COURT FILE NUMBER	2201-01016
COURT	COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF ROBUS RESOURCES INC.
APPLICANT	PAMOCO RESOURCES LTD.
DOCUMENT	**BRIEF OF LAW**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Brief of Law is filed in support of an application (the "**Application**") of Pamoco Resources Ltd. ("**Pamoco**"), returnable January 18, 2023, for an Order: (i) declaring that that the Tangibles (as defined below) were properly purchased by Pamoco from Robus Resources Inc. (the "**Debtor**") pursuant to the Tangibles Transaction (defined below); and (ii) declaring that the Tangibles are the property of Pamoco, and do not form part of the estate of the Debtor for sale or distribution in this proceeding.

II. FACTS

2. The facts relevant to the Application are set out in detail in the Affidavit of Terry O'Connor sworn January 9, 2023 (the "**O'Connor Affidavit**"). A summary of the key facts as they relate to the relief requested in the Application is set out below.

A. The Parties

3. Pamoco is a corporation incorporated under the laws of Alberta with its registered office in Red Deer, Alberta.[1] The General Manager of Pamoco is Terry O'Connor ("**Mr. O'Connor**").

4. Robus Resources Inc. (the "**Debtor**") is a corporation incorporated under the laws of Alberta with its registered office in Calgary, Alberta. At all material times Ernest Methot ("**Mr. Methot**") is, or was, the President and sole director of the Debtor.[2]

5. Pursuant to a consent receivership order granted by the Court on April 12, 2022, in this proceeding, Alvarez & Marsal Canada Inc. (the "**Receiver**") was appointed receiver over all of the assets, undertakings, and properties of the Debtor.[3]

6. Robus Services LLC (the "**Senior Lender**") is the senior secured creditor of the Debtor in this proceeding.[4]

B. The Purchase Agreement

7. On November 17, 2017, the Debtor acquired certain assets from Enerplus Corporation (the "**Enerplus Transaction**").[5]

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[1] O'Connor Affidavit at paras 1, 2, Exhibit A
[2] O'Connor Affidavit at paras 3, 4, Exhibit B
[3] O'Connor Affidavit at para 5

8. The Enerplus Transaction was made pursuant to an Agreement of Purchase and Sale dated as of December 9, 2016 (the "**Purchase Agreement**"), with Enerplus Corporation, as vendor, and the Debtor, as purchaser.[6]

9. The Purchase Agreement was amended pursuant to two amending agreements and the transaction pursuant to the Purchase Agreement, as amended, closed on November 17, 2017.[7]

10. The Enerplus Transaction was for the Debtor to purchase from Enerplus Corporation certain petroleum and natural gas rights located near Camrose, Alberta, and related property.[8]

11. The related property that was subject to the Enerplus Transaction included the "**Tangibles**", which are certain facilities, pipelines, gas plants, pumps, tanks, compressors, production equipment and other depreciable assets located on or within the vicinity of the properties where the petroleum and natural gas rights were located.[9]

12. The Purchase Agreement, as amended, provides that all the assets subject to the Enerplus Transaction were acquired for cash consideration of a $100,000 from the Debtor to Enerplus Corporation. $20,000 of the cash consideration was allocated as consideration for the Tangibles.[10]

C. The Tangibles Transaction

13. Mr. O'Connor and Mr. Methot have a long standing business relationship. In respect of Mr. O'Connor's business dealings with the Debtor, at various times over the course of its business operations, Mr. Methot had approached Mr. O'Connor for money to fund purchases or to pay for its operations.[11] This included Mr. O'Connor providing the funds required by the Debtor to complete the Enerplus Transaction.[12]

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[4] O'Connor Affidavit at para 6
[5] O'Connor Affidavit at para 7, Exhibits C, D, E
[6] O'Connor Affidavit at para 8, Exhibits C
[7] O'Connor Affidavit at Exhibits D, E
[8] O'Connor Affidavit at para 10, Exhibit C
[9] O'Connor Affidavit at para 11, Exhibit C
[10] O'Connor Affidavit at paras 12, 13, Exhibit C
[11] O'Connor Affidavit at paras 15, 16
[12] O'Connor Affidavit at paras 19, 20, Exhibits H, I

14. Between May 2018, and August 2018, Mr. Methot requested that Mr. O'Connor, through Pamoco, assist the Debtor by providing it with funds for the Debtor to acquire mineral right interest in certain other petroleum and natural gas producer companies on the Debtor's leased lands (the "**Acquisition Advances**"). Mr. O'Connor, on behalf of Pamoco agreed, and the amounts paid by Pamoco to the Debtor for the Acquisition Advances totalled $36,000.[13]

15. Between January 2019, and April 2019, Mr. Methot approached Mr. O'Connor for more funds. This time the Debtor was requesting that Pamoco pay certain of the Debtor's then due or coming due accounts payable (the "**Robus AP Payments**").[14]

16. At the time the Debtor requested that Pamoco make the Robus AP Payments, Pamoco and Mr. O'Connor already had significant secured loans outstanding with Pamoco that were in default, in addition to Pamoco having made the Acquisition Advances. Mr. O'Connor and Pamoco therefore refused to extend any further credit to the Debtor in respect of making the Robus AP Payments.[15]

17. As a result, the Debtor offered to sell to Pamoco its interests in the Tangibles in satisfaction of the Acquisition Advances and in exchange for Pamoco making the upcoming Robus AP Payments the "**Tangibles Transaction**"). Pamoco agreed to the Tangibles Transaction.[16]

18. Pursuant to the Tangibles Transaction, the Debtor, as vendor, and Pamoco, as purchaser, entered into a general conveyance agreement made January 4, 2019 (the "**General Conveyance Agreement**"), which purported to sell and transfer to Pamoco, among other things, all of the Debtor's "right, title, estate and interest" in, among other things, the Tangibles.[17]

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[13] O'Connor Affidavit at para 24, Exhibit M
[14] O'Connor Affidavit at para 26
[15] O'Connor Affidavit at para 26
[16] O'Connor Affidavit at para 27
[17] O'Connor Affidavit at para 29, Exhibit N

19. Further to the Tangibles Transaction, between February 2019, and March 2019, after entering into the General Conveyance Agreement, Pamoco took an inventory of the purchased Tangibles, which had not been previously done by the Debtor.[18]

20. Since the Debtor required use of certain of the Tangibles to operate, at the request of the Debtor, Pamoco did not remove any of the Tangibles from the leased lands. Instead, Pamoco took possession of the Tangibles by affixing signage identifying its ownership to the property, including applying it on the gates of certain wells and on some of the other larger pieces of equipment. In addition, Pamoco took the step of applying a square QR identity code to the main sign on each piece of the Tangibles, linking each piece of equipment to Pamoco's sister company's account with Sortly, an inventory management software system.[19] The QR codes that were applied to the main signs of each of the Tangibles allowed third parties to easily identify and locate the owner of the property.[20]

21. In accordance with the Tangibles Transaction, between January 2019, and April 2019, Pamoco made three Robus AP Payments for the benefit of the Debtor in the total aggregate amount of $67,800, in respect of accounts payable owing by the Debtor.[21]

22. The total amount ultimately paid by Pamoco to, or for the benefit of the Debtor, in respect of the Acquisition Advances and the Robus AP Payments that made up the consideration for the Tangibles Transaction was $103,800.[22]

23. On April 16, 2019, Mr. Methot became aware of an error in the General Conveyance Agreement, in that the document purported to convey to Pamoco the Debtor's petroleum and natural gas interests from the Enerplus Transaction in addition to the Tangibles.

24. At the request of the Debtor, Pamoco prepared a revised document titled Conveyance of Tangibles (the "**Conveyance of Tangibles**"), which remedies this error. The Conveyance of Tangibles was provided to the Debtor as was requested by it.[23]

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[18] O'Connor Affidavit at para 30, Exhibit O
[19] O'Connor Affidavit at paras 31, 32, Exhibit P
[20] O'Connor Affidavit at para 31, Exhibit P
[21] O'Connor Affidavit at paras 33, 34, Exhibit Q
[22] O'Connor Affidavit at para 35, Exhibits M, Q
[23] O'Connor Affidavit at para 37.

D. PPR Registrations Against the Debtor

25. On February 21, 2020, the Senior Lender extended a loan to the Debtor pursuant to a loan agreement. This loan was secured against the assets of the Debtor and the Senior Lender registered a financing statement with the Alberta Personal Property Registry (the "**PPR**") over all of the present and after-acquired personal property of the Debtor on February 13, 2020.[24]

26. The PPR registration of the Senior Lender did not specify any particular Tangibles for which the Senior Lender's security attached to. Similarly, the loan and security documents of the Senior Lender did not identify any inventory or particular Tangibles as being security for the loan.[25]

27. In January 2021, Pamoco became aware of the Debtor attempting to enter into contracts for the sale of, among other things, the Tangibles to potential third party purchasers. As a result of the Debtor's attempted dealings with the Tangibles, on January 8, 2021, Pamoco took a precautionary step of registering its ownership interest in the Tangibles with the PPR pursuant to the *Sale of Goods Act* (the "**Pamoco Registration**").[26]

E. This Receivership Proceeding

28. On June 17, 2022, the Receiver's counsel advised Pamoco's corporate counsel that the Receiver was of the view the Conveyance of Tangibles did not transfer title in the Tangibles to Pamoco due to a lack of consideration.[27]

29. The Receiver's counsel also advised that even if title to the Tangibles was transferred from the Debtor to Pamoco, the Tangibles are subject to the security of the Senior Lender pursuant to section 26 of the *Sale of Goods Act*.[28]

F. Location of the Tangibles

30. The Tangibles remain on the leased properties of the Debtor tagged with Pamoco's QR Codes to identify Pamoco's ownership of the Tangibles.

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[24] Affidavit of Robert Brantman sworn January, 2022 at paras 6, 7

[25] Affidavit of Robert Brantman sworn January, 2022 at Exhibits C, F

[26] O'Connor Affidat at para 39, Exhibit S; *Sale of Goods Act,* RSA 2000, c S-2, (the "***Sale of Goods Act***"), section 26(2) [**TAB 1**]

[27] O'Connor Affidavit at Exhibit U

[28] O'Connor Affidavit at Exhibit U

31. The Tangibles have not been sold, delivered or transferred to the Senior Lender, any nominee of the Senior Lender, or any other third party.

III. ISSUES

32. Based on the reasons from the Receiver for rejecting Pamoco's ownership claim to the Tangibles, the issues before the Court are:

    (a) Did Pamoco provide adequate consideration for the Tangibles Transaction such that title in the Tangibles transferred from the Debtor to Pamoco?

    (b) If title to the Tangibles did transfer to Pamoco, are the Tangibles subject to the Senior Lender's first in time PPR registration against all present and after-acquired personal property of the Debtor pursuant to section 26(1) of the *Sale of Goods Act*?

IV. LAW AND ARGUMENT

A. Pamoco Provided Consideration for the Tangibles Transaction

33. The Tangibles Transaction occurred pursuant to an offer made by the Debtor, to Pamoco.[29] The Tangibles Transaction was not made by the Debtor under any duress, or pursuant to any pressure from Pamoco.

34. The Tangibles Transaction was documented pursuant to the General Conveyance Agreement, as amended by the Conveyance of Tangibles. In each of these documents, the Debtor, as vendor, expressly sold, assigned, transferred, and conveyed to Pamoco, as purchaser, the Debtor's "right, title estate and interest" in and to the Tangibles.[30]

35. Pursuant to the General Conveyance Agreement, as amended by the Conveyance of Tangibles, the Debtor expressly acknowledges having received consideration from Pamoco in the sum of $90,000. This consideration was provided pursuant to the Acquisition Advances and the Robus AP Payments.

36. As it turns out, the total amount that was ultimately paid by Pamoco to, or for the benefit of the Debtor, in respect of the Tangibles Transaction totalled $103,800.[31] This amount

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[29] O'Connor Affidavit at para 27.
[30] O'Connor Affidavit at Exhibits N, R
[31] O'Connor Affidavit at para 35

is not nominal consideration. This is especially apparent since the Debtor acquired the Tangibles pursuant to the Enerplus Transaction for only $20,000.[32] The consideration given by Pamoco to the Debtor for the Tangibles was more than five times the amount that the Debtor had paid for these assets.

37. Further, much of the individual pieces of the Tangibles were marked by the previous owner, Enerplus Corporation, as being out of service, and may not have any value.[33]

38. As this Court has stated, "[g]enerally, the law does not look at the sufficiency of the consideration for a transaction, and avoids making bargains for the parties."[34] Whether or not the liquidation value of the Tangibles will exceed the value of the consideration provided by Pamoco for the Tangibles is not known at this time, and certainly was not known to either the Debtor or Pamoco at the time of the Tangibles Transaction. No inventory of the Tangibles had been conducted by the Debtor on this property at the time of the Tangibles Transaction. An inventory on the Tangibles was first completed by Pamoco after the Tangibles were sold to it.[35]

39. Notably, a list of the Tangibles was not part of the Enerplus Transaction documents. Similarly, the Senior Lender loan and security documents do not set out a list of any Tangibles that influenced the Senior Lender's decision to extend credit to the Debtor like the Senior Lender had done with respect to the Debtor's land interests.[36]

40. It is clear from the Enerplus Transaction documents and the Senior Lender loan documents that neither the Debtor or the Senior Lender conducted any due diligence on the Tangibles. It is also apparent from these documents that the Tangibles had very little value to these parties in entering into their respective transactions. It was the mineral interests that were of valuable to these parties at the time of their respective transactions.

41. It is well known that Courts avoid disturbing the bargain parties have struck.[37] In the circumstances of this case, the Tangibles Transaction was made between arm's length

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[32] O'Connor Affidavit at Exhibit C
[33] O'Connor Affidavit at para 31, Exhibit P
[34] *Lydian Properties Inc v Chambers,* 2007 ABQB 541 at para 62 [**TAB 2**]
[35] O'Connor Affidavit at paras 12, 30
[36] Affidavit of Robert Brantman sworn January, 2022 at Exhibit F
[37] *Syncrude Canada Ltd v Hunter Engineering Co,* [1989] 1 SCR 426 at para 55 [**TAB 3**]

parties, it was documented pursuant to the General Conveyance Agreement and the Conveyance of Tangibles, and valuable consideration was given by Pamoco to, or for the benefit of, the Debtor.

42. It is clear that adequate consideration was provided from Pamoco for the Tangibles such that title to the Tangibles legally transferred from the Debtor to Pamoco.

B. Section 26 of the *Sale of Goods Act* Does Not Apply

43. The *Sale of Goods Act* contains the basic legal framework that applies to a sale of goods in Alberta. It governs the interactions of buyers, sellers and others.[38]

44. The issue in this case is to determine if section 26(1) of the *Sale of Goods Act* applies to make an exception to the *nemo dat quod non habet* principle, which simply means you cannot sell what you don't have.[39] The *nemo dat* principle is consistent with section 23 of the *Sale of Goods Act,* which provides:[40]

> **23(1)** Subject to this Act, if goods are sold by a person who is not the owner of them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell.

45. As discussed below, it is clear that section 26 of the *Sale of Goods Act* does not apply to upset the *nemo dat* principle by making the Tangibles, which were sold to Pamoco, subject to the security interests of the Senior Lender for two reasons:

(a) first, there has been no delivery or transfer of title to the Tangibles to the Senior Lender; and

(b) second, the Debtor is not "in possession" of the Tangibles, as Pamoco has constructive possession over the Tangibles.

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[38] Alberta Kings Printer: https://kings printer.alberta.ca/570.cfm?frm_isbn=9780779765874&search_by=link

[39] *Bank of Montreal v Mason*, 2018 ABQB 161 ("***Mason***") at paras 13 and 16 [**TAB** 4]

[40] *Sale of Goods Act,* section 23(1)

(i) There has been no delivery or transfer of the Tangibles to the Senior Lender

46. This Court has found that the purpose of section 26 of the *Sale of Goods Act* "is to protect innocent purchasers from a seller who appears to have ownership and the authority to sell."[41] This is clear from the language of section 26(1) of the *Sale of Goods Act* which states:[42]

> **26(1)** When a person who has sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it. [*Emphasis added*]

47. The Secured Lender provided a loan to the Debtor, and in return the Secured Lender was granted a "continuing security interest" in, among other things, the Debtor's present and after-acquired personal property.[43]

48. Receiving a floating charge security interest in the Debtor's personal property interests as they existed at the time of the loan is not equivalent to "the delivery or transfer … of the goods or documents of title" to the Tangibles, which were sold prior to the Senior Lender's security interests existing.

49. Instead, the Tangibles continue to be located on the leased properties of the Debtor, and title to the Tangibles remains with Pamoco. It is clear that section 26(1) does not apply to these facts.

50. A party that is relying on section 26 of the *Sale of Goods Act* has the burden of proving three things:[44]

    (a) that the seller retained possession;

    (b) that the purchaser acted in good faith; and

    (c) that the purchaser acted without notice of the initial buyer's interest.

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[41] *Bank of Montreal v Mason*, 2018 ABQB 161 ("***Mason***") at para 16 [**TAB** 4]

[42] *Sale of Goods Act,* section 26(1) [**TAB 1**]

[43] Affidavit of Robert Brantman sworn January, 2022 at Exhibit F at s. 3.1(c)

[44] *Mason* at para 16 [**TAB** 4]

51. The Senior Lender is simply not an "innocent purchaser from a seller" for the provision to apply.[45] There is no purchase and sale between the Debtor and the Senior Lender.

52. The Receiver has only recently received Court approval to conduct a sales process for the assets of the Debtor.[46] To date, there has been no purchase and sale of the Tangibles to any party other than Pamoco.

53. Section 26(1) of the *Sale of Goods Act* will also not apply to any future sale of the Tangibles to the Secured Lender, its nominee, or any third party pursuant to the Receiver's sale process. This is because Pamoco registered its ownership interest at the PPR pursuant to section 26(2) of the *Sale of Goods Act*, which provides:[47]

> **26(2)** Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*, and Part 4 of that Act applies, with the necessary modifications, to that registration. [*Emphasis added*]

54. Finally, this Court has held that in order to gain the benefit of section 26(1) of the *Sale of Goods Act*, the party relying on this section must prove that it did not act recklessly or in a grossly negligent manner.[48] Courts are to apply an objective test to determine whether the buyer, as a reasonable person, must have known of the sellers defect in title or must have had suspicions and wilfully shut its eyes to the information available to it.[49]

55. In the case of the Secured Lender, had it conducted any cursory inventory, inspection, or due diligence on the Tangibles it would have been apparent from the markings that Pamoco made on the property, that title to such property was not with the Debtor.

56. In the circumstances, it is not appropriate or reasonable to allow the Secured Lender to rely on section 26(1) of the *Sale of Goods Act* in order to strip Pamoco of title to the

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[45] *Mason* at para 16 [**TAB 4**]

[46] Order Approving Sale Process, Stalking Horse Term Sheet and Other Relief pronounced December 14, 2022

[47] *Sale of Goods Act,* section 26(2) [**TAB** 1]

[48] *Alberta Treasury Branches v Cam Holdings LP*, 2016 ABQB 33 ("***Cam Holdings***") at para 41. [**TAB 5**]

[49] *Cam Holdings* at para 42.

Tangibles that it validly purchased. This is clearly not in the spirit or intent of the provision.

(ii) *The Debtor is not in possession of the Tangibles*

57. Since the Debtor required use of certain of the Tangibles to operate the leased premises, at the request of the Debtor, Pamoco did not remove any of the Tangibles from the leased lands. Instead, Pamoco took possession of the Tangibles by affixing signage identifying its ownership to the property, including applying it on the gates of certain wells and on some of the other larger pieces of equipment.[50]

58. In addition, Pamoco took the step of taking possession of the Tangibles by applying a square QR identity code to the main sign on each piece of the Tangibles, which if scanned, shows it is the property of Pamoco's sister company, Terroco Industries Ltd.[51]

59. The reason Pamoco used its sister company Terroco Industries Ltd. as the identified owner for the purposes of tagging the Tangibles, is because Terroco Industries Ltd. is a 50-year-old, established and well known oilfield service provider and supplier in Alberta, with six offices around the province. It is therefore easy for third parties attending the premises where the Tangibles are located to identify and locate the proper owner.[52]

60. In an analogous situation, a secured party may perfect its security interests pursuant to the *Personal Property Security Act* by taking possession of the property subject to a security interest.[53] This Court has suggested that the concept of possession under personal property security legislation can be broader than physical possession, and that in some instances possession can be deemed even where the collateral remains in the physical possession of the debtor.[54]

61. In the case of *Kallis,* Justice Hawco of this Court determined that perfection of the security interest in certain share certificates had been effected despite the fact that the share certificates remained in the physical possession of the debtor. In *Kallis,* this Court found that the debtor had always acknowledged that the shares in question were being held by it for a specific creditor. The primary piece of evidence indicating that the debtor

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[50] O'Connor Affidavit at para 31

[51] O'Connor Affidavit at para 31, Exhibit P

[52] O'Connor Affidavit at para 31

[53] *Personal Property Security Act,* RSA 2000, c P-7 at section 24 [**TAB 6**]

[54] Cassels Brock Lawyers Newsletter Article, *Perfection by Possession: Possession Not Required* [**TAB 7**]

was holding the shares for the benefit of the specific creditor was a post-it note on the share certificates.[55]

62. The identification of the Tangibles as being the property of Pamoco went much further than applying a post-it note to the property. In the case of the Tangibles it was apparent to anyone who attended the premises to view the Tangibles that title to the property was not with the Debtor.

63. In an analogous situation of the seizure of property pursuant to landlord distress claims, seizure may be done constructively rather than by taking physical possession. This is common where taking physical possession may be either expensive, impractical or both. "In these circumstances all a bailiff needs to do is show some positive acts of distress such as posting a notice on all doors and tagging the goods with the fact that the bailiff has seized the property". [56]

64. In this case, to remove the Tangibles from the leased lands would have been extremely expensive, impractical, and damaging to both the Tangibles and real property. Further, the Debtor had requested that Pamoco leave the property on the premises to assist it with its operations. As a result, Pamoco took constructive possession of the Tangibles by taking an inventory of its property and marking it.[57] There is no other practical or economical way for Pamoco to take possession of the Tangibles.

65. As a result of Pamoco having taken constructive possession of the Tangibles, the Debtor is no longer "in possession" of the Tangibles for section 26(1) of the *Sale of Goods Act* to apply.

V. CONCLUSION

66. Pamoco gave fair and sufficient consideration for the Tangibles pursuant to the Acquisition Advances and the Robus AP Payments. These payments far exceeded the value of the consideration paid by the Debtor to acquire the Tangibles. As a result, title to the Tangibles transferred from the Debtor to Pamoco pursuant to the Tangibles Transaction.

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[55] Cassels Brock Lawyers Newsletter Article, *Perfection by Possession: Possession Not Required* [**TAB 7**]; *Kallis v First Capital Management Ltd,* 2011 ABQB 60 ("***Kallis***") at para 20 [**TAB 8**]

[56] Frank Bennett, *Bennett of Creditors' and Debtors' Rights and Remedies*, 4th Edition at p. 255 [**TAB 9**]

[57] O'Connor Affidavit at para 31, Exhibits O, P

67. Pamoco took title to the Tangibles from the Debtor prior to the Secured Lender being granted a security interest in the personal property of the Debtor, such that at no point did the Secured Lender's security ever attach to the Tangibles.

68. The Tangibles continue to be on the leased premises and title has not been delivered or transferred to the Secured Lender, or anyone else, for section 26(1) of the *Sale of Goods Act* to apply to strip Pamoco of its ownership interests in the property.

69. Further, the Debtor is not "in possession" of the Tangibles, as Pamoco has exercised constructive possession over this property since February 2019. As a result, section 26(1) of the *Sale of Goods Act* again cannot apply to impact Pamoco's title to the Tangibles.

70. Based on the foregoing, Pamoco requests that this Honourable Court grant the relief requested by Pamoco in its Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF JANUARY, 2023.

MILLER THOMSON LLP

Per: _____

James W. Reid
Counsel for the Applicant, Pamoco Resources Ltd.

TABLE OF AUTHORITIES

R.S.A. 2000, c. S-2, s. 23

s 23. Sale by person not owner

Currency

23.Sale by person not owner

23(1) Subject to this Act, if goods are sold by a person who is not the owner of them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell.

23(2) Nothing in this Act affects

(a) the *Factors Act* or any enactment enabling the apparent owner of goods to dispose of them as if the apparent owner were the true owner of them, or

(b) the validity of any contract or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Currency

Alberta Current to Gazette Vol. 118:17 (September 15, 2022)

Alberta Statutes
Sale of Goods Act
Part 2 — Effects of the Contract (ss. 18-26)
Transfer of Title

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

R.S.A. 2000, c. S-2, s. 26

s 26. Possession of goods after sale

Currency

26.Possession of goods after sale

26(1) When a person who has sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.

26(2) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*, and Part 4 of that Act applies, with the necessary modifications, to that registration.

26(3) When a person who has bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

26(4) Subsection (3) does not apply to a sale, pledge or other disposition of goods or documents of title to goods by a person who has obtained possession of the goods pursuant to a security agreement under which the seller has a security interest as defined in the *Personal Property Security Act*.

26(5) In this section, **"mercantile agent"** means a mercantile agent having, in the customary course of the agent's business as a mercantile agent, authority to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods.

Currency

Alberta Current to Gazette Vol. 118:17 (September 15, 2022)

End of Document

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Condominium Plan No.7822583 v. Asiedu | 2022 ABKB 842, 2022 CarswellAlta 3641 | (Alta. K.B., Dec 16, 2022)

2007 ABQB 541
Alberta Court of Queen's Bench

Lydian Properties Inc. v. Chambers

2007 CarswellAlta 1159, 2007 ABQB 541, [2007] 12 W.W.R. 651, [2007] A.W.L.D. 3682, [2007] A.W.L.D. 3701, [2007] A.J. No. 979, 160 A.C.W.S. (3d) 994, 427 A.R. 304, 60 R.P.R. (4th) 1, 80 Alta. L.R. (4th) 183

Lydian Properties Inc. (Applicant / Respondent) and Donna Chambers (Respondent / Applicant)

Donna Chambers (Applicant) and Lydian Properties Inc. (Respondent)

R.A. Graesser J.

Heard: June 26, 2007
Judgment: August 31, 2007
Docket: Edmonton 0603-06114, 0603-08396

Counsel: Donald Savich for Lydian Properties Inc.
Robert Gillespie for Donna Chambers

Subject: Civil Practice and Procedure; Criminal; Property; Contracts
Related Abridgment Classifications
Criminal law
XIV Offences against rights of property
XIV.3 Criminal interest rate
Equity
IV Relief from unconscionable transactions
IV.2 Mortgage and loan transactions
IV.2.c Inequality of bargaining power
Headnote
Equity --- Relief from unconscionable transactions — Mortgage and loan transactions — Inequality of bargaining power
Debtor had serious difficulties with personal finances — Debtor's house was being foreclosed and she was subject to judgment obtained by creditor — Debtor responded to company's advertisements offering solutions to get out of heavy personal debt — Debtor signed series of documents from company without benefit of independent advice — Resultant agreement transferred title to debtor's home to company and made debtor company's tenant — Debtor fell into arrears in rent and company initiated action to terminate tenancy, regain possession and get judgment for rental arrears — Debtor cross-applied for declaration that transactions were illegal and void from outset — Master ruled that transaction between parties constitued legitimate sale and was not result of unconscionable agreement — Debtor brought appeal from master's decision — Appeal allowed — Transaction was unconscionable at law and at equity — True nature of transaction between paries was lending agreement — Company exploited debtor's vulnerable position and ignorance of agreement clauses — Company failed to provide proper disclosure of cost of transaction as required by Fair Trading Act — Cost of transaction exceeded criminal interest rate — Company was ordered to reconvey property to debtor.
Criminal law --- Offences — Criminal interest rate — Entering into agreement to receive interest at criminal rate
Debtor had serious difficulties with personal finances — Debtor's house was being foreclosed and she was subject to judgment obtained by creditor — Debtor responded to company's advertisements offering solutions to get out of heavy personal debt —

Debtor signed series of documents from company without benefit of independent advice — Resultant agreement transferred title to debtor's home to company and made debtor company's tenant — Debtor fell into arrears in rent and company initiated action to terminate tenancy, regain possession and get judgment for rental arrears — Debtor cross-applied for declaration that transactions were illegal and void from outset — Master ruled that transaction between parties constitued legitimate sale and was not result of unconscionable agreement — Debtor brought appeal from master's decision — Appeal allowed — Transaction was unconscionable at law and at equity — Company exploited debtor's vulnerable position and ignorance of agreement clauses — Company failed to provide proper disclosure of cost of transaction as required by Fair Trading Act — Cost of transaction exceeded criminal interest rate — Interest rate charged by company approached 100 percent per annum — Company was ordered to reconvey property to debtor.

Table of Authorities

Cases considered by *R.A. Graesser J.*:

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Black v. Wilcox (1976), 1976 CarswellOnt 844, 12 O.R. (2d) 759, 70 D.L.R. (3d) 192 (Ont. C.A.) — referred to

Brown v. Northey (1991), 1991 CarswellAlta 472, 115 A.R. 321 (Alta. C.A.) — referred to

C.A.P.S. International Inc. v. Kotello (2002), [2002] 6 W.W.R. 307, 23 B.L.R. (3d) 280, 164 Man. R. (2d) 202, 2002 CarswellMan 210, 2002 MBQB 142 (Man. Q.B.) — referred to

Cain v. Clarica Life Insurance Co. (2005), 2005 CarswellAlta 1871, 2005 ABCA 437, 47 C.C.E.L. (3d) 70, 263 D.L.R. (4th) 368, 384 A.R. 11, 367 W.A.C. 11, [2006] 7 W.W.R. 111, 2006 C.L.L.C. 210-001, 54 Alta. L.R. (4th) 146 (Alta. C.A.) — followed

Canadian Imperial Bank of Commerce v. Ohlson (1997), 57 Alta. L.R. (3d) 213, [1998] 6 W.W.R. 115, 154 D.L.R. (4th) 33, 1997 CarswellAlta 1050, 209 A.R. 140, 160 W.A.C. 140 (Alta. C.A.) — considered

Dickey v. Pep Homes Ltd. (2006), 401 A.R. 149, 391 W.A.C. 149, 2006 ABCA 402, 2006 CarswellAlta 1682 (Alta. C.A.) — considered

Dusik v. Newton (1985), 1985 CarswellBC 86, 62 B.C.L.R. 1 (B.C. C.A.) — referred to

Garland v. Consumers' Gas Co. (1998), 114 O.A.C. 1, 40 O.R. (3d) 479 (headnote only), 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 97, [1998] 3 S.C.R. 112, 1998 CarswellOnt 4053, 1998 CarswellOnt 4054, 231 N.R. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77 (S.C.C.) — considered

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Pacific National Developments Ltd. v. Standard Trust Co. (1991), 53 B.C.L.R. (2d) 158, 1991 CarswellBC 12 (B.C. S.C.) — referred to

Pierce v. Empey (1939), 1939 CarswellOnt 97, [1939] S.C.R. 247, [1939] 4 D.L.R. 672 (S.C.C.) — distinguished

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Transport North American Express Inc. v. New Solutions Financial Corp. (2004), 2004 SCC 7, 2004 CarswellOnt 512, 2004 CarswellOnt 513, 17 R.P.R. (4th) 1, 235 D.L.R. (4th) 385, 183 O.A.C. 342, [2004] 1 S.C.R. 249, 18 C.R. (6th) 1, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 18, 316 N.R. 84 (S.C.C.) — considered

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Statutes considered:

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s. 12 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 347 — considered

s. 347(1)(a) — considered

s. 347(2) "criminal rate" — considered

Fair Trading Act, R.S.A. 2000, c. F-2

Generally — referred to

s. 2.1 [en. 2005, c. 9, s. 3] — considered

s. 6 — considered

Interest Act, R.S.C. 1985, c. I-15

Generally — referred to

Unconscionable Transactions Act, R.S.A. 2000, c. U-2

Generally — referred to

s. 2 — considered

s. 2(d) — considered

s. 4 — considered

Rules considered:

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

R. 499 — referred to

R. 500 — referred to

APPEAL by debtor from ruling that transaction between parties constituted legitimate sale.

***R.A. Graesser J.*:**

Introduction

1 Donna Chambers was in difficult circumstances. Her house was being foreclosed, and a creditor had a judgment against her. Refinancing attempts had stalled. Believing that she had few if any options available to her, she contacted Matt Robertson of Lydian Properties Inc. in response to advertising materials he had sent her.

2 Offering "several ways to get money to you quickly to pay off arrears and other expenses so you can carry on with your life", and "honest, lasting solutions to help you out of foreclosure", Mr. Robertson soon put a complicated set of documents in front of Ms. Chambers, which she signed without the benefit of independent advice.

3 The result of the documents was that title to Ms. Chambers' home was transferred to Lydian. Ms. Chambers became Lydian's tenant, at a monthly rent of $1,914.79 per month. The estimated equity in her home, $20,950.51, became a deposit for an option to reacquire the home within a year's time so long as Ms. Chambers faithfully paid the rent and paid a repurchase price of some $20,000 more than the estimated value of the home.

4 Ms. Chambers soon fell into arrears in rent, and Lydian quickly started action to terminate the tenancy, regain possession of the home and get judgment for the rental arrears.

5 Ms. Chambers resisted the tenancy application, and cross-applied for a declaration that the transactions with Lydian be declared illegal and void *ab initio* (from the outset) and for relief under the criminal interest rate provisions of the *Criminal Code*, the *Unconscionable Transactions Act*, the *Fair Trading Act* and the *Interest Act*.

6 Master Wacowich concluded that the various transactions between the parties were a sale (and not a loan) and a tenancy, making the *Criminal Code* interest provisions, the *Unconscionable Transactions Act, Fair Trading Act* and *Interest Act* inapplicable. He apparently concluded that the transactions were not otherwise unconscionable as between the parties. As a result, the Master ordered that she vacate the home and dismissed her application for relief. He did not award Lydian any rental arrears, but did give them costs. Ms. Chambers appeals from his decision.

Issues

7 This case raises a number of issues:

(a) What is the appropriate standard of review?

(b) Is the affidavit of Lothar Engelhardt admissible in these proceedings?

(c) What is the proper characterization of the transaction between Ms. Chambers and Lydian - a sale or a loan?

(d) What application does the *Fair Trading Act* have to the transaction?

(e) What application do the *Unconscionable Transactions Act* and the doctrine of unconscionability have to the transaction?

(f) What application do the criminal interest rate provisions of the *Criminal Code* have to the transaction?

(g) What are the appropriate remedies between the parties?

Facts

8 Ms. Chambers is a city transit driver with a grade 12 education. She purchased the home from her step-parents in 2003. For various reasons, she experienced significant financial difficulties and fell into arrears on the mortgages against the home in the fall of 2005. She says that she was working with a financial institution to refinance the home, but became panicky when foreclosure proceedings were commenced against her just before Christmas that year.

3. Overwhelming imbalance in the bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

4. The other party's knowingly taking advantage of this vulnerability.

See *Cain v. Clarica Life Insurance Co.* (2005), 384 A.R. 11 (Alta. C.A.).

60 Lydian submits that the consideration paid by them for the "purchase" was fair and reasonable. Mr. Robertson's evidence was that the price specified in the documentation, being $168,803.14, was market value for the property at the time, as determined by the City of Edmonton's tax assessment and information he had obtained from realtors. There was no evidence to the contrary, and I accept his evidence in that regard. However, that does not end the issue of the fairness and reasonableness of the transaction. Had Lydian simply paid Ms. Chambers the difference between that price and the various charges against the property, there would likely be no argument on consideration. Instead, Lydian kept the difference as the "option consideration". Nothing at all was paid to Ms. Chambers. In that regard, the sale cannot be looked at in isolation from the other transactions: the option and the lease. Was it "fair and reasonable" that Ms. Chambers pay Lydian some $20,000 for the right to repurchase her property for $20,000 more than its then value, as well as rent inflated by at least $350 per month (being the additional option consideration)? The answer is clearly no.

61 It is inexplicable why Ms. Chambers would agree to the transactions, regardless of how they are characterized. She was in financial difficulty, and could not keep up her existing mortgage payments. She had equity in her property; by Mr. Robertson's account some $20,000 (although that was before the judgment debt was taken into account, so the "real" number was closer to the $16,940.36 in the Statement of Adjustments). The effect of the transactions, on their face, was to transfer the property to Lydian, pay them an inflated rent, and have the right to buy the property back for an additional $20,000. On any view of the transactions, the consideration was neither fair, nor reasonable.

62 Generally, the law does not look at the sufficiency of the consideration for a transaction, and avoids making bargains for the parties. They are left to their own devices, but for the possible intervention of the doctrine of unconscionability and specific pieces of legislation such as the *Unconscionable Transactions Act*.

63 The first part of the test as set out by the Alberta Court of Appeal is thus satisfied: the transaction was grossly unfair and improvident for Ms. Chambers.

64 The second part of the test relates to the obtaining of independent legal advice or other appropriate advice. The is no suggestion that Ms. Chambers had advice other than her discussions with Mr. Robertson. She did not consult a lawyer and did not consult any other advisor. While she was not prevented from doing so, the nature of transactions such as these call out for independent advice of some sort. She has satisfied the second part of the test, even though she chose not to get advice from a third party. Given the contradictions between the initial representations made to her and the nature of the transactions as documented, the utility of any information provided by Mr. Robertson is suspect.

65 The third part of the test for unconscionability deals with the relative position of the parties. Here, Ms. Chambers was in very difficult circumstances; she was a mother with five children and was in financial difficulties. She was facing foreclosure, and had been unable so far to refinance the home on her own. She needed help. There was little evidence before me as to her level of sophistication. Apart from matrimonial matters, she had no previous dealings with lawyers. She had not used her own lawyer when she purchased the property a couple of years earlier. Lydian, on the other hand, was under no apparent financial pressure and was actively seeking business. They specifically targeted people such as Ms. Chambers, offering their services to people being foreclosed against. They actively sought out people at a disadvantage. Their promotional materials emphasized urgency and exaggerated to some extent the foreclosure process and its consequences, and in particular the ability of mortgagees to pursue mortgagors for deficiency judgments. Further, they clearly offered a way out of the foreclosure predicament, which was not presented as simply transferring or selling the home.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Williams-Sonoma Inc. v. Oxford Properties Group Inc. | 2013 ONCA 441, 2013 CarswellOnt 8646, 22 C.L.R. (4th) 199, [2013] O.J. No. 2980, 307 O.A.C. 314, 229 A.C.W.S. (3d) 865 | (Ont. C.A., Jun 26, 2013)

1989 CarswellBC 37
Supreme Court of Canada

Syncrude Canada Ltd. v. Hunter Engineering Co.

1989 CarswellBC 37, 1989 CarswellBC 703, [1989] 1 S.C.R. 426, [1989] 3 W.W.R. 385, [1989] B.C.W.L.D. 1283, [1989] C.L.D. 691, [1989] S.C.J. No. 23, 14 A.C.W.S. (3d) 277, 35 B.C.L.R. (2d) 145, 57 D.L.R. (4th) 321, 92 N.R. 1, J.E. 89-571, EYB 1989-66979

HUNTER ENGINEERING COMPANY INC. (HUNTER MACHINERY CANADA LTD.), INTEGRATED METAL SYSTEMS CANADA LTD. and ALLIS-CHALMERS CANADA LTD. v. SYNCRUDE CANADA LTD. et al.

Dickson C.J.C., Estey [*], McIntyre, Wilson, Le Dain [**], La Forest and L'Heureux-Dubé JJ.

Heard: February 25 and 26, 1988
Judgment: March 23, 1989
Docket: No. 19773, 19950

Counsel: *J. Giles, Q.C.*, and *R. McDonell*, for appellants Hunter Engineering Inc. et al.
D.M.M. Goldie, Q.C., and *P.G. Plant*, for appellant Allis-Chalmers Canada Ltd.
D.B. Kirkham, Q.C., and *G.S. McAlister*, for respondents Syncrude Canada Ltd. et al.

Subject: Contracts; Restitution; Property
Related Abridgment Classifications
Commercial law
V Sale of goods
V.5 Statutory contract
V.5.g Condition
V.5.g.i Express condition
V.5.g.i.B Effect
Conflict of laws
VI Contracts
VI.1 Choice of law
VI.1.a Where contract specifying law
VI.1.a.ii Miscellaneous
Contracts
VII Construction and interpretation
VII.10 Law governing contract
Contracts
IX Performance or breach
IX.8 Breach
IX.8.b Fundamental breach
IX.8.b.i What constitutes
Restitution and unjust enrichment

I General principles
I.2 Requirements for unjust enrichment
I.2.a Conferral of benefit

Headnote

Contracts --- Performance or breach — Breach — Fundamental breach — General
Restitution --- Bars to recovery — No benefit conferred
Sale of Goods --- Statutory contract — Condition — Express condition — Effect
Contracts — Discharge — Breach — Fundamental breach — Exclusion clauses — Plaintiff entering into contract with second defendant for supply of conveyor systems including mining gearboxes — Contract excluding statutory warranties and defects appearing after expiry of term of contractual warranty — Gearboxes defective but repairable — Breach not amounting to fundamental breach — In any event, exclusion clause excluding fundamental breach.
Sale of goods — Contract of sale — Implied conditions and warranties — Quality and fitness — Plaintiff entering into contract with defendants for supply of conveyor systems including mining gearboxes — Gearboxes defective due to design errors within contractual responsibility of defendants — Although defects appearing after expiry of term of contractual warranty, contract with first defendant not excluding warranty of fitness under Sale of Goods Act — Contract with second defendant excluding statutory warranties and fundamental breach not applying.
Trusts — Constructive trusts — Third party fraudulently misrepresenting to plaintiff that it was Canadian subsidiary of defendant — Plaintiff contracting with third party for purchase of certain machinery — Defendant commencing passing off action — Plaintiff establishing trust with moneys intended to pay for machinery — Defendant successful in passing off action but unwilling to assume warranties as required by trust — Defendant not being entitled to moneys under unjust enrichment or under terms of trust.
Contracts — Discharge — Breach — Defective performance — Plaintiff entering into contract with first defendant for supply of mining gearboxes — Gearboxes defective due to design errors within contractual responsibility of defendant — Although defects appearing after expiry of term of contractual warranty, contract not excluding warranty of fitness under Sale of Goods Act — Defendant liable for breach of statutory warranty of fitness.
Sale of goods — Contract of sale — Discharge — Breach — Fundamental breach — Exclusion clauses — Plaintiff entering into contract with second defendant for supply of conveyor systems including mining gearboxes — Contract excluding statutory warranties and defects appearing after expiry of term of contractual warranty — Gearboxes defective but repairable — Breach not being fundamental breach — In any event, exclusion clause excluding fundamental breach.
The plaintiff S. operated a synthetic oil plant. It entered into three contracts to obtain mining gearboxes for use at the plant. The first contract was with the defendant H.(U.S.) for the supply of 32 gearboxes at a total price of $464,000. Under the contract H.(U.S.) was to "furnish all labour and material for the design, fabrication and delivery ..." of the gearboxes, and while S. supplied specifications as to what the gearboxes were required to do, H.(U.S.) bore sole responsibility for their correct and adequate design. The gearboxes were manufactured by a subcontractor. The second contract, with the defendant A.-C., was for the supply of 14 conveyor systems, at a price in excess of $4,000,000, four of which included gearboxes. These gearboxes were also made by the same subcontractor and according to the same design.
Both contracts contained provisions that the contract and the rights of the parties were to be governed by the laws of Ontario, and both contained warranties which expired on the earlier of 24 months after delivery or 12 months after the gearboxes entered service. However, the contract with A.-C. also included a clause that those provisions represented the only warranty, and that "no other warranty or conditions, statutory or otherwise shall be implied".
The third contract was with H.(Can.) for an additional 11 gearboxes. S. had been approached by employees of H.(U.S.), who said they now represented a Canadian subsidiary of H.(U.S.). However, these representations were fraudulent, and H.(Can.) was in fact an independent company with no connection with H.(U.S.). The warranty provision of this contract was unlimited in time. These gearboxes were of the same design as the original gearboxes and H.(Can.) also contracted with the same subcontractor as H.(U.S.). After work had commenced but before S. made any payments to H.(Can.), H.(U.S.) discovered the deception, alerted S. and commenced a passing off action against H.(Can.) and its owners. S., which had an urgent need for the gearboxes, secured a waiver from H.(Can.) of any interest arising under contract subject to the creation of an acceptable trust agreement.
S. then entered into an agreement directly with the subcontractor under which the latter would manufacture the gearboxes for S. at the price it would have received from H.(Can.), and established a trust fund into which were paid the moneys that would have

been payable to H.(Can.). The subcontractor was to be paid its contract price out of the fund, with an amount representing the profit H.(Can.) would have made to be payable to the successful party in the litigation between H.(Can.) and H.(U.S.), provided that that party agreed to assume the warranty and service obligations of H.(Can.). The trust further provided that if the holder of the interest in the trust fund and S. were unable to agree with respect to the warranty and service of work, the balance of the trust moneys were to be paid to S. Both H.(U.S.) and H.(Can.) had knowledge of the agreements with the subcontractor and the trust agreement but they were not parties to either agreement. H.(U.S.) succeeded in its action against H.(Can.), but it refused to assume the warranty provisions of H.(Can.)'s contract.

Between one and two years after they were put in service, problems were discovered in the gearboxes. Although the gearboxes should have lasted ten years, the thickness of steel plates and the way in which the housing was welded together was inadequate and they were too weak for service. Both H.(Can.) and A.-C. refused warranty coverage, and S. repaired the gearboxes at a cost of some $700,000 with respect to those obtained from H.(U.S.), $400,000 with respect to those obtained from A.-C., and $200,000 with respect to those which had been the subject of the contract with H.(Can.). S. commenced an action against H.(U.S.) and A.-C., and by third party notice A.-C. claimed contribution or indemnity from H.(U.S.). H.(U.S.) claimed entitlement to the moneys in the trust.

The trial judge held that the failure of the gearboxes was due to design fault and that this was H.(U.S.)'s responsibility. He held that the time limit in the contractual warranties excused H.(U.S.) and A.-C. from liability under those provisions, but that the warranty of fitness in s. 15(1) of the Ontario Sale of Goods Act applied to the contract between S. and H.(U.S.) and that H.(U.S.) had breached that warranty. Accordingly, the trial judge awarded judgment against H.(U.S.). However, the trial judge held that the statutory warranty was excluded in the contract between S. and A.-C., and he rejected S.'s claim that A.-C. had committed a fundamental breach so as to negate the exclusion clause. Accordingly, the trial judge dismissed the action against A.-C. and its third party notice. Finally, the trial judge held that H.(U.S.) was entitled to the principal in the trust fund, but only if it met the conditions of the H.(Can.) contract, and he allowed time for H.(U.S.) to assume the warranty and service obligations. The Court of Appeal dismissed H.(U.S.)'s appeal on the question of liability, allowed the plaintiffs' appeal against the dismissal of the action as against A.-C., and allowed H.(U.S.)'s appeal on the ownership of the trust fund. H.(U.S.) and A.-C. appealed the finding of liability and the plaintiffs cross-appealed with respect to the ownership of the trust fund.

Held:

H.(U.S.)'s appeal dismissed; A.-C.'s appeal allowed; plaintiffs' cross-appeal allowed.

I Liability of H.(U.S.)

Per WILSON J. (L'HEUREUX-DUBÉ and MCINTYRE JJ. concurring): It was apparent that under its contract H.(U.S.) was responsible for deciding specific design details, and that S.'s specifications were only specifications as to what the gearboxes were required to do, not of how they were actually to be built. Accordingly, H.(U.S.) was responsible for the design flaw that caused the gearboxes to fail.

Although the contract warranty period had expired, the statutory warranty of fitness in s. 15(1) of the Ontario Sale of Goods Act applied. Considering that an exclusion clause should be strictly construed against the party seeking to invoke it, and that clear and unambiguous language is required to oust an implied statutory warranty, the statutory warranty was not excluded by the contract. Moreover, it was abundantly clear that S. informed H.(U.S.) of the purpose for which the gearboxes were required and relied on its expertise, that the gearboxes were goods which were in the course of H.(U.S.)'s business to supply, and that they were not reasonably fit for their purpose. Accordingly, H.(U.S.) was liable for the cost of repairing the gearboxes it supplied.

Per DICKSON C.J.C. (LA FOREST J. concurring): Upon its true construction the contract between S. and H.(U.S.) placed the responsibility for the design of the gearboxes solely on H.(U.S.). The words of the contract clearly indicated a creative role for H.(U.S.), and the specifications S. supplied were specifications as to what the gearboxes were required to do, not how they were to be built. Moreover, H.(U.S.) failed to discharge its responsibility with respect to the adequacy of their design.

The contractual warranty had expired, and S. was not entitled to rely on that warranty. However, the statutory warranty in s. 15(1) of the Ontario Sale of Goods Act applied. While s. 53 provides for contracting out of the provisions of the Act, this must be done by clear and direct language and the mere presence of an express warranty does not mean that the express and statutory warranties are inconsistent so as to exclude the statutory warranties. Finally, the three prerequisites for the application of s. 15(1) were satisfied and H.(U.S.) was liable under that section.

II Liability of A.-C.

Per WILSON J. (L'HEUREUX-DUBÉ J. concurring): The provision in the A.-C. agreement explicitly and unambiguously ousted the statutory warranty and it was effective to prevent the application of s. 15(1) of the Sale of Goods Act.

A fundamental breach occurs where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties he should obtain. Fundamental breach gives the innocent party the election to put an end to all the remaining contractual obligations, and this is an exceptional remedy which should be available only where the foundation of the contract has been undermined and the very thing bargained for has not been provided. Here the breach of the A.-C. contract with respect to the gearboxes was not a fundamental breach. Although the gearboxes were an important part of the conveyor systems, the cost of their repair was only a small part of the total cost and their inferior performance did not deprive S. of substantially the whole benefit of the contract. Moreover, as the gearboxes did work for a period of time and were repairable, the breach did not go to the very root of the contract and was not fundamental to it.

In any event, even if the breach were fundamental, it was excluded by the terms of the contractual warranty. While no rule of law invalidates or extinguishes exclusion clauses in the event of fundamental breach, and exclusion clauses should be given their natural and true construction so that the parties' agreement is given effect, the court must still determine whether in the context of the particular breach which has occurred it is fair and reasonable to enforce the clause in favour of the party who committed that breach. Although the courts are unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them, and a requirement that an exclusion clause should be fair and reasonable per se should be rejected, it is a different matter for the courts to determine after a particular breach has occurred whether an exclusion clause should be enforced. In the absence of specific legislation, the courts must continue to develop a balance through the common law between the desirability of allowing the parties to make their own bargains and having them enforced by the courts and the undesirability of having the courts used to enforce a bargain in favour of a party which is itself totally repudiating that bargain. Whether this is addressed narrowly in terms of fairness between the parties, or on a broader, and preferably, policy basis of the need to balance conflicting values inherent in the contract law, the question is essentially the same: in the circumstances that have happened, should the court lend its aid in enforcing the clause?

There are other means available to render exclusion clauses unenforceable even in the absence of a finding of fundamental breach, including statutory provisions dealing with consumer sales and unconscionability stemming from inequality of bargaining power. However, where, as here, there is no inequality of bargaining power, the courts should, as a general rule, give effect to the bargain. Nonetheless, there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. To abandon the doctrine of fundamental breach and rely solely on unconscionability would require an extension of the principle of unconscionability beyond inequality of bargaining power, and arguably it would be even less certain than the doctrine of fundamental breach.

Here, even if the breach were fundamental, there would be nothing unfair or unreasonable, or unconscionable, in giving effect to the exclusion clause: the parties were of roughly equal bargaining power, familiar with this type of contract, and there was no evidence A.-C. was guilty of sharp or unfair dealing.

Per DICKSON C.J.C. (LA FOREST J. concurring): The warranty clauses in the A.-C. contract effectively excluded liability for defective gearboxes after the warranty period ended.

In the context of deciding whether to enforce exclusion clauses the doctrine of fundamental breach should be replaced with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable. Accordingly, if on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will be saved from liability unless the contract is unconscionable. While the motivation underlying the continuing use of fundamental breach as a rule of law to relieve parties from the effects of unfair bargains may be laudatory, the doctrine has spawned a host of difficulties, the most obvious of which is in determining whether a particular breach is fundamental. As well, not all exclusion clauses are unreasonable, and they are not the only contractual provisions which may lead to unfairness. Accordingly, there is no sound reason for applying special rules in the case of exclusion clauses than in the case of other clauses producing harsh results.

Here the warranty clause excluded liability for the defects that materialized and, as unconscionability was not an issue, the parties should be held to the terms of their bargain.

Per MCINTYRE J.: Any breach of the contract by A.-C. was not fundamental, and in any event its liability would be excluded by the terms of the contractual warranty even if the breach were fundamental. Accordingly, it was unnecessary to deal further with the concept of fundamental breach in this case.

III Entitlement to the trust fund

Per DICKSON C.J.C (LA FOREST and MCINTYRE JJ. concurring): There was no basis in law or in equity for awarding the trust moneys to H.(U.S.). As H.(U.S.) maintained that it was not bound by the terms of the trust agreement and not obliged to honour any warranty or service obligations as a condition of payment to it of the trust moneys, it was not entitled to those moneys under the trust agreement. Nor had it satisfied any of the criteria necessary to establish a claim for unjust enrichment. As between H.(U.S.) and H.(Can.), H.(U.S.) had the better claim to the money accruing to H.(Can.) under S.'s contract with H.(Can.), and would be entitled to claim any profits made by H.(Can.) under both the traditional doctrine of constructive trust and unjust enrichment. However, as between S. and H.(Can.), S. had a stronger claim to the money: the relationship between S. and H.(Can.) was regulated by a contract which S. entered into on the basis of H.(Can.)'s fraudulent misrepresentation and which was therefore voidable at the instance of S. As the only connection between H.(U.S.) and S. was H.(Can.), H.(U.S.) had no higher claim against S. than did H.(Can.). Accordingly, the result of S.'s decision to terminate H.(Can.)'s contract and H.(Can.)'s acceptance of that termination was that H.(Can.) was no longer entitled to any payment under the contract and this precluded any claim by H.(U.S.).

The creation of the trust by S. was not an admission that either H.(U.S.) or H.(Can.) was entitled to the profit under the H.(Can.) contract. Upon suspecting fraud, S. was entitled to rescind the contract. Accordingly, it did not need to obtain the acceptance of H.(Can.) and create the trust fund, and it should not be worse off than it would have been had it simply rescinded the contract. At most, the establishment of the trust fund indicated S. was willing to pay the contract price if it received its negotiated warranties; it was not an admission that the trust moneys belonged to either H.(U.S.) or H.(Can.). Finally, the trial judge erred in declaring H.(U.S.) entitled to the trust moneys by assuming the warranty obligations after judgment without incurring liability for warranty claims prior to its assumption of the warranties.

Per WILSON J. (dissenting) L'HEUREUX-DUBÉ J. concurring): H.(U.S.) was entitled to the balance of the trust moneys. As the trust terms were not agreed to by the parties but were unilaterally established by S., the trial judge erred in holding that the fund should only be disposed of in accordance with the terms of the trust agreement. When the trust was established S. was perfectly prepared to acknowledge that the profit margin was payable to one of H.(U.S.) or H.(Can.), and in the circumstances the entitlement to the trust fund should be decided on the equitable principles governing unjust enrichment. S. would be enriched if allowed to retain the fund, as it would receive interest income on money it initially intended to pay to H.(Can.). Moreover, if S. were permitted to keep the entire fund, H.(U.S.) would be correspondingly deprived of the interest income it would have earned on the contract for the supply of the additional gearboxes. There need not be a contractual link for the causal connection between contribution and enrichment to be proved, and on the facts of this case there was a sufficient causal connection. Finally, there was no juristic reason for the enrichment. Accordingly, provided it accepted the warranty terms of the H.(Can.) contract and paid for the costs of repairing the gearboxes, the trust fund minus administration expenses belonged in equity to H.(U.S.).

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s. 6(d)

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Fridman, Law of Contract in Canada, 2nd ed. (1986), pp. 531, 558.

exclude liability for fundamental breach. It was submitted this approach involves returning to the notion of treating fundamental breach as something which, as a rule of law, will displace the terms of the contract; to paraphrase Lord Bridge's decision in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*, [1983] 2 A.C. 803, [1983] 3 W.L.R. 163, [1983] 2 All E.R. 737 at 741 (H.L.): it reintroduces by the back door a doctrine which the *Suisse Atl.* case, and cases following, had evicted by the front.

49 Allis-Chalmers adopted in its entirety the argument of Hunter U.S. with respect to the fundamental breach issue. The argument in the factum of Allis-Chalmers was directed to the further question whether the Court of Appeal erred in failing to construe properly the warranty clause in ascertaining whether it applied to the instant breach.

50 Allis-Chalmers argued that the words of cl. 8 are clear and fairly susceptible of only one meaning, and the Court of Appeal erred in failing to give effect to them; instead of giving effect to the language of the contract, the Court of Appeal imported its own implied warranty and erroneously embarked on a consideration of whether cl. 8 was effective to eliminate the "essential undertaking of Allis-Chalmers to provide gearboxes capable of meeting the requirements of the extraction process". In proceeding in this fashion, the Court of Appeal in effect resurrected a term analogous to the implied statutory warranty of fitness for the purpose required, which the parties had expressly excluded. By importing this additional term into the contract, the court rewrote the bargain which the parties had made for themselves.

51 Syncrude argues in response that the seller's fundamental obligation does not derive from, and is not dependent upon, the existence of express or implied warranties or conditions. It is inherent in the contract of sale.

52 Syncrude relied upon the pronouncement of the doctrine of fundamental obligation of the seller enunciated by Weatherston J. in *Cain v. Bird Chevrolet-Oldsmobile Ltd.* (1976), 12 O.R. (2d) 532, 69 D.L.R. (3d) 484, affirmed 20 O.R. (2d) 569, 88 D.L.R. (3d) 607 (C.A.). The court stated at pp. 534-35:

> The first and most important thing in any case is to determine what are the terms of the contract, so as to decide what performance was required by the defaulting party ...
>
> Where a machine has been delivered which has such a defect, or "such a congeries of defects" as to destroy the workable character of the machine, there is said to be a fundamental breach of contract by the seller. This is so because the purported performance of the contract is quite different than that which the contract contemplated ... There has been no failure of consideration, no failure to deliver the thing contracted for, but it is implicit in the transaction, as a fundamental term, that the thing contracted for is what it seems to be.

53 The House of Lords cases decided that liability for breach of a fundamental term may be excluded by a suitably worded exclusion clause. However, counsel contended that there is a rule of construction that exemption clauses must be very clearly worded if they are to be sufficient to exclude liability for fundamental breach. It was said that this approach to the construction of a contract was confirmed in this court in *Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co.*, [1980] 2 S.C.R. 718, 15 R.P.R. 62, 116 D.L.R. (3d) 193, *(*sub nom. *Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.)* 33 N.R. 460 [Ont.].

54 On the application of the principles to the present case, Syncrude asked the question whether Allis-Chalmers and Syncrude intended that Allis-Chalmers could supply gearboxes which were so fundamentally defective as to require complete replacement, or in this case, complete reconstruction, after 15 months' service, at Syncrude's sole cost. Syncrude would give a negative response to this question.

55 I have had the advantage of reading the reasons for judgment prepared by my colleague, Justice Wilson, in this appeal and I agree with her disposition of the liability of Allis-Chalmers. In my view, the warranty clauses in the Allis-Chalmers contract effectively excluded liability for defective gearboxes after the warranty period expired. With respect, I disagree, however, with Wilson J.'s approach to the doctrine of fundamental breach. I am inclined to adopt the course charted by the House of Lords in *Photo Production Ltd. v. Securicor Tpt. Ltd.*, [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556, and to treat fundamental breach as a matter of contract construction. I do not favour, as suggested by Wilson J., requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation. In my view, the courts should not disturb the bargain the parties have struck, and

I am inclined to replace the doctrine of fundamental breach with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable.

56 The doctrine of fundamental breach in the context of clauses excluding a party from contractual liability has been confusing at the best of times. Simply put, the doctrine has served to relieve parties from the effects of contractual terms, excluding liability for deficient performance where the effects of these terms have seemed particularly harsh. Lord Wilberforce acknowledged this in *Photo Production*, supra, at p. 843:

> 1. The doctrine of "fundamental breach" in spite of its imperfections and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate.

In cases where extreme unfairness would result from the operation of an exclusion clause, a fundamental breach of contract was said to have occurred. The consequence of fundamental breach was that the party in breach was not entitled to rely on the contractual exclusion of liability but was required to pay damages for contract breach. In the doctrine's most common formulation, by Lord Denning in *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 (C.A.), fundamental breach was said to be a rule of law that operated regardless of the intentions of the contracting parties. Thus, even if the parties excluded liability by clear and express language, they could still be liable for fundamental breach of contract. This rule of law was rapidly embraced by both English and Canadian courts.

57 A decade later in the *Suisse Atl.* case, the House of Lords rejected the rule of law concept in favour of an approach based on the true construction of the contract. The Law Lords expressed the view that a court considering the concept of fundamental breach must determine whether the contract, properly interpreted, excluded liability for the fundamental breach. If the parties clearly intended an exclusion clause to apply in the event of fundamental breach, the party in breach would be exempted from liability. In *B.G. Linton Const. Ltd. v. C.N.R.*, [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 49 D.L.R. (3d) 548, 3 N.R. 151 [Alta.], this court approved of the *Suisse Atl.* formulation. The renunciation of the rule of law approach by the House of Lords and by this court, however, had little effect on the practice of lower courts in England or in Canada. Lord Denning quickly resuscitated the rule of law doctrine in *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.*, [1970] 1 Q.B. 447, [1970] 2 W.L.R. 198, [1970] 1 All E.R. 225 (C.A.).

58 Finally, in 1980, the House of Lords definitively rejected the rule of law approach to fundamental breach in *Photo Production*, supra. In that case, the plaintiff Photo Production had contracted with Securicor, a company in the business of supplying security services, to provide four nightly patrols of its factory. At issue was whether Securicor was liable for a fire deliberately set by one of its employees in the course of his duties at the Photo Production factory. The contract between the two parties contained the following limitation clause (at p. 840):

> Under no circumstances shall the company (Securicor) be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for (a) any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment ...

The limitation clause clearly excluded liability for fire with the exception of fires started by negligent acts. Securicor argued it could not be liable under the contract for the fire that occurred. Photo Production contended that Securicor was liable for the damage done to the factory under the doctrine of fundamental breach.

59 Lord Wilberforce rejected Photo Production's argument. He began by reviewing the fractured history of the doctrine of fundamental breach and then forcefully repudiated the rule of law concept. Lord Wilberforce reiterated the thoughts articulated in *Suisse Atl.*, stating at pp. 842-43, he had no doubt as to:

> ... the main proposition that the question whether and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract.

2018 ABQB 161
Alberta Court of Queen's Bench

Bank of Montreal v. Mason

2018 CarswellAlta 363, 2018 ABQB 161, [2018] A.W.L.D. 1038, 288 A.C.W.S. (3d) 785, 8 P.P.S.A.C. (4th) 136

Bank of Montreal (Plaintiff) and Gary Mason and Christine Mason (Defendants) and Red Deer RV Country Ltd, Red Deer RV Country Ltd operating as Paradise RV, No Limit Group Inc and No Limit Group Inc both operating as Paradise RV, ABC Corporation, XYZ Corporation, Craig Anstead and Karen Pezderic, John Doe and Richard Roe (Third Party)

Master W.S. Schlosser

Heard: January 3, 2018
Judgment: March 2, 2018
Docket: Edmonton 1603-15836

Counsel: Nicholas Williams, for Plaintiff
Erin Viala, Sean Mannery, for Defendants

Subject: Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Commercial law
III Conditional sales
III.7 Rights and liabilities of parties
III.7.c Assignment of contract
III.7.c.iii Assignee's remedies

Headnote

Commercial law --- Conditional sales — Rights and liabilities of parties — Assignment of contract — Assignee's remedies

In January 2009, dealership (owned by CA) sold motorhome to CA under conditional sales contract, with monthly payments from dealership and CA's joint account — Second purchaser put $5,000 deposit on motorhome, to be purchased via $160,000 worth of trades provided as $230,000 bank draft and $13,044.75 personal cheque, and sale was concluded in June 2009 — Meanwhile, dealership assigned conditional sales contract from sale to CA to first purchaser's lender which financed purchase, and purported to assign both rights to payments and all "right, title and interest in and to the goods", but title was to remain with seller until paid, and correspondingly, with assignee lender until paid in full — In February 2009, lender registered security interest, renewing it in November 2013 — In June 2009, second purchaser paid for motorhome, registered it, and drove it off lot, but dealership or CA kept money and did not pay lender — CA continued to make payments under first sale until he defaulted in June 2015 — Lender attempted to seize motorhome — CA was bankrupt and dealership was sold — Lender brought action asserting superior right to motorhome — Second purchaser brought motion for summary judgment dismissing claim — Motion granted — There was sufficient evidence of continuity of physical possession, especially during key dates of January to March, or January to June 2009 for purpose of making s. 26 of Sale of Goods (SGA) applicable — Second purchaser did not do lien search and had no actual notice of CA's or lender's interest, and lender's registration of its security interest was not in and of itself enough to determine issues of lack of notice or good faith — Nothing in circumstances required second purchaser to prove that he should not have known of lender's interest — Therefore, s. 26 of SGA defeated lender's title — While CA was technically debtor, not dealership, both were distinction without difference, right down to payments initially coming from their joint account, such that it was little more than disguised corporate loan — Security interest for purposes of Personal Property Security Act ought to be treated as one given by dealership.

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Anstead (Re) (2017), 2017 ABQB 700, 2017 CarswellAlta 2426 (Alta. Q.B.) — referred to

Bartin Pipe & Piling Supply Ltd. v. Western Environment of Oklahoma (2004), 2004 ABCA 52, 2004 CarswellAlta 98, (sub nom. *Epscan Industries Ltd. v. Bartin Pipe & Piling Supply Ltd.)* 236 D.L.R. (4th) 75, 42 B.L.R. (3d) 172, 346 A.R. 95, 320 W.A.C. 95, 30 Alta. L.R. (4th) 216, [2005] 1 W.W.R. 290 (Alta. C.A.) — referred to

Bender v. National Acceptance Corp. (1928), 63 O.L.R. 215, [1929] 1 D.L.R. 222, 1928 CarswellOnt 118 (Ont. C.A.) — referred to

Conan, Re (2014), 2014 ABPC 190, 2014 CarswellAlta 1743, 596 A.R. 157, 16 Alta. L.R. (6th) 189 (Alta. Prov. Ct.) — referred to

E. Dehr Delivery Ltd. v. Dehr (2016), 2016 ABQB 714, 2016 CarswellAlta 2438, 43 C.B.R. (6th) 233, 45 Alta. L.R. (6th) 383, 6 P.P.S.A.C. (4th) 307 (Alta. Q.B.) — referred to

General Motors Acceptance Corp. of Canada v. Midway Chrysler Plymouth Ltd. (1987), 7 P.P.S.A.C. 156, 50 Man. R. (2d) 185, 1987 CarswellMan 133 (Man. Q.B.) — referred to

General Motors Acceptance Corp. of Canada v. Owens (1993), 11 Alta. L.R. (3d) 269, 5 P.P.S.A.C. (2d) 242, 140 A.R. 344, 1993 CarswellAlta 64 (Alta. Q.B.) — referred to

Rowland v. Divall (1923), [1923] 2 K.B. 500 (Eng. K.B.) — referred to

Stoney Tribal Council v. Canadian Pacific Railway (2017), 2017 ABCA 432, 2017 CarswellAlta 2729 (Alta. C.A.) — referred to

TD Auto Finance (Canada) Inc. v. Yan (2015), 2015 ABCA 114, 2015 CarswellAlta 448, 30 C.B.R. (6th) 266, 3 P.P.S.A.C. (4th) 268, 25 Alta. L.R. (6th) 266 (Alta. C.A.) — considered

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1214777 Alberta Ltd. v. 480955 Alberta Ltd. (2014), 2014 ABQB 301, 2014 CarswellAlta 821 (Alta. Q.B.) — referred to

Statutes considered:

Civil Enforcement Act, R.S.A. 2000, c. C-15

Generally — referred to

Garage Keepers' Lien Act, R.S.A. 2000, c. G-2

Generally — referred to

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

Generally — referred to

s. 1(1)(tt) "security interest" (i) — considered

s. 30 — considered

s. 30(1) — considered

s. 30(2) — considered

s. 47 — considered

Sale of Goods Act, R.S.A. 2000, c. S-2

Generally — referred to

s. 26 — considered

s. 26(1) — considered

Authorities considered:

McLaren, Richard H., *The 2010 Annotated Alberta Personal Property Security Act* (Toronto: Carswell, 2009)

Generally — referred to

Cuming, Ronald C. C., Catherine Walsh and Roderick J.Wood, *Personal Property Security Law, 2nd ed.* (Toronto: Irwin Law, 2012)

Generally — referred to

MOTION by second purchaser for summary judgment dismissing lender's claim asserting superior right to motorhome.

***Master W.S. Schlosser*:**

1 Paradise RV sold a luxury motorhome twice: once to the dealer's owner and then to Defendant, Gary Mason. The first purchaser, Craig Anstead is bankrupt (related proceedings reported at 2017 ABQB 700 (Alta. Q.B.)) and the dealership has been sold. This is the fight between the second purchaser, Gary Mason, and the first purchaser's lender. The central issue is whether BMO's interest is superior to Mason's interest.

List of Authorities

By the parties

1. *Sale of Goods Act*, RSA 2000, c S-2;

2. *Alberta Treasury Branches v. Cam Holdings LP*, 2016 ABQB 33 (Alta. Q.B.) ;

3. *Garage Keepers' Lien Act*, RSA 2000, c G-2;

4. *General Motors Acceptance Corp. of Canada v. Midway Chrysler Plymouth Ltd.*, 1987 CarswellMan 133 (Man. Q.B.) ;

5. *Personal Property Security Act*, RSA 2000, c P-7;

6. *Conan, Re*, 2014 ABPC 190 (Alta. Prov. Ct.);

7. Richard H. McLaren, *The 2010 Annotated Alberta Personal Property Security Act* (Toronto: Carswell, 2009);

8. *TD Auto Finance (Canada) Inc. v. Yan*, 2015 ABCA 114 (Alta. C.A.) ;

9. *Unrau v. Ford Credit Canada Ltd.*, 1995 CarswellAlta 822 (Alta. Q.B.) [Master Funduk];

10. *Civil Enforcement Act*, RSA 2000, c c-15;

11. *E. Dehr Delivery Ltd. v. Dehr*, 2016 ABQB 714 (Alta. Q.B.) ;

12. *General Motors Acceptance Corp. of Canada v. Owens*, [1993] A.W.L.D. 678 (Alta. Q.B.) [1993 CarswellAlta 64 (Alta. Q.B.)];

13. *Bartin Pipe & Piling Supply Ltd. v. Western Environment of Oklahoma*, 2004 ABCA 52 (Alta. C.A.) ;

14. *Bender v. National Acceptance Corp.* (1928), [1929] 1 D.L.R. 222 (Ont. C.A.) ;

15. *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) ;

16. *1214777 Alberta Ltd. v. 480955 Alberta Ltd.*, 2014 ABQB 301 (Alta. Q.B.) ;

17. Personal Property Security Law, Cuming Walsh and Wood, Irwin Law 2nd ed;

18. *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 (Alta. C.A.)

Facts

2 The facts are unusual. Craig Anstead owned Red Deer RV Country, operating as Paradise RV. On January 28, 2009, Paradise sold a Supreme Silver Crown RV to Craig Anstead. The RV was described in the Conditional Sales Contract as a "new" 2008 model. The RV cost more than the value of the average home in Edmonton. The monthly payments were to come out of Paradise RV's joint account with Anstead.

3 Between January 28, 2009, and March 20, 2009, Gary Mason drove by Paradise RV roughly 12 times; seeing the Silver Crown on the lot. He had seen it before, in August, 2008, at a motor race where it was being used for promotional purposes for Paradise RV.

4 Gary Mason was sufficiently interested in the RV to have a look. He was told by a Paradise RV sales rep that it was for sale. After looking at it he left a deposit of $5,000, subject to several conditions, one of which was Christine Mason's approval: another concerned some minor repairs.

5 It was contemplated that Gary Mason would bring in $160,000 worth of trades (an older motor home, a 2006 Volvo and a trailer). The negotiated balance was to be paid in cash. The trades were provided as was a $230,000 bank draft and a personal cheque for $13,044.75. This sale was concluded in June 2009. If the deal had been financed, there might have been a search.

6 In the meantime, Paradise RV had assigned the Conditional Sales Contract from the sale to Anstead to the Bank of Montreal, who financed the purchase. The assignment purports to assign both the rights to the payments, and all 'right, title and interest in and to the goods'. Title was to remain with the seller until paid and, correspondingly, with the assignee, Bank of Montreal, until paid in full.

7 BMO registered a security interest at the personal property registry February 2, 2009, and renewed it on November 15, 2013.

8 In June 2009, Gary Mason paid for the motorhome, registered it and drove it off the lot. But Paradise (or Anstead) kept the money and did not pay the bank.

9 Mr. Anstead, meanwhile, continued to make payments under the first sale until June of 2015 when he defaulted. BMO then attempted to seize the motorhome. They brought this action to assert what they say is a superior right to the motorhome. The Masons are seeking summary dismissal of their claim.

Analysis

10 If this were a contest between Mason, Anstead and Paradise, it would end with one more line. Anstead and Paradise are out of the picture, so the contest becomes which of two innocent parties will be the victim. With two "owners", neither of whom knew about each other, the analysis is not so simple.

11 Ownership consists of the right to use or possess *and* title. Title is the crucial element (*Rowland v. Divall*, [1923] 2 K.B. 500 (Eng. K.B.)). For the purposes of the following discussion, two sets of rights need be considered: the right of the bank as owner of all 'right title and interest in the chattel by virtue of the assignment of the Conditional Sales Contract, and the right to receive the payments, or to seize the collateral create a registerable interest as defined in Section 1(ll),(tt)(i) of the *Personal Property Security Act*.

12 The reason we need to look at the bank's interest in this detail is that this range of rights engages both s 26 of the *Sale of Goods Act*, with respect to ownership and title, and s 30 of the *Personal Property Security Act*, which deals with the security

interest. In a manner of speaking, there would be no use in saying that Mr. Mason got title if he took it subject to the Bank of Montreal's security interest. Then, the victory would only be pyrrhic.

BMO as Owner

13 Paradise sold to Anstead. Title was initially to remain with Paradise until the buyer paid in accordance of the terms of the conditional sales contract. All of Paradise's interest 'right title and interest' was assigned to BMO. Paradise then purported to sell the RV for a second time. The starting point is the principle expressed by the Latin maxim: *Nemo dat quod non habet*, which simply means you can't sell what you don't have. If this were the end of the story, Mr. Mason would lose because Paradise purported to sell him something they did not have.

14 Section 26(1) of the *Sale of Goods Act* provides a statutory exception to this common law principle. It is as follows:

> 26(1) When a person who has sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.

15 I acknowledge that the evidence about possession is somewhat hazy but it is uncontroverted and I am willing to conclude that there is sufficient evidence of continuity of physical possession; especially during the key dates of January to March or January to June 2009 for the purposes of making s 26 of the *Sale of Goods Act* applicable to this case.

16 In a manner of speaking, the first issue is whether the 'seller in possession' exception to the *nemo dat* rule applies to this case. The purpose of the section is to protect innocent purchasers from a seller who appears to have ownership and the authority to sell (eg: *E. Dehr* per Breitkreuz M at para 41 and *GMAC* per Funduk M, at paras 83, 91).

The decided cases tell us that a person relying on s 26 has the burden of proving three things (***Barton Pipe*** at para 7):

1. that the seller retained possession;

2. that the purchaser acted in good faith; and

3. that the purchaser acted without notice of the initial buyers interest.

17 As noted above, I am willing to conclude that Mr. Mason has discharged the burden of proving the first factor.

18 Mr. Mason did not do a 'lien search' and had no actual notice of either Mr. Anstead's interest or the BMO's interest. Section 47 of the *PPSA* provides that registration of a financing statement is not constructive notice or knowledge of its existence or contents, so BMO's registration of its security interest is not in and of itself enough to determine the issues of lack of notice or good faith.

19 BMO argues that Mr. Mason should not be entitled to rely on s 26 because:

(i) Gary Mason had experience and expertise;

(ii) The RV was not "new inventory";

(iii) The RV was not common inventory of Paradise RV;

(iv) Gary Mason could have searched the PPR;

(v) The RV was not purchased for fair market value;

(vi) The 'suspicious circumstances';

(vii) The size of the transaction warranted robust due diligence.

20 In my view, this is a very able attempt to reverse the onus and the lack of constructive notice under the *Act*.

21 However, I do not find any of the circumstances of this case require Mr. Mason to prove that he should *not* have known of the BMO's interest.

22 In my view, the result of the foregoing is that s 26 defeats the *title* of the Bank of Montreal.

BMO's Security Interest

23 It is not difficult to find strong statements about security interests. For example, in *TD v. Yan* the Court of Appeal said:

> Rights under the *PPSA* do not depend on who gets to the collateral first. So long as the security interest is properly registered, the creditor's rights follow the collateral wherever it may go. A subsequent purchaser, even if *bona fide*, cannot defeat the creditor because the original rogue was especially successful in concealing the location of the collateral, or his own identity or location.
>
> If this were to apply in an unqualified way, a registered security interest would be on par with *in rem* right and the BMO's right to the collateral on default would prevail over Mr. Mason's apparent ownership of it. It makes a significant difference when there is no practical recourse against the seller. An unqualified right of the type set out above would take us to the same conclusion that the application of the *nemo dat* rule might have if it were not qualified by s 26 of the *Sale of Goods Act*.

24 Section 30(1), (2) of the *Personal Property Security Act* provides:

> 30(1) For the purposes of this section,
>
> (a) "buyer of goods" includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods' becoming a fixture or accession to property in which the person has an interest;
>
> (b) "ordinary course of business of the seller" includes the supply of goods in the ordinary course of business as part of a contract for services and materials;
>
> (c) "seller" includes a person who supplies goods that become a fixture or accession
>
> (i) under a contract with a buyer of goods, or
>
> (ii) under a contract with a person who is a party to a contract with a buyer of goods.
>
> (2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

25 The difficulty here is that Mr. Anstead is technically the debtor, not Paradise RV. Technically, then, the section would protect Mr. Mason from the BMO's right to the security based on a sale by Anstead in the ordinary course of business. He (not Paradise) gave the interest that was assigned to the BMO.

26 As I see this transaction, however, Anstead and Paradise were a distinction without a difference, right down to payments coming, at least initially, from their joint account. It was little more than a disguised corporate loan. If s 26 of the *Sale of Goods Act* does not wipe the slate clean, I am willing to treat the security interest for the purposes of s 30 of the *PPSA*, as one given

by Paradise. On this basis, I would distinguish *GMAC* with respect to section 30 of the *PPSA* and apply the *dicta* in that case to this one. I am not willing to hold what appear to have been Anstead's corporate shenanigans against the Masons.

Disposition

27 I am confident that a fair and just disposition can be made on the evidence before the court (*Stoney*).

28 The claim against Christine Mason was abandoned and is dismissed.

29 The claim against Gary Mason is dismissed for the foregoing reasons.

Motion granted.

2016 ABQB 33
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Cam Holdings LP

2016 CarswellAlta 88, 2016 ABQB 33, [2016] 9 W.W.R. 569,
[2016] A.W.L.D. 873, 263 A.C.W.S. (3d) 517, 58 B.L.R. (5th) 314

Alberta Treasury Branches, Applicant and Cam Holdings LP and Cam GP Inc., G.L.M. Industries LP and G.L.M. Industries Inc., Respondents

J.B. Veit J.

Heard: December 18, 2015
Judgment: January 21, 2016
Docket: Edmonton 1503-09941

Counsel: Charles P. Russell, Q.C., for Husky Oil
William B. Hembroff, for Calroc Industries

Subject: Contracts; Corporate and Commercial; Property
Related Abridgment Classifications
Commercial law
V Sale of goods
V.3 Transfer of title
V.3.d Seller in possession
Headnote
Commercial law --- Sale of goods — Transfer of title — Seller in possession
Buyer H Ltd. purchased three custom oil storage tanks from manufacturer G, which were stored on manufacturer's property in accordance with industry practice — Third party F purchased nine custom tanks from manufacturer, which were stored on manufacturer's property, and later sold to buyer — Manufacturer purported to sell all twelve tanks to broker C for much less than it had sold them to buyer — Buyer brought application for declaration that it owned twelve tanks — Application granted — Buyer proved entitlement to twelve tanks — Section 26 of Sale of Goods Act applied to three tanks purchased by buyer from manufacturer — Section 26 of Act likely applied to sale of tanks that had initially been purchased by third party, but if s. 23 of Act applied to third party's tanks, then manufacturer could not have given good title to broker as manufacturer did not have title to tanks — Manufacturer was bailee in possession of tanks with consent of owner of tanks — Broker did not have actual notice and did not act with wilful blindness — Broker's actions were either grossly negligent or reckless such that it did not have benefit of s. 26 of Act — Broker knew that fully-paid tanks remained on manufacturer's property, it was purchasing tanks for less than half of current retail price, suspected that manufacturer was in financial difficulties, and paid no attention to issue of whether manufacturer had authority to sell tanks — It would be unconscionable for broker to obtain benefit of tanks when comparing its position as victim of manufacturer with buyer's position as victim Sale of Goods Act, R.S.A. 2000, c. S-2, s 26.
Table of Authorities
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Alberta Treasury Branches v. Elaborate Homes Ltd. (2014), 2014 ABQB 350, 2014 CarswellAlta 921, 14 C.B.R. (6th) 199, 590 A.R. 156 (Alta. Q.B.) — referred to
Bartin Pipe & Piling Supply Ltd. v. Western Environment of Oklahoma (2004), 2004 ABCA 52, 2004 CarswellAlta 98, (sub nom. *Epscan Industries Ltd. v. Bartin Pipe & Piling Supply Ltd.)* 236 D.L.R. (4th) 75, 42 B.L.R. (3d) 172, 346 A.R. 95, 320 W.A.C. 95, 30 Alta. L.R. (4th) 216, [2005] 1 W.W.R. 290 (Alta. C.A.) — referred to
Bartin Pipe & Piling Supply Ltd. v. Western Environment of Oklahoma (2004), 2004 CarswellAlta 1248, 2004 CarswellAlta 1249, (sub nom. *Epscan Industries Ltd. v. Bartin Pipe & Piling Supply Ltd.)* 335 N.R. 194 (note), (sub nom. *Epscan*

Industries Ltd. v. Bartin Pipe & Piling Supply Ltd.) 371 A.R. 397 (note), *(*sub nom. *Epscan Industries Ltd. v. Bartin Pipe & Piling Supply Ltd.)* 354 W.A.C. 397 (note) (S.C.C.) — referred to

Battle River Dodge Chrysler (1994) Ltd. v. Vulcan Chev Olds Geo Ltd. (1999), 242 A.R. 119, 1999 ABQB 153, 1999 CarswellAlta 1300, 80 Alta. L.R. (3d) 92, [2000] 8 W.W.R. 218 (Alta. Q.B.) — referred to

Canada (Attorney General) v. Sjoquist (2014), 2014 SKQB 66, 2014 CarswellSask 155, 439 Sask. R. 277 (Sask. Q.B.) — referred to

Carriere Industrial Supply Ltd. v. Toronto-Dominion Bank (2014), 2014 ONSC 6489, 2014 CarswellOnt 16164 (Ont. S.C.J.) — considered

Cora v. Adwokat (2005), 2005 CarswellOnt 6 (Ont. S.C.J.) — referred to

Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd. (2015), 2015 BCSC 787, 2015 CarswellBC 1298, 4 P.P.S.A.C. (4th) 136, 77 B.C.L.R. (5th) 297 (B.C. S.C.) — referred to

Cumberbatch v. Toronto (City) (2015), 2015 ONSC 4859, 2015 CarswellOnt 12071 (Ont. S.C.J.) — considered

General Motors Acceptance Corp. of Canada v. Mahfouz (1984), 14 D.L.R. (4th) 437, 67 A.R. 145, 1984 CarswellAlta 426 (Alta. C.A.) — referred to

Gray v. Smith (2013), [2013] EWHC 4136 (Eng. Comm. Ct.) — considered

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

R. v. Briscoe (2010), 2010 SCC 13, 2010 CarswellAlta 588, 2010 CarswellAlta 589, 253 C.C.C. (3d) 140, 316 D.L.R. (4th) 577, [2010] 6 W.W.R. 1, 73 C.R. (6th) 224, 22 Alta. L.R. (5th) 49, 400 N.R. 216, 477 A.R. 86, 483 W.A.C. 86, [2010] 1 S.C.R. 411, 210 C.R.R. (2d) 150 (S.C.C.) — considered

R. v. Sansregret (1985), [1985] 1 S.C.R. 570, *(*sub nom. *Sansregret v. R.)* 17 D.L.R. (4th) 577, *(*sub nom. *Sansregret v. R.)* 58 N.R. 123, *(*sub nom. *Sansregret v. R.)* [1985] 3 W.W.R. 701, *(*sub nom. *Sansregret v. R.)* 35 Man. R. (2d) 1, *(*sub nom. *Sansregret v. R.)* 45 C.R. (3d) 193, *(*sub nom. *Sansregret v. R.)* 18 C.C.C. (3d) 223, 1985 CarswellMan 176, 1985 CarswellMan 380 (S.C.C.) — considered

R. v. Vinokurov (2001), 2001 ABCA 113, 2001 CarswellAlta 622, 281 A.R. 176, 248 W.A.C. 176, [2001] 8 W.W.R. 168, 156 C.C.C. (3d) 300, 44 C.R. (5th) 369, 92 Alta. L.R. (3d) 238 (Alta. C.A.) — referred to

Radius Credit Union Ltd. v. Royal Bank (2009), 2009 SKCA 36, 2009 CarswellSask 157, 51 C.B.R. (5th) 197, 14 P.P.S.A.C. (3d) 124, 324 Sask. R. 191, 451 W.A.C. 191, [2009] 8 W.W.R. 60, 306 D.L.R. (4th) 444 (Sask. C.A.) — referred to

Sinclair Investments (UK) Ltd. v. Versailles Trade Finance Ltd. (2011), [2011] EWCA Civ 347 (Eng. & Wales C.A. (Civil)) — referred to

Stella Psarakis Medicine Professional Corp. v. Gonnsen (2015), 2015 ONSC 25, 2015 CarswellOnt 348, 51 R.P.R. (5th) 77 (Ont. S.C.J.) — referred to

Stevenson v. First Nations University of Canada Inc. (2015), 2015 SKQB 122, 2015 CarswellSask 254 (Sask. Q.B.) — referred to

Witting v. Tauber (2006), 2006 ABQB 23, 2006 CarswellAlta 20 (Alta. Q.B.) — referred to

Statutes considered:

Sale of Goods Act, R.S.A. 2000, c. S-2

Generally — referred to

s. 2(1) — considered

s. 23 — considered

s. 23(1) — considered

s. 26 — considered

s. 26(1) — considered

s. 26(2) — considered

Sale of Goods Act, R.S.S. 1978, c. S-1
Generally — referred to
Words and phrases considered:

wilful blindness

. . . there is a distinction between the two concepts: wilful blindness includes an element of intentionality, whereas recklessness consists only of gross, or very great, negligence.

APPLICATION by buyer for declaration that it was owner of oil storage tanks.

***J.B. Veit J.*:**

Summary

1 In this special chambers application, relying on ss. 26(1) and 23(1) of the Sale of Goods Act, Husky Oil asks the court for a declaration that it is the owner of 12 oil storage tanks. Three of the tanks had been bought by Husky from the manufacturer G.L.M. Industries; nine of the tanks had originally been manufactured by G.L.M. for FoGo Energy, and thereafter sold by FoGo to Husky. All 12 of the tanks had been continuously stored on G.L.M. property from the date of their manufacture; the three original Husky tanks were stored at the vast G.L.M. yard at Nisku, Alberta and the nine original FoGo tanks were stored at the vast G.L.M. yard at Battleford, Saskatchewan. All 12 tanks were sold by G.L.M. to Calroc Industries, which bought them at prices far below what Husky had paid for them.

2 Husky Oil adds that it is industry practice to store purchased tanks on the manufacturer's property, and that, because of its principal's experience, Calroc knew, or should have known, of that practice.

3 Husky asks the court to declare that Calroc is not a person of good faith without notice of the previous sale as required under s. 26(1) of the Sale of Goods Act.

4 Husky also asks the court to declare that s. 23(1), rather than s. 26(1), of the Sale of Goods Act applies to the FoGo situation because Husky did not authorize G.L.M. to sell the FoGo tanks.

5 In relation to the three originally Husky-owned tanks and s. 26(1) of the Act, Calroc responds that constructive notice of a potential problem is not the equivalent of actual knowledge of a problem.

6 In relation to the nine originally FoGo-owned tanks and s. 23 of the Act, Calroc responds that s. 26 of the Act is clearly intended to deal with the situation which arose here, where the original manufacturer of the tanks remained in possession of them, and that s. 26 should apply to both the Nisku and the Battleford situations.

7 In the circumstances here, s. 26 of the Act, rather than s. 23, applies to the analysis of the ownership of the "FoGo" tanks: that section was intended to deal with the situation here where the original owner and manufacturer was left as a bailee in possession by both the first purchaser and the second purchaser of the tanks. In the alternative, Calroc has no title to those tanks because G.L.M. had no title to pass on.

8 On the s. 26 analysis, although Calroc has proved that it did not have the equivalent of actual knowledge that G.L.M. did not have title to the tanks. Calroc has not proved that it was a purchaser "in good faith and without notice of the previous sales". On the contrary, the evidence establishes, in the circumstances, Calroc had sufficient notice of the possibility that G.L.M. did not have title to the tanks that it acted recklessly, and thereby lost the benefit of s. 26(1).

9 In the result, Husky has proved its entitlement to the 12 tanks Cases and authority cited

10 *By* Husky Oil: Saskatchewan Sale of Goods Act, R.S.S. 1978, c.S-1; *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.*, 2015 BCSC 787 (B.C. S.C.); *Canada (Attorney General) v. Sjoquist*, 2014 SKQB 66 (Sask. Q.B.); *Bartin Pipe & Piling*

Supply Ltd. v. Western Environment of Oklahoma, 2004 ABCA 52 (Alta. C.A.), leave to appeal denied [2004] S.C.C.A. No. 203 (S.C.C.); *Radius Credit Union Ltd. v. Royal Bank*, 2009 SKCA 36 (Sask. C.A.); *Cora v. Adwokat*, 2005 CarswellOnt 6 (Ont. S.C.J.).

11 *By* Calroc Industries Ltd.: Sale of Goods Act, RSA 2000 c. S-2; *Bartin Pipe & Piling Supply Ltd. v. Western Environment of Oklahoma*, 2004 ABCA 52 (Alta. C.A.); *Battle River Dodge Chrysler (1994) Ltd. v. Vulcan Chev Olds Geo Ltd.*, 1999 ABQB 153 (Alta. Q.B.); *General Motors Acceptance Corp. of Canada v. Mahfouz* (1984), 14 D.L.R. (4th) 437, 1984 CarswellAlta 426 (Alta. C.A.); *Witting v. Tauber*, 2006 ABQB 23 (Alta. Q.B.); *R. v. Vinokurov*, 2001 ABCA 113 (Alta. C.A.).

12 By the court: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.); *Stella Psarakis Medicine Professional Corp. v. Gonnsen*, 2015 ONSC 25 (Ont. S.C.J.); *Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB 350 (Alta. Q.B.), appeal dismissed *sub nom Alco Industrial Inc. v Pricewaterhousecoopers Inc.* 29 April 2015, appeal number 1403-0168AC; *R. v. Sansregret*, [1985] 1 S.C.R. 570 (S.C.C.); *R. v. Briscoe*, 2010 SCC 13 (S.C.C.); *Cumberbatch v. Toronto (City)*, 2015 ONSC 4859 (Ont. S.C.J.); *Stevenson v. First Nations University of Canada Inc.*, 2015 SKQB 122 (Sask. Q.B.); *Carriere Industrial Supply Ltd. v. Toronto-Dominion Bank*, 2014 ONSC 6489 (Ont. S.C.J.) *Gray v. Smith*, [2013] EWHC 4136 (Eng. Comm. Ct.); *Sinclair Investments (UK) Ltd. v. Versailles Trade Finance Ltd.*, [2011] EWCA Civ 347 (Eng. & Wales C.A. (Civil)).

1. Background

a) Factual background

13 Husky Oil Operations Limited has, over the past 15 years, purchased tanks from G.L.M. Industries, often making acquisitions of several million dollars in a given year.

14 Calroc Industries is a broker; it is in the business of buying and selling equipment, *inter alia*, new and used oil storage tanks. The president of Calroc is Dan Echino. A majority of the shares of Calroc Industries is owned by Corlac (sic) Resources Ltd. Dan Echino is the sole voting shareholder of Corlac. Corlac had been in the business of manufacturing and selling tanks in much the same way as G.L.M.

15 Husky bought three tanks from G.L.M. in 2008; it paid G.L.M. $61,600.00 apiece for the 750 bbl tanks, for a total of $194,040.00. The tanks remained at the G.L.M. site from the date of manufacture. One of Husky's oil and gas projects and construction manager swears:

> 6. (c) As moving tanks from site to site is a costly and time consuming endeavor, the arrangement entered into by Husky and G.L.M. contemplated Husky leaving the manufactured tanks at the G.L.M. manufacturing facilities until Husky had a specific location (where) the tanks would be used. This avoided the necessity of moving the tanks twice - first to Husky's holding yard, and then to the actual site at which the tanks would be used.
>
> (d) Historically, G.L.M. never charged Husky for the storage of the tanks left on site at G.L.M.
>
> (insert from para. 18 of the same affidavit: On September 8, 2014, Mr. Stinson of G.L.M. advised Husky that Husky's tanks needed to be moved out, and that "there are a number of ways of dealing with this, just need to know who to talk to about moving them out". David Evans of Husky responded to Mr. Stinson that he would pass on G.L.M.'s request to Husky's asset recovery group. There was no further communication with G.L.M. with respect to removal of the 2008 tanks.)
>
> ...but in November 2014, G.L.M. proposed a form of contract which contemplated that for new tank orders, tanks would only be stored for free for 60 days from completion of manufacture and thereafter storage would be charged.
>
> . . .
>
> 9. I am aware from discussions with other entities carrying on business similar to the Husky Operations that the arrangements for manufacture, storage and delivery of tanks as outlined ... above, was an industry standard, in that most entities conducting such business entered into similar arrangements with G.L.M. and other tank manufacturers.

16 On June 26, 2015, G.L.M. sold these three tanks to Calroc for $20,800.00 apiece.

17 In the spring of 2014, Husky was approached by FoGo Energy with respect to the possible sale to Husky of nine 1000 bbl tanks which FoGo had purchased from G.L.M. in 2012 and had stored since manufacture in the G.L.M. yard at Battleford. The same Husky manager who provided the sworn evidence in para. 15 above swears: "I am informed by Mr. Cochrane of FoGo, and do verily believe that FoGo's arrangements with G.L.M. were very similar to those described in paragraph 6 above." Husky asserts that G.L.M. was, or should have been, aware of the intended sale by FoGo to Husky because Husky had required FoGo to obtain material specifications for the tanks from G.L.M.; the required information was provided by G.L.M. to FoGo on May 1, 2014, and FoGo forwarded that information to Husky. Husky asserts that it understands that, during this exchange between FoGo and G.L.M., there was a discussion to the effect that G.L.M. may start charging storage fees for tanks left on site. However, Husky asserts that it is informed by FoGo that FoGo never received an invoice from G.L.M. for storage fees. On August 1, 2014, Husky purchased the FoGo tanks from FoGo. It paid $42,000.00 per tank, plus 5% GST and 5% Saskatchewan PST, for a total of $415,800.00. The tanks were not moved by FoGo from the G.L.M. yard after the sale to Husky. Husky asserts that it never received any request or demand from G.L.M. to remove the tanks it had bought from FoGo or any invoice for storage of those tanks.

18 On April 9, 2015, G.L.M. sold those "FoGo" tanks to Calroc Industries for $ 20,800.00 apiece.

19 Husky asserts that all of the tanks with which this application is concerned are unique tanks rather than stock tanks. None of the tanks were registered in the Personal Property Registry.

20 The Husky engineer who provided the affidavit evidence referred to in para. 15 gave the following evidence when cross-examined on her affidavit:

> Q You indicate in your paragraphs 23 and 24 in your affidavit, based on the price that Calroc paid for the tanks, you indicate that Mr. Echino or his company should have known that they were purchasing tanks for below market value.

How do you assess market value for a broker or a company like Calroc when Husky has — doesn't deal with them to sell off its inventory, doesn't sell its inventory itself to third parties or for rental or for flipping or otherwise?

> A So I would assess market value as to what we would purchase — I mean, Husky's got a reasonable buying power. So what we would purchase tanks at from a manufacturer, I would consider that to be market value.
>
> Q When there's no market for it, when the economy is bad, when the oil prices are low, you think that that's — that what?
>
> A Well, there's still a market value in steel. So if you look at the price of steel versus the — and the U.S. dollar exchange, actually the market value on tanks — and I'd have to confirm this because the price of steel and the U.S. dollar has gone up — Canadian market value of these tanks I don't believe would have changed significantly.

So we've been purchasing other pieces of equipment and haven't seen significant price drops based on the market value because of the U.S. dollar. So a lot of the steel for tanks comes out of the U.S. And because of that price — obviously the Canadian dollar has dropped - the market value of these tanks hasn't changed that significantly.

> Q Right. You're aware, though, that — from listening to this questioning and from reviewing the affidavits that Calroc purchased 40 tanks in February of 2015 for around the same price for per tank that it purchased the April 2015 9 tanks for. Right?
>
> A Correct. I can't really comment on what GLM was offering those tanks for knowing that they were in financial distress. I mean, I think that puts people in an awkward position, and they may be doing things, like they said — like Mr. Echino said, to recover cash, to recover some sort of value. So do I consider that to be fair market value? No, because I don't think that's a common occurrence in the industry for that to happen.

> Q But that's not what you've done with — you have no idea what the — who was interested in purchasing tanks in February of 2015 from GLM and whether or not they looked for bidders or otherwise; they just — you have no idea what they did.
>
> A Well, we had been out for a bid with GLM in late fall of 2014, early 2015, and we knew the price that we were purchasing GLM tanks for was $55,000 or $56,000, so that was a recent bid that we had to be able to compare. And we would have (gone) to other manufacturers at that time.
>
> Q I'm talking about in February of 2015 when they were offering these 40 tanks. You have no idea who they offered these tanks to, what other parties were willing to pay for the tanks versus what Calroc paid for the tanks. You have no information in that regard.
>
> A I don't have information in that regard. I do have information that we had just gone out to bid with GLM, so I knew what the price of a 1,000-barrel tank was new from GLM at that time.

21 Calroc swears that it does not go to the yard where tanks are stored to mark them when it purchases tanks.

22 With respect to the tanks in question on this application, Calroc swears that it purchased the tanks at a fair price given the state of the economy and the prevailing market, and given that it knew G.L.M. was in financial distress and presumed that G.L.M. wished to clear its yard of old and cancelled inventory. Calroc knew that the age of manufacture of the tanks was from between 2004 to 2014. It stated that, in late 2014, it was first approached by G.L.M. about the purchase of one small tank. Then, in early 2015, G.L.M. offered 40 tanks at once. Calroc says that they took this as an indication that G.L.M. wanted to divest itself of some inventory.

23 Calroc swears that it has never had any adverse experiences with, or concerns about, G.L.M.'s ownership of stock tanks it has sold to Calroc. Calroc also swears that, as a broker of equipment, when Calroc bought tanks it moved them off the property where the tanks were stored "within one or two months"; there is no evidence that it has ever paid storage to G.L.M.

24 In March, 2015, G.L.M. contacted Calroc with the following information:

> Hey guys, I've found another nine tanks in Battleford where the storage fees are worth more than the tanks and the customer isn't going to pay, looking to sell if you're interested. They're all identical, the order was for 12, only three were ever picked up. Drawings attached.

25 The principal of Calroc gave the following evidence when cross-examined on his affidavit:

> Q When did Calroc first become aware of GLM's financial distress?
>
> A I think that the wording is not maybe the correct way to do it, but one of the individuals that's a friend of mine is a partner with the lady that owns GLM, which I've never met. But they're partners in another company called Tervita.
>
> And by talking to him, my understanding is that his company is in distress, this Tervita company. And knowing that the owner of GLM is this lady that is a partner with him in Tervita, and knowing that the economy — the orders have just about stopped at that time as oil was dropping and knowing that they approached me about a big sale.
>
> Typically nobody sells a lot of tanks out of their inventory unless they really need the money.
>
> Q So you reached the conclusion that they were in some financial problems as at February when you saw the list of 40 tanks?
>
> A And then laying off all the — the tank factories were all laying off people like crazy, and they were all phoning me because they know I'm a broker, and I buy a lot of tanks. So they're all phoning me with cut-rate prices and if I could

give them some orders that they would discount, brand-new manufactured tanks. So I knew it was across the whole industry. Everyone was getting into distress. And it continues today.

Q Were you — when were you first aware that MNP Ltd., who later became a receiver, were onsite at GLM on a regular basis?

A I don't really know the exact date, but it was after our second purchase of tanks. And I remember Brian Kientz telling me this. And then soon after was when they approached us about buying some more tanks.

Q All right.

A But I never really touched base with the receiver on a personal level until after the trucks were unloaded.

Q In paragraph 10 of your affidavit, you reference that prior to June 26, 2015, and then you reference with the knowledge of MNP. So presumably before June 26, 2015, you were aware of MNP's presence?

A Okay, correct.

Q Correct?

A Correct.

. . .

Q MR. RUSSELL: Now, sir, when you bought any of the tanks — and I'm talking collectively the 40 tanks, the 9 tanks, and basically all of the tanks that are shown on the invoices in Exhibits B, C, and D — did you ask for any assurances from GLM that any creditor of GLM with a security interest in these tanks was fine with allowing the sale to go through to Calroc?

A I've been buying tanks since 1990, and I don't think I've ever done that once unless I was buying it from a broker of dubious character, which sometimes happens. But from a reputable manufacturer like GLM, I wouldn't even think to ask them. Plus on their invoice, they even state on it that the tank stays on their property until paid in full.

Q Did you do any searches or cause anybody to do any searches at Personal Property Registry to see what encumbrances might be registered against any of these tanks?

A In my 25 years, I've never done that once against a manufacturer.

Q But you knew at least by the time of the third sale that they were in financial difficulty; and, in fact, you suspected it at the time of the first sale?

A Still didn't matter to me. I was buying their new inventory. It's just something that's just not done.

Q While the tanks were left in the possession of GLM, did you carry insurance on them or do you know?

A I don't know, and I would probably guess not.

Q Did you ever ask GLM if they carried insurance on them?

A In my 25 years, I've never heard of a tank getting damaged in storage. Q I assume the answer was no?

A Correct.

26 When asked if Calroc knew, or at least suspected, that G.L.M. was in financial difficulty, when it bought the tanks, Mr. Echino's response was:

> Q. But you knew at least by the time of the third sale that they were in financial difficulty; and, in fact, you suspected it at the time of the first sale?
>
> A. Still didn't matter to me. I was buying their new inventory. It's just something that's just not done.

27 In relation to the FoGo tanks, Calroc knew that those tanks were owned by someone other than G.L.M., but chose to make no further inquiries.

> Q. Did it surprise you that someone could run up storage fees to such an extent that it made a sale at 20,800?
>
> A. To be honest, I never even paid attention to that. I was just buying from a large - one of the oldest tank manufacturers and one of the most reputable, the most high quality tanks. Of all the manufacturers in Alberta, GLM has the reputation as number 1. So I'm buying it from them. I really don't care what their reasoning to sell them is. If they need cash, if they got no storage room, or if somebody owes them money, or someone hasn't paid, it wasn't up to me to ask. I was buying from General Motors.

. . .

> Q. Well, except if Mr. Weins is saying to you that the nine tanks have an associated storage fee worth more than the tanks that would surely indicate to you that some third party was involved?
>
> A. Again, Chevrolet is selling me something. I'm not going to get into the details of why they're selling it. I just knew I smelled a good deal, and I had the trucks to move it. And I have the resources to sell them.

28 On July 3, 2015, G.L.M. was placed in receivership.

b) Legislative background

29 The sections of the Alberta Sale of Goods Act which potentially apply are:

> **Interpretation**
>
> 2(1) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly whether it is done negligently or not.
>
> **Transfer of Title**
>
> **Sale by person not owner**
>
> 23(1) Subject to this Act, if goods are sold by a person who is not the owner of them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell.
>
> (2) Nothing in this Act affects
>
> (a) the Factors Act or any enactment enabling the apparent owner of goods to dispose of them as if the apparent owner were the true owner of them,
>
> (b) the validity of any contract or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.
>
> . . .
>
> **Possession of goods after sale**

> 26(1) When a person who has sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.
>
> (2) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the Personal Property Security Act, and Part 4 of that Act applies, with the necessary modifications, to that registration.

30 The provisions of the Saskatchewan Sale of Goods Act are to the same effect.

2. Finding the facts: even on the basis of this evidence, some of which is hearsay, it is possible to determine facts for the purposes of the application

31 Because this is a chambers application for what amounts to final relief, and in light of the encouragement provided by the Supreme Court of Canada in *Hryniak* to make civil litigation less costly and less protracted by making fair assessments of the evidence where possible, the court concludes that:

- it is not disputed that G.L.M. was not a mercantile agent;
- historically, G.L.M. had a good reputation in the industry. In coming to this conclusion, I rely on the evidence of Calroc, which was not undermined by Husky;
- G.L.M. had not, historically, asked the purchasers of its oil storage tanks for storage fees if the purchasers left the paid-for tanks on G.L.M. property. In coming to this conclusion, I rely on: the sworn evidence from Husky; the fact that it would be reasonable for G.L.M. to treat tank purchasers differently from tank brokers at least in part because of the different business objectives of those two classes of customers; the fact that both FoGo and Husky reported discussions with G.L.M. in 2014 about the possible charge of rental fees in the future;
- G.L.M. never made a demand for storage fees from either Husky or FoGo. In coming to this conclusion, I have relied on the following: the sworn evidence of Husky's officer; the evidence of Calroc that not even it, and not even as late as late spring 2015, had paid storage fees to G.L.M;
- the tanks in question on this application were not "stock" tanks but were in fact unique tanks which were manufactured according to specifications provided by the purchasers; in this decision, they will be referred to as "unique" tanks. In coming to this conclusion, I have relied on the following: although Calroc refers to the tanks as stock tanks, on several occasions its principal refers to the fact that at least some of the tanks which it purchased in late 2014/early 2015 from G.L.M. were unique tanks, (for example in the context that Calroc was taking a greater risk in purchasing them than it would have in the case of stock tanks); the fact that there were plans for all of the tanks initially purchased by FoGo (which plans are a feature of unique tanks but not of stock tanks); and, the three tanks initially purchased by Husky were no longer an industry standard;
- it was not a common practice in the industry to register purchased oil tanks in the PPR.

3. Ascertaining the law: a purposive interpretation of the Sale of Goods Act in light of the case law requires that, in this case, s. 26 of the Act - rather than s. 23 - apply to the sale of the nine former FoGo tanks and that s. 26(1) requires an absence of gross negligence or recklessness

32 As the parties have both noted, our Court of Appeal's decision in *Bartin Pipe* guides the interpretation to be given to the provisions of the *Sale of Goods Act* in question.

a) Section 26 applies to the FoGo tanks transaction

33 Husky correctly observes that, in the circumstances here, s. 26(1) of the Sale of Goods Act does not facially govern the sale by G.L.M. to Calroc of the "FoGo" tanks because FoGo was not in possession of the tanks when it sold them to Husky. Understandably, Husky concludes that s. 23(1) of the Act applies to the "FoGo" transaction. However, the purposive interpretation of the Act leads to a different conclusion.

34 *Bartin Pipe* said:

> 17 Section 27(1) is one of the provisions in the Act where a buyer may acquire better title better than the seller's. The purpose of s. 27(1) was described by Denning L.J. in Bishopsgate Motor Finance Corporation, *Limited v. Transport Brakes, Limited* [1949] 1 K.B. 323 at 336-7:
>
> > In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.
> >
> > . . .
>
> 20 The English Court of Appeal similarly has emphasized that the possession of the goods is what is significant, not the contractual relationship between the buyer and seller. In *Worcester Works Finance Ltd. v. Cooden Engineering Co. Ltd.*[1972] 1 Q.B. 210, Denning M.R. stated at 217:
>
> > It does not matter what private arrangement may be made by the seller with the purchaser - such as whether the seller remains bailee or trespasser, or whether he is lawfully in possession or not. It is sufficient if he remains continuously in possession of the goods that he has sold to the purchaser. If so, he can pass a good title to a bona fide third person, and the original purchaser will be ousted.

35 What is important in this case is that G.L.M. was a bailee in possession, that is, G.L.M. was in possession of the tanks with the consent of the owner of the tanks. That is what distinguishes the situation here from all the *nemo dat* situations where a person in possession of goods, without title, cannot give onward good title to the goods. The situation here is not, therefore, comparable to that of a person in possession of a car (without ownership or documents of ownership of the car) who purports to sell the car to another person.

36 Even at that, it may not be in every situation where a person without title is in possession of goods with the consent of the owner of those goods that the equitable approach articulated in s. 26(1) of the Sale of Goods Act would apply. However, I agree with Calroc that the provisions of s. 26(1) do apply in the situation here. In the FoGo situation, GLM was a bailee in possession for FoGo and a bailee in possession for Husky. By leaving the tanks it had purchased from FoGo in the manufacturer's yard, Husky endorsed FoGo's decision to leave purchased goods with the vendor. When the goods in question - which are heavy goods, uniquely manufactured by the original vendor - are left in new condition in the manufacturer's possession by both the first purchaser and by the second purchaser, the purchasers together have put into place a fact situation which s. 26(1) was intended to address.

37 In the result, in the situation here, the equivalent to s. 26(1) of Alberta's Sale of Goods Act in Saskatchewan applies to the FoGo tanks rather than s. 23(1) of the Act. We must therefore turn to that analysis to determine the parties' entitlement to the tanks.

38 If I have erroneously applied the s. 26 analysis to the "FoGo" tanks, then s. 23(1) of the Act applies. In that event, Husky has good title to the nine "FoGo" tanks: G.L.M. could not give good title to Calroc because G.L.M. had no title to the tanks.

b) The "good faith without notice" required in s. 26 excuses negligence but not excuse gross negligence/ recklessness

39 An analysis of the wording of the Act begins with a reminder of the obvious burden: the party claiming that it was acting *bona fide*, i.e. in good faith and without notice, has the burden of proving it; see, for example, *Stella Psarakis* at para. 21.

40 The analysis must also begin with an assessment of the actual wording of the statute; s. 2(1) refers only to "negligently". To put it another way, the statute itself does not explicitly excuse gross negligence, recklessness or wilful blindness, all of which concepts are well known to the law, all of which go beyond mere negligence, and all of which might have been explicitly addressed in the statute.

41 For the reasons which follow, I have concluded that, in order to obtain the benefit of s. 26(1) of the Act, the party in the position of Calroc must prove that it did not act recklessly or in a grossly negligent fashion.

42 In analyzing what kind of negligence is excused by s. 26(1), I begin by observing that English courts have recently emphasized that even commercial transactions may be affected by constructive notice. see, for example, *Sinclair Investments*, at paras. 97-101 and its reference to informal notifications of claims. This theme is further developed by the English Commercial Court in *Gray*:

> **The test for notice**
>
> 132. There is a perceived tension between notice as understood by commercial lawyers and equity lawyers. It is commonly said that the doctrine of constructive notice has no place in "commercial transactions", a proposition rejected by Millett J (as he then was) in Macmillan Inc v Bishopsgate (No. 3) [1995] 1 WLR 978 at pp. 1000-1001. Whilst, at paragraph 7-047 of Benjamin's Sale of Goods (8th Edition) the authors submit that in the context of the Factors Act and of the Sale of Goods Act, "notice" of a fact prima facie means actual knowledge of that fact, reference is made to the dictum of Lord Tenterden in *Evans v Trueman* (1830) 1 Moody & R 10 at p. 12 to the following effect:
>
> > "A person may have knowledge of a fact either by direct communication, or by being aware of the circumstances which must lead a reasonable man applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provisions of this statute: a slight suspicion, I think, will not."
>
> This dictum has subsequently been judicially approved but it is now established that suspicion in the mind of a person, and the means of knowledge in his power wilfully disregarded, would amount to notice. The main problem, as explained in Benjamin, is the extent to which the courts will adopt an objective approach to the question of notice by reference to the "reasonable man". The paragraph goes on to say that the doctrine of constructive notice does not normally apply to commercial transactions and there is no general duty on the buyer of goods in an ordinary commercial transaction to make enquiries as to the right of the seller to dispose of the goods. Nevertheless, it is appropriate that the court should apply an objective test to determine whether, in the circumstances of the sale, the buyer as a reasonable man, must have known of the agent's want of authority (or defect in title) or must have had suspicions and wilfully shut his eyes to the means of knowledge available to him. It is a question of fact and degree.
>
> . . .
>
> 134. The Master of the Rolls further cited Millett J in an addendum to his judgment in Macmillan where he said that unless and until someone was alerted to the possibility of wrong doing, he was entitled to proceed on the assumption that he was dealing with an honest man. "In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper."

135. The supposed tension between commercial and equity lawyers is, in my judgment, essentially put to rest in Snell's Equity (32nd edition) at paragraph 4-035 where the following passage appears under the sub-heading "COMMERCIAL TRANSACTIONS NOT INVOLVING LAND."

> "It is commonly said that the doctrine of constructive notice has no place in "commercial transactions". ...
>
> But the question whether a recipient of property is fixed with constructive notice of an equitable interest should not depend simply on whether the transaction may be characterised as "commercial". The better approach may be to ask if there is a recognised practice of making inquiries as to the transferor's title in transactions of this sort. In many transactions that may broadly be called "commercial" that practice may be non-existent or minimal. The overriding need is for speed and finality. It would be inappropriate to introduce the demanding standard of inquiry expected of a purchaser buying unregistered land.
>
> It would be difficult to fix a person in such a transaction with constructive notice because the threshold of knowledge necessary to raise an obligation of inquiry is set so high. The person might not be put on enquiry unless he knew facts which pointed so clearly to the equitable interest affecting the payment that he would have actual notice of it at any event."

136. Lindley LJ in Manchester Trust (ibid) at p. 545 stated that "in commercial transactions possession is everything and there is no time to investigate title". This is a key feature of many commercial transactions and in the present case, the ordinary practice of dealers and customers in purchase of cars of this kind must be borne in mind. Investigation of title to the car is not common on the evidence before me, where purchasers accept delivery from a dealer in possession of the car with the delivery of the car and transfer of possession with a bill of sale or invoice as the norm.

137. The authors of that textbook also state that it has long been settled that in the actual or constructive notice which an agent has (e.g. a purchaser's solicitor) is normally imputed to his principal if obtained by the agent in the same transaction and coming to him as agent.

138. I was also referred to the decision of the Court of Appeal in BCCI (Overseas) Ltd v Akindele [2001] CH 347, where Nourse LJ referred to the judgments of Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539 at 545 and of Richardson J in the New Zealand Court of Appeal decision in *Westpac Banking Corporation v Savin* [1995] 2 NZR 41 at page 53. In both these decisions, caution was expressed in relation to the application of the doctrine of constructive notice in commercial transactions. In Akindele the test was laid down for "knowing receipt" of trust property which had been received in breach of trust. Whereas dishonesty was a prerequisite for a case of knowing assistance, the state of knowledge required for imposition of a constructive trust on the basis of "knowing receipt" was only such as made it unconscionable for him to obtain the benefit of the receipt.

43 This decision reminds us, on the one hand, of the need to apply the notion of negligence cautiously in commercial transactions: "in commercial transactions possession is everything and there is no time to investigate title" On the other hand, however, even in a commercial transaction, there may not be an over-riding need for speed and finality. Thus, even in a commercial situation, if a party knows certain facts which require an explanation, it is "imperative ...to seek an explanation". The decision also reminds us that, in every application of the principles of constructive notice, the specific circumstances require scrutiny: therefore, the court must look both at the ordinary practice in the situation - including the need for speed - and at the particular experience and expertise of the buyer.

44 With this general background in mind, we can return to the development of the concept of notice in Canadian civil law. In the context with which we are concerned, the concept of notice is inextricably intertwined with the framework of negligence. The amount of notice one is given of the potential existence of a set of facts before one's subsequent actions - without taking that set of facts into account - determines the place where one's actions lie on the spectrum between negligence and actual knowledge.

45 Understandably, courts have wrestled more prominently with that assessment in criminal matters where knowledge is an essential element of a crime. In those situations, if an accused does not have actual knowledge, in light of the burden to prove the elements of a crime beyond a reasonable doubt, it is not surprising that the jurisprudence has concluded that an accused must be proven beyond a reasonable doubt to have had the equivalent of actual knowledge. That degree of constructive notice has been described as "wilful blindness". The courts which have developed those standards have made it clear that the criminal test of wilful blindness may not be appropriate in every area of civil law. This warning is emphasized by the Supreme Court of Canada in *Sansregret*:

> 16 The concept of recklessness as a basis for criminal liability has been the subject of much discussion. Negligence, the failure to take reasonable care, is a creature of the civil law and is not generally a concept having a place in determining criminal liability. Nevertheless, it is frequently confused with recklessness in the criminal sense and care should be taken to separate the two concepts. Negligence is tested by the objective standard of the reasonable man. A departure from his accustomed sober behaviour by an act or omission which reveals less than reasonable care will [page582] involve liability at civil law but forms no basis for the imposition of criminal penalties. In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.

46 The distinction between the civil law concept of negligence and the criminal law concepts of recklessness and wilful blindness were further explored by the S.C.C. in *Briscoe*:

> 20 In essence, Mr. Briscoe argues that wilful blindness is but a heightened form of recklessness which is inconsistent with the very high mens rea standard for murder under s. 229(a) of the Criminal Code. He argues further that allowing fault for murder, as either a principal or party, to be established by wilful blindness could run afoul of the principle that "subjective foresight of death" is the minimum standard of fault for murder under s. 7 of the Canadian Charter of Rights and Freedoms: *R. v. Martineau* [1990] 2 S.C.R. 633, at p. 645. The Court of Appeal rejected these arguments and, in my view, rightly so. As I will explain, wilful blindness, correctly delineated, is distinct from recklessness and involves no departure from the subjective inquiry into the accused's state of mind which must be undertaken to establish an aider or abettor's knowledge.
>
> 21 Wilful blindness does not define the mens rea required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the mens rea. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen* [1985] 1 S.C.R. 570, and *R. v. Jorgensen* [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in Jorgensen (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
>
> 22 Courts and commentators have consistently emphasized that wilful blindness is distinct from recklessness. The emphasis bears repeating. As the Court explained in Sansregret (at p. 584):
>
> > ... while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
> >
> > [Emphasis added.]

23 It is important to keep the concepts of recklessness and wilful blindness separate. Glanville Williams explains the key restriction on the doctrine:

> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge. [Emphasis added.]
>
> (Criminal Law: The General Part (2nd ed. 1961), at p. 159 (cited in Sansregret at p. 586.)

24 Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" (Canadian Criminal Law: A Treatise (5th ed. 2007), at p. 241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".

47 The commercial ramifications of the concepts of wilful blindness on the one hand and recklessness on the other were referenced by our Court of Appeal in *Bartin Pipe* which is referred to by both parties, even though the result of that decision was to give to the party who is in the position of Calroc good title to contested goods. Presumably Husky relies on *Bartin Pipe* because of the potential difference between wilful blindness and recklessness which did not have to be determined in that case:

> 28 To the extent that the trial judge equated wilful blindness to a reckless failure to make inquiry, he erred in law. It is clear in the criminal context that wilful blindness is distinct from recklessness. As the Supreme Court of Canada recently stated in *R. v. Williams* [2003] S.C.J. No. 41, 2003 SCC 41:
>
> > Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. (*Sansregret v. The Queen* [1985] 1 S.C.R. 570, at p. 584, per McIntyre J.)
>
> 29 In this appeal, the distinction between wilful blindness and recklessness in the civil context need not be determined, nor the significance of such distinction. Whether or not the trial judge misstated the law regarding recklessness, he correctly stated that acting negligently or naively does not constitute wilful blindness. However, in applying the law, the trial judge erred.
>
> [Emphasis added]

48 Because of my finding of fact - discussed below - that Calroc did not, on the evidence here, have the equivalent of actual knowledge that G.L.M. had no title to the tanks in question, this is a case foreseen by our Court of Appeal in which it is necessary to determine if there is a distinction between wilful blindness and recklessness and, if there is, the significance of that distinction.

49 I have concluded that there is a distinction between the two concepts: wilful blindness includes an element of intentionality, whereas recklessness consists only of gross, or very great, negligence. The significance of the distinction is that even though a buyer can prove that it did not have the equivalent of actual knowledge of a defect in title from a seller, it will only benefit

from the provisions of s. 26(1) of the Act, or its equivalent in other Canadian jurisdictions, if it is able to also prove that it did not act recklessly in failing to investigate the actual facts of the situation.

50 In coming to this conclusion, I note first the reasons of my colleague Nielsen J. in *Elaborate Homes*:

> 35 Black's Law Dictionary, 9th ed (St Paul, MN: West, 2009) defines gross negligence as, inter alia:
>
> > A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.
> >
> > ...As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous...have construed gross negligence as requiring wilful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof... But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind...
>
> 36 The Dictionary of Canadian Law, 4th ed (Scarborough, Ont: Thomson Carswell, 2011) provides the following definition:
>
> > Conduct in which if there is not conscious wrongdoing, there is a very marked departure from the standard by which responsible and competent people...habitually govern themselves...a high or serious degree of negligence...
>
> 37 The Supreme Court of Canada has considered these terms in the context of tort litigation. In *McCulloch v Murray*, [1942] SCR 141 at 145, [1942] SCJ No 7, Duff C.J. observed:
>
> ... All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves....
>
> [Emphasis added]

51 As is noted in *Carriere*, Black's Law Dictionary has come to define recklessness in civil law as:

> 85 For the purposes of this claim and the claim of deceit addressed below, the definition of "recklessness" is important. "Recklessness" is defined in Black's Law Dictionary (7th Ed.) (St. Paul, Minn., 1999) in the following terms:
>
> > Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. 2. The state of mind in which a person does not care about the consequences of his or her action.
> >
> > [Emphasis added]

52 I adopt the definition given in the Dictionary as a useful summary of the current state of Canadian law.

53 The reliability of that definition can be assessed by the substance which is given to the notion of "gross negligence" in Canadian civil law; as is noted, for example, in *Cumberbatch*, at paras. 73 ff, that notion continues to be a live concept in our law: Indeed, emphasis on greater than ordinary negligence has a long history not only in the area of municipal law but in many areas of commercial law such as the sale of goods and the responsibility of a bankruptcy trustee. Although "gross negligence" is often translated as "very great negligence", case law also reminds us that the notion has a variable content, depending on the situation: see, for example, *Stevenson*:

> That said, this language must be given a meaning. It must be interpreted in light of the entire contract, and the surrounding circumstances. The parties submit, and I agree, that the case law relating to the meaning of the phrase "gross negligence"

in legislation is of assistance in this context. In *McCulloch v Murray*, [1942] SCR 141, p 145 [McCulloch], Duff C.J. commented as follows in relation to Nova Scotia legislation which permitted claims by gratuitous passengers only if the accident was caused "by the gross negligence or wilful and wanton misconduct of the owner or operator":

> I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct. All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, I think it is entirely a question of fact for the jury whether conduct falls within the category of gross negligence, or wilful misconduct, or wanton misconduct. These words, after all, are very plain English words, not difficult of application by a jury whose minds are not confused by too much verbal analysis.
>
> (emphasis added)

35 The "marked departure" test was referred to with approval in Walker v Coates Estate, [1968] SCR 599 [Walker] and by Wagner J. (dissenting in part) in *Peracomo Inc. v TELUS Communications Co.*, 2014 SCC 29, [2014] 1 SCR 621. Kirkpatrick J. relied on both McCulloch and Walker in *Doern v Phillips Estate*, [1995] 4 WWR 1 (BC SC), where he considered a similar provision in the British Columbia Police Act, SBC 1988, c 53 (since rep). He also commented as follows:

> 83 The definition of "gross negligence" was also discussed in the context of "gratuitous passenger" cases in *Ogilvie v. Donkin* [1949] 1 W.W.R. 439 (B.C.C.A.). O'Halloran, J.A. held, at p. 441:
>
> ...a rational test for deciding whether negligence is "gross" (within the meaning of the gratuitous passenger section) is the magnitude of the foreseeable risks in the particular circumstances.

The failure to take care develops into gross negligence within the meaning of the statute, when it must be plain the magnitude of the risks involved are such that, if more than ordinary care is not taken, a mishap is likely to occur in which loss of life, serious injury or grave damage is almost inevitable.

In light of these definitions, it is apparent that the definition is not rigid, but rather reflects the degree to which the conduct falls below the appropriate standard of care. Therefore, in situations where the standard of care is very high, as in the example of O'Halloran J.A., the standard for gross negligence is arguably anything less than ordinary care, whereas particularly egregious conduct may be required where the standard of care is low or the risks very minor.

. . .

37 In the result, the case law confirms that it is appropriate to tread carefully in attempting to define "gross negligence". As Duff C.J. noted in McCulloch, the question of whether there has been gross negligence turns on the facts. However, the "marked departure" from the standard of care approach — whether the behaviour is described in those or other words — is well established, and can be readily adapted to this case. In my view, "gross negligence of duty" should be interpreted to mean that Mr. Stevenson could only be dismissed for cause if he was guilty of conduct which represented a marked departure from the standards of performance and conduct he was required to meet as a result of his employment as Vice-President, Administration.

38 The question is one of degree. The relevant considerations would properly include not only the extent to which he failed to comply with the duty at issue, but the potential impact of that failure, which in turns affects the standard of performance or conduct that applies to the actions at issue. The fact that Mr. Stevenson was a senior employee in a position of leadership and trust must inform this analysis. Further, it follows from this approach that not every act of gross negligence by Mr. Stevenson would, taken alone, necessarily constitute cause within the meaning of para. 6. A single failure to seek an approval or carry out a task in circumstances where there was little or no potential to undermine Mr. Stevenson's ability

to serve as Vice-President would not constitute cause. The nature and extent of the breach, and the number of breaches, are relevant considerations.

54 The emphasis on the contextual nature of the definition of gross negligence is perhaps the main thrust of *Stevenson*.

55 In summary on this issue, I conclude that, in the context of the interpretation of s. 26(1) of the Sale of Goods Act, there are three possible degrees of negligence, mere negligence, gross negligence/recklessness and wilful blindness, and, that only mere negligence is excused. To put this in another way, a person who claims the benefit of s. 26(1) of the Act must prove that it did not act recklessly or in a grossly negligent fashion.

4. Application of the principles to the facts here

56 Based on the foregoing analysis, the question that must be asked here is: Has Calroc proved that when it bought the 12 tanks from G.L.M., it was not acting recklessly? I have come to the conclusion that Calroc has not met that burden; on the contrary, the evidence establishes that Calroc was acting recklessly. Therefore, Calroc does not have the benefit of s. 26(1) of the Act, and Husky has proven its entitlement to a declaration of ownership of the 12 tanks.

57 In coming to the decision that Calroc was acting recklessly, I have taken the following into account:

• I accept that Calroc has proved that it did not act in wilful blindness: it has shown that it did not deliberately act to cheat the system by intentionally buying tanks which it essentially knew G.L.M. had no right to sell.

• Calroc cannot rely on the fact that G.L.M.'s invoices state that the tanks are to remain on G.L.M.'s property until paid for: Calroc knew that fully paid tanks remained on G.L.M. property until the purchaser of the tanks had a specific use for the tanks.

• Calroc knew that the tanks which it bought were not, in fact, "new inventory"; on the contrary, it knew that these tanks had been manufactured between 2004 and 2014.

• Calroc knew that oil tank manufacturing companies like G.L.M. sometimes built stock tanks. Those tanks would have been stored as inventory on G.L.M. property. It would not have been negligence for Calroc to have bought stock tanks from G.L.M.

• Calroc knew that companies which bought unique tanks from G.L.M. were allowed to store the paid-for tanks on G.L.M. property until the purchaser had need for the tank in a special location. It would have been negligent for Calroc to buy unique tanks from G.L.M. when Calroc knew that they could have been fully-paid tanks which were merely being stored on G.L.M. property. Calroc couldn't check the PPR, but it could have made inquiries from G.L.M. about why a unique tank was available for sale by G.L.M.

58 Up to this point, Calroc's failure to make inquiries was, at the most, merely negligent. What made Calroc's actions grossly negligent, or reckless, are the following additional facts:

• there was no need for speed or urgency and finality in relation to these transactions: the tanks themselves were not mobile and the first approach from G.L.M. to Calroc occurred in late 2014, with the last sale occurring on June 26, 2015. Nor did Calroc have any immediate buyers for the tanks.

• Calroc was buying these "in new condition" tanks at considerably less than half the then current retail cost. In coming to this conclusion, I rely on Husky's evidence of retail value of the tanks in the spring of 2015 and on Calroc's own estimate that it was paying 50 cents on the dollar.

• Calroc suspected that, in the spring of 2015, G.L.M. was in financial difficulty. Even if G.L.M. had had a reputation as the General Motors of the oil tank industry, at the time it purchased these tanks, there was no longer any ability to rely on that reputation. Tellingly, when asked why, suspecting that G.L.M. was in financial difficulty, Calroc didn't make

inquiries about the tanks it was buying, Mr. Echino said: "Still didn't matter to me. I was buying their new inventory. It's just something that just not done". Calroc knew, on the one hand, that the situation with respect to G.L.M.'s reputation had changed and also knew that it was not buying new inventory from G.L.M. Moreover, Calroc knew that MNP, which often acts as a receiver, was on the G.L.M. premises frequently at least during the last part of June, 2015.

• Because Calroc suspected that G.L.M. was in financial difficulties, because it knew that it was common practice in the industry for a buyer from G.L.M. to store the paid-for tanks on G.L.M. property, and because it knew that it was the practice in the industry not to register this type of tank in the PPR, the magnitude of the risk which Calroc was taking when it went ahead with the purchases without making any inquiries was the serious risk that through either shambolic record keeping which might arise when a major manufacturer is in financial trouble, or, worse, through evil intent on G.L.M.'s part, G.L.M. might offer for sale tanks which it was not authorized to sell.

• Calroc knew that G.L.M. had no storage problem because it had "vast" storage yards at both Nisku and Battleford.

• Calroc was told that the nine FoGo tanks came to be within G.L.M.'s power to sell because the owner of the relatively newly manufactured tanks had not paid storage on them, and knowing that even it - as a broker - did not pay storage on tanks that it bought, Calroc made no inquiries about the amount of the outstanding storage charges or the name of the purchaser who had allegedly failed to pay the storage charges, or any other questions about G.L.M.'s authority to sell the tanks. As Calroc candidly admitted, it "paid no attention" to the issue of G.L.M.'s authority to sell the tanks.

59 In other words, even though this was a commercial situation, in looking at all of the information that was available to Calroc, I have concluded that it would be unconscionable for Calroc to obtain the benefit of the tanks when its position as a victim of G.L.M. is compared with the situation of Husky as a victim of G.L.M.

60 Finally, I must emphasize that the s. 26(1) analysis may apply only to the three tanks which Husky originally bought from G.L.M., which tanks clearly come within that section. Either the nine "FoGo" tanks also come within that section, and Calroc has also failed to meet its burden in relation to those tanks, or the "FoGo" tanks come within s. 23(1), and Calroc acquired no title to those tanks because G.L.M. had no title to pass on.

5. Costs

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

Application granted.

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

R.S.A. 2000, c. P-7, s. 24

s 24. Perfection by possession

Currency

24.Perfection by possession

24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in

(a) goods,

(b) chattel paper,

(c) [Repealed 2006, c. S-4.5, s. 108(16)(a).]

(d) a negotiable document of title,

(e) an instrument, and

(f) money,

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

24(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

24(3) Subject to section 19, a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 68 of the *Securities Transfer Act*.

24(4) Subject to section 19, a security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 68 of the *Securities Transfer Act* and remains perfected by delivery until the debtor obtains possession of the security certificate.

Amendment History
2006, c. S-4.5, s. 108(16)

Currency
Alberta Current to Gazette Vol. 118:17 (September 15, 2022)

Concordance References
Personal Property Security Act Concordance 38, Perfection by possession or repossession

CASSELS BROCK
LAWYERS

Newsletter Article

PERFECTION BY POSSESSION: POSSESSION NOT REQUIRED

Published: 03/25/2011

By Michael Casey

Under Canadian personal property security legislation perfection of a security interest is effected by registration or by taking possession of the collateral. Perfection relates to the steps required to be taken in relation to a security interest in order to make it effective against third parties. A security interest is only enforceable against a debtor and third parties if it has attached and been perfected.

In a recent Alberta case *Michael Kallis and Suzanne Kallis v. First Capital Management Ltd. et al.* the Alberta Court of Queen's Bench examined the issue of perfection by possession through an escrow agent. Under the loan agreement, pledged shares were to be secured by delivering them to an escrow agent. Under Canadian law, in certain circumstances, possession by an escrow agent can constitute perfection of a security interest. However, in deciding if the purported security interest had been perfected, the Honourable Mr. Justice G.C. Hawco was faced with a unique set of facts in this case as the share certificates in question had not actually been delivered to the escrow agent.

The proposal trustee disallowed the secured creditor claim on the basis that by failing to deliver the share certificates to the escrow agent, the security interest was not enforceable as it had not been perfected by possession. The creditor appealed the proposal trustee's disallowance on the basis that a transfer of the securities to the escrow agent was not required, as the debtor had always acknowledged that the shares in question were being held for that specific creditor. The primary piece of evidence indicating that the debtor was holding the shares for the creditor was a post-it note on the share certificates indicating that they were being held for that creditor.

Remarkably, the honourable Mr. Justice G.C. Hawco granted the creditors' appeal and determined that perfection of the security interest had been effected despite the fact that the share certificates were not delivered to the escrow agent and remained in the possession of the debtor. In making this ruling the honourable Mr. Justice G.C. Hawco placed emphasis on the fact that the debtor had maintained and acknowledged that it was physically holding the pledged shares on behalf of the creditor, and that this acknowledgement constituted "delivery" under the *Securities Transfer Act*. The honourable Mr. Justice G.C. Hawco concluded by stating:

> There need be no actual delivery to an escrow agent, even though that was anticipated, and indeed required, in one of the agreements. The escrow agent need not make the acknowledgment. The acknowledgment may be made, as it was in this case, by the debtor who had previously acquired possession of those certificates. The security has therefore been sufficiently perfected and the Applicants are entitled to be regarded and treated as secured creditors.

This decision is important as it suggests that the concept of possession under personal property security legislation may be broader than actual physical possession, and that in some instances possession can be deemed even if the collateral remains in the possession of the debtor.

Editor's Note: Copies of the Court decision discussed in this article are available from Michael Casey at mcasey@casselsbrock.com.

2011 ABQB 60
Alberta Court of Queen's Bench

Kallis v. First Capital Management Ltd.

2011 CarswellAlta 157, 2011 ABQB 60, [2011] A.W.L.D. 1637, [2011] A.W.L.D. 1673, 17 P.P.S.A.C. (3d) 292, 198 A.C.W.S. (3d) 904, 74 C.B.R. (5th) 63

Michael Kallis and Suzanne Kallis and Watson-Pastorino Revocable Trust (Applicants) and First Capital Management Ltd., and Alger & Associates Inc., in the capacity as Proposed Trustee for First Capital Management Trust (Respondents)

G.C. Hawco J.

Heard: January 25, 2011
Judgment: February 4, 2011
Docket: Calgary BE01-406754

Counsel: Michael Loberg, Arif Chowdhury for Applicants
S.B. Gavin Matthews, Pat Robinson for Applicant, Watson-Pastorino Revocable Trust
Kenneth Lenz, Chris Simard for Respondent, First Capital Management Ltd.
Howard Gorman for Respondent, Alger & Associates Inc.

Subject: Corporate and Commercial; Insolvency; Securities

Related Abridgment Classifications

Personal property security
III Perfection of security interest
III.2 Possession
Securities
III Trading in securities
III.7 Miscellaneous

Headnote

Personal property security --- Perfection of security interest — Possession

Applicant creditor, K, loaned debtor money and debtor pledged one million shares of C Ltd. and 220,000 shares of O Corp. — Debtor held share certificates representing pledged shares at its place of business; shares were held in name of debtor and held for K pursuant to loan agreements — Under terms of loan agreements, shares were to have been delivered to named escrow agent but that did not take place — Applicant creditor, W, also loaned money to debtor — Pursuant to loan agreements, debtor granted security interest and charge over shares in O Corp.; these shares were not required to be delivered to anyone in escrow — Shares were, however, held by debtor in their offices — Debtor defaulted on its loan payments to K and W and filed notice of intention (NOI) pursuant to Bankruptcy and Insolvency Act — Applicants filed financing statements against debtor at personal property registry, claiming to have security over impugned shares — Proposal trustee disallowed claims on basis that security interest was invalid because securities had not been delivered to escrow agent — Applicants applied for declaration that their security was valid and they were secured creditors of debtor — Application granted — Security interest of each applicant was perfected by delivery pursuant to s. 68(1) of Securities Transfer Act — It was accepted that debtor had always acknowledged that it was physically holding pledged shares on behalf of both applicants — There need be no actual delivery to escrow agent, even though that was anticipated and required in one of agreements — Acknowledgment may be made by debtor who had previously acquired possession of those certificates.

Securities --- Trading in securities — Miscellaneous

Delivery — Applicant creditor, K, loaned debtor money and debtor pledged one million shares of C Ltd. and 220,000 shares of O Corp. — Debtor held share certificates representing pledged shares at its place of business; shares were held in name of

debtor and held for K pursuant to loan agreements — Under terms of loan agreements, shares were to have been delivered to named escrow agent but that did not take place — Applicant creditor, W, also loaned money to debtor — Pursuant to loan agreements, debtor granted security interest and charge over shares in O Corp.; these shares were not required to be delivered to anyone in escrow — Shares were, however, held by debtor in their offices — Debtor defaulted on its loan payments to K and W and filed notice of intention (NOI) pursuant to Bankruptcy and Insolvency Act — Applicants filed financing statements against debtor at personal property registry, claiming to have security over impugned shares — Proposal trustee disallowed claims on basis that security interest was invalid because securities had not been delivered to escrow agent — Applicants applied for declaration that their security was valid and they were secured creditors of debtor — Application granted — Security interest of each applicant was perfected by delivery pursuant to s. 68(1) of Securities Transfer Act — It was accepted that debtor had always acknowledged that it was physically holding pledged shares on behalf of both applicants — There need be no actual delivery to escrow agent, even though that was anticipated and required in one of agreements — Acknowledgment may be made by debtor who had previously acquired possession of those certificates.

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

Securities Transfer Act, S.A. 2006, c. S-4.5

Generally — referred to

s. 68(1)(b) — considered

APPLICATION by creditors for declaration that their security was valid and they were secured creditors of debtor.

***G.C. Hawco J.*:**

1 The Applicants, Michael Kallis, Suzanne Kallis (the "Kallis Creditors") and the Watson-Pastorino Revocable Trust ("WP Trust") seek a declaration that their security is valid and enforceable and that they are secured creditors of First Capital Management Ltd. ("FCM").

2 The Respondent, Alger & Associates Inc. ("Alger") is a proposal trustee for FCM pursuant to a Notice of Intention ("NOI") made by FCM on September 15, 2010. The Kallis Creditors entered into a number of agreements with FCM whereby they loaned approximately $6 million to FCM. Pursuant to the loan agreements made between the Kallis Creditors and FCM, FCM pledged one million shares of Catalyst Health Care Ltd. ("Catalyst") and 220,000 shares of OSUM Oilsands Corp. ("OSUM"). FCM held share certificates representing the pledged shares at its place of business. The shares were held in the name of FCM and were set aside by FCM and held for the Kallis Creditors pursuant to the loan agreements.

3 In the quarterly reports issued by FCM, FCM described the amount and type of securities being held by them on behalf of the Kallis Creditors. It was always the intent of FCM that the Kallis Creditors' claims under the loan agreements would be secured by the shares in Catalyst and OSUM. Under the terms of the loan agreements, the shares were to have been delivered to a named escrow agent. That did not take place.

4 It is argued by Alger that the amounts secured pursuant to the loan agreements is a maximum of $2.5 million because of certain limits provided for in the agreements. I am not going to determine the amount of the Kallis Creditors' security. I am simply going to determine whether they are secured creditors.

5 WP Trust loaned money to FCM. Loan agreements were executed whereby FCM granted to WP Trust a security interest and charge over certain securities, which in this case, were shares in OSUM. These shares were not required under the terms of the agreement to be delivered to anyone in escrow. They were, as were the Kallis shares, physically held by FCM in their offices. As with the Kallis Creditors' shares, FCM acknowledged that these shares were being held by them as security for WP Trust.

6 FCM defaulted on its loan payments to both the Kallis Creditors and WP Trust on September 15, 2010. As stated earlier, on that same day, it filed a NOI pursuant to the Bankruptcy and Insolvency Act. On October 5, 2010, proof of claim forms were sent to the Applicants, along with other creditors, by Alger.

7 On October 19, 2010 and November 17, 2010, respectively, the Applicants filed financing statements against FCM at the Personal Property Registry, claiming to have security over the shares which were being held for them by FCM.

8 On December 10, 2010, Alger, in its capacity as proposal trustee for FCM, purported to disallow the claims of the Applicants on the basis that the security interest was not valid and was not enforceable against third parties because the securities had not been delivered to an escrow agent, nor had there been any registration of any interest claimed in these securities prior to the NOI having been filed.

9 Alger argues that the security interest held by both Applicants are not enforceable because they had not "attached" under the *Personal Properties Security Act* ("PPSA"). They have not "attached" because the securities were not "enforceable" under the *Act*. They are not "enforceable" because the securities had not been delivered as required under the *Security Transfer Act* ("STA"), nor did the Applicants have control over the shares.

10 The Kallis Creditors argue that delivery was not necessary. FCM breached its obligation to deliver the shares to the escrow agent and it cannot now turn around and use its breach of the agreement as a sword against the Kallis Creditors. FCM's failure to deliver the shares pursuant to its obligation to do so cannot serve to extinguish the Kallis Creditors security interest.

11 Alternatively, the Kallis Creditors argue that delivery did take place under the STA because FCM has always acknowledged that it was holding those shares for the Kallis Creditors.

12 WP Trust argues that it has a valid and enforceable claim under the PPSA. There was no obligation under its agreement to have the shares delivered. Nevertheless, delivery did take place under the terms of the STA because of the acknowledgment of FCM that the shares were being held by it for WP Trust.

13 Both Applicants argue that the registrations under the PPSA are valid in any event as no act of bankruptcy has formally taken place. Since Alger is not a trustee in bankruptcy, and as no act of bankruptcy has occurred, the assets remain vested in FCM and the Applicants are free to register their interest, which they have now done.

14 In the alternative, the Applicants argue that if the NOI has the effect of prohibiting or nullifying the registration, a stay should be granted.

Issue

15 The issues are simply whether the shares have effectively been delivered to the Applicants or whether the Applicants' security interest has been perfected by the registration which did take place.

Decision

16 I am satisfied that the security interest of each of the Applicants has been perfected by delivery.

Reasoning

17 Section 68(1) of the *Securities Transfer Act*, Statutes of Alberta 2006, c-4.5 states:

> 68(1) Delivery of a certificated security to a purchaser occurs when
>
> . . .
>
> (b) another person, other than a securities intermediary, either
>
> (i) acquires possession of the security certificate on behalf of the purchaser, or
>
> (ii) having previously acquired possession of the security certificate, acknowledges that the person holds the security certificate for the purchaser,

18 In this case, it is accepted that FCM has always maintained and acknowledged that it was physically holding the pledged shares on behalf of both Applicants.

19 The Respondent argues that this section cannot be used to find the securities have been perfected by way of delivery because it would be absurd that a debtor could, by acknowledging it held shares for another, thereby effect delivery of those shares. With respect, I simply look to the wording of section 68(1)(b). The acknowledgment has been made. It is accepted that it has been made. In my respectful view, this constitutes a delivery.

20 There need be no actual delivery to an escrow agent, even though that was anticipated, and indeed, required, in one of the agreements. The escrow agent need not make the acknowledgment. The acknowledgment may be made, as it was in this case, by the debtor who had previously acquired possession of those certificates. The security has therefore been sufficiently perfected and the Applicants are entitled to be regarded and treated as secured creditors.

21 Although this is sufficient to dispose of the application, I would simply add that Alger, as a proposal trustee, cannot stand in a higher position than the debtor itself. Although there are a number of unsecured creditors, there had been no competing claims to the pledged shares under the PPSA at the time of registration. The registration by both Applicants takes precedent over any claims which may yet be made.

22 As was the case in *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)*, 2006 ABQB 572 (Alta. Q.B.), the Applicants here were not attempting to gain an advantage through the registration. They were simply trying to hold on to an advantage they had already negotiated.

23 If the registration which took place in September and November by the Applicants has been stayed by virtue of the NOI, I would lift the stay *nunc pro tunc* to enable both Applicants to file their registrations.

24 Parties may speak to me with respect to costs.

Application granted.

BENNETT
on
CREDITORS' AND DEBTORS' RIGHTS AND REMEDIES

Fourth Edition

by

Frank Bennett, B.A., LL.B., LL.M.

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upon the tenant's premises as a mere licencee without any trouble. However, in situations where physical entry may be difficult, the bailiff may only do so without committing illegal distress by entering through open doors and windows.

When the bailiff has lawfully entered only to find a hostile tenant who ejects him or her or leaves for assistance, the bailiff may subsequently re-enter by force.

Section 49 of the *Landlord and Tenant Act* provides an exception to the general rule that no force may be made in that, where a tenant fraudulently removes the goods from the premises to some other place, the landlord may, with assistance of a peace officer, break open such place where it is a dwelling house to seize the goods. The prudent course of action is to avoid physical violence.[63]

The seizure — actual or constructive. In most cases of distress, the bailiff will physically seize, remove and lock up the goods. There are, however, other instances where doing so may be either expensive, impractical or both and, therefore, there developed at common law what is known as constructive distress.[64] All the bailiff need do is show some positive acts of distress such as posting a notice on all doors and tagging the goods with the fact that the bailiff has seized the property and is thereby controlling the disposition of the goods.[65] With respect to equipment, the bailiff should render such equipment unusable.

The notice of seizure. Upon distress, the bailiff should leave or post a notice of seizure at a conspicuous place on the premises setting out the cause of such taking.[66] There is no statutory requirement with respect to the contents of the notice except for the reference to the cause of taking. The notice should set out the amount of the arrears outstanding to date, the inventory of the goods held, the place where they are to be held and the time and place of the intended sale. If, after the expiry of five days from the seizure and notice thereof, the tenant fails to tender the rent and costs or fails to commence an action to recover the same, the landlord is at liberty to sell the goods after making an appraisal.

(ii) *Between Seizure and Sale*

Impounding. At common law, the landlord was required to remove the goods from the tenant's premises at the end of the five days from the date of seizure in order to give the tenant an opportunity to redeem them, or the landlord was required to cause no further damage to the tenant. Where practical, the prudent course of action is to remove and impound the goods elsewhere than on the tenant's premises. However, by virtue of subsection 51(4) of the *Landlord and Tenant Act*, the goods and chattels may be impounded even on the premises, part or whole, where it is fit and convenient, and subsequently sold therefrom, but wherever the goods are impounded, they must not be impounded in several

63 See *R. v. Doucette*, [1960] O.R. 407 (C.A.) where a bailiff was convicted of common assault and trespassing when he used force in re-possessing a chattel after default under a conditional sales contract.

64 *Cramer v. Mott* (1870), 39 L.J. Q.B. 172.

65 *Traders Finance Corp. v. Primerano*, [1955] O.W.N. 553 (H.C.).

66 *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, section 53.