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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANT(S)	ROYAL BANK OF CANADA
RESPONDENT(S)	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION, MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52 DENTAL CORPORATION, DELTA DENTAL CORP., 52 WELLNESS CENTRE INC., PARADISE MCIVOR DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT LTD., FAISSAL MOUHAMAD and FETOUN AHMAD also known as FETOUN AHMED
DOCUMENT	**BENCH BRIEF OF PATTERSON DENTAL CANADA INC. IN ADVANCE OF THE RECEIVER'S APPLICATION FOR DIRECTIONS**

Clerk's Stamp

BENCH BRIEF

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. On January 11, 2023, the Honourable Justice Mah heard the Receiver's Application (Approval of Sales and Vesting Assets, Sealing Distributions, Approval of Fees and Activities) (the "**Receiver's Application**"). The Receiver's Application requested the approval by this Honourable Court of an asset sale and vesting order encompassing equipment that had been sold by Patterson Dental Canada Inc. ("**Patterson**") to Dr. Faissal Mouhamad in his personal capacity (the "**Equipment**").

2. Patterson challenged the Receiver's Application on the ground that the Equipment was always legally owned by Dr. Mouhamad personally and that the Receivership Order made by this Honourable Court on September 16, 2022 did not extend to Dr. Mouhamad's personal assets. Therefore, the Equipment never formed part of the Receivership's assets and the Receiver had no right to sell the Equipment or distribute proceeds from its sale to the of creditors of 52 Dental Corporation ("**52 Dental**"), Delta Dental Corporation and Faissal Mouhamad Professional Corporation.

3. Part of the Equipment (the "**Leased Equipment**"), however, had been the subject of a lease agreement between Dr. Mouhamad and 52 Dental entered into on May 4, 2022 (the "**Master Lease Agreement**"). A debate therefore arose regarding whether Dr. Mouhamad would still be the legal and beneficial owner of the Leased Equipment following the conclusion of the Master Lease Agreement. The ultimate legal question at issue became whether the Master Lease Agreement was intended to convey equity or a proprietary interest in the Leased Equipment – in other words, whether the Master Lease Agreement constitutes a true lease or financing lease.

4. Justice Mah ultimately decided to approve the asset sale but ordered that an amount of $ 417,000 be held back from the sale proceeds to stand in the place and stead of the Leased Equipment to guarantee any claim or encumbrance attaching to it that could be asserted by Patterson.[1]

5. On June 13, 2023, the Honourable Justice Little ordered interested parties to submit materials on the matters to be determined as part of the Receiver's Application for Advice and Direction – the application whereby the Receiver would petition the Court to, *inter alia*, rule on the nature of the Master Lease Agreement.

6. This is the brief of Patterson filed in advance of the Receiver's Application for Advice and Direction.[2]

7. Patterson submits that:

    a. The Master Lease Agreement constitutes a true lease, and at all times, Dr. Mouhamad has been the legal and beneficial owner of the Leased Equipment;

    b. Patterson's security interests in relation to the Equipment ranks prior to all other creditors, including but not limited to, Royal Bank of Canada.

II. FACTS

8. Patterson sold the Equipment to Dr. Mouhamad, in his personal capacity, via two sale and security agreements (collectively, the "**Agreements**") described as follows:

    a. The sale and security agreement numbered 731575 effective as of April 28, 2022 (the "**731575 Agreement**"); and

    b. The sale and security agreement numbered 732002 effective as of May 3, 2022 (the "**732002 Agreement**").

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[1] As ordered in paragraph 7 of the Approval and Vesting Order made January 11, 2023.
[2] As defined in paragraph 18 of the Receiver's Eighth Report.

9. The Agreements created security interests attaching to the Equipment sold under each of them until payment in full by Dr. Mouhamad of the balance of the purchase price provided in the Agreements for such Equipment as well as interest.

10. Dr. Mouhamad made an initial payment toward the Equipment by applying credits he had accrued with Patterson as part of one of its customer loyalty programs. This was the sole payment made to Patterson in relation to the Equipment, such that any difference between the purchase price of the Equipment and the amount owing to Patterson with respect to the Equipment is attributable to Dr. Mouhamad's use of his personal credits under Patterson's customer loyalty program. No funds have been advanced by Dr. Mouhamad to Patterson at the date hereof in respect of the Equipment.

11. On May 4, 2023, Dr. Mouhamad entered into the Master Lease Agreement with 52 Dental. By this agreement, Dr. Mouhamad leased the Leased Equipment – the Equipment subject to the 731575 Agreement – to 52 Dental.

12. The Equipment subject to the 731575 Agreement was delivered on April 28, 2023, and was perfected pursuant to the provisions of the Alberta *Personal Property Security Act* (the "**Act**") on May 9, 2022.

13. The Equipment subject of the 732002 Agreement was delivered to Dr. Mouhamad on May 3, 2022, and was perfected pursuant to the provisions of the Act on May 9, 2022 – thereby creating a purchase-money security interest with respect to the 732002 Agreement pursuant to section 22(1)(a)(i) of the Act.

14. Patterson further perfected its security interest in the Equipment subject to the 731575 Agreement, preventively as against 52 Dental on January 4, 2023 when it came to learn of the existence of the Master Lease Agreement, pursuant to section 22(1)(a)(ii) of the Act.

15. Patterson also further perfected its security interest in the Equipment subject to the 732002 Agreement as against 52 Dental on January 10, 2023 when it was notified by the Receiver that such Equipment was present and being used by 52 Dental. Patterson had previously been informed by the Receiver that this Equipment was not in 52 Dental's possession.

16. Therefore, from those dates, Patterson has had has and continues to have valid and enforceable security interests in the Equipment as against Dr. Mouhamad, and, to the extent necessary, 52 Dental, arising out of the Agreements.

III. ISSUES

17. Patterson submits that this Honourable Court must consider the following issues:

    a. Does the Master Lease Agreement constitute a true lease or a financing lease?

    b. Does Patterson's security interest in the Equipment rank prior to all other creditors?

IV. ARGUMENT

A. The Master Lease Agreement Constitutes a True Lease

18. The Master Lease Agreement constitutes a true lease. Indeed, the Master Lease Agreement has several provisions which are characteristic of this type of lease and when read in its entirety, it does not seek to effect a transfer of ownership.

(a) Applicable Legal Principles

19. A true lease is a lease whereby the lessee pays for the use of the lessor's property.[3] It is a bailment contract.[4] A financing lease, on the other hand, entails a debtor not merely using the lessor's property, but also earning equity in the property with each payment.[5] It is a "security agreement disguised as a lease."[6]

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[3] See *Connacher Oil and Gas Limited (Re)*, 2017 ABQB 769 at para 14 [*Connacher*] **[TAB 1]**.
[4] *Ibid.* See also *Re 843504 Alberta Ltd.*, 2011 ABQB 448 at para 54 [*843504*] **[TAB 2]**.
[5] See *Connacher*, *supra* note 3 at para 14 **[TAB 1]**.
[6] *843504*, *supra* note 4 at para 55 **[TAB 2]**.

20. The Alberta Court of Queen's Bench in *Connacher Oil and Gas Limited (Re)* summarizes the principles from case law to determine the nature of a lease:

1. For a court to determine whether it is dealing with a true lease or a financing lease, it must look to the substance of the arrangement between the parties rather than the form of the arrangement.

2. The court must examine a number of factors, some of which are contained in the document itself, some of which relate to the manner in which the parties effected their arrangement, and some of which deal with the nature of the parties themselves.

3. No one factor is determinative, although some might be more indicative of the nature of the lease.

4. The objective of a court's analysis is to determine the parties' intent at the time they entered into their arrangement, and the document itself may help in that determination.

5. Courts must show particular deference to the wording of the document where the parties are sophisticated commercial parties.

6. A court must interpret an agreement as at the date it was made, as the exercise is intended to discern the intention of the parties at the time the contract was formed.[7]

21. Several Alberta cases also refer to a non-exhaustive list of factors found in the British Columbia case of *Smith Brothers Contracting Ltd. (Re) (Trustee of)*, to determine the nature of a lease:

1. Whether there was an option to purchase for a nominal sum;

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;

3. Whether the nature of the lessor's business was to act as a financing agency;

4. Whether the lessee paid a sales tax incident to acquisition of the equipment;

5. Whether the lessee paid all other taxes incident to ownership of the equipment;

6. Whether the lessee was responsible for comprehensive insurance on the equipment;

7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;

8. Whether the agreement placed the entire risk of loss upon the lessee;

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this does not apply in Canada);

13. Whether there was a default provision in the lease inordinately favourable to the lessor;

14. Whether there was a provision in the lease for liquidated damages;

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[7] *Connacher*, *supra* note 3 at para 21 **[TAB 1]**.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;

16. Whether the aggregate rental approximated the value of purchase price of the equipment.[8]

22. There is insufficient information in the record to comment about factors 4, 5, 10 and 12 and as such Patterson submits that these are neutral factors. Factor 3 is also irrelevant to the present situation since Dr. Mouhamad is not a financing agency and need not be considered.

23. Several cases rendered by the Alberta Court of Queen's Bench quote from an influential scholarly article by Michael E. Burke, which delineates "primary" and "secondary" factors used in determining the nature of a lease:

> Although Canadian courts will refer to various factors as being relevant in their determination as to the characterization of a lease, they rarely indicate the relative weight given by them to each of the indicia or factors.
>
> It is possible, however, to make the following generalizations from the case law. First, from the universe of factors or indicia that have been mentioned in the jurisprudence, some factors or indicia (referred to in this paper as "primary factors") are clearly more important than other factors or indicia (referred to in this paper as "secondary factors"). Second, the presence of a primary factor in a lease will often be determinative of the characterization of the agreement. Third, secondary factors generally have a corroborative value and are not in and of themselves determinative of the characterization. Accordingly, the presence of a number of secondary factors that are indicative of a characterization that is contrary to the characterization indicated by the primary factor will not be sufficient to overturn the weighting given by a court to the primary factor. Fourth, in those situations where the primary factor is ambiguous or absent, then the relative weighting given by a court to the secondary factors will be relevant in determining the characterization of the lease in question.[9]
>
> [emphasis added]

24. In *Re 843504 Alberta Ltd*., Justice Topolniski briefly summarized what Mr. Burke referred to as "primary factors:"

1. **Relevance of the purchase option price**: whether the purchase option price is nominal or reflective of fair market value;

2. **Mandatory purchase options:** whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term;

3. **Open-end leases/guaranteed residual clauses**: whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term;

4. **Sale-leaseback transactions**: whether the transaction is structured as a sale and leaseback.[10]

25. Justice Topolniski also summarized the "secondary factors" enumerated by Mr. Burke :

1. The ability to replace/exchange leased equipment is indicative of a true lease.

2. The lessor's ability to accelerate payments and the residual value are generally inconsistent with a true lease. However, it is equally consistent with a true lease if the acceleration clause limits the lessor's damages to the present value of the remaining rents, plus the present value of the residual value at the end of the term, minus the value of net proceeds from a sale of the assets. If the acceleration clause is more narrowly crafted, it favours a security lease.

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[8] 1998 CanLII 3844 (BC SC) at para 67 **[TAB 3].**
[9] Michael E. Burke, Ontario Personal Property Security Act Reform: Significant Policy Changes (2009) 48 Can Bus LJ 289 at 291-92 **[TAB 4]**. This passage and the framework of "primary" and "secondary" factors used to determine the nature of a lease is cited or referred to in *843504*, *supra* note 4 at para 62 **[TAB 2]**; *Connacher*, *supra* note 3 at para 18 **[TAB 1]**; *Royal Bank of Canada v. Cow Harbour*, 2012 ABQB 59 at para 55 **[TAB 5]**.
[10] *Supra* note 4 at para 63 **[TAB 2]**, referring to Burke, *supra* note 9 at 292-95 **[TAB 4]**.

3. A full payment lease may be indicative of either form of lease, depending on the language of the provision.

4. A security deposit is indicative of a security lease.

5. A substantial down payment is indicative of a security lease.

6. Covenants relating to maintenance, insurance and risk of loss can be indicators of either type of lease. They are weak evidence of a security lease.

7. Whether the lessor uses different forms for different types of transactions may be some evidence of intention.[11]

26. Of the above "primary factors", only the first – whether the purchase option price is nominal or reflective of fair market value – has any bearing on the present case. This primary factor relates to the considerations found in *Smith Brothers* factors 1, 2, and 16. No other "primary factor" applies in the case at hand since (1) the Master Lease Agreement does not contain a mandatory purchase option obligating 52 Dental to purchase the Equipment at the end of its term, (2) the Master Lease Agreement does not provide for a residual value guarantee and (3) the Master Lease Agreement was not formed in the context of a sale-leaseback transaction.

27. With regards to "secondary factors", only the second factor – the lessor's ability to accelerate payments – and the sixth factor – covenants relating to maintenance, insurance and risk of loss – are relevant. The other factors have no bearing on the present situation since (1) no provision of the Master Lease Agreement allow for the replacement or exchange of the Leased Equipment, (2) the Master Lease Agreement is not a full payment lease, (3) the Master Lease Agreement does not require 52 Dental to make a security deposit, and (6) to Patterson's knowledge, Dr. Mouhamad does not use different forms for different transactions.

28. While the Alberta Court of Appeal in *De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada* has cautioned that one factor should not trump another and that a court's evaluation of the nature of the lease should be holistic,[12] more recent court decisions have continued to distinguish between "primary" and "secondary" factors as interpretive aids, reasoning that some factors in fact have more probative value than others.[13] Patterson submits that the Court should do the same in light of the Court of Appeal's comment.

(b) Application to the Facts

29. Dr. Mouhamad declined all invitations from Patterson to discuss the provisions of the Master Lease Agreement. Nevertheless, Patterson submits that the Court has enough facts at its disposal to find that the Master Lease Agreement is a true lease.

30. Factors 1, 2, 11, and 16 cumulatively weigh heavily in favour of characterizing that the Master Lease Agreement as a true lease. The other factors enumerated in *Smith Brothers* offer limited indication that the parties intended the Master Lease Agreement to constitute a financing lease. Accordingly, these other factors are largely outweighed by Factors 1, 2, 11, and 16.

i. Factor 1: The Master Lease Agreement Does Not Include an Option to Purchase the Leased Equipment for a Nominal Price

31. The Master Lease Agreement contains no provision to purchase the Leased Equipment at a nominal price.

32. The inclusion of such a provision in a lease is typically a strong indication that the lease is a financing lease that is intended to convey an equity interest in the leased equipment. This is because the rental payments made pursuant to the lease agreement are in effect payments toward the full purchase price of the equipment.[14]

33. Section 5 of the Master Lease Agreement provides a purchase option formulated thus:

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[11] *Ibid*, referring to Burke, *supra* note 9 at 295-97 **[TAB 4]**.
[12] 2010 ABCA 394 at para 15 **[TAB 6]**.
[13] See *843504*, *supra* note 4 at para 63 **[TAB 2]**; *Cow Harbour*, *supra* note 9 at para 65 **[TAB 5]**.
[14] See Burke, *supra* note 9 at 293 **[TAB 4]**.

> 5. Purchase Option: If no unremedied default exists, Lessee will have an option to purchase the Equipment, on the Purchase Option Date for the Purchase Option Price set forth in the Lease Agreement. If the Purchase is "Fair Market Value" then the Purchase Option Price will be the fair market value of the Equipment as of the Purchase Option Date, as determined by the Lessor. (…) Upon payment by Lessee of the Purchase Option Price, Lessor will transfer Lessor's interest in the Equipment to Lessee on an "as is, where is" basis, free of any security interests created by Lessor.

34. The Master Lease Agreement does not specify a Purchase Option Price or a Purchase Option Date. This presumably reflects the parties' intent that the Lessor have the discretion to determine the Purchase Option Date or Purchase Option Price alone in the future. Indeed, under this scenario, the Lessor's ultimate intention is undetermined: the Lessor could sell the Leased Equipment at fair market value or at another price.

35. This ultimately reflects a lack of intention to transfer equity through successive rent payments at the time of the formation of the Master Lease Agreement.[15]

36. Furthermore, Section 6 of the Master Lease Agreement specifies that, in principle, "Lessee will return the Equipment to Lessor on the termination of a Lease Agreement." This is an indicator that the Master Lease Agreement is a true lease.[16] Indeed, under the provisions of the Master Lease Agreement, 52 Dental could end up paying the aggregate amount of rental payments and still have to return the Leased Equipment if it does not exercise its purchase option.

37. Additionally, there is no stated intention from the parties to make the Leased Equipment's Purchase Option Price equal to the aggregate rental payments envisaged by the Master Lease Agreement, which is very often the case for financing leases.[17]

38. All of this advocates in favour of finding that the Master Lease Agreement is a true lease.

ii. Factor 2: No Provision of the Master Lease Agreement Conveys Equity in the Leased Equipment

39. No provision of the Master Lease Agreement conveys equity or a property interest in the Leased Equipment.

40. As previously stated, Section 6 of the Master Lease Agreement, quoted above, provides, in principle, for the return of the Leased Equipment at the end of the term of the Master Lease Agreement if 52 Dental does not exercise its purchase option.

41. In addition to this, Section 5 specifies that only "[u]pon payment by Lessee of the Purchase Option Price, Lessor will transfer Lessor's interest in the Equipment to Lessee on an "as is, where is" basis, free of any security interests created by Lessor".

42. These provisions highlight that there is no correlative transfer of equity or proprietary interest in the Leased Equipment with each payment made by 52 Dental. Whether a lease agreement operates a transfer of equity in the leased property or merely allow for use of the leased property is the foremost consideration in determining whether a lease agreement is a true lease or financing lease.[18]

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[15] See *Crawford v. Morrow*, 2004 ABCA 150 at para 72 (stating that the intention of the parties is determined at the time of formation of the contract) **[TAB 7]**. See also *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para 47 (stating that the function of the court is to determine the intent of the parties in entering into the arrangement) **[TAB 8]** cited in *Edmonton Kenworth Ltd. v. Kos*, 2018 ABQB 439 at para 27 [*Kos*] **[TAB 9]**.

[16] See *Cow Harbour*, *supra* note 9 at para 106 (highlighting that the Scott Capital leases, later found to constitute true leases, require the return of the equipment to the lessor if the lessee does not exercise its purchase option), 193 (highlighting that the Concentra Financial Corporation, later found to constitute true leases, leases envisage the return of the lease equipment to the lessor, although it provides no purchase option) **[TAB 5]**; *Connacher*, *supra* note 3 at para 22 (highlighting that the lease, ultimately found to constitute a true lease, prohibited sale of the leased equipment to the lessee at the end of the lease after having made all rental payments) **[TAB 1]**.

[17] See e.g. *Cow Harbour*, *supra* note 9 at 176 (the Kempenfelt leases), 207 (the Alter Moneta leases); *Kos*, *supra* note 15 **[TAB 5]**.

[18] See *Connacher*, *supra* note 3 at para 14 **[TAB 1]**. See also *Smith Brothers*, *supra* note 8 at para 58.

43. This advocates in favour of finding that the Master Lease Agreement is a true lease.

iii. Factor 11: The Master Lease Agreement Does Not Require a Substantial Security Deposit

44. The Master Lease Agreement does not require a substantial security deposit – in fact, it requires none.

45. Security deposits are typically more associated with financing leases since they can serve as down payment towards equity in the leased equipment or as collateral to obtain the equipment.[19]

46. While not consequential, the absence of a security deposit also militates in favour of finding that the Master Lease Agreement is a true lease.

iv. Factor 16: The Aggregate Rental Amount is Significantly Higher than the Value of the Purchase Price of the Leased Equipment

47. The aggregate rental amount is significantly above the value of the purchase price of the Leased Equipment.

48. The Leased Equipment is the same equipment which was sold by Patterson pursuant to the 731575 Agreement.

49. Under the 731575 Agreement, the Leased Equipment had a purchase price of $357,128.30, before taxes.

50. The aggregate rental amount under the Master Lease Agreement is equal to $700,457.52 exclusive of GST – almost twice the Leased Equipment's purchase price. This amount is reached by multiplying the number of months in the term of the Master Lease Agreement (84) by the monthly rent amount exclusive of the goods and services tax ($8,338.78).

51. This is a strong indicator that the aggregate rent does not constitute a payment toward the purchase price of the Leased Equipment as it is excessively too high to effectively serve that purpose. Consequently, 52 Dental is not acquiring equity in the Leased Equipment through its successive payments.

52. The magnitude of the aggregate rental further runs contrary to several cases which have found the existence of a financing lease in situations where the aggregate rental amount under this lease was equivalent to the purchase price of the leased property.[20]

53. On the contrary, leases providing for aggregate rental payments higher than the leased equipment's purchase price have been found to constitute true leases.[21]

54. This advocates in favour of finding that the Master Lease Agreement is a true lease.

v. Additional Factor: The Prohibition to Encumber the Leased Equipment with Additional Liens

55. An additional factor which militates in favour of finding that the Master Lease Agreement is a true lease: it prohibits 52 Dental from encumbering the Leased Equipment with "any liens, encumbrances, hypothecs, security interests and claims."[22]

56. In *DaimlerChrysler Services Canada Inc. v. Cameron*, the British Columbia Court of Appeal confirmed the British Columbia Supreme Court's finding that the lessee's obligation to not make an inappropriate use of the truck and keep it free of third-party claims was indicative of a true lease since it protected the equity on the leased equipment.[23]

57. This further weighs in favour of finding that the Master Lease Agreement is a true lease.

vi. The Above Factors Outweigh All the Others

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[19] Burke, *supra* note 9 at 296 **[TAB 4]**.
[20] See e.g. *Cow Harbour*, *supra* note 9 **[TAB 5]**; *Kos*, *supra* note 15 **[TAB 9]**.
[21] See *Cow Harbour*, *supra* note 9 at para 92-119, 112 (see the Scott Capital leases) **[TAB 5]**.
[22] Section 6, Master Lease Agreement.
[23] 2007 BCCA 144 at para 27 [*Cameron*] **[TAB 10]**.

58. The following *Smith Brothers* factors remain:

- **Factor 6:** Whether the lessee was responsible for comprehensive insurance on the equipment;
- **Factor 7:** Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
- **Factor 8:** Whether the agreement placed the entire risk of loss upon the lessee;
- **Factor 9:** Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
- **Factor 13:** Whether there was a default provision in the lease inordinately favourable to the lessor;
- **Factor 14:** Whether there was a provision in the lease for liquidated damages;
- **Factor 15:** Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;

59. Not all of these are indicia of financing leases. When these were in fact considered as such, they have not been significant in case law: none of them have individually outweighed factors tending to show more direct indications as to the parties' intents as are found in factors 1, 2 and 16 of the *Smith Brothers* factors. Indeed, these provisions were present in several leases that the Court ultimately characterized as "true leases."[24]

a. Factors 6, 7, 8: Insurance, maintenance, risk of loss and disclaimer of warranties

60. Having to take on insuring, maintaining, or the risk of loss of the leased property, or the disclaimer of warranties has been found to be equivocal evidence in favour of either a true lease or financing lease.

61. In *843504*, Justice Topolniski stated, paraphrasing Burke: "[c]ovenants relating to maintenance, insurance and risk of loss can be indicators of either type of lease. They are weak evidence of a security lease."[25]

62. In *DaimlerChrysler Services Canada Inc. v. Cameron*, the British Columbia Court of Appeal also confirmed the British Columbia Supreme Court's finding that the lessee's obligation to maintain the good condition of a leased truck was indicative of a true lease because it ensured the reasonableness of the truck's value upon expiration of the lease.[26] A similar situation is present here since 52 Dental has an obligation under Section 4 of the Master Lease Agreement to "maintain the Equipment at Lessee's cost in good repair and working order" and in principle to return the Equipment at the end of the lease period pursuant to Section 6 of the Master Lease Agreement.

63. Similarly, on risk of loss, Justice Yamauchi in *Connacher* found that: "[risk of loss] is one of those factors that this Court sees as being equivocal, in the sense that even in a payment for use of, say a rental vehicle, the renter always assumes the risk of loss. The renter is certainly not acquiring any equity interest in the rental vehicle."[27]

64. Finally, with respect to disclaimer of warranties, Burke characterizes this factor as a 'red herring':

> [t]he exclusion of all warranties on the part of a lessor (except those that are given by statute and that cannot be waived by the lessee) can be viewed as equivocal evidence in the characterization process. It is typical for both a lessor under a financing lease or a lessor under a true lease to exclude to the fullest extent permitted by applicable law) all warranties on the basis that the lessor is not the manufacturer.[28]

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[24] *See Cow Harbour*, *supra* note 9 at para 92 (the Scott Capital leases), 134 (the Caterpillar Financial Services Limited leases), 159 (the Wajax Industries leases), 192 (the Concentra Financial leases) **[TAB 5]**.
[25] *843504*, *supra* note 4 at para 65 **[TAB 2]**. This analysis is also echoed in *Cow Harbour*, *supra* note 9 at para 57 **[TAB 5]**.
[26] See *Cameron*, *supra* note 23 at para 27 **[TAB 10]**.
[27] *Connacher*, *supra* note 3 at para 27 **[TAB 1]**.
[28] Burke, *supra* note 9 at 297 **[TAB 4]**.

65. While the Master Lease Agreement contains provisions requiring 52 Dental to insure the Leased Equipment, maintain it in a good state of repair, and bear the risk of loss as well as a disclaimer of warranties with respect to the Leased Equipment, no additional facts surrounding the conclusion of the Master Lease Agreement point to these being significant indicators of the parties' intentions. Patterson submits that these factors are therefore of limited usefulness in the present case and should be considered neutral indicators at best.

b. Factors 9, 13, 14: acceleration of rent payments, default provision and liquidated damages

66. Some acceleration provisions, default provisions and liquidated damages provisions have been found to be more aligned with financing leases. However, these are not present in the case at hand.

67. The Master Lease Agreement contains the following default clause:

> 11. Default: If (a) Lessee fails to pay any Rent or other amount payable under this Agreement when due; (b) Lessee fails to comply with any other term of this Agreement; (c) Lessee defaults under any other agreement with Lessor; (d) any representation made by Lessee in connection with this Agreement is or becomes untrue; (e) any of the Equipment is lost, stolen, damaged or destroyed and such loss is not covered by insurance; (f) Equipment is subjected to any liens, encumbrances, hypothecs, security interests and claims; (g) Lessee makes any assignment for the benefit of Lessee's creditors, becomes insolvent, commits or threatens to commit any act of bankruptcy, winding up in dissolution, ceases or threatens to cease to carry on business or seeks any arrangement or compromise with Lessee's creditors; (h) any bankruptcy, receivership, winding up, dissolution, liquidation, or insolvency proceeding is commenced against Lessee; or (i) Lessor believes, acting reasonably and in good faith that the prospect payment under this Agreement is impaired; then all Rent and any other amounts to become due under this Agreement to the end of the Term shall immediately become due and payable on demand. Lessee will at its own cost on Lessor's demand immediately deliver the Equipment to a location directed by Lessor. Lessor may without notice and without resort to legal process, take immediate possession of the Equipment. Lessor may enter the premises where the Equipment is located for purposes of disabling or removal of the Equipment without incurring any liability to Lessee. Lessee will pay Lessor's cost of collection, re-possession of the Equipment and of the enforcement of Lessor's rights, including legal costs on a solicitor and client basis.

68. This section provides for the acceleration of payments on an event of default. Since the provision also provides for the return of the Leased Equipment, it is clearly skewed towards the lessor. There is no provision for liquidated damages, however.

69. The presence of acceleration provisions in leases has not prevented courts in the past from finding that a lease was a true lease.[29]

70. Accelerated damages have been questioned as indicia of financing leases. The British Columbia Court of Appeal notably wrote in *DaimlerChrysler Services Canada Inc. v. Cameron*:

> (…) the basis for calculating damages does not distinguish a true lease from a security lease. The ability to claim accelerated damages in *Langille* was not a consequence of the character of the lease, i.e., a true lease or a security lease. Rather, it was simply the proper measure of damages for breach of a chattel lease. Generally, the basis for calculating damages can provide only some insight as to whether an impugned lease secures payment or performance of an obligation. I emphasize that it cannot serve as a decisive factor.[30]

71. With regards to the default provision itself, the fact that it strongly favours the lessor does not decisively make it a financing lease.

72. In *Cameron*, the defendant-lessee had leased a truck from the plaintiff-lessor. While the trial judge characterized the lease as a financing lease largely on the basis that the lease's default provision was inordinately in favour

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[29] See *Cow Harbour*, *supra* note 9 at para 92 (the Scott Capital leases), 134 (the Caterpillar Financial Services Limited leases), 159 (the Wajax Industries leases), 192 (the Concentra Financial leases) **[TAB 5]**.
[30] *Cameron*, *supra* note 23 at para 37 **[TAB 10]**.

of the lessor (it allowed the lessor to take immediate possession of the truck, claim all remaining rent payments and obtain the difference between the residual value of the truck and the net proceeds from its sale), the Court of Appeal overturned this characterization, finding that the amount envisaged under this provision did not create any separate security. It simply constituted the amounts owed under the agreement in the event of a breach.[31]

73. Furthermore, it ruled that the trial judge had accorded too much weight to this factor and not enough to the purchase option.[32]

74. In the case at hand, the Master Lease Agreement's default provision provides for the immediate repossession of the Leased Equipment and the payment of outstanding rent amounts, but offers no residual value guarantee. As such, the default provision simply provides for the payment of amounts owed under the bailment relationship between Dr. Mouhamad and 52 Dental.

75. To summarize, none of the above factors offer sufficient reasons to outweigh the clear indicia that the Master Lease Agreement is a true lease.

vii. Conclusion on the Nature of the Master Lease Agreement

76. Based on the foregoing, Patterson submits that the Master Lease Agreement is a true lease.

77. It follows that Dr. Mouhamad, at all times, since the formation of the Master Lease Agreement, has retained title as well as legal and beneficial ownership to the Leased Equipment.

78. Consequently, the Leased Equipment does not form part of the Receivership and any proceeds from their sale must be distributed to the secured creditors of Dr. Mouhamad, in his personal capacity.

B. Patterson's Security Interests Rank Prior to the Royal Bank of Canada's

79. Pursuant to the provisions of the Act, Patterson's security interests arising out of each of the Agreements ranks prior to the security interests of all other creditors, including but not limited to Royal Bank of Canada, as against Dr. Faissal Mouhamad in his personal capacity.

80. Whereas Patterson perfected its security interests against Dr. Mouhamad through registration respectively, on July 5, 2022 and May 4, 2022 (the latter interest furthermore constituting a purchase-money security interest), Royal Bank of Canada registered its interest against Dr. Mouhamad on August 17, 2022.

V. CONCLUSION AND RELIEF SOUGHT

81. Patterson requests the following declarations from this Honourable Court:

a. That Patterson holds a valid and enforceable security interest in the Equipment as against Dr. Mouhamad;

b. That Dr. Mouhamad was the legal and beneficial owner of the Equipment up to January 11, 2023 when the Honourable Justice Mah made his Approval and Vesting Order;

c. That Dr. Mouhamad executed a valid true lease with 52 Dental Corporation, transferring no legal title in the Leased Equipment to the latter;

d. That Dr. Mouhamad is in default with respect to the Agreements as:

i. From the date that legal title in the Equipment was vested in Dr. Mouhamad pursuant to the Agreements, there were and still are other liens or security interests registered against Dr. Mouhamad affecting the Equipment, in violation of sections 5 and 15 of the Agreements;

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[31] *Ibid* at para 28.
[32] *Ibid* at para 41-43.

ii. A possessory interest in the Leased Equipment was transferred to 52 Dental Corporation, in violation of sections 5 and 15 of the Agreements; and

iii. Dr. Mouhamad has parted with possession of the Equipment since it was turned over to the Receiver, in violation of sections 14 and 15 of the Agreements; and

e. That Patterson's security interests against Dr. Mouhamad rank in priority to Royal Bank of Canada's with respect to the serial numbered collateral listed in the Personal Property Registry registrations associated with the Agreements.

82. Patterson requests any other remedy that this Honourable Court may deem appropriate or equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of September, 2023.

DS LAWYERS CANADA LLP

DS Lawyers Canada LLP

Per: _____

JEAN-YVES SIMARD, LINDSAY AMANTEA, LAURENT CRÉPEAU
Counsel for Patterson Dental Canada Inc.

LIST OF ATTACHMENTS

Court of Queen's Bench of Alberta

Citation: Connacher Oil and Gas Limited (Re), 2017 ABQB 769

Date: 20171211
Docket: 1601 06131
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Connacher Oil and Gas Limited

Between:

Connacher Oil and Gas Limited

Applicant / Cross-Respondent

- and -

Emkay Canada Leasing Corp.

Cross-Applicant / Respondent

Reasons for Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] These are applications that flow from the same set of facts and documents. This Court's determination of the primary issue will determine the other issues that the parties have placed before this Court.

[2] The primary issue is whether a lease agreement dated as of October 4, 2012 (the "Lease"), between Connacher Oil and Gas Limited ("Connacher") and Emkay Canada Leasing Corp ("Emkay") is a true lease or a financing lease.

[3] This Court's determination of the primary issue will determine whether the Lease falls within section 11.01(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which provides as follows:

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

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

[4] The ancillary orders that fall within the application and cross-application involve payment for the use of the vehicles that form the subject-matter of the Lease, and what flows from the sale of those vehicles, once Connacher returns them to Emkay.

II. Background

[5] Pursuant to the Lease, Connacher leased twenty-three vehicles from Emkay (the "Vehicles"). Emkay purchased the Vehicles that were the subject-matter of the Lease, and paid all applicable sales tax on the Vehicles' purchase price. Emkay then provided the Vehicles to Connacher pursuant to the Lease. Lease s 2 requires Connacher to make monthly lease payments, payable on the first day of each calendar month.

[6] On May 17, 2016, Dario J granted an initial order (the "Initial Order") under the *CCAA*, which provided, among other things, for a stay of proceedings up to and including June 16, 2016. The stay of proceedings has been extended to January 31, 2018.

[7] The Initial Order appointed Ernst & Young Inc (the "Monitor") as monitor.

[8] Connacher with the assistance of its counsel, and in consultation with the Monitor, reviewed the Lease to determine whether it fell within *CCAA* s 11.01(a). Connacher concluded that the Lease was a finance lease (not a true lease) and therefore it did not fall within *CCAA* s 11.01(a). Thus, Connacher has not paid rent under the Lease since Dario J granted the Initial Order. This led to Emkay filing its application seeking an order requiring Connacher to pay the post-*CCAA* filing rent and monthly rent thereafter.

[9] Despite this application, Connacher decided to return the Vehicles to Emkay because it could obtain replacements for the Vehicles at a lower cost.

[10] Connacher returned 2 of the Vehicles to Emkay in December 2016, and Emkay picked up all the remaining Vehicles on August 3, 2017.

III. Legal Principles

[11] The parties cite the following cases in support of their respective positions:

> ***Smith Brothers Contracting Ltd., Re*** (1998), 53 BCLR (3d) 264, 13 PPSAC (2d) 316 (SC) [***Smith Brothers***]
>
> ***Royal Bank v Cow Harbour Construction Ltd***, 2010 ABQB 637, 37 Alta LR (5th) 82, (*sub nom.* ***Cow Harbour Construction Ltd., Re***) 504 AR 319 [***Cow Harbour #1***]
>
> ***De Lage Landen Financial Services Canada Inc v Royal Bank,*** (*sub nom.* ***Cow Harbour Construction Ltd., Re v***) 499 AR 198, (*sub nom.* ***Cow Harbour Construction Ltd., Re***), 2010 ABCA 394, 73 CBR (5th) 22 [***Cow Harbour CA***]
>
> ***Re 840504 Alberta Ltd***, 2011 ABQB 448, 46 Alta LR (5^{th}) 362, 523 AR 180 [***Skyreach***]

Royal Bank v Cow Harbour Construction Ltd, 2012 ABQB 59, 529 AR 147, 59 Alta LR (5th) 215 [***Cow Harbour #2***]

[12] The parties referred to other cases throughout their arguments. This Court will refer specifically to those cases as it discusses them.

[13] It was this Court that rendered the written reasons in the 2 ***Cow Harbour*** cases. ***Cow Harbour CA*** was an appeal to the Alberta Court of Appeal resulting from ***Cow Harbour #1***, which upheld this Court's finding. ***Cow Harbour #1*** was dealing with the lessor's application for leave to appeal this Court's earlier ruling. It did not deal with the substantive finding of the nature of the lease.

[14] Why is the differentiation between a "true lease" and a "financing lease" important? In a true lease, the debtor corporation is paying for the *use* of the lessor's property, and *CCAA* s 11.01(a) allows the lessor to be compensated for the debtor's *use* during the pendency of the *CCAA* proceedings. As this Court stated previously, "[a] true lease, in essence, is a bailment contract such that ownership of the leased goods remain with the bailor/lessor and the bailee/lessee pays for 'use' of those goods": ***Cow Harbour #2*** at para 44. Under a "financing lease," the debtor is not using the lessor's property at all, but is earning equity in the property with each payment. In other words, in essence, the payments under the financing lease are debt obligations which are stayed pursuant to the *CCAA* proceedings: ***Nortel Networks Corp, Re***, 2009 ONCA 833 at para 16. *CCAA* s 11.01(a) protects parties who provide goods and services to the debtor corporation after a court grants an initial order, but not "creditors" to whom the debtor corporation has "debt obligations." To do otherwise would put the latter in a better position *vis-a-vis* the debtor corporation than the debtor corporation's other creditors.

[15] The principles that this Court applied in the ***Cow Harbour*** cases, and that Topolniski J applied in ***Skyreach***, apply with equal force to the case at bar. Thus, it might be useful to provide those principles, without specific attribution to the cases from which those principles arise.

- For a court to determine whether it is dealing with a true lease or a financing lease, it must look to the substance of the arrangement between the parties rather than the form of the arrangement
- The court must examine a number of factors, some of which are contained in the document itself, some of which relate to the manner in which the parties effected their arrangement, and some of which deal with the nature of the parties themselves
- No one factor is determinative, although some might be more indicative of the nature of the lease
- The objective of a court's analysis is to determine the parties' intent at the time they entered into their arrangement, and the document itself may help in that determination
- Courts must show particular deference to the wording of the document where the parties are sophisticated commercial parties
- A court must interpret an agreement as at the date it was made, as the exercise is intended to discern the intention of the parties at the time the contract was formed

[16] When conducting this analysis, this Court cannot overemphasize the importance of ***Smith Brothers*** in its analysis. This Court relied on that case in ***Cow Harbour #2*** and Topolniski J relied on it in ***Skyreach***. In that case, Bauman J provided a checklist that Professor Ronald CC Cuming prepared for his *Teaching Material for Personal Property Security Transactions Governed by Personal Property Security Acts* in September, 1991. In those materials, Professor Cuming summarized the considerations that American courts had taken into account when determining whether a document is a true lease or a security agreement. Although Professor Cuming prepared this checklist to deal with a similar issue under personal property security legislation, Bauman J, Topolniski J and this Court have used this checklist to examine whether an arrangement constitutes a true lease or a financing lease in *CCAA* proceedings. That checklist is transcribed in ***Smith Brothers*** at para 67, which provides as follows:

> 1. Whether there was an option to purchase for a nominal sum;
>
> 2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
>
> 3. Whether the nature of the lessor's business was to act as a financing agency;
>
> 4. Whether the lessee paid a sales tax incident to acquisition of the equipment;
>
> 5. Whether the lessee paid all other taxes incident to ownership of the equipment;
>
> 6. Whether the lessee was responsible for comprehensive insurance on the equipment;
>
> 7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
>
> 8. Whether the agreement placed the entire risk of loss upon the lessee;
>
> 9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
>
> 10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;
>
> 11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;
>
> 12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);
>
> 13. Whether there was a default provision in the lease inordinately favourable to the lessor;
>
> 14. Whether there was a provision in the lease for liquidated damages;
>
> 15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;
>
> 16. Whether the aggregate rental approximated the value of purchase price of the equipment.

[17] It is interesting to note that item 12 of the checklist excepts the requirement or permission to execute a financing statement under the *Uniform Commercial Code*. Of course, this would not apply in Canada, as we do not have such a code. In Alberta (and elsewhere in Canada) we have the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] which deems a security interest in favour of "a lessor under a lease for a term of more than one year." Does this make the lease a financing lease? The answer is no, as the *PPSA* itself qualifies that "deeming" by saying, "whether or not the interest secures payment or performance of the obligation." The *PPSA* is created to protect the priority that the lessor holds in the leased property, but it does not itself create an intention where none existed.

[18] In ***Skyreach***, Topolniski J referred to an article that designated certain of the ***Smith Brothers*** factors as being "primary factors" which will often be determinative of the characterization of the agreement, and "secondary factors" which generally have a corroborative value. See Michael E Burke, "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" (2009) 48 Can Bus LJ 289 at 291-92. This Court also referred to the same article in ***Cow Harbour #2***. Connacher argues that Topolniski J "adopted" Burke's "primary/secondary" approach, and that this Court "similarly adopted" that approach.

[19] This Court disagrees with that that characterization. In fact, this Court held, and still holds, that it is bound by the following statement that Ritter JA made in ***Cow Harbour CA***, which was an appeal from this Court's decision in ***Cow Harbour #1***, when he said:

> The applicant points to a British Columbia decision which suggests in *obiter* that there should be a hierarchy of factors used to determine if a lease is a true lease or a financing lease. In my view, this *obiter* runs contrary to current trends about how to weigh the factors in a legal test and about the deference afforded to courts of first instance in this respect. If one factor trumps the others, there is simply no point in including the others in the test.
>
> ***Cow Harbour CA*** at para 15 [emphasis added].

[20] It should also be noted that Topolniski J quoted this Court's statement from ***Cow Harbour #1***, where this Court said the following:

> ... no one factor "is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions ..."
>
> ***Cow Harbour #1*** at para 32.

[21] In the end, Topolniski J in ***Skyreach*** took the same approach as did this Court in ***Cow Harbour #2***, which this Court articulated as follows:

> The proper approach is more holistic than the one advocated by GE. While the presence or absence of one or more factors may loom larger than others, in all instances the inquiry remains focussed on determining the intention of the parties and is based on an interpretation of the entire agreement. As stated by the Alberta Court of Appeal in *De Lage Landen (CA)*, one factor cannot trump others in terms of the legal test. Courts must review the entire agreement and they must consider all factors. That is not to say, however, that certain factors may not have greater probative value than others in terms of the particular agreement before the court. In such a case, the court might give those factors greater weight. In all cases, the

> court must examine the various *Smith Brothers* factors and any other factors it considers material and relevant, balance those factors in the context of the entire agreement, and make a determination as to whether the agreement before it as a financing lease or a true lease. This is not a scientific exercise.
>
> ***Cow Harbour #2*** at para 65.

IV. The Lease

[22] It might be worthwhile to examine the provisions of the Lease to see how they fit within the legal principles that this Court has articulated above. This examination will be done through the lens of the ***Smith Brothers*** checklist.

> 1. Whether there was an option to purchase for a nominal sum: No, see Lease s 12. The vehicle in question could be sold to the "driver, employee or related party," but the Lease prohibited any sale to Connacher. Any such sale to a "driver, employee of related party" would be "at the wholesale fair market value."
>
> 2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment: No, see Lease ss 1 and 14. The vehicles remained "the sole and exclusive property of [Emkay]."
>
> 3. Whether the nature of the lessor's business was to act as a financing agency: No, Emkay is a vehicle leasing company.
>
> 4. Whether the lessee paid a sales tax incident to acquisition of the equipment: No, Emkay paid on applicable taxes on its purchase of the Vehicles.
>
> 5. Whether the lessee paid all other taxes incident to *ownership* of the equipment: No, Connacher paid only taxes, such as goods and services tax, as part of its lease payments.
>
> 6. Whether the lessee was responsible for comprehensive insurance on the equipment: Yes. The reason for this was explained by Emkay's president, Norman S Lyle, in the affidavit he swore on July 4, 2017 ("Lyle Affidavit"), where he said the following in para 22:
>
> > Because the Leased Vehicles belong to Emkay, the Lease is structured to ensure that the condition and value of the Leased Vehicles are maintained throughout the life of the Lease. Emkay must protect itself against a reduction in market value at the end of the lease term, and market value depends on the condition of the Leased Vehicles. This is why the Lease obligates the lessee (in this case, Connacher) to maintain the Vehicles in good and efficient working order, condition and repair and to maintain insurance. [Emphasis added].
>
> 7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense: Yes, see Lyle Affidavit para 22, above.

8. Whether the agreement placed the entire risk of loss upon the lessee: No. See the discussion below.

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee: Yes. Although Emkay argues that any payments following default is likely limited to one-month, Lease s 11 says that Connacher must make a payment "for the balance of the lease term," which is three hundred sixty-seven days, which is the minimum lease term, or thirty days, once the minimum lease term has expired and the term has converted to a month-to-month arrangement. The balance of the remedies on default are similar to those of a mortgagee, in the sense that Connacher's rights in the Vehicles are essentially foreclosed.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease: Yes, as this prevents Emkay from having to maintain a fleet of vehicles, with the corresponding cost of maintaining such inventory.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment: No

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada): As discussed above, Canada does not have a *Uniform Commercial Code*. To the extent that Emkay wanted to give notice of its interest in the Vehicles, it registered pursuant to the *PPSA*. As mentioned earlier, this registration is not indicative of a financing arrangement.

13. Whether there was a default provision in the lease inordinately favourable to the lessor: No

14. Whether there was a provision in the lease for liquidated damages: No

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor: Yes. This Court has said, "Burke also identified (at 297) some factors, such as the exclusion of warranties on the lessor's part, as 'red herrings' because their presence (or lack of presence) in a lease is equivocal": ***Cow Harbour #2*** at para 58.

16. Whether the aggregate rental approximated the value of purchase price of the equipment: No, see discussion below.

[23] This Court feels that a couple of the items in the ***Smith Brothers*** checklist require a more detailed discussion. Item 8 deals with the risk of loss. That, however, is not an insurable risk of loss. It relates to the loss at the end of the term of the Lease, or other earlier termination. The parties acknowledge that Connacher would be entitled to any proceeds of sale at the expiry or termination of the Lease that exceed the Depreciated Value, as defined, of the Vehicles, provided Connacher is not in default of its obligations under the Lease. That is not what is at issue in this discussion. What is at issue is who bears the risk if the proceeds of sale are less than the Depreciated Value? Lease s 12 says that Connacher must pay the deficiency plus a 1.5% disposal fee of the gross proceeds as additional rental to Emkay. This was similar to the provision in the lease that Topolniski J was considering in ***Skyreach***, which she found to be a financing lease.

The difference in the Lease that this Court is considering is that the deficiency is subject to a threshold percentage of 20%, such that the present value of the payments can never exceed 80% of the Vehicle's fair market value.

[24] Connacher argues that Topolniski J adopted Burke's explanation, which is as follows:

> Where the lessee is liable under an open-end lease for *any* deficiency in the sale of the leased property following its return at the end of the scheduled lease term, the current line of authority is to treat such a lease as a security lease, because the lessor is "guaranteed" to receive a minimum return on the transaction.
>
> [Emphasis added].

[25] Connacher argues that the term "any" allows the lessor to receive a guaranteed return, which would indicates a financing lease, no matter what the amount of the deficiency.

[26] The ***Smith Brothers*** checklist does not say that, however. It says that the "entire" risk of loss falls on the lessee. Thus, this Court would agree with Burke's analysis if he were referring to the total amount of the deficiency, as that would place the entire risk of loss on the lessee. If it is something less, however, it does not fall within that characterization. As well, in ***Skyreach***, Topolniski J was dealing with a situation where Skyreach was required to pay the deficiency. As she said, "If there is a shortfall, Skyreach pays it": ***Skyreach*** at para 64.

[27] Connacher argues that "risk of loss" refers to an insurable risk, with which this Court agrees, and that Connacher was responsible for any such risks. This, however, is covered in item 6 of the ***Smith Brothers*** checklist. This is one of those factors that this Court sees as being equivocal, in the sense that even in a payment for use of, say, a rental vehicle, the renter always assumes the risk of loss. The renter is certainly not acquiring any equity interest in the rental vehicle.

[28] To this Court's mind, the issue of whether the aggregate rental approximated the value of purchase price of the equipment is a red herring. Why? We are dealing here with sophisticated commercial parties. Presumably, they do their respective calculations and conclude whatever transaction is most beneficial to them. In fact, Connacher did not feel that continuing with the Lease was in their financial best interests as they found a better deal post-*CCAA*. The Lyle Affidavit says that the minimum lease payments never equal eighty-percent or more of the fair market value of the Vehicles at the Lease's inception. But what if it did? Burke himself said the following at p 296 of his article:

> If a lessee is required to pay what is the equivalent of the original cost of the leased property (i.e., the lessor's capital investment), plus a finance charge based on the rate existing at the date of the lease agreement, it does not necessarily follow that such an agreement is a security lease, especially if the lease contains a true fair market value purchase option.
>
> In such a lease, it is possible that the lessee has simply agreed to pay a premium for the use of the leased property.

V. Conclusion

[29] There are certain aspects of the Lease that point to a financing arrangement. However, when this Court looks at the transaction as a whole, it finds that the Lease is a true lease.

[30] As mentioned at the outset of these reasons, the result of this application should resolve or, at least, assist the parties in resolving the other matters that formed the subject-matter of the other applications before this Court. If that is not the case, this Court grants the parties leave to bring these matters before this Court when next it sits during its Commercial Duty week.

Heard on the 30th day of October, 2017.
Dated at the City of Calgary, Alberta this 11th day of December, 2017.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Cynthia L. Spry and Khrystina McMillan
Babin Bessner Spry LLP
for Emkay Canada Leasing Corp.

Timothy Pinos and Joseph J. Bellissimo
Cassels Brock & Blackwell LLP
for Connacher Oil and Gas Limited

Walker W. MacLeod
McCarthy Tetrault LLP
for Ernst & Young Inc., in its capacity as CCAA Monitor

Chris D. Simard
Bennett Jones LLP
for the Interim Financing Agent and First Lien Agent

Court of Queen's Bench of Alberta

Citation: 843504 Alberta Ltd., 2011 ABQB 448

Date: 20110708
Docket: 0303 19663
Registry: Edmonton

In the matter of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended; and the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

And in the matter of a Plan of Compromise or Arrangement of 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

Memorandum of Decision
of the
Honourable Madam Justice J. E. Topolniski

I. Introduction

[1] This application concerns a 7.5 year old appeal of a monitor's disallowance of a lessor's claim to priority over certain assets in the restructuring of 843504 Alberta Ltd. (formerly Skyreach Equipment Ltd.) [Skyreach] under the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 [*CCAA*].

[2] The restructuring of Skyreach's affairs under the *CCAA* was peculiar in many respects. The delayed prosecution of the lessor's appeal and the circumstances surrounding it add to the list of unusual events.

II. Background

[3] A brief review of the *CCAA* proceedings and circumstances giving rise to this application is warranted.

A. The *CCAA* Proceedings

[4] Skyreach was in the business of renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. Its restructuring began in the fall of 2003, when a mezzanine lender, EdgeStone Mezzanine Fund II Nominee Inc. [EdgeStone], initiated the *CCAA* application. Skyreach clearly was insolvent at the time and met the threshold requirements for protection under the *CCAA*. The directors largely had abandoned ship and allegations of corporate interference and conflict of interest abounded in terms of the remaining director (who also was the chief executive officer).

[5] An initial order in the *CCAA* proceedings was granted on October 9, 2003 [Initial Order], naming Pricewaterhouse Coopers as monitor [Monitor]. Skyreach's primary operating lender, GE Commercial Distribution Finance Inc. [GE], supported the application. Numerous other creditors did not. The Initial Order provided for the usual 30-day moratorium and permitted the Monitor to sell assets up to certain capped amounts without court approval. For a brief period of time, the Monitor was authorized to operate the business. That function was then assumed by a chief restructuring officer, who was allowed to sell unencumbered assets up to a maximum of $100,000 without court approval.

[6] The Initial Order defined the following terms, among others:

> 2(e) "Inventory" - means Property which is inventory within the meaning of the applicable personal property legislation;
>
> (h) "Other Security Claimants" - means those creditors other than the Lenders with a registered security interest against certain of the Property, including… TransportAction Lease Systems Inc...
>
> (k) "Property" - means <u>any present or future property, assets, business and undertakings of the Corporation</u> of any kind or nature whatsoever whether real or personal wherever located and, for greater certainty, does not include any equipment or inventory which is the subject of a True Lease;
>
> (m) "True Lease" - means a lease of equipment or inventory to the Corporation, which at common law is in substance a true lease and with respect to which registration and any required notice has been properly effected under any applicable personal property security legislation such that the True Lessor has priority over the security interest of GE;
>
> (n) "True Lessor" - means a lessor under a True Lease; and
>
> (o) "True Lessor Property" - means equipment or inventory which is the subject of a True Lease in favour of a True Lessor [Emphasis added.]

[7] The Initial Order also provided a mechanism for determining whether particular leases were “True Leases” and authorized the Monitor to elect whether to release equipment to a “True Lessor” or to retain it and pay for use of the equipment during the proceedings (clause 33).

[8] Clause 34 of the Initial Order set out the requisite particulars to prove the status of a “Priority Claimant” whose security has priority over the GSA. “Priority Claimant” was defined as “[a]ny person claiming to hold security ranking in priority to GE’s security with respect to any Property.”

[9] The Initial Order permitted the Monitor to release assets subject to such security, or to retain possession of the assets and pay for their use. The information required of a person seeking “priority claimant” status is the standard sort of information required in insolvency proceedings generally, including information as to the security, the assets subject to the security, a detailed calculation of the balance owing, proof of delivery, registration and notices of PMSI claims, if applicable, and any other information reasonably requested by the Monitor.

[10] Given the nature of Skyreach’s business operations, it was essential to resolve priorities of securities held by various creditors over the existing assets. All affected parties agreed that GE held a first-place, valid and enforceable general security agreement [GSA]. Consequently, the claims process focussed on determining the claims of “true lessor” and “priority” claimants (as defined in the Initial Order).

[11] The claims procedure itself was fairly typical of those in many *CCAA* proceedings. Creditors submitted their claims to the Monitor within a given time frame. The Monitor then decided which, if any, claims took priority to GE. If the Monitor disallowed a claim, a notice of disallowance was delivered and the creditor had a given period of time in which to appeal the disallowance to this court.

[12] A report by the Monitor in late October 2003 indicated that Skyreach had sold 80 pieces of encumbered equipment between March 22, 2001 and September 19, 2003. The report did not disclose the name of the secured party.

[13] Transportaction Lease Systems Inc. [Transportaction] is a fleet management company which provides leasing and fleet management services. In the course of the *CCAA* proceedings, Transportaction received information that at some time prior to granting of the Initial Order, Skyreach had sold a large number of vehicles or other pieces of equipment [Impugned Sales] that Transportaction believed it had leased to Skyreach under a master lease agreement dated June 1, 2000 [Master Lease].

[14] Transportaction submitted a claim in the *CCAA* proceedings as a “true lessor” [Claim], claiming priority over vehicles, tractors and equipment which it had leased to Skyreach under the Master Lease. On December 19, 2003, the Monitor disallowed the Claim [Disallowance] on the basis that Transportaction did not have “purchase money security interest” [PMSI] priority to any inventory and did not have any priority to the equipment listed in its Alberta Personal

Property Registry [APPR] registrations (other than over two pieces of equipment which are not at issue in this matter).

[15] On December 23, 2003, Transportaction filed a notice of appeal of the Disallowance [Appeal]. At the time, the plan for Skyreach's restructuring was moving quickly. The intention was to sell the majority of Skyreach's assets to an arm's length third party. The remaining assets were to be transferred to a yet-to-be-incorporated company [Newco] without affecting the secured interests in them.

[16] Given the promising outlook under the proposed plan, Transportaction adjourned the Appeal *sine die* by consent, after informing GE of its intention to do so. Later, Transportaction filed a "without prejudice" proof of claim for $790,866 as an unsecured creditor [Proof of Claim].

[17] On January 27, 2004, a plan of arrangement incorporating the intended scheme [Plan] was sanctioned by the court. A vesting and receivership order was granted that day to facilitate implementation of the Plan by appointing a receiver to liquidate the Newco assets and to distribute the proceeds.

[18] Article 9.1 of the Plan contained a release by Skyreach's creditors of the company, the chief restructuring officer, the Monitor, the company which was acquiring the majority of Skyreach's assets, and their officers, directors or employees, of any claims based on anything done or not done at or before the effective date of the Plan, but the release was not to apply to entitlements of GE and EdgeStone, affect the rights of any person to pursue recoveries for a claim that might be obtained against any other person otherwise obligated at law for the claim, and was not to affect the right of any person to pursue claims against directors and officers of Skyreach with respect to collateral leased to or financed with Skyreach that was sold prior to the Initial Order without payment of the proceeds to the lessor or financier.

[19] The vesting and receivership order expressly preserved the Appeal and required that it be heard in the *CCAA* proceeding. The order directed that:

> The issues of priority over GE raised by Notice of Motion dated December 23, 2003 of Transportaction Lease Systems Inc., filed pursuant to s. 34 of the Initial Order in these proceedings, shall be addressed and determined in these receivership proceedings, including any issues of priority with respect to other secured creditors.

[20] After granting of the vesting and receivership order, GE, the Monitor, and (in hindsight, somewhat surprisingly) Transportaction all considered the Appeal to be a dead issue because the GE debt was to be retired without resort to any of the assets over which Transportaction claimed priority.

[21] Only limited activity in the *CCAA* proceedings has occurred since granting of the vesting and receivership order on January 27, 2004.

B. Transportaction's Lawsuits Against GE and EdgeStone

[22] In October 2005, Transportaction commenced an action against GE, alleging that the proceeds from the Impugned Sales were deposited into Skyreach's bank account, GE knew or ought to have known of the terms of the Master Lease, GE received a daily accounting of the funds in the bank account from Skyreach, and GE cleared the bank account on a daily basis, applying the funds to reduce the indebtedness of Skyreach. Transportaction claimed that GE was a constructive trustee of the proceeds and that it breached its duty as such. It also alleged unjust enrichment and conversion of over $836,000 of Transportaction's property [Litigation]. GE was not served with the statement of claim until October 2006.

[23] GE argues that Transportaction's failure to raise its concern about Skyreach's pre-*CCAA* sale of encumbered assets before granting of the vesting and receivership order precludes it disputing those sales.

[24] Sometime after 2006, GE applied unsuccessfully for summary dismissal, but in 2009 it succeeded in obtaining a temporary stay of the Litigation. Belzil J., who heard the stay application, rejected Transportaction's contention that the Appeal was moot. He found that permitting the Litigation to proceed without first having the Appeal determined would "amount to sanctioning unilateral abandonment by one party of a binding court ordered claims resolution process" (***Transportaction Lease Systems Inc. v GE Commercial Distribution Finance Canada Inc***., 2009 ABQB 626 at para 42).

[25] In a separate lawsuit, Transportaction sued EdgeStone, EdgeStone's nominee director of Skyreach, and the former president of Skyreach for damages resulting from the Impugned Sales [EdgeStone Litigation]. EdgeStone and its nominee director have settled the EdgeStone Litigation for (what it describes as) nuisance value.

[26] As matters now stand:

- GE's debt has been fully retired.
- Transportaction has been paid $25,851.03 pursuant to its Proof of Claim.
- Skyreach has been inactive since at least early 2004.
- Newco continues as an inactive shell company.

- Newco's receiver remains in place, although no steps other than some distributions have been taken in the receivership since about 2004.

- The Litigation is temporarily stayed.

C. The Parties, Their Security, and Their Personal Property Registry Registrations

1. Transportaction

[27] Transportaction's Master Lease, dated June 1, 2000, was for a term of more than one year.

[28] The lease of each vehicle and piece of equipment was for a minimum six month term, commencing on the date of delivery, with successive monthly renewals. At the end of each term, Skyreach either had to return the unit or continue making monthly payments.

[29] The Master Lease prohibited Skyreach from selling or subletting any vehicles or equipment, regardless of the circumstances.

[30] Transportaction registered the Master Lease at the APPR on August 9, 2000, describing its "general collateral" as including: "... other vehicles of whatever year, make or model including after acquired property and including proceeds thereof." The reference to "serial number goods" on the filing form was deleted [2000 APPR Filing].

[31] Transportaction subsequently registered the Master Lease at the British Columbia Personal Property Registry.

[32] On October 9, 2003 (coincidentally, the date the Initial Order was granted), Transportaction filed a further registration at the APPR [2003 APPR Filing], listing 150 serial numbers. None of the vehicles or equipment sold in the Impugned Sales was registered by serial number prior to October 9, 2003.

2. GE

[33] Pursuant to the GSA, Skyreach granted GE a security interest in all of its present and after acquired personal property. GE registered the GSA at the APPR on October 22, 1999.

[34] It is common ground that GE was authorized to sweep (or clear) Skyreach's bank account on a daily basis before and during the *CCAA* proceedings.

3. EdgeStone

[35] The Appeal was heard in two installments. During the first installment, it became apparent that EdgeStone could be affected by the outcome. Accordingly, I invited it to make submissions on the Appeal.

III. Issues

[36] Transportaction and GE agree that evidence taken in the Litigation can be relied on by them for this Appeal. Their agreement in that regard is supportable by case law (***Walt Disney Productions v Fantasyland Hotel Inc.*** (1993), 141 AR 291(CA)) and the *Alberta Rules of Court* (Rule 6.11(1)(f)) .

[37] Transportaction and GE are both parties to the Appeal and the Litigation. The core issue, the priority of security claims, is the same. Accordingly, their joint application to adduce evidence taken in the Litigation is granted.

[38] The remaining issues to be decided on this Appeal include:

A. Is the Appeal moot?

B. Is the Master Lease an operating lease and, therefore a “Permitted Lien” as defined in the GSA?

C. Did GE subordinate its priority position to Transportaction?

D. If so, are Transportaction’s APPR registrations sufficient for it to take priority?

E. Does the doctrine of laches preclude Transportaction from the relief sought?

IV. Analysis

A. Is the Appeal Moot?

[39] Transportaction argues that the Appeal is moot given that GE has been paid in full and none of the assets that were the subject of the Master Lease were required to be sold to repay Skyreach’s indebtedness to GE. Transportation states that as far as it is aware, no assets remain in the receiver’s possession which could be used to satisfy any claim by GE which existed as at the date of the Initial Order or any present claim. Further, Transportation notes that it does not assert any priority to assets in the possession of Skyreach as at the date of the Initial Order which were used to retire the indebtedness to GE. It argues that the *CCAA* proceeding is not meant to

deal with disputes between a creditor of the company and a third party, except perhaps for priority to assets in existence at the Initial Order. It maintains that a finding that it or GE has priority will not have any practical affect on the parties.

[40] GE takes the position that the Appeal may be determinative of the Litigation. It argues that if it knowingly received proceeds from the Impugned Sales prior to the Initial Order, its justification for retaining those proceeds would be based on the priority of its security compared to that of Transportaction. If Transportaction has priority, GE would have to pay those proceeds to Transportaction, which would serve to revive its claim against Skyreach for the same amount. It suggests that it would have recourse not only against Skyreach but also Newco (both hollow entities), EdgeStone (which received the "next in line" payments under the Plan) or the Monitor and receiver (for not having sought court approval of distributions). GE asserts that if, on the other hand, its security has priority, Transportaction could not succeed in the Litigation.

[41] The issue of whether the Appeal is moot was decided by Belzil J. on the stay application in the Litigation, which involved the same parties. In fact, it appears that Transportaction relied on the same authorities then as it does now. No new evidence or special circumstances have been raised by Transportaction.

[42] In ***Ernst and Young Inc. v Central Guaranty Trust Co.***, 2006 ABCA 337, 397 AR 225 [***Ernst and Young***], the Alberta Court of Appeal discussed *res judicata*, issue estoppel, collateral attack and abuse of process by re-litigation. According to the court (at para 29), the doctrine of *res judicata* has two branches, one of which is issue estoppel, which "precludes the litigation of an issue previously decided in another court proceeding." The party alleging issue estoppel must establish that the issue is the same as that decided in the prior judicial decision, that decision was final (even if made in an interlocutory proceeding), and the parties to both proceedings are the same (or their privies) (para 30).

[43] At para 47, the court in ***Ernst and Young*** quoted the following description of the rule against collateral attach from ***Wilson v The Queen***, [1983] 2 S.C.R. 594 at 599:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[44] Courts have an inherent and residual discretion to prevent an abuse of process. The court in ***Ernst and Young*** at para 52 cited the following passage from ***Toronto (City) v Canadian Union of Public Employees, Local 79***, 2003 SCC 63 at para 37, [2003] 3 SCR 77:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel ... are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[45] In my view, the doctrines of issue estoppel, collateral attack and abuse of process by re-litigation apply in these circumstances. To permit Transportaction to re-litigate the question of mootness would sanction wasting the parties' and the court's resources, encourage forum shopping and create the potential of inconsistent decisions.

[46] Even if I had found otherwise, I would have rejected Transportaction's contention that the issues in the Appeal are moot. The doctrine of mootness applies if the decision does not have the effect of resolving some controversy which affects or may affect the rights of the parties (***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 at paras 15-16). The outcome of the Appeal may well be determinative of the issues in the Litigation. The decision in this case will not be academic. It will resolve a live controversy that will affect the parties' rights.

B. Is the Master Lease an Operating Lease and, Therefore, a "Permitted Lien" as defined in the GSA?

[47] Transportaction contends that characterization of the Master Lease as a True Lease or otherwise is irrelevant as the mechanism for determining that as provided for in the Initial Order was established only to assess whether equipment lessors should be paid during the *CCAA* proceedings for use of their equipment, and it makes no such claim.

[48] However, Transportaction also asserts that the GSA contained a subordination of GE's priority in favour of those such as it with "Permitted Liens." In my view, in order to decide the priority issue as between Transportaction and GE, it is essential to determine whether the Master Lease was a "Permitted Lien" for purposes of the GSA, which in turn depends on whether it was an operating lease/true lease or a capitalized/security/financing lease.

[49] I note that the distinction was the basis for the Monitor's Disallowance of the Claim.

[50] Transportaction contends that GE's officer's acknowledgement under questioning that he thought the Master Lease was a "Permitted Lien" is evidence that it was. GE argues that the answers were given in the context of the defined term "Permitted Liens" as being "lessor's Liens arising from operating leases." I need not decide the issue as the officer's evidence only concerns what GE thought after the GSA was drafted. Whether the Master Lease was a "Permitted Lien" for purposes of the GSA does not depend on what the company thought but rather is a matter of law and interpretation.

[51] The GSA provides in part:

10.4 Encumbrance of Assets: Borrower will not, and will not permit a Subsidiary to, mortgage, pledge, grant or permit to exist a security interest in or lien upon any of the Collateral, now owned or hereafter acquired except for the Permitted Liens.

12.1 Events of Default: Borrower will be in default under this Agreement, each a "Default": if…

12.1.14 Liens Other than Permitted Liens: Any of the Collateral becomes subject to any Lien, claim, encumbrance or security interest other than a Permitted Lien."

[52] "Lien" is defined in the GSA as meaning (clause 1.1):

> ... any security interest, mortgage, pledge, lien, hypothec, hypothecation, judgment lien or similar legal process, charge, encumbrance, title retention agreement or analogous instrument or device (including, without limitation, the interest of lessors under capitalized leases and the interest of a vendor under any conditional sale or other title retention agreement), reservations, exceptions, encroachments, easements, rights of ways, covenants, conditions, restrictions, leases and other title exceptions and encumbrances affecting any of Borrower's property. [Emphasis added.]

[53] "Permitted Lien" is defined as meaning, in part (clause 1.1):

> (d) lessor's Liens arising from operating leases entered into in the ordinary course of business; [Emphasis added.]

[54] The term "operating lease" is used interchangeably with the term "true lease" (see for example ***Re Woodward's Ltd.*** (1993), 84 B.C.L.R. (2d) 206 at para 24; ***J-1 Contracting Ltd. v John Deere Ltd.***, 2004 NLSCTD 50, 44 BLR (3d) 10; ***Robert Michaels Group v Shaw Communications Inc.***, 2004 ABQB 745; and ***CCLI* (1994) *Inc. v Canada***, 2007 FCA 185 at para 7, 365 N.R. 94). A true lease, in essence, is a bailment contract. Title to the leased goods remains with the lessor and the lessee pays for use of those goods.

[55] A security agreement disguised as a lease is a security lease (R.C.C. Cuming, "True Leases and Security Leases Under Canadian Personal Property Security Acts" (1983) 7 Can Bus LJ 251 at 256 (cited in ***Re Smith Brothers Contracting Ltd.*** (1998), 53 BCLR (3d) 264 at para 48 [***Smith Brothers***]). The terms "security lease," "financing lease" and "capitalized lease" are used interchangeably.

[56] In ***Re Winnipeg Motor Express Inc.***, 2009 MBQB 204, 243 Man R (2d) 31, leave to appeal ref'd 2009 MBCA 110, 245 Man R (2d) 274, Suche J. observed (at para 31) that: "... the

true nature of arrangements involving the supply of equipment can be very difficult to peg."

[57] Farley J. in ***Re Philip Services Corp.*** (1999) 15 CBR (4th) 107 at para 3 (Ont SCJ) [***Philip Services***] described the court's task as: "... not a simple analysis of determining between black and white but rather the shade of grey where all factors are weighed in the balance as to whether the scales would tip towards a true lease relationship - or alternatively against being a true lease relationship."

[58] The characterization of a transaction involving a "lease" requires a functional analysis of the parties' relationship. What matters is substance, not form (***Smith Brothers***; ***Royal Bank of Canada v Cow Harbour Construction Ltd.***, 2010 ABQB 637 at para 32, 37 Alta LR (5th) 82, leave to appeal ref'd 2010 ABCA 394 [***Cow Harbour***]; ***Philip Services***; M.E. Burke, "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" (2009) 48 Can Bus LJ 289).

[59] In ***Smith Brothers*** at para 67, Bauman J. (as he then was) considered the following factors in determining whether the contract at issue in that case constituted a true lease.

1. Whether there was an option to purchase for a nominal sum;

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;

3. Whether the nature of the lessor's business was to act as a financing agency;

4. Whether the lessee paid a sales tax incident to acquisition of the equipment;

5. Whether the lessee paid all other taxes incident to ownership of the equipment;

6. Whether the lessee was responsible for comprehensive insurance on the equipment;

7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;

8. Whether the agreement placed the entire risk of loss upon the lessee;

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);

13. Whether there was a default provision in the lease inordinately favourable to the lessor;

14. Whether there was a provision in the lease for liquidated damages;

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;

16. Whether the aggregate rental approximated the value of purchase price of the equipment.

[60] As Yamauchi J. observed in ***Cow Harbour*** at para 32, no one factor "is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions..."

[61] Applying the ***Smith Brothers*** factors to the Master Lease discloses the following:

1. Option to purchase for a nominal sum - None.

2. A provision in the lease granting the lessee an equity or property interest in the equipment - None.

3. The lessor's business was to act as a financing agency - No.

4. Whether the lessee paid a sales tax incident to acquisition of the equipment - No Evidence.

5. Whether the lessee paid all other taxes incident to ownership of the equipment - Yes.

6. Whether the lessee was responsible for comprehensive insurance on the equipment- Yes.

7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense- Yes

8. Whether the agreement placed the entire risk of loss on the lessee- Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent on default by the lessee and granted remedies similar to those of a mortgagee - No.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - No evidence.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - No.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to the lessor - No.

14. Whether there was a provision in the lease for liquidated damages - No.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - No, but there were no representations or warranties, either express or implied.

16. Whether the aggregate rental approximated the value of the purchase price of the equipment - No Evidence.

[62] M.E. Burke, in his article "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" at pp 291-291, discusses how certain factors have been weighed by the courts:

> Although Canadian courts will refer to various factors as being relevant in their determination as to the characterization of a lease, they rarely indicate the relative weight given by them to each of the indicia or factors.
>
> It is possible, however, to make the following generalizations from the case law. First, from the universe of factors or indicia that have been mentioned in the jurisprudence, some factors or indicia (referred to in this paper as "primary factors") are clearly more important than other factors or indicia (referred to in this paper as "secondary factors"). Second, the presence of a primary factor in a lease will often be determinative of the characterization of the agreement. Third,

secondary factors generally have a corroborative value and are not in and of themselves determinative of the characterization. Accordingly, the presence of a number of secondary factors that are indicative of a characterization that is contrary to the characterization indicated by the primary factor will not be sufficient to overturn the weighting given by a court to the primary factor. Fourth, in those situations where the primary factor is ambiguous or absent, then the relative weighting given by a court to the secondary factors will be relevant in determining the characterization of the lease in question.

[63] The author identifies (at pp 292-294) the following as "primary factors:"

(a) Relevance of the purchase option price - whether the purchase option price is nominal or reflective of fair market value.

(b) Mandatory purchase options - whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term.

(c) Open-end leases/guaranteed residual clauses - whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term.

(d) Sale-leaseback transactions- whether the transaction is structured as a sale and leaseback.

[64] The Master Lease provides (clause 5) that after expiry of the six month minimum lease term for any vehicle and on notice to Transportaction, Skyreach may return the vehicle and Transportation will sell it. Skyreach remains responsible for payment of rent until the end of the month in which the returned vehicle is sold. If the sale proceeds of a vehicle exceed the termination book value, Skyreach keeps the surplus. If there is a shortfall, Skyreach pays it (clause 6). This provision is indicative of a security lease since it renders the lessee liable for a deficiency on the sale at the end of the term ("Ontario *Personal Property Security Act* Reform: Significant Policy Changes" at 294, citing ***Crop & Soil Service Inc. v Oxford Leaseway Ltd.*** (2000),186 DLR (4th) 85, 48 OR (3d) 291 at para 6 (CA); ***Re Cronin Fire Equipment Ltd.*** (1993), 14 OR (3d) 269).

[65] The following are the "secondary factors" described by M.E. Burke in "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" at 295-298:

(a) The ability to replace/exchange leased equipment is indicative of a true lease.

(b) The lessor's ability to accelerate payments and the residual value are generally inconsistent with a true lease. However, it is equally consistent with a true lease if the acceleration clause limits the lessor's damages to

the present value of the remaining rents, plus the present value of the residual value at the end of the term, minus the value of net proceeds from a sale of the assets. If the acceleration clause is more narrowly crafted, it favours a security lease.

(c) A full payment lease may be indicative of either form of lease, depending on the language of the provision.

(d) A security deposit is indicative of a security lease.

(e) A substantial down payment is indicative of a security lease.

(f) Covenants relating to maintenance, insurance and risk of loss can be indicators of either type of lease. They are weak evidence of a security lease.

(g) Whether the lessor uses different forms for different types of transactions may be some evidence of intention.

[66] Applying these (secondary) factors to the Master Lease discloses that:

(a) Ability to replace/exchange leased equipment - Yes.

(b) Acceleration clause - No.

(c) Full payment lease - Yes.

(d) Security deposit - No.

(e) Down payment - No.

(f) Maintenance, insurance and risk of loss - Skyreach was responsible for maintenance, operating costs and expenses, taxes, fees and penalties (clause 7), licensing and registration (clause 8), and insurance (clause 9). These are weak indicia of a security lease that may be equally consistent with a true lease. This is a neutral factor.

(g) Lessor's documentation - No evidence.

[67] The secondary factors are, in and of themselves, not determinative of the proper characterization of the Master Lease. The presence of some secondary factors is insufficient to outweigh the clear effect of the primary factors.

[68] In the result, I conclude that the Master Lease is properly characterized as a security/financing/capitalized lease. Accordingly, it is not a "Permitted Lien" under the GSA.

C. Did GE Subordinate its Priority Position to Transportaction?

[69] The Alberta Court of Appeal in ***Chiips Inc. v Skyview Hotels Ltd.*** (1994), 155 AR 281 (CA) considered a debenture which permitted the assuming or giving of purchase money mortgages or other purchase money liens on property acquired by the company provided they were secured only by that property. The appellants argued this amounted to a subordination by the debenture holder. At para 56, Harradence JA, in separate and concurring reasons, stated: "[t]he question to be asked is: what did the debenture holders intend when they included this clause?"

[70] Following a review of the authorities, he also indicated (at para 49):

> From the above cases, the parameters are clear. An explicit and specific waiver clearly gives rise to a valid subordination clause. A vague and non-specific clause is not to be construed as a subordination clause. The question that arises is simply where on the continuum do the purported subordination clauses in the case at bar lie?

[71] In the present case, the GSA simply exempts "Permitted Liens" from the prohibition against encumbering the collateral. It does not afford a priority over the GSA to "Permitted Liens."

[72] The GSA neither expressly nor impliedly subordinates GE's priority in favour of the Master Lease. Accordingly, Transportaction's argument in this regard fails.

[73] I do not find ***Bank of Montreal v Dynex Petroleum*** (1995), 39 Alta LR (3d) 66 to be helpful in terms of this issue.

D. Are Transportaction's APPR Registrations Sufficient For It to Take Priority?

[74] Transportaction asserts that it has PMSI super priority.

[75] The Alberta *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] applies to the Master Lease as it captures transactions that create a security interest and true leases for a term of more than one year:

> 3(1) Subject to section 4, this Act applies to
>
> (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who

has title to the collateral, and

(b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

(2) Subject to sections 4 and 55, this Act applies to…

(b) a lease of goods for a term of more than one year, and

that does not secure payment or performance of an obligation.

[76] Transportaction's security interest under the Master Lease was a PMSI:

1(1)(ll) "purchase-money security interest" means

. . .

(iii) the interest of a lessor of goods under a lease for a term of more than one year,

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable in respect of the purchase or loan.

[77] Section 34(2) of the *PPSA* gives priority to a PMSI in the following circumstance:

34(2) A purchase-money security interest in

(a) collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

has priority over any other security interest in the same collateral given by the same debtor. [Emphasis added.]

[78] The *PPSA* defines "inventory" as follows:

1(1)(y) "inventory" means goods

> (i) that are held by a person for sale or lease, or that have been leased by that person,
>
> (ii) that are to be furnished by a person or have been furnished by that person under a contract of service,
>
> (iii) that are raw materials or work in progress, or
>
> (iv) that are materials used or consumed in a business.

[79] “Equipment” in defined in s 1(1)(p) as meaning "goods that are held by a debtor other than as inventory or consumer goods.”

[80] Transportaction asserts that because Skyreach could neither sublet nor sell the equipment (subject to the Master Lease), the assets must be characterized as equipment rather than inventory. Given my conclusion with respect to the adequacy of the registration, I need not determine that issue.

[81] A security interest in collateral is perfected under the *PPSA* by registration of a financing statement (s 25).

[82] The Master Lease dealt with vehicles and trailers, which are considered "serial number goods" pursuant to s. 1(1)(y) of the *Personal Property Security Regulation*, AR 95/2001 [*Regulation*].

[83] Section 34 of the *Regulation* provides that:

> 34(1) Where a financing statement is submitted for registration in respect of a security interest in collateral that is serial number goods,
>
> (a) if the goods are consumer goods, the secured party must provide a description of the goods by serial number in accordance with section 35, and
>
> (b) if the goods are equipment or inventory, the secured party may provide a description of the goods in accordance with section 36 or by serial number in accordance with section 35.

[84] Section 35 of the *Regulation* outlines the requirements for description by serial number, which include the following:

> 35(1) Where collateral is required to be described under this section, the

> description must be set out in the space provided for serial number description, and must include
>
> (a) the last 25 characters of the serial number for the collateral or all the characters if the serial number contains less than 25 characters,
>
> (b) the 4 digits for the model year of the collateral,
>
> (c) the make and model of the collateral, and
>
> (d) the appropriate category of collateral as set out in Schedule 3.

[85] Section 36 applies to serial number goods not described in accordance with s 35 in the case of inventory or equipment (s 36(1)(b)). Section 36(2) provides that:

> 36(2) Where collateral is to be described under this section, the secured party must set out the description under “Collateral: General” and must provide
>
> (a) a description of the collateral by item or kind or as “goods,” “chattel paper,” “investment property,” “documents of title,” “instruments,” “money” or “intangibles,”
>
> (b) a statement indicating that a security interest is taken in all of the debtor’s present and after-acquired personal property,
>
> (c) a statement indicating 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,” or
>
> (d) a description of the collateral as inventory, but such a description is valid for the purposes of this section only while the collateral is held by the debtor as inventory.

[86] The 2000 APPR Filing described the “general collateral” as being: “... other vehicles of whatever year, make or model including after acquired property and including proceeds thereof.” Neither the 2000 APPR Filing nor the 2003 APPR Filing described the collateral "by item or kind;" that is, a description such as that given in Schedule “A” to the Main Lease or a description that would enable the type or kind of collateral taken to be distinguished from the types or kinds of collateral not taken. The 2000 APPR Filing did not set out serial numbers. The 2003 APPR Filing included serial numbers.

[87] Since the Impugned Sales occurred before the 2003 APPR Filing, Transportaction's attempt to cure the 2000 APPR Filing fails. The 2000 APPR Filing was deficient.

[88] The Master Lease could not take priority over the GSA.

E. Does the Doctrine of Laches Preclude Transportaction from the Relief Sought?

[89] Given my findings, I need not address the issue of laches.

V. Conclusions

[90] The parties' joint application to adduce evidence taken in the Litigation is granted.

[91] The doctrines of issue estoppel, collateral attack and abuse of process by re-litigation apply to prevent Transportaction from arguing that the Appeal is moot. In any event, I find that it is not moot in the circumstances.

[92] The Master Lease is properly characterized as a security/financing/capitalized lease and, therefore, is not a "Permitted Lien" as that term is defined in the GSA.

[93] GE neither expressly nor impliedly subordinated its security interest in the GSA to Transportaction.

[94] Transportaction's registration of the security interest granted to it by Skyreach is deficient.

[95] The GSA has priority over the Master Lease.

[96] The Appeal is dismissed.

[97] If the parties cannot agree on costs, they may speak to me within 45 days.

Heard on the 20th day of January, 2011 and the 20th day of May, 2011.
Dated at the City of Edmonton, Alberta this 8th day of July, 2011.

J. E. Topolniski
J.C.Q.B.A.

Appearances:

Darren Bieganek
Duncan & Craig LLP
for Transportaction Lease Systems Inc.

Jeremy Hockin
Parlee McLaws LLP
for GE Commercial Distribution Finance Inc.

Michael McCabe, Q.C.
Reynolds, Mirth, Richards & Farmer LLP
for Pricewaterhouse Coopers

Kelly Bourassa
Blake, Cassels & Graydon LLP
for EdgeStone Mezzanine Fund II Nominee Inc.

Date: 19980331
Docket: 03189
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36

AND

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1996, c. 62

AND

IN THE MATTER OF SMITH BROTHERS CONTRACTING LTD. SMITH'S HEAVY HAULING LTD. COTTONWOOD RIVER HOLDINGS LTD. and T.R. GRADING LTD.

PETITIONERS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BAUMAN

Counsel for the Petitioners:	Mr. Jan Christianson
Counsel for Ford Credit Canada Ltd.:	Ms. B. J. Brown
Counsel for G. E. Capital Canada Equipment Financing Inc. and G. E. Capital Canada Leasing Services Inc.:	Mr. J. K. Dungate
Counsel for Toronto Dominion Bank:	Mr. M. J. Brecknell
Counsel for Bank of Nova Scotia:	Mr. D. Marcotte
Place and Date of Hearing:	Prince George, B.C. 2 February 1998

I INTRODUCTION

[1] Ford Credit Canada Ltd. ("Ford Credit") brings this application in the context of proceedings commenced by the petitioners (collectively "Smith Brothers") under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (the "CCAA").

[2] Ford Credit seeks leave of the court to terminate one conditional sales contract and eight "leases" held by Smith Brothers in respect of nine Ford trucks. I put "leases" in quotation marks because the characterization of these documents is at the heart of the controversy before me.

[3] The central issue involves the proper interpretation of s. 11.3(a) of the CCAA. This subsection was added to the ***Act*** as part of amendments proclaimed in force on 30 September 1997. It creates a specific exception to a s. 11 stay order. It reads:

> 11.3 No order made under s. 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licenced property or other valuable consideration provided after the order is made;

[4] By the date of hearing, Smith Brothers had voluntarily returned four of the leased vehicles to Ford Credit.

II RELIEF SOUGHT

[5] On 19 December 1997, Mr. Justice Meiklem made the initial stay order under s. 11 of the CCAA (the "Stay Order"). It was effective until 18 January 1998. It was extended to 26 January 1998 by the order of Mr. Justice R. D. Wilson on 12 January 1998. It was further extended until dismissal of the petition or further order of the court by the order of Mr. Justice Williamson made 26 January 1998.

[6] Two clauses in the Stay Order are potentially relevant on the facts before me.

[7] The first is at page 4, paragraph (i) of the Stay Order. In its essential terms this paragraph reads:

> (i) All persons having agreements with the petitioner (*sic*) whether written or oral for the supply of goods or services to the petitioner (*sic*) (including, without limitation, leases of goods, . . . equipment leases, . . .) are enjoined from accelerating, terminating, determining or cancelling such agreements and that such person shall continue to supply the goods or services pursuant to the provisions of such agreements so long as the petitioner pays the prices or charges under the agreements for such goods or services incurred . . . after the Filing Date concurrently with such supply . . .

[8] I conclude that the payment proviso in this paragraph, to the extent that it covers leased property, is simply a

reflection of the limitation on any stay order found in s. 11.3(a) of the CCAA.

[9] The second relevant clause is paragraph (j) on page 5 of the Stay Order. It reads in part:

> (j) All persons having other agreements or other contracts with the Petitioner are restrained and enjoined from accelerating, terminating, determining or cancelling such agreements or acting upon any right or forfeiture (*sic*) (statutory, contractual or otherwise) without the consent of the petitioner, or leave of this court and that all such persons shall continue to perform and observe the terms, conditions and provisions contained in such agreements on their part to be performed or observed. . .

[10] The interplay between these clauses and s. 11.3(a), on the facts at bar, raises a number of possibilities. If Ford Credit can bring its agreements under s. 11.3(a), it may demand payment for the use of the vehicles after the Filing Date without leave of the court. This is so under s. 11.3(a) and it is buttressed (perhaps unnecessarily) by the payment proviso in clause (i) of the Stay Order.

[11] If, on the other hand, s. 11.3(a) is not engaged, in order to demand payment and thereafter seize the vehicles, Ford Credit would require the written consent of the petitioners or leave of the court under clause (j) of the Stay Order.

[12] I say immediately that if Ford Credit is before the court under clause (j), I am not inclined to grant leave because that would tend to undermine Smith Brothers' efforts to rearrange its affairs under the CCAA before the merits of that arrangement have been considered. It would, as well, do so in a manner tending to favour Ford Credit -- only one of many creditors.

[13] I turn to Ford Credit's Notice of Motion.

[14] It seeks leave of the court permitting it to terminate "all contracts and vehicle leases with Smith Brothers Contracting Ltd." and to seize the vehicles. It seeks this relief "pursuant to the order of Mr. Justice Meiklem granted December 19, 1997 herein".

[15] This leads to a number of observations. First, if Ford Credit can bring itself within clause (i) of the Stay Order, leave of the court to do that which it proposes is not necessary in light of the payment proviso. Further, or perhaps more properly of initial importance, s. 11.3(a) precludes anything in the Stay Order from preventing Ford Credit, if it can bring itself within the terms of the section, from demanding payment for the use of the vehicles after the Filing Date. I interject to say that I construe s. 11.3(a) to mean that if one can require immediate payment for the use of leased property after the Stay Order is made, impliedly one is then

entitled, in the absence of payment, to retake the goods (if, of course, that remedy is reserved to the lessor).

[16] Third, it follows that by seeking leave, Ford Credit must be doing so under clause (j) of the Stay Order. This is obviously not the basis upon which Ford Credit has put its case and accordingly I will consider its application as one seeking the direction of the court on the applicability of s. 11.3(a) (and clause (i) of the Stay Order) to the arrangements covering the vehicles. To the extent that Ford Credit is unable to bring itself within s. 11.3(a), I have considered the possibility of granting leave under clause (j) but choose not to for the reasons set out above.

III THE MERITS

[17] I can deal quickly with the conditional sales agreement covering the 1993 Ford F 350 Crewcab. It is neither in form nor substance a lease of property and accordingly it comes within clause (j) of the Stay Order. Leave is not granted in respect of this vehicle.

[18] The "leases" present an issue of considerable difficulty and require a consideration of the breadth of s. 11.3(a) of the CCAA, which, I am told by counsel, is a matter of first impression. My research has suggested this as well.

[19] I will first deal with what is in the nature of a threshold issue, that is, whether s. 11.3(a) extends to a lease of property made before the stay order. I conclude that it does, in respect of payment for use of that property after the date of the stay order. If s. 11.3(a) was intended to apply only to leases entered into after the stay order, one would expect the section to read to the effect:

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment <u>for</u> goods, services, <u>leased or licensed property</u> or other valuable consideration <u>provided after the order is made</u>. (underlining added)

By instead wording the section as it has, Parliament, to my mind, is saying that it is the provision of the <u>use</u> of leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a).

[20] This view is supported by what scant academic writing on the section there is at this time. In ***L.W. Houlden and G.B. Morawetz*** <u>Bankruptcy and Insolvency Law of Canada</u>, 3rd Ed. (Toronto: Carswell), the learned authors note in their commentary on s. 11.3:

> (13) *Suppliers of Goods and Services or Rental of Property to the Debtor after the Filing of a Plan.*

> If a person supplies goods and services or the debtor continues to occupy or use leased or licensed property, no stay order can be made in respect of such goods and services or leased or licensed property: s. 11.3.

[21] It is the essential submission of Smith Brothers that a "lease" for the purposes of s. 11.3(a) should be narrowly construed. It is argued that an arrangement which may partake in part of a "lease" at law should not be so construed for the purpose of s. 11.3(a) if, upon close analysis, it is more than a true lease or rental agreement. This would be the case if, for example, it is essentially a financing arrangement facilitating the eventual acquisition of the vehicle.

[22] In pursuing this submission Smith Brothers cites cases considering the lease/conditional sales contract dichotomy in the context of personal property security legislation across Canada.

[23] For the purposes of this discussion I will use Professor R.C.C. Cuming's definition of a "true lease":

> . . . the term "lease" is used to refer to any transaction denominated a lease by the parties. A lease which is in substance a bailment contract is referred to as a true lease. A lease which is not a bailment, but a disguised security agreement is referred to as a security lease or security agreement. "True Leases and Security Leases Under Canadian Personal Property Security Acts" (1983) 7 Can. Bus. L.J. 251 at 256.

[24] Ford Credit responds by submitting that nothing in s. 11.3(a) requires the court to invoke a PPSA analysis in construing the phrase "leased property". There is nothing ambiguous, it is urged, about that term or about the concept of a "lease" at law. In particular, Ford Credit says that there is no reason to read down "lease" for the purposes of s. 11.3(a) of the CCAA, which, it is said, is effectively the submission of the petitioners.

[25] Obviously the phrase "leased property" requires some construction and any arrangement which purports to be a lease of property must be analyzed to ensure that it is one within the meaning of s. 11.3(a). To hold otherwise would permit creditors to so arrange the form of their contracts to avoid one of the major objectives of the CCAA, that is:

> . . . to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business [per Gibbs J.A. in ***Hongkong Bank of Canada v. Chef Ready Foods Ltd.*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315].

[26] In my view, one must have regard to the substance rather than simply the form of the arrangement in considering the application of s. 11.3(a).

[27] Having said what may be obvious, it is still necessary to consider whether s. 11.3(a) covers all leases or only those

which might be characterized as true leases. Is a lease which is more than that -- what I will call a "Lease Plus" -- excluded from the effect of s. 11.3(a) on a proper construction thereof?

[28] The most common form of Lease Plus, and the one which is at bar, is a lease with an option to purchase.

[29] Smith Brothers says that it has historically acquired vehicles and equipment for its logging concern through a variety of methods. These include conditional sales agreements, term loans with chattel mortgages, and lease/option agreements. Each arrangement is essentially an alternative method of acquiring vehicles and equipment, although Smith Brothers admits that it has not always exercised its options to purchase leased property.

[30] If s. 11.3(a), properly construed, elevates form over substance, then anomalies arise under the CCAA. As in the case at bar, property acquired by way of lease/option can be lost to the debtor while that acquired by term loan or conditional sales agreement would not (at least not without the leave of the court).

[31] The critical issues, then, are whether s. 11.3(a) is to be construed as covering all leases, including all forms of Lease Plus, or whether it is to be confined to "true leases" and if

so, what are the criteria upon which certain forms of Lease Plus are to be excluded?

[32] Much PPSA litigation has of course concerned itself with whether a document in the form of a lease is nevertheless to be considered a financing agreement.

[33] However, it will be observed that the need and basis for segregating various types of leases is expressly dictated by the PPSA. That is, the legislation distinguishes between a true lease and one which creates a security interest, that is one which in reality secures payment or performance of an obligation.

[34] There is no express need to distinguish between forms of leases under s. 11.3(a) of the CCAA. Does a proper construction of the section imply that need?

[35] I approach the construction of s. 11.3(a) by considering the intention of Parliament and the object and scheme of the CCAA.

[36] The Court of Appeal considered the purposes of the CCAA in ***Chef Ready Foods Ltd., supra***.

[37] Mr. Justice Gibbs made reference to S. E. Edwards, "Reorganization Under the ***Companies' Creditors Arrangement Act***"

(1947), 25 Can. Bar Rev. 587 as explaining "very well the historic and continuing purposes of the Act" (at 318):

> It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
>
> (Gibbs J.A. quoting Edwards)

[38] Mr. Justice Gibbs was considering whether the CCAA could operate to stay a bank's realization under a s. 178 ***Bank Act*** security. In holding that it could, Mr. Justice Gibbs noted that Canadian courts "have shown themselves partial to a standard of liberal construction which will further the policy objectives" of the CCAA (at 320). [On the purpose and object of the CCAA see also ***Re Repap British Columbia Inc.*** (9 January 1998), Vancouver A970588 (B.C.S.C.) and ***Re Starcom International Optics Corporation*** (6 March 1998), Vancouver A980298 (B.C.S.C).]

[39] ***Chef Ready Foods Ltd., supra*** was considered by the Ontario Court of Appeal in ***Nova Metal Products Inc. v. Comiskey (Trustee of)*** (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101.

[40] Finlayson J.A. (Krever J.A. concurring) said this of the purpose of the CCAA (at O.R. 297):

> It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

Doherty J.A. dissented, but his views on the purpose and objects of the CCAA reflect those of Gibbs J.A. in ***Chef Ready Foods Ltd., supra*** Mr. Justice Doherty writes (at O.R. 306-307):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court supervised attempt to reorganize the financial affairs of the debtor company is made. . . . The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose, ***Interpretation Act*** R.S.C. 1985, c. I-21, s. 12; ***Chef Ready Foods Ltd. v. HongKong Bank of Canada, supra*** *(sic)*, at p. 14 of the reasons.

[41] I approach s. 11.3(a) with that spirit, that is, with the perspective that a liberal construction which furthers the policy objectives of the ***Act*** will dictate a narrow construction of the types of arrangement which are excepted from a stay order under s. 11.3(a). I underline, however, that any such construction must be intellectually defensible on the basis of the words which Parliament has used in the section -- I am not to redraft the section in the guise of construing it.

[42] The decision of the Court of Appeal in ***Quintette Coal Ltd. v. Nippon Steel Corp.*** (1990), 51 B.C.L.R. (2d) 105 is also of assistance.

[43] There, certain Japanese corporate debtors of Quintette Coal Ltd. ("Quintette") sought to set off monies owing to them by Quintette against payments due Quintette for deliveries of coal. Quintette was then under CCAA protection and the issue centered on the scope of s. 11 and the jurisdiction to restrain the proposed setoff.

[44] Gibbs J.A. cited numerous decisions on s. 11 and concluded (at 113):

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise

> or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially. It would be a reasonable expectation that it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from or services thereafter received from the debtor company, as is the case here. In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances.
>
> The order made by Mr. Justice Thackray was in accord with his understanding of the "overall intention of the Act" and consistent with the reported cases. It falls well within the "general principle" distilled from those cases. At p. 199, after considering the submissions of counsel for the Japanese companies, he said:
>
> > I must look to the overall intention of the Act, and, as has been put before me by Quintette, what is required within an order to allow Quintette the time to reorganize and make a proposal. Unless there is a sound legal principle for doing so, I must not carve out one portion of the order and give an advantage to one creditor over another. I have not acceded to the arguments of counsel for J.S.I. and consequently I cannot find the legal basis for compromising the effect of the ex parte order.

[45] It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

> . . . where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries . . .

[46] Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the

subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.

[47] To repeat the relevant portion of the section:

> 11.3 No order made under s. 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for . . . use of leased or licenced property. . . provided after the order is made;

It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.

[48] "Payment for use" is the essential basis of a true lease covering personal property. As Professor Cuming notes (in "True Leases", *supra*, at 263):

> Under a true lease, the lessor surrenders his possessory right in chattels to the lessee in return for an undertaking by the lessee to perform certain acts which usually involve the payment of money to the lessor. The lessee has obligations, but the transaction cannot be characterized as a security agreement because the interest of the lessor is not related to those obligations. In other words, the lessor does not remain owner merely to ensure or to induce performance of the lessee's obligations. He remains owner because a bailment contract does not involve the transfer of ownership to the bailee.

[49] In the lease/option agreements at bar, the remedy which Ford Credit invokes is found in clause 21 of the Agreements. That clause reads:

> Default: If You Fail to make any payment under this Lease when it is due, or if You fail to keep any other agreement in this Lease, Dealer may terminate this Lease and take back the Vehicle. Dealer may go on your property to retake the Vehicle. Even if Dealer retakes the Vehicle, You must still pay at once the monthly payments for the rest of the lease term and any other amounts that You owe under this Lease. Dealer will subtract from the amount owed sums received from the sale of the Vehicle in excess of what Dealer would have had invested in the Vehicle at the end of the lease term. You must also pay all expenses paid by Dealer to enforce Dealer's rights under this Lease, including reasonable solicitors' fees as permitted by law, and any damages caused to Dealer because of your default. Dealer may sell the Vehicle at public or private sale with or without notice to You.

[50] Now I should say that Ford Credit does not indicate in its Notice of Motion that it expressly invokes clause 21, but I conclude that I must analyze the case on the basis that it seeks to pursue its contractual remedies. What else can it pursue but the remedies for which it has bargained?

[51] Ford Credit may say that it is prepared, at this time, to forego the benefit of the acceleration provision in clause 21. But this overlooks the fact that clause 21, regardless of whether it is fully invoked, nevertheless assists us in characterizing what the document is as a matter of law. Further, the invocation of clause 21 is not the unilateral decision of Ford Credit. The lessee is entitled to insist on

the sale of the vehicle and the benefit of any credit in his or her favour as set out in the clause.

[52] Returning to the analysis, s. 11.3(a), by referring to "payment for use", evokes, as I have said, the notion of a true lease arrangement.

[53] Clause 21 of the lease/option agreements is hardly that. Not only is the lessee dispossessed of the vehicle on default, he or she is still liable for the monthly payments for the unexpired term. The lessee in that situation is of course credited with the amount, if any, which the dealer receives on a resale of the vehicle "in excess of what Dealer would have had invested in the Vehicle at the end of the lease term".

[54] Clause 21 is not limited to "payment for use". It goes far beyond that and secures the entire term of lease payments.

[55] The presence of the acceleration provision is itself telling. Once again, I refer to Professor Cuming's article (*supra*, at 279):

> Some American courts have recognized as an *indicium* of a security agreement a provision in a lease under which failure by the lessee to make one or more lease payments or to otherwise to perform his obligations under the contract permits the lessor to accelerate a payment date for all unpaid lease payments. An acceleration clause is important in an instalment debt transaction between a debtor and a creditor because it enables the creditor on default by his debtor to seek the payment of the entire debt rather

> than having to wait until each instalment comes due. However, while the relationship between a lessor and a defaulting lessee may be one of creditor and debtor, an acceleration clause should, at least, in some cases, be viewed as foreign to the lessor -- lessee relationship. Unlike a defaulting buyer or borrower, a lessee is generally not obligated under the rules of damages to pay a specific predetermined sum to the lessor. The lessor may well be entitled to damages for breach of contract, but there is no certainty that those damages will be assessed as the equivalent of all rental payments owing under the lease with or without deduction of an amount realized from the sale of the leased chattels by the lessor. (footnotes omitted)

[56] What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

[57] To put the matter in a slightly different way: Ford Credit's lease does not simply require "payment for . . . use of leased or licenced property", clause 21 secures payments when the property will clearly not be <u>used</u> by the lessee after a default and a retaking by the lessor.

[58] Further, can one say that the leases here contemplate payments by the lessee only for the use of the vehicles? That after all is the epitome of a true lease -- that is, a contract of bailment. Once again, clause 21 assists. On a default, the lessee is liable for the lease payments for the unexpired term. However, it is contemplated that the dealer will sell the vehicle and:

> . . . will subtract from the amount owed sums received from the sale of the Vehicle in excess of what Dealer would have had invested in the Vehicle at the end of the lease term.

[59] I can only conclude that by crediting the lessee in these circumstances with the excess sum defined in clause 21, the document is implicitly (and fairly) ensuring that even a defaulting lessee will enjoy whatever equity he or she has effectively built up in the vehicle.

[60] From this perspective one can say that the lessee under these leases is not simply paying for use of the vehicle. He or she is potentially acquiring, as well, equity therein.

[61] It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use and equity are not. Similarly payments for use and equity and an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

[62] Having reached this conclusion, what are the criteria for exclusion of arrangements from the scope of s. 11.3(a)? It is here that the PPSA jurisprudence offers some useful guideposts.

[63] ***Re Bronson*** (1995), 34 C.B.R. (3d) 255 is a decision of Master Powers sitting as a Registrar in Bankruptcy. His decision was affirmed on appeal by Mr. Justice Lamperson, (1996), 39 C.B.R. (3d) 33 (B.C.S.C.).

[64] Master Powers' decision offers a thorough review of the law on when a lease/option agreement will be construed as a security agreement for the purposes of the seize or sue provision in s. 67 of the PPSA S.B.C. 1989, c. 36.

[65] Master Powers quotes this extract from R.C.C. Cuming and R.J. Wood, ***British Columbia Personal Property Act Handbook*** (Toronto: Carswell, 1990):

> If a transaction is one under which a party gives or recognizes that someone else has an interest in his or her property in order to secure payment or performance of an obligation, it is a security agreement. (p.31)
>
> If the commercial realities, *i.e.,* the substance of the transaction, point to a secured financing arrangement rather than to a bailment in the case of a lease, or an agency relationship in the case of a consignment, then the transaction is a security agreement even though it takes the form of a lease or consignment, and even though there is no provision vesting title in the lessee or consignee. Likewise the fact that a lease provides for a purchase option exercisable by the lessee does not by itself dictate (as it did under the sale of goods on conditions act)

> that transaction is to be regarded as a security lease. (p. 31)
>
> The general approach is to examine carefully the relationship between the lessor and lessee in order to determine whether or not in that relationship the standard indicia of a secured credit arrangement are to be found. If the lessee is required to pay what is the equivalent of the lessor's capital investment plus a credit charge at the rate existing at the date of the agreement, there is strong evidence of a secured sale. A clause in a lease giving to the lessee the option to purchase the goods at less than their expected market value (as determined at the date of execution) indicates that the lessee has acquired an equity in the goods not unlike that which would have been acquired under an instalment purchase contract. However, the fact that at the end of a lease term roughly equivalent to the useful life of the goods the lessee can purchase the goods at their then market value does not prevent characterization of the transaction as a security agreement. Evidence that the lessee bears some of the obligations of ownership such as the requirement to repair and insure the goods provide some persuasive but not determinative indication of a security agreement. In one case, the court was prepared to look at the business activities of the lessor to determine whether or not it had a lessor's facilities and methods of operation and to take this into consideration in making the determination. (p.32-33)

[66] The learned Master also referred to a checklist prepared by Professor Cuming in September, 1991 wherein he summarized the considerations taken into account by American courts in determining whether a document is a true lease or a security agreement.

[67] These criteria are as follows:

1. Whether there was an option to purchase for a nominal sum;

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;

3. Whether the nature of the lessor's business was to act as a financing agency;

4. Whether the lessee paid a sales tax incident to acquisition of the equipment;

5. Whether the lessee paid all other taxes incident to ownership of the equipment;

6. Whether the lessee was responsible for comprehensive insurance on the equipment;

7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;

8. Whether the agreement placed the entire risk of loss upon the lessee;

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);

13. Whether there was a default provision in the lease inordinately favourable to the lessor;

14. Whether there was a provision in the lease for liquidated damages;

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;

16. Whether the aggregate rental approximated the value of purchase price of the equipment.

[68] In my opinion s. 11.3(a) does not, at a minimum, include arrangements which are closer to financing agreements than true leases as discussed in the cases on the PPSA legislation.

[69] I turn to review these lease/option agreements before me:

> they disclose a "Retail Selling Price/Lease Price of Vehicle";
>
> they contemplate a cash "down payment" or trade-in;
>
> they include an annualized lease rate, that is, I take it, something akin to a financing charge;
>
> they include an option to purchase exercisable by the lessee at the end of the term;
>
> they require that the lessee insure the vehicle;
>
> they exclude warranties by Ford Credit;
>
> they include the default clause to which I have earlier referred;
>
> they require the lessee to pay all sales, use and other taxes;
>
> they require the lessee to pay all maintenance and operating costs.

[70] Counsel for Smith Brothers stresses the absence of warranties flowing from Ford Credit and submits that the essential function and responsibility of Ford Credit under the agreements is to provide financing.

[71] In earlier PPSA litigation, the fact that the option price reflected the approximate residual value of the vehicle at the

conclusion of the term, was thought to weigh heavily against a finding that the arrangement was in essence a financing agreement.

[72] Here Ford Credit's Customer Service Representative deposes that by her estimate, Smith Brothers does not have equity in any of the leased vehicles and that each is worth significantly less than the current net payout figures.

[73] The president of the petitioner deposes that in his discussions with the manager of the initial vehicle supplier, she indicated that she was confident that they could, if permitted, sell the returned vehicles for a sum in excess of the outstanding amounts under the agreements.

[74] In an early leading case, Henry J. considered the question of the option price in ***Re Ontario Equipment (1976) Ltd.*** (1981), 33 O.R. (2d) 648 (Ont. H.C.J.), affirmed (1982), 35 O.R. (2d) 194 (Ont. C.A.).

[75] Henry J. adopted this practical distinction between a true lease and a lease by way of security (at 651):

> The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or nominal amount . . . if the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a

> real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale (per Croake D. J. in ***Re Crown Cartridge Corp., Debtor*** (1962) 220 F. Supp. 914).

[76] Later commentators have noted, however, that the fact that at the end of a lease term roughly equivalent to the useful life of the goods, the lessee can purchase the goods at their market value, does not prevent characterization of the transaction as a security agreement (per Cuming and Wood, quoted in ***Re Bronson, supra***).

[77] In any event, I should stress that it is not necessary for me to reach a conclusion on whether the lease/option agreements before me on this application are security agreements for the purposes of the PPSA. It is enough that I have concluded that s. 11.3(a) does not cover all types of lease arrangement and that, in particular, those at bar are within the class of arrangement not included within the ambit of the section.

[78] Smith Brothers submitted in the alternative that if s. 11.3(a) does apply, nevertheless, if these arrangements are to be properly construed as financing agreements for the purposes of the PPSA, the court enjoys the jurisdiction under s. 63 of that ***Act*** to stay the enforcement of Ford Credit's rights on default.

[79] Counsel for Ford Credit vigorously opposes any such conclusion and submits that on a division of powers analysis, the CCAA has constitutionally occupied the field to the exclusion of the provincial legislation in these circumstances.

[80] Because of the conclusion that I have reached, it is not necessary for me to deal with this submission.

[81] In the result, the motion is dismissed. The petitioners shall have their costs against Ford Credit on Scale 3.

"BAUMAN, J."
Bauman J.

March 31, 1998
Vancouver, B.C.

ONTARIO PERSONAL PROPERTY SECURITY ACT REFORM: SIGNIFICANT POLICY CHANGES

*Michael E. Burke**

I. INTRODUCTION

On August 1, 2007, the most significant set of revisions to the Ontario Personal Property Security Act[1] (the OPPSA) since 1989 came into force.[2] Bill 152 made approximately 15 changes to the OPPSA (the 2007 Amendments).[3] The 2007 Amendments brought into effect, among other things, two long-overdue major policy initiatives. The first policy change is the inclusion of long-term true leases within the scope of the OPPSA for conflict, registration, perfection and priority purposes. The second major policy change is the override of the effect of an anti-assignment clause in an account or chattel paper as against an assignee. These policy initiatives have long been a feature in the

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1. R.S.O. 1990, c. P.10.
2. The OPPSA amendments are contained in Schedule E to Bill 152, entitled "An Act to modernize various Acts administered or affecting the Ministry of Government Services, 2006". For an overview of the PPSA amendments made by Bill 152, see (2007) 26(3) Nat. B. L. Rev.
3. Two of the amendments contained in Bill 152 have not yet come into force. Those two amendments deal with (i) the simplification of the rules for determining where to register security interests in certain types of collateral, such as mobile goods, intangibles and documentary intangibles, and (ii) the elimination of the "check-box" collateral classification system. The Ontario government has correctly decided that it will not bring this first amendment into force until a critical mass of other PPSA jurisdictions have agreed to introduce the same rules in their jurisdictions. The elimination of the "check-box" collateral classification system will not be implemented until the PPS Registry's computer system has been reprogrammed. At the time Bill 152 came into effect, the Ontario government expected that the computer reprogramming would take about two years to complete. As of December 2009, the author understands that no funds have been appropriated by the Ontario government to begin work on this project and the Ontario government has not given any formal indication on when this project will commence, let alone when it will be completed.

personal property security acts (each, a PPSA) of the other provinces (excluding Quebec) and territories of Canada. Based on the experience of these other PPSA jurisdictions, these two policy shifts will go a long way to reducing the frequency of expensive litigation regarding the characterization of leases for OPPSA purposes and to making receivables financing more efficient.

II. INCLUSION OF LONG-TERM TRUE LEASES

1. Characterization of Leases under the OPPSA

Since the introduction of the PPSA in Ontario in 1976, the issue of whether a lease is a true lease or a security lease has kept more litigators gainfully employed than any other specific OPPSA issue.[4] The reason for this is because, prior to the 2007 Amendments, the treatment under the OPPSA between a security lease and a true lease was so completely different: if a lease was characterized as a true lease, then that lease was completely outside the scope of the OPPSA, but if that lease was characterized as a security lease, then it was completely within the scope of the OPPSA. Prior to the 2007 Amendments, the characterization of leases under the OPPSA was an "all or nothing" game. The 2007 Amendments have done away with this "all or nothing" game for most (but not all) purposes under the OPPSA. As will be described below, this characterization issue also remains relevant in non-OPPSA contexts.

2. True Leases vs. Security Leases

Before examining the 2007 Amendments that are relevant to lease characterization, it is useful to have a working concept of the distinction between a true lease and a security lease under the OPPSA. The distinction arises out of the language in the application section of the OPPSA. Section 2(a)(ii) of the OPPSA reads as follows:

> Subject to subsection 4(1), this Act applies 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 . . . [a] *lease . . . that secures payment or performance of an obligation* . . . (emphasis added)

Therefore, a lease that "secures payment or performance of an obligation" (a "security lease") falls completely within the OPPSA. A

4. Canadian Bar Association — Ontario, *Submission to the Minister of Consumer and Commercial Relations concerning the Personal Property Security Act* (Toronto: Canadian Bar Association — Ontario, 1998) (the 1998 Submission) at p. 8.

lease that does not secure payment or performance of an obligation is a true lease and, prior to the 2007 Amendments, fell completely outside the OPPSA. The $64,000 question that lawyers, lessors and courts have had to grapple with is what is meant by the words "that secures payment or performance of an obligation"?

Part of the difficulty in distinguishing between a "security lease" and a "true lease" and undoubtedly a key reason for why this issue has been litigated so often is that the OPPSA provides virtually no guidance on when a lease transaction will be considered to be a security lease. Neither the term "security lease" nor the term "true lease" is used or defined in the OPPSA.[5] Moreover, the OPPSA does not contain any presumptions such as those contained in the Uniform Commercial Code of the United States of America (UCC).[6]

When determining the characterization of a lease agreement, Canadian courts have, for the most part, used a typical conditional sale or, in the case of a sale-leaseback transaction, a typical chattel mortgage as a benchmark.[7] If the terms of the lease agreement are, on balance, closer to a conditional sale or chattel mortgage, as applicable, than a true lease, then that agreement will generally be held to be a security lease. In other words, the characterization process can be viewed as a scale, with the ultimate characterization of the lease being based on the weighing of a number of factors or indicia. Although Canadian courts will refer to various indicia or factors as being relevant in their determination as to the characterization of a lease, they rarely indicate the relative weight given by them to each of the indicia or factors.

It is possible, however, to make the following generalizations from the case law. First, from the universe of factors or indicia that have

5. Neither of these terms is used or defined in any of the other PPSAs.

6. UCC §1-203 contains a list of factors that create presumptions for and against security interests created by lease. This approach does not solve the characterization problem. Indeed, §1-203(a) provides that this issue will be "determined by the facts of each case". As a result, the inclusion of such presumptions has not been successful in bringing certainty to this characterization issue in the United States. Interestingly, the Ontario Bar Association's Personal Property Security Law Sub-Committee, in its 1993 Submission to the Minister of Consumer and Commercial Relations (a copy of which is attached as Appendix A to the 1998 Submission), recommended that the OPPSA be amended to substantially include the presumptions in UCC §1-203. The Ontario government did not adopt this recommendation and this approach was not recommended by the Personal Property Security Law Sub-Committee in the 1998 Submission.

7. See Jacob S. Ziegel and David L. Denomme, *The Ontario Personal Property Securities Act: Commentary and Analysis*, 2nd ed. (Toronto: Butterworths, 2000), pp. 59-60; Ronald C.C. Cuming, Catherine Walsh and Roderick J. Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005), pp. 69-70.

been mentioned in the jurisprudence, some factors or indicia (referred to in this paper as "primary factors") are clearly more important than other factors or indicia (referred to in this paper as "secondary factors"). Second, the presence of a primary factor in a lease will often be determinative of the characterization of the agreement. Third, secondary factors generally have a corroborative value and are not in and of themselves determinative of the characterization. Accordingly, the presence of a number of secondary factors that are indicative of a characterization that is contrary to the characterization indicated by the primary factor will not be sufficient to overturn the weighting given by a court to the primary factor.[8] Fourth, in those situations where the primary factor is ambiguous or absent, then the relative weighting given by a court to the secondary factors will be relevant in determining the characterization of the lease in question.

3. Primary Factors

There are only a handful of primary factors that have consistently been identified or applied as such in the case law. Four of the most important primary factors are as follows:

(i) *Relevance of Purchase Option Price.* A *nominal* purchase option price (in the sense that the option price is significantly below the fair market value of the leased equipment on the purchase option date) strongly indicates a security lease. The *lack* of a fair market value option price is generally sufficient to tip the scale in favour of a security lease characterization. Conversely, an end-of-term fair market value option price, exercisable when the leased property still has market value,[9] will almost always indicate a true lease.[10] The fair market value option price can be

8. See, *e.g.*, *DaimlerChrysler Services Canada Inc. v. Cameron*, [2007] B.C.J. No. 456 (QL), 279 D.L.R. (4th) 629 (C.A.) (*Cameron*). See also *Accent Leasing & Sales Ltd. v. Babic*, [2007] B.C.J. No. 2158 (QL), 62 R.P.R. (4th) 269 (S.C.), which accepts the conclusions of the *Cameron* case and adopts a characterization of the lease based on the factors present therein.

9. Where the equipment is essentially worthless at the end of the term, a court will conclude that the lessee has financed its acquisition given that the equipment is of no value to any other party. Examples would include where the lease term is such that the useful life of the equipment would have expired (see *Gatx Corporate Leasing Inc. v. William Day Construction Ltd.*, [1986] O.J. No. 806 (QL), 6 P.P.S.A.C. 188 (Ont. H.C.J.)). This may also be the result where the equipment in question is unique to the lessee and cannot be used by any other person (*e.g.*, specialized signage).

10. If the lease term is roughly equal to the useful life of the leased property, then the

determined in two ways: the lease may provide for a market-price evaluation at the end of the term of the lease or, alternatively, the parties may determine a pre-estimate of the market value at the signing of the lease. In either case, if the option price is reflective of the market value (or a reasonable pre-estimate thereof) when the leased property still has market value, the lease will be a true lease.[11] The rationale for this primary factor is rather straightforward. If the lessee is required to pay the actual value of the property at the end of the lease at a time when the property still has value, then the lease payments cannot reasonably be said to have been payments towards an equity interest in the property. Alternatively, a purchase option that may be exercised at a nominal or below fair market value price (or below a reasonable pre-estimate thereof) strongly suggests that the lease payments were consideration for an equity interest in the property.

(ii) *Mandatory Purchase Options.* If a lessee is obligated to purchase the equipment at the end of the lease (as opposed to the decision to purchase being at the option of the lessee) or title to the leased equipment is automatically transferred to the lessee at the end of the lease term, the lease agreement is not a lease at law, but a conditional sale contract.[12]

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presence of a fair market value option price will not prevent a security lease characterization. A fair market value option price will only be indicative of a true lease if the option can be exercised at a time when the leased property has a significant commercial value (see *First City Capital Ltd. v. Hall*, [1988] O.J. No. 2140 (QL), 67 O.R. (2d) 12 (H.C.J.), supp. reasons 67 O.R. (2d) at p. 19, revd on other grounds [1993] O.J. No. 135 (QL), 11 O.R. (3d) 792 (C.A.); *Unilease Inc. v. Graphic Centre (Ontario) Inc.*, [1982] O.J. No. 398 (QL), 2 P.P.S.A.C. 197 (Co. Ct.); *Ontario Equipment (1976) Ltd. (Re)*, [1981] O.J. No. 2509 (QL), 33 O.R. (2d) 648 (S.C.), affd [1982] O.J. No. 3105 (QL), 35 O.R. (2d) 194*n* (C.A.) and *Leaseway Autos Ltd. v. Burlingham* (1986), 25 D.L.R. (4th) 294, 45 Sask. R. 254 (Q.B.)).

11. *Cameron, supra*, footnote 8. Prior to the *Cameron* case, there was no definitive ruling on the effect of a fixed option price, which is based on a genuine pre-estimate and which price is more than a nominal amount but less than the actual fair market value. Some cases have found pre-estimated option prices that ultimately turn out to be less than the fair market value of the leased equipment as being inconsistent with a true lease (see *Bronson (Re)*, [1995] B.C.J. No. 1579 (QL), 34 C.B.R. (3d) 255 (B.S.S.C.), affd [1996] B.C.J. No. 216 (QL), 39 C.B.R. (3d) 255 (B.C.S.C.)). However, fixed option prices that do reflect anticipated (or historical) fair market value have also been found in other cases to be consistent with true leases (see *Ambassador Graphic Arts Supplies Ltd. (Re)*, [1995] O.J. No. 4549 (QL), 32 C.B.R. (3d) 180 (Ont. C.J. (Gen. Div. in Bkcy.) and *Finchside International Ltd. (Re)*, [1994] O.J. No. 3266 (QL), 10 P.P.S.A.C. (2d) 33 (Ont. Ct. (Gen. Div.)).

Accordingly, such a "lease" (that is, the disguised conditional sale contract) will be subject to the OPPSA. Moreover, leases that do not provide the lessee with an option to return the equipment (*i.e.*, the only available options to a lessee at the end of the scheduled term of the lease are either to purchase the leased property or to renew the lease) can be expected to be construed as conditional sales, because the inability of the lessee to return the leased property at the end of the term will likely be construed as effectively requiring the lessee to acquire the leased property.

(iii) *Open-End Leases/Guaranteed Residual Clauses.* Where the lessee is liable under an open-end lease for any deficiency in the sale of the leased property following its return at the end of the scheduled lease term, the current line of authority is to treat such a lease as a security lease, because a lessor is "guaranteed" to receive a minimum return on the transaction.[13] If, however, the lessee's residual value guarantee only applies in the case of an early termination of the lease, whether voluntarily by the lessee or by the lessor as a result of the occurrence of a default, but not at the end of the scheduled lease term, then such a residual value guarantee will not constitute a primary factor that is indicative of a security lease.[14]

(iv) *Sale-Leaseback Transactions.* Prior to the commencement of a sale-leaseback transaction, the property is owned and used by the prospective lessee. The buyer (*i.e.*, the prospective lessor) buys the property from the seller (*i.e.*, the prospective lessee) and then immediately leases it back to the seller

12. See, *e.g.*, *Federal Business Development Bank v. Bramalea Ltd.*, [1983] O.J. No. 297 (QL), 144 D.L.R. (3d) 410 (Ont. H.C.J.), affd 150 D.L.R. (3d) 768*n* (C.A.) (a PPSA case); *Lee v. Butler*, [1893] 2 Q.B. 318 (Eng. C.A.) and *Helby v. Matthews*, [1895] A.C. 471 (H.L.) (the latter two cases regarding the commercial law characterization of a hire-purchase vs. a sale).

13. See, *e.g.*, *Crop & Soil Service, Inc. v. Oxford Leaseway Ltd.*, [2000] O.J. No. 1372 (QL), 48 O.R. (3d) 291 (C.A.). In the Crop & Soil case, the lease included an option to purchase at the end of the lease's term for $7,000. If the lessee chose not to exercise this option, the leased vehicle would be sold at auction, and the lessee would be accountable for any deficiency if the sale price was less than $7,000, or be entitled to any surplus if the sale price was greater than $7,000. The Ontario Court of Appeal construed the $7,000 figure not as the market value estimated by the parties at the signing of the lease, but rather as a "balance due and owing in respect of a debt obligation at the end of the lease" (see para. 9).

14. See *Cameron, supra*, footnote 8. See, however, the critique of the *Cameron* case in Jacob S. Ziegel, "Security Interests and Continuing Challenges in Characterization of Equipment Leases: *DaimlerChrysler Services Canada Inc. v. Cameron*" (2009), 47 C.B.L.J. 283 at pp. 290-94.

(lessee). A sale-leaseback transaction has been determined by the courts to be a disguised loan and, therefore, subject to the OPPSA.[15] Courts will look at the entire sale-leaseback transaction. Accordingly, this determination will be the same, even if the terms of the lease in such transaction would, in isolation, be indicative of a true lease characterization.

4. Secondary Factors

There is a much longer list of secondary factors that have been identified or applied as such by the courts. Examples of secondary factors include the following:

(i) *Ability to Exchange/Replace Leased Equipment.* The ability of the lessee to exchange or replace the original equipment at any time will suggest that the leased equipment is not "unique" to the lessee's needs and, therefore, is a factor that is indicative of a true lease characterization.[16]

(ii) *Acceleration Clauses.* The presence or absence of acceleration clauses may also be relevant. The ability of a lessor to accelerate payment of all future rental installments and the residual value are generally considered to be inconsistent with a true lease, since the lessor has no incentive to mitigate damages by finding a new lessee for the leased property.[17] However, an acceleration clause that limits the lessor's damages to the present value of the remaining rental stream, plus the present value of the residual value at the scheduled end of the lease term, minus the net proceeds received from the sale of the leased property (assuming that such sale has been completed on a commercially reasonable basis) is equally consistent with a lessor recovering damages for loss of bargain under a true lease. If the acceleration clause in the lease is drafted in more narrow terms, then this indicia of favouring a security lease characterization could be reduced or even be converted into favouring a true lease characterization. For example, if the acceleration clause in a lease limited the lessor's damages to the present value of the remaining rental stream only, then such a clause would be

15. *Speedrack Ltd. (Re)* (1980), 1 P.P.S.A.C. 109, 11 B.L.R. 220 (Ont. H.C.J.).
16. See, *e.g.*, *Stark Coaxial Systems Inc. (Re)*, [1985] O.J. No. 1738 (QL), 6 P.P.S.A.C. 300 (S.C.).
17. See, *e.g.*, *Bronson (Re)*, *supra*, footnote 11; *Standard Finance Corp. v. Econ Consulting Ltd.*, [1984] 4 W.W.R. 543 at p. 548, 28 Man. R. (2d) 99 (Q.B.).

equivalent to a "closed end lease", because the lessee in such a situation would not be obligated to compensate the lessor for the residual value of the leased property. Accordingly, an acceleration clause that is limited to the rental stream only (where the residual value of the leased property is not nominal) should not be indicative of a security lease.

(iii) *Full Payment Lease.* If a lessee is required to pay what is the equivalent of the original cost of the leased property (*i.e.*, the lessor's capital investment), plus a finance charge based on the rate existing at the date of the lease agreement, it does not necessarily follow that such an agreement is a security lease, especially if the lease contains a true fair market value purchase option. In such a lease, it is possible that the lessee has simply agreed to pay a premium for the use of the leased property.

(iv) *Security Deposits.* Substantial security deposits are indicative of a security lease in that the lessee is required to post collateral in order to obtain the equipment.

(v) *Down Payments.* Substantial down payments are indicative of a security lease, because the lessee may be viewed as acquiring an equity interest in the leased property.

(vi) *Maintenance, Insurance and Risk of Loss.* Where the lease agreement places responsibility on the lessee for maintenance, insurance and risk of loss, such factors provide some evidence of a security lease, as this suggests that some of the "risks of ownership" are borne by the lessee.[18] However, covenants such as these would appear to be equally consistent with a true lease[19] because the lessor is trying to protect its equity interest in the residual value of the leased property. Accordingly, the presence of such covenants in a lease provides some, but rather weak, evidence of a security lease.

(vii) *Lessor's Documentation.* If a lessor has a variety of lease forms that it uses for different transactions (*i.e.*, one "true lease" form and one "security lease" form) and these forms are substantially different in substance and content with respect to the relevant characterization factors, some weight

18. See *Bronson (Re)*, *supra*, footnote 11, and *Smith Brothers Contracting Ltd. (Re)*, [1998] B.C.J. No. 728 (QL) (B.C.S.C.).

19. See *Cameron*, *supra*, footnote 8, where excess kilometre charges and maintenance obligations were found to be factors indicating a true lease because they protected the lessor against reduction of market value upon expiration of the lease due to excess "wear and tear".

will be given by the court to a lessor's argument that if it intended to enter into a "security lease transaction", it would have used its "security lease agreement" form.[20]

5. "Red Herrings"

(i) *Inclusion of Provisions or Terminology Prescribed by Statute.* The fact that the lease agreement must set out certain statutorily prescribed "line items"[21] should not be relevant to the ultimate characterization of the substance of the transaction. Nevertheless, some courts have incorrectly stated that the inclusion of such matters in a lease is indicative of a security lease, but did not appear to consider that such matters were required to be included in the lease by applicable laws.[22]

(ii) *Provisions Authorizing Lessor to File Financing Statements.* The presence of these provisions should not be relevant in the characterization process as the filing of a financing statement does not evidence the intention of the parties and/or the substance of the transaction.[23]

(iii) *Exclusion of Warranties on the Part of Lessor.* The exclusion of all warranties on the part of a lessor (except those that are given by statute and that cannot be waived by the lessee) can be viewed as equivocal evidence in the characterization process. It is typical for both a lessor under a financing lease or a lessor under a true lease to exclude (to the fullest extent permitted by applicable law) all warranties on the basis that the lessor is not the manufacturer.[24]

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20. See, *e.g.*, *Bronson (Re)*, *supra*, footnote 11.
21. For example, cost of credit disclosure rules have been extended to leases in a number of provinces and lessors are required to make the following disclosures in respect of a consumer lease transaction: "capitalized amount"; "annualized percentage rate" or "APR"; "implicit finance charge" and "total lease cost". (See, *e.g.*, paras. 8, 16, 17 and 18 of s. 74(2) of Ont. Reg. 17/05 to the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A).
22. See, *e.g.*, *Bronson (Re)*, *supra*, footnote 11 and *Smith Brothers*, *supra*, footnote 18.
23. Indeed s. 46(5)(b) of the OPPSA expressly provides that a registration under the OPPSA in respect of a transaction does not create a presumption that the OPPSA applies to that transaction.
24. See *Smith Brothers*, *supra*, footnote 18, but see *Accent Leasing*, *supra*, footnote 8, where the court states that the exclusion of warranties on behalf of the lessor is suggestive of a security lease.

6. Other Factors

There are, nevertheless, more than a few cases that cannot be easily explained by the above generalizations.[25] In these cases, it seems that other factors external to the terms of the lease agreement have been used by the courts to tip the scale from what appeared to have been a true lease to a security lease characterization. Not surprisingly, many lessors (except those where the value of their leased goods does not justify the cost of making an OPPSA filing) became unwilling to play the characterization game. It was simply too much of a crapshoot. Instead, these lessors began to file financing statements in respect of their leases, knowing that s. 46(5)(b) of the OPPSA permits a lessor to do a precautionary OPPSA filing without that filing creating a presumption that the lease is a security lease.

7. True Leases and the OPPSA after the 2007 Amendments

To introduce more certainty on this issue as well as to bring the OPPSA in line with the PPSAs in other jurisdictions in Canada, the 2007 Amendments introduced a new concept of "leases for a term of more than one year" and added to the application provisions in s. 2 of the OPPSA the following words: "a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation".[26]

The effect of this addition is to effectively make such long-term true leases deemed security interests under the OPPSA. Accordingly, such long-term true leases will fall within the scope of the OPPSA for most purposes. This means, for example, that a lessor's ownership of the leased property can be defeated by, among others, a lessee's trustee-in-bankruptcy and by any secured party with a perfected security interest in such leased property, because the registration, perfection and general priority provisions of the OPPSA now apply to these long-term true leases.

25. See, *e.g.*, *Adelaide Capital Corp. v. Integrated Transportation Finance Inc.*, [1994] O.J. No. 103 (QL), 16 O.R. (3d) 414 (Gen. Div.), where the nature of the lessor's business was used as a primary factor supporting a security lease characterization, even though the judge conceded that the leases had all of the indicia of true leases. Inferences from other cases suggest that the nature of the lessor's business is used as a secondary factor, where the primary factors are inconclusive or as additional support for the characterization indicated by the primary factors (see *Bronson (Re)*, *supra*, footnote 11; *Finchside International Ltd. (Re)*, *supra*, footnote 11).

26. OPPSA, s. 2(c). To give effect to this inclusion of long-term true leases, a number of complementary changes were made to the OPPSA, such as to the definitions of "debtor", "purchase-money security interest" and "security interest".

The inclusion of long-term true leases under the OPPSA will have some side benefits for lessors of such leases. They will be able to take advantage of the mobile goods conflict rule under s. 7 of the OPPSA and the special fixture and accession priority rules under ss. 34 and 35 of the OPPSA, all of which are much more advantageous to lessors than the common law rules that apply to interests that are not subject to the OPPSA.[27]

These long-term true leases will not, however, be subject to the rights and remedies provisions set out in Part V of the OPPSA.[28] Accordingly, the characterization issue will continue to be relevant under the OPPSA in the event that a lessee defaults under the lease and the lessor decides to exercise its remedies under the lease.

27. The following example illustrates one of the potential advantages of s. 7 of the OPPSA from a true lessor's perspective. If a fleet of trucks is leased to a trucking company with its chief executive office located in Ontario under a 13-month true lease and those trucks will be used by the trucking company in each of the provinces from British Columbia to Ontario, then prior to the 2007 Amendments the lessor would not have been required to register a financing statement in respect of that true lease under the OPPSA, but the lessor should have registered a financing statement in respect of the true lease in each of those provinces outside Ontario. These multiple PPSA registrations should have been made because the 13-month true lease would have been caught by the registration and perfection rules under each of the PPSAs in Western Canada and the mobile goods conflict rule in each of those provinces could not have been safely relied upon by the lessor to exempt the application of such rules in all potential PPSA-related priority disputes. Under each of the PPSAs in Western Canada, its mobile goods conflict rule has an important exception that does not appear in the OPPSA (see, for example, B.C. PPSA, s. 7(4)(b)). Under this exception, if the law governing the perfection of a security interest (in our example being Ontario because that is where the lessee's chief executive office is located) does not provide for public registration or recording of the security interest (in our example being a long-term true lease) or a notice relating to it and the collateral (in our example being the leased trucks) is not in the possession of the secured party (in our example being the lessor), the security interest (in our example being the lessor's ownership in the leased property) will be subordinate to an interest in goods acquired when the collateral was located in such PPSA province. Although it was (and is still) possible to make a precautionary filing under the OPPSA in respect of a true lease pursuant to s. 46(5)(b) of the OPPSA, it is not clear whether this provision will be sufficient to satisfy the requirement in each of the PPSAs in Western Canada that the jurisdiction in which the chief executive office is located provides for a public registration or recording in respect of long-term true leases. Subsequent to the 2007 Amendments, the lessor in the above example would only be required to register under the OPPSA and would not need to register under any other PPSA.

For the beneficial effects of the OPPSA rules over the pre-PPSA common law rules for fixtures and accessions, see Ziegel and Denomme, *supra*, footnote 7, at pp. 293-95 (with respect to fixtures) and pp. 308-309 (with respect to accessions) and Michael E. Burke, "Fixture Financing under the PPSA: The Ongoing Conflict between Realty and Fixture-secured Interests" (1986), 24 Osgoode Hall L.J. 547 (with respect to fixtures).

28. OPPSA, s. 57.1.

8. Meaning of "Leases for a Term of More than One Year"

The definition of "leases for a term of more than one year" has an expanded technical meaning, not necessarily evident from the everyday meaning of the phrase. Predictably, it encompasses any true lease with an actual term of more than one year. It also extends to any true lease with the *potential* of having a term exceeding one year (such as a lease for an indefinite term or a lease for a term of less than one year that is automatically renewable for one or more terms, the total of which may exceed one year). In addition, the definition covers an overholding lessee permitted by the lessor. If the initial and any renewal terms of a true lease is less than one year and, with the consent of the lessor, the lessee retains uninterrupted or substantially uninterrupted possession of the leased goods for a continuous period of more than one year, such a lease is subject to the OPPSA, but only after the lessee's possession exceeds the one-year period.

There are two exceptions to this definition. The OPPSA will not apply to a true lease, even if it has a term that is greater than one year, if (i) the lessor is not regularly engaged in the business of leasing goods, or (ii) the leased goods are household furnishings or appliances that are subject to a lease of land and such goods are incidental to the use and enjoyment of the land.

9. Future of the True Lease and Security Lease Characterization

The inclusion of long-term true leases within the scope of the OPPSA will go a long way towards reducing the frequency of litigation in respect of this issue. Where no default occurs under a long-term lease, the need to determine whether such a lease is a true lease or a security lease under the OPPSA will be unnecessary. Only if a default occurs under a lease will the characterization of the lease possibly be relevant for purposes of Part V of the OPPSA. As will be described below, this characterization issue will also remain extremely relevant in non-PPSA contexts and disputes.

The potential to avoid the application of Part V of the OPPSA for a true lease (as opposed to a security lease) is important for a number of reasons. Firstly, lessors in true lease arrangements will not be required to provide notices of disposition to the lessee and other interested parties under s. 63 of the OPPSA or notices of its proposal to accept the collateral in satisfaction of the obligation secured (*i.e.*, proposal to foreclose) under s. 65(2) of the OPPSA. Similarly, if the leased property is "consumer goods" in the hands of the lessee, a

lessor under a security lease will be required to dispose of such consumer goods after seizing it pursuant to s. 65(1) of the OPPSA.[29] Secondly, in the case of true leases, as it was before the 2007 Amendments, a lessor's remedies will be governed by the more lax common law principles and the terms of the lease agreement.[30] Thirdly (and perhaps most significantly), unless the lease agreement provides otherwise, a lessor under a true lease will not be required to account for any surplus realized upon the disposition of the seized leased property.

Outside of the PPSA context, the distinction between true and security leases will be relevant where the lessee becomes insolvent. Under both the Bankruptcy and Insolvency Act[31] (the BIA) and the Companies' Creditors Arrangement Act[32] (CCAA), a lessor under a true lease is not prevented from requiring payment after a lessee initiates insolvency proceedings, while a lessor under a security lease cannot require such payment.[33] Property leased under a security lease can, therefore, remain with the lessee/debtor, and no payments are required to be made to the lessor during the course of the insolvency proceeding. Conversely, if the lessee/debtor fails to make payments

29. In British Columbia, if the leased property is "consumer goods" and the lease is a security lease, then the "seize or sue" provisions under s. 67 of the B.C. PPSA will apply and a lessor must choose between either seizing the leased property or suing for the amount outstanding under the lease.

30. In the United States, lessees under true leases can benefit from the protections provided by Article 2A of the UCC. See Jacob S. Ziegel, "Should Canada Adopt an Article 2A Type Law on Personal Property Leasing?" (1990), 16 C.B.L.J. 369.

31. R.S.C. 1985, c. B-3.

32. R.S.C. 1985, c. C-36.

33. See BIA s. 65.1(4) and CCAA s. 11.01. See *Smith Brothers, supra*, footnote 18, where Justice Bauman adopted a narrow interpretation of s. 11.3(a) (a predecessor to s. 11.01) and found that it was a limited remedy only intended to apply to true leases. See also *International Wall Coverings Ltd. (Re)*, [1999] O.J. No. 5850 (QL) (Ont. C.J.); *Sharp-Rite Technologies Ltd. (Re)*, [2000] B.C.J. No. 135 (QL) (S.C.) and *PSINet Ltd. (Re)*, [2001] O.J. No. 6104 (QL) (Ont. S.C.J.), which have adopted and followed the reasoning in *Smith Brothers*. See also Harvey G. Chaiton and John R. Hutchins, "Equipment Lessors in Restructurings: Hostage Lenders" (2009), 21 Comm. Insol. R. 21 at pp. 23-25 (Chaiton) for a more detailed discussion of the principles established by *Smith Brothers* and its successor cases with respect to the scope and application of s. 11.3(a) (now s. 11.01). For application with respect to the BIA, see *Cosgrove-Moore Bindery Services Ltd. (Re)*, [2000] O.J. No. 1661 (QL) (Ont. S.C.J.), where the court determined that s. 65.1(4) applies with respect to goods leased to the debtor pre-filing and gives the lessor the right to demand immediate payment for the use of the leased goods by the insolvent debtor post-filing, but did not consider the matter of whether "lease" excludes financing leases as have cases involving s. 11.01 of the CCAA. See also Chaiton and Hitchings, *ibid.*, at pp. 26-27 for a more detailed discussion on the possible future interpretations of "lease" within the context of s. 65.1(4) of the BIA.

under a true lease, the lessor has grounds to obtain leave from the court to either exercise remedial provisions under the lease (such as seizure of the leased property) or otherwise compel payment.

The distinction between true lease and security lease will also be relevant in CCAA "restructurings" that are in effect liquidations (*i.e.*, no plan of arrangement is contemplated and the operating lender intends to dispose of its collateral during the period of "restructuring"). The following example will illustrate the concern for an equipment lessor. Assume a printing company files for CCAA protection with the support of its senior operating lender. All creditors are stayed from enforcing their remedies, including the leasing company that leases the printing press, without which the printing company's business would not be able to continue to operate. During the "restructuring" period, the debtor's receivables are maintained or increased while the value of the printing press depreciates. When the printing company's business is sold, the senior operating lender will be able to claim priority to the bulk of the proceeds, because little value will be allocated to the printing press, even though it was the free use of the printing press during the restructuring period that permitted the printing business to continue as a going concern and to generate value for the operating lender.[34] Lessors under true leases, on the other hand, will be spared this result, because they can either require payment under the lease, or use the non-payment as grounds for a court order allowing them to repossess the property.[35]

34. For a more detailed discussion of the true lease/security lease distinction under the CCAA with respect to CCAA liquidations, see Steven J. Weisz, Linc A. Rogers and Stacey McLean, "Striking an Imbalance: The Treatment of Equipment Lessors under Section 11.3 of the CCAA" (2003), 20 Nat. Insol. Review 45.

35. Equipment lessors who are found to have security leases may be further harmed by the granting of court-ordered charges. Under the CCAA, such charges are imposed by the court to secure, for example, the costs of the court-appointed monitor and its legal counsel and the debtor's counsel, debtor in possession financing and the obligation of the debtor to indemnify its officers and directors. Similarly, an interim receiver appointed under the BIA or a receiver and manager appointed under provincial rules of court may have its fees and disbursements and its legal counsel's fees and disbursements secured by a receiver's charge, and borrowings by the receiver or interim receiver may also be secured by a receiver's borrowing charge. These and many other charges are usually secured against all property and assets of the debtor and may be granted priority over existing security interests, including those of equipment lessors. Equipment lessors under a true lease are able to avoid the application of these priority charges as against the leased property because such charges will only apply against the property of the debtor (which will not include any equipment that is leased to a debtor under a true lease). To the extent that realizations from equipment subject to security leases are applied in satisfaction of the obligations secured by the court-ordered

Another situation in which the distinction between true and security lease will continue to be relevant is with respect to the right to keep overhold rent that the lessor has received during the period from the end of the lease term until return of the leased property. In *Kaffa Ltd. v. Newcourt Credit Group Inc.*,[36] the court was of the view that the lease was not a true lease. The court, therefore, required the lessor, based on the principles of unjust enrichment and fair dealing, to allow the lessee to retroactively exercise its purchase option and to refund that portion of the overhold rent that exceeded the purchase option price. Such reasons are less likely to apply if the lessor was receiving the overhold rent under a true lease.

10. Gaps in the 2007 Amendments

Unfortunately, the Ontario government failed to include a transitional provision in the 2007 Amendments, which would have eased formerly OPPSA-exempt true leases into the OPPSA's new regime.[37] As such, lessors under long-term true leases have been involuntarily and perhaps unknowingly swept into the OPPSA, without any accommodation being granted to them to comply with the OPPSA's registration and perfection requirements or to confirm their first-ranking priority position after completing such registrations. As a result, those true lessors that had not done a precautionary OPPSA filing, as contemplated by s. 46(5)(b) of the OPPSA, are now at risk of finding themselves on the losing end of an OPPSA priority dispute (a dispute that they would have been able to avoid prior to the 2007 Amendments).

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charges, the equipment lessors' recovery will be diminished and they will be left to bear a disproportionately higher burden of the cost of restructuring. To avoid this outcome, insolvency practitioners recommend (see, *e.g.*, Chaiton and Hutchins, *supra*, footnote 32, at pp. 29-30) that equipment lessors/financiers take proactive steps at or near the commencement of the case to limit the application of these charges to their equipment, including by making submissions to the court on the inequity caused by compelling them to "donate" the collateral subject to their security for the benefit of other creditors.

36. [1996] O.J. No. 3428 (QL) (Gen. Div.), affd [1996] O.J. No. 4416 (QL) (C.A.).

37. The Ontario government should not entirely be blamed for the absence of a transition provision under the OPPSA for true leases. The Personal Property Security Law Sub-Committee of the Ontario Bar Association, which had proposed the inclusion of long-term true leases as far back as the 1998 Submission, failed to mention the need for such a transition provision. Presumably, because it had become such a widespread practice in the Ontario leasing industry to make precautionary OPPSA registrations in respect of true leases (which registrations could be made without prejudicing the characterization of such true leases), both the Ontario government and the PPSL Sub-Committee failed to anticipate the need for a transition provision.

In order to protect themselves, lessors under long-term true leases will need to file a financing statement under the OPPSA to perfect their deemed security interests in the leased property and will also need to obtain releases, subordination and/or no interest/estoppel letters, to the extent that there are any prior registrations that perfect or could perfect a security interest in the leased property. It is the latter task that can be extremely costly and time consuming.

III. OVERRIDE OF ANTI-ASSIGNMENT CLAUSES

1. Anti-Assignment Clauses under the Common Law

The question of the effectiveness of clauses in contracts that expressly prevent one party from assigning its benefits without the other party's consent (referred to in this paper as "anti-assignment clauses") has not generated much litigation in Ontario. This paucity of litigation, however, masks the uncertainty, controversy and complexity of this issue. Overall, anti-assignment clauses can result in significant direct and indirect costs to borrowers/sellers when financing their receivables, whether the financing is provided in the form of a secured loan, a factoring arrangement or a securitization transaction. Although not perfect, the 2007 Amendments take a big step towards making the financing of receivables and chattel paper more efficient and predictable.

The law regarding the effectiveness of anti-assignment clauses in contracts is unclear.[38] Where there are genuine commercial reasons for the presence of such a clause,[39] Anglo-Canadian common law will not strike down such clauses as being contrary to public policy.[40] The

38. 1998 Submission, *supra*, footnote 4, at p. 19; Canadian Bar Association — Ontario, *Personal Property Security Report: Commentary and Illustrative Opinion* (Toronto: Canadian Bar Association — Ontario, 1997) at p. 131 (the OBA Opinion Report).

39. Examples include (i) respecting the parties' freedom to contract, (ii) preserving the account debtor's set-off rights with respect to new equities that may arise after the assignment, (iii) avoiding the risk provided for under s. 40(2) of the OPPSA of having to pay twice the same amount owing under the contract, because the account debtor accidentally paid the assignor notwithstanding that the assignee had directed the account debtor to pay the assignee directly and (iv) avoiding the possibility of the account debtor having to deal with a third party/assignee who is less willing to make accommodations to the account debtor in terms of the timing of payment. See, *e.g.*, 1998 Submission, *ibid.*, at p. 19; Roy Goode, *Legal Problems of Credit and Security*, 3rd ed. (London: Sweet & Maxwell, 2003), p. 106.

40. See, *e.g.*, *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, [1993] 3 All E.R. 417 at pp. 430-31 (H.L.).

uncertainty relates, however, to the extent of the reach of an anti-assignment clause.

In most cases, it appears that the anti-assignment clause is only effective as between the assignor and the account debtor. In such circumstances, the assignee cannot sue the account debtor directly for amounts owing under the assigned contract,[41] but such a clause can neither be used by the account debtor to restrict what an assignor does with its own property (so long as it does not affect the right of the account debtor to require that it deal exclusively with the assignor),[42] nor be relied on by an assignor to refuse to perform obligations owed to the assignee under the assignment (including the obligation on the assignor to pay over to the assignee any monies received by the assignor from the account debtor).[43] In other cases, the decisions appear to stand for the principle that the assignment is ineffective not only as between the assignor and the account debtor, but also as between the assignee and the assignor.[44] If this latter view is applied, then the assignee's interest/security interest in the contract and in the monies paid thereunder will be void against the claims of the assignor's other secured parties and the assignor's trustee-in-bankruptcy.[45]

41. *Linden Gardens, ibid.*, at pp. 431-32; *Turcan (Re)* (1889), 40 Ch. D. 5 (C.A.).
42. See Goode, *supra*, footnote 39, at pp. 107-10; Ziegel and Denomme, *supra*, footnote 7, at p. 335.
43. *Cawood v. Yablonski*, [1997] S.J. No. 17 (QL), 143 D.L.R. (4th) 65 (Sask. C.A.). See also Cuming, Walsh and Wood, *supra*, footnote 7, at pp. 113-14.
44. *Helstan Securities Ltd. v. Hertfordshire County Council*, [1978] 3 All E.R. 262 (Q.B.). But see *Linden Gardens, supra*, footnote 40, at p. 431 where Lord Browne-Wilkinson suggested that it may be possible to draft an anti-assignment clause that was broad enough to make the assignment void as between the assignor and assignee, but he noted, without expressing a view on the point, that such a clause may be contrary to public policy ("A prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy.")
45. A similar uncertainty used to exist with respect to the effect of an assignment of, or a security interest granted in, a federal Crown debt that did not comply with Part VII of the Financial Administration Act, R.S.C. 1985, c. F-11 (the FAA). Section 67 of the FAA provides as follows: "Except as provided in this Act or any other Act of Parliament, (a) a Crown debt is not assignable and (b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt." In order to validly assign a Crown debt, ss. 68 and 69 of the FAA must be strictly complied with. At one time, it was thought that an assignment made in violation of the FAA was invalid only to the extent that an assignee attempted to exercise "rights or remedies" directly against the Crown debtor. Accordingly, the assignment otherwise remained valid as between the assignor and the assignee and, therefore, any monies received by the assignor would be held in trust for the assignee by the

2. Practical Effects of Anti-Assignment Clauses in Receivables Financings

As a result of the potential consequences of an anti-assignment clause, a common part of the due diligence for most receivables financings is to check the forms of contracts under which the receivables arise to ensure they do not contain anti-assignment clauses. This task is relatively easy to complete where (i) the company (*i.e.*, the proposed borrower/assignor) uses standard forms, (ii) the financier is satisfied that the company's policies do not permit its employees to agree to any restrictions on the company's ability to assign its receivables and (iii) employees strictly comply with such policies. The challenges of satisfactorily completing this due diligence task grows exponentially when a company sells its products or services under negotiated agreements or in response to standard form purchase orders provided by its customers. There may be a myriad of contracts to review, and these contracts may well have anti-assignment clauses in them, in many cases, with different formulations. If they do, this can become a serious impediment to financing the company's business, which may even jeopardize the financial well-being of the company. Where receivables arise under contracts with anti-assignment clauses, such receivables will often be classified by receivables financiers as being ineligible under the credit or securitization agreement or may become subject to additional conditions before they can be treated as eligible.

It is not uncommon in securitizations, for example, to find companies with large pools of receivables owing by investment-grade account debtors, but which cannot be sold because of anti-assignment clauses. In such circumstances, lawyers may be able to suggest creative ways to circumvent the restrictions on assigning such receivables,[46] but financings that rely on creative devices are usually many times more costly to complete and often at lower advance rates

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assignor (see *Northward Airlines Ltd. (Re)* (1981), 37 C.B.R. (N.S.) 137, [1981] 2 W.W.R. 764 (Alta. Q.B.)). This view was expressly rejected by the Supreme Court of Canada in *Marzetti v. Marzetti*, [1994] S.C.J. No. 64 (QL), [1994] 2 S.C.R. 765 at pp. 802-805. See also *Profitt v. AD Productions Ltd. (Trustee of)*, [2002] O.J. No. 1128 (QL), 32 C.B.R. (4th) 94 (Ont. C.A.) in which the grant of a security interest in a Crown debt was also held to be prohibited by the FAA.

46. For a brief description of two simple devices that are used (*i.e.*, a power of attorney and a trust arrangement), see Ziegel and Denomme, *supra*, footnote 7, at pp. 334-35. For a case that held that the trust arrangement successfully circumvented an anti-assignment clause, see *Don King Productions Inc. v. Warren*, [1999] 2 All E.R. 218 (C.A.).

than financings with companies whose receivables do not contain any restrictions on their assignability.[47]

3. Anti-Assignment Clauses and the OPPSA after the 2007 Amendments

The drafters of Article 9 of the UCC recognized decades ago that giving effect to anti-assignment clauses in receivables created extreme hardship for companies, because their sources of funding would be severely restricted if they could not use their receivables as security for loans. A policy favouring the assignability of receivables was, therefore, implemented into Article 9 of the UCC. Article 9 invalidates any term in a contract that prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or that requires the account debtor's consent to such assignment or security interest.[48] A similar policy choice has been made in each of the PPSA jurisdictions in Canada (other than Ontario).[49] For the most part, Ontario has now followed the approach that had been taken by the other PPSA provinces. Section 40(4) of the OPPSA, which was added by the 2007 Amendments, provides as follows:

> A term in the contract between the account debtor and the assignor that prohibits or restricts the assignment of, or the giving of a security interest in, the whole of the account or chattel paper for money due or to become due or that requires the account debtor's consent to such assignment or such giving of a security interest,
>
> (a) is binding on the assignor only to the extent of making the assignor liable to the account debtor for breach of their contract; and
>
> (b) is unenforceable against third parties.

Contractual restrictions on the assignment of an account (*e.g.*, accounts receivables) or chattel paper (*e.g.*, leases, conditional sale contracts and chattel mortgages) will no longer be effective against purchasers of accounts and chattel paper or lenders who make loans on the security of that type of collateral. Because receivables financiers will be able to more safely provide their financing (even if the receivables arise under contracts that contain anti-assignment

47. Another practical consequence of the potential effect of anti-assignment clauses is that opinions delivered in connection with a secured loan or a securitization transaction will contain qualifications as to the validity, enforceability, creation and perfection of a security interest or other interest purported to be created in the rights arising under contracts containing anti-assignment clauses (see, *e.g.*, the OBA Opinion Report, *supra*, footnote 38, at p. 131).

48. See, *e.g.*, the 1972 version of the UCC, § 9-318(4) (the Former UCC).

49. See, *e.g.*, B.C. PPSA, s. 41(9).

clauses), this should mean that companies will be able to raise capital more quickly and cheaply, all other things being equal.

4. Gaps and Deficiencies in the 2007 Amendments

There remain a number of gaps in the OPPSA's override provision of anti-assignment clauses, which means that, within those gaps, financiers will have to continue dealing with the adverse effects and the uncertainties of the existing common law rules on anti-assignment clauses. It is also unfortunate that the Ontario government did not take the opportunity to consider whether to include in s. 40(4) of the OPPSA a number of enhancements that are found in the new override provisions in §§ 406 and 408 of Revised Article 9 of the UCC. Many of the deficiencies of the override provision in §§ 318(4) of the Former UCC (which also exist in the override provisions found in all of the other PPSA) have been eliminated.

Three of the most significant gaps and deficiencies in s. 40(4) of the OPPSA are the following.

(i) *Legal Restrictions.* The 2007 Amendments do not address existing legal restrictions on assignments that arise under a statute, regulation or rule of law. Revised § 9-406(f) extends the override provision to cover such legal restrictions on assignments. However, even if s. 40(4) of the OPPSA had been expanded to cover legal restrictions on assignment, assignments of federal Crown debts that are subject to the prohibition in s. 67 of the FAA would still be unassignable, unless ss. 68 and 69 of the FAA are complied with.[50]

(ii) *Partial Assignments.* By its terms, the 2007 Amendment only overrides anti-assignment clauses relating to the assignment of "the whole of the account or chattel paper". It is common, particularly in securitization transactions, to sell interests in receivables, rather than selling the whole receivables. A sale of an interest in a receivable will still be subject to an anti-assignment clause. The 1998 Submission intentionally decided not to recommend the extension of the override provision to partial assignments, because a majority of the committee was concerned that allowing assignments of partial interests could cause undue hardship to account debtors. The 1998 Submission recommended that this issue warranted more study.[51] However, the

50. See footnote 45, *supra*.
51. 1998 Submission, *supra*, footnote 4, at p. 20.

override provision provided for under the *United Nations Convention on the Assignment of Receivables in International Trade*[52] will extend to partial assignments.[53] Canada expects that it will, with the support of the provinces and territories of Canada, be ratifying the UNCITRAL Convention. In conjunction with the ratification of the UNCITRAL Convention, Ontario and the other PPSA jurisdictions will have to revise their override provisions so that they apply to partial assignments.

(iii) *Account Debtor's Remedies under the OPPSA.* There are two points of interest with respect to the issue of an account debtor's potential remedies against an assignor for breaching an anti-assignment clause.

First, although s. 40(4) of the OPPSA is almost identical to the override provisions in most of the other PPSA jurisdictions, there is a curious difference between the OPPSA and the corresponding provision in the other PPSAs. All of the other PPSAs (except for the Yukon PPSA) provide that an anti-assignment clause "is binding on the assignor only to the extent of making the assignor liable *in damages* for breach of contract".[54] Where the accounts or chattel paper arise from the sale or lease of goods or services, only those accounts or chattel paper in respect of which the goods or services have been fully delivered, accepted and/or performed will usually be eligible for financing. In such circumstances, the risk of there being any damages suffered by the account debtor as a result of the assignment should be quite small. This should give receivables financiers some real comfort that they are not dealing with a borrower or assignor who could be liable for significant damages because of breaching the anti-assignment clause.

In contrast, s. 40(4)(a) of the OPPSA does not refer to damages. It says that such a clause "is binding on the assignor only to the extent of

52. *United Nations Convention on the Assignment of Receivables in International Trade*, UN Doc. E.04.V.14 (2004) (the UNCITRAL Convention).

53. In Article 2(a) of the UNCITRAL Convention, the subject matter of an "assignment" is defined to include "all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum . . . from a third person". Article 8-1 of the UNCITRAL Convention states that an assignment "is not ineffective as between the assignor and the assignee or as against the debtor or as against a competing claimant . . . on the ground that it is an assignment of . . . parts of or undivided interests in receivables . . . ".

54. Section 39(5) of the Yukon PPSA, R.S.Y. 2002, c. 169, provides that "a term in a contract between a debtor on an intangible and an assignor that prohibits assignment of the whole of an account or intangible for money due or to become due is void".

making the assignor liable to the account debtor for breach of their contract". Will this difference matter? The omission of the word "in damages" should not mean that a court will order the termination of the contract because of the breach or issue an injunction that enjoins the assignor from assigning the contract, because granting either of those remedies would mean that the court was not giving effect to s. 40(4)(b) of the OPPSA, which is intended to make anti-assignment clauses unenforceable against assignees. Accordingly, in my opinion, these omitted words should not make a difference in practice; but it will give counsel to account debtors an opportunity to make some creative arguments, to which assignors, assignees and their counsel will be forced to respond. The Ontario government has indicated that it will consider adding these omitted words when the OPPSA is revised in connection with Canada's ratification of the UNCITRAL Convention.

The second and more important point of interest relates to another enhancement contained in § 406(d) of Revised Article 9. Like § 318(4) of the Former UCC, § 406(d) uses the word "ineffective". The Official Comment to Revised Article 9 states that "ineffective" is intended to mean that anti-assignment clauses are "of no effect whatsoever".[55] Section 406(d)(2) of Revised Article 9 provides that an anti-assignment clause in an account or chattel paper is ineffective to the extent that it provides that the assignment or transfer or the creation, attachment, perfection or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defence, termination, right of termination or remedy under the account or chattel paper. In other words, pursuant to § 406(d)(2) of Revised Article 9, an account debtor will not be permitted to bring any claim against the assignor for breaching the anti-assignment clause.[56]

The Ontario government should consider whether to add to the OPPSA the various enhancements in Revised Article 9 that have been described in this part of the article. Their adoption would certainly allow lenders and purchasers to dramatically change their practices in lending against, or the purchasing of, accounts and receivables. The need to conduct detailed due diligence on the terms of the contracts would become less important, meaning that the often significant costs to do such due diligence could be substantially reduced.

55. Revised UCC, § 406, § 5 of the Official Comment.
56. The same language is also used in § 406(f)(2) of Revised Article 9 with respect to legal restrictions.

IV. CONCLUSION

The 2007 Amendments implemented two significant and commendable policy shifts: the inclusion of long-term true leases within the scope of the OPPSA for certain purposes and the addition of an anti-assignment override provision for accounts and chattel paper. Unfortunately, in addition to the gaps and deficiencies described above in this paper, the 2007 Amendments contain other gaps and deficiencies, both large and small.[57] The Ontario government has deservedly been praised for its efforts in modernizing and reinvigorating Ontario's business laws. Because the OPPSA directly affects all types of business and consumer transactions, any unintended gaps or deficiencies in the OPPSA will severely impact the access to and the cost of credit for both consumers and businesses. To avoid this, the Ontario government must not make the mistake that previous Ontario governments have done of allowing these and other gaps and deficiencies in the OPPSA to fester untreated for too long.

57. Examples of two gaps include (i) the failure to expressly include governmental licences and quotas as property under the OPPSA and (ii) the failure to create a permanent advisory committee to work with Ministry staff to continue the process of modernizing the PPSA in an organized and principled manner (see a description of these gaps in Michael E. Burke, "PPSA 2007: What's Missing", (2007), 26 Nat. B.L. Rev. at pp. 39-40). In addition, there were other drafting mistakes including (a) the inadvertent repeal of s. 46(3) of the OPPSA, which formerly provided that a general collateral description would limit the scope of the collateral classifications marked by the secured party in an OPPSA financing statement and (b) the words that expressly exclude sale-leaseback transactions from what constitutes a "purchase-money security interest" or "PMSI" were inadvertently dropped from the definition of "PMSI" (see Michael Burke and Mark Selick, "No Immediate Solution to PPSA Collateral Classification Problem", *Blakes Bulletin on Financial Services*, December 2007, which can be found online at <http://www.blakes.com>).

Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2012 ABQB 59

Date: 20120123
Docket: 1003 11241, 1003 05560
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendants

And Between:

Docket: 1003 05560

BKCY Action No: 24-115359

In the Matter of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

And in the Matter of a Plan of Arrangement of Cow Harbour Construction Ltd.

Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi

I. Nature of the Matter

[1] Various equipment lessors (collectively, the Applicants) have applied for what they claim to be their proportionate share of funds that PricewaterhouseCoopers Inc. (PWC) currently holds, pending this Court's determination of whether their leases were subject to section 11.01(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*). PWC is the court-appointed receiver and manager of the assets, property and undertaking of Cow Harbour Construction Ltd. (Cow Harbour).

II. Procedural History

[2] On April 7, 2010, Cow Harbour obtained a stay of proceedings against it (Initial Order) under *CCAA* s. 11.02. This Court extended the Initial Order from time to time by a number of subsequent court orders. Pursuant to the Initial Order, this Court appointed Deloitte LLP as monitor under the *CCAA* (Monitor).

[3] Cow Harbour's primary business consisted of overburden removal and general contracting services for oil extraction companies in Fort McMurray, Alberta. Its assets consisted mainly of earth moving and hauling equipment. Much of the equipment that Cow Harbour used in its operations was leased from various parties.

[4] On May 21, 2010, this Court directed the Monitor to provide all interested parties with a list of those leases which it had classified as ones entitling the respective lessors to receive ongoing monthly payments pursuant to *CCAA* s. 11.01. This Court gave any party who claimed to have such a lease, but whose claim was not included in the Monitor's list, until June 2, 2010 to advise the Monitor that it was disputing the classification, failing which it was barred from subsequently asserting that its lease entitled it to those ongoing monthly payments.

[5] Disputes were registered in relation to a total of 58 leases (Disputed Leases).

[6] Also on May 21, 2010, this Court directed Cow Harbour to pay over to the Monitor's counsel monies representing all monthly payments from April 1, 2010, that Cow Harbour would have paid to lessors under the Disputed Leases, or leases which had not yet been categorized

(Disputed Lease Funds). This Court directed the Monitor's counsel to hold the Disputed Lease Funds pending resolution of disputes pertaining to categorization of the Disputed Leases.

[7] It became clear as matters progressed that Cow Harbour was not going to be able to restructure it affairs through refinancing, compromise or an equity restructuring. Rather, the proceedings evolved into a liquidation. PWC was appointed as transaction facilitator to assist the various parties in their negotiations. Acting in that capacity, PWC negotiated a potential sale of certain of Cow Harbour's assets to Aecon Group Inc. (Aecon). On August 10, 2010, PWC's acceptance of Aecon's letter of intent received this Court's endorsement, subject to the parties later applying for court approval of an asset purchase agreement and vesting order.

[8] On August 25, 2010, the Royal Bank of Canada (RBC) successfully applied for a receivership order, pursuant to which this Court appointed PWC as receiver and manager of the assets, property and undertaking of Cow Harbour (Receiver). This Court then approved the asset purchase agreement and granted a vesting order in Aecon's favour. The transaction contemplated by the asset purchase agreement closed on August 26, 2010.

[9] The Disputed Lease Funds were transferred to the Receiver pending resolution of the disputes over classification of the Disputed Leases.

[10] RBC was paid out in full through the *CCAA* and receivership proceedings. The secured creditor holding the next general security over Cow Harbour's assets, property and undertaking is GE Capital Equipment Financing G.P. (GE).

[11] The Receiver has settled many of the issues between Cow Harbour and various third parties, including many of the lessors under the Disputed Leases. However, it continues to hold back a portion of the Disputed Lease Funds until this Court's determination of entitlement to those funds.

III. Issue

[12] The Applicants ask this Court to determine which of the remaining Disputed Leases fall within *CCAA* s. 11.01(a). This, in turn, will determine which party or parties are entitled to a portion of the Disputed Lease Funds.

IV. Law

A. Legislation

[13] Section 11.01(a) of the *CCAA* provides:

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

> (A) prohibiting a person from requiring immediate payment for . . . use of leased . . . property or other valuable consideration provided after the order is made.

[14] Section 11.02 of the *CCAA* provides for a stay of proceedings. It states:

> 11.02(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

B. General Legal Principles

[15] Section 11.02 of the *CCAA* allows a court to order a stay of proceedings on an initial application under the *CCAA* in respect of a debtor company. This is in keeping with the general policy underlying the *CCAA*, which is to allow a debtor corporation to restructure its corporate or financial affairs in a way that will permit it to continue on as a going concern, without being hampered by those who wish to enforce their previously bargained for rights. As the Ontario Court of Appeal commented in ***Re Nortel Networks Corp.***, 2009 ONCA 833 at para 16, 59 CBR (5th) 23 [***Nortel***], "[t]he primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company" (emphasis added). Courts have given the *CCAA* a wide and liberal construction to facilitate this policy objective (see *e.g.* ***Chef Ready Food Ltd. v. HongKong Bank of Canada*** (1990), 51 BCLR (2d) 84 (CA)).

[16] While a debtor corporation is proceeding through the *CCAA* restructuring process, it must still carry on its business. It hardly seems fair to require a person to continue to supply the debtor corporation with goods or services, or to allow the debtor corporation to continue to use leased property, without that person being compensated for those goods, services or use. Section 11.01(a) of the *CCAA* allows for that compensation.

[17] As noted in ***Re Smith Brothers Contracting Ltd.*** (1998), 53 BCLR (3d) 264 at para 3 (SC) [***Smith Brothers***], Parliament added what is now s. 11.01 to the *CCAA* as part of a set of

amendments proclaimed in force on September 30, 1997. Suche J. in ***Re Winnipeg Motor Express Inc.***, 2009 MBQB 204, 243 Man R (2d) 31 [***Re Winnipeg***], leave to appeal to CA refused, 2009 MBCA 110, [2009] 12 WWR 224, suggested that Parliament may have added this provision to clarify the point made in ***Quintette Coal Ltd. v. Nippon Steel Corp.*** (1990), 51 BCLR (2d) 105 (CA) [***Quintette***], that a stay would never be used to enforce the continuous supply of goods or services without payment for current deliveries. She also commented that the amendment brought the *CCAA* in line with the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], which contains a similar provision relating to proposals.

[18] To further facilitate the policy objective of the *CCAA*, courts have given *CCAA* s. 11.01(a), which is an exception to the stay provision, a narrow construction (***Nortel*** at para 17). They have differentiated between a "true lease," in which the debtors' corporation is paying for use of the property, and a debt obligation clothed in the guise of a lease, i.e., a financing lease in which the debtors' corporation is "earning equity" in the property. Courts and writers have used the term "financing lease," "security lease," "financial leasing arrangement" or similar terms to describe the latter type of arrangement (referred to here as a financing lease). It is only the debtor corporation's obligations under a true lease that courts have excepted from the stay of proceedings, not its obligations under a financing lease (***Smith Brothers*** at para 61).

[19] Canadian courts have accepted the conclusion of Bauman J. (as he then was) in ***Smith Brothers*** that a true lease, being a bailment of property, falls within the *CCAA* s. 11.01(a) exception, while a financing lease does not. They also have endorsed his approach to distinguishing between the two types of arrangements (see *e.g.* *Re International Wallcoverings Ltd.* (1999), 28 CBR (4th) 48 (Ont Ct Jus (Gen Div)) [*International Wallcoverings*]; *Re Sharp-Rite Technologies Ltd.*, 2000 BCSC 122. In *Re PSINET Ltd.* (2001), 26 CBR (4th) 288 at para 19 (Ont SCJ) [*PSINET*], Swinton J. stated:

> In my view, *Smith Brothers Contracting Ltd.* was correct in determining that [*CCAA* s. 11.01(a)] is to apply to payments for the use of property provided after the stay order — that is, where a party provides new credit to the debtor following the stay. The payments under the leases here are not that type of payment. These leases are clearly financing arrangements, whose purpose is to secure a loan which was provided before the stay order was made, and the payments owing are repayments for that loan. Therefore, the leases here do not fall within [*CCAA* s. 11.01(a)] of the Act, and the order of Farley J. which prohibits the company from making payments under them is consistent with the purpose of the Act. Any other determination would give the RBC an unfair advantage when compared to other creditors of the applicants, who are bound by the stay.

[20] While initially having questioned in oral reasons on August 25, 2010, whether it might be worthwhile to re-examine the approach that Bauman J. took in ***Smith Brothers***, this Court

concluded the approach was sound, given that *CCAA* s. 11.01(a) is to be narrowly construed. The substance and not the form of the arrangement between the debtor corporation and the other contracting party is of importance and, unless there is a sound policy reason for doing so, the court should not give an advantage to one creditor over another.

[21] Why did this Court initially question the reasoning in ***Smith Brothers***?

[22] Bauman J. relied heavily on Professor Ronald CC Cuming's article, "True Leases and Security Leases Under Canadian Personal Property Security Acts" (1983) 7 Can Bus LJ 251, in arriving at his conclusions. As is apparent from the title, Professor Cuming's article dealt with differentiating leases for purposes of personal property security legislation, not insolvency legislation.

[23] The *CCAA* does not expressly incorporate personal property security legislation concepts. Unlike such legislation, the *CCAA* does not distinguish between a true lease and a financing lease.

[24] The way in which courts have used personal property security legislation concepts when they are dealing with *CCAA* proceedings, and the tension that this approach creates, was discussed by Professor Roderick J. Wood in his article, "The Definition of Secured Creditor in Insolvency Law" (2010) 25 BFLR 341.

[25] Professor Wood recognized that the *CCAA* does not expressly deem a lessor in a financing lease transaction to be a "secured creditor" rather than an owner of the goods. He remarked that the definitions of "secured creditor" and "security interest" in insolvency law (the *CCAA* and *BIA*) do not adopt personal property security legislation terminology (at p 347). He noted that courts have held that the broader definition of the term "secured creditor" in the *Income Tax Act*, RSC 1985, c one (5th Supp.) (*ITA*) does not encompass lessors under a financing lease. Professor Wood recognized the difficulty in interpreting the definition of "a secured creditor" in the *CCAA* as including a lessor under a title retention device such as a financing lease, given that courts have not done so in the context of the broader definition in the *ITA*. He expressed the view that the best way to resolve this tension would be for Parliament to clarify federal insolvency legislation, suggesting at p. 356 that:

> It would also produce a proper dovetailing of the federal insolvency provisions. For example, the insolvency statutes provide that a stay of proceedings does not prevent a lessor from requiring immediate payment for use of the leased property. This gives the lessor the ability to collect post-commencement lease payments. Courts have held that this provision only applies to true leases and not to security leases. The latter are treated in the same manner as other security interests and the debtor is able to retain possession of the goods without the need to satisfy the post commencement payments. This further demonstrates that the division between

> true leases and security leases that is produced by the application of the substance test of the *PPSA* is being recognized in insolvency law, and that an amendment of the definition of secured creditor to reflect this fact is the most sensible solution.

[26] When examining ***Smith Brothers*** closely, it appears that Bauman J. was simply saying that the logic that Professor Cuming applied when differentiating between true leases and financing leases in the context of personal property security legislation applies equally to *CCAA* proceedings. Said differently, *CCAA* s. 11.01(a) protects parties who provide goods and services to the debtor corporation after a court grants an initial order, but not "creditors" to whom the debtor corporation has "debt obligations." This would put the latter in a better position *vis-a-vis* the debtor corporation than the debtor corporation's other creditors.

[27] As previously stated, this Court is of the view that Bauman J's decision with respect to this issue is in keeping with the *CCAA*'s underlying policy objectives.

[28] It is arguable, however, that Blair J. in ***International Wallcoverings*** left the door open for a court to find that a financing lease could fall within *CCAA* s. 11.01(a), when he said at para 4:

> While I would not go so far as to say, [*CCAA* s. 11.01(a)] requires payment under all leasing arrangements, or (on the other hand) that it could never encompass a financial leasing arrangement, I am satisfied that in the particular circumstances of this case the reasoning of ***Smith Brothers*** is applicable and that the arrangements in question are more akin to equipment purchase financing arrangements . . .

[29] He used the ***Smith Brothers*** true lease/financing lease analysis in reaching his conclusion. He did not speculate as to the type of situation where *CCAA* s. 11.01(a) might encompass a financing lease arrangement.

[30] ***Winnipeg Motor*** could be considered one such case, and, as the result, is contrary to what might be expected when using the ***Smith Brothers*** analysis.

[31] ***Winnipeg Motor*** dealt with the proper distribution of interim financing and administrative charges incurred after the court granted an initial order under the *CCAA*. The monitor recommended that the charges be distributed among the secured creditors based on a *pro rata* recovery. Two parties claimed to be true lessors. The court referred to the distinction made in ***Smith Brothers*** between true leases and financing leases. It commented that the exclusion of financing leases from *CCAA* s. 11.01(a) makes perfect sense based on the notion of ownership, as a financing lessor cannot seek the benefits of ownership when it has given it away (assuming the lessee has been acquiring equity in the leased goods). It also suggested that the narrow construction of *CCAA* s. 11.01(a) as limiting the obligation of the debtor to make payments for "use" is consistent with the idea that a supplier cannot be expected to continue to provide its product without payment.

[32] The court in ***Winnipeg Motor*** noted the financing lessors' complaint that they had been unduly prejudiced by the stay of proceedings. They argued that not only were they not being paid while the debtor corporation was using their assets for the benefit of the other stakeholders, but the debtor corporation was deteriorating their underlying security in the process. They maintained that this violated one of the fundamental objectives of the stay of proceedings: preventing one creditor from obtaining an advantage over other creditors during the stay period. The court at paras 60-62 suggested that the fact true lessors were entitled to be paid aggravated the problem, stating:

> It is difficult to know how this situation can be remedied, given that the whole point of the *CCAA* is to relieve a company of ongoing financial burden to allow it the opportunity to restructure. In this case, for example, [the debtor corporation] would not have succeeded had it been obliged to pay for its equipment during the entirety of the restructuring.
>
> On the particular facts of this case, this issue became somewhat easier to address given the nature of [the debtor corporation's] business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if [the debtor corporation] was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.
>
> I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as [the debtor corporation's] do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice suffered has been recognized, *albeit* not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

[33] Of interest, the court in ***Winnipeg Motor*** required one of the debtor corporation's true lessors to contribute to the court-ordered charges, as it had derived the same benefit from the *CCAA* proceedings as the financing lessors.

[34] In ***Re Clayton Construction Co. Ltd.***, 2009 SKQB 397, 59 CBR (5th) 213 [***Clayton Construction***], the debtor corporation sought an extension of a *CCAA* stay of proceedings. Rothery J. granted the extension, but also allowed the payment of interest that the debtor

corporation owed to nine of its equipment lessors as a means of compensating them for the use and depreciation of their equipment. The debtor corporation required the equipment to complete its contracts. The court determined that the monthly interest payments to the equipment lessors would not prejudice the other creditors. The major secured creditor had benefited from the accounts receivable generated by the debtor's use of the equipment and the unsecured creditors likely would not have received any benefit, had the equipment lessors withdrawn their support for the restructuring process.

[35] ***Winnipeg Motor*** and ***Clayton Construction*** might be responses to the non-peer reviewed journal articles that criticize the ***Smith Brothers*** approach that courts have taken to the issue before this Court (see *e.g.* Steven J. Weisz, Linc A. Rogers & Stacy McLean, "Striking an Imbalance: The Treatment of Equipment Lessors Under Section 11.3 of the *CCAA*" (2003) 20:5 Nat'l Insolv Rev 45 at 48-49; Jeffrey C. Cahart, "Should There be Special Rules in Commercial Reorganizations for Equipment Lessors?" (2002) 15:2 Comm Insol R 13; Harvey G. Chaiton and John R. Hutchins, "Equipment Lessors in Restructurings: Hostage Lenders" (2009) 21 Comm Insol R 3).

[36] One of the themes that runs through these articles is that it is unfair for courts to allow creditors that hold general security to gain a benefit from the debtor corporation's use of the leased equipment during the stay period. Cahart commented at p. 15:

> ... it is simply unfair to allow a debtor to continue to use (and to depreciate) a piece of (perhaps essential) equipment which the debtor only has because of the equipment lessor's financing while the debtor pursues a reorganization and/or a sale as a going concern (as has happened in so many *CCAA* cases) possibly over a very extended period. Again, unlike lenders with more general security, equipment lessors (usually) only have recourse to a specific asset. Is it fair to allow, for instance, a mining company under *CCAA* protection to continue to use a specialized leased truck, continue to wear it down and to diminish its value, for 11 months for free, while the company pursues sale as a going concern and/or reorganization based on the company's going concern value? Among other things, the availability of the truck to the company over time: (i) contributes to the going concern value of the company (and the preservation of which is at the heart of what the *CCAA* is trying to achieve); and (ii) allows the company to produce product which is turned into cash and which goes to pay down an operating lender. Yet under the current jurisprudence, the relevant equipment lessor probably receives nothing during the stay period – not even its regular monthly payments, let alone any kind of "premium" for its contribution to the going concern value or to the ability of the company to generate cash.

[37] The problem, however, is that one creditor should not receive "an unfair advantage when compared to other creditors of the applicants, who are bound by the stay" (***PSINET*** at para 19).

If some creditors are to be bound by the stay of proceedings, all creditors must be bound. Any contrary approach invariably would lead to every creditor attempting to argue that its interests are being prejudiced by the stay of proceedings in one way or another, with the end result that the stay of proceedings would prove meaningless.

[38] ***Smith Brothers*** concluded that courts must differentiate between true leases and financing leases. Is this what the legislation says?

[39] If certain portions of *CCAA* s. 11.01(a) are emphasized, the legislation could be read differently. For example, *CCAA* s. 11.01(a) might be read as stating that: "No order made under section 11 or 11.02 has the effect of prohibiting a person from requiring immediate payment for . . . use of leased . . . property . . . provided after the order is made" (emphasis added). In other words, the phrase "provided after the order is made" might refer to "leased property." In that case, lessors of pre-stay leases, whether true or financing, would be subject to the stay of proceedings. Only lessors of property leased post-stay could demand that the debtor corporation make its lease payments. This would be in keeping with judicial interpretation of the balance of *CCAA* s. 11.01(a). For example, a supplier may provide goods or services to the debtor corporation post-stay on the basis of "cash on delivery."

[40] This type of interpretation would not be unusual, as Canadian courts, including the Alberta Court of Appeal, have taken such a grammatical-interpretative approach when they have considered, for example, *BIA* s. 178(1)(d). That section provides:

> 178(1) An order of discharge does not release the bankrupt from
> . . .
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity
> . . .

[41] The question has arisen whether the words "while acting in a fiduciary capacity" qualify only the word "defalcation" or whether they qualify all of the listed factors, including fraud, embezzlement, misappropriation and defalcation. Courts have held that the latter is the proper interpretation (see *e.g.* ***Confederation Life Insurance Co. v. Waselenak***, [1998] 5 WWR 712, 57 Alta LR (3d) 38 (QB), affd 2000 ABCA 136; ***166404 Canada Inc. v. Coulter*** (1998), 4 CBR (4th) 1 (Ont CA), leave to appeal to SCC refused (1998), 223 NR 395 (note); ***Ross & Associates v. Palmer***, 2001 MBCA 17, 22 CBR (4th) 140; ***Re Brant*** (1984), 52 CBR (NS) 317 (Ont SC)).

[42] Including all pre-stay leases in the stay of proceedings would be in keeping with the broad and liberal interpretation that courts have given to the *CCAA*, which is to provide the debtor corporation with "breathing space" in which to determine whether it is in a position to restructure its affairs and to facilitate its survival. Including only post-stay leases under *CCAA* s. 11.01(a)

also would be in keeping with the narrow interpretation of transactions that are excepted from the stay of proceedings. It would simplify *CCAA* proceedings involving equipment leases.

[43] This interpretation, however, does not give weight to the word "use" in *CCAA* s. 11.01(a). In making the true lease/financing lease distinction, Bauman J. in ***Smith Brothers*** and courts in subsequent cases have sought to do just that. They have read the section as stating, "No order made under section 11 or 11.02 has the effect of prohibiting a person from requiring immediate payment for . . . use of leased . . . property . . . provided after the order is made" (emphasis added). In other words, it is "use" of the leased property which is provided after a court makes the initial order.

[44] A true lease, in essence, is a bailment contract such that ownership of the leased goods remains with the bailor/lessor and the bailee/lessee pays for "use" of those goods. In ***Punch v. Savoy's Jewellers Ltd.*** (1986), 54 OR (2d) 383 at para 17 (CA), the court defined bailment as follows:

> ... Bailment has been defined as the delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as the time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.

(See also ***Visscher v. Triple Broek Holdings Ltd.***, 2006 ABQB 259, 399 AR 184 at paras 27-28; ***Letourneau v. Otto Mobiles Edmonton (1984) Ltd***., 2002 ABQB 609, 315 AR 232 at para 23).

[45] The central character of a true lease is "payment for use." Bauman J. in ***Smith Brothers*** at para 48 adopted the following statement in Professor Cuming's above-referenced article to expand on this principle:

> Under a true lease, the lessor surrenders his possessory right in chattels to the lessee in return for an undertaking by the lessee to perform certain acts which usually involve the payment of money to the lessor. The lessee has obligations, but the transaction cannot be characterized as a security agreement because the interest of the lessor is not related to those obligations. In other words, the lessor does not remain owner merely to ensure or to induce performance of the lessee's obligations. He remains owner because a bailment contract does not involve the transfer of ownership to the bailee.

[46] Bauman J. concluded in ***Smith Brothers*** at para 61:

> It is only payments for the use of leased property that are excepted from a s. 11 stay order under [*CCAA* s. 11.01(a)]. Payments for use and equity are not. Similarly payments for use and equity and an option to purchase are not. This is another reason to conclude . . . [*CCAA* s. 11.01(a)] is not inclusive of all forms of lease.

[47] This is a curious statement inasmuch as it might be seen as suggesting that a court should identify what portion of the lease payments made under the instrument is for use rather than for acquisition of equity (and, perhaps, of the option to purchase). This approach is not in keeping with other statements that Bauman J. made in ***Smith Brothers***. In this Court's view, the instrument is either a financing lease or a true lease. There is no room for finding the instrument to be a hybrid of the two, as this unnecessarily confuses the issue.

[48] As acknowledged by Suche J. in ***Winnipeg Motor*** at para 31, " . . . the true nature of arrangements involving the supply of equipment can be very difficult to peg." There can be a fine line between what is considered a true lease and a financing lease.

[49] The determination of whether an arrangement is a true lease for purposes of *CCAA* s. 11.01(a) involves a functional analysis of the relationship between the parties based on substance as opposed to form (***Smith Brothers*** at para 26; ***Re Philip Services Corp.***, (1999) 15 CBR (4th) 107 at para 2 (Ont SCJ [Commercial List] [***Philip Services***])).

[50] Professors Ronald CC Cuming and Roderick J. Wood in their *Alberta Personal Property Security Act Handbook*, 4th ed (Toronto: Carswell, 1998) at 53 [*Handbook*] emphasized the need to examine the relationship between the lessor and lessee to determine if it reflects indicia of a financing arrangement. They noted, however, that they were not referring to the traditional indicia prescribed by the common law, but rather those which would be relevant to someone examining the economic realities of the transaction.

[51] In ***Smith Brothers*** at para 67, Bauman J. referred to the following non-exhaustive list of considerations mentioned by Master Powers sitting as a Registrar in Bankruptcy in ***Re Bronson*** (1995), 34 CBR (3d) 255 [***Bronson***], aff'd (1996), 39 CBR (3d) 33 (BCSC). This list includes factors considered by American courts in determining whether a document is a true lease or a security agreement, as summarized in *Teaching Material for Personal Property Security Transactions Governed by Personal Property Security Acts* by Professor Cuming in September 1991:

1. Whether there was an option to purchase for a nominal sum;

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;

3. Whether the nature of the lessor's business was to act as a financing agency;

4. Whether the lessee paid a sales tax incident to acquisition of the equipment;

5. Whether the lessee paid all other taxes incident to ownership of the equipment;

6. Whether the lessee was responsible for comprehensive insurance on the equipment;

7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;

8. Whether the agreement placed the entire risk of loss upon the lessee;

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement;

13. Whether there was a default provision in the lease inordinately favourable to the lessor;

14. Whether there was a provision in the lease for liquidated damages;

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;

16. Whether the aggregate rental approximated the value of purchase price of the equipment. [See also ***PSINET*** at para 12.]

[52] Other courts have added that the right of the lessee to an "option to purchase" can be established through the course of conduct between the parties, if not expressly provided for in the document itself (***Philip Services*** at paras 4-5). As well, leases that are "bundled together" for financing purposes may be construed as financing transactions and not as true leases, because the

transactions really involve payment for financing the acquisition of the assets rather than payment for use (***Philip Services*** at para 9).

[53] Neither Professor Cuming nor the court in ***Smith Brothers*** said that a lease must contain all of the foregoing indicia to be classified as a financing lease. Indeed, the main factor on which Bauman J. relied in deciding that the arrangement before him was a financing lease was the default clause.

[54] A court may use some or all of the ***Smith Brothers*** factors when assessing whether a particular transaction is a true lease or a financing arrangement. It is the substance of the transaction that is determinative.

[55] Michael E Burke, in his article "Ontario *Personal Property Security Act* Reform: Significant Policy Changes" (2009) 48 Can Bus LJ 289 at 291-97, undertook an empirical review of the authorities and discussed the relative weight courts have placed on these factors. He stated at 291-92:

> First, from the universe of factors or indicia that have been mentioned in the jurisprudence, some factors or indicia (referred to in this paper as "primary factors") are clearly more important than other factors or indicia (referred to in this paper as "secondary factors"). Second, the presence of a primary factor in a lease will often be determinative of the characterization of the agreement. Third, secondary factors generally have a corroborative value and are not in and of themselves determinative of the characterization. Accordingly, the presence of a number of secondary factors that are indicative of a characterization that is contrary to the characterization indicated by the primary factor will not be sufficient to overturn the weighting given by a court to the primary factor. Fourth, in those situations where the primary factor is ambiguous or absent, then the relative weighting given by a court to the secondary factors will be relevant in determining the characterization of the lease in question.

[56] Topolniski J. in ***Re 843504 Alberta Ltd.***, 2011 ABQB 448 at para 63, 80 CBR (5th) 177 [***843504***] identified what Burke at 292-94 referred to as "primary factors:"

> (a) Relevance of the purchase option price - whether the purchase option price is nominal or reflective of fair market value.
>
> (b) Mandatory purchase options - whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term.
>
> (c) Open-end leases/guaranteed residual clauses - whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term.

(d) Sale-leaseback transactions - whether the transaction is structured as a sale and leaseback.

[57] Topolniski J. then identified (at para 65) what Burke (at 295-98) referred to as "secondary factors":

(a) The ability to replace/exchange leased equipment is indicative of a true lease.

(b) The lessor's ability to accelerate payments and the residual value are generally inconsistent with a true lease. However, it is equally consistent with a true lease if the acceleration clause limits the lessor's damages to the present value of the remaining rents, plus the present value of the residual value at the end of the term, minus the value of net proceeds from a sale of the assets. If the acceleration clause is more narrowly crafted, it favours a security lease.

(c) A full payment lease may be indicative of either form of lease, depending on the language of the provision.

(d) A security deposit is indicative of a security lease.

(e) A substantial down payment is indicative of a security lease.

(f) Covenants relating to maintenance, insurance and risk of loss can be indicators of either type of lease. They are weak evidence of a security lease.

(g) Whether the lessor uses different forms for different types of transactions may be some evidence of intention.

[58] Burke also identified (at 297) some factors, such as the exclusion of warranties on the lessor's part, as "red herrings" because their presence (or lack of presence) in a lease is equivocal: see also Weisz, Rogers & McLean at 48-49.

[59] On an application for leave to appeal this Court's assessment that a particular agreement at issue in these proceedings was a financing lease, the Alberta Court of Appeal in ***De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada***, 2010 ABCA 394 at para 60 [***De Lage Landen (CA)***], refusing leave to appeal 2010 ABQB 637, 37 Alta LR (5th) 82 [***De Lage Landen (QB)***] expressly rejected the suggestion that there should be a hierarchy of factors that a court

should use to determine if a lease is a true lease or a financing lease. In denying the leave application, Ritter J.A. stated at para 15:

> The applicant points to a British Columbia decision which suggests in *obiter* that there should be a hierarchy of factors used to determine if a lease is a true lease or a financing lease. In my view, this *obiter* runs contrary to current trends about how to weigh the factors in a legal test and about the deference afforded to courts of first instance in this respect. If one factor trumps the others, there is simply no point in including the others in the test. [Emphasis added].

[60] During the present hearing before this Court, counsel spent a significant amount of time attempting to rationalize ***843504*** and ***De Lage Landen (CA)***. In this Court's view, there is no conflict between the two. Topolniski J. in ***843504*** cited the Court of Appeal's decision in ***De Lage Landen (CA)*** and quoted (at para 60) this Court's observation in ***De Lage Landen (QB)*** at para 32 that:

> ... no one factor "is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions . . ."

While Topolniski J. referred to Burke's discussion of how courts weigh certain factors and outlined the results in her case of applying his "primary" and "secondary" factors, she did not necessarily endorse the view that there is a "hierarchy" of factors in every case.

[61] Topolniski J. considered (at para 64) a provision in the lease before her which provided that:

- the lessee could return the vehicle at the end of the six-month minimum lease term;
- once the lessee returned the vehicle, the lessor would sell the vehicle;
- the lessee would keep the surplus if the sale proceeds exceeded the termination book value; and
- if the sale proceeds did not exceed the termination book value, the lessee would be liable for the shortfall.

She found this provision was indicative of a security lease since it rendered the lessee liable for a deficiency on the vehicle's sale at the end of the term.

[62] Topolniski J. also applied Burke's "secondary" factors to the lease that was before her. There would have been no point in her doing so had she accepted that the lessee's liability for the deficiency trumped any and all secondary factors. She concluded that the secondary factors were not determinative of the proper characterization of the lease (at para 67). The presence of some secondary factors was insufficient to outweigh the clear effect of the primary factors in her case.

[63] GE suggests that Topolniski J. acknowledged that the presence of a primary factor often can be determinative of the characterization, while absence or ambiguity in respect of the primary factors can make weighing of the secondary factors more relevant. In fact, Topolniski J. did not make such a statement. She simply quoted the Burke article where Burke made that argument.

[64] GE argues that while the presence of one of Burke's "primary" factors is significant, absence or ambiguity in respect of a primary factor is not determinative. It simply means that other factors will be more important in the analysis. For example, GE submits that the presence of an option to purchase at nominal value is a primary factor, and while its presence likely will result in the agreement being characterized as a financing lease, the absence of such an option or, indeed, the presence of an option to purchase at fair market value, means that focus must be directed to the other factors. GE suggests that this approach is consistent with authorities which hold that agreements without an option to purchase may still be classified as financing leases when the other indicia of financing leases are present.

[65] The proper approach is more holistic than the one advocated by GE. While the presence or absence of one or more factors may loom larger than others, in all instances the inquiry remains focussed on determining the intention of the parties and is based on an interpretation of the entire agreement. As stated by the Alberta Court of Appeal in ***De Lage Landen (CA)***, one factor cannot trump others in terms of the legal test. Courts must review the entire agreement and they must consider all factors. That is not to say, however, that certain factors may not have greater probative value than others in terms of the particular agreement before the court. In such a case, the court might give those factors greater weight. In all cases, the court must examine the various ***Smith Brothers*** factors and any other factors it considers material and relevant, balance those factors in the context of the entire agreement, and make a determination as to whether the agreement before it as a financing lease or a true lease. This is not a scientific exercise.

[66] Counsel for several of the Applicants argue that payments that Cow Harbour made under leases containing an option to purchase were payments for "use," as the "purchase price" was not due and payable until Cow Harbour exercised the option to purchase or the lease came to an end and the lessee chose to pay the purchase price at a nominal sum. They cite ***Ed Miller Sales & Rentals Ltd. v. Alberta*** (1982), 42 AR 350 (QB) [***Ed Miller***] in support of this position. Purvis J, in that case, relied in turn on ***Ramsay v. Pioneer Machinery Co.*** (1981), 28 AR 429 (CA) [***Ramsay***].

[67] The issues in ***Ramsay*** were whether a transaction fell within the *Conditional Sales Act*, RSA 1970, c 61 and, if it did, whether the conditional seller could recover the purchase price through the sale of the equipment or by suing the conditional buyer. This was called the "seize or sue" provision. The Alberta Court of Appeal stated at para 20:

> ... Until the option is exercised the lessor is not pursuing his "right to recover the purchase price". If he chooses to recover the chattel he is exercising his right of possession on default, which is a right independent of any money claim. I have no hesitation in saying that [the seize or sue provision] is not applicable unless the lessor is seeking to recover the purchase money and he cannot seek to recover the purchase money until the option is exercised. It may be that a "lessor" who is found to be, in substance, a "conditional sales vendor" should be treated as a vendor claiming his purchase price within the section, but that is not this case.

[68] In ***Ed Miller***, the court considered whether lessors holding leases with options to purchase could maintain a priority claim to a builders' lien fund. The court applied the analysis in ***Ramsay*** in finding that until the lessees exercised the options to purchase, the lessors were not "sellers" under the *Conditional Sales Act* and, " . . . [t]hey are not attempting to recover a purchase price, but are attempting to establish priority against a lien fund for rental for equipment" (at para 49). As a result, the court held that the lessors' claims were not for payment of purchase moneys but for rental and, as a result, they were entitled to advance a claim for a lien for a reasonable and just rental of the equipment while used on the contract site (at para 50).

[69] The now repealed *Conditional Sales Act* contained specific provisions concerning registration and remedies available to conditional sellers. The courts, when considering that statute, were more interested in the structure of the transaction than the parties' intention. In fact, the court in ***Ed Miller*** commented, "Stevenson J.A. [in ***Ramsay***] found that it was sufficient to bring the transaction within the relevant sections of the *Conditional Sales Act* if it was established that the lessee merely had it within his power to acquire ownership. It was not necessary to establish intention" (at para 43).

[70] When a court undertakes the true lease/financing lease analysis under the *CCAA*, substance, including the parties' intention, is one of the paramount considerations. The form the transaction takes is not. The "all or nothing" argument advanced by certain of the Applicants could just as easily result in all lessors of true and financing leases being precluded from receiving anything during the stay of proceedings.

[71] Accordingly, it is of the utmost importance that this Court examine each lease individually to determine whether it falls within the category of a true lease or a financing lease.

[72] Finally, it is a fundamental principle of contractual interpretation that a court must interpret an agreement as at the date it was made, as the exercise is intended to discern the intention of the parties at the time the contract was formed (***McDonald Crawford v. Morrow***, 2004 ABCA 150 at para 72, 348 AR 118).

V. Specific Leases

A. Scott Capital Group Inc. (Scott Capital) Leases

1. The leases

[73] Five of the Disputed Leases are between Cow Harbour and Scott Capital. The lease details are as follows:

Lease number	Date day/month/year	Term (months)	Capital Cost of Items	Monthly Rental	Option Price	Security Deposit
6049520 Schedule 001	1/10/2009	60	$559,951	$10,469	25% of original capital cost	$55,995 = 10% of original capital cost
6049520 Schedule 002	30/10/2009	48	$801,250	$18,184	20% of original capital cost	$160,250 = 20% of original capital cost
6049520 Schedule 003	18/12/2009	48	$234,000	$5,295	Fair market value	$46,800 = 20% of original capital cost
6049520 Schedule 004	4/2/2010	48	$664,832	$16,717	Fair market value	$132,966 = 20% of original capital cost
6049520 Schedule 005	5/2/2010	48	$286,020	$7,190	Fair market value	$57,204 = 20% of original capital cost

[74] All of the Scott Capital leases are subject to the terms of the Scott Capital Master Equipment Lease that the parties entered into on October 1, 2009 (Scott Master Lease). Scott Capital's affiant deposed that the Scott Master Lease had been in effect for 30 years, with the last revision having been made about ten years ago. He confirmed that Scott Capital used the same form for what Scott Capital intended to be true leases and financing leases. The number 6049520 refers to the Scott Master Lease to which all of the Scott Capital leases being considered are subject. This Court will refer to each lease by its Schedule number.

[75] Scott Capital leased eight pieces of heavy equipment or vehicles to Cow Harbour under these five leases. It entered into all of these leases with Cow Harbour within six months prior to Cow Harbour's *CCAA* filing. In the case of the Schedule 001 lease, the equipment was only commissioned for use by Cow Harbour in July 2010, which was well into the *CCAA* proceedings.

[76] The evidence of Scott Capital's affiant was that Cow Harbour sourced the equipment, negotiated the sale price and approached a broker to seek assistance with acquisition of the assets. The broker then contacted Scott Capital and the equipment went straight from the third party vendor to Cow Harbour.

[77] Scott Capital's affiant deposed that Scott Capital generally structured its leases as true leases. His due diligence on Cow Harbour suggested that Cow Harbour might be in a precarious financial position. As a result, Scott Capital had no intention of providing "financing leases" to Cow Harbour. He deposed that Scott Capital made it clear to Cow Harbour, and Cow Harbour accepted and acknowledged at the time they negotiated the leases, that the lease options to purchase were to be at fair market value.

[78] All of the leases identify the option price as being fair market value. In three of the leases, that value is not specified. In the other two, the fair market value of the equipment is pre-estimated and agreed by the parties to be a particular percentage of the original capital cost of the equipment (25 percent in the Schedule 001 lease and 20 percent in the Schedule 002 lease).

[79] The security deposits that Scott Capital required Cow Harbour to pay under the leases amounted to 10 percent of the capital cost of the equipment in the case of the Schedule 001 lease and 20 percent of the capital cost of the equipment in the other four leases.

2. Lease-specific arguments of the parties

(a) Scott Capital

[80] Scott Capital asserts that it did not structure its leases in such a way that Cow Harbour was financing its purchase of the equipment or accruing equity in the equipment over the lease term. Rather, Scott Capital structured the leases to ensure that the use, condition and value of the equipment were being controlled and maintained, as Scott Capital expected that Cow Harbour

would return the equipment to it at the end of the lease terms. As the affiant stated on cross-examination:

> A. You will see that the terms on these leases are different. And part of that is because we feel that certain equipment may be perhaps more abused. Certain equipment naturally has a different life than other equipment.
>
> But that type of an analysis is factored into whether or not we will enter into a 48-month lease or perhaps a 60-month lease. If we think that equipment will be used gingerly, then we will perhaps enter into a longer-term lease. If we think that equipment will be used harshly in harsh conditions, we want to put it on a shorter-term lease. There always has to be value on that equipment in the event that it's returned.
>
> [Transcript of the cross-examination of Brian Jagt, 26 October 2010, p. 20, ll 21-34.]

[81] The Schedule 003, Schedule 004 and Schedule 005 leases, in addition to other detailed terms concerning the maintenance and condition of the equipment, specified usage maximums in the return provisions of the lease. Scott Capital did this with specific care and concern for the equipment's condition, having regard to how Cow Harbour intended to use the equipment. The affiant explained that Scott Capital was concerned about the number of hours that Cow Harbour intended to use the equipment, rather than the number of kilometres of recorded use, as Scott Capital anticipated that the buses and trucks would be running constantly but not travelling great distances.

[82] The purchase option prices set out in the Schedule 001 and the Schedule 002 leases (25 and 20 percent, respectively, of the original capital cost of the equipment) were not arbitrary figures. Rather, Scott Capital determined those prices and Cow Harbour agreed to those prices as a reasonable pre-estimate of the equipment's fair market value at the end of the lease term, based on Cow Harbour's anticipated use and the nature of the use.

[83] Scott Capital points out that the present value of the rentals under each lease was less than 90 percent of the original equipment cost.

(b) Monitor

[84] The Monitor suggests that the Schedule 001 and Schedule 002 leases are best characterized as financing leases because, among other factors, the end of term purchase option price appears to be arbitrary and bears no direct connection to the actual value of the leased equipment at the time Cow Harbour was to exercise the option. In other words, Cow Harbour appears to have acquired equity in the leased equipment because the fair market value of the

leased equipment at the time Cow Harbour was to exercise the option may exceed the purchase option price.

[85] In addition, the Schedule 001 and Schedule 002 leases overwhelmingly exhibit other indicia of a financing lease, as discussed in ***Smith Brothers***, which militates against them being considered true leases. Specifically, the leases contain the ***Smith Brothers*** financing lease factors 3 to 10 and 13 to 16.

[86] The Monitor points out that the aggregate rental under the Schedule 001 and Schedule 002 leases approximated the value of the purchase price of the equipment, factoring in interest and carrying costs (***Smith Brothers*** factor 16), as the equipment in the Schedule 001 lease originally was valued at $559,951 plus applicable tax, while the total amount to be paid by Cow Harbour during the course of the term was $628,140 plus applicable tax. In the Schedule 002 lease, the equipment originally was valued at $801,249.96 plus applicable tax, while the total amount to be paid by Cow Harbour over the course of the term was $1,033,079.83 plus applicable tax.

[87] In the Schedule 003, Schedule 004 and Schedule 005 leases, the end of term purchase option was referred to as "fair market value" (with no approximated value of what that value might be). While this factor militates in favour of each such lease being characterized as a true lease, the Monitor notes that, as in ***Bronson***, these leases contained default provisions which guaranteed to Scott Capital the residual value of the equipment. These three leases contained financing lease ***Smith Brothers*** factors 3 to 10 and 13 to 15.

(c) GE

[88] GE takes the position that the Scott Master Lease bears the indicia of a financing lease as ***Smith Brothers*** factors 4 to 11 and 13 to 15 are present.

[89] It says the present value of the rental payments is irrelevant. The more important factor is that the aggregate cost of the rental payments exceeded the value of the equipment at the commencement of the lease.

[90] GE points to the evidence of Scott Capital's affiant that the amount of the security deposit that Cow Harbour paid at the outset of the Schedule 002 lease was equal to the amount of the purchase option at the conclusion of the term. It contends this was equivalent to a nominal purchase option price and suggestive of a financing lease as Cow Harbour, at the outset of the lease, paid the amount of the purchase price due at the conclusion of the lease.

[91] GE maintains that, if this Court accepts Scott Capital's assertion that the purchase price options in the Schedule 003, Schedule 004 and Schedule 005 leases were for fair market value, it would be accepting form over substance. Scott Capital's affiant confirmed that the amount of the security deposit that Cow Harbour paid in respect of each of these three leases at the outset of the

leases was equal to Scott Capital's internal estimate of the remaining value of the equipment at the conclusion of the leases. Said differently, Cow Harbour, at the outset of the lease, paid what was estimated to be the equipment's remaining value at the conclusion of the lease, leaving Cow Harbour with a nominal purchase option.

3. Decision

[92] Applying the ***Smith Brothers*** criteria to the five Scott Capital leases reveals the following:

1. Whether there was an option to purchase for a nominal sum - No, the purchase price was reflective of fair market value (see discussion below).

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - No.

3. Whether the nature of the lessor's business was to act as a financing agency - The affiant acknowledged financing leases are a small portion of its business.

4. Whether the lessee paid sales tax incidental to acquisition of the equipment - Yes.

5. Whether the lessee paid all other taxes incidental to ownership of the equipment -Yes.

6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes.

7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Yes.

8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Yes.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - Yes.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - Yes.

14. Whether there was a provision in the lease for liquidated damages - Yes.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - Yes.

[93] What do these results establish?

[94] Scott Capital's affiant conceded that Cow Harbour sourced the equipment and then approached a broker to seek assistance with acquisition of the assets. The broker would then contact Scott Capital. The way in which the leases came about is more reflective of a financing lease transaction than a true lease situation. However, it is important for this Court to examine the structure of each transaction to characterize properly the agreement.

[95] All of the leases had purchase options. This Court must attempt to value the purchase price option as at the date Cow Harbour and Scott Capital executed the lease agreements. As stated in the *Handbook* at 55:

> A clause in a lease giving the option to purchase the goods at less than their expected market value (as determined at the date of execution) indicates that the lessee has acquired an equity in the goods not unlike that which he would have acquired under an instalment purchase contract. [Emphasis added.]

[96] In ***Re Ontario Equipment (1979) Ltd.*** (1981), 33 OR (2d) 648 at para 9 (HCJ), aff'd (1982), 35 OR (2d) 194 (CA), Henry J.considered the nature of the option to purchase to be a critical factor in distinguishing between true leases and financing leases in personal property security legislation cases, stating:

> The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount ... If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one.

> On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale.

[97] Whether a purchase option price is nominal is fact-specific. A purchase option for a nominal sum is indicative of a financing lease. On the other hand, a purchase option at fair market value is highly suggestive of a true lease. The rationale, according to Burke, is that, "[i]f the lessee is required to pay the actual value of the property at the end of the lease at a time when the property still has value, then the lease payments cannot reasonably be said to have been payments towards an equity interest in the property" (at 293).

[98] However, as noted by the Master in ***Bronson*** at para 55 and confirmed by the British Columbia Supreme Court in that case (at para 7), the mere existence of a fair market value purchase option price in the agreement is not necessarily determinative of whether the agreement is a true lease or a financing transaction.

[99] In ***Smith Brothers***, Bauman J. commented that simply because the lessee can purchase the equipment at its fair market value at the end of the lease does not prevent a court from characterizing the transaction as a financing transaction if the end of the lease term is roughly equivalent to the end of the equipment's useful life (at para 76).

[100] Professors Cuming and Wood explained in their *Handbook* at 55 that:

> A clause in a lease giving the lessee the option to purchase the goods at less than their expected market value (as determined at the date of execution) indicates that the lessee has acquired an equity in the goods not unlike that which he would have acquired under an instalment purchase contract. The economic reality is that it is quite predictable the lessee will pay this amount to the lessor. Consequently, the transaction is likely to be characterized as a security agreement. However, the fact that at the end of a lease term roughly equivalent to the useful life of the goods the lessee can purchase the goods at their then market value does not prevent characterization of the transaction as a security agreement. If one or more of the major indicia of a security agreement are present, the transaction may be a security agreement. Accordingly, if the lease is for all or the greater part of the useful life of the leased equipment and the lessee is obligated to pay rental equivalent to the capital cost of the goods and an appropriate credit charge, the fact that the lessee is given the right to buy the goods at the end of the term for their then small market price should play no role in the characterization process. A consideration of the option price is relevant to the characterization of the transaction only if the option can be exercised at a time when the goods have significant commercial value. It may be possible to show that the option price was not designed to ensure that the lessor is fairly compensated for his interest in the goods, but was included for some

> other purpose (such as satisfying income tax authorities). This provides strong evidence that the parties recognize that by the time the option is exercised the lessor has been fully compensated through rental payments and that it matters little to either the lessor or the lessee that the option is or is not exercised.

[101] In the Schedule 001 and Schedule 002 leases, the purchase option price was expressed to be the "fair market value" of the equipment, pre-estimated and agreed by the parties to be 25 percent and 20 percent, respectively, of its original capital cost. These percentages equated to purchase prices of $139,987.75 (Schedule 001 lease) and $160,249.99 (Schedule 002 lease). These are not nominal amounts.

[102] Scott Capital's affiant deposed that Scott Capital used a "combination of past experience, extensive equipment knowledge, market knowledge and the application or intended use of the equipment to determine the value of any purchase option at lease end such that it is a reasonable estimate of fair market value."

[103] The Schedule 003, Schedule 004 and Schedule 005 leases all stated that the purchase option price was "fair market value." There is no evidence to suggest that the parties meant or intended otherwise.

[104] This Court finds that the options were for fair market value or a reasonable pre-estimate of such.

[105] There was no evidence that 60 months in the case of the Schedule 001 lease or 48 months in the case of the Schedule 002, Schedule 003, Schedule 004 and Schedule 005 leases was roughly equivalent to the end of the useful life of the equipment involved in those leases. In fact, Scott Capital's affiant stated that Scott Capital structured the leases to ensure there was value in the equipment at the end of the lease term.

[106] These leases did not contain any mechanism, either in a default situation or at full term, whereby the surplus value of the equipment would go to Cow Harbour. If, at the end of the term of each lease, Cow Harbour did not exercise the purchase option to acquire the equipment, Cow Harbour had to return the equipment to Scott Capital. Scott Capital could then deal with the equipment as it saw fit for its own benefit and account. Cow Harbour was not responsible under any of these leases for any deficiency or shortfall on the sale of the equipment at the end of the term.

[107] The Scott Master Lease s 13(f) contained a default clause allowing for liquidated damages to consist of the present value of rents owing to the end of the term, plus the present value of the residual value of the equipment "which Lessor expected to receive at the expiry of the term of the lease, which is equal to the Fair Market Value of the Equipment as set out in the Equipment Schedule ...," minus the net proceeds from a sale or lease of the equipment. The lease schedules

stated that if Cow Harbour defaulted in its obligations under the lease, Scott Capital would retain the security deposit as liquidated damages.

[108] The default provisions in ***DaimlerChrysler Services Canada Inc. v. Cameron***, 2007 BCCA 144 [***DaimlerChrysler***], rev'g 2006 BCSC 1992, 32 CBR (5th) 188 were similar (other than retention of the security deposit). The court found that the lease secured the payment of the residual value by the lessee in the contingency of default (at para 28). The court went on at para 37 to say:

> ... the basis for calculating damages does not distinguish a true lease from a security lease. The ability to claim accelerated damages in *Langille* was not a consequence of the character of the lease, i.e., a true lease or a security lease. Rather, it was simply the proper measure of damages for breach of a chattel lease. Generally, the basis for calculating damages can provide only some insight as to whether an impugned lease secures payment or performance of an obligation. I emphasize that it cannot serve as a decisive factor.

[109] The Chambers Judge had concluded in ***DaimlerChrysler*** that the transaction was a security lease, following ***Bronson***, which found that the default clause secured payment of both the lease payments and the option price. On appeal, the court determined that the chambers judge had placed undue weight on the default provision as it can have only corroborative effect (at para 46).

[110] According to Burke at 294:

> If, however, the lessee's residual value guarantee only applies in the case of an early termination of the lease, whether voluntarily by the lessee or by the lessor as a result of the occurrence of a default, but not at the end of the scheduled lease term, then such a residual value guarantee will not constitute a primary factor that is indicative of a security lease.

[111] In the case before this Court, the default provisions contained in the Scott Capital leases are equivocal.

[112] The aggregate of rental payments for each of these leases is greater than the original capital cost of the equipment. Professors Cuming and Wood expressed their view in the *Handbook* that if the lessee must pay the equivalent of the lessor's capital investment plus a credit charge at the rate existing at the date of the agreement, there is strong but not conclusive evidence of a secured sale (at 54). However, Burke commented at 296:

> If a lessee is required to pay what is the equivalent of the original cost of the leased property (i.e., the lessor's capital investment), plus a finance charge based on the rate

> existing at the date of the lease agreement, it does not necessarily follow that such an agreement is a security lease, especially if the lease contains a true fair market value purchase option.
>
> In such a lease, it is possible that the lessee has simply agreed to pay a premium for the use of the leased property.

[113] The Schedule 003, Schedule 004 and Schedule 005 leases contain specific use limitations with corresponding excess use charges. In ***DaimlerChrysler***, the Chambers Judge found that excess kilometre charges and maintenance obligations were indicative of a true lease as they protected the lessor against reduction of market value on expiry of the lease term due to excess "wear and tear" (at para 25). Burke, however, considered such provisions equally consistent with a financing lease, as they suggest that the lessee bears some risks of ownership (at 296). This Court finds that those provisions are equivocal in the case of the Scott Capital leases.

[114] All five Scott Capital leases required substantial security deposits. The evidence of Scott Capital's affiant on cross-examination was that for four of the five Scott Capital leases, the amount of the security deposit was equivalent to the purchase option price in the lease or the anticipated purchase option price (transcript of the cross-examination of Brian Jagt, 26 October 2010, pp 43-45). He explained that in terms of the Schedule 003, Schedule 004 and Schedule 005 leases (which have purchase options simply stated to be at "fair market value"), the security deposit was based on the "estimated" fair market value of the equipment, but that this was just Scott Capital's internal estimate (transcript of the cross-examination of Brian Jagt, 26 October 2010, pp 39-42). Scott Capital did not provide this information to Cow Harbour. Cow Harbour had the ability to purchase the equipment at the end of the term of the lease for the "fair market value," irrespective of whether that amount turned out to be less than, equal to, or greater than the amount of the security deposit.

[115] During cross-examination, the Scott Capital affiant gave the following evidence:

> Q. And would I be correct in stating as well that typically if a purchaser or if a lessee does exercise an option to purchase the equipment at the end of the lease, the deposit will be utilized in some fashion to acquire the equipment?
>
> A. It depends on the customer. Some customers want us to reimburse in the form of a cheque their security deposit, and then they pay us a separate cheque for the full amount if they purchase it. And other customers just tell us to net it against their purchase option, making sure that the bill of sale records the correct gross purchase price and then with the reflection that the other amount has been applied.

Q. And was there any discussion with Cow Harbour at any point in time with respect to how the deposit, whether the deposit would be utilized for the purchase price of the asset if Cow Harbour did exercise an option to purchase?

A. There was no discussion with Cow Harbour.

[Transcripts of the cross-examination of Brian Jagt, 26 October 2010, p 25, ll 8-26.]

[116] This Court finds that Scott Capital's estimated fair market value at the end of the lease term was a reasonable "security deposit" amount to protect against its risk that Cow Harbour might not return the equipment to it when the lease ended because of some total loss event or that Cow Harbour would return the equipment to Scott Capital in such poor condition that the equipment no longer had value. In such cases, the security deposit would have served its stated purpose of being a recourse for Scott Capital's damages under the lease.

[117] There are certainly indicia of a financing arrangement. There are hypothetical situations under which Cow Harbour could indeed have built up equity and paid only the residual amount of the equipment's capital cost plus a financing charge; *e.g.* if it defaulted in its obligations under the leases. Those hypothetical situations did not occur, however, and based on the wording of the leases, Cow Harbour was paying for use of the equipment.

[118] Although the security deposits are relatively substantial, there was no obligation on Cow Harbour's part to forfeit the security deposits at the end of the lease term. It could simply return the equipment and demand the security deposits (less any additional charges that it had incurred in the meantime). This is especially so with respect to the Schedule 001 lease, where the purchase option price was 25 percent of the equipment's original capital cost, while the security deposit was ten percent. Although Burke suggested (at 296) that a substantial security deposit is indicative of a financing lease in that the lessee is required to post collateral to obtain the equipment, considering the whole of the Scott Capital lease agreements, this factor is not determinative and, in fact, it assists Scott Capital in its position.

[119] For the foregoing reasons, this Court concludes that the Scott Capital leases are true leases.

B. Caterpillar Financial Services Limited (CFSL) Lease

1. The Lease

[120] Cow Harbour leased a Caterpillar off-highway truck from CFSL pursuant to a lease dated March 27, 2006. According to CFSL's affiant, the original cost of the truck was $2,235,456. The amount shown in the floating rate addendum was $500 more, which CFSL's affiant explained was a fee payable by Cow Harbour (transcript of the cross examination of Renee Bertha Fournier, 21

October 2011, p. 7, ll 32-41). The lease term was 60 months. The lease required Cow Harbour to pay irregular monthly payments pursuant to the terms of the irregular payment schedule attached to the CFSL lease (6 months at $100,000 and 54 months at $28,397.86). The aggregate amount of those rents was about $2,133,485.

[121] If Cow Harbour exceeded the maximum hours of use of the equipment, it was to pay an excess hour charge.

[122] The CFSL lease contained an end of term purchase option price of $524,535.

2. Lease-specific arguments of the parties

(a) CFSL

[123] CFSL argues that the most probative factor is that the purchase option price was neither a nominal sum nor arbitrarily selected. Rather, it calculated the purchase option price after considering factors such as depreciation, historic resale market for like equipment, application, exchange rate and annual hours of usage. The purchase option price represented 102 percent of the standard residual amount, which CFSL calculated to be $514,250, and was more than 15 percent of the value of the truck at the commencement of the term.

[124] According to CFSL, the purchase option price was an amount intended to represent a reasonable pre-estimate of the fair market value of the truck at the end of the lease term. It relies on the statement by Burke (at 293) that, "[i]f the lessee is required to pay the actual value of the property at the end of the lease at a time when the property still has value, then the lease payments cannot reasonably be said to have been payments towards an equity interest in the property." CFSL says that the term of the lease did not exceed 75 percent of the economic useful life of the truck, which it estimated to be 120 months.

[125] The net present value of the rental payments is $1,865,621.73, which is less than 90 percent of the equipment's value at the beginning of the term. CFSL points out that the rental payments could not be applied in satisfaction of the purchase option price.

[126] CFSL maintains that other factors point to this being a true lease, including:

- the lack of any requirement for a security deposit or down payment
- Cow Harbour was not required to pay the equivalent of the original cost of the truck, plus a financing charge based on a rate existing at the date of the CFSL lease

- Cow Harbour was required to maintain certain minimum standards of repair with respect to the truck.

CFSL submits that the latter factor is consistent with it attempting to protect its interest in the residual value of the truck on its return at the end of the lease.

[127] Cow Harbour was not required to make a residual payment at the end of the lease term or to guarantee residual value. Cow Harbour could exercise the option or return the truck to CFSL.
[128] CFSL asserts that the presence of other factors, such as the inability of Cow Harbour to exchange or replace the truck; a default provision favourable to CFSL; and the inclusion of the floating rate addendum, should be given less weight in comparison with the fair market value option to purchase. Equipment lessors are in the business of making money and the floating rate addendum simply reflects its cost of capital or a return of investment.

[129] CFSL relies on ***DaimlerChrysler*** in arguing that the acceleration of rent on default is equivocal.

[130] CFSL submits that given Cow Harbour's operations, the specialized equipment it was leasing and the relatively remote location of the oil sands site where it was working, it was only logical that CFSL would impose the obligation for insurance, maintenance and the risk of loss on Cow Harbour. Accordingly, these are neutral factors.

(b) Monitor

[131] The Monitor contends that the CFSL lease is best characterized as a financing lease because, among other factors, the end of term purchase option price (approximately 23 percent of the original value of the equipment) appears to be arbitrary and bears no direct connection to the actual value of the leased equipment at the time Cow Harbour exercises the option. In other words, Cow Harbour appears to have acquired equity in the leased equipment because the fair market value of the leased equipment at the time when the option could be exercised might exceed the purchase option price. This leads to the conclusion that the lease is a financing agreement and/or a lease pursuant to which payments are made for "use and equity."

[132] The Monitor suggests that the CFSL lease exhibits other indicia of a financing lease, as discussed in ***Smith Brothers***, which militates against it being considered a true lease. Specifically, ***Smith Brothers*** factors 4 to 6, 8, 9 and 13 to 16 are present in the CFSL lease. The Monitor notes that the equipment originally was valued at $2,235,956 plus applicable tax, while the total amount that Cow Harbour was to pay during the course of the term was $2,658,019.44 plus applicable tax. Therefore, the aggregate rentals approximated the value of the purchase price of the equipment factoring in interest and carrying costs.

(c) GE

[133] GE focuses on the floating rate addendum, which provided that the rental payments were subject to an interest rate adjustment. It says this resulted in the lease operating like a credit or loan agreement. GE notes that:

- CFSL charged interest to Cow Harbour equivalent to its cost of acquiring the truck;
- the interest rate that CFSL charged fluctuated over the term of the lease, according to the cross-examination of CFSL's affiant (transcript of the cross-examination of Renee Bertha Fournier, 21 October 2011, p.6, ll 5-8);
- Cow Harbour had the option, at any time over the term of the lease, to lock into a fixed interest rate equal to the rate of interest charged to CFSL on fixed rate loans (transcript of the cross-examination of Renee Bertha Fournier, 21 October 2011, p.8, ll 30-41; p.9, ll 1-4);
- at the end of the lease, Cow Harbour's final rent payment was subject to a credit or debit adjustment on the interest rate fluctuation over the term of the lease.

GE suggests that this is the most significant evidence the lease was a financing arrangement.

3. Decision

[134] The following results from applying the ***Smith Brothers*** criteria to the CFSL lease:

1. Whether there was an option to purchase for a nominal sum - No, the purchase price was reflective of fair market value.

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - No.

3. Whether the nature of the lessor's business was to act as a financing agency - It acted as both a financing and a leasing company, according to its affiant.

4. Whether the lessee paid sales tax incidental to acquisition of the equipment - The lessee was to pay any taxes due on its exercise of the sale option.

5. Whether the lessee paid all other taxes incidental to ownership of the equipment - Yes.

6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes.

7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Not specifically in the lease agreement
8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Yes.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - No.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - Yes.

14. Whether there was a provision in the lease for liquidated damages - Yes

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - Yes, if interest payments are added to the rent.

[135] Cow Harbour selected the truck and CFSL acquired the truck to lease to Cow Harbour.

[136] This Court finds that the purchase option price for the CFSL equipment was a reasonable pre-estimate of the truck's fair market value at the end of the 60-month lease term. It was approximately 23 percent of the truck's original price. Based on CFSL's estimate that the truck had an economic useful life of 120 months, it was reasonable for CFSL to believe that the truck would still have value at the end of the lease term. No evidence was led which would suggest otherwise.

[137] The lease did not require Cow Harbour to pay a security deposit or down payment. While CFSL was entitled to accelerate rental payments on default, Cow Harbour was not responsible for the residual value, if any, of the truck.

[138] The aggregate rent was about five percent less than the truck's original value. However, as is apparent from the floating rate amortization schedule attached to the lease, the rent payments and option purchase price together amounted to the capital cost of the truck, plus a seven percent interest rate (Toronto Dominion prime plus 1.50 percent).

[139] GE argues that a "payment for use" contract will not impose an obligation on the lessee to pay interest on the funds that the lessor uses to acquire the leased equipment. However, in this Court's view, it is just as likely that such a charge will be included in a true lease, *albeit* it may be incorporated in the overall rental amount rather than being identified as interest or a financing charge.

[140] Some of the terminology that CFSL used in the floating rate addendum suggests that it is an addendum to a financing lease agreement. The terminology includes "principal balance," which is defined as "equal to the amount of credit extended of $2,235,956.00, as adjusted by amortization during the term of the Contract" (emphasis added). Also, "gross lease" was defined as meaning "the total Amount of Credit Extended and Aggregate Finance Charge(s) payable hereunder" (emphasis added). These definitions, however, are not definitive and this Court must look at the lease as a whole.

[141] Cow Harbour was not obliged to exercise the purchase option. If it did, the purchase option price was a significant amount and CFSL was not guaranteed the residual value of the truck unless Cow Harbour exercised the option. This Court finds that Cow Harbour simply agreed to pay a premium for the use of the leased property.

[142] In looking at the CFSL lease as a whole, this Court holds that it was a true lease.

C. Wajax Industries (Wajax) Leases

1. The Leases

[143] Wajax had three leases with Cow Harbour, as set out below:

Lease number (Monitor's Report)	Date day/month /year	Initial Term (months)	Original Cost of Equipment	Monthly Rental	Option Price	Assessed Value June 2010
196	12/11/2008	6	$439,810	$16,500	$439,810,	$130,000

					less a % of rent payments	
198	8/4/2009	6	$1,681,500	$40,000	$1,681,500, less a % rent payments	$450,000
197	8/4/2009	6	$991,860	$30,000	$991,860, less a % of rent payments	$175,000

[144] The leases were for a maximum six-month initial term, with month-to-month extensions allowed after the initial term. Cow Harbour could exercise the option to purchase at any time during the initial term of the lease, or within 6 months after that, if CFSL extended the term of the lease.

[145] Cow Harbour was responsible to pay the specified monthly rental, unless it used the equipment for more than 200 hours in a month, in which case it was required to pay overtime charges.

[146] The option to purchase was for the original cost of the equipment, but if Cow Harbour exercised it during the initial six-month term, 85 percent of the rental payments that Cow Harbour had made was to be credited towards the purchase price. Wajax had the sole option to extend the option to purchase for a further six-month term. If Cow Harbour exercised the option during the second six-month term, Wajax was to credit towards the purchase price 85 percent of the rental payments that Cow Harbour had made during the first six month term and 50 percent of the rental payments that Cow Harbour had made during the second six-month term.

[147] Cow Harbour did not exercise the option to purchase during the initial six-month term and Wajax did not extend the option to purchase beyond that term. At the date this Court granted the Initial Order, Cow Harbour no longer had an option to purchase the equipment.

2. Lease specific arguments of the parties

(a) Wajax

[148] Wajax's affiant deposed that Wajax is not in the business of providing equipment financing. He stated that, in this case, Wajax entered into short-term rental agreements with Cow Harbour to accommodate Cow Harbour's need for the equipment and to permit Cow Harbour time to find third party financing for payment of the purchase price.

[149] The affiant stated that Wajax set the rental rate with a view to covering the equipment's depreciation during the rental period, as Cow Harbour could have returned the equipment after the initial six-month term without incurring any further obligation to Wajax.

[150] Wajax emphasizes that the focus on this application should be on whether the lease agreements secured payment of the purchase price for the equipment. Wajax suggests that this Court should bear in mind the distinctions between leasing consumer goods to an individual versus leasing a large piece of equipment that generates revenue for a business.

[151] Wajax submits that the percentage of the rental payments credit that Cow Harbour would have received had it elected to exercise the option to purchase the equipment was minimal when compared to the purchase price for the equipment. It asserts this credit was not "equity" given the equipment's depreciation, as demonstrated by the Ritchie Brothers valuations that were undertaken in these proceedings and the evidence of Wajax's affiant.

[152] Wajax notes that there was no mandatory purchase option and no liability for any deficiency on the sale of the equipment following the expiry of the lease. It says these were not sale-leaseback transactions. Under the leases, Wajax could replace the equipment with a comparable piece of equipment if Cow Harbour did not exercise the purchase option during the first six months. Further, if Cow Harbour defaulted, Wajax was entitled only to the amounts that Cow Harbour owed to it under the agreement plus 30 percent of the aggregate rental charges for the unexpired portion of the term as a pre-estimate of liquidated damages. Wajax maintains this was a weak default clause.

[153] Wajax points out that the assessed fair market value of the equipment in June of 2010 was significantly less than the purchase option price, even after the second term. As a result, Cow Harbour had not built up equity in the equipment through the lease agreements.

(b) Monitor

[154] The Monitor acknowledges that the Wajax leases could be characterized as financing leases or true leases, depending on the approach used in performing the characterization analysis.

[155] The Monitor says the Wajax leases were not security agreements under a personal property security analysis. However, it maintains that Cow Harbour made payments for use of and earned equity in the equipment during the first six months of the leases. This militates in favour of the leases being considered financing leases.

[156] The Monitor notes that the six-month purchase option period had expired under each of the leases, and Wajax had not given any indication of its election to extend the purchase option period. Therefore, it would appear that Cow Harbour no longer had any equity in the leased equipment, which would militate in favour of each lease being considered a true lease.

(c) GE

[157] GE contends that the Wajax leases bear several indicia of financing leases, including Cow Harbour's:

- obligation to pay all taxes incidental to ownership;
- responsibility for insuring the equipment;
- responsibility for payment of license fees for maintenance of the equipment;
- bearing the entire risk of loss

As well, it asserts that the default provisions were inordinately favourable to Wajax, and the leases contained a provision providing for liquidated damages.

[158] GE contends that the rental payments earned Cow Harbour a significant equity interest in the equipment over the term of the leases. It says that the most significant factor is that Wajax intended to sell the equipment to Cow Harbour pursuant to the leases, as confirmed by Wajax's affiant. As well, Cow Harbour previously had purchased a number of pieces of the same type of equipment from Wajax.

3. Decision

[159] Application of the ***Smith Brothers*** criteria to the Wajax leases reveals the following:

1. Whether there was an option to purchase for a nominal sum - No, the option purchase price was reflective of fair market value.

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - Yes, but contingent on the option to purchase being exercised.

3. Whether the nature of the lessor's business was to act as a financing agency - No.

4. Whether the lessee paid sales tax incidental to acquisition of the equipment - Yes.

5. Whether the lessee paid all other taxes incidental to ownership of the equipment - Yes

6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes.

7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Yes.

8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes, but only 30 percent of the aggregate rental charges for the unexpired portion of the term, as a pre-estimate of liquidated damages.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Wajax is the exclusive dealer for Hitachi equipment in Canada. The equipment was new when it provided the equipment to Cow Harbour.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - No. However, rent for the minimum rental period was payable before delivery of the equipment.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - No (see discussion below).

14. Whether there was a provision in the lease for liquidated damages - Yes (see discussion below).

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - No.

[160] The parties' intent in this case was that Cow Harbour would purchase the equipment, which was the subject of these leases, if it could find a third party to finance its purchase of the equipment.

[161] If Cow Harbour exercised the option to purchase within the first six-month term of the leases, it would be credited with 85 percent of the rental payments made. Professors Cuming and Wood commented in the *Handbook* at 56 on this type of situation:

> Some leases provide that rental payments made up to the point when the option is exercised are to be "credited" to the lessee and deducted from the amount payable under the option. Under an economic realities test, the amount "credited" to the lessee has little significance; it remains necessary to determine if the amount of new money to be paid by the lessee represents the reasonably expected fair market value of the goods at the time of exercise of the option. If the new money is equal to or near the market value of the goods, the "credit" is of no significance. If the amount of new money is significantly less than the market value of the goods, the term providing for the credit is an overt recognition that the debtor has purchased an "equity" in the goods through his lease payments. It is inevitable that, as a rational person, the lessee will exercise the option in order to realize that equity.

[162] This Court finds that the purchase option price or "new money" in this case was a reasonable pre-estimate of what the market value of the equipment would be if and when Cow Harbour exercised the option, taking into account depreciation, which was reflected by the rental "credit." These were relatively short term leases. In any event, the six-month option had expired for each lease and Wajax did not extend them for a second term.

[163] While there was a default clause in each case which allowed for acceleration of rents, it was only for 30 percent of the aggregate rental charges for the unexpired portion of the term. Further, Cow Harbour had no liability for deficiency on sale of the leased property at the end of the term.

[164] Accordingly, this Court finds that the Wajax leases were true leases.

D. Kempenfelt Vehicle Leasing (a Division of Equirex Vehicle Leasing 2007 Inc.) (Kempenfelt) Leases

1. <u>The Leases</u>

[165] Kempenfelt had four leases with Cow Harbour, as described below:

Lease number	Date day/month/year	Initial Term (months)	Original Cost of Equipment	Monthly Rental	Option Price
ZNCS1001	2/2/ 2010	66	$202,738.90	$4,122.95 (plus one	$20,268 at 60 months,

				initial payment of $20,468)	FMV at 66 months
ZNEW1002	10/2/2010	66	$145,000.00	$2,979.99 (plus one initial payment of $14,700)	$14,500 at 60 months, FMV at 66 months
ZEX1002	2/2/ 2010	66	$101,369.00	$2,061.48 (plus one initial payment of $10,334)	$10,134 at 60 months, FMV at 66 months
ZNEY1002	10/2/2010	66	$101,369.00	$2,061.48 (plus one initial payment of $10,334)	$10,134 at 60 months, FMV at 66 months

[166] All the leases required Cow Harbour to make an initial payment, roughly equivalent to 10 percent of the original cost of the equipment, and approximately the same amount as the purchase option price. These payments are not identified as security deposits. However, clause 20 of each lease makes reference to a security deposit, which is refundable at the termination date of the lease, provided Cow Harbour has not defaulted under the lease.

2. Lease-specific arguments of the parties

(a) Kempenfelt

[167] Kempenfelt takes the position that all of these leases fall within C*CAA* s. 11.01(a). In the alternative, Burke's primary/secondary factor approach applies, as the ***Smith Brothers*** factors are not equally probative of the issue as to whether the leases are true leases or financing leases.

[168] Kempenfelt points out that under each lease, Cow Harbour was entitled to purchase the leased equipment for approximately 10 percent of its original value at the end of 60 months, or at fair market value at the end of the 66-month term. Kempenfelt's affiant deposed that the purchase option price was the estimated fair market value of the equipment at the conclusion of the lease term. She did not specify how Kempenfelt arrived at, or calculated, that value.

[169] Kempenfelt notes that the leases contained a guaranteed residual clause, but only if Cow Harbour defaulted or on early termination of the leases. Kempenfelt contends that the acceleration of rents on default is typical of both true leases and financing leases. It says the leases were not full payment leases. Cow Harbour was not required to pay a security deposit or down payment. All payments were described in the leases as "rent."

(b) Monitor

[170] The Monitor submits that the leases are best characterized as financing leases because the 60-month purchase option price (approximately 10 percent of the original value of the equipment) appears to be arbitrary and bears no direct connection to what the actual value of the leased equipment might be at the time Cow Harbour exercised the option.

[171] The Monitor says the leases overwhelmingly exhibit other ***Smith Brothers*** indicia of a financing lease. Specifically, ***Smith Brothers*** financing lease factors 3 to 7, 9, 10 and 13 to 15 are present in the Kempenfelt leases. The Monitor asserts that the aggregate rental approximated the value of the purchase price of the equipment, factoring in interest and carrying costs. It points out that under the terms of lease ZNCS1001, the equipment originally was valued at $202,738 plus applicable tax, while the total amount Cow Harbour was to pay during the lease term, including the initial payment, was $288,459.95 plus applicable tax. In both leases ZEX1002 and ZNEY1002, the equipment originally was valued at $101,369 plus applicable tax, while the total amount Cow Harbour was to pay during the lease term of each lease, including the initial payment, was $144,330.30 plus applicable tax. In lease ZNEW1002, the equipment originally was valued at $145,000 plus applicable tax, while the total amount Cow Harbour was to pay during the lease term, including the initial payment, was $208,399.35 plus applicable tax.

(c) GE

[172] GE contends that the Kempenfelt leases are full payment leases. GE notes that the aggregate cost of the rental payments exceeded the equipment's original cost in each case.

[173] GE notes that the purchase option price exercisable after 60 payments was less than the remaining payments due under the leases. Therefore, the economic reality was that Cow Harbour would be inclined to purchase the equipment for that lower price.

3. Decision

[174] The following are the results of applying the ***Smith Brothers*** criteria to the Kempenfelt leases:

> 1. Whether there was an option to purchase for a nominal sum - See discussion below.

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - No.

3. Whether the nature of the lessor's business was to act as a financing agency - Yes.

4. Whether the lessee paid sales tax incidental to acquisition of the equipment - Yes.

5. Whether the lessee paid all other taxes incidental to ownership of the equipment - Yes.

6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes

7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Yes.

8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Yes.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - The leases refer to a security deposit in clause 20.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - Kempenfelt was permitted to accelerate rent on default.

14. Whether there was a provision in the lease for liquidated damages - Yes.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - Yes.

[175] Each lease referred to a security deposit and stated that Cow Harbour would not earn any interest on the deposit. Kempenfelt was to return the security deposit to Cow Harbour on the termination of the lease. The leases, however, did not identify any security deposit, unless it was meant to be the first payment, which in each case was approximately 10 percent of the original value of the equipment, or five times the other monthly rental payments.

[176] The aggregate of the rental payments, not including the initial payment, was more than the original cost of the equipment in each case. The purchase option price available at 60 months was approximately the same as the remaining five monthly rental payments, less interest.

[177] At the end of the term of each lease, the lessee could return the equipment to Kempenfelt or exercise the option to purchase the equipment at fair market value.

[178] This Court finds that the option served merely as window dressing. The economic reality was that Cow Harbour would have exercised the 60-month option, whether the first payment was considered a security deposit or actual rent.

[179] Considering all of the ***Smith Brothers*** factors, this Court concludes that the Kempenfelt leases were financing leases.

E. Concentra Financial (Concentra) Lease

1. The Leases

[180] Concentra's lease 7958-1, dated February 24, 2006, was for a new off-highway mining truck. The original cost of the truck was $2,335,456, according to the Monitor's brief. The vendor was shown as Finning (Canada). The initial term of the lease was 60 months. The lease required one payment of $100,000 and 59 monthly payments of $35,224.79. The end of term resale value was identified as $415,000.

[181] Under clause 10 of lease 7958-1, Cow Harbour unconditionally guaranteed the end of term minimum resale value of the equipment, on or at expiry of the lease or any renewal term.

[182] Attached as part of an appendix to the Monitor's 13th Report was a Concentra lease credit approval relating to this equipment. Concentra approved a "loan" of $2,075,000, with an "origination fee" of $21,000 and contract initiation fee of $5,188. Monthly rental was shown as $35,224.78, with the term being 60 months. Approval was said to be subject to a "rental" payment in advance of $100,000. Also attached was a Capital City Savings amortization schedule for a $2,075,000 loan, at a nominal annual rate of 8.321 percent, compounded monthly, showing the

payments noted above in the lease document, plus a $415,000 payment on February 20, 2011. The copies of these document that this Court reviewed were not signed and Concentra's affiant was not cross-examined on them.

[183] The other lease is referred to as "Alter Moneta Equipment Schedule Number 2 to Master Lease No. CCB5314A." It is dated April 18, 2007 and was assigned to Concentra by Alter Moneta Corporation on September 27, 2007. The subject of the lease was a new CAT off-highway truck and accessories, the net price of which was shown as $2,558,295. The term of the lease was 60 months. The payment schedule addendum provided for an initial payment of $683,295 and 59 monthly payments of $40,372.39 each. The lease contained an option to purchase for $1 at the end of the initial lease term or end of any renewal period

2. Lease-specific arguments of the parties

(a) Concentra

[184] Concentra notes that under clause 9 of lease 7958-1, if either party elected not to renew the lease or elected to cancel it during the renewal period, the lessee could return the equipment to Concentra.

[185] Concentra suggests the default clause is typical, presumably meaning it is equivocal.

[186] Lease 7958-1 did not have an option to purchase. Nor was there a mandatory option requirement. There was no ability for the lessee to exchange equipment. Concentra concedes the $100,000 payment was a down payment.

[187] In terms of the Alter Moneta Corporation assigned lease, Concentra argues that even an option at a nominal purchase price is irrelevant until such time as Cow Harbour exercises the option (***Ed Miller***; see this Court's discussion above). Concentra notes that the option did not state that it was mandatory. As well, there was a guaranteed residual clause. Concentra contends that it is a matter of interpretation whether the termination options or the end of term options make the lease open-ended. The lease was not stated to be a full payment lease and there was no security deposit. The down payment was only about 20 to 25 percent of the equipment's initial acquisition cost.

(b) Monitor

[188] The Monitor says that lease 7958-1 is best characterized as a financing lease because, among other things, it contained a "guaranteed residual clause" in clause 10, thereby constituting it a security agreement under a personal property security analysis. The Monitor asserts that because it is a security agreement under a personal property security analysis, it falls outside of the scope of *CCAA* s. 11.01(a).

[189] As well, the Monitor submits that lease 7958-1 overwhelmingly exhibits the ***Smith Brothers*** indicia of a financing lease. Specifically, ***Smith Brothers*** factors 3 to10 and 13 to16 are present. It notes that the equipment originally was valued at $2,335,456 plus applicable tax, while the total amount that Cow Harbour was to pay during the course of the lease term was $2,593,261.84 plus applicable tax. Therefore, the aggregate rental approximated the value of the purchase price of the equipment, factoring in interest and carrying costs.

(c) GE

[190] GE takes the position that both leases have indicia of financing leases. Under lease 7958-1, Cow Harbour guaranteed the end of term resale value of the equipment ($415,000) to Concentra, which suggests this is financing lease.

[191] GE says the Alter Moneta Corporation assigned lease was substantively identical to the Alter Moneta Corporation lease (discussed below) in having a mandatory end of term purchase obligation for $1. This also points to it being a financing lease.

3. Decision

[192] The following are the results of applying the ***Smith Brothers*** criteria to the Concentra leases:

1. Whether there was an option to purchase for a nominal sum - No option to purchase in lease 7958-1, but end of term resale value guaranteed; nominal option price for the Alter Moneta Corporation assigned lease.

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - No.

3. Whether the nature of the lessor's business was to act as a financing agency - Yes.

4. Whether the lessee paid sales tax incidental to acquisition of the equipment - Yes.

5. Whether the lessee paid all other taxes incidental to ownership of the equipment - Yes.

6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes

7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Yes.

8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Yes.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - There was a down payment for both leases.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - Yes.

14. Whether there was a provision in the lease for liquidated damages - Yes.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - Yes, in terms of lease 7958-1, but the aggregate would not account for financing charges on the full amount. However, the aggregate was equal to a lesser amount with monthly compounded interest. Yes, in terms of the Alter Moneta Corporation assigned lease.

[193] Lease 7958-1 did not contain an option to purchase. At the end of the term, end of any renewal period, or on default, Cow Harbour was required to pay the residual value of the equipment. Cow Harbour, however, also was required to return the equipment to Concentra. If Concentra sold the equipment and the sale yielded an amount less than the end of term minimum resale value, Cow Harbour was responsible for the deficiency (at Concentra’s option), but was not entitled to any surplus.

[194] Burke stated at 294 that:

> Where the lessee is liable under an open-end lease for any deficiency in the sale of the leased property following its return at the end of the scheduled lease term, the current line of authority is to treat such a lease as a security lease, because a lessor is "guaranteed" to receive a minimum return on the transaction.

[195] Burke cited ***Crop & Soil Services, Inc. v. Oxford Leaseway Ltd.*** (2000), 48 OR (3d) 291 (CA) as authority for this proposition. That case, however, and those referred to in it, involved situations where the lessee was entitled, as well, to any surplus on the sale of the equipment.

[196] Burke suggested (at 296) that a substantial down payment is indicative of a financing lease in that the lessee may be viewed as acquiring an equity interest in the leased property.

[197] The parties presented no evidence that 60 months was the anticipated useful life of the truck. There was no purchase option. Even though Concentra had a residual value guarantee and Cow Harbour made a substantial down payment, Cow Harbour was required to return the truck at the end of the lease term or renewal period, and it was not entitled to any surplus above the end of term minimum resale value, this Court finds that the Concentra lease was a true lease**.**

[198] The aggregate of rents for the Alter Moneta Corporation assigned lease was approximately $3,065,266, which was greater than the $2,558,295 net price. A substantial down payment was required. The assigned lease contained an option to purchase for $1. The economic reality is that Cow Harbour would have exercised that option. The lease contained other lesser indicia of a financing lease. This Court concludes that the Alter Moneta assigned lease was a financing lease.

F. Alter Moneta Corporation (Alter Moneta) Lease

1. The Lease

[199] The lease dated January 21, 2008 between Alter Moneta and Cow Harbour was Equipment Schedule No. 003 to Master Lease No. CCB5314A.

[200] The net price of the leased equipment, a new 2008 Caterpillar off-highway truck, was shown as $2,737,433. The lease term was 60 months. Addendum 4 to the lease called for an initial payment of $273,743.30 and 59 monthly payments of $53,116.94.

[201] At the end of the initial term or renewal period, Cow Harbour, if not in default, had the option to purchase the lessor's interest and title in the equipment for $1 or to renew the lease for a further 12 months for the same monthly lease payment.

2. Lease-specific arguments of the parties

(a) Alter Moneta

[202] Alter Moneta advanced the same arguments as those advanced in relation to the Alter Moneta lease that Alter Moneta assigned to Concentra. In particular, it argued that the nominal purchase option price was irrelevant until such time as Cow Harbour exercised the option.

[203] Alter Moneta notes that the option to purchase was not mandatory, there was no residual guarantee clause and the document did not relate the amount of payments to the purchase price. Alter Moneta says that the document refers to all payments as rent, but the initial payment is different from the others.

(b) GE

[204] GE notes that the aggregate value of the rental payments over the term of the lease ($3,407,643) exceeded the cost of the leased equipment ($2,737,433).

[205] GE asserts that, inasmuch as the option to purchase was for $1, the economic reality is that Cow Harbour would have bought the leased equipment.

3. Decision

[206] The following results from application of the ***Smith Brothers*** criteria to the Alter Moneta lease:

> 1. Whether there was an option to purchase for a nominal sum - Yes, the option purchase price was $1 at the end of the term.
>
> 2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - No.
>
> 3. Whether the nature of the lessor's business was to act as a financing agency - Yes.
>
> 4. Whether the lessee paid sales tax incidental to acquisition of the equipment - Yes.
>
> 5. Whether the lessee paid all other taxes incidental to ownership of the equipment - Yes.
>
> 6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes
>
> 7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Yes.

8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Yes.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - There is a large down payment required, although it is referred to as "rent."

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - Yes.

14. Whether there was a provision in the lease for liquidated damages - Yes.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - Yes.

[207] The aggregate of the lease payments was greater than the net price of the equipment. Cow Harbour was required to make a substantial down payment. The lease contained an option to purchase for $1. Alter Moneta's affiant deposed that the option was for the estimated fair market value of the equipment at the end of the lease term. If it is seen as a nominal purchase option price, the economic reality is that Cow Harbour would have exercised that option. If it is a reflection that the equipment was expected to be at the end of its useful life at the conclusion of the lease, Alter Moneta, in essence, was giving credit to Cow Harbour for its purchase of the equipment. The lease contained other ***Smith Brothers*** indicia of a financing lease.

[208] As with the Alter Moneta lease that Alter Moneta assigned to Concentra, this Court concludes that this lease was a financing lease.

G. Key Equipment Finance Canada Ltd. (Key Equipment) Lease

1. <u>The Lease</u>

[209] Key Equipment was the assignee of a lease agreement dated November 15, 2006 between Alter Moneta and Cow Harbour (assigned June 27, 2008) relating to a hydraulic excavator. The agreement was described as Equipment Schedule No. 001 to Master Lease No. CCB5314A

[210] The equipment's value at the time of the lease agreement was stated to be $1,484,277.99. The lease term was 60 months. Addendum 4 to the lease agreement called for an initial payment of $148,429.80, with 59 monthly payments of $26,777.34.

[211] Addendum 3 to the lease provided that if the lease had not been terminated earlier and if the lessee was not in default, the "Lessee shall... elect for one of the following options" (emphasis added). The three options were to: (1) purchase the equipment on November 15, 2011 (the option date) for $148,429.80 plus taxes (the purchase option price), which was said to be the estimated fair market value of the equipment at that date; (2) find a third party to purchase the equipment on the option date for the purchase option price; or (3) rent the equipment for a further period and periodic rent to be established by the lessor acting reasonably.

[212] Clause 27 of the Master Lease provided that if there was a substantial adverse change in Cow Harbour's financial circumstances, the lessor could terminate the lease, at the lessor's sole option.

2. Lease-specific arguments of the parties

(a) Key Equipment

[213] Key Equipment argues that the purchase option price was not nominal. Instead, it was an amount to which the parties agreed at the outset to be the estimated fair market value of the equipment at the end of the lease term. Key Equipment takes no position on whether the option can be characterized as mandatory.

[214] Key Equipment points out that the termination provision in clause 27 of the Master Lease is common to all Alter Moneta leases (including this one and the one Alter Moneta assigned to Concentra). Key Equipment says that the lease agreement did not contain a guaranteed residual clause and it is a matter of interpretation whether the renewal provision made this an open-ended lease. The lease did not state that it is a full payment lease. Key Equipment submits that all payments under the lease were rent.

(b) Monitor

[215] The Monitor submits that this lease was a financing lease since the end of term purchase option price (approximately 10 percent of the original value of the equipment) appears to be

arbitrary, rather than bearing some connection to what the actual value of the equipment might be at the time Cow Harbour could exercise the option.

[216] The Monitor maintains that the lease overwhelmingly exhibits other ***Smith Brothers*** indicia of a financing lease, which militates against it being considered a true lease. Specifically, ***Smith Brothers*** factors 3 to 10 and 13 to 16 are present, indicating a financing lease. The Monitor points out that the equipment originally was valued at $1,484,297.99 plus applicable tax while the total amount Cow Harbour was to pay during the course of the term was $1,728,292.86 plus applicable tax. Therefore, the aggregate rental approximated the value of the purchase price of the equipment, factoring in interest and carrying costs.

(c) GE

[217] GE notes that the aggregate of rental payments exceeded the cost of the equipment, which suggests that this lease agreement was a financing lease. It points out that Cow Harbour was required to purchase the equipment at an option purchase price of $148,429.80 plus tax, find a purchaser for it at the purchase option price, or renew the lease. Cow Harbour could not return the equipment to Key Equipment.

3. Decision

[218] Application of the ***Smith Brothers*** factors to the Key Equipment lease produces the following results:

> 1. Whether there was an option to purchase for a nominal sum - There was an option, but it was not for a nominal sum.
>
> 2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment - No.
> 3. Whether the nature of the lessor's business was to act as a financing agency - Yes.
>
> 4. Whether the lessee paid sales tax incidental to acquisition of the equipment - Yes.
>
> 5. Whether the lessee paid all other taxes incidental to ownership of the equipment - Yes.
>
> 6. Whether the lessee was responsible for comprehensive insurance on the equipment - Yes.

7. Whether the lessee was required to pay any licence fees for operation of the equipment at its expense - Yes.

8. Whether the agreement placed the entire risk of loss on the lessee - Yes.

9. Whether the agreement included a clause permitting the lessor to accelerate payment of rent on default by the lessee and granted remedies similar to those of a mortgage - Yes.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease - Yes.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment - There was a substantial down payment.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement - Not applicable.

13. Whether there was a default provision in the lease inordinately favourable to lessor - Yes.

14. Whether there was a provision in the lease for liquidated damages - Yes.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor - Yes.

16. Whether the aggregate rentals approximated the value of the purchase price of the equipment - Yes.

[219] The purchase option price in this case was approximately 10 percent of the original cost of the equipment, which is not a nominal amount. The parties agreed that this was a pre-estimate of the market value of the equipment at the end of the lease term. Ordinarily, a fair market value option would be highly suggestive of a true lease. In this case, however, Key Equipment was guaranteed the option price, as Cow Harbour was required to exercise the option, find a third party who would pay the option price, or renew the lease for a term and at a rate selected at the sole option of Key Equipment. This was equivalent to a mandatory purchase option. Cow Harbour could not return the equipment to Key Equipment. As Burke stated (at 294):

> ... leases that do not provide the lessee with the option to return the equipment (i.e., the only available options to a lessee at the end of the scheduled term of the lease are either to purchase the leased property or to renew the lease) can be expected to be construed as conditional sales, because the inability of the lessee to return the

leased property at the end of the term will likely be construed as effectively requiring the lessee to acquire the leased property.

[220] The Key Equipment lease also contained other indicia of a financing lease. This Court concludes that it was a financing lease.

VI. Conclusions

[221] This Court categorizes the Disputed Leases as follows:

A. Scott Capital's leases were true leases.

B. CFSL's lease was a true lease.

C. Wajax's leases were true leases.

D. Kempenfelt's leases were financing leases.

E. Concentra's lease was a true lease. The Alter Moneta lease assigned to Concentra was a financing lease.

F. Alter Moneta lease was a financing lease.

G. The Alter Moneta lease assigned to Key Equipment was a financing lease.

[222] The true leases are subject to *CCAA* s. 11.01(a).

Heard on the 2nd and 3rd days of November, 2011.
Dated at the City of Edmonton, Alberta this 23rd day of January, 2012.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Walker W. MacLeod
McCarthy Tétrault
for GE

Joseph J.Bellissimo
Cassels Brock & Blackwell LLP
for Scott Capital

Kentigern A. Rowan, Q. C. and Stephanie A. Wanke
Ogilvie LLP
for Wajax

Ryan Zahara
Blake, Cassels & Graydon LLP
for Caterpillar Financial

Jeremy H. Hockin
Parlee McLaws LLP
for Kempenfelt Vehicle Leasing (a Division of Equirex Vehicle Leasing 2007 Inc.), Alter Moneta Corporation , Concentra Financial, and Key Equipment

In the Court of Appeal of Alberta

Citation: De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada, 2010 ABCA 394

Date: 20101214
Docket: 1003-0292-AC
Registry: Edmonton

Between:

De Lage Landen Financial Services Canada Inc.

Applicant (Appellant)

- and -

**Royal Bank of Canada and PricewaterhouseCoopers Inc.,
In Its Capacity As Court Appointed Receiver and
Court-Appointed Transaction Facilitator**

Respondents (Respondents)

**Reasons for Decision of
The Honourable Mr. Justice Keith Ritter**

Application for Leave to Appeal, Expedite Appeal and Stay/Direction
(Docket: Q.B.1003-05560; Bankruptcy 24-115359)

Reasons for Decision of
The Honourable Mr. Justice Keith Ritter

[1] The applicant seeks leave to appeal pursuant to s. 13, of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) and a stay pending appeal.

[2] The applicant was a creditor of Cow Harbour Construction Ltd.'s ("CHC"), by virtue of a lease agreement ("Agreement"), which provided that CHC would rent certain equipment ("Equipment") for a term of 37 months. The Agreement did not contain a purchase option.

[3] In the spring of 2010, CHC obtained a stay of proceedings under the *CCAA* to restructure its affairs. Various court applications were heard by an assigned case management judge over the summer of 2010 and, eventually, the *CCAA* proceedings turned into a liquidation, whereby CHC would restructure by selling its assets. The sales process resulted in an offer from a purchaser, who offered to purchase a large number of CHC's assets, including the Equipment. The applicant objected to the sale of the Equipment, arguing that it could not be sold without its consent.

[4] The applicant sought a declaration that, for the purposes of s. 11.01, *CCAA*, the Agreement was a true lease, rather than a financing agreement. This characterization affects how approximately $900,000 in lease payments (currently held in trust by the Receiver's counsel) would be distributed. The applicant claims entitlement to the whole amount if the Agreement is a true lease.

[5] On August 25, 2010, the case management judge concluded that the Agreement was a security lease. He also appointed the respondent PricewaterhouseCoopers Inc. as Receiver and granted an order approving the purchase and vesting CHC's assets, including the Equipment, to the purchaser.

[6] The applicant applied to the case management judge for a stay of the August 25, 2010 order as it related to the Equipment. The application was dismissed, as it was moot (the Equipment having already been sold) and as no appeal had been taken. The applicant made a further application before the case management judge seeking leave to appeal the August 25, 2010 order as it related to the Equipment and a stay pending the appeal. Both those applications were denied: ***Royal Bank of Canada v. Cow Harbour Construction Ltd.***, 2010 ABQB 637.

[7] The applicant seeks leave to appeal pursuant to s. 13, *CCAA*. Section 13 provides:

> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this *Act* may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[8] The parties agree that the test for leave is whether there are serious and arguable grounds of real and significant interest to the parties. In order to obtain leave, the applicant must demonstrate that the following four criteria are met:

(a) the point on appeal is of significance to the practice;

(b) the point raised is of significance to the action itself;

(c) the appeal is *prima facie* meritorious or frivolous; and

(d) the appeal will not unduly hinder the progress of the action: ***Liberty Oil & Gas Ltd. (Re)***, 2003 ABCA 158, 44 C.B.R. (4th) 96 at paras. 15-16; ***Resurgence Asset Management LLC v. Canadian Airlines Corp***., 2000 ABCA 149, 261 A.R. 120 at paras. 6-7. The parties disagree about whether the proposed appeal meets the test.

[9] The applicant agrees that the case management judge applied the correct test in determining that the Agreement was a financing lease rather than a true lease. However, it proposes to argue that the case management judge erred by giving equal weight to each factor within that test. It also proposes to argue that there is no case law in Alberta holding that a lease which did not include an option to purchase is anything but a true lease. In resisting the applicant's leave to appeal application, the respondents state that the four criteria have not been met. They also argue that the application was filed out of time, contrary to s. 14, *CCAA*.

[10] With respect to the argument that the application is out of time, the applicant argues that s. 14, *CCAA* only requires an appellant to apply to one of the concurrent courts as set out in s. 13, *CCAA* within the time specified. It states that if it does that and is refused, it can then make an application to the other court even though the subsequent application is outside the time limit in s. 14. I have some significant doubts about the viability of this argument as s. 14 includes a mechanism to extend time and the approach suggested by the applicant seems to render that mechanism meaningless. However, I prefer to deal with this application on the basis of whether leave should be granted, as this analysis leads to the conclusion urged by the respondents in any event.

[11] I conclude that factors (a) and (c) lead to my rejecting this leave application. With respect to the issue of importance to the practice, the applicant argues that this Court has never considered whether a lease agreement without a right of ultimate purchase to the lessee is a security lease. Accordingly, it says, this issue is significant to legal practice surrounding the *CCAA*. However, stating the issue in that way is re-stating it.

[12] It is clear that the parties argued before the case management judge that he should consider the factors in ***Smith Brothers Contracting Ltd. (Re)*** (1998), 53 B.C.L.R. (3d) 264 (S.C.), 1998 CarswellBC 678. One of the factors set out in that case is whether there is any right of acquisition.

Therefore, the proposed issue is really about the weight given to a relevant factor in comparison to the weight given to other factors. This leads to the question of prospect of success on appeal.

[13] This court has stated, with respect to many contexts, that substantial deference is accorded to the weight given by trial, chambers, and case management judges, to the factors in legal tests. Any deference afforded is amplified when the judge is a case management judge whose decision is part of a series of decisions relating to an ongoing court process.

[14] That is the case here, where the applicant seeks to appeal the portion of the decision dealing with the rentals and not the direction that the Equipment be included in the sale of assets. Proceedings under *CCAA* often involve compromise. A case management judge is in the best position to assess whether a particular directive is fair in the context of the compromises made by everyone involved in the proceedings. The case management judge alluded to this in his reasons.

[15] The applicant points to a British Columbia decision which suggests *in obiter* that there should be a hierarchy in the factors used to determine if a lease is a true lease or a financing lease. In my view, this *obiter* runs contrary to current trends about how to weigh the factors in a legal test and about the deference afforded to courts of first instance in this respect. If one factor trumps the others, there is simply no point in including the others in the test.

[16] In sum, I conclude that the chances of success with respect to this appeal are minimal and that the proposed issue is not important to the practice surrounding the *CCAA*. Leave to appeal is denied.

Application heard on December 1, 2010

Reasons filed at Edmonton, Alberta
this 14th day of December, 2010

Ritter J.A.

Appearances:

S.J. Weatherill and K.R. Kawanami
for the Applicant (Appellant)

L.K. Harris
for the Respondent (Respondent) the Royal Bank of Canada

H.A. Gorman
for the Respondent (Respondent) PricewaterhouseCoopers Inc., in its capacity as Court Appointed Receiver and Court-Appointed Transaction Facilitator

In the Court of Appeal of Alberta

Citation: Crawford v. Morrow, 2004 ABCA 150

Date: 20040503
Docket: 0203-0298-AC
Registry: Edmonton

Between:

McDonald Crawford

Appellant (Applicant)

- and -

Sam Morrow

Respondent (Respondent)

The Court:

The Honourable Mr. Justice Côté
The Honourable Madam Justice Russell
The Honourable Mr. Justice Berger

Reasons for Judgment of the Honourable Mr. Justice Berger
Concurred in by the Honourable Madam Justice Russell

Dissenting Reasons for Judgment of the Honourable Mr. Justice Côté

Appeal from the Judgments by
The Honourable Madam Justice A.B. Moen
Dated the 1st day of March, 2002
Filed on the 12th day of March, 2002
(2002 ABQB 239 and 2002 ABQB 241, Docket: 0001-12027)

Reasons for Judgment of the
Honourable Mr. Justice Berger

[1] The issue in this appeal is whether a solicitor, bound by a retainer agreement, can seek a higher fee on taxation when the agreement does not expressly so provide.

[2] Because the proper construction of the retainer letter is engaged, I reproduce the relevant portions for ease of reference:

> "The Law Society of Alberta requires that we advise you of the costs associated with conducting this suit. My legal fee is $200.00 an hour, Mr. Crawford's legal fee is $250.00 an hour, ...
>
> . . .
>
> We are also required to advise you that a fair and reasonable fee will depend upon and reflect such factors as:
>
> (a) the time and effort required and spent;
>
> (b) the difficulty and importance of the matters;
>
> (c) whether special skill or service has been required and provided;
>
> (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
>
> (e) the amount involved or the value of the subject matter;
>
> (f) the results obtained;
>
> (g) tariffs or scales authorized by local law;
>
> (h) such special circumstances such as loss of other employment, uncertainty of reward and urgency."
>
> (A.B. E85 & E86)

[3] The recited factors are an echo of Rule 613 of the *Rules of Court* which provides as follows:

> "Barristers and solicitors are entitled to such compensation as may appear to be a reasonable amount to be paid by the client for the services performed having regard to
>
> (a) the nature, importance and urgency of the matters involved,
>
> (b) the circumstances and interest of the person by whom the costs are payable,
>
> (c) the fund out of which they are payable,
>
> (d) the general conduct and costs of the proceedings,
>
> (e) the skill, labour and responsibility involved, and
>
> (f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved."

[4] Also relevant to the interpretation and application of the retainer agreement are Rules 614, 615, 635, 643.1 and 646:

> "**614** The charges of barristers and solicitors for services performed by them are, notwithstanding any agreement to the contrary, subject to taxation as provided by these Rules.
>
> **615** A barrister and solicitor may make an agreement with the client, respecting the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements in respect of business done or to be done by the barrister and solicitor either by a gross sum or by commission or percentage or by salary or otherwise and either at the same or at a greater or less rate, than the rate at which he would otherwise be entitled to be remunerated, subject to taxation.
>
> . . . .
>
> **635(1)** The taxing officer may refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved.

(2) The taxing officer may refuse to allow the costs of all or any part of proceedings that were

(a) improper, vexatious, prolix or unnecessary, or

(b) taken through over-caution, negligence or mistake.

. . . .

643.1 An account of a barrister and solicitor may be taxed in Alberta

(a) at the request of a client if

(i) the barrister and solicitor resides in Alberta,

(ii) the barrister and solicitor's principal office is in Alberta,

(iii) the barrister and solicitor's account specifies an Alberta address for the barrister and solicitor or the law firm of the barrister and solicitor,

(iv) most of the services were performed in Alberta,

(v) the services were performed in connection with legal proceedings commenced in Alberta in which the barrister and solicitor was a barrister and solicitor of record, or

(vi) the retainer agreement between the barrister and solicitor and the client so provides;

(b) at the request of the barrister and solicitor if

(i) the client resides in Alberta,

(ii) the principal office or place of business of the client is in Alberta,

(iii) most of the services were performed in Alberta and the barrister and solicitor has no office in the jurisdiction where the client resides or carries on business, or

(iv) the retainer agreement between the barrister and solicitor and the client so provides.

. . . .

646 (1) When an account is taxed under Rule 643.1, a copy of the retainer agreement must be provided to the taxing officer at least 7 days before the date scheduled for taxation.

(2) Any such agreement shall be allowed only to the extent that it is fair and reasonable in the circumstances, and it may be allowed or disallowed, in whole or in part, and as well with respect to sums paid thereunder as to sums unpaid."

STANDARD OF REVIEW

[5] The standard of review with respect to the interpretation of a contract is correctness: ***Alberta v. Western Irrigation District*** (2002), 33 M.P.L.R. (3d) 62; 2002 ABCA 200 at para. 17 and ***Partec Lavalin Inc. v. Meyer***, [2001] 8 W.W.R. 628; 2001 ABCA 145 at para. 11; leave to appeal to S.C.C. refused [2001] S.C.C. No. 453.

[6] It follows that although, pursuant to Rule 601(1) of the *Rules of Court*, costs of any proceedings and the party who is to pay them are at the discretion of the Court, and although an award of costs is, accordingly, subject to the contract, at the discretion of the presiding judge: ***Tat v. Ellis*** (1999), 228 A.R. 263, and although the standard for the exercise of discretion is reasonableness: R. Kerans, *Standards of Review Applied by Appellate Courts* (Edmonton: Juriliber, 1994) at 122, when the exercise of discretion is founded upon the interpretation of a contract, the standard of review remains correctness.

[7] My colleague suggests in his reasons for judgment that the standard of review on appeal from a taxing officer's assessment of the legal fees is "very deferential" and implies that fact findings are a matter for a taxation officer, not the judge interpreting the fee contract. (He states: "Taxation finds facts; it does not create them."). In my opinion, where the proper interpretation of a retainer contract between solicitors and their client is a central issue on appeal, fact findings that warrant deference are not essentially at play.

ANALYSIS

[8] In ***Braithwaite, Boyle & Associates, Re*** (1995), 33 Alta. L.R. (3d) 81; 171 A.R. 76, legal author, Mark M. Orkin, Q.C., in his book *The Law of Costs*, (Aurora, Ont.: Canada Law Book Inc., 1987, 2nd edition) is quoted at p. 84 as saying:

> "In all cases of an agreement respecting remuneration, there is an onus on the solicitor to take care that the client thoroughly understands not merely the terms but also the effect of such an agreement, otherwise it will be unenforceable . . ."

[9] In my opinion, the same considerations apply to non-contingent fee agreements.

[10] In my opinion, an agreement for fees must be construed as of the date upon which it is made and not after settlement has taken place***: Re Collier and Swingle*** (1960), 36 W.W.R. 695; ***Speers v. Hagemeister*** (1975), 52 D.L.R. (3d) 109 and ***Galbraith v. Murray, Robertson & Thomas*** (1930), 4 D.L.R. 1005, (1930) 3 W.W.R. 120.

[11] Rule 613 factors apply to the taxation of a solicitor's account absent any agreement as to fees, or when an agreement invokes or can be interpreted to invoke the Rule. If a solicitor and his or her client have not agreed beforehand on what the solicitor's charges will be, the solicitor is entitled to reasonable compensation on a *quantum meruit* basis, to be measured by the factors listed in Rule 613. Both the solicitor and the client can marshall the recited factors in support of their respective positions.

[12] Côté, J.A., however, seems to suggest that Rule 613 may be invoked to the benefit of a solicitor once the results of the litigation are known even in the face of an agreement as to fees which excludes the application of the Rule or fails to expressly include it. It is inequitable, he argues, to hold otherwise. I respectfully disagree. I adopt the reasons for judgment of Master Funduk on this point in ***Molstad Gilbert (c.o.b. Molstad Gilbert) v. Douglas Rentals Ltd.***, [1983] A.J. No. 664, who stated (at para. 6):

> "If the parties had beforehand agreed to what the Solicitors charges would be, they would then prima facie be those charges subject to the right the Client has to still have a taxation if he is later of the view the agreed upon price is too much. What it comes down to is that an agreement as to price is binding on the solicitor but not on the client. That is not as inequitable as it appears. It is a recognition by the Court of the reality of a solicitor-client relationship. A client is often not in the position to properly assess whether a solicitors proposed price is reasonable."

[13] Rule 613 and its recited factors do not accrue to the benefit of a law firm seeking a fee greater than the hourly rate specified in a retainer agreement.

[14] My colleague relies on what he construes as the plain meaning of Rule 613 which he says, read with Rules 614 and 615, gives the barrister and solicitor just as much right to tax as the client. I respectfully disagree. It is an error to confuse the right to tax with the right to seek a greater fee than that contracted for. If a lawyer seeks to recover the amount owing on an unpaid statement of account delivered to his client, he may do so by taxing his account and thereafter applying for a fiat to enter the

taxed solicitor/client bill as a judgment: ***Rusnak v. A.C.H.A.I.A. Holdings Ltd***, [1983] A.J. No. 28 (Q.B.) and ***Gibson v. Bassie, Kantor & Plupek***, [1985] A.J. No. 193 (C.A.). A lawyer may also invoke the Rule to demonstrate to the client the appropriateness of the fee. But, it is not open to the lawyer to invoke Rule 613 to increase the fees beyond what was contracted for.

[15] How then does one construe the remaining relevant provisions of the retainer letter reproduced above? In my opinion, they represent notice to a client of his right to tax the law firm's account, notwithstanding the specified hourly rate. The recited factors are those to be considered by the taxing officer in the event of such a taxation. In the instant case, the law firm, in its retainer letter, states clearly and unequivocally that Mr. Newcombe's legal fee is $200.00 per hour and Mr. Crawford's fee is $250.00 per hour. It is notable that in the preamble to the recited factors, the law firm, in this case, chose language consistent only with advice to its client of his right to tax, as reflected by the words "we are also required to advise you ..." If the law firm wished to reserve to itself the determination of the ultimate fee and to charge a premium when the results of the litigation were known, it would have been a simple thing to say so in clear and unmistakable language. The basic and fundamental principles of contract law recited so eloquently in the reasons for judgment of my colleague, Côté, J.A., also support these conclusions, as does the Law Society of Alberta's Code of Professional Conduct. Chapter 13, Rule 2, reads as follows:

> "A lawyer must provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements as is reasonable and practical in the circumstances, including the basis on which fees will be determined."

[16] The Law Society of Alberta has crafted a template to describe the specific services to be provided to a client and the basis on which fees will be determined for the matter on which a law firm has been engaged. If a solicitor proposes that fees be determined on an hourly rate or time basis, but also anticipates the prospect of charging a greater amount based on the results obtained or the difficulty and complexity of the engagement, the following wording is recommended (A.B. Vol. 6, E246):

> 1. Interim bills will be based on the amount of time spent on the matter to the time the interim bill is sent.
>
> 2. Your final account may be adjusted up or down to a fair and reasonable amount, based on various factors, including
>
> . . . .
>
> (b) the results obtained;

[17] In my opinion, the fundamental principle governing legal fees is that a solicitor may not stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable. In the absence of

an express agreement, the solicitor's obligation of utmost good faith precludes the reservation of a right to charge a bonus if there is resounding success. A "premium" fee based on a favourable result in the absence of full prior disclosure is wholly inconsistent with the obligation of the solicitor to clearly and fairly advise a client of the terms of his or her contract: ***Arctic Installations (Victoria) Ltd. v. Campney & Murphy***, [1994] 3 W.W.R. 178 (B.C.C.A.) per Southin, J.A., Taylor, J.A. and Rowles, J.A. in separate concurring opinions. At p. 198, Southin, J.A., stated:

> "In my opinion, solicitors deprive themselves of the benefit of the entire contract principle if they do not inform the client of their claiming the right to charge a bonus while at the same time asserting a right to retain the fees paid through the course of litigation in the event of failure.
>
> There is no right, in the absence of express agreement, to charge for success as if it were a stand alone foundation for remuneration. ..."

And at pp. 200-201, Rowles, J.A. said:

> "For a lawyer to assert, after the results of litigation are known, that he or she is entitled to a 'fair fee', based on all of the factors referred to in [*Yule v. Saskatoon (City) (No. 4)* (1955), 17 W.W.R. 296 (Sask. C.A.)], after having reserved unto himself or herself the determination that the ultimate fee could only be adjusted upward, based on the results achieved, appears to me to be wholly inconsistent with the obligation of a lawyer to fully and fairly advise a client of the terms of their contract.
>
> I agree with Madam Justice Southin that in the circumstances presented here, a lawyer cannot reserve the right to charge a 'bonus', in the event of success, because of his or her obligation of the utmost good faith.
>
> I also agree with Madam Justice Southin that in the absence of an express agreement, there is no right to charge for success as if it were a 'stand alone' foundation for remuneration."

See also ***London Loan & Savings Co. v. Brickenden***, [1933] S.C.R. 257 at 261-62, [1933] 3 D.L.R. 161; ***Ladner Downs v. Crowley*** (1987), 14 B.C.L.R. (2d) 357; ***Fraser & Co. v. Holden***, [1998] B.C.J. No. 1164 (B.C.C.A.); ***Swinton & Co. v. Perry***, [1985] B.C.J. No. 2850 Vancouver Registry No. F832930 (B.C.C.C.) and ***Fine & Deo Buchta***, [1994] O.J. No. 1437 (Ont. C. of J. Gen. Div.).

[18] The solicitor and client can make any express contract which they desire. It follows that if, after the litigation smoke clears, a retainer contract is relied upon by a solicitor to exact a "premium" fee based on "the difficulty and importance of matters" and "the results obtained", the authority to do so must be expressly stated. That is not to say that a law firm is precluded in such circumstances from

rendering interim accounts based on an agreed upon rate and subject to factors specified in the retainer agreement for such interim billings. When the litigation is complete and the results known, a further account based on any recited factors set out in the contract may also be rendered, but still subject to taxation by the client.

[19] In ***Gaglardi v. Gaglardi***, [1983] 4 W.W.R. 752 (B.C.S.C.), Boyle, L.J.S.C. was called upon to consider an agreement between a solicitor and client that the solicitor's fee would be based on an hourly rate. In rendering his account, the solicitor added, and the registrar allowed in part, a bonus for success which was not part of the agreement. The judge held (at p. 753):

> "... on reflection, I concluded that solicitors must be held to their agreements. If a bonus in the event of success is contemplated, the client must be made aware at the outset of that possibility.
>
> A deal, in other words, is a deal."

[20] In the case at bar, a bonus for success was not part of the agreement. I would dismiss the appeal and remit the issue of the Appellant's fees to the taxation officer with the direction that he tax the Appellant's account at the hourly rate in accordance with this judgment.

[21] Counsel, if necessary, may speak to costs, at which time the Respondent's prayer for an order directing the Appellant to refund the sum of $20,000.00 plus interest, alleged to have been mistakenly paid to the law firm, will be considered by the Court.

Appeal heard on October 31, 2003

Reasons filed at Edmonton, Alberta
this 3rd day of May, 2004

Berger J.A.

I concur:

Russell J.A.

Dissenting Reasons for Judgment of
the Honourable Mr. Justice Côté

A. Introduction

[22] The main issue here is how to interpret a non-contingency lawyers' fee agreement. Does it call for a mechanical calculation to the exclusion of other factors such as reasonableness?

[23] A judge ordered trial of an issue:

> "whether or not the Client, Sam Morrow, was to be billed on an hourly basis with respect to services provided pertaining to the appearance before the Court of Appeal, or whether a premium billing rate was allowed;"

[24] After trial of that issue by another judge, a formal judgment was entered declaring that "The Applicant is not entitled to a bonus." The trial Reasons are 2002 ABQB 239 and 2002 ABQB 241.

[25] The law firm has appealed to us, and the client seeks to vary the costs award.

B. Facts

[26] Sam Morrow and one of his companies were defendants in a very large complex torts class action over a troubled time-share resort. Other lawyers had acted for Mr. Morrow, and ran all the discovery processes in the suit. The previous lawyers recommended that Mr. Morrow retain the appellant law firm for the trial. Its lead counsel, Mr. Crawford, Q.C., had then been about 32 years at the Bar. (Other lawyers represented Mr. Morrow's company.)

[27] Mr. Morrow did retain the appellant firm. The firm and the client entered into a written Retainer Agreement, in the form of a letter dated January 29, 1997. (See Agreed Facts, A.B. p. 315, para. 2, and pp. 320-21.) That Agreement sets out the bases for billing. It is quoted (less salutations and names) as the Appendix to these Reasons. The main dispute is how to interpret that letter.

[28] The torts suit went to a 14-day trial. That judge held Mr. Morrow and his company jointly and severally liable to pay $2,100,000.00. The trial Reasons are reported at (1997) 214 A.R. 54. They found Mr. Morrow liable on some torts grounds, but not others. They made important fact findings in Mr. Morrow's favour, such as negativing the fraud which the plaintiffs had alleged.

[29] The torts plaintiffs petitioned both Mr. Morrow and the company into bankruptcy as a result of the trial judgment. Mr. Morrow instructed the appellant law firm to appeal the 1997 torts trial judgment to the Court of Appeal, which they did, following the existing retainer letter. (The company did not appeal.)

[30] After lengthy argument, the Court of Appeal issued complex reserved Reasons for Judgment. With one dissent, it allowed Mr. Morrow's appeal and held him not liable, thus presumably awarding him costs at trial and on appeal. Those Reasons are reported at [2000] 11 W.W.R. 476, 261 A.R. 28, 187 D.L.R. (4th) 614, 84 Alta. L.R. (3d) 270, 1 C.C.L.T. (3d) 149, 7 Bus. L.R. (3d) 204, 2000 ABCA 175.

[31] Therefore, Mr. Morrow was no longer insolvent, so the appellant firm prepared documents to have his bankruptcy annulled, which the Court did.

[32] The unsuccessful plaintiffs in the torts suit sought leave to appeal to the Supreme Court of Canada. Mr. Morrow instructed the appellant firm to file argument opposing such leave, and the firm did so. The same day that the firm filed that, Mr. Morrow fired the firm.

[33] The Supreme Court of Canada later denied leave to appeal on April 19, 2001, with costs: see [2001] 1 S.C.R. vii, 270 N.R. 197. So the law firm made Mr. Morrow himself completely victorious. Mr. Morrow was and is happy with the work that the law firm did for him (A.B. p. 246).

[34] Mr. Morrow's new counsel argued before us that the bankruptcy somehow made the effective amount in issue less than the $2,100,000.00 which was the trial judgment against Mr. Morrow. Or that there was no success in getting liquidation proceeds of the company, though the retainer was expressly different: it was to defend the torts suit, and the firm did that. See also the Reasons now under appeal (para. 84) expressing uncertainty on this subject. I have trouble following Mr. Morrow's argument here, especially in light of ***Severin v. Veale***, 1999 ABCA 258, [1999] A.R. Uned. 275, Edm. 9603-0332-AC (Sep. 13), at para. (b) of its Appendix. Before us, counsel disputed the basic facts, and said that there was no evidence of some of them. Besides, the Statement of Agreed Facts here says that the subject of the retainer was the torts suit by the time-share holders. That retainer did not oblige the law firm to help Mr. Morrow turn his two companies into cash, let alone collect that cash.

[35] The law firm had sent Mr. Morrow some interim accounts from time to time, which said they were calculated merely on an hourly basis. There was evidence that their amounts were reduced, but the firm only told Mr. Morrow that in one instance (Mar. 9, 1998 account). He paid some accounts, but not others. He did not pay some until after his victory in the Court of Appeal.

[36] The firm then rendered Mr. Morrow a further account for fees beyond the hourly ones, reflecting the victory in the Court of Appeal. He contended that fees had to be based solely upon hours spent, and could not reflect success.

[37] The first taxation proceeded without any appearance by Mr. Morrow. He was personally served, and was reminded the evening before of the upcoming hearing (A.B. pp. 245-246). His complaints about lack of explanation ring hollow when one recalls that he attended a re-taxation and objected to its being held at all (Statement of Agreed Facts, para. 18).

[38] A taxing officer upheld the firm's last account (but did not tax paid accounts). Mr. Morrow appealed, and sought to tax earlier accounts. A judge gave the order described above for trial of an issue. Mr. Morrow induced the taxing officer not to proceed with a new taxation. After trial of the issue, the judgment now under appeal held for Mr. Morrow. Those Reasons held that a taxing officer should not look at anything other than the hours spent and the hourly rate. That conclusion was based on the view that the retainer letter was "very ambiguous at best" (para. 85), so that something should be construed against the firm (para. 76). The judge trying the issue thought that that would mean that the lower fee would be selected.

[39] Mr. Morrow contends that the taxing officer had not seen all the accounts for trial work, a view shared by the Reasons under appeal. I question any such suggestion or finding, especially as there is no transcript of the hearing before the taxing officer, and Mr. Morrow cannot and does not give evidence of what was said or not there.

[40] The appellant's factum tries to blacken the law firm with other irrelevancies and unfounded claims of fraud. However, those appear to me legally irrelevant, and I will not pursue them.

[41] I see no reason to go into amounts, which are a question for taxation, especially as I would send the matter back to re-tax. The respondent contended before us that nothing could be charged beyond hourly rates. He did not argue the amount before us.

C. Standard of Review

[42] An earlier judge had also left a preliminary issue for the Queen's Bench judge trying the main issue: whether the matter before her should proceed as a ***de novo*** hearing, or as an appeal on the record. (It might be proper to dispose of one part one way and another part another way, of course.) The proper method of scope of review is a question of law, and on appeal to the Court of Appeal, the standard of review of that question is correctness: ***Friends of the Old Man. R. Socy. v. A.P.E.G.G.A.*** (2001) 199 D.L.R. (4th) 85, 277 A.R. 378, 2001 ABCA 107 (para. 30), leave den. (2001) 284 N.R. 193 (S.C.C.); ***Housen v. Nikolaisen*** [2002] 2 S.C.R. 235, 286 N.R. 1, 2002 SCC 33 (paras. 1, 8, 75, 77).

[43] The major issue before the chambers judge and on appeal from her is how to interpret the retainer contract. Interpretation of a contract is usually a question of law, and so such an interpretation is reviewable on appeal on a standard of correctness: ***R. v. W. Irr. Distr.*** (2002) 312 A.R. 358, 33 M.P.L.R. (3d) 62, 2002 ABCA 200 (para. 17); ***Partec Lavalin v. Meyer (#1)*** [2001] 8 W.W.R. 628, 281 A.R. 339, 2001 ABCA 145 (para. 11), leave den. (2001) 289 N.R. 198, 2001 SCC 453.

[44] Whether or not that is so, there are legal rules for the interpretation of contracts, and breach of them is an error of law. An error of law is reviewable on the standard of correctness: ***Housen v. Nikolaisen***, ***supra***.

[45] I conclude below that there have been such errors in the Reasons for the decision of the chambers judge now appealed.

[46] The Reasons now under appeal also purported to make some fact findings, and to try ***de novo*** the ***quantum*** of the legal fee (paras. 89 ff.). They did not approach this as a mere review of the taxing officer's decision. Nor did those Reasons or judgment send the matter back to the taxing officer to rehear. (I discuss that further in Parts E.2 and F below.)

[47] Maybe that was because those Reasons imply that the taxing officer had assumed an interpretation of the retainer contract which the Reasons later found incorrect. But absent error of law or principle, a taxing officer's assessment of legal fees cannot be upset on appeal by a judge (or by the Court of Appeal) unless it is grossly excessive or grossly inadequate, completely outside a proper range. The standard of review on appeal from a taxing officer is very deferential: ***Mercantile Bank of Can. (Keen Ind.) v. McLennan Ross (#2)*** (1988) 86 A.R. 311 (C.A.), affg. (#1) (1987) 83 A.R. 322 (C.A.); ***Carter v. Blake*** (1982) 41 A.R. 418 (N.W.T. C.A.). There are a host of Alberta Queen's Bench decisions to the same effect.

[48] The same deferential standard of review applies to fact findings by the taxing officer: ***Mercantile Bank of Can. (Keen Ind.) v. McLennan Ross (#2)***, ***supra***; ***Nelson v. Densmore*** (1991) 116 A.R. 318 (para. 7); ***Snyder & Co. v. Lautrec Acquisition Co.*** (1996) 192 A.R. 275, 278 (para. 6); ***509703 Alta. v. Witten Binder*** [2000] A.J. #1607, 2000 ABQB 729 (Oct. 16) (para. 15); ***Owners Condo. Plan 911945 v. Zavislake*** (1998) 215 A.R. 355, 1998 ABQB 160 (paras. 8-16).

[49] The earlier Queen's Bench judge could not permit the later one (now under appeal) to go outside the proper scope of either an appeal from taxation or a reference as to the meaning of a fee contract. If the earlier Queen's Bench judge did purport to permit that (as the respondent suggests) it would be plainly wrong. Though there was no appeal from that earlier order, R. 523 says that earlier interlocutory order does not bind the Court of Appeal. The earlier Queen's Bench judge merely ordered a re-taxation, and Mr. Morrow objected and got the taxing officer to desist from re-taxation. Yet the Reasons now appealed (para. 40) claimed only to be interpreting the contract, not setting fees. See also ***Anderson v. Van den Brink P.C.*** (1990) 107 A.R. 143 (para. 2) (C.A.); ***Panther v. Code Hunter***, 2002 ABQB 158, J.D.C. 0001-00377 (Feb. 12) (para. 6), not reported. Both say that the Court of Queen's Bench cannot conduct a ***de novo*** hearing.

[50] And, of course, the taxing officer did not purport to interpret the fee contract, so there can be no suggestion of upsetting his findings for a mistaken contract interpretation.

D. Interpreting Fee Contracts in General

[51] The broad outlines of a client's position in fee disputes are often predictable. If the suit or transaction ended badly, the client oft contends that the prime factor in assessing the legal services should be their "worth". Therefore, he argues that his lawyer should share the burden of the bad result, and that results and proportion between fee and size of case should be the main factors in assessing the fee. But if the suit or transaction ended well, the client oft asserts that he and not the lawyer owned the suit or transaction, and that the lawyer is entitled to no more than payment for his work. Therefore, results are irrelevant, and time spent sets a ceiling for the fee, says the client.

[52] Hence both parties' need for a contract at the outset. The Reasons under appeal do not cite the relevant Rules.

[53] Fee contracts are contracts. Any possible doubt as to their validity or efficacy is removed by R. 615, which reads:

> "**615.** A barrister and solicitor may make an agreement with the client, respecting the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements in respect of business done or to be done by the barrister and solicitor either by a gross sum or by commission or percentage or by salary or otherwise and either at the same or at a greater or less rate, than the rate at which he would otherwise be entitled to be remunerated, subject to taxation."

[54] Such a contract cannot validly exclude taxation, liability for negligence, power to discontinue a suit, or power to discharge the lawyer (Rr. 614, 615, 620). Aside from that, Rules in Alberta impose no restrictions on making such contracts. Contingency fee contracts are subject to many conditions, but this is not a contingency fee contract, so the Rules on them (such as R. 616) are irrelevant.

[55] It is especially dangerous to use decisions from other provinces without seeing whether the legislation and Rules which they apply are the same as Alberta's. Often they are not.

[56] Here the taxing officer was satisfied with the contract and taxed the full amount.

[57] And an inquiry into whether the client here understood this contract would be especially unfair, indeed impossible. That is because there was an agreed set of facts which says this fee letter is the contract governing. See further Part E.4 below.

[58] Since a non-contingency fee contract is a contract, it is subject to the usual rules for interpreting contracts: ***MacDonald & Freund v. Chernetski*** (1987) 81 A.R. 142; ***Can. Life Casualty Ins. Co. v. Pahl*** [1998] 3 W.W.R. 263, 207 A.R. 65; ***Cordery on Solicitors***, para. 401 (p. E/251) (9th looseleaf ed. 1995, updated March 2003).

[59] The first and most fundamental commandment is this. A court must interpret a contract as a whole. It must weigh all parts, ignore none, and seek an interpretation which makes all parts fit together. One part must not be read in isolation so as to conflict with another part; each must be interpreted in the light of every other: ***Grand Trunk Ry. Co. v. Robinson*** [1915] A.C. 740, 22 D.L.R. 1, 6 (P.C. (Can.)); ***Can. Fdry. Co. v. Edm. Portland Cement Co.*** [1918] 3 W.W.R. 866, 872, 43 D.L.R. 583 (P.C.(Alta.)); ***Forbes v. Git*** [1922] 1 A.C. 256, [1922] 1 W.W.R. 250, 253 (P.C. (Can.)); ***Cie. Française du Phénix v. Travelers Fire Ins. Co.*** [1952] 2 S.C.R. 190, 221; ***Hassard v. Peace R. Co-op. etc.*** [1954] 2 D.L.R. 50, 54-5 (S.C.C.); ***Cooke v. Anderson*** [1945] 2 D.L.R. 698, 708, 710-11, 1 W.W.R. 657 (Alta. C.A.); Lewison, ***Interpretation of Contracts***, at paras. 6.02, 6.03 and 8.13 (2d ed. 1997); Odgers' ***Construction of Deeds and Statutes*** 55-6 (5th ed. 1967); 1 ***Chitty on Contracts***, paras. 12-061, 12-076 (28th ed. 1999); ***Melanesian Mission Tr. Bd. v. Austr. Mut. Prov. Socy.*** [1996] J.C.J. #63 (Q.L.), [1997] 1 N.Z.L.R. 391, 394-5, 396 (paras. 9, 14); ***B.G. Checo Int. v. B.C. Hydro & Power Authy.*** [1993] 1 S.C.R. 12,147 N.R. 81, 90 (para. 9), recon. den. (S.C.C. March 18, 1993).

[60] The Privy Council applies those rules and bars rejection of one contractual clause, in ***Yien Yieh Comm. Bank v. Kwai Chung Cold Storage Co.*** [1989] L.R.C. (Comm.) 527, 534 (P.C. (H.K.)):

> "Their Lordships wish to stress that to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth irreconcilable. In point of fact, this is likely to occur only where there has been some defect of draftsmanship. The usual case is where a standard form is taken and then adapted for a special need, as is frequently done in, for example, the case of standard forms of charterparty adapted by brokers for particular contracts. From time to time, it is discovered that the typed additions cannot live with part of the printed form, in which event the typed addition will be held to prevail as more likely to represent the intentions of the parties. But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction. Such, in their Lordships' opinion, is the situation in the present case. Here there are two clauses. Clause 6(3) is in clear and unequivocal terms; and it is said that cl 4 is inconsistent with it. Yet cl 4 is at the very least open to the interpretation that its function is no more than to indicate the document which the company requires to be presented before goods stored with the company will be redelivered. So construed, any apparent inconsistency between cll 4 and 6(3) disappears. Their Lordships consider that such a construction not only flows from the principle that contracts must be construed as a whole; . . . Such a construction is, in their Lordships' opinion, preferable to a construction

> of cl 4 which produces a direct conflict with another clause, in itself clear and unequivocal, where both clauses form part of a document drafted as a coherent whole."

Somewhat similar is ***Lewis v. Barrett*** [1982] 2 E.G.L.R. 127, 264 E.G. 1079 (C.A.).

[61] The Reasons appealed from here purported to apply what

> "in contract law . . . is the ***contra proferentem*** rule. Where there is ambiguity on the face of a contract, the interpretation of the contract is read against the writer of the contractor [sic]." (para. 76).

And the Reasons found the retainer letter to be "very ambiguous at best" (para. 85).

[62] In Queen's Bench, the parties partly differed about whether the contract is ambiguous. The law firm argued that it is not. Mr. Morrow's counsel usually argued that it is not, but that in the alternative it is ambiguous (A.B. pp. 271, 275); but sometimes he argued that it is ambiguous (pp. 280, 285). In the Court of Appeal the firm argued the same, and Mr. Morrow's factum again seemed to hesitate about the point (para. 45 vs. para. 46; cf. para. 59).

[63] The Reasons under appeal did not mention four very important qualifications to the ***contra proferentem*** doctrine.

[64] The first is that is a very weak canon of construction, to be applied last (if at all), and only when all other rules have failed: ***Barthel v. Scotten*** (1895) 24 S.C.R. 367, 374-5; ***Watson v. Jamieson*** (1910) 12 W.L.R. 667, 668-9 (Alta. C.A.); ***Cooke v. Anderson***, ***supra***, at 711; Broom's ***Legal Maxims*** 402, 407 (10th ed. 1939); Fridman, ***The Law of Contract in Canada*** 470 (3d ed. 1994); Chitty, ***op. cit. supra***, at para. 12-081.

[65] The second qualification is closely linked. The Court must not search for or create an ambiguity, and then use the ***contra proferentem*** doctrine. The ambiguity must already exist on the face of the document: ***London & Lancs. Fire Ins. Co. v. Bolands*** [1924] A.C. 836, 848, 93 L.J.P.C. 230 (H.L. (Ir.)); Ritchie J. in ***Survey Aircraft v. Stevenson*** [1962] S.C.R. 555, 563, 38 W.W.R. 280; Lewison, ***op. cit. supra***, at p. 170 (para. 6.07); ***Melanesian Mission Tr. Bd. v. Austr. Mut. Prov. Socy.***, ***supra***.

[66] In particular, a court must not interpret a contract ***contra proferentem*** where the two supposedly conflicting clauses can be reconciled: ***Cooke v. Anderson***, ***supra***, at 711; ***Forbes v. Git***, ***supra***; cf. ***Birrell v. Dryer*** (1884) 9 App. Cas. 345, 350 (H.L.(Sc.)); cf. ***Yien Yieh Comm. Bank v. Kwai Chung Cold Storage***, ***supra***.

[67] The third qualification is that the "ambiguity" needed for the doctrine is a term of art. It does not refer to uncertain breadth, nor to difficulty of interpretation. It requires a passage which can be read

in either of two opposed senses: Lewison, ***op. cit. supra***, at para. 7.01; Chitty, ***op. cit. supra***, at para. 12-081; ***London & Lancs. Fire Ins. v. Bolands***, ***supra***; ***Survey Aircraft v. Stevenson***, ***supra***. Mr. Morrow's arguments in Queen's Bench and here sometimes downplayed the need for ambiguity.

[68] There is a fourth difficulty in how the Reasons under appeal apply the ***contra proferentem*** doctrine. If the doctrine does apply, it tells the Court to select one of the two possible interpretations of the contract, the one less favourable to the party who drafted the contract.

[69] That refers to selecting one interpretation of the contract, not selecting one result of the suit. The proper interpretation of the contract must exist at the time that it is made, and not change. It cannot come and go as the parties' fortunes wax and wane. It cannot be unknowable and shrouded in fog until after the event. For example, one interprets an insurance contract the same way before and after a fire, and it has meaning before any fire. See Lewison, ***op. cit. supra***, at para. 3.03.

[70] That is important here, because this fee contract expressly contemplated a torts lawsuit with an uncertain outcome. Even if the contract were ambiguous as to whether or not billings were to be strictly confined to hours spent and an hourly rate, and whether it was to ignore success or failure, which interpretation of the contract would be less favourable to the law firm? That would depend upon the future result of the torts suit.

[71] As the suit turned out, the law firm's labours were totally successful on behalf of its client Mr. Morrow. But fee disputes are more common when the client has lost the suit, which temporarily happened here at the end of trial. Mr. Morrow postponed payment and dispute at that stage. What interpretation was then less favourable to the law firm? The very one which the client Mr. Morrow now repudiates, and which the Reasons appealed from reject. That interpretation weighs failure and other circumstances, and does not merely multiply all the hours spent by the hourly rate.

[72] How to interpret a contract, even how to interpret a fee contract ***contra proferentem***, cannot depend on the stage or time at which one party chooses to go to court and have it interpreted. A contract must be interpreted as at the date it was made, not later: Lewison, ***op. cit. supra***, at para. 4.13; cf. ***Texaco Antilles v. Kernochan*** [1973] A.C. 609, 621, [1973] 2 All E.R. 118 (P.C.(Bah.)). The same is true of a retainer contract with a lawyer: ***Re Collier & Swingle*** (1960) 36 W.W.R. 695, 699 (Alta. T.O.).

[73] The ***contra proferentem*** doctrine does not let one party later elect which of two alternatives he prefers: see ***Barthel v. Scotten***, ***supra***, at 375-6.

[74] The Reasons under appeal suggest that the ***contra proferentem*** doctrine exists "to protect ordinary people against excessive legalese" (para. 76). I have never seen that rationale before, no authority is cited for it, and it seems to me inconsistent with the terms of the doctrine in the textbooks and decided cases. Bright as burns my admiration for plain English, I shun any large, arbitrary and

inflexible penalty for fusty prose. Besides, I see no "legalese" or difficult phrasing in this retainer letter, especially its p. 2.

[75] In sum, the Reasons under appeal failed to apply binding principles of legal interpretation, substituting mistaken precepts; so the interpretation so manufactured cannot stand. This Court must interpret the contract afresh, given the standard of review.

E. Interpreting This Contract

1. The Contract's Wording

[76] The Reasons under appeal do discuss some preliminary or peripheral aspects of the fee contract here, and of its interpretation, including the ***contra proferentem*** doctrine. Aside from that, I cannot find there any real discussion or analysis of the words of the contract, even though the Reasons conclude that that wording should govern. We must recall that the Statement of Agreed Facts says that the contract is the retainer letter (A.B. p. 315, para. 2).

[77] Given that and the contents of Parts C and D above, I must now interpret the contract's words (which are in the Appendix).

[78] Page 1 of the retainer letter names dollar rates to be used when calculating time spent by certain lawyers and paralegals, and lists some disbursements which the client must reimburse in full.

[79] Page 2 of the letter says that "a fair and reasonable fee will depend upon and reflect such factors as . . . ". There follow eight subparagraphs, listing in all about 13 factors. One of them, item (f), is "the results obtained". That plainly refers to victory or defeat in the torts suit which was the express topic of the retainer. Another subparagraph includes "the amount involved . . . ".

[80] The other contents of the retainer letter are subsidiary or mechanical.

[81] I see no contradiction between pp. 1 and 2 of the fee contract. Indeed, nothing on p. 1 says what is the basis for billing. The relevant paragraph on p. 1 merely begins with a statement that the firm wishes to "advise you of the costs associated with conducting this suit." Conversely, p. 2 begins with a positive statement (quoted above) about what the fee will "depend upon and reflect". That plainly means that p. 2 gives the principles and criteria for fees.

[82] And p. 2 legislates that the fee will be what is fair and reasonable in the circumstances. Those circumstances include the 13 or so factors listed, one of which is "the results obtained".

[83] I read p. 1 as giving subsidiary details. Page 2 makes "the time . . . required and spent" one of the 13 relevant factors. So <u>to the extent</u> that it is applied, a record of hours expended and the named

hourly rate for the lawyer in question (p. 1) is to be given some weight; but not exclusive weight. That makes pp. 1 and 2 fit together smoothly.

[84] Even if I am wrong, a rate per hour cannot yield a fee. One must know the number of hours spent, and what are the bases for billing. Are hours irrelevant, relevant, or the sole criterion? Is reasonableness excluded in favour of mechanical computation?

[85] With respect, Mr. Morrow's present argument for a fee based on a mechanical time computation alone flies in the face of the clear words on p. 2 that the fee will reflect success and other factors. His argument rejects those clear words in favour of a mere implication (computing hours and hourly rates alone) from p. 1. That argument violates all the principles of contractual interpretation recited above in Part D.

[86] It also contradicts a basic rule for construing contracts. The express terms prevail over possible implied ones, and one cannot infer a term contrary to an express term: ***C.N.R. v. Volker Stevin Contr.*** (1991) 120 A.R. 39, 44, 1 Alta. L.R. (3d) 167 (para. 17) (C.A.); cf. Chitty, ***op. cit. supra***, at para. 12-090.

[87] There is nothing in the fee contract to confine its p. 2 to cases where the client wants taxation, and nothing in R. 613 so confines it.

[88] For all the reasons in Part D above, the Court cannot ignore p. 2 of the fee contract; it must give it some effect.

2. No Weight for the Enumerated Factors

[89] The Reasons appealed from here find, in the alternative, that all the factors on p. 2 are reflected in the hourly rates on p. 1 (paras. 90 to 96). With respect, that seems to me to be the same error of interpretation wearing a different shirt. But even if I am wrong there, that reflection would only apply to the rate of $x per hour. It could not apply to the number of hours, which p. 2 expressly says is only one of 13 factors to weigh. It was physically impossible for the parties contracting ahead of time to reflect or compute unknown future victory or defeat by an unknown number of hours to be later worked and recorded. That is especially true because the two things (hours and victory) are usually not correlated, even positively.

[90] To conclude that all of the 13 factors on p. 2 have no weight is tantamount to giving p. 2 no effect, and is thus error in principle. Worse yet, it ignores the standard of review on a Queen's Bench appeal from a taxing officer who gave those factors full weight (on which see Part C, ***supra***). How one could say that the taxing officer erred in giving some weight to those 13 circumstances mandated by the contract escapes me.

3. Two-Part Fees

[91] Mr. Morrow's argument suggests that a "bonus" beyond ordinary fees is extraordinary, so it should be presumed not to exist, and would be possible only with a special form of contract.

[92] That proposition seems to me to depend upon gaps in logic and mistaken propositions of law, with respect. First, a fee computed solely upon time spent and hourly rates and no other factor would not be ordinary; the legal presumption is against it, not for it. The legal presumption is that success and various other factors (besides time spent) will shape the fee. That a lawyer could charge for excessive hours would be very surprising, for example. Part F below expands upon all that.

[93] Second, proper legal fees are not a two-part calculation. One must select a single amount in light of all the relevant factors. The law firm's internal calculations of hourly rates and time have no special significance: ***Stellar Ent. v. Walsh Young*** [1982] A.U.D. 1887, Calg. 13963, [1982] A.J. #45 (Q.L.) (C.A. Oct. 12).

[94] Third, this Court has held that the word "bonus" is a misleading term which has no place in a discussion of solicitor's fees: ***Stellar Ent. v. Walsh Young***, ***supra***. Only an artificial division of the total fee into hourly-based dollars and other dollars could even create the artificial parts. And if there are not two parts, there cannot be an ordinary part and a "bonus" part. The word "bonus" is particularly tendentious. For one thing, in most contested taxations, results and amount involved have a negative effect, so a proper overall fee is often less than the product of hours times usual hourly rate.

[95] The ***Stellar Ent.*** decision binds this Court.

[96] By definition, interim fees are tentative and subject to adjustment at the end. When they are first billed and then later a further final fee is charged, it is pointless to ask what the size of the final bill is, or how it is calculated. All that matters is the size of the total: ***Stellar Ent. v. Walsh Young***, ***supra***. If the interim billings were modest, a proper last bill will be high. If the interim billings were aggressive, a proper last bill will be low. To adopt a rule which makes the last bill suspect, and ignores the total, would simply penalize modest interim billings and encourage aggressive interim billings. That would be backwards from every point of view.

[97] I find instructive ***Cooke v. Anderson***, ***supra***. There one clause in an agreement for the sale of land said the purchase price was $5,000, but another clause referred to payment by delivery of 100 tons of sugar beets grown on the land. The Court held that the contract was to be construed as a whole, so that all parts agreed. Following ***Forbes v. Git***, ***supra***, the Court found that the clauses were not repugnant, and that the beet clause qualified the price clause as to manner of payment. The facts and decision in ***Forbes v. Git***, ***supra***, were similar.

4. Outside Evidence

[98] The Reasons under appeal expressly rely also upon a "sample retainer letter . . . published by the Law Society, I believe, after the original retainer letter was sent to the Client . . ." (para. 77).

[99] How a form of contract, later recommended by someone else, not used by these parties, and not even available at the time that they contracted, can legitimately assist in interpreting this different contract, escapes me. I can recall no reported case relying upon such evidence.

[100] In contrast, the firm seems to have argued that the retainer letter was based on what the Law Society recommended at the time, but the trial judge's Reasons reject that as irrelevant (para. 87).

[101] In my respectful opinion, that last view is closer to being correct. In the absence of the parties' incorporation by reference of some Law Society document, or of some established custom, any forms which professional organizations or publishers recommend, but which the parties do not use, appear to me irrelevant. We must recall that lawyers' fees are regulated by the Rules of Court. There is no legislative power in the Law Society to regulate them, and clients are rarely lawyers, and so get no duties or rights from the Law Society's regulations. Still less do any rights or duties flow to, or upon, a client from a mere recommendation by the Practice Management Consultant of the Law Society. Worse yet, the document itself expressly states (on its p. 6) that it is produced to assist in office management and administration, and does not purport to state Law Society policy.

[102] The Reasons nowhere discuss how the new Law Society sample letter (or any of the other parol evidence) was admissible. Indeed, the Reasons state that the Court was "left with little contemporaneous documentary evidence to assist in the interpretation of the retainer" (para. 47), and that no parol evidence was available (para. 49). So the Reasons seem not to be based upon parol evidence (aside from the sample letter). (See paras. 47, 48, 51, 75, 76.)

[103] I agree that that approach is the proper one. For one thing, there is a contract or there is not. If there were none, then R. 613 would apply (see Part F); and if there is one, then its interpretation governs.

[104] Yet Mr. Morrow's factum spends some pages trying to summarize the evidence of Mr. Morrow about what he could and could not recall of oral discussions with the law firm, and about what he thought the basis of billing would be.

[105] Mr. Morrow never complained of that letter, nor tendered any alternative terms. He gave the retainer amount called for in the letter.

[106] There is a bigger reason not to look at such evidence. The Agreed Facts say that the retainer letter is the contract (A.B. p. 315, para. 2), and that "no evidence shall be adduced contrary to the evidence in this Statement of Agreed Facts" (A.B. p. 314).

[107] A contract cannot come from or be shaped by the unilateral belief of one party, as Master Funduk has often pointed out. A contract's terms come either from a written document, or from the understanding of the conversation which an objective reasonable bystander would form. There is no

evidence that Mr. Morrow's alleged beliefs were ever communicated to anyone at any relevant time. And the evidence about the conversations conflicts to a degree, though Mr. Morrow seems on the whole merely to say that he cannot recall much of an hour-long discussion, not to say that more was not said, as testified by the lawyers.

[108] Therefore, like the Reasons appealed, I will not pursue oral discussions.

5. British Columbia Law

[109] Nor will I consider at length a British Columbia decision cited by the Reasons appealed: ***Arctic Installations (Vict.) v. Campney & Murphy*** [1994] 3 W.W.R. 178, 39 B.C.A.C. 173. Two of the three judgments there are brief, and are based solely on the unusual fact findings there. The third may also so turn, and much of it may be ***obiter***. Despite what the Reasons here say, I find the operative fact finding in ***Arctic Installations***, ***supra***, totally different from the facts here.

[110] Furthermore, British Columbia has not the Alberta Court of Appeal decisions on fees and taxation. Indeed some of the British Columbia decisions are contrary to binding Alberta authorities. And an examination of British Columbia legislation shows important differences from the Alberta statutory regime, especially in the ***Legal Profession Act (B.C.)*** 1998, c. 9, ss. 68, 71, and 75, and British Columbia R. 57(35). I am not familiar with the prevailing culture, customs, and problems of legal bills in British Columbia, but I seem to detect a concern or approach in many British Columbia decisions about them which is rarely found in Alberta decisions. Therefore, I do not find cases from British Columbia relevant or even helpful.

F. Rule 613

[111] The Reasons under appeal do not mention R. 613. They do mention Rr. 616 and 618, but these do not apply here, as this is admittedly not a contingency agreement.

[112] So far, I have proceeded as though Alberta law gave no default mode to compute a lawyer's fee to his or her client. But that is not so.

[113] If any contract requires one party to provide goods or services without setting the method or rate of payment, the Court must presume that compensation is to be an amount reasonable in light of all the circumstances: ***Way v. Latilla*** [1937] 3 All E.R. 759 (H.L.(E.)); ***Lou Petit Trucking v. Petit*** [1990] 3 W.W.R. 252, 261, 64 Man. R. (2d) 139 (C.A.); ***Watson v. Veit*** (1996) 75 B.C.A.C. 72, 75 (paras. 11-12). That common-law rule is codified in s. 10(2) of the ***Sale of Goods Act***, R.S.A. 2000, c. S-2.

[114] That rule also applies to legal fees. The common law worked out a list of relevant circumstances for the taxing officer to consider when fixing a proper fee, absent a contrary contract. That list has been codified in Alberta by the overlooked Rule, R. 613: ***Wainoco Oil & Gas v. Solick*** (1987) 77 A.R. 20, 49 Alta. L.R. (2d) 390 (paras. 8-9); ***Nissen v. Calgary (City)*** (1983) 51 A.R. 252 (C.A.) (paras. 7-8); ***Lennie DeBow v. Richter*** (1984) 55 A.R. 26, 29 (para. 16) (M.).

[115] Rule 613 reads as follows:

> "**613.** Barristers and solicitors are entitled to such compensation as may appear to be a reasonable amount to be paid by the client for the services performed having regard to
>
> (*a*) the nature, importance and urgency of the matters involved,
>
> (*b*) the circumstances and interest of the person by whom the costs are payable,
>
> (*c*) the fund out of which they are payable,
>
> (*d*) the general conduct and costs of the proceedings,
>
> (*e*) the skill, labour and responsibility involved, and
>
> (*f*) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved."

[116] The 13 factors under eight headings which the parties contracted for on p. 2 of the retainer letter here are similar. They elaborate the 13 factors under six headings found in R. 613.

[117] From that Rule and that parallelism, several corollaries flow.

[118] First, had there been no contract here, obviously R. 613 would have governed. See ***Wainoco Oil & Gas v. Solick***, ***supra*** (paras. 8, 9). The Reasons under appeal state a parallel proposition (***quantum meruit***) (para. 74).

[119] Second, if the contract here had been void or unenforceable, R. 613 would have governed. And R. 613 would have produced the same result as the fee contract, given its p. 2.

[120] Third, interpreting the contract here to include the factors listed on its p. 2 is by definition fair, reasonable and legal. A contract which is authorized by law cannot be held unreasonable: ***Grand Trunk Ry. v. Robinson***, ***supra***, at 5.

[121] Fourth, it would take clear words in a contract to exclude R. 613. So interpreting the contract here as excluding the factors on its own p. 2 is very difficult, and is not reading it ***contra proferentem***. That doctrine would adopt a possible interpretation of the contract which is less favourable to the law firm. But R. 613 makes it difficult to find any interpretation of this contract which excludes the factors found both on its p. 2 and in R. 613. Of course the parties could contract to exclude some or all the

factors in R. 613, in which case the contract would prevail, and R. 613 would not apply. But they have not done so here. See also para. 82 above.

[122] Fifth, it is highly improbable that these parties to this agreement contracted to exclude the relevance of the factors in R. 613, especially when they adopted a similar list of factors and contracted that "a fair and reasonable fee will depend upon and reflect" them and similar factors. That is doubly so when one considers R. 646(2). Any suggestion that the parties would instead adopt vague conditions of reasonableness in one direction only, is very improbable.

[123] The Reasons appealed from hint that the retainer letter here is unfair to the client. I see problems with that suggestion.

[124] One problem is that if there is any power to find the contract unfair, it belongs to the taxing officer, not to a judge. The taxing officer here found in favour of the firm on this issue, and the standard of review does not let a judge substitute his or her view of fairness: see Part C (paras. 21ff.) above. I will not repeat the point, but wish to emphasize it.

[125] The second problem is noted above. Rule 613 and its approach and criteria cannot be unfair, as a matter of law or fact. Since the criteria on p. 2 of the retainer letter are similar, they could not be unfair. And even if somehow (on grounds I do not understand) the court wiped out the contract here, then one would have to use the approach in R. 613.

[126] Therefore, it is impossible to reach the conclusion that hourly rates multiplied by hours alone set or cap the proper fee under the fee contract found here, if one has any regard at all to R. 613.

[127] In ***Harwood v. Harwood*** (1998) 61 Alta. L.R. (3d) 56, 1998 ABQB 96, the wife was granted an award of costs, being "full indemnity for all of her solicitor/client costs", and the bill submitted by the wife's counsel was taxed down by the taxing officer. There was an agreed hourly rate in the retainer agreement between the client and counsel, which also referred to such factors as "results achieved", and the effect of the taxation was to reduce the hourly rate. On appeal from the taxation, the Court held that the taxing officer correctly considered success, or lack thereof, the amount at stake, the benefit derived, or what was accomplished. That was because he must determine what is fair and reasonable for the work done, and take into account the matters stated in the Rules.

[128] Even if all the above were wrong, it would be absurd for the law to switch between two different default modes, one to use if the contract is absent or unenforceable (R. 613), the other to use if the contract is hard to understand (the trial judge's version of ***contra proferentem***, whatever turns out as the lower fee).

[129] Nor can I see any warrant for using different default modes depending upon which party seeks taxation. I emphasize that this is not a contingency fee contract, which is what was involved in ***Molstad Gilbert v. Douglas Rentals*** [1983] A.J. #664 (M.). Still less is it logical or fair to mandate different fees

depending upon whether taxation occurs, and who seeks it. A lawyer's fee is proper or not when billed. Taxation finds facts; it does not create them.

[130] The express wording of R. 613 does not permit such an interpretation. The Rule begins "Barristers and solicitors are entitled to such compensation . . . ". It does not say they are so entitled only if the client seeks taxation. And Rr. 614 and 615 give a right to tax fees despite any contract. (But of course a contract can exclude R. 613 or part of it.)

[131] ***Molstad Gilbert v. Douglas Rentals***, ***supra,*** is also not on point. It contains ***dicta*** about a contingency agreement. This is not a contingency agreement, and there are Rules of Court on them which do not apply here. And the ***dicta*** are about departing from the contract. Given my interpretation of the contract here, that does not arise.

G. Conclusion

[132] The Reasons and judgment under appeal should not stand. The judge trying an issue had no ground in law to conduct a new taxation, and another Queen's Bench judge could not give her that power.

[133] It is arguable that the decision of the taxing officer should simply be restored. Indeed, the appellant's factum seeks judgment for the full amount billed, plus interest. But there are some considerations which tend to support a new taxation. As this is a dissent, I need not go into the details of the relief which I would have given.

[134] I would have allowed the appeal.

Appeal heard on October 31, 2003

Reasons filed at Edmonton, Alberta
this 3rd day of May, 2004

Côté J.A.

Appendix - (Body of Retainer Letter dated January 29, 1997)

Re: Lyndon and Fran Blacklaws et al (Plaintiffs) v.
470433 Alberta Ltd. carrying on business as
Ghostpine Lake Golf & Country Resort and
Sam Morrow (Defendants) Action 9501-000065

We are pleased to be retained to act on your behalf in the above matter. We enclose an unfiled Notice of Change of Solicitors, and will be providing you with a filed copy in due course.

The Law Society of Alberta requires that we advise you of the costs associated with conducting this suit. My legal fee is $200.00 an hour, Mr. Crawford's legal fee is $250.00 an hour, and wherever possible and appropriate, we utilize as a disbursement cost the services of J.A.B. Holdings Ltd., (paralegal services - Bettie Davison) at a billable rate of $40.00 an hour, in order to minimize your costs. Other disbursement costs which would be paid by McDonald & Hayden and upon which reimbursement would be sought from you include:

1. Process Server
2. Courier charges
3. Photocopy charges
4. FAX charges
5. Search charges
6. Court filing fees
7. Travel costs
8. Agents fees (i. e. used for filing documents at Edmonton Land Titles office)
9. Court Reporters
10. Court Runner charges
11. Conduct money re: Examinations for Discovery, etc.
12. Payment for Court transcripts
13. Expert opinions

We are also required to advise you that a fair and reasonable fee will depend upon and reflect such factors as:

(a) the time and effort required and spent;

(b) the difficulty and importance of the matters;

(c) whether special skill or service has been required and provided;

(d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;

(e) the amount involved or the value of the subject matter;

(f) the results obtained;

(g) tariffs or scales authorized by local law;

(h) such special circumstances such as loss of other employment, uncertainty of reward and urgency.

Payment of our accounts is due within ten (10) days of receipt of our invoices, and interest will be charged on all past due accounts at a rate of two (2) per cent per month.

We acknowledge your telephone advice that you have mailed a $5,000.00 retainer. Retainers are held in our trust account and are utilized in payment of accounts as rendered. Once and if exhausted, a further retainer will be required and no further work is undertaken until received.

Trust accounts are reviewed annually by a professional accountant and the results of the review are reported to the Law Society.

Yours very truly,

Appearances:

J.C. Crawford, Q.C.
for the Appellant

A. Oshry
for the Respondent

COUR SUPRÊME DU CANADA

RÉFÉRENCE : Sattva Capital Corp. *c.* Creston Moly Corp., 2014 CSC 53, [2014] 2 R.C.S. 633

DATE : 20140801
DOSSIER : 35026

ENTRE :

Sattva Capital Corporation (anciennement Sattva Capital Inc.)
Appelante
et
Creston Moly Corporation (anciennement Georgia Ventures Inc.)
Intimée
- et -
Procureur général de la Colombie-Britannique et BCICAC Foundation
Intervenants

TRADUCTION FRANÇAISE OFFICIELLE

CORAM : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner

MOTIFS DE JUGEMENT : (par. 1 à 125) — Le juge Rothstein (avec l'accord de la juge en chef McLachlin et des juges LeBel, Abella, Moldaver, Karakatsanis et Wagner)

Sattva Capital Corp. *c.* Creston Moly Corp., 2014 CSC 53, [2014] 2 R.C.S. 633

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et
BCICAC Foundation *Intervenants*

Répertorié : Sattva Capital Corp. *c.* Creston Moly Corp.

2014 CSC 53

N^{o} du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation

d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble? — L'interprétation contractuelle constitue-t-elle une question de droit ou une question mixte de fait et de droit?

S et C ont conclu une entente selon laquelle C devait payer à S des honoraires d'intermédiation relativement à l'acquisition d'une propriété minière de molybdène par C. Les parties reconnaissaient qu'en vertu de l'entente, S a droit à des honoraires d'intermédiation de 1,5 million $US, versés en actions de C. Cependant, elles ne s'entendaient pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que S doit recevoir. S prétendait que la valeur de l'action était dictée par la date établie dans la définition du cours prévue dans l'entente et, par conséquent, qu'elle devait recevoir environ 11 460 000 actions, à raison de 0,15 $ l'unité. C prétendait que la stipulation relative

au « plafond », qui figure dans l'entente, empêchait S de recevoir des actions d'une valeur supérieure à 1,5 million $US à la date du versement des honoraires et donc que S devait obtenir environ 2 454 000 actions, à raison de 0,70 $ l'unité. Les parties ont soumis le différend à l'arbitrage conformément à l'*Arbitration Act* de la Colombie-Britannique et l'arbitre a statué en faveur de S. C a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*Arbitration Act*. La demande a été rejetée au motif que la question soulevée n'était pas une question de droit. La Cour d'appel a infirmé la décision et accueilli la demande, présentée par C, en autorisation d'interjeter appel, jugeant que l'omission par l'arbitre d'examiner la signification de la stipulation de l'entente relative au « plafond » soulevait une question de droit. Le juge de la cour supérieure saisi de l'appel a rejeté l'appel de C et conclu que l'interprétation de l'entente par l'arbitre était correcte. La Cour d'appel a accueilli l'appel de C, concluant que l'interprétation de l'arbitre menait à un résultat absurde. S interjette appel des décisions de la Cour d'appel ayant accordé l'autorisation d'appel et ayant accueilli l'appel.

Arrêt : Le pourvoi est accueilli et la sentence arbitrale est rétablie.

L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*Arbitration Act*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit, et l'autorisation d'appel est requise lorsque les parties ne consentent pas à l'appel. L'alinéa 31(2)(a) énonce les critères d'autorisation sur lesquels porte le présent litige, à savoir que le tribunal peut accorder l'autorisation s'il

estime que, selon le cas, l'issue est importante pour les parties et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire.

En l'espèce, la Cour d'appel a assimilé à tort l'interprétation de l'entente relative aux honoraires d'intermédiation à une question de droit. Un tel exercice soulève une question mixte de fait et de droit, et la Cour d'appel a donc commis une erreur en accueillant la demande d'autorisation d'appel.

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel de ce dernier.

Il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit, mais le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les cas où il sera possible de dégager une question de droit de l'exercice d'interprétation[*]. Le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Par conséquent, le tribunal doit faire preuve de prudence

[*] voir Erratum [2016] 1 R.C.S. iv

avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. L'interprétation contractuelle peut occasionner des erreurs de droit, notamment appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent. Conclure que la demande d'autorisation d'appel présentée par C ne soulevait aucune question de droit suffit à trancher le présent pourvoi; toutefois, la Cour juge salutaire de poursuivre l'analyse.

Pour que l'erreur de droit reprochée soit une erreur judiciaire pour l'application de l'al. 31(2)(a), elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat. Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, le tribunal saisi de la demande d'autorisation doit procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier l'issue du litige. Ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable, à savoir que l'argument

soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit.

L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet cette norme. Le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire à l'égard de la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel.

Les termes « peut accorder l'autorisation » figurant au par. 31(2) de l'*Arbitration Act* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés. Les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) comprennent : la conduite des parties, l'existence d'autres recours, un retard indu et le besoin urgent d'obtenir un règlement définitif. Ces facteurs pourraient justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères légaux. Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

L'examen en appel des sentences arbitrales commerciales diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif, de sorte que le

cadre relatif à la norme de contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Par conséquent, certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences arbitrales commerciales.

En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur. La question dont nous sommes saisis n'appartient pas à l'une ou l'autre de ces catégories; la norme de la décision raisonnable s'applique donc à la présente affaire.

En l'espèce, l'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble en déterminant que S était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du

cours, donne effet à cette dernière et à la stipulation relative au « plafond » en les conciliant d'une manière qui ne peut être considérée comme déraisonnable. Le raisonnement de l'arbitre satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité.

Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond. Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

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CAF 160 (CanLII); *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744; *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69; *Moore Realty Inc. c. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712; *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns c. Hansey*, 2013 MBCA 23 (CanLII); *R. c. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326; *Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010]

1 R.C.S. 6; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, autorisation d'appel refusée, [2013] 3 R.C.S. viii; *Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566.

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Michael A. Feder et *Tammy Shoranick*, pour l'appelante.

Darrell W. Roberts, c.r., et *David Mitchell*, pour l'intimée.

Jonathan Eades et *Micah Weintraub*, pour l'intervenant le procureur général de la Colombie-Britannique.

David Wotherspoon et *Gavin R. Cameron*, pour l'intervenante BCICAC Foundation.

TABLE DES MATIÈRES

Version française du jugement de la Cour rendu par

[1] LE JUGE ROTHSTEIN — Dans quelles circonstances l'interprétation contractuelle est-elle une question mixte de fait et de droit et dans quelles circonstances est-elle une question de droit? Comment établir l'équilibre entre le caractère révisable et l'irrévocabilité des sentences arbitrales commerciales prononcées sous le régime de la *Commercial Arbitration Act*, R.S.B.C. 1996, ch. 55 (maintenant l'*Arbitration Act*, ci-après l'« *AA* »)? Les conclusions relatives au

bien-fondé de l'appel tirées par le tribunal qui autorise l'appel peuvent-elles lier celui qui est appelé à trancher l'appel? Voilà trois questions qui sont soulevées dans le présent pourvoi.

I. Faits

[2] Les questions soulevées dans le présent pourvoi découlent de l'obligation de Creston Moly Corporation (anciennement Georgia Ventures Inc.) de payer des honoraires d'intermédiation à Sattva Capital Corporation (anciennement Sattva Capital Inc.). Les parties reconnaissent que Sattva a droit à des honoraires d'intermédiation de 1,5 million $US, qui peuvent lui être versés en argent, en actions de Creston, ou en argent et en actions. Elles ne s'entendent pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que Sattva recevra.

[3] M. Hai Van Le, un directeur de Sattva, a fait part à Creston de la possibilité d'acquérir une propriété minière de molybdène au Mexique. Le 12 janvier 2007, les parties ont conclu une entente (l'« entente »), selon laquelle Creston devait payer à Sattva des honoraires d'intermédiation relativement à l'acquisition de cette propriété. Les dispositions pertinentes de l'entente sont énoncées à l'annexe I.

[4] Le 30 janvier 2007, Creston a conclu une convention d'achat de la propriété, le prix étant fixé à 30 millions $US. Le 31 janvier 2007, Creston a demandé

que la négociation de ses actions à la Bourse de croissance TSX (la « Bourse ») soit suspendue afin d'empêcher la spéculation le temps d'achever le contrôle diligent préalable à l'achat. Le 26 mars 2007, Creston a annoncé qu'elle avait l'intention de conclure l'achat, et la négociation à la bourse a repris le lendemain.

[5] Aux termes de l'entente, Sattva doit recevoir des honoraires d'intermédiation correspondant au plafond autorisé par le point 3.3 de la politique 5.1 qui se trouve dans le Guide du financement des sociétés de la Bourse. Le point 3.3 est incorporé par renvoi à l'entente, à l'art. 3.1, et il est reproduit à l'annexe II des présents motifs. Dans le cas qui nous occupe, le plafond autorisé au point 3.3 de la politique 5.1 est de 1,5 million $US.

[6] Aux termes de l'entente, à moins d'indication contraire, les honoraires sont payés sous forme d'actions de Creston. Ils ne seraient versés en argent ou en argent et en actions que si Sattva avait indiqué avoir fait tel choix, ce qu'elle n'a pas fait. Ses honoraires devaient donc lui être versés sous forme d'actions au plus tard cinq jours ouvrables après la conclusion de l'achat de la propriété minière de molybdène.

[7] Le différend qui oppose les parties porte sur la date à retenir pour fixer le cours de l'action de Creston et, par conséquent, le nombre d'actions auquel Sattva a droit. Cette dernière prétend que la valeur de l'action est dictée par la définition du « cours », à l'art. 2 de l'entente, c.-à-d. la valeur de l'action [TRADUCTION] « le dernier jour ouvrable avant la publication du communiqué de presse annonçant

l'acquisition ». Le communiqué de presse a été publié le 26 mars 2007. Avant la suspension de la négociation des actions le 31 janvier 2007, le dernier cours de clôture de l'action de Creston s'établissait à 0,15 $. Suivant cette interprétation, Sattva recevrait environ 11 460 000 actions (selon le calcul effectué en fonction des honoraires d'intermédiation de 1,5 million $US).

[8] Creston prétend que la stipulation relative au « plafond », qui figure dans l'entente, a pour effet de limiter à 1,5 million $US la somme d'argent ou la valeur des actions que peut recevoir Sattva à la date de versement des honoraires. Les actions devaient être cédées au plus tard cinq jours après le 17 mai 2007, date de conclusion de l'achat. À ce moment-là, l'action de Creston valait 0,70 $, selon les calculs effectués par une société bancaire d'investissement en vue d'un placement privé par voie de prise ferme le 17 avril 2007. Suivant cette interprétation, Sattva recevrait environ 2 454 000 actions, soit environ 9 millions d'actions de moins que si chacune valait 0,15 $.

[9] Les parties ont soumis le différend à l'arbitrage conformément à l'*AA*. L'arbitre a statué en faveur de Sattva. Creston a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*AA*. La Cour suprême de la Colombie-Britannique a refusé l'autorisation (2009 BCSC 1079 (CanLII) (« formation de la CS saisie de la demande d'autorisation »)). Creston a appelé de cette décision et obtenu l'autorisation de la Cour d'appel de la Colombie-Britannique

d'interjeter appel de la sentence arbitrale (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (« formation de la CA saisie de la demande d'autorisation »)).

[10] Le juge de la Cour suprême de la Colombie-Britannique chargé de statuer sur le bien-fondé de l'appel (2011 BCSC 597, 84 B.L.R. (4th) 102 (« formation de la CS saisie de l'appel »)) a confirmé la sentence arbitrale. Creston a interjeté appel de cette décision devant la Cour d'appel de la Colombie-Britannique (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (« formation de la CA saisie de l'appel »)), laquelle a infirmé la décision de la formation de la CS saisie de l'appel et a donné gain de cause à Creston. Sattva interjette appel des décisions des deux formations de la CA, soit celle saisie de la demande d'autorisation et celle saisie de l'appel, devant la Cour.

II. Sentence arbitrale

[11] L'arbitre, Leon Getz, c.r., a donné gain de cause à Sattva, concluant qu'elle était en droit de recevoir des honoraires d'intermédiation de 1,5 million $US en actions, à raison de 0,15 $ l'action.

[12] L'arbitre a fondé sa décision sur la définition du « cours » figurant dans l'entente :

> [TRADUCTION] Qu'était donc le « cours » au sens de l'entente? Le communiqué de presse pertinent est celui qui a été publié le 26 mars [. . .] Il n'y avait pas de cours de clôture le 25 mars (la négociation des actions était suspendue à cette date). Par conséquent, le « dernier cours de clôture », au sens où cette expression est employée dans la définition,

> était de 0,15 $, soit le cours de clôture des actions de [Creston] le 30 janvier, le jour précédant la suspension des opérations « jusqu'à nouvel ordre » [. . .] Cette conclusion ne nécessite aucune extension de sens des mots employés dans la définition qui figure au contrat. Au contraire, elle concorde littéralement avec la définition. [par. 22]

[13] L'entente et les honoraires d'intermédiation devaient être approuvés par la Bourse. Creston était chargée d'obtenir cette approbation. L'arbitre a conclu qu'il était implicitement ou expressément prévu dans l'entente que Creston ferait de son mieux pour obtenir l'approbation de la Bourse. Selon lui, Creston n'avait pas fait de son mieux pour y arriver.

[14] Comme nous l'avons expliqué, les honoraires d'intermédiation se payaient en actions à moins d'avis contraire de la part de Sattva. L'arbitre a conclu que Sattva n'avait pas manifesté de choix. Malgré cela, Creston a déclaré à la Bourse que les honoraires d'intermédiation seraient versés en argent. La Bourse a donc approuvé conditionnellement le versement d'une somme de 1,5 million $US en argent. Sattva a appris qu'un versement en argent de ses honoraires avait été approuvé au début du mois de juin 2007. Quand Sattva a abordé ce point avec Creston, cette dernière a répondu que Sattva avait le choix de percevoir ses honoraires en argent ou en actions, à raison de 0,70 $ l'action.

[15] Sattva a soutenu qu'elle avait droit au versement des honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. Creston a demandé à ses avocats de communiquer avec la Bourse afin qu'elle indique la valeur minimale de l'action qu'elle approuverait pour le versement des honoraires d'intermédiation. La

Bourse a confirmé, par téléphone le 7 juin 2007 et par courriel le 9 août de la même année, qu'un cours minimal de 0,70 $ l'action s'appliquait aux fins du calcul des honoraires d'intermédiation. Selon l'arbitre, Creston [TRADUCTION] « a constamment fait des déclarations inexactes quant à l'obligation qu'elle avait contractée envers Sattva ou, à tout le moins, omis d'en divulguer complètement la nature » (par. 56(k)) et qu'« à moins que Sattva n'en décide autrement, elle a le droit aux termes de l'entente de percevoir ces honoraires sous forme d'actions, à raison de 0,15 $ l'action » (par. 56(g)). Selon l'arbitre, la position de Sattva a été véritablement présentée à la Bourse pour la première fois dans la lettre de l'avocat de celle-ci datée du 9 octobre 2007.

[16] L'arbitre était d'avis que si Creston avait fait de son mieux, la Bourse aurait pu approuver le versement des honoraires d'intermédiation sous forme d'actions, à 0,15 $ l'action, et qu'une telle décision aurait été conforme à ses politiques. Il a affirmé que [TRADUCTION] « [la Bourse] aurait fort probablement donné son approbation » (par. 81) et il a évalué cette probabilité à 85 p. 100.

[17] Selon l'arbitre, Sattva aurait pu vendre ses actions de Creston après quatre mois à un prix variant entre 0,40 et 0,44 $ l'unité, ce qui aurait représenté un produit net situé dans une fourchette de 4 583 914 $ à 5 156 934 $. Établissant la moyenne de ces deux sommes d'argent à 4 870 424 $, l'arbitre a ensuite évalué les dommages-intérêts à 85 p. 100 de ce nombre, soit 4 139 860 $, qu'il a ensuite arrondis à la hausse, pour obtenir 4 140 000 $, plus les dépens.

[18] Après le prononcé de cette sentence arbitrale, Creston a versé 1,5 million $US (ou l'équivalent en dollars canadiens) à Sattva. Le solde des dommages-intérêts accordés par l'arbitre a été placé dans le compte en fiducie des avocats de Sattva.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079*

[19] La Cour suprême de la Colombie-Britannique a rejeté la demande d'autorisation d'appel parce qu'elle était d'avis que la question soulevée n'était pas une question de droit, un critère prévu à l'art. 31 de l'*AA*. Selon le juge, il s'agissait d'une question mixte de fait et de droit puisque l'arbitre avait appuyé sa conclusion sur le [TRADUCTION] « fondement factuel ». Plus précisément, pour déterminer sous quelle forme les honoraires d'intermédiation devaient être versés, il fallait examiner « les politiques de la TSX se rapportant au plafond applicable aux honoraires d'intermédiation, ainsi que les pouvoirs discrétionnaires dont dispose la Bourse pour déterminer le montant des honoraires » (par. 35).

[20] Le juge a conclu que, même s'il avait été d'avis que le litige soulevait une question de droit, il aurait exercé son pouvoir discrétionnaire pour refuser l'autorisation d'appel en raison des déclarations inexactes faites par Creston à propos des honoraires d'intermédiation à la Bourse et à Sattva, et par égard pour le

[TRADUCTION] « principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41).

B. *Cour d'appel de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2010 BCCA 239*

[21] La Cour d'appel a infirmé la décision de la Cour suprême et a accueilli la demande, présentée par Creston, en autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour suprême avait [TRADUCTION] « commis une erreur en ne reconnaissant pas que l'omission par l'arbitre d'examiner la signification de l'art. 3.1 de l'entente (et plus particulièrement de la stipulation relative au "plafond") soulevait une question de droit » (par. 23). La Cour d'appel a conclu que l'interprétation de l'art. 3.1 de l'entente, et plus particulièrement de la stipulation relative au « plafond », constituait une question de droit parce qu'elle ne reposait pas sur les faits de l'affaire, à savoir les renseignements communiqués à la Bourse et la décision de cette dernière.

[22] La Cour d'appel a reconnu que Creston s'était montrée [TRADUCTION] « moins que franche dans ses démarches auprès de M. Le et de [la Bourse] », mais a déclaré que « ces faits n'intéressent pas directement la question de droit qu'elle soulève en appel » (par. 27). Au sujet de la remarque sur la préservation de l'intégrité du système d'arbitrage formulée par la formation de la CS saisie de la demande d'autorisation d'appel, la formation de la CA saisie de la demande d'autorisation a dit que les parties, quand elles ont choisi de soumettre leur différend à l'arbitrage en vertu de l'*AA*, savaient que l'appel d'une question de droit était possible. De plus,

bien que l'irrévocabilité de la sentence arbitrale constitue un facteur important dans l'exercice du pouvoir discrétionnaire, lorsqu'« une question de droit importante est soulevée et qu'il y a risque d'erreur judiciaire en cas d'impossibilité d'interjeter appel, l'intégrité du processus exige, du moins dans les circonstances de l'espèce, que le droit d'appel conféré par la loi soit respecté » (par. 29).

C. *Cour suprême de la Colombie-Britannique — décision sur l'appel, 2011 BCSC 597*

[23] Le juge Armstrong a contrôlé la sentence arbitrale selon la norme de la décision correcte. Il a rejeté l'appel et conclu que l'interprétation de l'entente proposée par l'arbitre était correcte.

[24] Le juge Armstrong estimait que, selon le sens ordinaire de l'entente, les honoraires de 1,5 million $US devaient être versés en actions, à raison de 0,15 $ l'unité. Il n'estimait pas une telle interprétation absurde du simple fait que le cours de l'action à la date du versement des honoraires était supérieur à celui déterminé suivant la définition du cours. Selon lui, avec le temps, la fluctuation des cours est inévitable, et dès lors qu'elles ont prévu la possibilité du versement des honoraires en actions, les parties, des entreprises averties, devaient raisonnablement s'attendre à la fluctuation du marché. De l'avis du juge Armstrong, c'est d'ailleurs à cause de cette fluctuation qu'il faut indiquer une date précise qui servira à déterminer la valeur de l'action avant le versement. Il est arrivé à la conclusion que pour ce faire, le « cours » était défini dans l'entente et que le montant des honoraires demeurait

1,5 million $US, à payer sous forme d'actions à raison de 0,15 $ l'unité, cette valeur étant établie suivant la définition du cours, sans égard à la valeur de l'action à la date du versement des honoraires.

[25] Selon le juge Armstrong, il était prévisible que le cours de l'action à la date du versement soit supérieur à celui établi conformément à la définition du cours et il s'agissait là d'une [TRADUCTION] « conséquence naturelle de l'entente relative aux honoraires d'intermédiation » (par. 62). Il était d'avis que le risque était assumé par Sattva, puisque le prix de l'action pouvait certes augmenter, mais il pouvait aussi diminuer, de sorte que Sattva aurait alors reçu un portefeuille d'actions d'une valeur inférieure au montant des honoraires (1,5 million $US) qui avait été convenu.

[26] Le juge Armstrong était d'avis que l'interprétation de l'arbitre, laquelle donnait effet à la définition du cours et à la stipulation relative au « plafond », était préférable à celle de Creston, qui faisait fi de la définition du cours.

[27] En réponse à l'argument de Creston selon lequel l'arbitre n'avait pas examiné l'art. 3.1 de l'entente, qui contient la stipulation relative au « plafond », le juge Armstrong a souligné que l'arbitre avait fait expressément référence à cette stipulation au par. 23 de la sentence arbitrale.

D. *Cour d'appel de la Colombie-Britannique — décision sur l'appel, 2012 BCCA 329*

[28] La Cour d'appel a accueilli l'appel de Creston et a statué que la somme de 1,5 million $US versée par Creston en faveur de Sattva en exécution de la sentence arbitrale constituait le paiement intégral des honoraires d'intermédiation. La cour a contrôlé la sentence arbitrale suivant la norme de la décision correcte.

[29] La formation de la CA saisie de l'appel s'estimait liée, de même que la Cour suprême, par deux conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente.

[30] Selon la Cour d'appel, conclure que Sattva avait droit à des honoraires d'intermédiation de 8 millions $ menait à un résultat absurde, étant donné la stipulation de l'entente relative au « plafond », qui limite le montant de tels honoraires à 1,5 million $US. La cour était d'avis qu'il faudrait donner l'effet prépondérant à cette stipulation qui limite à 1,5 million $US les honoraires [TRADUCTION] « à la date de leur versement » (par. 47). Elle était d'avis que donner effet à la définition du cours ne saurait avoir été l'intention des parties, et ce n'était pas non plus une décision sensée sur le plan commercial.

IV. Questions en litige

[31] Les questions suivantes sont soulevées dans le présent pourvoi :

a) La Cour a-t-elle été saisie à bon droit de la question de savoir si la Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

b) La Cour d'appel a-t-elle commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

c) Si l'autorisation a été accordée à bon droit, quelle norme de contrôle convient-il d'appliquer aux sentences arbitrales commerciales rendues sous le régime de l'*AA*?

d) L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble?

e) La Cour d'appel a-t-elle commis une erreur en s'estimant liée par les remarques formulées par la formation de la CA saisie de la demande d'autorisation au sujet du bien-fondé de l'appel?

V. Analyse

A. *Notre Cour est saisie à bon droit de la question de l'autorisation*

[32] Sattva prétend notamment que la Cour d'appel a commis une erreur en accordant l'autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour d'appel n'a cerné aucune question de droit, alors que l'autorisation est subordonnée à l'existence d'une telle question, aux termes du par. 31(2) de l'*AA*. Creston soutient que la Cour n'est pas saisie à bon droit de cette question et avance deux arguments à l'appui de sa position.

[33] Premièrement, Creston fait valoir que cette question n'était pas soulevée dans la demande d'autorisation d'appel que Sattva a présentée à la Cour. Cet argument ne saurait tenir. À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale ». Par conséquent, l'appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation. La Cour peut toutefois exercer son pouvoir discrétionnaire et refuser de trancher une question qui n'a pas été abordée par les tribunaux d'instance inférieure, s'il en résulte un préjudice pour l'intimé, ou si, pour toute autre raison, elle juge opportun de ne pas la trancher.

[34] En l'espèce, l'ordonnance accordant l'autorisation d'interjeter appel des deux décisions de la Cour d'appel, sur la demande d'autorisation d'appel et sur l'appel, ne comportait aucune restriction (2013 CanLII 11315). La question — à savoir si l'appel proposé soulevait une question de droit — a été expressément débattue devant les formations de la CS et de la CA saisies de la demande d'autorisation, qui l'ont tranchée. Rien n'empêche Sattva de soulever cette question

en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour.

[35] Deuxièmement, Creston soutient que la Cour n'a pas été saisie à bon droit de la question de savoir si la formation de la CA saisie de la demande d'autorisation a cerné une question de droit parce que Sattva n'a pas contesté la décision rendue à ce sujet devant tous les tribunaux d'instance inférieure. Plus précisément, aux dires de Creston, Sattva n'aurait pas fait valoir devant la formation de la CS saisie de l'appel que l'appel soulevait une question mixte de fait et de droit et aurait reconnu devant la Cour d'appel que l'appel soulevait une question de droit. Un tel argument ne tient pas. Devant la formation de la CS saisie de l'appel, il n'était pas possible pour Sattva de débattre à nouveau de la question de savoir si l'autorisation aurait dû être accordée. La formation de la CS saisie de l'appel était liée par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir que l'autorisation était opportune et qu'une question de droit avait été cernée. Ainsi, Sattva ne pouvait guère plaider devant la formation de la CS saisie de l'appel un point sur lequel la formation de la CA saisie de la demande d'autorisation s'était déjà prononcée. Rien dans l'*AA* n'habilite Sattva à interjeter appel de la décision sur la demande d'autorisation d'appel rendue par une formation de la Cour d'appel à une autre formation de la même cour. Ce n'est pas parce que Sattva n'a pas plaidé à nouveau le point devant la formation de la CS saisie de l'appel ou devant la formation de la CA saisie de l'appel qu'elle ne peut le soulever devant notre Cour, tout particulièrement étant donné que Sattva a obtenu de notre Cour l'autorisation

d'appeler de la décision rendue par la formation de la CA saisie de la demande d'autorisation.

[36] Ainsi, la Cour peut certes refuser l'autorisation si la question que l'on cherche à soulever devant elle n'a pas été plaidée devant les tribunaux d'instance inférieure, mais ce n'est pas le cas en l'espèce. En l'occurrence, les arguments sur le fondement de la demande d'autorisation d'appel de la sentence arbitrale présentée par Creston — à savoir si elle soulevait une question de droit ou une question mixte de fait et de droit — avaient été plaidés devant les formations saisies des demandes d'autorisation.

[37] Par conséquent, la Cour est saisie à bon droit de la question de savoir si la formation de la CA qui a accueilli la demande d'autorisation a conclu à tort que l'appel soulevait une question de droit.

B. *La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA*

(1) Facteurs qui entrent en ligne de compte dans l'analyse de la demande d'autorisation d'appel présentée au titre de l'*AA*

[38] L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*AA*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit dans le cas où les parties consentent à l'appel ou, en l'absence de consentement, dans les cas où l'autorisation d'appel est accordée. Le

paragraphe 31(2) de l'*AA*, reproduit intégralement à l'annexe III, énonce les critères d'autorisation :

> [TRADUCTION]
>
> (2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :
>
> (a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,
>
> (b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,
>
> (c) la question de droit est d'importance publique.

[39] De l'avis des tribunaux de la C.-B., l'expression [TRADUCTION] « peut accorder l'autorisation » qui figure au par. 31(2) de l'*AA* confère au tribunal un pouvoir discrétionnaire qui l'habilite à refuser l'autorisation même lorsque les critères légaux sont respectés (*British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (« *BCIT* »), par. 25-26). L'appel d'une sentence arbitrale n'est donc entendu que si les critères du par. 31(2) sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel.

[40] Bien que Creston ait présenté une demande d'autorisation à la Cour suprême sur le fondement des al. 31(2)(a), (b) et (c), il semble que les arguments

invoqués devant elle et au cours des autres instances portaient sur l'al. 31(2)(a). La décision de la Cour suprême sur la demande d'autorisation reprend un long passage tiré de l'affaire *BCIT* axé sur les éléments de l'al. 31(2)(a). La Cour suprême y souligne que les deux parties reconnaissent qu'il est satisfait au premier élément de l'al. 31(2)(a), c'est-à-dire que la question est importante pour les parties. Dans sa décision sur la demande d'autorisation d'appel, la Cour d'appel a dit craindre que refuser l'autorisation ne donne lieu à une erreur judiciaire — un critère prévu seulement à l'al. 31(2)(a). Enfin, ni les décisions sur les demandes d'autorisation des tribunaux d'instance inférieure ni les arguments soulevés devant notre Cour ne traitent des autres critères, à savoir que la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie (al. 31(2)(b)) ou est d'importance publique (al. 31(2)(c)). Par conséquent, l'analyse qui suit porte principalement sur l'al. 31(2)(a).

(2) L'issue est importante pour les parties

[41] L'autorisation d'interjeter appel d'une sentence arbitrale commerciale est subordonnée au respect d'un critère minimal : l'appel doit porter sur une question de droit. Toutefois, avant d'aborder ce sujet, il convient d'examiner sommairement un autre élément requis par l'al. 31(2)(a) et sur lequel s'entendent les parties, à savoir que l'importance de l'issue de l'arbitrage pour les parties doit justifier l'intervention du tribunal. Selon l'explication donnée par la juge Saunders de ce critère dans *BCIT*, il faut que l'issue de l'arbitrage soit [TRADUCTION] « suffisamment importante » aux

yeux des parties, pour le principe ou les sommes d'argent en jeu, pour justifier le coût et la longueur d'une instance (par. 27). Les parties en l'espèce ont convenu que l'issue de l'arbitrage revêt de l'importance pour chacune. Étant donné la somme relativement considérable en litige et compte tenu du fait que les parties s'entendent pour dire que l'issue est importante pour elles, je conviens que l'importance de l'issue de l'arbitrage pour les parties justifie l'intervention du tribunal. Cette condition prévue à l'al. 31(2)(a) est remplie.

(3) La question soulevée n'est pas une question de droit

a) *Dans quelles circonstances l'interprétation contractuelle est-elle une question de droit?*

[42] Aux termes de l'art. 31 de l'*AA*, la demande d'autorisation d'appel doit porter sur une question de droit. Pour déterminer la norme de contrôle applicable ou, comme c'est le cas en l'espèce, pour déterminer si les critères d'autorisation sont respectés, le tribunal siégeant en révision est régulièrement appelé à décider si une question tranchée en première instance est une question de droit, une question de fait ou une question mixte de fait et de droit.

[43] Autrefois, la détermination des droits et obligations juridiques des parties à un contrat écrit ressortissait à une question de droit (*King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 20, la juge Steel; K. Lewison, *The Interpretation of Contracts* (5e éd. 2011 et suppl. 2013),

p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2e éd. 2012), p. 125-126). Cette règle a pris naissance en Angleterre, à une époque où les procès civils devant jury étaient fréquents et l'analphabétisme courant. Dans de telles circonstances, l'interprétation des documents écrits devait être assimilée à une question de droit parce que le juge était le seul dont on pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats

écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaisser l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle souvent le fondement factuel — dans l'interprétation d'un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente » (*Jesuit Fathers of Upper Canada c.*

Cie d'assurance Guardian du Canada, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l'objet de l'entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

> [TRADUCTION] Le sens d'un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n'équivaut pas au sens des mots

> qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu'il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l'approche historique de l'interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties — un but axé sur les faits — par l'application des principes juridiques d'interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l'arrêt *Housen* comme supposant « l'application d'une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l'application directe de cette définition, qui avait été établie à l'égard d'une action intentée pour négligence, à des questions d'interprétation contractuelle et laissent entendre que cette dernière est d'abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Ainsi, le rôle des cours d'appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C'est pourquoi la Cour dans l'arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l'intervention de la cour d'appel sera utile :

> Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [par. 37]

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent

également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L'interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d'autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l'obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. Compte tenu de l'obligation, prévue au par. 31(2) de l'*AA*, que la demande d'autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu'ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d'appels, et les tribunaux doivent examiner

soigneusement le motif d'appel proposé pour déterminer s'il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu'il s'agit d'isoler une question de droit s'applique dans le cas présent :

> Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d'une action pour négligence, mais elle s'applique également à mon avis à l'interprétation contractuelle. Comme je le mentionne précédemment, le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les cas où il sera possible de dégager une question de droit de l'exercice d'interprétation[*]. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'*AA*.

b) *Le rôle et la nature des « circonstances »*

[*] voir Erratum [2016] 1 R.C.S. iv

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle

d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

c) *Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque*

[59] Quelques mots sur l'examen des circonstances et la règle d'exclusion de la preuve extrinsèque s'imposent. Cette règle empêche l'admission d'éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d'y ajouter de nouvelles clauses ou d'en supprimer (*King*, par. 35; Hall, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (Hall, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu'une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d'exclusion de la preuve extrinsèque n'interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu'elle sert d'outil d'interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s'y substituer. Les circonstances sont des faits connus ou qui auraient raisonnablement dû l'être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d'une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d'exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d'application restreinte vu la myriade d'exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d'exclusion de la preuve extrinsèque ne s'oppose pas à la présentation d'une preuve des circonstances entourant le contrat pour l'interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l'espèce, la Cour d'appel a accordé l'autorisation d'appel relativement à la question suivante : [TRADUCTION] « L'arbitre a-t-il commis une erreur de droit en n'interprétant pas l'entente relative aux honoraires d'intermédiation dans son ensemble . . .? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l'obligation d'interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l'isoler, de satisfaire au critère minimal exigé à l'art. 31 de l'*AA*. À mon avis, cette question n'a pas été isolée comme il se doit en l'espèce.

[64] Je reconnais qu'il est un principe fondamental de l'interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l'arbitre n'a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n'a alors pas interprété l'entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ». En effet, selon la formation de la CA saisie de la demande d'autorisation, l'arbitre a examiné la stipulation, puisqu'elle signale qu'il a envisagé le plafond de 1,5 million $US, un nombre auquel il ne peut être arrivé que s'il a consulté la politique de la Bourse à laquelle renvoie la stipulation relative au « plafond » à l'art. 3.1 de l'entente. À la lumière de ses motifs, j'estime que la formation de la CA saisie de la demande d'autorisation, au lieu de se demander si l'arbitre a négligé la stipulation relative au plafond — ce que Creston prétend devant la Cour —, a axé sa décision sur l'interprétation qu'a donnée l'arbitre de l'art. 3.1 de l'entente, qui contient cette stipulation (par. 25-26). Par exemple, la formation de la CA saisie de la demande d'autorisation s'est dite préoccupée que l'arbitre n'ait pas

abordé l'[TRADUCTION] « absurdité » de la variation « considérable » dans la valeur des honoraires selon qu'ils étaient versés en argent ou en actions (par. 25).

[66] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de la demande d'autorisation a assimilé à tort l'interprétation de l'art. 3.1 de l'entente à une question de droit. Comme l'explique le juge Armstrong dans la décision de la CS sur l'appel, pour interpréter l'art. 3.1 et tenir compte de la stipulation, il fallait examiner les circonstances pertinentes, y compris le fait que les parties étaient des parties avisées, la fluctuation du cours de l'action et la nature du risque qu'une partie assume quand elle opte pour le versement de ses honoraires en actions plutôt qu'en argent. Un tel exercice soulève une question mixte de fait et de droit. Comme aucune question de droit ne peut être isolée de la question mixte de fait et de droit qui porte sur l'interprétation de l'art. 3.1 et de la stipulation, la Cour d'appel a commis une erreur en accueillant la demande d'autorisation d'appel.

[67] Conclure que la demande d'autorisation d'appel présentée par Creston ne soulevait aucune question de droit suffirait à trancher le présent pourvoi. Toutefois, puisque la Cour a rarement l'occasion de se pencher sur l'appel d'une sentence arbitrale, il est à mon avis utile d'expliquer que même si la formation de la CA saisie de la demande d'autorisation avait conclu à bon droit que l'interprétation de l'art. 3.1 de l'entente constituait une question de droit, elle devait néanmoins rejeter la demande, car il n'était pas satisfait aux autres volets de l'analyse des demandes

d'autorisation que requiert l'al. 31(2)(a) de l'*AA*, qui concernent l'erreur judiciaire et le pouvoir discrétionnaire résiduel.

(4) Le règlement de la question de droit peut permettre d'éviter une erreur judiciaire

a) *L'erreur judiciaire pour l'application de l'al. 31(2)(a) de l'AA*

[68] Une fois qu'il a cerné une question de droit, le tribunal doit être convaincu que le fait de statuer sur cette dernière [TRADUCTION] « peut permettre d'éviter une erreur judiciaire » avant d'accorder l'autorisation d'appel en vertu de l'al. 31(2)(a) de l'*AA*. La première étape de l'analyse consiste donc à définir l'erreur judiciaire pour l'application de cette disposition.

[69] Dans *BCIT*, la juge Saunders traite du critère concernant l'erreur judiciaire prévu à l'al. 31(2)(a). Elle confirme la définition énoncée dans l'affaire *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), selon laquelle l'erreur de droit doit toucher une question importante de sorte qu'une conclusion différente aurait abouti à un résultat différent : [TRADUCTION] « . . . si le point de droit avait été tranché différemment, l'arbitre aurait rendu une décision différente. Autrement dit, l'erreur de droit invoquée a-t-elle eu un effet déterminant sur la décision; touche-t-elle au cœur de la décision? » (*BCIT*, par. 28). Voir également l'arrêt *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712, où la Cour analyse le critère qui sert à déterminer

s'il y a « préjudice grave ou [. . .] erreur judiciaire » dans le contexte des procès civils avec jury (par. 43).

[70] Compte tenu des arrêts *BCIT* et *Quan*, je suis d'avis que, pour que l'erreur de droit reprochée soit une erreur judiciaire au sens où il faut l'entendre pour l'application de l'al. 31(2)(a) de l'*AA*, elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat.

[71] Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

[72] Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, il faut procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier le résultat du litige.

[73] Selon l'arrêt *BCIT*, le demandeur doit établir [TRADUCTION] « plus qu'un argument défendable » (par. 30) lors de cet examen préliminaire de l'appel. Pourtant, une fois un argument défendable soulevé, que faudrait-il démontrer de plus pour qu'il soit satisfait à cette norme? Vraisemblablement, le juge saisi de la demande

d'autorisation devrait alors examiner les arguments se rapportant à la question de droit soulevée en appel de plus près que ce qui serait indiqué à cette étape pour trouver *plus* qu'un argument défendable. À mon humble avis, exiger un examen plus approfondi du point de droit brouille les rôles respectifs de la formation saisie de la demande d'autorisation et de celle saisie de l'appel.

[74] Selon moi, ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable. Ce critère s'applique souvent à l'étape de l'autorisation, pour établir sommairement le bien-fondé de l'appel (voir par exemple *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, par. 5; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII), par. 7). Il est bien connu et a été exprimé de diverses façons : [TRADUCTION] « une possibilité raisonnable d'être accueilli » (*a reasonable prospect of success*) (*Quick Auto Lease*, par. 5; *Enns c. Hansey*, 2013 MBCA 23 (CanLII), par. 2); une « certaine chance de succès » (*some hope of success*) et un « fondement suffisant » (*sufficient merit*) (*R. c. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, par. 11); un « argument plausible » (*credible argument*) (*R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270, par. 8). À mon avis, les diverses appellations qui désignent le fondement défendable présentent un élément commun : l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit. Pour déterminer s'il faut annuler la sentence arbitrale, un examen approfondi est nécessaire, et c'est au tribunal saisi de l'appel qu'il incombe, une fois l'autorisation accordée.

[75] L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet la norme applicable. Comme nous le verrons, la norme de la décision raisonnable s'appliquera presque toujours aux arbitrages commerciaux régis par l'*AA*, sauf dans les rares circonstances où l'application de la norme de la décision correcte s'imposera, notamment lorsqu'il s'agit d'une question constitutionnelle ou d'une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif. Par conséquent, dans le cadre de l'examen préalable à l'autorisation le tribunal s'interrogera ordinairement quant à savoir si la prétention — selon laquelle la sentence arbitrale sur la question en litige était déraisonnable — a un fondement défendable, compte tenu du fait que le décideur n'est pas tenu de faire référence à tous les arguments, dispositions ou précédents ni de tirer une conclusion précise sur chaque élément constitutif du raisonnement pour que sa décision soit raisonnable (*Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 16). Certes, le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire ayant pour objet la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel. Ainsi, il ne faudrait pas considérer qu'il s'agit d'une invitation à se perdre en analyses ou en arguments poussés à propos de la norme de contrôle à l'étape de la demande d'autorisation.

[76] Dans *BCIT*, la juge Saunders s'interroge sur l'étape à laquelle il convient d'examiner le bien-fondé de l'appel dans le cadre de l'analyse requise par l'al. 31(2)(a) de l'*AA*. Contrairement à ce que prétendait une partie, soit que l'évaluation du bien-fondé se rapporte au critère de l'erreur judiciaire, la juge détermine que cet examen se rattache plutôt à l'exercice du pouvoir discrétionnaire. Ses motifs révèlent que sa décision découle de sa volonté d'adopter une approche uniforme à l'égard des al. 31(2)(a), (b) et (c) :

> [TRADUCTION] À quel moment, le cas échéant, faut-il alors examiner le bien-fondé de l'appel? M. Roberts, qui représente l'Association étudiante, prétend qu'il convient de procéder à cet examen lorsqu'on se demande si une erreur judiciaire risque d'être commise, c'est-à-dire, à la deuxième étape. Je ne suis pas d'accord. À mon avis, l'appréciation du bien-fondé ou de l'absence de fondement apparent de l'appel s'inscrit dans l'exercice du pouvoir discrétionnaire résiduel et s'applique également aux trois alinéas, de (*a*) à (*c*). Tout comme un appel manifestement dénué de fondement ne devrait pas être autorisé en vertu de l'al. (*b*) (revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie) ou de l'al. (*c*) (est d'importance publique), un tel appel ne devrait pas non plus être autorisé en vertu de l'al. (*a*). Dans un but d'uniformité à l'égard de l'article entier, l'appréciation du bien-fondé devrait être intégrée à l'exercice du pouvoir discrétionnaire résiduel. [par. 29]

[77] Je reconnais la validité du raisonnement axé sur l'uniformité. Cependant, à mon humble avis, cette volonté d'adopter une démarche semblable au regard des al. 31(2)(a), (b) et (c) ne saurait l'emporter sur le libellé de la disposition. Contrairement aux al. 31(2)(b) et (c), l'al. 31(2)(a) exige que le tribunal détermine si le fait d'autoriser l'appel « peut permettre d'éviter une erreur judiciaire ». J'estime qu'un examen préliminaire de la question de droit s'inscrit implicitement dans

l'examen qui vise à déterminer si l'autorisation « peut permettre d'éviter une erreur judiciaire ».

[78] Cependant, lorsqu'il s'agit d'une demande d'autorisation d'appel présentée en vertu des al. 31(2)(b) ou (c) — puisque ces dispositions ne prévoient pas le risque d'erreur judiciaire comme critère —, je souscris aux commentaires formulés par la juge Saunders dans *BCIT* selon lesquels l'examen préliminaire du bien-fondé de la question de droit devrait intervenir à l'étape de l'exercice du pouvoir discrétionnaire résiduel dans l'analyse, puisque l'examen du bien-fondé de l'appel proposé demeure pertinent dans la décision d'accorder ou non l'autorisation d'appel en vertu de l'art. 31.

[79] Bref, afin d'établir que l'intervention du tribunal est justifiée [TRADUCTION] « et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire » pour l'application de l'al. 31(2)(a) de l'*AA*, le demandeur doit prouver que le point de droit en appel aura une incidence sur le résultat final et qu'il est défendable.

b) *Application au présent pourvoi*

[80] La formation de la CA saisie de la demande d'autorisation a conclu à la possibilité d'une erreur de droit par l'arbitre qui n'aurait pas interprété l'entente dans son ensemble et, plus particulièrement, aurait fait fi de la stipulation relative au « plafond ». Admettons cette prétention comme question de droit uniquement pour les

besoins de la cause. Le règlement de la question est déterminant parce qu'il pourrait avoir pour effet de modifier la sentence de l'arbitre, lequel a accordé 4,14 millions $ en dommages-intérêts au motif qu'il évaluait à 85 p. 100 la probabilité que la Bourse approuve des honoraires d'intermédiation payés en actions, à raison de 0,15 $ l'unité. Si l'argument invoqué par Creston est correct et que le cours de l'action ne peut s'établir à 0,15 $ en raison de la stipulation relative au « plafond », les dommages-intérêts seraient réduits à 1,5 million $US, une amputation considérable de la somme initiale accordée.

[81] Comme l'al. 31(2)(a) de l'*AA* est la disposition pertinente en l'espèce, il doit être procédé à un examen préliminaire de la question de droit pour déterminer le risque qu'une erreur judiciaire découle du rejet de la demande d'autorisation d'appel présentée par Creston. Cette dernière soutient que le fait que Sattva reçoive un portefeuille d'actions dont la valeur est très supérieure au plafond de 1,5 million $US en exécution de la sentence arbitrale prouve que l'arbitre n'a pas tenu compte de la stipulation relative au « plafond ».

[82] Or, l'arbitre renvoie effectivement à l'art. 3.1, la stipulation relative au « plafond », à deux reprises dans sa décision, soit aux par. 18 et 23(a). Par exemple, il affirme ce qui suit au par. 23 :

> [TRADUCTION]
>
> Bref, à partir du 27 mars 2007, il était clair et incontestable qu'aux termes de l'entente :

(a) Sattva avait le droit de recevoir des honoraires équivalant au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX – article 3.1. Les parties conviennent que le montant des honoraires s'établit à 1 500 000 $US.

(b) La commission était payable en actions, en fonction du cours, tel qu'il est défini dans l'entente, à moins que Sattva n'opte pour le versement des honoraires en argent ou en argent et en actions.

(c) Le cours de l'action, tel qu'il est défini dans l'entente, s'établissait à 0,15 $. [Je souligne.]

[83] Ainsi, même si l'arbitre n'indique pas expressément avoir examiné le jeu de la stipulation relative au « plafond » et de la définition du cours, cet examen ressort implicitement de sa sentence. La seule clause de l'entente qui prévoit le montant des honoraires, soit 1,5 million $US, est la stipulation relative au « plafond », qui renvoie au point 3.3 de la politique 5.1 de la Bourse. Reconnaissant que le montant des honoraires s'élève à 1,5 million $US, l'arbitre a accordé à Sattva pareille somme, payable en actions, à raison de 0,15 $ l'unité. Contrairement à l'argument avancé par Creston, selon qui l'arbitre aurait négligé la stipulation dans son interprétation de l'entente, il ressort de l'examen préliminaire de la question que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

[84] Par conséquent, même si la Cour d'appel avait cerné à juste titre une question de droit, elle aurait dû rejeter la demande d'autorisation. Il n'était pas satisfait au critère qui exige que le caractère déraisonnable de la sentence arbitrale ait un fondement défendable, ni à celui de l'erreur judiciaire.

(5) Le pouvoir discrétionnaire résiduel qui habilite à refuser l'autorisation

a) *Éléments à examiner dans l'exercice du pouvoir discrétionnaire résiduel à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a)*

[85] Les tribunaux de la C.-B. ont conclu que les termes [TRADUCTION] « peut accorder l'autorisation » figurant au par. 31(2) de l'*AA* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés (*BCIT*, par. 9 et 26). Dans *BCIT*, la juge Saunders énumère des facteurs à considérer dans l'exercice de ce pouvoir discrétionnaire (par. 31) :

1. [TRADUCTION] « le bien-fondé apparent de l'appel »;

2. « l'importance de la question pour les parties, les tiers et la société en général »;

3. « les circonstances qui sont à l'origine du différend et de l'arbitrage, y compris le besoin urgent d'obtenir un règlement définitif »;

4. « d'autres considérations temporelles, y compris la possibilité pour l'une ou l'autre des parties de remédier autrement aux conséquences »;

5. « la conduite des parties »;

6. « l'étape à laquelle la décision qui a été portée en appel avait été prise »;

7. « le respect du choix des parties d'avoir recours à l'arbitrage pour résoudre leurs différends »;

8. « la reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends, spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage ».

[86] Je conviens avec la juge Saunders pour dire qu'il n'est pas opportun de dresser ce qu'elle appelle une [TRADUCTION] « liste immuable » de facteurs à considérer dans l'exercice du pouvoir discrétionnaire prévu au par. 31(2) (*BCIT*, par. 32). Cependant, je ne peux convenir que tous les facteurs qui figurent sur la liste qu'elle a dressée sont applicables à cette étape de l'analyse.

[87] Dans l'exercice du pouvoir discrétionnaire que lui confère l'al. 31(2)(a) et qui l'habilite à rejeter la demande d'autorisation, le tribunal devrait examiner les motifs traditionnels justifiant le refus d'une réparation discrétionnaire : la conduite des parties, l'existence d'autres recours et tout retard indu (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 364-367). L'exercice du pouvoir discrétionnaire qui permet de refuser une réparation fait intervenir des considérations relatives à la prépondérance des inconvénients (*Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 52). Parmi celles-ci se trouve le besoin urgent d'obtenir un règlement définitif.

[88] Quant aux autres facteurs mentionnés dans la liste et dont je traite successivement ci-après, j'estime qu'ils ont déjà été examinés dans le cadre de l'analyse fondée sur l'al. 31(2)(a) ou qu'il conviendrait mieux de les examiner à un autre volet du critère énoncé au par. 31(2). Une fois examinés, ces facteurs ne devraient pas être réexaminés par le tribunal au moment de l'exercice de son pouvoir discrétionnaire résiduel.

[89] Je le rappelle, dans l'analyse fondée sur l'al. 31(2)(a), il faut procéder à l'examen préliminaire du bien-fondé de la question de droit soulevée dans la demande d'autorisation pour déterminer s'il y a risque d'erreur judiciaire. La question de l'importance pour les parties se règle à l'al. 31(2)(a) : [TRADUCTION] « l'importance de l'issue de l'arbitrage pour les parties ». L'importance de la question pour les tiers et pour la société en général ne doit pas être examinée à l'al. 31(2)(a), car l'*AA* prévoit ces motifs à des dispositions distinctes, soit les al. 31(2)(b) et (c). En outre, le respect du choix des parties d'avoir recours à l'arbitrage sous-tend la loi elle-même, ce dont témoigne le seuil élevé auquel l'autorisation est subordonnée aux termes de l'al. 31(2)(a). La reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends et spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage s'inscrit dans le besoin urgent d'obtenir un règlement définitif.

[90] Quant à l'étape du processus à laquelle la décision dont on veut faire appel a été rendue, ce n'est pas un facteur pertinent pour l'exercice par le tribunal du

pouvoir discrétionnaire résiduel conféré par l'al. 31(2)(a) qui lui permet de refuser l'autorisation. Ce facteur a été défini en réponse à des préoccupations selon lesquelles l'autorisation d'appeler d'une décision interlocutoire risque d'être prématurée et d'entraîner des retards indus ainsi qu'une fragmentation inutile du processus judiciaire (D. J. M. Brown et J. M. Evans, avec la collaboration de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 3-67 à 3-76). Or, ces préoccupations auront été dissipées par la formation saisie de la demande d'autorisation lorsqu'elle se sera penchée sur le risque d'erreur judiciaire, et, plus précisément, sur la possibilité que la question interlocutoire ait une incidence sur le résultat final. Ainsi, les préoccupations mentionnées précédemment ne devraient donc pas être réexaminées.

[91] En résumé, une liste non exhaustive des facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) de l'*AA* comprendrait :

- la conduite des parties;
- l'existence d'autres recours;
- un retard indu;
- le besoin urgent d'obtenir un règlement définitif.

[92] Ces facteurs pourraient, le cas échéant, justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas

où il est satisfait aux critères prévus à l'al. 31(2)(a). Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire. Après avoir conclu à l'existence d'une erreur de droit et, au moins en ce qui concerne l'al. 31(2)(a), d'un risque d'erreur judiciaire, le tribunal doit soupeser ces facteurs avec soin avant de décider s'il va rejeter ou non pour des motifs discrétionnaires une demande par ailleurs admissible.

b) *Application au présent pourvoi*

[93] Le juge de la CS saisi de la demande d'autorisation a rejeté cette dernière au motif qu'elle ne soulevait aucune question de droit. Il a indiqué que, même s'il avait conclu à l'existence d'une telle question, il aurait refusé l'autorisation en vertu de son pouvoir discrétionnaire résiduel, et ce, pour deux raisons : premièrement, à cause de la conduite de Creston qui a présenté inexactement les faits relatifs aux honoraires d'intermédiation à la Bourse et à Sattva; deuxièmement, [TRADUCTION] « par égard pour le principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41). La formation de la CA saisie de la demande d'autorisation a écarté la décision de la CS pour ces deux raisons discrétionnaires.

[94] Pour les motifs énoncés précédemment, l'objectif qui vise à favoriser et à préserver l'intégrité du système d'arbitrage ne devrait pas constituer une considération distincte dans l'analyse que requiert l'al. 31(2)(a) préalable à l'exercice du pouvoir discrétionnaire. Bien que le régime instauré par le par. 31(2) reconnaît cet

objectif, l'exercice du pouvoir discrétionnaire doit se rapporter aux faits et aux circonstances de l'affaire. Cet objectif général ne fait pas partie des considérations susceptibles de justifier le refus discrétionnaire de l'autorisation.

[95] Toutefois, la conduite des parties est un facteur que le tribunal peut prendre en considération dans l'exercice du pouvoir discrétionnaire résiduel que lui confère l'al. 31(2)(a). La cour d'appel doit faire preuve de déférence lorsqu'elle contrôle la décision discrétionnaire de refuser l'autorisation d'interjeter appel. Elle doit se garder d'intervenir seulement parce qu'elle aurait exercé son pouvoir discrétionnaire différemment (*R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 18 et 30). La cour d'appel ne saurait intervenir à l'égard de l'exercice du pouvoir discrétionnaire par le juge de l'instance inférieure que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117).

[96] En l'espèce, la formation de la CS saisie de la demande d'autorisation a fondé sur un facteur reconnu sa décision de refuser la réparation discrétionnaire : l'inconduite de Creston. La formation de la CA saisie de la demande d'autorisation a infirmé cette décision au motif que [TRADUCTION] « ces faits [la conduite de Creston] n'intéressent pas directement la question de droit » soulevée en appel (par. 27).

[97] La formation de la CA saisie de la demande d'autorisation n'a pas expliqué pourquoi l'inconduite doit se rapporter directement à une question de droit

pour que l'autorisation soit refusée. Rien dans le par. 31(2) de l'*AA* ne limite l'exercice du pouvoir discrétionnaire du juge saisi de la demande d'autorisation de la façon avancée par la Cour d'appel. Mon interprétation de la jurisprudence ne cadre pas avec le point de vue selon lequel l'inconduite d'une partie doit se rapporter directement à la question devant être tranchée par la cour.

[98] Dans l'arrêt *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011, p. 1037-1038, l'inconduite d'une partie ne se rapportait pas directement à la question en cause devant la Cour, mais cette dernière a néanmoins refusé d'accorder la réparation. Le litige tirait son origine d'un désaccord sur la question de savoir si l'acheteur de lots sur un lotissement, Homex, avait assumé les obligations du vendeur prévues à la convention de lotissement, c'est-à-dire de satisfaire à « toutes les exigences, financières ou autres » relativement à l'installation des services d'utilité publique sur un lotissement (p. 1015-1016). La Cour décide qu'Homex n'a pas bénéficié de l'équité procédurale lorsque la municipalité avait adopté un règlement se rapportant au litige (p. 1032). Néanmoins, la demande visant à obtenir l'annulation discrétionnaire du règlement a été rejetée notamment parce que « [t]out au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains » qu'elle détenait (p. 1037), même si Homex savait, de l'avis de la Cour, qu'elle devait assumer cette obligation (p. 1017-1019). Cette conduite se rapportait, non pas à la question de savoir si le règlement avait été adopté d'une manière équitable sur le plan de la procédure, mais au désaccord à l'origine du litige. Par conséquent, je crois que l'arrêt *Homex* étaye la

proposition selon laquelle une conduite répréhensible se rapportant au différend à l'origine du litige peut justifier le refus de la réparation discrétionnaire sollicitée, en l'occurrence l'autorisation d'interjeter appel.

[99] En l'espèce, l'arbitre a tiré la conclusion de fait suivante : Creston a induit la Bourse et Sattva en erreur en ce qui concerne [TRADUCTION] « la nature de l'obligation qu'elle avait contractée envers Sattva en affirmant que les honoraires d'intermédiation étaient payables en argent » (par. 56(k)). Bien que cette conduite ne soit pas reliée à la question de droit énoncée par la formation de la CA saisie de la demande d'autorisation, elle est reliée à l'arbitrage visant à déterminer le cours de l'action applicable aux fins du versement des honoraires d'intermédiation de Sattva. La Cour suprême pouvait à bon droit fonder sur une telle conduite sa décision de refuser l'autorisation, en vertu de son pouvoir discrétionnaire.

[100] Par conséquent, à mon humble avis, même si la formation de la CA saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la CS saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

[101] S'il est vrai que la formation de la CA saisie de la demande d'autorisation a commis une erreur en autorisant l'appel, ces interminables procédures ne s'en trouvent pas moins à l'heure actuelle devant nous. Puisque, par ailleurs, c'est la question de fond de l'appel — soit celle de savoir combien l'entente exige que

Creston paie à Sattva — qui intéresse réellement les parties, et que les tribunaux d'instance inférieure ont considérablement divergé d'opinion quant à l'interprétation qu'il faut donner à l'entente, il serait bien peu satisfaisant que le véritable litige à l'origine de cette instance ne soit pas réglé. Je vais donc examiner les trois autres questions soulevées en appel comme si l'autorisation d'interjeter appel avait été accordée à bon droit.

C. *Norme de contrôle applicable aux affaires régies par l'AA*

[102] Abordons les décisions des tribunaux siégeant en appel. Tout d'abord, il est nécessaire de déterminer la norme applicable au contrôle de la sentence arbitrale en fonction de la question à l'égard de laquelle la formation de la CA saisie de la demande d'autorisation a accordé cette dernière : l'arbitre a-t-il interprété la disposition sur les honoraires d'intermédiation à la lumière de l'entente dans son ensemble? Plus particulièrement, l'a-t-il interprétée en tenant compte de la stipulation relative au « plafond »?

[103] D'entrée de jeu, il convient de souligner que l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45, laquelle prévoit les normes de contrôle applicables aux décisions rendues par de nombreux tribunaux administratifs de la Colombie-Britannique (art. 58 et 59), ne s'applique pas aux arbitrages régis par l'*AA*.

[104] L'examen en appel des sentences arbitrales commerciales s'inscrit dans un régime, strictement défini et adapté aux objectifs de l'arbitrage commercial, qui

diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif. Par exemple, la plupart du temps, les parties décident d'un commun accord de soumettre leur différend à l'arbitrage. Il ne s'agit pas d'un processus imposé par la loi. De plus, contrairement à la procédure devant un tribunal administratif, dans le cas d'un arbitrage les parties à la convention choisissent le nombre d'arbitres et l'identité de chacun. Ces différences révèlent que le cadre relatif au contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Par exemple, l'*AA* interdit le contrôle des conclusions de fait tirées par l'arbitre. En matière d'arbitrage commercial, une telle disposition est absolue. Suivant le cadre établi dans *Dunsmuir*, l'existence d'une disposition d'inattaquabilité (aussi appelée clause privative) n'empêche pas le tribunal judiciaire de procéder au contrôle d'une décision administrative, elle signale simplement que la déférence est de mise (*Dunsmuir*, par. 31).

[105] Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Dans les deux cas, le tribunal examine la décision rendue par un décideur administratif. En outre, l'expertise constitue un facteur tant en matière de contrôle judiciaire qu'en matière d'arbitrage commercial : quand les parties choisissent leur propre décideur, on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable. Pour ces raisons, j'estime que certains éléments du cadre

établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences rendues en matière d'arbitrage commercial.

[106] La jurisprudence depuis l'arrêt *Dunsmuir* vient confirmer qu'il est souvent possible de déterminer la norme de contrôle applicable suivant la nature de la question en litige (voir par exemple *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 44). En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur (*Alberta Teachers' Association*, par. 30). La question dont nous sommes saisis, à savoir si l'arbitre a interprété l'entente dans son ensemble, n'appartient pas à l'une ou l'autre de ces catégories. Compte tenu des éléments pertinents de l'analyse établie dans l'arrêt *Dunsmuir*, la norme de la décision raisonnable s'applique en l'espèce.

D. *L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble*

[107] Essentiellement pour les mêmes motifs que ceux exprimés par le juge Armstrong aux par. 57-75 de la décision de la CS sur l'appel, je suis d'avis que

l'arbitre, en déterminant que Sattva était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action, a donné une interprétation raisonnable de l'entente considérée dans son ensemble. Le juge Armstrong a contrôlé la décision de l'arbitre selon la norme de la décision correcte, mais ses motifs démontrent amplement le caractère raisonnable de cette décision. L'analyse qui suit est largement fondée sur son raisonnement.

[108] La question que devait trancher l'arbitre portait sur la date qui doit être retenue pour évaluer le cours de l'action aux fins du versement des honoraires d'intermédiation : la date établie selon la définition du cours qui figure dans l'entente ou la date du versement des honoraires d'intermédiation.

[109] L'arbitre a conclu que la valeur calculée selon la définition du cours l'emportait, soit 0,15 $ l'action. Selon lui, tel constat découlait des termes de l'entente et était [TRADUCTION] « clair et incontestable » (par. 23). Apparemment, comme il estimait que ce point était clair, il ne l'a pas motivé abondamment.

[110] Dans l'arrêt *Newfoundland and Labrador Nurses' Union*, la juge Abella cite le professeur David Dyzenhaus pour expliquer que les tribunaux siégeant en révision peuvent compléter les motifs du décideur de première ligne dans le cadre de l'analyse du caractère raisonnable :

> [TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étayent, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à

> fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de première ligne, la connaissance directe qu'a le tribunal du différend, son expertise, etc., il est aussi vrai qu'on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Soulignement ajouté par la juge Abella; par. 12.]

(Citation de D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Par conséquent, on peut supposer que l'explication donnée par le juge Armstrong du jeu de la définition du cours et de la stipulation relative au « plafond » complète les motifs de l'arbitre.

[111] Les deux clauses en cause sont la définition du cours et la stipulation relative au « plafond » :

> [TRADUCTION]
>
> **2. DÉFINITIONS**
>
> **« cours »**, pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

Et :

> **3. HONORAIRES D'INTERMÉDIATION**
>
> 3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation. [Je souligne.]

[112] L'article 3.1 de l'entente permet à Sattva de recevoir ses honoraires d'intermédiation en actions en fonction du « cours ». Aux termes de l'art. 2 de l'entente, le cours des titres des sociétés cotées à la Bourse de croissance TSX est égal au « cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». En l'espèce, compte tenu de la définition du cours, l'action vaudrait 0,15 $. Le passage « dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation » tiré de l'art. 3.1 de l'entente constitue la stipulation relative au « plafond ». Cette stipulation limite le montant des honoraires d'intermédiation. Le plafond correspond dans le cas qui nous occupe à 1,5 million $US (voir le point 3.3 de la politique 5.1 de la Bourse à l'annexe II).

[113] La stipulation relative au « plafond » limite le montant des honoraires d'intermédiation, mais elle ne change rien à la définition du cours. Comme l'explique le juge Armstrong, la définition du cours fixe la date à laquelle un moyen de paiement (dollars américains) est converti en un autre (actions) :

> [TRADUCTION] Le moyen de paiement des honoraires d'intermédiation est clairement établi par l'entente conclue en ce sens. La valeur marchande de ces actions au moment où les parties ont conclu cette entente était inconnue. L'intimée établit une analogie entre le paiement en actions des honoraires d'intermédiation de 1,5 million $US et une entente hypothétique en vertu de laquelle la somme de 1,5 million $US serait convertie en dollars canadiens. Dans les deux cas, les honoraires seraient payés en devises différentes. Le taux de change d'une à l'autre serait fixé à une date précise, tout comme l'est le cours de l'action dans l'entente relative aux honoraires. Ce taux de change permettrait de calculer la somme à verser en dollars canadiens en règlement des honoraires de 1,5 million $US, tout comme le cours permet de déterminer le nombre d'actions cédées en règlement des honoraires. Le dollar canadien est une forme de paiement, au même titre que l'action. Il importe peu que la valeur du dollar canadien augmente ou diminue après la date fixée pour établir le taux de change. Le montant des honoraires payé est toujours égal à 1,5 million $US. Il est converti en un certain nombre de dollars canadiens (ou d'actions) équivalant au montant des honoraires en fonction de la valeur de la devise à la date à laquelle cette valeur est déterminée.

(Décision de la CS sur l'appel, par. 71)

[114] Comme l'explique le juge Armstrong, accepter la position de Creston revient à ne pas tenir compte de la définition du cours et à fixer le cours de l'action en fonction de l'évaluation faite en prévision d'un placement privé.

[115] Cependant, rien dans l'entente n'indique, expressément ou implicitement, qu'il faille réévaluer avant la date du versement des honoraires d'intermédiation la

conformité à la stipulation relative au « plafond ». L'entente ne précise pas non plus — ni expressément, ni implicitement — la base sur laquelle il faudrait procéder à une telle réévaluation — en l'occurrence un placement privé. Accepter l'interprétation de Creston reviendrait à faire fi du libellé de l'entente selon lequel les « honoraires d'intermédiation sont versés en actions de la société en fonction du cours ».

[116] La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond ». Comme l'explique le juge Armstrong, l'interprétation par l'arbitre de l'entente atteint cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne peut être considérée comme déraisonnable.

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions

dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et Creston et Sattva, des parties avisées, en auraient eu connaissance.

[118] En acceptant un paiement en actions, Sattva acceptait de se soumettre à la volatilité du marché. Si l'action de Creston avait chuté, Sattva aurait tout de même été liée par la valeur déterminée en application de la définition du cours, de sorte qu'elle aurait reçu des actions d'une valeur marchande inférieure au plafond de 1,5 million $US. Il ne serait guère logique d'accepter le risque d'une baisse du cours de l'action sans avoir la possibilité de bénéficier d'une hausse. Pour reprendre les propos du juge Armstrong :

> [TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.

(Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 47).

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel*

[120] La Cour d'appel a conclu qu'elle-même et la formation de la CS saisie de l'appel étaient liées par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation en ce qui a trait non seulement à la décision d'autoriser l'appel, mais aussi au bien-fondé de l'appel. Autrement dit, elle a conclu que la formation de la CS saisie de l'appel avait commis une erreur de droit en faisant fi des conclusions de la formation de la CA saisie de la demande d'autorisation quant au bien-fondé de l'appel.

[121] La formation de la CA saisie de l'appel a mis en relief deux conclusions précises quant au bien-fondé de l'appel qui, à son avis, la liaient elle, et aussi la formation de la CS saisie de l'appel : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente :

> [TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.
>
> Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 $ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions $. Si elle optait pour le versement en argent, elle recevrait un

> montant de 1,5 million $US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.
>
> Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 42-44]

[122] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la CA saisie de la demande d'autorisation la liaient elle, de même que la formation de la CS saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 88). Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli (*Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, par. 27, autorisation d'appel refusée, [2013] 3 R.C.S. viii). Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause, comme c'est le cas en l'espèce. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs (*Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), par. 32).

[123] Creston concède ce point, mais prétend que la conclusion tirée par la formation de la CA saisie de l'appel selon laquelle elle était liée par les conclusions de celle saisie de la demande d'autorisation était sans conséquence parce que la

première est arrivée à la même conclusion que la seconde sur le bien-fondé, à l'issue d'un raisonnement distinct et indépendant.

[124] Le fait que la formation de la CA saisie de l'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur. Dès lors que la formation de la CA saisie de l'appel a accordé un caractère obligatoire aux motifs concernant le bien-fondé de l'appel énoncés par celle saisie de la demande d'autorisation, elle ne pouvait guère arriver à une autre décision. Comme le souligne l'avocat de Sattva, considérer comme impérative la décision relative à la demande d'autorisation rendrait l'appel futile.

VI. Conclusion

[125] La formation de la CA saisie de la demande d'autorisation a commis une erreur en accordant l'autorisation d'interjeter appel en l'espèce. Quoi qu'il en soit, la sentence arbitrale était raisonnable. L'appel interjeté à l'encontre des décisions de la Cour d'appel de la Colombie-Britannique datées du 14 mai 2010 et du 7 août 2012 est accueilli avec dépens devant toutes les cours. La sentence arbitrale est rétablie.

ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

b) Disposition relative aux honoraires d'intermédiation (laquelle contient la stipulation relative au « plafond ») :

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation.

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

3.3 Plafond des honoraires d'intermédiation

Les honoraires d'intermédiation sont assujettis à un plafond si l'avantage que retire l'émetteur prend la forme d'un achat ou d'une vente d'actifs ou d'une convention de coentreprise, ou si son avantage n'est pas lié à un financement précis. La contrepartie devrait être exprimée à la fois en valeur monétaire et en pourcentage de la valeur de l'avantage reçu. Sauf dans des circonstances exceptionnelles, les honoraires d'intermédiation ne doivent pas dépasser les pourcentages suivants :

Avantage	Honoraires d'intermédiation
300 000 $ et moins	Jusqu'à 10 %
Entre 300 000 $ et 1 000 000 $	Jusqu'à 7,5 %
1 000 000 $ et plus	Jusqu'à 5 %

De façon générale, les honoraires ou la commission, exprimés en pourcentage de la valeur monétaire de l'avantage, devraient être inversement proportionnels à cette valeur.

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

[TRADUCTION]

Appel devant le tribunal

31 (1) Une partie à l'arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

(a) toutes les parties à l'arbitrage y consentent,

(b) le tribunal accorde l'autorisation.

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

(3) Si le tribunal accorde l'autorisation en vertu du présent article, il peut assortir des conditions qu'il estime équitables l'ordonnance accordant l'autorisation.

(4) En appel, le tribunal peut, selon le cas :

(a) confirmer, modifier ou annuler la sentence,

(b) renvoyer la sentence à l'arbitre avec l'opinion du tribunal sur la question de droit qui a fait l'objet de l'appel.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante BCICAC Foundation : Fasken Martineau DuMoulin, Vancouver.

Court of Queen's Bench of Alberta

Citation: Edmonton Kenworth Ltd v Kos, 2018 ABQB 439

Date: 20180606
Docket: 1603 16020
Registry: Edmonton

Between:

Edmonton Kenworth Ltd.

Plaintiff

- and -

Artie Kos

Defendant

Memorandum of Decision
of the
Honourable Madam Justice C. Dario

I. Introduction

[1] This is an application by Artie Kos for summary judgment against the plaintiff, Edmonton Kenworth Ltd. ("**Kenworth**") or an order that all or some of the statement of claim be struck. Kenworth's claim is to enforce a personal guarantee Mr. Kos granted with respect to the performance of a related company under a lease agreement.

[2] Kenworth cross-applies for summary judgment against Mr. Kos with respect to liability under the personal guarantee, with the quantum of the award to be assessed later by a referee.

II. Background

[3] At the time of its incorporation on April 15, 2010, Mr. Kos was the sole director and (directly or indirectly) the sole shareholder of ATK Oilfield Transportation Inc. ("**ATK**"). Around July 28, 2010, Kenworth and ATK entered into a Master Vehicle Lease Agreement (the "**2010 Master Lease**") under which ATK could lease certain equipment from Kenworth. Bill Doyle was the authorized signatory on behalf of ATK.

[4] The 2010 Master Lease set out some general terms. The actual equipment leased and terms relevant to that equipment were set out in separate schedules, each of which, according to Mr. Kos, was separately negotiated. The 2010 Master Lease contemplated that schedules would be added, deleted and amended from time to time. Several schedules were added after the initial schedules of July 2010.

[5] On December 6, 2010, Kenworth sought and Mr. Kos provided a limited personal guarantee (the "**Guarantee**") in favor of Kenworth, in which he guaranteed the performance by ATK of all of the terms, conditions and obligations within the 2010 Master Lease. The Guarantee is limited to two million dollars plus applicable interest and costs. The Guarantee describes Mr. Kos as a principal obligor and states that he is jointly and severally bound with ATK for performance under the 2010 Master Lease. The parties do not dispute the compliance of the form of the Guarantee with the requirements under the *Guarantees Acknowledgement Act*, and that Mr. Kos understood his obligations under the Guarantee, notwithstanding that Mr. Kos states he did not review (or possibly even see) the 2010 Master Lease.

[6] Between March and December 2013, ATK underwent a major corporate restructuring. In March 2013, ATK issued 25 million new shares to qualified investors under parts 9 & 10 of the Alberta *Securities Act*, RSA 2000, c S-4.

[7] On August 28, 2013, Alberta Treasury Branches ("**ATB**") advanced up to $25 million to ATK under a commitment letter. Around that time, ATK, at its own initiation, paid out to Kenworth all amounts then owing under the 2010 Master Lease, approximately $10.7 million (the "**2013 Buyout**"). I note that this effectively terminated all of the existing schedules under the 2010 Master Lease. A few days later, Kenworth discharged all its security agreements registered against ATK at the Personal Property Registry with respect to the 2010 Master Lease. There is no dispute that Kenworth unconditionally accepted the 2013 Buyout as payment for all the amounts then owing under the 2010 Master Lease.

[8] The parties' recollections of the circumstances of the 2013 Buyout diverge. Mr. Kos states that this was part of the larger reorganization for ATK to become an exempt distributor and ultimately to go public, so ATK was clearing off all of its accounts and cancelling all personal guarantees. Kenworth states it was because ATK wanted to transfer the Trucks to the USA, and it could not secure the vehicles if moved across the border. Kenworth argues that there were 21 additional vehicles on order, so they would not have terminated the 2010 Master Lease. Mr. Kos states the ATB funding would be used to finance those vehicles (which was in fact how they were funded). It is not clear whether those 21 vehicles were ordered prior to or shortly after the 2013 Buyout. There was no written document of a termination of the 2010 Master Lease or the Guarantee, although Mr. Kos maintains that it was the intent of the 2013 Buyout to terminate these agreements.

[9] Between the 2013 Buyout and December 2013, ATK issued an additional 6.5 million shares and increased its shareholdings to 115 voting and non-voting shareholders with a total of over 31.4 million shares outstanding. Mr. Kos states ATK became an exempt distributor under both the Alberta *Securities Act* and the British Columbia *Securities Act*, RSBC 1996, c 418. Mr. Kos remained Director and was CEO and Chairman of the Board of ATK.

[10] Approximately 5 months after the 2013 Buyout, Mr. Kos had conversations with Kenworth about further equipment ATK wanted to lease. ATK was nearing maximum utilization of the ATB operating line and did not want to continue paying cash for the new equipment. On February 7, 2014, Mr. Kos sent an email to Kenworth stating "Let's simply do the conventional lease finance we have done with you in the past for the last batch of units ordered." On February 12, 2014, Bill Doyle on behalf of ATK requested more operating leases for trucks from Kenworth. Mr. Riddell on behalf of Kenworth replied to Mr. Doyle that the 2010 Master Lease was still in place, and the parties proceeded on that basis. Mr. Kos was not copied on that email exchange.

[11] In July 2015, Mr. Kos attended at Kenworth to request relief on lease payments.

[12] On April 1, 2016, a Consent Receivership Order was granted over the assets and properties of ATK, which Kenworth asserts constituted an event of default under the 2010 Master Lease.

[13] At that time, ATK had 22 trucks and related add-ons (collectively, the "**Trucks**") under lease from Kenworth at various stages of the lease and payment term. These were documented by 22 separate schedules, each indicating that it formed part of the 2010 Master Lease. Kenworth states the original selling price of the Trucks totaled over $15 million. ATK was in arrears of amounts payable under the 2010 Master Lease, which Kenworth argues was also an event of default.

[14] Kenworth advised ATK it was treating the events of default as repudiation of the 2010 Master Lease and pursuing all remedies available to it. It arranged with ATK to transfer possession of the Trucks back to Kenworth. Kenworth argues that the Trucks' value for resale is greatly diminished, due in part to required repairs and parts replacement, and in part because they had been altered without authorization. It suggests that the Trucks may not be worth any more than they would have been had they been returned at the end of the applicable lease. As such, Kenworth states that the losses it sustained due to the defaults of the 2010 Master Lease far exceed the two million dollar limit of the Guarantee.

III. Issues

[15] There are three applications before me. Mr. Kos applies to strike Kenworth's statement of claim and applies for summary judgment. Kenworth applies for summary judgment with respect to Mr. Kos' liability under the Guarantee. Therefore, the issues to be determined are as follows.

1) Is there a basis to strike out any of the statement of claim?
    a. What is the nature of the 2010 Master Lease and does Part 5 of the *PPSA* apply to it?
    b. Do sections 60 and/or 62 of the *PPSA* apply and what is their effect?
2) Is there a basis to grant summary judgment in favor of either Mr. Kos or Kenworth?

a. Was the 2010 Master Lease terminated by the 2013 Buyout, thereby ending the guaranteed obligation?

b. Has the Guarantee been cancelled or has it expired?

c. Is Mr. Kos entitled to equitable relief?

d. Is there any other basis to deny summary judgment?

IV. Application to Strike

[16] A court may strike out all or part of a claim where the pleading discloses no reasonable claim: ARC rule 3.68. This test may also be stated as whether it is plain and obvious that the pleadings disclose no reasonable prospect of success: ***R v Imperial Tobacco Canada Limited***, 2011 SCC 42 at para 17. See also ***Trimove Inc v Servus Credit Union Ltd***, 2017 ABQB 50 at para 39. The court considers if it is "beyond doubt" or "plain and obvious" that the claim will fail: ***Lameman v Alberta***, 2013 ABCA 148 at para 10.

[17] In making this assessment, the court assumes the facts pleaded are true unless they are manifestly incapable of being proven: ***Imperial*** at para 22. On a motion to strike pleadings on the grounds they disclose no reasonable cause of action, evidence is not admissible: rule 3.68(3).

A. Nature of Lease and Application of Part 5 of the *PPSA*

[18] Mr. Kos asserts that it is plain and obvious the claim will fail because Kenworth cannot establish damages. He relies on Part 5 of the *Personal Property Security Act*, RSA 2000, c P-7 (the "***PPSA***"), particularly s. 62, to establish the obligations secured by the Guarantee have been satisfied.

[19] In reply, Kenworth notes that s. 55 of the *PPSA* provides that Part 5 does not apply to the transactions listed in s. 3(2). Section 3(2) states in part:

> 3(2) Subject to sections 4 and 55, this Act applies to …
>
> (b) a lease of goods for a term of more than one year, …
>
> that does not secure payment or performance of an obligation.

[20] Kenworth's position is that the Master Lease is a "true lease" - a lease that does not secure payment or performance of an obligation. As such, it argues that Part 5 of the *PPSA* does not apply. Since the 2010 Master Lease was for a term of more than one year, its characterization as a true lease or a financing lease (also referred to as a security lease) is central to this application.

[21] The principles that apply in ascertaining the nature of a lease are summarized as follows in ***Connacher Oil and Gas Limited (Re)***, 2017 ABQB 769 at para 15:

- For a court to determine whether it is dealing with a true lease or a financing lease, it must look to the substance of the arrangement between the parties rather than the form of the arrangement.
- The court must examine a number of factors, some of which are contained in the document itself, some of which relate to the manner in which the parties effected their arrangement, and some of which deal with the nature of the parties themselves.

- No one factor is determinative, although some might be more indicative of the nature of the lease.
- The objective of a court's analysis is to determine the parties' intent at the time they entered into their arrangement, and the document itself may help in that determination.
- Courts must show particular deference to the wording of the document where the parties are sophisticated commercial parties.
- A court must interpret an agreement as at the date it was made, as the exercise is intended to discern the intention of the parties at the time the contract was formed.

[22] With these principles in mind, courts often have considered the non-exhaustive 16 factor test set out in ***Smith Brothers Contracting Ltd*** (Re) (1998), 53 BCLR (3d) 264 at para 67 to evaluate the nature of a particular lease.

[23] My application of those factors to the 2010 Master Lease is as follows:

1. Whether there was an option to purchase for a nominal sum;
   - No, but this had been permitted in the past under the same lease terms.
2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
   - No.
3. Whether the nature of the lessor's business was to act as a financing agency;
   - Not much evidence was provided on this factor. Kenworth is a dealership; typically both leasing and financing options are available at this type of business.
4. Whether the lessee paid a sales tax incident to acquisition of the equipment;
   - Yes, but the provision in the 2010 Master Lease is not particularly clear and GST would be payable regardless of the type of lease.
5. Whether the lessee paid all other taxes incident to ownership of the equipment;
   - Yes.
6. Whether the lessee was responsible for comprehensive insurance on the equipment;
   - Yes.
7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
   - Yes.
8. Whether the agreement placed the entire risk of loss upon the lessee;
   - No. The insurable risk of loss was entirely borne by the lessee. The Court in ***Connacher***, however, held at paras 23-26 that, rather than the insurable risk of loss, this factor means the loss at the end of the term of the lease or other earlier

termination. Under that interpretation, the entire risk was *not* borne by ATK in the event of early termination.

9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;

    - No, the acceleration clause pertains only to arrears and additional charges.

10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;

    - Yes, the Trucks were selected by and customized for ATK.

11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;

    - Yes. The 2010 Master Lease contemplated a security deposit. While this was waived by Kenworth, Mr. King attested that this was due to the personal guarantee subsequently provided by Mr. Kos, although only provided nine months later when ATK leased additional Trucks.

12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a UCC financing statement;

    - The UCC is not applicable, however, the 2010 Master Lease permits PPR registration.

13. Whether there was a default provision in the lease inordinately favourable to the lessor;

    - No. While amounts owing are subject to 24% interest, the acceleration clause pertains only to arrears and certain other operational and enforcement charges.

14. Whether there was a provision in the lease for liquidated damages;

    - No. Upon an event of default, only arrears, interest and enforcement costs are payable. The 2010 Master Lease contemplates only actual damages; there is no pre-estimate of damages due to default.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;

    - Yes.

16. Whether the aggregate rental approximated the value of purchase price of the equipment.

    - Yes (the amounts payable under the schedules appear to be slightly in excess of the original value, presumably to account for some financing rate)

[24] The above analysis leads to a somewhat mixed result. Not all of the factors are necessarily weighted equally, however, and the court may include other factors it considers material and relevant, which are then balanced in the context of the entire agreement: ***Royal Bank of Canada v Cow Harbour Construction Ltd***, 2012 ABQB 59 at para 65. The court's role

is focused on determining the intention of the parties based on an interpretation of the entire agreement and other relevant and material factors: *Ibid*.

[25] The 2010 Master Lease did not contain an acceleration clause upon an event of default or a penalty for early termination, the result of which is that if there was a default or early termination, Kenworth would be entitled only to the arrears and the return of the Trucks (together with some other incidental costs). The 2010 Master Lease did not transfer the risk of a shortfall to ATK, did not confer any equity or proprietary interest in the Trucks, and did not include an automatic end of lease purchase option.

[26] While these are material factors weighing in favor of a true lease, the majority of the factors weigh in favor of a finding that the 2010 Master Lease is a financing lease. This includes that the aggregate of the rental payments over the course of the lease term (typically five years) is approximately the purchase price of the Trucks. In addition, there are a few significant points beyond the terms of the 2010 Master Lease. For example, although there was no buyout provision, in 2013 ATK bought out all the leased Trucks part way through the lease term. I also note that, in its communication with Kenworth at the time of the 2013 Buyout, ATK's counsel referred to the payment as a payout of "equipment loans". Further, the Trucks were not only selected by but also customized for ATK, making them less usable for leasing to other parties once the lease term was over (including in the event of an early termination).

[27] The function of the court is to determine the intent of the parties in entering into the arrangement; see ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at para 47. I find telling Mr. Kos' request to Kenworth in February 2014 to repeat the "conventional lease finance" they had in the past. This evidence assists me in finding that the intention of the parties was to enter into an arrangement to finance the vehicles. They relied on the 2010 Master Lease to record this transaction primarily because it was already in place and required no further negotiation or documentation other than to add new schedules.

[28] At the striking out stage, based on the limited submissions on this point, I agree with Mr. Kos' position vis à vis s. 3(2)(b) - the 2010 Master Lease (and each schedule attached to it) secures payment or performance of the obligations set out in the 2010 Master Lease, and is therefore not caught by s. 3(2)(b). This means Part 5 of the *PPSA does* apply, including ss. 60 and 62.

[29] Had I instead found that the 2010 Master Lease was a true lease, Part 5 of the *PPSA* would not apply. Mr. Kos' strike application in that case would be based on the fact that Kenworth has not yet sold the Trucks and therefore does not know whether there is a deficiency. Kenworth replies that the value of the Trucks is far less than what it is owed under the 2010 Master Lease, particularly in light of the required repairs and parts replacement and the unauthorized alterations made by ATK.

[30] A further issue to be addressed as part of that argument is the lack of mitigation by Kenworth, as the Trucks are sitting in storage, although Kenworth states that by waiting for the market to improve, it hopes to recover a greater value upon sale at a later date.

[31] If I had concluded that the 2010 Master Lease was a true lease, Mr. Kos' application to strike would fail. While Kenworth's damages may be uncertain and there is an issue with respect to mitigation, it is not plain and obvious that Kenworth's claim cannot succeed. The question of whether there is a deficiency remains to be determined.

B. Sections 60 and 62 of the *PPSA*

[32] Viewing the 2010 Master Lease as a financing lease, Mr. Kos argues Kenworth seized the Trucks under s. 62 of the *PPSA*, and as such, the seizure is in full satisfaction of its claim.

[33] Section 62 of the *PPSA* provides that after default, a secured party may propose to take the collateral in satisfaction of the obligations secured and shall give a notice of the proposal to various interested parties (including the debtor). If it does so and none of the notified parties objects within 15 days, the secured party is deemed to have irrevocably elected to take the collateral in satisfaction of the obligation and is entitled to hold or dispose of the collateral free from all rights and interest of the debtor and any person entitled to receive a notice.

[34] If such election occurs, the secured party cannot then pursue the guarantor as the underlying obligation is fully satisfied. Mr. Kos argues that Kenworth has seized the Trucks and now cannot claim a deficiency. Although Kenworth did not give the notice provided for in s. 62, Mr. Kos argues that Kenworth's indefinite retention of the Trucks suggests that it has elected to retain them in satisfaction of the obligation. This Court deemed a 10 month retention and subsequent sale of collateral was a s. 62 election in ***241301 Alberta Ltd v 482176 BC Ltd***, 2003 ABQB 711 ["***241***"] at para 17:

> Section 60(11) specifically provides that a secured party may only purchase the collateral at a public sale, therefore it would be contrary to the *PPSA* to characterize 241 taking over the assets as a sale to them at the value attributed to them in the appraisal completed just before 241 appointed the receiver. Their actions in using the assets for 10 months and then selling them without notice are properly characterized as a s. 62 election to take the collateral in satisfaction of the obligation secured by it. Therefore there can be no deficiency judgment owing to 241.

[35] In ***241***, the secured party had failed to comply with the sale requirements of s. 60 of the *PPSA* in a number of ways, including failing to provide notice of the sale and sale of the collateral to the secured party outside the public sales process (before selling the collateral to a third party). In the present case, Mr. Kos similarly notes no notice of the sale to Kenworth was provided. Further, Mr. Kos argues Kenworth's failure to purchase the Trucks at a public sale pursuant to s. 60(4)(b) of the *PPSA* demonstrates Kenworth's election pursuant to s. 62 to retain them in full satisfaction of ATK's debt. Alternatively, Mr. Kos argues that because Kenworth has not made any attempt to sell the Trucks, it is unclear that there are any damages at all and Kenworth's claim is premature.

[36] Kenworth denies making an election under s. 62. It argues that if Part 5 of the *PPSA* applies, then the Trucks were seized pursuant to s. 60.

[37] Section 60(1) allows a secured party to dispose of seized collateral and apply the proceeds to the secured obligations. I note s. 60(3) states that the secured party may delay disposition of the collateral in whole or in part. As will be discussed later in this decision, the *PPSA* does not expressly limit the permissible delay under s. 60(3). Kenworth points out, however, that even if the present delay exceeds the intent of s. 60(3), s. 67(3) limits Kenworth's ability to recover the deficiency only to the extent that its failure to comply with s. 60 has affected the defendant's right to protect its interest in the collateral or has made the accurate determination of the deficiency impracticable. These issues have not yet been determined.

[38] In light of the circumstances of this case, I find the conduct of Kenworth is effectively a s. 60 disposition that has not yet occurred. Unlike the facts in ***241***, Kenworth has not taken the Trucks for its own use and subsequently sold them to a third party. Kenworth may still give the interested parties at least 20 days' advance notice of its intent to dispose of the Trucks, permit an opportunity to redeem the collateral, and otherwise comply with the requirements of s. 60. Notwithstanding possible future compliance with the s. 60 requirements, there may be other obstacles to Kenworth enforcing its disposition rights, as addressed further below. In light of this and my further findings below, however, it is not plain and obvious that Kenworth's claim cannot succeed. Accordingly, it is not appropriate at this stage to strike the Statement of Claim.

V. Application for Summary Judgment

[39] Mr. Kos applies for summary judgment, stating the claim should be dismissed against him as the Guarantee is no longer binding against him. Kenworth cross-applies for summary judgment on Mr. Kos' liability under the Guarantee, with quantum to be determined later.

A. Termination of 2010 Master Lease

[40] Mr. Kos contends that the 2010 Master Lease was terminated by the 2013 Buyout and that the Trucks supplied by Kenworth in 2014 and later were governed by a new agreement between the parties to which the Guarantee did not apply.

[41] Once the 2013 Buyout occurred, there were no active schedules. Mr. Kos argues that the necessary contractual elements of mutuality and consideration were no longer present and, as such, the 2010 Master Lease came to an end. I disagree with this assessment. Many contracts have a master agreement component with schedules delineating particular leased items, projects, or statements of work pertaining to that master agreement. The absence at a given time of active schedules does not necessarily terminate the master agreement. It merely lies dormant, then applies in full force upon the parties entering into a subsequent schedule. Based on a plain interpretation of the contractual terms of the 2010 Master Lease, that is the effect of no active schedules on this contract.

[42] Mr. Kos argues that after the 2013 Buyout, the subsequent Trucks were leased under a new operating lease, not a continuation of the 2010 Master Lease. The contractual evidence indicates otherwise; all of the post-2013 Buyout schedules referred expressly to the 2010 Master Lease, not to an amended or replacement agreement. Further, although initially ATK inquired as to what was required to enter into additional lease arrangements with Kenworth, Kenworth and ATK treated the 2010 Master Lease as extant, available for the parties should they chose to add new schedules to it. Mr. Doyle suggests it was just simpler to use this agreement, as the documentation was already in place and did not require new negotiation.

[43] Clause 4(B) of the 2010 Master Lease provides that "This Lease and any Schedule "A" executed hereunder cannot be cancelled or terminated except as expressly provided herein." While each vehicle lease under the respective Schedule A has a "Lease Expiry Date", there is no express termination provision for the 2010 Master Lease itself, only provisions addressing the right to repudiate in the event of a default. This may have been an oversight by the parties. Where a contract contains no termination provision, the courts consider the contract carefully to determine the intent of the parties (whether it is terminable or perpetual) and, assuming the intent is that the contract can be terminated, generally infer an implied term that termination must be

done on reasonable notice to the other party. Each case turns on the particular agreement under consideration and the circumstances surrounding it: ***Shaw Cablesystems (Manitoba) Ltd v Canadian Legion Memorial Housing Foundation (Manitoba***), [1997] 115 Man R 85 (CA) at para 15. See also: ***Bernard-Norman Specialties Co v SC Time Inc*** (1989), 71 OR (2d) 278 (HCJ), ***SR & J Customer Care Call Centres Inc v Craig Wireless International Inc***, 2004 MBQB 205, varied on other grounds, 2005 MBCA 136, ***Martin-Baker Ltd v Canadian Flight Ltd***, [1955] 2 QB 556, ***Hillis Oil & Sales v Wynn's Canada***, [1986] 1 SCR 57 (notice referred to in the contract, but not the notice period); ***Salex Technical Products Ltd v NSI Holdings Inc*** [2003] OJ No 631 (SCJ), affirmed [2004] OJ No 5159 (CA) (oral contract).

[44] In this case, assuming the 2010 Master Lease could be terminated, to succeed in his summary judgment application, Mr. Kos must satisfy this court that ATK gave appropriate notice to Kenworth that the 2013 Buyout was intended to terminate it.

[45] Mr. Kos suggests that such notice could be inferred from the nature of the 2013 Buyout. The buyout was an atypical event not addressed in the 2010 Master Lease. The parties have very divergent recollections of the reasons for this buyout and the circumstances surrounding financing of additional equipment (either already on order or ordered shortly thereafter). While both Mr. Kos and Mr. Doyle state the intent of ATK in completing the 2013 Buyout was to bring the 2010 Master Lease to an end, there is a very limited record regarding the discussions they had with Kenworth as to the effect of the 2013 Buyout at the time. Mr. King on behalf of Kenworth states no one discussed termination of the Master Lease or the Guarantee with him at the time of the 2013 Buyout. Kenworth's Controller, Mr. Riddell, who was involved in the implementation of the financing, was not examined. I note that although at the time of the 2013 Buyout, counsel for ATK requested discharges of the registrations against the Trucks on the PPR, he did not request the return of the Personal Guarantee.

[46] In light of both the wording of the 2010 Master Lease and the parties' conduct in respect of it based on the limited record before me, Mr. Kos has not established for the purpose of his summary judgment application that the 2013 Buyout terminated the 2010 Master Lease. Accordingly, his argument that the Guarantee ceased to be effective as a result of termination of the 2010 Master Lease fails.

[47] I have found Mr. Kos fails in his summary judgment application on this basis, however, there remain conflicting positions of the parties and their recollection of their mutual understanding regarding whether the 2013 Buyout terminated the 2010 Master Lease, and consequently whether the February 2014 use of the Master Lease constitutes a renewal or some other revival of an expired contract. The record before me is not sufficiently complete and the Court requires *viva voce* evidence to resolve these conflicts. The Court of Appeal commented on summary judgment as follows in ***Commercial Construction Supply Ltd v Ghost Riders Farm Inc***, 2016 ABCA 331 at para 23:

> Summary judgment is not appropriate when *viva voce* evidence is needed, where the judge is required to weigh evidence or make findings of credibility (as is often required in a conspiracy action) or where the subject matter, as here, concerns complicated legal scenarios that involve complex intertwined facts...

The court cannot arrive at a fair and just disposition of this matter on the existing record; see ***Windsor v Canadian Pacific Railway***, 2014 ABCA 108 at para 13.

B. Termination of the Guarantee

1. Nature of the Guarantee

[48] As an alternate argument to the 2010 Master Lease being terminated, Mr. Kos argues that the Guarantee was intended to be fixed to specific equipment rather than floating. His position is that the 2013 Buyout, having extinguished all outstanding debt in respect of the Trucks then leased under the 2010 Master Lease, also extinguished his liability under the Guarantee. In support of this position, he cites the following passage from McGuinness, *The Law of Guarantee*, 2d ed at para 12.13:

> [T]he most basic defence to a claim under a guarantee is to show that it is spent: that its purpose has been fulfilled so that there are no further obligations remaining. Since the purpose of a guarantee is to secure the performance of an obligation by the principal, it stands to reason that the surety is discharged from his liability under a guarantee where the principal pays or otherwise performs the debt or obligation which the surety has guaranteed.

[49] Mr. Kos asserts that the courts are reluctant to infer continuing guarantee obligations in the absence of a clearly expressed intention. He cites ***Pharmaceutical Supplies Ltd v Martin*** (2000), 185 Nfld & PEIR 119 (SC) at paras 17 and 18, in which the Court quoted as follows from McGuinness:

> Conceptually, there are three basic types of guarantee: specific or discrete guarantees, continuing guarantees, and all accounts guarantees. The category to which any particular guarantee belongs is a matter of construction.
>
> ...
>
> The courts appear to be reluctant to infer the existence of a continuing guarantee obligation, unless it is clear that the surety intended to assume a continuing liability.

[50] In ***Martin***, the Court found that the guarantee was specific, rather than continuing, based on its particular wording. In contrast, the Guarantee in this case expressly purports to be continuing. It states "This shall be a continuing Guarantee and shall apply to and secure the payment of all amounts or other liabilities from time to time payable under the Master Lease and shall be binding as a continuing security of the Guarantor." Standard principles of contractual interpretation support a finding that the Guarantee was floating and continuing in nature.

[51] Mr. Kos argues, however, that to give a guarantee a reasonable meaning, the courts must look at the context in which it was given and the underlying transaction to which the guarantee applies. In ***Martin***, the plaintiff had supplied pharmaceuticals to the defendant's drug store on an ongoing basis with invoices issued periodically. The plaintiff became concerned about difficulties in collecting and sent Mr. Martin a guarantee. Mr. Martin refused to sign the document and instead provided a one-sentence "consent to personally guarantee the debt owed". The Court held that on a "plain and literal interpretation" this referred only to the amount owed as of the date of the guarantee and did not extend to future liabilities. The Court was not persuaded that the course of dealings between the parties indicated a continuing guarantee and held at para 27:

> In order to conclude the Guarantee was intended to cover future advances, I would have to read into it something the words, themselves, do not imply. As well, I would have to conclude that simply because the nature of the relationship between the plaintiff and Cornwall Drug Co., Ltd. was revolving credit, that alone should satisfy me the Guarantee was intended to cover future indebtedness. I reject this argument. I am satisfied the words of the Guarantee are sufficiently clear it ought to be found to be a specific one.

[52] In this case, the wording of the Guarantee, coupled with the course of dealings between Kenworth and ATK, satisfies me that the Guarantee was intended to be continuing. As in ***Martin***, this was an ongoing business relationship. The parties clearly intended the 2010 Master Lease to apply to various schedules that would be added and deleted over time. In contrast to ***Martin***, however, there is nothing in the wording of the Guarantee suggesting that it is limited to particular times or assets and I find that it would be unreasonable to interpret it as such.

[53] Therefore, I find that the Guarantee was not extinguished by the payout of all the Schedule As attached to the 2010 Master Lease occasioned by the 2013 Buyout, notwithstanding that there was nothing owing under the 2010 Master Lease at that time. I note that the Court in ***Martin*** also cited the following passage from McGuinness at para 6.4:

> ...a continuing guarantee covers a series of transactions, and the surety will be liable in respect of any of those transactions ... the surety will be liable whenever a balance is owed by the principal with respect to the account. The surety will not be discharged merely because at one or more times during the term of the guarantee the balance of the account is reduced to zero. Each advance of new credit on the account during the term of the guarantee revives the surety's liability under the guarantee. Continuing guarantees of this sort are most often encountered in limited but on-going credit arrangements. For instance, a surety may agree to provide a continuing guarantee for inventory supplied to the principal on credit over a fixed period of time.

[54] Similarly, in the present case, the fact that, as a result of the 2013 Buyout, there was a zero balance owing under the Master Lease does not alone discharge Mr. Kos from his Guarantee obligations.

2. Belief that the Guarantee was Expired or Cancelled

[55] Mr. Kos also asserts that he believed the Guarantee had "expired and been cancelled" after the 2013 Buyout. In his questioning, Mr. Doyle also testified to his belief that the Guarantee had expired. He indicated that he thought he had received the Guarantee back from Kenworth and given it to Mr. Kos. In fact, however, counsel for Kenworth is in possession of the Guarantee.

[56] Kenworth asserts that any cancellation of a guarantor's obligations must be clear and must be either permitted by the terms of the guarantee or accepted by the creditor. It cites ***Alberta Treasury Branches v Mulley*** (1997), 199 AR 55 (QB) at para 23. In ***Mulley***, however, the guarantee contained an express provision permitting the guarantor to give notice of his desire to be released from his obligation. The Court held that such a release required that the guarantor receive some form of written confirmation from the creditor and that no such confirmation had

been received. Therefore, there was no evidence that parties had agreed to a release of the guarantor.

[57] In this case, the Guarantee contains no express provision permitting its cancellation. In the particular circumstances of this case, I find that it was incumbent upon Mr. Kos at a minimum to give some form of notice to Kenworth of his belief that the 2013 Buyout brought the Guarantee to an end. There is no evidence that Mr. Kos' stated belief was communicated to Kenworth or that Kenworth would have agreed to lease further Trucks without the Guarantee. Neither Mr. Kos nor Mr. Doyle stated in their affidavits or in questioning that they communicated to Kenworth their view that the Guarantee was terminated. Instead, Mr. King's evidence is that there was no communication about discharge of the Guarantee and that Kenworth would not have accepted that position. He stated in his questioning that Kenworth considered the Guarantee to be in effect given the favourable lease terms that had been given to ATK.

[58] Mr. Kos contends that, while he was aware of the post-2013 Buyout leases, he was never notified that Kenworth was treating them as connected to the 2010 Master Lease. This argument is limited to whether Mr. Kos had notice of use of the 2010 Master Lease; it is clear ATK and Kenworth had a mutual understanding that they were resuming use of the 2010 Master Lease. While Mr. Doyle's evidence was that he had no discussions with Mr. Kos about the new leases, the documentary evidence before me shows that Kenworth advised Mr. Doyle on February 12, 2014 that the "master lease document is still in place." There is no suggestion that Mr. Doyle did not have the authority on behalf of ATK to resume using the 2010 Master Lease. Whatever communications occurred internally within ATK do not bind Kenworth, which states it was unaware of any expectation that the 2010 Master Lease had terminated, and thought it was continuing. This argument relates back to the discussion above regarding the termination of the 2010 Master Lease.

[59] For purposes of this application, even if I accept Mr. Kos' subjective belief that subsequent leases would not be secured by the Guarantee, I find that, given the express language of the Guarantee and the 2010 Master Lease, the absence of confirmation of termination of the Guarantee or the 2010 Master Lease in 2013 on the existing record, and the fact that less than six months after the 2013 Buyout it was his suggestion to use the same arrangement as before, Mr. Kos had a positive obligation in these circumstances to confirm his understanding regarding the Guarantee with Kenworth at the time of the 2013 Buyout to ensure that his obligation under the Guarantee was at an end and to permit ATK and Kenworth to renegotiate the necessary security if further schedules were to be added to the 2010 Master Lease. He did not do so. Accordingly, it is not necessary for the Court to hear *viva voce* evidence on Mr. Kos' belief. It may be, however, that viva voce evidence would show that Mr. Kos' belief was indeed communicated to Kenworth.

[60] Mr. Kos has failed at this stage to establish that the Guarantee was terminated.

C. Equitable Relief

[61] Mr. Kos argues that he is entitled to equitable relief from his obligations under the Guarantee. Kenworth contends that this argument is without merit and is merely an attempt by Mr. Kos to avoid his commitment under the Guarantee.

[62] Mr. Kos' argument centres around clause 4 of the Guarantee, which makes him a principal debtor, rather than merely a guarantor:

> 4. The Guarantor's obligation hereunder is that of a principal obligor and not a mere guarantor or surety, the Guarantor shall be jointly and severally bound with the Lessee to the Lessor for the performance of the Lessee's obligations under the Master Lease.

[63] Mr. Kos argues that, as a principal debtor, he was entitled at least to notice of, and possibly to consultation about, any substantial modification to the 2010 Master Lease, including a renewal of its terms. He cites a number of cases in support of his position that a principal debtor cannot contract out of this entitlement, or if they can, such waiver must be express. He also argues that he is an accommodation surety and that the courts have been particularly astute to protect guarantors of this nature.

[64] Mr. Kos cites ***Manulife Bank of Canada v Conlin*** [1996] 3 SCR 415, in which the court confirmed at para 2 that "It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor." The Court reasoned at para 3 that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk: at para 3. The majority of the Supreme Court in that case refused to bind a guarantor to a renewal of a mortgage without notice based on the specific wording of that guarantee, and made these comments at paras 19 and 22:

> Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.
>
> ...
>
> **The question is whether in this case, either as principal debtor or as surety, the guarantor has expressly contracted out of the normal protections accorded to him.** This question must be determined as a matter of interpretation of the clauses of the agreement, through consideration of the transaction as a whole, and the application of the appropriate rules of construction. [Emphasis added.]

[65] Thus, while the Court found such provisions did not exist in the guarantee in that case, the majority in ***Conlin*** accepted that there could be narrow situations in which a guarantor who is also described as a principal debtor can waive the right to notice; however, the waiver provision in the guarantee must be express and will be strictly construed in favor of the guarantor.

[66] Mr. Kos also cites ***Scotia Mortgage Corp v Varro*** (1998), 127 Man R (2d) 173 (QB Mstr). In that case, the Master referred to the decision of Master Quinn of this Court in ***CIBC Mortgage Corp v Cherry Lane Holdings Ltd*** [1997] 204 AR 131 (QB Mstr) at para 23 that "...clause 3 of the guarantee in question in the present case is unambiguous in providing that the Guarantor as principal debtor waives his right to legal and equitable protection he would otherwise have against a claim by the mortgagee." The Master in ***Varro*** disagreed, holding as follows at para 24:

> ...There is certainly nothing wrong in a guarantee with making the guarantor have the same responsibilities as a principal debtor. It is impossible however in the same document to then remove the right of notice to that individual. Is the guarantor a principal debtor or is he not? If he has the same liability at law as a principal debtor he must then have notice of any renewal or extension regardless of whether the concept of novation is applied or not. No document can change the basic characteristics of various parties to commercial transactions. A person borrowing money has the right at the end of a mortgage term to either pay the money back to the lender or renew on commercially acceptable terms. The guarantor cannot be converted to a principal debtor and then be stripped of his notice provisions on renewals which may go on forever. This is contrary to the basic function of a guarantor.

[67] While the Court in ***Varro*** raises a compelling issue, I am bound in this case by the determination of the Supreme Court of Canada in ***Conlin*** that a guarantor can waive the right to notice if the express language of the guarantee is sufficiently clear.

[68] The strict adherence to the wording of a guarantee was echoed by Master Hanebury of this Court in ***Do All Metal Fabricating Ltd v Embury***, 2013 ABQB 135 at para 21:

> ...defences can be rendered unavailable to the guarantor as a result of the wording in the guarantee. The Supreme Court of Canada noted that most guarantees are contracts of adhesion with the result that the guarantor has little if any ability to negotiate terms. Therefore, particularly in the case of accommodation sureties, the court has construed guarantees strictly and been vigilant in limiting guarantor's liability to the precise terms of the guarantee. The words used to contract out of the protections usually afforded to a guarantor must be clear and any doubt or ambiguity is to be construed in favour of the guarantor: [***Conlin***].

[69] In ***Royal Bank of Canada v Samson Management & Solutions Ltd***, 2013 ONCA 313, leave to appeal refused [2013] SCCA No 301, the Court of Appeal considered ***Conlin***, but arrived at the opposite conclusion based on the facts before it. The Court noted that the personal guarantees in that case covered Samson's present and future liabilities and were not tied to a specific loan. The amount of the loan facility was increased without notice to one of the guarantors. Notwithstanding that she was an accommodation surety, the Court held that she was liable on her guarantee and distinguished ***Conlin*** in four ways at paras 38-41, including by noting that in ***Samson***, the nature of the loan was continuing rather than specific, and that the language of the guarantee designated the guarantor as a principal debtor only upon conversion due to the debtor's default rather than from the outset. The Court also considered whether the alteration to the arrangement was permitted by the terms of the guarantee, although I find this distinction requires further clarification. In ***Conlin***, a renewal was *permitted* (subject to notice) by the terms of the guarantee, whereas in ***Samson***, the Court found at paras 30, 32 and 59 that increases by the bank in the obligations under the principal loan contract were *contemplated* by the parties and formed part of what the guarantee was designed to assure. Further, the prospect of an increase in future liabilities was expressly acknowledged by the guarantor in her endorsement on the letter of independent legal advice: see para 60.

[70] It is clear to me from the foregoing case law that Mr. Kos' rights as guarantor are to be determined based on the specific wording of the Guarantee, and that any provision in the

guarantee waiving his common law rights, including the right to notice of material changes in the debt contract, must be express and will be strictly construed in his favor, in part by way of application of the principle of *contra proferentem*: ***Conlin*** at para 10, 12 and 15.

[71] In the present case, the relevant terms of the Guarantee for such determination are clause 4 (designating him as a principal debtor), as set out above, and the following:

> 3. The Guarantor acknowledges and agrees that, without requiring the consent of or giving notice to the Guarantor, the Master Lease may be amended, restated or replaced from time to time, and that its schedules may be, from time to time, added, deleted, substituted or amended and that all such additions, deletions, substitutions or amendments made substantially in accordance with the terms of the Master Lease form part of the Master Lease for the purposes of this Guarantee and the obligations of the Guarantor hereunder. Any amendments to the Master Lease shall bind the Guarantor under this Guarantee and shall not in any way affect or limit the liability of the Guarantor hereunder, always subject to Paragraph 2 [being the $2 million limit of the guaranteed amount].
>
> 11. The obligations of the Guarantor under this Guarantee shall extend for so long as the Master Lease, or any renewal or extension thereof, remains in effect and shall continue after termination or expiry of the Master Lease if any obligations, debts or liabilities of the Lessee under the Master Lease remain owing or outstanding.

[72] Mr. Kos' primary assertion is that, as a principal debtor, he was entitled to notice of substantial changes to the 2010 Master Lease, including renewal thereof. I am not persuaded that the 2010 Master Lease was indeed renewed following the 2013 Buyout. Rather, as I have found above, absent effective notice of termination, the 2010 Master Lease was simply dormant until the parties resumed using it by adding new schedules. Thus, there is no consequent obligation on Kenworth to notify Mr. Kos when the parties resumed using the 2010 Master Lease. Accordingly, I decline to grant Mr. Kos summary dismissal on this matter as, based on the evidence before the Court at this stage of the litigation, he is not discharged from liability under the Guarantee.

[73] Even if Mr. Kos were able to establish at trial that the 2013 Buyout terminated the 2010 Master Lease, the Court would have to consider how to characterize its use subsequent to the 2013 Buyout. If that use constituted an amendment, restatement or replacement of the 2010 Master Lease, Mr. Kos has waived the notice or consent requirement per Clause 3 of the Guarantee. If instead it is a renewal or extension, Clause 11 states that the Guarantee remains in effect, but neither Clause 3 nor 11 expressly waives the right to notice or consent in that circumstance. Although one might argue that the ongoing nature of the 2010 Master Lease could suggest that a renewal or extension would be included in the term "amended, restated or replaced" such that no notice or consent is required, I am mindful that guarantee contracts generally are construed narrowly to protect guarantors, who typically do not have equal bargaining power: ***Conlin***, ***Do All Metal***. Such a narrow construction could mean that Mr. Kos' right to notice had not been waived, even though an extension of the 2010 Master Lease was permitted.

[74] As this is a matter that may be heard at trial relating to an equitable remedy (for which the Court exercises a certain amount of discretion), I decline to make a finding on this issue. I

note however that, although the Guarantee is continuing (unlike that in ***Conlin***), this case has relevant similarities to the fact pattern in ***Conlin***: the guarantee in that case contained one provision addressing permitted acts of the debtor and lender for which the guarantor waived its notice rights (Clause 34 – which acts including the giving additional time for payment, or varying the terms of payment or the interest rate) and a separate clause permitting additional acts of the debtor and lender for which the provision was silent on whether notice was waived (Clause 7 – which acts included extensions, renewals, increased interest rates and other amendments). As stated above, the Court found the guarantor had *not* waived the right to notice of the renewal based in large part on the specific wording of those provisions.

[75] If in the present case notice was required, it would then be up to the Court to determine whether Mr. Kos effectively had notice through his involvement in negotiations, his communication suggesting use of 'the conventional lease financing [ATK has] done with [Kenworth] in the past" and/or his general involvement with ATK as a director.

[76] In summary, Mr. Kos does not succeed in his summary judgement application, however, if he is able at trial to establish that notice of termination was given to Kenworth such that the 2013 Buyout did effectively terminate the 2010 Master Lease, and if the use of the 2010 Master Lease after the 2013 Buyout constituted a renewal, and if Mr. Kos did not have notice of that renewal, he could have a defence to liability under the Guarantee. The issue of whether Mr. Kos had notice will require a finding of fact that I cannot make on the record before me.

[77] A further argument that Mr. Kos raises relates to ATK's corporate restructuring in 2013, which he argues changed both ATK's share structure and legal status (becoming an exempt distributor). I note Clause 10 of the Guarantee states that a change in the objects, capital structure or constitution of ATK will not affect the Guarantee, although the provision does not address a change in legal status. Mr. Kos argues that a fundamental change in the nature of the debtor ends a guarantor's liability. The sole case he cites in support of this is ***Dance v Girdler*** (1804), 1 Bos & Pul (NR) 370 in which it appears that the debtor corporation had ceased to exist. Reliance on this single, factually distinct case is not a sufficient basis to ground a summary judgment application.

[78] Mr. Kos also argues that he was entitled to notice of these changes to ATK based on the same equitable principles outlined above, failing which, the Guarantee ceases to be effective. Given his role in the restructuring, it is not clear what more notice he would require. Further, Mr. Kos has made no submissions on how such changes to ATK's structure or legal status are a material alteration to the 2010 Master Lease: how they result in a change of the terms upon which the surety was to become liable, which will then result in a change in the surety's risk: ***Conlin*** at para 3, or how such fundamental changes to ATK otherwise affect his risk under the Guarantee. I am not prepared to grant summary judgment to release Mr. Kos from the guarantee obligations on the basis of this argument.

D. Other Basis to Deny Summary Judgment

[79] As previously stated, Kenworth has not yet disposed of the Trucks and does not yet know the quantum of any deficiency. It seeks summary judgment holding Mr. Kos liable under the Guarantee, with quantum of that liability to be determined later by assessment. For the reasons that follow, in addition to those set out above, I decline to give summary judgment on liability.

[80] As noted above, s. 60(3) of the *PPSA* permits a secured party who has seized collateral to delay disposing of it, but does not specify any limit for that delay. I note, however, that s. 66(1) of the *PPSA* states the following:

> 66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

[81] Section 67(3) of the *PPSA* provides as follows:

> 67(3) In an action for a deficiency, the defendant may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 60 or 61, but non-compliance shall limit the right to the deficiency only to the extent that it has affected the right of the defendant to protect his interest in the collateral or has made the accurate determination of the deficiency impracticable.

[82] As I read the *PPSA*, the obligation set out in s. 66(1) to act in a commercially reasonable manner informs the exercise of a secured party's rights, including the right under s. 60(3) to delay disposition of collateral.

[83] I am supported in this conclusion by the comments made by the Court in ***HSBC Bank Canada v Kupritz***, 2011 BCSC 788. The British Columbia legislation includes provisions identical to ss. 60(3) and 66(1) and the Court held as follows at para 39:

> There is no evidence that a delay in the sale of any specific asset has had an impact on the sale price of that asset. Section 59(5) of the PPSA permits a secured party to delay selling collateral **if it is commercially reasonable to do so**. [Emphasis added.]

[84] If it can be said that Kenworth's delay in disposing of the Trucks was not commercially reasonable, then there may be non-compliance with its obligations under s. 60(3), which may give Mr. Kos a defence pursuant to s. 67(3). Section 67(4) of the *PPSA* places the onus on the secured party to demonstrate that the delay has not made the accurate determination of the deficiency impracticable. The Court was presented with no evidence or submissions in this regard. Mr. Kos notes that the Trucks have sat idle since Kenworth took possession of them. Without evidence on this issue, even though I have declined for purposes of this summary application to find that the Guarantee had been terminated, I am not prepared to find that Mr. Kos is liable under it. The possibility that he may have a defence to liability under the Guarantee is a question for the trial judge as I do not have sufficient evidence before me to allow me to arrive at a fair and just determination on this matter.

VI. Disposition

[85] In the result, Mr. Kos' application to strike Kenworth's Statement of Claim and his application for summary judgment are dismissed and Kenworth's application for summary judgment is also dismissed.

[86] The parties may speak to costs within 90 days.

Dated at the City of Edmonton, Alberta this 6th day of June, 2018.

C. Dario
J.C.Q.B.A.

Appearances:

Carter D. Greschner
for the Plaintiff

Roderick C. Payne
for the Defendant

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***DaimlerChrysler Services Canada Inc. v. Cameron,*** 2007 BCCA 144

Date: 20070308
Docket: CA33795

Between:

DaimlerChrysler Services Canada Inc.

Appellant
(Plaintiff)

And

James Stuart Cameron

Respondent
(Defendant)

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Low
The Honourable Madam Justice Kirkpatrick

G.G. Plottel and P. Chan	Counsel for the Appellant
R.D. Braun	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 15 February 2007
Place and Date of Judgment:	Vancouver, British Columbia 8 March 2007

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] The appellant, DaimlerChrysler Services Canada Inc. ("Daimler") (plaintiff in the Supreme Court), appeals from the order of the Supreme Court pronounced 26 January 2006 and entered 7 February 2006. Pursuant to that order, the chambers judge declared that Part 5 of the ***Personal Property Security Act***, R.S.B.C. 1996, c. 359 (the "***PPSA***") applies to the impugned lease agreement.

BACKGROUND

[2] The respondent, James Stuart Cameron (defendant in the Supreme Court), signed a lease agreement dated 5 October 2002. The lease was in respect of a 2003 Dodge Ram pickup truck. Mr. Cameron and Vernon Chrysler Dodge Ltd. were named lessee and dealer, respectively. The lease provided that the dealer would assign the lease to the appellant (then named Chrysler Credit Canada Ltd.), which is in the business of leasing vehicles. The contemplated assignment occurred on the date on which Mr. Cameron signed the lease.

[3] Daimler alleged that Mr. Cameron failed to make payments due under the lease. Consequently, Daimler repossessed the truck and sold it.

[4] In the Supreme Court, Daimler claimed damages approximating $30,000 from Mr. Cameron. Mr. Cameron contended that Daimler's remedies were limited by Part 5 of the ***PPSA***. The parties agreed to submit a special case to the court pursuant to Rule 33 of the ***Supreme Court Rules***, B.C. Reg. 221/90. The question for the court was framed as follows: "Does Part 5 of the ***PPSA*** apply to the lease agreement that

is the subject of this action?" The chambers judge answered this question affirmatively.

The Statutory Framework

[5] Sections 2 and 3 of the ***PPSA*** set out the scope of the Act. Subsection 2(1) provides that the ***Act*** applies

> (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting paragraph (a), to … a lease … if … [it] secure[s] payment or performance of an obligation.

Such a lease is generally referred to as a "security lease".

[6] Subsection 3(c) of the ***PPSA*** extends the application of the Act to "a lease for a term of more than one year" that does not secure payment or performance of an obligation; that is, what is commonly termed a "true lease". Such leases are deemed security interests.

[7] Notwithstanding that the scope of the ***PPSA*** encompasses leases in general, the characterization of a lease has critical implications on the rights and remedies available upon default.

[8] Paragraph 55(2)(a) of the ***PPSA*** states that Part 5, which sets out the rights and remedies on default, "does not apply to a transaction referred to in section 3"; namely, a true lease. In the event of default, the contractual rights and remedies as set out the lease, in addition to any common law rights and remedies, apply. As

between the lessor and the lessee, a true lease never actually assumes the characteristics of a security interest.

[9] In contrast, a security lease is subject to Part 5. Accordingly, the relief available under Part 5 applies, and a lessor under a security lease is limited to the statutory remedies. With certain exceptions, a secured party, whose collateral constitutes “consumer goods”, must make an election as to remedies. The secured party ─ in this context, the lessor ─ may sue under the security agreement. Alternatively, the lessor may choose to enforce its security by seizure or repossession or accept a surrender of goods by the debtor lessee.

The Lease

[10] In the instant case, the lease was on a printed form. The term of the lease was 48 months, ending 5 October 2006. Pursuant to the lease, Mr. Cameron was obliged to pay $1,092.30 monthly. He was also required to pay $0.12 per kilometre if the truck was driven over 2,000 kilometres monthly.

[11] Mr. Cameron was required to maintain the truck in good condition and operating order, and to make all requisite repairs. Further, the lease imposed restrictions on Mr. Cameron’s use of the vehicle: he was obliged both not to use the truck unlawfully or inappropriately and to keep the truck free of others’ claims.

[12] The lease did not include a down-payment or trade-in allowance.

[13] Mr. Cameron had an option to purchase the truck at the expiration of the lease term for $29,851.20. The option purchase price (to which the parties refer as

the truck's "Residual Value") was 54 percent of the manufacturer's suggested retail price of $55,280 before the dealer installed accessories. The figure of 54 percent was derived from a table prepared by Daimler to forecast various vehicles' values at the end of their respective lease terms.

[14] Mr. Cameron had the right to terminate the lease anytime before the end of the lease term. However, if he invoked this right, he was required to either exercise the option to purchase or pay an early termination liability and return the vehicle to Daimler.

[15] If Mr. Cameron exercised the option to purchase prior to the expiration of the lease, he had to pay the Residual Value plus the unpaid monthly payments for the balance of the lease term, plus any other charges payable under the lease, less unearned lease charges on an actuarial calculation method.

[16] If Mr. Cameron terminated the lease without exercising the option to purchase, he had to pay the early termination liability, which the lease defined as all past due monthly amounts, plus all monthly payments not yet due, plus any amounts due under the lease, plus the Residual Value, minus the net amount that Daimler received in a reasonable sale, minus any insurance monies received by Daimler, minus any unearned lease charges.

[17] Mr. Cameron was also required to pay the early termination liability if Daimler terminated the lease. Regardless of who terminated the lease, Mr. Cameron's ensuing payment obligation would ensure that Daimler obtained at least the Residual Value.

[18] Upon default, Daimler could take immediate possession of the truck, obtain the early termination liability and sue for damages to be calculated in accordance with the terms of the lease described above.

ISSUE

[19] The sole issue on this appeal is whether the learned chambers judge erred in deciding that the lease agreement is subject to Part 5 of the ***PPSA***. In other words, is the lease a true lease or a security lease as found by the chambers judge?

DISCUSSION

Standard of Review

I preface my consideration of the issue on appeal with a discussion of the applicable standard of review. In the instant case, the parties agreed to state a question of law – the applicability of Part 5 of the ***PPSA*** to the instant lease – in the form of a special case for the opinion of the court. In essence, the court was asked to determine the applicable legal principles in characterizing a lease for the purposes of Part 5 of the ***PPSA***.

[20] It is well-established that the standard of review of this Court on questions of law is one of correctness: ***Bell v. Bell*** (2001), 153 B.C.A.C. 10, 15 R.F.L. (5^{th}) 23.

Characterization of the Lease

[21] Paragraph 2(1)(a) of the ***PPSA*** reflects the centrality of the substance test in characterizing a lease as either a security lease or a true lease. The court must scrutinize the relationship between the lessor and lessee to ascertain whether in that

relationship, the indicia of a security agreement are evident. If, in substance, the impugned transaction creates a security interest, it is a security agreement, irrespective of its form and the parties' subjective intention when they entered into it (Ronald C.C. Cuming, "True Leases and Security Leases under Canadian Personal Property Acts" (1983), 7 Can. Bus. L.J. 251 at 264).

[22] The process of characterization is guided by numerous factors. In his article at 285, Professor Cuming refers to a helpful list of factors derived from American jurisprudence. The factors that support a finding that the lease is a security lease include:

1. whether there was an option to purchase for a nominal sum;
2. whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
3. whether the nature of the lessor's business was to act as a financing agency;
4. whether the lessee paid a sales tax incident to acquisition of the equipment;
5. whether the lessee paid all other taxes incident to ownership of the equipment;
6. whether the lessee was responsible for comprehensive insurance on the equipment;
7. whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
8. whether the agreement placed the entire risk of loss upon the lessee;
9. whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;

10. whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;

11. whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;

12. whether there was a default provision in the lease inordinately favourable to the lessor;

13. whether there was a provision in the lease for liquidated damages;

14. whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor; and

15. whether the aggregate rentals approximate the value or purchase price of the equipment.

[23] Various Canadian courts have been influenced by similar considerations. In the case of ***Re Bronson*** (1995), 34 C.B.R. (3d) 255, [1995] B.C.J. No. 1579 (Q.L.) (S.C. Master), aff'd [1996] B.C.J. No. 216 (Q.L.) (S.C.) followed by the chambers judge, the master rendered his decision by considering, *inter alia*, Professor Cuming's list of factors.

[24] Another relevant factor is the term of the lease. A lease for a short period generally indicates a true lease, since the leased property will have a significant residual useful life upon expiration of the lease and can be leased again or sold by the lessor (*Ibid.* at 269).

[25] In the instant case, the chambers judge embarked on the characterization process by setting out the pertinent terms of the lease and classifying each such term as indicative of a true lease or security lease or as equivocal. A term was

considered to be equivocal if it related merely to form or the parties' subjective intention.

[26] The chambers judge found the following terms to be equivocal: the title of the document *i.e.* "Retail Lease Gold Key"; the description of the respondent as "lessee"; the lessee's obligation to continue complying with the lease if the truck was destroyed and the lessor supplied a replacement truck; the absence of a mandatory sale; the requirement to return the truck at the end of the term if the option to purchase was not exercised; the lessee's purported acknowledgment on the printed form that the lease is a true lease and that he will have no ownership interest in the truck or its replacement parts unless the option to purchase is exercised; and the statement on the printed form that the document records the whole agreement between the parties.

[27] The chambers judge also recognized that numerous terms indicated a true lease. First, the chambers judge found the absence of a down-payment or trade-in allowance consistent with a true lease because the lessee would start with no equity in the vehicle. Second, the chambers judge found that the excess kilometre charge compensated for extra wear and tear on the truck, which would presumably reduce market value at the end of the lease term. Accordingly, the term reflected a true lease. Third, the chambers judge found that the lessee's obligation to maintain the truck's good condition evidenced a true lease because it ensured the reasonableness of the truck's value upon expiration of the lease. Fourth, the term prohibiting against unlawful or inappropriate use of the truck and imposing a responsibility on the lessee to keep the truck free of others' claims was found to be

consistent with a true lease because it protected Daimler's equity in the truck. Fifth, the option purchase price indicated a true lease. The chambers judge accepted that the option purchase price represented a genuine effort to estimate accurately the truck's value at the end of the lease term. An option purchase price set at market value generally demonstrates that the lessee will acquire no equity in the truck.

[28] However, the chambers judge found the default provisions in the lease were indicative of a security lease. The lease provided that upon default, the lessor could take immediate possession of the truck, obtain the early termination liability and sue for damages. As I have mentioned, early termination liability consisted of all past due monthly amounts, plus all monthly payments not yet due, plus any amounts due under the lease, plus the Residual Value, minus the net amount the lessor received in a reasonable sale, minus any insurance monies received by the lessor, minus any unearned lease charges. In essence, the lease secured the payment of the Residual Value by the lessee in the contingency of default.

[29] In my view, the chambers judge correctly identified the factors relevant to the characterization process. It also cannot be said that she erred in her classification of the pertinent terms as indicative of a true lease or a security lease or as equivocal.

[30] The chambers judge ultimately concluded that the impugned transaction was a security lease. She followed ***Re Bronson***, in which the master (sitting as a registrar in bankruptcy proceedings) found a security lease after considering that the default clause secured the payment of the lease payments and the option price and

that the lessor knew it would receive the vehicle's full value and the full benefit of the lease payments in the event of default.

[31] The traditional analysis used in determining whether a lease is a true lease or a security lease is reflected in the following passage from ***Re Ontario Equipment (1976) Ltd.*** (1981), 125 D.L.R. (3d) 321, 33 O.R. (2d) 648 at paras. 8-10 (H.C.J.), aff'd (1982), 141 D.L.R. (3d) 766, 35 O.R. (2d) 194 (C.A.):

> It is of the essence of a lease intended as security within the meaning of the *Personal Property Security Act* that the property in the subject of the lease is to pass ultimately to the lessee, who is obliged to pay the lessor what might be reasonably regarded as the purchase price with interest and carrying charges over the life of the lease. In such a case the transaction is not unlike a conditional sale agreement or hire purchase agreement.
>
> What I consider to be a practical definition of the distinction between a true lease and a lease by way of security was adopted in *Re Crown Cartridge Corp., Debtor* (1962), 220 F. Supp. 914, by Croake D.J. from the decision of *Referee Asa S. Herzog*:
>
> > The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount. … If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale.
>
> The critical issue in every case is the intention of the parties and this depends upon the facts of the case. In *Re Speedrack Ltd.* (1980), 1 P.P.S.A.C. 109, 33 C.B.R. (N.S.) 209, 11 B.L.R. 220, for example, the facts led to the conclusion that the lease was a security for the financing of the ultimate purchase of the subject-matter, and the failure to register a financing statement left the security interest unperfected and subordinate to the interest of the trustee in bankruptcy.

[32] As I have noted, the master in ***Re Bronson*** considered the factors enumerated by Professor Cuming. However, the pivotal consideration for the master was the default clause in the lease agreement. He stated at para. 47:

> It strikes me that it is clear from the default clause that this agreement secures the payment of the lease payments and the option price. If defaults occur, the full amount of the lease payments become due, the option price becomes due and the lessee will be given credit for the net sale price, but if that is insufficient to cover the amount due, it will still be liable for a portion of the residual price. The lessee will be given credit for the residual value if the net sale proceeds are less than the residual value. In that case the lessee would only be liable for the lease payments, not the residual value portion and the lessor would have sustained the loss.

[33] In arriving at that conclusion, the master at para. 41 referred to ***Standard Finance Corp. v. Econ Consulting Ltd.***, [1984] 4 W.W.R. 543, 28 Man. R. (2d) 99 (Q.B.) and, in particular, to the default clause in the lease in question:

> In referring to the default clause of the lease in the Manitoba case, the court said at p. 548:
>
> > In particular, the lease (Ex. 1) contains an acceleration clause which, under its terms, purports to permit the plaintiff lessor, on default, to recover as liquidated damages all amounts due or to become due under the lease. As was pointed out in the article by Cuming "True Leases and Security Leases under Canadian Personal Property Security Acts" (1983), 7 Can. Business L.J. at p. 279:
> >
> > > However, while the relationship between the lessor and the defaulting lessee may be one of creditor and debtor, an acceleration clause should, at least in some cases, be viewed as foreign to the lessor-lessee relationship. Unlike a defaulting buyer or borrower, a lessee is generally not obliged under the rules of damages to pay a specific predetermined sum to the lessor.

> The lessor may well be entitled to damages for breach of contract, but there is no certainty that those damages will be assessed as the equivalent of all rental payments owing under the lease with or without deduction of an amount realized from the sale of the lease[d] chattels by the lessor.

Reference was made in the article to the decision of the Manitoba Court of Appeal in *Can. Accept. Corp. Ltd. v. Regent Park Butcher Shop Ltd.* (1969), 67 W.W.R. 297, 13 C.B.R. (N.S.) 8, 3 D.L.R. (3d) 304 (Man. C.A.), and to the remarks of Dickson J.A. at p. 310 (D.L.R.):

> We do not suggest that all acceleration clauses are in the nature of a penalty and unenforceable. On the contrary, in a mortgage given to secure the due payment by instalments of a sum due, a provision making the total sum due enforceable on any default is not to be considered a penalty … The same holds true with respect to instalments of purchase price payable under a sale agreement. Here, however we are not dealing with a mortgage nor with a sale agreement. We are dealing with a lease, and in our opinion a provision accelerating the due date of rental payments on default is as foreign to a lease of chattels as to a lease of land.

[34] As is evident from the above passage, the master relied in part on the decision of ***Canadian Acceptance Corp. Ltd. v. Regent Park Butcher Shop Ltd.*** (1969), 3 D.L.R. (3d) 304, 67 W.W.R. 297 (Man. C.A.).

[35] However, as counsel for Daimler has demonstrated, ***Regent Park*** was specifically overruled by the Supreme Court of Canada in 1987 in ***Keneric Tractor Sales Ltd. v. Langille et al.***, [1987] 2 S.C.R. 440, 43 D.L.R. (4th) 171. In ***Langille***, the issue was the proper calculation of damages for breach of a chattel lease. The

Court decided that the law of damages for breach of real property leases ─ as modified by the 1971 decision of ***Highway Properties Ltd. v. Kelly, Douglas & Co.***, [1971] S.C.R. 562, 17 D.L.R. (3d) 710 ─ should apply equally to chattel leases, such that damages for the loss of the benefit of the lease over its unexpired term are recoverable. Thus, the court held that accelerated damages can be awarded to a chattel lessor, subject to the obligation to mitigate. Specifically, the court stated at 453:

> The damages flowing from the breach of a chattel lease, like the damages flowing from the breach of a land lease, should be calculated in accordance with general contract principles. To the extent that *Regent Park* reflects a different approach it should not be followed.

[36] Consequently, the court awarded damages under ordinary contractual principles concerning damages for breach of contract. The court determined the lessee's liability to be, in addition to any arrears, the value of the unpaid rentals under the leases (discounted for early receipt), minus the proceeds of sale, plus the expenses of repossession, repair and resale (***Langille***, *supra* at 457).

[37] As counsel for Daimler has argued, the basis for calculating damages does not distinguish a true lease from a security lease. The ability to claim accelerated damages in ***Langille*** was not a consequence of the character of the lease, *i.e.* a true lease or a security lease. Rather, it was simply the proper measure of damages for breach of a chattel lease. Generally, the basis for calculating damages can provide only some insight as to whether an impugned lease secures payment or performance of an obligation. I emphasize that it cannot serve as a decisive factor.

[38] Counsel for Mr. Cameron contends that the default provisions ─ in particular, the acceleration of lease payments and the obligation on the part of the lessee to compensate the lessor for the full amount of the Residual Value ─ has the combined effect, as in ***Re Bronson***, of ensuring that the lessor receives full payment for the subject property. Mr. Cameron contends that it is the cumulative effect of these provisions, and not simply the acceleration of rent, that was considered to be significant in ***Re Bronson***.

[39] It appears to me unhelpful to focus on default provisions and render them determinative of whether a lease is a security lease. The fundamental question is whether a lease secures payment or performance of an obligation.

[40] The decision in ***Child & Gower Piano Company Ltd. v. Gambrel***, [1933] 2 W.W.R. 273 (Sask. C.A.) articulates this point at 281-82:

> In *Stroud's Judicial Dictionary*, vol. 3, p. 1815, it is stated that a security is "anything that makes the money more assured in its payment or more readily recoverable". Security for a debt, in the ordinary meaning of the term, carries with it the idea of something or somebody to which, or to whom, the creditor can resort in order to aid him in realizing or recovering the debt, in case the debtor fails to pay; the word implies something in addition to the mere obligation of the debtor. When a person buys goods from a merchant, his promise to pay, whether express or implied, is not security, nor does the promise to pay become security merely because it is reduced to writing.

[41] In my view, it cannot be said that the default provisions in the lease in question create any separate security. They simply represent the calculation of the amounts owing by the lessee upon a breach of the agreement.

[42] As can be seen, the crux of Daimler's argument is that the chambers judge erred in her characterization of the lease by placing undue emphasis on the default provisions of the lease and, accordingly, by failing to accord proper weight to the option purchase price.

[43] In my respectful view, the learned chambers judge did err in according such influence to the default provisions that they effectively decided the characterization issue.

[44] In *British Columbia Personal Property Security Act Handbook*, 4th ed. (Scarborough: Carswell, 1998) at 35-36, Professors Cuming and Roderick J. Wood provide insight on the role of the option purchase price in the characterization process:

> A clause in a lease giving the lessee the option to purchase the goods at less than their expected market value (as determined at the date of execution) indicates that the lessee has acquired an equity in the goods not unlike that which he would have acquired under an instalment purchase contract. Consequently, the transaction is likely to be characterized as a security agreement. However, the fact that at the end of a lease term roughly equivalent to the useful life of the goods the lessee can purchase the goods at their then market value does not prevent characterization of the transaction as a security agreement. If one or more of the major indicia of a security agreement are present, the transaction may be a security agreement. Accordingly, if the lease is for all or the greater part of the useful life of the leased equipment and the lessee is obligated to pay rental equivalent to the capital cost of the goods and an appropriate credit charge, the fact that the lessee is given the right to buy the goods at the end of the term for their then small market price should play no role in the characterization process. A consideration of the option price is relevant to the characterization of the transaction only if the option can be exercised at a time when the goods have significant commercial value. It may be possible to show that the option price was not designed to ensure that the lessor is fairly compensated for his interest in the goods, but was included for some other purpose (such as

> satisfying income tax authorities). This provides strong evidence that the parties recognize that by the time the option is exercise[d] the lessor has been fully compensated through rental payments and that it matters little to either the lessor or the lessee that the option is or is not exercised.

[45] It is also instructive to reproduce the following passage on default provisions from Professor Cuming's article at 278-79:

> Since an economic realities or substance test for characterization of leases involves a close examination of all aspects of the relationship between a lessor and a lessee, it follows that lease provisions dealing with the rights and remedies of a lessor in the event of default cannot be ignored. If a lessor is given remedies equivalent to those of a secured seller or lender, there is some evidence that a security agreement is involved. However, if it is the only evidence pointing to this conclusion, the transaction should be characterized as a true lease. Default remedies cannot, by themselves, be a determinant because most lessees do not default; consequently, the other provisions in the leases are the ones which in practice govern the relationship of the parties. As is the case with other peripheral indicia of security agreements, default rights and remedies have corroborative value and are relevant to the extent that they help to tip the balance.
>
> [Emphasis added.]

[46] In the instant case, it appears that the learned chambers judge accorded more than "corroborative value" to the default provisions. They did more than "tip the balance". Instead, the default provisions played a determinative role in her decision that the impugned transaction was a security lease. It is important to bear in mind that the other factors considered by the chambers judge were classified as either equivocal or indicative of a true lease.

[47] In my view, having regard to the relevant considerations, the impugned transaction is a true lease that comes within the definition of s. 3 and, therefore, is excluded from Part 5 of the ***PPSA***.

[48] Accordingly, I would accede to the appellant's argument.

CONCLUSION

[49] For the foregoing reasons, I would allow the appeal. It follows that the answer to the question in the stated case is: No, Part 5 of the ***PPSA*** does not apply to the lease agreement that is the subject of this action.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Prowse"

I agree:

"The Honourable Mr. Justice Low"

Form 49
[Rule 13.19]

COURT FILE NUMBER	2203 12557
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF(S)	ROYAL BANK OF CANADA
DEFENDANT(S)	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION, MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52 DENTAL CORPORATION, DELTA DENTAL CORP., 52 WELLNESS CENTRE INC., PARADISE MCIVOR DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT LTD., FAISSAL MOUHAMAD and FETOUN AHMAD also known as FETOUN AHMED
DOCUMENT	**AFFIDAVIT**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

DS Lawyers Canada LLP
Suite 800 Dome Tower, 333 7th Avenue S.W.
Calgary, Alberta T2P 2Z1

Attention: Jean-Yves Simard/Lindsay Amantea/Laurent Crépeau
Telephone : (514) 360-5102
Fax : (514) 284-3235
File Number 43503/1

AFFIDAVIT OF JEAN LAFLEUR

Affirmed on JANUARY 10, 2023

I, JEAN LAFLEUR, of the City of Montreal, in the Province of Quebec, AFFIRM AND SAY THAT:

1. I am a duly authorized representative of Patterson Dental Canada Inc. ("**Patterson**"), having my professional domicile at 1205 Henri-Bourassa Boulevard West, Montreal, province of Quebec, Canada H3M 3E6, and am fully vested with the authority to act on behalf of Patterson in the present proceeding.

2. Patterson is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c-44, specialised in the sale of dental equipment.

A. Patterson's Security Agreements, the Master Lease Agreement and Dr. Mouhamad's Title to the Equipment

3. Patterson has entered into two (2) sale and security agreements with Dr. Faissal Mouhamad in his personal capacity (collectively, the "**Agreements**"), attached hereto as "Exhibit JL-1", specifically:

    a. The sale and security agreement numbered 731575 effective as of April 28, 2022 (the "**731575 Agreement**"); and

    b. The sale and security agreement numbered 732002 effective as of May 3, 2022 (the "**732002 Agreement**").

6

Form 49
[Rule 13.19]

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JUDICIAL CENTRE	EDMONTON
PLAINTIFF(S)	ROYAL BANK OF CANADA
DEFENDANT(S)	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION, MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52 DENTAL CORPORATION, DELTA DENTAL CORP., 52 WELLNESS CENTRE INC., PARADISE MCIVOR DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT LTD., FAISSAL MOUHAMAD and FETOUN AHMAD also known as FETOUN AHMED
DOCUMENT	**AFFIDAVIT**

Clerk's Stamp

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   a. The sale and security agreement numbered 731575 effective as of April 28, 2022 (the "**731575 Agreement**"); and

   b. The sale and security agreement numbered 732002 effective as of May 3, 2022 (the "**732002 Agreement**").

4. The Agreements provide for the sale of certain dental clinic equipment to Dr. Faissal Mouhamad (the "**Equipment**") with a security interest attaching to the Equipment until payment in full of the balance of the purchase price of the Equipment provided in the Agreements, including interest.

5. Dr. Mouhamad made an initial payment toward the Equipment by applying credits he had accrued with Patterson as part of one of its customer loyalty program. This was the sole payment made to Patterson in relation to the Equipment such that any difference between the purchase price of the Equipment and the amount owing to Patterson with respect to the Equipment is attributable to Dr. Mouhamad's use of his personal credits under Patterson's customer loyalty program. No funds have been received by Patterson at the date hereof in respect of the Agreements from any party.

6. Pursuant to the provisions of the Alberta *Personal Property Security Act* (the "**Act**"), the 731575 Agreement was registered as against Dr. Mouhamad personally on July 5, 2022, and the 732002 Agreement was registered as against Dr. Mouhamad personally on May 9, 2022 as appears from the Alberta Personal Property Registry search of Dr. Mouhamad, attached to the present affidavit as "Exhibit JL-2".

7. Dr. Mouhamad entered into a master lease agreement dated May 4, 2022 with 52 Dental Corporation, whereby he leased the Equipment subject to the 731575 Agreement to 52 Dental Corporation (the "Master Lease Agreement", attached hereto as "Exhibit JL-3".

8. Patterson registered its security interest in the Equipment subject to the 731575 Agreement preventively against 52 Dental Corporation on January 4, 2023 when it came to learn of the Master Lease Agreement's existence, pursuant to section 22(1)(a)(ii) of the Act, attached hereto as "Exhibit JL-4".

9. Patterson also registered its security interest in the Equipment subject to the 732002 Agreement against 52 Dental Corporation on January 10, 2023, attached hereto as "Exhibit JL-4", when it learned that such Equipment was present and being used by 52 Dental Corporation, Patterson had previously been informed by the Receiver that this Equipment was not 52 Dental Corporation's possession.

10. The Master Lease Agreement contains the following terms:

    a. Section 5 contemplates an option by the lessee to purchase the Equipment when not in default for fair market value at the date of the exercise of the option to purchase;

    b. The "Purchase Option Price" does not change based on the rental payments made; and

    c. Section 6 contemplates that the lessee is required to return the Equipment at the end of the term.

11. At no time since the Agreements were signed has Patterson consented to the sale or disposition of the Equipment in any manner to any person.

B. General

12. All of the above is true to the best of my knowledge.

13. All of the facts in Patterson's *Application For Certain Declarations and Orders in relation to the Receiver's Application (Approval of Sales and Vesting Assets, Sealing, Distributions, Approval of Fees and Activities)* are true to the best of my knowledge.

14. I was not physically present before the commissioner for oaths but was linked with the commissioner utilizing video technology and the process as set out in the Notice to the Profession & Public: Remote Commissioning of Affidavits for use in civil and family proceedings during the Covid-19 Pandemic dated March 25, 2020 was followed and utilized.

4. The Agreements provide for the sale of certain dental clinic equipment to Dr. Faissal Mouhamad (the "**Equipment**") with a security interest attaching to the Equipment until payment in full of the balance of the purchase price of the Equipment provided in the Agreements, including interest.

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AFFIRMED BEFORE ME in Calgary, Alberta, this)
Tenth day of January, 2023.)
)
)
)
)
)
_____)
LINDSAY AMANTEA, BARRISTER, SOLICITOR) JEAN LAFLEUR
AND NOTARY PUBLIC)
My Appointment/Commission is Perpetual)

This is Exhibit JL-1 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

_____

A Commissioner of Oaths for
the Province of Alberta

_____

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

AFFIRMED BEFORE ME in Calgary, Alberta, this)
Tenth day of January, 2023.)
)
)
)
)
)
)
LINDSAY AMANTEA, BARRISTER, SOLICITOR) JEAN LAFLEUR
AND NOTARY PUBLIC)
My Appointment/Commission is Perpetual)

CERTIFICATE OF COMMISSIONER FOR OATHS

I am satisfied that the remote commissioning process was necessary because it is impossible or unsafe, for medical reasons, for the deponent and the commissioner to be physically present together.

Lindsay Amantea, Barrister & Solicitor
and Commissioner for Oaths in and for
the Province of Alberta

This is Exhibit JL-1 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

A Commissioner of Oaths for
the Province of Alberta

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

PATTERSON DENTAL/DENTAIR

Balance of Purchase Price Contract - Security Agreement

Effective Date: April 28, 2022

31575

Seller
Name: PATTERSON DENTAL CANADA, INC.
Address: 1205 Henri-Bourassa Blvd. West
Address: Montreal, Quebec H3M 3E6

Individual Buyer(s) and Address
Name: Dr. Faisal Mouhamad
52 Dental Centre
Address: 3505 52nd Street NE, Suite 100
Calgary, AB, T2B 3R3

This Balance of Purchase Price Contract - Security Agreement ("Agreement") is entered into by and between the Seller and Buyer(s) above (collectively "Buyer") as of the Effective Date. Seller and Buyer agree as follows:

1. Property Sold Seller hereby sells and Buyer (jointly and severally, if more than one) hereby purchases the Property described on the attached Schedule A(s) (together with all present and future accessions, attachements, enhancements, accessories, additions, supplements, improvements, spare parts, substitutions, replacements, exchanges and trade-ins, thereto or thereof (if any) as well all proceeds of any of the foregoing in whatever form, including any chattel paper, documents of title, goods, instruments, intangibles, money, fixtures or investment property, including amounts payable under insurance policies, the "Property") at the price described below. Buyer has elected not to pay the Unpaid Balance stated below on the Effective Date but rather to make instalment payments in accordance with Section 3 hereof.

2. Time Sale Price Computation

a. Price		$ 357,128.30
b. Taxes (If Any)		$ 17,850.42
c. Official Fees (Filing Fees, Recording Fees, Service Provider Charges etc.)		$ 100.00
d. Installation Charges		$ -
e. Total Price		$ 375,034.72
f. Trade-in (If Buyer is not required to collect GST/HST/QST, deduct from Total Price		$ -
g. Down Payment (1) Cash	$ 51,828.59	
(2) Trade-in where Buyer is required to collect for GST/HST/QST	$ -	
	$ -	
(3) Total Down Payment (1) +(2)		$ 51,828.59
h. Unpaid Balance (a. + b. + c. + d. -g.)		$ 323,206.13
i. Annual Interest Rate (per annum)		4.50%
j. Total Interest		$ 46,544.67
k. Total Credit Charges for the Original Term (c+d+j)		$ 46,644.67
l. Monthly Payment		$ 6,183.43
m. Total Obligation of Buyer for the Original Term (h. + j.) (aggregate of net capital and all related credit charges)		$ 369,606.80

* All amounts herein are stated in Canadian dollars.

3. Payment Schedule. Buyer hereby acknowledges that it is indebted to and agrees to repay to Seller, at the address of Seller stated on the face hereof or such other place notified by Seller to Buyer, the Unpaid Balance, together with interest thereon, by paying the instalments stated on Schedule B hereto. Unless otherwise stated, instalments are due on the date stated on Schedule B hereof in each month, or other period (on the last day of the month, if there is no corresponding date) (each, an "Instalment Date"), in arrears, throughout the term hereof. On the final instalment Date, Buyer shall pay Seller the outstanding balance of the Unpaid Balance, all accrued and unpaid interest thereon and all other amounts payable hereunder.

Buyer may at any time prepay in whole or in part, without penalty, the unpaid outstanding portion of the Unpaid Balance, upon payment to Seller of any Overdue Payments, all other amounts then owing under this Agreement. Any portion of the Unpaid Balance prepaid shall be applied to the remaining instalments in inverse order of maturity.

4. Delivery and Acceptance of Property The Property has been delivered by Seller to Buyer's address set forth above unless otherwise noted. Buyer has accepted the Property. Without in any way limiting the generality of any limitation of liability on the part of Seller contained in the terms of conditions governing any purchase order, invoice of other document relating to the purchase of the Property, no failure or delay in installation of Property for whatever reason shall affect the Buyer's payment or other obligations in connection with this Agreement. The Property shall at all times remain at the following location (the Property Location), provided that if no address is specified below the Property Location shall be deemed at the Buyer's address specified above:

address city, state zip

SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE PROPERTY. NOTHING HEREIN SHALL BE CONSTRUED AS A WAIVER BY BUYER OF ANY WARRANTY WHICH MAY BE PROVIDED BY THE MANUFACTURER OF ANY PROPERTY, BUT BORROWER'S SOLE REMEDY FOR ALLEGED DEFECTS IN THE DESIGN OR THE MANUFACTURE OF THE PROPERTY SHALL BE AGAINST THE MANUFACTURER(S).

Notwithstanding the signature(s) on this Agreement may indicate a representative capacity, the individual(s) signing below for the Buyer agree(s) that in order to induce the Seller to enter into this Agreement, they will unconditionally guarantee payment and performance of all liability of Buyer to Seller under this Agreement, whether now existing or hereafter incurred. Each reference herein to "Buyer" shall include the individual(s) signing below. Buyer's signature below shall constitute Buyer's acceptance and agreement to be bound to all terms of this Agreement. A facsimile, scanned or electronic copy shall be considered equally effective and of the same evidentiary status as an original. The additional terms and conditions on Page 2 and Page 3 hereof are part of his agreement.

Buyer: _____

By: _____

Buyer: Dr. Faisal Mouhamad

By: _____

(6/16)

PATTERSON
DENTAL/DENTAIR

Balance of Purchase Price Contract - Security Agreement

Effective Date: April 28, 2022

731575

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Address: 3505 52nd Street NE, Suite 100
Calgary, AB, T2B 3R3

This Balance of Purchase Price Contract - Security Agreement ("Agreement") is entered into by and between the Seller and Buyer(s) above (collectively "Buyer") as of the Effective Date. Seller and Buyer agree as follows:

1. Property Sold Seller hereby sells and Buyer (jointly and severally, if more than one) hereby purchases the Property described on the attached Schedule A(s) (together with all present and future accessions, attachements, enhancements, accessories, additions, supplements, improvements, spare parts, substitutions, replacements, exchanges and trade-ins, thereto or thereof (if any) as well all proceeds of any of the foregoing in whatever form, including any chattel paper, documents of title, goods, instruments, intangibles, money, fixtures or investment property, including amounts payable under insurance policies, the **"Property"**) at the price described below. Buyer has elected not to pay the Unpaid Balance stated below on the Effective Date but rather to make installment payments in accordance with Section 3 hereof.

2. Time Sale Price Computation

a. Price		$ 357,128.30
b. Taxes (If Any)		$ 17,856.42
c. Official Fees (Filing Fees, Recording Fees, Service Provider Charges etc.)		$ 100.00
d. Installation Charges		$ -
e. Total Price		$ 375,084.72
f. Trade-in (If Buyer is not required to collect GST/HST/QST, deduct from Total Price		$ -
g. Down Payment....(1) Cash	$ 51,823.59	
(2) Trade-in where Buyer is required to collect for GST/HST/QST	$ -	
$ -		
(3) Total Down Payment (1) +(2)		$ 51,823.59
h. Unpaid Balance (a. + b. + c. + d. -g.)		$ 323,261.13
i. Annual Interest Rate (per annum)		4.50%
j. Total Interest		$ 46,544.67
k. Total Credit Charges for the Original Term (c+d+j)		$ 48,644.67
l. Monthly Payment		$ 6,163.43
m. Total Obligation of Buyer for the Original Term (h. + j.) (aggregate of net capital and all related credit charges)		$ 369,805.80

* All amounts herein are stated in Canadian dollars.

3. Payment Schedule. Buyer hereby acknowledges that it is indebted to and agrees to repay to Seller, at the address of Seller stated on the face hereof or such other place notified by Seller to Buyer, the Unpaid Balance, together with interest thereon, by paying the installments stated on Schedule B hereto. Unless otherwise stated, installments are due on the dates stated on Schedule B hereof in each month, or other period (on the last day of the month, if there is no corresponding date) (each, an **"Installment Date"**), in arrears, throughout the term hereof. On the final installment Date, Buyer shall pay Seller the outstanding balance of the Unpaid Balance, all accrued and unpaid interest thereon and all other amounts payable hereunder.

Buyer may at any time prepay in whole or in part, without penalty, the unpaid outstanding portion of the Unpaid Balance, upon payment to Seller of any Overdue Payments, all other amounts then owing under this Agreement. Any portion of the Unpaid Balance prepaid shall be applied to the remaining installments in inverse order of maturity.

4. Delivery and Acceptance of Property The Property has been delivered by Seller to Buyer's address set forth above unless otherwise noted. Buyer has accepted the Property. Without in any way limiting the generality of any limitation of liability on the part of Seller contained in the terms of conditions governing any purchase order, invoice of other document relating to the purchase of the Property, no failure or delay in installation of Property for whatever reason shall affect the Buyer's payment or other obligations in connection with this Agreement. The Property shall at all times remain at the following location (the Property Location), provided that if no address is specified below the Property Location shall be deemed at the Buyer's address specified above:

address

city, state zip

SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE PROPERTY, NOTHING HEREIN SHALL BE CONSTRUED AS A WAIVER BY BUYER OF ANY WARRANTY WHICH MAY BE PROVIDED BY THE MANUFACTURER OF ANY PROPERTY, BUT BORROWER'S SOLE REMEDY FOR ALLEGED DEFECTS IN THE DESIGN OR THE MANUFACTURE OF THE PROPERTY SHALL BE AGAINST THE MANUFACTURER(S).

Notwithstanding the signature(s) on this Agreement may indicate a representative capacity, the individual(s) signing below for the Buyer agree(s) that in order to induce the Seller to enter into this Agreement, they will unconditionally guarantee payment and performance of all liability of Buyer to Seller under this Agreement, whether now existing or hereafter incurred. Each reference herein to "Buyer" shall include the individual(s) signing below. Buyer's signature below shall constitute Buyer's acceptance and agreement to be bound to all terms of this Agreement. A facsimile, scanned or electronic copy shall be considered equally effective and of the same evidentiary status as an original. The additional terms and conditions on Page 2 and Page 3 hereof are part of his agreement.

Buyer: _____

By: _____

Buyer: Dr. Faissal Mouhamad

By: _____

(8/18)

6. Security Interest. In order to secure its obligations to Seller under this Agreement, Buyer hereby grants to Seller a purchase money security interest in and against all, and does mortgage, pledge, charge and assign, the Property. Buyer represents and agrees that, except for the security hereby granted, Buyer is the owner of the Property free from any lien, security interest, hypothec, encumbrance or other security, and that Buyer will defend the Property against all claims and demands of all persons at any time claiming the same or any interest therein. Buyer further represents and agrees that if any debt put and will not exist any lien, security interest, encumbrance or other security, whether or not filed in any public office, which affects or purports to affect the Property, and Buyer will take such other actions as Seller does as necessary or desirable to protect, perfect and maintain Seller's purchase money security interest, hypothec and security. Buyer shall not remove the Property from the Property Location or out of Province in any material way without prior written consent of Seller. Buyer shall not alienate Property by any real estate sale or at any time thereafter. The Property shall remain personal and movable property regardless of whether affixed or attached to any land, building or structure in violation of the terms hereof. No transfer, renewal, extension or assignment by Seller of any transaction or this Agreement and related Buyer does any liability hereunder. Buyer agrees to allow a representative of the property selected by Seller, from any lender, mortgagee, hypothecary creditor or other encumbrancer of the property, before the Property is delivered.

7. Interest. The Unpaid Balance shall bear interest at the Annual Interest Rate from the date of delivery of the property to Buyer until Unpaid Balance is unconditionally paid in full to Seller, and shall be payable in arrears on each instalment date. In addition to interest payable under the preceding sentence, each agreed shall be and hereby is (an "Overdue Payment") shall bear interest from the date due until unconditionally paid in full to Seller at the rate of 18% per annum, and shall be payable on demand by Seller. All such payable from time) shall accrue and be calculated daily upon the daily outstanding balance of the Unpaid Balance or an Overdue Payment, as applicable, on the basis of the number of the Unpaid Balance or an Overdue Payment, as applicable, on the basis of the actual number of days elapsed in a year of 365 days. All interest payments in accordance under this Agreement in respect of the outstanding balance of the Unpaid Balance or any Overdue Payment, as applicable, shall be paid both before and after default, order) demand, if any, and the unconditional payment of the outstanding balance of the Unpaid Balance or Overdue Payments made. The yearly rate of interest to which each Unpaid Balance or Overdue Payment compound herein is equivalent to the product of (a) one-half, multiplied by (b) the actual number of days in the calendar year at which the same is to be ascertained divided by two, in order to ascertain the Seller's true annualized rate, that is in the sole discretion payment at the making of any loan prior to delivery and interest on (a) changes in the principal amount of this Agreement; (b) a change in the Seller's funding interest rate; (c) further charges applicable to the Buyer or the Seller; and (d) general market conditions.

8. Title. Buyer may Title to ownership of, and all rights in the Property shall be transferred to Buyer upon the Effective date hereof, and subject changes by previous payday monthly interest and hereafter and the other provisions hereof, and as Buyer's sole title, until full payment of each of all amounts payable (even when prior to each payment). Buyer's right as therein are to quiet enjoyment and use of the terms and conditions of this Agreement so long as a Default has not occurred under Section 12 hereof.

9. Personal Property Security Filings. The Buyer hereby irrevocably appoints Seller, with full power of substitution, as the Buyer attorney in fact and authorizes Seller to file such of the Buyer and in the name of the Buyer as otherwise, to take any action and to execute any instrument which Seller may deem necessary to accomplish the purposes of this Agreement, including without limiting the filing of a financing statement or other registration any purpose of more fully granting to Seller such a "financing statement". Buyer hereby authorizes and ratifies all actions of the Seller in executing and filing a financing statement prior to the execution of this Agreement. Buyer shall execute and deliver to Seller, upon Seller's request, such other documents as Seller deems necessary or advisable for the protection or perfection of this Agreement and Seller's rights hereunder and shall pay all costs incurred therein. Buyer waives its right to receive a copy of any financing statement or financing change statement registered by Seller and any related verification statement.

10. Prepayment; Credit. Buyer may pay part or all of the remaining Unpaid Balance at any time without penalty. Any Unpaid Balance shall not take effect until receipt by Seller of cleared funds. Payments shall be applied first to any Overdue Payments and then to remaining instalments in inverse order of maturity.

11. Taxes and Other Charges. Buyer shall pay when due, and defend and indemnify Seller against liability for all taxes, charges, assessments and liens of any kind now or hereafter imposed by any governmental entity upon this Agreement or upon the disposition of the Property.

12. Indemnity. Buyer shall bear all risk of loss with respect to the Property and indemnify, hold harmless and defend Seller against any liabilities and expenses arising out of the manufacture, delivery, purchase, acceptance, ownership, selling title, possession, operation, use, repair or other disposition of Property, including personal injuries or losses or death, any claims based on statute law, warranty or implied agreement or any third infringement. The covenants and indemnities contained in this Section 12 and Section 8 shall survive the termination of this Agreement and shall be payable by Buyer within 7 days of Seller's written demand therefore.

13. DISCLAIMER OF LIABILITY. SELLER SHALL NOT BE RESPONSIBLE OR LIABLE FOR ANY DEFECTS, REPAIRS, IMPROPER FUNCTIONING OF THE PROPERTY SERVICED, OR MAINTAINED THE PROPERTY OR FOR ANY ERROR, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY KIND OR NATURE, IN LAW OR EQUITY. BUYER HAS SELECTED THE PROPERTY BASED UPON BUYER'S OWN INVESTIGATION AND JUDGMENT. OTHER HEREBY WAIVES AND DISCLAIMS REPRESENTING THAT BUYER IS NOT PURCHASING THE PROPERTY BASED UPON THE QUALITATIVE, WARRANTIES, STATEMENTS OF FACT, VERBAL OR WRITTEN, OR ANY REPRESENTATIONS OF SELLER. BUYER AGREES THAT IT SHALL SEEK ITS REMEDIES FROM THE MANUFACTURERS BASED SOLELY UPON THE MANUFACTURERS WARRANTIES RELATED TO THE PROPERTY. This Section 13 shall in no way limit the generality of any limitation of liability on the part of Seller contained in the terms and conditions governing any additional goods, trades or other equipment relating to the purchase of the Property. In the event of any inconsistency between this Section 13 and any such other limitation of liability, the broader limitation of liability shall prevail.

14. Buyer's Representations and Warranties. Buyer represents Buyer will use the Property solely in the operation of its business (not for personal, household or family purposes), in compliance with all applicable laws and at the Property Location. If Buyer is an individual, Buyer warrants that Buyer's principal residence is now on Province's/are Buyer, or Guarantor's leased place of permanent to Seller. If Buyer is a business entity, Buyer represents and warrants: (a) Buyer is duly organized, existing in good standing and qualified to do business where required; (b) this Agreement has been duly authorized and executed by Buyer and any Guarantor; (c) the Agreement is the legal, valid and binding obligation of Buyer and any Guarantor, enforceable against them in accordance with its terms; and (d) that the legal locality and other ownership status of Buyer is and shall remain as set forth on page 1 of this Agreement.

15. Location of Property. Buyer's Name Buyer as otherwise expressly permitted hereunder, Buyer shall not part with possession of the Property nor permit any of same from Canada, Buyer warrants that it shall not change its name, chief executive, registered office and chattels or remove the Property from the Property Location without at least 30 days prior written notice to Seller.

16. Default. Buyer shall be in default of this Agreement upon (a) failure to make a payment within 10 days after the due date, or (b) failure to perform or observe any term or condition of this Agreement which continues for 10 business days after notice thereof to Buyer; or (c) any representation or warranty made by Buyer is materially incorrect; or (d) the Seller deems itself insecure or (e) default by Buyer under any note, security agreement, lease or conditional sales agreement entered with Seller or any third party or (f) Buyer shall generally not pay its debts when due, the dissolution or insolvency of Buyer, or a proceeding in bankruptcy or insolvency is commenced by or against Buyer; or (g) Buyer dies or Buyer commences to commence by proper commencement or allotment, or (h) Buyer shall fail to use the proper checks, keep in repair, insurance and maintain, as represented by the manufacturer of the Property. Notwithstanding any other term or condition herein, the Buyer's payment obligations shall be absolute and unconditional. Buyer agrees that Buyer shall not be exempt from liability for payment due by fact of setoff, by waiver of use of any part of the collateral, by the waiver of any other rights, or by reason of any claim against the Seller. If more than one buyer signs this Agreement, all obligations shall be construed jointly and severally so each and whole rights for the Buyer.

17. Remedies Upon Default. Seller may exercise any or all of the following remedies: repair to any or all Property, including all add-ons, accessories, supplements, substitutions and proceeds; (a) enter the Property location and take immediate possession and remove the Property by any legal proceedings or otherwise, without liability to Seller for or by reason of damage to Buyer's property or such entry or taking possession; (b) sell any or all of the Property at public or private sale, or otherwise dispose of the Property; (c) recover such deficit, for the account of and at the expense of the Buyer; (d) retain further sums or payments, accretions and dividends all owed due under this Agreement and other obligations of Buyer to Seller; to recover any and payable; and (e) exercise any other right or remedy at law, in equity or contemplated, including specific performance or damages for the breach hereof. Buyer agrees to pay all reasonable attorney fees, court costs and other expenses incurred by Seller arising out of any default or the exercise of any remedies hereunder. To the extent permitted by law, Buyer expressly waives notice of any of the foregoing remedies or events of default. Each remedy shall be cumulative and in addition to any other remedy referred to above or otherwise available to Seller at law or in equity. Buyer shall provide Seller with the following documents, the expense or limited waiver of any default shall constitute a waiver of any of Seller's other rights. If notice of repossession of the Property is required by law, Buyer and Seller agree that ten (10) days notice is reasonable and sufficient. Seller may apply proceeds of the Property to payment of reasonable attorney fees, court costs and other expenses of collection.

18. Insurance. Buyer agrees that it will, during the term of this Agreement, maintain insurance with responsible insurers, satisfactory to Seller, insuring against coverage shall include (a) Comprehensive General Liability and (b) All Risk Physical Damage in an amount not less than the greater of the replacement value or the outstanding Unpaid Balance. Seller shall be named as loss payee and additional insured. Buyer hereby Buyer's rights and the insurance vendor's right to subrogation against Seller for any loss or damages. All of such insurance policies shall be in place at the effective date of this agreement and shall contain endorsements providing that: (a) 30 days' written notice shall be given to Seller before the policy lapses or is materially altered or cancelled; (b) the insurance shall be primary and not contributory to Seller's interests herein shall not be invalidated or otherwise adversely affected by any act or omission, statement or misrepresentation, of Buyer or its agents, servants or employees (the so-called "standard mortgage clause"); (c) Seller shall not be responsible for premiums of any premiums; and (d) Seller acquitted to have all accounts of the payable with to Buyer. Upon request by Seller, Buyer shall furnish Seller with a certificate of insurance or other evidence satisfactory to Seller that such insurance coverage is in effect.

19. Guarantee. Each Guarantor agrees that this is a guaranty of payment and performance not of collection. Each Guarantor's liability shall not be affected by any inability to or unenforceability or any limitation under this Agreement, or any collateral security for them, or by change, alteration, extension, modification, compromise, waiver or other modification of such liabilities. Each Guarantor waives notice of any of the foregoing, and waives notice of acceptance of this guaranty and of presentment and demand for payment of any of the liabilities of Buyer under this Agreement, protest and notice of dishonour or default by such Guarantor or any other party to the Agreement or such liabilities and all notices, demands, actions, commencements and enforcement of any person whatsoever. This guaranty may be enforced by Seller without first commencing against Buyer or any other party or any security. Each Guarantor hereby irrevocably waives any bonds or sureties or securities. Each Guarantor agrees not to assert, take steps for the collection of, or realize, transfer or otherwise dispose of any liability owed by it, or to such Guarantor, and waives all rights of subrogation against Buyer. Seller shall have the sole right to demand, receive, sue for, collect, receipt for and give full discharge of such indebtedness with all of the liabilities if Buyer to Seller under this Agreement have been satisfied in full.

20. Electronic Waiver and Authorized person. Buyer waives, to the fullest extent permitted by law, the application of the provisions of (a) The Limitation of Civil Rights Act (Saskatchewan), and (b) The Statute Act (Manitoba). Buyer agrees that any provisions of this Agreement are unreasonably unconscionable;

21. Further Assurances and Power of Attorney. Buyer and Seller each shall do, execute and perform all such acts, deeds, documents and things as may be reasonably required to enable Seller to have the full benefit of all rights and remedies provided to it pursuant and hereby and to better secure, register and perfect the Liens granted or taken in relation to the Property or any part of the Property. Seller is hereby appointed Buyer's irrevocable attorney to complete and/or correct any information on the face hereof or in any financing forms.

Each power of attorney granted in this Agreement is granted with fair power of substitution, is coupled with an interest, shall survive termination of this Agreement and may be exercised during any subsequent legal incapacity of Buyer or Seller.

22. Miscellaneous. Time is of the essence in this Agreement. Any provision of this Agreement which is unenforceable shall not affect the enforceability of the remaining provisions hereof. Any waiver of the terms hereof shall be effective only if it is in writing and in the circumstances and for the specific purpose given. The parties hereto agree to execute and deliver such further documents and do such further acts as may be necessary to carry out the intent of this Agreement. If applicable law limits the interest rate, or the repayment obligations and charges thereunder, then such payment obligation shall be deemed reduced to the maximum allowable under applicable law and any payments made at request of Buyer hereunder in excess of that permitted under applicable law shall be credited to the Unpaid Balance, or if the Unpaid Balance is paid in full, refunded to the Buyer. This Agreement is deemed to be delivered in the Province where the Buyer's address set forth on the first page hereof is located and shall be governed by the laws of such Province and by the federal laws of Canada applicable thereto, without regard to conflict of laws principles. The parties agree that the courts of such Province shall have jurisdiction to hear any suit, action or proceeding arising out of or in connection with this Agreement and the parties submit to the jurisdiction of such courts. Buyer waives any claim that another venue should prevail. Notwithstanding, if the laws of the Province where the Property is located permit the collection of higher payment obligations than such governing laws permit, such laws shall prevail. This Agreement is a final and complete statement of the terms, conditions and representations made by both parties. All previous representations of agreements, written or oral, are merged into the terms hereof which shall control the obligations of the parties. This agreement may only be modified by written agreement. All acknowledgments and waivers shall be written and signed by the Buyer and Seller. Timely delivery and Buyer's acceptance of the equipment as described in Schedule A, the parties agree that Seller shall be entitled to a reasonable period of time to review the equipment prior to the Total Cash Price and Unpaid Balance Owing, to the terms in this Agreement to reasonable Seller for discovery errors. It shall notify Buyer that the acceptance of this Agreement on Buyer's acceptance of the amended transaction. Seller's acceptance of this Agreement, or the amended terms of this Agreement shall only take place upon notice of acceptance to Buyer. Any notices required hereunder shall be in writing and sent postage prepaid to the address of the party stated above or such other address as a party may designate by written notice, and shall be effective when mailed. This Agreement is assignable by Seller without notice. Buyer may not assign this Agreement or its rights or obligations hereunder.

24. Language of Documentation. The parties have expressly required that this Agreement and all documents, agreements and notices relating thereto be drafted in the English language. Les parties ont exprimé leur volonté que la présente entente et tous les autres documents, ententes ou avis qui sont afférents soient rédigés en langue anglaise.

Buyers Initials

(8/18)

6. Security Interest In order to secure its obligations to Seller under this Agreement, Buyer hereby grants to seller a purchase money security interest in and hypothec on, and as an mortgagee, pledgee, chargee and assignee, the Property. Buyer represents and agrees that, except for the security hereby granted, Buyer is the owner of the Property free from any lien, security interest, hypothec, encumbrance or other security, and the Buyer will defend the Property against all claims and demands of all persons at any time hereafter claiming the same or any interest therein. Buyer further represents and agrees that there does not and will not exist any lien, security interest, hypothec, encumbrance or other security, whether or not filed in any public office, which affects or purports to affect the Property and Buyer will take such other actions as Seller deems necessary or desirable to protect, perfect and maintain Seller's purchase money security interest, hypothec and security. Buyer shall not remove the Property from the Property Location or sell or transfer any interest in the Property without prior written consent of Seller. Buyer shall not affix the Property to any real estate now or at any time hereafter. The Property shall remain personal and movable property regardless of whether affixed or attached to any land, building or structure in violation of the terms hereof. No transfer, renewal, extension or assignment by Seller of any interest under this Agreement shall release Buyer from any liability hereunder. Buyer agrees to obtain a waiver, if required by any in a form satisfactory to Seller, from any landlord, mortgagee, hypothecary creditor or other encumbrancer of the premises where the Property is situated.

8. Interest The Unpaid Balance shall bear interest at the Annual Interest Rate from the date of delivery of the property to Buyer until Unpaid Balance is unconditionally paid in full to Seller, and shall be payable in arrears on each Instalment Date. In addition to interest payable under the preceding sentence, each amount that is not paid when due hereunder (an "Overdue Payment") shall bear interest from the date due until unconditionally paid in full to Seller at the rate of 18% per annum, and shall be payable on demand by Seller. Interest payable here under shall accrue and be calculated daily upon the daily outstanding balance of the Unpaid Balance or an Overdue Payment, as applicable, on the basis of the because of the Unpaid Balance or an Overdue Payment, as applicable on the basis of the actual number of days elapsed in a year of 365 days. All interest payments to be made under this Agreement in respect of the outstanding balance of the Unpaid Balance or any Overdue Payment, as applicable, shall be paid both before and after maturity and before and after default and/or judgment, if any, until full and unconditional payment of the outstanding balance of the Unpaid Balance or Overdue Payment is made. The yearly rate of interest to which each Unpaid Balance or other rate of interest expressed herein is equivalent is the product of: (a) such rate, multiplied by (b) the actual number of days in the calendar year in which the same is to be ascertained divided by 365. In order to preserve the Seller's real economic return, Seller in its sole discretion may adjust the pricing at any time prior to disbursement to reflect: (1) changes in the pricing assumptions of this Agreement; (2) a change in the Seller's funding index rate; (3) tax law changes applicable to the Buyer or the Seller; and (4) general market conditions.

7. Title, Ownership Title to, ownership of, and all rights in the Property shall be transferred to Buyer upon the Effective date hereof, but subject always to the purchase money security interest and hypothec created hereunder and the other provisions hereof, and as Buyer's sole risk, until full payment in cash of all amounts now payable hereunder, prior to such payment, Buyer's rights therein are to quiet enjoyment and use on the terms and conditions of this Agreement so long as a Default has not occurred under Section 12 hereof.

9. Personal Property Security Filings The Buyer hereby irrevocably appoints the Seller, with full power of substitution, as the Buyers attorney in fact and mandatary, with full authority in the place of the Buyer and in the name of the Buyer or otherwise, to take any action and to execute any instruments which the Seller may deem necessary to accomplish the purposes of this Agreement, including without limitation the filing of a financing statement or other registration of a personal or movable property registry (in each case, a "financing statement"). Buyer hereby authorizes and ratifies all actions of the Seller in executing and filing a financing statement prior to the execution of this Agreement. Buyer shall execute and deliver to Seller, upon Seller's request, such other documents as Seller deems necessary or advisable for the protection or perfection of this Agreement and Seller's rights hereunder and shall pay all costs incident thereto. Buyer waives its right to receive a copy of any financing statement or financing change statement registered by Seller and all any related verification statement.

9. Prepayment Credit Buyer may pay each or all of the remaining Unpaid Balance at any time without penalty. Any Unpaid Balance shall include all fees. Notwithstanding any terms to the contrary herein, payments shall be applied first to any Overdue Payments and then to remaining instalments in inverse order of maturity.

10. Taxes and Other Charges Buyer shall pay when due, and defend and indemnify Seller against liability for all fees, charges, assessments and taxes of any kind now or hereafter imposed by any governmental entity upon this Agreement or on the disposition of the Property.

11. Indemnity Buyer shall bear all risk of loss with respect to the Property and indemnify, hold harmless and defend Seller against any liabilities and expenses arising out of the manufacture, ordering, purchase, acceptance, ownership, selling, filing, possession, operation, use, repair or other disposition of Property, including patent or latent defects, any claims based on absolute and liability, warranty or patent, trademark or copyright infringement. The covenants and indemnities contained in this Section 11 and Section 8 shall survive the termination of this Agreement and shall be payable by Buyer within 7 days of Seller's written demand therefore.

12. SELLER'S LIMITATION OF LIABILITY SELLER SHALL NOT BE RESPONSIBLE OR LIABLE FOR ANY DEFECTS, REPAIRS, IMPROPER FUNCTIONING OF THE PROPERTY SERVICING, OR MAINTAINING THE PROPERTY OR FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY KIND OR NATURE, IN LAW OR EQUITY. BUYER HAS SELECTED THE PROPERTY BASED UPON BUYER'S OWN INVESTIGATION AND JUDGEMENT. BUYER HEREBY WARRANTS AND REPRESENTS THAT BUYER IS NOT PURCHASING THE PROPERTY BASED UPON THE GUARANTEES, WARRANTIES, STATEMENTS OF FACT, VERBAL OR WRITTEN, OR ANY REPRESENTATIONS OF SELLER. BUYER AGREES THAT IT SHALL SEEK ITS REMEDIES FROM THE MANUFACTURERS BASED SOLELY UPON THE MANUFACTURER'S WARRANTIES RELATED TO THE PROPERTY. This Section 12 shall in no way limit the generality of any limitation of liability on the part of Seller contained in the terms and conditions governing any purchase order, invoice or other document relating to the purchase of the Property. In the event of any inconsistency between this Section 12 and any such other limitation of liability, the broader limitation of liability shall prevail.

13. Buyer's Representations and Warranties Buyer represents Buyer will use the Property solely in the operation of its business (not for personal, household or family purposes). In compliance with all applicable laws and at the Property Location. If Buyer is an individual, Buyer warrants that Buyer's principal residence is shown on Buyer's driver's license, or Government issued photo ID, presented to Seller. If Buyer is a business entity, Buyer represents and warrants: (a) Buyer is duly organized, existing in good standing and qualified to do business where required; (b) the Agreement has been duly authorized and executed by Buyer and any Guarantor; (c) the Agreement is the legal, valid and binding obligation of Buyer and any Guarantor, enforceable against them in accordance with its terms; and (d) that the legal identity and chief executive office of Buyer is and shall remain as set forth on page 1 of this Agreement.

14. Location of Property Buyer's Name Except as otherwise expressly permitted hereunder, Buyer shall not part with possession of the Property nor remove any of same from Canada. Buyer covenants that it shall not change its name, chief executive, registered office and does not move the Property from the Property Location without first providing at least 30 days prior written notice to Seller.

15. Default Buyer shall be in default of this Agreement upon (a) failure to make a payment within 10 days after the due date, or (b) failure to perform or observe any term or condition of this Agreement which continues for 10 business days after notice thereof to Buyer; or (c) any representation or warranty made by Buyer is materially incorrect; or (d) the Seller deems itself insecure; or (e) default by Buyer under any note, security agreement, lease or rental form/ sales agreement whether with Seller or any third party; or (f) Buyer shall generally not pay its debts when due, the dissolution or insolvency of Buyer, or a proceeding in bankruptcy or insolvency is commenced by or against Buyer; or (g) Buyer dies or Buyer terminates its existence by merger consolidation or otherwise; or (h) Buyer shall fail to use the proper stocks, parts, supplies, inventory and materials, as recommended by the manufacturer of the Property. Notwithstanding any other term or condition herein, the Buyer's payment obligations shall be absolute and unconditional. Buyer agrees that Buyer shall not be exempt from liability for payments due on right of setoff, by waiver of use of any part of the collateral, by the waiver of any other rights, or by reason of any claim against the Seller. If more than one buyer signs this Agreement, all obligations shall be unconditionally guaranteed, joint and severally by each and shall apply to the Buyer.

16. Remedies Upon default, Seller may exercise any or all of the following remedies with respect to any or all Property, including all additions, accessories, supplements, substitutions and proceeds: (a) enter the Property location and take immediate possession and remove the Property by summary proceedings or otherwise, all without liability to Seller for or by reason of damages to Buyer's property or such entry or taking possession; (b) sell any or all of the Property at public or private sale, or otherwise dispose of the Property; (c) remedy such default for the account of and at the expense of the Buyer; (d) without further notice or demand, accelerate and declare all sums due under the Agreement and other obligations of Buyer to Seller immediately due and payable; and (e) exercise any other right or remedy at law, in equity or bankruptcy, including specific performance or damages for the breach hereof. Buyer agrees to pay all reasonable attorney fees, court costs and other expenses incurred by Seller arising out of any default or the exercise of any remedies hereunder. To the extent permitted by law, Buyer expressly waives notice of any of the foregoing remedies or events of default. Each remedy shall be cumulative and in addition to any other remedy referred to above or otherwise available to Seller at law or in equity. Buyer shall remain fully liable for any deficiency. No express or implied waiver of any default shall constitute a waiver of any of Seller's other rights. If notice of any disposition of the Property is required by law, Buyer and Seller agree that ten (10) days notice is reasonable and sufficient. Seller may apply proceeds of the Property to payment of reasonable attorney fees, court costs and other expenses of collection.

17. Use of Property Buyer will operate Property according to manufacturer's manuals or recommended procedures and in compliance with applicable laws. Buyer shall keep Property in good condition and working order. If all or part of the Property shall become lost, stolen, destroyed, damaged beyond repair, unfit for use for any reason, or part of a condemnation, confiscation, seizure or requisition of title, Buyer will pay Seller an amount equal to the outstanding Unpaid Balance.

18. Inspection Any representative of Seller shall have the right to inspect Property at all reasonable times upon notice to Buyer.

19. Insurance Before entering into this Agreement, Buyer shall procure and maintain at its expense insurance with responsible insurers, satisfactory to Seller, insurance coverage shall include (a) Comprehensive General Liability and (b) All Risk Physical Damage in an amount not less than the greater of the replacement value or the outstanding Unpaid Balance. Seller shall be named as loss payee and additional insured. Buyer waives Buyer's rights and its insurance carrier's right to subrogation against Seller for any and all loss or damage. All of such insurance policies shall be in place at the effective date of this Agreement and shall contain endorsements providing that: (a) 30 days' written notice shall be given to Seller before the policy lapses or is materially altered or cancelled; (b) the insurance shall be primary and not contributory; (c) Seller's interests herein shall not be invalidated or otherwise adversely affected by any act or omission, deliberate, negligent or otherwise, of Buyer or its agents, servants or employees (the so-called "standard mortgage clause"); (d) Seller shall not be responsible for payment of any premiums; and (e) Seller may elect to have all proceeds of loss payable only to itself. Upon request by Seller, Buyer shall furnish Seller with a certificate of insurance or other evidence satisfactory to Seller that such insurance coverage is in effect.

20. Guaranty Each Guarantor agrees that this is a guaranty of payment and performance not of collection. Each Guarantor's liability shall not be affected by any invalidity in or unenforceability or any default under this Agreement, or any collateral security for them, or any change, alteration, renewal, extension, compromise, waiver or other modification of such liabilities. Each Guarantor waives notice of any of the foregoing, and waives notice of acceptance of this guaranty and of presentment and demand for payment of any of the liabilities of Buyer under this Agreement, protest and notice of dishonor or default in such Guarantor or any other party with respect to such liabilities and all notices, demands, actions, counterclaims and defenses of any nature whatsoever. This guaranty may be enforced by Seller without first proceeding against Buyer or any other party or any security. Each Guarantor hereby irrevocably waives any benefits of division or discussion. Each Guarantor agrees not to demand, take steps for the collection of, or assign hereafter or otherwise dispose of any liability owed by Buyer to such Guarantor, and waives all rights of subrogation respect hereto. Seller shall have the sole right to demand, receive, sue for, collect, receipt for and give full discharge of such indebtedness and all of the liabilities of Buyer to Seller under this Agreement have been satisfied in full.

21. Statutory Waivers and Acknowledgement Buyer waives, to the fullest extent permitted by law, the application of the provisions of (a) *The Limitation of Civil Rights Act* (Saskatchewan), and (b) *The Consumer Act* (Manitoba). Buyer agrees that the provisions of the Agreement are commercially reasonable.

22. Further Assurances and Power of Attorney Buyer and Seller each shall do, execute and perform all such acts, deeds, documents and things as may be reasonably required to enable Seller to have the full benefit of all rights and remedies intended to be reserved or created hereby and to better assure, register and perfect the liens granted or arising in relation to the Property or any part of the Property. Seller is hereby appointed Buyer's lawful attorney to complete and/or correct any information or the lien hereof or in any Schedule hereto.

Each power of attorney granted in this Agreement is granted with full power of substitution, is coupled with an interest, shall survive termination of this Agreement and may be exercised during any subsequent legal incapacity of Buyer or Seller.

23. Miscellaneous. Time is of the essence in this Agreement. Any provision of this Agreement which is unenforceable shall not affect the enforceability of the remaining provisions hereof. Any waiver of the terms hereof shall be effective only if it is in writing and in the specific instance and for the specific purpose given. The parties intend to comply with applicable law regarding the collection of the payments owed hereunder. If applicable law limits the enforceability of any payment obligation owed hereunder then such payment obligation shall be deemed reduced to the maximum amount under applicable law computed from the date hereof until payment and any payments made in respect of same which are in excess of that permitted under applicable law shall be credited to the Unpaid Balance, or if the Unpaid Balance has been repaid, rebated to the Buyer. This Agreement is deemed to be delivered in the Province where the Buyer's address set forth on the first page hereof is located and shall be governed by the laws of such Province and by the federal laws of Canada applicable therein, without regard to conflict of laws principles. The parties agree that the courts of such Province shall have jurisdiction to hear any suit, action or proceeding arising out of or in connection with this Agreement and the parties submit to the jurisdiction of such courts. Buyer waives any claim that another venue should prevail, notwithstanding, if the laws of the Province where the Property is located permit the election of higher payment obligations than such governing laws permit, such laws shall prevail. This Agreement is a final and complete statement of the terms, conditions and representations made by both parties. All previous representations of agreements, written or verbal are merged into the terms hereof which shall control the obligations of the parties. This provision shall survive termination of this agreement. All amendments and waivers shall be written and signed by the Buyer and Seller. Despite delivery and Buyer's acceptance of the equipment on Schedule A, the parties agree that Seller shall be entitled to a reasonable period of time to review the equipment prior to the Total Cash Price and Unpaid Balance Consideration terms in this Agreement for accuracy. Should Seller discover errors, it shall notify Buyer that its acceptance of this Agreement is conditional on Buyer's acceptance of the corrected transaction. Seller's acceptance of this Agreement, as the modified terms of this Agreement shall only take place upon notice of acceptance to Buyer. Any notices required hereunder shall be in writing and sent postage prepaid to the address of the party stated above or such other address as a party may designate by written notice, and shall be effective when mailed. This Agreement is assignable by Seller without notice. Buyer may not assign this Agreement or its rights or obligations hereunder.

24. Language of Documentation The parties herein have expressly required that this Agreement and all documents, agreements and notices related thereto be drafted in the English language. Les parties aux présentes ont expressément exigé que la présente convention et tous les autres documents, conditions ou avis qui sont afférents soient rédigés en langue anglaise.

Buyers Initials

(8/18)

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 04/28/22 7:03 PM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	GST	PST	SC
068-1277	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21F0016 Equipment Specialist ID# 002550	9936.99	9936.99		T	03
068-1278	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21G0004 Equipment Specialist ID# 002550	9936.99	9936.99		T	03
068-1279	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21G0002 Equipment Specialist ID# 002550	9936.99	9936.99		T	03
068-1280	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21F0059 Equipment Specialist ID# 002550	9936.99	9936.99		T	03
068-1281	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21F0014 Equipment Specialist ID# 002550	9936.99	9936.99		T	03
068-1282	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21G0008 Equipment Specialist ID# 002550	9936.99	9936.99		T	03
068-1283	1	1	EA	BELMON		UNIT,HEATER DELUXE , ICE SNOW Serial# VW21E0235 Equipment Specialist ID# 002550	4975.14	4975.14		T	03

RETURNED

Total

INSTALLED BY WARREN

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month. (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Total

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068-1277	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21F0016 Equipment Specialist ID# 002550	9936.99	9936.99	T	03
068-1278	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21G0004 Equipment Specialist ID# 002550	9936.99	9936.99	T	03
068-1279	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21G0002 Equipment Specialist ID# 002550	9936.99	9936.99	T	03
068-1280	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21F0059 Equipment Specialist ID# 002550	9936.99	9936.99	T	03
068-1281	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21F0014 Equipment Specialist ID# 002550	9936.99	9936.99	T	03
068-1282	1	1	EA	BELMON		CHAIR,QUALIS , W/ HEADREST UPGRDE, STONE 3602 Serial# AQ21G0008 Equipment Specialist ID# 002550	9936.99	9936.99	T	03
068-1283	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0235 Equipment Specialist ID# 002550	4975.14	4975.14	T	03

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Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	S/T	P/T	SC
068-1284	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0238 Equipment Specialist ID# 002550	4975.14	4975.14	T		03
068-1285	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0245 Equipment Specialist ID# 002550	4975.14	4975.14	T		03
068-1286	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21C0185 Equipment Specialist ID# 002550	4975.14	4975.14	T		03
068-1287	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0242 Equipment Specialist ID# 002550	4975.14	4975.14	T		03
068-1288	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0234 Equipment Specialist ID# 002550	4975.14	4975.14	T		03
068-1289	1	1	EA	BELMON		[illegible] Serial# AV21K0332 Equipment Specialist ID# 002550	3145.30	3145.30	T		03
068-1290	1	1	EA	BELMON		[illegible] Serial# AV21K0328 Equipment Specialist ID# 002550	3145.30	3145.30	T		03

RETURNED

Total

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Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount		SC
068-1284	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0238 Equipment Specialist ID# 002550	4975.14	4975.14	T	03
068-1285	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0245 Equipment Specialist ID# 002550	4975.14	4975.14	T	03
068-1286	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21C0185 Equipment Specialist ID# 002550	4975.14	4975.14	T	03
068-1287	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0242 Equipment Specialist ID# 002550	4975.14	4975.14	T	03
068-1288	1	1	EA	BELMON		UNIT,REAR DELIVERY , ICE SNOW Serial# VW21E0234 Equipment Specialist ID# 002550	4975.14	4975.14	T	03
068-1289	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0332 Equipment Specialist ID# 002550	3145.30	3145.30	T	03
068-1290	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0328 Equipment Specialist ID# 002550	3145.30	3145.30	T	03

Total

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Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	GST	PST	SC
068-1291	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0330 Equipment Specialist ID# 002550	3145.30	3145.30		T	03
068-1292	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0335 Equipment Specialist ID# 002550	3145.30	3145.30		T	03
068-1293	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0345 Equipment Specialist ID# 002550	3145.30	3145.30		T	03
068-1294	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0339 Equipment Specialist ID# 002550	3145.30	3145.30		T	03
068-1295	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27		T	03
068-1296	1	1	EA	BELMON		[illegible] Serial# Equipment Specialist ID# 002550	590.27	590.27		T	03
068-1297	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27		T	03

Total

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Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	T	SC
068-1291	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0330 Equipment Specialist ID# 002550	3145.30	3145.30	T	03
068-1292	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0335 Equipment Specialist ID# 002550	3145.30	3145.30	T	03
068-1293	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0345 Equipment Specialist ID# 002550	3145.30	3145.30	T	03
068-1294	1	1	EA	BELMON		LIGHT,CLESTA LED, 10FT Serial# AV21K0339 Equipment Specialist ID# 002550	3145.30	3145.30	T	03
068-1295	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T	03
068-1296	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T	03
068-1297	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T	03

Total

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Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	GST	PST	SC
068-1298	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T		03
068-1299	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T		03
068-1300	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T		03
068-1301	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T		03
068-1302	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T		03
068-1303	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T		03
068-1304	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T		03

Total

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Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	PST	SC
068-1298	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T	03
068-1299	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T	03
068-1300	1	1	EA	BELMON		UNIT COMP,POWER OPTIC KIT Serial# Equipment Specialist ID# 002550	590.27	590.27	T	03
068-1301	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1302	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1303	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1304	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03

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Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	PST	SC
068-1305	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1306	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1307	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0581 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1308	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0582 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1309	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21K0126 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1310	1	1	EA	BELMON		[illegible] I-RAY W/ 800MM Serial# EX21K0128 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1311	1	1	EA	BELMON		XR INTRA,PHOT-X [illegible] I-RAY W/ 800MM Serial# EX21L0574 Equipment Specialist ID# 002550	4496.05	4496.05	T	03

Total

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Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	ST	SC
068-1305	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1306	1	1	EA	BELMON		UNIT COMP,HVE TUBING Serial# Equipment Specialist ID# 002550	140.54	140.54	T	03
068-1307	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0581 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1308	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0582 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1309	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21K0126 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1310	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21K0129 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1311	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0574 Equipment Specialist ID# 002550	4496.05	4496.05	T	03

Total

INSTALLED BY WARREN

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month. (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Total

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Printed: 04/28/22 7:03 PM

GST#: R101355113

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	SOT	PST	SC
068-1312	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0575 Equipment Specialist ID# 002550	4496.05	4496.05		T	03
068-1482	1	1	EA	AIRTEC		EVAC PUMP,MOJAVE V7 Serial# MM700-22040017, MM100-22040024 Equipment Specialist ID# 002550	14867.00	14867.00		T	03
068-1483	1	1	EA	AIRTEC		EVAC PUMP,MOJAVE DUAL INST Serial# Equipment Specialist ID# 002550	611.00	611.00		T	03
068-1484	1	1	EA	AIRTEC		COMPRESSOR,AIRSTAR 70 Serial# AS700-22040008 Equipment Specialist ID# 002550	14800.00	14800.00		T	03
068-1485	1	1	EA	AIRTEC		EVA.COMPNT,ACADIA AMALGAM , SEPARATOR Serial# AD100-22030028 Equipment Specialist ID# 002550	925.00	925.00		T	03
068-1486	1	1	EA	AIRTEC		[illegible] Serial# Equipment Specialist ID# 002550	2063.00	2063.00		T	03
068-1487	1	1	EA	AIRTEC		MASTER CTRL,[illegible] Serial# Equipment Specialist ID# 002550	446.00	446.00		T	03

Total

INSTALLED BY WARREN

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month. (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Total

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 04/28/22 7:03 PM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	GST	SC
068-1312	1	1	EA	BELMON		XR INTRA,PHOT-X II I-RAY , W/ 800MM Serial# EX21L0575 Equipment Specialist ID# 002550	4496.05	4496.05	T	03
068-1482	1	1	EA	AIRTEC		EVAC PUMP,MOJAVE V7 Serial# MM700-22040017, MM100-22040024 Equipment Specialist ID# 002550	14867.00	14867.00	T	03
068-1483	1	1	EA	AIRTEC		EVAC PUMP,MOJAVE DUAL INST Serial# Equipment Specialist ID# 002550	611.00	611.00	T	03
068-1484	1	1	EA	AIRTEC		COMPRESSOR,AIRSTAR 70 Serial# AS700-22040008 Equipment Specialist ID# 002550	14800.00	14800.00	T	03
068-1485	1	1	EA	AIRTEC		EVA.COMPNT,ACADIA AMALGAM , SEPARATOR Serial# AP100-22030028 Equipment Specialist ID# 002550	925.00	925.00	T	03
068-1486	1	1	EA	AIRTEC		EVA.COMPNT,1" WATER VALVE , SOLENOID Serial# Equipment Specialist ID# 002550	2063.00	2063.00	T	03
068-1487	1	1	EA	AIRTEC		MASTR CTRL,REMOTE CONTROL , PANEL, 3 SWITCH Serial# Equipment Specialist ID# 002550	446.00	446.00	T	03

REPRINTED

Total

INSTALLED BY WARREN

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Total

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 04/28/22 7:03 PM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	OST	PST	SC
068-0501	1	1	EA	SIRONA		CONEBEAMXR,AXIOS 17 X 13 Serial# 10812/51245 Equipment Specialist ID# 002550	120000.00	120000.00		T	03
068-1418	1	1	EA	SCHICK		DIG XR SEN,SCHICK 33 SIZE 1, USB 9FT Serial# WL10000026 Equipment Specialist ID# 002550	9391.00	9391.00		T	03
068-1421	1	1	EA	SCHICK		DIG XR SEN,SCHICK 33 SIZE 1, USB 9FT Serial# WL10000005 Equipment Specialist ID# 002550	9391.00	9391.00		T	03
068-1416	1	1	EA	SCHICK		DIG XR SEN,SCHICK 33 SIZE 2, USB 9FT Serial# WL20000099 Equipment Specialist ID# 002550	10616.00	10616.00		T	03
068-1437	1	1	EA	SCHICK		DIG XR SEN,5M USB CABLE Serial# Equipment Specialist ID# 002550	0.00	0.00		T	03
068-1438	1	1	EA	SCHICK		[illegible] Serial# Equipment Specialist ID# 002550	0.00	0.00		T	03
068-1439	1	1	EA	SCHICK		DIG XR SEN,5M USB CABLE Serial# Equipment Specialist ID# 002550	0.00	0.00		T	03

RETURNED

Total

INSTALLED BY WARREN

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month. (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Total

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 04/28/22 7:03 PM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	$	SC
068-0501	1	1	EA	SIRONA		CONEBEAMXR,AXEOS 17 X 13 Serial# 10812/51245 Equipment Specialist ID# 002550	120000.00	120000.00	T	03
068-1418	1	1	EA	SCHICK		DIG XR SEN,SCHICK 33 SIZE 1, USB 9FT Serial# WL10000026 Equipment Specialist ID# 002550	9391.00	9391.00	T	03
068-1421	1	1	EA	SCHICK		DIG XR SEN,SCHICK 33 SIZE 1, USB 9FT Serial# WL10000005 Equipment Specialist ID# 002550	9391.00	9391.00	T	03
068-1416	1	1	EA	SCHICK		DIG XR SEN,SCHICK 33 SIZE 2, USB 9FT Serial# WL20000099 Equipment Specialist ID# 002550	10616.00	10616.00	T	03
068-1437	1	1	EA	SCHICK		DIG XR SEN,5M USB CABLE Serial# Equipment Specialist ID# 002550	0.00	0.00	T	03
068-1438	1	1	EA	SCHICK		DIG XR SEN,5M USB CABLE Serial# Equipment Specialist ID# 002550	0.00	0.00	T	03
068-1439	1	1	EA	SCHICK		DIG XR SEN,5M USB CABLE Serial# Equipment Specialist ID# 002550	0.00	0.00	T	03

RETURNED

Total

INSTALLED BY WARREN

Payment due upon receipt.
Overdue balance is subject to service
(charges not to exceed 1.75% per month (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Total

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 04/28/22 7:03 PM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	GST	PST	SC
068-1501	1	1	EA	SCICAN		THERMO DIS,HYDRIM L110W G4 Serial# 400122D00004 Equipment Specialist ID# 002550	9955.00	9955.00	T		03
068-1502	1	1	EA	SCICAN		THERMO DIS,HYDRIM L110W G4 Serial# 400122D00008 Equipment Specialist ID# 002550	9955.00	9955.00	T		03
067-9964	1	1	EA	W&H		AUTOCLAVE,LEXA 220V Serial# 162302 Equipment Specialist ID# 002550	6968.00	6968.00	T		03
067-9965	1	1	EA	W&H		AUTOCLAVE,LEXA 220V Serial# 162320 Equipment Specialist ID# 002550	6968.00	6968.00	T		03
068-0760	1	1	EA	W&H		AUTOCLAVE,AUTOFILL KIT , W/ VALVE Serial# Equipment Specialist ID# 002550	233.28	233.28	T		03
068-0761	1	1	EA	W&H		Serial# Equipment Specialist ID# 002550	233.28	233.28	T		03
Total	55	55									

INSTALLED BY WARREN

Subtotal	357128.30
GST	17856.42 T 15
Total	374984.72

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month. (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

SCHEDULE A

PATTERSON
DENTAL/DENTAIRE

INVOICE#: 964/1090959

SOLD TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 04/28/22 7:03 PM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04

Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 04/21/22

Item#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount		SC
068-1501	1	1	EA	SCICAN		THERMO DIS,HYDRIM L110W G4 Serial# 400122D00004 Equipment Specialist ID# 002550	9955.00	9955.00	T	03
068-1502	1	1	EA	SCICAN		THERMO DIS,HYDRIM L110W G4 Serial# 400122D00008 Equipment Specialist ID# 002550	9955.00	9955.00	T	03
067-9964	1	1	EA	W&H		AUTOCLAVE,LEXA 220V Serial# 162302 Equipment Specialist ID# 002550	6968.00	6968.00	T	03
067-9965	1	1	EA	W&H		AUTOCLAVE,LEXA 220V Serial# 162320 Equipment Specialist ID# 002550	6968.00	6968.00	T	03
068-0760	1	1	EA	W&H		AUTOCLAVE,AUTOFILL KIT , W/ VALVE Serial# Equipment Specialist ID# 002550	233.28	233.28	T	03
068-0761	1	1	EA	W&H		AUTOCLAVE,AUTOFILL KIT , W/ VALVE Serial# Equipment Specialist ID# 002550	233.28	233.28	T	03
Total	55	55								

INSTALLED BY WARREN

Subtotal	357128.30
GST	17856.42 T 15
Total	374984.72

Payment due upon receipt.
Overdue balance is subject to service charges not to exceed 1.75% per month. (21% per year)

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

PATTERSON
DENTAL/DENTAIRE

Balance of Purchase Price Contract - Security Agreement

Effective Date: May 5, 2022

[illegible]

Seller
Name: PATTERSON DENTAL CANADA INC.
Address: 1205 Henri-Bourassa Blvd. West
Address: Montreal, Quebec H3M 3E6

Individual Buyer(s) and Address
Name: Dr. Faisal Mouhamed
52 Dental Centre
Address: 3505 32nd Street NE, Suite 100
Calgary, AB, T2B 3R3

This Balance of Purchase Price Contract - Security Agreement ("Agreement") is entered into by and between the Seller and Buyer(s) above (collectively "Buyer") as of the Effective Date. Seller and Buyer agree as follows:

1. Property Sold: Seller hereby sells and Buyer (jointly and severally, if more than one) hereby purchases the Property described on the attached Schedule A(s) (together with all present and future accessions, attachments, enhancements, accessories, additions, supplements, improvements, spare parts, substitutions, replacements, exchanges and trade-ins, thereto or thereof (if any) as well all proceeds of any of the foregoing in whatever form, including any chattel paper, documents of title, goods, instruments, intangibles, money, fixtures or investment property, including amounts payable under insurance policies, the "Property") at the price described below. Buyer has elected not to pay the Unpaid Balance stated below on the Effective Date but rather to make installment payments in accordance with Section 3 hereof.

2. Time Sale Price Computation

a. Price	$ 35,000.00
b. Taxes (If Any)	$ 1,750.00
c. Official Fees (Filing Fees, Recording Fees, Service Provider Charges etc.)	$ 100.00
d. Installation Charges	$
e. Total Price	$ 36,850.00
f. Trade-in (if Buyer is not required to collect GST/HST/QST, deduct from Total Price)	$
g. Down Payment (1) Cash $ - (2) Trade-in where Buyer is required to collect for GST/HST/QST $ - (3) Total Down Payment (1) + (2)	$
h. Unpaid Balance (a. + b. + c. + d. - g.)	$ 36,850.00
i. Annual Interest Rate (per annum)	4.50%
j. Total Interest	$ 5,306.00
k. Total Credit Charges for the Original Term (c+d+j)	$ 5,406.00
l. Monthly Payment	$ 702.00
m. Total Obligation of Buyer for the Original Term (h. + j.) (aggregate of net capital and all related credit charges)	$ 42,156.00

* All amounts herein are stated in Canadian dollars.

3. Payment Schedule. Buyer hereby acknowledges that it is indebted to and agrees to repay to Seller, at the address of Seller stated on the face hereof or such other place notified by Seller to Buyer, the Unpaid Balance, together with interest thereon, by paying the installments stated on Schedule B hereto. Unless otherwise stated, installments are due on the dates stated on Schedule B hereof in each month, or other period (on the last day of the month, if there is no corresponding date) (each, an "Installment Date"), in arrears, throughout the term hereof. On the final Installment Date, Buyer shall pay Seller the outstanding balance of the Unpaid Balance, all accrued and unpaid interest thereon and all other amounts payable hereunder.

Buyer may at any time prepay in whole or in part, without penalty, the unpaid outstanding portion of the Unpaid Balance, upon payment to Seller of any Overdue Payments, all other amounts then owing under this Agreement. Any portion of the Unpaid Balance prepaid shall be applied to the remaining installments in inverse order of maturity.

4. Delivery and Acceptance of Property. The Property has been delivered by Seller to Buyer's address set forth above unless otherwise noted. Buyer has accepted the Property. Without in anyway limiting the generality of any limitation of liability on the part of Seller contained in the terms of conditions governing any purchase order, invoice of other document relating to the purchase of the Property, no failure or delay in installation of Property for whatever reason shall affect the Buyer's payment or other obligations in connection with this Agreement. The Property shall at all times remain at the following location (the Property Location), provided that if no address is specified below the Property Location shall be deemed at the Buyer's address specified above:

address | city, state zip

SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE PROPERTY. NOTHING HEREIN SHALL BE CONSTRUED AS A WAIVER BY BUYER OF ANY WARRANTY WHICH MAY BE PROVIDED BY THE MANUFACTURER OF ANY PROPERTY, BUT BORROWER'S SOLE REMEDY FOR ALLEGED DEFECTS IN THE DESIGN OR THE MANUFACTURE OF THE PROPERTY SHALL BE AGAINST THE MANUFACTURER(S).

Notwithstanding the signature(s) on this Agreement may indicate a representative capacity, the individual(s) signing below for the Buyer agree(s) that in order to induce the Seller to enter into this Agreement, they will unconditionally guarantee payment and performance of all liability of Buyer to Seller under this Agreement, whether now existing or hereafter incurred. Each reference herein to "Buyer" shall include the individual(s) signing below.
Buyer's signature below shall constitute Buyer's acceptance and agreement to be bound to all terms of this Agreement. A facsimile, scanned or electronic copy shall be considered equally effective and of the same evidentiary status as an original. The additional terms and conditions on Page 2 and Page 3 hereof are part of this agreement.

Buyer: ______________________
By: ______________________

Buyer: Dr. Faisal Mouhamed
[signature]

(8/19)

6

PATTERSON DENTAL/DENTAIRE

Balance of Purchase Price Contract - Security Agreement

Effective Date: May 3, 2022

752002

Seller
Name: PATTERSON DENTAL CANADA INC.
Address: 1205 Henri-Bourassa Blvd. West
Address: Montreal, Quebec H3M 3E6

Individual Buyer(s) and Address
Name: Dr. Faissal Mouhamad
52 Dental Centre
Address: 3505 52nd Street NE, Suite 100
Calgary, AB, T2B 3R3

This Balance of Purchase Price Contract - Security Agreement ("Agreement") is entered into by and between the Seller and Buyer(s) above (collectively "Buyer") as of the Effective Date. Seller and Buyer agree as follows:

1. Property Sold Seller hereby sells and Buyer (jointly and severally, if more than one) hereby purchases the Property described on the attached Schedule A(s) (together with all present and future accessions, attachements, enhancements, accessories, additions, supplements, improvements, spare parts, substitutions, replacements, exchanges and trade-ins, thereto or thereof (if any) as well all proceeds of any of the foregoing in whatever form, including any chattel paper, documents of title, goods, instruments, intangibles, money, fixtures or investment property, including amounts payable under insurance policies, the "Property") at the price described below. Buyer has elected not to pay the Unpaid Balance stated below on the Effective Date but rather to make installment payments in accordance with Section 3 hereof.

2. Time Sale Price Computation

a. Price		$ 35,000.00
b. Taxes (If Any)		$ 1,750.00
c. Official Fees (Filing Fees, Recording Fees, Service Provider Charges etc.)		$ 100.00
d. Installation Charges		$ -
e. Total Price		$ 36,850.00
f. Trade-In (If Buyer is not required to collect GST/HST/QST, deduct from Total Price		$ -
g. Down Payment....(1) Cash	$ -	
(2) Trade-In where Buyer is required to collect for GST/HST/QST	$ -	
	$ -	
(3) Total Down Payment (1) +(2)		$ -
h. Unpaid Balance (e. + b. + c. + d. -g.)		$ 36,850.00
i. Annual Interest Rate (per annum)		4.50%
j. Total Interest		$ 5,306.00
k. Total Credit Charges for the Original Term (c+d+j)		$ 5,406.00
l. Monthly Payment		$ 702.80
m. Total Obligation of Buyer for the Original Term (h. + j.) (aggregate of net capital and all related credit charges)		$ 42,156.00

* All amounts herein are stated in Canadian dollars.

3. Payment Schedule. Buyer hereby acknowledges that it is indebted to and agrees to repay to Seller, at the address of Seller stated on the face hereof or such other place notified by Seller to Buyer, the Unpaid Balance, together with interest thereon, by paying the installments stated on Schedule B hereto. Unless otherwise stated, installments are due on the dates stated on Schedule B hereof in each month, or other period (on the last day of the month, if there is no corresponding date) (each, an "Installment Date"), in arrears, throughout the term hereof. On the final Installment Date, Buyer shall pay Seller the outstanding balance of the Unpaid Balance, all accrued and unpaid interest thereon and all other amounts payable hereunder.

Buyer may at any time prepay in whole or in part, without penalty, the unpaid outstanding portion of the Unpaid Balance, upon payment to Seller of any Overdue Payments, all other amounts then owing under this Agreement. Any portion of the Unpaid Balance prepaid shall be applied to the remaining installments in inverse order of maturity.

4. Delivery and Acceptance of Property The Property has been delivered by Seller to Buyer's address set forth above unless otherwise noted. Buyer has accepted the Property. Without in any way limiting the generality of any limitation of liability on the part of Seller contained in the terms of conditions governing any purchase order, invoice of other document relating to the purchase of the Property, no failure or delay in installation of Property for whatever reason shall affect the Buyer's payment or other obligations in connection with this Agreement. The Property shall at all times remain at the following location (the Property Location), provided that if no address is specified below the Property Location shall be deemed at the Buyer's address specified above:

address city, state zip

SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE PROPERTY. NOTHING HEREIN SHALL BE CONSTRUED AS A WAIVER BY BUYER OF ANY WARRANTY WHICH MAY BE PROVIDED BY THE MANUFACTURER OF ANY PROPERTY, BUT BORROWER'S SOLE REMEDY FOR ALLEGED DEFECTS IN THE DESIGN OR THE MANUFACTURE OF THE PROPERTY SHALL BE AGAINST THE MANUFACTURER(S).

Notwithstanding the signature(s) on this Agreement may indicate a representative capacity, the individual(s) signing below for the Buyer agree(s) that in order to induce the Seller to enter into this Agreement, they will unconditionally guarantee payment and performance of all liability of Buyer to Seller under this Agreement, whether now existing or hereafter incurred. Each reference herein to "Buyer" shall include the individual(s) signing below. Buyer's signature below shall constitute Buyer's acceptance and agreement to be bound to all terms of this Agreement. A facsimile, scanned or electronic copy shall be considered equally effective and of the same evidentiary status as an original. The additional terms and conditions on Page 2 and Page 3 hereof are part of this agreement.

Buyer: _____
By: _____

Buyer: Dr. Faissal Mouhamad
By: _____

Buyers Initials

3. Security Interest In order to secure its obligations to Seller under this Agreement, Buyer hereby grants to Seller a purchase money security interest in and hypothec on, and also mortgages, pledges, charges and assigns, the property. Buyer represents and agrees that, except for the security hereby granted, Buyer is the owner of the Property free from any lien, security interest, hypothec, encumbrance or other security, and the Buyer will defend the Property against all claims and demands of all persons at any time hereafter claiming the same or any interest therein. Buyer further represents and agrees that there does not and will not exist any lien, security interest, hypothec, encumbrance or other security, whether or not filed in any public office, which affects or purports to affect the Property and Buyer will take such other actions as Seller deems necessary or desirable to protect, perfect and maintain Seller's purchase money security interest, hypothec and security. Buyer shall not remove the Property from the Property Location or sell or transfer any interest in the Property without prior written consent of Seller. Buyer shall not affix the Property to any real estate now or at any time hereafter. The Property shall remain personal and movable property regardless of whether affixed or attached to any land, building or structure in violation of the terms hereof. No transfer, renewal, extension or assignment by Seller of any interest under this Agreement shall release Buyer from any liability hereunder. Buyer agrees to obtain a waiver, if required by Seller in a form satisfactory to Seller, from any landlord, mortgagee, hypothecary creditor or other encumbrancer of the premises where the Property is situated.

4. Interest The unpaid Balance shall bear interest at the Annual Interest Rate from the date of delivery of the property to Buyer until Unpaid Balance is unconditionally paid in full to Seller, and shall be payable in arrears on each Installment Date. In addition to interest payable under the preceding sentence, each amount that is not paid when due hereunder (an "Overdue Payment") shall bear interest from the date due until unconditionally paid in full to Seller at the rate of [illegible] per annum, and shall be payable on demand by Seller. [illegible]

7. Title, Ownership [illegible]

8. Personal Property Security Filings [illegible]

9. Prepayment Credit [illegible]

10. Taxes and Other Charges [illegible]

11. Indemnity [illegible]

12. SELLER'S LIMITATION OF LIABILITY SELLER SHALL NOT BE RESPONSIBLE OR LIABLE FOR ANY DEFECTS, REPAIRS, IMPROPER FUNCTIONING OF THE PROPERTY [illegible]

13. Buyer's Representations and Warranties [illegible]

14. Location of Property [illegible]

15. Default [illegible]

16. Remedies Upon default, Seller may exercise any or all of the following remedies with respect to any or all Property [illegible]

17. Use of Property [illegible]

18. Inspection [illegible]

19. Insurance [illegible]

20. Guaranty [illegible]

21. Statutory Waivers and Acknowledgement [illegible]

22. Further Assurances and Power of Attorney [illegible]

23. Miscellaneous. [illegible]

24. Language of Documentation [illegible]

Buyers Initials

PATTERSON
DENTAL/DENTAIRE

SCHEDULE A

INVOICE#: 964/1090981

52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 05/03/2022 7:58 AM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04
Customer P.O.: SURESMILE
Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 03/21/2022

tem#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	T	SC
068-0954	1	1	EA	SIRONA		DI SCANNER,PRIMESCAN DI Serial# 112826 Equipment Specialist ID# 006088	35000.00	35000.00	T	03
tal	1	1								

INSTALLED BY HI-TECH TEAM.

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Subtotal	35000.00
GST	1750.00 T 15
otal	36750.00

nt due upon receipt.
ue balance is subject to service
s not to exceed 1.75% per month. (21% per year)

PATTERSON
DENTAL/DENTAIRE

SCHEDULE A

INVOICE#: 964/1090981

SHIP TO
52 DENTAL CENTRE
Dr Faissal Mouhamad
100-3505 52 St SE
Calgary, AB T2B 3R3

SOLD BY
PATTERSON DENT CANADA INC.
CALGARY BRANCH
112-4152 27TH STREET NE.
CALGARY, AB T1Y 7J8

Printed: 05/03/2022 7:58 AM

GST#: R101355113

Customer#: 964/201415-7 Representative: 964-04
Customer P.O.: SURESMILE
Account: EQUIP
Dept: EQUIP

Telephone: (403) 250-9838
Order#: 964/0000000
Submitted: 03/21/2022

tem#	Ordered	Shipped	Pkg	Mfr	Mfr Catalog#	Item Description	Unit Price	Amount	T	SC
068-0964	1	1	EA	SIRONA		DI SCANNER,PRIMESCAN DI Serial# 112826 Equipment Specialist ID# 006088	35000.00	35000.00	T	03
tal	1	1								

INSTALLED BY HI-TECH TEAM.

** YOUR PATTERSON ORDER SHIPPED COMPLETE **

Subtotal		35000.00	
GST		1750.00	T 15
Total		36750.00	

nt due upon receipt.
due balance is subject to service
s not to exceed 1.75% per month (21% per year)

This is Exhibit JL-2 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

_____

A Commissioner of Oaths for
the Province of Alberta

_____

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

This is Exhibit JL-2 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

A Commissioner of Oaths for
the Province of Alberta

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

Government of Alberta

Personal Property Registry
Search Results Report

Search ID #: Z15743783

Transmitting Party

ELDOR-WAL REGISTRATIONS (1987) LTD.

1200, 10123 99 st NW
EDMONTON, AB T5J 3H1

Party Code: 50073881
Phone #: 780 429 5969
Reference #:

Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Individual Debtor Search For:

MOUHAMAD, FAISSAL

Both Exact and Inexact Result(s) Found

NOTE:

A complete Search may result in a Report of Exact and Inexact Matches.
Be sure to read the reports carefully.

REGISTRAR OF PERSONAL PROPERTY

Government of Alberta

Personal Property Registry
Search Results Report

Search ID #: Z15743783

Transmitting Party

ELDOR-WAL REGISTRATIONS (1987) LTD.

1200, 10123 99 st NW
EDMONTON, AB T5J 3H1

Party Code: 50073881
Phone #: 780 429 5969
Reference #:

Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Individual Debtor Search For:

MOUHAMAD, FAISSAL

Both Exact and Inexact Result(s) Found

NOTE:

A complete Search may result in a Report of Exact and Inexact Matches.
Be sure to read the reports carefully.

REGISTRAR OF PERSONAL PROPERTY

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 16082230828
Registration Date: 2016-Aug-22
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2026-Aug-22 23:59:59

Exact Match on: Debtor No: 8

Amendments to Registration

22072128251	Amendment	2022-Jul-21
22080926628	Amendment	2022-Aug-09
22081709434	Amendment	2022-Aug-17
22081711767	Amendment	2022-Aug-17
22081727466	Amendment	2022-Aug-17

Debtor(s)

Block 1

FAISSAL MOUHAMAD PROFESSIONAL CORPORATION
101-5018-45TH STREET
RED DEER, AB T4N 1K9

Status
Current

Block 2

DELTA DENTAL CORP
202-4921 49ST
RED DEER, AB T4N 1V2

Status
Current by
22072128251

Block 3

52 DENTAL CORPORATION
202-4921 49ST
RED DEER, AB T4N 1V2

Status
Current by
22072128251

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 16082230828
Registration Date: 2016-Aug-22
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2026-Aug-22 23:59:59

Exact Match on: Debtor No: 8

Amendments to Registration

22072128251	Amendment	2022-Jul-21
22080926628	Amendment	2022-Aug-09
22081709434	Amendment	2022-Aug-17
22081711767	Amendment	2022-Aug-17
22081727466	Amendment	2022-Aug-17

Debtor(s)

Block 1

FAISSAL MOUHAMAD PROFESSIONAL CORPORATION
101-5018-45TH STREET
RED DEER, AB T4N 1K9

Status
Current

Block 2

DELTA DENTAL CORP
202-4921 49ST
RED DEER, AB T4N 1V2

Status
Current by
22072128251

Block 3

52 DENTAL CORPORATION
202-4921 49ST
RED DEER, AB T4N 1V2

Status
Current by
22072128251

Block

4 52 WELLNESS CENTRE INC.
600, 4911 51 ST
RED DEER, AB T4N6V4

Status
Current by
22080926628

Block

5 AHMAD, FETOUN
52-26534 TOWNSHIP ROAD 384
RED DEER COUNTY, AB T4E 1A1

Birth Date:
1984-Mar-01

Status
Current by
22081709434

Block

6 FETOUN, AHMED
52-26534 TOWNSHIP ROAD 384
RED DEER COUNTY, AB T4E 1A1

Birth Date:
1984-Mar-01

Status
Current by
22081711767

Block

7 MICHAEL DAVE MANAGEMENT LTD.
600, 4911 - 51 STREET
RED DEER, AB T4N 6V4

Status
Current by
22081727466

Block

8 MOUHAMAD, FAISSAL
7151-50TH AVENUE
RED DEER, AB T4N 4E4

Status
Current by
22081727466

Block

9 PARADISE MCIVOR DEVELOPMENTS LTD.
600, 4911 - 51 STREET
RED DEER, AB T4N 6V4

Status
Current by
22081727466

Secured Party / Parties

Block

1 ROYAL BANK OF CANADA
2ND FLOOR, 4943 ROSS STREET
RED DEER, AB T4N 1X8

Status
Deleted by
22072128251

Block

2 ROYAL BANK OF CANADA
2ND FLOOR, 4943 ROSS STREET
RED DEER, AB T4N 1X8
Email: torbscpr@rbc.com

Status
Current by
22072128251

Block

4 52 WELLNESS CENTRE INC.
600, 4911 51 ST
RED DEER, AB T4N6V4

Status
Current by
22080926628

Block

5 AHMAD, FETOUN
52-26534 TOWNSHIP ROAD 384
RED DEER COUNTY, AB T4E 1A1

Birth Date:
1984-Mar-01

Status
Current by
22081709434

Block

6 FETOUN, AHMED
52-26534 TOWNSHIP ROAD 384
RED DEER COUNTY, AB T4E 1A1

Birth Date:
1984-Mar-01

Status
Current by
22081711767

Block

7 MICHAEL DAVE MANAGEMENT LTD.
600, 4911 - 51 STREET
RED DEER, AB T4N 6V4

Status
Current by
22081727466

Block

8 MOUHAMAD, FAISSAL
7151-50TH AVENUE
RED DEER, AB T4N 4E4

Status
Current by
22081727466

Block

9 PARADISE MCIVOR DEVELOPMENTS LTD.
600, 4911 - 51 STREET
RED DEER, AB T4N 6V4

Status
Current by
22081727466

Secured Party / Parties

Block

1 ROYAL BANK OF CANADA
2ND FLOOR, 4943 ROSS STREET
RED DEER, AB T4N 1X8

Status
Deleted by
22072128251

Block

2 ROYAL BANK OF CANADA
2ND FLOOR, 4943 ROSS STREET
RED DEER, AB T4N 1X8
Email: torbscpr@rbc.com

Status
Current by
22072128251

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY	Current
2	ALL PERSONAL PROPERTY OF THE DEBTOR LOCATED AT 101-5018-45TH STREET, RED DEER, ALBERTA, T4N 1K9	Current
3	ALL PRESENT PROPERTY OF THE DEBTOR LOCATED AT 5207 POWER CENTRE BLVD., DRAYTON VALLEY, ALBERTA, T7A 0A5	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY	Current
2	ALL PERSONAL PROPERTY OF THE DEBTOR LOCATED AT 101-5018-45TH STREET, RED DEER, ALBERTA, T4N 1K9	Current
3	ALL PRESENT PROPERTY OF THE DEBTOR LOCATED AT 5207 POWER CENTRE BLVD., DRAYTON VALLEY, ALBERTA, T7A 0A5	Current

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 17060924997
Registration Date: 2017-Jun-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jun-09 23:59:59

Exact Match on: Debtor No: 2

Debtor(s)

Block		Status
1	PARADISE MCIVOR DEVELOPMENTS LTD. 101, 5018-45 STREET RED DEER, AB T4N 1K9	Current
2	MOUHAMAD, FAISSAL 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707-7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
2	1105550 ALBERTA INC. C/O 500, 707-7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
3	1245233 ALBERTA INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 17060924997
Registration Date: 2017-Jun-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jun-09 23:59:59

Exact Match on: Debtor No: 2

Debtor(s)

Block		Status
1	PARADISE MCIVOR DEVELOPMENTS LTD. 101, 5018-45 STREET RED DEER, AB T4N 1K9	Current
2	MOUHAMAD, FAISSAL 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707-7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
2	1105550 ALBERTA INC. C/O 500, 707-7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
3	1245233 ALBERTA INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Block		Status
4	SOLAR STAR HOLDINGS INC. C/O 500, 707-7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

6

Block		Status
4	SOLAR STAR HOLDINGS INC. C/O 500, 707-7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 17060925256
Registration Date: 2017-Jun-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jun-09 23:59:59

Exact Match on: Debtor No: 2

Debtor(s)

Block		Status
1	PARADISE MCIVOR DEVELOPMENTS LTD. 101, 5018-45 STREET RED DEER, AB T4N 1K9	Current
2	MOUHAMAD, FAISSAL SUITE 101, 5018-45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
2	1105550 ALBERTA INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
3	1245233 ALBERTA INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 17060925256
Registration Date: 2017-Jun-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jun-09 23:59:59

Exact Match on: Debtor No: 2

Debtor(s)

Block		Status
1	PARADISE MCIVOR DEVELOPMENTS LTD. 101, 5018-45 STREET RED DEER, AB T4N 1K9	Current
2	MOUHAMAD, FAISSAL SUITE 101, 5018-45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
2	1105550 ALBERTA INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
3	1245233 ALBERTA INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Block		Status
4	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Block		Status
4	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 17112118290
Registration Date: 2017-Nov-21
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Nov-21 23:59:59

Exact Match on: Debtor No: 2

Debtor(s)

Block		Status
1	PARADISE MCIVOR DEVELOPMENTS LTD. 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current
2	MOUHAMAD, FAISSAL SUITE 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current
2	1105550 ALBERTA INC. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current
3	1245233 ALBERTA INC. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 17112118290
Registration Date: 2017-Nov-21
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Nov-21 23:59:59

Exact Match on: Debtor No: 2

Debtor(s)

Block		Status
1	PARADISE MCIVOR DEVELOPMENTS LTD. 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Block		Status
2	MOUHAMAD, FAISSAL SUITE 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current

Block		Status
2	1105550 ALBERTA INC. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current

Block		Status
3	1245233 ALBERTA INC. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current

Block		Status
4	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

6

Block		Status
4	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE SW CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 18083016077
Registration Date: 2018-Aug-30
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2023-Aug-30 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	ATB FINANCIAL 3699 - 63 AVENUE N.E. CALGARY, AB T3J 0G7	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND FUTURE OBLIGATIONS AND INDEBTEDNESS OF PARADISE MCIVOR DEVELOPMENTS LTD. OWING TO THE DEBTOR AND ALL INSTRUMENTS, DOCUMENTS OF TITLE, INVESTMENT PROPERTY, CHATTEL PAPER, MONEY, INTANGIBLES OR OTHER DOCUMENTS TAKEN IN CONNECTION THEREWITH OR AS EVIDENCE THEREOF, OR THAT MAY BE GRANTED OR PLEDGED AS SECURITY THEREFOR (THE "COLLATERAL").	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 18083016077
Registration Date: 2018-Aug-30
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2023-Aug-30 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 101, 5018 - 45 STREET RED DEER, AB T4N 1K9	Current

Secured Party / Parties

Block		Status
1	ATB FINANCIAL 3699 - 63 AVENUE N.E. CALGARY, AB T3J 0G7	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND FUTURE OBLIGATIONS AND INDEBTEDNESS OF PARADISE MCIVOR DEVELOPMENTS LTD. OWING TO THE DEBTOR AND ALL INSTRUMENTS, DOCUMENTS OF TITLE, INVESTMENT PROPERTY, CHATTEL PAPER, MONEY, INTANGIBLES OR OTHER DOCUMENTS TAKEN IN CONNECTION THEREWITH OR AS EVIDENCE THEREOF, OR THAT MAY BE GRANTED OR PLEDGED AS SECURITY THEREFOR (THE "COLLATERAL").	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 19040215863
Registration Date: 2019-Apr-02
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2029-Apr-02 23:59:59

Exact Match on: Debtor No: 2

Amendments to Registration

19092010319	Amendment	2019-Sep-20

Debtor(s)

Block		Status
1	MICHAEL DAVE MANAGEMENT LTD. 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Block		Status
2	MOUHAMAD, FAISSAL 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Deleted by 19092010319

Block		Status
2	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Block		Status
3	1245233 ALBERTA INC. C/O 500,707-7 AVENUE SW CALGARY, AB T2P 3H6	Current by 19092010319

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 19040215863
Registration Date: 2019-Apr-02
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2029-Apr-02 23:59:59

Exact Match on: Debtor No: 2

Amendments to Registration

19092010319 Amendment 2019-Sep-20

Debtor(s)

Block		Status
1	MICHAEL DAVE MANAGEMENT LTD. 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current
2	MOUHAMAD, FAISSAL 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Deleted by 19092010319
2	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current
3	1245233 ALBERTA INC. C/O 500,707-7 AVENUE SW CALGARY, AB T2P 3H6	Current by 19092010319

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 19101738498
Registration Date: 2019-Oct-17

Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2029-Oct-17 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Block		Status
2	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 19101738498
Registration Date: 2019-Oct-17
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2029-Oct-17 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	JOVICA PROPERTY MANAGEMENT LTD. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Block		Status
2	SOLAR STAR HOLDINGS INC. C/O 500, 707 - 7 AVENUE S.W. CALGARY, AB T2P 3H6	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR.	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 20072817465
Registration Date: 2020-Jul-28
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2030-Jul-28 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 7151 - 50TH AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	1193770 ALBERTA LTD. C/O 500, 707 - 7TH AVENUE S.W., CALGARY, AB T2P 3H6 Phone #: 403 269 9400 Fax #: 403 266 2447 Email: btwerdoff@hendrixlaw.ca	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY OF THE DEBTOR	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 20072817465
Registration Date: 2020-Jul-28
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2030-Jul-28 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 7151 - 50TH AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	1193770 ALBERTA LTD. C/O 500, 707 - 7TH AVENUE S.W., CALGARY, AB T2P 3H6 Phone #: 403 269 9400 Fax #: 403 266 2447 Email: btwerdoff@hendrixlaw.ca	Current

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY OF THE DEBTOR	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 21081933296
Registration Date: 2021-Aug-19
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2026-Aug-19 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	THE BANK OF NOVA SCOTIA 4715 TAHOE BOULEVARD MISSISSAUGA, ON L4W 0B4 Email: bsc@scotiabank.com	Current

Collateral: General

Block	Description	Status
1	ANY AND ALL PRESENT AND FUTURE ACCOUNTS, MONIES AND ALL OTHER INDEBTEDNESS, OBLIGATIONS, AND LIABILITIES OF ANY KIND, DIRECT OR INDIRECT, ABSOLUTE OR CONTINGENT, JOINT OR SEVERAL OF 52 WELLNESS CENTRE INC. WHICH ARE NOW OR HEREAFTER OWED TO THE DEBTOR AND ALL INSTRUMENTS, DOCUMENTS, AGREEMENTS, CHOSES IN ACTION, CLAIMS AND/OR DEMANDS IN RESPECT OF THEREOF, OR IN ANY WAY RELATED THERETO.	Current
2	PROCEEDS: ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY.	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 21081933296
Registration Date: 2021-Aug-19
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2026-Aug-19 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 7151 - 50 AVENUE RED DEER, AB T4N 4E4	Current

Secured Party / Parties

Block		Status
1	THE BANK OF NOVA SCOTIA 4715 TAHOE BOULEVARD MISSISSAUGA, ON L4W 0B4 Email: bsc@scotiabank.com	Current

Collateral: General

Block	Description	Status
1	ANY AND ALL PRESENT AND FUTURE ACCOUNTS, MONIES AND ALL OTHER INDEBTEDNESS, OBLIGATIONS, AND LIABILITIES OF ANY KIND, DIRECT OR INDIRECT, ABSOLUTE OR CONTINGENT, JOINT OR SEVERAL OF 52 WELLNESS CENTRE INC. WHICH ARE NOW OR HEREAFTER OWED TO THE DEBTOR AND ALL INSTRUMENTS, DOCUMENTS, AGREEMENTS, CHOSES IN ACTION, CLAIMS AND/OR DEMANDS IN RESPECT OF THEREOF, OR IN ANY WAY RELATED THERETO.	Current
2	PROCEEDS: ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY.	Current

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 22042607078
Registration Date: 2022-Apr-26
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2032-Apr-26 23:59:59

Exact Match on: Debtor No: 3

Debtor(s)

Block **Status**

1 Current
52 DENTAL CORPORATION
3505-52ND STREET SE
CALGARY, AB T2B3R3

Block **Status**

2 Current
DELTA DENTAL
3505-52ND STREET SE
CALGARY, AB T2B3R3

Block **Status**

3 Current
MOUHAMAD, FAISSAL
3505-52ND STREET SE
CALGARY, AB T2B3R3
Birth Date:
1968-Sep-25

Block **Status**

4 Current
FAISSAL MOUHAMAD PROFESSIONAL CORPORATION
3505-52ND STREET SE
CALGARY, AB T2B3R3

Secured Party / Parties

Block **Status**

1 Current
CWB NATIONAL LEASING INC.
1525 BUFFALO PLACE
WINNIPEG, MB R3T 1L9
Phone #: 204 954 9000 Fax #: 866 814 4752
Email: ppsa.adminstration@cwbnationalleasing.com

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 22042607078
Registration Date: 2022-Apr-26
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2032-Apr-26 23:59:59

Exact Match on: Debtor No: 3

Debtor(s)

Block		Status
1	52 DENTAL CORPORATION 3505-52ND STREET SE CALGARY, AB T2B3R3	Current
2	DELTA DENTAL 3505-52ND STREET SE CALGARY, AB T2B3R3	Current
3	MOUHAMAD, FAISSAL 3505-52ND STREET SE CALGARY, AB T2B3R3 Birth Date: 1968-Sep-25	Current
4	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION 3505-52ND STREET SE CALGARY, AB T2B3R3	Current

Secured Party / Parties

Block		Status
1	CWB NATIONAL LEASING INC. 1525 BUFFALO PLACE WINNIPEG, MB R3T 1L9 Phone #: 204 954 9000 Fax #: 866 814 4752 Email: ppsa.adminstration@cwbnationalleasing.com	Current

Collateral: General

Block	Description	Status
1	ALL GOODS AND EQUIPMENT OF EVERY NATURE OR KIND LEASED PURSUANT TO MASTER LEASE AGREEMENT NUMBER 51058404 BETWEEN THE SECURED PARTY, AS LESSOR AND THE DEBTOR AS LESSEE, AS AMENDED FROM TIME TO TIME, TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, SUBSTITUTIONS AND PROCEEDS OF ANY KIND DERIVED DIRECTLY OR INDIRECTLY THEREFROM, INCLUDING ALL AFTER ACQUIRED GOODS AND EQUIPMENT SUBJECT TO ANY INTERIM FUNDING AGREEMENT(S) AND ANY LEASE SCHEDULES ATTACHED TO AND FORMING PART OF MASTER LEASE AGREEMENT NUMBER 51058404	Current

Collateral: General

Block	Description	Status
1	ALL GOODS AND EQUIPMENT OF EVERY NATURE OR KIND LEASED PURSUANT TO MASTER LEASE AGREEMENT NUMBER 51058404 BETWEEN THE SECURED PARTY, AS LESSOR AND THE DEBTOR AS LESSEE, AS AMENDED FROM TIME TO TIME, TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, SUBSTITUTIONS AND PROCEEDS OF ANY KIND DERIVED DIRECTLY OR INDIRECTLY THEREFROM, INCLUDING ALL AFTER ACQUIRED GOODS AND EQUIPMENT SUBJECT TO ANY INTERIM FUNDING AGREEMENT(S) AND ANY LEASE SCHEDULES ATTACHED TO AND FORMING PART OF MASTER LEASE AGREEMENT NUMBER 51058404.	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 22050905694
Registration Date: 2022-May-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-May-09 23:59:59

Exact Match on: Debtor No: 1

Amendments to Registration

23011020393	Amendment	2023-Jan-10

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A9 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23011020393

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090981 068-0964 SIRONA DI SCANNER SER 112826 $35000.00	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 22050905694
Registration Date: 2022-May-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-May-09 23:59:59

Exact Match on: Debtor No: 1

Amendments to Registration

23011020393 Amendment 2023-Jan-10

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A9 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23011020393

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090981 068-0964 SIRONA DI SCANNER SER 112826 $35000.00	Current

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 22070509451
Registration Date: 2022-Jul-05

Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jul-05 23:59:59

Exact Match on: Debtor No: 1

Amendments to Registration

23010434017	Amendment	2023-Jan-04

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23010434017

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Search ID #: Z15743783

Individual Debtor Search For:
MOUHAMAD, FAISSAL
Search ID #: Z15743783 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:54:15

Registration Number: 22070509451
Registration Date: 2022-Jul-05
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jul-05 23:59:59

Exact Match on: Debtor No: 1

Amendments to Registration

23010434017	Amendment	2023-Jan-04

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23010434017

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090959 068-1277 BELMON CHAIR SER AQ21F0016 $9936.99 068-1278 BELMON CHAIR SER AQ21G0004 $9936.99 068-1279 BELMON CHAIR SER AQ21G0002 $9936.99 068-1280 BELMON CHAIR SER AQ21F0059 $9936.99 068-1281 BELMON CHAIR SER AQ21F0014 $9936.99 068-1282 BELMON CHAIR SER AQ21G0008 $9936.99 068-1283 BELMON UNIT SER VW21E0235 $4975.14 068-1284 BELMON UNIT SER VW21E0238 $4975.14 068-1285 BELMON UNIT SER VW21E0245 $4975.14 068-1286 BELMON UNIT SER VW21C0185 $4975.14 068-1287 BELMON UNIT SER VW21E0242 $4975.14 068-1288 BELMON UNIT SER VW21E0234 $4975.14 068-1289 BELMON LIGHT SER AV21K0332 $3145.30 068-1290 BELMON LIGHT SER AV21K0328 $3145.30 068-1291 BELMON LIGHT SER AV21K0330 $3145.30 068-1292 BELMON LIGHT SER AV21K0335 $3145.30 068-1293 BELMON LIGHT SER AV21K0345 $3145.30 068-1294 BELMON LIGHT SER AV21K0339 $3145.30 068-1295 BELMON UNIT $590.27 068-1296 BELMON UNIT $590.27 068-1297 BELMON UNIT $590.27 068-1298 BELMON UNIT $590.27 068-1299 BELMON UNIT $590.27 068-1300 BELMON UNIT $590.27 068-1301 BELMON UNIT $140.54 068-1302 BELMON UNIT $140.54 068-1303 BELMON UNIT $140.54 068-1304 BELMON UNIT $140.54 068-1305 BELMON UNIT $140.54 068-1306 BELMON UNIT $140.54 068-1307 BELMON XR INTRA PHOT SER EX21L0581 $4496.05 068-1308 BELMON XR INTRA PHOT SER EX21L0582 $4496.05 068-1309 BELMON XR INTRA PHOT SER EX21K0126 $4496.05 068-1310 BELMON XR INTRA PHOT SER EX21K0129 $4496.05 068-1311 BELMON XR INTRA PHOT SER EX21L0574 $4496.05 068-1312 BELMON XR INTRA PHOT SER EX21L0575 $4496.05 068-1482 AIRTEC EVAC PUMP SER MM700-22040017, MM100-22040024 $14867.00 068-1483 AIRTEC EVAC PUMP $611.00 068-1484 AIRTEC COMPRESSOR SER AS700-22040008 $14800.00 068-1485 AIRTEC EVA COMPNT SER AP122030028 $925.00 068-1486 AIRTEC EVA COMPNT $2063.00 068-1487 AIRTEC MASTR CTRL $446.00 068-0501 SIRONA CONEBEAMXR SER 1081251245 $120000.00 068-1418 SCHICK DIG XR SEN SER WL10000026 $9391.00 068-1421 SCHICK DIG XR SEN SER WL10000005 $9391.00 068-1416 SCHICK DIG XR	Current
2	SEN SER WL20000099 $10616.00 068-1501 SCICAN THERMO SER 400122D00004 $9955.00 068-1502 SCICAN THERMO SER 400122D00008 $9955.00 067-9964 W&H AUTOCLAVE SER 162302 $6968.00 067-9965 W&H AUTOCLAVE SER 162320 $6968.00 068-0760 W&H AUTOCLAVE $233.28 068-0761 W&H AUTOCLAVE $233.28	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090959 068-1277 BELMON CHAIR SER AQ21F0016 $9936.99 068-1278 BELMON CHAIR SER AQ21G0004 $9936.99 068-1279 BELMON CHAIR SER AQ21G0002 $9936.99 068-1280 BELMON CHAIR SER AQ21F0059 $9936.99 068-1281 BELMON CHAIR SER AQ21F0014 $9936.99 068-1282 BELMON CHAIR SER AQ21G0008 $9936.99 068-1283 BELMON UNIT SER VW21E0235 $4975.14 068-1284 BELMON UNIT SER VW21E0238 $4975.14 068-1285 BELMON UNIT SER VW21E0245 $4975.14 068-1286 BELMON UNIT SER VW21C0185 $4975.14 068-1287 BELMON UNIT SER VW21E0242 $4975.14 068-1288 BELMON UNIT SER VW21E0234 $4975.14 068-1289 BELMON LIGHT SER AV21K0332 $3145.30 068-1290 BELMON LIGHT SER AV21K0328 $3145.30 068-1291 BELMON LIGHT SER AV21K0330 $3145.30 068-1292 BELMON LIGHT SER AV21K0335 $3145.30 068-1293 BELMON LIGHT SER AV21K0345 $3145.30 068-1294 BELMON LIGHT SER AV21K0339 $3145.30 068-1295 BELMON UNIT $590.27 068-1296 BELMON UNIT $590.27 068-1297 BELMON UNIT $590.27 068-1298 BELMON UNIT $590.27 068-1299 BELMON UNIT $590.27 068-1300 BELMON UNIT $590.27 068-1301 BELMON UNIT $140.54 068-1302 BELMON UNIT $140.54 068-1303 BELMON UNIT $140.54 068-1304 BELMON UNIT $140.54 068-1305 BELMON UNIT $140.54 068-1306 BELMON UNIT $140.54 068-1307 BELMON XR INTRA PHOT SER EX21L0581 $4496.05 068-1308 BELMON XR INTRA PHOT SER EX21L0582 $4496.05 068-1309 BELMON XR INTRA PHOT SER EX21K0126 $4496.05 068-1310 BELMON XR INTRA PHOT SER EX21K0129 $4496.05 068-1311 BELMON XR INTRA PHOT SER EX21L0574 $4496.05 068-1312 BELMON XR INTRA PHOT SER EX21L0575 $4496.05 068-1482 AIRTEC EVAC PUMP SER MM700-22040017, MM100-22040024 $14867.00 068-1483 AIRTEC EVAC PUMP $611.00 068-1484 AIRTEC COMPRESSOR SER AS700-22040008 $14800.00 068-1485 AIRTEC EVA COMPNT SER AP122030028 $925.00 068-1486 AIRTEC EVA COMPNT $2063.00 068-1487 AIRTEC MASTR CTRL $446.00 068-0501 SIRONA CONEBEAMXR SER 1081251245 $120000.00 068-1418 SCHICK DIG XR SEN SER WL10000026 $9391.00 068-1421 SCHICK DIG XR SEN SER WL10000005 $9391.00 068-1416 SCHICK DIG XR	Current
2	SEN SER WL20000099 $10616.00 068-1501 SCICAN THERMO SER 400122D00004 $9955.00 068-1502 SCICAN THERMO SER 400122D00008 $9955.00 067-9964 W&H AUTOCLAVE SER 162302 $6968.00 067-9965 W&H AUTOCLAVE SER 162320 $6968.00 068-0760 W&H AUTOCLAVE $233.28 068-0761 W&H AUTOCLAVE $233.28	Current

Search ID #: Z15743783

Note:

The following is a list of matches closely approximating your Search Criteria, which is included for your convenience and protection.

Debtor Name / Address

MAHAMED, FAADEEL, ABDINASIR
306 305A MARLBOROUGH DR NE
CALGARY, AB

Birth Date:
1992-Feb-13

Gender:
Male

Reg.#

19032024417

WRIT OF ENFORCEMENT

Debtor Name / Address

MAHAMED, FATHE
290 PLAMONDON DR SUITE 214SUITE 214
FORT MCMURRAY, AB T9K0A5

Birth Date:
1982-Apr-04

Reg.#

21081130074

SECURITY AGREEMENT

Debtor Name / Address

MAHAMED, FEYSAL IBRAHIM
10610 111 STRE NW APT 405
EDMONTON, AB T5H 3E9

Birth Date:
1988-Jun-06

Reg.#

20090227287

SECURITY AGREEMENT

Debtor Name / Address

MAHAMED, FEYSAL, IBRAHIM
10610 111 STRE NW APT 405
EDMONTON, AB T5H 3E9

Birth Date:
1988-Jun-06

Reg.#

20090227287

SECURITY AGREEMENT

Debtor Name / Address

MAHAMED, FOUAD
6887 TEMPLE DR NE
CALGARY, AB T1Y 5E7

Reg.#

20020515968

SECURITY AGREEMENT

Debtor Name / Address

MAHAMEED, FADI
18230 104 A STREET SUITE 14
EDMONTON, AB T5X 0G9

Birth Date:
1979-Mar-05

Reg.#

19092718935

SECURITY AGREEMENT

Search ID #: Z15743783

Note:

The following is a list of matches closely approximating your Search Criteria, which is included for your convenience and protection.

Debtor Name / Address	Birth Date:	Reg.#
MAHAMED, FAADEEL, ABDINASIR 306 305A MARLBOROUGH DR NE CALGARY, AB	1992-Feb-13 Gender: Male	19032024417

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	Reg.#
MAHAMED, FATHE 290 PLAMONDON DR SUITE 214SUITE 214 FORT MCMURRAY, AB T9K0A5	1982-Apr-04	21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MAHAMED, FEYSAL IBRAHIM 10610 111 STRE NW APT 405 EDMONTON, AB T5H 3E9	1988-Jun-06	20090227287

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MAHAMED, FEYSAL, IBRAHIM 10610 111 STRE NW APT 405 EDMONTON, AB T5H 3E9	1988-Jun-06	20090227287

SECURITY AGREEMENT

Debtor Name / Address		Reg.#
MAHAMED, FOUAD 6887 TEMPLE DR NE CALGARY, AB T1Y 5E7		20020515968

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MAHAMEED, FADI 18230 104 A STREET SUITE 14 EDMONTON, AB T5X 0G9	1979-Mar-05	19092718935

SECURITY AGREEMENT

Debtor Name / Address

MAHAMEED, FADI, N
18230 104A STREET NW, SUITE 6
EDMONTON, AB T5X0G9

Birth Date:
1979-Mar-05

Reg.#

18101715278

SECURITY AGREEMENT

Debtor Name / Address

MAHAMMED, FATMA, SULIMAN
17128 64 ST NW
EDMONTON, AB T5Y 3T6

Birth Date:
1965-Nov-03

Reg.#

22112404556

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FADUMO, AHMED
1804 121 STRE SW
EDMONTON, AB T6W 1T5

Birth Date:
1975-Sep-12

Reg.#

17100533387

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FADUMO JAMA
10920 83 STREET NW SUITE 302
EDMONTON, AB T5H1M1

Birth Date:
1983-Jan-18

Reg.#

21031634364

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FADUMO, JAMA
10920 83 STREET NW SUITE 302
EDMONTON, AB T5H1M1

Birth Date:
1983-Jan-18

Reg.#

21031634364

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FAISAL
11532 139 AVENUE NW
EDMONTON, AB T5X 3L4

Birth Date:
1982-Oct-12

Gender:
Unknown

Reg.#

21050423207

WRIT OF ENFORCEMENT

Debtor Name / Address

MAHAMEED, FADI, N
18230 104A STREET NW, SUITE 6
EDMONTON, AB T5X0G9

Birth Date:
1979-Mar-05

Reg.#

18101715278

SECURITY AGREEMENT

Debtor Name / Address

MAHAMMED, FATMA, SULIMAN
17128 64 ST NW
EDMONTON, AB T5Y 3T6

Birth Date:
1965-Nov-03

Reg.#

22112404556

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FADUMO, AHMED
1804 121 STRE SW
EDMONTON, AB T6W 1T5

Birth Date:
1975-Sep-12

Reg.#

17100533387

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FADUMO JAMA
10920 83 STREET NW SUITE 302
EDMONTON, AB T5H1M1

Birth Date:
1983-Jan-18

Reg.#

21031634364

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FADUMO, JAMA
10920 83 STREET NW SUITE 302
EDMONTON, AB T5H1M1

Birth Date:
1983-Jan-18

Reg.#

21031634364

SECURITY AGREEMENT

Debtor Name / Address

MAHAMUD, FAISAL
11532 139 AVENUE NW
EDMONTON, AB T5X 3L4

Birth Date:
1982-Oct-12

Gender:
Unknown

Reg.#

21050423207

WRIT OF ENFORCEMENT

Debtor Name / Address

MAHAMUD, FAISAL, A
11532 139 AVENUE NW
EDMONTON, AB T5X 3L4

Birth Date:
1982-Oct-12

Gender:
Unknown

Reg.#

21050423207

WRIT OF ENFORCEMENT

Debtor Name / Address

MAHAMUD, FAISAL, ABDI
11532 139 AVENUE NW
EDMONTON, AB T5X 3L4

Birth Date:
1982-Oct-12

Gender:
Unknown

Reg.#

21050423207

WRIT OF ENFORCEMENT

Debtor Name / Address

MAHAMUD, FAISAL, ABDI
11513 83 STRET NW
EDMONTON, AB T5B2Y6

Reg.#

21072236269

BANKRUPTCY / PROPOSAL

Debtor Name / Address

MOHAMAD, FADHEL
3 INVERMERE PL
ST. ALBERT, AB T8N 5M9

Birth Date:
1956-Apr-08

Reg.#

22092810370

SECURITY AGREEMENT

Debtor Name / Address

MOHAMAD, FATHE
290 PLAMONDON DR SUITE 214SUITE 214
FORT MCMURRAY, AB T9K0A5

Birth Date:
1982-Apr-04

Reg.#

21081130074

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FADUMA
179 CORNERBROOK GATE NE
CALGARY, AB T3N1L5

Birth Date:
1989-Jan-10

Reg.#

22080904607

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1990-Jan-01

Reg.#

Debtor Name / Address	Birth Date:	Reg.#
MAHAMUD, FAISAL, A 11532 139 AVENUE NW EDMONTON, AB T5X 3L4	1982-Oct-12 Gender: Unknown	21050423207

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	Reg.#
MAHAMUD, FAISAL, ABDI 11532 139 AVENUE NW EDMONTON, AB T5X 3L4	1982-Oct-12 Gender: Unknown	21050423207

WRIT OF ENFORCEMENT

Debtor Name / Address	Reg.#
MAHAMUD, FAISAL, ABDI 11513 83 STRET NW EDMONTON, AB T5B2Y6	21072236269

BANKRUPTCY / PROPOSAL

Debtor Name / Address	Birth Date:	Reg.#
MOHAMAD, FADHEL 3 INVERMERE PL ST. ALBERT, AB T8N 5M9	1956-Apr-08	22092810370

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMAD, FATHE 290 PLAMONDON DR SUITE 214SUITE 214 FORT MCMURRAY, AB T9K0A5	1982-Apr-04	21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FADUMA 179 CORNERBROOK GATE NE CALGARY, AB T3N1L5	1989-Jan-10	22080904607

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1990-Jan-01	

MOHAMED, FAHAD
403 - 2840 BAYCREST DR
OTTAWA, ON K1V 7P8

Gender:
Unknown

19111929153

WRIT OF ENFORCEMENT

Debtor Name / Address

Birth Date:
1989-Sep-26

Reg.#

MOHAMED, FAHAD, ABDI
12618 152 AVENUE NW SUITE 211
EDMONTON, AB T5X 6B2

20073001863

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1989-Sep-26

Reg.#

MOHAMED, FAHAD, ABDI
211-12618 152 AVE NW
EDMONTON, AB T5X6B2

20111829362

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1990-Jan-01

Reg.#

MOHAMED, FAHAD, ABDULLAH
408, 2840 BAYCRESCENT DRIVE
OTTAWA, ON K1V 7P8

Gender:
Male

19052311664

WRIT OF ENFORCEMENT

Debtor Name / Address

Birth Date:
1988-Sep-26

Reg.#

MOHAMED, FAHEEM, IBRAHIM
9914 PENHORWOOD STREET #SUITE 55
FORT MCMURRAY, AB T9H 3N3

20082016528

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1980-Sep-06

Reg.#

MOHAMED, FAIZUL, R
57 COPPERPOND AVENUE SE
CALGARY, AB T2Z5B3

18072036653

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1990-Mar-03

Reg.#

MOHAMED, FAHAD
403 - 2840 BAYCREST DR
OTTAWA, ON K1V 7P8

Gender:
Unknown

19111929153

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1989-Sep-26	
MOHAMED, FAHAD, ABDI 12618 152 AVENUE NW SUITE 211 EDMONTON, AB T5X 6B2		20073001863

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1989-Sep-26	
MOHAMED, FAHAD, ABDI 211-12618 152 AVE NW EDMONTON, AB T5X6B2		20111829362

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1990-Jan-01	
MOHAMED, FAHAD, ABDULLAH 408, 2840 BAYCRESCENT DRIVE OTTAWA, ON K1V 7P8	Gender: Male	19052311664

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1988-Sep-26	
MOHAMED, FAHEEM, IBRAHIM 9914 PENHORWOOD STREET #SUITE 55 FORT MCMURRAY, AB T9H 3N3		20082016528

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1980-Sep-06	
MOHAMED, FAIZUL, R 57 COPPERPOND AVENUE SE CALGARY, AB T2Z5B3		18072036653

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1990-Mar-03	

MOHAMED, FARDOWS
179 CORNERBROOK GATE NE
CALGARY, AB T3N1L5

22080904607

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMED, FARHAN 3027 36 ST NW EDMONTON, AB T6L 4N5	1995-Jan-01	22111603746

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7	1965-Jun-15	22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7	1965-Jun-15	22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7	1965-Jun-15	22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7	1965-Jun-15	22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1967-Jan-10	

MOHAMED, FARDOWS
179 CORNERBROOK GATE NE
CALGARY, AB T3N1L5

22080904607

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1995-Jan-01	
MOHAMED, FARHAN 3027 36 ST NW EDMONTON, AB T6L 4N5		22111603746

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1965-Jun-15	
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7		22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1965-Jun-15	
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7		22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1965-Jun-15	
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7		22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1965-Jun-15	
MOHAMED, FARHIA, M 10303 180 AVE NW EDMONTON, AB T5X5Z7		22121004186

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1967-Jan-10	

MOHAMED, FAROUK, AZIZ
11023 - 154 ST
SURREY, BC V3R 6V7

05101219524

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1982-Jan-01

Reg.#

MOHAMED, FARTUN, JAMA
17116 121 STREET NW
EDMONTON, AB T5X0H4

22010426449

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1992-Mar-30

Reg.#

MOHAMED, FARUZA, ABDULAZIZ
10621 123 ST NW SUITE 107SUITE 107
EDMONTON, AB T5N1P3

22101502815

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1972-Aug-19

Reg.#

MOHAMED, FARZANA
39 TEMPLEVALE WAY NE
CALGARY, AB T1Y 4V1

19071213302

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1972-Aug-19

Reg.#

MOHAMED, FARZANA, MIRO
39 TEMPLEVALE WAY NE
CALGARY, AB T1Y 4V1

19071213302

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1982-Apr-04

Reg.#

MOHAMED, FATHE
290 PLAMONDON DRIVE
FORT MCMURRAY, AB T9K0A5

20101512288

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1982-Apr-04

Reg.#

MOHAMED, FAROUK, AZIZ
11023 - 154 ST
SURREY, BC V3R 6V7

05101219524

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1982-Jan-01	**Reg.#**
MOHAMED, FARTUN, JAMA 17116 121 STREET NW EDMONTON, AB T5X0H4		22010426449

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1992-Mar-30	**Reg.#**
MOHAMED, FARUZA, ABDULAZIZ 10621 123 ST NW SUITE 107SUITE 107 EDMONTON, AB T5N1P3		22101502815

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1972-Aug-19	**Reg.#**
MOHAMED, FARZANA 39 TEMPLEVALE WAY NE CALGARY, AB T1Y 4V1		19071213302

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1972-Aug-19	**Reg.#**
MOHAMED, FARZANA, MIRO 39 TEMPLEVALE WAY NE CALGARY, AB T1Y 4V1		19071213302

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1982-Apr-04	**Reg.#**
MOHAMED, FATHE 290 PLAMONDON DRIVE FORT MCMURRAY, AB T9K0A5		20101512288

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1982-Apr-04	**Reg.#**

MOHAMED, FATHE
290 PLAMONDON DR SUITE 214SUITE 214
FORT MCMURRAY, AB T9K0A5

21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FATHE, O 290 PLAMONDON DR SUITE 214SUITE 214 FORT MCMURRAY, AB T9K0A5	1982-Apr-04	21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FATHUMZARA 10621 123 ST NW SUITE 107SUITE 107 EDMONTON, AB T5N1P3	1992-Mar-30	22101502815

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FATHYA 230 EDWARDS DRIVE SW SUITE 185SUITE 185 EDMONTON, AB T6X1G7	1984-Jun-19	22050706789

SECURITY AGREEMENT

Debtor Name / Address	Reg.#
MOHAMED, FATHYA, ABDI 407, 8620 JASPER AVENUE EDMONTON, AB T5H3S6	21092332532

BANKRUPTCY / PROPOSAL

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FATHYA, ABDI 230 EDWARDS DRIVE SW SUITE 185SUITE 185 EDMONTON, AB T6X1G7	1984-Jun-19	22050706789

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FATHYAABDI, ABDI 230 EDWARDS DRIVE SW SUITE 185SUITE 185 EDMONTON, AB T6X1G7	1984-Jun-19	22050706789

MOHAMED, FATHE
290 PLAMONDON DR SUITE 214SUITE 214
FORT MCMURRAY, AB T9K0A5

21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1982-Apr-04	**Reg.#**
MOHAMED, FATHE, O 290 PLAMONDON DR SUITE 214SUITE 214 FORT MCMURRAY, AB T9K0A5		21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1992-Mar-30	**Reg.#**
MOHAMED, FATHUMZARA 10621 123 ST NW SUITE 107SUITE 107 EDMONTON, AB T5N1P3		22101502815

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1984-Jun-19	**Reg.#**
MOHAMED, FATHYA 230 EDWARDS DRIVE SW SUITE 185SUITE 185 EDMONTON, AB T6X1G7		22050706789

SECURITY AGREEMENT

Debtor Name / Address		**Reg.#**
MOHAMED, FATHYA, ABDI 407, 8620 JASPER AVENUE EDMONTON, AB T5H3S6		21092332532

BANKRUPTCY / PROPOSAL

Debtor Name / Address	Birth Date: 1984-Jun-19	**Reg.#**
MOHAMED, FATHYA, ABDI 230 EDWARDS DRIVE SW SUITE 185SUITE 185 EDMONTON, AB T6X1G7		22050706789

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1984-Jun-19	**Reg.#**
MOHAMED, FATHYAABDI, ABDI 230 EDWARDS DRIVE SW SUITE 185SUITE 185 EDMONTON, AB T6X1G7		22050706789

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FATMA
7 REDSTONE CIRCLE NE
CALGARY, AB T3N 0M8

Birth Date:
1985-Jun-20

Reg.#

19091619526

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FATMA, IBRAHIM
3010 16A AVENUE NORTH WEST
EDMONTON, AB T6T 0P8

Birth Date:
1978-May-29

Reg.#

22060400013

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FATUMO
8415 36 AVEN NW
EDMONTON, AB T6K 0J7

Birth Date:
1991-Jan-01

Reg.#

22032322495

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FAWZIA
12312 - 152C AVE
EDMONTON, AB T5X 1Z2

Birth Date:
1955-Jun-04

Gender:
Female

Reg.#

15060942444

WRIT OF ENFORCEMENT

Debtor Name / Address

MOHAMED, FERDOSE
726 175A STREET SW
EDMONTON, AB T6W 2G5

Birth Date:
1997-Jul-21

Reg.#

20100902102

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FIROZ
1088 WEDGEWOOD BLVD NW
EDMONTON, AB T6M2L6

Birth Date:
1960-Jul-17

Reg.#

22092701442

SECURITY AGREEMENT

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FATMA
7 REDSTONE CIRCLE NE
CALGARY, AB T3N 0M8

Birth Date:
1985-Jun-20

Reg.#

19091619526

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FATMA, IBRAHIM
3010 16A AVENUE NORTH WEST
EDMONTON, AB T6T 0P8

Birth Date:
1978-May-29

Reg.#

22060400013

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FATUMO
8415 36 AVEN NW
EDMONTON, AB T6K 0J7

Birth Date:
1991-Jan-01

Reg.#

22032322495

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FAWZIA
12312 - 152C AVE
EDMONTON, AB T5X 1Z2

Birth Date:
1955-Jun-04

Gender:
Female

Reg.#

15060942444

WRIT OF ENFORCEMENT

Debtor Name / Address

MOHAMED, FERDOSE
726 175A STREET SW
EDMONTON, AB T6W 2G5

Birth Date:
1997-Jul-21

Reg.#

20100902102

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FIROZ
1088 WEDGEWOOD BLVD NW
EDMONTON, AB T6M2L6

Birth Date:
1960-Jul-17

Reg.#

22092701442

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FOZI, SALD
9-72 ABERGALE CLOSE NE
CALGARY, AB T2A 6J1

Birth Date:
1986-Jan-01

Reg.#

21013003856

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FOZIA, AHMED
10482 16AVE NW
EDMONTON, AB T6J 5N8

Birth Date:
1980-May-17

Reg.#

21070608002

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FUAD, H
7006 149 AVEN NW
EDMONTON, AB T5C2V3

Birth Date:
1983-Mar-02

Reg.#

22072108062

SECURITY AGREEMENT

Debtor Name / Address

MOHAMED, FUAD, HUSSEIN
7006 149 AVEN NW
EDMONTON, AB T5C2V3

Birth Date:
1983-Mar-02

Reg.#

22072108062

SECURITY AGREEMENT

Debtor Name / Address

MOHAMEDD, FATHE, K
290 PLAMONDON DR SUITE 214SUITE 214
FORT MCMURRAY, AB T9K0A5

Birth Date:
1982-Apr-04

Reg.#

21081130074

SECURITY AGREEMENT

Debtor Name / Address

MOHAMMAD, FAIYAZ
1077 EATON ROAD
EDMONTON, AB T6M1M9

Birth Date:
1976-Dec-08

Reg.#

23010533063

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FOZI, SALD 9-72 ABERGALE CLOSE NE CALGARY, AB T2A 6J1	1986-Jan-01	21013003856

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FOZIA, AHMED 10482 16AVE NW EDMONTON, AB T6J 5N8	1980-May-17	21070608002

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FUAD, H 7006 149 AVEN NW EDMONTON, AB T5C2V3	1983-Mar-02	22072108062

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMED, FUAD, HUSSEIN 7006 149 AVEN NW EDMONTON, AB T5C2V3	1983-Mar-02	22072108062

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMEDD, FATHE, K 290 PLAMONDON DR SUITE 214SUITE 214 FORT MCMURRAY, AB T9K0A5	1982-Apr-04	21081130074

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAIYAZ 1077 EATON ROAD EDMONTON, AB T6M1M9	1976-Dec-08	23010533063

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FARAZ RAUF 213 CITYSCAPE LANE NE CALGARY, AB T3J4E8	1983-Apr-19	22122016035

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FARIHA 11024 HIDDEN VALLEY DRIVE NW CALGARY, AB T3A 5W5	1973-Nov-15	21021104706

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAZAAN, ASAD APT 11187 HARVEST HILLS GATE NE CALGARY, AB T3K 3X2	1988-Nov-17	17062932805

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAZAAN, ASAD 11187 HARVEST HILLS GATE NE CALGARY, AB T3K 3X2	1988-Nov-17	17081831395

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAZAAN ASAD 11187 HARVEST HILLS GATE NE CALGARY, AB T3K 3X2	1988-Nov-17	21070909949

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FOWZIA 2228 28 AVENUE SW CALGARY, AB T2T1K7	1981-Mar-09	22110913114

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1981-Mar-09	

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FARAZ RAUF 213 CITYSCAPE LANE NE CALGARY, AB T3J4E8	1983-Apr-19	22122016035

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FARIHA 11024 HIDDEN VALLEY DRIVE NW CALGARY, AB T3A 5W5	1973-Nov-15	21021104706

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAZAAN, ASAD APT 11187 HARVEST HILLS GATE NE CALGARY, AB T3K 3X2	1988-Nov-17	17062932805

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAZAAN, ASAD 11187 HARVEST HILLS GATE NE CALGARY, AB T3K 3X2	1988-Nov-17	17081831395

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FAZAAN ASAD 11187 HARVEST HILLS GATE NE CALGARY, AB T3K 3X2	1988-Nov-17	21070909949

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMAD, FOWZIA 2228 28 AVENUE SW CALGARY, AB T2T1K7	1981-Mar-09	22110913114

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1981-Mar-09	

MOHAMMAD, FOWZIAAKHTAR, AKHTAR
2228 28 AVENUE SW
CALGARY, AB T2T1K7

22110913114

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FAHEEM 7650 38 AV NW SUITE 216BSUITE 216B EDMONTON, AB T6K2L6	1990-Jan-23	20072425192

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FAHEEM 7650 38 AVENUE NW #SUITE 216B EDMONTON, AB T6K 2L6	1990-Jan-23	20090106871

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FAIRYANA, ALI 177 SANTANA CRES FORT SASKATCHEWAN, AB T8L 0T4	1988-Dec-24 Gender: Female	22041917712

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FAIZAN 164 BLACKBURN DRIVE WEST DRIVE EDMONTON, AB T6W 1B6	1991-Mar-03	18010916697

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FARAH 5011 140 AVENUE NW SUITE 312 EDMONTON, AB T6V 0E7	1970-Jan-15	18070319201

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1991-Mar-03	

MOHAMMAD, FOWZIAAKHTAR, AKHTAR
2228 28 AVENUE SW
CALGARY, AB T2T1K7

22110913114

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1990-Jan-23	
MOHAMMED, FAHEEM 7650 38 AV NW SUITE 216BSUITE 216B EDMONTON, AB T6K2L6		20072425192

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1990-Jan-23	
MOHAMMED, FAHEEM 7650 38 AVENUE NW #SUITE 216B EDMONTON, AB T6K 2L6		20090106871

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1988-Dec-24	
MOHAMMED, FAIRYANA, ALI 177 SANTANA CRES FORT SASKATCHEWAN, AB T8L 0T4	Gender: Female	22041917712

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1991-Mar-03	
MOHAMMED, FAIZAN 164 BLACKBURN DRIVE WEST DRIVE EDMONTON, AB T6W 1B6		18010916697

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1970-Jan-15	
MOHAMMED, FARAH 5011 140 AVENUE NW SUITE 312 EDMONTON, AB T6V 0E7		18070319201

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
	1991-Mar-03	

MOHAMMED, FARDEEN
16108 32 AV SW
EDMONTON, AB T6W4P3

21092324266

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FARHAD 145 KINNIBURGH BOULEVARD CHESTERMERE, AB T1X0M2	1985-Sep-01	19060637543

SECURITY AGREEMENT

Debtor Name / Address	Reg.#
MOHAMMED, FARHAD 145 KINNIBURGH BLVD CHESTERMERE, AB T1X 0M2	19120933803

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FATIMA, S 17128 64 ST NW EDMONTON, AB T5Y 3T6	1965-Nov-03	22112404556

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FATMA 955 MCPHERSON ROAD NE SUITE 310 CALGARY, AB T2E 6V3	1990-Oct-10	20111628694

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FATMA 17128 64 ST NW EDMONTON, AB T5Y 3T6	1965-Nov-03	22112404556

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMMED, FATMA, ALI 955 MCPHERSON ROAD NE SUITE 310 CALGARY, AB T2E 6V3	1990-Oct-10	20111628694

MOHAMMED, FARDEEN
16108 32 AV SW
EDMONTON, AB T6W4P3

21092324266

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1985-Sep-01	**Reg.#**
MOHAMMED, FARHAD 145 KINNIBURGH BOULEVARD CHESTERMERE, AB T1X0M2		19060637543

SECURITY AGREEMENT

Debtor Name / Address		**Reg.#**
MOHAMMED, FARHAD 145 KINNIBURGH BLVD CHESTERMERE, AB T1X 0M2		19120933803

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1965-Nov-03	**Reg.#**
MOHAMMED, FATIMA, S 17128 64 ST NW EDMONTON, AB T5Y 3T6		22112404556

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1990-Oct-10	**Reg.#**
MOHAMMED, FATMA 955 MCPHERSON ROAD NE SUITE 310 CALGARY, AB T2E 6V3		20111628694

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1965-Nov-03	**Reg.#**
MOHAMMED, FATMA 17128 64 ST NW EDMONTON, AB T5Y 3T6		22112404556

SECURITY AGREEMENT

Debtor Name / Address	Birth Date: 1990-Oct-10	**Reg.#**
MOHAMMED, FATMA, ALI 955 MCPHERSON ROAD NE SUITE 310 CALGARY, AB T2E 6V3		20111628694

SECURITY AGREEMENT

Debtor Name / Address

MOHAMMED, FAUD
201 DAWSON DR
CHESTERMERE, AB T1X1Z8

Birth Date:
1968-May-30

Reg.#

22120124063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMMED, FAUD
201 DAWSON DR
CHESTERMERE, AB T1X1Z8

Birth Date:
1968-May-30

Reg.#

22120124063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMMED, FAZIA, TASNEEM
145 KINNIBURGH BOULEVARD
CHESTERMERE, AB T1X0M2

Birth Date:
1987-Oct-26

Reg.#

19060637543

SECURITY AGREEMENT

Debtor Name / Address

MOHAMMED, FEEROZ
H102 3204 116 A AVE
EDMONTON, AB T5W 4W7

Birth Date:
1962-Nov-18

Gender:
Male

Reg.#

17050931673

MAINTENANCE ORDER

Debtor Name / Address

MOHAMMED, FEROZ
H102 3204 116 A AVE
EDMONTON, AB T5W 4W7

Birth Date:
1962-Nov-18

Gender:
Male

Reg.#

17050931673

MAINTENANCE ORDER

Debtor Name / Address

MOHAMMED, FUAD
201 DAWSON DR
CHESTERMERE, AB T1X1Z8

Birth Date:
1968-May-30

Reg.#

22120124063

SECURITY AGREEMENT

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMMED, FAUD 201 DAWSON DR CHESTERMERE, AB T1X1Z8	1968-May-30	22120124063

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMMED, FAUD 201 DAWSON DR CHESTERMERE, AB T1X1Z8	1968-May-30	22120124063

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMMED, FAZIA, TASNEEM 145 KINNIBURGH BOULEVARD CHESTERMERE, AB T1X0M2	1987-Oct-26	19060637543

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMMED, FEEROZ H102 3204 116 A AVE EDMONTON, AB T5W 4W7	1962-Nov-18 Gender: Male	17050931673

MAINTENANCE ORDER

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMMED, FEROZ H102 3204 116 A AVE EDMONTON, AB T5W 4W7	1962-Nov-18 Gender: Male	17050931673

MAINTENANCE ORDER

Debtor Name / Address	Birth Date:	**Reg.#**
MOHAMMED, FUAD 201 DAWSON DR CHESTERMERE, AB T1X1Z8	1968-May-30	22120124063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMMED, FUAD, S
201 DAWSON DR
CHESTERMERE, AB T1X1Z8

Birth Date:
1968-May-30

Reg.#

22120124063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FARAH, M
202-6971 16 AVENUE SE
CALGARY, AB T2A0X8

Birth Date:
1986-Jan-01

Reg.#

21100800063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FARAH, MOHAMED
#7203, 32 RADCLIFFE CR SE
CALGARY, AB T2A 5W9

Birth Date:
1986-Jan-01

Reg.#

19032935221

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FARAH, MOHAMED
202-6971 16 AVENUE SE
CALGARY, AB T2A0X8

Birth Date:
1986-Jan-01

Reg.#

21100800063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FATIMA, HIRMOOGE
2819 79 ST NW
EDMONTON, AB T6K3Z7

Birth Date:
1993-Oct-28

Reg.#

17080336190

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FOZIE
38 115 VILLAGE ACRES
EDMONTON, AB T5C 3C9

Birth Date:
1982-Aug-15

Gender:
Male

Reg.#

22052006577

WRIT OF ENFORCEMENT

Debtor Name / Address

MOHAMMED, FUAD, S
201 DAWSON DR
CHESTERMERE, AB T1X1Z8

Birth Date:
1968-May-30

Reg.#

22120124063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FARAH, M
202-6971 16 AVENUE SE
CALGARY, AB T2A0X8

Birth Date:
1986-Jan-01

Reg.#

21100800063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FARAH, MOHAMED
#7203, 32 RADCLIFFE CR SE
CALGARY, AB T2A 5W9

Birth Date:
1986-Jan-01

Reg.#

19032935221

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FARAH, MOHAMED
202-6971 16 AVENUE SE
CALGARY, AB T2A0X8

Birth Date:
1986-Jan-01

Reg.#

21100800063

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FATIMA, HIRMOOGE
2819 79 ST NW
EDMONTON, AB T6K3Z7

Birth Date:
1993-Oct-28

Reg.#

17080336190

SECURITY AGREEMENT

Debtor Name / Address

MOHAMOUD, FOZIE
38 115 VILLAGE ACRES
EDMONTON, AB T5C 3C9

Birth Date:
1982-Aug-15

Gender:
Male

Reg.#

22052006577

WRIT OF ENFORCEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARDOWSA, KHALIF 16609 102A AVENUE NW SUITE 208 EDMONTON, AB T5P 4G7	1987-Dec-22	18013115025

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARDOWSA, KHALIF 16609 102A AVENUE NW SUITE 208 EDMONTON, AB T5P 4G7	1987-Dec-22	18013115025

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARHIA, AHMED 13818 64 STREET NW SUITE 32 EDMONTON, AB T5A 1R9	1972-Apr-04	17103139929

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARHIA, AHMED 6811 161 AV NW EDMONTON, AB T5Z3B2	1972-Apr-04	19061002425

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARTUN 128 COUNTRY VILLAGE MANOR NE CALGARY, AB T3K 0L6	1988-Oct-01	20041310374

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARTUN, MOSE 16C GREENBROOK CRESCENT E BROOKS, AB T1R 0J7	1993-Jul-27	20012728692

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1993-Jan-21	

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARDOWSA, KHALIF 16609 102A AVENUE NW SUITE 208 EDMONTON, AB T5P 4G7	1987-Dec-22	18013115025

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARDOWSA, KHALIF 16609 102A AVENUE NW SUITE 208 EDMONTON, AB T5P 4G7	1987-Dec-22	18013115025

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARHIA, AHMED 13818 64 STREET NW SUITE 32 EDMONTON, AB T5A 1R9	1972-Apr-04	17103139929

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARHIA, AHMED 6811 161 AV NW EDMONTON, AB T5Z3B2	1972-Apr-04	19061002425

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARTUN 128 COUNTRY VILLAGE MANOR NE CALGARY, AB T3K 0L6	1988-Oct-01	20041310374

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
MOHAMUD, FARTUN, MOSE 16C GREENBROOK CRESCENT E BROOKS, AB T1R 0J7	1993-Jul-27	20012728692

SECURITY AGREEMENT

Debtor Name / Address	Birth Date:	Reg.#
	1993-Jan-21	

MOHUMED, FADUMO
15339 121 STREET NW
EDMONTON, AB T5X 3B3

Gender:
Female

19100309226

WRIT OF ENFORCEMENT

Debtor Name / Address

Birth Date:
1993-Jan-21

Reg.#

22020913586

MOHUMED, FADUMO
107 14503 MILLER BLVD NW
EDMONTON, AB T5Y3A7

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1993-Jan-21

Reg.#

22020913586

MOHUMED, FADUMO, ABDULAHI
107 14503 MILLER BLVD NW
EDMONTON, AB T5Y3A7

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1968-Sep-25

Reg.#

16091931388

MOUHAMAD, FAISSAL, I
101 - 5018 45TH STREET,
RED DEER, AB T4N1K9

SECURITY AGREEMENT

Debtor Name / Address

Reg.#

21070532323

MUHAMMAD, FARES
228 WHITEWOOD PL NE
CALGARY, AB T1Y 3N4

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1981-Dec-16

Reg.#

22121604562

MUHAMMAD, FIDA
30 DENTON AVENUE SUITE 1704SUITE 1704
SCARBOROUGH, ON M1L4P2

SECURITY AGREEMENT

Result Complete

MOHUMED, FADUMO
15339 121 STREET NW
EDMONTON, AB T5X 3B3

Gender:
Female

19100309226

WRIT OF ENFORCEMENT

Debtor Name / Address

Birth Date:
1993-Jan-21

Reg.#

MOHUMED, FADUMO
107 14503 MILLER BLVD NW
EDMONTON, AB T5Y3A7

22020913586

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1993-Jan-21

Reg.#

MOHUMED, FADUMO, ABDULAHI
107 14503 MILLER BLVD NW
EDMONTON, AB T5Y3A7

22020913586

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1968-Sep-25

Reg.#

MOUHAMAD, FAISSAL, I
101 - 5018 45TH STREET,
RED DEER, AB T4N1K9

16091931388

SECURITY AGREEMENT

Debtor Name / Address

Reg.#

MUHAMMAD, FARES
228 WHITEWOOD PL NE
CALGARY, AB T1Y 3N4

21070532323

SECURITY AGREEMENT

Debtor Name / Address

Birth Date:
1981-Dec-16

Reg.#

MUHAMMAD, FIDA
30 DENTON AVENUE SUITE 1704SUITE 1704
SCARBOROUGH, ON M1L4P2

22121604562

SECURITY AGREEMENT

This is Exhibit JL-3 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

_____

A Commissioner of Oaths for
the Province of Alberta

_____

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

This is Exhibit JL-3 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

A Commissioner of Oaths for
the Province of Alberta

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

MASTER LEASE AGREEMENT No. 0405202252Dental

Lessee Name: 52 Dental Corporation

Address: 3505-52nd St. SE, Calgary, AB T2B 3R3

Contact Name: Fetoun Ahmad

Email: fetoun1@icloud.com

Lessor Name; Faissal Mouhamad

Address: 7151 50th Avenue, Red Deer, AB T4N 4E4

Telephone: (403) 347-7477

Email: drmouhamad@hotmail.com

Contract Start Date: 04.05.2022

Contract End Date: 03.05.2029

Number of Payments: 84

Number of Skip Payment: 6

Annual Interest Rate: 6%

Monthly Payment: $8338.78 plus GST CANADIAN DOLLAR

First Payment Due Date: 4th November 2022

Equipment Address; #100 3505 52nd Street, SE Calgary, AB T2B 3R3

Terms and Conditions Attachment

Equipment Schedule Attached

Date 04.05.2022
52 Dental Corporations
By:
Signature X
Name: Fetoun Ahmad
Title: Director

MASTER LEASE AGREEMENT No. 0405202252Dental

Lessee Name: 52 Dental Corporation

Address: 3505-52nd St. SE, Calgary, AB T2B 3R3

Contact Name: Fetoun Ahmad

Email: fetoun1@icloud.com

Lessor Name; Faissal Mouhamad

Address: 7151 50th Avenue, Red Deer, AB T4N 4E4

Telephone: (403) 347-7477

Email: drmouhamad@hotmail.com

Contract Start Date: 04.05.2022

Contract End Date: 03.05.2029

Number of Payments: 84

Number of Skip Payment: 6

Annual Interest Rate: 6%

Monthly Payment: $8338.78 plus GST CANADIAN DOLLAR

First Payment Due Date: 4th November 2022

Equipment Address; #100 3505 52nd Street, SE Calgary, AB T2B 3R3

Terms and Conditions Attachment

Equipment Schedule Attached

Date 04.05.2022
52 Dental Corporations
By:
Signature X _____
Name: Fetoun Ahmad
Title: Director

TERMS AND CONDITIONS ATTACHMENT

This attachment is attached to and forms part of:
Agreement No. 04052022 52Dental
Lessee: 52 Dental Corporation

Capitalized words not defined in these terms and conditions refer to terms described in the first page of the agreement

1.Lease, Term and Rent: the Lessor Leases to Lessee and Lessee leases from Lessor the Personal property ("Equipment") described in any lease Agreement schedule ("Lease Agreement") executed and to be executed by the parties. Each Lease Agreement will constitute a separate lease of the Equipment described in the Lease Agreement and the terms of this Agreement will be incorporated into and form part of each Lease Agreement. The term of any Lease Agreement ("Term") begins on the commencement date to be established by Lessor on its acceptance of the Lease Agreement but, will be no earlier than the date the Equipment is delivered to Lessee, unless Lessee directs otherwise in writing ("Commencement Date"). Lessee will pay rent as described in each Lease Agreement schedule("Rent"). Lessee will pay provincial sales tax, goods and services tax and/or harmonized sales tax and other taxes applicable to the Equipment and the Lease Agreement. Any security deposit set forth in the Lease Agreement ("Security Deposit") will be non-interest bearing and may be held by Lessor and applied by it to any amount due under this Agreement. Upon termination of this Agreement, Lessor will return any balance of the Security Deposit to Lessee. Lessee will pay partial Rent and the Security Deposit on the date Lessor paid Equipment supplier for the Equipment.

2. Pre-Authorized Payment Plan: Lessee authorizes Lessor to debit from Lessee's account for business purposes, the rent and all other amounts due under this Agreement. Each amount will be debited on its respective due date as determined under this Agreement. Lessee has attached a sample cheque marked "void" identifying the particulars of the account to be debited or has separately provided Lessor with Lessee's account information. Lessee will immediately notify Lessor in writing of any change in Lessee's account. The signatory/ies to this Agreement is/are authorized to debit Lessee's bank account. If Lessor waives the requirement for pre-authorized debit, then Lessee will pay a service charge for other payment methods. Lessee (a) may change or cancel this authorization at any time on 10 days written notice to Lessor; and (b) has certain recourse rights if any debit does not comply with this Agreement (for example, the right to receive reimbursement for any debit that is not authorized or is not consistent with this Agreement). To obtain information on recourse rights, a sample cancellation form or information on the right to cancel an authorization, Lessee may contact the lessor. Lessor will obtain the specific prior authorization of Lessee for one-time or other sporadic debits, the amounts or due dates of which are not identified in this Agreement. Lessee waives the right to receive prior notice of all other amounts to be debited and the dates on which such debits will be processed, as well as notice of future changes to such amounts or dates. Lessor may assign this authorization to any third party to whom it assigns its interest in this Agreement. Lessee will be notified of the identity and contact information of any such assignee. This authorization applies to any payments due pursuant to any invoice, interim funding

TERMS AND CONDITIONS ATTACHMENT

This attachment is attached to and forms part of:
Agreement No. 04052022 52Dental
Lessee: 52 Dental Corporation

Capitalized words not defined in these terms and conditions refer to terms described in the first page of the agreement

1.Lease, Term and Rent: the Lessor Leases to Lessee and Lessee leases from Lessor the Personal property ("Equipment") described in any lease Agreement schedule ("Lease Agreement") executed and to be executed by the parties. Each Lease Agreement will constitute a separate lease of the Equipment described in the Lease Agreement and the terms of this Agreement will be incorporated into and form part of each Lease Agreement. The term of any Lease Agreement ("Term") begins on the commencement date to be established by Lessor on its acceptance of the Lease Agreement but, will be no earlier than the date the Equipment is delivered to Lessee, unless Lessee directs otherwise in writing ("Commencement Date"). Lessee will pay rent as described in each Lease Agreement schedule("Rent"). Lessee will pay provincial sales tax, goods and services tax and/or harmonized sales tax and other taxes applicable to the Equipment and the Lease Agreement. Any security deposit set forth in the Lease Agreement ("Security Deposit") will be non-interest bearing and may be held by Lessor and applied by it to any amount due under this Agreement. Upon termination of this Agreement, Lessor will return any balance of the Security Deposit to Lessee. Lessee will pay partial Rent and the Security Deposit on the date Lessor paid Equipment supplier for the Equipment.

2. Pre-Authorized Payment Plan: Lessee authorizes Lessor to debit from Lessee's account for business purposes, the rent and all other amounts due under this Agreement. Each amount will be debited on its respective due date as determined under this Agreement. Lessee has attached a sample cheque marked "void" identifying the particulars of the account to be debited or has separately provided Lessor with Lessee's account information. Lessee will immediately notify Lessor in writing of any change in Lessee's account. The signatory/ies to this Agreement is/are authorized to debit Lessee's bank account. If Lessor waives the requirement for pre-authorized debit, then Lessee will pay a service charge for other payment methods. Lessee (a) may change or cancel this authorization at any time on 10 days written notice to Lessor; and (b) has certain recourse rights if any debit does not comply with this Agreement (for example, the right to receive reimbursement for any debit that is not authorized or is not consistent with this Agreement). To obtain information on recourse rights, a sample cancellation form or information on the right to cancel an authorization, Lessee may contact the lessor. Lessor will obtain the specific prior authorization of Lessee for one-time or other sporadic debits, the amounts or due dates of which are not identified in this Agreement. Lessee waives the right to receive prior notice of all other amounts to be debited and the dates on which such debits will be processed, as well as notice of future changes to such amounts or dates. Lessor may assign this authorization to any third party to whom it assigns its interest in this Agreement. Lessee will be notified of the identity and contact information of any such assignee. This authorization applies to any payments due pursuant to any invoice, interim funding

agreement or other agreement relating to this Lease and the Equipment.

3.No Warranties, No Cancellation: Lessee is leasing the Equipment "as is". Lessor does not make any warranty or representation whatsoever with respect to the Equipment, including, without limitation as to the durability, quality, condition or suitability of the Equipment for Lessee's purposes. Lessor will not be liable to Lessee for any loss, damage or expense of any kind caused directly or indirectly by the Equipment or its use, operation, or possession, or by any interruption of service or loss of use, or for any loss of business or damage however caused. Where permitted, Lessor assigns all manufacturers and supplier's warranties related to the Equipment to Lessee during the Term. This Agreement cannot be cancelled by Lessee during the Term for any reason including equipment failure, loss or damage. Lessee many no t revoke acceptance of the Equipment. Lessee acknowledges that Lessee selected the Equipment and the Equipment supplier, Lessor purchased the Equipment at Lessee's request and on Lessee's instructions. Lessee shall perform, satisfy and discharge any purchaser obligations under any agreements with the Equipment supplier relating to the purchase of the Equipment, other than payment of the purchase price of the Equipment. Lessor is not responsible for equipment failure, software defects, the Equipment suppliers acts or the failure of the Equipment supplier or manufacturer to comply with any of its obligations. If any such failure or defects occur, Lessee may pursue any claim it may have against the Equipment supplier or manufacturer and will continue to comply with this Agreement.

4. Use, Location, Maintenance: Lessee certifies that the Equipment will be used solely for lawful business purposes and that the Equipment is not acquired for use primarily for personal, family or householder purposes. Lessee will operate and maintain the Equipment in accordance with any applicable manufacturer's instructions and recommendations and applicable laws. The Equipment will remain personal property and will no be affixed or attached to any lands or buildings without Lessor's prior written consent. Lessee will not relocate the Equipment from the Equipment location or operate the Equipment outside the Province of the Equipment location without Lessor's prior written consent. Lessee will (a) maintain the Equipment, at Lessee's cost in good repair and working order; (b) pay all costs relating to the use and operation of the Equipment; and 9c) not alter the Equipment in any manner without Lessor's prior written consent, any replacements, alterations or improvements to the Equipment's will form part of the Equipment and immediately become the property of Lessor.

5. Purchase Option: If no unremedied default exists, Lessee will have an option to purchase the Equipment, on the Purchase Option Date for the Purchase Option Price set forth in the Lease Agreement. If the Purchase is "Fair Market Value" then the Purchase Option Price will be the fair market value of the Equipment as of the Purchase Option Date, as determined by the Lessor. Lessee may exercise this purchase option by giving written notice to exercise to Lessor at least 60 days before the Purchase Option Date and paying the Purchase Option Price, plus applicable taxes, at least 30 days before the Purchase Option Date. If the required notice and payment are not received by Lessor by the specified dates, the purchase option will terminate. Upon payment by Lessee of the Purchase Option Price, Lessor will transfer Lessor's interest in the Equipment to Lessee, on an "as is, where is" basis, free of any security interests created by Lessor.

agreement or other agreement relating to this Lease and the Equipment.

3.No Warranties, No Cancellation: Lessee is leasing the Equipment "as is". Lessor does not make any warranty or representation whatsoever with respect to the Equipment, including, without limitation as to the durability, quality, condition or suitability of the Equipment for Lessee's purposes. Lessor will not be liable to Lessee for any loss, damage or expense of any kind caused directly or indirectly by the Equipment or its use, operation, or possession, or by any interruption of service or loss of use, or for any loss of business or damage however caused. Where permitted, Lessor assigns all manufacturers and supplier's warranties related to the Equipment to Lessee during the Term. This Agreement cannot be cancelled by Lessee during the Term for any reason including equipment failure, loss or damage. Lessee many no t revoke acceptance of the Equipment. Lessee acknowledges that Lessee selected the Equipment and the Equipment supplier, Lessor purchased the Equipment at Lessee's request and on Lessee's instructions. Lessee shall perform, satisfy and discharge any purchaser obligations under any agreements with the Equipment supplier relating to the purchase of the Equipment, other than payment of the purchase price of the Equipment. Lessor is not responsible for equipment failure, software defects, the Equipment suppliers acts or the failure of the Equipment supplier or manufacturer to comply with any of its obligations. If any such failure or defects occur, Lessee may pursue any claim it may have against the Equipment supplier or manufacturer and will continue to comply with this Agreement.

4. Use, Location, Maintenance: Lessee certifies that the Equipment will be used solely for lawful business purposes and that the Equipment is not acquired for use primarily for personal, family or householder purposes. Lessee will operate and maintain the Equipment in accordance with any applicable manufacturer's instructions and recommendations and applicable laws. The Equipment will remain personal property and will no be affixed or attached to any lands or buildings without Lessor's prior written consent. Lessee will not relocate the Equipment from the Equipment location or operate the Equipment outside the Province of the Equipment location without Lessor's prior written consent. Lessee will (a) maintain the Equipment, at Lessee's cost in good repair and working order; (b) pay all costs relating to the use and operation of the Equipment; and 9c) not alter the Equipment in any manner without Lessor's prior written consent, any replacements, alterations or improvements to the Equipment's will form part of the Equipment and immediately become the property of Lessor.

5. Purchase Option: If no unremedied default exists, Lessee will have an option to purchase the Equipment, on the Purchase Option Date for the Purchase Option Price set forth in the Lease Agreement. If the Purchase is "Fair Market Value" then the Purchase Option Price will be the fair market value of the Equipment as of the Purchase Option Date, as determined by the Lessor. Lessee may exercise this purchase option by giving written notice to exercise to Lessor at least 60 days before the Purchase Option Date and paying the Purchase Option Price, plus applicable taxes, at least 30 days before the Purchase Option Date. If the required notice and payment are not received by Lessor by the specified dates, the purchase option will terminate. Upon payment by Lessee of the Purchase Option Price, Lessor will transfer Lessor's interest in the Equipment to Lessee, on an "as is, where is" basis, free of any security interests created by Lessor.

6. Return of equipment: Lessee will return the Equipment to Lessor on the termination of a Lease Agreement, at Lessee's cost to a location directed by Lessor, in the same condition as it was delivered. Ordinary wear and tear excepted. If the Equipment is not purchased or returned to Lessor at the end of the Term, then provided that no unremedied default exists, the Lease Agreement will be automatically renewed on a month-to-month basis.

7. Insurance Loss, Damage: Lessee is responsible for and accepts the risk of loss or damage to the Equipment. Lessee will insure the Equipment against all risk of loss at replacement value in amounts on the term's acceptance to Lessor. Proceeds of such insurance may be applied at Lessor's option, to replacement or repair of the Equipment or toward payment of the Lessee's obligations under this Agreement. Lessee will also obtain at Lessor's request, comprehensive general liability insurance and insurance against any other risks, in amounts on terms acceptable to Lessor. Lessee will name Lessor as first loss payee and/or additional insured and provide Lessor written proof of this insurance. If Lessee does not provide Lessor with such proof of insurance, at Lessor's request, Lessee will pay Lessor a monthly loss damage waiver fee in consideration of Lessor waiving Lessee's obligation to obtain and provide proof of insurance. Such fee will be calculated within the first month of the Term and payable on the same date as Rent commencing on the third month of the Term. Written notice of this fee is incorporated by reference to this Lease. Lessor may (but is not obligated to) obtain insurance coverage to protect its interest in the Equipment.

8. Assignment: Lessee consents to the Lessor's assignment of this Agreement to a third party provided that the Lessor continues to be liable for its obligations, as lessor, under this agreement. Any assignee will be entitled to enforce all of Lessor's rights but will have no obligations under this Agreement. Lessee will not assign this Agreement or transfer, sublease, encumber, or give up possession of the Equipment without Lessor's prior written consent. If Lessor consents, Lessee will pay a reasonable assignment fee to cover Lessor's processing costs.

9. Indemnity: Lessee indemnifies and saves Lessor harmless from and againlosses ,expensesda mages, liabilities, claims and orders, including solicitors' fees on a solicitor and client basis arising from this Agreement or the Equipment, including any obligations imposed on Lessor by the Equipment supplier, except for loss caused solely by the negligence of Lessor. This indemnity will survive the termination of this Agreement.

10. Other fees and Charges: If any payment of Rent or other amounts payable under this Agreement is late, Lessee will pay a late fee, when it accrues of 2% per month (24% per annum) on the unpaid amount or $10 per month, whichever is greater, both before and after judgement. Lessee will also pay an insufficient funds charge of $60 for any dishonoured cheque or pre-authorized payment on the date that the cheque or payment is dishonoured. Lessee will pay (a) arrangement, documentation sale and lease back transaction (if applicable) fees for document processing costs on the due date of the first rent payment. (b) a re-documentation fee if and when this Agreement is cancelled and re-documented. (c) all applicable assignment and assumption fees in connection with each request by the Lessee to assign the Lessee's rights and interest in this Agreement to a third party (d) a fixture filing fee, if and when a fixture filing is required, and (e) all applicable lease expiry fees on the date this Agreement expires. Lessee will also pay all other reasonable administrative fees charged by Lessor to Lessee generally. Administrative fees are subject to change at the discretion of Lessor. A statement of the current amount of all administrative fee's payable is available upon request.

11. Default: If;(a) Lessee fails to pay any Rent or other amount payable under this Agreement when due; (b) Lessee fails to comply with any other term of this Agreement; (c) Lessee defaults under any other agreement with Lessor; (d) any representation made by Lessee in connection with this Agreement is or becomes untrue; (e) any of the Equipment is lost, stolen, damaged or destroyed and such loss is not covered by insurance; (f) Equipment is subjected to any liens,

6. Return of equipment: Lessee will return the Equipment to Lessor on the termination of a Lease Agreement, at Lessee's cost to a location directed by Lessor, in the same condition as it was delivered. Ordinary wear and tear excepted. If the Equipment is not purchased or returned to Lessor at the end of the Term, then provided that no unremedied default exists, the Lease Agreement will be automatically renewed on a month-to-month basis.

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encumbrances, hypothecs, security interests and claims; (g) Lessee makes any assignment for the benefit of Lessee's creditors, becomes insolvent, commits or threatens to commit any act of bankruptcy, winding up in dissolution, ceases or threatens to cease to carry on business or seeks any arrangement or compromise with Lessee's creditors; (h) any bankruptcy, receivership, winding up, dissolution, liquidation, or insolvency proceeding is commenced against Lessee; or (i) Lessor believes, acting reasonably and in good faith that the prospect payment under this Agreement is impaired; then all Rent and any other amounts to become due under this Agreement to the end of the Term shall immediately become due and payable on demand. Lessee will at its own cost on Lessor's demand immediately deliver the Equipment to a location directed by Lessor. Lessor may without notice and without resort to legal process, take immediate possession of the Equipment. Lessor may enter the premises where the Equipment is located for purposes of disabling or removal of the Equipment without incurring any liability to Lessee. Lessee will pay Lessor's cost of collection, re-possession of the Equipment and of the enforcement of Lessor's rights, including legal costs on a solicitor and client basis.

12. Miscellaneous: Lessee consents to the collection, use and disclosure of personal information by Lessor and its assignees for the purpose set out in this Agreement, to enable Lessor to provide leasing services to Lessee and to promote the products and services of Lessor and its affiliates. Lessor is entitled to conduct a personal investigation or credit check upon Lessee subject to applicable legislation. Lender is entitled to disclose financial and other information about Borrower to its affiliates for the purpose of assessing credit risks and promoting the products and services of Lender and its affiliates. A signed copy of this Agreement transmitted by email, facsimile or other electronic means is deemed to be an original. An electronic signature to this Agreement shall be as valid as an original signature. Time is of the essence of this Agreement. Each Lease Agreement will be construed according to the laws of the Province of the Location of the Equipment. To the extent permitted by law Lessee waives the provisions of the Limitation of Civil Rights Act of Saskatchewan. If applicable, the parties agree that this Agreement and all related documents be written in English. his Agreement constitutes a leasing as defined in the Civil Code of Quebec if the Equipment Location is in Quebec. Lessee will allow Lessor access to the Equipment for inspection during the Term. The Equipment is and will remain the sole property of Lessor during the Term. This Agreement will not become binding upon Lessor until accepted by Lessor. This Agreement is binding on Lessee's heirs, executors, administrators, successors and permitted assigns. If more than one Lessee is named in this Agreement, the liability of each Lessee will be joint and several and will not be affected by any amendment or renewal of this Agreement. Notice required under this Agreement will be provided to the Lessee in writing to the address set forth in this Agreement. Clerical errors will not affect the validity of this Agreement and Lessor may correct clerical errors provided that Lessor gives notice of the correction to. only Lessee acknowledge that the Equipment that the Equipment suppliers or their sales representatives or any not Lessor's agents and are not authorized to waive or change the terms of the Agreement or act on behalf of Lessor. Lessee acknowledges receipt of a copy of this Agreement and waives the delivery of a copy of any financing statement registered in respect of this Agreement. Where permitted, Lessor grants to Lessee and Lessee accepts a non-transferable and non-exclusive license to use any software referred to in this Agreement with the Equipment Lessee may not alter such software and will not copy, disclose or make such software available to any other person without Lessor's prior written consent.

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CS

EQUIPMENT SCHEDULE

This schedule is attached to and forms part of:

Agreement No. 0405202252Dental

Equipment Description:

068-1277 BELMON CHAIR SER AQ21F0016

068-1278 BELMON CHAIR SER AQ21G0004
068-1279 BELMON CHAIR SER AQ21G0002
068-1280 BELMON CHAIR SER AQ21F0059
068-1281 BELMON CHAIR SER AQ21F0014
068-1282 DELMON CHAIR SER AQ21G0008
068-1283 BELMON UNIT SER VW21E0235
068-1284 BELMON UNIT SER VW21E0238
068-1285 BELMON UNIT SER VW21E0245
068-1286 BELMON UNIT SER VW21C0185
068-1287 BELMON UNIT SER VW21E0242
068-1288 BELMON UNIT SER VW21E0234
068-1289 BELMON LIGHT SER AV21K0332
068-1290 BELMON LIGHT SER AV21K0328
068-1291 BELMON LIGHT SER AV21K0330
068-1292 BELMON LIGHT SER AV21K0335
068-1293 BELMON LIGHT SER AV21K0345
068-1294 BELMON LIGHT SER AV21K0339
068-1295 BELMON UNIT
068-1296 BELMON UNIT
068-1297 BELMON UNIT
068-1298 BELMON UNIT
068-1299 BELMON UNIT
068-1300 BELMON UNIT
068-1301 BELMON UNIT
068-1302 BELMON UNIT
068-1303 BELMON UNIT
068-1304 BELMON UNIT
068-1305 BELMON UNIT
068-1306 BELMON UNIT
068-1307 BELMON XR INTRA PHOT SER EX21L0581
068-1308 BELMON XR INTRA PHOT SER EX21L0582
068-1309 BELMON XR INTRA PHOT SER EX21K0126
068-1310 BELMON XR INTRA PHOT SER EX21K0129
068-1311 BELMON XR INTRA PHOT SER EX21L0574
068-1312 BELMON XR INTRA PHOT SER EX 21L0575
068-1482 AIRTEC EVVAC PUMP SER MM700-22040017, MM100-22040024
068-1483 AIRTEC EVVAC PUMP
068-1484 AIRTEC COMPRESSOR SER AS700-22040008
068-1485 AIRTEC EVA COMPNT SER AP122030028
068-1486 AIRTEC EVA COMPNT
068-1487 AIRTEC MASTR CTRL
068-0501 SIRONA CONEBEAMXR SER 1081251245
068-1418 SCHICK DIG XR SEN SER WL 10000026
068-1421 SCHICK DIG XR SEN SER WL 10000005
068-1416 SCHICK DIG X
SEN SER WL20000099
068-1501 SCICAN THERMO SER 400122D00004
0068-1502 SCICAN THERMO SER 400122D00008
067-9964 W&H AUTOCLAVE SER 162302
067-9965 W&H AUTOCLAVE SER 162320
068-0760 W&H AUTOCLAVE
068-0761 W&H AUTOCLAVE

EQUIPMENT SCHEDULE

This schedule is attached to and forms part of:

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068-1294 BELMON LIGHT SER AV21K0339
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068-1301 BELMON UNIT
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068-1305 BELMON UNIT
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068-1307 BELMON XR INTRA PHOT SER EX21L0581
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068-1421 SCHICK DIG XR SEN SER WL 10000005
068-1416 SCHICK DIG X
SEN SER WL20000099
068-1501 SCICAN THERMO SER 400122D00004
0068-1502 SCICAN THERMO SER 400122D00008
067-9964 W&H AUTOCLAVE SER 162302
067-9965 W&H AUTOCLAVE SER 162320
068-0760 W&H AUTOCLAVE
068-0761 W&H AUTOCLAVE

52 DENTAL CORPORATION

000008

DATE 2 0 - -
Y Y Y Y M M D D

PAY to
the order of

$

DOLLARS
100

92999

THE BANK OF NOVA SCOTIA
TIMBERLANDS CENTRE
439 TIMBERLANDS DR., UNIT 6113
RED DEER, AB T4P 0Z3

52 DENTAL CORPORATION

RE

per

⑈000008⑈ ⑆92999⑈002⑆ 00191⑈19⑈

52 DENTAL CORPORATION

000008

DATE 2 0 - -
Y Y Y Y M M D D

PAY to
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_____ DOLLARS
100

THE BANK OF NOVA SCOTIA
www.scotiabank.com 1-800-4-SCOTIA
TIMBERLANDS CENTRE
499 TIMBERLANDS DR., UNIT 9113
RED DEER, AB T4P 0Z3

92999

52 DENTAL CORPORATION

RE _____ PER _____

⑈000008⑈ ⑆92999⑆002⑆ 00191 19⑈

This is Exhibit JL-4 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

_____

A Commissioner of Oaths for
the Province of Alberta

_____

LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

This is Exhibit JL-4 referred to in the affidavit of JEAN LAFLEUR sworn before me on January 10, 2023.

A Commissioner of Oaths for
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LINDSAY AMANTEA, BARRISTER, SOLICITOR AND NOTARY PUBLIC
My Appointment/Commission is Perpetual

Government of Alberta

Personal Property Registry
Search Results Report

Search ID #: Z15743767

Transmitting Party

ELDOR-WAL REGISTRATIONS (1987) LTD.

1200, 10123 99 st NW
EDMONTON, AB T5J 3H1

Party Code: 50073881
Phone #: 780 429 5969
Reference #:

Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Business Debtor Search For:

52 DENTAL CORPORATION

Exact Result(s) Only Found

NOTE:

A complete Search may result in a Report of Exact and Inexact Matches.
Be sure to read the reports carefully.

REGISTRAR OF PERSONAL PROPERTY

Government of Alberta

Personal Property Registry
Search Results Report

Search ID #: Z15743767

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REGISTRAR OF PERSONAL PROPERTY

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 16080309855
Registration Date: 2016-Aug-03
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2026-Aug-03 23:59:59

Exact Match on: Debtor No: 3

Amendments to Registration

21070901456	Renewal	2021-Jul-09
22081811079	Amendment	2022-Aug-18

Debtor(s)

Block		Status
1	MCIVOR DEVELOPMENTS LTD. SUITE 101, 5018 45 ST RED DEER, AB T4N 1K9	Current
2	DELTA DENTAL CORP. 202 - 4921 49 STREET RED DEER, AB T4N 1V2	Current by 22081811079
3	52 DENTAL CORPORATION 202 - 4921 49 STREET RED DEER, AB T4N 1V2	Current by 22081811079
4	52 WELLNESS CENTER INC. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811079

Search ID #: Z15743767

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52 DENTAL CORPORATION
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4	52 WELLNESS CENTER INC. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811079

Block		Status
5	AHMAD, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811079

Block		Status
6	AHMED, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811079

Block		Status
7	MICHAEL DAVE MANAGEMENT LTD 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811079

Block		Status
8	PARADISE MCIVOR DEVELOPMENTS LTD. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811079

Secured Party / Parties

Block		Status
1	ROYAL BANK OF CANADA 36 YORK MILLS ROAD, 4TH FLOOR TORONTO, ON M2P 0A4	Deleted by 22081811079

Block		Status
2	ROYAL BANK OF CANADA 36 YORK MILLS ROAD, 4TH FLOOR TORONTO, ON M2P 0A4 Email: torbscpr@rbc.com	Current by 22081811079

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY	Current

Block		Status
5	AHMAD, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811079

Block		Status
6	AHMED, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811079

Block		Status
7	MICHAEL DAVE MANAGEMENT LTD 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811079

Block		Status
8	PARADISE MCIVOR DEVELOPMENTS LTD. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811079

Secured Party / Parties

Block		Status
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Block		Status
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Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 16082230828
Registration Date: 2016-Aug-22
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2026-Aug-22 23:59:59

Exact Match on: Debtor No: 3

Amendments to Registration

22072128251	Amendment	2022-Jul-21
22080926628	Amendment	2022-Aug-09
22081709434	Amendment	2022-Aug-17
22081711767	Amendment	2022-Aug-17
22081727466	Amendment	2022-Aug-17

Debtor(s)

Block		Status
1	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION 101-5018-45TH STREET RED DEER, AB T4N 1K9	Current
2	DELTA DENTAL CORP 202-4921 49ST RED DEER, AB T4N 1V2	Current by 22072128251
3	52 DENTAL CORPORATION 202-4921 49ST RED DEER, AB T4N 1V2	Current by 22072128251
4	52 WELLNESS CENTRE INC. 600, 4911 51 ST RED DEER, AB T4N6V4	Current by 22080926628

Search ID #: Z15743767

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Registration Number: 16082230828
Registration Date: 2016-Aug-22
Registration Type: SECURITY AGREEMENT
Registration Status: Current
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Exact Match on: Debtor No: 3

Amendments to Registration

22072128251	Amendment	2022-Jul-21
22080926628	Amendment	2022-Aug-09
22081709434	Amendment	2022-Aug-17
22081711767	Amendment	2022-Aug-17
22081727466	Amendment	2022-Aug-17

Debtor(s)

Block		Status
1	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION 101-5018-45TH STREET RED DEER, AB T4N 1K9	Current
2	DELTA DENTAL CORP 202-4921 49ST RED DEER, AB T4N 1V2	Current by 22072128251
3	52 DENTAL CORPORATION 202-4921 49ST RED DEER, AB T4N 1V2	Current by 22072128251
4	52 WELLNESS CENTRE INC. 600, 4911 51 ST RED DEER, AB T4N6V4	Current by 22080926628

Block		Status
5	AHMAD, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1984-Mar-01	Current by 22081709434
6	FETOUN, AHMED 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1984-Mar-01	Current by 22081711767
7	MICHAEL DAVE MANAGEMENT LTD. 600, 4911 - 51 STREET RED DEER, AB T4N 6V4	Current by 22081727466
8	MOUHAMAD, FAISSAL 7151-50TH AVENUE RED DEER, AB T4N 4E4	Current by 22081727466
9	PARADISE MCIVOR DEVELOPMENTS LTD. 600, 4911 - 51 STREET RED DEER, AB T4N 6V4	Current by 22081727466

Secured Party / Parties

Block		Status
1	ROYAL BANK OF CANADA 2ND FLOOR, 4943 ROSS STREET RED DEER, AB T4N 1X8	Deleted by 22072128251
2	ROYAL BANK OF CANADA 2ND FLOOR, 4943 ROSS STREET RED DEER, AB T4N 1X8 Email: torbscpr@rbc.com	Current by 22072128251

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY	Current

Block		Status
5	AHMAD, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1984-Mar-01	Current by 22081709434
6	FETOUN, AHMED 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1984-Mar-01	Current by 22081711767
7	MICHAEL DAVE MANAGEMENT LTD. 600, 4911 - 51 STREET RED DEER, AB T4N 6V4	Current by 22081727466
8	MOUHAMAD, FAISSAL 7151-50TH AVENUE RED DEER, AB T4N 4E4	Current by 22081727466
9	PARADISE MCIVOR DEVELOPMENTS LTD. 600, 4911 - 51 STREET RED DEER, AB T4N 6V4	Current by 22081727466

Secured Party / Parties

Block		Status
1	ROYAL BANK OF CANADA 2ND FLOOR, 4943 ROSS STREET RED DEER, AB T4N 1X8	Deleted by 22072128251
2	ROYAL BANK OF CANADA 2ND FLOOR, 4943 ROSS STREET RED DEER, AB T4N 1X8 Email: torbscpr@rbc.com	Current by 22072128251

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY	Current

2	ALL PERSONAL PROPERTY OF THE DEBTOR LOCATED AT 101-5018-45TH STREET, RED DEER, ALBERTA, T4N 1K9	Current
3	ALL PRESENT PROPERTY OF THE DEBTOR LOCATED AT 5207 POWER CENTRE BLVD., DRAYTON VALLEY, ALBERTA, T7A 0A5	Current

2	ALL PERSONAL PROPERTY OF THE DEBTOR LOCATED AT 101-5018-45TH STREET, RED DEER, ALBERTA, T4N 1K9	Current
3	ALL PRESENT PROPERTY OF THE DEBTOR LOCATED AT 5207 POWER CENTRE BLVD., DRAYTON VALLEY, ALBERTA, T7A 0A5	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 18042545916
Registration Date: 2018-Apr-25
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2023-Apr-25 23:59:59

Exact Match on: Debtor No: 3

Amendments to Registration

22081811233	Amendment	2022-Aug-18

Debtor(s)

Block		Status
1	985842 ALBERTA LTD. 7151 50 AVE RED DEER, AB T4N 4E4	Current
2	DELTA DENTAL CORP. 202 - 4921 49 STREET RED DEER, AB T4N 1V2	Current by 22081811233
3	52 DENTAL CORPORATION 202 - 4921 49 STREET RED DEER, AB T4N 1V2	Current by 22081811233
4	52 WELLNESS CENTER INC. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811233
5	AHMAD, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811233

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 18042545916
Registration Date: 2018-Apr-25
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2023-Apr-25 23:59:59

Exact Match on: Debtor No: 3

Amendments to Registration

22081811233	Amendment	2022-Aug-18

Debtor(s)

Block		Status
1	985842 ALBERTA LTD. 7151 50 AVE RED DEER, AB T4N 4E4	Current
2	DELTA DENTAL CORP. 202 - 4921 49 STREET RED DEER, AB T4N 1V2	Current by 22081811233
3	52 DENTAL CORPORATION 202 - 4921 49 STREET RED DEER, AB T4N 1V2	Current by 22081811233
4	52 WELLNESS CENTER INC. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811233
5	AHMAD, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811233

Block		Status
6	AHMED, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 2208181 1233

Block		Status
7	MICHAEL DAVE MANAGEMENT LTD 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 2208181 1233

Block		Status
8	PARADISE MCIVOR DEVELOPMENTS LTD. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 2208181 1233

Secured Party / Parties

Block		Status
1	ROYAL BANK OF CANADA 36 YORK MILLS ROAD, 4TH FLOOR TORONTO, ON M2P 0A4	Deleted by 2208181 1233

Block		Status
2	ROYAL BANK OF CANADA 36 YORK MILLS ROAD, 4TH FLOOR TORONTO, ON M2P 0A4 Email: torbscpr@rbc.com	Current by 2208181 1233

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY.	Current
2	THIS REGISTRATION IS A RE-REGISTRATION PURSUANT TO SECTION	Current
3	35(7) AND 35(8) OF THE PERSONAL PROPERTY SECURITY ACT	Current
4	RELATING TO REGISTRATION NO. 16080309153 DATED AUGUST 3,	Current
5	2016, ERRONEOUSLY DISCHARGED ON APRIL 19, 2018.	Current

Block		Status
6	AHMED, FETOUN 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E1A1	Current by 22081811233

Block		Status
7	MICHAEL DAVE MANAGEMENT LTD 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811233

Block		Status
8	PARADISE MCIVOR DEVELOPMENTS LTD. 600, 4911 51 STREET RED DEER, AB T4N 6V4	Current by 22081811233

Secured Party / Parties

Block		Status
1	ROYAL BANK OF CANADA 36 YORK MILLS ROAD, 4TH FLOOR TORONTO, ON M2P 0A4	Deleted by 22081811233

Block		Status
2	ROYAL BANK OF CANADA 36 YORK MILLS ROAD, 4TH FLOOR TORONTO, ON M2P 0A4 Email: torbscpr@rbc.com	Current by 22081811233

Collateral: General

Block	Description	Status
1	ALL PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY.	Current
2	THIS REGISTRATION IS A RE-REGISTRATION PURSUANT TO SECTION	Current
3	35(7) AND 35(8) OF THE PERSONAL PROPERTY SECURITY ACT	Current
4	RELATING TO REGISTRATION NO. 16080309153 DATED AUGUST 3,	Current
5	2016, ERRONEOUSLY DISCHARGED ON APRIL 19, 2018.	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 22042607078
Registration Date: 2022-Apr-26
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2032-Apr-26 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	52 DENTAL CORPORATION 3505-52ND STREET SE CALGARY, AB T2B3R3	Current
2	DELTA DENTAL 3505-52ND STREET SE CALGARY, AB T2B3R3	Current
3	MOUHAMAD, FAISSAL 3505-52ND STREET SE CALGARY, AB T2B3R3 Birth Date: 1968-Sep-25	Current
4	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION 3505-52ND STREET SE CALGARY, AB T2B3R3	Current

Secured Party / Parties

Block		Status
1	CWB NATIONAL LEASING INC. 1525 BUFFALO PLACE WINNIPEG, MB R3T 1L9 Phone #: 204 954 9000 Fax #: 866 814 4752 Email: ppsa.adminstration@cwbnationalleasing.com	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 22042607078
Registration Date: 2022-Apr-26
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2032-Apr-26 23:59:59

Exact Match on: Debtor No: 1

Debtor(s)

Block		Status
1	52 DENTAL CORPORATION 3505-52ND STREET SE CALGARY, AB T2B3R3	Current
2	DELTA DENTAL 3505-52ND STREET SE CALGARY, AB T2B3R3	Current
3	MOUHAMAD, FAISSAL 3505-52ND STREET SE CALGARY, AB T2B3R3 Birth Date: 1968-Sep-25	Current
4	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION 3505-52ND STREET SE CALGARY, AB T2B3R3	Current

Secured Party / Parties

Block		Status
1	CWB NATIONAL LEASING INC. 1525 BUFFALO PLACE WINNIPEG, MB R3T 1L9 Phone #: 204 954 9000 Fax #: 866 814 4752 Email: ppsa.adminstration@cwbnationalleasing.com	Current

Collateral: General

Block	Description	Status
1	ALL GOODS AND EQUIPMENT OF EVERY NATURE OR KIND LEASED PURSUANT TO MASTER LEASE AGREEMENT NUMBER 51058404 BETWEEN THE SECURED PARTY, AS LESSOR AND THE DEBTOR AS LESSEE, AS AMENDED FROM TIME TO TIME, TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, SUBSTITUTIONS AND PROCEEDS OF ANY KIND DERIVED DIRECTLY OR INDIRECTLY THEREFROM, INCLUDING ALL AFTER ACQUIRED GOODS AND EQUIPMENT SUBJECT TO ANY INTERIM FUNDING AGREEMENT(S) AND ANY LEASE SCHEDULES ATTACHED TO AND FORMING PART OF MASTER LEASE AGREEMENT NUMBER 51058404	Current

Collateral: General

Block	Description	Status
1	ALL GOODS AND EQUIPMENT OF EVERY NATURE OR KIND LEASED PURSUANT TO MASTER LEASE AGREEMENT NUMBER 51058404 BETWEEN THE SECURED PARTY, AS LESSOR AND THE DEBTOR AS LESSEE, AS AMENDED FROM TIME TO TIME, TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, SUBSTITUTIONS AND PROCEEDS OF ANY KIND DERIVED DIRECTLY OR INDIRECTLY THEREFROM, INCLUDING ALL AFTER ACQUIRED GOODS AND EQUIPMENT SUBJECT TO ANY INTERIM FUNDING AGREEMENT(S) AND ANY LEASE SCHEDULES ATTACHED TO AND FORMING PART OF MASTER LEASE AGREEMENT NUMBER 51058404.	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 22050905694
Registration Date: 2022-May-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-May-09 23:59:59

Exact Match on: Debtor No: 2

Amendments to Registration

23011020393	Amendment	2023-Jan-10

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A9 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23011020393

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090981 068-0964 SIRONA DI SCANNER SER 112826 $35000.00	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 22050905694
Registration Date: 2022-May-09
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-May-09 23:59:59

Exact Match on: Debtor No: 2

Amendments to Registration

23011020393	Amendment	2023-Jan-10

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A9 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23011020393

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090981 068-0964 SIRONA DI SCANNER SER 112826 $35000.00	Current

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 22070509451
Registration Date: 2022-Jul-05
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jul-05 23:59:59

Exact Match on: Debtor No: 2

Amendments to Registration

23010434017	Amendment	2023-Jan-04

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23010434017

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Search ID #: Z15743767

Business Debtor Search For:
52 DENTAL CORPORATION
Search ID #: Z15743767 **Date of Search:** 2023-Jan-10 **Time of Search:** 11:52:10

Registration Number: 22070509451
Registration Date: 2022-Jul-05
Registration Type: SECURITY AGREEMENT
Registration Status: Current
Expiry Date: 2027-Jul-05 23:59:59

Exact Match on: Debtor No: 2

Amendments to Registration

23010434017	Amendment	2023-Jan-04

Debtor(s)

Block		Status
1	MOUHAMAD, FAISSAL 52-26534 TOWNSHIP ROAD 384 RED DEER COUNTY, AB T4E 1A1 Birth Date: 1968-Sep-25	Current
2	52 DENTAL CORPORATION 3505 52ND STREET S.E. CALGARY, AB T2B 3R3	Current by 23010434017

Secured Party / Parties

Block		Status
1	PATTERSON DENTAL CANADA, INC. 1205 BLVD HENRI-BOURASSA WEST MONTREAL, QC H3M 3E6 Email: absecparties@avssystems.ca	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090959 068-1277 BELMON CHAIR SER AQ21F0016 $9936.99 068-1278 BELMON CHAIR SER AQ21G0004 $9936.99 068-1279 BELMON CHAIR SER AQ21G0002 $9936.99 068-1280 BELMON CHAIR SER AQ21F0059 $9936.99 068-1281 BELMON CHAIR SER AQ21F0014 $9936.99 068-1282 BELMON CHAIR SER AQ21G0008 $9936.99 068-1283 BELMON UNIT SER VW21E0235 $4975.14 068-1284 BELMON UNIT SER VW21E0238 $4975.14 068-1285 BELMON UNIT SER VW21E0245 $4975.14 068-1286 BELMON UNIT SER VW21C0185 $4975.14 068-1287 BELMON UNIT SER VW21E0242 $4975.14 068-1288 BELMON UNIT SER VW21E0234 $4975.14 068-1289 BELMON LIGHT SER AV21K0332 $3145.30 068-1290 BELMON LIGHT SER AV21K0328 $3145.30 068-1291 BELMON LIGHT SER AV21K0330 $3145.30 068-1292 BELMON LIGHT SER AV21K0335 $3145.30 068-1293 BELMON LIGHT SER AV21K0345 $3145.30 068-1294 BELMON LIGHT SER AV21K0339 $3145.30 068-1295 BELMON UNIT $590.27 068-1296 BELMON UNIT $590.27 068-1297 BELMON UNIT $590.27 068-1298 BELMON UNIT $590.27 068-1299 BELMON UNIT $590.27 068-1300 BELMON UNIT $590.27 068-1301 BELMON UNIT $140.54 068-1302 BELMON UNIT $140.54 068-1303 BELMON UNIT $140.54 068-1304 BELMON UNIT $140.54 068-1305 BELMON UNIT $140.54 068-1306 BELMON UNIT $140.54 068-1307 BELMON XR INTRA PHOT SER EX21L0581 $4496.05 068-1308 BELMON XR INTRA PHOT SER EX21L0582 $4496.05 068-1309 BELMON XR INTRA PHOT SER EX21K0126 $4496.05 068-1310 BELMON XR INTRA PHOT SER EX21K0129 $4496.05 068-1311 BELMON XR INTRA PHOT SER EX21L0574 $4496.05 068-1312 BELMON XR INTRA PHOT SER EX21L0575 $4496.05 068-1482 AIRTEC EVAC PUMP SER MM700-22040017, MM100-22040024 $14867.00 068-1483 AIRTEC EVAC PUMP $611.00 068-1484 AIRTEC COMPRESSOR SER AS700-22040008 $14800.00 068-1485 AIRTEC EVA COMPNT SER AP122030028 $925.00 068-1486 AIRTEC EVA COMPNT $2063.00 068-1487 AIRTEC MASTR CTRL $446.00 068-0501 SIRONA CONEBEAMXR SER 1081251245 $120000.00 068-1418 SCHICK DIG XR SEN SER WL10000026 $9391.00 068-1421 SCHICK DIG XR SEN SER WL10000005 $9391.00 068-1416 SCHICK DIG XR	Current
2	SEN SER WL20000099 $10616.00 068-1501 SCICAN THERMO SER 400122D00004 $9955.00 068-1502 SCICAN THERMO SER 400122D00008 $9955.00 067-9964 W&H AUTOCLAVE SER 162302 $6968.00 067-9965 W&H AUTOCLAVE SER 162320 $6968.00 068-0760 W&H AUTOCLAVE $233.28 068-0761 W&H AUTOCLAVE $233.28	Current

Collateral: General

Block	Description	Status
1	INVOICE 9641090959 068-1277 BELMON CHAIR SER AQ21F0016 $9936.99 068-1278 BELMON CHAIR SER AQ21G0004 $9936.99 068-1279 BELMON CHAIR SER AQ21G0002 $9936.99 068-1280 BELMON CHAIR SER AQ21F0059 $9936.99 068-1281 BELMON CHAIR SER AQ21F0014 $9936.99 068-1282 BELMON CHAIR SER AQ21G0008 $9936.99 068-1283 BELMON UNIT SER VW21E0235 $4975.14 068-1284 BELMON UNIT SER VW21E0238 $4975.14 068-1285 BELMON UNIT SER VW21E0245 $4975.14 068-1286 BELMON UNIT SER VW21C0185 $4975.14 068-1287 BELMON UNIT SER VW21E0242 $4975.14 068-1288 BELMON UNIT SER VW21E0234 $4975.14 068-1289 BELMON LIGHT SER AV21K0332 $3145.30 068-1290 BELMON LIGHT SER AV21K0328 $3145.30 068-1291 BELMON LIGHT SER AV21K0330 $3145.30 068-1292 BELMON LIGHT SER AV21K0335 $3145.30 068-1293 BELMON LIGHT SER AV21K0345 $3145.30 068-1294 BELMON LIGHT SER AV21K0339 $3145.30 068-1295 BELMON UNIT $590.27 068-1296 BELMON UNIT $590.27 068-1297 BELMON UNIT $590.27 068-1298 BELMON UNIT $590.27 068-1299 BELMON UNIT $590.27 068-1300 BELMON UNIT $590.27 068-1301 BELMON UNIT $140.54 068-1302 BELMON UNIT $140.54 068-1303 BELMON UNIT $140.54 068-1304 BELMON UNIT $140.54 068-1305 BELMON UNIT $140.54 068-1306 BELMON UNIT $140.54 068-1307 BELMON XR INTRA PHOT SER EX21L0581 $4496.05 068-1308 BELMON XR INTRA PHOT SER EX21L0582 $4496.05 068-1309 BELMON XR INTRA PHOT SER EX21K0126 $4496.05 068-1310 BELMON XR INTRA PHOT SER EX21K0129 $4496.05 068-1311 BELMON XR INTRA PHOT SER EX21L0574 $4496.05 068-1312 BELMON XR INTRA PHOT SER EX21L0575 $4496.05 068-1482 AIRTEC EVAC PUMP SER MM700-22040017, MM100-22040024 $14867.00 068-1483 AIRTEC EVAC PUMP $611.00 068-1484 AIRTEC COMPRESSOR SER AS700-22040008 $14800.00 068-1485 AIRTEC EVA COMPNT SER AP122030028 $925.00 068-1486 AIRTEC EVA COMPNT $2063.00 068-1487 AIRTEC MASTR CTRL $446.00 068-0501 SIRONA CONEBEAMXR SER 1081251245 $120000.00 068-1418 SCHICK DIG XR SEN SER WL10000026 $9391.00 068-1421 SCHICK DIG XR SEN SER WL10000005 $9391.00 068-1416 SCHICK DIG XR	Current
2	SEN SER WL20000099 $10616.00 068-1501 SCICAN THERMO SER 400122D00004 $9955.00 068-1502 SCICAN THERMO SER 400122D00008 $9955.00 067-9964 W&H AUTOCLAVE SER 162302 $6968.00 067-9965 W&H AUTOCLAVE SER 162320 $6968.00 068-0760 W&H AUTOCLAVE $233.28 068-0761 W&H AUTOCLAVE $233.28	Current

Search ID #: Z15743767

Result Complete

Search ID #: Z15743767

Result Complete

MASTER LEASE AGREEMENT No. 0405202252Dental

Lessee Name: 52 Dental Corporation

Address: 3505-52nd St. SE, Calgary, AB T2B 3R3

Contact Name: Fetoun Ahmad

Email: fetoun1@icloud.com

Lessor Name; Faissal Mouhamad

Address: 7151 50th Avenue, Red Deer, AB T4N 4E4

Telephone: (403) 347-7477

Email: drmouhamad@hotmail.com

Contract Start Date: 04.05.2022

Contract End Date: 03.05.2029

Number of Payments: 84

Number of Skip Payment: 6

Annual Interest Rate: 6%

Monthly Payment: $8338.78 plus GST CANADIAN DOLLAR

First Payment Due Date: 4th November 2022

Equipment Address; #100 3505 52nd Street, SE Calgary, AB T2B 3R3

Terms and Conditions Attachment

Equipment Schedule Attached

Date 04.05.2022
52 Dental Corporations
By:
Signature X _____
Name: Fetoun Ahmad
Title: Director

TERMS AND CONDITIONS ATTACHMENT

This attachment is attached to and forms part of:
Agreement No. 04052022 52Dental
Lessee: 52 Dental Corporation

Capitalized words not defined in these terms and conditions refer to terms described in the first page of the agreement

1.Lease, Term and Rent: the Lessor Leases to Lessee and Lessee leases from Lessor the Personal property ("Equipment") described in any lease Agreement schedule ("Lease Agreement") executed and to be executed by the parties. Each Lease Agreement will constitute a separate lease of the Equipment described in the Lease Agreement and the terms of this Agreement will be incorporated into and form part of each Lease Agreement. The term of any Lease Agreement ("Term") begins on the commencement date to be established by Lessor on its acceptance of the Lease Agreement but, will be no earlier than the date the Equipment is delivered to Lessee, unless Lessee directs otherwise in writing ("Commencement Date"). Lessee will pay rent as described in each Lease Agreement schedule("Rent"). Lessee will pay provincial sales tax, goods and services tax and/or harmonized sales tax and other taxes applicable to the Equipment and the Lease Agreement. Any security deposit set forth in the Lease Agreement ("Security Deposit") will be non-interest bearing and may be held by Lessor and applied by it to any amount due under this Agreement. Upon termination of this Agreement, Lessor will return any balance of the Security Deposit to Lessee. Lessee will pay partial Rent and the Security Deposit on the date Lessor paid Equipment supplier for the Equipment.

2. Pre-Authorized Payment Plan: Lessee authorizes Lessor to debit from Lessee's account for business purposes, the rent and all other amounts due under this Agreement. Each amount will be debited on its respective due date as determined under this Agreement. Lessee has attached a sample cheque marked "void" identifying the particulars of the account to be debited or has separately provided Lessor with Lessee's account information. Lessee will immediately notify Lessor in writing of any change in Lessee's account. The signatory/ies to this Agreement is/are authorized to debit Lessee's bank account. If Lessor waives the requirement for pre-authorized debit, then Lessee will pay a service charge for other payment methods. Lessee (a) may change or cancel this authorization at any time on 10 days written notice to Lessor; and (b) has certain recourse rights if any debit does not comply with this Agreement (for example, the right to receive reimbursement for any debit that is not authorized or is not consistent with this Agreement). To obtain information on recourse rights, a sample cancellation form or information on the right to cancel an authorization, Lessee may contact the lessor. Lessor will obtain the specific prior authorization of Lessee for one-time or other sporadic debits, the amounts or due dates of which are not identified in this Agreement. Lessee waives the right to receive prior notice of all other amounts to be debited and the dates on which such debits will be processed, as well as notice of future changes to such amounts or dates. Lessor may assign this authorization to any third party to whom it assigns its interest in this Agreement. Lessee will be notified of the identity and contact information of any such assignee. This authorization applies to any payments due pursuant to any invoice, interim funding

agreement or other agreement relating to this Lease and the Equipment.

3.No Warranties, No Cancellation: Lessee is leasing the Equipment "as is". Lessor does not make any warranty or representation whatsoever with respect to the Equipment, including, without limitation as to the durability, quality, condition or suitability of the Equipment for Lessee's purposes. Lessor will not be liable to Lessee for any loss, damage or expense of any kind caused directly or indirectly by the Equipment or its use, operation, or possession, or by any interruption of service or loss of use, or for any loss of business or damage however caused. Where permitted, Lessor assigns all manufacturers and supplier's warranties related to the Equipment to Lessee during the Term. This Agreement cannot be cancelled by Lessee during the Term for any reason including equipment failure, loss or damage. Lessee many no t revoke acceptance of the Equipment. Lessee acknowledges that Lessee selected the Equipment and the Equipment supplier, Lessor purchased the Equipment at Lessee's request and on Lessee's instructions. Lessee shall perform, satisfy and discharge any purchaser obligations under any agreements with the Equipment supplier relating to the purchase of the Equipment, other than payment of the purchase price of the Equipment. Lessor is not responsible for equipment failure, software defects, the Equipment suppliers acts or the failure of the Equipment supplier or manufacturer to comply with any of its obligations. If any such failure or defects occur, Lessee may pursue any claim it may have against the Equipment supplier or manufacturer and will continue to comply with this Agreement.

4. Use, Location, Maintenance: Lessee certifies that the Equipment will be used solely for lawful business purposes and that the Equipment is not acquired for use primarily for personal, family or householder purposes. Lessee will operate and maintain the Equipment in accordance with any applicable manufacturer's instructions and recommendations and applicable laws. The Equipment will remain personal property and will no be affixed or attached to any lands or buildings without Lessor's prior written consent. Lessee will not relocate the Equipment from the Equipment location or operate the Equipment outside the Province of the Equipment location without Lessor's prior written consent. Lessee will (a) maintain the Equipment, at Lessee's cost in good repair and working order; (b) pay all costs relating to the use and operation of the Equipment; and 9c) not alter the Equipment in any manner without Lessor's prior written consent, any replacements, alterations or improvements to the Equipment's will form part of the Equipment and immediately become the property of Lessor.

5. Purchase Option: If no unremedied default exists, Lessee will have an option to purchase the Equipment, on the Purchase Option Date for the Purchase Option Price set forth in the Lease Agreement. If the Purchase is "Fair Market Value" then the Purchase Option Price will be the fair market value of the Equipment as of the Purchase Option Date, as determined by the Lessor. Lessee may exercise this purchase option by giving written notice to exercise to Lessor at least 60 days before the Purchase Option Date and paying the Purchase Option Price, plus applicable taxes, at least 30 days before the Purchase Option Date. If the required notice and payment are not received by Lessor by the specified dates, the purchase option will terminate. Upon payment by Lessee of the Purchase Option Price, Lessor will transfer Lessor's interest in the Equipment to Lessee, on an "as is, where is" basis, free of any security interests created by Lessor.

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6. Return of equipment: Lessee will return the Equipment to Lessor on the termination of a Lease Agreement, at Lessee's cost to a location directed by Lessor, in the same condition as it was delivered. Ordinary wear and tear excepted. If the Equipment is not purchased or returned to Lessor at the end of the Term, then provided that no unremedied default exists, the Lease Agreement will be automatically renewed on a month-to-month basis.

7. Insurance Loss, Damage: Lessee is responsible for and accepts the risk of loss or damage to the Equipment. Lessee will insure the Equipment against all risk of loss at replacement value in amounts on the term's acceptance to Lessor. Proceeds of such insurance may be applied at Lessor's option, to replacement or repair of the Equipment or toward payment of the Lessee's obligations under this Agreement. Lessee will also obtain at Lessor's request, comprehensive general liability insurance and insurance against any other risks, in amounts on terms acceptable to Lessor. Lessee will name Lessor as first loss payee and/or additional insured and provide Lessor written proof of this insurance. If Lessee does not provide Lessor with such proof of insurance, at Lessor's request, Lessee will pay Lessor a monthly loss damage waiver fee in consideration of Lessor waiving Lessee's obligation to obtain and provide proof of insurance. Such fee will be calculated within the first month of the Term and payable on the same date as Rent commencing on the third month of the Term. Written notice of this fee is incorporated by reference to this Lease. Lessor may (but is not obligated to) obtain insurance coverage to protect its interest in the Equipment.

8. Assignment: Lessee consents to the Lessor's assignment of this Agreement to a third party provided that the Lessor continues to be liable for its obligations, as lessor, under this agreement. Any assignee will be entitled to enforce all of Lessor's rights but will have no obligations under this Agreement. Lessee will not assign this Agreement or transfer, sublease, encumber, or give up possession of the Equipment without Lessor's prior written consent. If Lessor consents, Lessee will pay a reasonable assignment fee to cover Lessor's processing costs.

9. Indemnity: Lessee indemnifies and saves Lessor harmless from and againlosses ,expensesda mages, liabilities, claims and orders, including solicitors' fees on a solicitor and client basis arising from this Agreement or the Equipment, including any obligations imposed on Lessor by the Equipment supplier, except for loss caused solely by the negligence of Lessor. This indemnity will survive the termination of this Agreement.

10. Other fees and Charges: If any payment of Rent or other amounts payable under this Agreement is late, Lessee will pay a late fee, when it accrues of 2% per month (24% per annum) on the unpaid amount or $10 per month, whichever is greater, both before and after judgement. Lessee will also pay an insufficient funds charge of $60 for any dishonoured cheque or pre-authorized payment on the date that the cheque or payment is dishonoured. Lessee will pay (a) arrangement, documentation sale and lease back transaction (if applicable) fees for document processing costs on the due date of the first rent payment. (b) a re-documentation fee if and when this Agreement is cancelled and re-documented. (c) all applicable assignment and assumption fees in connection with each request by the Lessee to assign the Lessee's rights and interest in this Agreement to a third party (d) a fixture filing fee, if and when a fixture filing is required, and (e) all applicable lease expiry fees on the date this Agreement expires. Lessee will also pay all other reasonable administrative fees charged by Lessor to Lessee generally. Administrative fees are subject to change at the discretion of Lessor. A statement of the current amount of all administrative fee's payable is available upon request.

11. Default: If;(a) Lessee fails to pay any Rent or other amount payable under this Agreement when due; (b) Lessee fails to comply with any other term of this Agreement; (c) Lessee defaults under any other agreement with Lessor; (d) any representation made by Lessee in connection with this Agreement is or becomes untrue; (e) any of the Equipment is lost, stolen, damaged or destroyed and such loss is not covered by insurance; (f) Equipment is subjected to any liens,

encumbrances, hypothecs, security interests and claims; (g) Lessee makes any assignment for the benefit of Lessee's creditors, becomes insolvent, commits or threatens to commit any act of bankruptcy, winding up in dissolution, ceases or threatens to cease to carry on business or seeks any arrangement or compromise with Lessee's creditors; (h) any bankruptcy, receivership, winding up, dissolution, liquidation, or insolvency proceeding is commenced against Lessee; or (i) Lessor believes, acting reasonably and in good faith that the prospect payment under this Agreement is impaired; then all Rent and any other amounts to become due under this Agreement to the end of the Term shall immediately become due and payable on demand. Lessee will at its own cost on Lessor's demand immediately deliver the Equipment to a location directed by Lessor. Lessor may without notice and without resort to legal process, take immediate possession of the Equipment. Lessor may enter the premises where the Equipment is located for purposes of disabling or removal of the Equipment without incurring any liability to Lessee. Lessee will pay Lessor's cost of collection, re-possession of the Equipment and of the enforcement of Lessor's rights, including legal costs on a solicitor and client basis.

12. Miscellaneous: Lessee consents to the collection, use and disclosure of personal information by Lessor and its assignees for the purpose set out in this Agreement, to enable Lessor to provide leasing services to Lessee and to promote the products and services of Lessor and its affiliates. Lessor is entitled to conduct a personal investigation or credit check upon Lessee subject to applicable legislation. Lender is entitled to disclose financial and other information about Borrower to its affiliates for the purpose of assessing credit risks and promoting the products and services of Lender and its affiliates. A signed copy of this Agreement transmitted by email, facsimile or other electronic means is deemed to be an original. An electronic signature to this Agreement shall be as valid as an original signature. Time is of the essence of this Agreement. Each Lease Agreement will be construed according to the laws of the Province of the Location of the Equipment. To the extent permitted by law Lessee waives the provisions of the Limitation of Civil Rights Act of Saskatchewan. If applicable, the parties agree that this Agreement and all related documents be written in English. his Agreement constitutes a leasing as defined in the Civil Code of Quebec if the Equipment Location is in Quebec. Lessee will allow Lessor access to the Equipment for inspection during the Term. The Equipment is and will remain the sole property of Lessor during the Term. This Agreement will not become binding upon Lessor until accepted by Lessor. This Agreement is binding on Lessee's heirs, executors, administrators, successors and permitted assigns. If more than one Lessee is named in this Agreement, the liability of each Lessee will be joint and several and will not be affected by any amendment or renewal of this Agreement. Notice required under this Agreement will be provided to the Lessee in writing to the address set forth in this Agreement. Clerical errors will not affect the validity of this Agreement and Lessor may correct clerical errors provided that Lessor gives notice of the correction to. only Lessee acknowledge that the Equipment that the Equipment suppliers or their sales representatives or any not Lessor's agents and are not authorized to waive or change the terms of the Agreement or act on behalf of Lessor. Lessee acknowledges receipt of a copy of this Agreement and waives the delivery of a copy of any financing statement registered in respect of this Agreement. Where permitted, Lessor grants to Lessee and Lessee accepts a non-transferable and non-exclusive license to use any software referred to in this Agreement with the Equipment Lessee may not alter such software and will not copy, disclose or make such software available to any other person without Lessor's prior written consent.

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EQUIPMENT SCHEDULE

This schedule is attached to and forms part of:

Agreement No. 0405202252Dental

Equipment Description:

068-1277 BELMON CHAIR SER AQ21F0016

068-1278 BELMON CHAIR SER AQ21G0004
068-1279 BELMON CHAIR SER AQ21G0002
068-1280 BELMON CHAIR SER AQ21F0059
068-1281 BELMON CHAIR SER AQ21F0014
068-1282 BELMON CHAIR SER AQ21G0008
068-1283 BELMON UNIT SER VW21E0235
068-1284 BELMON UNIT SER VW21E0238
068-1285 BELMON UNIT SER VW21E0245
068-1286 BELMON UNIT SER VW21C0185
068-1287 BELMON UNIT SER VW21E0242
068-1288 BELMON UNIT SER VW21E0234
068-1289 BELMON LIGHT SER AV21K0332
068-1290 BELMON LIGHT SER AV21K0328
068-1291 BELMON LIGHT SER AV21K0330
068-1292 BELMON LIGHT SER AV21K0335
068-1293 BELMON LIGHT SER AV21K0345
068-1294 BELMON LIGHT SER AV21K0339
068-1295 BELMON UNIT
068-1296 BELMON UNIT
068-1297 BELMON UNIT
068-1298 BELMON UNIT
068-1299 BELMON UNIT
068-1300 BELMON UNIT
068-1301 BELMON UNIT
068-1302 BELMON UNIT
068-1303 BELMON UNIT
068-1304 BELMON UNIT
068-1305 BELMON UNIT
068-1306 BELMON UNIT
068-1307 BELMON XR INTRA PHOT SER EX21L0581
068-1308 BELMON XR INTRA PHOT SER EX21L0582
068-1309 BELMON XR INTRA PHOT SER EX21K0126
068-1310 BELMON XR INTRA PHOT SER EX21K0129
068-1311 BELMON XR INTRA PHOT SER EX21L0574
068-1312 BELMON XR INTRA PHOT SER EX 21L0575
068-1482 AIRTEC EVVAC PUMP SER MM700-22040017, MM100-22040024
068-1483 AIRTEC EVVAC PUMP
068-1484 AIRTEC COMPRESSOR SER AS700-22040008
068-1485 AIRTEC EVA COMPNT SER AP122030028
068-1486 AIRTEC EVA COMPNT
068-1487 AIRTEC MASTR CTRL
068-0501 SIRONA CONEBEAMXR SER 1081251245
068-1418 SCHICK DIG XR SEN SER WL 10000026
068-1421 SCHICK DIG XR SEN SER WL 10000005
068-1416 SCHICK DIG X
SEN SER WL20000099
068-1501 SCICAN THERMO SER 400122D00004
0068-1502 SCICAN THERMO SER 400122D00008
067-9964 W&H AUTOCLAVE SER 162302
067-9965 W&H AUTOCLAVE SER 162320
068-0760 W&H AUTOCLAVE
068-0761 W&H AUTOCLAVE