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

BETWEEN: ACTION NO.: 2001 05482

KALINKO ENTERPRISES LTD.

APPLICANT

- and –

JMB CRUSHING SYSTEMS INC.

RESPONDENT

**WRITTEN BRIEF OF THE INTERESTED PARTY N.P.A. LTD.
IN RESPONSE TO THE APPLICATION OF KALINKO ENTERPRISES LTD.
SCHEDULED FOR AUGUST 7, 2020, BEFORE
THE HONOURABLE JUSTICE K.M. EIDSVIK**

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I. INTRODUCTION/SUMMARY OF POSITION

1. We act for the interested party, N.P.A. Ltd. ("**NPA**"). NPA claims ownership to the aggregate pile (the "**Subject Aggregate**") located on SML 020038 (the "**Precambrian SML**") referred to specifically in para. 1 c of the Application Notice of the Applicant, Kalinko Enterprises Ltd. ("**Kalinko**"). NPA opposes any alleged ownership interest of Kalinko in the Subject Aggregate and, further, NPA opposes any claimed security interest alleged by Kalinko in the Subject Aggregate.

2. JMB Crushing Systems Inc. ("**JMB**") was intending to actively participate in this application, and oppose the relief claimed by Kalinko until last week when JMB counsel indicated that due to a lack of support from the two main secured lenders, due to economic reasons, JMB would be reducing its involvement in the application. JMB counsel has previously indicated to interested parties that it sold the Subject Aggregate to NPA, and was paid for it by NPA, in January of 2020. JMB counsel has further indicated that it will be providing an affidavit, correcting the record of earlier affidavit evidence sworn around the time of obtaining the CCAA Order, to indicate that JMB did receive the purchase price payment from NPA in January of 2020.

3. In relation to the Application, Kalinko has filed the affidavit of Tim Kalinski and Tim Kalinski was examined on his affidavit by NPA counsel last week. Further, NPA has sent out a sworn affidavit (sworn July 30, 2020), and supplemental affidavit (sworn July 31, 2020), of Bill Turner to Kalinko counsel and Bill Turner was examined on his affidavits by Kalinko counsel last week. The Bill Turner affidavits are in the process of being filed.

4. NPA purchased the Subject Aggregate from JMB in January of 2020 for a price of $1,396,500.00. Part of the purchase transaction was provisions dealing with access for NPA to the Subject Aggregate at the Precambrian SML. The Subject Aggregate had been removed by JMB from a Kalinko SML to the Precambrian SML in late 2018/early 2019 with the expectation it would be purchased and used by NPA in a project at the Regional Municipality of Wood Buffalo ("**Wood Buffalo**").

5. In February of 2020, NPA learned about a potential issue associated with it accessing the Subject Aggregate arising from a company operating as AL's Contracting, whose legal name is 8488745 Alberta Ltd. ("**Al's Contracting**"), changing the locks to a gate at the Precambrian

SML. JMB had indicated such a position taken by Al's Contracting was frivolous and JMB was dealing with it.

6. NPA then was informed of the CCAA Order in early May 2020, and was told, in early May 2020, that JMB counsel was dealing with the access issue and would keep NPA informed.

7. In early June 2020, counsel for Kalinko began communicating with NPA counsel and communications continued between NPA, JMB, Kalinko, and Al's Contracting regarding the positions of these Parties regarding ownership of, security in, or access to the Subject Aggregate. Such discussions included exchanging information regarding positions and discussing a potential Consent Order whereby NPA would place security for the claims of Kalinko and Al's Contracting in return for immediate use of and access to the Subject Aggregate. Discussions regarding the Consent Order were ultimately unsuccessful and substantive discussions about it stopped when Kalinko proceeded to serve its application materials which also sought relief in relation to the Subject Aggregate.

8. NPA submits it is the owner of the Subject Aggregate, not Kalinko. JMB agrees with this position. The material agreement between JMB and Kalinko is the Sand and Gravel Operating Agreement entered into between those parties in 2012 and which was subsequently amended (the "**Operating Agreement**").

9. NPA submits the Operating Agreement provided JMB with the right to mine, remove and sell aggregates on and from various surface material leases obtained from the Province of Alberta by Kalinko and family members (the "**Kalinko SM Leases**"). We submit that under the Operating Agreement JMB was the owner of such aggregates, consistent with profit a prendre rights, and that JMB was to ensure that all legal, beneficial, title and interest in the Operations (as defined in the Operating Agreement), were to be owned by JMB, that Kalinko had a contractual right to a royalty payment from JMB based on tonnage of aggregates sold by JMB to JMB customers which royalty payments were only due following JMB receiving payment from JMB customers, and that Kalinko had to exercise an option, after termination of the Operating Agreement, to become owner of aggregate stockpiles remaining on Kalinko SM Leases which were produced by JMB.

10. In addition, Kalinko had agreed by separate letter agreement that JMB did not owe any royalty payment to Kalinko, in relation to the Subject Aggregate, until the Subject Aggregate had been removed from the Precambrian SML.

11. In the alternative, to JMB owing the Subject Aggregate when such was sold to NPA, we submit JMB, as agent of Kalinko or otherwise, had the authority to extract, remove and sell the Subject Aggregate which JMB did in removing the Subject Aggregate to the Precambrian SML and then by selling the Subject Aggregate to NPA.

12. The discussions between the Parties leading up to this Kalinko application had included discussion about the alleged Kalinko security interest. There is evidence before the Court by Kalinko regarding the registration of an alleged security interest and examination on affidavits has "touched on" the alleged security interest.

13. Further, the Operating Agreement by its terms creates no security agreement or interest in aggregates excavated and sold by JMB. In the alternative, we submit any alleged security agreement cannot apply to the Subject Aggregate, or be enforced against NPA, as the Subject Aggregate was, and is, removed from the Kalinko SM Lease location, Kalinko authorized the sale of the Subject Aggregate, and the sale of the Subject Aggregate by JMB to NPA was a sale in the ordinary course of JMB's business.

14. We further submit that Kalinko only has a contractual claim for a royalty payment from JMB, under the Operating Agreement, which is an unsecured claim and which claim has no impact on the ownership rights of NPA in the Subject Aggregate.

15. Alternatively, if Kalinko has an ownership or security claim against the Subject Aggregate of any merit, then such a claim is discharged fully, against the Subject Aggregate, by Kalinko being paid the applicable royalty amount under the Operating Agreement which Kalinko has claimed as being $593,000, approximately.

II. FACTS

16. NPA is a long operating company that by amalgamation took over E Constriction Ltd. ("**E Construction**"). E Construction had dealings in this matter prior to the NPA amalgamation taking effect on May 1, 2019. NPA, which in part operates using the name of Wapiti Gravel Suppliers, was a sister company of E Construction and there was lots of interaction between the companies. NPA operates in gravel supply, road construction, granular base construction, underground utility construction, and paving industries in Alberta, and elsewhere, for government, commercial and private customers.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 2 and Examination Transcript of Bill Turner, July 31, 2020, pages 4 and 5

17. Bill Turner, who swore the Affidavits for NPA, is the Vice- President and General Manager for NPA and he has worked with NPA since 1990. NPA sells several million tonnes of aggregate per year.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 1 and Examination Transcript of Bill Turner, July 31, 2020, page 6

18. JMB/Jeff Buck (JMB's former principal) was in the business of supplying materials out of remote SML's, including from more than one SML holder, to satisfy one contract. NPA and E Construction have done business with JMB/Jeff Buck a number of times over decades and it was the JMB niche to locate aggregate sources, act as a crushing contractor and hauler, and supply the aggregates; and even from more than one source.

Examination Transcript of Bill Turner, July 31, 2020, pages 16 and 17

19. The Operating Agreement is attached as Exhibit A to the Affidavit of Tim Kalinski. It provided, *inter alia*, that:

> **Preamble C.** JMB operates a commercial aggregate crushing and sales business;
>
> **Preamble D.** JMB wishes to obtain exclusive access to the Sand and Gravel located on the Leased lands;
>
> **1.1 Definitions**
>
> "Leased Lands" means those various parcels of land subject to the SM Leases;
>
> "Operations" means the business to be conducted by JMB on the Leased Lands pursuant to this Agreement being the extraction, processing and sale of Sand

and Gravel and products produced or derived therefrom and all activities reasonable related thereto;

"Sand and Gravel" means alluvial sand and gravel material permitted to be extracted from the Leased Lands pursuant to the SM Leases but does not include any crushed gravel inventory held by Kalinko and the Owners (Kalinko family members having SM Leases in their personal name) as of January 1, 2012;

"Sand and Gravel Royalty" has the meaning set out in Section 6.1;

"SM Leases" means collectively, the surface material leases set out in Schedule A , as each of the same may be amended or renewed from time to time;

2.1 Grant
The Owners and Kalinko hereby grant to JMB and JMB hereby accepts and takes from the Owners… the exclusive right:
a) to mine and remove the Sand and Gravel from the Leased Lands;
b) to blend, process and stockpile Sand and Gravel upon the Leased Lands and haul, transport and sell Sand and Gravel from the Leased lands;
c) to construct such improvements on the Leased Lands…
d) to install such Machinery and Equipment on and over the leased Lands …

2.3 No Unreasonable Interference
The Owners and Kalinko's activities on the leased lands shall not unreasonably interfere with JMB's conduct of the Operations;

2.4 No Interest
JMB shall have no legal or beneficial interest in title to the Leased Lands or the SM Leases which shall remain the exclusive property of the Owners and Kalinko;

5.2 Operations Cost
JMB shall, at its own expense, be responsible for all capital investment, the provision of all working capital, and all other funding for the Operations, including…

5.4 Operations
In connection with Operations, JMB shall:

d) pay all rentals, royalties and taxes (other than Kalinko's taxes based on royalty income) payable with respect to the Operations, including business taxes related to the Operations, …

(i) at all times throughout the Term, ensure that all legal and beneficial right, title and interest in and to the Operations , the Improvements and the Machinery and the Equipment is owned by JMB;

m) issue an invoice for all Sand and Gravel removed from the Leased Lands to its customers within 15 days of its removal;

5.10 Removal of Stockpile Sand and Gravel on Termination

(a) After the termination of this Agreement, JMB shall be entitled for a period of 15 days to enter on and remove from the Leased Lands the stockpile of Sand and Gravel produced by JMB pursuant to the terms of this Agreement provided that the Sand and Gravel Royalty in respect of the same has been paid in full to Kalinko.

(b) Any stockpile of Sand and Gravel not removed from the Leased Lands on or before the expiry of the date as set out in Section 5.10(a) above, at the option of Kalinko, become the sole and absolute property of Kalinko without compensation to JMB.
(c) Notwithstanding the foregoing, if this Agreement is terminated because of a default by JMB, the stockpile of Sand and Gravel shall, at the option of the owners, become the sole and absolute property of the Owners without compensation to JMB.
(d) Any stockpile of Sand and Gravel so removed from the Leased Lands shall, for the purpose of the Sand and Gravel Royalty, be construed as a sale and shall be deemed to be at the then "fair market value" for that type and quality product.

6.4 Payment of Sand and Gravel Royalty
JMB shall, within 14 days after JMB receiving payment from its customers, deliver to the Owners the Sand and Gravel Royalty in respect of the amount sold to such paying customer.

6.8 Gravel Inventory
Any gravel inventory held by the Owners and Kalinko as of the date of this Agreement shall be sold to JMB at a mutually agreeable price per tonne….

15.6 Entire Agreement
This Agreement and the ancillary agreements contemplated herein constitute the entire agreement among the Parties with respect to the matters contained herein, and, any and all previous agreements, written or oral, express or implied, between the Parties or on their behalf, relating to the matters contained herein are hereby terminated and cancelled.

15.10 No Partnership
Nothing contained in this Agreement shall be construed to constitute any Party a partner , agent or representative of the other Party…

20. The term of the Operating Agreement was five (5) years with provisions for an extension of five (5) years on certain terms (Article 4). All production of aggregate by JMB was to be measured and tracked and all aggregate leaving the Leased Lands shall be weighed and JMB shall provide monthly statements identifying quantities removed, and the customer and location to which the Sand and Gravel was shipped (Article 5.11). The Sand and Gravel Royalty was based on a set dollar value per metric tonne of aggregate with specific increases to the royalty and the obligation for prepayment of royalties (Article 6).

21. An Amending Agreement to the Operating Agreement was entered into between the Parties. JMB believes it was Exhibit E to the Affidavit of Tim Kalinski, while Tim Kalinski is unsure if it was Exhibit E or Exhibit D to the Affidavit of Tim Kalinski.

22. The Exhibit E Amending Agreement is signed, is dated June 12, 2017, and it provides, *inter alia*, that:

> 1.The Parties agree that Kalinko had been paid an amount greater than 12 million under the Operating Agreement, JMB will pay further owed royalties of approx. 1.18 million to Kalinko by October 1, 2017 and the Operating Agreement will automatically extend for an additional 5 years.
>
> 2. After termination of the Operating Agreement, the 15 day period in Article 5.10(a) for JMB to remove stockpiles of Sand and Gravel from the Leased lands was amended to 730 days
>
> 8. An annual minimum royalty payment to Kalinko was added to the Operating Agreement.
>
> 10. Notwithstanding section 15.6, the Parties may enter into contracts for the completion of work on a case by case basis, as between JMB and Kalinko, separate and apart from Operating Agreement terms.

23. The Operating Agreement was extended for a further five (5) years in June of 2017.

Examination Transcript of Tim Kalinski, July 30, 2020, page 17 (line 27) and page 18 (lines 1-3)

24. The Amending Agreement further increased royalty amounts.

Examination Transcript of Tim Kalinski, July 30, 2020, page 19 (lines 4-7)

25. Kalinko registered a security interest for the first time against JMB in April of 2019. The security registration arose from the Operating Agreement according to Kalinko.

Examination Transcript of Tim Kalinski, July 30, 2020, page 21 (lines 3-6) and page 28 (lines 10-20)

26. E Construction, now part of NPA by amalgamation, entered into a contract with OCL Group Inc. ("**OCL**") for the construction of the Anzac water and sewer project for Wood Buffalo (the "**Anzac Project**"). As a result, E Construction entered into subcontracts with JMB for aggregate supply related to the Anzac Project in the spring and summer of 2018. JMB planned to supply some of the needed aggregate to E Construction, for the Anzac Project, from SML 120004 which is one of the Kalinko SM Leases listed in Schedule A of the Operating Agreement and which SM Lease is in the name of Zach Kalinski (the "**Kalinko SML**") who is a son of Tim Kalinski and Zach Kalinski is a Kalinko foreman.

Affidavit of Bill Turner, sworn July 30, 2020, paragraphs 9-11, and Exhibit "J"
Affidavit of Tim Kalinski, sworn July 11, 2020, Exhibit "A", Schedule A
Examination Transcript of Tim Kalinski, July 30, 2020, page 4 (lines 20-23) and page 33 (lines 8-13)

27. Wood Buffalo, as project owner, decided to reduce the scope of work for the Anzac Project which was communicated to E Construction by OCL. E Construction communicated the work scope reduction to JMB and indicated the Subject Aggregate from the Kalinko SML will not be needed for the Anzac Project. E Construction offered to purchase the aggregate at issue in

this application, which was intended to come from the Kalinko SML and at that time thought to be 70 000 tonnes, being the Subject Aggregate, but JMB rejected the E Construction purchase terms.

Affidavit of Bill Turner, sworn July 30, 2020, paragraphs 12-13 and Exhibit "M"

28. Notwithstanding communications with E Construction regarding the reduction in work scope for the Anzac Project, JMB proceeded to excavate the Subject Aggregate from the Kalinko SML in late 2018 and early 2019 and have it transported to the Precambrian SML for crushing and stockpiling.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 38, Exhibits "cc" and "dd"

29. By letter agreement dated December 18, 2018, signed by JMB, Zach Kalinski and the principal of Precambrian being Randall Lacombe, it was agreed, *inter alia*:

(a) The Subject Aggregate would be transported from the Kalinko SML to the Precambrian SML for crushing, stockpiling and storage;

(b) JMB and E Construction will have a financial interest in the Subject Aggregate being stored and at no point would Randall Lacombe prevent removal of the Subject Aggregate by JMB, or its designates, from the Precambrian SML; and

(c) Zach Kalinski acknowledges that royalties owed for aggregate from the Kalinko SML would not become payable until the aggregate leaves the stockpile site at the Precambrian SML.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 35, Exhibit "aa"

30. Kalinko purported to terminate the Operating Agreement for default in April of 2019 for failures to pay monies which are not related to the Subject Aggregate. This occurred after JMB counsel sent a letter on April 8, 2018 indicating one amount would be paid but disputing other amounts owed due to a set off claim in excess of $500,000 and, further JMB was seeking arbitration as provided for under the Operating Agreement to resolve the dispute. Neither Kalinko or the Kalinko family members (referred to as "Owners" in the Operating Agreement) exercised their option to own any stockpiles of Sand and Gravel produced by JMB.

Affidavit of Tim Kalinski, sworn July 11, 2020, Exhibits "J" and "L"

31. In September of 2019, JMB counsel was contacting Wood Buffalo, legal counsel for NPA and legal counsel for OCL regarding seeking payment for the Subject Aggregate located at the Precambrian SML. When no payment was forthcoming to JBM, JBM issued a lawsuit against NPA. NPA disputed the allegations of JMB regarding its claim and NPA did not have to file a defence. Discussions then occurred in the fall of 2019 regarding Wood Buffalo directly purchasing the Subject Aggregate as Wood Buffalo still needed aggregate for the completion

of the Anzac Project which had gone to re-tender following the termination of OCL by Wood Buffalo.

Affidavit of Bill Turner, sworn July 30, 2020, paragraphs 16-18 and paragraph 17 sets out why NPA did not owe or pay the monies requested by JMB

32. JMB signed a Purchase Agreement to sell the Subject Aggregate to Wood Buffalo but the Purchase Agreement, with Wood Buffalo purchasing the Subject Aggregate, did not proceed as Wood Buffalo did not want to pay the entire purchase price for the Subject Aggregate at once as the Subject Aggregate was expected to be needed in quantities over time; rather than all at once.

Affidavit of Bill Turner, sworn July 30, 2020, paragraphs 19-20 and Exhibits "P" and "Q"

33. JMB continued to access Kalinko SM Leases to mine, remove and sell aggregates between April and November of 2019. JMB provided monthly Statements of Account with particulars of the quantities of Sand and Gravel removed, in accordance with the Operating Agreement, along with particulars of the aggregate size, JMB customer involved and the Sand and Gravel Royalty owed to Kalinko which information is used by Kalinko for the issuing of invoices to JMB for payment.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 44 and Exhibit "jj"
Examination Transcript of Tim Kalinski, July 30, 2020, pages 12-14 and page 15 (line 1-3)

34. The royalties to be paid to Kalinko by JMB, arising from aggregates removed from the Kalinko SM Leases by JMB in the summer of 2019, were based on the royalties set out in the Operating Agreement.

Examination Transcript of Tim Kalinski, July 30, 2020, page 30 (lines 1-18)

35. When Wood Buffalo could not complete a purchase of the Subject Aggregate from JMB, NPA proceeded to try and purchase the Subject Aggregate as Wood Buffalo was a good customer of NPA, NPA believed it could likely sell the Subject Aggregate to NPA profitably as Wood Buffalo still had need for the Subject Aggregate at the Anzac Project and if not, NPA could make use of the Subject Aggregate elsewhere.

Supplemental Affidavit of Bill Turner, sworn July 31, 2020, paragraph 4

36. NPA and JMB entered into an Aggregate Purchase and Removal Agreement in January of 2020 (the "**NPA-JMB Purchase Agreement**") involving the Subject Aggregate. The NPA-JMB Purchase Agreement, signed by the JMB and NPA, provided that, *inter alia*:

> The Subject Aggregate was owned by JMB and that JMB had free and unencumbered ownership of the Subject Aggregate, with the right to sell the

> Subject Aggregate free and clear of any and all claims, liens, encumbrances or security interests; and
>
> JMB had no indebtedness which might by operation of law or otherwise constitute a lien, charge, claim or security interest of any kind against the Subject Aggregate

Affidavit of Bill Turner, sworn July 30, 2020, paragraphs 24-26, Exhibit "T"

37. By an Amending Agreement entered into between NPA and JMB (the "**NPA-JMB Amending Agreement**"), the term in which NPA had to remove the Subject Aggregate from the Precambrian SML was moved to November of 2021.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 27, Exhibit "V"

38. NPA paid the purchase price of $1,396 500.00, for the Subject Aggregate, to JMB which JMB deposited in January of 2020.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 28-31, Exhibits "W", "X" and "Y"

39. In March of 2020, NPA entered into an Aggregate Sale Agreement for the Subject Aggregate with Wood Buffalo. Title to the Subject Aggregate will pass to Wood Buffalo when the Subject Aggregate is loaded on to Wood Buffalo trucks or delivered to the Project site; neither of which has occurred.

Affidavit of Bill Turner, sworn July 30, 2020, paragraph 32, Exhibit "Z"

40. In March of 2020, Kalinko counsel demanded payment of outstanding accounts receivable, from JMB, arising mostly from the summer/fall of 2019 and relate to payment of Sand and Gravel royalties. None of the demanded amounts relate to any amounts owing in relation to the Subject Aggregate and there is no demand claiming ownership of the Subject Aggregate or any other aggregates. This same March 2020 letter from Kalinko counsel directs JMB to "cease all sales of any Kalinko products" until the accounts receivable have been paid in full and Kalinko provides consent to resume work. In response, JMB counsel writes Kalinko counsel in April of 2020 confirming it appears Kalinko is continuing to rely on the Operating Agreement as amended.

Affidavit of Tim Kalinski, sworn July 11, 2020, Exhibit "P"
Examination Transcript of Tim Kalinski, July 30, 2020, page 28 (lines 21-27) and page 29 (lines 1-3)

41. Pursuant to a position letter sent by Kalinko counsel to JMB counsel dated May 5, 2020, Kalinko indicated that should JMB wish to obtain ownership of the Subject Aggregate, the Operating Agreement sets out the amount to be paid by Kalinko to JMB being 8.48 per tonne or approximately $593,600.

Affidavit of Bill Turner, sworn July 30, 2020, Exhibit "bb"

III. LEGAL SUBMISSIONS

(i) Operating Agreement

42. We submit that the Operating Agreement does not provide Kalinko ownership of aggregates being excavated by JMB from the SML Leases. Rather, we submit such ownership is with JMB. In this regard, the Operating Agreement expressly provides:

(a) **Article 2.1**: That JMB has the exclusive right to mine and remove Sand and Gravel from the Leased Lands and the exclusive right to stockpile Sand and Gravel upon the Leased Lands and haul, transport and sell Sand and Gravel from the Leased Lands;

(b) **Article 5.4(i) and 1.1**: JMB was to ensure that all legal and beneficial right, title and interest to the Operations was owned by JMB and, further, Operations means the business to be conducted by JMB on the Leased Lands pursuant to the Operating Agreement which would involve the extraction, processing and sale of Sand and Gravel and products produced or derived therefrom and all activities reasonably related thereto;

(c) **Article 5.10(b) and (c):** That Kalinko, or the individual Kalinko family members referred to in the Operating Agreement as "Owners" had to exercise an option after the termination of the Operating Agreement should Kalinko or the Owner want any stockpile of Sand and Gravel not removed from the Leased Lands in accordance with the Operating Agreement, as amended, to become the sole and absolute property of Kalinko or the Owners.

43. We respectfully submit that if Kalinko was the owner of the aggregates mined and produced by JMB from the Kalinko Leased Lands, then it would make no commercial sense for Kalinko, or the individual Kalinski family members, to have to exercise an option in order to obtain ownership of stockpiles of Sand and Gravel not removed from the Leased Lands by JMB following termination of the Operating Agreement. In summary, why have to exercise an option to become owner if you are already the owner as alleged by Kalinko; we submit because Kalinko is not the owner.

44. In further support of JMB owning the aggregates, the Operating Agreement provides that legal and beneficial right, title and interest in products produced or derived from the business to be conducted by JMB, on the Leased Lands, is to be owned by JMB.

(ii) Profit a Prendre

45. In further support of the JMB ownership position, including the Subject Aggregate prior to its sale to NPA, we submit that the rights of JMB under the Operating Agreement arise from a profit a prendre. We submit the three key factors for a profit a prendre are:

    (a) The right to enter onto the Lands of the other party;

    (b) The right to dig for and sever the gravel; and

    (c) The right to haul away the gravel for use of the party performing the digging and severing.

46. We submit that JMB had profit a prendre rights pursuant to the Operating Agreement. We further submit at law, ownership of the aggregates, in a profit a prendre passes, to the Party doing the extraction at the time of severance of the aggregates from the soil. As such, we further submit that JMB was the owner of the Subject Aggregate which it sold to NPA.

***Bussey Seed Farms Ltd. v DBC Contractors Ltd.*, 2016 ABQB 577, see paragraphs 6, 8 and 14 [TAB 1]**

(iii) Additional Operating Agreement References

47. We further note that the Operating Agreement indicates, in Article 2.4, that JMB shall have no legal or beneficial interest in title to the Leased Lands on the SM Leases which shall remain the exclusive property of the Owners and Kalinko; however no such reservation of ownership of the aggregates and products derived therefrom is set out in the Operating Agreement.

48. Additionally under the Operating Agreement, Article 5.4(m), JMB was required to issue an invoice to its customers within fifteen days of Sand and Gravel being removed from the Leased Lands of Kalinko. It is JMB issuing an invoice to its customers, on sale of aggregate to its customers from the Leased Lands, and not Kalinko, because we submit it is JMB which owns and has the right to sell the aggregates including the Subject Aggregate.

49. Additionally we submit in support of JMB's ownership of aggregates, pursuant to Article 6.4 of the Operating Agreement, JMB is to pay a royalty owed to Kalinko only fourteen days after JMB receives payment from its customer in respect to the amount of aggregate sold to that paying customer. It is JMB who is dealing with the customers directly and receiving payment from those customers since it owns and has the right to sell aggregates from the Kalinko

Leased Lands including the Subject Aggregate we respectfully submit. Furthermore, Kalinko would only invoice JMB, not any third parties or customers, for payment of the royalty after Kalinko had received reporting from JMB regarding the removal and sale of aggregates and amounts owed.

Examination Transcript of Tim Kalinski, July 30, 2020, pages 12-14 and page 15 (lines 1-3)

(iv) Continued JMB and Kalinko Business Dealings

50. Further of note, Kalinko acknowledges that the Operating Agreement term was extended for a further term of five (5) years in June of 2017. Although Kalinko purports to have terminated the Operating Agreement in April of 2019, at no time did Kalinko exercise an option to become owner of any aggregates produced JMB. Furthermore, from their conduct and actions, we submit that Kalinko condoned the conduct of JMB (and JMB disputed the defaults) and, as such, JMB and Kalinko continued to do business in 2019 regarding JMB continuing to extract, remove and sell aggregates from the Kalinko Leased Lands and provide monthly reporting to Kalinko regarding such conduct and in response, Kalinko was issuing invoices to JMB based on the monthly reporting by JMB on aggregate removal and sales through the summer and fall of 2019. In fact, it was not until March of 2020 that Kalinko counsel demanded that JMB cease all sales of any Kalinko products until the outstanding accounts receivable, being outstanding royalties, had been paid in full. Further, JMB in April of 2020 understood that Kalinko was continuing to deal with JMB on the basis of the Operating Agreement, as amended.

Affidavit of Bill Turner , sworn July 30, 2020, paragraph 44 and Exhibit "jj" being the information supplied by JMB counsel
Examination Transcript of Tim Kalinski, July 30, 2020, pages 12 - 14 and pages 15 (lines 1-3) and see Affidavit of Tim Kalinski, sworn July 11, 2020, Exhibit "P", March 17, 2020 Kalinko letter and the April 15, 2020 JMB counsel letter (see first paragraph)

(v) Authority of JMB to Sell and December 18, 2018 Letter

51. Further, we submit that Kalinko clearly authorized JMB to extract, to remove and to sell the Subject Aggregate. As discussed, the Operating Agreement provided JMB such rights and such rights were specifically confirmed in a December 18, 2018 letter agreement signed by JMB and by Zach Kalinski. In the letter agreement, Zach Kalinski, as the foreman of Kalinko, was confirming that JMB will be transporting the Subject Aggregate from the Kalinko SML (SML 120004) to the Precambrian SML (SML 020038) at which location JMB would crush and stockpile the material to be stored at the Precambrian SML. It was acknowledged that JMB and E Construction had a financial interest in the Subject Aggregate being stored at the

Precambrian SML, that access would be provided to the Subject Aggregate to JMB and its designates and, further, Zach Kalinski acknowledged that the royalties payable in relation to the Subject Aggregate would not become payable until the Subject Aggregate was stockpiled at the Precambrian SML. We respectfully submit that this letter was confirming JMB had the right to extract, transport and sell the Subject Aggregate and that the financial interest in the Subject Aggregate is with JMB and its intended customer E Construction. We further submit that this letter confirmed that all Kalinko was owed in relation to the Subject Aggregate was payment of a royalty which was not due until the Subject Aggregate was removed from the Precambrian SML. The Kalinko SML (SML 120004) had environmental and wildlife restrictions which meant that after the Subject Aggregate was excavated by JMB, it had to be transported to another location for excavation and storage.

Affidavit of Bill Turner, sworn July 30, 2002, Exhibit "aa", December 18, 2018 letter agreement and Affidavit of Tim Kalinski, sworn July 11, 2020, paragraph 31

52. In the alternative, we note in the December 18, 2018 letter agreement that JMB is referred to as the marketing agent for Zach Kalinski. We submit that the letter is prepared and signed by non-lawyers and, further, the Operating Agreement in Article 15.10 already indicates that JMB and Kalinko will not be considered to be an agent of the other. In the alternative, if JMB was considered an agent, then it was an agent with the right and authority to sell the Subject Aggregate which it did and when doing so to NPA was binding upon Kalinko and Zack Kalinski in our respectful submission. In any event, the evidence indicates that the right to sell Kalinko aggregates by JMB was not demanded to be ceased by Kalinko until Kalinko counsel's letter dated March 17, 2020 which is well after the Subject Aggregate is sold by JMB to NPA in January of 2020.

Affidavit of Bill Turner, sworn July 30, 2020, Exhibit "aa", December 18, 2018 letter agreement
Affidavit of Tim Kalinski, sworn July 11, 2020, Exhibit "A",
Article 15.10 in the Operating Agreement and
Exhibit "P", March 17, 2020 demand letter

(vi) Entire Agreement Clause

53. We note that the Operating Agreement in Article 15.6 has an "Entire Agreement" clause and, therefore, we respectfully submit that this Honourable Court should avoid relying upon any purported pre-contractual obligations being suggested by Kalinko for interpreting the Operating Agreement.

***Arens v M.S.A Ford Sales Ltd.*, 2002 BCCA 509, see paragraph 5 [Tab 2]**

(vii) Amending Agreement to the Operating Agreement

54. We further respectfully submit that the Amending Agreement between JMB and Kalinko in 2017 is enforceable, was acted upon by the Parties and that it further had mutual benefits to both sides. We further note that the Amending Agreement had confirmed that Kalinko had been paid by JMB more than $12,000,000.00 and that JMB would further pay to Kalinko approximately $1,800.000.00 (and Kalinko confirmed that such payment was made). The Amending Agreement further provided Kalinko specific protections to avoid breaches of their Non-Competition Agreement with JMB, provided Kalinko with higher royalty rates and also provided Kalinko with annual minimum royalty payments from JMB, in the amount of $800,000.00 annually, to ensure Kalinko with certain cash flow. Certainly there was consideration going to JMB from the Amending Agreement, which the Parties acted upon, and the Operating Agreement was renewed for a further five (5) years. We respectfully submit that Kalinko's suggestions that the Amending Agreement lacked consideration, or was entered into under duress, is not credible. In no reasonable period of time has Kalinko taken action to try and set aside the Operating Agreement, or any Amending Agreement, on the basis of alleged duress but rather Kalinko has continued to do business and work with JMB and only directed that JMB cease sales of Kalinko products in March of 2020.

Affidavit of Tim Kalinski, sworn July 11, 2020, Exhibits "D" and "E"
Examination Transcript of Tim Kalinski, July 30, 2020, page 15 (lines 4-27), page 16-18 and page 19 (lines 1-24)

(viii) Claimed Security Interest

55. We further submit that the Operating Agreement does not create a security agreement for Kalinko and as such, any registration of the financing statement by Kalinko at PPR against JMB, based on the Operating Agreement, is improper has no merit and should be discharged in our submission. We submit there are no provisions in the Operating Agreement which indicate that Kalinko is reserving title to the aggregates until payment of the royalties. We further submit that the Operating Agreement provisions do not evidence any creation of a security interest; in this regards there is no "charging language" or language that clearly indicates an intention to grant Kalinko an interest in the aggregate assets to secure the contractual royalty payments. We note Kalinko and Owners have the option to become owner of stockpiles of aggregate on the Leased Lands on certain conditions but we submit this does not involve a present grant of security and in our submission in any event, no option was ever exercised by Kalinko.

***Stafford v Sumbler*, 1989 CarswellOnt 628 (D. Ct) see paragraphs 22 and 23 [Tab 3]**

56. We respectfully submit that JMB has not signed a security agreement that is enforceable against a third party in compliance with section 10 (d) of the PPSA.

***Personal Property Security Act*, RSA 2000, c. P-7 ("*PPSA*") section 10 and section 1 definitions for "security agreement" and "security interest" [Tab 4]**

(viv) Authorized Sale Exception

57. Even if it was to be found that Kalinko had a valid security interest against the Subject Aggregate, which our respectful position opposes, then we respectfully submit that Kalinko authorized JMB to sell the Subject Aggregate, as well as other aggregates under the Operating Agreement, and in doing so purchasers of such aggregates, and NPA in purchasing the Subject Aggregate, take sold aggregates, and NPA takes the Subject Aggregate sold, free and clear of any Kalinko claimed security interest based upon authorizing and expecting JMB to sell aggregates including the Subject Aggregate.

***Lanson v Saskatchewan Valley Credit Union*, (1998) CarswellSask 697 (CA) see paragraphs 5, 7 and 9 [Tab 5]**
***PPSA* section 28(a) [Tab 6]**

(vv) Sale in the Ordinary Course of Business Exception

58. Finally, we respectfully submit that the sale of the Subject Aggregate by JMB to NPA in January of 2020 was a sale in the ordinary course of business and as such, such a sale permits NPA to take the Subject Aggregate free and clear of any claimed security interest by Kalinko. We note in his evidence, that Mr. Turner has stated that NPA was buying aggregate from a producer (JMB) who had done business with NPA/E Construction for approximately 30 years and that the NPA-JMB Aggregate Purchase Agreement was "pretty straight forward" and the lawsuit was beside the point because NPA does not believe it owed any money to JMB prior to purchasing the Subject Aggregate. Further, Mr. Turner indicated in his evidence it is very common for aggregate materials to be moved from their location in the winter in frozen conditions, it's quite common in the Fort McMurray area for materials to come out of remote SMLs, even from more than one SML holder, to satisfy a contract, and that Jeff Buck was in the business of doing this and "this was Jeff's kind of niche". Mr. Turner further stated that JMB rounded up aggregate sources, JMB was a crushing contractor, a trucker and an aggregate provider and it is quiet common for JMB to supply aggregates from more than one source and from more than even one pit owner or SML holder to supply the job. It is further

noted in this matter that JMB nearly consummated a sale for the same Subject Aggregate with Wood Buffalo before NPA stepped in and purchased the Subject Aggregate and paid a purchase cheque in excess of $1,000,000.00. We further note that the Subject Aggregate had been removed from the Kalinko SML to the Precambrian SML before any Kalinko purported termination of the Operating Agreement in April, 2019 and, further, as previously indicated, Kalinko did not set out a demand for JMB to cease sales of Kalinko products until March of 2020 well after NPA purchased the Subject Aggregate from JMB.

Examination Transcript of Bill Turner, July 31, 2020, page 22 (lines 5-10), page 15, (lines 13-20) page 16 and page 17 (lines 1-5)
***PPSA* section 30(2) [Tab 7]**
***Agricultural Commodity Corp. v Schaus Feedlots Inc.*, 2001 CarswellOnt 2592 (SCJ) see paragraphs 15-18 and 20, affirmed by 2003 CarswellOnt 654 (CA) [Tab 8]**

IV. SUMMARY OF LEGAL POSITION and RELIEF REQUESTED

59. We submit Kalinko is not the owner of the Subject Aggregate but rather NPA is resulting from the NPA January, 2020 purchase from JMB. We further submit that Kalinko has no security interest in the Subject Aggregate sold to NPA as any claimed security interest has no merit or alternatively, the NPA purchase from JMB in the circumstances permits NPA to solely own the Subject Aggregate free and clear of any claimed Kalinko security interest.

60. NPA seeks the following:

(a) A declaration Kalinko is not the owner of the Subject Aggregate;

(b) A declaration NPA is the present owner of the Subject Aggregate; and

(c) A declaration the Kalinko registered security interest has no merit and shall be discharged or alternatively, a declaration that NPA purchased the Subject Aggregate, and owns it, free and clear of any registered Kalinko security interest.

ALL OF WHICH IS RESPECTFULLY submitted by Brownlee LLP this 4th day of August, 2020.

BROWNLEE LLP

PER:

Daniel R. Peskett
Solicitors for N.P.A. Ltd.

V. TABLE OF AUTHORITIES

1. *Bussey Seed Farms Ltd. v DBC Contractors Ltd.*, 2016 ABQB 577, see paragraphs 6, 8 and 14

2. *Arens v M.S.A Ford Sales Ltd.*, 2002 BCCA 509, see paragraph 5

3. *Stafford v Sumbler*, 1989 CarswellOnt 628 (D. Ct) see paragraphs 22 and 23

4. *Personal Property Security Act*, RSA 2000, c. P-7 ("*PPSA*") section 10 and section 1 definitions for "security agreement" and "security interest"

5. *Lanson v Saskatchewan Valley Credit Union,* (1998) CarswellSask 697 (CA) see paragraphs 5, 7 and 9

6. *PPSA* section 28(a)

7. *PPSA* section 30(2)

8. *Agricultural Commodity Corp. v Schaus Feedlots Inc.*, 2001 CarswellOnt 2592 (SCJ) see paragraphs 15-18 and 20, affirmed by 2003 CarswellOnt 654 (CA)

Tab 1

2016 ABQB 577
Alberta Court of Queen's Bench

Bussey Seed Farms Ltd. v. DBC Contractors Ltd.

2016 CarswellAlta 2026, 2016 ABQB 577, [2016] A.W.L.D. 5007, 272 A.C.W.S. (3d) 178

Bussey Seed Farms Ltd., Gordon J. Bussey and Joanne Bussey (Plaintiffs) and DBC Contractors Ltd. (Defendant)

Master J.T. Prowse, In Chambers

Heard: October 6, 2016
Judgment: October 13, 2016
Docket: Calgary 1601-03841

Counsel: Terry L. Czechowskyj, for Plaintiffs
Elmer S. Chiu, for Defendant

Subject: Contracts; Corporate and Commercial; Property

Headnote

Commercial law --- Sale of goods — Transfer of property — Miscellaneous
Plaintiffs signed written contract allowing defendant to extract gravel aggregates from their land — Plaintiffs took position that defendant was in arrears of payments under agreement and they barred defendants from entering onto land to remove 42000 tonnes of crushed gravel which defendant had stockpiled on land — Plaintiffs brought application to determine preliminary issue of ownership of stockpiled aggregate — Defendant was owner of stockpiled aggregate — Both case law and wording of agreement support conclusion that agreement in question was profit a prendre — Review of agreement showed that it did not grant exclusive possession to defendant — Plaintiff's contention that it was lease was rejected — Payments to be made to plaintiffs were royalties and not rent.

Table of Authorities

Cases considered by *Master J.T. Prowse, In Chambers*:

Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co. (1975), 12 N.S.R. (2d) 179, 62 D.L.R. (3d) 663, 1975 CarswellNS 92 (N.S. C.A.) — considered

BC Rail Ltd. v. Biro (2001), 2001 BCSC 264, 2001 CarswellBC 318, [2001] B.C.T.C. 264 (B.C. S.C. [In Chambers]) — considered

Berkheiser v. Berkheiser (1957), [1957] S.C.R. 387, 7 D.L.R. (2d) 721, 1957 CarswellSask 60 (S.C.C.) — considered

Lenko v. Grabler (1993), 14 Alta. L.R. (3d) 414, 1993 CarswellAlta 201 (Alta. Q.B.) — considered

Saskatoon Sand & Gravel Ltd. v. Steve (1973), 40 D.L.R. (3d) 248, 1973 CarswellSask 175 (Sask. Q.B.) — followed

1056 Enterprises Co. v. Katchmar Enterprises Inc. (1987), 1987 CarswellBC 2491 (B.C. S.C.) — considered

Statutes considered:

Sale of Goods Act, R.S.A. 2000, c. S-2
Generally — referred to

s. 19 — considered

s. 20(4) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 7.1 — considered

APPLICATION by plaintiffs to determine preliminary issue of ownership of stockpiled aggregate.

***Master J.T. Prowse, In Chambers*:**

1 The issue to be determined is the ownership of gravel aggregate crushed and stockpiled on the plaintiffs' land.

2 On December 1, 2010, the plaintiffs signed a written contract allowing the defendant DBC Contractors Ltd. ("DBC") to extract gravel aggregates from their land until 2015. The term was subsequently extended to March 31, 2018. I will refer to this agreement and the extending agreement together as "the agreement".

3 In January of 2016 the plaintiffs took the position that DBC was in arrears of payments under the agreement, and they barred DBC from entering onto the land to remove 42,000 tonnes of crushed gravel which DBC had stockpiled on the land.

4 The plaintiffs seek the Court's ruling on a preliminary issue pursuant to Rule 7.1, namely, the ownership of the stockpiled aggregate.

5 For the reasons which follow and based on the written agreement between the parties, it is my conclusion that DBC is the owner of the stockpiled aggregate.

Case law on the ownership of stockpiled aggregate

6 The leading case is *Saskatoon Sand & Gravel Ltd. v. Steve*, 1973 CarswellSask 175, 40 D.L.R. (3d) 248 (Sask. Q.B.), a decision of Bayda, J. He stated:

> The gist of the defendants' argument is that the formula for ascertaining the price as prescribed by the agreement is such that the defendants were bound to weigh or measure the gravel for the purpose of ascertaining the price; as a matter of normal procedure the weighing and measuring was done after the gravel was taken off the premises; and because the provisions of this Rule stipulate that the property does not pass until that act of weighing or measuring occurs, it follows that the ownership in the gravel was not intended to pass to the plaintiff until after the gravel was hauled off the premises. The short answer to the defendants' argument is that the *Sale of Goods Act* does not apply for the simple yet cogent reason that the sale of the gravel in question was not a sale of goods (see *Morgan v Russell & Sons*, [1909] 1 K.B. 357).
>
> My answer to the secondary question is that ownership in the gravel passed to the plaintiff at the time of severance from the soil.

7 This decision was followed by the Nova Scotia Supreme Court, Appeal Division, in *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.*, 1975 CarswellNS 92 (N.S. C.A.) where Cooper, J.A. stated at para's 71 and 76:

The respondent, which I shall also refer to as "B & D", entered into an oral agreement with Angus A. MacDonald to extract rock from the quarry at George's River and to pay ten cents per ton by way of royalty for the rock that B & D "moved over the scale at the quarry" . . .

I am in respectful agreement with Mr. Justice Bayda that where an interest in land of the nature of a profit à prendre is conferred "ownership in the subject-matter is transferred to the grantee at the moment the subject-matter is severed from the soil".

8 In his concurring reasons, Coffin, J.A. stated at para's 90 and 94:

. . . the trial judge was not in error in adopting the reasoning of Bayda, J., in *Saskatoon Sand & Gravel Ltd. v. Steve* (1974), 40 D.L.R. (3d) 248.

I realize that in the Saskatoon Sand and Gravel case the gravel was stockpiled, but none the less Bayda, J. set forth the general principle that transfer of ownership takes place "at the moment the subject matter is severed from the soil."

9 In *1056 Enterprises Co. v. Katchmar Enterprises Inc.*, 1987 CarswellBC 2491 (B.C. S.C.), the Court stated:

Saskatoon Sand & Gravel Ltd. v. Steve et al, 40 D.L.R. (3d) 248 bears directly on the issue. It is apparent from that case that gravel is, prior to its severance from the soil, a profit a prendre. Once it is severed from the soil and processed, it becomes a chattel. Furthermore, paragraph 3 of the agreement between Cantex and Block Bros. Contracting Ltd. leads to the inference that the plaintiff [lessee] was to obtain title to the gravel once it was processed.

In my opinion therefore the stockpiled gravel belonged to the plaintiff. It is also clear from the *Saskatoon Sand & Gravel* case that the *Sale of Goods Act* has no application to situations of this type. The conclusion I have reached is that the plaintiff, 1056 Enterprises Inc. is the owner of the stockpiled gravel . . .

10 In *Lenko v. Grabler*, 1993 CarswellAlta 201, 14 Alta. L.R. (3d) 414 (Alta. Q.B.) at para. 26, the Court stated:

At best, the 1976 agreement is a profit à prendre. Case authorities establish that the grantee acquires ownership of the material severed from lands when the material is taken out of the ground. See *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.* and *Saskatoon Sand & Gravel Ltd. v. Steve.*

11 In *BC Rail Ltd. v. Biro*, 2001 BCSC 264 (B.C. S.C. [In Chambers]), the Court stated:

In this regard, I find that the residual rail ballast and the spur line were not the property of Graehold [lessee] at the expiration of the lease and the grace period for several reasons. First, clause 5.2 provides that rock product, equipment and stockpiles not removed at the end of the grace period "will become the property" of the Owners Group. However, with respect to the residual rail ballast, Graehold sold it to BCR during the term of the lease at a time when it had an ownership interest in the rock and authority to manufacture it into rail ballast and stockpile it in the quarry.

Furthermore, while I accept that the [*Sale of Goods*] Act does not apply to the issue of whether Graehold acquired an ownership interest in the rock, in my opinion, insofar as the sale of rail ballast by Graehold to BCR is concerned, the [*Sale of Goods*] Act does apply. As between these parties it was a contract for the sale of goods. Thus, in my opinion, the residual rail ballast became the property of BCR from the moment that it was weighed and stockpiled alongside the spur line in the quarry for removal by BCR. At that point the rail ballast became "ascertained" goods.

Is the agreement a lease or a profit a prendre?

12 The case law cited above makes it clear that one must have regard to the provisions in the agreement between the

parties when considering the question of ownership of stockpiled aggregate.

13 The plaintiffs attempt to support their claim to ownership of the stockpiled aggregate by asserting that the agreement was simply a lease, and when the lease came to an end so did DBC's right to the stockpiled aggregates.

14 In my view, the amended agreement is a classic profit a prendre. I reject the contention of the plaintiffs that it is a lease. It contains the three key ingredients of a profit a prendre, namely:

(1) The right to enter the lands of the plaintiffs, and

(2) The right to dig for and sever the gravel from the soil, and

(3) The right to haul away the gravel so severed for the use of the defendant.

15 The primary right given to DBC, under clause 2.01 (which describes the plaintiffs as "the vendors" and not as "the lessors") is as follows:

> The Vendors agree to allow DBC, during the term of and in accordance with the provisions of this agreement, the exclusive right to, at its sole expense, on the land, explore for, prospect for, test for, extract, remove, process, crush, wash, stockpile, mix and dispose of aggregates located within or on the land . . .

16 The plaintiffs base their argument that the agreement on the assertion that it provides exclusive possession of the land to DBC. A close review of the agreement shows that it does *not* grant exclusive possession to DBC.

17 Firstly, the only exclusive grant to DBC is an exclusive grant to gravel aggregates. See clause 2.01 quoted above.

18 The payments to be made to the plaintiffs by DBC are "royalties" and not rent.

19 Clause 3.08 makes it clear that the plaintiffs reserve rights to concurrently use the land, such as the right to conduct mines and minerals exploration on the land. This is inconsistent with an allegation that DBC has exclusive possession.

20 One clause which is consistent with a lease is the plaintiffs' promise to provide 'quiet enjoyment' of the land, which is a phrase more commonly associated with a lease, but this can simply be construed as a promise not to interfere with DBC's exclusive right to the aggregates.

21 The plaintiffs also support their argument that the agreement is a lease, and not a profit a prendre, by pointing to clause 3.05, which requires the plaintiffs to pay:

> any assessment, levy or other charge to be paid to Rocky View County with respect to the Aggregates produced or removed from the Land . . .

22 The plaintiffs note that this type of clause was discussed in *Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.) at para 13, as being consistent with a lease, but it is not conclusive. I note that a similar clause was in the agreement being considered by the Supreme Court of Canada in *Berkheiser* and it concluded that the agreement was a profit a prendre or an irrevocable license to search for and to win the substances named.

23 In my view, both the case law and the wording of the agreement support the conclusion that the agreement in question is a profit a prendre.

If the agreement is a profit a prendre, who is the owner of the stockpiled aggregate?

24 The plaintiffs argue that, even if the agreement is a profit a prendre, the ownership of the stockpiled aggregate would remain with the plaintiffs until it was removed from the land, weighed and paid for.

25 The plaintiffs invoke section 19 of the *Sale of Goods Act*, RSA 2000, c.S-2, but the more pertinent reference is to section 20(4) of the *Act* which states:

> When there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice of it.

26 The argument that section 20(4) of the *Sales of Goods Act* supports the land owner's claim to ownership of stockpiled aggregates was considered and rejected in the cases cited previously, which determined that the *Act* does not apply to the relationship between parties to a profit a prendre. See: *Saskatoon Sand & Gravel*, *supra*, *1056 Enterprises Co.*, *supra*, and *BC Rail*, *supra*.

27 While the *Sale of Goods* Act would apply to subsequent sale by DBC to an ultimate purchaser, it does not apply to the profit a prendre between the plaintiffs and DBC.

28 More importantly, the agreement itself provides that DBC owns the stockpiled aggregate. Specifically, clause 5.04 states:

> Notwithstanding the term granted herein, at the expiration of this agreement, DBC shall have the right to remove its stockpiles of aggregates from the land for a further period of one year immediately following the last day of the term of this agreement, provided however, that DBC shall continue to be obligated, in accordance with the provisions of this agreement, to pay royalty payments to the vendors for these aggregates removed from the land. (emphasis added)

29 Clause 5.04 clearly envisages ownership of the stockpiled aggregate belonging to DBC prior to the aggregates being removed from the lands and weighed.

Conclusion

30 My conclusion on the preliminary issue of ownership of the stockpiled aggregates, is that they are owned by DBC, and I so declare.

Costs

31 If the parties cannot agree on costs of this application, they may approach me for a ruling in that regard.

Defendant was owner.

Tab 2

2002 BCCA 509
British Columbia Court of Appeal

Arens v. M.S.A. Ford Sales Ltd.

2002 CarswellBC 2378, 2002 BCCA 509, [2002] B.C.W.L.D. 960, [2002] B.C.J. No. 2055, 116 A.C.W.S. (3d) 368, 174 B.C.A.C. 167, 286 W.A.C. 167, 5 B.C.L.R. (4th) 272

Kathleen Joy Arens, Respondent (Plaintiff) and M.S.A. Ford Sales Ltd., Appellant (Defendant)

Finch C.J.B.C., Rowles, Donald JJ.A.

Heard: September 9, 2002
Oral reasons: September 9, 2002
Docket: Vancouver CA028193

Counsel: *M. LeDressay*, for Appellant
L. Wilson, *T. Hordal*, for Respondent

Subject: Evidence; Contracts

Headnote

Evidence --- Parol Evidence Rule — Admission of evidence in particular matters — Proof of fraud or misrepresentation
Defendant's salesman showed plaintiff inspection report stating that engine block in truck was free of cracks — Salesman made oral representation as to fitness of truck — Plaintiff and defendant entered contract of sale for truck — Contract stated that there were no warranties regarding truck, plaintiff obtained independent inspection and written agreement constituted entire agreement between parties — Truck's engine failed and subsequent inspection showed hole in engine block which had been improperly repaired — Trial judge held defendant liable on basis that there were two contracts — Trial judge found that first contract was plaintiff's agreement to buy truck in reliance on representations that engine was free of defect and that in consideration of representation, plaintiff entered second contract which was written agreement — Defendant appealed — Appeal allowed — Evidence of pre-contractual representations was inadmissible — Representations were inconsistent with terms of written contract — Admission of evidence rendered entire agreement clause meaningless — Parole evidence could not be admitted to vary or contradict written agreement's express terms.

Table of Authorities

Cases considered by *Finch C.J.B.C.*:

Hawrish v. Bank of Montreal, [1969] S.C.R. 515, 2 D.L.R. (3d) 600, 66 W.W.R. 673, 1969 CarswellSask 9 (S.C.C.) — followed

APPEAL by defendant from judgment holding it liable for breach of contract in sale of truck.

***Finch C.J.B.C.* (orally):**

1 The defendant appeals the judgment of the Supreme Court of British Columbia holding it liable for breach of contract in

the sale of a used pick-up truck to the plaintiff.

2 The defendant's salesman Annis showed the plaintiff an inspection report which stated that the engine block was free of cracks. He also made oral representations as to the fitness of the truck. The parties entered into a written contract on 12 April 1997, which stated that there were no warranties express or implied given by the defendant regarding the truck, that the plaintiff had obtained her own independent inspection, and that the written agreement constituted the entire agreement between the parties. The language of the entire agreement clause is as follows:

> 17. This Agreement constitutes the entire agreement between the parties and there are no representations or warranties, express or implied, statutory or otherwise and no agreements collateral hereto other than as expressly set forth or referred to herein.

3 The plaintiff drove the truck for about 40,000 kilometres. The engine then failed. Subsequent inspection showed that the engine block contained a hole that had been improperly repaired by patching with epoxy glue.

4 The only cause of action alleged in the statement of claim was negligent misrepresentation. The learned trial judge rightly, in my view, dismissed that allegation. However, he held the defendant liable on the basis that there were two contracts. He held that the first contract was the plaintiff's agreement to buy the truck in reliance on the representations both oral and written that the engine was free of defects. He held that in consideration of the defendant's representation being true the plaintiff entered into the second contract which was the written agreement containing the entire agreement clause. In effect, the judge held that the representation as to the engine's soundness was a term of the contract. The questions are whether admission of the evidence as to the engine's condition offended the parole evidence rule and whether there was a second contract as found by the trial judge.

5 In my respectful view, evidence of the pre-contractual representations was inadmissible. Those representations are inconsistent with the terms of the written contract. The admission of that evidence would render the entire agreement clause and other terms of the written contract meaningless. The plaintiff did not allege that the written agreement did not contain the whole agreement. Parole evidence cannot be admitted to vary or contradict the written agreement's express terms.

6 The plaintiff did not plead the two contract theory adopted by the judge. In my view, there is no evidence to support the allegation that the plaintiff purchased the vehicle in reliance on those pre-contractual representations.

7 In my view, the judge's two contract theory cannot be supported in law. The first contract, as found by the judge, again would contradict the written agreement that the parties entered into. The law does not permit this, see *Hawrish v. Bank of Montreal* (1969), 2 D.L.R. (3d) 600 (S.C.C.).

8 I would allow the appeal.

***Rowles J.A.* (orally):**

9 I agree.

***Donald J.A.* (orally):**

10 I agree.
(submissions on costs by counsel)

***Finch C.J.B.C.* (orally):**

11 The order will be that the appellant will have its costs, as to disbursements only, both in this Court and the court below.

Appeal allowed.

End of Document

Tab 3

1989 CarswellOnt 628
Ontario District Court

Stafford v. Sumbler

1989 CarswellOnt 628, [1989] C.L.D. 547, 14 A.C.W.S. (3d) 92, 9 P.P.S.A.C. 47

STAFFORD v. SUMBLER

MacDonald D.C.J.

Judgment: February 10, 1989
Docket: Niagara South 2537/87

Counsel: *B.H. Matheson*, for plaintiff.
M.E. Tiidus, for defendants.

Subject: Insolvency; Property; Corporate and Commercial

Headnote

Personal Property Security --- Attachment of security interest — General rules — Security agreements — General

Personal Property Security --- Attachment of security interest — General rules — Security agreements — Intention to attach

Personal Property Security --- Perfection of security interest — Registration — Time limits for initial registration

***MacDonald D.C.J.*:**

Nature Of Action

1 The plaintiff, Michael Stafford (Stafford), has brought an action for the return of a truck and damages for its wrongful retention by the defendants or any of them. The defendant, William Sumbler (Sumbler), did not defend the action. The defendants, 560949 Ontario Inc., carrying on business as Disher Transportation Services (Disher) and 460948 Ontario Inc., carrying on business as Falcon Leasing (Falcon), are associated companies, both under the management of Howard Disher. Disher is responsible for the administration of the truck transportation business and Falcon is used as a leasing service for Disher. Falcon holds the titles to the trucks operated by Disher to comply with the Public Commercial Vehicles Act, R.S.O. 1980, c. 198 (the P.C.V.A.). These companies defended the action and brought a cross claim against Sumbler and a counterclaim against Stafford.

2 In the cross claim, Disher and Falcon claim the amount of $5,772.36 from Sumbler as his indebtedness to them in respect of moneys paid by Disher for his personal and truck repair and related expenses while he was operating for Disher as an independant trucker and in respect of certain expenses incurred after they seized his truck. They claim a security interest under the Personal Property Security Act, R.S.O. 1980, c. 375 (the P.P.S.A.) in respect of the truck. In the counterclaim, Disher and Falcon claim damages from Stafford on the basis of restitution and *quantum meruit* in respect of moneys and services advanced to preserve and enhance the truck.

Facts

3 The facts are that, on July 1, 1986, Stafford and Sumbler agreed in writing that Sumbler would purchase from Stafford a two axle, twelve tire, 1979 freightliner tractor truck for $35,000. The total purchase price was secured by a chattel mortgage drawn by Sumbler's solicitors. It was dated July 4, 1986 and provided for monthly payments of principal in the amount of $1,458.33 from August 4, 1986 to July 4, 1988, at which time the balance of the principal was to become due and payable. Stafford did not have a solicitor. The chattel mortgage provided, among other things, that,

(a) upon default of any payment, the whole amount secured by the mortgage would immediately become due and payable;

(b) upon default, Stafford would become entitled to immediate possession of the truck;

(c) upon default, Stafford would have the right to sell the truck and apply all moneys realized against the outstanding amount owing on the mortgage;

(d) upon default, Stafford would have the option to retain the truck in his possession without hindrance by Sumbler; and

(e) if Sumbler were to attempt to sell or otherwise dispose of possession of the truck in any way, the full amount of the moneys owing under the mortgage would become due and payable.

4 On July 3, 1986, the day before the chattel mortgage was signed, a financing statement in respect of it was registered pursuant to the P.P.S.A. by Sumbler's solicitors.

5 Upon taking delivery of the truck, Sumbler obtained work as an independant trucker with Disher and, pursuant to Sumbler's request, Stafford transferred the title (ownership papers) of the truck to Falcon Leasing. This was in accordance with the practice of the trucking trade, a practice engaged in to comply with the C.P.V.A. and avoid the necessity of individual truckers obtaining public commercial vehicle licenses. Transferring the title of trucks to the transporting company was also useful for insurance purposes and facilitated the obtention of fuel permits for the trucks. Stafford was well aware of this practice. During the period he had operated the truck for Mel's Express, the title of the truck had similarly been held in the name of the trucking company, Mel's Express, rather than in his name as the beneficial owner.

6 Sumbler failed to make any payments to Stafford under the chattel mortgage which accordingly became due and payable on August 4, 1986. Meanwhile Sumbler was using the truck in the transportation operation of Disher and incurring debts for personal expenses and truck repairs, which expenses were being paid by Disher. Further, on September 4, 1986, the financing statement was discharged by Sumbler's solicitors without the knowledge or consent of Stafford.

7 When Stafford tried to repossess the truck under the mortgage, at first he could not locate Sumbler or the truck. When he subsequently located the truck on October 17, it was in the possession of Disher. He told Howard Disher that the truck belonged to him, but Disher refused to surrender it and claimed a security interest in it in respect of the debts incurred by Sumbler.

8 The claim for a security interest by Disher is based on an oral agreement and a document dated July 11, 1986 on Disher Transportation Services letterhead paper which, as submitted as Exhibit 4, is reproduced below:

9 July 11, 1986.

10 *Re: Credit card charges* — this applies to company credit cards or personal credit cards of Howard Disher

11 I, Bill Sumbler, have accepted a Commerce Visa card from Disher Transportation Services, #4502 287 075 122 and I accept full responsibility of this card. I agree to be responsible to reimburse Disher Transportation Services for any and all charges incurred under this card while it is in my possession. It is understood that the title of my truck will be held until *all* charges are cleared and paid to the company.

12 Signed:_____

13 *William Sumbler*

14 Witness:_____

15 *Howard Disher* Howard Disher stated that, when it became clear to him that Sumbler could not pay his debts to Disher and Falcon, on September 26, 1986, after the truck had been returned to Welland and repaired, he seized it and placed it in storage.

16 After this action was commenced, the truck was released to Stafford pursuant to an order of this court dated January 23, 1987 on terms that Stafford pay into court to the credit of this action or post a bond in the amount of $7,000 as security for the debt, interest and costs of Disher and Falcon pending the outcome of these proceedings. The truck was returned to Stafford on March 19, 1987. He made further repairs to it, including providing a new muffler and exhaust system, tires and a battery. Shortly thereafter, on March 24, he sold it for $18,000. The truck was, thus, out of Stafford's possession for over eight months. During that period, it was operated by Sumbler for nearly three months (July 6 to September 26) and was held by Disher and Falcon in storage for nearly six months (September 26 to March 19).

17 There is not much dispute about the facts, as set out herein, except that Sumbler testified that Exhibit 4 did not include the re-line and last sentence when he signed it.

Issues

18 The issues to be determined are whether the plaintiff and either of the two corporate defendants had a security interest in the truck and, if so, which security interest had priority over the other under the P.P.S.A.

Legal Considerations

19 Stafford takes the position that he had a security interest in the truck and, indeed, owned it by reason of the default of Sumbler under the chattel mortgage. Counsel for Stafford argued that Exhibit 4 was altered after signature and, in any case, does not create a security interest. It does not provide for Disher or Falcon to have possession of the truck, he said.

20 The claim of Stafford for a security interest under the P.P.S.A. is based on two documents, the chattel mortgage and a handwritten bill of sale. While there is no real disagreement that the chattel mortgage created a security interest, to look at it in the light of certain definitions and provisions of the P.P.S.A. may provide assistance in determining the nature of the other documents under consideration. The P.P.S.A. provides:

1. In this Act,

(s) "purchase-money security interest" means a security interest that is,

(i) taken or reserved by the seller of the collateral to secure payment of all or part of its price,

(x) "security agreement" means an agreement that creates or provides for a security interest;

(y) "security interest" means an interest in goods, ...; _____ ,...;

(z) "value" means any consideration sufficient to support a simple contract.

2. Subject to subsection 3(1), this Act applies,

(a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,

(i) a chattel mortgage,

. . . . .

12. — (1) A security interest attaches when,

(a) the parties intend it to attach;

(b) value is given; and

(c) the debtor has rights in the collateral.

The chattel mortgage clearly is a security agreement that creates an interest in goods. The interest secures payment of the purchase price of the truck. Since it is a security interest taken by the seller of the collateral to secure payment of all of its price, it is also a purchase-money security interest within the meaning of the P.P.S.A. Further, section 2 of the P.P.S.A. proves that the Act is specifically applicable to chattel mortgages.

21 The chattel mortgage was signed on July 4, 1986 and Sumbler received possession of the truck on that day. Value, as defined by the Act, was given in that the promise to pay was in exchange for possession of the truck. Clearly, the security interest was attached to the truck on July 4, 1986.

22 The next question is whether the security interest attached earlier, on July 1, 1986, the day the initial bill of sale was signed by the parties. It is handwritten and reads as follows:

$35,000 July 1/86

Truck — payments 2 yrs no interest if longer 3 yrs 6% interest

payments are to be made to

Bank of Nova Scotia

327 Ontario St.,

St. Catharines Ont.

acc. no. 656038

Truck must have collision — fire — theft and made payable to Mike Stafford

Truck goes as is from

29 Parkview Rd.

St. Catharines Ontario

L2M 5R8

New owner is to supply contract & new truck no. (license plate)

William Sumbler

Mike Stafford

23 This document would give the purchaser an interest in the goods. However, while it provides for a contract, it does not state that the contract is to consist of a chattel mortgage or other document that would create a security interest. Therefore, since it does not create or provide for a security interest in the truck, it is not a security agreement. Authority for this conclusion may be found in *J.J. Riverside Manufacturing Ltd. v. E.J.W. Development Co.*, 1 P.P.S.A.C. 330, [1981] 5 W.W.R. 607, 9 Man. R. (2d) (74 Co. Ct.), a 1981 Manitoba decision by Jewers C.C.J., as he then was. In that case, the plaintiff sold heavy construction equipment to the defendant on 60 days' credit but refused to deliver the equipment. The buyer demanded delivery and registered a financing statement under the Personal Property Security Act, S.M. 1973, c. 5. Jewers J., held that the making of the contract gave the buyer an interest in the equipment but not for the purpose of securing payment or performance of an obligation. The buyer's interest was merely that given by ordinary sales law. There was no security interest or security agreement in respect of which registration could be effected.

24 Since the July 1, 1986 bill of sale does not create a security interest, it becomes relevant to consider whether the registration of a financing agreement on July 3, 1986 perfected the security interest created by the chattel mortgage. Subsections 47(1) to (3) of the P.P.S.A. provide:

> 47. — (1) In order to register under this Act for the purpose of perfecting a security interest that is created in or provided for in a security agreement, a financing statement in the prescribed form shall be registered.
>
> (2) Where the collateral is goods to be held for sale or lease a financing statement in the prescribed form may be registered before a security agreement is signed for the purpose of perfecting a security interest in such goods.
>
> (3) The financing statement referred to in subsection (1) shall not be registered before the execution of the security agreement or after thirty days from the date of the execution of the security agreement.

25 Counsel for Stafford argued that subs. 47(2) applies to permit registration of the financing statement before the chattel mortgage was signed. Counsel for Disher and Falcon argued that subs. 47(2) does not apply because the truck is not "goods to be held for sale or lease" within the meaning of that subsection. I agree with him that "any goods to be held for sale or lease" usually refers to inventory. Subsection 47(2) ties in with the definition of inventory which reads in part as follows:

> (n) 'inventory' means goods that are held for sale or lease, ...

Even if subs. 47(2) could apply to goods other than inventory, the truck in the present case would not constitute goods to be held for sale. The July 1 bill of sale would have sufficed to pass ownership of the truck to the purchaser even if possession was not transferred until the parties entered into a security agreement. Jewers, J., enunciated the law on this point in the *Riverside* case. He stated at p. 333:

> Since the transaction related to the sale of specific goods in a deliverable state, the very making of the contract sufficed to transfer the property in the machine from the plaintiff to the defendant: see Fridman Sale of Goods in Canada (1973), p. 69. Thus, the buyer, the defendant, did acquire a property interest in the machine.

26 Since subs. 47(2) of the P.P.S.A. does not apply in the circumstances of this case, perfection of the security interest in the truck by registration could only be achieved by registering a financing agreement under subs. 47(3) after execution of the security agreement. Consequently, the July 3 registration was invalid and Stafford's security interest in the truck was not perfected. Authority for this conclusion may be found in *Commerce Leasing Ltd. v. General Electric Credit Corp.* (1986), 55 O.R. (2d) 603, 6 P.P.S.A.C. 131, 60 C.B.R. (N.S.) 113, 28 O.A.C. 284 (H.C.), [reversed (1988), 63 O.R. (2d) 220, 8 P.P.S.A.C. 99, 67 C.B.R. (N.S.) 8, 38 B.L.R. 144, 47 D.L.R. (4th) 611, 28 O.A.C. 281 (C.A.)]. In that case, after it had been signed but before it had been delivered, a financing statement was registered. O'Driscoll J., held that execution in subs. 47(3) requires delivery and consequently the registration was invalid.

27 Because Stafford's security interest was not perfected, Stafford cannot rely on subs. 34(2) of the Act which gives priority to purchase-money security interests. Also, because the registration was invalid, he cannot rely on subs. 22(3) to give him the priority afforded in respect of an unperfected money-purchase security interest that is registered before or within 10 days after the debtor's possession of the collateral.

28 Before leaving Stafford's interest in the truck, it may be noted that Sumbler defaulted in his payments on August 4, 1988 and Stafford became entitled to possession of the truck on that date.

29 Disher and Falcon claim to have a security interest in the truck by reason of Exhibit 4 and oral representations by Sumbler that he had a beneficial interest in the truck and could pledge it as collateral to secure his debts to them in respect of cash advances, permits and other expenses. This security interest attached, counsel argued, at the latest, on July 11, 1986, when Sumbler signed Exhibit 4, and was perfected on September 26, 1986, when Disher took possession of the truck. It would, therefore, have priority over Stafford's unperfected security interest.

30 If Exhibit 4 was altered after Sumbler signed it, as he testified, this may have some bearing on whether it created a security interest in the truck. I view the testimony of Sumbler with some suspicion due to a number of discreditable actions on his part. For example, he misled Stafford as to where the truck was located and improperly caused his solicitors to discharge the financing statement. Further, he may have some desire to harm Howard Disher. However, even a witness who may not be credible in some respects, may be believed on other points, particularly if there is external support for his story. Accordingly, I have closely examined Exhibit 4 in the light of his testimony and that of Howard Disher.

31 The two parts of Exhibit 4 alleged to have been added after signature are the re-line and the last sentence. The re-line purports to extend the undertaking in respect of one credit card to all credit cards of Disher or Howard Disher that might be used by Sumbler. It stands to reason that, if it had been expected at the outset that Sumbler would use more than one credit card, the text, as originally written, would have made reference to his use of any personal or company cards of Disher or Howard Disher. That the extension is made by way of a re-line is suspect. Further, the re-line appears to be slightly closer to the left hand margin of the paper and slightly out of line with the text. I doubt that these slight differences would occur if all the words were typed at one time. The words in the last sentence are squeezed into what would otherwise be a reasonable space between the prior sentence and the word "signed". The signature runs up into the typing. Yet a sizeable space is left below for the signature of the witness. Also, to my eye there is a slightly wider space between the fifth and sixth lines of the text, that is between the first part of the text and the first full line of the last sentence. Taking into account the testimony and my visual observation of the text, and without any expert evidence, I find that the re-line and last sentence were added after the original document was signed.

32 Exhibit 4, before alteration, clearly does not create a security interest. It is merely an acknowledgement of receipt of a credit card and of Sumbler's responsibility to pay for all charges incurred under the card while it was in his possession. It has nothing to do with the truck. Further, even if I had found that document had been signed in its present form, I am of opinion that it would not create a security agreement. The last sentence of Exhibit 4 purports to allow Disher to hold the title of the truck until all charges are paid to the company. I take this to mean the "paper title of the truck" or the ownership papers as, on the admission of the corporate defendants in their statement of defence, this was all that was intended to be transferred to Falcon. Even Howard Disher testified that what was intended was that ownership would be held until the money issues were settled. Consequently, it is my view that the parties did not reach a common intention, within the meaning of s. 12 of the P.P.S.A., either orally or in writing, that a security interest attach pursuant to which Disher or Falcon could become entitled to take possession of the truck. Moreover, even if a security interest had attached, the agreement to hold the title of the truck could well be considered to constitute an alternative agreement that would deprive the secured party of the right to possession

on default. Section 58 of the P.P.S.A. provides in part:

> 58. Upon default under a security agreement,
>
> (a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

33 Since it is my finding that no security interest was created or attached, I have not considered the questions raised by counsel for Disher and Falcon as to whether an oral security agreement can be enforced under the P.P.S.A. or whether the possession obtained by Disher, which was without the consent of Sumbler, could perfect a security interest. Nor have I considered the argument of counsel for Stafford that the Assignments and Preferences Act, R.S.O. 1980, c. 33 would render void any transaction between Sumbler and Disher or Falcon purporting to create a security interest in the truck.

Relief

34 Stafford asks for interest on the $18,000 selling price of the truck for the period the truck was in the possession of the corporate defendants. He calculates the interest to be in the amount of $760. He also asks for costs incidental to obtaining the money to pay into court in order to recover the truck in the amount of $292.30 and for the payment out of the $7,000 paid into court and interest thereon. I find these claims to be reasonable and justifiable.

35 Stafford also asks for general damages. General damages are not usually awarded in this kind of commercial action except in special circumstances of which there was no evidence in this action. Nor was any authority cited in this connection. Further, since this action involves parties who have all suffered financial losses due to the unfortunate series of circumstances, in my view, it would not be appropriate to award general damages. Stafford concludes by asking for costs on a solicitor and client basis based on his counsel's argument that, if I were to find that Exhibit 4 had been altered, such costs would be justifiable. I agree with that argument, subject to the question of offers to settle. While the parties are innocent in the sense of suffering financial loss due to unfortunate circumstances, altering the document was a wrongful act and probably led to unnecessary litigation. Stafford should not have to bear the costs of an action in which the claim of the corporate defendants was advanced largely on the basis of an altered document. The plaintiff asked, in particular, that costs be levied against Howard Disher personally. Costs cannot be levied against Howard Disher personally as he is not a party to the action. The appropriate persons to be ordered to pay costs are the corporate defendants.

36 In the counterclaim, Disher and Falcon claimed the amounts charged on the credit cards against Stafford. Since they did not have a security interest in the truck, these claims are dismissed. Similarly, any claims for truck repairs while Sumbler had possession of the truck are dismissed. If the truck had not been in use, repairs would not have been necessary. There is no betterment that would warrant a *quantum meruit* payment since the truck was eventually sold at a much lower price than the price agreed upon by Stafford and Sumbler.

37 Counsel for Disher and Falcon argued that these defendants should also be allowed a claim for certain amounts incurred after Disher took possession of the truck. The amounts so incurred are as follows:

Storage	$1,074.00
Winterizing	73.30
Appraisal	135.95
Batteries	173.34

	$1,456.59

He argued that these amounts can be justified as reasonable charges under the heading of care of collateral and reasonable expenses of preparing for disposition under s. 59 of the P.P.S.A. This section requires a secured party to apply the proceeds

of the disposition of collateral to certain costs. It provides in part:

> 59. — (1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to,
>
> > (a) the reasonable expenses of retaking, holding, repairing, processing, preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement and not prohibited by law, any other reasonable expenses incurred by the secured party;

This provision would apply to the costs incurred by Stafford, as the secured party, but not to costs incurred by Disher and Falcon as they had no security interest.

38 It remains to consider whether any portion of these post seizure claims should be awarded to Disher and Falcon on a *quantum meruit* basis. As I remember the argument, the claim for $173.34 for batteries was withdrawn because the batteries were removed prior to the release of the vehicle to Stafford. If so, the claim would not be payable. On the other hand, Stafford and Howard Disher discussed the question of winterizing the truck as Stafford was concerned that it was being stored out of doors. This expense was reasonable and properly incurred and I would allow it. The storage cost was incurred, in my view, for the benefit of the corporate defendants to ensure their possession of the truck as against Stafford and Sumbler. Similarly the appraisal was a preliminary step towards their disposition of the truck. These expenses conferred no benefit on Stafford, are not part of his costs of disposing of the collateral and are not payable by him.

39 On the basis that the truck belonged to the plaintiff and he was entitled to possession of it from August 4, 1986, there will be judgment as between the plaintiff and the corporate defendants as follows:

> 1. The plaintiff is entitled to the payment out of court of the moneys paid in to the credit of his action and any interest thereon.
>
> 2. The plaintiff is entitled to judgment against the corporate defendants for interest on $18,000 for the period the truck was in the possession of the corporate defendants in the amount of $760 and for incidental costs in the amount of $292.30.
>
> 3. The corporate defendants are entitled jointly on the counterclaim to $73.30.
>
> 4. Costs to the plaintiff to be taxed on a solicitor and client basis, (subject to further argument).

40 The corporate defendants shall have judgment on the cross claim against Sumbler in the amount claimed of $5,772.36, less the $1,456.59 discussed above. The expenses included in the latter amount were incurred after they took possession of the truck and are not attributable to Sumbler. The judgment is therefore in the amount of $4,315.77, plus prejudgment interest at 10% from the date of the service of the cross claim, January 19, 1987, and taxed costs on an undefended basis.

41 I reserve the right to settle this judgment further, on application by counsel, since certain matters either were not clear or not addressed. Firstly, if the batteries were installed by Disher and not removed prior to the release of the truck to Stafford, the corporate defendants may be entitled to a further $173.34. Secondly, counsel for Stafford did not specifically state in argument what relief is being sought from Sumbler now that the truck has been sold. I would assume that the correct amount of the judgment of Stafford against Sumbler would be the difference between the chattel mortgage amount owing of $35,000 and the $18,000 selling price of the truck or $17,000, plus prejudgment interest in the terms of the chattel mortgage at the rate of six per cent per annum from July 4, 1988, plus taxed costs on an undefended basis. However, this matter may require to be spoken to and there may be other details that require attention such as the costs if there are relevant offers to settle or other Vthere are relevant offers to settle or other relevant considerations.

Order accordingly.

End of Document

Tab 4

Alberta Statutes
Personal Property Security Act
Part 2 — Validity of Security Agreements and Rights of Parties (ss. 9-18)

Most Recently Cited in: Aubin v. Petrone, 2020 ABCA 13, 2020 CarswellAlta 55, 100 Alta. L.R. (6th) 10, [2020] A.W.L.D. 1028, 98 B.L.R. (5th) 179, 40 R.F.L. (8th) 26, 314 A.C.W.S. (3d) 587, 441 D.L.R. (4th) 677, [2020] A.W.L.D. 913, [2020] A.W.L.D. 914, [2020] A.W.L.D. 921, [2020] A.W.L.D. 981, [2020] A.W.L.D. 983, [2020] A.W.L.D. 984, [2020] A.W.L.D. 985, [2020] A.W.L.D. 989 | (Alta. C.A., Jan 14, 2020)

R.S.A. 2000, c. P-7, s. 10

s 10. Enforceability of security interest

Currency

10.Enforceability of security interest
10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where

(a) the collateral is not a certificated security and is in the possession of the secured party,

(b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the *Securities Transfer Act* pursuant to the debtor's security agreement,

(c) the collateral is investment property and the secured party has control under section 1(1.1) pursuant to the debtor's security agreement, or

(d) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind or as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles",

(ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or futures contract,

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or

(iv) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except personal property described as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles".

10(2) For the purposes of subsection (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.

10(3) A description is inadequate for the purposes of subsection (1)(d) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

10(4) A description of collateral as inventory is adequate for the purposes of subsection (1)(d) only while it is held by the debtor as inventory.

10(5) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

Amendment History
2006, c. S-4.5, s. 108(9); 2016, c. 18, s. 14(2)

Currency
Alberta Current to Gazette Vol. 116:9 (May 15, 2020)

Alberta Statutes
Personal Property Security Act

Most Recently Cited in: Aubin v. Petrone, 2020 ABCA 13, 2020 CarswellAlta 55, 100 Alta. L.R. (6th) 10, [2020] A.W.L.D. 1028, 98 B.L.R. (5th) 179, 40 R.F.L. (8th) 26, 314 A.C.W.S. (3d) 587, 441 D.L.R. (4th) 677, [2020] A.W.L.D. 913, [2020] A.W.L.D. 914, [2020] A.W.L.D. 921, [2020] A.W.L.D. 981, [2020] A.W.L.D. 983, [2020] A.W.L.D. 984, [2020] A.W.L.D. 985, [2020] A.W.L.D. 989 | (Alta. C.A., Jan 14, 2020)

R.S.A. 2000, c. P-7, s. 1

s 1. Interpretation

Currency

1.Interpretation
1(1) In this Act,
...

(ss) **"security agreement"** means an agreement that creates or provides for a security interest, and, if the context permits, includes

(i) an agreement that creates or provides for a prior security interest, and

(ii) a writing that evidences a security agreement;

...

(tt) **"security interest"** means

(i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods, and

(ii) the interest of

(A) a transferee arising from the transfer of an account or a transfer of chattel paper,

(B) a person who delivers goods to another person under a commercial consignment, and

(C) a lessor under a lease for a term of more than one year,

whether or not the interest secures payment or performance of the obligation;

...

Amendment History
2006, c. S-4.5, s. 108(2)

Currency
Alberta Current to Gazette Vol. 116:9 (May 15, 2020)

Tab 5

1998 CarswellSask 679
Saskatchewan Court of Appeal

Lanson v. Saskatchewan Valley Credit Union Ltd.

1998 CarswellSask 679, [1998] S.J. No. 717, 14 P.P.S.A.C. (2d) 71, 172 Sask. R. 106, 185 W.A.C. 106

Saskatchewan Valley Credit Union Limited, Appellant (Respondent) and Robert Lanson and Sharon Severson, Respondents (Applicants)

Vancise, Lane, Jackson JJ.A.

Oral reasons: October 5, 1998
Docket: 2964

Proceedings: reversing (1998), 165 Sask. R. 147, [1998] 10 W.W.R. 82 (Sask. Q.B.)

Counsel: *Mr. D. Layh*, for the appellant.
Mr. L. Francis, for the respondents.

Subject: Insolvency; Corporate and Commercial

Headnote

Personal property security --- Priority of security interest — Competing perfected interests — Miscellaneous issues
Credit union appealed ruling that secured interest of other lender in mobile home held priority — Appeal was allowed — Other lender advanced funds to purchaser to acquire mobile home — Purchaser signed promissory note which provided that on resale of mobile home loan became fully payable — Lender perfected security interest — Purchaser sold mobile home without advising lender — Credit union financed resale and registered financing agreement, claiming security — Upon discovery of resale, lender attempted to seize mobile home — Trial judge erred by concluding lender did not authorize resale, pursuant to s. 28(1) of Personal Property Security Act — Lender expressly authorized purchaser to deal with security — Failure of purchaser to pay back loan did not invalidate resale — Title in mobile home passed free from secured interest — Personal Property Security Act, 1993, S.S. 1993, c. P-6.2, ss. 28(1), 30(2).

Table of Authorities

Cases considered by *Vancise J.A.*:

Canadian Commercial Bank v. Tisdale Farm Equipment Ltd., [1984] 6 W.W.R. 122, 35 Sask. R. 166 (Sask. Q.B.) — distinguished

Canadian Commercial Bank v. Tisdale Farm Equipment Ltd. (1985), [1987] 1 W.W.R. 574 (Sask. C.A.) — referred to

Statutes considered:

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2
s. 28(1) — considered

s. 30(2) — referred to

Tariffs considered:

Court of Appeal Rules
Tariff of Costs, Sched. I "B", column 5 — referred to

APPEAL by Credit Union from ruling that secured interest of other creditor held priority on resale of mobile home.

***Vancise J.A.*:**

Introduction

1 The issue on this appeal is the priority of a security interest in a mobile home granted by Johnathon Nickel to Robert Lanson and Sharon Severson (Lanson) and a subsequent purchaser for value, the Saskatchewan Valley Credit Union (the Credit Union), having regard to the operation of s. 28(1) and s. 30(2) of *The Personal Property Security Act, 1993*[1] (P.P.S.A.).

Facts

2 The facts are not in dispute and are fully set out in the judgment of the trial judge. To facilitate an understanding of this oral judgment a brief recitation of the facts will suffice.

3 Lanson loaned Nickel $16,000 to purchase a mobile home. Lanson registered their financing statement giving them a security interest in the mobile home. At trial it was found that Lanson knew that Nickel would either rent to sell the mobile home, their only concern being that upon a sale Nickel would repay the loan in full. Nickel did sell the mobile home but did not disclose the sale to Lanson. The purchaser, Spruce Meadow Trucking Ltd., did not require financing and did not search the Personal Property Registry. Spruce Meadow Trucking Ltd. later sold the mobile home to Dale Rempel who obtained financing by the Credit Union. The Credit Union registered a financing statement claiming a security interest in the mobile home and its proceeds. It was at this time that Lanson discovered that the mobile home had been sold and attempted to seize it. The Credit Union resisted seizure and an application was brought before the Court of Queen's Bench to find priorities as between the parties. At trial, Mr. Justice Krueger concluded that Lanson did not authorize the sale of the mobile home within the meaning of s.28(1) of the P.P.S.A., and the sale did not occur in the ordinary course of business as contemplated by s. 30(2) of the P.P.S.A., with the result that his security interest continues and takes priority over the security interest of the Credit Union. The Credit Union appeals this decision.

Issues

4 The issue on this appeal is reduced to whether the security holder, Lanson, authorized Nickel to sell the mobile home as contemplated by s. 28(1) or if he was not authorized, did he sell the mobile home in the ordinary course of business as contemplated by s. 30(2).

Applicable Statutory Provisions

> 28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest:
>
> (a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing; and
>
> (b) extends to the proceeds;
>
> but where the secured party enforces a security interest against both the collateral and the proceeds, the amount

> secured by the security interest in the collateral land the proceeds is limited to the market value of the collateral at the date of the dealing.
>
> 30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest that is given by the seller or lessor or that arises pursuant to section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement pursuant to which the security interest was created.

Section 28(1)

5 Section 28(1) reiterates the common law principle of *nemo dat quod non habet*. The debtors right to deal with collateral is subject to the security interest granted to the creditor unless certain things occur — i.e., the secured party authorizing expressly or by implication the dealing with the security.

6 The trial judge found that Lanson perfected his security interest under the terms of *The Personal Property Security Act, 1993* by the registration of the financing statement on April 6, 1995. That registration being prior in time to the registration of the Credit Union takes priority unless the Credit Union can demonstrate that Lanson lost the priority due to the operation of s. 28(1). The security agreement between Nickel and Lanson anticipated Nickel dealing with the security, the mobile home. Section 4 of the security agreement expressly provided:

> I will look after the property and keep it in good repair. I will not sell it nor grant another security interest in it, without repaying in full my indebtedness to the secured party.

7 Lanson knew that Nickel was buying the mobile home to rent it out or resell it. Thus, the issue is reduced to whether the agreement or the conduct of Lanson authorized the resale.

8 The trial judge found that Lanson had not authorized the sale to Spruce Meadow Trucking Ltd. He, in effect, found that Lanson, the secured party had to authorize the buyer, Spruce Meadow Trucking, to deal with the property and that the buyer must know of the authorization. With respect, in our opinion, he was in error. Section 28(1) contemplates the secured creditor (Lanson) authorizing the debtor to deal with the secured creditor. It does not contemplate an authorization to a third party to deal with the collateral. The fundamental issue is whether the authorization is subject to the pre-condition of payment in full. The trial judge found that Lanson had no interest in releasing the security interest until he received payment in full.

9 In our opinion, that interpretation is incorrect. The authorization to sell must be given before the sale. Lanson clearly gave Nickel express authority to deal with the security. That dealing would include resale. The fact the debtor failed to pay the secured creditor does not invalidate the sale to the buyer.

10 The appellant relied heavily on *Canadian Commercial Bank v. Tisdale Farm Equipment Ltd.*[2] In that case the trial judge found that "dealing" with the security interest was based on the express condition that the security interest would only be released on payment of the entire proceeds in circumstances where all parties, including the vendor the purchaser and the holder of the security interest, had knowledge of the security interest. That is not the case here. *Canadian Commercial Bank* is restricted to cases where the secured party agrees with the buyer to release the security interest on the express condition that the obligation is satisfied in full and makes it clear to the debtor that he does not intend to rely simply on the proceeds.

11 There is a distinction between a conditional authorization and an authorized sale subject to conditions that the proceeds be remitted to the secured party. (See: Cuming and Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Carswell, 1994) at pp. 198-99). Section 28(1) provides that "when collateral is dealt with or otherwise gives rise to proceeds, the security interest continues in the collateral *unless* the secured party expressly or impliedly authorizes the dealing. In other words the security interest in the collateral does not continue when the secured party authorizes expressly or by implication the dealing." In this case the trial judge clearly found that Lanson authorized the dealing. It follows that the security interest did not continue in the collateral and the title passed to the buyer, Spruce Meadow Trucking Ltd., free from

the secured interest. It follows the Credit Union acquired the collateral free of the security interest of Lanson and that the Credit Union therefore has priority over the security interest of Lanson and that Lanson's rights against Nickle are restricted to the proceeds.

12 It is not necessary for us, given the express authorization by Lanson to Nickel to deal with the collateral, to determine whether one could find on the facts of this case that there was an implied authorization to deal with the collateral as a result of the prior commercial dealings of the parties.

13 In light of this finding it is also not necessary for us to deal with the claim for priority of the Credit Union based on s.30(2) of *The Personal Property Security Act, 1993*. By declining to deal with this matter we are not to be taken as approving of the reasons of the trial judge.

14 The appellant shall have costs in the usual way on double Column V.

Appeal allowed.

Footnotes

1 S.S. 1993, c.P-6.2

2 (1984), 35 Sask. R. 166 (Sask. Q.B.) approved in (1985), [1987] 1 W.W.R. 574 (Sask. C.A.).

Tab 6

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

Most Recently Cited in: Canada North Group Inc (Companies' Creditors Arrangement Act), Re , 2019 ABQB 307, 2019 CarswellAlta 910, 10 P.P.S.A.C. (4th) 116, 308 A.C.W.S. (3d) 18, [2019] A.W.L.D. 2863, [2019] A.W.L.D. 2936, [2019] A.W.L.D. 2937, [2019] A.W.L.D. 2938, 96 Alta. L.R. (6th) 384 | (Alta. Q.B., May 14, 2019)

R.S.A. 2000, c. P-7, s. 28

s 28. Perfection re proceeds

Currency

28.Perfection re proceeds
28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

28(1.1) The limitation of the amount secured by a security interest as provided in subsection (1) does not apply where the collateral is investment property.

28(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected

(a) by the registration of a financing statement that contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) by the registration of a financing statement that covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) by the registration of a financing statement that covers the original collateral, if the proceeds consist of money, cheques or deposit accounts in a financial institution.

28(3) Where the security interest in the original collateral was perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.

Amendment History
2006, c. S-4.5, s. 108(19)

Currency
Alberta Current to Gazette Vol. 116:9 (May 15, 2020)

Tab 7

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

Most Recently Cited in: Canada North Group Inc (Companies' Creditors Arrangement Act), Re , 2019 ABQB 307, 2019 CarswellAlta 910, 10 P.P.S.A.C. (4th) 116, 308 A.C.W.S. (3d) 18, [2019] A.W.L.D. 2863, [2019] A.W.L.D. 2936, [2019] A.W.L.D. 2937, [2019] A.W.L.D. 2938, 96 Alta. L.R. (6th) 384 | (Alta. Q.B., May 14, 2019)

R.S.A. 2000, c. P-7, s. 30

s 30. Buyer or lessee takes free of security interest

Currency

30.Buyer or lessee takes free of security interest
30(1) For the purposes of this section,

(a) **"buyer of goods"** includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods' becoming a fixture or accession to property in which the person has an interest;

(b) **"ordinary course of business of the seller"** includes the supply of goods in the ordinary course of business as part of a contract for services and materials;

(c) **"seller"** includes a person who supplies goods that become a fixture or accession

(i) under a contract with a buyer of goods, or

(ii) under a contract with a person who is a party to a contract with a buyer of goods.

30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

...

Tab 8

2001 CarswellOnt 2592
Ontario Superior Court of Justice

Agricultural Commodity Corp. v. Schaus Feedlots Inc.

2001 CarswellOnt 2592, [2001] O.J. No. 2908, [2001] O.T.C. 542, 106 A.C.W.S. (3d) 1121, 2 P.P.S.A.C. (3d) 270

Agricultural Commodity Corporation, Plaintiff and Schaus Feedlots Inc., Schaus Land and Cattle Co. Limited and Schaus Trading Company Ltd., Defendant

Donnelly J.

Heard: May 2-4, 2001
Judgment: July 11, 2001
Docket: Stratford 99-260

Counsel: *John M. Skinner*, for Plaintiff
Peter E. Loucks, for Defendant

Subject: Corporate and Commercial; Insolvency

Headnote

Personal property security --- Disposition of collateral by debtor — Sale in ordinary course of business

Table of Authorities

Cases considered by *Donnelly, J.*:

Fairline Boats Ltd. v. Leger, 1 P.P.S.A.C. 218, 1980 CarswellOnt 607 (Ont. H.C.) — considered

Statutes considered:

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — considered

s. 28(1) — considered

ACTION by holder of registered security interest for declaration that encumbered corn was not sold in ordinary course of business.

***Donnelly, J.*:**

The Issue

1 Was the sale of corn by Larry Eurig (Eurig) to the defendant, Schaus Feedlots Inc. (Schaus) a sale "in the ordinary course of business"? If so, title passed free of the Plaintiff, Agriculture Commodity Corporation's (A.C.C.) registered security interest by virtue of s. 28(1) of the Personal Property Security Act (P.P.S.A.):

A buyer of goods from a seller who sells the goods in the ordinary course of business takes them free from any security interest therein given by the seller even though it is perfected and the buyer knows of it unless the buyer also knew that the sale constituted a breach of the security agreement.

The Parties

2 *Agriculture Commodity Corporation* is a non-profit corporation formed by the Government of Ontario and commodity producer Associations to provide low cost financing for crop input costs.
Schaus operates farm and cattle related businesses including a custom feedlot at Brentwood, Ontario, where 7000 to 8000 beef cattle are annually finished for market.
The term "custom" describes provision of a service for another for hire, ex. Schaus custom cattle feeding, Eurig custom corn harvesting.

The Corn

3 The standard for commercial corn is 15.5% water by weight. Corn with a higher moisture content is known in the trade as high moisture corn. In 1996 Eurig produced 1151 tonnes of high moisture corn on 475 acres of rented land. The crop was grown on seven locations near Mt. Forest — all within a ten mile radius and ranging between 50 and 70 miles from Brentwood. Schaus purchased the entire crop for cattle feed. Delivery was made by Eurig directly from field harvest to the Brentwood Feedlot in 40 truckloads between November 23rd 1996 and January 6th 1997.

The Year

4 The 1996 growing season was cold and wet producing much late maturity, high moisture, poor quality corn. This was particularly so in the Mt. Forest area which, in the north part of the corn belt, is low in the heat units required for quality and maturity. Harvest, dependant on the ground being dry or frozen, extended into January well beyond the usual October/November period. In a wet season harvest may be at night when the ground is frozen.
As a result of market conditions some farmers stored corn for sale in the Spring, speculating that the future price would more than compensate for storage costs and interest considerations. That corn was not available for the fall and winter market.

The Price

5 A pricing formula based on Chicago Commodity Exchange prices was negotiated using conventional industry guidelines and conversions. Eurig and Schaus finally agreed upon $3.75 per bushel plus transportation and a 50% drying bonus. This was consistent with pricing in the area and was admitted by the Plaintiff to be fair market value.

A.C.C.'s Business Practice

6 Before advancing its loan under a general security agreement registered under the P.P.S.A., precautions were taken by A.C.C:
Credit verification for Eurig including P.P.S.A. searches.
All licensed elevators including Colwest Elevators (Colwest) at Collingwood, which was identified by Eurig in his loan application as a potential buyer of his commercial corn, were given notice of A.C.C.'s security interest. Eurig was not required to sell to Colwest and could sell elsewhere to best advantage.
Obtained a buyer agreement from Colwest requiring scheduled payments to A.C.C. from crop proceeds in the event Colwest purchased corn from Eurig.
Obtained priority agreements in favour of A.C.C. from other P.P.S.A. claimants against Eruig's crop. (Royal Bank, Brussels Agromart and Sprucedale Agromart).

A.C.C.'s Security

7 On July 11th, 1996 the General Security Agreement was registered. Funds were advanced. The loan was secured against the crop on the entire 1495 acres rented by Eurig. No issue was taken regarding compliance with P.P.S.A. requirements or the perfected state of the security interest. The matter for determination was agreed by Plaintiff and Defendant to be under s. 28(1).

Eurig

8 Eurig was familiar with A.C.C. procedures having borrowed under that program in 1994 and 1995. His experience in growing corn was limited to 1995 when he sold his entire crop from 150 acres to Zurbrigg Elevator, the buyer which he had designated on his loan application. From the sale proceeds due to Eurig, Zurbrigg made the required payments to A.C.C.

Schaus

9 The main ration at the Brentwood Feedlot was dry corn fed in a grain and nutrient mix. That corn was purchased throughout southern Ontario either from cash crop farmers or from farmers whose production exceeded farm needs or storage capacity. Often the corn was a back haul on Schaus trucks returning from delivering beans to Hamilton or Windsor. The term "cash crop" connotes production of a crop for sale rather than for consumption in the producer's farm operation.

Background Between Schaus and Eurig

10 Schaus had no association with Eurig other than answering his advertisement in a farm magazine. As a result Schaus bought a trailer load of hay and straw from Eurig every two weeks through 1994 and 1995. Schaus encountered no problem with the delivery schedules or quality of product.

The Corn Transaction

11 Eurig testified that after checking prices and drying costs he concluded that it was cost prohibitive to sell his crop to an elevator as commercial corn. He had no storage facilities for high moisture corn. That corn is subject to rapid degradation with oxygen exposure. Prompt storage in an adequate facility is required. Accordingly, Eurig was confronted with a limited time frame for marketing 475 acres of crop.
About November 1st, 1996 Eurig asked Schaus to purchase his corn. Schaus expressed an interest but not at Eruig's price. After a brief interval Eurig reported that he had sold his corn at Hensall. He claimed that by reason of his custom combining and trucking operation, he had 500-700 acres of his neighbour's corn available for sale to Schaus.
As a safeguard against Eurig not paying the corn producers, Schaus did a telephone credit check with a Bank in Mt. Forest. Satisfied with the response and with a renegotiated price, Schaus agreed to purchase the corn as a hedge against an uncertain market in a bad production year. This was Schaus' only purchase of high moisture corn since starting the feedlot in the late 1980's.
Although he represented that the corn had been grown by neighbours, Eurig sold and delivered his corn. After the first few truckloads, because of inconvenient night deliveries and high moisture content, Schaus suggested the deal be cancelled. Eurig insisted upon performance and Schaus complied.

Payment

12 Eurig disclosed neither the security interest to Schaus nor the sale to A.C.C. Schaus neither searched for, nor enquired about, liens and had no knowledge of any security interest. Eurig was paid $151,530.67 in full but made no payment on the A.C.C. loan which was due February 28, 1996.
On March 19, 1998, A.C.C. obtained judgment against Eurig for $113,662.35 plus costs of $1797.25 with post judgment

interest at 8.25% per annum. That full balance remains unpaid less market revenue payments of $800.94 and $470.54.

On this Evidence I Find as Facts

13 At some moisture level, drying costs together with shrinkage and quality downgrade resulting from drying render it uneconomical to dry high moisture corn.
There is a large cattle feedlot market for high moisture corn.
The market sources are cash crop producers or surplus corn from farmers,
For cost considerations, trucking may be directly from harvest to feedlot.
In poor quality years corn may be trucked to the Grey/Bruce area from Chatham, London or Guelph. It was not unusual to ship corn 50 to 70 miles.
The distances from Eurig's growing corn crops to Colwest and to Brentwood were not significantly different.
For feedlots with high volume consumption, the amount of individual purchases varies with the producer's available supply.
A Feedlot purchase of surplus from an area farmer is often an annual event. The entire surplus for an individual farmer is usually a relatively small quantity.
Schaus ran a large scale Feedlot requiring large volumes of feed.
Schaus did not grow corn for the Feedlot
It was not unusual for Schaus to buy more than 1000 tonnes of corn from one producer.
Schaus' corn purchases were approximately equally divided between farmers and elevators.
Not much corn was produced in the Brentwood area which is north of Mt. Forest and close to the Minising Swamp. Most of that corn was controlled through contracts by two large local elevators, one being Colwest. As a result Schaus shopped elsewhere.
Eurig was not, and did not hold himself out to Schaus as, a licensed commodity dealer.
Eurig sold his crop to Schaus. Reference to his neighbours' corn was a mechanism to re-open bargaining after rejection of his opening price.
Converted to dry corn the Eurig purchase would be two weeks supply for the entire Schaus operation.
In the circumstances of the crop year no ulterior motive was indicated by this being Schaus' only purchase of high moisture corn and his first purchase from Eurig.
The trade custom in the Feedlot business, and particularly Schaus' custom, was that no P.P.S.A. searches were made for purchases of corn.

Did Eurig Sell the Corn to Schaus in the Ordinary Course of Business?

14 Direction on the application of S. 28(1) is found in comment by Linden, J. in *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.):

> Thus in deciding whether a transaction is one that is in the ordinary course of business, the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact. (See the Ziegel article, supra, at p. 86.) The usual, or regular type of transaction that people in the seller's business engage in must be evaluated. If the transaction is one that is not normally entered into by people in the seller's business, then it is not in the ordinary course of business. If those in the seller's business ordinarily do enter into such agreements, then, even though it may not be the most common type of contract, it may still be one in the ordinary course of business.

And in McLaren, Secured Transactions s. 9.01(5)(c) at 9-34:

> Whether a transaction will be in the ordinary course of business under s. 28(1) is a question of fact to be objectively assessed, taking into consideration all circumstances which were known, or ought reasonably to have been known, to the buyer. The effect is that a transaction which seems to be in the ordinary course of business will be within s. 28(1) notwithstanding that circumstances unknown or not reasonably within the knowledge of the buyer might establish that the dealing was not in the ordinary course of business. It is therefore, unnecessary to make inquiries as to whether a particular transaction is fraudulent or unauthorized. It is merely required that the transaction be in the ordinary course of business.

15 The object of the section is to provide certainty and confidence in the commercial market. Personal Property Security Law in Ontario 1976 at 144. Fred M. Catzman.

16 Whether the sale is "in the ordinary course of business" is determined from the buyer's perspective. The frequency and number of sales are not determinative. The sale need not be the most common type of transaction.

17 This issue is whether the sale was a proper component of the seller's business. General commercial practice rather than the seller's particular operating methods is the criterion. Accordingly, it is not significant that this was Eurig's second sale of corn. Whether the sale was in the ordinary course of Eurig's business is a question of fact to be determined by the circumstances of the sale. Significant features are:

a) Eurig was a cash crop farmer. That status was not affected by his limited experience in growing corn.

b) The primary function of a cash cropper is to sell inventory.

c) The corn was inventory in Eurig's hands,

d) There are two markets for corn — either as commercial corn or as animal feed.

e) The high moisture content (in the 30% range) rendered reasonable Eurig's decision not to sell as dry corn.

f) With no storage facilities and the risk of rapid degradation, Eurig was obliged to promptly market his crop.

g) It is in the ordinary course of business for a cash crop farmer to sell his crop to persons who use his product.

h) Eurig was known to Schaus for two years through supply of hay and straw for Schaus' operation,

i) The corn sale was negotiated by attendance at and telephone calls to the Schaus business premise.

j) The timing of the sale was at harvest.

k) The characteristics of the delivery, direct from the field, late in the season, at night and over a period of time, were consistent with harvest conditions.

l) The distance from field to market was not unusual

m) The quantity sold was not excessive — for Eurig, the entire crop — for Schaus, two weeks supply.

n) Schaus had adequate storage facilities for this purchase in three roofed pit silos.

o) The refusal to buy at Eurig's first price points to an arm's length transaction.

p) The entire corn crop was sold to Schaus at a fixed price so it was unnecessary to find, and negotiate with, other buyers.

q) Fair market price was paid.

r) Payment following delivery was normal.

s) The corn was fed at Brentwood as mixed grain on a schedule which finished in the Spring in the ordinary course of the Feedlot operation.

18 From Schaus perspective the sale was a normal transaction — a cash crop farmer selling his crop in a recognized market for cattle feed at fair market price. There was nothing to indicate that the sale was not in the ordinary course of

Eurig's business.

19 The operative dishonesty was neither in the sale nor in the misrepresentation as to ownership. It was in the misapplication of sale proceeds by Eurig.

20 In result I find the sale to Schaus, as a large scale consumer of cattle feed, was in the ordinary course of Eurig's day to day business activity as a cash crop farmer. The sale was protected by s. 28(1). Schaus acquired the corn free of A.C.C.'s secured interest.

21 The quantum of A.C.C.'s loss crystallized with the judgment of March 19, 1998. Less the two payments, the judgment remains unpaid. No further assessment is required.

22 By consent of all parties the action is dismissed without costs against the defendants, Schaus Land and Cattle Co. Limited and Schaus Trading Company Ltd.

23 The Plaintiff's action is dismissed against Schaus. If costs are contended to be other than party and party following the event, representations in writing may be made within 15 days of release of these reasons.

Action dismissed.

2003 CarswellOnt 654
Ontario Court of Appeal

Agricultural Commodity Corp. v. Schaus Feedlots Inc.

2003 CarswellOnt 654, 121 A.C.W.S. (3d) 365, 4 P.P.S.A.C. (3d) 266

AGRICULTURAL COMMODITY CORPORATION (Plaintiff / Appellant) v. SCHAUS FEEDLOTS INC., SCHAUS LAND AND CATTLE CO. LIMITED and SCHAUS TRADING COMPANY LTD. (Defendants / Respondents

Abella J.A., O'Connor A.C.J.O., and Simmons J.A.

Heard: February 20, 2003
Judgment: February 20, 2003
Docket: CA C36838

Proceedings: affirming *Agricultural Commodity Corp. v. Schaus Feedlots Inc.* (2001), 2001 CarswellOnt 2592, 2 P.P.S.A.C. (3d) 270 (Ont. S.C.J.)

Counsel: A. Duncan Grace for Appellant
Daniel R. Dowdall, Alex A. Ilchenko for Respondent

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

Headnote

Personal Property Security --- Disposition of collateral by debtor — Sale in ordinary course of business
Defendant S Inc. operated farm and cattle related businesses, including custom feedlot — In 1996 E produced 1151 tonnes of high moisture corn on 475 acres of rented land — S Inc. purchased E's entire crop for cattle feed at fair market value — In 1996, plaintiff Agriculture Commodity Corporation ("ACC") entered into general security agreement with E — ACC loan was secured against crop on entire 1495 acres rented by E — E disclosed neither security interest to S Inc. nor sale to ACC — S Inc. neither searched for, nor enquired about, liens and had no knowledge of ACC's security interest — Trade custom in feedlot business was that no Personal Property Security Act ("PPSA") searches were made for purchases of corn — In 1998, ACC obtained judgment against E for $113,662.35 — ACC as holder of registered security interest brought appeal against S Inc. for declaration that encumbered corn was not sold in ordinary course of business pursuant to PPSA — Appeal dismissed — General commercial practice rather than seller's particular operating methods is criterion of ordinary course of business sale — Whether sale was in ordinary course of E's business was question of fact to be determined by circumstances of sale — With no storage facilities and risk of rapid degradation, E was obliged to promptly market his crop — It is in ordinary course of business for cash crop farmer like E to sell crop to persons who use his product — Fair market price was paid — Sale to S Inc. as large scale consumer of cattle feed was in ordinary course of E's day-to-day business activity as cash crop farmer.

Table of Authorities

Statutes considered:

Personal Property Security Act, R.S.O. 1990, c. P.10
s. 25(1) — considered

APPEAL by registered security holder of judgment reported at 2001 CarswellOnt 2592 (Ont. S.C.J.) dismissing holder's action that sale of encumbered corn was not in ordinary course of business.

Abella J.A., O'Connor A.C.J.O., and Simmons J.A.:

1 Section 5(b)(iii) of the loan agreement expressly authorized Mr. Eurig to sell the crops that were secured by the agreement on a "farm-to-farm" basis. The sale from Eurig to the respondent was a sale from farm-to-farm. The fact that Eurig told the respondent that the corn was being sold by his neighbours rather than by himself is irrelevant to the authority conferred by s. 5(b)(iii). There was no prejudice to the appellant's security under the loan agreement arising from the misrepresentation.

2 Because the sale was expressly authorized by the agreement, it falls within s. 25(1) of the *PPSA*. As a result, the respondent took title of the crops free and clear of the security interest.

3 Thus, we agree with the result reached by the trial judge and dismiss the appeal.

Appeal dismissed.