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THE *REPAIR AND STORAGE LIENS ACT*: THE ONE TO WATCH OUT FOR

This article was written by Glenn Grenier, a partner at Lang Michener LLP, and Shannon Seitz, an articling student at the same firm. Glenn carries on a commercial litigation practice with emphasis on construction litigation and construction lien enforcement and defence. He also has significant experience in the areas of aviation law and bankruptcy and insolvency. The article was originally published on the firm's Web site, www.langmichener.ca, *and is the précis of a paper presented by Glenn on October 31, 2007 as part of "Remedies Fast Forward", an Ontario Bar Association Continuing Legal Education Conference. This article is reproduced with permission. © Lang Michener LLP.*

The *Repair and Storage Liens Act* ("RSLA")[1] covers the repair and/or storage of "articles", defined as "tangible personal property other than a fixture". A "repair" "means an expenditure of money on, or the application of labour, skill or materials to, an article for the purpose of altering, improving or restoring its properties or maintaining its condition ...". Though the term "storage" is not defined in the Act, a "storer" is "a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be".

To use the RSLA to full advantage, however, one must think creatively with respect to the foregoing definitions. If one believes the RSLA is confined to auto repairs and u-store outlets, the benefits of the RSLA will be lost. I once filed an RSLA lien on behalf of a company that was unpaid after having rented movie production equipment to a film producer. I took the position that the film negative was an "article" that had been altered and improved by the movie cameras and, thus, had been "repaired" within the meaning of the RSLA. (I will tell you how this ended later in the article, so keep reading.)

Inside

Possessory and Non-Possessory Liens

The RSLA lien world is further divided into possessory liens and non-possessory liens. A possessory lien is automatically created when a repairer or a storer obtains possession of the article and commences an authorized repair or storage. The possessory lien continues until the amount for such services is paid or until possession of the article is surrendered. Thereafter, an unpaid repairer or storer has a non-possessory lien.

Signed Acknowledgment of Indebtedness

In order for a non-possessory lien to be enforceable, the repairer or storer requires a "signed acknowledgment of indebtedness". This term is not defined in the statute; however, the statute does state that the written acknowledgment *may* be on an invoice or other statement of account. Case law has held that this provision does not require that a specific or discrete amount has to be admitted as owing, but simply an acknowledgment that *some* amount is owing will be sufficient.[2]

The acknowledgment of indebtedness does not have to be signed by the owner of the article but may be signed by others on behalf of the owner. In the Ontario Court of Appeal decision *Royal Tire Service Ltd. v. Shelleby Transportation*,[3] an equipment lessee, and not the registered owner, executed the document relied upon as supporting the non-possessory lien. The Court of Appeal held that others in legal possession of the article had the authority to authorize repairs and to execute the required acknowledgment.

What is really surprising is that by simply carrying out its statutory duty to provide a listing of creditors of an insolvent person or corporation, a trustee or receiver can unwittingly provide a non-possessory lien claimant with the means to enforce his/her lien. It has been held that being enumerated on a "List of Creditors" in a Statement of Affairs signed by the trustee was sufficient to constitute a signed acknowledgment of indebtedness for the purposes of the RSLA.[4] Further, an RSLA lien claimant can then register his/her lien *after* a bankruptcy or receivership and, as a result, claim a higher interest in the article than any other interest, including that of the trustee or receiver.[5]

Timing and Priority

A non-possessory lien claimant has no prescribed time limit under the RSLA to register a lien in the article. By filing a registration of a lien, a lien claimant is giving notice to all others of that non-possessory lien. A non-possessory lien becomes enforceable against third parties after registration. If a third party acquires an interest in an article *after* a non-possessory lien in that article has arisen but *before* the lien is registered, that third party will have priority over the non-possessory lienholder.

One of the primary incentives for a non-possessory lien claimant to register quickly is to ensure he/she does not lose priority to a third party who acquires some interest in the article *after* the lien arises and who would be otherwise unaware of the unregistered non-possessory lien (and granted priority as a result). Further, registration is required in order to allow the non-possessory lien claimant to utilize the seizure mechanism in the RSLA.

Priority in an article is not determined by the order of registration. A subsequently registered non-possessory lien will have priority over a previously registered security interest. Further, priority amongst non-possessory lien claimants is not determined by the order of registration, but by the reverse order of giving up possession, the last repairer or storer having priority.

Tacking

Each individual repair or storage of an article must be registered as a separate lien, as the statute prevents the tacking of liens. For example, if lien claimant "A" acquired rights in January and March, and lien claimant "B" acquired rights in February, then section 16 provides that the priorities, in order, would be A (March repair), B (February repair), and A (January repair). If A were allowed to tack his/her January claim to the March claim, it would defeat B's right to have the February claim have second priority, behind A's March claim and before A's January claim.

In the *Canadian Imperial Bank of Commerce v. Kawartha Feed Mills Inc.*[6] case, Justice Ferrier explained that aggregating lien claims was only a concern between competing non-possessory lien claimants, and not between a

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For CCH Canadian Limited:

CHARMAINE TIERNEY, LL.B., Senior Editor
(416) 224-2224, ext. 6366
e-mail: Charmaine.Tierney@wolterskluwer.com

SHARI ZINMAN, B.A., M.A., Editor
(416) 224-2224, ext. 6376
e-mail: Shari.Zinman@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Cheryl.Finch@wolterskluwer.com

FARIDA KARIM, B.A., Marketing Manager
(416) 228-6138
e-mail: Farida.Karim@wolterskluwer.com

90 Sheppard Ave. East, Suite 300
Toronto, Ontario M2N 6X1

non-possessory lien claimant and a prior *Personal Property Security Act* claimant.

Seizure

Once a non-possessory lien is registered, a lien claimant can provide a copy of the registered lien to the local sheriff or a licensed bailiff and direct that the article be seized. Upon receipt of the registered lien and direction, the sheriff shall seize the article wherever it may be found and deliver it to the lien claimant. Note that in doing so, the lien claimant is not required to start any court proceeding nor obtain a court order.

To conclude my film story, after registering the lien, I provided a copy to the local sheriff who was directed to seize the negative, which happened to be in the possession of another firm which was developing the negative. That firm could have asserted a possessory lien and resisted my sheriff under the RSLA, but it did not know it had such rights and thus did not assert them. Following seizure and upon having possession of the film negative, I was able to secure funds for my client, who otherwise would have remained unpaid as an unsecured creditor, hopelessly seeking funds from an insolvent movie production company.

Conclusion

The following should be noted with respect to the RSLA:

- the priorities enjoyed by lien claimants over other interests;
- the fact that such priorities can be registered and asserted after an insolvency; and
- the fact that self-help remedies can be asserted quickly, simply, and initially, without any court oversight.

Notes:

[1] R.S.O. 1990, c. R.25.

[2] *Altruck Transportation Services (c.o.b. Kirby International Trucks Ltd.) v. Barry Humphrey Enterprises Ltd.* (1993), 101 D.L.R. (4th) 470, 5 P.P.S.A.C. (2d) 81 (Ont. Gen. Div.); *Alexandrov v. 1030999 Ontario Ltd.* (1994), 8 P.P.S.A.C. (2d) 152 (Ont. Gen. Div.).

[3] (1999), 124 O.A.C. 66, 1 B.L.R. (3d) 250, 14 C.B.R. (4th) 149, 15 P.P.S.A.C. (2d) 39 (C.A.).

[4] *1538565 v. Leggat Aviation Ltd.* (November 17, 2004), Newmarket File No. 69918/04 (Ont. S.C.J.); *Fountain Tire Corp. v. Sturgeon Timber Ltd. (Receiver of)* (2007), 34 C.B.R. (5th) 37 (Ont. S.C.J.).

[5] *Fountain Tire Corp. v. Sturgeon Timber Ltd. (Receiver of)* (2007), 34 C.B.R. (5th) 37 at paragraph 38 (Ont. S.C.J.).

[6] (1998) 41 O.R. (3d) 124, 14 P.P.S.A.C. (2d) 35 (Gen. Div.).

"IP IS HOT!"

Highlights from the 12th Annual Intellectual Property Law – The Year in Review

By Charmaine Tierney, LL.B., Senior Legal Editor, Legal & Business Markets, CCH Canadian Limited. © CCH Canadian Limited.

So exclaimed intellectual property lawyer Ronald E. Dimock at the Law Society of Upper Canada's "12th Annual Intellectual Property Law – The Year in Review". This popular CLE program was held in Toronto on January 17, 2008 (January 18 in Ottawa) and explored the latest developments in trade-marks, copyright, and patents law.

The half-day event was hosted by Andrea Rush of Heenan Blaikie LLP, and included the following erudite speakers:

- Donald H. MacOdrum of Lang Michener LLP, on patents law;
- Sheldon Burshtein of Blake, Cassels & Graydon LLP, on copyright law;
- Cynthia Rowden of Bereskin & Parr LLP, on trade-marks law;
- Darlene Carreau, Acting Chair of the Trade-marks Opposition Board, on the new procedures at the Board;
- the Honourable Mr. Justice Marc Nadon of the Federal Court of Appeal, who moderated a panel on whether intellectual property rights are out of control;
- the Honourable Mr. Justice William J. Vancise of the Saskatchewan Court of Appeal and Chairman of the Copyright Board of Canada, on copyright law and the challenges of the Board;
- Barry B. Sookman of McCarthy Tétrault LLP, on copyright law and the tensions faced by the courts;
- Mr. Dimock of Dimock Stratton LLP, on the Supreme Court of Canada versus intellectual property rights, and how to win IP clients and impress others;
- R. Scott Jolliffe of Gowlings Lafleur Henderson LLP, on public policy in the Supreme Court of Canada and IP conflicts of interest;
- Leonora Hoicka, Senior Counsel at IBM Canada Ltd., who moderated a panel on IP practice and its people;

- C. Lloyd Sarginson of Bereskin & Parr LLP, on privilege; and

- Norman Bacal of Heenan Blaikie LLP, on how to keep IP lawyers happy.

Each speaker either covered the significant developments that occurred in 2008 or gave helpful practice information. The following are some of the highlights and main themes of the day.[1]

The Treasurer's Address and Conflicts of Interest

The day began with an introduction from Law Society Treasurer Gavin MacKenzie, who spoke about three major practice issues facing the Law Society and Ontario lawyers today: the increase in conflicts of interest, the growing number of applications for admission to the Law Society, and the erosion of the legal profession's right to self-regulate. With respect to conflicts of interest, the Treasurer noted that the incidence of such conflicts has grown exponentially in the last few years. This has been caused, in part, by the growth of national firms, greater specialization amongst lawyers, and the diminishing loyalty of clients. The Treasurer suggested that lawyers make use of client databases to identify and prevent conflict issues, limit their retainers, and ask other law firms to act for them in cases of conflict.

Later on in the day, Mr. Jolliffe also made a presentation on conflicts of interest. Like the Treasurer, he recommended that lawyers do conflict searches and added that they ought to draw up engagement letters with clients that identify who the client is, identify the matter in which the lawyer has been retained, define when the relationship ends, and specify situations in which the lawyer could act for others against the client.

Euro-Excellence Inc. v. Kraft Canada Inc.

The most talked about case was the Supreme Court of Canada's decision in *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 ("*Kraft Canada*"), which most agreed was the top IP decision of the year. Of the speakers who referred to the grey-marketing decision, many were happy that a copyright case had made it to Canada's top court, but bemoaned the fact that there were four different judgments on three different issues, each of which was decided in favour of Kraft Canada, but with Euro-Excellence winning at the end of the day.

Trade-marks Opposition Board Rules and Procedures

Perhaps the most controversial speaker of the morning was Ms. Carreau, Acting Chair of the Trade-marks Opposition Board. Ms. Carreau outlined the new procedures before the Board regarding time limits and extensions of time. These new procedures became effective as of October 1, 2007 and may be found at the Canadian Intellectual Property Office Web site at http://strategis.gc.ca/sc_mrksv/cipo/tm/tm_notice/tmn2007-10-01-e.html.

Ms. Carreau warned that extensions of time are now more difficult to obtain, the Board's goal being to move opposition proceedings along. While in the past extensions of time were granted on a near *pro forma* basis, this is no longer the case. In accordance with section 47 of the *Trade-marks Act*, the Board must be satisfied that the circumstances justify an extension of the time. In most cases, this means that "exceptional circumstances" are now required.

Ms. Carreau offered a number of helpful tips to determine whether exceptional circumstances exist.

1. Exceptional circumstances might not be what you thought they were. They must truly be exceptional – beyond the norm or standard set of circumstances.
2. Argue in the alternative, especially if there are consequences in the *Trade-marks Act*.
3. The Board will not give you more time than that requested.
4. A short period of time might not be considered exceptional.
5. Ongoing settlement negotiations do not automatically lead to extensions of time. The negotiations must be progressing toward an actual settlement. The Board will consider whether an extension of time will actually move the settlement along.
6. Do not keep recycling firm precedents; the standards have changed.
7. International settlement negotiations generally do lead to extensions of time. However, an application for an extension of time must relate the negotiations back to a Canadian registration. The Board will not accept a "wait and see" approach. Nor will it accept a statement that the settlement "might" affect a Canadian trade-mark. Indicate how many jurisdictions and how many and which Canadian trade-marks are involved.
8. Exceptional circumstances do not include principals that are not in Canada, the consent of the opposite party, and the fact that a large or multinational company is involved.

Ms. Carreau suggested that practitioners keep in mind the deemed abandonment provisions in subsections 38(7.1) and (7.2) of the *Trade-marks Act*. Should an extension of time be refused and a deadline be missed as a result, the Act deems abandonment in some cases. Ms. Carreau advises that practitioners argue in the alternative, i.e., claim exceptional circumstances and add "but if the request is denied, please find our counter-statement". This was met by several guffaws in the audience.

A question from the floor was asked about whether citing lawyer–client privilege is enough to obtain an extension of time. Ms. Carreau said that the request must give enough information for the Board to decide the issue. The audience member argued that stating that the issue is protected by lawyer–client privilege ought to be sufficient. A rather heated exchange then ensued about the meaning of exceptional circumstances and whether there ought to be a practice notice to clarify the issue. Ms. Carreau stated that that is likely not going to happen.

Intellectual Property Law Rights - Are They Out of Control?

A panel of great minds explored whether IP rights are out of control. The panel was moderated by Justice Nadon, who said that intellectual property law is in a "state of effervescence". While all but one of the panellists declined to answer directly the key question, they all agreed that a balancing of interests is the current paradigm of the courts. Mr. Joliffe was the only one of four (Justice Vancise, Mr. Sookman, and Mr. Dimock being the others) to state directly that the Supreme Court of Canada is out of control. Looking more closely at the public policy threat in several Supreme Court of Canada IP cases (*Théberge v. Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34; *CCH v. Law Society of Upper Canada*, 2004 SCC 13; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22; *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23; and *Kraft Canada*, *supra*), he lamented that one could almost put the statute aside and just bring public policy arguments to the Court. His advice to practitioners included:

- know the personalities on the Court, since the judges seem to take a subjective, results-oriented approach;
- consider authors, rights holders, and users;
- remember that public interest and economic factors will be relevant;
- include public policy arguments in your theory of the case and pleadings;
- provide the Court with evidence of the public interest; and
- include arguments on the balancing of rights.

IP Practice and People - Pitfalls and Panacea

The morning ended with an interesting panel on IP practice. Ably moderated by Ms. Hoicka, the panel (Mr. Dimock, Mr. Bacal, Mr. Jolliffe, and Mr. Sarginson) provided helpful tips on how to structure and manage IP law firms and lawyers. More than one speaker agreed that managing client expectations was the key to winning and impressing clients. Mr. Bacal's presentation on how to keep your IP lawyers happy noted that IP lawyers, being rather nerdy and creative types much like their clients, require flexibility and freedom to be creative in their work and the way they approach their clients. Above all, he emphasized mentoring as the most important building block to growing and developing an IP practice.

Conclusion

Although the speakers were great, unfortunately the amount of terrain to cover was even greater, as evidenced by the struggle to keep within time limits. Clearly the presenters were forgiven, as shown by the number of apt and appreciative listeners that remained to the very end.

Notes:

[1] This article could not possibly report on all of the invaluable information imparted at the program. However, most of the speakers wrote articles which can be found in the session's materials: *12th Annual Intellectual Property - The Year in Review* (Toronto: Continuing Legal Education, Law Society of Upper Canada, 2008).

LEGISLATIVE UPDATE

Federal

An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act, S.C. 2006, c. 12, formerly Bill C-25, amending the *Proceeds of Crime (Money Laundering) Act*, received first reading in the Commons October 5, 2006, second reading October 24, 2006, where it was referred to the Standing Committee on Finance and amended, and third reading November 10, 2006. It received first reading in the Senate November 21, 2006, second reading November 28, 2006, and third reading and Royal Assent December 14, 2006. It is in force on proclamation. Subsections 1(2) and 3(2) and section 40 will be in force December 30, 2008.

The *Olympic and Paralympic Marks Act*, S.C. 2007, c. 25, formerly Bill C-47, amending the *Trade-marks Act*, received first reading in the Commons March 2, 2007, second reading May 17, 2007, and third reading June 14, 2007. It received first reading in the Senate June 14, 2007, second reading June 19, 2007, and third reading and Royal Assent June 22, 2007. Section 13 will come into force December 31, 2010. The rest of the Act was proclaimed in force December 17, 2007.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations, SOR/2007-292, comes into force December 28, 2008. These regulations set out new administrative monetary penalties.

Alberta

The *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2, formerly Bill 46, amending the *Fair Trading Act*, received first reading June 14, 2007, second reading December 3, 2007, third reading December 4, 2007, and Royal Assent December 7, 2007. It was proclaimed in force January 1, 2008.

Northwest Territories

The *Workers' Compensation Act*, S.N.W.T. 2007, c. 21, formerly Bill 6, amending the *Business Licence Act* and the *Personal Property Security Act*, received first and second readings March 14, 2007, third reading August 22, 2007, and Royal Assent August 23, 2007. It is proclaimed in force April 1, 2008.

CASE SUMMARIES

Please also consult the "Recent Cases" tab division in Volume 1 of the CANADIAN COMMERCIAL LAW GUIDE *at the paragraph numbers indicated, where fuller case digests and citations for reported cases are provided.*

Car Buyers Did Not Take Steps of Prudent Purchaser

• • • **Ontario Court of Appeal** • • • The appellants, Town & Country Chrysler Ltd. ("T & C") and Devolin Auto Group Ltd. ("Devolin"), appealed from a trial decision awarding $49,082 in damages to the respondent, General Motors Acceptance Corporation of Canada ("GMAC"). On November 24, 1999, 9069-7368 Quebec Inc. ("9069") purchased a 1999 Corvette from Wilhelmy Chevrolet Geo Oldsmobile Cadillac Limitée ("Wilhelmy") in Quebec. A conditional sales agreement was signed the same day and Wilhelmy assigned it to GMAC, who financed the purchase by advancing funds to 9069. After delivery, 9066-1141 Quebec Inc. ("9066"), took possession of the vehicle. On November 25, 1999, T & C, an Ontario car dealer, purchased the Corvette from 9066 for $60,990. 9066 told T & C that there existed no interest in the Corvette other than that of the vendor, a long-time wholesale vendor of vehicles to T & C. On the same day, T & C sold the car to Devolin, an Ontario wholesaler, for $62,274. On December 9, 1999, Devolin sold the Corvette to a dealer in Michigan for US$44,000. The vehicle had since been resold. GMAC did not register its security interest in Quebec with the Register of Personal and Movable Real Rights until December 7, 1999. The Registry was a new personal property registration system, which came into operation in September 1999. GMAC did not register its security interest in Ontario under the *Personal Property Security Act* until January 24, 2000.

On March 17, 2000, GMAC sent a letter to T & C and Devolin advising of its security interest in the Corvette and claiming damages against them. GMAC brought an action in Ontario for a declaration that it had a valid registered security interest in the Corvette when T & C purchased it on November 25, 1999. GMAC invoked Article 1745 of the *Civil Code of Quebec*, which provides that the registration of a security interest has a retroactive effect to the date of sale as long as registration is completed within 15 days of the sale. The trial judge held that T & C and Devolin were presumed to have knowledge of the GMAC's interest and that their presumed good faith conduct was rebutted by their failure to act with due diligence. He granted the declaratory relief and awarded damages of $49,081.72, plus prejudgment interest against T & C and Devolin. On appeal, the first issue was the standard of review to be applied to questions of foreign law determined by a trial judge. The second issue concerned the application of the personal property security legislation in Quebec to T & C and Devolin. They argued that the trial judge erred in determining Quebec law without reference to the expert evidence and in his treatment of the good faith issue.

The Ontario Court of Appeal dismissed the appeal. The appropriate standard of review on questions of foreign law was correctness. The rationale that supported a high degree of deference for findings of fact made by a trial judge did not apply to findings and determinations made in respect of foreign law. It is highly unlikely that the autonomy or integrity of trial courts would in any way be put at risk if appellate courts did not defer to a trial judge's findings in respect of questions of foreign law. The trial judge had indeed erred in determining the issues of Quebec law without reference to the expert evidence. Where a trial judge fails to make findings in respect of the evidence of foreign law, the court is at liberty "to apply its own mind" to the questions of foreign law. That approach comported with the conclusion that the standard of appellate review was correctness. However, the trial judge did not err in his treatment of good faith. The evidence of GMAC's expert as to the steps that a prudent purchaser would take in the circumstances of T & C and Devolin was sufficient to rebut the presumption of good faith of both. A purchaser who fails to take the simple steps referred to cannot be said to be justified in believing he/she has an unfettered right to the vehicle he/she has purchased. Those steps include waiting for the 15-day period to expire, retaining the purchase price until the expiry of the 15 days and checking the register again, and inquiring more closely as to the chain of title back to the dealer. The lack of registration at the time of purchase was not sufficient to rebut the presumption of knowledge. There was no basis in law for accepting the newness of the Quebec registration system as a relevant consideration.

General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited and Devolin Auto Group Limited, 2008 CCLG ¶24-892

Secured Creditor Not Entitled to Land Sale Proceeds

• • • **Manitoba Court of Queen's Bench** • • • The applicant, 5198837 Manitoba Ltd. ("519"), sought a declaration that it was entitled to the proceeds generated by the sale of a beneficial interest in land by Lawrence Hadiken

("Hadiken"). Hadiken granted two security interests perfected by registration of a financing statement in the Personal Property Registry. The interests secured included all of Hadiken's present and after acquired personal property. 519 was, by assignment, the beneficial owner of the two registered security interests. Hadiken had a beneficial interest in land located in Arizona. In July 2005, after the security interests were registered, Hadiken borrowed $100,000 from the respondent, Terry Pankiw ("Pankiw"). He represented to Pankiw that the land was not subject to any form of security. The lending agreement provided that if Hadiken did not repay the loan by August 1, 2005, there would be an irrevocable assignment of his beneficial interest in the land to Pankiw. Hadiken did not repay the loan. The property was sold and Hadiken's share was sent to the respondent solicitor, C. Mervin Ozirny ("Ozirny"). 519 claimed that it had a right to claim priority over the proceeds held by Ozirny.

The Manitoba Court of Queen's Bench dismissed the application. The issue was whether or not a security agreement registered under the *Personal Property Security Act* ("the Act") applied to proceeds from the sale of land that had been irrevocably assigned to Pankiw before the land was sold. When Hadiken defaulted on the loan to Pankiw on August 1, 2005, any beneficial interest in the sale proceeds of Hadiken's one-third interest in the property was vested in Pankiw. That occurred before the land was sold. After the land was sold, Hadiken had no claim to the proceeds. The proceeds were transferred to Ozirny in trust for Pankiw because he was the only person who had a beneficial interest in them. There was no moment in time when the proceeds belonged to or were the property of Hadiken. Therefore, Hadiken's beneficial interest was never converted into Hadiken's personal property so as to engage the prior security interests of 519. That interpretation was further supported by subsections 4(*e*) and 4(*f*) of the Act, which excludes from the Act the transfer of an interest in land or the creation or transfer of a right to payment that arises in connection with an interest in or a lease of land. Moreover, the registered security interests upon which 519 relied had no application to the land in which Hadiken had a beneficial interest. It was never collateral. Therefore, the sale of the land did not generate the type of proceeds that the Act was designed to include. 519's security interests did not give it priority over the sale of the land in Arizona. The proceeds did not constitute after acquired personal property of Hadiken.

5198837 Manitoba Ltd. v. Ozirny and Pankiw,
2008 CCLG ¶24-893

Bank Operating in Province Is Garnishee "in the Jurisdiction of the Court"

• • • **British Columbia Supreme Court** • • • The plaintiff, Univar Canada Ltd. ("Univar"), appealed from the dismissal of its application for a pre-judgment garnishing order and an order for *ex juris* service. Univar supplied goods to the defendant, PCL Packaging Corporation, at a value of $17,996.84. It sought a pre-judgment garnishing order on PCL's bank account, which was at a branch of TD Canada Trust ("TD") located in Toronto, Ontario, and an order to serve the garnishing order *ex juris*. The Master dismissed the application on the basis that the garnishee was the Ontario branch of the bank and that the branch was not "in the jurisdiction of the Court" as required by paragraph 3(2)(*e*) of the *Court Order Enforcement Act* ("COEA"). The Master did not consider the fact that the bank had branches in and carried on business in British Columbia to have a bearing on the matter. Univar obtained default judgment against PCL for the full amount of its claim plus costs and interest. Although the case might be moot, the Court decided to deal with the issue because it affected British Columbia collections, the issue had not been decided consistently in the province, and since the same issue applied to both pre-judgment and post-judgment attachment, it was an issue of some importance. Univar submitted that the Master erred in concluding that the garnishee was the branch of the bank that held the account and argued that TD was the garnishee, and not the branch of the bank located in Ontario.

The British Columbia Supreme Court allowed the appeal. Under subsection 3(2) of the COEA, the court is authorized to issue pre-judgment and post-judgment garnishing orders against a garnishee who is in the jurisdiction of the court. Generally, a garnishee is in the jurisdiction of the court where it has a presence in British Columbia. Pursuant to subsection 7(*c*) of the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"), a corporation is ordinarily resident if it has a place of business in the province. Subsection 462(1) of the *Bank Act* provides that where a bank is in possession of money owed to a person by reason of a deposit in a bank, documents or notice must be served on the branch of the bank that has possession of the property. The Master placed too much emphasis on the effect of subsection 462(1) and too little emphasis on paragraph 3(2)(*e*) of the COEA, which requires a garnishee to be within the court's jurisdiction. Moreover, there is a distinction to be made between the garnishee and the debt. The COEA requires the garnishee to be in the jurisdiction of the court. It does not require the debt to be in the jurisdiction. TD was a garnishee that was in the jurisdiction of the court, under paragraph 3(2)(*e*) of the COEA. Where a party seeks to attach funds on deposit in a branch of a bank, whether pre-judgment or post-judgment, it must, under subsection 462(1) of the *Bank Act*, serve the branch where those funds are located. If the branch is outside of British Columbia, the party must obtain leave to serve the garnishing order *ex juris*.

Univar Canada Ltd. v. PCL Packaging Corporation,
2008 CCLG ¶24-894

No Judgment Needed To Commence Action under *Statute of Elizabeth*

• • • **Nova Scotia Court of Appeal** • • • The appellants, defendants in two separate but collateral proceedings, appealed from the dismissal of their application to strike out the pleadings of the respondent, Geophysical Service Inc. ("GSI"), in the second of the actions. GSI operated seismic vessels in the Atlantic Canadian offshore. In early 1998, GSI contracted with the appellant, Sable Mary Seismic Incorporated ("SMSI"), to provide GSI with vessel crew, management, and related support services, including the administration of the crew payroll. The appellant Matthew Kimball ("Kimball") was SMSI's directing mind. GSI paid SMSI prescribed monthly fees for its services and paid for the vessel crew as arranged by SMSI. On March 1, 2002, GSI took over SMSI's responsibility to provide vessel crew for GSI's marine operations, as well as administering the crew payroll. SMSI continued to offer certain vessel management services to GSI. GSI discovered what it alleged were excessive charges for its past payments to crew under the old arrangements, which were significantly higher than what GSI later paid directly to the same crew. GSI sued SMSI and Kimball for breach of contract, negligent misrepresentation, and fraudulent misrepresentation. Several months later, GSI began a second action suing, in addition to SMSI and Kimball, Kimball's wife, the appellant Mary Kimball, and two other businesses owned and operated by Kimball, the appellants Abbott Contracting Limited and Windsor Sales and Rentals Limited. The second action alleged that SMSI and Kimball made transfers of real and personal property to the others without good consideration and with the intention to defraud, and that, as a consequence, any such transfers ought to be declared null and void. The appellants' application to strike the statement of claim in the second action was dismissed. On appeal, the appellants argued that the statement of claim should be struck because it disclosed no cause of action and merely referenced an anticipated outcome that had not yet accrued. They stated that the claim was false, frivolous, vexatious, or otherwise an abuse of the court's process. The appellants further conteded that sufficient facts had not been pleaded nor particulars provided to sustain the action.

The Nova Scotia Court of Appeal dismissed the appeal. The appellants' submissions were based on the notion that under current law, a plaintiff must have either a judgment against the debtor prior to starting proceedings to set aside the conveyance under the *Statute of Elizabeth* or, if both remedies are sought in the same action, the court first make a finding in favour of the creditor before considering whether to set aside a conveyance. Those propositions no longer conform to the current law. The remedy prescribed in the *Statute of Elizabeth* is not restricted to judgment creditors. There was no merit to the appellants' submission that GSI's second action was an abuse of process. GSI could have named all of the appellants as defendants in the main action or apply to join the two actions. However, GSI preferred not to name certain appellants as defendants in the main action, as they were not seen to be implicated. That approach avoided dragging Mary Kimball and the corporate appellants into the litigation surrounding the main action, which was highly contentious and complex. The appellants did not meet the burden required to strike the claim as false, scandalous, frivolous, or vexatious, or otherwise as an abuse of the court's process.

Sable Mary Seismic Incorporated, Abbott Contracting Limited, Windsor Sales and Rentals Limited, Kimball, and Kimball v. Geophysical Service Incorporated,
2008 CCLG ¶24-895

Defendants' Discharge Did Not Prevent Plaintiffs from Continuing Motor Vehicle Action

• • • **Newfoundland and Labrador Supreme Court – Appeal Division** • • • The appellants, Steward Genge ("Steward") and Rick Genge ("Rick"), appealed from the dismissal of their application for summary judgment to dismiss the action of the respondents, Lionel Parrill ("Lionel") and his father, Wilson Parrill. In March 1990, Lionel was driving an automobile that was struck by a snowmobile operated by Rick and owned by Steward. As a result, Lionel was rendered a paraplegic. There was no insurance on the snowmobile. At a trial as to liability only, the Genges were held 75 per cent responsible for the collision and Lionel's injuries. An appeal from that decision was dismissed. Following receipt of Lionel's claim in respect of the quantum of damages, the Genges made an assignment in bankruptcy in December 2001. In September 2002, they were discharged from bankruptcy. Lionel sought to continue his action against the Genges to obtain a judgment as to the quantum of damages. He was doing so not to enforce the judgment against the Genges, but rather to recover what he could from Judgment Recovery pursuant to the Judgment Recovery (Nfld.) Act ("JRA"), Newfoundland and Labrador's former scheme for compensating victims of uninsured motorists. The Genges applied to dismiss Lionel's action on the basis that they were undischarged bankrupts and, therefore, released from his claims. Lionel maintained that he could not obtain payment from Judgment Recovery without a final judgment against the Genges. The application judge dismissed the application, determining that the scheme established under the JRA was covered by the phrase "liability insurance policy" in section 145 of the *Bankruptcy and Insolvency Act* ("BIA") and was therefore unaffected by the BIA.

The Newfoundland and Labrador Court of Appeal dismissed the appeal. The Genges' discharge from bankruptcy did not prevent Lionel from continuing his action. While the Genges were released from claims provable in bankruptcy, the bankruptcy did not extinguish the underlying legal obligations that formed the basis for such claims. In this case, the underlying legal obligation survived for the purpose of the insurance policy.

Genge and Genge v. Parrill and Parrill,
2008 CCLG ¶24-896

Ice-Maker Liable for Unlawful Interference with Contractual Relations and Price Discrimination

• • • **Alberta Court of Queen's Bench** • • • The plaintiff, Polar Ice Express Inc. ("Polar"), sued the defendant, Arctic Glacier Inc. ("Arctic"), for damages for breach of the *Competition Act* ("the Act") and unlawful interference with contractual relations. In 2002, Polar was a fledgling family company. It had an ice making plant in Edmonton, which sold ice in six pound bags for use principally as party ice and in 12 kilogram bags for commercial use. Arctic was a well established, publicly traded company, and the biggest supplier of ice in Manitoba, Saskatchewan, and Alberta. Arctic virtually had a monopoly in Alberta for the supply of ice to grocery stores, liquor stores, service stations, small confectionary stores, and concrete supply companies. Both parties supplied ice to Inland Cement. When Arctic discovered that Polar was also supplying ice to Inland at the Genesee power plant construction project, it threatened to withdraw its ice supply unless it obtained an exclusive contract with Inland. Arctic offered Clifford Levell ("Levell"), Inland's batch plant operator, a bribe of $10,000 to arrange for Arctic to be the exclusive supplier of ice to Inland at the Genesee project. Arctic offered Sobeys grocery stores, at which Polar had secured the contract to supply ice in substitution for Arctic or had at least tried to do so, a lower price but did not offer an across-the-board lower price to its other grocery chain customers in the Edmonton area. Arctic employed this same tactic with respect to some liquor stores approached by Polar. Polar claimed it lost the business of Inland, 10 Sobeys grocery stores, and two liquor stores, and sought damages, including punitive damages.

The Alberta Court of Queen's Bench allowed the action. To establish the tort of unlawful interference with contractual relations, Polar had to prove that Arctic had an intention to injure it, the means employed by Arctic to accomplish this were unlawful, and Polar suffered economic loss or a related injury as a result. There was no doubt that Arctic specifically intended by its actions to injure Polar and not simply to advance its own interests. Its representative told Levell that Arctic would run Polar out of business in six months. Arctic intimidated Levell to get him to break Inland's contract with Polar. Arctic's competitive pricing moves only targeted Polar and not other ice companies. The threats to Levell and the offer of a bribe were unlawful. Arctic's offers to match or even undercut Polar's price to the liquor stores and Sobeys were direct and deliberate attempts to induce those businesses to breach their contracts with Polar. The measures employed were unlawful and in direct contravention of subsection 50(1) of the Act. As a result of Arctic's actions, Polar lost the contract with Inland, two liquor stores and 10 Sobeys stores. It was difficult, if not impossible, to calculate how much business Polar lost. However, there was no doubt it suffered serious economic loss at a time when it was still a fledgling corporate enterprise.

Polar was not awarded punitive damages because it did not seek those damages in its statement of claim. Its counsel only sought an amendment to the pleading in his closing argument. Consequently, Arctic did not know the case it had to meet. Because Polar elected not to open its books to Arctic, fearing that disclosure would better enable Arctic to compete against it, it was unable to prove lost profit and nothing was awarded under that heading. No damages were awarded under subsection 36(1) of the Act because Polar did not lead evidence and failed to prove the specific loss or damage suffered by it as a result of Arctic's conduct in relation to the Sobeys and liquor outlets. Damages at large of $50,000 were awarded. Those damages took into account not only Polar's pecuniary loss, but also non-pecuniary damages for such matters as injured feelings, loss of reputation, and the nature of the conduct. Arctic's conduct in muscling Inland and offering the bribe demanded meaningful at large damages. But for Arctic's unlawful acts, Polar would have supplied as much ice as it could have to Inland and would not have lost the potential to supply ice to many more liquor and Sobeys stores than those with which it had contracts. Polar was awarded pre-judgment interest from the date its statement of claim was filed and solicitor-and-client costs.

Polar Ice Express Inc. v. Arctic Glacier Inc.,
2008 CCLG ¶24-897

Class Action Certified against Automotive Resin Producer for Vertical Price-Fixing

• • • **Ontario Superior Court of Justice** • • • The proposed representative plaintiff, Axiom Plastics Inc. ("Axiom"), brought a motion for certification of a class proceeding against the defendant, E.I. DuPont Canada Company ("DuPont"), alleging that DuPont, through vertical conspiracies with its distributors and certain Tier 1 manufacturers in the automotive industry, unlawfully fixed the prices of engineering resins for use in automotive parts. The automotive industry is comprised of the original equipment manufacturer ("OEM") at the top, such as General Motors, Ford, and DaimlerChrysler, and several "tiers" of manufacturers below. "Tier 1" manufacturers supplied parts and assemblies directly to OEMs. "Tier 2" manufacturers supplied automotive parts to Tier 1 manufacturers for incorporation into the products the Tier 1 manufactured and supplied to the OEMs. During the proposed class period, Axiom was principally a Tier 2 manufacturer. DuPont manufactured several types of engineering resins regularly used in automotive parts, as well as in non-automotive applications. DuPont had 16 competitors in the Canadian engineering resins market. DuPont sold the resins in Canada directly and through its three distributors. It supplied distributors with resins at list price (the price DuPont sold the resin directly to its own customers), less a percentage discount depending on the product. Dupont had arrangements with Tier 1 manufacturers, agreeing to supply resins to them and their "moulders" (Tier 2 manufacturers who use the resin to produce parts supplied to the Tier 1 manufacturers) at less than DuPont's list price. When DuPont distributors supplied resins to moulders that DuPont agreed should have preferential prices, or to other moulders that seek a lower price, the distributor asks DuPont for a credit in the amount of the discount. If DuPont agrees, then after the distributor completes the sale, DuPont gives the distributor a credit, i.e. a "Credit Upon Proof of Sale", or "CUPS". Axiom argued that the economic effect of the "CUPS system" was that the distributor was compelled to sell resins to moulders at not less than the list price unless DuPont agreed. DuPont also had various forms of agreement with several Tier 1 manufacturers ("Tier 1 agreements") that specify the prices that the moulders would be charged for resins. These agreements also provided that, in consideration of the Tier 1 manufacturer requiring Tier 2 manufacturers to use DuPont resins, DuPont would "rebate" to the Tier 1 manufacturer a portion of the purchase price paid to DuPont or one of its three distributors by the Tier 1 manufacturer's moulders. Most of these agreements prohibited the disclosure of the rebate arrangement to the Tier 2 manufacturer.

Axiom alleged that DuPont's CUPS system and agreements with the Tier 1 manufacturers violated paragraphs 45(1)(*b*), (*c*) and (*d*) and 61(1)(*a*) of the *Competition Act* ("the Act"), and that class members suffered damage as a result, which they were entitled to recover pursuant to section 36. Axiom alleged vertical price-fixing, but did not allege that DuPont conspired with other manufacturers of engineering resins to fix prices. Axiom asserted that the same conduct also founded claims for civil conspiracy and unjust enrichment. The proposed class of approximately 216 plaintiffs comprised all Canadian purchasers since January 2000 of engineering resins for automotive applications from DuPont or its distributors, excluding DuPont, the distributors, and specified Tier 1 manufacturers and their associated and affiliated companies. Axiom claimed these plaintiffs paid prices that were unreasonably enhanced and maintained, were denied ability to negotiate lower prices, and were prevented from sourcing identical lower-priced resins from other suppliers because of DuPont's system of dealings. Axiom also alleged that DuPont engaged in threats, promises, and other manner of dealings to discourage its distributors from reducing the prices of its resins.

The Ontario Superior Court of Justice granted the motion and certified the action as a class proceeding. The pleadings disclosed a cause of action. It was not plain and obvious that a claim for damages under section 36 of the Act, founded on a breach of subsection 45(1) or section 61, or for civil conspiracy and unjust enrichment could not succeed. The claim was not, fundamentally, one of "exclusive dealing", within the meaning of subsection 77(1) of the Act, so as to fall within the exclusive jurisdiction of the Competition Tribunal. As a result of the broad definition of the proposed class, virtually none of the proposed common issues constituted common issues and a class proceeding would not be the preferable procedure. However, if the class was narrowed by restricting it to purchasers required by a customer to use only engineering resins manufactured by DuPont in the automotive application, a class proceeding would be the preferable procedure. The allegation of breaches of section 45 of the Act related to Tier 1 agreements did not present common issues. Individual actions would be the preferable method of resolving those claims. There was a common issue with respect section 61 of the Act in relation to the CUPS system and consideration of whether the CUPS system used by DuPont amounted to an "agreement, threat, promise or like means" to discourage the reduction of prices at which DuPont's distributors supplied engineering resins to class members. The issue of whether DuPont was unjustly enriched by its actions and whether there was a juristic reason for the enrichment was a common issue. How damages or restitution payments were to be computed could, in respect of a narrowed class comprised of persons required to buy DuPont resins, constitute a common issue. A class action would be a fair, efficient, and manageable method of advancing Axiom's claim, if the class definition was amended, as provided above, and the common issues were amended to delete reference to the rebate Tier 1 Agreements. Axiom was a suitable representative plaintiff. It convinced the Court that it would fairly and adequately represent class. Axiom did not have an interest in conflict with the rest of class. Axiom needed to provide a better litigation plan at a subsequent case conference.

Axiom Plastics Inc. v. E.I. DuPont Canada Company,
2008 CCLG ¶24-898

Famous Luxury Goods Maker Entitled to Record Award

• • • **Federal Court** • • • The plaintiffs, Louis Vuitton Malletier S.A. and Louis Vuitton Canada, Inc. (collectively "Louis Vuitton"), brought a motion for default judgment. Since 2001, Louis Vuitton had been attempting to stop the sale of counterfeit Louis Vuitton products at K2 Fashions, a retail store in British Columbia. In spite of two court judgments, numerous letters, seizures, and other actions taken by Louis Vuitton, they failed to shut down the illegal actions. Louis Vuitton brought an action, claiming that the defendants Lin Pi-Chu Yang and Tim Yang Wei-Kai, who controlled and operated K2 Fashions, infringed and passed off counterfeit Louis Vuitton products in contravention of the *Trade-marks Act* and sold products that infringed the Louis Vuitton copyright in contravention of the *Copyright Act*. A title search indicated that Lin Pi-Chu Yang was registered as the owner in fee simple of the property occupied by the K2 Fashions premises since June 4, 2001. The record of business licence records showed that the defendant Tim Yang Wei-Kai was the principal owner of K2 Fashion since 2000. Louis Vuitton received no response to its statement of claim.

The Federal Court allowed the action. Louis Vuitton was able to establish copyright and trade-mark infringement. There was evidence that the sale of counterfeit items by the defendants was continuous since the date of the last court judgment involving the same store and subject matter. Loius Vuitton was therefore entitled to default judgment. The only issue was the amount of damages. Louis Vuitton elected an award of statutory damages for copyright infringement pursuant to subsection 38.1(1) of the *Copyright Act*. There was evidence of infringement of two copyrighted works. The Court awarded the maximum statutory award of $20,000 for each discrete act. The higher award was made because of the bad faith conduct by the defendants in continuing to sell counterfeit Louis Vuitton products in the face of two previous judgments restraining their sale. The higher award was also necessary to deter others. The total amount awarded was $40,000. There was a lack of evidence as to damages relating to the loss of goodwill or sales that would have been made by Louis Vuitton but for the trade-mark infringement. There was some evidence of loss of profits. However, the Court was unable to accept Louis Vuitton's submission with respect to the turnover of stock. $87,000 of damages was awarded, which was the amount justifiable on the evidence and the use of the nominal damages approach. Punitive damages of $100,000 were awarded because the defendants persisted in selling infringing products in spite of an *Anton Piller* order and two judgments. The defendants also attempted to conceal and cover-up their actions by placing the counterfeit products in hidden displays and drawers. Moreover, the behaviour of the defendants made an accurate assessment of profits impossible. Plaintiffs were also awarded their costs on a solicitor-and-client basis in the amount of $36,699.14.

Louis Vuitton Malletier S.A. and Louis Vuitton Canada, Inc. v. Lin and Yang, both doing business as K2 Fashions, 2008 CCLG ¶24-899

CCH a Wolters Kluwer business

CCH Canadian Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 • 1 800 268 4522 tel
416 224 2243 • 1 800 461 4131 fax
www.cch.ca