COURT FILE NUMBER	24-2806908	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	EDMONTON	
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* RSA 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	
APPLICANT	915245 ALBERTA LTD. o/a PRAIRIE TECH OILFIELD SERVICES	
RESPONDENTS	1635623 ALBERTA INC. o/a ADRENALINE DIESEL and BONNIE'S EQUIPMENT SERVICES LTD.	
DOCUMENT	**BENCH BRIEF OF 1635623 ALBERTA INC. o/a ADRENALINE DIESEL**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McAllister LLP Brennan St. Arnaud 2500 Commerce Place, 10155 -102 Street Edmonton, AB T5J 4G8 T: 780-425-2500 F: 780-425-1222 File No 89733-4	

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I. FACTS

1. The Respondent, 1635623 Alberta Inc. o/a Adrenaline Diesel ("Adrenaline") performed repairs (the "Repairs") on a Peterbilt Tractor with the VIN: 1NPXD49X9GD305583 (the "Peterbilt"), between July and October 2021, at the request of the Applicant, 915245 Alberta Ltd. o/a Prairie Tech Oilfield Services (the "Applicant").[1]

2. The Applicant leases the Peterbilt from 1369274 Alberta Ltd.[2]

3. On September 30, 2021, Adrenaline invoiced the Applicant $27,086.54 for the Repairs and filed a Garage Keeper's Lien (the "Lien") at the Personal Property Registry against the Peterbilt for the invoiced amount.[3]

4. The Peterbilt has remained in the possession of Adrenaline since the Applicant delivered the Peterbilt to Adrenaline for repair in or around July 2021.[4] The Financing Statement registered at the PPR mistakenly indicates that Peterbilt had been released on September 30, 2021. This is not correct.[5]

5. On February 22, 2022, the Applicant filed a Notice of Intention to Make a Proposal (the "NOI") pursuant to section 50.4 of the *Bankruptcy and Insolvency Act (BIA).*[6]

6. On March 17, 2022, Adrenaline began the process to realize on its security. The Peterbilt was seized by the Consolidated Civil Enforcement Inc. on March 21, 2022 (the "Seizure").[7]

7. Adrenaline submits that:

a. prior to the NOI, Adrenaline took and maintained possession of the Peterbilt for the purpose of realization. The stay of proceedings set out in s 69(1) of the *BIA,* does not apply to Adrenaline pursuant to s 69(2)(a);

b. alternatively, if the exception to the stay does not apply, and the seizure is of no force and effect, then Adrenaline is entitled to maintain possession of the Peterbilt, since the continued possession of the Peterbilt is not deemed "unlawful" as a result of the general stay created by section 69(1) of the *BIA.*

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[1] Second Affidavit of Dwayne Vogel.
[2] *Ibid.*
[3] *Ibid.*
[4] Affidavit of Marty Pederson.
[5] *Ibid.*
[6] Second Affidavit of Dwayne Vogel; *Bankruptcy and Insolvency Act,* RSC 1985, s B-3 [*BIA]*.
[7] Affidavit of Marty Pederson.

II. ISSUES

8. The primary issues are as follows:

    a. Did Adrenaline take possession of the Peterbilt for the "purpose of realization" before the NOI was filed, such that the exception to the stay, set out at section 69(2)(a) of the *BIA* applies?

    b. If section 69(2)(a) of the *BIA* does not apply, does the general stay created by section 69(1) of the *BIA* render the otherwise lawful possession of the Peterbilt by Adrenaline "unlawful" pursuant to Rule 6.48 (a) of the Alberta Rules of Court? [8]

III. LAW

Garage Keeper's Liens and Common Law Liens

9. Pursuant to the *GKLA,* a "garage keeper" is a "person who keeps a place of business for the housing, storage or repair of a motor vehicle or farm vehicle and who receives compensation for that housing, storage or repair."[9]

10. The *GKLA,* creates two avenues for a garage keeper to be entitled to a lien. They are:

    a. Retaining possession of the motor vehicle, or

    b. Obtaining an acknowledgment of indebtedness from the person who authorized the repairs, and filing a Financing Statement at the Personal Property Registry.

11. In *Continental Bank of Canada v Henry Mogensen Transport Ltd. [Continental]*[10], Funduk M. explains a repairer's right to a common law lien and its interaction with a Garage Keeper's Lien. Funduk M writes that, "If a garagemen retains possession, the Act [*GKLA]* gives him a statutory lien which is coincidentally concurrent to the common law lien."[11]

12. In *Continental,* the garage keeper maintained possession of the motor vehicle, and also registered a lien. However, the registration was inaccurate due an incorrect serial number. Despite that, Funduk M. noted that resort to the filed claim of lien is not necessary, due to the continued possession by the garage keeper.[12] That is, mistakes in filing do not negate a garage keeper's lien when they have maintained possession.

13. Garage Keeper's Liens have priority over previously registered security interests.[13]

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[8] Alberta Rules of Court, Alta Reg 124/2010 [*Rules].*
[9] *Garage Keepers' Lien Act,* RSA 2000, c G-2 [*GKLA].*
[10] *Continental Bank of Canada v Henry Mogensen Transport Ltd.,* [1984] A.J. No 2583.
[11] *Ibid* at para 70.
[12] *Ibid,* at para 83.
[13] *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 112, at paras 79-83.

Secured Creditors, the Stay and the Exception Thereto

14. Section 2 of the *BIA* defines a Secured Creditor as

    "a person holding a mortgage, hypothec, pledge, charge, or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor…"[14]

15. Houlden, Morawetz and Sarra, write, in the 2019-2020 Annotated Bankruptcy and Insolvency Act, that "A mechanic or construction lien holder who holds a lien against the property of an owner who has become bankrupt is a secured creditor: *Re Rockland Chocolate & Cocoa Co. (1921)…"*[15]

16. Section 69 (1) of the *BIA* creates a general stay against the property of an insolvent person.

17. An exception to the general stay is created for Secured Creditors who take possession prior to a NOI being filed, by virtue of section 69(2)(a) which reads as follows:

    "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…"[16]

18. The Ontario Superior Court of Justice dealt with the exception in the case, *Janodee Investments Ltd. v Pellegrini [Janodee].*[17] In *Janodee,* the applicants sought an Order declaring that the stay created by filing a Notice of Intention did not apply with respect to their Writs of Possession and execution against real property due to section 69(2)(a). The notice of intention was filed on the same date that the sheriff attended at the property to enforce the Writ of Possession. The insolvent person was not removed from the property by the sheriff, but instead was given a "grace period". As a result, Lax J. held that the applicants never "took possession" prior to the Notice of Intention being filed.[18]

19. Although the instant case deals with personal property, and not real property, the explanation of section 69(2)(a) by Lax J. is helpful. Justice Lax wrote that, "the language of section 69(2)(a) is not the language of execution. It is the language of possession."[19] The language of the exception provision does not require a Secured Party to have executed on their security, it requires them to have taken possession for the purpose of

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[14] *BIA,* supra note 6, s 2.
[15] Houlden, Llyod W., Morawetz, Geoffrey B.; Sarra, Janis P; The 2019-2020 Annotated Bankruptcy and Insolvency Act, Page 725.
[16] *Ibid.*
[17] *Janodee Investments Ltd. v Pellegrini,* [2001] O.J. No 1388, 2001 CanLii 28455.
[18] *Ibid,* at para 19.
[19] *Ibid,* at para 18.

eventually executing.

20. In its Bench Brief, the Applicant cites *Goodfellow Inc. v Heather Building Supplies Ltd.[Goodfellow].* [20] *Goodfellow* is distinguishable from the current case, as in *Goodfellow* the issue was whether the plaintiff had a secured creditor's interest in lumber pursuant to an alleged conditional sales contract.[21] However, the plaintiff had not met the requirements of Nova Scotia's *Conditional Sales Act,* rendering the conditional sales contract unenforceable against third parties.

21. In the instant case, Adrenaline's Lien is valid and enforceable against third parties. The analysis of the possession of lumber by an unsecured party under a conditional sales contract is irrelevant to the issue of the possession of a vehicle pursuant to a valid lien by a Secured Creditor.

<u>Replevin and Unlawful Detention</u>

22. Applications and Orders for Replevin are governed by Rules 6.48 – 6.53 of the *Rules.* Specifically, Replevin actions relate to the recovery of personal property when the applicant claims that the property was unlawfully taken or is unlawfully detained.[22]

23. In *Reddick v Barry's Place Collision Repairs Ltd. [Reddick],* the Plaintiff brought an application for replevin of an automobile which was subject to both a common law lien and a garagemen's lien.[23] Master Funduk wrote, "If the Defendant has a valid common law lien (possessory lien) or a valid garagemen's lien he has most lawful excuse for retaining possession unless he is paid what is properly owing and due to him."[24]

24. In *Totalline Transport Inc. v Caron Belanger Ernst & Young Inc.*[25]*,* the Plaintiff claimed a storage lien pursuant to the *Repair and Storage Liens Act,* RSO 1990, c R-25, against the property of a bankrupt. The Plaintiff sought summary judgment, whereas the Trustee sought the return of the property which was in the possession of the Plaintiff. Justice Mossip held that the Plaintiff did not require leave of the court to exercise its security as a lienholder and that the Trustee was restrained from taking possession of the security.[26]

<u>IV. ANALYSIS & ARGUMENT</u>

<u>The Exception</u>

25. Adrenaline submits that it has maintained possession of the Peterbilt solely for the purpose of realization. There is no other purpose for Adrenaline to possess the Peterbilt, which has been sitting in Adrenaline's yard, taking up space for more than six months.

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[20] *Goodfellow Inc. v Heather Building Supplies Ltd.,* 1996 CanLii 5497 (NS SC).
[21] *Ibid,* at para 1.
[22] *Rules,* supra note 6, Rule 6.48 (a).
[23] *Reddick v Barry's Place Collision Repairs Ltd., [1984] A.J. No 448.*
[24] *Ibid,* at para 5.
[25] *Totalline Transport Inc. v Caron Belanger Ernst & Young Inc.,* [1999] O.J. No 660.
[26] *Ibid* at para 17.

26. As noted by Lax J. in *Janodee,* the language of section 69 (2)(a) is the language of possession not execution. If Parliament wished to prevent possessory lienholders from realizing on their security, the language of section 69(2)(a) could have extended the exception only to those Secured Creditors who had effected seizure prior to the filing of a NOI. However, Parliament opted to extend the exception to all secured creditors who had possession for the purpose of realization. This wording includes possessory lien claimants, whether the lien is through common law, or through the *GKLA.*

27. The Applicant conflates purpose and process. The purpose of maintaining possession of the Peterbilt is realization on the Peterbilt as security, whereas the process of realization is seizure and sale.

The Stay & Replevin

28. In the alternative, Adrenaline is in lawful possession of the Peterbilt as supported by *Reddick.* There is no basis for a Replevin Order granting the Peterbilt to the Applicant when a valid lien is in place.

29. The purpose of the general stay created by the filing of a Notice of Intention is to prevent creditors from seizing assets which the insolvent person has in its possession and is using in the process of restructuring. This is the underlying reasoning of the exception created by section 69(2)(a) of the *BIA.*

30. When an insolvent person does not have, and has not had, possession of an asset for more than six months, the purpose of the stay is no longer required for that specific asset. It is situations where possession already lays with a secured creditor that the stay need not apply.

31. The stay created by section 69(1) of the *BIA* removes a creditor's right to any remedy against an insolvent person's property, or ability to commence or continue any action, execution or other proceedings.[27] Adrenaline submits that the continued possession of the Peterbilt, is not a "remedy" or "action, execution or other proceeding", within the meaning of the *BIA.*

32. Finally, there is nothing in the *BIA* which directly states that a valid lienholder must return its security to an insolvent person who has filed a Notice of Intention.

Prejudice to Adrenaline Diesel

33. Adrenaline Diesel has a valid garage keeper's lien and common law possessory lien against the Peterbilt. Maintaining possession of the Peterbilt is the best way to ensure realization on the security.

34. Forcing Adrenaline Diesel to give up possession of the Peterbilt is prejudicial for the following reasons:

[27] *BIA*, supra note 6, s 69(1)(a).

a. If the Peterbilt is damaged in transport, the value of the Peterbilt may be reduced to amount less than the amount secured via the lien, thereby impacting Adrenaline Diesel's ability to recover the full amount secured; and

b. If the Peterbilt becomes part of the property of the insolvent person, then the Administration Charge created by the Order of Justice Burns, dated March 21, 2022, will rank in priority to the liens, possibility limiting the recovery of Adrenaline Diesel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of April, 2022.

McAllister LLP

Brennan St. Arnaud
Counsel for Adrenaline Diesel

V. LIST OF AUTHORITIES

Jurisprudence

1 *Continental Bank of Canada v Henry Mogensen Transport Ltd.*, [1984] A.J. No 2583.

2 *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 112.

3 *Janodee Investments Ltd. v Pellegrini*, [2001] O.J. No 1388, 2001 CanLii 28455.

4 *Goodfellow Inc. v Heather Building Supplies Ltd.*, 1996 CanLii 5497 (NS SC).

5 *Reddick v Barry's Place Collision Repairs Ltd.*, [1984] A.J. No 448.

6 *Totalline Transport Inc. v Caron Belanger Ernst & Young Inc.*, [1999] O.J. No 660.

Secondary Sources

7 Lloyd W. Houlden, Geoffrey B. Morawetz, & Janis P. Sarra, *The Annotated Bankruptcy and Insolvency Act*, 2019-2020.

Statutes and Regulations

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

Garage Keeper's Lien Act, RSA 2000, c G-02

Tab 1

Continental Bank of Canada v. Henry Mogensen Transport Ltd.

Alberta Judgments

Alberta Court of Queen's Bench

Master Funduk (In Chambers)

May 3, *1984*.

No. 8303-38081

[*1984*] *A.J. No. 2583* | [*1984*] 5 W.W.R. 110 | 32 Alta. L.R. (2d) 116 | 54 A.R. 27 | 27 A.C.W.S. (2d) 98

Between *Continental Bank of Canada*, and *Henry Mogensen Transport Ltd*. and Allwest Petroleum & Industrial Supplies *Ltd*.

(140 paras.)

Counsel

M. McCabe, for the applicant. N. St. Arnaud, for the respondent, Allwest Petroleum & Industrial Supplies *Ltd*.

MASTER FUNDUK

1 This is an application by the respondent Allwest Petroleum and Industrial Supplies *Ltd*. ("Allwest") for a declaration that it had a valid lien on a truck and that certain money in court be paid to it. The application is opposed by the applicant. The essential facts are not in dispute.

2 In December, 1979, the respondent *Henry Mogensen Transport Ltd*. ("*Henry*") purchased the truck under a conditional sale contract. The vendor then assigned the contract to the applicant.

3 In July and August 1983, *Henry* had Allwest do certain "work, maintenance and repairs" to the truck. Whatever was done by Allwest was allegedly completed by August 24, 1983. On September 2, 1983, Allwest filed a claim of lien pursuant to the Garagemen's Lien Act.

"a garageman who is entitled to payment of a sum for the storage, repair or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle or part thereof or the farm vehicle or part thereof for the sum to which he is entitled.

"(2) (not relevant)

"(3) ***No*** garageman is entitled to a lien under this Act unless he retains possession of the motor vehicle or farm vehicle or he obtains from

"(a) the person who authorized the storage, repair or maintenance or his authorized agent, or

"(b) the person who ordered that accessories or parts be furnished for the motor vehicle or farm vehicle or his authorized agent,

"an acknowledgment of indebtedness by requiring that person or his agent to sign an invoice or other statement of account."

Section 2(1) creates the lien and sets the parameters which dictate for what a garageman can have a lien for, the parameters being a debt incurred for those matters enumerated in clauses (1) and (b) of subsection (1).

69 Subsection (3) clearly gives a garageman an alternative in order to be entitled to a lien. He may simply retain possession of the vehicle. He may obtain a written acknowledgment of the debt. Sub-section (3) clearly uses the disjunctive "or". The garageman could probably do both. He could retain possession and obtain a written acknowledgment.

70 If a garageman retains possession the Act gives him a statutory lien which is coincidentally concurrent to the common law lien. The Act does not require that if the garageman retains possession of the vehicle he must also obtain a written acknowledgment of the debt or file a claim of lien, or both. Retention of the vehicle without anything else entitles a garageman to a garageman's lien.

71 Only if the garageman gives up possession, or never had possession, is he required to obtain a written acknowledgment of the debt and file a claim of lien within the time span dictated by s. 3.

72 If a garageman retains possession of the vehicle there is ***no*** need for him to obtain a written acknowledgment of the debt. In my view, the legislators intended the requirement for a written acknowledgment to be mandatory where the garageman would have to file a claim of lien in order to maintain it. The alternative in s. 2(3), the written acknowledgment, is a mandatory handmaiden to s. 3.

73 Section 3(1) provides:

"A lien referred to in s. 2 terminates on the 21st day after the day

"(a) on which possession of the motor vehicle or farm vehicle is surrendered to the owner or his agent,

> "(b) on which repairs were completed to the motor vehicle or farm vehicle or any part of the motor vehicle or farm vehicle if the vehicle was not at the time of repair in the possession of the garageman, or
>
> "(c) on which the accessories or parts for the motor vehicle or farm vehicle were furnished,
>
> "as the case may be, unless on or before the 21st day the garageman files a claim of lien in the prescribed form in the Vehicle Registry together with an affidavit made by the garageman or his agent verifying the claim in the prescribed form."

It must be kept in mind that the charging section is s. 2, not s. 3. Section 3 deals solely with the "termination" of the lien.

74 Section 3 deals with two situations: (1) where the garageman had possession but surrendered it to the owner, and (2) where the garageman never had possession. It does not include the situation where the garageman retains possession.

75 Section 3(1)(a) deals with a case where the garageman had possession but surrendered it. In that case he must file a claim of lien within 21 days or the lien terminates. However, if the garageman retains possession the 21 days never starts running and so the lien cannot terminate.

76 Clause (b) deals with a situation where the garageman did not have possession when he did the repairs. That is obviously intended to cover the situation where the vehicle is not brought to the garageman, but the garageman goes to the vehicle, which remains in the possession of the owner. A garageman attending at the owners residence to start the balky vehicle is a prime example.

77 Clause (c) is intended to cover the case of a supplier of accessories or parts. It is analogous to the materialman in a builders lien situation. Literally, the clause could mean that a garageman who has possession of a vehicle and repairs it and, in repairing it, supplies parts must file a claim within 21 days after the furnishing of the parts.

78 In my view that is not a reasonable interpretation of the clause. It would mean a garageman who retains possession of the vehicle would not have to file a claim for his labour but would have to file it for the parts supplied. It is clear from s 2(3)(b) that retaining possession of the vehicle for the supply of parts is just as allowable as retaining possession for repairs. Clause (c) is intended to cover the supplier of accessories or parts who does not have possession of the vehicle and accordingly cannot maintain a lien by retaining possession of the vehicle.

79 If a garageman retains possession of the vehicle the filing of a claim for lien is not necessary. The filing of a claim does not improve the garageman's position. Neither does it lessen his position. Only if the garageman later surrenders possession would he be forced to rely on the filed claim.

80 It also follows that if a garageman retains possession but does not file a claim of lien the time limit imposed by s. 7 would never start to run.

81 An interesting question arises if a garageman retains possession and files a claim for lien. Does the time limit imposed by s. 7 start to run? Could the garageman find himself in the position where after 6 months he *no* longer has a garageman's lien even though he still has possession of the vehicle?

82 The ramifications of inserting "unless he retains possession" in s. 2(3), which occurred in 1976, may not have been totally appreciated. I will refer to the legislative history of the Act later.

83 As Allwest retained possession of the truck it was entitled to a lien whether or not it also filed a claim of lien. The continuous possession is sufficient to support a garageman's lien. Resort to the filed claim of lien is not necessary. Accordingly, the erroneous serial number in the claim of lien is irrelevant.

84 It might be that a garageman who retains possession and does not file a claim of lien may be at risk as against bona fide third parties, by virtue of s. 5. However, an owner who authorizes the repairs obviously cannot claim the protection of s. 5. The applicant is an owner who authorized the repairs.

85 I find that at the time of seizure on behalf of the applicant Allwest had a valid garageman's lien by virtue of its continued possession of the truck.

Possessory Lien

86 Counsel for the applicant submits that Allwest does not have a possessory lien because of s. 13 of the Possessory Lien Act. Counsel for the applicant submits that as there is provision for realizing by sale in the Garagemen's Lien Act Allwest cannot have a possessory lien.

87 If Allwest has a garagemen's lien then whether or not it also has a possessory lien is academic. However, if Allwest does not have a garagemen's lien then it must rely on having a possessory lien.

88 In effect, the submission of counsel for the applicant is that a garageman cannot have a possessory lien because of the existence of the Garagemen's Lien Act. I do not agree that s. 13 of the Possessory Liens Act has that effect.

89 Section 13 provides:

"13 This Act

"(a) applies only to cases of lien where

'(i) there is *no* provision for realizing by sale in any other statute, and

'(ii) *no* provision is made in any other statute for determining the rights of the owner of the goods and chattels and the bailee,'

"and

"(b) in particular does not apply to a lien given under the Innkeepers Act, the Livery Stable Keepers Act or the Warehousemen's Liens Act."

90 The common law lien, or legal lien, is a creature of the common law. It is today usually described by one of its mandatory attributes, being possession. Apart from statute, the term possessory lien is synonymous with common law lien.

91 The common law lien is somewhat of an umbrella. The word "lien" is from the Latin "ligamen", which means "a binding". The common law lien then binds something, the something being property.

92 The common law lien has two classes, being a general lien and a particular lien. The general lien allows the lien claimant to retain possession of the property for any claims relating to the property in question and also for other claims which are not related to the property.

93 The particular lien, on the other hand, is a right the lien claimant has to retain possession of property in respect of which the liability has been incurred. In other words, the liability to the lien claimant must be connected in some way to the property.

94 If Allwest has a possessory lien it is not a general lien so the law relative to a general lien can be ignored. Hereafter references to the common law lien or possessory lien will mean a particular lien.

95 C.E.D. (Ont.) (3rd Ed.), vol. 19, states that:

> "A common law lien is a right given to one person to retain possession of the property of another person until such time as that other person satisfies certain conditions, usually, although not necessarily, the payment of a debt." (p. 86-13)

That is a reasonably accurate description.

96 There are three basic categories where the common law allowed a lien:

(1) where the law obliged certain classes of persons to receive goods;

(2) where work was done on a chattel;

(3) where the surety paid the debt of the principal debtor.

131 Although it is probably unusual for a garageman to both retain possession and file a claim of lien it is not unusual for a garagemen to merely retain possession. Since 1976 a garageman who retains possession has, on the face of it, both a possessory lien and a garageman's lien. Can he go under the Possessory Liens Act or must he go under the Garagemen's Lien Act? Does the effect of s. 13 of the Possessory Liens Act negate a possessory lien for a garageman who retains possession? Is the garagemen who retains possession limited to proceeding under the Garagemen's Lien Act?

132 If Allwest still had possession of the truck and was attempting to realize its debt by sale of the truck the above issue would exist.

133 However, the truck has been sold by the applicant, not Allwest, and the amount of Allwest's claim is in court. The order granted under Rule 469 allowed the applicant to have possession of the truck, sell it and pay the amount of Allwest's claim into court. That being the case, it is not necessary to consider whether or not s. 13 of the Possessory Liens Act would have required Allwest to "realize by sale" under the Garagemen's Lien Act.

134 As Allwest had a garageman's lien which bound the applicants interest in the truck it is not necessary to decide whether Allwest could have also had a possessory lien.

135 In Alberta Drilling & Developing Company Limited *v.* Lethbridge Iron Works Company Limited, *[1947] 1 W.W.R. 983* (Alta. D.C.), Sissons, J., indicates that the Possessory Liens Act does not create the lien, but that the Act merely gives the additional right of sale to the lienholder.

136 If that is correct it may be that s. 13 does not negate a possessory lien, but merely requires that if there is another statute which deals with "realizing by sale" that statute is to apply. The effect is that the Possessory Liens Act only catches those lien claimants who would otherwise fall between the cracks. The Possessory Liens Act and all the other statutes would cover the field between them.

137 Alberta Drilling and Developing Company Limited also deals with the question of an owner "requesting" that work be done by authorizing someone else to have the work done.

Decision

138 I find Allwest had a valid garagemen's lien at the time of seizure of the truck, that the lien is valid not only as against *Henry*'s interest in the truck but also as against the applicant's interest in the truck.

139 There will be an order that the clerk pay to counsel for Allwest the money in court in this action.

Tab 2

Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2012 ABQB 112

Date: 20120221
Docket: 1003 11241, 1003 05560
Registry: Edmonton

2012 ABQB 112 (CanLII)

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendant's

And Between:

Docket: 1003 05560
BKCY Action No: 24-115359

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

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

And in the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] On April 7, 2010, Cow Harbour Construction Ltd. (“Cow Harbour”) applied for a stay of proceedings against it under section 11.02 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. This Court granted that order (“Initial Order”) in *CCAA* action number 1003-05560, and extended the stay of proceedings from time to time by a number of subsequent orders.

[2] The history and other background information concerning this Court’s handling of the Cow Harbour matter is in its decision reported as ***Royal Bank of Canada v Cow Harbour Construction Ltd***, 2010 ABQB 637, 504 AR 319, leave to appeal den’d ***De Lage Landen Financial Services Canada Inc v Royal Bank of Canada***, 2010 ABCA 394, 499 AR 198. The present decision deals exclusively with applications by Fountain Tire Mine Services Ltd. (“Fountain Tire”) and Kramer Ltd. (“Kramer”), in which they claim that they have valid garage keepers’ liens (collectively, the “Liens”).

[3] Fountain Tire and Kramer (collectively, the “Lien Claimants”) registered the Liens pursuant to the *Garage Keepers' Lien Act*, RSA 2000, c G-2 [*Act*] against equipment that Cow Harbour owned or leased. The Lien Claimants registered notice of their Liens at the Alberta Personal Property Registry (“Alberta PPR”).

[4] This Court eventually appointed PricewaterhouseCoopers Inc. as receiver and manager of Cow Harbour’s assets, property and undertaking (“Receiver”). The Receiver sold most of Cow Harbour’s assets to a third party, but retained an amount representing the Liens, pending this Court’s determination of their validity.

[5] GE Canada Equipment Financing G.P. (“GE”), which held general security over Cow Harbour’s assets, property and undertaking, challenges the validity of the Liens.

[6] This Court will outline the specific fact situation relating to each of the Lien Claimants’ claims later in these Reasons, but first it is useful to provide the legislative and jurisprudential background that will guide this Court through its reasoning.

II. Legislation and Case Law

[7] The *Act* provides:

> 2(1) In addition to every other remedy that a garage keeper has for the recovery of money owing to the garage keeper for
>
> > (a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or

2012 ABQB 112 (CanLII)

[75] Perfection of the liens was maintained under Alberta law only to the extent that Kramer met the requirements of the *AB PPSA* s 5(2).

[76] Ronald C.C. Cuming and Roderick J. Wood, in 4th ed., *Alberta Personal Property Security Act Handbook* (4th ed) (Scarborough Ont.: Carswell, 1998) comment at 105:

> ... Failure to perfect under the *PPSA* within the periods specified in section 5(2) results in the foreign security interest being treated as unperfected from the moment the collateral comes into the province.

[77] However, even though perfection of the liens may not have been maintained uninterrupted, Kramer could still perfect the liens under Alberta law (*AB PPSA* s 5(3)). Like the Saskatchewan legislation, the *AB PPSA* s 19 provides that a security interest is perfected when it has attached and all steps required for perfection under that statute have been completed, regardless of the order of occurrence. According to *AB PPSA* s 25, registration of a financing statement perfects a security interest in collateral.

[78] As provided in the *SK PPSA* s 6, the priority of the liens is determined under Alberta law.

3. Conclusions

[79] As Kramer registered financing statements at the Alberta PPR within 21 days after surrendering possession of the Vehicles to Cow Harbour, its liens are valid pursuant to the *Act* and have been perfected pursuant to the *AB PPSA*. Their priority will depend on when Kramer registered the financing statements. If it registered them before it surrendered possession of the equipment to Cow Harbour, the liens will be considered to have been continuously perfected for purposes of determining priority.

[80] If Kramer registered the financing statements after giving up possession of the Vehicles, for purposes of determining priority perfection will be considered to have been interrupted between the date when Kramer surrendered possession of the Vehicles to Cow Harbour and the date Kramer registered the financing statements.

[81] Priority is governed by the *AB PPSA* s 32, which states that a garage keeper's lien has "priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority." However, the *Act* s 4 also applies. It provides that every lien on a Vehicle under the statute is postponed to an interest in or charge, lien or encumbrance on the Vehicle that is created or arises in good faith and without express notice of the first mentioned lien, and that was created or arose before the registration of a financing statement. The garage keeper's lien is postponed to a security interest taken *bona fide* and without notice in the interim between the garage keeper's lien arising and notice of it being registered (emphasis added). As stated in ***Craddock Trucking*** at para 11:

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> ... the priority given to a lien that meets all the requirement of [*AB PPSA*] s. 32 can be lost if “the lien is given by an Act that provides that the lien does not have the priority." This exception would apply, i.e. s. 5 of the ***Garagemen's Lien Act*** [the predecessor of the *Act* s 4] would be triggered, if Paccar's [security] interest arose after the lien claimant surrendered possession of the vehicle and before the lien claimant had registered its interest at the Personal Property Registry.

[82] The rationale for this was set forth in ***Craddock Trucking*** at para 8, where the court said:

> ... [T]he lien claimant favoured by [*AB PPSA*] s. 32 is someone who has supplied materials or services that have increased or preserved the value of the collateral, over and above the value that might otherwise have been expected, and it would be giving the owner of the security interest an unjustifiable windfall to allow him to claim the improved property, unencumbered by the lien, while the lien claimant remains unpaid.

[83] In the case before this Court, there are no charges, liens or encumbrances that have arisen after Kramer surrendered possession of the Vehicles and before it had registered its lien interest at the Alberta PPSA. Thus, Kramer would retain it priority over the Vehicles in question.

Heard on the 2nd day of November, 2011 to the 4th day of November, 2011.
Dated at the City of Edmonton, Alberta this 21st day of February, 2012 .

K.D. Yamauchi
J.C.Q.B.A.

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Tab 3

Janodee Investments Ltd. v. Pellegrini

Ontario Judgments

Ontario Superior Court of Justice

Lax J.

Heard: January 15, 2001.

Judgment: April 12, 2001.

Court File Nos. 01-CL-003995 and 01-CL-003996

[2001] O.J. No. 1388 | [2001] O.T.C. 247 | 25 C.B.R. (4th) 47 | 104 A.C.W.S. (3d) 627

IN THE MATTER OF the Intended Proposal of Rieso Jim Pellegrini under the Bankruptcy and Insolvency Act Between ***Janodee*** Investments Limited, applicant, and Rieso Jim Pellegrini and Shiner Kideckel Zweig, Trustee in Bankruptcy, respondents And between Leroy McQuaid, applicant, and Rieso Jim Pellegrini and Shiner Kideckel Zweig, Trustee in Bankruptcy, respondents

(35 paras.)

Case Summary

Bankruptcy — Proposals — Effect of proposal — Stay of proceedings, what proceedings stayed.

Application by ***Janodee*** Investments and McQuaid for an order declaring that a stay pursuant to the Bankruptcy and Insolvency Act did not apply. In the alternative, they sought an order lifting the stay. ***Janodee*** and McQuaid were the first and second mortgagees on property owned by Pellegrini. Both obtained writs of possession against Pellegrini. The sheriff attended at the property to execute ***Janodee***'s writ of possession. Pellegrini's wife asked him to delay the execution until her husband returned home. In the meantime, Pellegrini filed a notice of intention to make a proposal under the Act. ***Janodee*** and McQuaid were the only two secured creditors, and the value of the property was less than the amount owed on the mortgages.
HELD: Application allowed.

When the sheriff entered the premises and indicated his intention to remove the Pellegrinis from the premises, he had taken possession of the property. The writ of possession was not fully executed when the notice of intention was filed as the sheriff had not yet departed from the property. However, the Act did not require that the execution had taken place, but merely that possession had occurred. The sheriff merely offered a grace period to Pellegrini. There was nothing that Pellegrini could propose that could have any effect on other creditors. His notice of intention to make a proposal constituted an abuse of the bankruptcy process. The creditors had proceeded diligently.

Upton v. Wells (1589), 1 Leon. 145 state that the "Sheriff, or his officer, should remove all persons from off the premises, for if any persons are left thereon the execution is not complete" (at p. 184). In addition, the authors state that "execution is not complete until the bailiffs are withdrawn and possession completely given" (at p. 187)

17 On these authorities, it is clear that the Writ of Possession was not fully executed when the Notice of Intention was filed. This is consistent with the law that applies to a Writ of Execution or a Writ of Seizure and Sale. In these cases, execution is not complete until the property has been seized and sold and the proceeds turned over to the execution creditor: see, for example, Oxley, Re *(1997), 5 C.B.R. (4th) 258* (Alta. Q.B.).

18 Nevertheless, the language of section 69(2)(a) is not the language of execution. It is the language of possession. ("took possession of secured assets for the purpose of realization"). The neat question is whether a secured creditor, in the process of executing a Writ of Possession, can be considered to have taken possession for the purpose of section 69(2)(a) when the Sheriff has taken possession but has neither evicted the occupants nor delivered possession to the secured creditor.

19 I was not referred to any authorities on point and I am not aware of any, but the "foot in the door" argument of the applicants is not persuasive. The execution of a Writ of Possession appears to require three distinct steps: possession, eviction and delivery of possession to the creditor. Here, the Sheriff may have taken possession, but he returned it to the debtor before eviction and the transfer of possession to ***Janodee***. ***Janodee*** had a right to possession by virtue of its judgment and Writ of Possession, but, it never "took possession" as the writ was not fully executed.

20 Mr. Solomon submitted that the Sheriff had no discretion to offer a grace period and that in doing so, he prejudiced ***Janodee***'s execution. In support of this proposition, he relied on the decision in Central Guaranty Trust Co. v. McRae et al. *(1993), 13 O.R. (3d) 295* (Gen. Div.). In this decision, the Sheriff had refused to execute a writ of possession, relying on a statutory declaration by an occupant that he was a tenant. In fact, there was evidence before the Master attesting to the fact that the purported tenant was not a tenant under the Landlord and Tenant Act. At p. 298, McCombs J. stated:

> A writ of possession is an order of the court. It is granted only after a judge or master has made a judicial determination which includes consideration of the rights of the occupants. A Sheriff is an officer of the court, sworn to uphold the law. Refusal by a law enforcement officer to enforce an order of the court can only serve to undermine respect for the judicial system and bring the administration of justice into disrepute. A sheriff, therefore, has no discretion to refuse to execute a writ of possession.

21 In my view, there is a difference between refusing to execute a Writ of Possession and executing a Writ of Possession in a manner that is respectful to the occupants of the property. The above authority makes clear that in levying execution, the Sheriff acts on the direction of the court and is not the agent of the execution creditor: see also, Frontec Corp. v. Halifax (Regional Municipality) *(1999), 182 N.S.R. (2d) 130* (N.S.S.C.). It would bring no

Tab 4

Nova Scotia Judgments

Nova Scotia Supreme Court

Sydney, Nova Scotia

MacAdam J.

Heard: November 30 and December 1, 1995.

Judgment: April 3, 1996.

S.H. No. 120591

[1996] N.S.J. No. 140 | 150 N.S.R. (2d) 341 | 40 C.B.R. (3d) 189 | 62 A.C.W.S. (3d) 1216

Between Goodfellow Inc., plaintiff, and Heather Building Supplies Limited, defendant

(35 pp.)

Case Summary

Bankruptcy — Proposals — Effect of proposal — Stay of proceedings, provisional execution — Conditional sales — Seller's remedies, repossession and sale — Repossession — Effect of failure to register.

Application to determine whether the plaintiff Goodfellow had a secured creditor's interest in certain lumber previously sold to the defendant Heather. The plaintiff was a wholesaler which sold lumber to the defendant. With each delivery, the plaintiff enclosed a sales order and an invoice. The defendant was often late with payment. In the last few years of the relationship, the plaintiff included a stamp on the invoice stating that it remained the rightful owner as long as the purchase price had not been paid. The defendant owed the plaintiff about $167,000. The latter commenced an action and obtained judgment. Lumber allegedly secured under conditional sales contracts was recovered and stored in the plaintiff's warehouse. During the three-day period provided under the rules of civil procedure in which others could make claims on the goods, the defendant filed a notice of a stay of proceedings, as well as a notice of intention to make a proposal. At issue was the plaintiff's interest in the goods.
HELD: Plaintiff did not have a secured creditor's interest in the lumber.

The goods were to be among the assets distributed by the trustee. The reservation in title made by the plaintiff was valid for establishing conditional sales. However, it could only be enforced against third party creditors if the conditional sales complied with the Conditional Sales Act. A seller who did not comply with the Act's provisions was prohibited from asserting its common law rights. In order to retain the common law rights of a conditional sales contract, the seller had to register the agreement. The plaintiff did not do so. Insofar as the requirements of the Act

were not complied with, the provision that title remained in the seller was void. A trustee under a proposal had the authority to challenge preferences. The plaintiff's seizure of the goods did not preclude the effectiveness of the stay pursuant to the Bankruptcy and Insolvency Act.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, *R.S.C. 1985, c. B-3, ss. 50.4*(1), 66(1), 71(2), 73(2), 135. Bills of Sales Act, R.S.N.S., 1923, c. 201, s. 8. Conditional Sales Act, R.S.N.S. 1985, c. 84, s. 3. Nova Scotia Civil Procedure Rules, Rule 48.06(1).

Counsel

Joseph M.J. Cooper, Q.C., for the plaintiff. Douglas J. Lloyd, for the defendant.

MacADAM J.

1 This application is to determine whether the plaintiff, pursuant to alleged conditional sales contracts, has a secured creditor's interest in certain lumber it had previously sold to the defendant.

Background

2 The plaintiff, (also herein referred to as "Goodfellow"), is in the business of wholesaling lumber and over the years sold to the defendant, (also herein referred to as "Heather"), upon the receipt of telephone orders. With each delivery the plaintiff would enclose a "sales order/packing slip" listing certain particulars of the sale, including the quantity and a description of the goods. Upon receipt, a representative of the defendant would sign a copy of the "sales order /packing slip", ostensibly as confirmation of receipt of the goods thereon listed.

3 Later, an invoice would be forwarded listing the unit prices for the goods acknowledged on the "sales order/packing slip" and also containing the total price and the terms of payment in respect to the goods in question. Although the defendant was sometimes late in making payment, this business relationship, between the plaintiff and the defendant, continued for approximately 10 years.

4 For approximately five to six years, the "sales order/packing slip" and the ensuing invoice each had stamped thereon:

> "RESERVE ON OWNERSHIP: GOODFELLOW INC. WILL REMAIN THE RIGHTFUL OWNER OF ALL GOODS SOLD TO THE BUYER AS LONG AS THE PURCHASE PRICE HAS NOT BEEN PAID IN FULL."

From a practical point of view this decision, from the position of the trustee in bankruptcy, is in its effect undesirable, since abuses might take place and injustice could be done to creditors, who are intended to be protected by the Bills of Sale and Chattel Mortgages Act, if a mortgagee were permitted to overcome a serious defect in a mortgage by simply taking possession of the goods and chattels and disposing of them shortly before bankruptcy."

38 Relevant to the present proceeding is the further statement by Justice Coffin, also at p. 336:

" Accepting the view that the defective bills of sale are voidable, the position so far as the mortgagee Traders Finance Corp. is concerned, has not been improved. The sale under the repossession notices had not been completed before the Trustee in Bankruptcy commenced these proceedings. There was no disposal of the assets by the mortgagee within the meaning of the Meriden case and Re Shelly Films Ltd., supra."

39 Even if the obtaining and service of the Recovery Order, by Goodfellow, constituted "an effective, open and notorious re-taking of possession", in view of the statutory requirement for the goods to be held for three days in order to provide Heather with an opportunity to regain possession by the filing of a Bond and assuming the word "void", as it appears in s. 3 (1), is to be construed as "voidable", it is clear that here there was no disposal of the assets by Goodfellow prior to the intervention of the trustee by the service of the Notice of Intention to Make a Proposal and the Stay of Proceedings, pursuant to the Bankruptcy Act,

40 In Maritime Office Systems Ltd. (Bankruptcy Trustee) v. Borgwarner Acceptance Canada Ltd. *(1986), 75 N.S.R. (2d) 83*, Justice Hallett held a conditional sale void, as against the Trustee in Bankruptcy of the buyer, where the agreement was not executed within ten days of delivery as required by the Conditional Sales Act. At p. 86 he said:

"Insofar as the requirements of the Act as to the registration were not complied with, the provision of the contract that title remained in the vendor is void and Maritime would be deemed to be the owner of the goods pursuant to the provisions of s. 2 of the Act. Maritime executed an assignment in bankruptcy in favour of Peat Marwick Limited in February of 1986 and, as a consequence, the Trustee in Bankruptcy has title to the photocopier and Borg-Warner, the assignee of the contract, has no interest therein."

41 Whether the agreement is "void" or "voidable" on account of the failure to comply with the statutory provisions, it is clear, at least in Nova Scotia, the mere act of re-taking possession by the conditional vendor is not sufficient to cure a defect in registration or in the instrument itself.

(c) Is the applicant entitled to bring an application to have the purported reservation of title declared void as against certain of the creditors of the defendant?

42 Counsel for Goodfellow Inc., in a supplementary memorandum, raises "the appropriateness of a Trustee under a proposal to attack the non-registration of a conditional sales agreement" citing Re Zutphen Bros. Construction Ltd. (Insolvent), *(1994), 132 N.S.R. (2d) 337*. Zutphen Bros., an insolvent company, filed a proposal that was

Tab 5

Reddick v. Barry's Place Collision Repairs Ltd.

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

Master Funduk (In Chambers)

April 6, 1984.

No. 8404-09769

[1984] A.J. No. 448

Between Benjamin Reddick, plaintiff, and Barry's Place Collision Repairs Ltd., defendant

(8 pp.)

Counsel

Coley, Gustafson & Ewasiuk, for the plaintiff. L. Marr, for the defendant.

REASONS FOR DECISION

MASTER FUNDUK

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

2 Certain facts are not in dispute. The Plaintiff was at all relevant times the owner of the automobile which is the subject matter of the action. The automobile was damaged in a collision. The automobile was repaired by the Defendant. The Defendant retains possession of the automobile. The Defendant has not been paid. The Plaintiff wants possession of the automobile.

3 The Plaintiff gives evidence as follows:

> 3. THAT on or about October 23, 1983, the said motor vehicle was involved in a motor vehicle collision. As a consequence of the collision, the said motor vehicle was rendered inoperative and was towed to the Defendant's place of business for the purposes of obtaining a repair estimate.

14. THAT the circumstances referred to in paragraph 13 herein were communicated to the Defendant during our telephone conversation of November 21, 1983, at which time the Defendant again stated that the terms of the agreement were that payment had to be in advance.
15. THAT I am advised by a friend of my common-law wife and do verily believe that a tow truck arrived at my residence shortly after November 21, 1983 and the said motor vehicle was towed away.
16. THAT I was not at that time residing at 6408 - 157 Avenue, Edmonton, and I first became aware of the fact that the said motor vehicle was missing on or about December 2, 1983, at which time my brother advised that the vehicle was gone.
17. THAT I was shortly thereafter verbally advised by the Defendant that the said motor vehicle was repaired.
18. THAT at no time did I authorize such repair by the Defendant; that any agreement reached for such repairs was clearly conditional on the Defendant's receipt of the cost of such repairs.
19. THAT I admit that the Defendant is entitled to the reasonable cost of repairs effected by it to the said motor vehicle but the Defendant refuses to deliver up possession of the said motor vehicle to me.
20. THAT the value of the said motor vehicle, in my opinion, is in the approximate sum of $4,000.00.
21. THAT I make this Affidavit in support of an application for an Order of ***Replevin*** directing the Sheriff to replevy the said motor vehicle and return possession to me.
22. THAT the grounds of the said application are that the Defendant refuses to deliver up possession of the said motor vehicle without lawful excuse. (emphasis mine)

4 In view of the admission in paragraph 19 of the plaintiff's affidavit, the logic of the Plaintiff's position that the Defendant does not have "lawful excuse" for retaining the automobile escapes me.

5 If the Defendant has a valid common law ***lien*** (possessory ***lien***) or a valid garageman's ***lien*** he has most lawful excuse for retaining possession unless he is paid what is properly owing and due to him. It is clear the Defendant has not been paid anything.

6 It is clear from the Plaintiff's own evidence that there was a contract between the parties. The only possible dispute might be as to its terms.

7 The Plaintiff's evidence is most contradictory. He states, in the first part of paragraph 18, that he never authorized the repairs. Then he admits, in paragraph 19, that the Defendant is entitled to the reasonable cost of repairs.

8 Counsel for the Plaintiff submits that the Defendant does not have a valid ***lien*** because it did not obtain an acknowledgment of indebtedness in writing. I disagree.

9 First, the Defendant has retained possession of the automobile. That alone entitles it to a garageman's ***lien*** if the repairs were requested or authorized by the Plaintiff.

10 In 1976 the Garagemen's ***Lien*** Act was amended to allow a garageman to maintain the garageman's ***lien*** given by section 2(1) merely by retaining possession of the vehicle.

11 Section 2(3) provides:

> (3) No garageman is entitled to a ***lien*** under this Act unless he retains possession of the motor vehicle or farm vehicle or he obtains from
>
> (a) the person who authorized the storage, repair or maintenance or his authorized agent, or
>
> (b) the person who ordered that accessories or parts be furnished for the motor vehicle or farm vehicle or his authorized agent,
>
> an Acknowledgment of indebtedness by requiring that person or his agent to sign an invoice or other statement of account.

The subsection uses the disjunctive "or". The garageman must retain possession or obtain an acknowledgment of indebtedness in writing. The Defendant has done the first here. That is sufficient for it to maintain a garageman's ***lien*** if it otherwise has a right to one.

12 The time limit imposed by section 3(1) for filing a claim of ***lien*** does not come into play where the garageman retains possession. It cannot. It is a matter of fact.

13 Clause (a) cannot apply where the garageman retains possession because there is obviously then no surrender of possession.

14 Clause (b) deals with the case where the garageman never had possession.

15 Clause (c) deals with the materials supplier who never had possession.

16 None of the clauses can apply in a case where the garageman had possession and retains possession. Hence the time limit for filing a claim of ***lien*** never starts to run.

17 Second, even if the Defendant does not have a valid garageman's ***lien*** by retaining possession alone it would have a valid common law ***lien*** (possessory ***lien***) if the repairs were requested or authorized by the Plaintiff. The Defendant would have the right to retain possession of the automobile until it was paid by the Plaintiff. The Defendants right to a common law ***lien*** is a defence to a ***replevin*** claim by the Plaintiff.

Tab 6

Totalline Transport Inc. v. Caron Belanger Ernst & Young Inc.

Ontario Judgments

Ontario Court of Justice (General Division)

Brampton, Ontario

Mossip J.

February 26, 1999.

Court File No. 99-BN-0101

[1999] O.J. No. 660 | 8 C.B.R. (4th) 307 | 86 A.C.W.S. (3d) 665

Between Totalline Transport Inc., plaintiff, and Caron Belanger Ernst & Young Inc., personally and as Trustee in Bankruptcy and Receiver for Adventure Electronique Inc./Adventure Electronics Inc., a bankrupt, defendant

(10 pp.)

Case Summary

Liens — Particular or possessory lien — Creation at common law — When available — What property is subject to lien — Creation by statute — Garagemen's lien — Suppliers of services — Towing and storage — Bankruptcy — Trustees — Powers of — Respecting security.

Motion by the plaintiff, Totalline Transport, for injunctive relief and summary judgment. The dispute was over a truck load of goods owned by the defendant, Adventure Electronics, that was being stored by Totalline. Totalline claimed a statutory shipper's lien for shipping charges owed to it, and a storage lien under common law. The defendant, Caron Belanger Ernst & Young, was the trustee in bankruptcy, and claimed that the goods belonged to the bankrupt, and therefore to the trustee. Totalline also sought leave to commence an action against Caron for damages occasioned when it tried to enforce an order of the Bankruptcy Division of the Superior Court of Quebec. HELD: Motion allowed.

Totalline did not require leave to exercise its security pursuant to a carrier's lien and a storer's lien under the Repair and Storage Liens Act. Totalline was entitled to exercise these liens outside of the bankruptcy. The goods that composed the security held by Totalline did not form part of the bankrupt's property that could be seized by the trustee. The trustee was restrained from taking possession of the goods and inventory in Totalline's possession that formed the security for its shipper's and storer's lien. Totalline was required to seek leave from the Bankruptcy Division of the Superior Court of Quebec for the action against the trustee.

12 There does not seem to be any dispute that the plaintiff has a shipper's lien for carriage of Adventures' goods, and a warehouseman's lien for the storage of the goods once it was unable to deliver same to one of Adventures' stores that had been closed pursuant to the bankruptcy. There is certainly an issue as to the amount of the liens and the circumstances under which the plaintiff refused to turn over the good when requested by the trustee. The trustee submits that there was at the initial time of the request a very small storer's lien, and they were from the outset prepared to pay the shipper's charges. The trustee submits that the plaintiff, in fact, held the goods because of an unrelated outstanding account that the plaintiff thought they would loose in any bankruptcy of the defendant company. The plaintiff, on the other hand, asserts that at all material times it was prepared to turn over the goods once its shipping and storage charges were paid.

13 It will be a matter for the judge finally determining the amount of the storer's lien to resolve these factual disputes. It will be a matter of fact as to whether the goods continued to be held by the plaintiff, and were not able to be delivered through "no fault" of the plaintiff.

14 I find that the plaintiff does not need leave of the court to exercise its security pursuant to a carrier's lien and a storer's lien under the Repair and Storage Liens Act. The plaintiff is entitled to exercise these liens outside of the bankruptcy. The plaintiff is a secured creditor that can exercise on its security pursuant to s. 69.3(2). The goods that compose the security held by Totalline do not form part of the bankrupt's property that can be seized by the trustee.

15 Having said this, this order will provide that the plaintiff pay all funds into court that it realizes on exercising its liens. The funds shall remain in court until there is a determination of the exact amount of the liens, pursuant to s. 23 of the Repair and Storage Liens Act. Hopefully that issue can be decided following cross-examinations and a motion for summary judgment brought pursuant to Rule 20, with the appropriate material being filed on such a motion.

16 I do not accept the position of the trustee that this is splitting the actions of the plaintiff. These are distinct and separate causes of action that have, in my view, distinct and separate remedies. The cause of action for damages against the trustee will continue in a statement of claim after the plaintiff has sought leave in the Quebec Bankruptcy Court, and there has been a determination as to that issue, and as to which province should hear that claim. The issue with respect to the possessory liens, the quantum of the possessory liens, will be determined in the Ontario court, after the plaintiff has realized on its security. Obviously the trustee in bankruptcy cannot take any further action against this security based on my decision. If the trustee in bankruptcy wishes to purchase the goods held by the plaintiff, I presume the plaintiff will entertain any reasonable offer and those funds will, as they will from any third party, be paid into court to the credit of the action.

17 Accordingly order to go as follows: