COURT NO. / ESTATE NO.	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
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	**REVISED BENCH BRIEF OF BONNIE'S EQUIPMENT SERVICES LTD. ***
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP Barristers & Solicitors 1700 Enbridge Centre 10175 – 101 Street Edmonton, AB T5J 0H3 Attention: Bryan P. Maruyama Telephone: (780) 423-8698 Facsimile: (780) 423-2870 File Number: new/bpm

Clerk's Stamp

* For changes to pages in Tabs 1, 7, 9 and 16, only

1. It is respectfully submitted that Bonnie's Equipment Services Ltd. ("**Bonnie's**") is entitled to maintain a possessory lien over the concerned trailers (the "**Trailers**") for payment of repairs, based on an exception to the stay for commercial proposal proceedings under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended ("**BIA**"). 915245 Alberta Ltd. o/a Prairie Tech Oilfield Services ("**Prairie Tech**") argues otherwise.

2. The stay for commercial proposal proceedings provides certain exceptions – one of which is that it does not prevent a secured creditor who took possession of secured assets for the purpose of realization before the proposal from dealing with those assets: s.69(2)(a) BIA.[**Tab 1**]

   (a) The definition of a "secured creditor" includes a person holding a "lien" on or against the property of the debtor as security for a debt due or accruing due: 2 BIA. A repairer who claims a possessory lien is considered a secured creditor under the BIA: Roderick J Wood and Michael J Wylie, "*Non-Consensual Security Interest in Personal Property*" (1992) Volume 30 No. 4 *Alberta Law Review* 1055 at 1093.[**Tab 2**]

   (b) A secured creditor can obtain possession of secured assets where a civil enforcement agency has seized the secured assets and surrendered possession of them to the secured creditor: s. 58(2) *Personal Property Security Act,* RSA 2000, c P-7 ("**PPSA**") [**Tab 3**]

   (c) A secured creditor can obtain possession of secured assets where the debtor has voluntarily provided possession to the secured creditor, without the need for a seizure: Ronald CC Cuming, Catherine Walsh, and Roderick J Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2012, 2nd ed), pp 631 - 632. [**Tab 4**]

   (d) A secured creditor should be able to maintain possession of secured assets under a lien, where continued possession from the onset is required to maintain the lien for realization. If the stay in commercial proposal proceedings prevented the maintenance of possession, then the secured creditor would lose its lien.

3. The *Possessory Liens Act,* RSA 2000, c P-13, as amended ("**PLA**"), provides for the following: "A person has a particular lien for the payment of the person's debt on a chattel on which the person has expended the person's money, labour or skill at the request of the owner of it and in so doing enhanced its value": s. 2 PLA. Bonnie's is claiming a possessory lien for repairs to the Trailers under the PLA. [**Tab 5**]

   (a) The PLA has restated the common law repairer's lien, and does not take away rights the claimant had at common law, but gives the claimant a right of sale, which was unavailable at common law: *Alberta Drilling & Development Co. Ltd. v. Lethbridge Iron Works Co. Ltd.,* [1947] 1 WWR 983 (Alta Dist Ct); Alberta Law Reform Institute, *Report on Liens,* Report for Discussion No. 13, 1992, "**ALRI Report**", p. 26 on-line pdf. [**Tab 6**] and [**Tab 7**]

(b) "Actual or constructive and continued possession of the property that is the subject-matter of the debt is essential to the existence of the lien.": s. 5 PLA. [**Tab 5**]

(c) "A person entitled to a lien on any property pursuant to this Act may detain the property in the person's possession until the amount of the person's debt has been paid.": s. 8 PLA. [**Tab 5**]

(d) In addition to detaining the property, the lien claimant "may" provide notice to the debtor that an application would be made to court for permission to sell the property: s. 10(1)(a) PLA and s. 10(2)(c) PLA. The claimant would need to wait 6 months after the start of the creditor / debtor relationship before providing the notice (or 3 months if the property is a "motor vehicle"): s.10(1)(a) PLA. [**Tab 5**]

4. Given the provisions of the PLA, Bonnie's submits that it would fall within the exception to the stay in commercial proposal proceedings, where the secured creditor has taken possession of the "secured assets" before the proceedings for the purposes of "realization".

(a) Prairie Tech argues (at para 12 on page 4 of its Bench Brief) that Bonnie's only took possession of the Trailers for the purposes of repair. As seen by the above provisions in the PLA, Bonnie's not only took possession for the repairs, Bonnie's took and kept possession for the purposes of being paid, and ultimate sale if chosen, which would be forms of "realization". Bonnie's had a lien which arose on its own from the beginning, once Bonnie's took possession of the Trailers and started work.

(b) Bonnie's had the option of maintaining possession of the Trailers until paid. If Bonnie's had released possession of the Trailers, then it would have lost its lien against the Trailers. Bonnie's also would not have been entitled to make an application of the Court to sell instead, as there would be no lien to enforce.

(c) Prairie Tech argues (at para 11 on pages 8 and 9 of its Bench Brief) that Bonnie's did not provide the notice under s. 10(1) PLA (being the notice for a court hearing for permission to sell). It should be noted that if Bonnie's had wished to provide such a notice, it would not have been able to do so in this case, that the notice can be provided 6 months after the start of the creditor / debtor relationship: s. 10(1)(a) PLA. As the Trailers were provided to Bonnies between October 2021 and February 2022, this 6 month period had not yet expired: see para 18 of the Affidavit of Dwyane Vogel of Prairie Tech, sworn on March 30, 2022).

5. Prairie Tech argues that Bonnie's is not entitled to lien under the PLA, on the basis that the Trailers fall under the definition of a "motor vehicle" under the *Garage Keepers' Lien Act*, RSA 2000, c G-2, as amended ("**GKLA**"), instead. Bonnie's disagrees.

(a) Under ss. 2, 3, and 1(h) GKLA, a creditor if it wishes can file a non-possessory lien at the Personal Property Registry under the PPSA, and release possession of the "motor vehicle", upon meeting certain conditions. [**Tab 8**]

(b) Under s. 1(e) GKLA, a "motor vehicle" is defined as follows: "(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". Prairie Tech argues that a trailer falls within this definition of a "motor vehicle". [**Tab 8**]

(c) Based on its ordinary meaning, a "motor vehicle" would not include a trailer. Why use the word "motor" if the "vehicle" did not need to have one? The ordinary garage keeper, who relies on the GKLA, would not likely think a motor vehicle does not have to have a motor.

(d) The Alberta Law Reform Institute has noted that the GKLA does not apply to trailers: ALRI Report, at p 59-60 online pdf, citing *Province of Alberta Treasury Branches v. R. in Right of Alberta* (1984), 32 Alta LR (2d) 306 (QB), as support. [**Tab 9**] and [**Tab 10**]

(e) Further, under the "presumption of consistent expression", the same words used, or same pattern of expression, across statutes dealing with the same subject matter are to be read harmoniously: Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2014, 6th ed), at paras 8.32 to 8.35, 8.38 to 8.39; *TransAlta Corporation v. Alberta (Utilities Commission)*, 2022 ABCA 37, at para 39. [**Tab 11**] and [**Tab 12**]

(f) Under s. 1(1)(x) *Traffic Safety Act,* RSA 2000, T-6, as amended ("**TSA**"), a "motor vehicle" is defined as follows: "(i) a vehicle propelled by any power other than muscular power, or (ii) a moped, but does not include a bicycle, a power bicycle, an aircraft, an implement of husbandry or a motor vehicle that runs only on rails." The first part of this definition is the exact same wording as the first part of the definition of "motor vehicle" in the GKLA. The rest of the parts provide different exceptions. [**Tab 13**]

(g) Under s. 1(1)(uu) TSA, a "trailer" is defined as "a vehicle so designed that it may be attached to or drawn by a motor vehicle or tractor, and is intended to transport property or persons, and includes any vehicle defined by regulation as a trailer but does not include machinery or equipment solely used in the construction or maintenance of highways". Thus, a "trailer" is defined as something separate and apart from a "motor vehicle". [**Tab 13**]

(h) Following the "presumption of consistent expression", the harmonious definition of "a vehicle propelled by any power other than muscular power" would not include a trailer.

6. Even if the GKLA applied to Bonnie's and Trailers instead of the PLA, Bonnie's submits the result would remain the same for Bonnie's – that Bonnie's would be able to maintain possession of the Trailers until paid.

(a) The non-possessory statutory lien under the GKL is in addition to every other remedy the garage keeper has for the recovery of money: s. 2(1) GKLA. [**Tab 8**]

(b) "A garageman can keep possession as a common law possessory lien, or a garageman's lien under the Garagemen's Lien Act.": *Tomcat Machinery (Edm) Inc. v. Knight*, 2001 ABQB 95, at para 11; see also *Continental Bank of Canada v. Henry Mogensen Transport Ltd.*, 1984 CanLII 1178, at para 134: "Although it is probably unusual for a garageman to both retain possession and file a claim of lien it is not unusual for a garageman to merely retain possession. [**Tab 14**] and [**Tab 15**]

(c) Arguably, a lien claimant can elect to assert the common law lien governed by the PLA, instead of asserting a statutory lien under the GKLA: ALRI Report, at pgs 24-25 on-line pdf; *Bank of Nova Scotia v. Henuset* (1987), 50 Alta LR (2d) 253 (QB). [**Tab 16**] and [**Tab 17**]

7. Prairie Tech argues that it is entitled to a Replevin Order for the Trailers. Bonnie's submits that no Replevin Order can be granted, as there has been no wrongful taking or detention of the Trailers.

(a) Under R. 6.49 of the *Alberta Rules of Court,* a claim for a Replevin Order must be supported by an affidavit to set out facts for "the wrongful taking or detention". [**Tab 18**]

(b) Goods held under a possessory lien cannot be subject to replevin: *Dr. Anne Anderson Native Heritage and Cultural Centre v. Marcon Consulting Corp.* [1988] A.J. No. 1244. [**Tab 19**]

(c) Further, Bonnie's would suffer prejudice if the replevin order were granted. Would Bonnie's become an unsecured creditor? Would Bonnie's be named as an additional insured or first loss payee under insurance against the Trailers? Would Bonnie's lose priority to secured creditors of Prairie Tech? What happens if Prairie Tech goes bankrupt, and the Trailers cannot be located? What happens if the Trailers are repaired after release, and another repairer claims a possessory lien? What happens if the Trailers are destroyed while working? How would the interest of Bonnie's be discoverable, as the PLA does not provide for the registration of a lien at the Personal Property Registry: see *Bank of Nova Scotia v. Henuset* (1987), 50 Alta LR (2d) 253 (QB), *supra* at para 14?

8. In response to certain arguments of Prairie Tech, Bonnie's notes the following:

(a) In response to Prairie Tech putting forward *Mustang GP Ltd., Re,* 2015 ONSC 6562 (at paras 7 and 8 on page 8 of its Bench Brief), it must be noted that the jurisdiction of the court in proceedings in BIA is limited as compared to the jurisdiction in CCAA proceedings, due to no equivalent in the BIA of s. 11 *Companies Creditors Arrangement Act,* RSC 1985, c C-36, which states that the court "… as it may see fit, make any order that it considers appropriate in the circumstances." It is respectfully submitted that the relief sought by Prairie Tech is beyond the BIA. [**Tab 20**]

(b) In response to Prairie Tech putting forward s. 73(2) BIA (at paras 17 – 18, on page 7 of its Bench Brief), it should be noted that bankruptcy proceedings are subject to the rights of secured creditors, as noted in s. 71 BIA. Thus, s. 73(2) BIA would be inapplicable to a garage keeper seizing and selling under the GKLA, as the garage keeper would be a secured creditor, as noted above under s. 2 BIA. As a secured creditor, the garage keeper would not be required to turn over the seized motor vehicle or its proceeds to the trustee in bankruptcy. [**Tab 1**]

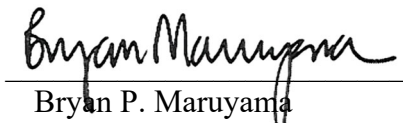
(c) In response to Prairie Tech putting forward *Goodfellow Inc. v. Heather Building Supplies Ltd.* (1996) 150 NSR (2d) 341, 40 CBR (3d) 189, aff'd 1996 NSCA 230 (at para 16 on page 8 of its Bench Brief), it must be noted that the court there dealt with the situation where possession of the seized secured assets had not yet been provided to the secured creditor by the sheriff, as the notice of intention to make a proposal was filed during the three day waiting period under the Nova Scotia Rules before the Sheriff could provide possession (see the first paragraph of the appeal decision). Thus, this was an entirely different situation in the case at hand where Bonnie's had possession of the Trailers throughout.

9. In the alternative, Bonnie's submits that if it does not fall within the exception under s.69.1(2)(a) BIA to the stay (as being a secured creditor who took possession of secured assets for the purpose of realization before the proposal), then it still would be entitled to maintain possession of the Trailers, as the stay under s. 69(1)(a) BIA for commercial proposals is meant to preserve the status quo and place a hold on remedies, and not take them away altogether. Then, by maintaining possession of the Trailers, Bonnie's would be preserving its possessory lien, and would not be commencing or continuing "any action, execution or other proceeding, for recovery of a claim."

10. Bonnie's respectfully submits that it is entitled to maintain a possessory lien under the PLA over the Trailers, and the relief sought by Prairie Tech should be dismissed with costs.

All of which is respectfully submitted this 4th day of April, 2022.

PARLEE MCLAWS LLP

Per: 

Bryan P. Maruyama
Counsel for Bonnie's Equipment Services Ltd.

LIST OF AUTHORITIES

TAB

1. *Bankruptcy & Insolvency Act*
2. *Non-Consensual Security Interest in Personal Property* (1992) Volume 30 No. 4 *Alberta Law Review* 1055 at 1093
3. s. 58(2) *Personal Property Security Act*
4. Ronald CC Cuming, Catherine Walsh, and Roderick J Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2012, 2nd ed), p 631 - 632
5. *Possessory Liens Act*
6. *Alberta Drilling & Development Co. Ltd. v. Lethbridge Iron Works Co. Ltd.*
7. Alberta Law Reform Institute, *Report on Liens,* Report for Discussion No. 13, 1992
8. *Garage Keeper's Lien Act*
9. ALRI Report, at p 59-60 on-line pdf
10. *Province of Alberta Treasury Branches v. R. in Right of Alberta* (1984), 32 Alta LR (2d) 306 (QB
11. Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2014, 6th ed)
12. *TransAlta Corporation v. Alberta (Utilities Commission)*, 2022 ABCA 37
13. *Traffic Safety Act*
14. *Tomcat Machinery (Edm) Inc. v. Knight*, 2001 ABQB 95
15. *Continental Bank of Canada v. Henry Mogensen Transport Ltd.*, 1984 CanLII 1178,
16. ALRI Report, at pgs 24-25 on-line pdf
17. *Bank of Nova Scotia v. Henuset* (1987), 50 Alta LR (2d) 253 (QB).
18. *Alberta Rules of Court*
19. *Anderson Native Heritage and Cultural Centre v. Marcon Consulting Corp.* [1988] A.J. No. 1244
20. s. 11 *Companies Creditors Arrangement Act,* RSC 1985, c C-36

TAB 1

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a ***provincial pension plan*** as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

d) est suspendu l'exercice par Sa Majesté du chef d'une province des droits que lui confère toute disposition législative provinciale à l'égard d'une personne insolvable, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est ***une province instituant un régime général de pensions*** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un ***régime provincial de pensions*** au sens de ce paragraphe.

Limitation

(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;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 416]

Exceptions

(2) Le paragraphe (1) n'a pas pour effet :

a) d'empêcher le créancier garanti de faire des opérations à l'égard des avoirs garantis de la personne insolvable dont il a pris possession — en vue de les réaliser — avant le dépôt de l'avis d'intention prévu à l'article 50.4;

b) d'empêcher le créancier garanti, sauf s'il a consenti à la suspension, qui a donné le préavis prévu au paragraphe 244(1) plus de dix jours avant le dépôt de l'avis d'intention prévu à l'article 50.4 de mettre à exécution sa garantie;

c) d'empêcher le créancier garanti qui a donné le préavis prévu au paragraphe 244(1) de mettre à exécution sa garantie si la personne insolvable a consenti à l'exécution au titre du paragraphe 244(2).

d) [Abrogé, 2012, ch. 31, art. 416]

TAB 2

NON-CONSENSUAL SECURITY INTERESTS IN PERSONAL PROPERTY

RODERICK J. WOOD*
MICHAEL I. WYLIE**

The authors trace the chaotic growth of non-consensual security interests in personal property. Rules governing non-consensual security interests are analyzed and shown to have developed in an inconsistent and unpredictable manner. The authors set out a framework to resolve the priority contests between security interests governed by the Personal Property Security Act *and non-consensual security interests. Ultimately, the authors call for reform to this area of the law, similar to that which occurred to chattel security law with the advent of the* Personal Property Security Act, *so as to create some degree of predictability in the area.*

Les auteurs suivent la croissance chaotique des sûretés non consensuelles relatives aux biens personnels. Les règles qui les régissent ont été élaborées de façon incohérente et imprévisible. Les auteurs établissent un cadre permettant de résoudre les conflits de priorités entre les sûretés régies par la loi sur les sûretés mobilières relatives aux biens personnels et les sûretés non consensuelles. Finalement, les auteurs réclament des réformes similaires dans ce secteur du droit à celles qui ont déjà eu lieu en matière de garanties mobilières avec l'adoption de la PPSA, afin de créer une certaine mesure de prévisibilité dans le domaine.

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subject to distribution in bankruptcy, except to the extent that a surplus remains after the claim of the secured party is fully satisfied.

Under the bankruptcy statute, a creditor who has a non-consensual security interest falls within the definition of a "secured creditor."[221] For example, a repairer who claims a possessory lien is considered to be a secured creditor.[222] The repairer may therefore proceed to enforce the non-consensual security interest and apply the proceeds solely in satisfaction of the repairer's claim. The priority of the non-consensual security interest is governed by provincial law, and is not affected by bankruptcy.

The outcome is different if the claim secured by the non-consensual security interest happens to be one mentioned as a preferred claim in section 136 of the *Bankruptcy Act*. This section creates a hierarchy of ten classes of claims which are given a preference on distribution over the claims of the general creditors. Each class of preferred claim must be fully satisfied before the next class of preferred claim receives anything. The classes of preferred claims include claims for wages by unpaid employees, claims for municipal taxes that do not constitute a preferential lien or charge against real property, and claims by landlords for arrears of rent. Claims under workers' compensation, income tax and unemployment insurance legislation, and any other Crown claim were originally included as preferred claims. However, the 1992 amendments remove their designation as preferred claims.

The Supreme Court of Canada has held that the priority of a preferred claim is to be determined by section 136, and that a claimant can not assert a claim as a secured creditor on the basis of a non-consensual security interest created under provincial law.[223] Although the non-consensual security interest remains valid outside of bankruptcy, section 136 governs the distribution in bankruptcy. This approach accepts that there may be a difference between the priorities existing under provincial law and the priorities in bankruptcy. Secured parties have exploited this feature by invoking bankruptcy in order to obtain the benefits of this inversion of priorities.[224] A secured creditor may avail itself of the bankruptcy process for the sole purpose of enhancing its position, and this does not constitute a sufficient reason for the Court to dismiss a petition for a receiving order.[225] The troublesome feature of this approach is that it does not accord with the underlying rationale for the existence of a bankruptcy system. Bankruptcy is an enforcement remedy under which unsecured creditors collectively assert their claims against the debtor. Secured creditors were never brought within this system; for the most part they enforced their security interests against the collateral outside of the bankruptcy system. It is difficult to understand why they should be able to invoke bankruptcy to enhance their claims at the expense of unsecured creditors for whom the bankruptcy system was designed.

221. *Bankruptcy Act*, R.S.C. 1985, c. B-3, s. 2.
222. *Re Victoria Bed & Mattress Co. Ltd.* (1960), 24 D.L.R. (2d) 414 (B.C.S.C.).
223. *Deloitte, Haskins & Sells* v. *Workers' Compensation Board*, [1985] 1 S.C.R. 785.
224. *Re Fresh Air Fireplaces of Canada Ltd.* (1986), 62 C.B.R. (N.S.) 39 (Alta. Q.B.).
225. *Bank of Montreal* v. *Scott Road Enterprises Ltd.*, [1989] 4 W.W.R. 566 (B.C.C.A.).

TAB 3

(2) Except as provided in sections 17, 17.1, 60, 61 and 63, no provision of section 17 or 17.1 or sections 58 to 67, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

RSA 2000 cP-7 s56;2006 cS-4.5 s108(25)

Collection rights of secured party

57(1) Where so agreed and in any event on default under a security agreement, a secured party is entitled

(a) to notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification, and

(b) to apply any money taken as collateral to the satisfaction of the obligation secured by the security interest.

(2) A secured party may deduct the secured party's reasonable collection expenses from

(a) money held as collateral, or

(b) an amount collected

(i) from a debtor on an intangible or chattel paper, or

(ii) from an obligor under an instrument.

1988 cP-4.05 s57;1990 c31 s45;1991 c21 s29(8)

Right of secured party to enforce, etc., on default

58(1) Subject to Part 2 of the *Civil Enforcement Act* and sections 36, 37 and 38, on default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

(b) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and any method of enforcement that is available with respect to the document of title is also available, with all the necessary modifications, with respect to the goods covered by it,

(c) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate alternative storage facilities are not readily available, the collateral may be seized without removing it from the debtor's premises in any manner by which a civil

enforcement agency may seize without removal under subsection (2)(b) to (d), if the secured party's interest is perfected by registration, and

(d) where clause (c) applies or where the collateral has been seized by a civil enforcement agency as provided in subsection (2)(b) to (d) and the collateral is of a kind mentioned in clause (c), the secured party may dispose of the collateral on the debtor's premises, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal.

(2) To make a seizure of property, the civil enforcement agency may

(a) take physical possession of the property,

(b) give to the debtor or the person in possession of the collateral a notice of seizure in the prescribed form,

(c) post in some conspicuous place on the premises on which the property is located at the time of seizure a notice of seizure in the prescribed form, or

(d) in the case of property in the form of goods, affix to the goods a sticker in the prescribed form,

and seizure by the civil enforcement agency shall continue until possession of the property is surrendered to the secured party or the secured party's agent, or the seizure has been released.

(3) At any time after making a seizure, the civil enforcement agency may appoint the debtor or other person in possession of the property seized as bailee of the civil enforcement agency on the debtor or such other person executing a written undertaking in the prescribed form to hold the property as bailee for the civil enforcement agency and to deliver up possession of the property to the civil enforcement agency on demand and property held by a bailee is deemed to be held under seizure by the civil enforcement agency.

(4) When a seizure occurs, a civil enforcement agency, on the written request of the person who has reasonable grounds to believe that the person has an interest in or a right to property seized by the civil enforcement agency, shall deliver to that person a list of items of property seized that fall within the general description of property in or to which that person claims to have an interest.

(5) On making a seizure, a civil enforcement agency may surrender possession or the right of possession of the property seized to the secured party or to a person designated in writing by the secured party.

(6) A civil enforcement agency may give before or after seizure of property, a notice to the secured party named in the warrant under which the seizure was made informing the secured party that the seizure shall be released at a date specified in the notice unless before that date the secured party takes possession of the property seized.

(7) If the person to whom the notice referred to in subsection (6) is given does not take possession of the property referred to in the notice on or before the date specified, the civil enforcement agency may release the seizure.

(8) After surrender of possession as provided in subsection (5) or release of seizure as provided in subsection (7), the civil enforcement agency has no liability for loss or damage to the property or for unlawful interference with the rights of the debtor or any other person who has rights in or to the property, occurring after the surrender or release.

(9) A seizure shall not affect the interest of a person who under this Act or under any other law has priority over the rights of the secured party.

1988 cP-4.05 s58;1990 c31 s46;1994 cC-10.5 s148

Seizure of mobile homes

59(1) In this section, "mobile home" means

(a) a vacation trailer or house trailer, or

(b) a structure, whether ordinarily equipped with wheels or not, that is designed to be moved from one point to another by being towed or carried and to provide living accommodation for one or more persons.

(2) When a mobile home is seized to enforce a security agreement and the mobile home is occupied by the debtor or some other person who fails, on demand, to deliver up possession of the mobile home, the person who has authorized the seizure or a receiver may apply to the Court under section 64 for an order directing the occupant to deliver up possession of the mobile home.

(3) The order may provide that if the occupant fails to deliver up possession of the mobile home within the time specified in the order, the civil enforcement agency shall eject and remove the

TAB 4

ESSENTIALS OF
CANADIAN LAW

PERSONAL PROPERTY SECURITY LAW

SECOND EDITION

RONALD C.C. CUMING
University of Saskatchewan, College of Law

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McGill University, Faculty of Law

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IRWIN LAW

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1 2 3 4 5 16 15 14 13 12

make an application under the *Farm Debt Mediation Act*.[82] The notice must be given at least fifteen business days before the remedy or proceeding is taken. A failure to give the notice renders any act of the creditor null and void, except that a good faith purchaser is protected unless related to the creditor.[83] The notice requirement cannot be waived by the farmer.[84]

7) Forbearance Agreements

Instead of enforcing a security interest against the collateral, a secured party may enter into a forbearance agreement with the debtor. The secured party agrees not to enforce its security for a period of time if certain conditions are satisfied, and the debtor agrees not to contest any actions taken by the secured party to enforce the security interest in the event that the debtor fails to make scheduled payments or satisfy the other terms of the forbearance agreement.[85] Forbearance agreements will typically contain an acknowledgement by the debtor of the relevant facts including the delivery of all the requisite pre-seizure notifications. The secured party is thereby in a position to immediately enforce its security interest if the debtor defaults under the forbearance agreement.

D. SEIZURE

If the debtor is in default under the security agreement and if the required pre-seizure notices have been given, the secured party, unless otherwise agreed,[86] has the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law.[87] The secured party will generally wish to take possession before selling the collateral or retaining it in satisfaction of the obligation secured. However, seizure of the collateral is not a precondition for the exercise of these remedies, and in exceptional cases the secured party

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82 SC 1997, c 21, s 21(1).

83 *Ibid*, s 22.

84 *Intec Holdings Ltd v Grisnick*, 2003 ABQB 993.

85 See *Quon v the Queen*, 2001 CanLII 733 (TCC).

86 See *300593 BC Ltd v 410627 Alberta Ltd* (1991), 79 Alta LR (2d) 91 (QB) in which the court gave effect to a contractual provision that afforded the debtor a sixty-day period within which to cure a default.

87 PPSA (BC, M, NB, NWT, Nu, PEI, S) s 58(2); A s 58(1); (NL, NS) s 59(2); O s 62; Y s 56.

may choose to sell or foreclose before the collateral is seized. Sometimes the debtor will voluntarily surrender the collateral to the secured party, thereby eliminating any need for the secured party to seize the collateral.

1) The Right to Seize the Collateral

The PPSA provides that a secured party has the right to take possession of the collateral upon default by any method permitted by law. This incorporates the ancient common law rules governing the self-help remedy of recaption of chattels. This permits the secured party to seize the collateral without the assistance of the courts or any legal process. Alberta, the Northwest Territories, and Nunavut take a different approach. They restrict the exercise of self-help remedies by providing that a seizure pursuant to a security agreement must be undertaken by a civil enforcement bailiff or a sheriff.

a) Peaceable Recaption

In jurisdictions that do not restrict the exercise of the self-help remedy, collateral can be seized by the secured party so long as it does not involve a breach of the peace. The use of unlawful force will render the seizure unlawful and expose the secured party to both civil and criminal liability.[88] The unlawful use of force cannot be validated by a term in the security agreement.[89]

There are two situations where the validity of the seizure may be brought into question. The first occurs where the seizure is undertaken in the presence of the debtor and the debtor resists the seizure. In such cases, the secured party is not permitted to use force. The appropriate response is for the secured party to back down and to obtain a court order for the seizure of the collateral. However, the secured party is entitled to use reasonable force to prevent the debtor from retaking possession of the collateral from the secured party after the secured party has obtained possession.[90] Less clear is the situation where the secured party used deception or trickery to obtain possession of the collateral. There is no Canadian authority, but the caselaw in the United States

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88 *Devoe v Long* (1950), [1951] 1 DLR 203 at 217 (NBSCAD); *R v Shand* (1904), 7 OLR 190 (CA); *R v Doucette*, [1960] OR 407 (CA); *Stackaruk v Woodward*, [1966] 2 OR 32 (CA).

89 *R v Doucette*, *ibid.*

90 *Casey v City National Leasing Ltd* (1987), 51 Alta LR (2d) 85 (QB).

TAB 5

POSSESSORY LIENS ACT

Chapter P-19

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

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

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

RSA 2000 cP-19 s1;2006 c23 s65

Lien on chattels

2 A person has a particular lien for the payment of the person's debt on a chattel on which the person has expended the person's

money, labour or skill at the request of the owner of it and in so doing enhanced its value.

RSA 1980 cP-13 s2

Lien of owner or keeper of wharf

3 An owner or keeper of a wharf has a particular lien for the owner's or keeper's lawful charges on a chattel entrusted to that owner's or keeper's keeping.

RSA 1980 cP-13 s3

Lien of bailee

4(1) A bailee, whether gratuitous or for reward, has a particular lien on a chattel bailed to the bailee by the owner of it for any charges that are due to the bailee under the terms of the contract of bailment.

(2) In addition to the particular lien mentioned in subsection (1), or if there is nothing due to the bailee under the terms of the contract of bailment, the bailee has a particular lien on the chattel for the bailee's reasonable charges for caring for it

(a) after the time fixed in the contract of bailment for the termination of that contract has expired, or

(b) if there is no time fixed by the contract or if there is no contract of bailment, then after the expiration of the time specified in a notice given by the bailee to the bailor to take possession of the chattel.

(3) The Court may dispense with the giving of the notice by the bailee if the bailor's address or whereabouts is unknown.

RSA 1980 cP-13 s4;1981 c7 s6

Possession of property

5 Actual or constructive and continued possession of the property that is the subject-matter of the debt is essential to the existence of the lien.

RSA 1980 cP-13 s5

Extent of lien

6 A lien extends over all the property on which the lienholder has expended the lienholder's money, labour or skill, but no lien arises on account of a general balance due from the owner of the property to the lienholder.

RSA 1980 cP-13 s6

Waiving of right to lien

7 The right to a lien under this Act may be waived by an express agreement in writing based on legal consideration and made

between the parties at the time the contract out of which the lien arises was made or at any time afterwards.

RSA 1980 cP-13 s7

Detention of property

8 A person entitled to a lien on any property pursuant to this Act may detain the property in the person's possession until the amount of the person's debt has been paid.

RSA 1980 cP-13 s8

Storage charges

9(1) If the contract out of which the lien arises provides for the payment of storage charges in respect of the property detained, the person entitled to a lien on the property

(a) may make lawful charges for the storage of it during the period of the detention, and

(b) may add the amount of those charges to the person's debt.

(2) If the contract out of which the lien arises relates to any kind of motor vehicle as defined in the *Traffic Safety Act* and if the contract makes no provision for the payment of storage or otherwise, the person entitled to a lien on the motor vehicle

(a) may make ordinary and reasonable charges for the storage of it during the period of detention, and

(b) may add the amount of those charges to the person's debt.

(3) When a bailee has in the bailee's possession perishable goods that might deteriorate or be destroyed by detention,

(a) the bailee may forthwith apply to the Court for permission to sell the goods, and

(b) on the application, the Court may forthwith give directions for the sale of the goods or may make any order in the matter that seems just to it.

RSA 2000 cP-19 s9;RSA 2000 cT-6 s206;2014 c13 s49

Notice to debtor

10(1) If

(a) the debt and storage charges, if any, are unpaid at the expiration of 3 months in the case of a motor vehicle and of 6 months in the case of any other property, from the time when the relation of creditor and debtor arose with respect to the alteration or repair or the bailment of the property, or

(b) the chattel is not taken by the bailor at or before the expiration of the time specified for taking it in the contract of bailment, or at or before the expiration of the time specified in the notice referred to in section 4,

the lienholder may serve a notice on the lienholder's debtor by registered mail or personal service.

(2) The notice shall specify

(a) a reasonable time and place for payment of the debt,

(b) the amount owing and the property detained, and

(c) that in default of payment, an application will be made to the Court on the day and at the hour and place stated in the notice for permission to sell the chattel.

(3) The day fixed for the application to the Court shall be not less than 30 days after the date of mailing or serving the notice.

(4) If the amount claimed is not paid to the bailee,

(a) the bailee may apply on the day and at the hour and place specified in the notice to the Court informally for a sale of the chattel, and

(b) the Court may make any order that seems just to it with respect to the sale.

(5) Unless the Court otherwise directs, it is not necessary to take out an order for sale, but the Court may note informal directions for the sale on the notice or on any affidavit that is used.

(6) If

(a) a dispute arises between the bailor and bailee as to the amount due, or

(b) the bailor does not appear at the time and place referred to in subsection (4),

the Court may, on hearing the application, fix the amount due or direct an action to be brought.

RSA 2000 cP-19 s10;2009 c53 s137;2014 c13 s49

Substituted service

11 If it is made to appear to the Court that it is not practicable to serve a notice required to be given by this Act on a debtor, either personally or by registered mail, the Court may, on the application

ex parte by or on behalf of the lienholder, make an order for substituted or other service or for the substitution for service of notice by letter, public advertisement or otherwise, or may dispense with service.

RSA 1980 cP-13 s11;1981 c7 s6

Disposal of property valued at less than $300

12(1) Notwithstanding section 10,

(a) if

(i) the debt and storage charges, if any, are unpaid at the expiration of 3 months in the case of a motor vehicle and of 6 months in the case of any other property, from the time when the relation of creditor and debtor arose with respect to the alteration or repair or the bailment of the property, or

(ii) the chattel is not taken by the bailor at or before the expiration of the time specified for taking it in the contract of bailment, or at or before the expiration of the time specified in the notice referred to in section 4,

and

(b) if the lienholder believes on reasonable grounds that the chattel has a total market value of less than $300,

the lienholder may sell the property by a means and for a price that the lienholder believes is reasonable.

(2) If no person purchases the chattel put up for sale under subsection (1) within a reasonable time, the lienholder may dispose of the chattel in any manner that the lienholder believes is reasonable in the circumstances.

1984 c9 s2

Application of proceeds of sale

13(1) 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 balance, if any, shall be paid to the person entitled to it on application by the person for it.

(2) If application under subsection (1) is not made forthwith,

(a) the officer conducting the sale under section 10, or

(b) the lienholder or the lienholder's agent conducting the sale under section 12,

shall immediately pay the balance to the Minister.

(3) The Minister shall keep the money the Minister receives under subsection (2) on behalf of the person entitled to it for one year from the day the Minister receives the money and, if that person does not make a claim for that money within that year or, if a claim is made within that year but is not upheld, that money is to be paid into the General Revenue Fund.

(4) The Minister may entertain an application, verified by affidavit as the Minister requires, on the part of a mortgagee of the chattel so sold, or on the part of a creditor of the owner of the chattel, and may in the Minister's discretion

(a) make an order for the payment of all or a portion of the balance to the mortgagees or creditors according to their priorities, or

(b) informally refer the facts to the Court.

(5) Where the Minister refers facts to the Court under subsection (4), the Court may direct interpleader proceedings to be taken if there is more than one claimant, or in any case may on the production of evidence that it considers necessary make an order that to it seems just.

(6) An order made under subsection (5) is sufficient authority for the Minister to pay any money in the Minister's possession according to the tenor of the order.

RSA 2000 cP-19 s13;2006 c23 s65

Application of Act

14 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 *Animal Keepers Act* or the *Warehousers' Liens Act*.

RSA 2000 cP-19 s14;2005 cA-40.5 s14

General liens

15 Nothing in this Act affects the law respecting general liens.

RSA 1980 cP-13 s14

TAB 6

1947 CarswellAlta 25
Alberta District Court

Alberta Drilling & Developing Co. v. Lethridge Iron Works Co.

1947 CarswellAlta 25, [1947] 1 W.W.R. 983

Alberta Drilling & Developing Company Limited v. Lethbridge Iron Works Company Limited

Sissons, D.C.J.

Judgment: May 17, 1947

Counsel: *S. H. Adams, K C.*, for plaintiff.
W. E. Huckvale, for defendant.

Subject: Property; Contracts; Civil Practice and Procedure

Headnote

Bailment and Warehousing --- Hire of services or work — Liens for services or work

Sale of Goods --- Seller's remedies — Lien

Liens on Chattels — Possessory Liens Act, S. 3 — "At the Request of the Owner" — Repairs to Well-Drilling Equipment Ordered by Borrower.

Sec. 3 of *The Possessory Liens Act*, RSA, 1942, ch. 229, reads: "Every person shall have a particular lien upon a chattel upon which he has expended his money, labour or skill at the request of the owner thereof, thereby enhancing its value, for the payment of his debt."

Held:

The statute does not create the lien — it always existed at common law — nor does the statute take away any rights which the lienholder had at common law. It merely gives the lienholder the additional right of sale.

The required "request of the owner" is no different from that required by the common law. The request may be implied, and on the evidence herein it was found that the defendant (the lienholder) had the implied authority of the plaintiff (the owner) to do the work in question on well-drilling equipment which the plaintiff had lent to the company which took it to the defendant to be repaired. *Keene v. Thomas*, [1905] 1 K.B. 136, 74 L.J.K.B. 21, applied. *Harding v. Johnston* (1909) 18 Man R 625, 10 WLR 712, 3 Can Abr 100; and *Yeo v. Farragher*, [1918] 1 W.W.R. 624, 28 Man. R. 424, distinguished, on the ground that they dealt with statutory liens of stable keepers, there being no such lien at common law.

***Sissons, D.C.J.*:**

1 There is no dispute as to the facts in this case. The plaintiff is the owner of certain well-drilling equipment known as a drilling mast. On or about May 1, 1945, it loaned this drilling mast to the Pacific Oil & Refinery of Alberta for a short time, without any recompense therefor, on the understanding and condition that the said drilling equipment would be returned to the plaintiff, subject only to ordinary wear and tear from its use in drilling operations. The evidence of the plaintiff was that it is the custom among owners of well-drilling equipment to loan equipment on the understanding that if the equipment is damaged in any way such damage will be made good and the equipment returned in the same condition as received.

2 The said equipment was badly damaged while in use by the Pacific Oil & Refinery a few days after it was borrowed and was taken by Pacific Oil & Refinery to the defendant company to be repaired. The plaintiff knew within a few days that the equipment had been damaged and had been taken to the defendant to be repaired. The field superintendent of the plaintiff gave evidence that he saw the equipment in the yard of the defendant some two or three weeks after it had been borrowed, and knew that it was there for the purpose of being repaired. He passed the yard of the defendant quite often and, finally, went in and

looked over the drilling equipment. He discussed the equipment with the foreman of the defendant and said to him, "Be sure and make a good job of that." At that time nothing had been done towards repairing the equipment.

3 The equipment was repaired during the fall of 1945. The account of the defendant for repairing amounted to $494.39, and was made out to Pacific Oil & Refinery of Alberta. A copy of the account was sent to the plaintiff. The defendant refused to deliver the equipment to the plaintiff unless and until the said account had been paid.

4 The defendant asserted a lien claim on the said drilling equipment, which claim the plaintiff denied.

5 The plaintiff paid into court the sum of $494.39 to stand as security to the defendant in the same manner and to the same extent as the defendant's possession of the said drilling equipment, and the defendant thereupon delivered over possession of the equipment to the plaintiff.

6 The plaintiff's action is for a declaration that the defendant possessed no lien rights on the said equipment and for a return of the said sum of $494.39, and for damages.

7 Counsel for the defendant submits that the plaintiff clothed Pacific Oil & Refinery with authority to get the equipment repaired if it became broken; had full knowledge of where the equipment was, and that it was being repaired by the defendant; had the right to remove the equipment and have it repaired elsewhere if they so desired; and that the plaintiff had actually instructed the defendant to do the repair work. He relies on the following, among other, authorities: *Green v. All Motors Ltd.*, [1917] 1 K.B. 625, 86 L.J.K.B. 590; *Sterling Securities Corpn. Ltd. v. Hicks Motor Co. Ltd.*, [1928] 2 W.W.R. 74, 22 Sask. L.R. 507 ; *Commercial Finance Corpn. Ltd. v. Stratford* (1920) 47 OLR 392; *Gurevitch v. Melchoir* (1921) 29 BCR 394.

8 The argument of counsel for the plaintiff revolves around the words "at the request of the owner" in sec. 3 of *The Possessory Liens Act*, RSA, 1942, ch. 229:

> Every person shall have a particular lien upon a chattel upon which he has expended his money, labour or skill at the request of the owner thereof, thereby enhancing its value, for the payment of his debt.

9 It was argued that there must be "a direct request;" that consent is a passive thing, request is an active thing; that consent, express or implied, is not sufficient under the Alberta statute; that the cases cited by the defendant are not authorities under the Alberta Act, as the relative sections of the *Mechanics' Lien Acts* of Ontario, Saskatchewan and British Columbia do not contain the words "at the request of the owner;" that the common law decisions do not apply to the Alberta statute.

10 I cannot see that the Alberta statute takes away any rights which the lienholder had at common law. The statute does not create the lien. The lien always existed at common law. However, at common law there was no efficient method of enforcing the lien. The statute gives the additional right of sale to the lienholder.

11 The "request of the owner" required by sec. 3 of *The Possessory Liens Act* appears no different from that required by the common law. At common law, the work on the chattel must be expressly or impliedly authorized by the owner of the chattel: *Wallace, Mechanics' Lien Laws in Canada*, 3rd ed., p. 205:

> At common law, a lien is also given to one who expends his money or labour upon the chattel of another; but, in order that this lien may arise, it is essential that the labour should be rendered or service performed at the request of the owner: *Automobile and Supply Co. v. Hands Ltd.* (1913) 28 OLR 585, 13 DLR 222, Middleton, J.

12 I do not think the position of a possessory lienholder in Alberta is any different than that of such a lienholder in Ontario, Saskatchewan or British Columbia. In Alberta there is a separate *Possessory Liens Act*. In the other provinces mentioned the matter of such liens is covered by a section of the respective *Mechanics' Lien Act*. It is true, as pointed out by counsel for the plaintiff, that these sections do not state, as the Alberta statute does, that the work shall be at the request of the owner of the chattel. However, the definition of "owner" given in these *Mechanics' Lien Acts* is that of a person at whose request the work is performed.

> The sections of a *Mechanics' Lien Act* defining the meaning of the word 'owner' must be read in connection with the section creating the lien: *Wallace*, p. 142.

13 Counsel for the plaintiff quoted the following from 5 *C.E.D.* (*Western*), p. 529:

> It should require express words for a statute to give a lien upon the property of a third party: *Harding v. Johnston* (1909) 18 Man R 625, 10 WLR 712.

14 This does not help the plaintiff. The *Harding v. Johnston* case, and *Yeo v. Farragher*, [1918] 1 W.W.R. 624, 28 Man. R. 424, also referred to, had to do with statutory liens under *The Stable Keepers Act*, RSM, 1913, ch. 183. There is no livery stable keeper's lien at common law. The principle stated could not apply to common law liens. On the contrary, such common law liens being consistent with the principle of natural equity are favoured by the law, which is construed liberally in such cases: *Scarfe v. Morgan* (1838) 4 M & W 270, at 283, 7 LJ Ex 324, 150 ER 1430, per Parke, B.

15 Neither do the cases, *Hiscox v. Greenwood* (1802) 4 Esp 174, 170 ER 681, and *Cassils & Co. v. Holden Wood Bleaching Co. Ltd.* (1914) 84 LJKB 834, 112 LT 373, cited by counsel, help the plaintiff. In the first case, a request could not be implied, and, in the second case, there was no proper proof of either a general lien or a particular lien.

16 Counsel for the plaintiff also referred to *Webster v. Black* (1914) 24 Man R 456, 28 WLR 300. In this case a car was left in the garage of the defendant by one Jones, the purchaser from the plaintiff under a lien note, but there were no instructions to repair. Mathers, C.J.K.B. stated:

> If there was any evidence that Jones ordered these repairs to be made, I think the defendant would be entitled to hold the car until they were paid for; but there is nothing to show that Jones gave any such instructions.

17 This authority would, therefore, appear to be against the plaintiff.

18 In this case I find that the Pacific Oil & Refinery had implied authority from the plaintiff to have the equipment repaired. According to the evidence, the Pacific Oil & Refinery was obligated to have the equipment repaired if it became broken.

19 The case of *Keene v. Thomas*, [1905] 1 K.B. 136, 74 L.J.K.B. 21, appears to be in point. By a hire-purchase agreement the plaintiff let a dog-cart to a person who, in the course of time, sent the cart to be repaired to the defendant, a coach-builder. The agreement contained a clause by which the hirer undertook "to keep and preserve the dog-cart from injury." Some instalments under the agreement being unpaid, the plaintiff sought to recover the cart, but the defendant claimed a lien upon it for the cost of the repairs, and it was held that, under the circumstances, the hirer had authority to send the cart to be repaired, and, therefore, that the defendant's lien was good, not only against the hirer, but also against the plaintiff.

20 I do not find that the plaintiff actually instructed the defendant to do the repair work. It is not necessary that I so find.

21 The authority of the owner to do the work will be implied from circumstances which would not raise an implication of a contract by the owner to pay the charges to be enforced by a suit against him: *White v. Smith* (1882) 44 NJL 105.

22 The cases of *Green v. All Motors Ltd., Sterling Securities Corpn. Ltd. v. Hicks Motor Co. Ltd., Commercial Finance Corpn. Ltd. v. Stratford*, and *Gurevitch v. Melchoir, supra*, are authorities supporting the defendant.

23 My conclusion is that the defendant has a good and valid lien for the amount of its claim, $494.39.

24 There will be judgment dismissing the action of the plaintiff with costs, including costs of examinations for discovery; payment out to the defendant of the moneys in court.

TAB 7

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

REPORT ON LIENS

Report for Discussion No. 13

September 1992

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mechanic's lien legislation in 1889,[72] but this was repealed upon the enactment of the Possessory Liens Act. In 1923 the province of New Brunswick enacted legislation[73] which is nearly identical to the Alberta Act. There is no equivalent statute in other provinces. Other provinces have expanded the classes of lien claimants to include certain kinds of storers. For example, the Livestock Lien Act[74] of British Columbia creates an agister's lien. However, only Alberta and New Brunswick have enacted a comprehensive statute that creates a general entitlement to a possessory lien. As a result, Alberta and New Brunswick have the most expansive possessory lien legislation of any of the common law provinces.

(b) Entitlement to the lien

The Possessory Liens Act gives a person a particular lien for the payment of a debt on a chattel on which the person has expended money, labour or skill at the request of the owner of it and thereby enhanced its value.[75] This is simply a restatement of the common law repairer's or artisan's lien. The statute does not take away any of the rights the lien claimant had at common law, but merely gives the lien claimant a right of sale.[76]

The Act gives a bailee, whether gratuitous or for reward, a particular lien on a chattel bailed by the owner of it for charges that are due to the bailee under the terms of the contract of bailment.[77] This is a major change to the common law. The common law did not recognize a lien for storage or maintenance of goods because the services merely preserved the goods and did not result in an enhancement of them. The Warehousemen's Lien Act and the Livery Stable Keepers Act gave a lien to certain kinds of storers, but did not create a general right to a lien in favour of bailees.

The Act creates a lien in favour of a bailee if the bailor fails to take possession of the goods at the end of the term under a contract of bailment (or

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[72]Mechanics' Lien Ordinance, O.N.W.T. 1889, No. 5.

[73]Liens on Goods and Chattels Act, S.N.B. 1923, c.7. See now R.S.N.B. 1973, c. L-6.

[74]R.S.B.C. 1979, c. 244.

[75]Possessory Liens Act, s.2.

[76]*Alberta Drilling & Development Co. Ltd.* v. *Lethbridge Iron Works Co. Ltd., supra*, note 22.

[77]Possessory Liens Act, s.4(1). The reference to a gratuitous bailee is puzzling. If the bailment is gratuitous, there will be no charges due and therefore no lien can be claimed under s.4(1).

TAB 8

GARAGE KEEPERS' LIEN ACT

Chapter G-2

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "farm vehicle" means a farm machine or other machine or equipment

(i) that is identifiable by a manufacturer's serial number cut, embossed or otherwise permanently marked or attached on it,

(ii) that is used, or intended for use, in any type of farming operations, and

(iii) that is not a motor vehicle;

(b) "financing change statement" means a financing change statement as defined in the *Personal Property Security Act*;

(c) "financing statement" means a financing statement as defined in the *Personal Property Security Act*;

(d) "garage keeper" means a person who keeps a place of business for the housing, storage or repair of a motor vehicle or farm vehicle and who receives compensation for that housing, storage or repair;

(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;

(f) "prescribed" means prescribed in the regulations made under the *Personal Property Security Act*;

(g) "Registrar" means the Registrar of the Registry;

(h) "Registry" means the Personal Property Registry under the *Personal Property Security Act*.

RSA 1980 cG-1 s1;1983 cC-7.1 s21;1988 cP-4.05 s83

Lien of garage keeper

2(1) In addition to every other remedy that a garage keeper has for the recovery of money owing to the garage keeper for

(a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or

(b) the price of accessories or parts furnished for a motor vehicle, farm vehicle or part of a motor vehicle or farm vehicle,

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

(2) No garage keeper is entitled to a lien under this Act for the price of fuel, oil or grease furnished for a motor vehicle or farm vehicle.

(3) No garage keeper is entitled to a lien under this Act unless the garage keeper retains possession of the motor vehicle or farm vehicle or the garage keeper obtains from

(a) the person who authorized the storage, repair or maintenance or the person's authorized agent, or

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

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

RSA 1980 cG-1 s2

Termination of lien

3(1) A lien referred to in section 2 terminates on the 21st day after the day

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

(b) on which repairs were completed to the motor vehicle or farm vehicle or any part of the motor vehicle or farm vehicle if the vehicle was not at the time of repair in the possession of the garage keeper, or

(c) on which the accessories or parts for the motor vehicle or farm vehicle were furnished,

as the case may be, unless on or before the 21st day the garage keeper registers in the Registry a financing statement indicating a claim of lien on the motor vehicle or farm vehicle.

(2) A financing statement referred to in subsection (1) must be signed by the garage keeper or by a person authorized by the garage keeper.

RSA 1980 cG-1 s3;1988 cP-4.05 s83

Postponement of lien

4 Every lien on a motor vehicle or farm vehicle under this Act shall be postponed to an interest in or charge, lien or encumbrance on the motor vehicle or farm vehicle,

(a) that is created or arises

(i) in good faith, and

(ii) without express notice of the first mentioned lien,

and

(b) that was created or arose before the registration of a financing statement referred to in section 3(1).

RSA 1980 cG-1 s5;1988 cP-4.05 s83

When 2 or more lienholders

5(1) If at any one time more persons than one have a lien under this Act on the same motor vehicle or farm vehicle,

(a) the person whose claim of lien is registered earlier in time has a prior lien over that of the person whose claim of lien is registered later in time, and

(b) if one of those persons seizes the motor vehicle or farm vehicle, that person is deemed to have made that seizure on behalf of all persons who have on the motor vehicle or farm vehicle a lien subsisting at the time of seizure.

(2) If at any one time a person has more than one lien under this Act on the same motor vehicle or farm vehicle, seizure of the motor vehicle or farm vehicle under any one of the liens constitutes a seizure in respect of all of the liens of that person on the motor vehicle or farm vehicle.

RSA 1980 cG-1 s6;1988 cP-4.05 s83

Term of lien

6(1) On registration of a financing statement pursuant to section 3, the lien continues for a further period of 6 months from the date of the registration.

(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.

(3) Notwithstanding subsection (2), when it appears that a seizure cannot be effected within the 6 months provided for in that subsection, the Court of Queen's Bench may, on ex parte application made during those 6 months, extend the time within which the seizure may be made for a further period not exceeding 6 months from the date of the order, and in that case the lien does not determine until the date so specified, if a financing change statement

is registered in respect of the order in the Registry prior to the expiration of the 6-month period provided for in subsection (2).

RSA 2000 cG-2 s6;2020 c23 s7

Memorandum of discharge of lien

7 The garage keeper on receipt of the amount due in respect of the lien the garage keeper holds shall sign and deliver to a person who demands it a memorandum in writing stating that the garage keeper's lien is discharged.

RSA 1980 cG-1 s8

Seizure of vehicle

8 A civil enforcement agency shall in accordance with the *Civil Enforcement Act* seize the motor vehicle or farm vehicle in respect of which the warrant was issued if the vehicle is found anywhere in Alberta.

RSA 1980 cG-1 s9;1994 cC-10.5 s127

Seizure of vehicle

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.

RSA 1980 cG-1 s10;1994 cC-10.5 s127

Discharge of lien

10(1) Where a financing statement or a financing change statement referred to in section 6(3) is registered and

(a) the indebtedness, with respect to which the lien is claimed and the financing statement or financing change statement has been registered, is paid,

(b) the motor vehicle or farm vehicle has been sold in accordance with section 9, or

(c) the garage keeper is not entitled to maintain the registration of the financing statement or financing change statement relating to a claim of lien on a motor vehicle or farm vehicle,

the garage keeper shall discharge the registration by registering a financing change statement.

(2) If a garage keeper fails to discharge a registration as required by subsection (1), the owner or any person with an interest in the motor vehicle or farm vehicle may give a written demand to the garage keeper requiring the garage keeper to register a financing change statement discharging the registration or an order of the Court of Queen's Bench confirming that the registration need not be amended or discharged.

(3) If a garage keeper fails to comply with a demand referred to in subsection (2) within 30 days after the demand is given, the person giving the demand may register the financing change statement referred to in subsection (2) on providing to the Registrar satisfactory proof that the demand has been given to the garage keeper.

(4) A demand referred to in subsection (2) may be given in accordance with section 72 of the *Personal Property Security Act* or by registered mail addressed to the address of the garage keeper as it appears on the financing statement.

(5) On application to the Court by the garage keeper, the Court may order that the registration be confirmed or discharged.

(6) No fee shall be charged and no amount shall be accepted by a garage keeper for compliance with a demand referred to in subsection (2).

(7) If a garage keeper fails to comply with subsection (1) or the demand referred to in subsection (2), the owner or any person with an interest in the motor vehicle or farm vehicle has a right to recover any loss or damage that was reasonably foreseeable as liable to result from the non-compliance.

1988 cP-4.05 s83

Regulations

11 The Lieutenant Governor in Council may make regulations

(a) respecting forms for use under this Act;

(b) prescribing fees that may be charged in respect of a warrant and a seizure under it or any matter incidental to it.

RSA 1980 cG-1 s12;1983 cC-7.1 s21;1988 cP-4.05 s83;
1994 cC-10.5 s127

TAB 9

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

REPORT ON LIENS

Report for Discussion No. 13

September 1992

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statutes and common law principles. The enactment of the Possessory Liens Act in 1921 was an attempt to create a partial statutory consolidation of the law of liens, but this effort was quickly overshadowed by the creation of new statutory liens. As a result, each type of lien is subject to its own special set of rules. The legal rules that govern the lien of a warehouse keeper differ from the rules that apply to a lien in favour of an agister, which in turn differ from the rules that apply to the lien of a stable keeper.

There are several important efficiencies that can be gained through uniformity. A system of law that provides a single set of rules produces a more predictable commercial environment. The cost of determining the validity, priority and method of enforcement is reduced. A common set of forms and procedures can be developed for use by all lien claimants. Decisional law which resolves ambiguities in the scope and operation of the legislation gains a wider applicability. This reduces the need for costly litigation to resolve issues of law.

(3) Limited Scope of the Registration Option

Under the common law, surrender of the goods by the lien claimant destroyed the lien. There may, however, be good practical reasons for wishing to give up possession while maintaining the lien. The surrender of possession of the goods to the debtor allows a lien claimant to avoid incurring the costs of storage. Storage costs can be considerable when the lien covers larger items such as automobiles. The debtor gets the use of the item, which may increase the likelihood of payment if the item is necessary to the debtor's business or employment. Lien claimants have sometimes tried to circumvent this problem by surrendering the goods to the owner under a bailment agreement. Under this arrangement, the owner agrees to hold the goods as bailee or agent of the lien claimant. This solution is far from ideal. Although this device is permitted under the common law, it has the potential for misleading third parties who deal with the owner. These third parties have no means of discovering the existence of the lien.

The Garagemen's Lien Act was an early response to this problem. It permits a lien claimant to surrender a vehicle without losing the lien through the creation of a non-possessory lien. The lien must be registered, and this provides third parties with the means of discovering the existence of the lien. The Act limits the non-possessory lien to motor vehicles and farm vehicles. The restricted scope of the registration option has caused problems. The Garagemen's Lien Act

does not apply to trailers.[283] A credit manager of a company that manufactures truck trailers was of the view that the exclusion of trailers Act creates unfair discrimination between truck manufacturers and trailer manufacturers in the freight transportation sector.

The restricted scope of the Garagemen's Lien Act was in part due to the limited capability of the personal property registry system at the time the legislation was passed. Recent advances in computer technology has led to the centralization of the registries and the use of a powerful computer which gives rise to an extensive registration and search capability. There is no longer any reason why the registration option must be limited. The registration option can be extended to all goods subject to a lien.

(4) Lack of a Uniform and Rational System for Enforcement

There are two major problems with the procedures for enforcing a lien through sale of the goods under the present law. The first is that the various statutes provide different rules and procedures governing notification of the intended sale, the manner of sale and the distribution of proceeds. For example, the Warehousemen's Lien Act, the Livery Stable Keepers Act and the Innkeepers Act require sale by public auction. These statutes provide different periods for commencement of sale proceedings and different notice and advertising procedures. The Possessory Liens Act requires that the lien claimant obtain a Court order prior to sale. The Possessory Liens Act and the Garagemen's Lien Act contain different methods through which a debtor may object to the claim of a lien. The other statutes are silent on this matter and therefore the debtor must commence court proceedings to raise the objection.

The second major problem concerns the method of sale. Statutes that require sale by public auction may produce a lower recovery than might otherwise be obtained. For example, an operator of an equine centre commented upon the low recovery from the sale of a horse by public auction under the Livery Stable Keepers Act. The amount of sale proceeds recovered at the auction is often little more than the cost of conducting the public auction. She was of the view that the lien claimant could recover a higher amount through a private sale. In the past, the public auction was the normal enforcement remedy available to

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[283]The definition of "motor vehicle" in the Garagemen's Lien Act does not cover trailers. In addition, it has been held that the definition does not cover a motor boat. See *Province of Alberta Treasury Branches* v. *R. in Right of Alberta* (1984), 32 Alta. L.R. (2d) 306 (Q.B.).

TAB 10

Alberta (Treasury Branches) v. Alberta

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

Sulatycky J.

July 9, 1984.

No. 8403 14916

[1984] A.J. No. 2511 | 32 Alta. L.R. (2d) 306 | 55 A.R. 70 | *27 A.C.W.S. (2d) 309*

Between Alberta (Treasury Branches), and Province of Alberta

(18 paras.)

Counsel

J.T. Nielson, for the applicant. L. Whittaker, for the respondent.

SULATYCKY J.

1 The applicant seeks an order declaring a certain boat and motor to be an "itinerant machine" as defined in the Bills of Sale Act, R.S.A. 1980, c. B-5, and a consequent direction that the clerk of the Vehicle Registry for the Province of Alberta register a particular chattel mortgage of that boat and motor at that registry.

2 The question before the court, in simple terms is:

> "Is a motor boat a motor vehicle?"

3 The Chattel Security Registries Act, R.S.A. 1980, c. C-7, establishes two chattel registry offices in Alberta, a central registry and a vehicle registry. The Bills of Sale Act requires chattel mortgages comprising an "itinerant machine" to be registered at the vehicle registry within 21 days of its completion. The same Act permits chattel mortgages comprising chattels other than itinerant machines to be registered at Central Registry within 30 days.

4 Section 1 of the Bills of Sale Act provides definitions as follows:

> "(h) 'itinerant machine' means a motor vehicle, aircraft, trailer, or oilwell drilling equipment.
>
> "(j) 'motor vehicle' means a vehicle propelled by any power other than muscular power, except aircraft, tractors whether equipped with rubber tires or not, traction engines, and vehicles that run only on rails".

5 The word "vehicle" is not defined in the Bills of Sale Act.

6 It may assumed that a boat to which a motor is attached, is propelled by power other than muscular power. If it is a "vehicle" then it falls within the definition of "motor vehicle" in the Act. If it is not a "vehicle", then notwithstanding its means of propulsion, it is not a motor vehicle.

7 In a statute of general application, undefined single word object nouns of common everyday use must be given their plain and ordinary meaning. When the legislature uses such words without providing a definition, it is speaking in the language of the people in use during the time and in the territory in which the statute comes into force. To determine the legislative sense of such word, modern dictionaries which emphasize current usage rather than etymology are the most useful reference. Judicial opinion which is not referable exclusively to a specific enactment is also of value.

8 Rand, J., in Sugar City Municipal District v. Bennett & White Ltd. and Attorney General of Canada, *[1950] S.C.R. 450*, at 463 said:

> "The word "vehicle" in its original sense conveys the meaning of a structure on wheels for carrying persons or goods. We have generally distinguished carriage from haulage, and mechanical units whose chief function is to haul other units, to do other kinds of work than carrying, are not usually looked upon as vehicles. But that meaning has, no doubt, been weakened by the multiplied forms in which wheeled bodies have appeared with the common feature of self-propulsion by motor."

9 The appurtenance of wheels is the essential characteristic of a vehicle in the view of the learned justice, in even the widest scope of the word.

10 In support of the application, the court was referred to the Oxford English Dictionary, 1970, which defines "vehicle" as follows:

> "6. A means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge, or similar contrivance.
>
> "7. Any means of carriage, conveyance, or transport; a receptacle in which anything is placed in order to be moved".

11 It is suggested that the latter definition encompasses a boat.

12 The Concise Oxford Dictionary 1976 provides the following definition:

> "vehicle. n. carriage or conveyance or any kind used on land or in space."

13 In the Canadian Law Dictionary, 1980, "vehicle" is defined as:

> "vehicle: any kind of carriage moving on land, either on wheels or runners, comprehending coaches, chariots, buggies, wagons, carts, cars, automobiles, sleighs, sleds - every conveyance".

14 Funk and Wagnall's Standard College Dictionary, Canadian edition, provides the following:

> "vehicle. n. 1. Any contrivance fitted with wheels or runners for carrying something; a conveyance, as a car or sled. 2. Med. An innocuous medium, as a liquid, with which is mixed some therapeutic substance that may be applied or administered more easily; an excipient. 3. A medium, as oil, with which pigments are mixed in painting. 4. thought, etc. is transmitted or communicated. 5. In the performing arts, anything, as a play, musical composition, etc. that permits the performer to display his particular powers or talents".

15 It should be noted that the latter is one of the few dictionaries compiled with Canadian content in mind. Further, it emphasizes usage rather than etymology. The plan of this dictionary states that in entries for words having several senses, the order in which the definitions appear is, wherever possible, that of frequency of use, rather than semantic evolution. Amongst the dictionary definitions, it is the last quoted which is to be preferred because of its emphasis on modern Canadian usage, it is also consistent with the definition provided by the Canadian Law Dictionary and Rand, J., both quoted above.

16 Roget's Thesaurus, 1962, lists 389 synonyms ranging from an araba to a wagon - lit under the entry for "vehicle", not a single one being any type of boat. According to Roget, the word in its adjectival form is synonymous with "wheeled, on wheels; on rails, on runners, on sleds, on skates".

17 It is my view that, unless otherwise defined, in the Statutes of Alberta, the word "vehicle" does not include a boat. Therefore a motor boat is not a motor vehicle hence not an itinerant machine.

18 The application fails.

Order accordingly.

End of Document

TAB 11

The Presumption of Consistent Expression

Sullivan on the Construction of Statutes, 6th Ed.

Ruth Sullivan

CHAPTER 8 - TEXTUAL ANALYSIS

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

The Presumption of Consistent Expression

§8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.

§8.33 The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

Same words, same meaning

§8.34 ***Same words, same meaning.*** In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same

words the same meaning throughout a statute is a basic principle of statutory interpretation."1 Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Deputy Minister of Agriculture)*.2 The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

> There is another basis for concluding that 'recommendations' should be given its usual meaning in s. 52(2).
>
> The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report … and any "recommendations" that the Committee considers appropriate …
>
> It would be obviously inappropriate to interpret 'recommendations' in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly, in s. 52(1) 'recommendations' has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word 'recommendations' in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both subsections.3

§8.35 The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning; he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related. This way of resolving interpretation problems is often relied on in the cases.4

Different words, different meaning

§8.36 ***Different words, different meaning.*** Given the presumption of consistent expression, it is

possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in *Jabel Image Concepts Inc. v. Canada*:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.5

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must have meant to express a different idea.6 In *R. v. Barnier*7 the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity … Under the primary canon of construction to which I have referred, "appreciating" and "knowing" must be different, otherwise the Legislature would have employed one or the other only.8

As this passage from the *Barnier* case indicates, the presumption that using different words implies an intention to express different meanings is often reinforced by the presumption against tautology. In *R. v. Clark*,9 for example, the issue was whether performing an indecent act in an illuminated room near an uncovered window violated s. 173(1)(a) of the *Criminal Code*. The relevant provisions were in the following terms:

> 150. In this Part,
>
> …
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
>
> 173. (1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons,
>
> …

is guilty of an offence punishable on summary conviction.

174.(1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, …

is guilty of an offence punishable on summary conviction.

§8.37 The Supreme Court of Canada held that although the indecent act in question was witnessed by two neighbours who were peeking through their windows into the accused's apartment, the act had not been done in a public place. In reaching this conclusion, Fish J. relied on both the presumption against tautology and the presumption of consistency:

> Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(*b*) would be entirely superfluous.
>
> Section 150 applies equally to s. 174(1) and s. 173(1)(*a*). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(*a*). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.10
>
> [Emphasis in original]

The reasoning here is persuasive and is consistent with any purposive or consequential analysis the court might undertake.

Recurring pattern of expression

§8.38 ***Recurring pattern of expression.***11 The presumption of consistent expression applies not only to individual words, but also to patterns of expression. In *Kirkpatrick v. Maple Ridge (District)*,12 for example, the Supreme Court of Canada was concerned with a provision of British Columbia's *Municipal Act* which conferred on municipalities a power to require permits for

the removal of soil or other substances and to "fix a fee for the permit". The question was whether this authorized the imposition of a flat fee for all holders, a fee proportionate to the amount of substance removed by each holder, or both. In concluding that the fee must be flat, the Court relied on the pattern apparent in the Act of setting out the basis for differential fees when such fees were contemplated, but simply providing for the imposition of the fee when the same rate was to be charged to all. La Forest J. wrote:

> The foregoing [conclusion] is strongly fortified by the terms of other taxing and licensing provisions in the Act … Under s. 612(2), a council may vary the charge for sewerage or combined sewerage and drainage facilities in accordance with a number of outlets served and the quantity of water delivered. Development cost charges "may vary in respect of different defined or specified areas … and sizes or number of units or lots … " (s. 719(5)). Municipal councils are even empowered to vary the amount of the fees for dog licences according to sex, age, size or breed (s. 524). Flat fees have been set for many other licences (ss. 505(1), 520(1)) … 13

La Forest J. concluded that since the legislature had chosen the formula ordinarily used to authorize a flat fee, in contrast to the formula ordinarily used when the legislature intended to authorize differential fees, the only plausible inference was that in this case the legislature intended to authorize a flat fee.

§8.39 Similar reasoning is found in *Canada v. Antosko*,14 where the Supreme Court of Canada had to interpret s. 20(14) of the *Income Tax Act*. It provided that when title in an interest-bearing security passes from transferor to transferee and interest accrued before the day of transfer is paid to the transferee, that amount:

> (a) shall be included in computing the transferor's income for the taxation year in which the transfer was made, and
>
> (b) may be deducted in computing the transferee's income for a taxation year in the computation of which there has been included [certain interest payments].

The issue was whether a transferee could have the benefit of para. (b) even though the transferor was not obliged to include the pre-transfer interest in its own income as contemplated by para. (a). The Court held that para. (b) applied independently of para. (a). Iacobucci J. wrote:

> In this regard I find helpful the comments of M.D. Templeton … [15]
>
> The grammatical structure of subsection 20(14) is similar to a number of other provisions in the Act in which Parliament lists the income tax consequences that arise when certain preconditions are met. Usually, the preconditions are set out in

> an introductory paragraph or paragraphs and the consequences in separate subparagraphs. We do not know of any canon of statutory interpretation that makes a tax consequence listed in the text of a provision subject to the taxpayer's compliance with all the other tax consequences listed before it.
>
> To carry this observation further, where specific provisions of the *Income Tax Act* intend to make the tax consequences for one party conditional on the acts or position of another party, the sections are drafted so that this interdependence is clear: see, *e.g.*, ss. 68, 69(5), 70(2), (3) and (5).16

Iacobucci J. here describes a convention for drafting provisions in which tax consequences depend on the fulfilment of certain preconditions. A special pattern is used when the tax consequences of one person are conditional on another's circumstances. When this pattern is not used, the interpreter can fairly infer that such interdependence was not intended.

Counterfactual argument

§8.40 ***Counterfactual argument.*** The reasoning of Iacobucci J. in *Antosko* forms the basis for a form of argument that is frequently found in statutory interpretation, here labelled counterfactual argument. In this form of argument, X claims that Y's interpretation is implausible because if that were what the legislature intended, it would have expressed itself in a different way. X justifies this claim by pointing out examples of what the legislature says when it does intend what Y is claiming.

§8.41 In *Miller, McClelland Ltd. v. Barrhead Savings & Credit Union Ltd.*,17 for example, the issue was whether a creditor lost his security interest because he registered the security under the name he used in practice (James Smith) as opposed to the name on his birth certificate (Robert James Smith). Subsection 17(1) of the *Personal Property Regulations* provided:

> If a debtor or secured party is an individual, the registering party shall specify the last name of that individual followed by his first name and middle name, if any.

The court held that "first name" could refer to the customarily used first name:

> The term "first name" is not defined. The *Vital Statistics Act* … describes the name on the birth certificate as the "given name." The *Change of Name Act* … defines "name" to mean … a given name or surname or both." Had the legislators intended to circumscribe the registration requirement under the P.P.S.A. regulations as suggested, no doubt they would have adopted the more precise term "given name" found in other provincial legislation.18

§8.42 When the pattern on which a counterfactual argument is based is express reference to something, the implied exclusion maxim comes into play.19 In *Ordon Estate v. Grail*,20 for example, the Supreme Court of Canada had to determine whether the Ontario Court (General Division) had concurrent jurisdiction with the Federal Court, Trial Division over maritime fatal accident claims by dependants under s. 646 of the *Canada Shipping Act*. In concluding that it did, Iacobucci and Major JJ. wrote:

> As noted by the Court of Appeal below, when Parliament intended the Federal Court to have exclusive jurisdiction to adjudicate a particular matter in the *Canada Shipping Act*, it set this intention out in clear language in the Act. For example, ss. 209(2) and 453, as well as the newly enacted s. 580(1) (see S.C. 1998, c. 6, s. 2), state:
>
> 209. . . .
>
> (2) Subject to this Part, no other court in Canada [referring to the Admiralty Court] has jurisdiction to hear or determine any action, suit or proceeding instituted by or on behalf of any seaman or apprentice for the recovery of wages in any amount.
>
> . . .
>
> 453. Disputes respecting salvage, whether of life or property, shall be heard and determined by and before the receiver of wrecks or the Admiralty Court, as provided for respectively by this Part, and not otherwise.
>
> . . .
>
> 580. (1) The Admiralty Court has exclusive jurisdiction with respect to any matter in relation to the constitution and distribution of a limitation fund pursuant to Articles 11 to 13 of the Convention.
>
> …
>
> By contrast, s. 646 makes no express reference to exclusivity of jurisdiction in the Admiralty Court. In our opinion, if it was intended that s. 646 should grant exclusive jurisdiction to the Admiralty Court in maritime fatal accident claims, language similar to that in ss. 209(2), 453 and 580(1) would have been used.21

Factors affecting weight of presumption

TAB 12

In the Court of Appeal of Alberta

Citation: TransAlta Corporation v Alberta (Utilities Commission), 2022 ABCA 37

Date: 20220202
Docket: 2101-0060AC
Registry: Calgary

Between:

TransAlta Corporation

Appellant

- and -

Alberta Utilities Commission

Respondent

The Court:

The Honourable Justice Jack Watson
The Honourable Justice Brian O'Ferrall
The Honourable Justice Michelle Crighton

Memorandum of Judgment of the Honourable Justice Watson and the Honourable Justice Crighton

Memorandum of Judgment of the Honourable Justice O'Ferrall Concurring in the Result

Appeal from the Decision of
Alberta Utilities Commission in Proceeding 23778
dated on the 10th day of February, 2021

[36] The Commission's decision that, in law, it was not *bound* to accede to the *legal* conclusion of the arbitration panel – as to its interpretation of a concept in a different statute, albeit one in the same language about "associated facilities" – forms part of what remains on the whole of it *an interlocutory* ruling in the as yet unfinished Proceeding 23778. The Commission did not say so expressly, but it is reasonable to infer that the Commission was not persuaded by TransAlta that there would be *wasted* costs and delay from its refusal to accede to TransAlta's preliminary argument for a pre-emption of the Commission's jurisdiction.

[37] The first instance decision-maker should get to decide whether it has jurisdiction to proceed: compare (private arbitrators) ***Dell Computer Corp v Union des consommateurs***, 2007 SCC 34 at paras 84-86, [2007] 2 SCR 801; ***Rogers Wireless Inc v Muroff***, 2007 SCC 35 at para 11, [2007] 2 SCR 921; ***Uber Technologies Inc v Heller***, 2020 SCC 16 at para 34, 447 DLR (4th) 179; ***Alberta Union of Provincial Employees v Alberta***, 2014 ABCA 43 at para 16, 566 AR 380. In ***Horrocks***, the Supreme Court of Canada said the labour arbitrator had *exclusive* jurisdiction but that decision was after the human rights adjudicator and even the Court of Appeal had first found the jurisdiction was not exclusive.

[38] It follows from this that there was nothing untoward about the Commission looking at the question of its jurisdiction and reaching a conclusion on it despite facing the objection that its jurisdiction was confined. The Commission's legal position, in substance, was that it was not bound by the *legal* conclusion of the arbitration award as to the definition of "associated facilities". But it may yet agree with the award, in light of the fact findings made therein to which it might defer, that the decommissioning costs for Sundance A should be, as TransAlta asserts, the same as for Sundance B and C and for the same basic line of reasoning as set out in the arbitration award.

[39] After all, there is a substantial body of law as to statutory construction that repeated usage of identical terms by a legislature in an overall scheme of related legislation conveys legislative intent that the terms be read harmoniously by the presumption of consistent expression: compare ***Alberta (Information and Privacy Commissioner v University of Calgary***, 2016 SCC 53 at para 53, [2016] 2 SCR 555. Related legislation is read together: compare ***T W Logistics Ltd v Essex County Council and another***, (February 12, 2021) [2021] UKSC 4, [2021] 3 All ER 395, citing Lord Mansfield's statement in ***R v Loxdale*** (1758) 1 Burr 445, 447. On the other hand. the wording *around* such terms or other aspects of the context may be found to modify the shared term[s] towards a different interpretation: compare ***HMB Holdings Ltd v Antigua and Barbuda***, 2021 SCC 44 at para 59, [2021] SCJ No 44 (QL).

[40] The arbitration award was not and will not be useless to TransAlta. It dealt with the specific problem as to which that arbitration was aimed and produced consequences that the parties have evidently accepted. TransAlta wants to draw from that award a further 'summary judgment' benefit in this different Proceeding #23778 that the Commission *was bound* to attorn to the award and *was bound* crunch the numbers accordingly.

TAB 13

vehicles known in the automotive trade as motorcycles and scooters;

(x) "motor vehicle" means

(i) a vehicle propelled by any power other than muscular power, or

(ii) a moped,

but does not include a bicycle, a power bicycle, an aircraft, an implement of husbandry or a motor vehicle that runs only on rails;

(y) "motor vehicle document" means

(i) an operator's licence;

(ii) a certificate of registration;

(iii) a financial responsibility card;

(iv) a licence plate;

(v) an operating authority certificate;

(vi) a safety fitness certificate;

(vii) a permit;

(viii) repealed 2021 c13 s15;

(ix) any other document not referred to in subclauses (i) to (vii) that is prescribed by regulation as a motor vehicle document;

(z) "municipality" means a municipality as defined in the *Municipal Government Act* and includes a Metis settlement;

(aa) "non-repairable vehicle" means a motor vehicle or a trailer described by the regulations as a non-repairable vehicle;

(bb) "operator's licence" or "driver's licence" means an operator's licence or a driver's licence that is issued under this Act and includes a document or information and other data contained in an electronic form that is recognized under this Act as an operator's licence or a driver's licence;

(cc) "optometrist" means a regulated member of the Alberta College of Optometrists;

(nn) "roadway" means that part of a highway intended for use by vehicular traffic;

(oo) "salvage motor vehicle" means a motor vehicle described by regulation as a salvage motor vehicle;

(pp) "sidewalk" means that part of a highway especially adapted to the use of or ordinarily used by pedestrians, and includes that part of a highway between

(i) the curb line, or

(ii) where there is no curb line, the edge of the roadway,

and the adjacent property line, whether or not it is paved or improved;

(qq) "state of the United States of America" includes the District of Columbia;

(rr) "subsisting" when used in relation to a motor vehicle document or a policy means, that at the relevant time, the motor vehicle document or policy is current and has not expired nor been suspended or cancelled;

(ss) "traffic control device" means any sign, signal, marking or device placed, marked or erected under the authority of this Act for the purpose of regulating, warning or guiding traffic;

(tt) "traffic control signal" means a traffic control device, whether manually, electrically or mechanically operated, by which traffic is directed to stop and to proceed;

(uu) "trailer" means a vehicle so designed that it

(i) may be attached to or drawn by a motor vehicle or tractor, and

(ii) is intended to transport property or persons,

and includes any vehicle defined by regulation as a trailer but does not include machinery or equipment solely used in the construction or maintenance of highways;

(vv) "urban area" means a city, town or village or an urban service area within a specialized municipality;

(ww) "vehicle", other than in Part 6, means a device in, on or by which a person or thing may be transported or drawn on a

TAB 14

Tomcat Machinery (Edm) Inc. v. Knight, 2001 ABQB 95

Date: 20010213
Action No. 0003 17218

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

BETWEEN:

TOMCAT MACHINERY (EDM) INC.

Plaintiff

- and -

GREG KNIGHT

Defendant

REASONS FOR DECISION
of M. FUNDUK, Master in Chambers

APPEARANCES:

Sid Kobewka
Kobewka Stadnyk
Counsel for the Plaintiff

K. J. Alyluia
Gledhill Lacocque
Counsel for the Defendant

[1] This is an application by the Plaintiff for summary judgment on a promissory note.

[2] The Plaintiff's witness, Jim Murray, says that the Defendant had an account with the Plaintiff since November 1996 and he exhibits a summary of the account. The summary starts March 31, 1997, but that does not today matter. The summary shows a zero balance as at May 25, 1998 and an outstanding balance of $17,898.81 as at December 4, 1998.

[5] Although the Plaintiff can assign the lease it cannot divest itself of any liabilities it might have to the Defendant for any misrepresentations about the mechanical quality of the loader or any issues about the quality of the repairs to the loader that it did.

[6] From time to time the Defendant gave demand promissory notes for the balance outstanding in the account. On May 6, 1998 he gave one for $5,158.69. On June 5, 1998 he gave one for $9,650.66. On June 24, 1998 he gave one for $13,500. Finally, on January 6, 1999 he gave one for $15,000. This lawsuit is on the last note.

[7] The Defendant had brought the loader in for more repairs this last time. The account stood at $17,898.81. The Plaintiff refused to release possession of the loader to the Defendant unless he signed the promissory note for $15,000, which he did. The Defendant then got possession of the loader. The Defendant says that he signed the note only because the Plaintiff would not give possession of the loader to him. It appears that the Defendant was making the monthly lease payments to Kubota, not to the Plaintiff.

[8] The Defendant chose to act for himself and delivered a defence. He has now retained Mr. Alyluia. The Defendant cross applies to deliver an amended statement of defence and a counterclaim.

One

[9] I will deal with the Defendant's application first.

[10] In his present defence the Defendant pleads, among other things, that he signed the note under duress. He now wants to amend his defence to also plead that there was no consideration given for the note. In addition, he wants to plead in better detail his underlying complaints and to add a counterclaim for damages.

[11] The defences of duress and no consideration should not be allowed. A garageman who refuses to give up possession of a vehicle unless he is paid, unless he is given a promissory note or unless the customer signs an acknowledgment of indebtedness does not exert duress in law. A garageman can keep possession as a common law possessory lien, or a garageman's lien under the Garagemen's Lien Act. If a customer pays, or gives a cheque or a promissory note, or signs an acknowledgment of indebtedness, to get possession, that is not duress. See, for example ***Muscle Therapy Clinic and Rehabilitation Ltd. v. Procura Real Estate Services Ltd.*** (1999) 231 A.R. 251 (M), paras. 30 on which amplify on what is duress in law.

[12] By the same token, any argument about lack of consideration has no merit. See the case above cited about "past consideration" being consideration. In any event, at the very least there was some quid pro quo for the note because the Plaintiff gave possession of the loader to the Defendant when it got the note.

TAB 15

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.

4 After Allwest did the work it retained possession of the truck. An officer of Allwest deposes in part:

Bryan Maruyama

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 16

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

REPORT ON LIENS

Report for Discussion No. 13

September 1992

ISSN 0834-9037
ISBN 0-8886-4177-X

potential to mislead a reasonable user of the system. The test is the same whether the issue of validity is between the lien claimant and the debtor, or between the lien claimant and a third party.

(iii) Priority provisions

A garageman's lien is postponed to a charge, lien or encumbrance on the vehicle that is created before the lien is registered if the interest is taken in good faith and without notice of the lien. An unregistered lien is subordinate to the competing interest only if the competing interest arises after the garageman's lien comes into existence.[61] The Act also provides a priority rule for a contest between two or more garagemen's liens. A person whose claim is registered earlier in time is given priority over a person whose claim of lien is registered later in time.

(iv) The statutory possessory lien

The Garagemen's Lien Act at one time created only a non-possessory lien. A claim to a possessory lien was governed by the common law and the Possessory Liens Act. This was changed in 1976 when the legislation was amended to provide for a statutory possessory lien in addition to the statutory non-possessory lien.[62] The Garagemen's Lien Act provides that the statutory lien is in addition to any other remedy that a lien claimant has for the recovery of money.[63] This would appear to preserve the common law possessory lien.[64] It seems therefore that a lien claimant has the option of claiming either a common possessory law lien or a possessory lien under the Garagemen's Lien Act (a statutory possessory lien).

A lien claimant who claims on the basis of a statutory possessory lien does not have to get a written acknowledgment of the indebtedness and does not have to register the lien. Furthermore the statutory possessory lien is not subject to the 6 month period for enforcement. However, a literal reading of the Act suggests

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[61] *R. Angus Alberta Ltd.* v. *Union Tractor Ltd.* (1967), 61 W.W.R. 603 (Alta. Dist. Ct.).

[62] Attorney General Statutes Amendment Act, 1976, S.A. 1976, c. 57, s.3.

[63] Garagemen's Lien Act, s.2(1).

[64] In Saskatchewan, courts have held that the Act replaces the right at common law to continue possession by surrendering possession to the debtor under an agency or bailment agreement. See *Canadian Imperial Bank of Commerce* v. *Tisdale Farm Equipment Ltd.*, [1984] 6 W.W.R. 122 (Sask. Q.B.), aff'd [1987] 1 W.W.R. 574 (Sask. C.A.). In all other respects, the common law possessory lien is preserved.

that a statutory possessory lien that is not registered is subordinate to any subsequent interest created in good faith and without notice. It has been held that the priority and enforcement of a possessory lien is governed by the Possessory Liens Act rather than the Garagemen's Lien Act.[65] This interpretation is troublesome because the Garagemen's Lien Act was expressly amended to create a possessory lien. An alternative approach is to apply a theory of concurrent liens. The lien claimant may elect to assert the common law lien (governed by the Possessory Liens Act) instead of asserting the statutory lien, and obtain priority on the basis of its common law lien.

(d) Enforcement of the lien

The Garagemen's Lien Act[66] provides that a vehicle subject to a lien shall be seized by a sheriff in accordance with the Seizures Act. This incorporates the seizure and notice of objection system and the sale procedure set out in the Seizures Act.[67] A seizure pursuant to a garageman's lien operates as a seizure in respect of all outstanding garagemen's liens.[68] The proceeds of sale are applied first to the expenses of sale, then in payment of the indebtedness secured by the lien. Any money remaining is then distributed pursuant to the Seizures Act.[69]

A literal reading of the legislation suggests that a statutory possessory lien must be enforced through the same procedure that applies to a non-possessory lien. This produces inefficiency since there is no good reason why a sheriff must undertake a seizure when the lien claimant is already in possession of the goods. As a result, the lien claimant may choose to assert the common law lien and enforce the lien by sale under the Possessory Liens Act.[70]

(3) Possessory Liens Act

(a) Origins

The Possessory Liens Act was enacted in 1921.[71] The statute expands the classes of claimants entitled to a lien. The statute also gives a lien claimant the right to sell the goods subject to a lien. A right of sale was given to repairers by

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[65]*Bank of Nova Scotia* v. *Henuset* (1987), 50 Alta. L.R. (2d) 253 (Q.B.)
[66]R.S.A. 1980, ss. 9-10.
[67]Seizures Act, R.S.A. 1980, c. S-11, ss. 14, 23-37.
[68]Garagemen's Lien Act, s.6(2).
[69]Section 10(2).
[70]*Bank of Nova Scotia* v. *Henuset, supra*, note 65.
[71]S.A. 1921, c. 10.

TAB 17

1987 CarswellAlta 36
Alberta Court of Queen's Bench

Bank of Nova Scotia v. Henuset Resources Ltd.

1987 CarswellAlta 36, [1987] A.W.L.D. 470, [1987] C.L.D. 436, 36 D.L.R. (4th) 406, 3 A.C.W.S. (3d) 440, 50 Alta. L.R. (2d) 253, 83 A.R. 396

BANK OF NOVA SCOTIA v. HENUSET RESOURCES LTD. et al.

Waite J.

Judgment: February 12, 1987
Docket: Calgary No. 8601-10217

Counsel: *J. A. Bancroft*, for R. Angus Alberta Ltd.
C. O. Llewellyn, for receiver-manager.

Subject: Property; Contracts

Headnote

Bailment and Warehousing --- Hire of services or work — Liens for services or work — Garagemen's lien — Priorities

Motor vehicles — Garagemen's liens — Priorities — Lienholder obtaining lien by possession — Garagemen's Lien Act not containing sale procedure for lien so acquired — Debenture holder having acquired charge prior to creation of lien — Priority governed by Possessory Liens Act, s. 13 — Lienholder having priority — In any event, s. 5 of Garagemen's Lien Act only giving priority to interests arising subsequent to lien.

R.A. Ltd. took proceedings to obtain a sale of certain tractors, which had been in its continuous possession, pursuant to the provisions of the Possessory Liens Act. Subsequently, the plaintiff debenture holder secured the court appointment of a receiver-manager for all of the property of the owner of the tractors. An application was brought to determine the issue of priority respecting the tractors.

Held:

R.A. Ltd. having priority.

The Garagemen's Lien Act provides no procedure for the sale of a vehicle on which a lien is maintained by continuous possession, nor does it provide for the determination of the rights of the owner or other persons with claims to the vehicle. Such a lien is therefore governed by s. 13 of the Possessory Liens Act. R.A. Ltd. therefore had priority as the holder of a possessory lien. Furthermore, s. 5 of the Garagemen's Lien Act only encompasses charges arising subsequent to the existence of a garagemen's lien. As the plaintiff's charge under its debenture arose prior to the existence of the lien, s. 5 would not have operated to give the plaintiff debenture holder priority.

Table of Authorities

Cases considered:

Angus (R.) Alta. Ltd. v. Union Tractor Ltd. (1967), 61 W.W.R. 603 (Alta. Dist. Ct.) — *applied*

Statutes considered:

Garagemen's Lien Act, R.S.A. 1980, c. G-1, s. 5.

Possessory Liens Act, R.S.A. 1980, c. P-13, s. 13.

Application to determine priorities.

***Waite J.*:**

1 The issue on this application is which of a debenture holder (the bank of Nova Scotia) and a garagemen's lienholder (R. Angus Alberta Limited) has a prior claim to certain Caterpillar tractors.

2 There is an agreed statement of facts which establishes, amongst other things, the following:

3 1. The tractors are motor vehicles as defined in the Garagemen's Lien Act.

4 2. The bank's charge under the debenture arose before the garageman's lien under the statute.

5 3. The debenture creates a valid and enforceable charge against the tractors.

6 4. The garageman's lien is valid and enforceable by reason of the garageman's continuous possession of the tractors since the repairs were performed.

7 On 18th April 1986 the garageman took proceedings designed to obtain a sale of the tractors pursuant to the provisions of the Possessory Liens Act. Those proceedings were adjourned sine die. On 9th June 1986 the debenture holder secured the court appointment of a receiver-manager for all of the property and undertaking of the owner of the tractors.

8 On 29th January 1987 the receiver-manager issued a notice of motion to determine the issue of priority between the debenture holder and the garageman and to obtain directions as to the sale of the tractors and the distribution of the sale proceeds.

9 The position of the debenture holder, in simple terms, is that by reason of s. 13 of the Possessory Liens Act the garageman cannot enforce a possessory lien but is restricted to the remedies created by the Garagemen's Lien Act, and by reason of s. 5 of the Garagemen's Lien Act the debenture holder's claim to the tractors has statutory priority to the claim of the garageman.

10 Put in equally simple terms, the position of the garageman is that the garageman's claim under the Possessory Liens Act is not displaced by s. 13 of that statute but, if it is, s. 5 of the Garagemen's Lien Act gives the garageman priority over the claims of the debenture holder.

11 Section 13 of the Possessory Liens Act provides as follows:

> 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 Lien Act*.

12 Section 5 of the Garagemen's Lien Act is as follows:

> 5 Every lien on a motor vehicle or farm vehicle under this Act shall be postponed to an interest in or charge, lien or encumbrance on the motor vehicle or farm vehicle,
>
> (*a*) that is created or arises
>
> (i) in good faith, and
>
> (ii) without express notice of the first mentioned lien,
>
> and

(*b*) that was created or arose before the filing of the claim of lien pursuant to this Act.

13 The general effect of each statute must be briefly mentioned.

14 Under the Possessory Liens Act, the lienholder retains his lien so long as he retains possession of the chattel. There is no provision for registration of that lien. A summary procedure is established whereby the debtor is notified of the opportunity to pay the debt and regain possession of the chattel. On failure of the debtor to do so, the sale is directed by the court with the proceeds being directed to payment of the claim of the lienholder before any other creditors are paid.

15 The scheme of the Garagemen's Lien Act is to protect the claim of a garageman for repairs done to motor vehicles or farm vehicles. The lien arising under that statute may be protected either by continuous possession of the vehicle by the garageman or by the registration of a lien in the designated registry office. If possession is not maintained but the lien is properly registered, specific statutory provisions establish the procedure to be followed by the garageman to realize the seizure and sale of the vehicle and the disposition of the sale proceeds. If, however, the lien is maintained by continuous possession of the vehicle as opposed to registration of a lien, there is no procedure in the Garagemen's Lien Act for the sale of the vehicle and the disposition of the sale proceeds. In other words, and paraphrasing the language of s. 13(*a*) of the Possessory Liens Act, a garageman's lien that is secured by continuous possession of the vehicle by the garageman, is a "case of lien where there is no provision for realizing by sale in any other statute, and is a lien with respect to which there is no provision in any other statute for determining the rights of the owner of the vehicle and the bailee".

16 Accordingly, s. 13 of the Possessory Liens Act does not deprive the garageman in this case of its possessory lien, or of the procedure set forth in the Possessory Liens Act for enforcing that lien, or of the priority accorded to the garageman as a possessory lienholder.

17 If the foregoing analysis is in error, and if the priorities between debenture holder and garageman in this case fall to be determined under the Garagemen's Lien Act, s. 5 of that statute does not favour the debenture holder. In *R. Angus Alta. Ltd. v. Union Tractor Ltd.* (1967), 61 W.W.R. 603 (Alta. Dist. Ct.), Haddad D.C.J. held that s. 5 of the Garagemen's Lien Act only referred to charges arising subsequent to the existence of a garageman's lien. That point was correctly decided by that court, and it has not been affected by any intervening amendments to the statute. The effect of s. 5 is to put a garageman in the position that, if he seeks to preserve his lien by possession and not registration, he runs the risk that persons who subsequently acquire an interest or charge in good faith and without notice of the garageman's lien may acquire priority to his claim. That risk can be avoided by immediate registration by the garageman of his claim for lien.

18 Accordingly, there will be a declaration that R. Angus Alberta Limited has a valid and enforceable possessory lien against the tractors in priority to any claim of the debenture holder. The tractors should be sold and the proceeds paid firstly to R. Angus Alberta Limited in satisfaction of its lien claims, the balance being paid to the receiver-manager. If the parties require further directions with respect to the sale or distribution of proceeds, they may apply informally for such directions.

19 R. Angus Alberta Limited is entitled to costs of this application, taxable on col. 6 of Sched. C of the Rules of Court, with no limiting rule of any kind to apply.

Order accordingly.

TAB 18

Application for replevin order

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.

Replevin order

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.

(2) A replevin order may also include either or both of the following:

(a) an order to a civil enforcement agency to make a report on its enforcement or attempted enforcement of the replevin order;

TAB 19

Dr. Anne Anderson Native Heritage and Cultural Centre v. Marcon Consulting Corp.

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

Master Quinn (In Chambers)

July 15, 1988.

Action No. 8703 13456

[1988] A.J. No. 1244

Between Dr. Anne ***Anderson*** Native Heritage and Cultural Centre, and ***Marcon*** Consulting Corporation Ltd.

(1 p.)

Counsel

R.D. Karoles, for the applicant. A.A. Robinson, for the respondent.

MEMORANDUM

MASTER QUINN

1 At the hearing of this matter I concluded that defendant Marcon had a valid possessory lien. Counsel for the plaintiff invited me to make an order of replevin with reference to a portion of the books in question and leaving the rest in the defendant's possession. I informed counsel I was unaware of any authority which would permit me to make such an order. I reserved my decision to permit counsel an opportunity to see if he could find any case authority for what he was proposing.

2 Counsel has now referred me to Snagproof Ltd. v. Brody, *69 D.L.R. 271*. In my view that case does not support the argument that a replevin order can be granted with reference to a portion of the goods that are being held under a possessory lien. The Snagproof case does not deal with a possessory lien but rather with a contract for sale and purchase of goods and with an alleged vendor's lien.

3 The application for replevin is dismissed. Goods held under a possessory lien cannot be replevied. If the owner

of the goods wants to get possession of such goods the owner must pay the amount claimed by the party who has the lien. Otherwise the goods will remain in the possession of the lienholder until the litigation is concluded and the trial judge decides what will ultimately be done. Section 8 of Possessory Lien Act, Chap. P-13, R.S.A. 1980 provides that a person entitled to a possessory lien may detain the property in his possession until the amount of his debt has been paid.

4 The defendant Marcon is entitled to its costs in opposing the replevin application.

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TAB 20

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;