



Cases

By Jennifer Babe

1. Unregistered Non Possessory Lien Has Priority Over Secured Creditor

1258917 Ontario Inc. (417 Truck Centre) v. Daimler Truck Financial 2012 ONSC 2522 (Ont SCJ); Divisional Court), on appeal from Small Claims Court

March 2006 dealer sold a Freightliner truck to the debtor. The conditional sale contract was assigned by the dealer to Daimler Truck Financial (“DTF”) which registered under the PPSA

March 2008 debtor took the vehicle to 417 Truck Center which did \$3,661.52 of work and released the vehicle to the debtor. 417 was not paid.

April 2008 debtor took the truck back to 417 for more work. After doing the work 417 kept the truck and claimed a further \$6,304.87 for the added repairs and \$3,433.50 for storage, plus the original repair bill.

DTF disputed 417’s unregistered non-possessory lien as having priority over DTF’s registered security interest. DTF lost at first hearing in the Small Claims Court and appealed the decision. The Divisional Court dismissed the appeal and held that the registered non-possessory lien:

- (a) had priority to DTF’s security interest by s.7(3) of the RSLA which gives a non-possessory lien holder priority against the article ahead of any one other than the person with a possessory lien in that article;
- (b) s.10 of the RSLA provide that a non possessory lien is only enforceable against third parties who acquire rights in the article after the lien arises, if the lien was registered, such as a third party purchaser;
- (c) DTF had rights in the article before the lien arose and gained no new or further rights when it paid the disputed lien amount into court under s.24 of the RSLA and obtained possession of the truck. DTF knew of this lien about 5 months before it made the payment into court and none of its rights were dependent on doing an RSLA search for a lien; and,

- (d) as registered owner of the vehicle, the conditional sale purchaser was a beneficial owner and had agreed to pay storage charges to 417. As such s.4(4) of the RSLA did not apply and DTF was required to pay all of the storage charges and not just 60 days from notice.

2. Small Claims Court has jurisdiction on deficiency claims; Sale by Auction #1

Chrysler Financial Service Canada Inc. v. Misner, 2012 ONSC 4609 (Ont SCJ), on appeal from Small Claims Court (Shaw, J)

Chrysler Financial (“CF”) repossessed the conditional sale contact vehicle after the debtor’s defaults, gave its PPSA Notice of Sale, sold the vehicle at an auction house, and then sued the debtor for the deficiency balance of about \$7,900 in Small Claims Court.

At trial, the judge dismissed the claims on the basis that Small Claims Court did not have jurisdiction over the matter under Part V of the PPSA.

On appeal, Healy, J. awarded CF its debt and interest from the debtor on the basis that:

- (i) references in Part V to matters brought before “a court of competent jurisdiction” and to the “Superior Court of Justice” include the Small Claims Court because:
 - (A) s.22(1) of the *Courts of Justice Act* provides that the Small Claims Court is continued as a branch of the Superior Court of Justice; and
 - (B) by s.23 and 25 of the *Courts of Justice Act*, a Small Claims Court can hear matters for a claim for the payment of money, up to its present \$25,000 monetary jurisdiction;
- (ii) CF had given the debtor the required PPSA Notice of Sale;
- (iii) the conditional sale contract as well as the PPSA gave CF the right to claim a deficiency balance;
- (iv) the debtor’s opinion as to a sale value of the vehicle, based on ads for sale of like vehicles was not evidence of actual sale prices;
- (v) CF’s evidence from the Black Book on actual wholesale values from auction houses was evidence of sale prices; and
- (vi) CF’s contract provided that a sale “at a private motor vehicle dealer auction which you acknowledge is a commercially reasonable method of disposition”, and CF used this method to sell the vehicle.

3. Internet Auction Sale – Defective Notice of Sale; Sale by Auction #2

CNH Capital Canada Ltd., v. Diamond 4 Holdings Ltd., 2012 BCSC 942

The debtor financed equipment with CNH and gave security over two excavators as collateral. The debtor defaulted. CNH gave a demand, then seized the two machines and gave a BC PPSA Notice of Sale for a “private sale”.

CNH’s sale process had the following steps:

- (i) an inspection of the machines was done by CNH to set a value and a price;
- (ii) the CNH dealer where the seized goods were stored had a first right to purchase. If that was not taken in the time period set then,
- (iii) an email notice goes out to all captive CNH dealers in North America over an email posting system. If no dealer offers to buy in the time period, then
- (iv) the equipment is offered to all captive and non-captive equipment dealers. If no one offers to buy the equipment by the end of the four months from seizure then,
- (v) the machines are listed for sale on an alternative website for internet auction sales.

The two machines were sold over the internet auction website for 81% of the value expected by CNH from its conditions reports. CNH sued the debtor for the deficiency of about \$164,000. The debtor defended the claim on the basis of:

- (a) lack of PPSA Notice of Sale by auction; and
- (b) the price obtained by CNH being too low.

The Court awarded CNH a reduced amount of \$105,000 because:

- (i) the PPSA contains no definition of either an auction or private sale;
- (ii) s.59(7)(h) of the BC PPSA requires a Notice of Sale to give, “the date, time and place of any sale by public auction” and CNH did not do so. The Court wrote:

The purposes served by having the additional information in the notice of disposition to a debtor, pursuant to s.59(7)(h), in my view, is to ensure that the debtor who has an option to redeem may also be able to encourage prospective purchasers to participate and/or to ensure the sale process is conducted reasonably. In a private sale a creditor determines whether the sale will occur or not, and is therefore more directly accountable; it can ensure that a reasonable price is obtained. In an auction, that control, or at least some of it, is lost. [at para 25]

- (iii) the use of an internet service to place the goods for sale to the highest bidder was an auction; and

while neither CNH nor the debtor provided expert evidence of the value of the goods, they showed from various publications and the Court used that to determine a reasonable sale price that should have been obtained.

Editorial Note: The CF case notes that the security agreement had the debtor agree that a sale by “private motor vehicle dealer auction” was a commercially reasonable sale method and this avoided disputes from the debtor on the method of sale being unreasonable. The CNH case focuses on the content of a Notice of Sale which did not include notice of a sale by auction as well as the possibility of a private sale.

Many recovered goods are sold by open or closed, in person and online auctions. I don’t know how one can meet the date, time and place notice requirements in the Notice of Sale, other than possibly to state the auction sale will occur after a set date and contact the secured party for the date, time and place.

4. Mistaken PPSA Discharge

KBA Canada Inc. v. 3S Printers Inc., 2012 BCSC 1078; this case is now under appeal.

2004	Supreme Graphics obtained a perfected GSA over the assets of 3S
Nov 20, 2005	KBA sold a printing press to Wells Fargo Equipment Financial on a full recourse basis, and Wells Fargo leased the press to 3S under a perfected PMSI
2006	CIT obtained a perfected GSA over the assets of 3S
March 15, 2010	3S defaulted on a lease to Wells Fargo. Wells Fargo used its recourse rights and sold the lease and press back to KBA under an assignment agreement. The BC PPSA registration was amended to record KBA as the new secured party

- May 4, 2010 Wells Fargo mistakenly discharged the PPSA registration for this lease without the approval or knowledge of KBA
- July 16, 2010 Wells Fargo re-registers the lease under the BC PPSA and attempts to get Supreme Graphics and CIT to subordinate in its favour. They refused to do so

KBA seized and sold the press and the sale proceeds of €800,000 was held in trust pending this application to determine priority.

CRA became a party to the action as 3S owed the Crown some \$1.142 million in unremitted payroll source deductions.

Wells Fargo applied to the Court pursuant to s.70 of the BC PPSA to correct the error resulting in a windfall to third parties on the basis that:

- (a) s. 35(7) allows a party 30 days to re-register to correct an inadvertent discharge by statutory right;
- (b) s.70(a) allows the Court to make an order to determine issues of priority for an error not corrected in the thirty day window; and
- (c) s. 68(1) provides the law of equity continues to apply where it is not inconsistent with the PPSA.

Wells Fargo noted here no additional advances had been made by any party after the innocent mistake and such order would prevent unjust enrichment.

The Court agreed and awarded KBA the sale proceeds on the printing press on two grounds:

- (i) an order under was issued under s.70 of the PPSA on the basis of a priority decision; and
- (ii) under equity to prevent unjust enrichment to CIT and Supreme.

The Court wrote:

In these limited circumstances;

- (i) Existence of a prior security interest perfected by registration;
- (ii) A mistaken discharge by innocent mistake and without notice to the security holder;
- (iii) No reliance [on the PPSA registry] by any competing security holder;

I am of the view an order under ss 68 and 70 determining priorities is appropriate. [at para 80]

5. Co-Lessee vs. Surety

GMAC Leaseco Corporation v. Jaroszynski, 2012 ONSC 7059 (Ont SCJ; Divisional Court), on appeal from 2012 ONSC 1005

This was an appeal by GMAC of the trial judge's decision finding that Mr. Jaroszynski ("J") who co-signed the lease was a surety of the first lessee and entitled to the defences of a surety.

The appeal concerned the interpretation of the lease contract as a question of law and not a review of factual issues. The Court overturned the trial decision and held:

- (i) that J was a co-lessee and not a surety. The Court reviewed jurisprudence on contract interpretation and held that by the clear meaning of GMAC's lease J had agreed to be bound as a co-lessee and agreed to be bound by all of the lease's terms and conditions. The fact that J chose to leave the vehicle with the first co-lessee and otherwise not pay attention to its insurance or operation or return at lease end, was extraneous evidence and not applicable to J's obligations as a co-lessee;
- (ii) the Lease did provide that it could not be amended without a signed agreement by both co-lessees. J had not been aware of the lease term extensions and should not therefore not be liable for these renewal term rent payments. However GMAC had applied these four payments taken from J's bank account and had reduced the residual balance owing and so had already accounted for his payments; and
- (iii) as this was a lease renewal by an extended term, no new agreement had been created.

6. Crown execution priority

Liberty Mortgage Services Ltd. v. Canada (MNR), 2012 ABCA 225

A mortgagor defaulted. The land was sold and after the mortgagee was paid about \$63,500 of surplus funds was paid into court. There were three execution creditors of whom one was the federal Crown for the debtor's arrears of income taxes. All three executions were filed under Alberta's *Civil Enforcement Act* ("CEA").

The Master and the Queen's Bench judge both held that the CEA applied to require the three execution creditors to rank equally and share rateably. The Crown appealed.

The Alberta Court of Appeal interpreted the case law on Crown privilege and noted that s.99(3) of the CEA preserves that privilege and the Crown had priority to payment.

7. Securitization Sale to Raise Funding not a bulk sale

In an earlier application by CLE for an exemption order under the *Bulk Sales Act* for a securitization sale of assets to raise funds, Brown J. granted the exemption order for that one sale but not for sales of future tranches between the same seller and funder. (See: [2012] O.J. No. 879). In that order, Brown, J. required that the next Application for an exemption order be done on notice to the Attorney General's office.

In a second application, with the Attorney General having been served, but not choosing to intervene, Brown, J. again held that a securitization asset sale done to raise funding, was not a sale under the *Bulk Sales Act* and was again exempted from application of this Act. Brown, J. noted that:

The definition of "sale" in the BSA includes a "transfer, conveyance" but excludes a "pledge, charge or mortgage". The exclusion of those types of transactions from the definition of "sale" strongly signals that the BSA was not intended to capture a sale the purpose of which was to raise operational financing for a business. [at para 19]