

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE NOTICES OF INTENTION  
TO MAKE A PROPOSAL OF 33 LAIRD INC. AND 33 LAIRD  
GP INC. CORPORATIONS INCORPORATED UNDER THE  
ONTARIO *BUSINESS CORPORATIONS aCT*, AND 33 LAIRD  
LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP  
FORMED UNDER THE ONTARIO *LIMITED PARTNERSHIPS ACT***

**FACTUM OF THE CROSS-MOVING PARTY,  
SCHINDLER ELEVATOR CORPORATION**  
(Cross-motion returnable June 11, 2021)

June 9, 2021

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**TO: THE SERVICE LIST**

## I — OVERVIEW

1. The moving party, Schindler Elevator Corporation (“**Schindler**”), manufactured and supplied an elevator and related equipment to the failed real estate development that is at the centre of this bankruptcy proceeding, being property located at 33 Laird Drive, Toronto (the “**Project**”). Schindler contracted with the general contractor retained by the developers of the Project. Aside from a 30% deposit for engineering and administrative costs, Schindler has not been paid for its work. Pursuant to the subject contract, title to the elevating equipment remains with Schindler until it is paid. The elevating equipment was delivered to the Project site, but has not been installed.

2. The owners and developers of the Project, 33 Laird Inc., 33 Laird GP Inc. and 33 Laird Limited Partnership (collectively the “**Laird Entities**”) each filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*. On a motion returnable June 11, 2021, they seek the approval of a proposed transaction for the sale of the subject property and chattels thereon, including the elevating equipment owned by Schindler. The Laird Entities are not the owners of the elevating equipment, and they have no right to sell it to a purchaser.

3. On this cross-motion, Schindler seeks declaratory relief to confirm that it is the owner of all right, title and interest in the elevating equipment, and an order permitting it to retrieve the equipment from the Project site. Schindler also seeks an order excluding the elevating equipment from the sale transaction proposed by the Laird Entities. If necessary, and in addition and in the alternative, Schindler seeks an order for the interim preservation of property pursuant to Rule 44 of the *Rules of Civil Procedure*.

## II — STATEMENT OF FACTS

4. On or about May 28, 2019, Schindler entered into a contract with Aztec Structural Restoration Inc. (“**Aztec**”) for the manufacture, supply, and installation of a Schindler 3100 passenger elevator (the “**Elevating Equipment**”) (the “**Schindler Contract**”). Aztec was the general contractor retained to construct the Project for the Laird Entities.

Affidavit of William Brock sworn June 9, 2021 at paras. 5-6

5. Each of the Laird Entities delivered notices of intention pursuant to the *Bankruptcy and Insolvency Act*.

Affidavit of William Brock sworn June 9, 2021 at para. 6.

6. The price payable to Schindler under the Schindler Contract is \$101,000 plus HST (before any change orders). A 30% deposit was required to be paid for Schindler’s engineering and administrative costs. Aztec paid the 30% deposit in the amount of \$30,815.10 (being \$30,300 less holdback, plus HST) in February 2020.

Affidavit of William Brock sworn June 9, 2021 at para. 7

7. Pursuant to the terms of the Schindler Contract, title to the Elevating Equipment does not pass to the purchaser until payment is made to Schindler. In particular, paragraph 21 of the Terms and Conditions to the Schindler Contract provide as follows:

Risk of loss of materials and equipment shall pass to purchaser upon delivery of materials to the site. **Title to materials and equipment shall pass to purchaser upon payment by purchaser to Schindler. (emphasis added)**

Affidavit of William Brock sworn June 9, 2021 at para. 8

8. Schindler manufactured the Elevating Equipment, and delivered it to the Project site, at 33 Laird Drive, Toronto. The Elevating Equipment is not custom tailored to the Property, and

therefore has commercial value to Schindler as it may be installed elsewhere for other Schindler customers. The Elevating Equipment is stockpiled at the Project site but has not been installed.

Affidavit of William Brock sworn June 9, 2021 at paras. 9-10, 14

9. On or about April 25, 2020, Schindler delivered its invoice no. 7401492935 to Aztec, providing a credit in the amount of \$4,948.72, to reflect a change order (change from a three stop elevator to a two stop elevator). On or about August 25, 2020, Schindler delivered its invoice no. 7401503137 to Aztec in the amount of \$51,358.50 including HST (and after holdback) for materials.

Affidavit of William Brock sworn June 9, 2021 at paras. 11-12

10. The total invoicing to Schindler to date is \$77,224.88. After crediting the amount paid by Aztec (\$30,815.10), the total outstanding amount owing to Schindler is \$46,409.78 not including the holdback, or \$54,489.78 inclusive of the holdback.

Affidavit of William Brock sworn June 9, 2021 at para. 13

11. The Agreement of Purchase and Sale for the sale transaction being proposed by the Laird Entities on their motion returnable June 11, 2021 purports to sell the Elevating Equipment to the proposed purchaser, as it is specifically included in the list of chattels to be sold, which is appended at Schedule 1(b) to the Agreement of Purchase and Sale.

Affidavit of William Brock sworn June 9, 2021 at paras. 15-17

12. Schindler is the owner of all right, title, and interest in the Elevating Equipment, and wishes to retrieve the Elevating Equipment from the Project site.

Affidavit of William Brock sworn June 9, 2021 at para. 18

### III — ISSUES

13. The issue on this motion is whether Schindler is the owner of all right, title and interest in the Elevating Equipment, such that the Elevating Equipment should be excluded from the Sale Transaction and returned to Schindler.

### IV — LAW AND ARGUMENT

#### a) Law of the Transfer of Title to Personal Property

14. Section 18 of the *Sales of Goods Act*, R.S.O. 1990 c. S.1 provides as follows:

Property passes where intended to pass

**18 (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.**

Ascertaining intention

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. R.S.O. 1990, c. S.1, s. 18.

**(emphasis added)**

*Sales of Goods Act*, R.S.O. 1990 c. S.1, s. 18

15. Section 19 of the *Sale of Goods Act* sets out the rules to be considered for ascertaining the parties' intentions, and provides as follows:

Rules for ascertaining intention

**19** Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

*Rule 1.*—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made

and it is immaterial whether the time of payment or the time of delivery or both is postponed.

**Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.**

**Rule 3.—Where 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 such act or thing is done and the buyer has notice thereof.**

**Rule 4.—**When goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer;

- (i) when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;
- (ii) if the buyer does not signify approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

**Rule 5.—**

- (i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.
- (ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller shall be deemed to have unconditionally appropriated the goods to the contract. R.S.O. 1990, c. S.1, s. 19; 1993, c. 27, Sched.

**(emphasis added)**

16. The Schindler Contract is not unconditional. Therefore Rule 1 above does not apply. The Schindler Contract contains a number of conditions, including that 90% payment is required before the elevator will be physically turned over to the purchaser (this is in addition to the condition that title to the Elevating Equipment does not pass until payment is made). Further, Schindler is

required to test the elevator upon installation and obtain TSSA approval. Therefore, both Rules 2 and 3, above, apply, such that the property has not passed.

17. A security interest in property is created when a vendor reserves the title in the goods until payment is made. When payment is not made upon delivery of the goods, a vendor has a security interest in the property within the meaning of the *Personal Property Security Act*.

[\*Banque Nationale de Paris \(Canada\) v Pine Tree Mercury Sales Ltd.\*](#), 42 O.R. (2d) 303 (Ont Cty Ct)

**b) Rule 44 Motions for the Interim Recovery of Personal Property**

18. The authority for a judge to make an order for the interim recovery of personal property is found in s. 104 of the *Courts of Justice Act*. The procedure is governed by Rule 44 of the *Rules of Civil Procedure*, which sets out the essential evidence to be put before the Court on a motion for interim recovery of personal property.

19. Section 104(1) of the *Courts of Justice Act* states:

**104 (1)** In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

*Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 104(1)

20. Rule 44.01(1) of the *Rules of Civil Procedure* states:

**44.01 (1)** An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

(a) a description of the property sufficient to make it readily identifiable;

- (b) the value of the property;
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
- (e) the facts and circumstances giving rise to the unlawful taking or detention.

*Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 44.01(1)*

21. The powers of the judge on disposition of the interim recovery motion are set out in Rule 44.03(1):

**44.03(1)** On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or any such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
- (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or
- (c) make such other order as is just.

*Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 44.03(1)*

22. The test for an order pursuant to section 104 of the *Courts of Justice Act* and Rule 44.01(1) is as follows:

- (a) there are substantial grounds for the plaintiff's assertion that it is the legal owner or entitled to possession of the property;



- (b) there are substantial grounds for its claim that the property is being unlawfully detained by the defendants; and
- (c) the balance of convenience favours the plaintiff.

[Baca v Tatarinov, 2017 ONSC 2935](#) (SCJ) at para 27

23. To succeed on a Rule 44 motion, the plaintiff need only show “substantial grounds” for its claim to the property, and that the property in question is being detained by the defendants. The court will not embark on a full trial on the question of property ownership or title; the enquiry is limited to determining whether there are substantial grounds for the plaintiff’s allegations, which if proved, bring the case within statute. The plaintiff must show *prima facie* that it has a right to possession.

*Clark Door of Canada Ltd. v Inline Fiberglass Ltd.* 1996 CarswellOnt 193 (OCJ Gen Div) at paras 9-10, 18

24. Cases in which there is clear documentation supporting the plaintiff’s claim to the property are more likely to meet the substantial grounds test.

*Ibid.*, at para. 24

**c) Argument**

25. It is clear that the Elevating Equipment remains the property of Schindler. Title did not pass to Aztec, or to any other entity. The Laird Entities do not own title to the Elevating Equipment, and therefore, they do not have the ability to sell it to the Purchaser. To allow the Sale Transaction to proceed without excluding the Elevating Equipment and returning it to Schindler would be unfair and contrary to the interests of justice. It would also be contrary to the above

noted provisions of the *Sale of Goods Act*, which also confirm that title to the Elevating Equipment has not passed and remains with Schindler.

26. If required, Schindler requests an order for the interim preservation of personal property. Schindler meets the required legal test set out above for the following reasons:

- (a) Schindler has sufficiently described the Elevating Equipment and its value;
- (b) Schindler is the lawful owner of the Elevating Equipment and is entitled to its possession;
- (c) the Elevating Equipment, through the failure of the Project and the pending bankruptcy of the Laird Entities, has become unlawfully detained at the Project site; and
- (d) Schindler has sufficiently described the facts and circumstances giving rise to the unlawful detainment of the Elevating Equipment.

27. Further, there are substantial grounds for Schindler's assertion that it is the legal owner of the Elevating Equipment. The facts in that regard are simple and uncontroversial: Schindler has not been paid beyond the 30% deposit, and has not been paid any amount on its invoice for the supply of material to Aztec. Given that Schindler remains the rightful owner of all right, title and interest in the Elevating Equipment, Schindler has discharged the onus to prove that there are substantial grounds for its claim that the Elevating Equipment is being unlawfully detained at the Project site.

28. Schindler submits that the balance of convenience favours the plaintiff. Schindler spent time, resources, and money fabricating and supplying the Elevating Equipment, and has not been paid. The Elevating Equipment is not custom made for the Project and therefore has commercial resale value to Schindler. There is no major inconvenience to the Laird Entities. They are proposing to sell a Project that appears to be in its infancy. The purchaser will likely need to spend many millions of dollars to bring the Project to fruition. It is open to the purchaser to contract with Schindler or another elevator installer to install an elevator. There will be no prejudice or inconvenience to the Laird Entities or to any other party.

29. Further, Schindler retains a security interest in the Elevating Equipment in light of the wording of the Schindler Contract and the case law confirming that a security interest arises (see *Banque Nationale, supra*).

**V — RELIEF REQUESTED**

30. Schindler seeks an order granting it the relief sought in its Notice of Cross-Motion and substantially in the form of the draft order contained at Tab 3 of its Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,**



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**Varoujan Arman**  
**BLANEY McMURTRY LLP**  
Lawyers for Schindler Elevator Corporation

**SCHEDULE A - LIST OF AUTHORITIES**

**No. Case Name**

1. [\*Banque Nationale de Paris \(Canada\) v Pine Tree Mercury Sales Ltd.\*](#), 42 O.R. (2d) 303 (Ont Cty Ct)
2. [\*Baca v Tatarinov, 2017 ONSC 2935\*](#) (SCJ)
3. *Clark Door of Canada Ltd. v Inline Fiberglass Ltd.* 1996 CarswellOnt 193 (OCJ Gen Div)

**SCHEDULE B - STATUTORY PROVISIONS RELIED UPON**

***Rules of Civil Procedure, RRO 1990, Reg. 194***

**Rule 44 Interim Recovery of Personal Property**

MOTION FOR INTERIM ORDER

**44.01 (1)** An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

- (a) a description of the property sufficient to make it readily identifiable;
- (b) the value of the property;
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
- (e) the facts and circumstances giving rise to the unlawful taking or detention.  
R.R.O. 1990, Reg. 194, r. 44.01 (1).

WHERE MADE ON NOTICE

**44.03(1)** On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may.

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or any such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;

(b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (1).

***Courts of Justice Act, RSO 1990, c. C.43***

**INTERIM ORDER FOR RECOVERY OF PERSONAL PROPERTY**

**104** (1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

- (a) was unlawfully taken from the possession of the plaintiff; or
- (b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

[...] R.S.O. 1990, c. C.43, s. 104.

*Sales of Goods Act, R.S.O. 1990 c. S.*

Property passes where intended to pass

**18** (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Ascertaining intention

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. R.S.O. 1990, c. S.1, s. 18.

*Sales of Goods Act, R.S.O. 1990 c. S.1, s. 18*

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*Rule 3.*—Where 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 such act or thing is done and the buyer has notice thereof.

*Rule 4.*—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer;

- (i) when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;
- (ii) if the buyer does not signify approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

*Rule 5.—*

- (i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.
- (ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller shall be deemed to have unconditionally appropriated the goods to the contract.  
R.S.O. 1990, c. S.1, s. 19; 1993, c. 27, Sched.

**(emphasis added)**



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Proceeding commenced at Toronto

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**FACTUM OF THE CROSS-MOVING PARTY,  
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