Clerk's Stamp

COURT FILE NUMBER	24-2806908
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED **AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 915245 ALBERTA LTD. o/a PRAIRIE TECH OILFIELD SERVICES**
DOCUMENT	**BENCH BRIEF OF 915245 ALBERTA LTD. o/a PRAIRIE TECH OILFIELD SERVICES IN SUPORT OF AN APPLICATION FOR A DECLARATION AND REPLEVIN ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DLA Piper (Canada) LLP** Barristers and Solicitors Suite 2700, Stantec Tower 10220 103 Avenue NW Edmonton, AB T5J 0K4 Attention: Jerritt Pawlyk / Kevin Hoy Phone: 780-429-6835 Fax: 780-670-4329 Email: jerritt.pawlyk@dlapiper.com / kevin.hoy@dlapiper.com File No.: 108761-00001

Table of Contents

I. INTRODUCTION

1. This is an Application brought by 915245 Alberta Ltd. (O/A Prairie Tech Oilfield Services) (the "**Company**") to resolve an issue concerning the ongoing unlawful detention of certain equipment - namely, a 2016 Peterbilt model 389, tractor-trailer (the "**Peterbilt**") and four TC Model 406 oil trailers (the "**Oil Trailers**", and collectively with the Peterbilt the "**Equipment**").

2. This Application is brought by the Company against Respondents, 1635623 Alberta Inc. (O/A as Adrenaline Diesel) ("**Adrenaline Diesel**") and Bonnie's Equipment Services Ltd. ("**Bonnie's**", and collectively with Adrenaline Diesel, the "**Mechanics**"). Adrenaline Diesel is currently detaining the Peterbilt and Bonnie's is currently detaining the Oil Trailers.

3. Herein, the Company argues that the stay of proceedings imposed automatically by section 69(1) of the *Bankruptcy and Insolvency Act*[1] against all of the Company's creditors upon the filing of its Notice of Intention to Make a Proposal (the "**NOI**") prohibits the Mechanics from exercising any right of detention (or any other right for that matter) that the Mechanics may have pursuant to the *Garage Keepers' Lien Act*[2] or the *Possessory Liens Act*.[3] The argument herein explains that the Mechanics are not entitled to rely on an exception to the stay of proceedings set out in *BIA* section 69(2)(a).

4. The Company's argument concludes that, as the Mechanics have no right to detain the Equipment, the Company is entitled to an order or orders for replevin of such property.

II. STATEMENT OF ISSUES

5. The Company submits that four issues are before this Honourable Court:

    i. Does this Court have the Jurisdiction to hear the Company's Application in its restructuring proceedings?

    ii. Are the Mechanics stayed by section 69(1) of the *BIA*, or are they entitled to rely on the exception to the stay set out in section 69(2)(a) of the *BIA*?

    iii. Are the Oil Trailers "motor vehicles" within the meaning of the *GKLA*?

    iv. Is the Company entitled to a replevin order compelling the return of the Equipment to the Company?

---

[1] RSC 1985, c B-3 [***BIA***].
[2] RSA 2000, c G-02 [***GKLA***].
[3] RSA 2000, c P-19 [***PLA***].

III. LAW AND ANALYSIS

A. Jurisdiction

2. The Company seeks declaratory orders and consequential relief thereof in the form of a replevin order. The Company has brought forward its Application for a declaration pursuant to section 11 of the *Judicature Act*[4] and a replevin order pursuant to Rules 6.48 - 6.50 of the *Alberta Rules of Court*[5] within the context of its ongoing restructuring proceedings under the *BIA*.

3. It is submitted that this Honourable Court has the authority pursuant to Rule 1.4 of the *Rules*, which empowers the Court to make broad discretionary orders respecting procedure, to hear the Company's present Application in the Company's restructuring proceedings. Hearing the Company's Application in the existing proceedings, as opposed to requiring the Company to commence a new action, serves the interests of both efficiency and justice.

B. The Mechanics Cannot Rely on the *BIA* s. 69(2)(a) Stay Exception

5. Below, the Company argues that the general stay of proceedings imposed against the Company's creditors generally pursuant to *BIA* section 69(1) prevents the Mechanics from commencing or continuing any action against the Equipment, including the continued detention thereof. The argument herein explains that the exception to *BIA* section 69(1) set out in section 69(2)(a) does not apply, as the Mechanics did not take possession of the Equipment for the purpose of realization.

Interpretation of Part III of Division I of the BIA

6. The *Interpretation Act* provides that all enactments "shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects."[6] Further, it is trite law that the modern precept of statutory interpretation requires this Court to read the words of an Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[7]" Consequently, this Court must take into consideration the scheme and object of Division I of the *BIA* and the remedial purpose for which *BIA* was enacted by Parliament in its analysis of *BIA* section 69(1) - (2).

---

[4] RSA 2000, c J-2.
[5] AR 124/2010 [***Rules***].
[6] RSA 2000, c I-8.
[7] *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21, [1998] SCJ No. 2.

7. In *Mustang GP Ltd., Re*,[8] the Ontario Superior Court of Justice ("**ONSC**") found that Division I of the *BIA* is analogous in purpose to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("***CCAA***"):

> 30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a Companies' Creditors Arrangement Act proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:
>
> > [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
> >
> > > ...the purpose of the CCAA... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
> >
> > In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
> >
> > > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> > >
> > > . . .
> > >
> > > [Emphasis in original]
>
> 31 I recognize that in the Comstock decision, the court was dealing with a CCAA proceeding. However, the comments quoted above seem quite apposite to this case. After all, the CCAA is an analogous restructuring statute to the proposal provisions of the BIA.[9]

8. In other words, *per* the ONCA's *dicta* in *Mustang GP*, it is submitted that this Court should interpret section 69 of the *BIA* bearing in mind that proposal provisions of the *BIA* exist for the remedial purpose of enabling an insolvent debtor to restructure its affairs in an orderly manner with a view to avoiding the devastating social and economic consequences of bankruptcy for the mutual benefit of the Company and all of its stakeholders.

Applicability of Stay

[8] 2015 ONSC 6562 [***Mustang GP***].
[9] *Ibid*, at para 30 - 30

9. *BIA* section 69(1)(a) imposes a broad stay of proceedings on all of the creditors of a debtor that has filed an NOI, inclusive of secured creditors. The stay expressly prohibits secured creditors from commencing or continuing any action against the property:

> 69(1) …(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy[10]

10. *BIA* section 69(2)(a) sets out a limited exception for secured creditors to the general stay of proceedings imposed by *BIA* section 69(1) -- specifically, *BIA* section 69(2) will not apply to a secured creditor who took possession of collateral for the purpose of realization prior to the filing of the NOI:

> 69(2) The stays provided by subsection (1) do not apply
>
> > (a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

11. A plain language reading of *BIA* section 69(2)(a) shows that mere control of collateral alone is not sufficient to engage the stay exception set out therein. Rather, the creditor must have taken possession for the purpose of realization. There is no prescribed definition for "realization" or "realize" in the *BIA*. Though, "realization" is defined in *Black's Law Dictionary* as the "conversion of noncash assets into cash assets.[11]" Thus, section 69(2)(a) expressly contemplates a circumstance wherein an asset impressed with a charge has been seized for the express purpose of a forced sale.

12. Therefore, in order for the Mechanics to rely on *BIA* section 69(2)(a), this Court must find that they took possession of the Equipment for the express purpose of the conversion of the same into cash, so as to generate proceeds to apply against the Mechanics' respective claims of lien. This was not the case in either instance. Rather, the Peterbilt and the Oil Trailers were left with Adrenaline Diesel and Bonnie's for the express purpose of allowing the Mechanics to complete repairs to such property in exchange for the promise of remuneration. It is submitted that no evidence suggests that such property was taken into possession by either of the Mechanics for the purpose of realization.

13. In fact, it appears that the Mechanics refrained from taking steps to take possession of the Equipment for the purpose of realization prior to the filing of the Company's NOI. In the case of liens governed by the *GKLA*, the question of when a garage keeper has taken "possession for the purpose of realization" appears to be informed by the *GKLA* itself; the *GKLA* contains clear provisions articulating a process

---

[10] *BIA*, *supra* note 1, at s 69(1)(a).
[11] *Black's Law Dictionary*, 11th ed, *sub verbo* "realization."

by which a motor vehicle must be seized in order for a garage keeper to facilitate the vehicle's sale for the purpose of recovery -- i.e., realization. The relevant sections of the *GKLA* read:

> 6… (2) A lien determines on the expiry of 6 months from the date of registration of a financing statement unless, within that 6-month period,
>
> > (a) there is delivered to a civil enforcement agency proof satisfactory to the civil enforcement agency that the lien is the subject of a subsisting registration in the Registry and a warrant in a form set by the Registrar addressed to the civil enforcement agency and directing the civil enforcement agency to seize the motor vehicle or farm vehicle in accordance with the requirements of the Civil Enforcement Act, and
> >
> > (b) seizure of the motor vehicle or farm vehicle that is subject to the lien has been effected.
>
> …
>
> 9(1) On a seizure of a motor vehicle or farm vehicle pursuant to this Act, Part 5 of the Civil Enforcement Act, except where expressly otherwise provided in this Act, governs and applies to the seizure, and the lienholder shall, subject to subsection (2), enforce the lienholder's rights and remedies under this Act in accordance with that Act.
>
> (2) The proceeds of the sale shall be applied first in payment of the expenses of the sale and then in payment of the lienholder's debt, and the subsequent payment out of the balance, if any, shall be governed by the provisions of the Civil Enforcement Act respecting the payments of a surplus remaining after distraint under that Act.[12]

14. A close reading of the *GKLA* shows that, as a matter of necessity, a garage keeper must retain a civil enforcement agency to effect the seizure of a motor vehicle prior to its sale to satisfy a lien under that Act. Indeed, in the instant case, Adrenaline Diesel determined it necessary to purport to effect the seizure of the Peterbilt by way of issuing a Warrant to a civil enforcement agency (presumably to attempt to put itself in a position to realize on the Peterbilt). Consequently, it is submitted that it is not possible to take possession of a motor vehicle impressed with a lien under the *GKLA* for the purpose of realization prior to seizure of the vehicle by a civil enforcement agency in accordance with the seizure provisions of the *GKLA*.

15. The above-described reading of the *BIA* and the manner in which it interfaces with the *GKLA* is consistent with the general scheme and remedial purpose of Part III of Division I of the *BIA,* which, as is stated above, is to facilitate the restructuring of an insolvent debtor and to avoid the devastating economic and social costs of bankruptcy. Interpreting the word "realization" in the phrase "…took possession… for the purpose of realization…" in *BIA* section 69(2)(a) to include simply holding a motor

---

[12] *GKLA*, *supra* note 2, at s 6 and 9.

vehicle prior to taking steps required by the *GKLA* to seize it for the purpose of sale would not be in keeping with the scheme of the *BIA*.

16. It also bears mention that general provisions of the *BIA* -- which are incorporated into Part III of Division I of the *BIA*, *mutatis mutandis*, by *BIA* section 66(1) -- indicate that simply holding seized property subject to security at the time of the filing an NOI is insufficient to have taken possession of it for the "purpose of realization." In *Goodfellow Inc. v. Heather Building Supplies Ltd.*,[13] a plaintiff lumber vendor obtained an order of the Nova Scotia Supreme Court ("**NSSC**") authorizing a sheriff to seize lumber delivered to the insolvent defendant over which the plaintiff retained security in its capacity as the vendor of goods in a conditional sales contract. The sheriff seized lumber and delivered it to the plaintiff's warehouse prior to the defendant's filing of an NOI. The defendant's proposal included a provision vesting all of its property in the name of the proposal trustee. With reference to *BIA* section 73(2) -- which provides that a seizure of property effected by an executing officer must be turned over to a trustee in bankruptcy following an assignment into bankruptcy -- the NSSC concluded that the plaintiff was not entitled to rely on the *BIA* section 69(2)(a) exception to the general stay of proceedings:

> 51 Section 69 of the Bankruptcy and Insolvency Act provides that upon the filing of a Notice of Intention to Make a Proposal "... no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy". Under subsection (2) the stay does not apply "to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets". In determining whether, for purposes of the *Bankruptcy and Insolvency Act*, Goodfellow had taken possession of the subject lumber prior to the filing of the Notice of Intention, section 73(2) is relevant:
>
> > Where an assignment or a receiving order has been made, the sheriff or other officer of any court or any other person having seized property of the bankrupt under execution or attachment or any other process shall, on receiving a copy of the assignment or the receiving order certified by the trustee as a true copy thereof, forthwith deliver to the trustee all the property of the bankrupt in his hands.
>
> 52 There has not, therefore, been a re-taking of possession by Goodfellow such as to preclude the application of the stay pursuant to s. 69. The decision of the Court of Appeal, in *Zutphen Bros. Construction Ltd.*, supra, does not, in these circumstances, suggest a Trustee vested by the terms of a proposal, or by law, with property of an insolvent, should not seek to carry out its mandate by locating and retrieving such property.[14]

---

[13] (1996) 150 NSR (2d) 341 (WL), 40 CBR (3d) 189, Aff'd 1996 NSCA 230.
[14] *Ibid*, at para 51-52. Note, this authority cites the predecessor section to section 73(2), which is identical in function to the current section 73(2) of the *BIA*.

17. The general applicability of *BIA* section 73(2) to NOI proceedings is reinforced by the commentary in Houlden, Morawetz and Sarra's *Annotated Bankruptcy and Insolvency Act*, which states as follows concerning the *BIA* section 73(2):

> By virtue of ss. 69(1) and 69.1, there is a stay of proceedings after the filing of a notice of intention or a proposal, and the executing officer cannot, therefore, make a distribution of the money in its possession after a notice of intention or a proposal has been filed. If the proposal is accepted by creditors and approved by the court, the claims of execution creditors are settled by the proposal; consequently, the creditors have no claim against the money in the hands of the executing officer. The executing officer must, therefore, return the property to the debtor. If the proposal is rejected by creditors or the court refuses to approve it, the debtor is deemed to have made an assignment: see ss. 57(a) and 61(2)(a). In these circumstances, the licensed insolvency trustee will be entitled to the property in the executing officer's possession.[15]

18. As a corollary to the above**,** *BIA* section 73(2) operates such that, if the Equipment had been seized by a civil enforcement agency[16] but not yet converted to proceeds that were delivered to the Mechanics, the Equipment (or their undistributed sales proceeds) would be turned over to the Trustee in Bankruptcy upon the Company's assignment into bankruptcy (which would be the necessary result if its restructuring fails). It is submitted that it would be a perverse result for the *BIA* to operate such that a garage keeper that had detained, but not yet seized *per* the GKLA, a motor vehicle is able to dispose of the motor vehicle during NOI proceedings given that a civil enforcement agency would be required to turn over the Equipment to the Trustee in Bankruptcy immediately upon seizure in a bankruptcy.

Summary

19. In summary of the above, a plain language interpretation of the *BIA* makes it clear that a secured creditor must not only be in possession of an asset to avail itself of a right to claim an exception under *BIA* section 69(2)(a). Rather, the secured creditor must have taken possession of collateral for the purpose of turning that collateral into proceeds. A purposive reading of the *BIA* should not lead this Court to find that the Mechanics control of the Equipment absent steps to seize such property under the *GKLA* amounts to them having taken possession for the purpose of realization within the meaning of the *BIA*. Moreover, if the *BIA* section 69(1) stay did not apply by virtue of the Mechanic's simple control of the Equipment, the Equipment (or undistributed sales proceeds thereof) may ultimately vest in a Trustee in Bankruptcy upon either the Company's assignment into bankruptcy, or the approval of a proposal calling for the Company's property to vest in the name of the Proposal Trustee.

---

[15] Lloyd W. Houlden, Geoffrey B. Morawetz, & Janis P. Sarra, *The Annotated Bankruptcy and Insolvency Act*, 2017-2018 ed (Toronto: Thompson Reuters, 2017), at 533.

[16] A civil enforcement agency meets the definition of an "executing officer" in *BIA* s 2, which reads: "***executing officer*** includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor."

B. The Oil Trailers are "Motor Vehicles" for the Purposes of the *GKLA*

6. The Company seeks a declaration that the Oil Trailers are "motor vehicles" within the meaning of definition for that term in the *GKLA*. The *GKLA* provides as follows:

> (e) "motor vehicle"
>
> (i) means a vehicle propelled by any power other than muscular power, and
>
> (ii) includes an airplane, but
>
> (iii) does not include a motor vehicle that runs only on rails;

7. The Oil Trailers meet the definition of "vehicle" articulated in *Black's Law Dictionary*:

> **1.** An instrument of transportation or conveyance.
>
> **2.** Any conveyance used in transporting passengers or things by land, water, or air.[17]

8. There exists scant jurisprudence from Courts in Alberta on this point. In *Precision Trailer Repair Ltd. v. Alberta Treasury Branches*,[18] this Court was asked to determine whether commercial trailers were "motor vehicles" within the meaning of an identical definition in the *GKLA*'s predecessor statute. There, this Court declined to speak to the issue, having resolved that matter on separate grounds. However, the Court did appear to suggest that the character of the trailers in question may have some bearing on the determination of whether they fell within the ambit of the *GKLA*.[19]

9. Though the Oil Trailers are not self-propelled, they are only capable of being propelled for any material distance by way of a motorized tractor-trailer. Accordingly, it is submitted that Bonnie's maintains a lien under section 2 of the *GKLA* in the Oil Trailers for the values of the invoices rendered for the repairs performed to each of the respective Oil Trailers.

10. Alternatively, in the event that this Honourable Court should determine that the Oil Trailers are not "motor vehicles" within the meaning of the *GKLA*, it is submitted that any lien Bonnie's maintains against the Oil Trailers is governed by the *PLA*.

11. Though the *PLA* differs somewhat from the *GKLA*, Bonnie's is also stayed by section 69(1) of the *BIA* from continuing to impound the Oil Trailers for reasons analogous to those articulated in Part B of the Argument set out above with a notable exception. Unlike the *GKLA*, the *PLA* does not require a lien claimant to engage a civil enforcement agency to effect seizure for the purpose of realization. Rather, pursuant to section 10 of the *PLA*, seizure for the purpose of realization is formalized by way of the

---

[17] *Black's Law Dictionary*, 11th ed, *sub verbo* "vehicle."
[18] 2001 ABQB 622.
[19] *Ibid*, at para 14.

notice described in section 10(1) and thereafter the attainment of an Order authorizing sale. No such notice was served on the Company in the instant case.

C. The Company is Entitled to Replevin Orders

12. For the reasons articulated above, the Mechanics are enjoined by the *BIA* section 69(1) stay from commencing or continuing any enforcement proceedings whatsoever against the Company. They are, therefore, no longer in a position to lawfully detain the Equipment, notwithstanding any claim of lien they may maintain against the Equipment.

13. Pursuant to the *Rules*, an applicant is entitled to recover its personal property by way of an order for replevin where that property has been unlawfully detained:

> 6.48 This Division applies to an application in an action
>
> > (a) for the recovery of personal property in which the applicant claims that the property was unlawfully taken or is unlawfully detained, and
> >
> > (b) in which the applicant seeks to repossess the personal property issue immediately, pending determination of the action described in clause (a).
>
> 6.49(1) A party may apply to the Court for a replevin order without serving notice of the application on any other party unless the Court otherwise orders.
>
> (2) The application for a replevin order must include in the application an undertaking
>
> > (a) to conclude the action for recovery of the personal property without delay,
> >
> > (b) to return the personal property to the respondent if ordered to do so, and
> >
> > (c) to pay damages, costs and expenses sustained by the respondent as a result of the replevin order if the applicant is not successful in the action for recovery of the personal property and the Court so orders.
>
> (3) The application for a replevin order must be supported by an affidavit that
>
> > (a) sets out the facts respecting the wrongful taking or detention of the personal property,
> >
> > (b) contains a clear and specific description of the personal property and its value, and
> >
> > (c) describes the applicant's ownership or entitlement to lawful possession of the personal property.

14. The test for replevin as set out the *Rules* and applied in the case law requires the applicant to establish:

> (a) the respondent wrongfully took or is wrongfully detaining the applicant's personal property;
>
> (b) the value and description of the property; and
>
> (c) the applicant is the rightful owner or is entitled to lawful possession of the personal property.[20] [21]

Standard of Proof

15. The standard of proof to be applied to an application for an order of replevin is generally accepted in the jurisprudence to be one of "substantial grounds". On application for replevin, the Court is not required to engage in a trial of the issues raised; rather, the applicant need only show substantial grounds for the claim of ownership or possession and wrongful detention. The "substantial grounds" standard as applied in Alberta is articulated in the often-cited passage from *Ryder Truck Rental Ltd. v Walker*:

> Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted.[22]

16. The "substantial grounds" standard has been applied with consistency in several Alberta decisions. For example, in *Dresser Canada Inc. v Vos*[23], Master Funduk held that the "substantial grounds" standard was the proper approach to a replevin application in Alberta. Most recently, the Court in *Enerplus* provided a non-exhaustive list of facts that will support a finding of "substantial grounds", including the existence of a valid contract contemplating ownership, a contractual obligation to return property, and a failure to return that property[24].

17. A notable deviation from the accepted standard of "substantial grounds" for an order of replevin in Alberta jurisprudence is *Stewart v Western RV Country Leduc Inc.*[25] which appears to apply a different standard of proof, requiring the applicant for an order of replevin establish that the right to possession is "obviously or apparently or most likely vested", that there must be "a strong prima facie claim to possession"[26].

---

[20] *Rules*, Rule 6.49
[21] *Enerplus Corporation v Copyseis Ltd.* (2019), 316 ACWS 3d 350 (ABQB) [***Enerplus***], at para 9
[22] *Ryder Truck Rental Ltd. v. Walker* (1960) OWN. 70 (Master) [***Ryder Truck Rental***], cited with approval in *Canada (Attorney General) v Hoverlift Systems Ltd.*, 1981 CarswellAlta 406, 36 AR 331 [***Hoverlift***]
[23] *Dresser Canada Inc. v Vos*, [1984] A.J. No. 876 (Alta QB) [***Dresser***] at para 28
[24] *Enerplus* at pp. 13 - 18.
[25] *Stewart v Western RV Country Leduc Inc.*, 2003 ABQB 730 [***Western RV***]
[26] *Western RV*, at para 12.

18. In Ontario, the substantial grounds test was considered in *Clark Door of Canada Ltd. v Inline Fibreglass Ltd.*[27]. In that case, the plaintiff had entered into an agreement with the defendant under which the defendant was to manufacture dies and use them to make door frames for the plaintiff. Eventually the parties' relationship deteriorated and the plaintiff sought return of the dies. The defendant refused, arguing that the plaintiff's ownership of the dies did not include a right to possession. The Court concluded that that substantial grounds test was not as high as that for summary judgment, but was higher than the test for interlocutory injunctions. It requires a high degree of assurance that the plaintiff would succeed at trial.[28]

19. Accordingly, there appears to be three standards applied in the case law:

    a. Substantial Grounds - low threshold / balance of probabilities (the "***Enerplus* Test"**)

    b. Substantial Grounds - high threshold / greater than the test for an injunction but lower than the test for summary disposition (the "***Clark Door* Test**"); and

    c. Strong Prima Facie case (the "***Western RV* Test**").

20. With one exception, the standard of Substantial Grounds has been consistently applied in Alberta. However, it is submitted that, for the reasons discussed above, the Company's entitlement to possession of the equipment and the inability of Mechanics' to detain such property is clearly established. Thus, under any of the standards noted above, it is submitted that the Company ought to be entitled to replevin.

Availability of the Remedy

21. An order for replevin requires the applicant show that the respondent wrongfully took or detained the applicant's personal property, the value and description of the property and that the applicant is the rightful owner or is entitled to lawful possession of the personal property. The applicant must show the facts upon which it bases its claim, and if these facts afford substantial grounds for the applicant's claim, then the order should be granted.

22. A replevin order is available not only where there has been a wrongful taking of personal property, but also in cases where a defendant's continued possession of such property is wrongful by reason of a terminated contract. In *Hoverlift*, Egbert J. found that provisions of the agreement between the parties clear and unambiguous, and granted an order for replevin without bond on the basis that the

[27] *Clark Door of Canada Ltd. v Inline Fibreglass Ltd.*, [1996] OJ No 238 (Ont Gen Div).
[28] *Clark Door* at para 18-23.

defendant's continued possession of the equipment constituted wrongful detention, citing *Allis-Chalmers, Rumely Ltd. v Forbes Equipment Ltd.*[29]:

> "The right to replevy goods and chattels is not limited to cases in which there has been a wrongful distress or a wrongful taking or detention; an order of replevin may also be made against one who holds goods pursuant to a contract but whose continued possession is wrongful by reason or the termination of the contract."[30]

23. To give any practical effect to the stay of proceedings imposed against the Mechanics pursuant to section 69(1) of the *BIA*, this Court must find that the Mechanics are prohibited from continuing to detain the Equipment. As the Equipment is unlawfully detained by the Mechanics and the Company meets the other requirements set out in Rules 6.49 and 6.50, it is respectfully submitted that the Company is entitled to a Replevin Order in respect of the Equipment.

Security for Replevied Property

24. Rule 6.50(1)(b) and (c) require that an order for replevin include a requirement to pay damages, costs and expenses in the event the application is not successful and further, that the applicant provide a security for such damages, costs and expenses:

> 6.50(1) A replevin order must
>
> (a) include a clear and specific description of the personal property to be repossessed,
>
> (b) impose on the applicant the following duties:
>
> (i) to conclude the action for recovery of the personal property without delay, and
>
> (ii) to return the personal property to the respondent if ordered to do so,
>
> (c) include a requirement to pay damages, costs and expenses sustained by the respondent as a result of the replevin order if the applicant is not successful in the action for recovery of the personal property and if the Court so orders, and
>
> (d) require the applicant to provide, to the person from whom the personal property is to be repossessed, security in a form satisfactory to the Court, which may include, without limitation, a bond, a letter of undertaking or payment into Court.

---

[29] *Allis-Chalmers, Rumely Ltd. v Forbes Equipment Ltd.* [1969], 71 WWR 300, 8 DLR. (3d) 105 (BCSC).
[30] *Hoverlift*, at para 14

25. The form of the security is discretionary, so long as it is satisfactory to the Court. It need not take the form of money paid into court as both undertakings and a bonds are recognized and acceptable alternate forms of security. In light of the Company's insolvency and ongoing restructuring proceedings, it is submitted an undertaking requiring the Company to pay damages, together with the ongoing security in the Equipment under the *GKLA* or the *PLA*, as the case may be, is sufficient to satisfy the security requirement Rule 6.50(1).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of April, 2022

DLA PIPER (CANADA) LLP

Per: 

Kevin Hoy, Counsel to
915245 Alberta Ltd.

IV. LIST OF AUTHORITIES

Jurisprudence

1. *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27, [1998] SCJ No. 2.
2. *Mustang GP, Re*, 2015 ONSC 6562.
3. *Goodfellow Inc. v. Heather Building Supplies Ltd.*, 150 NSR (2d) 341 (WL), 40 CBR (3d) 189.
4. *Thompson v Procrane Inc.*, 2016 ABCA 71.
5. *Custom Metal Installations Ltd v Winspia Windows (Canada) Inc.*, 2020 ABCA 333.
6. *Enerplus Corporation v Copyseis Ltd.* (2019), 316 ACWS 3d 350 (ABQB).
7. *Ryder Truck Rental Ltd. v Walker* (1960) OWN 70 (Master).
8. *Canada (Attorney General) v Hoverlift Systems Ltd.,* 1981 CarswellAlta 406, 36 AR 331 (QB).
9. *Dresser Canada Inc. v Vos*, [1984] A.J. No. 876 (Alta QB).
10. *Stewart v Western RV Country Leduc Inc.,* 2003 ABQB 730.
11. *JLV Industries Proprietary Ltd. v Luscar Ltd.,* 1999 ABQB 943.
12. *Clark Door of Canada Ltd. v Inline Fibreglass Ltd.*, [1996] O.J. No. 238 (Ont Gen Div).

Secondary Sources

13. Lloyd W. Houlden, Geoffrey B. Morawetz, & Janis P. Sarra, *The Annotated Bankruptcy and Insolvency Act*, 2017-2018 ed (Toronto: Thompson Reuters, 2017).

Statutes and Regulations

Bankruptcy and Insolvency Act, RSC 1985, c B-3.

Interpretation Act, RSA 2000, c I-8.

Judicature Act, RSA *2000, c J-2.*

Garage Keepers' Lien Act, RSA 2000, c G-02.

Possessory Liens Act, RSA 2000, c P-19.

Alberta *Rules of Court*, AR 124/2010.

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Jorgensen v. Surface Rights Board | 2021 BCSC 396, 2021 CarswellBC 628, 331 A.C.W.S. (3d) 207 | (B.C. S.C., Mar 8, 2021)

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] A.C.S. No. 2, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Employment; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
X.2.d Wages and salaries of employees
X.2.d.iv Type of wages claimable

Labour and employment law
III Employment standards legislation
III.2 Object of legislation

Labour and employment law
III Employment standards legislation
III.13 Termination of employment
III.13.b Termination pay
III.13.b.i Entitlement

law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words

TAB 2

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

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

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — General principles
In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors' obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently

28 This case bears some similarity to *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

29 The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

TAB 3

1996 CarswellNS 154
Nova Scotia Supreme Court

Goodfellow Inc. v. Heather Building Supplies Ltd.

1996 CarswellNS 154, 150 N.S.R. (2d) 341, 40 C.B.R. (3d) 189, 436 A.P.R. 341, 62 A.C.W.S. (3d) 1216

Goodfellow Inc. (plaintiff) and Heather Building Supplies Limited (defendant)

MacAdam J.

Heard: November 30, December 1, 1995, and February 4, 1996
Judgment: April 3, 1996
Docket: S.H. 120591/95

Counsel: *Joseph M.J. Cooper, Q.C.*, for plaintiff.
Douglas J. Lloy, for defendant.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.6 Effect of proposal
VI.6.a General principles

Bankruptcy and insolvency
VI Proposal
VI.6 Effect of proposal
VI.6.b As binding on creditors

Commercial law
III Conditional sales
III.1 Nature of conditional sale
III.1.a General principles

Commercial law
III Conditional sales
III.6 Non-compliance with legislation
III.6.d Effect of taking possession

Headnote

Conditional sales --- Nature of conditional sale — General

Conditional sales — Nature of conditional sale — Vendor selling lumber to purchaser — Packing slips reserving title until full payment made — Vendor not filing contract under Conditional Sales Act — Parties having valid conditional sales contract at common law — Conditional Sales Act, R.S.N.S. 1989, c. 84, s. 3.

Conditional sales --- Non-compliance with legislation — Effect of taking possession

> was valid as between Zutphen and its creditors. The role of the trustee was not one of enforcing rights of creditors but in supervising the proposal to see that it was carried out according to its terms; this did not include a directive to challenge securities for improper registration as if the trustee were an assignee for the general benefit of the creditors or 'a trustee under the *Bankruptcy Act*'. Therefore, in this case, s. 3(1) of the *Conditional Sales Act* does not come into play even if one were to conclude that a trustee named in a proposal falls within the scope of (d) and (e) of s. 3(1). The provisions of that section do not preclude insolvent persons and their creditors from making an arrangement to settle debts in any manner they choose as set out in a proposal.

49 It is clear, upon reading the decision of Justice Hallett, that it was the terms of the *Zutphen* proposal, and, in particular, the omission to include a clear direction in the proposal that the Trustee was to have the same power of disallowance of security as if there had been an assignment of bankruptcy, that lead him to the conclusion such a power was not intended. Justice Hallett, at p. 348, continues:

> ... To countenance this would be to undermine the very essence of a proposal, 'consensus', as between the creditors respecting payment of their claims by an insolvent person. Zutphen's intention, as expressed in the proposal, was to pay those creditors with security. The proposal was accepted. The trustee should have carried out the proposal in accordance with its terms. In challenging the security claimed by the respondent, the trustee misinterpreted the proposal and his role as trustee of this proposal.

50 Clearly, such is not the case in the present circumstance where there is no contractual "consensus" between the insolvent and the alleged secured creditor. Where a proposal "vests property" in a trustee, then presumably it is implicit in the mandate that the trustee is to gather up, and where necessary, retrieve from third parties, such vested property. In doing so, and again subject to any specific terms contained in the proposal, the trustee is bound by all outstanding "equities or legal rights", including the rights of any secured creditors, except only to the extent the secured creditors may have, by acceptance of the proposal, agreed to a modification or variation in their rights.

51 Section 69 of the *Bankruptcy and Insolvency Act* provides that upon the filing of a Notice of Intention to Make a Proposal "... no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy". Under subsection (2) the stay does not apply "to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets". In determining whether, for purposes of the *Bankruptcy and Insolvency Act*, Goodfellow had taken possession of the subject lumber prior to the filing of the Notice of Intention, section 73(2) is relevant:

> Where an assignment or a receiving order has been made, the sheriff or other officer of any court or any other person having seized property of the bankrupt under execution or attachment or any other process shall, on receiving a copy of the assignment or the receiving order certified by the trustee as a true copy thereof, forthwith deliver to the trustee all the property of the bankrupt in his hands.

52 There has not, therefore, been a re-taking of possession by Goodfellow such as to preclude the application of the stay pursuant to s. 69. The decision of the Court of Appeal, in *Zutphen Bros. Construction Ltd.*, supra, does not, in these circumstances, suggest a Trustee vested by the terms of a proposal, or by law, with property of an insolvent, should not seek to carry out its mandate by locating and retrieving such property.

53 There remains, however, a further difficulty in respect to the position of the Trustee, by virtue of the terms of the proposal in question. Counsel, in his original submission, and as noted, suggested that by virtue of s. 71(2) of the *Bankruptcy and Insolvency Act* property of the debtor is vested in the Trustee. However, as noted by Justice Hallett in *Zutphen Bros. Construction Ltd.*, supra, and pursuant to s. 66(1) of the *Bankruptcy and Insolvency Act*, the remaining provisions of the *Act* only apply "with such modifications as the circumstances require to proposals". Justice Hallett in *Zutphen Bros.*, supra, examined the terms of the proposal in ascertaining the role of the Trustee. It is therefore necessary to examine the provisions of the proposal by the insolvent, Heather, to determine whether the Trustee has been directed or authorized to retrieve the goods in question. In this regard, the terms of the proposal should be examined to determine whether the property of the

TAB 4

In the Court of Appeal of Alberta

Citation: Thompson v Procrane Inc. (Sterling Crane), 2016 ABCA 71

Date: 20160314
Docket: 1603-0021-AC
Registry: Edmonton

Between:

Derek Thompson

Applicant

- and -

Procrane Inc., operating under the trade name Sterling Crane

Respondent

- and -

Occupational Health and Safety Council

Respondent

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

Application for Permission to Appeal

18, 2016, and it is now scheduled to be heard on November 4, 2016. By the time of the actual date of the hearing Mr. Thompson will have had about 11 months of notice, which is far in excess of the 10 days required by the rules. The practice followed in this case, of setting the matter down in morning chambers for scheduling purposes, is very common and quite acceptable, efficient and reasonable. This ground of appeal is of insufficient merit to warrant permission to appeal.

[11] The applicant also notes that R. 11.4 requires that commencement documents be personally served. Rule 11.5 contemplates that service will be effected by leaving the document with the individual, or sending it by recorded mail. Service by email is not specifically contemplated for commencement documents. On the other hand, R. 11.27 enables the Court to validate service done "in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served".

[12] Service is essentially a question of fact: did the person being served actually get a copy of the document? If the document was actually received, the method of service is inconsequential. The principle was stated in ***Sandhu v MEG Place LP Investment Corp.***, 2012 ABCA 266, 542 AR 12:

> 19 Service is a quintessentially practical consideration. The only point of service is that the defendant must get notice of the claim against it. Service is not some sort of magical or formalistic ritual that has to be followed. While civil procedure recognizes certain forms of service, unconventional forms of service that actually bring the legal process to the attention of the person being served are still effective. For example, assume that personal service is required, but when the process server arrives the defendant is not there. His wife agrees, however, to provide the documents to her husband when he returns. The next day the husband sends an e-mail, the contents of which make it clear that his wife did follow through, and that he is aware that he has been sued and served. This is effective service, even though it is unconventional.

In this case, service of the Procrane Originating Application by email was an "unconventional form of service that actually brought the legal process to the attention of the person being served". The use of an unconventional method does not mean that the service is automatically ineffective.

[13] In this case Mr. Thompson fairly acknowledges that he did receive the Procrane Originating Application when he opened his email on the evening of November 23, 2015. At that moment he was "served". Counsel for Procrane may have "taken a chance" by using an electronic method of service. It was possible that the Originating Application would not, in fact, come to Mr. Thompson's attention. It was also possible that Procrane might have had trouble proving service. However, in this case, Mr. Thompson did get the document, and he admitted that he got it. The service by email was perfectly valid. This ground of appeal is also of insufficient merit to warrant permission to appeal.

TAB 5

In the Court of Appeal of Alberta

Citation: Custom Metal Installations Ltd v Winspia Windows (Canada) Inc, 2020 ABCA 333

Date: 20200921
Docket: 1901-0318-AC
Registry: Calgary

Between:

Custom Metal Installations Ltd.

Appellant
(Plaintiff by Counterclaim)

- and -

Winspia Windows (Canada) Inc. and Winspia Co. Ltd.

Respondents
(Defendants by Counterclaim)

The Court:

The Honourable Madam Justice Michelle Crighton
The Honourable Madam Justice Elizabeth Hughes
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice BE Mahoney
Dated the 20th day of September, 2019

(2019 ABQB 732, Docket: 1601 06606)

judicata and an interlocutory consent order that purports to engage the powers of the court and governs the conduct of the litigation. The contract analogy is more applicable to the former.

[58] In our view, ***Gates Estate*** and ***BeeTown Honey*** were correct to distinguish consent orders on that basis. ***Gates Estate*** and ***BeeTown Honey*** represent a more principled way to address the true nature of an interlocutory procedural order than to apply the law that might be relevant, for example, to a final order such as a consent judgment: ***Monarch Construction Ltd v Buildevco Ltd*** (1988), 26 CPC (2d) 164 (Ont CA), para 3; or family law cases settling final obligations between the parties, including division of property: ***Rick v Brandsema***, 2009 SCC 10, paras 49-50, [2009] 1 SCR 295. A discretionary approach is also more consistent with the interpretation of r 9.15(4)(c) which specifically recognizes "grounds that the Court considers just."

[59] Rule 9.15(4) is clearly discretionary. Once it has been determined that a consent order is interlocutory and procedural in effect and not in the nature of a final determination on a matter of substance, the Court may determine what is just in the circumstances.

c) Other rules

[60] We observe that other rules are available that might well have been more appropriate to the circumstances on this record.

[61] Rule 13.5(2) allows the court to "stay, extend or shorten a time period that is…(b) specified in an order…or (c) agreed on by the parties." The essence of the order was that the officer would show up for questioning on December 17, a date that was agreed upon by the parties. The officer missed the deadline for a rather weak but plausible reason, and sought to have the deadline extended. The issue for the court is whether the date should be extended, including consideration of the fact that it was agreed to. In those circumstances, the general rule is found in r 1.5(4) to the effect that a contravention, non-compliance or irregularity will only be overlooked if terms can be imposed that will eliminate any prejudice to the other party. The fact that there is a presumptive remedy for contempt in the order does not, in our view, deprive the court of its discretion in r 13.5(2) and 1.5(4). Any prejudice to the other party can be remedied by generous thrown-away costs and possibly accompanied by an order that all previously imposed but unpaid costs are to be paid forthwith. We note that all of ***Gates Estate***, ***Devlin v Boon***, ***BeeTown Honey*** and ***Stoughton Trailers*** could have been dealt with in Alberta under r 13.5(2). See ***Piikani Nation v Kostic***, 2018 ABCA 234 at para 25; ***Cornelson v Alliance Pipeline Ltd***, 2013 ABCA 378 at paras 2, 9-10.

[62] Custom Metal could also have proceeded under r 10.52 asking that the court cite Winspia in civil contempt. This rule provides for a wide variety of prospective sanctions, including ability to purge the contempt.

[63] Not surprisingly, the remedies set out for each of the above additional rules are, like r 9.15(4) with respect to an interlocutory procedural consent order, discretionary and focused on what the court considers just in the circumstances.

VIII. Conclusion

[64] We agree that the result reached by the chambers judge was appropriate and reasonable in the circumstances for the reasons set out above.

[65] The appeal is dismissed.

Appeal heard on June 12, 2020

Memorandum filed at Calgary, Alberta
this 21st day of September, 2020

Crighton J.A.

Authorized to sign for: Hughes J.A.

Feehan J.A.

Appearances:

G.W. Jaycock
for the Appellant

E.W. Halt, Q.C.
for the Respondents

TAB 6

2019 CarswellAlta 2885
Alberta Court of Queen's Bench

Enerplus Corporation v. Copyseis Ltd.

2019 CarswellAlta 2885, [2020] A.W.L.D. 1179, 316 A.C.W.S. (3d) 350

ENERPLUS CORPORATION (Plaintiff) and COPYSEIS LTD. (Defendant)

Campbell J.

Heard: November 13, 2019
Judgment: November 13, 2019
Docket: Calgary 1901-15257

Counsel: D.W. McGrath, Q.C., for Enerplus Corporation
M. O'Brien, for Enerplus Corporation
T. Derksen, for Copyseis Ltd.

Subject: Civil Practice and Procedure; Contracts

Related Abridgment Classifications

Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.b Enforcement of contractual terms

Headnote

Remedies --- Injunctions — Mandatory injunctions — Enforcement of contractual terms

When plaintiff terminated agreement for defendant to store, manage and archive its digital seismic data, defendant refused to return data until it was paid $1 million deletion or termination fee — Plaintiff commenced action and brought application for order of replevin seeking immediate return of data, which defendant characterized as attempt to circumvent ordinary operation of agreement — Application granted on terms — Rule 6.49 of Rules of Court required applicant for replevin to establish wrongful taking or detention of personal property, value and description of property, and rightful ownership or entitlement to lawful possession of property — On authorities, threshold for establishing extraordinary pre-trial remedy was relatively low as applicant was only required to establish substantial grounds for claim — Parties' agreement required defendant to transfer data to plaintiff within 60 days of termination — While it also required plaintiff to pay all data storage, management and archiving invoices before data was transferred, it made no reference to any termination fee — There was no question plaintiff had paid all monthly storage, management and archiving invoices to date of termination — While trial that included full examination of factual matrix surrounding formation of agreement might conclude agreement should be interpreted to provide for termination fee, it also might not — While it was possible cost of transfer, deletion or termination should have been on minds of parties at time agreement was made, plaintiff had established low threshold of substantial grounds for claim that defendant was wrongfully retaining data contrary to agreement — There was no question plaintiff had unrestricted access to data prior to termination of agreement, and that it required such access to run its core business functions — Replevin order would preserve status quo and allow defendant to pursue claim for termination fee in ordinary course — While plaintiff had already provided undertaking to pay any damages sustained by defendant in event action was unsuccessful, it was appropriate to enhance undertaking by requiring plaintiff to secure $1 million bond or letter of credit in favour of defendant prior to any release of data.

Table of Authorities

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 6.49 — considered

R. 6.50(1)(d) — considered

APPLICATION by plaintiff for order of replevin requiring defendant to return its digital seismic data immediately.

***Campbell J.*:**

1 THE COURT: First of all, I want to thank the parties for their very thorough written submissions. They certainly helped me to make my decision today as I had the benefit of those written arguments. So, I thank both of you for that — all four of you for that.

2 Enerplus Corporation commenced an action in the Court of Queen's Bench against Copyseis Ltd.

3 The action concerns a dispute between the parties as to whether the Plaintiff, Enerplus, is contractually obligated under the terms of a data storage, data management and data archiving agreement that was dated the 1st of January, 2014, as extended and amended in 2017, (I will refer to it as the 'Data Agreement') entered into between the parties, and terminated by the Plaintiff on the 13th of September, 2019, to pay certain fees and charges for data deletion and archiving that the Defendant advised that the Plaintiff must pay before the Defendant would return to the Plaintiff its digital seismic data, which I will refer to as the 'Seismic Data'.

4 After termination of the Data Agreement, the Defendant presented the Plaintiff with a proposal that was titled "Enerplus On-line Data Deletion Project", which I will call the 'Termination Fee', in which the Defendant advised the Plaintiff that it would not return the Seismic Data to the Plaintiff within 60 days of its termination notice unless the Plaintiff agreed to pay the Defendant $1 million in claimed digital deletion fees, specifically the Termination Fee. The Defendant also advised the Plaintiff there would be ongoing storage fees incurred until the dispute is ultimately decided at trial.

5 Over the course of its contractual relationship, I noted that the Plaintiff had paid the Defendant approximately $3 million to manage, store and digitalize the Seismic Data.

6 In this application today, the Plaintiff seeks an order of replevin for the immediate return of its Seismic Data that is currently being held by the Defendant allegedly in accordance with the Data Agreement. The Plaintiff is not pursuing its alternative claim for an interim injunction.

7 The Plaintiff contends that it is the uncontroverted owner of the Seismic Data and that without the Seismic Data it is unable to conduct essential functions of its core business. The Plaintiff argues that it established substantial grounds for its claim, that there was wrongful detention of the Seismic Data of which it is the rightful owner entitled to lawful possession of it.

8 The Defendant argues that the Plaintiff is attempting to obtain the replevin order or a mandatory injunction to circumvent the ordinary operation of the parties' contractual obligations under the Data Agreement. The Defendant asserts that the Plaintiff has not met the test for granting the replevin or a mandatory injunction because its view, as expressed in its written submissions, is that the Plaintiff does not have a strong prima facie case, there is no evidence of irreparable harm, and that the balance of convenience favours the Defendant. The Defendant argues that the Plaintiff does not need the Court's assistance or intervention to obtain the Seismic Data because if it pays the Termination Fee as contractually required, then the Defendant will provide the Seismic Data to the Plaintiff as requested. The Defendant relies on its evidence of the factual matrix within which the parties operated during the formation of the Data Agreement and the course of conduct of the parties during the course of their relationship as evidence that the Plaintiff knew that there would be termination fees due to the Defendant on termination of the Data Agreement.

9 As indicated by the parties, there is no dispute that Rule 6.49 of the Rules of Court sets out the test that must be established by an applicant to obtain replevin. Rule 6.49 provides that, first, it must be established there was a wrongful taking or detention of the personal property, second, the value and the description of the personal property must be established, and, lastly, the applicant must establish it is the rightful owner or is entitled to lawful possession of the personal property.

10 Case law, as indicated by the parties, establishes that replevin is an extraordinary pre-trial remedy because it allows for the return of personal property to the person claiming ownership or entitlement to possession before the issue is decided. The threshold for establishing replevin is relatively low as the applicant need only establish substantial grounds for its claim

11 The issue here is whether the Data Agreement permitted the Defendant to retain possession of the Seismic Data until the Plaintiff pays the Termination Fee.

12 Based on the evidence before me and the submissions of counsel and recognizing that I am not to embark on a trial of the issues raised, but only to decide whether the Plaintiff can show facts upon which it bases its claim and the facts shown provide substantial grounds for its claim, I am satisfied that the Plaintiff meets the test for the granting of a replevin order. I do so for the following reasons.

13 First, I am satisfied that the Plaintiff is the owner of the Seismic Data. Article 8.01 of the Data Agreement makes that clear and this was not disputed by the parties.

14 Second, I am satisfied that prior to termination of the Data Agreement, the Plaintiff had unfettered and unrestricted access to the Seismic Data, which included 24/7 access and unlimited downloading under the Data Agreement. I accept the Plaintiff's evidence that the Defendant restricted the Plaintiff's access to the Seismic Data after termination of the Data Agreement. I also accept the Plaintiff's evidence that it relies on unfettered 24/7 unfettered access to the Seismic Data including downloading of the data to run its core business functions. I accept that the Plaintiff has shown that its access has been fettered and restricted and that such restriction has affected, and would, in the future, affect its core business.

15 Third, I further accept that the Defendant is refusing to return the Seismic Data to the Plaintiff unless and until the Plaintiff pays the Termination Fee and so has detained the Seismic Data.

16 Fourth, the Plaintiff has established the facts as set out by the Plaintiff that provides substantial grounds for the Plaintiff's claim that the Defendant has wrongfully detained the Seismic Data and that it is entitled to lawful possession of the Seismic Data. These facts include the following:

17 The Plaintiff exercised its right to terminate the Data Agreement on 60 days notice as required under Article 3.

18 Article 3.02 set out that the termination notice triggered the Defendant's obligation to transfer all of the Seismic Data within 60 days of the termination notice to the Plaintiff.

19 Article 3.03, which is the clause that provides for payment, provided that all — and I quote: (as read)

> All data storage, on-line data storage, data management, on-line data management, and data archiving invoices must be paid in full before the data will be transferred from the Defendant to the Plaintiff.

20 The Plaintiff paid all monthly invoices from the Defendant for services rendered up to the point of termination.

21 There is no reference to any transfer deletion fees on termination or mention of any fees payable on termination of the Data Agreement. The Termination Fee is a fee that arose after the termination of the Data Agreement and, apparently, is for services that have yet to be rendered by the Defendants.

22 The Plaintiff has shown that the Termination Fee is based on services that were never requested by it, not required by it, have not been rendered, and is not one of the monthly invoices that was rendered for services rendered in accordance with Article 3.02.

23 I do take note of the Defendant's suggestion that deletion would have to occur, that there is a cost, and that this was something that should have been in the minds of the Plaintiff. However, at this stage, the Plaintiff has established on a very low threshold a substantial basis for its claim that the refusal by the Defendant to return the Seismic Data is contrary to the

TAB 7

These sections had been interpreted in *R. v. Eakins* (1943), 79 C.C.C. 256, where the Court did not follow its former decision in *R. v. Marin* (1937), 68 C.C.C. 245. A different interpretation had been adopted in other Provinces: *Reg. v. Girone* (1953), 106 C.C.C. 33 and *R. v. Sokol* (1949), 95 C.C.C. 360. The present relevant sections of the Code were ss. 168, 176. There had been a slight changing of wording in the sections and in the definition of keeper there had been added

> uses a place permanently or temporarily, with or without the consent of the owner or occupier.

That change would appear to have been made to clarify the Act and to reconcile the different interpretations which had been placed upon the sections. When the definition of place was considered with the last mentioned subsection the conclusion seemed inescapable that the activities of the accused on this occasion brought him squarely within the definition of a keeper. Had there been no change in the Act the Court would undoubtedly have followed *R. v. Smith, supra,* but in view of the present wording of the relevant sections no significance could be given to that case, based as it was on the law as it then stood. The appeal should be dismissed.

Appeal dismissed.

HIGH COURT OF JUSTICE.

FERGUSON, J. 18TH DECEMBER 1959.

RYDER TRUCK RENTAL LTD. v. WALKER.

Replevin — Order — Proof of ownership — Degree of proof.

This was an appeal by the defendant from the order of the senior master 4th December 1959, granting a replevin order.

In the action the plaintiff alleged that it was the owner of 26 trucks. It alleged that it had bought the trucks from the defendant under an oral agreement whereby the trucks would be leased back to the defendant. It alleged default by the defendant in payment of rental and other charges in the amount of $14,000 and consequently that it was entitled to possession of the trucks and in default of delivery to the replevin order sought on the ground of wrongful detention by the defendant. It also alleged that it was entitled to the order on the ground that it was capable of maintaining an action for damages and thus came within the Replevin Act, R.S.O. 1950, c. 339, s. 2. The senior master granted the order for reasons in writing as follows.

Senior Master:—As I understand it, there is no dispute respecting 6 of the vehicles but the defendant puts in issue the plaintiff's claim to the ownership of the other 20 trucks and contends therefore that the plaintiff is not entitled to the order. The plaintiff attempts to show its title by evidence which it contends proves it is the owner of these vehicles by purchase from the defendant.

The Replevin Act, R.S.O. 1950, c. 339, s. 2, provides

> Where goods, chattels . . . have been wrongfully distrained or have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery thereof and of the damages sustained by reason of such distraint, taking or detention.

Rule 359 provides

> A replevin order may be obtained: (1) On motion therefor on showing the facts of the wrongful taking or detention complained of, the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be).

Rule 360 provides that the motion should be on notice to the defendant except in special circumstances and makes it plain that the Court may grant or refuse the order or may direct the sheriff to take and detain the property until further order of the Court.

The first matter for consideration is the scope of the enquiry under Rules 359-60. Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the Court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted. This is consistent with *Gilchrist v. Conger* (1854), 11 U.C.Q.B. 197, where it was held on an application to set aside a *praecipe* order that the question of whether the defendant did in fact either take or detain the goods must be left to be ascertained upon the trial as that involved the merits of the case. Therefore, in my opinion the enquiry is limited to determining whether there are substantial grounds for the plaintiff's allegations, which if proved, bring the case within the statute.

Dealing then with the facts relating to the ownership of the 20 vehicles, although two agreements were prepared, one a lease back agreement in February, 1959 and the other an option agreement in June, 1959, neither were executed and the plaintiff is relying on an oral contract of purchase and sale and a lease back agreement. There is conclusive proof that the plaintiff paid to the defendant $89,000 for the trucks in question and although the last installment of $2,800 was paid in the form of a credit on rental charges, I do not think that alone is sufficient conclusively to nullify the plaintiff's title.

These payments coupled with the defendant's conduct in making payments on invoices submitted to him weekly covering rental charges and services from February to October of this year go a long way in support of the plaintiff's claim to be the equitable owner of the vehicles with an agreement to lease back under an oral contract. There are some facts which are inconsistent with this conclusion, i.e., the trucks are registered in the name of the defendant, and the plaintiff's name has not been painted on the vehicles. But there is good reason to believe that such inconsistencies can be explained and are not fatal to the plaintiff's claim.

Counsel for the plaintiff in an able argument relied on the terms of the draft option agreement, but I point out that the payments mentioned above were made by the plaintiff to the defendant prior to the date of this agreement, clearly indicating the parties were operating under some other agreement.

For all these reasons I find that there is a substantial ground for the plaintiff's claim to be the equitable owner of the vehicles in question. That being the case it is entitled to maintain an action for damages and so comes within s. 2. As to an equitable title being sufficient to bring the case within the purview of the statute, I refer to *Carter v. Long* (1896), 26 S.C.R. 430, at pp. 435-6.

I think that is sufficient to dispose of the matter without going into the question of the right to possession. However, I should think it was implied in such a contract to lease that the plaintiff was entitled to possession on default of payment of rental charges. This is consistent with the provisions of the first draft agreement.

As to the amount of the bond, under the circumstances it should be substantial and I do not think it should be less than treble the value of the 20 vehicles. It is said their value has substantially depreciated in the meantime. From the evidence, 20% would appear to be a fair rate of depreciation to be allowed. This would reduce the value of the 20 trucks to about $72,000.

Accordingly, I grant the replevin order and direct the sheriff to take a bond in the sum of $200,000. I understand that the plaintiff would be satisfied not to take the order if the defendant delivers up the 6 vehicles and furnishes security by way of a surety bond. I suggest that $90,000 would be a fair amount. Costs in the cause.

The defendant appealed.

W. G. Dingwall, for the defendant, appellant.
J. D. Pickup, Q.C., for the plaintiff.

Ferguson, J., at the conclusion of the argument without written reasons dismissed the appeal. Costs of the appeal reserved to the trial Judge.

Appeal dismissed.

TAB 8

Alberta Court of Queen's Bench
Canada (Attorney General) v. Hoverlift Systems Ltd.
Date: 1981-02-06

Ingrid C. Hutton, for plaintiff.

G. J. Forrest, for defendant.

(Doc. 8001-22457)

February 6, 1981.

[1] EGBERT J.: — The plaintiff has applied for a replevin order with respect to the equipment which is hereinafter described.

[2] On February 9, 1979, the plaintiff and the defendant entered into an agreement in writing whereby the defandant agreed “to design, construct, deliver and participate in the trials program of an Air Cushion Icebreaking Bow (ACIB) Attachment” to be attached to Canadian Coast Guard ships and used primarily at the Coast Guard base in Thunder Bay, Ontario. The consideration to be paid by the plaintiff was a target cost amount of $1,325,000 and a ceiling or maximum price of $1,603,250 plus specified extras and the plaintiff agreed to make progress (in the agreement called milestone) payments as work proceeded on the ACIB. Attached to and forming part of the agreement were General Conditions of the Department of Supply & Services Canada. The clauses of the general conditions relevant to this application are as follows:

> 21. Title on Progress Payments.
>
> *Upon any payment being made to the Contractor* for or on account of materials, parts, work-in-process, or finished work, *either by way of progress payments or accountable advances or otherwise, title in and to all materials, parts, work-in-process and finished work so paid for by such progress payments or accountable advances or otherwise shall vest and remain in Her Majesty* unless already so vested under any provision of the contract and the Contractor shall be responsible therefor in accordance with the provisions of Section 12 hereof, it being understood and agreed that such vesting of title in Her Majesty shall not constitute acceptance by Her Majesty of such materials, parts, work-in-process and finished work and shall not relieve the Contractor of its obligations to perform the work in conformity with the requirements of the contract.
>
> 24. Default by Contractor
>
> (1) *If the Contractor is in default in carrying out any of the terms, conditions, covenants or obligations of the contract,* or if the Contractor becomes bankrupt or insolvent, or has a receiving order made against it, or makes an assignment for the benefit of creditors, or if an order is made or resolution passed for the winding up of the Contractor, or if the Contractor takes the benefit of any statute for the time being in force relating to bankrupt or insolvent debtors, *the Minister may by giving notice in writing to the Contractor terminate the whole or any part of the contract.* In such

[8] On October 15, 1980, the defendant wrote to the Department and advised that delivery of the ACIB could take place as soon as payment of the balance claimed owing was made pursuant to s. 24(3) of the general conditions. The plaintiff then commenced action against the defendant asking, *inter alia,* for a replevin order and launched this application.

[9] The plaintiff's application is made pursuant to Rule 427 of the Alberta Supreme Court Rules which reads as follows:

> 427. In any action brought for the recovery of any personal property and claiming that the property was unlawfully taken or is unlawfully detained, the plaintiff may, if he desires to replevy the property, obtain an order of replevin for the delivery of the property to him.

[10] The plaintiff has also complied with the provisions of Rule 428(*b*) which states:

> 428. An order of replevin may be obtained
>
> . . . . .
>
> (*b*) in other cases, from the court, on application therefor, on an affidavit by the plaintiff or some other person showing the fact of the wrongful taking or detention complained of, the value and description of the property, and that the plaintiff is the rightful owner thereof or is lawfully entitled to the possession thereof, as the case may be.

[11] The defendant has conceded that the Alberta *Possessory Liens Act,* R.S.A. 1970, c. 279, does not apply to the Crown but it claims a possessory lien against the ACIB under the common law. However, in the case of *R. v. Fraser* (1877), 11 N.S.R. 431, the Nova Scotia Supreme Court held that no lien can be upheld at common law against the Crown and with this principle of law I agree. Therefore, this claim of the defendant fails.

[12] There is no doubt that, if the plaintiff is entitled to immediate possession of the ACIB, an order of replevin should be granted. The application, therefore, must succeed or fail on an interpretation of the general conditions of the agreement. In my opinion, the provisions of s. 24(1) are clear and unambiguous. It gives to the plaintiff an unequivocable right to terminate the agreement upon a default by the defendant. There can be no question that such default occurred due to the defendant's failure to deliver the ACIB within the time specified by the agreement. Section 24(3) then spells out the plaintiff's rights upon termination, again in clear and unambiguous language. It states that the plaintiff may require the defendant to deliver the ACIB to the Department and that, upon delivery, the Department will pay the defendant therefor. Such request was made by the Department. That is was the intention of the parties that delivery should precede payment becomes more than clear when the provisions of s. 25 which provide for payment before

delivery are taken into account. In other words, there were two separate and distinct times for payment set forth in the agreement, one following delivery on the termination of the agreement due to the default of the defendant and the other preceding delivery on the termination of the agreement for any reason other than the defendant's default.

[13] A number of cases were cited to me by counsel for both parties but they all dealt with the situation where the applicant for a replevin order either had title to the goods or the person holding the goods had a better title than the applicant. None of them dealt with the situation where the applicant was entitled to possession of the goods. However, in two of the cases, there are some general statements on the law of replevin that are useful. In *Ryder Truck Rental Ltd. v. Walker,* [1960] O.W.N. 70; affirmed on appeal [1960] O.W.N. 114, the Ontario Senior Master stated at p. 71:

> Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the Court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted.

[14] The W.W.R. headnote to *Allis-Chalmers, Rumely, Ltd. v. Forbes Eqiupment Ltd.* (1969), 8 D.L.R. (3d) 105, 71 W.W.R. 300, reads as follows:

> The right to replevy goods and chattels is not limited to cases in which there has been a wrongful distress or a wrongful taking or detention; an order of replevin may also be made against one who holds goods pursuant to a contract but whose continued possession is wrongful by reason of the termination of the contract.

[15] I am of the opinion that the plaintiff, pursuant to s. 24(3) of the general conditions of the agreement, is entitled to possession of the ACIB and all materials, parts and work in process associated therewith and that there has been wrongful detention of the same by the defendant. The plaintiff has shown that it has substantial grounds for its claim in that the ACIB is deteriorating as a result of being left exposed to the elements (despite what the defendant had to say in this regard) and it is urgently required by the Canadian Coast Guard for the purpose of facilitating the movement of grain in Canada. Therefore the order for replevin is granted without bond.

[16] It is not necessary for me to decide whether or not the plaintiff has title to the ACIB as either of the grounds set forth in Rule 427 may be relied upon by the plaintiff.

[17] The plaintiff, if it seeks costs of the application, is entitled to the same. If counsel for the parties cannot agree on the amount thereof, they may speak to me.

Application allowed.

TAB 9

1984 CarswellAlta 323
Alberta Court of Queen's Bench

Dresser Canada Inc. v. Vos

1984 CarswellAlta 323, [1984] A.W.L.D. 526, 26 A.C.W.S. (2d) 313, 53 A.R. 226

Dresser Canada Inc. Plaintiff, v. Henry Vos, Defendant

Funduk, Master

Judgment: April 3, 1984
Docket: Doc. Edmonton 8403-00917

Counsel: *A. Stacey, Esq. Bennett, Jones* For the Plaintiff.
Ms. C. Lane H. Kuckertz For the Defendant.

Subject: Torts
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.a Form and content
X.2.a.ii Claim for relief
Torts
XXIII Practice and procedure
XXIII.5 Pleadings
XXIII.5.c Adding or striking out
Headnote
Torts --- Replevin — Practice and procedure — Pleadings
Alta. R. 428(b).
Plaintiff delivering automobile to defendant pursuant to bill of sale -- Defendant dishonouring cheque for purchase price -- Plaintiff claiming for order of replevin as unpaid vendor -- Application dismissed -- Title passing to defendant on delivery -- Statement of claim not indicating plaintiff unpaid vendor because no reference made to contract of sale -- Court restricted to awarding only relief claimed -- Facts not appropriate for replevin order.
Replevin.
The parties entered into a bill of sale stating that an automobile had been sold by the plaintiff to the defendant. The defendant took possession but failed to pay the purchase price. The plaintiff commenced action, claiming that it owned the vehicle which the defendant wrongfully failed to deliver up to it, and applied for an order of replevin. *Held* , application dismissed. The statement of claim advanced no cause of action for rescission of the contract of sale and, in fact, ignored the contract of sale. The evidence disclosed that the vehicle had been sold to the defendant so that there was not merely an agreement to sell; nor was the contract merely a conditional one. An unpaid vendor of chattels cannot, without more, replevy the chattels if the purchaser does not pay the purchase price.

***M. Funduk* , Master [In Chambers]:**

REASONS FOR DECISION

1 This is an application by the Plaintiff for an order of replevin of an automobile: Rule 428(b).

2 The relevant parts of the statement of claim read as follows:

> from having possession of them. He is not bound to be active and send the goods back unless there is an obligation by contract to do so. It seems to me, therefore, that this demand of March 1, 1963, was not a good demand such as to found a claim in detinue. It did not merely demand delivery up. It demanded that the hirer should take the car back to one of these three addresses. He was under no obligation to do so.

26 Harman L.J. and Salmon L.J. also state the same.

27 In the case of hire-purchase agreements, or their common Canadian equivalent, being lease-option agreements, default in the lease payments normally entitles the lessor to repossess. It is invariably a term of the agreement. It is merely the straight lease situation. There is no vendor-purchaser situation, for the purpose of a replevin action, unless the lessee is entitled to exercise the option to purchase and does in fact exercise it. The cases on hire-purchase agreements are not relevant where the contract is solely a vendor-purchaser one.

28 In my view the proper approach to this application is as set out in *Ryder Truck Rental* . There must be in the evidence *substantial* grounds for the Plaintiff's claim. The evidence before me falls short of that. It appears to be a case of an unpaid vendor seeking to get back that which it sold without there being a rescission of the contract.

29 I have no doubt, on the evidence, that the Defendant deliberately set up the Plaintiff to extract from it the automobile without paying for it. Normally, one would expect the parties to have agreed that the purchase price be set off against the bonus owed by the Plaintiff to the Defendant. I have no doubt that Exhibit A and the dishonouring of the Defendant's cheque was a scheme by the Defendant to get paid his bonus first, get the automobile and leave the Plaintiff with a dishonoured cheque.

30 The Defendant justifies his scheme on the ground the Plaintiff allegedly owes him another $7,450.62. Rogues and scoundrels always have justification for their actions. He deposes that the Plaintiff sold the automobile to him "without any conditions to myself". Yet he has no compunction, despite that and Exhibit A, to decide that he will unilaterally impose a further condition on the Plaintiff (after he has gotten the automobile), the condition being that he will set off the purchase price against some alleged claims he has against the Plaintiff.

31 The Defendant decides to appoint himself as a holder of a judicial office, that he will advance further claims against the Plaintiff, that he will adjudicate on those claims and that the Plaintiff will pay him one automobile for these claims.

32 The Defendant deposes that he did not receive the bonus cheque until May 9, 1983 and that the Plaintiff had prior to that date attempted to negotiate his cheque. The Defendant further deposes that he did not have sufficient funds in his bank account to cover his cheque because the Plaintiff "had failed to comply with my request of February 26, 1983".

33 The Defendant attempts to leave the impression that it is all the Plaintiff's fault the cheque was not honoured. Litigants, and counsel, should not think the Court is gullible. Litigants may be. Counsel may be. The Court is not.

34 The telling fact is that the Defendant received the bonus called for and, *a year later* , has still not paid the Plaintiff. Does the Defendant seriously expect the Court to believe he is the proverbial innocent white lamb in all this?

35 The evidence on behalf of the Plaintiff is that it sent the bonus cheque to the Defendant on April 28, 1983 and that it attempted to negotiate the Defendants cheque on May 3, 1983. That hardly smacks of the Plaintiff engaging in improper conduct.

36 If, as the Defendant implies, the bonus cheque was to be used to cover his cheque why did he negotiate the deal in Exhibit A? Why did he not agree that the purchase price be set-off against the bonus? The inference is clear why not. Why, a year later, has the Plaintiff still not been paid if the Defendant intended to use the bonus cheque to cover his cheque? The Defendant received the bonus cheque. The inference is clear.

37 In *Capital Finance Company* Harmon L.J. describes the defendant as a "thoroughly undeserving person". That description is also apt here. However, it would not do to grant a replevin order because of that.

TAB 10

Stewart v. Western RV Country Leduc Inc., 2003 ABQB 730

Date: 20030821
Action No. 0303 01784

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

BETWEEN:

RICHARD STEWART

Plaintiff

- and -

WESTERN RV COUNTRY LEDUC INC.

Defendant

MEMORANDUM OF DECISION
of
L.A. SMART, Master in Chambers

APPEARANCES:

Neil Fenna
Ritchie Mill Law Office
for the Plaintiff

Ms. Erika Ringseis
Fraser Milner Casgrain LLP
for the Defendant

I Nature of the Application

[1] This is an application by the Plaintiff Richard Stewart for replevin of a 2002 Chev Silverado one ton truck ("the Truck") valued at about $45,000.00. The application is brought by way of notice of motion in this action. The action involves an apparent shareholders dispute and includes, *inter alia*, a replevin claim in relation to the Truck. During the application I was referred to the affidavits of Mr. Stewart dated February 24, 2003 and January 28, 2003. In addition, Mr. Craig Anstead the General Manager of the Defendant swore an affidavit on March 26, 2003. Cross examinations were conducted on Mr. Stewart's January 28, 2003 affidavit and on Mr. Anstead's affidavit.

II The Facts

[2] The Truck was leased by the Defendant Western RV Country Leduc Inc. ("Western RV Leduc") and it pays all lease payments, registration costs, repairs, maintenance and insurance premiums. The Truck is registered at the Motor Vehicle Registry in the name of Western RV Leduc. It is a special use vehicle equipped and used for hauling RV units.

[3] The Plaintiff owns 30% of the shares of Western RV Leduc with the remainder owned by Mr. Bruce Urban. In addition to the Western RV Leduc there are or have been two other corporations operating under the brand name "Western RV"(the "Connected Corporations"). Mr. Stewart owns no shares in the Connected Corporations which are apparently owned entirely by Mr. Urban.

[4] Mr. Stewart was an employee of one of the Connected Corporations, Western RV Country Ltd. as well as performing employment functions for Western RV Leduc and the other Connected Corporation. Employment with Western RV Leduc and Western RV Country Ltd. ceased sometime in October, 2002. A separate action has been commenced by Mr. Stewart against Western R.V. Country Ltd. in the nature of a claim for wrongful dismissal. Apparently the other Connected Corporation ceased operations although exactly when was not indicated.

[5] Mr. Stewart states that he was provided the Truck in January, 2002 by Western RV Leduc in keeping with its ongoing practice to provide vehicles to shareholders. He confirmed that he used the Truck to deliver trailers to customers and to RV shows as part of his "job description". The organizing and attendance at RV shows was done independently by Mr. Stewart but the other duties were performed when requested and on an as needed basis.

[6] Mr. Anstead agrees with Mr. Stewart's description of his responsibilities and acknowledged that Mr. Stewart's employment with Western RV Leduc was not full time. He noted that Mr. Stewart performed similar duties for the Connected Corporations. At the time that Mr. Stewart was employed the Truck was the only vehicle capable of hauling larger RV units.

[7] The Truck was designated for Mr. Stewart's use in that he generally drove it when performing his duties and was entitled to drive it to and from work as well as in the evenings and on weekends. Although Mr. Urban was the other shareholder of Western RV Leduc he did not

have a vehicle designated for his exclusive use. Mr. Anstead as General Manager, the former Service Manager and the present Service Manager of Western RV Leduc were provided vehicles on a basis similar to Mr. Stewart in that they used the vehicles for their employment duties and drove them to and from work as well as being permitted to use them in the evenings and on weekends.

[8] A payroll register produced as an undertaking from the cross examination of Mr. Anstead does not disclose a taxable benefit to Mr. Stewart for use of a vehicle. No information was provided by either party to explain on what basis the Connected Corporations accounted to Western RV Leduc for use of its Truck while Mr. Stewart performed his duties for those entitles.

[9] The Truck was in the possession of Mr. Stewart until the third or fourth week of January, 2003. Mr. Anstead while on other business in Calgary located the Truck on the driveway of Mr. Stewart's residence and using a set of keys he simply drove the Truck away. The Truck was taken at the direction of Mr. Urban as the Truck was required by Western RV Leduc. No attempt was made to contact Mr. Stewart to advise him that the Truck was being taken on the evening in question or at all.

III Analysis and Conclusions

[10] Pursuant to Rule 428(b) of the *Alberta Rules of Court* for Mr. Stewart to succeed he must show the following: (1) the fact of the unlawful taking or detention; (2) the description and value of the property; and (3) that he owns or is entitled to possession of the Truck.

[11] The description and value of the Truck have been adequately set out.

[12] In my view. the primary issue is whether or not Mr. Stewart is entitled to possession of the Truck. In that regard, Mr. Stewart must establish that the right to possession is "obviously or apparently or most likely vested" in him, or put another way, he must establish a strong prima facie claim to possession: Creditor's Remedies in Alberta, (2d), Carswell, 1996 at p. 17-3 referring to ***Robert Cooper Productions Inc. v. J.S. Kastner Associates Ltd.*** (1982), 24 C.P.C. 269 and ***Agricultural Development Corp. of Saskatc hewan v. Vigro Seed and Supply Ltd.*** (1989), 64 D.L.R. (4th) 385 (Sask.C.A.).

[13] There is no suggestion that Mr. Stewart would be entitled to retain possession if he had only been an employee. Mr. Stewart's counsel argues his client is entitled to possession by virtue of his status as a shareholder and that it is the practise of the corporation to provide shareholders a vehicle. He points to the payroll register for Mr. Stewart as evidence that he must of had possession in some capacity other than as an employee as no taxable benefit was attributed to him on that register.

[14] There are a number of difficulties with the position taken by Mr. Stewart. To start, a shareholder is not entitled to possession of the property of a corporation per se. Notwithstanding the professed practise, the only other shareholder of Western RV Leduc did not have a vehicle

designated for his use. The payroll register may be some evidence to support his position but without more it is equivocal. Mr. Stewart's possession of the Truck was consistent with the practise to supply management employees with a vehicle. It may have been that Mr. Stewart's status as a shareholder gave him the privilege to use the Truck consistent with that of management employees but in my view this was incidental to the primary reason for his possession which was to facilitate the performance of his duties for the Defendant and the Connected Corporations. Once he ceased performing those duties, his entitlement to the Truck in all respects must have also ceased. He no longer required the Truck to perform his duties on behalf Western RV Leduc and the Connected Corporations and does not need it to commute to and from work. If Mr. Stewart's position is correct, his entitlement to the Truck for evening and weekend use would burdened the Defendant with all the costs of this Truck and it would also have to acquire another truck at its expense to deliver larger RV units to its customers. In short, it is not obvious to me that Mr. Stewart ought to be entitled to possession, rather based on my assessment of the facts, if it were necessary for me to go that far, I would conclude just the opposite.

[15] As for whether or not there was unlawful taking of the Truck, it is true that the Truck was removed from Mr. Stewart's private driveway in the evening after it was dark and without notice. The Defendant was the registered owner of the vehicle, was paying all of the lease payments and expenses associated with the Truck, had a set of keys and had some right to possession at the very least. There may have been a technical trespass upon Mr. Stewart's driveway but it is certainly not the type of egregious conduct as in the case of *Moore* v. *Menard*, 2000 ABQB 469 referred to by the Plaintiff in argument.

[16] Accordingly, I dismiss the application of the Applicant Richard Stewart and grant costs of the application to the Defendant on column 1 of schedule C of the Alberta Rules of Court in any event of the cause, payable at the end of the day.

HEARD on the 10th day of July, 2003.

DATED at Edmonton, Alberta this 21st day of August, 2003.

_____

L.A. SMART
M.C. C.Q.B.A.

TAB 11

1999 ABQB 943
Alberta Court of Queen's Bench

JLV Industries Proprietary Ltd. v. Luscar Ltd.

1999 CarswellAlta 1394, 1999 ABQB 943, 10 B.L.R. (3d) 124, 258 A.R. 3

JLV Industries Proprietary Ltd., Plaintiff and Luscar Ltd., Roger Melley and Roger Melley & Associates Inc., Defendants

Shannon J.

Heard: November 26, 1999
Judgment: December 10, 1999
Docket: Calgary 9901-12812

Counsel: *Thos. H. Ferguson, Q.C.*, for Plaintiff.
R.B. Davison, Q.C. and *James F. McGinnis*, for Defendants.
A.D. Little, for Interveners.

Subject: Corporate and Commercial; Contracts; Civil Practice and Procedure; Torts
Related Abridgment Classifications
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.i Discovery
V.3.i.ix Miscellaneous
Headnote
Corporations --- Practice and procedure in actions involving corporations — Discovery — Miscellaneous issues
L Ltd. acquired company and became plaintiff in company's action for breach of contract and negligence regarding performance of conveyor belt system — In response to L Ltd.'s invitation to bid, J Ltd. sent confidential documents to L Ltd. describing product — Confidentiality notice specified that documents would remain property of J Ltd. and that L Ltd. was required to return them upon request — Negotiations between J Ltd. and L Ltd. broke down and contract was awarded to another supplier — J Ltd. made repeated requests for return of documents — L Ltd. refused on ground that documents were relevant to issue of mitigation of damages by L Ltd. in breach of contract and negligence action and that L Ltd. was obliged to produce them — J Ltd. brought action against L Ltd. seeking order for replevin of documents and application for return of documents pending trial — Application granted — When L Ltd. refused to return documents it breached contractual obligations to J Ltd. — L Ltd. was unlawfully detaining documents — L Ltd. ordered to deliver documents to J Ltd.'s solicitors, to be held in secure custody.
Torts --- Replevin — Availability — Upon contractual breach
L Ltd. acquired company and became plaintiff in company's action for breach of contract and negligence regarding performance of conveyor belt system — In response to L Ltd.'s invitation to bid, J Ltd. sent confidential documents to L Ltd. describing product — Confidentiality notice specified that documents would remain property of J Ltd. and that L Ltd. was required to return them upon request — Negotiations between J Ltd. and L Ltd. broke down and contract was awarded to another supplier — J Ltd. made repeated requests for return of documents — L Ltd. refused on ground that documents were relevant to issue of mitigation of damages by L Ltd. in breach of contract and negligence action and that L Ltd. was obliged to produce them — J Ltd. brought action against L Ltd. seeking order for replevin of documents and application for return of documents pending trial — Application granted — When L Ltd. refused to return documents it breached contractual obligations to J Ltd. — L Ltd. was unlawfully detaining documents — L Ltd. ordered to deliver documents to J Ltd.'s solicitors, to be held in secure custody.
Table of Authorities
Rules considered:

1999 ABQB 943, 1999 CarswellAlta 1394, 10 B.L.R. (3d) 124, 258 A.R. 3

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 428(b) — considered

APPLICATION for replevin of documents.

***Shannon J.*:**

1 Line Creek Resources Ltd., a subsidiary of Manalta Coal Ltd., owned and operated a coal mine near the Town of Sparwood in the Province of British Columbia.

2 On February 1, 1995, Line Creek Resources Ltd. entered into a contract with DBA Corporation (carrying on business as Cable Belt Conveyors, Inc.) pursuant to which it was to design and supply a cable belt for a 10.51 kilometre conveyor system to be used at the Sparwood mining site. The Laird Group Public Limited Company provided a guarantee. The work proceeded and the system was installed.

3 Manalta was disappointed by the performance of the belt and conveyor system and, on November 13, 1997, started Action No. 9701-16149 claiming, inter alia, breach of contract and negligence. That action is being defended by DBA and Laird and I am the case management judge.

4 Luscar Ltd. acquired all of the shares of Manalta Coal Ltd. in 1998 and effective January 1, 1999, Manalta Coal Ltd. was amalgamated with Luscar Ltd. The pleadings were amended and Luscar Ltd. is now the plaintiff in the action.

5 On August 11, 1999, JLV Industries Proprietary Ltd. ("JLV") started this action against Luscar Ltd., Roger Melley and Roger Melley & Associates Inc.

6 JLV seeks to replevin confidential property information and material that it provided to Manalta when it was in the course of changing the conveyer belt system - a procedure described as a "retrofit". Luscar refuses to return those items because they were, quite properly, disclosed in its affidavit of production in its action with DBA and Laird, and it is obliged to produce them in the litigation. They support that refusal claiming that they are important documents that are relevant in the action and are particularly relevant on the issue of mitigation of damages. Thus the issue is: what priority should be given to Luscar's competing obligations? That is to say, should it return the documents to JLV and thereby honour the confidentiality agreement or should it produce them to DBA and the Laird Group in accordance with the provisions of the Alberta Rules of Court?

7 JLV is an Australian company that supplies conveyor belt systems. Luscar approached JLV in the summer of 1997 with an invitation to bid on a contract to provide spare conveyor belt at the mine. JLV responded by providing Luscar with confidential documents describing its "Combi Belt" product. The documents were sent to Luscar with a written confidentiality notice. The notice stated, among other things, that the confidential documents would remain the property of JLV and that Luscar would be obligated to return the documents to JLV upon request. Over the course of the next year, JLV sent other confidential documents to Luscar at Luscar's request to bid on projects, which included replacing the conveyor belt system which DBA had supplied to Luscar. With the exception of two shipments of actual samples of the Combi Belt product, JLV consistently included provisions setting out Luscar's confidentiality obligations to JLV with all information it sent to Luscar.

8 Negotiations between JLV and Luscar broke down in the summer of 1998 when Luscar awarded the contract to replace its conveyor system to a third conveyor system supplier. JLV consequently requested that all its confidential documents be returned. Luscar refused to return the documents and continues to hold the documents despite JLV's repeated requests that they be returned. Luscar's refusal is motivated by DBA and Laird's request for production of these materials. They claim that the documents are relevant to an issue in the *Luscar v DBA/Laird* action, namely Luscar's attempt to mitigate its damages when it became dissatisfied with the conveyor system supplied by DBA. Motivated no doubt by the possibility that its confidential documents will end up in DBA's hands, JLV filed a statement of claim seeking, among other things, an order for replevin of its confidential documents. By way of this application, JLV seeks a return of its confidential documents pending trial.

Appropriate Forum

9 In its brief, Luscar has asserted that this court is not an appropriate forum for determining the issues of breach of contract and breach of confidentiality, which JLV claims in support of this application. Luscar suggests that these issues should be left for trial when the parties will have full opportunity for production of documents and discovery.

10 This position is not supported by the Alberta Rules of Court. Rule 428(b) clearly contemplates that an order for replevin may be made by application on affidavit by the plaintiff. For this reason I am prepared to rule on the plaintiff's application today.

Confidential Documents (not including Combi Belt samples)

11 On the evidence, I am satisfied that JLV would never have provided Luscar with its confidential information if it had not been satisfied that Luscar would accept and abide by certain conditions regarding confidentiality and ownership of the documents. In order to protect its competitive advantage, JLV jealously guards product specifications and information on its Combi Belt, a product it developed. JLV only discloses confidential information about its Combi Belt product under the following conditions, which were set out in the documents JLV provided to Luscar:

> This Material is Confidential
>
> The information contained herein is the confidential property of JLV Industries Proprietary Ltd. It may not be disclosed to any other person without the prior authorization of JLV Industries Proprietary Ltd. Such disclosure shall only be made to parties who have been informed of, and who have agreed to abide by your obligation of secrecy. All copies or extracts are to be treated in the same manner and must (unless otherwise agreed) be returned to JLV Industries Proprietary Ltd. upon request.

12 In addition, Luscar employees and the Defendant Roger Melley were advised prior to and during their visit to the JLV plant in February of 1998 that JLV was disclosing confidential proprietary information under the conditions set out above.

13 At no time did any Luscar employee ever question or dispute the conditions under which Luscar received the information from JLV. On the contrary, despite JLV's clear communication of these conditions, over the course of about a year, Luscar repeatedly requested that JLV provide more information. Luscar accepted JLV's information and consequently the conditions under which it was sent both before Luscar filed its statement of claim against DBA and Laird and after that date. For this reason, I find that Luscar implicitly agreed to be bound by the conditions set out by JLV despite the fact that it was involved in a lawsuit with DBA and Laird at the time and was aware, therefore, that document production obligations would arise in that matter.

14 When Luscar refused to return the documents to JLV upon request on July 7, 1998, it did so in breach of its contractual obligations to JLV. Despite JLV's repeated requests that Luscar return the documents, Luscar continues to unlawfully detain JLV's confidential documents. Having found that the defendant has breached its contract with the plaintiff, I need not go on to consider the plaintiff's claim of breach of confidentiality regarding the documents.

Combi Belt Samples

15 In addition to the confidential documents discussed above, JLV also provided two samples of its Combi Belt product to Luscar. The first sample was a one metre piece of belt. The parties understood that Luscar would subject this sample to destructive testing. The second sample was 20 metres long. The parties understood that Luscar would incorporate this sample into the belt previously provided by DBA and that the entire belt would be scrapped when the DBA belt was replaced. A copy of the confidentiality conditions was not shipped with the Combi Belt samples.

16 I am satisfied that the parties did not intend that the confidentiality conditions, which attached to the JLV documents, would also apply to the Combi Belt samples. The conditions clearly set out JLV's reserved title to the documents, In the case of the Combi Belt samples, however, the parties intended that legal title pass to Luscar.

Production of Documents Issue

17 The Defendant Luscar indicated in its brief that, with the exception of the two Combi Belt samples, it would be happy to return all JLV documents but for its discovery obligations in its action with DBA and Laird. As interveners in this application, DBA and Laird have filed a brief asserting that this court should balance DBA and Laird's interest in obtaining JLV's confidential documents against JLV's right to have the documents returned. I do not agree.

Remedy

18 Having found that Luscar is unlawfully detaining the property of JLV, I order that the documents as listed below be delivered up to the solicitors for JLV forthwith. The documents which are subject to this order include: all belt reports, specifications, test report warranties and delivery schedules including copies distributed to external consultants; test results obtained by carrying out tests and evaluations on Combi Belt samples; all technical submissions as requested by the defendants on pulley, curve units, rope and conveyor performance assessment; JLV Combi Belt production specification drawings (excluding belt installation equipment drawings); technical submissions in support of belt specifications; delivery schedules and JLV Combi Belt warranty; and JLV Combi Belt installation and operation manual.

19 I find that Luscar has not unlawfully detained the 20 metre and one metre Combi Belt samples.

20 The application for replevin is granted accordingly, subject to the condition that the items recovered will be held in secure custody in the jurisdiction by the solicitors of record for JLV pending the completion of this action and action number 9701-16149, or further order of this court, whichever first occurs.

21 The parties may speak to costs if they are unable to settle them.

Application granted.

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: New Carbon Co. v. Tastee Fare Canada Inc. | 2009 CarswellOnt 8569, 184 A.C.W.S. (3d) 652 | (Ont. S.C.J., Dec 8, 2009)

1996 CarswellOnt 193
Ontario Court of Justice (General Division)

Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.

1996 CarswellOnt 193, [1996] O.J. No. 238, 45 C.P.C. (3d) 244, 60 A.C.W.S. (3d) 712, 7 W.D.C.P. (2d) 100

CLARK DOOR OF CANADA LTD. (plaintiff/moving Party) v. INLINE FIBERGLASS LTD. (defendant/responding party)

Molloy J.

Judgment: January 29, 1996
Docket: Doc. 95-CU-94298

Counsel: *Thomas G. Andrews*, for moving party (plaintiff).
Gordon Capern, for responding party (defendant).

Subject: Torts; Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Civil practice and procedure
XV Preservation of property rights pending litigation
XV.3 Interim recovery of personal property
Torts
XVIII Replevin
XVIII.5 Miscellaneous
Headnote
Torts --- Replevin — Practice and procedure — Replevin bond — Amount
Torts --- Replevin — Practice and procedure — Evidence
Practice --- Pre-trial procedures — Miscellaneous procedures
Pre-trial procedures — Interim recovery of personal property — Plaintiff claiming ownership of dies used in manufacture of fibreglass doors — Defendant in possession of dies — Possession in dispute — Plaintiff showing substantial grounds for claim to ownership — Defendant alleging investment in dies as proprietary technology — Balance of convenience favouring defendant — Defendant to retain possession pending trial if posting security — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 104 — Ontario, Rules of Civil Procedure, r. 44, 44.01.
Torts — Replevin — Practice and procedure — Evidence — "Substantial grounds" test — Requirement to show more than probability of success at trial or simply that plaintiff more likely to succeed than defendant — Refusal to grant interim order for recovery of dies — Balance of covenience favouring defendant — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 104 — Ontario, Rules of Civil Procedure, r. 44, 44.01.
Torts — Replevin — Practice and procedure — Replevin bond — Amount — Motion for interim order for recovery of dies used in manufacture of fibreglass doors — Plaintiff showing substantial grounds for claim to ownership but defendant having balance of convenience in its favour — Defendant to retain possession pending trial upon posting of security in amount of $150,000, failing which, plaintiff could post security and regain possession pending trial or further order.
Pursuant to an agreement, the defendant was to manufacture pultrusion dies for the making of fibreglass door frames for the plaintiff. The defendant received $75,000 for the manufacturing of the dies. The parties had an ongoing business relationship

is not satisfied. Reliance is placed primarily on three cases: *Robert Cooper Productions Inc. v. J.S. Kastner Associates Ltd.; Peco Tool & Die Ltd. v. 939991 Ontario Ltd.*; and *Tuffy v. Schloendorf*, [1993] O.J. No. 1581 (Gen. Div.). Although in each of those cases the plaintiff's motion for interim recovery was denied, the reasoning applied does not in my view deviate from the substantial grounds test set down in *Ryder Trucks* and the cases that followed it.

13 In *Robert Cooper Productions* the plaintiff a movie producer, entered into a contract with the defendant writers to write a "treatment" for a screen play. The agreement provided that the plaintiff was granted all rights to the products of the writers' services. The finished product "treatment" was turned over to the plaintiff. The plaintiff also claimed entitlement to the defendant's tapes and notes of interviews and this was the subject of the replevin action. Master Donkin held at p. 271-272:

> In this case we are concerned not with goods which ever were in the possession of the plaintiff but rather goods that were created in the course of doing the work called for by the contract between the parties, and the whole case falls to be determined on the interpretation of the agreement which will be done either by an arbitration under the I.P.A. agreement or as a result of a trial, or other final disposition of this action. It is not a case involving goods in which the title is obviously or apparently or most likely vested in the plaintiff and where the defendant sets up a contrary claim by way of lien or charge, but rather a situation where the whole case will turn on the ownership of the chattels and that in turn will depend on the interpretation of the contract. In my view, the plaintiff has not shown to me that he has any more likelihood of success than the defendant. It is my view that it is not appropriate nor consistent with the whole idea of replevin to make an order at this stage which must be based on the finding that the plaintiff is the owner when that proposition is contested and where the outcome of the contest cannot be foretold.

The defendant relies on this case as supporting its argument that where the whole case turns on the ownership question and the interpretation of a contract, then an interim recovery order should not be made. I do not agree. A great many replevin actions turn on the ownership or right to possession of chattels and the interpretation of the agreement between the parties. That is, indeed, the very nature of replevin actions. I believe Master Donkin's decision in this case really turned on his finding that he could not say that the plaintiff had shown more likelihood of success than the defendant and that therefore the plaintiff did not meet the substantial grounds test.

14 Likewise, in *Peco Tool & Die* the motions judge accepted the substantial grounds test but found that the test was not met by the plaintiff.

15 Again, to a similar effect is the decision in *Tuffy v. Schloendorf* in which Carter J. held:

> Because of the differing affidavits of the parties as to their intention when the original document was signed, and the several alterations and proposed alterations in terms discussed between the parties, I am satisfied that the question of ownership cannot be determined - or substantial grounds shown — without a full trial, where credibility will certainly play a part.

16 I agree that if it is not possible because of credibility issues and competing affidavit evidence to find that the plaintiff has shown "substantial grounds" then the plaintiff should not be successful on its motion. However, I do not see *Tuffy v. Schloendorf* as going beyond that. Accordingly, in my opinion the plaintiff is required to show substantial grounds supporting the claims advanced to meet the test required under the Act and Rule 44.01. This test is not altered by the three cases referred to by the defendant as discussed above.

17 I accept the submission of Mr. Capern that the plaintiff must satisfy all of the elements listed in Rule 44.01(1). In particular, it is not enough for the plaintiff to prove ownership or lawful entitlement to possession (as required by Rule 44.01(1)(c)). The plaintiff must also show that the property was "unlawfully taken" or is "unlawfully detained" (Rule 44.01(1)(d)). These are cumulative. Further, it is not enough for the plaintiff to assert that it is the owner and that the right to possession simply flows from that. Rather, there is a positive onus on the plaintiff to establish substantial grounds for its claim that its property is being unlawfully detained by the defendant.

18 It is not easy to articulate precisely the degree of proof which is required to meet the "substantial grounds" test. While the case law consistently identifies "substantial grounds" as the proper test, it is not immediately obvious where that test fits

into the broad spectrum. Obviously since the order is only for interim recovery pending trial, the degree of proof is less than would be required on a motion for summary judgment. No final disposition of rights is being made. That is not to say, however, that the rights of the parties are not significantly affected even on an interim basis. In many cases, losing possession of goods for the time it takes to bring an action to trial may have serious, and perhaps irreversible consequences. Accordingly, I believe the plaintiff must show more than a probability of success at trial or simply that the plaintiff is more likely to succeed than the defendant. The test is "substantial" grounds, not reasonable grounds or probable grounds.

19 The nature of a replevin order is in many ways similar to that of an injunction. Accordingly, I find the standard of proof applied in interlocutory injunctions to be useful for comparative purposes. Since *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 205, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) our courts have required that a party seeking an interlocutory injunction establish a "substantial issue to be tried". This is the threshold question and if it is answered in the affirmative a number of other issues must then be considered before relief should be granted (e.g. whether there would be irreparable harm unless an injunction is granted and the balance of convenience). *Yule v. Atlantic Pizza Delight* specifically rejected the "strong *prima facie* case" test which had formerly been applied in injunction cases and instead adopted the "substantial issue test" established by the English House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396. The reasoning in *American Cyanamid* was essentially adopted by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385. The "substantial issue" test for general interlocutory injunctions is not a difficult one to meet. In *RJR-Macdonald* the Supreme Court of Canada observed at p. 402:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claims is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: See *Metropolitan Stores, supra*, at p. 350. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of a leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

20 The "strong *prima facie* test continues to be applied, however, in Mareva injunction cases which, of course, are much more draconian than other forms of interlocutory injunctions. (*Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, 69 C.P.R. (2d) 62 (C.A.).)

21 The impact of an interim replevin order seems to me to fall somewhere between the general interlocutory injunction and the Mareva injunction. It goes further than the interlocutory injunction in that it does not simply restrain the defendant from using the asset but requires delivery up of the asset to the plaintiff. On the other hand, it does not go as far as the Mareva injunction because it extends only to particular assets to which the plaintiff is asserting a proprietary claim. In terms of effect, a replevin order directing the delivery up of property is more like a mandatory injunction than other forms of injunctive relief.

22 Courts have traditionally required a higher standard of proof for mandatory injunctions than for prohibitive injunctions and have therefore not applied the *American Cyanamid* test in those situations (Sharpe, Robert, *Injunctions and Specific Performance*, 2nd ed. Canada Law Book Inc., 1995 at p. 2.19 and 2.38-2.39). The test for an interlocutory mandatory injunction has been described as requiring a "high degree of assurance that at trial it will appear that the injunction was rightly granted" (*Ticketnet Corp. v. Air Canada* (1987), 21 C.P.C. (2d) 38 at 43 (Ont. H.C.)

23 Clearly, the test for whether a replevin order should be made is not going to be exactly the same as the test for any type of injunction. However, the term "substantial grounds" is somewhat vague and it helps, in my opinion, to put it in a contextual framework. As I have said earlier, it is obvious that the substantial grounds test is a lesser standard than the test for summary judgment. Similarly, I consider the Mareva injunction "strong *prima facie* case" requirement to be too high a standard for replevin orders which are much less draconian and far reaching. On the other hand, the "substantial issue" test (not frivolous or

vexatious) applied generally in prohibitive injunction cases is, in my view, too low a standard for a replevin order which requires one party to actually deliver up possession of property to the other. It must be remembered that before obtaining a prohibitive injunction, a party must satisfy other requirements not imposed on applicants for replevin (eg. the requirement of demonstrating irreparable harm which damages cannot remedy). As the replevin order is more in the nature of a mandatory injunction and is a greater interference with responding parties' rights than a prohibitive injunction, a stronger standard is required. Accordingly, I am of the view that the "substantial grounds" test for interim recovery of property requires a high degree of assurance that the plaintiff will be successful at trial.

24 Cases in which there is clear documentation supporting the plaintiff are more likely to meet the substantial grounds test. Cases in which straight issues of credibility will determine the action are less likely to meet the test. However, that is not to say that the presence of a credibility issue is fatal to the plaintiff's success or that a solid "paper trail" is unrebuttable by a defendant. Most cases will fall somewhere in the middle with some but not perfect, documentation and some issues of credibility. The case before me falls into that category.

Has the Plaintiff Clark Door Met the Substantial Grounds Test?

25 It is recognized by the parties that the plaintiff has met the requirements of Rule 44.01(1)(a)(b)(c) and (e). The main dispute between them is with respect to subparagraph (d) dealing with whether the defendant is unlawfully detaining the dies. The defendant Inline concedes that it was agreed between the parties that Clark Door would be the owner of the dies. However, Inline insists that ownership did not include a right to possession and that it was orally agreed between the principal of Inline (Mr. Rokicki) and the principal of Clark Door (Mr. Zafir) that possession of the dies would rest forever with Inline. Inline maintains that Clark Door's ownership rights in the dies extends only to prevent Inline from using the dies for any customers other than Clark Door. Mr. Rokicki's version of this oral agreement is flatly contradicted by Mr. Zafir. More significantly, Mr. Rokicki's characterization of the agreement is also contradicted by the documentary evidence.

26 The first document relating to the agreement between the parties is a price quotation given by Inline to Clark Door. Prices are quoted for dies, followed by the statement, "Delivery of the first die from the date of the orders is 6-8 weeks". Prices are then quoted on a per foot basis for the production of fiberglass products using the dies. The payment terms are stated to be 50% upon placing the order and 50% upon receiving goods. The plaintiff argues that the references to "delivery" and "receiving goods" are consistent with the plaintiff's claim to possession. I agree that these references are suggestive. However, since it was common ground that the dies were in fact manufactured at Inline's plant and were intended to be used there immediately in the manufacturing of door frames, rather than delivered to Clark Door, the reference to "delivery" and "receiving" could equally apply to delivery into the manufacturing process. Therefore, in my view this document is of little assistance in resolving the right to possession issue.

27 The dies which are the subject matter of this action were ordered by Clark Door under two purchase orders — one dated April 22, 1992 for die profile #130 and the other dated October 15, 1992 for die profile #125. The April purchase order specified:

> Tooling will be the property of Clark Door Ltd. Maintenance of Tooling is the responsibility of Inline Fiberglass Ld.

The October purchase order contained virtually identical provisions as follows:

> Tooling is property of Clark Door Co. Die maintenance is the responsibility of Inline.

28 (It was accepted by both counsel before me that the words "tooling" and "dies" are used interchangeably).

29 A letter from Mr. Rokicki at Inline to Mr. Zafir at Clark Door dated July 27, 1992 (after the first purchase order but before the second) confirms Clark Door's property interest in the dies. He wrote:

> As per our discussion, Inline Fiberglass Ltd. confirms being paid in full $17,449.60 + G.S.T. Inline Fiberglass Ltd. verifies that we will hold the tool on our premises, and that the die is the property of Clark Door. Furthermore, Inline Fiberglass

TAB 13

the proposal or order approving the proposal, the purchaser receives a good title to the property.

By virtue of ss. 69(1) and 69.1, there is a stay of proceedings after the filing of a notice of intention or a proposal, and the executing officer cannot, therefore, make a distribution of the money in its possession after a notice of intention or a proposal has been filed. If the proposal is accepted by creditors and approved by the court, the claims of execution creditors are settled by the proposal; consequently, the creditors have no claim against the money in the hands of the executing officer. The executing officer must, therefore, return the property to the debtor. If the proposal is rejected by creditors or the court refuses to approve it, the debtor is deemed to have made an assignment: see ss. 57(a) and 61(2)(a). In these circumstances, the licensed insolvency trustee will be entitled to the property in the executing officer's possession.

(3) — Seizure by the Executing Officer

If, prior to bankruptcy, the executing officer receives a writ of execution and makes a seizure, the executing officer must continue to enforce it until the executing officer receives a copy of the assignment or bankruptcy order certified by the trustee as a true copy: *Gobeil v. Cie H. Fortier*, 42 C.B.R. (N.S.) 209, [1982] 1 S.C.R. 988, 44 N.R. 384, 138 D.L.R. (3d) 50.

(4) — Sale of Debtor's Property by the Executing Officer

By s. 73(1), a *bona fide* purchaser at an executing officer's sale acquires a good title to the goods purchased as against the trustee of the former owner: *Gobeil v. Cie H. Fortier*, 42 C.B.R. (N.S.) 209, [1982] 1 S.C.R. 988, 44 N.R. 384, 138 D.L.R. (3d) 50.

Section 73(1) makes no distinction between a sale before, and a sale after, bankruptcy. Hence, if a person purchases a property of the bankrupt in good faith at an executing officer's sale held after the date of bankruptcy, the purchaser acquires good title to the property as against the trustee: *Gobeil v. Cie H. Fortier*, *supra*.

(5) — Distribution of Proceeds of Sale by the Executing Officer

Where the executing officer has sold the property of the debtor, the executing officer must deliver to the trustee the money so realized less its fees and the costs of the first execution creditor: s. 73(3); *Gobeil v. Cie H. Fortier*, *supra*; *Re Sauriol* (1931), 12 C.B.R. 206, 39 O.W.N. 532 (S.C.). The object of s. 73(3) is to limit the rights of judgment creditors with a view to securing an equal distribution of the bankrupt's assets among all creditors: *Re Stewart*, 7 C.B.R. 680, [1926] 2 D.L.R. 1043 (Ont. S.C.).

If there is a difficulty about the amount of the executing officer's fees, the taxation of the fees is properly carried out in the court from which the execution issued: *Moroschan v. Moroschan*, 1 C.B.R. 493, 14 Sask. L.R. 233, [1921] 2 W.W.R. 147 (S.C.); *Re Toronto Metal & Waste Co.* (1921), 2 C.B.R. 138, 51 O.L.R. 287, 67 D.L.R. 111 (S.C.).

Section 73 will not apply if the money in the executing officer's hands has been paid on behalf of the execution creditor by a stranger and not by the execution creditor: *Re Stewart*, 7 C.B.R. 680, [1926] 2 O.L.R. 1043. If this is the case, the executing officer must pay the money to the execution creditor, not to the trustee: *Bower v. Hett*, [1895] 2 Q.B. 337, 64 L.J.Q.B. 772 (C.A.). If, however, the money had been paid for and on behalf of the debtor with the debtor's money, s. 73 applies even though the payment has been made by a stranger.

Unlike s. 73(2), s. 73(3) does not refer to the trustee serving a certified copy of the assignment or bankruptcy order on the executing officer. However, where the executing officer has