.

ARTICLE XIV

Modification des dispositions relatives aux priorités

1 Un acheteur d'un bien aéronautique en vertu d'une vente inscrite acquiert son droit sur ce bien libre de tout droit inscrit postérieurement et de toute garantie non inscrite, même s'il a connaissance du droit non inscrit.

2 A buyer of an aircraft object acquires its interest in that object subject to an interest registered at the time of its acquisition.

3 Ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft.

4 Article 29(7) of the Convention applies to an item, other than an object, installed on an airframe, aircraft engine or helicopter.

ARTICLE XV

Modification of Assignment Provisions

Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b):

> "and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee."

ARTICLE XVI

Debtor Provisions

1 In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the object in accordance with the agreement as against:

- **(a)** its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4) of the Convention or, in the capacity of buyer, Article XIV(1) of this Protocol, unless and to the extent that the debtor has otherwise agreed; and
- **(b)** the holder of any interest to which the debtor's right or interest is subject pursuant to Article 29(4) of the Convention or, in the capacity of buyer, Article XIV(2) of this Protocol, but only to the extent, if any, that such holder has agreed.

2 Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to an aircraft object.

2 Un acheteur d'un bien aéronautique acquiert son droit sur ce bien sous réserve d'un droit inscrit au moment de l'acquisition.

3 Le droit de propriété ou un autre droit ou garantie sur un moteur d'avion n'est pas affecté par le fait que le moteur a été posé sur un aéronef, ou qu'il en a été enlevé.

4 Le paragraphe 7 de l'article 29 de la Convention s'applique à un objet, autre qu'un bien, posé sur une cellule d'aéronef, un moteur d'avion ou un hélicoptère.

ARTICLE XV

Modification des dispositions relatives aux cessions

Le paragraphe 1 de l'article 33 de la Convention s'applique en ajoutant la disposition suivante immédiatement après l'alinéa b) :

> « et c) le débiteur a consenti par écrit, que le consentement ait ou non été donné avant que la cession n'ait eu lieu ou qu'il identifie ou non le cessionnaire. »

ARTICLE XVI

Dispositions relatives au débiteur

1 En l'absence d'une inexécution au sens de l'article 11 de la Convention, le débiteur a droit à la jouissance et à l'utilisation paisibles du bien conformément aux termes du contrat, à l'égard :

- **a)** de son créancier et du titulaire de toute garantie dont le débiteur acquiert des droits libres de toute garantie en vertu du paragraphe 4 de l'article 29 de la Convention ou, en qualité d'acheteur, du paragraphe 1 de l'article XIV du présent Protocole, à moins et pour autant que le débiteur en ait convenu différemment; et
- **b)** du titulaire de toute garantie à laquelle le droit du débiteur est subordonné en vertu du paragraphe 4 de l'article 29 de la Convention ou, en qualité d'acheteur, du paragraphe 2 de l'article XIV du présent Protocole, mais seulement pour autant que ledit titulaire en ait ainsi convenu.

2 Aucune disposition de la Convention ou du présent Protocole ne porte atteinte à la responsabilité d'un créancier en cas d'inexécution du contrat en vertu de la loi applicable dans la mesure où ledit contrat porte sur un bien aéronautique.

ARTICLE XXIX

Territorial Units

1 If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them and may modify its declaration by submitting another declaration at any time.

2 Any such declaration shall state expressly the territorial units to which this Protocol applies.

3 If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.

4 Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.

5 If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

(a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;

(b) any reference to the location of the object in a Contracting State refers to the location of the object in a territorial unit to which the Convention and this Protocol apply; and

(c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply and any reference to the national register or to the registry authority in that Contracting State shall be construed as referring to the aircraft register in force or to the registry authority having jurisdiction in the territorial unit or units to which the Convention and this Protocol apply.

ARTICLE XXX

Declarations Relating to Certain Provisions

1 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply any one or more of Articles VIII, XII and XIII of this Protocol.

ARTICLE XXIX

Unités territoriales

1 Si un État contractant comprend des unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par le présent Protocole, il peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, que le présent Protocole s'applique à toutes ses unités territoriales ou seulement à une ou plusieurs d'entre elles, et il peut à tout moment modifier cette déclaration en en soumettant une nouvelle.

2 Une telle déclaration doit indiquer expressément les unités territoriales auxquelles le présent Protocole s'applique.

3 Si un État contractant n'a pas fait de déclaration en vertu du paragraphe 1, le présent Protocole s'applique à toutes les unités territoriales de cet État.

4 Lorsqu'un État contractant étend l'application du présent Protocole à une ou plusieurs de ses unités territoriales, les déclarations autorisées par le présent Protocole peuvent être faites à l'égard de chacune desdites unités territoriales et les déclarations faites à l'égard de l'une d'elles peuvent différer de celles qui sont faites à l'égard d'une autre unité territoriale.

5 Si, conformément à une déclaration faite en vertu du paragraphe 1, le présent Protocole s'applique à l'une ou plusieurs des unités territoriales d'un État contractant :

a) le débiteur sera considéré comme étant situé dans un État contractant seulement s'il est constitué en vertu d'une loi en vigueur dans une unité territoriale à laquelle la Convention et le présent Protocole s'appliquent, ou s'il a son siège statutaire, son administration centrale, son établissement ou sa résidence habituelle dans une unité territoriale à laquelle la Convention et le présent Protocole s'appliquent;

b) toute référence à la situation du bien dans un État contractant vise la situation du bien dans une unité territoriale à laquelle la Convention et le présent Protocole s'appliquent; et

c) toute référence aux autorités administratives dans cet État contractant sera comprise comme visant les autorités administratives compétentes dans une unité territoriale à laquelle la Convention et le présent Protocole s'appliquent, et toute référence au registre national ou à l'autorité du registre dans cet État contractant sera comprise comme visant le registre d'aéronefs pertinent ou l'autorité du registre compétente dans l'unité ou les unités territoriales auxquelles la Convention et le présent Protocole s'appliquent.

ARTICLE XXX

Déclarations portant sur certaines dispositions

1 Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du présent Protocole ou de l'adhésion, qu'il appliquera un ou plusieurs des articles VIII, XII et XIII du présent Protocole.

2 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article X of this Protocol, wholly or in part. If it so declares with respect to Article X(2), it shall specify the time-period required thereby.

3 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, or the entirety of Alternative B of Article XI and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article XI.

4 The courts of Contracting States shall apply Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.

5 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will not apply the provisions of Article XXI, wholly or in part. The declaration shall specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied.

ARTICLE XXXI

Declarations Under the Convention

Declarations made under the Convention, including those made under Articles 39, 40, 50, 53, 54, 55, 57, 58 and 60 of the Convention, shall be deemed to have also been made under this Protocol unless stated otherwise.

ARTICLE XXXII

Reservations and Declarations

1 No reservations may be made to this Protocol but declarations authorised by Articles XXIV, XXIX, XXX, XXXI, XXXIII and XXXIV may be made in accordance with these provisions.

2 Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

ARTICLE XXXIII

Subsequent Declarations

1 A State Party may make a subsequent declaration, other than a declaration made in accordance with Article XXXI under Article 60 of the Convention, at any time after the date on

2 Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du présent Protocole ou de l'adhésion, qu'il appliquera en tout ou en partie l'article X du présent Protocole. S'il fait cette déclaration à l'égard du paragraphe 2 de l'article X, il doit indiquer le délai prescrit par cet article.

3 Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du présent Protocole ou de l'adhésion, qu'il appliquera intégralement la Variante A ou la Variante B de l'article XI et, en pareil cas, indiquer les types de procédures d'insolvabilité éventuelles auxquelles s'applique la Variante A ou la Variante B. Un État contractant qui fait une déclaration en vertu du présent paragraphe doit indiquer le délai prescrit par l'article XI.

4 Les tribunaux des États contractants appliquent l'article XI conformément à la déclaration faite par l'État contractant qui est le ressort principal de l'insolvabilité.

5 Un État contractant peut déclarer, au moment de la ratification, de l'acceptation, de l'approbation du présent Protocole ou de l'adhésion, qu'il n'appliquera pas en tout ou partie l'article XXI. La déclaration doit indiquer dans quelles conditions l'article pertinent sera appliqué, au cas où il ne serait appliqué que partiellement, ou quelles autres mesures provisoires seront appliquées.

ARTICLE XXXI

Déclarations en vertu de la Convention

Les déclarations faites en vertu de la Convention, y compris celles qui sont faites en vertu des articles 39, 40, 50, 53, 54, 55, 57, 58 et 60 de la Convention, sont réputées avoir également été faites en vertu du présent Protocole, sauf indication contraire.

ARTICLE XXXII

Réserves et déclarations

1 Aucune réserve ne peut être faite au présent Protocole, mais des déclarations autorisées par les articles XXIV, XXIX, XXX, XXXI, XXXIII et XXXIV peuvent être faites conformément à ces dispositions.

2 Toute déclaration ou déclaration subséquente ou tout retrait d'une déclaration faite en vertu du présent Protocole est notifiée par écrit au Dépositaire.

ARTICLE XXXIII

Déclarations subséquentes

1 Un État partie peut faire une déclaration subséquente, à l'exception d'une déclaration faite conformément à l'article XXXI en vertu de l'article 60 de la Convention, à tout moment à compter de la date d'entrée en vigueur du présent Protocole which this Protocol has entered into force for it, by notifying the Depositary to that effect.

2 Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3 Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

ARTICLE XXXIV

Withdrawal of Declarations

1 Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXXI under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

2 Notwithstanding the previous paragraph, this Protocol shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal.

ARTICLE XXXV

Denunciations

1 Any State Party may denounce this Protocol by notification in writing to the Depositary.

2 Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.

3 Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

ARTICLE XXXVI

Review Conferences, Amendments and Related Matters

1 The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regime established in the Convention as amended by this Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority

à l'égard de cet État, par une notification à cet effet au Dépositaire.

2 Une telle déclaration subséquente prend effet le premier jour du mois suivant l'expiration d'une période de six mois à compter de la date de réception de la notification par le Dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la déclaration est précisée dans la notification, la déclaration prend effet à l'expiration de la période ainsi précisée après réception de la notification par le Dépositaire.

3 Nonobstant les paragraphes précédents, le présent Protocole continue de s'appliquer, comme si une telle déclaration subséquente n'avait pas été faite, à l'égard de tous les droits et garanties nés avant la date de prise d'effet d'une telle déclaration subséquente.

ARTICLE XXXIV

Retrait des déclarations

1 Tout État partie qui a fait une déclaration en vertu du présent Protocole, à l'exception d'une déclaration faite conformément à l'article XXXI en vertu de l'article 60 de la Convention, peut à tout moment la retirer par une notification à cet effet au Dépositaire. Un tel retrait prend effet le premier jour du mois suivant l'expiration d'une période de six mois à compter de la date de réception de la notification par le Dépositaire.

2 Nonobstant le paragraphe précédent, le présent Protocole continue de s'appliquer, comme si un tel retrait de déclaration n'avait pas été fait, à l'égard de tous les droits et garanties nés avant la date de prise d'effet d'un tel retrait.

ARTICLE XXXV

Dénonciations

1 Tout État partie peut dénoncer le présent Protocole par une notification adressée par écrit au Dépositaire.

2 Une telle dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de douze mois à compter de la date de réception de la notification par le Dépositaire.

3 Nonobstant les paragraphes précédents, le présent Protocole continue de s'appliquer, comme si une telle dénonciation n'avait pas été faite, à l'égard de tous les droits et garanties nés avant la date de prise d'effet d'une telle dénonciation.

ARTICLE XXXVI

Conférences d'évaluation, amendements et questions connexes

1 Le Dépositaire, en consultation avec l'Autorité de surveillance, prépare chaque année ou à tout autre intervalle pertinent, des rapports à l'intention des États parties concernant la manière dont fonctionne dans la pratique le régime international établi dans la Convention telle qu'amendée par le présent Protocole. En préparant de tels rapports, le Dépositaire tient compte des rapports de l'Autorité de surveillance

TAB 2

Province of Alberta

GARAGE KEEPERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter G-2

Current as of January 1, 2002

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Discharge of lien

10(1) Where a financing statement or a financing change statement referred to in section 6(3) is registered and

(a) the indebtedness, with respect to which the lien is claimed and the financing statement or financing change statement has been registered, is paid,

(b) the motor vehicle or farm vehicle has been sold in accordance with section 9, or

(c) the garage keeper is not entitled to maintain the registration of the financing statement or financing change statement relating to a claim of lien on a motor vehicle or farm vehicle,

the garage keeper shall discharge the registration by registering a financing change statement.

(2) If a garage keeper fails to discharge a registration as required by subsection (1), the owner or any person with an interest in the motor vehicle or farm vehicle may give a written demand to the garage keeper requiring the garage keeper to register a financing change statement discharging the registration or an order of the Court of Queen's Bench confirming that the registration need not be amended or discharged.

(3) If a garage keeper fails to comply with a demand referred to in subsection (2) within 30 days after the demand is given, the person giving the demand may register the financing change statement referred to in subsection (2) on providing to the Registrar satisfactory proof that the demand has been given to the garage keeper.

(4) A demand referred to in subsection (2) may be given in accordance with section 72 of the *Personal Property Security Act* or by registered mail addressed to the address of the garage keeper as it appears on the financing statement.

(5) On application to the Court by the garage keeper, the Court may order that the registration be confirmed or discharged.

(6) No fee shall be charged and no amount shall be accepted by a garage keeper for compliance with a demand referred to in subsection (2).

(7) If a garage keeper fails to comply with subsection (1) or the demand referred to in subsection (2), the owner or any person with an interest in the motor vehicle or farm vehicle has a right to recover any loss or damage that was reasonably foreseeable as liable to result from the non-compliance.

1988 cP-4.05 s83

TAB 3

Indexed as:

Landlink Freight Inc. v. Timberland Forest Products Ltd.

IN THE MATTER OF the Garagemen's Lien Act, R.S.A. 1980 and amendments thereto; chapter G-1, s. 11.1(5)
Between
Landlink Freight Inc., applicant, and
Timberland Forest Products Ltd., respondent

[1998] A.J. No. 867

1998 ABQB 648

67 Alta. L.R. (3d) 340

230 A.R. 143

81 A.C.W.S. (3d) 371

Action No. 9803099642

Alberta Court of Queen's Bench
Judicial District of Edmonton

Master Funduk

Judgment: filed July 24, 1998.

(12 pp.)

Counsel:

D.L. Kennedy, for the Canadian Imperial Bank of Commerce.
C.P. Neufeldt, for the applicant.

REASONS FOR DECISION

1 **MASTER FUNDUK**:-- The fundamental issue on this application is the validity to two garagemen's liens registered by the Applicant.

2 Other secured creditors of the Respondent have exercised their securities so the contest now boils down to the Applicant and those other secured creditors.

3 I am told that funds are held in trust to cover the Applicant's claims so the two chattels can be dealt with by the secured creditors.

4 The Respondent owned a loader and a delimber. They were damaged by vandals. On September 27, 1997 the Respondent gave written authorizations to the Applicant to repair the two chattels. The two authorizations are attached to this decision [Editor's note: The authorizations could not be reproduced online.].

5 The Applicant did the repairs and released the chattels. It did not get the Applicant's signature to its "garage repair orders" which list the work that was done and its charges.

6 The Applicant was not paid so it registered garagemen's liens.

7 The issue is whether the Applicant complied with the Garagemen's Lien Act. That boils down to s. 2 of the Act. It says:

> 2(1) In addition to every other remedy that a garageman has for the recovery of money owing to him for
>
> (a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or
> (b) the price of accessories or parts furnished for a motor vehicle or part of a motor vehicle or farm vehicle,
>
> a garageman who is entitled to payment of a sum for the storage, repair or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle or part thereof or the farm vehicle or part thereof for the sum to which he is entitled.
>
> (3) No garageman is entitled to a lien under this Act unless he retains possession of the motor vehicle or farm vehicle or he obtains from
>
> (a) the person who authorized the storage. repair or maintenance or his authorized agent, or
> (b) the person who ordered that accessories or parts be furnished for the motor vehicle or farm vehicle or his authorized agent,
>
> an acknowledgment of indebtedness by requiring that person or his agent to sign an invoice or other statement of account.
>
> (emphasis mine)

8 The issue is whether the two "authorizations" are "invoices or other statements of account" signed by the Respondent.

9 Counsel cite General Motors Acceptance Corporation of Canada v. Gorniak, 6 Alta. L.R. (2d) 285 (D.C.); Union Tractor Ltd. v. FMX Construction Ltd., (1992) 126 A.R. 321(M); Crawler Sales Ltd. v. Hoe Cat Consulting Ltd., 83 Alta. L.R. (2d) 280 (M) and Craddock Trucking Ltd. v. Leclair, Edmonton Q.B. 9203-23583, Mar. 10, 1995 (M).

10 To those cases I would add Miller (Ed) Sales & Rentals Ltd. v. Canadian Imperial Bank of Commerce, (1987) 79 A.R. 161 (C.A.); R. v. Angus Alberta Limited, cited in Miller (Ed) Sales & Rentals; Reddick v. Barry's Place Collision Repairs Ltd. , Edmonton Q.B. 8404-0999769, April 6, 1984 (M); Leduc Farm (&) Truck Supply Ltd. v. High Artic Marketing Corporation Ltd., Wetaski-win Q.B. 8112-001005, Jan. 19, 1982 (M); Continental Bank of Canada v. Henry Mogensen Transport Ltd., (1984) 54 A.R. 27 (M); Ed Miller Sales (&) Rentals Ltd., Edmonton Q.B. 8303-19570, Dec. 17, 1984(M)

11 Miller (Ed) Sales & Rentals Ltd. points out that the rationale for a garageman's ability to give up possession of the vehicle to the owner and still have a lien if the owner signs an invoice or other statement of account is as follows, para. 4:

> A different approach to the interpretation of the Act was expressed by my brother Haddad, then sitting as a District Court Judge, in R. v. Angus Alberta Limited v. Union Tractor Limited (1967), 61 W.W.R. (N.S.) 603. He noted that the lien is an alternative to the possessory lien formerly enjoyed, concluding that he could "conceive that it could be harmful or impractical in many cases to hold a machine required in industry, or by a person in his trade or calling". I agree. The addition of the curative section shows a clear legislative intention that the Act is not to be strictly construed against the garageman. The purpose of the Act is to enable the garageman to exchange his possessory lien for a registered lien. As this action places the vehicle back in the hands of an apparent owner, a mechanism to protect third parties is necessary and the registration system is provided to that end.

12 R. v. Angus Alberta Limited was decided in 1967. At that time s. 2(3) did not have the clause about retaining possession of the vehicle. That was added in 1976. Continental Bank of Canada points out that the recast subsection gives the garageman a statutory right to keep possession which is concurrent to the common law possessory lien, paras. 70-72:

> Subsection (3) clearly gives a garageman an alternative in order to be entitled to a lien. He may simply retain possession of the vehicle. He may obtain a written acknowledgment of the debt. Sub-section (3) clearly uses the disjunctive "or". The garageman could probably do both. He could retain possession and obtain a written acknowledgment.
>
> If a garageman retains possession the Act gives him a statutory lien which is coincidentally concurrent to the common law lien. The Act does not require that if the garageman retains possession of the vehicle he must also obtain a written acknowledgment of the debt or file a claim of lien, or both. Retention of the vehicle without anything else entitles a garageman to a garageman's lien.

> Only if the garageman gives up possession, or never had possession, is he required to obtain a written acknowledgment of the debt and file a claim of lien within the time span dictated by s. 3.
>
> If a garageman retains possession of the vehicle there is no need for him to obtain a written acknowledgment of the debt. In my view, the legislators intended the requirement for a written acknowledgment to be mandatory where the garageman would have to file a claim of lien in order to maintain it. The alternative in s. 2(3), the written acknowledgment, is a mandatory handmaiden to s. 3.

13 See also Reddick on that point.

14 Union Tractor Ltd. is not directly on point, but it discusses the workings of the Act. There the owner's employee inadvertently went away with possession before signing an invoice or statement of account. A few days later the owner signed the invoice. The issue was whether a signing of an invoice or other statement of account had to be concurrent with giving up possession. This is what I said, paras. 35-41:

> Section 2(1) of the Garagemen's Lien Act creates the lien. To be "entitled to a lien" the garageman must retain possession of the vehicle or get a signed acknowledgment of indebtedness from the owner. It must be one or the other.
>
> The first is easy. We all know what retaining possession means. We cannot discuss different time periods for this. The garageman has possession or he does not.
>
> The subsection is silent about when the written acknowledgment must be obtained if that and registration are the foundation for maintaining the lien.
>
> Section 2 should not be read by itself. It is the charging section. A lien is given by it. That lien "terminates" in 21 days unless the garageman registers the lien in cases where possession is not the foundation for maintaining the lien. That is s. 3. The two sections should be read together to resolve the present issue.
>
> There is no compelling reason to say that the acknowledgment of indebtedness must be given when possession of the vehicle or possession of the parts is given up. The purpose of the act is to give a garageman a lien on a vehicle that he has "improved" in some fashion. That purpose is served by keeping possession of the vehicle (where the garageman has possession) or by getting a signed acknowledgment of indebtedness by the debtor and then registering the lien.
>
> One should not confuse practice with interpretation. It is usually the practice of garagemen to get the signed acknowledgment before giving up possession of the vehicle (where the garageman has possession) or before giving up possession of the parts where it is an "over the counter" supply of parts. Keeping possession unless an acknowledgment is first given gives the garageman leverage. The possession is the leverage.

> If the garageman gives up possession before obtaining an acknowledgment, he loses his leverage. He must then rely on the basic honesty of the owner to give a signed acknowledgment even though the owner already has possession. If the owner refuses to give a signed acknowledgment, the garageman will not be entitled to a lien.

15 Craddock Trucking Ltd. was a contest between a garageman and a security interest holder. A number of issues were raised, which I need not detail. I will quote this from the case:

> The final issue to be addressed is whether the requirements of a written acknowledgement were complied with. The law in this area has been canvassed by Master Funduk in an unreported decision: Union Tractor v. FMX Construction Ltd., 9003 20008, February 27, 1992. It is clear that the acknowledgement need not be obtained at the time the work order is prepared nor at the time possession of the vehicle is released to the owner. The acknowledgement must be obtained before the garageman's lien is registered at the Personal Property Security Registry. But this principle must not be confused with the principle enunciated in and Gorniak Truck and Diesel Repair, 6 Alta. L.R. (2d) 285 (District Court).

16 The issue before me comes down to a direct clash between two decisions of equal rank, Crawler Sales Ltd., and Leduc Farm (&) Truck Supply.

17 As I read Crawler Sales Ltd. the owner had signed only an "authorization" for the garageman to do the work. The garageman did the work and:

> when the services were completed three additional pages on the identical form as the document executed by the respondent were completed showing the details of the material provided and the labour expended to instal the material, for a total of $7,364.84.

18 The Master then goes on to say, p. 281:

> The argument is that because the document that was signed did not have an amount shown nor an express acknowledgment of indebtedness, it does not comply with s. 2 of the Act and therefore the applicant does not have a valid garagemen's lien.
>
> I do not agree. I think it would be an unreasonable straining of the statute and an unrealistic distortion of the realities of commercial practice to interpret the respondent's signature as less than an acknowledgment of indebtedness. I know of no authority that requires extraordinary rules of interpretation as to whether the Garagemen's Lien Act should be construed broadly or narrowly for a lienholder to fit within its provisions and failing such authority. I think the proper interpretation are the ordinary rules of construction which give practical meaning to the legislation in the context of commercial reality.

19 I do not agree. That is just an abstruse way of saying that a written request by the owner to the garageman to do the repairs is sufficient. But that is not what s. 2(3) says. The owner must "sign an invoice or other statement of account".

20 Asking someone to do something is not the same as "signing an invoice or other statement of account". The subsection is very plain. I do not really understand what is meant by "an unrealistic distortion of the realities of commercial practice". "Commercial practice" does not and cannot dictate how legislation is to be interpreted, otherwise businessmen would be driving the interpretation of statutes. That cannot be. Business practice does not run statutes. It must be the other way round. The Constitution Act, 1982 vests jurisdiction in the Legislature, not businessmen.

21 What is unrealistic about garagemen being required to do it right? As a vehicle owner for a few decades I can unequivocally say that the garagemen that I have dealt with have always gotten it right. (Perhaps they are extra careful in dealing with me for some reason.)

22 In Leduc Farm (&) Supply I said:

> On March 2, 1981 the Respondent took a truck to the Applicant for repairs. At that time a representative of the Respondent signed a form which contained the following:
>
> > "I hereby authorize the below repair work to be done along with necessary materials. You and your employees may operate vehicle for purpose of testing, inspection or delivery, at my risk. An express mechanic's lien is acknowledged on vehicle to secure the amount of repairs thereto. You are not responsible for loss of or damage to the motor vehicle or its contents due to collision not due to your negligence; or due to fire, theft or other casualty regardless of whether or not such fire, theft or other casualty is due to your negligence; and you and your agents are hereby released from any and all claims for such loan and damage.
> >
> > Authorized by (Signature) Date 3/2/81)"
>
> --
>
> The form is what would be generally known as a work order form. What was written in at the time was a description of the work to be done. It is not disputed that the charges for the work to be done were not determined at that time but were determined by the Applicant after the work was done and were then inserted in the form in the appropriate places.
>
> When the Respondent subsequently obtained possession of the truck from the Applicant it did not pay the Applicant's charges and did not sign anything else. The form did have on it the following:
>
> > "Received the machine described with equipment intact, charges for parts, shop, supplier, material and labor are hereby accepted."
>
> --

CUSTOMERS SIGNATURE DATE "

The Applicant did not have the Respondent sign the above when it gave up possession of the truck.

The Applicant later filed a garagemens lien, seized the truck and, on a notice of objection being filed, launched this application.

Counsel for the Respondent submits that the lien is invalid as the Respondent did not sign an invoice or other statement of account acknowledging the indebtedness. This involves whether what was signed by the Respondent is sufficient compliance with section 2 of the Garagemens Lien Act.

In my view, what was signed by the Respondent was merely an authorization to do the work described on the form. It is not an acknowledgment of the indebtedness. The amount of the indebtedness depends on what work is done. This in turn depends on both the materials supplied and the time spent in doing the work. At the time of the authorization there is no indebtedness. The indebtedness does not arise until the work is first done.

If the authorization was an acknowledgment of the indebtedness the owner could not later, once the work was done and the charges ascertained, object to the charges. The authorization would then become a carte blanche to the garagemen to charge whatever he wished. If the authorization was an acknowledgment of the indebtedness the owner would be liable to pay the charges even though the work done might be covered totally by warranty. Such would be the results of considering the authorization to do the work as an acknowledgment of the indebtedness.

The fact that the form, which is the Applicant's form, has another part which the owner signs when he takes possession of the vehicle, and whereby the owner expressly accepts the charges for "parts, shop, supplies, materials and labour" clearly indicates the Applicant itself does not regard the authorization tro do the work as an acknowledgment of the indebtedness.

(emphasis in original)

23 Basic contract law must not be overlooked. The Respondent asks the Applicant to do the work. If the Applicant agrees to do it a contract is formed so the "authorization" goes to the formation of the contract and to what the garageman is to do.

24 People do not always use the right words to express what they intend but we know what is being communicated. Southen J.A. put it quite nicely in Kalaman v. Singer Valve Co., 38 B.C.L.R. (3d) 331 (C.A.), p. 360:

> Persons do frequently understand what is being communicated although that which is being communicated may be ill expressed or not expressed at all. This proposition is illustrated by a limerick attributed to Anon:
>
> There was a young lady from Kent
> Who said she knew what it meant
> When men asked her to dine
> Gave her cocktails and wine
> She knew what it meant but she went.

25 Here "authorization" is used in a rather colloquial sense in the formation of a contract. "I want you to repair my motor vehicle and I give you written authority to do it". It is used more in the sense of a request which if accepted by the garageman creates (forms) a contract and identifies what the garageman is to do (i.e., performance by him).

26 I cannot interpret the two documents signed by the Respondent as "invoices" by the Applicant. They are clearly not even the Applicant's documents. I also cannot interpret them as "statements of account" by the Applicant. Here the Applicant did what the garagemen in Crawler Sales Ltd. did, created invoices after it did the work (there is nothing wrong in that), and then tries to tie them to the authorizations. I disagree that that is compliance with s. 2(3).

Decision

27 I find that the two liens are invalid.

28 Canadian Imperial Bank of Commerce will have costs of $500.00 against the Applicant.

MASTER FUNDUK

cp/s/drk

TAB 4

Case Name:

Royal Bank of Canada v. Cow Harbour Construction Ltd.

IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
IN THE MATTER OF Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.
Between
Royal Bank of Canada, Plaintiff, and
Cow Harbour Construction Ltd. and 1134252 Alberta Ltd., Defendant's

[2012] A.J. No. 197

2012 ABQB 112

65 Alta. L.R. (5th) 394

19 P.P.S.A.C. (3d) 93

534 A.R. 88

215 A.C.W.S. (3d) 218

2012 CarswellAlta 392

Dockets: 1003 11241, 1003 05560; BKCY Action No. 24-115359

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

K.D. Yamauchi J.

Heard: November 2-4, 2011.
Judgment: February 21, 2012.

(83 paras.)

Commercial law -- Liens -- Possessory liens -- Repairer's liens -- Enforcement of liens -- Applications by Fountain Tire and Kramer Ltd. for declarations that they had valid garage keepers' liens in vehicles owned by the respondent allowed oin part -- Fountain Tire's liens were not valid -- As Fountain Tire registered its liens before the respondent signed the final invoices, it did not comply with the Garage Keepers' Act -- Kramer's liens registered in Alberta for work performed in Saskatchewan were valid -- Lines were valid under Saskatchewan law -- Alberta law governed to determine the continuing validity, perfection and priority of liens -- Liens were properly registered in Alberta.

Applications by Fountain Tire and Kramer Ltd. for declarations that they had valid garage keepers' liens in vehicles owned by the respondent. Fountain Tire provided the respondent with industrial tires and performed various services in relation to those tires. Under a document processing system, the respondent processed its accounts by issuing purchase order numbers for the tires it requested and provided Fountain Tire with purchase orders containing the purchase order numbers after Fountain Tire supplied the tires. The respondent signed the Work orders, but did not sign the pre-invoices which Fountain Tire issued after it completed the work and which set out the amount the respondent owed. Fountain Tire registered financing statements indicating a claim of lien before the respondent signed the final invoices. Kramer leased vehicles to the respondent and provided mechanical services to the respondent. Kramer performed the services in Saskatchewan but returned the vehicles to the respondent in Alberta. Kramer registered a financing statement in Alberta before expiry of 21 days from the date it released the vehicle to the respondent.

HELD: Application by Fountain Tire dismissed. Application by Kramer allowed. Fountain Tire's document processing system with the respondent did not fulfill the requirements of the Garage Keepers' Lien Act. A garage keeper could not obtain the acknowledgement of indebtedness before it completed the work or in anticipation of the work being done, by having the owner sign an authorization to do the work, as there was not yet any indebtedness. A garage keeper must register notice of its lien after it obtained the acknowledgement of indebtedness from the owner, but before the 21st day after the day on which it surrendered possession of the vehicle to the owner. As Fountain Tire registered its liens before the respondent signed the final invoices, it did not comply with the Act and the liens were thus not valid. Kramer's liens registered in Alberta were valid. Saskatchewan law applied to determine the validity of the liens as Saskatchewan law was the lex situs. The liens were valid in Saskatchewan. According to Saskatchewan law, Alberta law governed to determine the continuing validity, perfection and the effect of perfection or non-perfection and priority of the Kramer liens as Alberta was the jurisdiction where the parties understood that the vehicles would be kept. As Kramer registered financing statements in Alberta within 21 days after surrendering possession of the vehicles, its liens were valid and had been perfected. As there were no charges, liens or encumbrances that had arisen after Kramer surrendered possession of the vehicles and before it had registered its lien interest in Alberta, Kramer retained its priority over the vehicles in question.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02

Garage Keepers' Lien Act, RSA 2000, c. G-2, s. 1(d), s. 1(h), s. 2(1), s. 2(3), s. 3(1)

Personal Property Security Act, RSA 2000, c P-7, s. 1(1)(tt), s. 4(a), s. 5, s. 5(2), s. 32

Personal Property Security Act, 1993, SS 1993, c P-6.2, s. 5, s. 6, s. 7, s. 9(2), s. 10(1)

Counsel:

Robert Millar, for Applicant Fountain Tire Mine Services Ltd.

Terrence Warner, for the Applicant Kramer Ltd.

Walker W. MacLeod, for the Respondent GE Capital Equipment Financing G.P.

Reasons for Judgment

K.D. YAMAUCHI J.:--

I. Introduction

1 On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") applied for a stay of proceedings against it under section 11.02 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. This Court granted that order ("Initial Order") in *CCAA* action number 1003-05560, and extended the stay of proceedings from time to time by a number of subsequent orders.

2 The history and other background information concerning this Court's handling of the Cow Harbour matter is in its decision reported as ***Royal Bank of Canada v. Cow Harbour Construction Ltd***, 2010 ABQB 637, 504 AR 319, leave to appeal den'd ***De Lage Landen Financial Services Canada Inc v. Royal Bank of Canada***, 2010 ABCA 394, 499 AR 198. The present decision deals exclusively with applications by Fountain Tire Mine Services Ltd. ("Fountain Tire") and Kramer Ltd. ("Kramer"), in which they claim that they have valid garage keepers' liens (collectively, the "Liens").

3 Fountain Tire and Kramer (collectively, the "Lien Claimants") registered the Liens pursuant to the *Garage Keepers' Lien Act*, RSA 2000, c G-2 [*Act*] against equipment that Cow Harbour owned or leased. The Lien Claimants registered notice of their Liens at the Alberta Personal Property Registry ("Alberta PPR").

4 This Court eventually appointed PricewaterhouseCoopers Inc. as receiver and manager of Cow Harbour's assets, property and undertaking ("Receiver"). The Receiver sold most of Cow Harbour's assets to a third party, but retained an amount representing the Liens, pending this Court's determination of their validity.

5 GE Canada Equipment Financing G.P. ("GE"), which held general security over Cow Harbour's assets, property and undertaking, challenges the validity of the Liens.

6 This Court will outline the specific fact situation relating to each of the Lien Claimants' claims later in these Reasons, but first it is useful to provide the legislative and jurisprudential background that will guide this Court through its reasoning.

II. Legislation and Case Law

7 The *Act* provides:

> 2(1) In addition to every other remedy that a garage keeper has for the recovery of money owing to the garage keeper for
>
> (a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or
> (b) the price of accessories or parts furnished for a motor vehicle, farm vehicle or part of a motor vehicle or farm vehicle,
>
> a garage keeper who is entitled to payment of a sum for the storage, repair or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle or part of it or the farm vehicle or part of it for the sum to which the garage keeper is entitled.
>
> (2) No garage keeper is entitled to a lien under this Act for the price of fuel, oil or grease furnished for a motor vehicle or farm vehicle.
> (3) No garage keeper is entitled to a lien under this Act unless the garage keeper retains possession of the motor vehicle or farm vehicle or the garage keeper obtains from
>
> (a) the person who authorized the storage, repair or maintenance or the person's authorized agent, or
> (b) the person who ordered that accessories or parts be furnished for the motor vehicle or farm vehicle or the person's authorized agent,
>
> an acknowledgment of indebtedness by requiring that person or that person's agent to sign an invoice or other statement of account.
>
> 3(1) A lien referred to in section 2 terminates on the 21st day after the day
>
> (a) on which possession of the motor vehicle or farm vehicle is surrendered to the owner or the owner's agent,
> (b) on which repairs were completed to the motor vehicle or farm vehicle or any part of the motor vehicle or farm vehicle if the vehicle was not at the time of repair in the possession of the garage keeper, or
> (c) on which the accessories or parts for the motor vehicle or farm vehicle were furnished,
>
> as the case may be, unless on or before the 21st day the garage keeper registers in the Registry a financing statement indicating a claim of lien on the motor vehicle or farm vehicle.

8 Two definitions contained in the *Act* s 1 are of some importance as well. Those are:

(d) "garage keeper" means a person who keeps a place of business for the housing, storage or repair of a motor vehicle or farm vehicle and who receives compensation for that housing, storage or repair;

(h) "Registry" means the Personal Property Registry under the *Personal Property Security Act*.

9 A garage keeper, at common law, has a recognized interest in a motor vehicle or farm vehicle ("Vehicle") while the garage keeper maintains possession of the Vehicle. In Alberta, if the garage keeper surrenders possession of the Vehicle to the person who authorized the repair or that person's authorized agent (the "Owner") or some other person, the garage keeper retains an interest in the Vehicle only if the garage keeper obtains an acknowledgment of indebtedness from the Owner.

10 As stated in the *Act*, the lien terminates on the 21st day after the garage keeper surrenders possession of the Vehicle, or after the garage keeper completes the work if the Vehicle was not in the garage keeper's possession at the time it undertook the work, unless the garage keeper registers a financing statement at the Alberta PPR.

11 Ronald C.C. Cuming, Catherine J. Walsh and Roderick J. Wood, in their text *Personal Property Security Law* (Toronto: Irwin Law, 2005) refer to the garage keeper's interest in those circumstances as an "artificer's lien" (at p 408) and to the garage keeper's lien (and others that the common law and statute create) as "non-consensual security interests" (at p 406).

12 The Alberta *Personal Property Security Act*, RSA 2000, c P-7 [*AB PPSA*] does not apply to liens, except as otherwise provided in that statute (*AB PPSA* s 4(a)). As the definition of "security interest" in *AB PPSA* s 1(1)(tt) does not expressly include liens, liens are not considered security interests for purposes of that statute. However, the *AB PPSA* governs the priority of secured interests and liens. Section 32 of the *AB PPSA* states:

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

III. The Fountain Tire Liens

A.Background and Facts

13 Fountain Tire provided Cow Harbour with industrial tires and performed various services in relation to those tires.

14 Cow Harbour and Fountain Tire began dealing with each other in or around January 2009, at which time Cow Harbour agreed to purchase tires from Fountain Tire at predetermined prices. Fountain Tire was to provide Cow Harbour with product management and support in relation to the tires Cow Harbour purchased, pursuant to an "enhanced services agreement." The parties began operating under the "enhanced services agreement" in or around the first half of September 2009. The parties confirmed their relationship by contract dated October 15, 2009 ("Service Agreement"). The support that Fountain Tire was to provide to Cow Harbour was outlined in the Service Agreement, and included the provision of garage and mobile repair facilities and technicians, and the operation of a maintenance and repair facility for Cow Harbour in Fort McMurray.

15 Pursuant to the Service Agreement, Fountain Tire was to provide Cow Harbour with updated price lists in advance of any increase or decrease in the price of its tires. Fountain Tire issued the price lists to Cow Harbour from time to time.

16 In accordance with the Service Agreement, Fountain Tire established an on-site garage facility for Cow Harbour at the Aurora mine in Fort McMurray, where Cow Harbour was then operating. As well, it established a mobile service facility to service Cow Harbour's equipment that was operating at other remote sites. These facilities allowed Fountain Tire to provide Cow Harbour with 24-hour site supply and service, in order to prevent any needless delay in the work on the mine site where Cow Harbour was then operating. In addition, they allowed Cow Harbour to satisfy itself that Fountain Tire was performing its services efficiently and safely, as Cow Harbour previously had suffered a fatal industrial accident when one of its workers was killed while installing and inflating a tire.

17 Cow Harbour and Fountain Tire set up a document processing and billing system ("Document Processing System"), designed to facilitate Cow Harbour's accounting requirements. The price lists were the foundation on which the Document Processing System was built.

18 In an affidavit sworn on September 7, 2011, Mr. Charles Kennedy Huntingford, Fountain Tire's Vice-President and General Manager, described how the Document Processing System worked:

> (a) Fountain Tire would replace tires as a result of tire failure or, more commonly, through regular service and inspection.
>
> (b) A tire replacement was initiated by an "OTR Work Order" that a representative of Cow Harbour (usually Mr. Byron Hutching, Cow Harbour's Superintendent of Equipment Maintenance, or Mr. Paul Brown) would sign and provide to Fountain Tire. Cow Harbour would then deliver its vehicle to the Fountain Tire on-site garage or mobile service site and the tire replacement would occur.
>
> (c) Once Fountain Tire completed the service, it would issue a "pre-invoice" setting out the amount that Cow Harbour owed it for the inventory that it provided to Cow Harbour, in accordance with the predetermined pricing set out in the price lists.
>
> (d) The pre-invoices stated, "[a]n express mechanic's lien is hereby granted on above vehicle to secure the amount of repairs hereto."
>
> (e) After Fountain Tire issued the pre-invoice, generally, it would register a garage keepers' lien in the Alberta PPR.
>
> (f) Cow Harbour processed its accounts by issuing purchase order numbers for the tires it requested. Cow Harbour provided Fountain Tire with purchase orders containing the purchase order numbers <u>after</u> Fountain Tire supplied the tires.
>
> (g) On receipt of notification of the purchase order numbers, Fountain Tire would issue a final invoice to Cow Harbour, incorporating the purchase

> order number information to accord with Cow Harbour's internal accounting system. Cow Harbour's agent would then sign the final invoice.

The parties presented no evidence to this Court as to when Cow Harbour's agent actually signed the final invoices.

19 The parties exchanged all of the documents in the Document Processing System electronically, due to the remote nature of the work sites and the respective locations of the Cow Harbour and Fountain Tire offices.

B.Issue

20 The issue that this Court must address is whether the Document Processing System fulfilled the requirements of the *Act* s 2(3).

C.Analysis

1. Interpretation of the Act

21 In ***Public Finance Corp v. Edwards Garage Ltd*** (1957), 22 WWR 312 at para 15 (Alta SC) [***Public Finance***], Greschuk J found that in passing the *Garagemen's Lien Act*, RSA 1942, c 233, the Alberta legislature "provided garagemen with a new statutory lien." Presumably, he meant that a garage keeper's lien was statutorily created, unlike a possessory lien which existed as a result of the common law. As the Alberta legislature conferred a statutory right on the garage keeper, Greschuk J observed (at para 15) that:

> ... it seems neither unjust nor inconvenient to exact a rigorous observance that the formalities and forms shall be complied with as essential to the acquisition of the right or authority conferred and this was probably the intention of the legislature.

22 The version of the *Garagemen's Lien Act* that Greschuk J was considering required the garage keeper to complete and file its lien claim in a prescribed form. The garage keeper in that case had failed to include in its filed form of lien the statement: "The address for service of the claimant is," and had failed to insert its address for service after those words, although its address for service was included in the top part of the form.

23 Greschuk J found that while *The Interpretation Act* s 36, as it was then, permitted slight deviations which did not affect the substance or were not calculated to mislead, the omission in the case before him was not a slight deviation or a minor defect or omission. Furthermore, he stated (at para 16) that: "[t]here is no provision in the Act which states that a substantial compliance with the Act or the forms shall be a sufficient compliance with the Act or the forms" (see also ***Delta Valley Landscaping & Lawn Services Ltd v. Twin Deer Parts & Sales Ltd***, 2000 ABQB 874 at para 16, 276 AR 191; ***Mountain School District No 28 v. General Brake & Clutch Service Ltd***, [1979] 2 WWR 284 (Man QB)).

24 In 1960, subsequent to ***Public Finance***, the Alberta legislature added a provision to the *Garagemen's Lien Act*, which provided that: "... substantial compliance with the requirements of the form is sufficient ..." As a result, in ***R Angus (Alta) Ltd v. Union Tractor Ltd*** (1967), 61 WWR 603 (Alta DC) [***R Angus***], Haddad J found that, in circumstances similar to those in ***Public Finance***, the garage keeper substantially had complied with the requirements of the form.

25 The Alberta Court of Appeal in ***Ed Miller Sales & Rental Ltd v. Canadian Imperial Bank of Commerce (CIBC)*** (1987), 51 Alta LR (2d) 54 at para 4 [***Ed Miller Sales***] held that there is a "clear legislative intention that the *Act* is not to be strictly construed against the garageman." The context in which that statement was made is important, however. The court was considering the amendment to the *Garagemen's Lien Act* made in response to Greschuk J's strict interpretation in ***Public Finance*** of the form requirements under the *Act*. The Court of Appeal in ***Ed Millar Sales*** went on to say at para 7 that: "[w]hen a statute requires substantial compliance it requires the doing of those things which are of real importance, of substance, having regard to the object and scheme of the Act."

26 The present *Act* does not have the same or a similar curative provision as the one the courts in ***R Angus*** and ***Ed Millar Sales*** considered. Nor does the current version of the *Act* have any form that a garage keeper must complete before it is entitled to maintain its lien. The garage keeper simply needs to comply with the *Act* ss 2(3) and 3(1).

27 How should this Court interpret the *Act* s 2(3)? In ***R Angus*** at para 29, Haddad J quoted the following passage from *Maxwell on Interpretation of Statutes*, 11th ed (London: Sweet and Maxwell, 1962) at 18:

> The literal construction then, has, in general, but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider, according to Lord Coke (***Heydon's Case*** [1584] 3 Co Rep 7a, 76 ER 637): 1. What was the law before the Act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy Parliament has appointed; and 4. The reason for the remedy.

28 In ***Calgary (City) Regional Planning Commission v. Alberta (Planning Board)*** (1986), 46 Alta LR (2d) 245 at para 16 (CA), the court instructed that:

> We should try to make statutes work by determining the object or scheme of the Act and then by giving the words the meaning which best advances that object or scheme, provided only that the actual words under review can reasonably bear that interpretation. [Citations excluded.]

2. Purpose of the Act

29 To answer the questions that Lord Coke posed in ***Heydon's Case***, the law before the Alberta legislature passed the *Act* and its predecessor was that for the garage keeper to maintain a lien, it had to retain possession of the Vehicle in question. If the garage keeper parted with its possession of the Vehicle, it would lose its "security" over the Vehicle and would have to pursue the Owner as an unsecured claimant. The Alberta legislature passed the *Act* and its predecessor to respond to this "mischief or defect."

30 In ***R Angus***, Haddad J commented (at para 32) that he could "conceive that it could be harmful or impractical in many cases to hold a machine required in industry, or by a person in his trade or calling." In ***Ed Miller Sales***, the Alberta Court of Appeal agreed with this observation (at para 4).

31 Ferg J opined in ***Prairie Mack Sales (1990) Ltd v. Dueck Builder Mart*** (1992), 12 CBR (3d) 1 at para 11 (Man QB) that the Manitoba equivalent of the *Act* was passed, "... not to accommodate garage keepers, but rather the public and commercial users of a garage." As the Alberta Court of Appeal stated in ***Ed Miller Sales*** at para 3, "[a]s this action places the vehicle back in the hands of an apparent owner, a mechanism to protect third parties is necessary and the registration system is provided to that end."

32 One of the reasons why the *Act* requires the garage keeper to register a financing statement at the Alberta PPR is to give the world notice of its lien. Cormack J observed in ***Union Tractor Ltd v. Black Cat Construction and Northwest Acceptance Corporation*** (1984), 6 DLR (4th) 195 at para 28 (Alta QB), that the description of the chattel is required to enable sufficient identification of it to be displayed in the Alberta PPR so as to fix anyone proposing to purchase or encumber the chattel with notice of the lien.

33 This Court's view is that the Alberta legislature passed the *Act* to accommodate all of these interested parties: the garage keeper wants to maintain its "security;" the Owner wants to use its Vehicle; and third parties interested in purchasing the Vehicle or obtaining security over it want to know about any liens on the Vehicle. By virtue of *AB PPSA* s 32, registration also is intended to assist parties and the courts in determining the priority that should be accorded to the lien.

3. When must the garage keeper obtain the acknowledgement of indebtedness?

34 The garage keeper must obtain an acknowledgement of indebtedness from the Owner. Section 2(3) of the *Act* does not set out a time limit within which the garage keeper must do so. In ***Union Tractor Ltd v. FMX Construction Ltd*** (1992), 126 AR 321 at paras 40 and 41 (QB) [***FMX***], Master Funduk cautioned:

> One should not confuse practice with interpretation. It is usually the practice of garagemen to get the signed acknowledgment before giving up possession of the vehicle ... Keeping possession unless an acknowledgment is first given gives the garageman leverage. The possession is the leverage.
>
> If the garageman gives up possession before obtaining an acknowledgment he loses his leverage. He must then rely on the basic honesty of the owner to give a signed acknowledgment even though the owner already has possession. If the owner refuses to give a signed acknowledgment the garageman will not be entitled to a lien.

35 Master Funduk went on to say (at para 46) that even though a garage keeper, at its own peril, does not obtain a signed acknowledgement of indebtedness before it gives up possession, its lien does not disappear "as long as it is gotten in time to let the garageman register a lien" (see also ***Craddock Trucking Ltd v. Leclair*** (1995), 28 Alta LR (3d) 145 at para 22 (Master) [***Craddock Trucking***]).

36 Master Breitkreuz agreed with this statement, commenting in ***Craddock Trucking*** at para 22:

> The final issue to be addressed is whether the requirements of a written acknowledgment were complied with. The law in this area has been canvassed by Master Funduk in an unreported decision: ***Union Tractor Ltd. v. FMX Construction Ltd.*** ... It is clear that the acknowledgment need not be obtained at the time the work order is prepared nor at the time possession of the vehicle is released to the owner. The acknowledgment must be obtained before the garageman's lien is registered at the [Alberta PPR]. [Citation and emphasis added.]

37 Section 2(3) of the *Act* provides that the garage keeper must obtain "an acknowledgment of indebtedness by requiring [the person who authorized the storage, repair or maintenance or the person's authorized agent] ... to sign an invoice or other statement of account."

38 Master Funduk in ***Landlink Freight Inc v. Timberland Forest Products Ltd*** (1998), 230 AR 143 (Master) [***Landlink Freight***], said that it was not sufficient that the owner had signed an authorization to do the work, as this did not comply with the wording of the *Act* s 2(3). He observed (at para 29) that, "[a]sking someone to do something is not the same as 'signing an invoice or other statement of account.' The subsection is very plain." Master Funduk was responding to a statement made by another Master in an earlier decision, ***Crawler Sales Ltd v. Hoe-Cat Consulting Ltd*** (1991), 83 Alta LR (2d) 280 at para 5 (Master), who was of the view that by not finding a signature on an authorization to do the work to be an acknowledgement of indebtedness:

> ... would be an unreasonable straining of the statute and an unrealistic distortion of the realities of commercial practice to interpret the respondent's signature as less than an acknowledgment of indebtedness. ... I think the proper interpretation are the ordinary rules of construction which give practical meaning to the legislation in the context of commercial reality.

39 Master Funduk went on to say in ***Landlink Freight*** at paras 20 and 21 that, "'[c]ommercial practice' does not and cannot dictate how legislation is to be interpreted ... What is unrealistic about garagemen being required to do it right?"

40 In one of his previous decisions, ***Leduc Farm & Truck Supply Ltd v. High Arctic Marketing Corp Ltd,*** [1982] AJ No 288 (QB Master) (QL) [***Leduc Farm & Truck***], which he quoted in ***Landlink Freight*** at para 22, Master Funduk stated at paras 2, 6 and 7:

> ... It is not disputed that the charges for the work to be done were not determined at that time but were determined by the Applicant after the work was done and were then inserted in the form in the appropriate places.
>
> ...
>
> In my view, what was signed by the Respondent was merely an authorization to do the work described on the form. It is not an acknowledgment of the indebtedness. The amount of the indebtedness depends on what work is done. This in turn depends on both the materials supplied and the time spent in doing the work. At

> the time of the authorization there is no indebtedness. The indebtedness does not arise until the work is first done.
>
> If the authorization was an acknowledgment of the indebtedness the owner could not later, once the work was done and the charges ascertained, object to the charges. The authorization would then become a *carte blanche* to the garagemen to charge whatever he wished. If the authorization was an acknowledgment of the indebtedness the owner would be liable to pay the charges even though the work done might be covered totally by warranty. Such would be the results of considering the authorization to do the work as an acknowledgment of the indebtedness. [Emphasis added.]

41 Master Funduk took this position again in ***Union Tractor Ltd v. Horseshoe Contracting Ltd***, 1999 ABQB 1015 at para 33 (Master), rev'd on other grounds (2000), 22 CLR (3d) 269 (Alta QB), rev'd 2002 ABCA 259 [***Horseshoe Contracting***]. On appeal to the Court of Queen's Bench, Clarke J held (at para 18) that he did not need to deal with the difference of opinion of the Masters, as the authorized signature in the case before him "was put on the work orders after the work was completed and after an approximate dollar value of the work was inserted on the document." The real issue was the location of the signature and the intention behind it. Clarke J determined that there had been compliance with the *Act*.

42 On further appeal, the Court of Appeal in ***Horseshoe Contracting*** held that the Owner must give the garage keeper the acknowledgement of indebtedness after the garage keeper has determined the amount of obligation. Signatures that authorize work or that the Owner provides before the garage keeper has determined the amount of the obligation are not compliant with the *Act*. The court stated at para 3:

> It is settled law in Alberta that to maintain a valid lien in the absence of continued possession, the garageman must first obtain "an acknowledgment of indebtedness by requiring [an authorized person] to sign an invoice or other statement of account." The acknowledgment must be given after the amount of the obligation has been determined and entered onto the document. Signatures authorizing work or otherwise given before the amount of the obligation has been determined do not comply with the Act. [Emphasis added.]

43 It went on to say at para 6:

> ... compliance with the Act is achieved where it is determinable on accepted evidence that the signature provided relates to and was furnished for the purpose of acknowledging indebtedness in the specified amount. Failure to affix one's signature on the specified line does not result in automatic invalidation of the lien. The relevant inquiry will always be whether the signature represents an acknowledgment of indebtedness within the meaning of the Act. There are cases where substance must override form. This is one of them. [Emphasis added.]

(See also ***Octane Energy Services Ltd (Companies' Creditors Arrangement Act)***, 2006 ABQB 65 [***Octane Energy***], in which Romaine J noted (at para 14) that the signatures in issue before her had been endorsed after the amount of indebtedness had been determined).

44 GE, in the present case, submits that the Court of Appeal's comment in ***Horseshoe Contracting*** at para 3 as to what was "settled law" was the *ratio decidendi* of that decision. This Court is of the view that the *ratio decidendi* is contained in ***Horseshoe Contracting*** at para 6, quoted above, and that the Court of Appeal's comments in para 3 are *obiter dictum*.

45 The duty of this Court, then, is to determine whether signatures authorizing work or otherwise given before the amount of the obligation has been determined comply with the *Act*. The issue is critical in this case because Cow Harbour signed the OTR Work Orders, but did not sign the pre-invoices which Fountain Tire issued after it completed the work and which set out the amount Cow Harbour owed. Fountain Tire registered financing statements indicating a claim of lien at the Alberta PPR <u>before</u> Cow Harbour signed the final invoices (emphasis added).

46 Fountain Tire points out that Romaine J in ***Octane Energy*** at para 15 suggested that in the event of ambiguity, a court may consider the surrounding circumstances to determine whether an Owner has acknowledged the indebtedness. Romaine J was dealing with a situation where the garage keeper's invoice contained two boxes; one that authorized the work, and the other that acknowledged the indebtedness. The Owner signed the wrong box, *viz.*, the "authorization to do the work" box. Romaine J found at para 14 that: "the signatures were endorsed <u>after</u> the amount of indebtedness had been determined" (emphasis added). In her view, given the timing of the signatures and the circumstances that led to them being endorsed on the invoices, it was reasonable to infer that the signatures were in substance acknowledgements of indebtedness. While it is not clear from her decision precisely when the owner signed the invoice, it appears to have been "shortly after the equipment was released" (at para 3), but "within 21 days of releasing possession of the [equipment]" (at para 5).

47 In the present case, the parties conceded that Cow Harbour signed the invoices not only after Fountain Tire did the work and released the vehicles to Cow Harbour, but also after Fountain Tire registered the garage keeper's liens at the Alberta PPR.

48 Fountain Tire submits that the *Act* contains no prohibition against an Owner giving an acknowledgement of indebtedness before the garage keeper performs the work. That is not what the *Act* says. Section 2(3) specifies that the garage keeper will retain its lien only if it obtains from the person who "authorized" the work an acknowledgement of indebtedness by requiring that person to sign an invoice or other statement of account. In other words, the Owner must first authorize the work, the work must then be done and the Owner must then acknowledge the indebtedness. The Owner cannot acknowledge the indebtedness before the work is done as there is not yet any indebtedness.

49 Fountain Tire maintains that Cow Harbour acknowledged its indebtedness when it issued the purchase orders to Fountain Tire. A purchase order is not an invoice or a statement of account. Even if it is, Cow Harbour's representative did not sign the purchase orders.

4. Conclusions

50 In summary, this Court finds that:

(a) a garage keeper is entitled to claim a lien through continuous possession of the Vehicle over which it completed repairs (*Act* s 2(1));

(b) a garage keeper will maintain its lien on releasing possession of the Vehicle to the Owner, provided the garage keeper obtains an acknowledgement of indebtedness from the Owner by having the Owner sign an invoice or other statement of account (*Act* s 2(3));
(c) a garage keeper need not obtain the acknowledgement of indebtedness immediately on surrendering the Vehicle to the Owner (***FMX*** at para 46; ***Craddock Trucking*** at para 22);
(d) a garage keeper must obtain the acknowledgement of indebtedness after the amount of the indebtedness is determined and entered onto the invoice or statement of account (***Horseshoe Contracting***, citing to the CA decision at para 3; ***Octane Energy*** at para 14);
(e) a garage keeper cannot obtain the acknowledgement of indebtedness before it completes the work, or in anticipation of the work being done, by having the Owner sign an authorization to do the work, as there is not yet any indebtedness (***Horseshoe Contracting***, citing to the CA decision at para 3; ***Leduc Farm & Truck Supply***; ***Landlink Freight*** at para 20). The garage keeper must obtain the acknowledgement of indebtedness after it completes the work;
(f) a garage keeper must register notice of its lien at the Alberta PPR after it obtains the acknowledgement of indebtedness from the Owner, but before the 21st day after the day on which it surrenders possession of the Vehicle to the Owner (*Act* s 3(1); ***FMX*** ar para 46; ***Craddock Trucking*** at para 22).

51 This Court concludes that any of Fountain Tire's liens that do not fall within those parameters are invalid, as a result of its failure to comply with the requirements of the *Act*.

52 In view of this conclusion, it is not necessary for this Court in this case to rule on whether electronic signatures would be sufficient to comply with the signature requirement contained in the *Act* s 2(3). Nor is it necessary to determine who signed the final invoices and when that person signed them, as the parties agree that Fountain Tire registered notice of its lien at the Alberta PPR before the final invoices were signed.

IV. The Kramer Liens

A.Background and Facts

53 Kramer is a Caterpillar distributor and service provider with facilities in Regina and Saskatoon, Saskatchewan. From time to time, Kramer leased Vehicles to Cow Harbour. As well, Kramer provided mechanical services to Cow Harbour in respect of certain Vehicles. If a Vehicle required service, Cow Harbour would transport the Vehicle to Kramer at its Saskatoon location. After Kramer completed the work, it would transport the Vehicle back to Fort McMurray and deliver the Vehicle to Cow Harbour. Kramer's practice was to have Cow Harbour sign an acknowledgment of its obligations, generally by signing a copy of the invoice for the work done. On occasion, Cow Harbour would sign the invoice before the Vehicle actually arrived in Fort McMurray, depending on when Kramer's sales representative met with a Cow Harbour representative.

54 Kramer would register a financing statement at the Alberta PPR, pursuant to the requirements of the *Act* s 3(2). It did so before the expiry of 21 days from the date it released the Vehicle to Cow Harbour at Fort McMurray.

55 As part of the *CCAA* proceedings, the Receiver sold ten Vehicles over which Kramer asserts a lien claim. All of the creditors which had competing interests in those Vehicles consented to and approved of Kramer's lien claims, except for GE. GE takes the position that Kramer was required to register notice of its garage keepers' liens at the Saskatchewan Personal Property Registry pursuant to the Saskatchewan *Commercial Liens Act*, SS 2001, c C-15.1 [*SK Act*], rather than at the Alberta PPR. This Court attaches the relevant portions of the *SK Act* to these Reasons as Appendix A. GE argues that the *Act* does not apply, since Kramer performed the work on the Vehicles in Saskatchewan. GE maintains that Kramer's lien claims were not properly preserved when it released possession of the Vehicles to Cow Harbour at Fort McMurray.

B.Issue

56 Neither Kramer nor GE disputes that Kramer's liens arose when it began to perform the work on Cow Harbour's Vehicles. Both the *Act* s 2(1) and the *SK Act* s 5 connect the creation of a lien with the performance of a service.

57 Kramer performed the services in Saskatchewan. Therefore, Kramer's liens arose in Saskatchewan. Kramer could have maintained its liens by maintaining possession of the Vehicles. Instead, it returned the Vehicles to Cow Harbour and registered financing statements in the Alberta PPR claiming liens on the Vehicles.

58 The parties do not dispute that Cow Harbour authorized the work that Kramer performed and acknowledged its indebtedness before Kramer registered the financing statements in the Alberta PPR.

59 The only issue which this Court must address is whether the liens were valid, given their registration at the Alberta PPR. To determine that issue, this Court must consider which jurisdiction's law governs the validity of Kramer's liens?

C.Analysis

1. *Which jurisdiction's law governs the validity of Kramer's liens?*

60 Several courts have held that liens generally create interests in property. In ***Suss Woodcraft Ltd v. Abbey Glen Property Corp***, [1975] 5 WWR 57 at 69 (Alta QB), McDonald J held that a person who has a builders' lien acquires an interest in the land on which that lien is registered. Similarly, in ***Superior Modular Homes Inc v. Canada***, [1997] TCJ No 1336 (TCC) (QL), Bowman J determined at para 6 that:

> ... a mechanics' lien, which under the provincial legislation arises when the work is begun or the material furnished, is an interest in land. It permits the lienholder to enforce his claim out of the land. I have no difficulty in concluding that a lienholder has an interest in the land to which the lien attaches until the claim is satisfied.

As well, in ***R. v. 1431633***, 2010 ONSC 266, 250 CCC (3d) 354, Molloy J acknowledged that a construction lien is an interest in property (at paras 31-34).

61 These cases refer to liens creating an interest in land because the liens arose in relation to work on land. A garage keeper's lien arises in relation to a Vehicle. When the law operates to grant the garage keeper a lien, the Owner's bundle of rights in relation to the Vehicle is reduced by the lien holder's rights. This Court finds, therefore, that a garage keeper's lien creates an interest in the Vehicle.

62 The Vehicles over which Kramer claims an interest by virtue of its liens are moveables. The location of a moveable is determined by the *lex fori*, which is the domestic law of the forum: Lawrence Collins, ed., *Dicey, Morris and Collins the Conflict of Laws* (London: Sweet & Maxwell, 2006) at p 33. See also ***Macmillan Inc v. Bishopsgate Investment Trust Plc (No. 3)***, [1995] E.W.J. No. 5017, [1995] 3 All ER 747 at p 760, [1995] 1 WLR 978 (Ch D). The *lex fori* includes the law which furnishes the conflict of laws rules that the court will apply (Janet Walker and Jean-Gabriel Castel in *Castel & Walker Canadian Conflict of Laws*, 6th ed. looseleaf (Markham: LexisNexis Canada, 2005) at p 1-11).

63 The validity of a transfer of an interest in moveable property, or the creation of a valid right in a moveable, is governed by the *lex situs*, the law of the place where the property is located at the time of the transfer. In ***Canadian Deposit Insurance Corp v. Canadian Commercial Bank*** (1994), 121 DLR (4th) 360 at para 13, 161 AR 121 (QB) (cited to DLR)) [***CDIC***], Wachowich ACJ, as he then was, stated:

> In general, the validity of a transfer of an interest in moveable property, and the effect of that transfer on the proprietary rights of the parties, are governed by the law of the place where the moveable is at the time of the transfer -- the *lex situs*. ... If, under the *lex situs*, a valid right in the collateral has been created, then the general principle is that such a proprietary right will be recognized, and may be enforced, unless it is opposed to some rule of domestic policy or procedure which prevents recognition of the right. [Citations excluded.]

64 ***International Harvester Company of Canada Ltd v. Canadian Kenworth Ltd*** (1962), 40 WWR 126 (BCSC) [***International Harvester***] involved a situation similar to the one before this Court. A garage in Lethbridge, Alberta made repairs to a Vehicle that was licensed and registered in British Columbia. After the garage keeper completed the repairs, the Vehicle was returned to British Columbia. The garage keeper sought to enforce its lien under the British Columbia *Mechanics' Lien Act*, RSBC 1960, c 238, not *The Garagemen's Lien Act* RSA 1955, ch 128, which was in force in Alberta at the time. The court decided that the lien arose in Alberta and that the *lex situs*, the law of Alberta, applied. It refused to apply the provisions of the British Columbia statute, stating at para 4:

> ... [t]he province of Alberta has seen fit to provide by statute under what conditions a person may be entitled to a lien for repair work done on a motor vehicle, and also to provide for the remedies available to realize on that lien. I cannot see how this entitles the garageman to invoke the provisions of a *Mechanics' Lien Act* in another province simply because the vehicle is registered or licensed in that other province. In my opinion the operation of the *Mechanics' Lien Act* of this province must be regarded as being confined to the territorial limits of the

> province. It is enacted to provide for the procedure to be followed respecting liens which have arisen within this province. There is nothing in the Act to show an intent that it should apply to liens arising elsewhere.

It should be noted that ***International Harvester*** was decided before the Alberta legislature enacted the *AB PPSA*.

65 The *lex situs* in the present case is Saskatchewan, as Saskatchewan was where the Vehicles were located when Kramer performed the mechanical services on them. According to the choice of laws rule, Saskatchewan law applies to determine the validity of the liens.

66 Pursuant to the *SK Act* s 5, the liens were created on Kramer's performance of the services on the Vehicles. They were enforceable since Cow Harbour acknowledged an obligation to pay for the services giving rise to the lien in a signed writing that included a description of the goods that were subject to the lien (*SK Act* s 6(1)).

67 Section 24 of the *SK Act* provides that:

> 24. Except as otherwise provided in this Act, subsection 2(2), sections 5 to 8, 17 and 18, Parts IV and v. and sections 65, 67 and 68 of *The Personal Property Security Act, 1993* apply, with any necessary modification, to a lien created by this Act as though the lien were a security interest.

68 Section 6 of the Saskatchewan *Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*SK PPSA*] states:

> 6. Subject to section 7, where:
>
> (a) the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time when the security interest attaches that the goods will be kept in another jurisdiction; and
>
> (b) the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches;
>
> the validity, the perfection and the effect of perfection or non-perfection and priority of the security interest are determined by the law of the other jurisdiction. [Emphasis added.]

69 The effect of this provision is that the continuing validity, perfection and the effect of perfection or non-perfection and priority of the Kramer liens are to be determined by the law of the jurisdiction where the parties understood that the Vehicles would be kept. In this case, that jurisdiction is Alberta. Therefore, according to Saskatchewan law, Alberta law governs those issues.

2. Are the liens valid?

70 The liens were validly created in Saskatchewan. However, according to *SK PPSA* s 6, the validity of the liens is to be determined by the law of Alberta. The liens comply with the *Act* s 2(3) as Kramer obtained an acknowledgment of indebtedness from Cow Harbour before giving up possession of the Vehicles. Section 3(1) of the *Act* provides that a lien terminates on the 21st day after possession of a Vehicle is surrendered to the Owner unless on or before the 21st day, the garage keeper registers a financing statement in the Alberta PPR claiming a lien on the Vehicle. In this case, Kramer registered financing statements within the time limit prescribed by the *Act* s 3(1).

71 Furthermore, the legislation in Alberta that deals with the concept of "perfection" and its effect is the *AB PPSA*. Section 5 of the *AB PPSA* states, in part:

> 5(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province
>
> (a) not later than 60 days after the goods are brought into the Province,
> (b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or
> (c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached,
>
> whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer's or lessee's interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.
>
> (3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected in the Province under this Act.
> (4) If a security interest referred to in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act. [Emphasis added.]

72 Were the liens perfected under the laws of Saskatchewan when the equipment came into Alberta? Section 9(2) of the *SK Act* states that "[p]ossession of goods by a lien claimant or by a person acting on behalf of a lien claimant perfects a lien on the goods." Kramer had possession of the Vehicles when it brought them back to Alberta. As a result, perfection of the liens continued if Kramer registered the liens in Alberta not later than 60 days after Kramer brought the Vehicles into Alberta, not later than 15 days after the day Kramer had knowledge that the goods had been brought into Alberta, or prior to the date that perfection ceased under the law of Saskatchewan, whichever was the earliest. In this case, the earliest of those dates likely was the date that perfection ceased under Saskatchewan law.

73 Section 10(1) of the *SK Act* states that:

> Where a lien is perfected by possession, returning the goods to the control of the person who requested the services does not affect the perfection of the lien if the lien claimant registers a financing statement pursuant to subsection 9(4) respect-

> ing the goods within the first 15 days after returning control of the goods to that person.

74 Since Kramer did not register financing statements in the Saskatchewan Personal Property Registry under *SK Act* s 9(4), perfection of the liens under Saskatchewan law ended when Kramer relinquished possession of the Vehicles to Cow Habour.

75 Perfection of the liens was maintained under Alberta law only to the extent that Kramer met the requirements of the *AB PPSA* s 5(2).

76 Ronald C.C. Cuming and Roderick J. Wood, in 4th ed., *Alberta Personal Property Security Act Handbook* (4th ed) (Scarborough Ont.: Carswell, 1998) comment at 105:

> ... Failure to perfect under the *PPSA* within the periods specified in section 5(2) results in the foreign security interest being treated as unperfected from the moment the collateral comes into the province.

77 However, even though perfection of the liens may not have been maintained uninterrupted, Kramer could still perfect the liens under Alberta law (*AB PPSA* s 5(3)). Like the Saskatchewan legislation, the *AB PPSA* s 19 provides that a security interest is perfected when it has attached and all steps required for perfection under that statute have been completed, regardless of the order of occurrence. According to *AB PPSA* s 25, registration of a financing statement perfects a security interest in collateral.

78 As provided in the *SK PPSA* s 6, the priority of the liens is determined under Alberta law.

3. Conclusions

79 As Kramer registered financing statements at the Alberta PPR within 21 days after surrendering possession of the Vehicles to Cow Harbour, its liens are valid pursuant to the *Act* and have been perfected pursuant to the *AB PPSA*. Their priority will depend on when Kramer registered the financing statements. If it registered them before it surrendered possession of the equipment to Cow Harbour, the liens will be considered to have been continuously perfected for purposes of determining priority.

80 If Kramer registered the financing statements after giving up possession of the Vehicles, for purposes of determining priority perfection will be considered to have been interrupted between the date when Kramer surrendered possession of the Vehicles to Cow Harbour and the date Kramer registered the financing statements.

81 Priority is governed by the *AB PPSA* s 32, which states that a garage keeper's lien has "priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority." However, the *Act* s 4 also applies. It provides that every lien on a Vehicle under the statute is postponed to an interest in or charge, lien or encumbrance on the Vehicle that is created or arises in good faith and without express notice of the first mentioned lien, and that was created or arose before the registration of a financing statement. The garage keeper's lien is postponed to a security interest taken *bona fide* and without notice <u>in the interim between the garage keeper's lien arising and notice of it being registered</u> (emphasis added). As stated in ***Craddock Trucking*** at para 11:

> ... the priority given to a lien that meets all the requirement of [*AB PPSA*] s. 32 can be lost if "the lien is given by an Act that provides that the lien does not have the priority." This exception would apply, i.e. s. 5 of the ***Garagemen's Lien Act*** [the predecessor of the *Act* s 4] would be triggered, if Paccar's [security] interest arose after the lien claimant surrendered possession of the vehicle and before the lien claimant had registered its interest at the Personal Property Registry.

82 The rationale for this was set forth in ***Craddock Trucking*** at para 8, where the court said:

> ... [T]he lien claimant favoured by [*AB PPSA*] s. 32 is someone who has supplied materials or services that have increased or preserved the value of the collateral, over and above the value that might otherwise have been expected, and it would be giving the owner of the security interest an unjustifiable windfall to allow him to claim the improved property, unencumbered by the lien, while the lien claimant remains unpaid.

83 In the case before this Court, there are no charges, liens or encumbrances that have arisen after Kramer surrendered possession of the Vehicles and before it had registered its lien interest at the Alberta PPSA. Thus, Kramer would retain it priority over the Vehicles in question.

K.D. YAMAUCHI J.

* * * * *

Appendix A

Saskatchewan *Commercial Liens Act*, SS 2001, c C-15.1

The relevant provisions of the *Sk Act* include the following:

> 3(2) A person who, pursuant to the legislation of another jurisdiction in Canada, has a lien on goods for services that he or she has provided in relation to those goods is deemed to have a lien on goods within the meaning of this Act if:
>
> (a) the services were requested by a person:
>
> (i) with an interest in the goods;
> (ii) in possession of the goods; or
> (iii) legally entitled to possession of the goods; and
>
> (b) the lien is registered in a public registry for liens in that other jurisdiction.
>
> 5. A lien attaches to goods on the commencement of the services giving rise to the lien but, until completion of the services, secures only the fair value of the services provided.
>
> 6(1) Subject to subsection (4), a lien is enforceable only where:
>
> (a) the goods are in the possession of the lien claimant; or

(b) the person requesting the services has, at any time:

(i) authorized the services giving rise to the lien in a signed writing that includes a description of the goods that are subject to the lien; or
(ii) acknowledged an obligation to pay for the services giving rise to the lien in a signed writing that includes a description of the goods that are subject to the lien.

(2) For the purposes of clause (1)(a), a lien claimant is deemed not to have possession of goods that are in the apparent possession or control of the person requesting the services or that person's agent.
(3) An acknowledgment of an obligation to pay pursuant to subclause (1)(b)(ii) is without prejudice to the right of the person requesting the services or any other person to dispute the amount the lien claimant is owed.
(4) <u>If the conditions mentioned in subsection (1) have not been met when a third party acquires an interest in the goods, a subsequent acquisition of possession or of a signed acknowledgment of indebtedness by the lien claimant does not render the lien enforceable against the third party</u>.

...

9(1) In this section:

"owner" includes a buyer, a lessee or a consignee under a transaction to which *The Personal Property Security Act, 1993* applies; (" propriétaire ")

"serial numbered goods" means serial numbered goods as defined in *The Personal Property Security Regulations*. (" biens numérotés en série ")

(2) Possession of goods by a lien claimant or by a person acting on behalf of a lien claimant perfects a lien on the goods.
(3) For the purposes of subsection (2), a lien claimant or a person acting on behalf of a lien claimant does not have possession of goods if:

(a) the goods are in the actual or apparent possession or control of the person requesting the services or that person's agent; or
(b) the goods are being held as a result of a seizure or repossession.

(4) Registration of a financing statement in the Personal Property Registry perfects a lien if:

(a) either:

(i) in the case of serial numbered goods, the goods are described in the financing statement by serial number; or

(ii) in the case of goods that are not serial numbered goods, both the owner of the goods and the person requesting the services, if that person is not the owner, are identified as debtors in the financing statement; and

(b) all other requirements of *The Personal Property Security Regulations* have been met.

(5) Part IV of *The Personal Property Security Act, 1993* applies, with any necessary modification, to a financing statement registered pursuant to subsection (4).

(6) A lien claimant may register a financing statement pursuant to subsection (4) for a lien that is enforceable pursuant to clause 6(1)(b) at any time after receiving the written authorization or written acknowledgment.

(7) Where the perfection of a lien is not continuous, the date of perfection to be considered in determining the priority of the lien is the lien's most recent date of perfection.

(8) With respect to a lien mentioned in subsection 3(2), registration of the lien in a public registry for liens in another jurisdiction does not constitute perfection of the lien for the purposes of this Act, but the lien may be perfected by any of the methods set out in this section.

10(1) <u>Where a lien is perfected by possession, returning the goods to the control of the person who requested the services does not affect the perfection of the lien if the lien claimant registers a financing statement pursuant to subsection 9(4) respecting the goods within the first 15 days after returning control of the goods to that person</u>.

(2) Where a lien claimant does not have possession of goods when a lien attaches to the goods and the lien claimant registers a financing statement pursuant to subsection 9(4) respecting the goods within the first 15 days after completion of the services, the lien is deemed to be perfected during that 15-day period.

11(1) Except as provided in this Act or any other Act, a perfected lien has priority over an interest that was created after the lien attached.

(2) Notwithstanding subsections 35(2) and (5) of *The Personal Property Security Act, 1993*, a lien, whether perfected or unperfected, has priority over:

(a) a security interest that attached before the lien attached; and

(b) a writ of execution issued or a charging order granted before the lien attached.

24. Except as otherwise provided in this Act, subsection 2(2), sections 5 to 8, 17 and 18, Parts IV and v. and sections 65, 67 and 68 of *The Personal Property Security Act, 1993* apply, with any necessary modification, to a lien created by this Act as though the lien were a security interest.

TAB 5

DECLARATIONS
LODGED BY CANADA UNDER THE AIRCRAFT PROTOCOL
at the time of the deposit of its instrument of ratification
AND SUBSEQUENT DECLARATION

The Government of Canada declares, in accordance with Article XXIX of the Protocol, that the Protocol shall extend to the following provinces and territories: Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Ontario, Quebec and Saskatchewan.

The Government of Canada also declares, in accordance with Article XXIX of the Protocol, that, in addition to the provinces and territories of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec and Saskatchewan, the Protocol shall extend to Prince Edward Island and Yukon.*

> * [This declaration was notified to UNIDROIT by the Government of Canada, as a subsequent declaration pursuant to Article XXXIII(1) of the Aircraft Protocol, and in accordance with Article XXXIII(2) of the Aircraft Protocol it took effect on 1 October 2014.]

The Government of Canada also declares, in accordance with Article XXIX of the Protocol, that, in addition to the provinces and territories of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon, the Protocol shall extend to New Brunswick. **

> ** [On 23 December 2015, the Government of Canada notified UNIDROIT, pursuant to Article XXXIII (1) of the Aircraft Protocol, of the making of this subsequent declaration, and in accordance with Article XXXIII(2) of the Aircraft Protocol, this subsequent declaration took effect on 1 July 2016.]

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will apply Article VIII of the Protocol.

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will apply paragraphs 3,4 and 5 of Article X of the Protocol.

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will comply with Article X(6) consistent with Canada's implementing legislation.

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will apply Article XI, Alternative A of the Protocol in its entirety to all types of insolvency proceedings and all insolvency-related events and that the waiting period of the purposes of Article XI(3), Alternative A shall be sixty (60) calendar days.

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will apply Article XII of the Protocol.

The Government of Canada also declares, in accordance with Article XXX of the Protocol, that it will apply Article XIII of the Protocol.

*

* *

Declarations lodged by Canada under the Cape Town Convention (/status-2001capetown-aircraft?id=1564)

DECLARATIONS
LODGED BY CANADA UNDER THE CAPE TOWN CONVENTION
at the time of the deposit ot its instrument of ratification
AND SUBSEQUENT DECLARATIONS

The Government of Canada declares, in accordance with **Article 39(1)(a)** of the Convention, that any non-consensual right or interest under Canadian law existing at the date of this declaration or created after that date, that has priority over an interest in an object equivalent to that of the holder of a registered international interest, shall have priority to the same extent over such registered international interest, whether in or outside insolvency proceedings.

The Government of Canada also declares, in accordance with Article 39(1)(a) of the Convention, that a legal hypothec under the law of the Province of Quebec existing at the date of this declaration or created after that date, that is registered in the register of personal and movable real rights of that Province, shall have priority over an international interest subsequently registered in the international Registry established under the Convention and the Protocol, whether in or outside insolvency proceedings.

The Government of Canada also declares, in accordance with Article 39(1)(a) of the Convention, that a prior claim to which the law of the Province of Quebec, existing at the date of this declaration, or created after that date, attaches the right of the creditor to be preferred over the other creditors, shall have priority over an international interest registered in the international Registry established under the Convention and the Protocol, whether in or outside insolvency proceedings.

The Government of Canada also declares, in accordance with **Article 39(4)** of the Convention, that a right or interest referred to in a declaration made pursuant to Article 39(1)(a) of the Convention shall have priority over an international interest registered prior to the date of deposit of Canada's instrument of ratification.

The Government of Canada also declares, in accordance with **Article 39** of the Convention, that nothing in the Convention shall affect the right of the Government of Canada or of a province or territory of Canada, a governmental entity, intergovernmental organization or other private provider of public services to arrest or detain an object under the laws of Canada for payment of amounts owed to that government, entity, organization or provider directly relating to those services in respect of that object or another object.

The Government of Canada also declares, in accordance with **Article 52** of the Convention, that the Convention is to apply to the following provinces and territories: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec and Saskatchewan.

The Government of Canada also declares, in accordance with Article 52 of the Convention, that, in addition to the provinces and territories: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec and Saskatchewan, the Convention is to apply to Prince Edward Island and Yukon. *

* [This declaration was notified to UNIDROIT by the Government of Canada, as a subsequent declaration pursuant to Article 57(1) of the Convention, on 28 March 2014, and in accordance with Article 57(2) of the Convention it took effect on 1 October 2014.]

The Government of Canada also declares, in accordance with Article 52 of the Convention, that, in addition to the provinces and territories: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon, the Convention is to apply to New Brunswick. **

** [On 23 December 2015, the Government of Canada notified UNIDROIT pursuant to Article 57(1) of the Convention, of the making of this subsequent declaration, and in accordance with Article 57(2) of the Convention, this subsequent declaration took effect on 1 July 2016.]

The Government of Canada also declares, in accordance with **Article 53** of the Convention, that for all matters within federal jurisdiction, the superior courts of the provinces and territories are the relevant courts for the purposes of Article 1 and Chapter XII of the Convention.

The Government of Canada also declares, in accordance with Article 53 of the Convention, that the following courts are the relevant courts for all matters within provincial and territorial jurisdiction for the purposes of Article 1 and Chapter XII of the Convention: in Alberta – the Court of Queen's Bench; in British Columbia – the Supreme Court; in Manitoba - the Court of Queen's Bench; in Newfoundland and Labrador – the Supreme Court, Trial Division; in the Northwest Territories – the Supreme Court; in Nova Scotia – the Supreme Court; in Nunavut - the Nunavut Court of Justice; in Ontario – the Superior Court of Justice; in Quebec –. The Superior Court; and in Saskatchewan – the Court of Queen's Bench.

The Government of Canada also declares, in accordance with Article 53 of the Convention, that, for the purposes of Article 1 and Chapter XII of the Convention, in Prince Edward Island the Supreme Court of Prince Edward Island is the relevant court for all matters within provincial jurisdiction and in Yukon the Supreme Court of Yukon is the relevant court for all matters within territorial jurisdiction. ***

***[This declaration was notified to UNIDROIT by the Government of Canada, as a subsequent declaration pursuant to Article 57(1) of the Convention, on 28 March 2014, and in accordance with Article 57(2) of the Convention it took effect on 1 October 2014.]

The Government of Canada also declares, in accordance with Article 53 of the Convention, that, for the purposes of Article 1 and Chapter XII of the Convention, in New Brunswick the Court of Queen's Bench of New Brunswick is the relevant court for all matters within provincial jurisdiction. ****

**** [On 23 December 2015, the Government of Canada notified UNIDROIT pursuant to Article 57(1) of the Convention, of the making of this subsequent declaration, and in accordance with Article 57(2) of the Convention, this subsequent declaration took effect on 1 July 2016.]

The Government of Canada also declares, in accordance with **Article 54** of the Convention, that any remedy available to a creditor under any provision of the Convention, the exercise of which does not thereby require application to the court, may be exercised without leave of the court.

The Government of Canada also declares, in accordance with **Article 60** of the Convention, that the Convention will apply to a pre-existing right or interest governed by Sections 426 to 436 of the Bank Act for the purpose of determining priority, including the protection of any existing priority, five years after the day on which the Aircraft Protocol comes into force for Canada. Until that time, that right or interest will remain governed by those Sections.

*

*   *

Declarations lodged by Canada under the Aircraft Protocol (/status-2001capetown-aircraft?id=1565)

TAB 6

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 13, 2016

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Personal Property Security Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Personal Property Security Act		
Personal Property Security	95/2001	*251/2001, 109/2003, 237/2004, 80/2006, 130/2007, 229/2007, 164/2010, 107/2012, 158/2015*
Personal Property Security Forms	231/2002	*35/2007, 230/2007, 108/2012, 159/2015*

(2) Except as provided in sections 17, 17.1, 60, 61 and 63, no provision of section 17 or 17.1 or sections 58 to 67, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

RSA 2000 cP-7 s56;2006 cS-4.5 s108(25)

Collection rights of secured party

57(1) Where so agreed and in any event on default under a security agreement, a secured party is entitled

(a) to notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification, and

(b) to apply any money taken as collateral to the satisfaction of the obligation secured by the security interest.

(2) A secured party may deduct the secured party's reasonable collection expenses from

(a) money held as collateral, or

(b) an amount collected

(i) from a debtor on an intangible or chattel paper, or

(ii) from an obligor under an instrument.

1988 cP-4.05 s57;1990 c31 s45;1991 c21 s29(8)

Right of secured party to enforce, etc., on default

58(1) Subject to Part 2 of the *Civil Enforcement Act* and sections 36, 37 and 38, on default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

(b) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and any method of enforcement that is available with respect to the document of title is also available, with all the necessary modifications, with respect to the goods covered by it,

(c) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate alternative storage facilities are not readily available, the collateral may be seized without removing it from the debtor's premises in any manner by which a civil enforcement agency may seize without removal under subsection (2)(b) to (d), if the secured party's interest is perfected by registration, and

(d) where clause (c) applies or where the collateral has been seized by a civil enforcement agency as provided in subsection (2)(b) to (d) and the collateral is of a kind mentioned in clause (c), the secured party may dispose of the collateral on the debtor's premises, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal.

(2) To make a seizure of property, the civil enforcement agency may

(a) take physical possession of the property,

(b) give to the debtor or the person in possession of the collateral a notice of seizure in the prescribed form,

(c) post in some conspicuous place on the premises on which the property is located at the time of seizure a notice of seizure in the prescribed form, or

(d) in the case of property in the form of goods, affix to the goods a sticker in the prescribed form,

and seizure by the civil enforcement agency shall continue until possession of the property is surrendered to the secured party or the secured party's agent, or the seizure has been released.

(3) At any time after making a seizure, the civil enforcement agency may appoint the debtor or other person in possession of the property seized as bailee of the civil enforcement agency on the debtor or such other person executing a written undertaking in the prescribed form to hold the property as bailee for the civil enforcement agency and to deliver up possession of the property to the civil enforcement agency on demand and property held by a bailee is deemed to be held under seizure by the civil enforcement agency.

(4) When a seizure occurs, a civil enforcement agency, on the written request of the person who has reasonable grounds to believe that the person has an interest in or a right to property seized by the civil enforcement agency, shall deliver to that person a list of items of property seized that fall within the general description of property in or to which that person claims to have an interest.

(5) On making a seizure, a civil enforcement agency may surrender possession or the right of possession of the property seized to the secured party or to a person designated in writing by the secured party.

(6) A civil enforcement agency may give before or after seizure of property, a notice to the secured party named in the warrant under which the seizure was made informing the secured party that the seizure shall be released at a date specified in the notice unless before that date the secured party takes possession of the property seized.

(7) If the person to whom the notice referred to in subsection (6) is given does not take possession of the property referred to in the notice on or before the date specified, the civil enforcement agency may release the seizure.

(8) After surrender of possession as provided in subsection (5) or release of seizure as provided in subsection (7), the civil enforcement agency has no liability for loss or damage to the property or for unlawful interference with the rights of the debtor or any other person who has rights in or to the property, occurring after the surrender or release.

(9) A seizure shall not affect the interest of a person who under this Act or under any other law has priority over the rights of the secured party.

1988 cP-4.05 s58;1990 c31 s46;1994 cC-10.5 s148

Seizure of mobile homes

59(1) In this section, "mobile home" means

(a) a vacation trailer or house trailer, or

(b) a structure, whether ordinarily equipped with wheels or not, that is designed to be moved from one point to another by being towed or carried and to provide living accommodation for one or more persons.

(2) When a mobile home is seized to enforce a security agreement and the mobile home is occupied by the debtor or some other person who fails, on demand, to deliver up possession of the mobile home, the person who has authorized the seizure or a receiver may apply to the Court under section 64 for an order directing the occupant to deliver up possession of the mobile home.

(3) The order may provide that if the occupant fails to deliver up possession of the mobile home within the time specified in the order, the civil enforcement agency shall eject and remove the occupant together with all goods the occupant may have in the mobile home, and the civil enforcement agency may take any reasonable steps necessary to obtain possession of the mobile home.

(4) The civil enforcement agency may act under subsection (3) only after an affidavit has been filed with the civil enforcement agency indicating that a copy of the Court order has been served on the occupant of the mobile home and stating that the occupant has failed to deliver up possession of it as required by the order.
1988 cP-4.05 s59;1990 c31 s47;1994 cC-10.5 s148

Disposal of collateral on default

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.

(2) Collateral may be disposed of as follows:

(a) by private sale;

(b) by public sale, including public auction or closed tender;

(c) as a whole or in commercial units or parts;

(d) if the security agreement so provides, by lease or by deferred payment.

(3) The secured party may delay disposition of the collateral in whole or in part.

(4) Not less than 20 days prior to the disposition of the collateral, the secured party shall give notice of disposition to

(a) the debtor and any other person who is known by the secured party to be an owner of the collateral,

(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party, and

(i) who has, prior to the date that the notice of disposition is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the secured party seized the collateral,

and

(c) any other person with an interest in the collateral who has given notice to the secured party of the person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(5) The notice referred to in subsection (4) shall contain

(a) a description of the collateral,

(b) the amount required to satisfy the obligations secured by the security interest,

(c) the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, and a brief description of any default other than non-payment, and the provision of the security agreement the breach of which resulted in the default,

(d) the amount of the applicable expenses referred to in subsection (1)(a) or, where the amount of those expenses has not been determined, a reasonable estimate,

(e) a statement that, on payment of the amounts due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral,

(f) a statement that, on payment of the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, or the curing of any other default, as the case may be, together with payment of the amounts due under subsection (1)(a), the debtor may reinstate the security agreement,

(g) a statement that, unless the collateral is redeemed or the security agreement is reinstated, the collateral will be disposed of and the debtor may be liable for any deficiency, and

(h) the date, time and place of any sale by public auction, the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted or the date after which any private disposition of the collateral is to be made.

(6) Where the notice required under subsection (4) is served on any person other than the debtor, it need not contain the information specified in subsection (5)(c), (f) and (g), and, where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in subsection (5)(c) and (f).

(7) No statement referred to in subsection (5)(g) shall make reference to any liability on the part of the debtor to pay a deficiency if under any Act or rule of law the secured party does not have the right to collect a deficiency from the debtor.

(8) Not less than 20 days prior to the disposition of the collateral, a receiver shall give notice to

(a) the debtor, and if the debtor is a corporation, a director of the corporation,

(b) any other person who is known by the secured party to be an owner of the collateral,

(c) any person referred to in subsection (4)(b), and

(d) any other person with an interest in the collateral who has given notice to the receiver of the person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(9) The notice referred to in subsection (8) shall contain

(a) a description of the collateral, and

(b) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(10) The notice required under subsection (4) or (8) may be given in accordance with section 72 or, where notice is to be given to the person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(11) The secured party may purchase the collateral or any part of it only at a public sale and only for a price that bears a reasonable relationship to the market value of the collateral.

(12) When a secured party disposes of the collateral to a purchaser who acquires the purchaser's interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are, as regards the purchaser, deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(13) Subsection (12) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not been given a written notice under this section.

(14) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or a similar instrument and who receives a transfer of collateral from the secured party or who is subrogated to the rights of the secured party has the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

(15) The notice in subsection (4) or (8) is not required if

(a) the collateral is perishable,

(b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if not disposed of immediately after default,

(c) the cost of care and storage of the collateral is disproportionately large relative to its value,

(d) the collateral is a security or an instrument that is to be disposed of by sale in an organized market that handles large volumes of transactions between many different sellers and many different buyers,

(e) the collateral is money other than a medium of exchange authorized by the Parliament of Canada,

(f) the Court, on ex parte application, is satisfied that a notice is not required, or

(g) after default, every person entitled to receive the notice consents to the disposition of the collateral without notice.

1988 cP-4.05 s60;1990 c31 s48;1991 c21 s29(9)

Surplus or deficiency

61(1) Where a security interest secures an indebtedness and the collateral has been dealt with under section 57 or has been disposed of in accordance with section 60 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested persons, be accounted for and paid in the following order to

(a) a person who has a subordinate security interest in the collateral

(i) who has, prior to the distribution of the proceeds, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person who has an interest in the collateral, if that person has given a written notice of that person's interest to the secured party prior to distribution of the proceeds, and

(c) the debtor or any other person who is known by the secured party to be the owner of the collateral

but the priority of the interest in the surplus of a person referred to in clause (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

(2) Where there is a question as to who is entitled to receive payment under subsection (1), the secured party may pay the surplus into the Court and the surplus shall not be paid out except on an application under section 69 by a person claiming an entitlement to the surplus.

(3) Within 30 days after receipt of the written notice of a person referred to in subsection (1), the secured party shall provide to that person a written accounting of

TAB 7

HMANALY L§51
Houlden & Morawetz Analysis L§51

Houlden and Morawetz Bankruptcy and Insolvency Analysis

THE BANKRUPTCY AND INSOLVENCY ACT

Part XI (ss. 243-252)
L.W. Houlden and Geoffrey B. Morawetz

L§51 — Priority of Receiver's Fees Over Secured Creditors

L§51 — Priority of Receiver's Fees Over Secured Creditors

See ss. 243, 244, 245, 246, 247, 248, 249, 250, 251, 252

In order for a receiver to have priority for its fees and disbursements over secured creditors, the secured creditors must have received notice of the application for an order giving priority to the receiver's fees. There are three exceptions to this principle: (1) if the secured creditors have approved or acquiesced in the order; (2) if the receiver has been appointed to preserve and realize the assets for the benefit of all interested parties, including secured creditors; but to obtain such an order, notice should be given of the application to the secured creditors affected by it; and (3) if the receiver has expended time and money for the necessary preservation and improvement of the property: *Royal Bank v. Vulcan Machinery & Equipment Ltd.* (1992), 13 C.B.R. (3d) 69, 3 Alta. L.R. (3d) 358, [1992] 6 W.W.R. 307, 1992 CarswellAlta 287 (Q.B.); *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201, 9 O.R. (2d) 84, 59 D.LR. (3d) 492 (C.A.).

To have priority for money expended for the necessary preservation and improvement of the property under the receiver-manager's jurisdiction, there must be circumstances that require the receiver-manager to do something to preserve the property in an emergency situation where there is no time to come to the court beforehand and give notice to the secured creditors beforehand of what the receiver-manager intends to do and thus obtain the approval of the court: *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 52 C.B.R. (N.S.) 271 (B.C. C.A.). If an order is made giving priority to receiver's charges subject to further order of the court, a secured creditor that wishes to have possession of its assets free of the charges, should return to court as soon as possible with evidence showing why it should not be liable for the charges and not wait until the receiver applies to the court for approval of the sale of the assets: *National Bank of Canada v. Global Fasteners & Clamps Ltd.* (2001), 24 C.B.R. (4th) 228, 2001 CarswellOnt 945 (Ont. S.C.J. [Commercial List]).

The British Columbia Court of Appeal, in dismissing an appeal of a decision of the British Columbia Supreme Court (reported at 2005 CarswellBC 1630, 13 C.B.R. (5th) 273 (B.C.S.C.)), held that a first-ranking secured creditor of a debtor company (who was not given proper notice of, or consented to, the appointment of a receiver-manager over the debtor company and who believed that the appointment of a receiver-manager was not necessary in light of the ample equity in the property securing its debt at the time of such appointment), does not have a positive duty to apply to vary the terms of an appointment order in order to preserve its priority over an administration charge for the fees and expenses of the receiver-manager. In such circumstances, the Court of Appeal held that the secured creditor is entitled to wait until the realization of the debtor company's assets in order to deal with the difficulty created by the administration charge in the appointment order, and that the receiver-manager should not be entitled to priority over the secured creditor for its fees and expenses and should bear the risk of any shortfall: *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.* (2006), 2006 CarswellBC 2565, 2006 BCCA 458, 58 B.C.L.R. (4th) 64, 25 C.B.R. (5th) 199 (B.C.C.A.).

The Ontario Superior Court of Justice held that an allocation of various receivership costs by an interim receiver and receiver-manager under a receiver's charge among a debtor company's two main secured creditors will not be unfair or inequitable to a secured creditor who holds a first charge over the real property that was part of a going concern sale of all of the debtor company's assets where: (1) the allocation is reasonable and in accordance with general principles established by Canadian insolvency courts; (2) the receiver was appointed for the benefit of interested parties to ensure that all creditors were treated fairly and to ensure a fair process to deal with the assets of the debtor company; (3) some indefinable part of the receiver's efforts was for the benefit of the secured creditor; (4) the sale of the real property was dependent on the sale of the personal property and vice-versa; and (5) there is no guarantee that the real property would have realized the same value if the going concern sale had not been completed and the secured creditor was left to its own devices: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 2006 CarswellOnt 4619, 25 C.B.R. (5th) 156 (Ont. S.C.J.).

Where a secured creditor with a prior claim to that of the creditor who obtained the receivership order did not acquiesce in the appointment of the receiver-manager, it was held that the receiver-manager did not have priority over the prior secured creditor for payment of its fees and disbursements: *Bank of Montreal v. Shaw Ranches Ltd.* (1984), 51 C.B.R. (N.S.) 292 (B.C. S.C.).

Where an appointment of a receiver-manager was made to preserve and realize assets for the benefit of all interested parties, the receiver-manager was given priority for its fees and disbursements to the claims of secured creditors: *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984), 52 C.B.R. (N.S.) 129 (B.C. C.A.).

A receiver was appointed at the request of the second mortgagee and the bank holding the first mortgage did not receive notice of the proceeding or participate in the order, but received the order and did nothing since it believed there was sufficient equity to cover its mortgage given its priority. The bank refused permission for a priority charge. The receiver received the court's permission but was unable to borrow in priority immediately behind the bank and an offer to purchase the debtor's assets was not completed. The Ontario Court of Appeal held that the receiver was not entitled to retain the non-refundable deposit from the proposed asset sale to cover its fees. Rather, the court held that the bank's priority was not supplanted by its failure to object to appointment of the receiver without direct evidence that the bank consented to give up its priority. Although the lower court erred in finding that the bank did not have knowledge of the order, the error was not palpable and did not affect the outcome of the case: *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.* (2006), 2006 CarswellBC 2565, 25 C.B.R. (5th) 199, 2006 BCCA 458, 58 B.C.L.R. (4th) 64 (B.C. C.A.).

In receivership proceedings, the court has a discretion to charge trust assets with payment of a receiver's proper fees and disbursements. This discretion should, however, be sparingly exercised and, ordinarily, an order should only be made after notice to those affected by it: *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 11 C.P.C. (3d) 352, 93 D.L.R. (4th) 321, 57 O.A.C. 241, 1992 CarswellOnt 176 (C.A.). The Alberta Court of Appeal held that a bankruptcy court has the jurisdiction to order that the fees of a trustee in bankruptcy be paid from the property that is subject to certain disputed trust claims by way of a charge against all of the assets under the trustee's administration, and that such jurisdiction includes the trustee's fees associated with the determination of the validity of the disputed trust claims: *Re Residential Warranty Co. of Canada Inc.* (2006), 2006 CarswellAlta 1354, 2006 ABCA 293, 25 C.B.R. (5th) 38, [2006] 12 W.W.R. 213, (*sub nom. Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)*) [2006] I.L.R. I-4552 (Alta. C.A.).

In *Re De Stefanis* (2004), 2004 CarswellBC 28, 2004 BCSC 10, 50 C.B.R. (4th) 175, 24 B.C.L.R. (4th) 306 (B.C. S.C.), the court refused to grant an administrative charge over the assets of an insolvent law firm, under the control of the Law Society and a custodian, in priority to existing security agreements, charges, liens or encumbrances. The court refused to find that the Law Society and custodian should be treated in the same manner as a receiver or monitor appointed under the *CCAA,* holding that to permit the Law Society to recover from the assets before other claimants would run counter to the principle that a self-regulating body is ultimately responsible for the actions of its members. See also *Re Kennedy* (1997), 1997 CarswellAlta 1086, 213 A.R. 120, 58 Alta. L.R. (3d) 345, 18 C.P.C. (4th) 81 (Alta. Q.B. [In Chambers]).

The fees and disbursements of a receiver do not have priority over the claim of a municipality for realty taxes: *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781, 32 C.B.R. (3d) 303, 1995 CarswellOnt 374 (Gen. Div.). By Ontario law, claim for realty taxes ranks ahead of all claims except a claim of the Crown, and "claims" includes a claim of a receiver for fees and disbursements: *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd., supra.* If there are arrears of realty taxes and a receiver is doubtful if the real estate will realize sufficient to pay the taxes, the receiver will be well advised before accepting the appointment as receiver to have an understanding with the municipality regarding payment of its fees and disbursements.

The following principles should be considered by a Court in determining whether to set aside or vary an allocation of receivership costs among the assets of a debtor and, by extension, among the debtor's creditors:

(i) the allocation of costs ought to be fair and even-handed amongst all creditors;

(ii) the fairest basis of allocation is a uniform percentage of the sale price received for the asset over which the creditor paying the costs had a security interest;

(iii) the receiver's allocation of costs may encompass all receivership costs as opposed to only realization costs;

(iv) exceptions to a uniform application of costs among creditors ought not to be lightly granted;

(v) exceptions to the rule of a uniform cost allocation should only be made where the requirement for such variation is reasonably articulated. The fact that a receiver did not expend efforts in respect of the sale of a certain asset or group of assets is an articulable reason for varying the costs allocation from a uniform amount: *Re Hickman Equipment (1985) Ltd.* (2004), 2004 CarswellNfld 263, 5 C.B.R. (5th) 56, (*sub nom. Hickman Equipment (1985) Ltd. (Receivership), Re*) 241 Nfld. & P.E.I.R. 294, 716 A.P.R. 294, 2004 NLSCTD 164 (N.L. T.D.).

The Alberta Court of Queen's Bench held that a junior ranking secured creditor could, in certain circumstances, recover its legal costs incurred in obtaining the appointment of a receiver. A creditor may logically receive super-priority for its costs, when the costs are incurred while a creditor takes actions that increase the recovery from a debtor; the increased recovery provides a benefit to higher ranked creditors; and the actions of the creditor are not a consequence of a separate legal duty. The court held that a lower ranking creditor was entitled to indemnity for its legal costs in obtaining the appointment of a receiver, notwithstanding that the applicant creditor would receive no benefit from the actions of the receiver. The right to indemnity did not extend to all costs incurred by the applicant creditor, but rather was limited to those costs directly related to the appointment of the receiver: *Father & Son Investments Inc. v. Maverick Brewing Corp.* (2007), 2007 CarswellAlta 1452, 37 C.B.R. (5th) 74, 2007 ABQB 651 (Alta. Q.B.).

In a priority dispute in respect of the payment of funds received by the interim receiver from the sale of the remaining units in a development, an interim receiver sought orders for payment with respect to matters pertaining to the receiver's borrowings and other costs. The interim receiver had received six final notices of tax forfeiture, indicating that the properties would forfeit to the Crown unless the delinquent taxes were paid. Counsel for a secured creditor sought confirmation that the interim receiver was taking steps on behalf of all creditors to prevent the forfeiture and counsel for the interim receiver confirmed that it was. Justice Brown of the British Columbia Supreme Court was of the view that the property taxes were properly paid for the protection of all creditors and the interim receiver had to pay the taxes when it did to avoid forfeiture, for the benefit of all creditors. Brown J. found that the interim receiver was entitled to priority for this payment, even without the approval of the secured creditor. Justice Brown then addressed the issue of the priority to funds arising from the sale of properties in the development. As units in the project began to sell, the interim receiver was required to provide clear title. There were a number of charges registered against the title and the interim receiver required proceeds from the sales to continue with the project. The parties had worked out an arrangement whereby 50% of the net proceeds would be paid to the interim receiver and 50% would be held in counsel's trust account. In some cases, the order provided that the balance would be held in trust in an interest bearing trust account for the lien claimants and the mortgagee, pending further court order. In other cases, it provided that the funds would be held in lieu of the subject lands as security for the amount claimed under the mortgages and for amounts claimed under the builders' liens. All of the orders were made after the order appointing the interim receiver. Justice Brown concluded that the interim receiver's charge appointing the interim receiver would take priority over the land, and over cash held in lieu. Accordingly, the interim receiver's charge would take priority over the claims of the mortgagee and the lien claimants: *269893 Alberta Ltd. v. Otter Bay Developments Ltd.* (2010), 2010 CarswellBC 3883, 82 C.B.R. (5th) 93, 2010 BCSC 1972 (B.C.S.C. [In Chambers]), affirmed (2011), 2011 CarswellBC 370, 75 C.B.R. (5th) 1 (B.C.C.A.).

The Ontario Superior Court of Justice approved a sales/auction process and priority of receiver's charges. In approving the priority of receiver's charges, the court reviewed *CCAA* cases and adopted the principles for receivership cases. Justice Brown held that the reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), specifically, when reviewing a sales and marketing process proposed by a receiver, a court should assess: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. The court approved the stalking horse agreement for the purposes requested by the receiver. Justice Brown was of the view that the need for certainty about the priority of charges for professional fees or borrowings apply to priority charges sought by a receiver pursuant to s. 243(6) of the *BIA*. Here, reasonable notice had been provided to affected persons and the requested relief was granted. The court did not regard the presence of a "come-back clause" in the appointment order as leaving the door open for some subsequent challenge to the priorities granted by this order: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]).

A receiver's borrowing charge did not have priority over previously filed liens under the British Columbia *Builders Lien Act*. Although s. 35 of the *Builders Lien Act* provides that a mortgagee may apply to court for an order that further advances under the mortgage have priority over liens, the loan to the receiver was not a further advance within the meaning of this provision. The Court of Appeal ordered that the lien claim be restored to priority over the receiver's borrowing charge and over all security to which the receiver's borrowing charge has priority: *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 CarswellBC 1714, 90 C.B.R. (5th) 288 (B.C. C.A.).

The British Columbia Supreme Court required the secured creditor, an assignee of the position of a creditor bank, who was assessing the receiver's accounts, to post security for costs to protect the receiver for its costs and disbursements arising from the assessment. Justice Burnyeat held that a receiver has a *prima facie* right to be paid its fees and disbursements, including the fees and disbursements of its counsel. The creation of a receiver's charge is the recognition of that right, referencing *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2011 CarswellBC 370, 75 C.B.R. (5th) 1, 2011 BCCA 90 (B.C. C.A.), where Lowry J.A. held: "The receiver was appointed by the court. It had no financial stake in the success of the receivership and no reason to agree that, in the event of a shortfall, it would forgo its own fees and expenses and be out of pocket some hundreds of thousands of dollars in costs incurred by it endeavouring to complete the construction for the benefit of the creditors. A court-appointed receiver would never take a risk of that kind and would never be required to do so." Justice Burnyeat observed that as part of its compensation, a receiver is entitled to be paid its fees and disbursements and those of its counsel relating to the application for discharge in the passing of its accounts on a full indemnity basis. By seeking its discharge and passing its accounts, the receiver is completing the administration of the estate and is therefore entitled to special costs for that process payable by the estate unless a receiver is guilty of scandalous, outrageous or reprehensible conduct, citing *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.*, 1996 CarswellBC 1083, 20 B.C.L.R. (3d) 70, 41 C.B.R. (3d) 251 (B.C. C.A.). Burnyeat J. further observed that the receiver could have assumed that the assessment of the accounts would be on a summary basis; and if the advice had been received that a passing of accounts before the registrar was required, all or some of what was forwarded to the assignee, would not have been forwarded: *HSBC Bank Canada v. Bay City Auto Inc.*, 2013 CarswellBC 1777, 4 C.B.R. (6th) 25, 2013 BCSC 993 (B.C. S.C.).

The Ontario Superior Court of Justice determined a receiver's motion to allocate sale proceeds and its costs as between two secured creditors. Justice Brown observed that the time for objecting to an allocation of the purchase price in a proposed sale is when the sale is brought before the court for approval. If the court agrees with the objection, it can decline to approve the sale, which may or may not result in further negotiations with the proposed purchaser, depending on the significance to it of the purchase price allocation. Once a court approves a sale agreement, it becomes more difficult for a creditor to advance an objection about the fairness of the term of the sales agreement allocating the purchase price because such an objection, in essence, constitutes an objection to a material term of the now-approved sale agreement. Brown J. found no reason to interfere with the receiver's recommendation to distribute the net sale proceeds using a methodology based on the allocation of the purchase price found in the approved agreement. Justice Brown also reviewed the general principles governing the allocation of receivers' costs: (i) the allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee; (ii) costs should be allocated in a fair and equitable manner that does not readjust the priorities between creditors, and does not ignore the benefit or detriment to any creditor; (iii) a strict accounting to allocate such costs is neither necessary nor desirable in all cases; (iv) a creditor need not benefit directly before the costs of an insolvency proceeding can be allocated against that creditor's recovery; (v) an allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis; and (vi) where an allocation appears *prima facie* fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial: *Royal Bank of Canada v. Atlas Block Co.*, 2014 CarswellOnt 2780, 2014 ONSC 1531 (Ont. S.C.J. [Commercial List]).

A receivership order was amended so that proceeds from sale of receivership properties would be applied first to the total amounts secured by the receiver's charges and borrowing charges in respect property sold; second to the total amounts secured by any first mortgage related to the receivership property sold; third to total amounts secured by the receiver's borrowing charges in respect of other receivership properties; fourth to total amounts secured by the mortgage held that was cross-collateralized across all the receivership properties; and last to the monitor in the concurrent *CCAA* proceeding for application in that proceeding. The court noted the importance of finality of orders; however, new facts may justify varying or setting aside an order where the evidence may have altered the judgment and could not with reasonable diligence been discovered sooner: *Romspen Investments Corp. v. Edgeworth Properties*, 2014 CarswellOnt 9980, 16 C.B.R. (6th) 81, 2014 ONSC 4340 (Ont. S.C.J.).

The Ontario Superior Court of Justice approved the fees of a court-appointed manager of a group of companies and properties. The properties were in various stages of development and the manager managed the properties, conducted a claims process and had sold 21 properties, paying off mortgages of $159 million. Because many of the properties did not have sufficient cash flow to support their operations, the manager was required to negotiate a borrowing arrangement with the applicants. The manager was granted a super-priority charge to secure its costs and fees; however, following negotiations, consent orders were made that provided that the manager's charge would be subordinate to prior ranking security on the properties involved. The manager took the position that given the number and interconnectedness of the companies and their respective properties, it would have been impractical and very expensive to track fees separately for each of the properties. Justice Newbould noted that allocating expenses to separate properties involved in a financial meltdown is no easy matter. He referenced the decision of Brown J. (as he then was) in *Royal Bank of Canada v. Atlas Block Co.*, 2014 CarswellOnt 2780, 2014 ONSC 1531 (Ont. S.C.J. [Commercial List]), which held, in respect of the allocation of fees, that the general principles governing the allocation of receiver's costs are: (i) the allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee; (ii) costs should be allocated in a fair and equitable manner, one that does not readjust the priorities between creditors, and does not ignore the benefit or detriment to any creditor; (iii) a strict accounting to allocate such costs is neither necessary nor desirable in all cases, as to require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-á-vis another likely would not be cost-effective and would drive up the overall cost of the receivership; (iv) a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery; (vi) an allocation does not require strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis; and (vi) where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial. Justice Newbould held that it would have been extremely costly and time consuming, and somewhat artificial, to keep segregated dockets. Moreover, he held that it was too late for the mortgagees to complain about the form of the dockets kept by the manager and its counsel. Justice Newbould was satisfied that what was charged was fair and reasonable. Justice Newbould held that the manager was a court-appointed officer with a charge for its fees, which were to be approved by the court. The Court approved the method for the allocation of the manager's fees among the various companies and properties of the debtor: *DBDC Spadina Ltd. v. Walton*, 2015 CarswellOnt 5706, 24 C.B.R. (6th) 34, 2015 ONSC 2550 (Ont. S.C.J. [Commercial List]).

The Newfoundland and Labrador Supreme Court provided directions to the receiver on how to distribute proceeds it had realized on the receivership of a real estate brokerage firm. The receiver received its compensation, in part, from trust property. Justice Stack noted that notwithstanding the limitations in s. 243(6) of the *BIA* to the scope of a receiver's charge, the court may, where it is equitable and appropriate to do so, extend a receiver's charge to funds that are held in trust. In this case, the court found that the receivership was complex, with numerous competing claims; and no individual claimant would have been able to receive any distribution from the assets without the services of a receiver. As required by s. 243(6) of the *BIA*, the receivership process ensured that all of the claimants had notice and ample opportunity to make representations on this issue. Justice Stack noted that in this context, where there were a large number of trust claimants, it would be inequitable for one class of claimant to bear the full cost of the receiver's expenses and to give other claimants a windfall. Therefore, it was one of the rare cases where the receiver's fees and disbursements should be paid by trust claimants as well as creditors. Stack J. concluded that each should bear its *pro rata* share of the costs incurred in realizing on the estate and sorting through the facts and issues, with the exception of CRA employee deductions: *PricewaterhouseCoopers v. Bank of Montreal*, 2017 CarswellNfld 91, 46 C.B.R. (6th) 309, 2017 NLTD(G) 43 (N.L. T.D.). For a full discussion of this judgment, see F§5(5) "Trust Property — Express Trusts".

The Alberta Court of Queen's Bench held that orders made under the *BIA* concerning priorities prevail over priorities under the Alberta *Builders' Lien Act* (*BLA*) where there is a conflict between federal and provincial legislative provisions. The court has the authority to determine the priority of the receiver's fees and disbursements, as well as repayment of any court-authorized borrowing. The Court held that its authority to grant a super priority must be exercised equitably, having regard for the purpose of the legislation and the purpose of the receivership. It was appropriate to have the receiver's charge rank ahead of claimants who would benefit from the receivership. For one claimant, a municipality, the Court held that there was no apparent benefit to it arising out of the receivership and thus its priority for property taxes was not subordinate to the receiver's fees or approved borrowings. The Alberta Court of Queen's Bench held that the situation before it was one in which recourse to the "comeback provision" was appropriate, citing *Re Garritty*, 2006 CarswellAlta 382, 21 C.B.R. (5th) 237, 2006 ABQB 238, [2006] A.J. No. 351 (Alta. Q.B.) for the principles that govern an application under s. 187(5), including: whether there are changed circumstance or there was fresh evidence that is material, substantial in nature and with reasonable diligence could not have been know at the time of the original application; the promptness of the application within a reasonable time of acquiring the new information; consideration of the rights of parties and the public interest; whether it is just and expedient in the court's control of its process; the integrity of the trustee's conduct; and that the authority is exercised sparingly. The Court also observed that the use of templates is highly desirable to provide consistency in practice; however, the court is not bound by the templates and must craft an order that meets the particular circumstances of the receivership: *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 CarswellAlta 305, 57 C.B.R. (6th) 1, 2018 ABQB 124 (Alta. Q.B.).

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HMANALY N§74
Houlden & Morawetz Analysis N§74

Houlden and Morawetz Bankruptcy and Insolvency Analysis

COMPANIES' CREDITORS ARRANGEMENT ACT

Sections 11-11.11
L.W. Houlden and Geoffrey B. Morawetz

N§74 — Relationship of Stay Order with Security on Aircraft Objects

N§74 — Relationship of Stay Order with Security on Aircraft Objects

See ss. 11, 11.01, 11.02, 11.03, 11.04, 11.05, 11.06, 11.07, 11.08, 11.09, 11.1, 11.11

Section 11.07 was repealed 2012, c. 31, s. 420. The treatment of aircrafct objects is addressed in the *Act to Implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* ("*Aircraft Objects Act*"); creating an exception so that creditors with security on aircraft objects are not subject to the stay of proceedings under the *CCAA* if the debtor fails to protect or maintain the object in accordance with the agreement. The *Aircraft Objects Act* provides that 60 days following the commencement of proceedings under the *CCAA*, the creditor can seize the object unless the debtor has (i) remedied all defaults under the agreement, other than a default constituted by the commencement of *CCAA* proceedings or the breach of a provision in the agreement relating to the company's financial condition; (ii) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until *CCAA* proceedings end, and (iii) agreed to perform all the obligations arising under the agreement after the *CCAA* proceedings end. It releases the stay if after the 60-day period the debtor remains in default.

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TAB 8

Most Negative Treatment: Not followed
Most Recent Not followed: Pyrogenesis inc., Re | 2004 CarswellQue 2292, J.E. 2004-1981, REJB 2004-70374, [2004] R.J.Q. 2769, 5 C.B.R. (5th) 286 | (C.S. Qué., Sep 1, 2004)

1975 CarswellOnt 123
Ontario Court of Appeal

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.

1975 CarswellOnt 123, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 9 O.R. (2d) 84

Robert F. Kowal Investments Limited and Randy Construction Company Limited v. Deeder Electric Limited

Jessup, Lacourcière and Houlden JJ.A.

Judgment: April 23, 1975

Counsel: *H. L. Morphy* and *S. R. Block*, for appellant Monte Denaburg.
J. G. Reid, Q.C., for respondents.
L. Klug, for respondent receiver.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees
Headnote
Receivers --- Remuneration of receiver — Remuneration — Priority of fees
Receivers — By court appointment — Winding-up of partnership — Fees and disbursements of receiver — Priorities.
The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. *Boehm v. Goodall*, [1911] 1 Ch. 155 applied. Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. In these circumstances the order permitting the receiver to borrow would ordinarily provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.
The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact, that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured

creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, supra, applied, and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding & Engineering Co. Ltd.*, [1912] W.N. 66; *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) (Man. C.A.) applied.
The third exception is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L.D. 12 Eq. 126; *Re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875), 3 Ch. D. 411 at 427; Clark on Receivers, vol. 2, s. 640, p. 1078 applied. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a mortgagee of sums to which he is legally entitled under his charge falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the receiver would be entitled only to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

Appeal from the judgment of Holland J., 13th December 1974.

The judgment of the Court was delivered by *Houlden J.A.*:

1 This is an appeal from an order of Holland J. dated 13th December 1974, which declared that Jerry Friedman was entitled, on his discharge as receiver, to priority for $24,043.26 over a land titles charge held by the appellant, the sum of $24,043.26 being the total of payments of principal and interest made by the receiver to the appellant on his charge during the period of the receivership.

2 On 30th November 1971 a charge under The Land Titles Act, R.S.O. 1970, c. 234, was given on the property municipally known as 2010 Jane St. in the Borough of North York. The charge was in the principal sum of $400,000. It was registered in the Office of Land Titles at Toronto on 1st December 1971, as instrument B-306317. By transfer of charge dated 31st December 1971, and registered in the Office of Land Titles at Toronto on 17th January 1972, as instrument B-310301, the charge was transferred to the appellant Monte Denaburg.

3 In February 1972 the premises at 2010 Jane St. were purchased by Robert F. Kowal Investments Limited, Randy Construction Company Limited and Deeder Electric Limited in partnership. On the property there was located a car wash. At the time of the purchase, the three limited companies entered into a partnership agreement with respect to the operation of the car wash.

4 In January 1974 serious differences arose between the partners concerning the management of the business. On 17th January 1974 the defendant Deeder Electric Limited gave notice to the plaintiffs of its desire to terminate the partnership. On 7th February 1974 the plaintiffs issued a writ against Deeder Electric Limited claiming, inter alia, the dissolution of the partnership, the appointment of a receiver and an accounting.

5 By a consent judgment dated 13th March 1974 Wright J. made an order dissolving the partnership and appointing Jerry Friedman as receiver of the partnership affairs. Prior to accepting the appointment, Friedman obtained from the plaintiffs an agreement to be responsible for his fees, costs, charges and expenses in acting as receiver insofar as he was unable to recover them from the assets of the partnership.

6 On 9th May 1974 Goodman J. made a consent order varying the judgment of 13th March 1974. Paragraph 13 of the order of 9th May 1974 provided:

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not

> to exceed prime plus 3 per cent, for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

7 Although para. 13 referred to the "receiver and manager", the original judgment and the amending order appointed Friedman as receiver only of the partnership assets. Pursuant to the authority given by para. 13, the receiver borrowed $25,000.

8 The appellant was not served with notice of any of the foregoing proceedings in the partnership action. However, there is no doubt that shortly after 13th March 1974 the appellant was aware of the appointment of the receiver. From March to September 1974 the appellant received payments on his charge from the receiver in the total amount of $24,043.26.

9 By notice of motion dated 18th October 1974 the receiver applied to the Court for permission to borrow a further $15,000 on the same terms as in para. 13 of the order of 9th May 1974, and for an order that the sum so borrowed and the $25,000 already borrowed should be a first charge on the whole of the undertaking, property and assets of the partnership in priority to the appellant's charge. The appellant was served with notice of this application. On 24th October 1974 Holland J. dismissed the application without written reasons.

10 By notice of motion dated 9th December 1974 the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made and obligations incurred by him. The appellant received notice of this application. On 13th December 1974 Holland J. made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

11 The mortgage payments made by the receiver to the appellant were proper payments for the receiver to have made. If they had not been made, the appellant would likely have taken steps to enforce his security and if this had occurred, the potential recovery of the partners and the unsecured creditors could have been seriously affected. The receiver was, therefore, clearly entitled to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make the payments on the appellant's charge. However, the issue that we are called on to decide is whether the receiver should receive priority over the secured claim of the appellant for the borrowed moneys.

12 The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. In *Boehm v. Goodall*, [1911] 1 Ch. 155, a receiver and manager of a partnership in carrying on a business made payments which the assets of the firm were insufficient to satisfy in full; he brought an application for an order that the partners should personally indemnify him for the balance owing to him. In dismissing the application, Warrington J. said (at p. 161):

> I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.

13 Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who

takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

14 There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him.

15 The priority which is given to a receiver in this type of situation is illustrated by *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1. In that case a building company became involved in serious financial difficulties. Receivers and managers were appointed at the request of debenture holders of the company. The receivers and managers obtained permission to borrow £5,000 by way of a first charge in priority to the security of the debenture holders. Certain proceedings were then taken by unsecured creditors as a result of which an agreement was made whereby unsecured creditors agreed to advance two-thirds and the plaintiff Strapp, who was a debenture holder, agreed to advance one-third of the moneys that the receivers and managers wished to borrow. In due course, the receivers and managers borrowed £1,750 from Strapp and £2,500 from the unsecured creditors. The receivership worked out badly, and in completing certain contracts, the receivers and managers used up all the moneys they had borrowed and, in addition, incurred substantial further indebtedness. The receivers and managers applied for an order that they were entitled to priority for the debts they had incurred not only over the security of the debenture holders, but also over the security held by Strapp and the unsecured creditors for the £4,250 that the receivers and managers had borrowed. This application was dismissed by Vaughan Williams J., but on appeal his decision was reversed and the receivers and managers were granted the priority they had requested. With reference to the position of the persons who had advanced the £4,250, A. L. Smith L.J. said (at p. 11):

> Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred [*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; and *Re Bushell; Ex parte Izard* (1883), 23 Ch. D. 75], applies, and consequently they [the receivers and managers] are entitled to be paid their charges.

16 However, the exception to the general rule enunciated in *Strapp v. Bull*, supra, has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given no notice of the proceedings which led to the appointment of Jerry Friedman as receiver. It was not until after

the indebtedness was incurred that the receiver sought an order giving him priority over the appellant's charge. The first exception to the general rule has, therefore, no application to the facts of this case.

17 The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors: *Greenwood v. Algesiras* (*Gibraltar*) *Ry. Co.*, [1894] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras* (*Gibraltar*) *Ry. Co.*, supra; and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order: *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding and Engineering Co. Ltd.*, [1912] W.N. 66.

18 The appointment of a receiver in these circumstances is illustrated by *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) 373 (Man. C.A.). In that case, a receiver was appointed of all the undertaking, property and assets of a building company which was in the course of construction of an apartment block. There was a first mortgage on the premises of $1,100,000. Unfortunately, the sale of the building by the receiver did not realize sufficient to pay the first mortgage in full. While admitting that certain disbursements of the receiver were in order and entitled to be paid in priority to its mortgage, the first mortgagee claimed that the balance of the disbursements and the fees of the receiver should not be given priority over the mortgage.

19 Although the judgment makes no mention of whether or not the first mortgagee was served with the motion to appoint the receiver, it would seem that service must have been made on the mortgagee, since Dickson J.A. (as he then was), who delivered the judgment of the Manitoba Court of Appeal, pointed out that the first mortgagee did not appeal the order appointing the receiver. The report does not indicate either whether the secured creditor consented to or approved of the appointment of the receiver. The Court of Appeal for Manitoba held that, the appointment having been made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property, the receiver should be given priority for all his fees and disbursements over the secured creditor. Dickson J.A. said (at pp. 375-76):

> The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property?

20 The second exception to the general rule likewise has no application to the facts of this case. Paragraph 13 of the order of Goodman J. of 9th May 1974, quoted supra, created a charge on the whole of the undertaking, property and assets of the partnership. This could have referred only to the equity that the partnership had in the undertaking, property and assets. Prior to the appointment of the receiver, the partners had, of course, no power to create a security having priority to the registered charge of the appellant. Although the court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly notice would have to be given to the appellant of such an application and likely the appellant would have to be made a party to the proceedings: *Allan v. Man. and North Western Ry.* (1894), 10 Man. R. 143.

21 The third exception which should be noted is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision

Re Regent's Canal Ironworks Co.; Ex parte Grissell (1875), 3 Ch. D. 411, James L.J. in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.

22 In Clark on Receivers, vol. 2, s. 640, p. 1078, the law on the point is stated in this way:

> By the great weight of authority the claims against, and the indebtedness incurred by a receiver as a result of his administering the affairs, and even conducting the business of an insolvent concern of a private nature, except where absolutely essential to the preservation of its property, cannot be given priority over the claims of mortgagees or lienholders to the corpus of the property in the absence of consent or estoppel affecting said lienees.
>
> However, preservation costs may be absolutely necessary and be allowed against the lienholders. Preservation of the property from destruction, waste or loss, with or without the mortgagee's consent may include putting a person in charge of the property, as a watchman or otherwise, paying necessary repairs on the property and taxes which would prevent a forfeiture, and necessary insurance.

23 Counsel for the respondents and for the receiver argued strenuously that the moneys paid by the receiver to the appellant were necessary costs of preservation of the property and hence should be given priority over the appellant's charge. However, in my opinion, the payments cannot be regarded as a necessary cost of preserving the property. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. The payments in the present case were made primarily for the benefit of the partners, and incidentally for the benefit of the unsecured creditors, but not for the benefit of the appellant. It is true that the appellant received payments on his charge, but the payments were made not to benefit the appellant; rather, they were made to prevent him from taking action to enforce his security.

24 The payments mentioned in the *Regent's Canal* case are the type of payments that in my opinion fall within the scope of payments necessary for the preservation of property for the benefit of all interested parties. If, for example, the wind had blown off the roof of the car wash so that the premises were exposed to the elements, the repair of the roof by the receiver to prevent damage to the interior of the premises would have been for the benefit of all parties; and the receiver would have been entitled to priority over the appellant's charge for moneys expended for this purpose. Again, if the receiver had been obligated to pay taxes to prevent a tax seizure, that would have been for the benefit of all parties, including the appellant. But a payment to a mortgagee of sums to which he was legally entitled under his charge, in my judgment, falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. If the order under appeal is allowed to stand, the appellant will receive little or no benefit from the payments that were made, since the receiver will have priority over his charge for those payments. I do not think, therefore, that the third exception to the general rule has any application to the facts of this case.

25 To sum up, I can see no basis for granting the receiver priority over the appellant's charge for the sum of $24,043.26 paid by the receiver to the appellant.

26 The appeal should be allowed with costs, and the order of Holland J. of 13th December 1974 should be varied by striking out para. 2 thereof.

End of Document

TAB 9

1992 CarswellAlta 287
Alberta Court of Queen's Bench

Royal Bank v. Vulcan Machinery & Equipment Ltd.

1992 CarswellAlta 287, [1992] 6 W.W.R. 307, [1992] A.W.L.D. 673, [1992] A.J. No. 1216, 13 C.B.R. (3d) 69, 3 Alta. L.R. (3d) 358

ROYAL BANK OF CANADA v. VULCAN MACHINERY & EQUIPMENT LTD.

Cairns J.

Judgment: June 5, 1992
Docket: Doc. Calgary 9001-14546

Counsel: *J. Ircandia* and *D. Kohlenberg*, for Royal Bank of Canada.
J.T. McCarthy, Q.C., and *T. Czechowskyj*, for Mitsui and Mitsubishi.
L. Robinson, for Price Waterhouse (receiver-manager of Vulcan).

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees
Headnote
Receivers --- Remuneration of receiver — Remuneration — Priority of fees
Secured creditors — Realization of security — Secured creditors not being bound by terms of ex parte court order giving receiver first charge over all assets of debtor company including their secured assets — Judicature Act, R.S.A. 1980, c. J-1.
Receivers — Costs and remuneration — Effect on secured assets of secured creditors — Secured creditors not being bound by terms of ex parte court order giving receiver first charge over all assets of debtor company including their secured assets — Judicature Act, R.S.A. 1980, c. J-1.
The plaintiff bank was the principal banker and financier of the debtor company. When the debtor got into financial trouble, the bank tried to resolve the problems but eventually decided to apply for a court-appointed receiver. Prior to applying, the bank did not notify any of the debtor's three principal secured creditors. The bank obtained an ex parte order which included a clause that gave the receiver a first charge over all of the debtor company's assets including the secured assets of the secured creditors (the "priority clause"). Two of the three secured creditors applied to vary the order to exclude them from the effect of the priority clause.
Held:
The application to vary was allowed.
While there was a need for the court-appointed receiver, there was no such emergent, unusual, or extraordinary need for the appointment of a receiver-manager with a priority clause which had the effect of seriously prejudicing the rights of secured creditors to the point of trammelling their rights.
Table of Authorities
Cases considered:

Bank of Montreal v. Shaw Ranches Ltd. (1984), 51 B.C.L.R. 235, 31 R.P.R. 35, 51 C.B.R. (N.S.) 292 (S.C.) — *considered*

Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co. (1991), 5 C.P.C. (3d) 299, (sub nom. *Re Wm. C. Rieger Co. (Receivership)*) 126 A.R. 69 (Q.B.) — *considered*

Credit foncier franco-canadien v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. S.C.) [affirmed (1966), 56 W.W.R. 623n (Alta. C.A.)] — *referred to*

Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc. (1984), 55 B.C.L.R. 38, 52 C.B.R. (N.S.) 129 (C.A.) — *considered*

Federal Business Development Bank v. Persic (1981), 32 B.C.L.R. 75 (C.A.)*referred to Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (C.A.), reversing (1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.) — *considered*

Oberman v. Mannahugh Hotels Ltd., [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.)*considered Robert F. Kowal Investments Ltd. v Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.)*considered Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.)*considered Stenner Financial Services Ltd., Re* (1988), 68 C.B.R. (N.S.) 298 (B.C.S.C.) — *considered*

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15 —

s. 95

Judicature Act, R.S.A. 1980, c. J-1 —

s. 13

Securities Act, S.B.C. 1985, c. 83.

Rules considered:

Alberta Rules of Court —

R. 387(2)

Application by secured creditors to vary order giving receiver-manager first charge over all of debtor's assets including secured assets of secured creditors.

***Cairns J.* (orally):**

1 These are reasons for judgment in the action *Royal Bank and Mitsubishi and Mitsui*. These matters came before the court by way of special chambers hearings on the motions of 1) Mitsubishi Canada Ltd., hereinafter referred to as "Mitsubishi," filed January 10, 1991 and originally returnable February 4, 1991; and 2) Mitsui Machinery Distribution Ltd., hereinafter referred to as "Mitsui," motion filed December 20, 1991 and originally returnable February 20, 1992, wherein the applicants Mitsubishi and Mitsui seek to vary the order of the Honourable Mr. Justice Medhurst dated October 9, 1990, hereinafter referred to as the "Medhurst order" such that neither Mitsubishi nor Mitsui is subject to the first charge, stipulated therein, of the receiver-manager for its costs and expenses. In other words, the applicants seek, pursuant to s. 95 of the Alberta *Business Corporations Act* [S.A. 1981, c. B-15] and pursuant to R. 387(2) and pursuant to para. 24 of the order — an order excluding them from the effect of para. 14 of the Medhurst order, which stated:

> 14. Any expenditure which shall be properly made or incurred by the Receiver shall be allowed to it in passing its accounts and, together with its remuneration, shall form a charge on the undertaking, property and assets of the Defendant in priority to all security on the undertaking, property and assets of the Defendant presently held by the Plaintiff, or any other party, and all encumbrances subsequent thereto.

and further, for an order excluding them at common law.

2 The issues that I must address are therefore these:

3 1) Should Mitsubishi or Mitsui be bound by the terms of the ex parte Medhurst order wherein the receiver-manager of Vulcan Machinery & Equipment Ltd., hereinafter referred to as "Vulcan Machinery," was given a first charge over all the assets of Vulcan Machinery including the secured assets of Mitsubishi and Mitsui? and

4 2) If the answer to issue 1 is in the negative, is there any other reason at law whereby either Mitsubishi or Mitsui or both ought to be liable for all or a portion of the receiver-manager's costs, fees, charges and expenditures in priority to the security held by Mitsubishi and Mitsui? and

5 3) If either Mitsubishi or Mitsui or both are liable to the priority of the receiver-manager's fees, expenses, charges or expenditures, on what basis are the fees to be allocated to either Mitsubishi or Mitsui or both?

6 The facts of this lawsuit are complex, convoluted and multi-faceted, however, relatively simple as they relate to the granting of the Medhurst order and events subsequent thereto. They may be simply stated as follows: Vulcan Machinery was in the business of sales, rentals and servicing of heavy equipment used in the construction and forestry industries, it having been incorporated in Ontario, and subsequently, registered extra-provincially in Alberta, Saskatchewan, Manitoba and British Columbia, in which provinces it conducted substantial business, having 13 offices and in the order of 170 employees. In other words, it was a substantial ongoing enterprise.

7 The principal banker and financier of Vulcan Machinery was the plaintiff in the within action, Royal Bank of Canada, who, at the time of the Medhurst order, was owed on outstanding loans nearly $14 million by Vulcan and in addition, in 1988, a deferred principal sum of $10 million. The Royal had been Vulcan's banker since 1982 and between then and October 1990, the date of the granting of the Medhurst order, had advanced substantial loans, received substantial payments, taken various and sundry forms of security to include, inter alia, fixed and floating charge debentures, pledge agreements, assignments of book debts, assignments of insurance, land mortgages, undertakings, guarantees, hypothecations and the like.

8 The debenture was in the amount of $50 million and provided, inter alia, 1) that the security was enforceable if the debtor, Vulcan, defaulted and, 2) that the bank, upon the security becoming enforceable or crystallizing, could appoint a receiver or a receiver-manager of the undertaking property and assets charged.

9 Over the course of time and having particular reference to the financial difficulties encountered by the debtor from time to time, the bank and Vulcan entered into loan restructuring agreements in 1986, 1987 and 1988. The object of those exercises was to permit the debtor an opportunity to resolve its financial difficulties. It is also worthy of note that these various security documents between Vulcan and Royal permitted, expressly, Vulcan to grant security and encumbrances to its suppliers to include Komdresco, Mitsubishi and Mitsui, all in the ordinary course of business.

10 Despite efforts by the bank and Vulcan to extricate itself from financial woes, Vulcan was not successful, as a result of which, by letter dated February 14, 1990, the bank provided formal notice to Vulcan of default pursuant to the amended restructuring agreement and gave the debtor 30 days to rectify and remedy the default. The bank did not immediately commence action, or privately appoint by instrument a receiver or receiver-manager, but rather continued to work with the defaulting debtor in an attempt to resolve the financial difficulties or to effect a sale as a going concern of Vulcan Machinery. In fact, in May 1990, some months after the default, Vulcan retained the accounting firm of Ernst and Young with a view to appraisal and possible sale.

11 By August 1990 the principals of Vulcan, and the Vulcan Group as guarantors, conceded that they were unable to meet the bank's demands and, further, conceded that if the sale were not consummated by mid-September, the debtor would consent to the appointment by the bank of a receiver-manager.

12 The September 17, 1990 deadline was extended to September 24, again to October 1 and again to October 8, 1990 to facilitate a resolve of financial difficulties or a sale, all without success. The sale that was anticipated was to a related company "Vulmac," the shares of which were owned principally by Mr. Ken Knight, the principal of Vulcan

Machinery and also the principal of another company of the Vulcan Group, known as Vulcan Machinery Sales Ltd., and after offers and counteroffers were exchanged, up to and through October 3 and 4, no sale was consummated by October 8, 1990 or at all.

13 On October 5, 1990, a Friday prior to the 1990 Thanksgiving weekend (the Monday, October 8 being a holiday), the two major principals of Vulcan Machinery, Mr. Knight, the president, and Mr. Green, the vice-president and chief financial officer, both resigned their positions with notice to the debtor company with a copy to the bank dated October 5, 1990.

14 It is obvious from the evidence that the resignations shocked representatives of the bank, Vulcan and Price Waterhouse and motivated the order. In addition, Knight wrote also on October 5, 1990 to Vulcan's suppliers, inter alia, Mitsubishi and Mitsui, advising of the facts that 1) no sale of Vulcan had been negotiated, and 2) that he had resigned.

15 In addition, other events occurred on October 5 which are worthy of note. They are: Mr. Steranka of the Royal Bank had several conversations this day with various people to include: a) Mr. Chuck Gerwing, Calgary counsel of Vulcan; b) Mr. Whent, general counsel of Vulcan in Thunder Bay, who first informed him of the resignations of Knight and Green; c) with Mr. Neil McManus, general counsel of one of the secured creditors, Komdresco.

16 In this conversation Mr. Steranka made no mention whatsoever of the already formulated bank plans of obtaining a court-appointed receiver with its subject priority clause, and only stated to Mr. McManus, "The Bank would be doing what we consider necessary," reference transcript 8, p. 150, line 8. In fact, McManus specifically mentioned receivership to Mr. Steranka to which Mr. Steranka replied, "I will check with my superiors and we will do whatever is necessary." His explanation for this omission was twofold: 1) he felt the receiver would so notify Mr. McManus after the granting of the order and the creditor would then be able to exercise rights of appeal or variation, and 2) "we were in an emergency and it was not a priority to contact McManus." All this despite his admission on cross-examination that he had all the documents to be presented to the court, prior to October 5, 1990. In fact, by September 19, 1990 he had a draft statement of claim, order and application which were reviewed at a meeting of bank officials and solicitors September 20, 1990 and was aware of the priority provisions as to costs and that the pro rata distribution of costs was, according to him, an advantage of going the "court-appointed route."

17 In other words, as he described on cross-examination, reference vol. 19, p. 303, lines 5 and 6: "We had all our ducks in order prior to the receivership, prior to October the 5th." In addition, Mr. Steranka had conversations this day with Mr. Bourbonnais of the Royal Bank Special Loans Division to discuss "modus operandi" and a concern over the "rudderless ship" (being Vulcan) and it was determined that the only course was a court-appointed receiver. Further on this day Mr. Steranka had conversations with Mr. McPhedran of Price Waterhouse in conjunction with his retainer as receiver-manager and in conjunction with securing the properties, principally in Calgary and Thunder Bay, over the weekend. In fact, the evidence indicated that numerous "drive-bys" were conducted over the weekend October 5-8, 1990 by personnel of Price Waterhouse in Calgary and Thunder Bay and by representatives of the Royal Bank in Calgary.

18 In addition, the bank in response to these continuing financial difficulties and the resignations again demanded payment on its security, which demand, of course, was not satisfied, with the result that the bank deemed it expedient and necessary to apply for what was to become the Medhurst order, which application was made in the early afternoon hours of Tuesday, October 9, 1990.

19 There was, however, an incident of note which occurred at or about 9:00 a.m. October 9, 1990 prior to the application, and that related to a conversation between Mr. Steranka of the bank and Mr. McPhedran of Price Waterhouse, wherein it was conceded by each that "things were quiet at each of Thunder Bay and Calgary" and further that they had each driven by the Calgary property of Vulcan and saw "no activity — everything was quiet." The evidence further indicated that at all branches of Vulcan across Canada there were various branch managers who were responsible people and Mr. Steranka testified on cross-examination that he had no reason to be suspicious of these branch managers, from a theft or misappropriation standpoint, in the face of the resignations of Knight and Green.

20 It is apparent from the evidence that the bank had taken a considerable number of steps in anticipation of an application of a court-appointed receiver well in advance of October 5, 1990 to include:

21 1) A meeting in August 1990 between bank officials and Mr. McPhedran of Price Waterhouse Limited respecting its options and possible receivership; and

22 2) A meeting in mid-September between bank officials and Mr. McPhedran wherein it was determined that, in the absence of an acceptable offer, the bank would apply for court-appointed receiver. Mr. McPhedran stated in cross-examination that these preparatory meetings merely put Price Waterhouse on stand-by and were standard, normal practice.

23 3) The bank's solicitors in mid-September prepared draft documents including draft statement of claim and draft application, af fidavit and order; and

24 4) The bank solicitors obtained, in late September 1990, consent of Price Waterhouse to act as receiver-manager if appointed by the court on a subsequent application; and

25 5) The bank's solicitors arranged for agent solicitors in British Columbia, Saskatchewan, Manitoba and Ontario.

26 One step, *however*, which neither the bank nor its solicitors, nor the anticipated receiver-manager, Price Waterhouse, took was to notify any of the three principal secured creditors, Komdresco, Mitsubishi or Mitsui, of its plans to place Vulcan in receivership by way of court-appointed receiver-manager despite its planning and deliberation prior to and up to October 5, 1990 nor, and this is most germane to my deliberations, did it give any form of notice whatsoever to those secured creditors prior to the granting of the Medhurst order, October 9, 1990, which order, by at least two paragraphs thereof, specifically paras. 14 and 29, had the capability of seriously prejudicing the secured creditors and their security. This order was granted pursuant to s. 13 of the *Judicature Act* [R.S.A. 1980, c. J-1] on an ex parte basis.

27 In addition, I am satisfied on the evidence that the bank knew of these three secured creditors, Komdresco, Mitsubishi and Mitsui, prior to the date of the application such that some form of notice, formal or informal, could have been given to them. Indeed at the hearing, Mr. Ircandia on behalf of the Royal Bank conceded that the Royal knew of Mitsubishi and Mitsui as suppliers, although it did not have a contact person for them, such as was the case with Komdresco and its contact, Mr. McManus. In fact, a review of the affidavit in support of the ex parte application, i.e., that of Mr. Peter Steranka sworn October 9, 1990, alludes, although not specifically to these secured creditors by name, to "numerous classes of claimants including trade creditors."

28 Subsequent to the granting of the Medhurst order, the same was formally served upon the secured creditors, Mitsubishi and Mitsui on or about October 19, 1990 at which time the provisions as to priority for the receiver's administration expenses (para. 14) was specifically brought to the attention of Mitsubishi and Mitsui.

29 In addition, it would appear that the three secured creditors knew of the ex parte Medhurst order and the appointment of Price Waterhouse sometime earlier than October 19, 1990 and within a few days of the order having been granted. However, despite that, one thing is clear and uncontradicted; it was granted ex parte Mitsui and Mitsubishi, and upon no notice of any kind or form to them. Mr. Steranka admitted on cross-examination that neither he nor anyone else at the Royal Bank canvassed the secured creditors prior to the appointment nor did he or anyone else at the bank solicit their views or preference in relation to proceeding with a court-appointed receiver.

30 The security claimed by the two applicant secured creditors, Mitsubishi and Mitsui, is as follows:

31 1) as to *Mitsubishi*

32 a) it held individual conditional sales agreements on specific units of heavy equipment supplied to Vulcan Machinery; and

33 b) in addition, there was a priority agreement between Mitsubishi and the Royal Bank embodied in a subordination letter August 4, 1988 from Royal Bank to Mitsubishi; and

34 c) in addition, as at September 27, 1990, prior to the Medhurst order, and resulting from negotiations between Mitsubishi and Vulcan Machinery, Mitsubishi had a voluntary surrender agreement from Vulcan as to specific machinery of Mitsubishi all as set forth in the voluntary surrender and Sched. A attached thereto, all attached as Ex. B to the Hasagawa affidavit sworn January 7, 1991.

35 Following advice of the Medhurst order, Mitsubishi demanded its equipment by letter of October 26, 1990 (that is to say, within one week of formal notice), and again by solicitors' letters December 11 and 13, 1990, at which time Mitsubishi also advised as to an application to vary the Medhurst order, the subject application now before me. By that time, specifically December 12, the receiver-manager, Price Waterhouse, had reported to the creditors, inter alia, that the receiver-manager was aware that Mitsubishi wished to realize on its security outside the administration of the receiverships by taking possession of its security and further that there was no apparent residual equity in the assets, the subject of the Mitsubishi security.

36 2) The security as it related to Mitsui was founded on its claiming an interest in 13 units of equipment on the basis of a verbal floor plan arrangement, and, in addition, possession having been garnered by it on or about September 21, 1990 prior to the receiving order of Mr. Justice Medhurst.

The law

37 I have been referred to several authorities by counsel herein for which I am grateful and I feel it appropriate to review and comment on these authorities.

38 1. *Oberman v. Mannahugh Hotels Ltd.*, [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.).

39 This case involved an application by a receiver to determine priorities of claims against proceeds realized from the sale of property. The receiver-manager had been appointed on application of a second mortgagee by the court on the consent of the first mortgagee. The property was ultimately sold, also by consent, and a dispute arose as to whether or not the first mortgagee ought to take a secondary position to the receiver's fees. The position of the first mortgagee was that the receiver must look to the equity of the defendant.

40 Mr. Justice Wilson, after discussing the facts and the positions of the parties, stated at p. 187 [C.B.R.]:

> And certainly, where the receiver acts under an appointment by the court, he may not (in the absence of an agreement for indemnity) look to the party at whose instance that order was made, even where the appointment, as here, was made with the consent of all the interested parties: *Boehm*, supra and *Johnston v. Courtney*, [1920] 2 W.W.R. 459 (B.C.C.A.). The reason for this is that a receiver so appointed is not the agent of any party, including the one whose initial request led to his appointment, but rather he is an officer of the court, and in the discharge of the responsibilities entailed by such appointment he is prima facie to be looked upon as the arm of the court in that behalf: see also *Braid Bldrs. Supply & Fuel Ltd. v. Genevieve Mtge. Corpn.* (1972), 17 C.B.R. (N.S.) 305 at 305, 29 D.L.R. (3d) 373 (Man. C.A.), per Dickson J.A. (as he then was):
>
>> In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B.D. 67 (D.C.).
>
> And he continued at pp. 307-308:

> The argument is that a receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 (C.A.); *Re Glasdir Copper Mines Ltd.; English Electro-Metallurgical Co. Ltd. v. Glasdir Copper Mines Ltd.*, [1906] 1 Ch. 365 (C.A.). It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. The court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of the creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property.

Further at p. 189 Wilson J. stated:

> And see *Credit Foncier Franco-Can. v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734, affirmed 56 W.W.R. 623n (Alta. C.A.), where Kirby J. at p. 743 accepted the opinion of Smith L.J. in *Strapp v. Bull, Sons & Co.*, supra, at p. 9, that:
>
> > Now, it seems to me that so far as the general law is applicable to the position of the receivers and managers, it is not in dispute. It is laid down in *Batten v. Wedgwood Coal & Iron Co.* (1884), 28 Ch. D. 317, and in *Re Bushell; Ex parte Izard* (1883), 23 Ch. D. 75 (C.A.), by Sir George Jessel; and nobody on the one side or the other quarrels with the law which was there enunciated, that the receivers and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed receivers and managers, and they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property.

And further at p. 189 Wilson J. stated:

> The situation may be otherwise where the receiver was appointed by the creditor himself pursuant to the terms of the debenture or other security signed by the debtor ...

And further at p. 190 Wilson J. stated:

> Prima facie, then, the receiver is entitled to enter upon the discharge of his responsibilities secure in the knowledge that his costs and disbursements, including fees paid to solicitors necessarily engaged by the receiver (*Re Sil-Van Consol. Mining etc. Co.; Can. Trust Co. v. Sil-Van Consol. Mining etc. Co.* (1957), 23 W.W.R. 142 (B.C.)) will rank above all claims except those set apart by the order appointing him or otherwise entitled to rank ahead of the receiver himself ...

41 2. *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (C.A.).

42 In this case a third mortgagee brought foreclosure proceedings and applied for and obtained a receiving order with no notice and thus, ex parte, the Federal Business Development Bank who held both the first and second mortgage. The receiver expended moneys in the renovation of the hotel. The property sold, and an application was brought to fix priorities. It was held at trial [(1982), 43 C.B.R. (N.S.) 179 (B.C.S.C.)] that the receiver's fees took priority. However, on appeal, it was reversed and no priority for the receiver's fees was granted.

43 The headnote, which accurately reflected the decision, read in part [D.L.R.]:

> Since the FBD Bank was not a party to the third mortgage foreclosure proceedings and did not receive notice of the application for the appointment of the receiver and, therefore, did not consent to the expenditure by the receiver, the receiver could not be given priority over it, unless the expenses incurred by the receiver were necessary for the preservation or improvement of the property.

44 In this case Hinkson J.A speaking for the court stated at p.632 and following:

> It is fundamental that a person is not to be bound by a court order of which he has no notice. In the Lochson foreclosure proceedings the Federal Business Development Bank was not named as a respondent nor, as I have indicated, did it have notice of the application. That then is the starting point in these proceedings, namely, that the Federal Business Development Bank cannot be bound by the order made by the Honourable Judge Stewart.

And further at p. 632 Hinkson J.A. stated:

> As the receiver and the Canadian Imperial Bank of Commerce are unable to rely upon the order made by Judge Stewart on August 10, 1978, it has been necessary to fall back on the position at common law in order to sustain the priority granted by Judge Tyrwhitt-Drake.

And further at p. 633 Hinkson J.A. stated:

> In my opinion, the issue is to be resolved on the basis of the decision of the Ontario Court of Appeal in *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84, 21 [C.B.R. (N.S.)] 201. In that case a secured creditor received no notice of the application to appoint a receiver and the issue arose as to whether or not and upon what basis the secured creditor could become bound by the acts of the receiver so that the receiver would be entitled to priority over the secured creditor. Mr. Justice Houlden, in delivering the judgment of the court, made reference to *Clark on Receivers*, 3rd ed., vol. 1, s. 22, p. 25, and quoted from that text at p. 496 D.L.R., p. 88 O.R. of the judgment, as follows:
>
> > When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.
>
> I understand that statement to express the position at law.
>
> Then, Mr. Justice Houlden continued at p. 496 D.L.R., p. 88 O.R.:
>
> > There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him.

> Pausing there for a moment, in my opinion the receiver and thus the Canadian Imperial Bank of Commerce do not fall within the first exception.
>
> Then Mr. Justice Houlden continued to discuss a second exception, and he said this at p. 497 D.L.R., p. 89 O.R.:
>
> > The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him.
>
> Mr. Meyer, on behalf of the Canadian Imperial Bank of Commerce, sought to come within the second exception. But Mr. Justice Houlden, after stating that to be a second exception, said this at p. 499 D.L.R., p. 91 O.R., in discussing it:
>
> > Although the Court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly, notice would have to be given to the appellant [I interpolate — the secured creditor] of such an application and likely the appellant would have to be made a party to the proceedings.
>
> Now, on the facts of the present case, if that be the situation, then clearly the second exception has no application because no notice was given to the Federal Business Development Bank, nor was it made a party to the proceedings.
>
> The third exception discussed by Mr. Justice Houlden is the situation where the receiver has expended money for necessary preservation or improvement of the property.

Further at p. 635, Mr. Justice Hinkson stated:

> An analysis of the three exceptions indicates that with regard to the first and second, the secured creditor must either apply for, consent to, or approve of, the appointment of a receiver or have notice under the second exception. The third exception, it seems to me, deals with a different type of situation, really one where there are circumstances which require the receiver to do something to preserve the property in an emergency situation where there is not time to come to the court beforehand and give notice to the creditors beforehand of what he intends to do, and thus obtain the approval of the court, and so he comes to the court after the event and in appropriate circumstances the court will approve the action of the receiver in those circumstances.
>
> In my opinion on the facts of the present case, the receiver does not come within the third exception.
>
> So, I go back to what Mr. Justice Houlden said with respect to the common law position, namely that a court under such circumstances has no power to authorize expenses for improving or making additions to the property for carrying on the business of the defendant at the expense of prior mortgages [sic] or lienholders without the sanction of such mortgagees or lienholders. It seems to me that that is the principle that applies in these circumstances.

45 3. *Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.)

46 In this case the bank applied ex parte for the appointment of a receiver-manager respecting the defendant. There were statutory claimants, Workers' Compensation Board and Revenue Canada, who continued to press their claims after learning of the appointment. Costs were incurred by the receiver-manager and the issue was one of priority. The headnote in part read [C.B.R.]:

> As the receiver-manager proceeded to incur the expenses of preservation and realization with the knowledge that Revenue Canada and W.C.B. intended to press their claims, it must be taken to have assumed the risk that the court

might be powerless to ensure reimbursement even though it was acting on behalf of the court. Consequently, the receiver-manager could not have priority over W.C.B. or Revenue Canada.

47 In this case, Mr. Justice D.C. McDonald stated at pp. 230-231:

3. *The claim of the receiver-manager for fees and certain disbursements*

Coopers claims priority for its fees, and for certain costs of preservation and realization. I have earlier indicated that those fees and disbursements totalled $159,406.52. In addition, in order to finance the process of preservation and realization, Coopers made borrowings of approximately $105,000.

If Revenue Canada and the W.C.B. had been given notice of the application by the bank to a master of this court for the appointment of Coopers as receiver-manager, and had not opposed the appointment, Mr. Bondar might have succeeded in persuading me that by the application of one principle or another Revenue Canada and the W.C.B. should be precluded from asserting their statutory trust and charge respectively. I need not speculate as to what principle might properly be applied to achieve that result. The fact is that the bank made its application ex parte, without notice to Revenue Canada or the W.C.B. Since then, the bank and the receiver have been aware that neither Revenue Canada nor the W.C.B. intended to retreat from their respective statutory redoubts. Yet Coopers proceeded to incur the expenses of preservation and realization, and must be taken to have assumed the risk in doing so that, although it acted on behalf of the court, the court might be powerless to ensure that it would be reimbursed for its outlay or paid fees for its services.

Consequently, the claim of Coopers for priority over the claims of the W.C.B. and Revenue Canada fails.

48 4. *Bank of Montreal v. Shaw Ranches Ltd.* (1984), 51 B.C.L.R. 235, 31 R.P.R. 35, 51 C.B.R. (N.S.) 292 (S.C.).

49 The second mortgagee in an action applied, ex parte, for a receiver-manager on no notice or participation by the first mortgagee although the first mortgagee had supported an earlier application for a receiver-manager which had been denied. The receiver-manager claimed priority for fees over the first mortgagee. The court held that the receiver-manager was not entitled to a priority over the plaintiff as the plaintiff was not present or represented at the time of appointment and the receiver-manager had failed to discharge its onus upon it to prove acquiescence, consent or approval by the plaintiff to its appoint ment or subsequent actions.

50 The court in this case distinguished both *Oberman*, due to consent, and the decision of the British Columbia Court of Appeal in *Federal Business Development Bank v. Persic* (1981), 32 B.C.L.R. 75, where the court found acquiescence and therefore an exception to the *Kowal* decision.

51 5. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.).

52 I have quoted extensively from this case in my review of the *Lochson* case and thus I intend to refer again only to a portion of the headnote which accurately and succinctly sets forth the decision [C.B.R., pp. 201-202]:

As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. [One would ordinarily expect that] in these circumstances the order permitting the receiver to borrow would [clearly] provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.

> The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact [as was attempted in the present case], that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.* ... and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order ...

> The third exception [which should be noted] is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors ... In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a mortgagee of sums to which he is legally entitled under his charge falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the receiver would be entitled only to priority over the [moneys] of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

53 6. *Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (November 6, 1991), Doc. Calgary 9101-13199 (Q.B.), [1982] A.W.L.D. 081, unreported decision of Mr. Justice Peter Power [now reported at 5 C.P.C. (3d) 299, (sub nom. *Re Wm. C. Rieger Co. (Receivership)*) 126 A.R. 69].

54 Similar to the instant case, this case involved an application by creditors to vary an ex parte order with respect to a priority clause which required creditors to pay a portion of the fees and expenses of a receiver-manager. The order appointing the receiver-manager had a similar provision to para. 14 of the Medhurst order which read, in part, in para. 22, as follows:

> The receiver's fees shall be paid from the assets of the estate of the Defendant, including the assets secured by parties other than the Plaintiff, on a basis proportionate to the amount of time spent by the Receiver in relation to the secured asset ...

In addition, the receiver was to maintain separate accounting records in order to ultimately attribute costs and expenses.

55 The debtor company, a substantial farm implement dealership, had experienced financial difficulties and had closed its doors ap proximately one week prior to the application for the order. The order was granted with the cooperation of the debtor company, however, on no notice to any of the creditors, other than Alberta Opportunity Co. ("A.O.C.") who had received notice, a draft of the order, but who did not appear on the application. It was the suggestion of counsel for the company that cl. 22 be inserted. It was also of record that none of the creditors, with the exception of A.O.C., were aware of the bank's proceedings or the application, August 15, 1991, for the ex parte order and, further, that A.O.C. did not, prior to it being granted, consent to or approve the order.

56 The day following the granting of the order, the same was forwarded to creditors together with a letter bringing attention to the priority paragraph.

57 Paragraph 23 of the order gave interested parties the right to apply to vary, and the motion was launched approximately seven weeks after granting of the order, and after the receiver had stepped in and incurred substantial expenses in protecting, reviewing and insuring assets, and maintaining staff.

58 Mr. Justice Power stated at p. 7 [p. 304 C.P.C.] and following of the unreported decision as follows:

I recognize that when the court takes the step of appointing a receiver the obligation then is clear that the court must protect the receiver by way of ensuring that the receiver will be paid for all of its reasonable costs in undertaking that particular task. That principle is clearly set out in *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 (C.A.) by Smith L.J. where he says:

> ... and nobody on the one side or the other quarrels with the law ... that the receivers and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed receivers and managers, and that they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property ...

Mr. Justice Power then referred to, firstly, the *Credit foncier franco-canadien v. Edmonton Airport Hotel Co.* case [(1966), 55 W.W.R. 734 (Alta. S.C.)] and secondly, the *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* case [(1984), 55 B.C.L.R. 38, 52 C.B.R. (N.S.) 129 (C.A.)] to the same effect that the court must protect the receiver court appointed.

59 And then at p. 8 [p. 305 C.P.C.], Justice Power continued:

Reference is made to the decision of Houlden J.A. in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.), where Houlden J.A. stated that as a general rule the court should not subject the security of a prior secured creditor to liability for fees and disbursements incurred by a receiver; however, he listed the following three exceptions to the general rule:

1. If the receiver has been appointed at the request of or with the consent or approval of holders of security.

2. If the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors.

3. If the receiver has expended money for the necessary preservation or improvement of the property.

Reference has been made to the decision of McDonald J., in *Royal Bank v. Canadian Aero-Marine Industries Inc.*, 67 Alta. L.R. (2d) 172, [1989] 5 W.W.R. 355, 74 C.B.R. (N.S.) 221, 98 A.R. 367 (Q.B.), and in that particular case, the court held the appointment of the receiver had been ex parte and without notice to the interested creditors and that the receiver knew that the creditors would not consent to the extraordinary expenditures. Where the rights of the interested creditors are affected, the requirement of notice cannot be waived unless exceptional physical emergency dictates immediate action after the receiver is duly appointed.

From the facts put before the court by counsel, it is clear that Rieger was in financial difficulty, that the doors of the farm implement operation were closed. That a receivership order could have been granted advising all creditors that the assets were to be protected by way of a receiver order being put in place. That on proper notice, the receiver would be seeking a specific order to protect him for fees and expenses. And that this application would be made a reasonable period of time after the receivership order was granted. In this case, that did not happen.

And further at p. 10 [pp.306-307 C.P.C.], Mr. Justice Power said:

In any event, the creditors did not realize that the method of allocating costs and expenses by the receiver was going to affect them financially on a proportionate basis that most of the creditors found unacceptable. The court is in full agreement with the statement made by the British Columbia Court of Appeal in *Lochson Holdings v. Eaton Mechanical Inc.* [supra]. At p. 632, specifically, the court states:

> It is fundamental that a person is not to be bound by a court order of which he has no notice.

In this case, I am satisfied there was sufficient time to get prior court approval of the proposed extraordinary source of remuneration being sought by the receiver. I am satisfied that the cost allocation schedule and the formula in

> para. 22 of the receivership order has the effect of depriving the secured creditors of a substantial portion of the benefit to which they are entitled.

Further at p. 12 of the unreported decision [p. 308 C.P.C.], Mr. Justice Power stated:

> The exceptions that the court has to look at with respect to the appointment of the receiver include: (1) the receiver has been appointed at the request or with the consent or approval of the holders of security. I am satisfied from the material put before the court that the receiver was not appointed at the request or with the consent, approval, or acquiescence of any of the secured creditors with the exception of the fact that Alberta Opportunity Company was aware that the receivership order was going to be applied for but indicated it did not approve of the order.
>
> Secondly, that the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors. In my opinion, the secured creditors had no need to have their goods and equipment protected as they were perfectly prepared to remove them from the premises of Rieger to a place of safekeeping the majority of which had their own distribution network and dealers throughout the province and could have disposed of this farm implement equipment and parts without the intervention of a receiver.
>
> The third condition, the receiver has expended money for the necessary preservation or improvements of the property. In my view, the position of the secured creditors is that the preservation of their property by the receiver was not an activity which was initiated at the request of the secured creditors nor was it something that was done with the acquiescence of the secured creditors.
>
> It is my opinion that there is no basis at law for enforcing the provisions of para. 22 of the receivership order as against the secured creditors. Facts of this case do not establish that there is any basis for an exception to the fundamental rule that a party not be bound by an order granted on an application in respect to which it had no notice. The receiver has not discharged its burden of establishing such an exception but rather the evidence establishes that the factual basis needed for the application of the exception to the fundamental rule is not present in this case.

60 7. *Re Stenner Financial Services Ltd.* (1988), 68 C.B.R. (N.S.) 298, a decision of the British Columbia Supreme Court.

61 Stenner, a mutual fund dealer, failed to comply with regulations under the British Columbia Securities Act [S.B.C. 1985, c. 83] and, accordingly, the British Columbia Securities Commission applied ex parte for an order appointing a receiver. The order included a priority clause. The court was not obliged to rule on the priority question in view of a prior assignment, however stated at p. 2 of the report:

> — that I make the passing comment that on the basis of such cases as *Robert F. Kowal Investments v. Deeder Electric Ltd.* (1975) 59 D.L.R. (3rd) 492, I would have been prepared in spite of the non-notification of the Canadian Imperial Bank of Commerce, to uphold the priority accorded the receiver on the basis that in my view,
>
> > 1. The receiver was appointed to preserve or realize assets for the benefit of all interested parties including the secured creditor; or
> >
> > 2. That the receiver has expended monies for the necessary preservation of the property to the benefit of all parties.

In other words, he would have held, if so obliged, to grant the priority on exceptions 2 and 3 of *Kowal* despite no service, due to the emergent nature of the proceeding and need for the order.

62 8. *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.*, supra, a decision of the British Columbia Court of Appeal.

63 In this case, the registrar of travel agents was appointed a receiver with respect to a travel agent. On a subsequent application, the receiver applied for a first charge provision, which latter applica tion was opposed by a debenture holder

on the basis of no acquiescence on the initial application by the debenture holder and, secondly, on the basis of an indemnity provided by the receiver.

64 In my view, this case has no application to the case at bar as it did not deal with an ex parte application for a receiver with the priority clause inserted at time of application, but rather was a case envisaged by Mr. Justice Power in *Rieger*, supra, that is to say, two-stage application; the second stage, for the priority, which was upheld in chambers, and on appeal in the *P.R.D.* case.

65 The respective positions of the two major litigants on this application, Mitsubishi and Mitsui on the one hand, and Royal Bank on the other, are as follows.

66 Mitsubishi and Mitsui submit (a) that they ought not to be bound by an order adversely affecting them on which they received no notice, that is to say, an ex parte order; and (b) that they do not fall within any of the three exceptions enumerated in the *Kowal* case, supra, in that, (1) they did not consent, approve of or acquiesce in the order and the priority clause, but rather showed no intent to retreat (to use the words of Mr. Justice McDonald, in the *Canadian Aero-Marine* case, supra) against the order by simply demanding their security after the receiver-manager inquired as to (i) validity, and (ii) equity or the security held; and (2) they did not receive notice and therefore exception 2 of *Kowal* does not apply; however, even if it does, they derived no benefit from the services of the receiver-manager, but rather his services and conduct were a detriment to Mitsubishi and Mitsui or, at the very best, a balance; and (3) that they do not fall within exception 3 of *Kowal* as no moneys were expended to necessarily preserve or maintain their security and, therefore, they ought not to be obliged to satisfy any of the receiver-manager's fees, charges or expenses, either pursuant to para. 14 of the order, or at common law on the exceptions of *Kowal*.

67 On the other hand, the Royal Bank submits that, while there was no prior notice, the secured creditors ought to share in payment of a portion of the receiver-manager's fees, costs, expenses and charged in that Mitsubishi and Mitsui (1) acquiesced in the order or by its delay in moving to vary, approved thereof and thereby took a benefit; and, (2) despite lack of service, the matter was so emergent, so unusual, so extraordinary that exception 2 of *Kowal* ought to be extended to include Mitsubishi and Mitsui in that the receiver-manager preserved and realized for the benefit of all creditors, including Mitsubishi and Mitsui; and (3) that they ought to share in the costs of expenses of the receiver-manager on exception 3 to *Kowal* in relation to moneys expended for the preservation and maintenance of Mitsubishi and Mitsui security.

68 As I stated earlier, I must in this action address three issues.

69 The first issue is: Should either Mitsubishi or Mitsui be bound by the terms of the ex parte Medhurst order wherein the receiver-manager of Vulcan Machinery & Equipment, namely, Price Waterhouse, was given a first charge over all the assets of Vulcan, including the secured assets of Mitsubishi and Mitsui? I have no difficulty with the theories expounded to me as follows: (1) I recognize the necessity that a court-appointed receiver-manager must be protected by the court in conjunction with its fees, expenses, charges and costs properly incurred in the administration of the estate on behalf of all creditors. (2) I also recognize and am in full and total agreement with the principles so aptly stated in the *Lochson* case wherein the British Columbia Court of Appeal stated, and Mr. Justice Power adopted in *Rieger* that: "It is fundamental that a person is not to be bound by a court order of which he has no notice."

70 In my opinion, while there may have been a need, indeed an urgent need, for the court-appointed receiver, there was, in my opinion, however, no such emergent, unusual or extraordinary need for the appointment of a receiver-manager *with the priority clause* (s. 14) such as to justify the so-called "double-barrelled" order as granted therein, which order, with the priority clause contained therein, had the effect of seriously prejudicing the rights of secured creditors such as Mitsubishi and Mitsui to the point of trammelling their rights. It is all well and good to argue that these parties had rights to apply to vary on a subsequent application; however that, in my view, puts the onus on entirely the wrong party.

71 I make these comments recognizing that the Royal Bank in this case on October 5 and October 9, 1990 was most concerned as to its secured position. However, it had, in my view, several options available to it which would have "stemmed the tide" and at the same time not adversely affected others' rights. While not necessarily exhaustive, those options included: (1) on October 5, 1990, on the resignation of Knight and Green, it could have appointed a receiver such as Price Waterhouse, who was ready to "swing into action," as indeed it did so by the evidence of the drive-bys, such appointment being private and by way of instrument as it was authorized by its debenture to do. That, of course, would have been short-term relief but effective nonetheless; or (2) it could have applied October 5 or October 9 for a receiver-manager only, leaving for another day and upon proper notice the question of the priority. This, of course, was suggested by Justice Power in *Rieger*; or, (3) it could have applied, giving informal notice to the secured creditors, as is often done in this jurisdiction; or (4) it could have formally applied on short notice, pursuant to R. 548, on the Tuesday or Wednesday, October 9 or 10; or (5) it could have given an informal notice or indication in August or September 1990 to the secured creditors of an anticipated application, that is to say, it could have informed the secured creditors that in the event of no sale or resolve of financial difficulties they intended to apply for a receiver-manager with the priority clause. This is also a step, or was also a step taken in the *Rieger* case, as decided by Justice Power, qua A.O.C.

72 *Instead* the Royal Bank took none of these steps, but rather, applied and obtained the Medhurst order, appointing Price Waterhouse as receiver-manager with the priority clause which, nearly two years later, has resulted in this long and no doubt expensive chambers application which has lasted seven days and resulted in countless hours of preparation, including days and days of cross-examination on affidavits, comprising some 20 volumes and approximately 1,750 pages of exhibits, all of which could have been avoided in large measure by notice to those parties adversely affected, being the applicants herein Mitsubishi and Mitsui.

73 The applicants would have me say that lack of notice herein was deliberate and deceitful and that service was avoided to facilitate the order. However, I do not go that far, although my comments will make it obvious that lack of notice has given rise to this rather difficult motion.

74 Having said all of that, and in specific response to the first issue to be addressed, it is my opinion that there can be no justification at law for enforcing the provisions of para. 14 of the Medhurst order as against those challenging secured creditors, Mitsubishi and Mitsui.

75 As to issue 2 which is, is there any other justification at law whereby either Mitsubishi or Mitsui or both ought to be liable for all or a portion of the receiver-manager's costs, charges and expenses in priority to its security?

76 To succeed then, on this application, the Royal Bank has the onus to establish that the secured creditors, Mitsubishi and Mitsui or either of them, fall within the *Kowal* exceptions or, as otherwise stated, the common law position. I intend to deal with each creditor and the three exceptions individually commencing with Mitsui.

77 As to exception 1 of *Kowal*, I have considered the matter and I am satisfied on the evidence that Mitsui neither consented, approved of nor acquiesced in the order respecting priority. On the evidence, it maintained its position throughout that it had possession of its property, other than through what it says was intervention by the receiver-manager, and it wanted nothing to do with the receiver-manager whatsoever.

78 As to exception 2, this exception is not available in argument to the bank in view of no service. However, if I am wrong in that, and there are circumstances whereby despite lack of service an unusual, emergent, extraordinary situation might arise (and I am hard pressed to envisage such a situation what with the viable options available) where a secured creditor might be liable for fees ex parte. There was in this case no such situation, and further, no benefit accrued to the creditor, Mitsui.

79 As to exception 3, there were, in my judgment, no moneys expended to maintain or preserve the security of Mitsui; however, if there were, they were moneys either not properly expended, or if properly expended, on property over which

they had no entitlement. In the result, Mitsui is liable for none of the receiver-manager's fees pursuant to para. 14 of the Medhurst order or at common law.

80 As to Mitsubishi and exception 1 in respect of consent, approval, application for the order or acquiescence, I have reviewed the evidence and I am satisfied thereon that Mitsubishi "stood fast" in its resolve that all it wanted was its equipment and that it would "go away."

81 That conclusion is reached by me notwithstanding the fact of two sales by the receiver-manager on behalf of Mitsubishi, in my view, on a case-by-case contract basis, for which the receiver-manager, Price Waterhouse, was paid a commission or a fee or recovered on the equity therein or otherwise derived a pecuniary benefit or at least the Royal Bank did. And despite the fact that the receiver-manager expected to receive proposals from Mitsubishi and despite the fact that Mitsubishi knew the receiver was incurring costs and despite the fact it knew on or about October 19, 1990 of the so-called priority clause. It remained steadfast in its position as is evidenced by its letter, October 26, 1990, to the receiver-manager demanding its goods and its solicitor's letters, December 11 and 13, 1990, threatening an application to vary the Medhurst order, and for the return of its goods.

82 As to exception 2 in Mitsubishi for the reasons stated respecting Mitsui is aforesaid. Similarly Mitsubishi does not fall into this category or exception.

83 As to Mitsubishi and exception 3, and this is the most difficult of the six analyses I have had to conduct, I have again considered the arguments of counsel and the evidence submitted. Despite the fact that the receiver-manager performed services such as employee retention, changing locks, inventory lists, hiring Mr. McIvor (a former employee of Vulcan) dealing with landlords and ensuring that no restraints or seizures occurred, liquidating furniture, ensuring equipment, attending warranty work and service work, attending to statutory claims, dealing with parts over which Mitsubishi had no security, and other miscellaneous matters, none of these activities, in my view, benefited, on balance, Mitsubishi and were conducted by Price Waterhouse knowing of Mitsubishi's position that it simply wanted its goods back and wanted nothing to do with Price Waterhouse in its capacity as receiver-manager of Vulcan and would have, subject to Price Waterhouse inquiring as to the validity and equity of their security, applied for and likely been exempted from the receivership order had it received notice. On a strict wording of the third *Kowal* exception being: "The receiver has expended money for the necessary preservation and improvement of the property."

84 It is my opinion, somewhat reluctantly, that no liability attaches to Mitsubishi.

85 In the result then, Mitsubishi, too, is exonerated from payment of the receiver-manager's fees, either pursuant to para. 14 of the Medhurst order or at common law.

86 As to issue 3, as to apportionment and allocation, that issue need not be addressed in view of my rulings aforesaid.

Application allowed.