Court File No. CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

AND IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

FACTUM OF MAYNARDS INDUSTRIES LTD.
(Distribution Hearing Returnable May 13, 2015)

April 24, 2015

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FACTUM OF MAYNARDS INDUSTRIES LTD.

(Distribution Hearing Returnable May 13, 2015)

PART I - OVERVIEW

1. This factum is filed by Maynards Industries Ltd. ("**Maynards**") for purposes of the Distribution Hearing returnable May 13, 2015 in respect of approximately $1,466,602.71 CDN[1] presently in a joint bank account (the "**Joint Account**") held by Maynards and Grant Thornton

[1] Subject to verification by the Receiver.

Limited (the **"Receiver"**), in its capacity as receiver over the assets, undertakings and properties of D&S Railway Construction Inc. (**"D&S Railway"**) and Ebersole Excavating Inc. (**"Ebersole Excavating"** and, together with D&S Railway, the **"Debtors"**). Maynards claims that it is entitled to recover from the Joint Account Canadian funds sufficient to purchase the sum of $265,150 USD in respect of the sale of Darrell's Vehicles (defined below) and $726,330.92 CDN in respect of the sale of the Company Assets (defined below). Maynards also seeks an Order directing that these amounts be paid to Maynards without deduction. Maynards claims no interest in the DLPC Funds (as defined below).

2. On October 31, 2014 Maynards entered into an arm's length agreement of purchase and sale (the **"Maynards Sale Agreement"**) with D&S Railway pursuant to which Maynards purchased various equipment, including motor vehicles (collectively, the **"Assets"**) for a purchase price of $1,350,000 CDN, plus HST.[2] The Assets were comprised of the following:

a) 16 motor vehicles (the **"Company Vehicles"**) and other equipment of D&S (the **"Company Equipment"** and, together with the Company Vehicles, the **"Company Assets"**) which comprised substantially all of the assets of D&S; and

b) 19 motor vehicles (**"Darrell's Vehicles"**) which had been owned personally by Darrell Ebersole (**"Darrell"**), a director and principal of each of the Debtors, and which Darrell authorized D&S Railway to sell on his behalf to Maynards.[3]

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[2] Affidavit of Michael B. McIntosh sworn April 1, 2015 (the "Michael McIntosh Affidavit"), para. 15 and Exhibit H.
[3] Affidavit of Sandra Ebersole sworn April 9, 2015 (the "Sandra Ebersole Affidavit"), paras. 3-5; Michael McIntosh Affidavit, para 16 and Exhibits H, R, S, Q, X; Affidavit of Stuart Detsky sworn April 6, 2015 paras. 12 and 13 and Exhibit C.

3. After Maynards purchased the Assets, the Applicant Trisura Guarantee Insurance Company **("Trisura")** contacted Maynards and took the position that all of the Assets were subject to Trisura's security interest registered pursuant to the provisions of the *Personal Property Security Act* (the "**PPSA**").[4] With the consent of Maynards, Trisura and the Receiver and with the approval of the Court, the Assets were sold by Maynards at an auction (the **"Auction")** on December 4, 2014. The proceeds from the sale of the Assets at the Auction were paid into the Joint Account pending this hearing and the sum of approximately $1,466,602.71 CDN remains available for distribution.[5]

4. Maynards' position is as follows:

a) with respect to Darrell's Vehicles, in its PPSA registrations, Trisura failed to record the vehicle identification number **("VIN")** for any of the vehicles, and accordingly pursuant to Subsection 28(5) of the PPSA Maynards, as buyer, purchased these vehicles free and clear of Trisura's security interests. Maynards is therefore entitled to $265,150 USD, being the amount realized for these vehicles at the Auction, from the funds held in the Joint Account;[6]

b) with respect to the Company Assets, at the time of the closing of the Maynards Sale Agreement, Trisura's security was subordinate to security registered by the Bank of Montreal **("BMO")**.[7] The Auction established that the aggregate value

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[4] Michael McIntosh Affidavit, para. 33 and Exhibit P.
[5] Michael McIntosh Affidavit, para. 58.
[6] Michael McIntosh Affidavit, paras. 36-38
[7] While BMO and Trisura both held registered security in the assets of the Debtors, BMO did not hold any registrations against the assets of Darrell Ebersole, and in particular had no registered security in Darrell's Vehicles; Affidavit of Stuart Detsky sworn November 24, 2014 (the "**First Detsky Affidavit**"), Exhibit "N".

of those assets totaled $1,006,304.10 USD.[8] Following completion of Maynards' purchase of the Assets, the sum of $726,330.92 CDN was paid to BMO and its security was discharged.[9] As BMO's security was registered first and was in first position, Trisura is only entitled to claim for recovery of the remaining value of these assets after deduction of the $726,330.92 CDN paid to BMO. Any further distribution to Trisura in respect of this same collateral would be a windfall to Trisura and would be unfair. Maynards is therefore entitled to recovery the sum of $726,330.92 CDN from these proceeds; and

c) In the alternative to (b) above, Trisura's registrations against the Company Vehicles also failed to include the VINs and therefore Maynards is entitled to $424,500 USD from the Joint Account in respect to those assets.

PART II - FACTS

(a) Maynards and the Debtors

5. Maynards carries on business as an auctioneer and global expert in asset auctions and provides liquidation and asset valuation appraisal services, with offices located in Canada, the United States, Europe, Japan and China. Since 1902 Maynards has specialized in the asset conversion of commercial inventories and industrial equipment, and provided comprehensive asset valuation services for collateral-based lending, asset dispositions and acquisitions. [10]

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[8] Michael McIntosh Affidavit, Exhibit Q and X.
[9] Sandra Ebersole Affidavit, para. 9.
[10] Michael McIntosh Affidavit, para 4.

6. Maynards acts as auctioneer at over one hundred (100) asset auctions and liquidations annually. At these auctions Maynards sells assets on behalf of others for a commission or flat fee or, in other instances, purchases assets and resells them for its own profit.[11]

7. D&S Railway was at all material times a company located in the community of Stevensville, Ontario, which provided railroad construction and maintenance services across southwestern Ontario. Its affiliate, Ebersole Excavating, was in the business of site preparation services including excavating, grading, sewer and water systems and septic tanks across southwestern Ontario.[12]

8. Darrell Ebersole and Sandra Ebersole were the sole officers and directors and were the principals and directing minds of each of the Debtors.[13]

(b) Sale of the Assets to Maynards

9. In or around the summer of 2014 Maynards was introduced to Robert Fowler of R&R Mergers and Acquisitions ("**R&R**"). R&R had been retained by D&S Railway to seek a purchaser for D&S Railway and/or various assets of D&S Railway, as the Ebersoles no longer intended to operate D&S Railway. In particular, R&R on behalf of D&S Railway was marketing for sale approximately one hundred and ten (110) pieces of equipment, including a substantial number of motor vehicles and appurtenances thereto, together with other miscellaneous equipment.[14]

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[11] Michael McIntosh Affidavit, para. 5.
[12] First Detsky Affidavit, paras. 6 and 7; Michael McIntosh Affidavit, paras. 6 and 7.
[13] Sandra Ebersole Affidavit, paras. 1 and 2; Michael McIntosh Affidavit, para. 9.
[14] Michael McIntosh Affidavit, para. 10.

10. Maynards had not previously had any business dealings with D&S Railway or the Ebersoles.[15]

11. Initially the parties discussed having Maynards conduct an auction, but after further discussions the parties agreed that instead Maynards would purchase the assets from D&S Railway and thereafter resell them at auction. Maynards and D&S Railway signed the Maynards Sale Agreement and completed the sale on October 31, 2014.[16]

12. Schedule "A" to the Maynards Sale Agreement contained a list of all of the Assets that were purchased by Maynards. The Assets were comprised of the Company Vehicles, other Company Equipment and Darrell's Vehicles.[17]

13. Pursuant to Section 2.1 of the Maynards Sale Agreement, the aggregate purchase price for the Assets was $1,350,000.00, inclusive of all applicable taxes (the "**Purchase Price**"). D&S Railway and Maynards were at arm's length in negotiating the Maynards Sale Agreement and the evidence is uncontroverted that the Purchase Price reflected the fair market value for the Assets at that time.[18]

14. Under Section 5.1 of the Maynards Sale Agreement D&S Railway expressly agreed, covenanted, warranted and undertook that the Assets delivered to Maynards in accordance with the Maynards Sale Agreement would be free and clear of all liens, charges and other encumbrances.[19]

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[15] Michael McIntosh Affidavit, para. 12.
[16] Michael McIntosh Affidavit, paras. 14 and 15 and Exhibit H.
[17] Michael McIntosh Affidavit, para. 16.
[18] Michael McIntosh Affidavit, para. 18.
[19] Michael McIntosh Affidavit, para. 19.

15. At the time of completion of the sale to Maynards, the Company Assets were subject to the following PPSA security registrations, listed by order of registration:[20]

File No.	Registration No.	Secured Party	Collateral
620706141	20051122 1701 8077 6370	Caterpillar Financial Services Limited	E, O, MV
623780658	20060329 1453 1530 4152	Bank of Montreal	E, O
623780667	20060329 1453 1530 4153	Bank of Montreal	I, E, A, O, MV
630011763	20061024 1451 1530 6141	Bank of Montreal	I, E, A, O, MV
694675377	20140326 1003 1462 0933	Trisura Guarantee Insurance Company	I, E, A, O, MV

16. Darrell's Vehicles were subject to the following PPSA security registrations[21]:

File No.	Registration No.	Secured Party	Collateral
694675386	20140326-1003-1462-0934	Trisura Guarantee Insurance Company	I, E, A, O, MV
692708355	20131219-1134-1793-1126	Curtis Gail Development Corporation	E, MV

17. The express agreement and understanding between the parties, as reflected in Section 5.1 of the Maynards' Sale Agreement, was that arrangements were in place to effect the discharge of all security interests in the Assets.[22] With respect to the Company Assets, Maynards received confirmations from D&S Railway's accountant that:

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[20] First Detsky Affidavit, Exhibit "J"; Michael McIntosh Affidavit, para. 21.
[21] The Affidavit of Michael B. McIntosh, sworn November 25, 2014, Exhibit R.
[22] Michael McIntosh Affidavit, para. 19.

a) arrangements had been made in order to effect the discharge of the registration of BMO, the first secured creditor, upon payment out of the sale proceeds and confirming that upon such payment BMO's security would be discharged;[23] and

b) arrangements had been made in order to effect the discharge of the PPSA registration of Caterpillar as the debt owing to it had been paid in full.[24]

18. In accordance with the Maynards Sale Agreement, on October 31, 2014 Maynards remitted the $1,350,000.00 Purchase Price to D&S Railway by wiring same directly into the D&S's bank account, and acquired ownership of the Assets.[25]

19. From the sale proceeds $726,330.92 CDN was paid to BMO[26], and thereafter BMO's registrations against the Company Assets were discharged.[27] The amounts owed to Caterpillar had already been paid and its registration was discharged without payment.[28]

20. While no specific arrangements were made to obtain a discharge of Trisura's registration, Maynards' understanding was that D&S Railway had delivered the Assets free of all encumbrances in accordance with its obligations under the Maynards' Sale Agreement.[29]

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[23] Michael McIntosh Affidavit, para. 27(a).
[24] Michael McIntosh Affidavit, para. 27(b).
[25] Michael McIntosh Affidavit, para. 29 and 30.
[26] Sandra Ebersole Affidavit, Exhibit B.
[27] Michael McIntosh Affidavit, para. 32 and Exhibit O.
[28] Michael McIntosh Affidavit, paras. 31 and 32 and Exhibits M and O.
[29] Michael McIntosh Affidavit, para. 35

(c) Receivership Proceedings and Sale of the Assets at Auction

21. In November, 2014, Trisura commenced this Application and the Receiver was appointed as interim receiver without security, of all of the assets, undertakings and properties of the Debtors.[30]

22. Maynards and Trisura, together with the Receiver, agreed that all of the Assets should be sold at an auction conducted by Maynards to preserve the value of the Assets while the respective interests of Maynards and Trisura therein, if any, were determined.[31] In accordance with the agreement reached between Maynards, the Receiver and Trisura, paragraph 28 of Justice Newbould's November 26, 2014 Order provided that:

a) Maynards was authorized and permitted to conduct the Auction for the sale of all of the Assets; and

b) Maynards was entitled to collect a buyer's premium (the **"Buyer's Premium"**) of up to 18% plus HST of the selling price of each individual piece of equipment sold at the Auction, but Maynards was only entitled to receive an amount that was equal to 15% plus HST of the selling price of each individual piece of equipment (the **"Maynard's Portion of the Buyer's Premium"**).[32]

23. Maynards advertised and marketed the Auction in order to ensure that the number and quality of the bidders at the Auction was maximized, thereby ensuring that the amount paid for each of the Assets was maximized. Among other things:

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[30] Michael McIntosh Affidavit, para. 45.
[31] Michael McIntosh Affidavit, para. 45.
[32] Michael McIntosh Affidavit, para. 45 and Exhibit T.

a) Maynards printed and distributed 9,300 copies of its auction brochure, approximately 8,600 of which were sent to potential bidders pre-qualified by Maynards via mail;

b) advertisements were printed in local and trade newspapers in area and industries from which potential bidders were likely; and

c) electronic web-based advertisements were purchased and posted on various websites published and frequently accessed by members of the railroad construction and maintenance industry players likely to be interested in participating in the auction.[33]

24. The Auction was conducted on December 4, 2014 and all of the Assets were sold for fair market value.[34]

25. All of the proceeds from the Assets sold at the Auction were paid into the Joint Account pending a determination of the respective interest of the parties in the proceeds.

(d) Amount Owed to Bidspotter.com

26. As explained in paragraph 22 above, Maynard's was entitled to collect up to an 18% plus HST Buyer's Premium from the Auction proceeds, of which Maynard's Portion of the Buyer's Premium would be 15% plus HST. The reason for the distinction between what Maynard's could "collect" and what it could "receive" was that the Auction was being facilitated by an online auction/payment facilitator by the name of Bidspotter.com, and Bidspotter.com was to be paid

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[33] Michael McIntosh Affidavit, para. 47.
[34] Michael McIntosh Affidavit, para. 49 and Exhibit X.

3% of the selling price of items sold using Bidspotter's online payment processing services. The simplest way to facilitate this payment was to permit Maynard's to collect up to a further 3% so that this amount could be paid to Bidspotter.com.[35]

27. Maynards has not received payment on account of monies owing to Bidspotter.com for the online payments facilitated by them. The sum of $14,220.61 USD is presently due and owing to Bidspotter.com on account of same. Pursuant to the agreement between the parties and order of the court, these monies are to be paid to Maynards from the auction proceeds presently held in the Joint Account and thereafter remitted by Maynards to Bidspotter.com.

PART III - ISSUES

28. The following issues arise on this motion:

a) Did Maynards acquire the Company Vehicles and Darrell's Vehicles free and clear of Trisura's security interests due to Trisura's failure to record in the VINs for these vehicles in its financing statements as required by Subsection 28(5) of the PPSA?

b) To what extent may Trisura recover from proceeds of the sale of the Company Assets?

c) Depending on the findings on the issues in (a) and (b) above, what is Maynards' entitlement to the Auction proceeds presently in the Joint Account?

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[35] The Affidavit of Joel D. Farber, sworn April 2, 2015, para. 9.

d) Is the Receiver obliged to pay the fees of Bidspotter.com in connection with its services for the Auction, or does that obligation rest with Maynards?

PART IV – LAW AND ARGUMENT

(a) Maynards acquired Darrell's Vehicles free and clear of Trisura's security interests

29. In total, 35 of the 141 items purchased by Maynards under the Maynards Sale Agreement were "motor vehicles" as defined in the PPSA Regulations. In particular, each was an automobile or other vehicle that was self-propelled and was not: (a) a street car or other vehicle running only upon rails; (b) a farm tractor; (c) an implement of husbandry, (d) a machine acquired for use or used as a road-building machine, or (e) craft intended primarily for use in the air or in or upon the water.

30. Subsection 28(5) of the PPSA provides as follows:

> **28(5) Motor vehicles, transaction other than in ordinary course**
>
> Where a motor vehicle, as defined in the regulations, is sold other than in the ordinary course of business of the seller and the motor vehicle is classified as equipment of the seller, the buyer takes it free from any security interest therein given by the seller even though it is perfected by registration unless the vehicle identification number of the motor vehicle is set out in the designated place on a registered financing statement or financing change statement or unless the buyer knew that the sale constituted a breach of a security agreement.[36]

31. Section 28(5) of the PPSA gives a buyer who purchases a vehicle other than in the ordinary course of business of the seller priority over any security interest given by the seller

[36] Personal Property Security Act, R.S.O. 1990, c.P.10 ["PPSA"] s. 28(5).

unless the VIN for the vehicle is set out in the security registration, or the buyer knew that the sale constituted a breach of the security agreement.[37]

32. Darrell's Vehicles were equipment[38] sold to Maynards outside the ordinary course of the business.[39] Further, none of the VINs for these vehicles were set out in the designated place on the Trisura's registered financing statements or financing change statements under the PPSA.

33. Maynards was aware at the time of sale that Trisura had registered a security interest against the Company Assets. However, knowledge of the security interest above is insufficient for purposes of Section 28(5). In particular, knowledge of the existence of the security, if any, does not constitute knowledge of any breach of a security agreement.[40]

34. In any event, the sale of the Assets was not prohibited by Trisura's security agreements and in fact Section 12(f) of its security agreement expressly contemplate that the Assets could be sold. However, even if it is determined that the sale did constitute a breach, there is no evidence that Maynards was aware of this. To the contrary, Maynards' understanding was that the vehicles would be sold free and clear of any security interests as agreed in Section 5.1 of the Maynards Sale Agreement.[41]

35. Accordingly, pursuant to Subsection 28(5) of the PPSA Maynards acquired Darrel's Vehicles free and clear of any security interest Trisura may have held in them.

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[37] McLaren, Richard H., *Transactions in Personal Property* (3rd edition) (Toronto: Thomson Reuters); see also *Concentra Financial Services Assn v. Kille* (2008) 43 C.B.R. (5th) 245; *CIBC v. CTV Television Inc.* (2005) 18 C.B.R. (5th) 217.
[38] "Equipment" is defined in Section 1(1) of the PPSA as goods that are not inventory or consumer goods.
[39] Sandra Ebersole Affidavit, para. 6.
[40] The 2015 Annotated Ontario Personal Property Security Act, Professor Richard H. McLaren, Thomson Reuters, 2015 – Commentary re: Section 28(5), at page 261.
[41] Michael McIntosh Affidavit, para. 19, 28 and 35.

36. Darrell's Vehicles were sold for an aggregate price of $265,150 USD. These proceeds are presently held in the Joint Account. Maynards claims entitlement to these funds.[42]

(b) Trisura's Security in the Company Assets was Subordinated to BMO's Security

37. Following the sale to Maynards BMO, as the secured creditor in first position in respect of the Company Assets, was entitled to and was paid $726,330.92 CDN out of the proceeds of the sale of the Company Assets and its registrations were discharged.[43] It is submitted that Trisura as a subordinate creditor is only entitled to claim for recovery of an amount representing the remaining value of the same collateral or the proceeds from the disposition of this collateral after the payment to BMO is deducted.

38. Trisura's claims arise from Section 25(1) of the PPSA, which provides as follows:

> 25(1) Where collateral gives rise to proceeds, the security interest therein,
>
> (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the secured interest; and
>
> (b) extends to the proceeds.[44]

39. The operation of Section 25 of the PPSA, and in particular the extent to which secured creditors can pursue recovery from both the collateral and the proceeds of the collateral, was considered in *Bank of Nova Scotia v. IPS Invoice Payment System Corporation*.[45] In that case

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[42] "Sandra Ebersole Affidavit, paras. 3-5; Michael McIntosh Affidavit, para 16 and Exhibits H, R, S, Q, X; Affidavit of Stuart Detsky sworn April 6, 2015 paras. 12 and 13 and Exhibit C.

[43] The PPSA registrations at Exhibit J to Michael McIntosh's Affidavit indicate that BMO's security registrations were registered prior to Trisura's registrations, and BMO therefore has priority pursuant to section 30 of the PPSA. BMO did not have any security registered against Darrell's Vehicles.

[44] PPSA, *supra* noted 8 at s. 25(1).

[45] 2010 ONSC 2101 (Ont. Sup. Ct.).

Justice Karakatsanis, as she then was, found that recovery under Section 25 of the PPSA is limited to the value of the collateral on the date of dealing.

40. In reaching this conclusion Justice Karakatsanis found that:

a) an interpretation that limits recovery to the value of the collateral secured strikes a balance between the interests of the various parties, including the third party, provides greater certainty and predictability in secured transactions, and gives them what they bargained for;

b) since the secured party only bargained for security over the value of the specific collateral, it should not be able to convert unsecured debt to secured debt simply because the collateral has been dealt with;

c) while the secured party's priority should not be prejudiced by the transaction, there is no compelling reason why it should be able to recover a windfall – double recovery from the same collateral;

d) the structure of the notice regime in the PPSA provides a strong rationale for limiting recovery to the value of the collateral on the date of dealing. A third party purchasing encumbered collateral will have no notice of the size of the debt secured, only of the fact that the security was subject to a prior security interest. Sequential dealings with the collateral could generate more than one set of proceeds and create uncertainty with respect to the extent of a third party's liability; and

e) the focus of section 25 is upon the collateral and the proceeds of dealing with the collateral. It provides the secured party with recourse to proceeds to ensure that any shortfall from the dealing with the assets can be remedied. Other provinces have made specific provision limiting recovery of the proceeds in such a way. Clearly such a principle is not generally destructive of a PPSA regime.[46]

41. In the present case, BMO was the first to register its security over the assets of D&S Railway (and Ebersole Excavating) and accordingly had first priority in respect of the Company Assets. Accordingly, when Trisura registered its security, it did so subject to BMO's prior registration. When the Company Assets were sold under the Maynards Sale Agreement, the proceeds in the amount of $726,330.92 CDN from the sale of those assets were paid to BMO. As the secured creditors could not claim recovery under Section 25 of the PPSA for more than the full value of the collateral, and as a substantial portion of the proceeds from the sale of the Company Assets was paid to BMO to discharge its senior security interest, Trisura's right of recovery was correspondingly reduced.

42. This position is entirely consistent with the 2003 decision of the Supreme Court of Canada in *H&R Block Canada Inc. v. National Trust Co.*[47] In that case, a purchaser ("**H&R Block**") purchased substantially all of the assets of Tax Time Services ("**Tax Time**"), a company in financial difficulty, without complying with the provisions of the *Bulk Sales Act*. The proceeds from the sale were applied against debts owed to Tax Time's two highest ranking secured creditors. The first creditor was paid in full and the second secured creditor was paid in part. An unsecured creditor sought an order under section 16(2) of the *Bulk Sales Act*, which

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[46] Ibid., para. 32.
[47] 2003 SCC 66.

provides that where a sale has been set aside or declared void and the buyer has taken possession of the stock in bulk, the buyer is personally liable to account to the creditors of the seller for the value thereof.

43. Justice Bastarache found that H&R Block's duty to account under Section 16(2) of the *Bulk Sales Act* only required H&R Block to pay to the seller's creditors the amount that such creditors were deprived of as a result of the non-compliant sale. Payments made directly from the proceeds of the bulk sale were to be credited to H&R Block, regardless of whether H&R Block or Tax Time made the payment. To require H&R Block to pay the applicant creditor the value of the proceeds of the sale would be to place the creditor in a better position than it would have been in had the requirements of the *Bulk Sales Act* been met. The recipient would have been the lucky recipient of a windfall and H&R Block would be unduly punished, which would be a very unfair result.[48]

44. In its decision the Supreme Court made the following findings:

a) the primary purpose of the *Bulk Sales Act* is to protect the interests of all creditors, secured and unsecured alike, whose debtors have disposed of all or substantially all of their assets;[49]

b) as a secondary purpose, the *Bulk Sales Act* ensures the fair distribution of the proceeds of a sale in bulk; specifically, that the creditors of a seller receive their

[48] Ibid., para. 46.
[49] Ibid., para. 6 and 22.

ratable share of the proceeds of a sale in bulk, based on their priority ranking, and are therefore not prejudiced by the sale;[50]

c) the buyer's duty to account must be considered in light of commercial realities, and in particular two factors have heightened importance: (i) predictability, since bright-line rules facilitate transactions and economic efficiency; and (ii) a sensible economic result, also to further economic efficiency;[51]

d) under a purposive approach to the buyer's duty to account under Section 16(2) of the *Bulk Sales Act*, the buyer must pay the seller's creditors the amount such creditors were deprived of as a result of a non-compliant sale. Creditors are put back in the position they would have been in had the buyer complied with the *Bulk Sales Act* – no unjust enrichment of the creditors takes place;[52] and

e) there is no legislative intent to punish non-compliant buyers in cases where there has been a proper payment to the seller's creditors.[53]

45. The objectives of the PPSA are closely aligned with the objectives of the *Bulk Sales Act*. Just as the *Bulk Sales Act* is intended to protect the interests of all creditors and ensure the creditors receive their rateable share of the proceeds of a sale in bulk based on their priority ranking, with no unjust enrichment, the PPSA provides protection and certainty to debtors to

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[50] Ibid, para. 22.
[51] Ibid.
[52] Ibid., paras. 30 and 31.
[53] Ibid., para. 44.

facilitate the use of personal property as collateral and to provide consistency and fairness in the enforcement of security interests.[54]

46. On the present facts, Maynards purchased substantially all of the Company Assets. The subsequent sale of these assets at the Auction confirmed the aggregate fair market value of these assets to be $1,006,295.11 USD.[55] BMO, which held first priority security over these assets, was paid the sum of $726,330.92 CDN.[56] Following the analysis of the Supreme Court in the H&R Block case, to require Maynards to now pay to Trisura an amount representing the full value of the same collateral without accounting for the payment of the proceeds to BMO would be to put Trisura in a better position than it was in prior to the sale of the assets to Maynards. Trisura would be "unjustly enriched", to use the phrase of Justice Bastarache, and the lucky recipient of a windfall, and Maynards would be unduly punished.

47. Such a result would also be contrary to the finding of Justice Karakatsanis in the IPS case that a secured creditor's right to seek recovery against the collateral or the proceeds from the collateral under Section 25 of the PPSA is limited to the value of the collateral. To permit recovery from the same collateral by Trisura without accounting for the payment to BMO would be to grant it a windfall and the sort of double recovery from the same collateral that Justice Karakatsanis found to be inappropriate.

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[54] *Bank of Nova Scotia v. IPS Invoice Payment Systems Corporation*, supra., note 14 at para. 29; *GE Canada Equipment Financing G.P. v. ING Insurance Co. of Canada,* ONCA 171.
[55] Michael McIntosh Affidavit, Exhibit X.
[56] Sandra Ebersole Affidavit, Exhibit B.

(c) Maynards Acquired the Company Vehicles Free and Clear of Trisura's Security Interests

48. The Company Vehicles were motor vehicles as defined in the PPSA regulations, were equipment sold to Maynards outside the ordinary course of business, and none of the VINs for these vehicles were set out in the designated place in the Trisura registrations under the PPSA.

49. Maynards was aware at the time of the Maynards Sale Agreements that Trisura had a registered security interest against the Company Assets. However, as noted above, knowledge of the security interest alone is insufficient for the purposes of s. 28(5) and does not constitute knowledge of a breach of a security agreement. (see paragraph 33 above)

50. If this Court does not accept that Maynards is entitled to a credit for the amount paid to BMO to discharge its first position security interest, Maynards nevertheless took the Company Vehicles free and clear of Trisura's security interest in them pursuant to s. 28(5) of the PPSA and is therefore entitled to $425,500 USD in the Joint Account in respect to them.

(d) Trisura Can Pursue Other Remedies

51. It is important to note that a finding that Maynards is entitled to the amounts set out above from the proceeds of the Auction does not necessarily mean that Trisura can have no recovery on its security. Trisura may still seek recovery from the proceeds of the sale of Darrell's Vehicles that were paid to the Debtors, Darrell or Sandra Ebersole notwithstanding that its security is not enforceable against Maynards. In this regard $396,242 (the "**DLPC Funds**"), which appears to be comprised of proceeds from the sale, was paid by Sandra Ebersole to the

Receiver. Trisura is at liberty to seek recovery of those proceeds, and Maynards claims no interest in them.[57]

(e) Fees Owed to Bidspotter.com

52. For the reasons set out in paragraphs 26 and 27 above, Maynards is entitled to collect from the proceeds of the Auction $14,220.61 for payment to Bidspotter.com.

PART IV - RELIEF SOUGHT

53. For the reasons set out above, Maynards respectfully requests the following declarations and Orders:

a) declarations that the sums of $265,150 USD and $726,330.92 CDN, which are held in the Joint Account, belong to it, do not form part of the property of the Debtors and are not subject to any security interests or claims of Trisura, Canada Revenue Agency or any other party;

b) an Order directing that Maynards be paid the sums outlined above from the funds presently held in the Joint Account or such other amounts as may be determined by this court; and

c) an Order that the sum of $14,220.61 USD, which is due and owing to Bidspotter.com for online service fees in respect of the Auction, be paid from the funds remaining in the Joint Account after the funds which belong to Maynards are distributed to it.

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[57] Sandra Ebersole Affidavit, paras. 10-16.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2015.

FOGLER, RUBINOFF LLP
Lawyers for Maynards Industries Ltd.

SCHEDULE "A"

LIST OF AUTHORITIES

1. McLaren, Richard H., *Transactions in Personal Property* (3rd edition) (Toronto: Thomson Reuters)

2. *Concentra Financial Services Assn v. Kille* (2008) 43 C.B.R. (5th) 245

3. *CIBC v. CTV Television Inc.* (2005) 18 C.B.R. (5th) 217

4. The 2015 Annotated Ontario Personal Property Security Act, Professor Richard H. McLaren, Thomson Reuters, 2015 – Commentary re: Section 28(5)

5. *Bank of Nova Scotia v. IPS Invoice Payment System Corporation* 2010 ONSC 2101 (Ont. Sup. Ct.).

6. *H&R Block Canada Inc. v. National Trust Co.* 2003 SCC 66

7. *GE Canada Equipment Financing G.P. v. ING Insurance Co. of Canada,* ONCA 171.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Ontario Statutes
Personal Property Security Act

R.S.O. 1990, c. P.10, s. 1

S 1.

Currency

1.
1(1)Definitions
In this Act,

"accessions" means goods that are installed in or affixed to other goods;

"account" means a monetary obligation not evidenced by chattel paper or an instrument, whether or not it has been earned by performance, but does not include investment property;

"broker" means a broker as defined in the *Securities Transfer Act, 2006*;

"certificated security" means a certificated security as defined in the *Securities Transfer Act, 2006*;

"chattel paper" means one or more than one writing that evidences both a monetary obligation and a security interest in or a lease of specific goods;

"clearing house" means an organization through which trades in options or standardized futures are cleared and settled;

"clearing house option" means an option, other than an option on futures, issued by a clearing house to its participants;

"collateral" means personal property that is subject to a security interest;

"consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

"debtor" means,

(a) a person who,

(i) owes payment or other performance of the obligation secured, and

(ii) owns or has rights in the collateral, including a transferee of or successor to a debtor's interest in collateral,

(b) if the person who owes payment or other performance of the obligation secured and the person who owns or has rights in the collateral are not the same person,

(i) in a provision dealing with the obligation secured, the person who owes payment or other performance of the obligation secured,

(ii) in a provision dealing with collateral, the person who owns or has rights in the collateral, including a transferee of or successor to a debtor's interest in collateral, or

(iii) if the context permits, both the person who owes payment or other performance of the obligation secured and the person who owns or has rights in the collateral, including a transferee of or successor to a debtor's interest in collateral,

(c) a lessee of goods under a lease for a term of more than one year, or

(d) a transferor of an account or chattel paper;

"default" means the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event whereupon under the terms of the security agreement the security becomes enforceable;

"document of title" means any writing that purports to be issued by or addressed to a bailee and purports to cover such goods in the bailee's possession as are identified or fungible portions of an identified mass, and that in the ordinary course of business is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers;

"entitlement holder" means an entitlement holder as defined in the *Securities Transfer Act, 2006*;

"entitlement order" means an entitlement order as defined in the *Securities Transfer Act, 2006*;

"equipment" means goods that are not inventory or consumer goods;

"financial asset" means a financial asset as defined in the *Securities Transfer Act, 2006*;

"financing change statement" means the information required for a financing change statement presented in a required format;

"financing statement" means the information required for a financing statement presented in a required format;

"future advance" means the advance of money, credit or other value secured by a security agreement whether or not such advance is given pursuant to commitment;

"futures account" means an account maintained by a futures intermediary in which a futures contract is carried for a futures customer;

"futures contract" means a standardized future or an option on futures, other than a clearing house option, that is,

(a) traded on or subject to the rules of a futures exchange recognized or otherwise regulated by the Ontario Securities Commission or by a securities regulatory authority of another province or territory of Canada, or

(b) traded on a foreign futures exchange and carried on the books of a futures intermediary for a futures customer;

"futures customer" means a person for which a futures intermediary carries a futures contract on its books;

"futures exchange" means an association or organization operated to provide the facilities necessary for the trading of standardized futures or options on futures;

"futures intermediary" means a person that,

(a) is registered as a dealer permitted to trade in futures contracts, whether as principal or agent, under the securities laws or commodity futures laws of a province or territory of Canada, or

(b) is a clearing house recognized or otherwise regulated by the Ontario Securities Commission or by a securities regulatory authority of another province or territory of Canada;

"goods" means tangible personal property other than chattel paper, documents of title, instruments, money and investment property, and includes fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted;

"instrument" means,

(a) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada) or any other writing that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(b) a letter of credit and an advice of credit if the letter or advice states that it must be surrendered upon claiming payment thereunder,

but does not include a writing that constitutes part of chattel paper, a document of title or investment property;

"intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments, money or investment property;

"inventory" means goods that are held by a person for sale or lease or that have been leased or that are to be furnished or have been furnished under a contract of service, or that are raw materials, work in process or materials used or consumed in a business or profession;

"investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account;

"lease for a term of more than one year" includes,

(a) a lease for an indefinite term, even if the lease is determinable by one of the parties or by agreement of two or more of the parties within one year from the date of its execution,

(b) a lease for a term of one year or less if the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a continuous period of more than one year, but a lease described in this clause is not a lease for a term of more than one year during the period before the day the lessee's possession of the leased goods exceeds one year,

(c) a lease for a term of one year or less if,

(i) the lease provides that it is renewable for one or more terms at the option of one of the parties or by agreement of all of the parties, and

(ii) it is possible for the total of the original term and the renewed terms to exceed one year,

but does not include,

(d) a lease by a lessor who is not regularly engaged in the business of leasing goods, or

(e) a lease of household furnishings or appliances as part of a lease of land, if the use and enjoyment of the household furnishings or appliances is incidental to the use and enjoyment of the land;

Proposed Addition — 1(1) "Minister", "ministry"

"Minister" means the member of the Executive Council to whom responsibility for the administration of this Act is assigned or transferred under the *Executive Council Act*;

"ministry" means the ministry of the Minister;

2012, c. 8, Sched. 45, s. 1 [Not in force at date of publication.]

"money" means a medium of exchange authorized or adopted by the Parliament of Canada as part of the currency of Canada or by a foreign government as part of its currency;

"obligation secured", for the purposes of determining the amount payable under a lease, means the amount contracted to be paid as rent under the lease and all other amounts that have or may become payable under the lease, including the amount, if any, required to be paid by the lessee to obtain full ownership of the collateral, as of the relevant date, less any amounts paid;

"option" means an agreement that provides the holder with the right, but not the obligation, to do one or more of the following on terms or at a price established by or determinable by reference to the agreement at or by a time established by the agreement:

1. Receive an amount of cash determinable by reference to a specified quantity of the underlying interest of the option.

2. Purchase a specified quantity of the underlying interest of the option.

3. Sell a specified quantity of the underlying interest of the option;

"option on futures" means an option the underlying interest of which is a standardized future;

"personal property" means chattel paper, documents of title, goods, instruments, intangibles, money and investment property, and includes fixtures but does not include building materials that have been affixed to real property;

"prescribed" means prescribed by the regulations;

"proceeds" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with collateral or the proceeds therefrom, and includes,

(a) any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom,

(b) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and

(c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

"purchase" includes taking by sale, lease, negotiation, mortgage, pledge, lien, gift or any other consensual transaction creating an interest in personal property;

"purchase-money security interest" means,

(a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price,

(b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral, to the extent that the value is applied to acquire the rights, or

(c) 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;

"purchaser" means a person who takes by purchase;

"registrar" means the registrar of personal property security;

"regulations" means the regulations made under this Act;

"secured party" means a person who holds a security interest for the person's own benefit or for the benefit of any other person and includes a trustee where the holders of obligations issued, guaranteed or provided for under a security agreement are represented by a trustee as the holder of the security interest and for the purposes of sections 17, 59 to 64, 66 and 67 includes a receiver or receiver and manager;

"securities account" means a securities account as defined in the *Securities Transfer Act, 2006*;

"securities intermediary" means a securities intermediary as defined in the *Securities Transfer Act, 2006*;

"security" means a security as defined in the *Securities Transfer Act, 2006*;

"security agreement" means an agreement that creates or provides for a security interest and includes a document evidencing a security interest;

"security certificate" means a security certificate as defined in the *Securities Transfer Act, 2006*;

"security entitlement" means a security entitlement as defined in the *Securities Transfer Act, 2006*;

"security interest" means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

(a) the interest of a transferee of an account or chattel paper, and

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

"standardized future" means an agreement traded on a futures exchange pursuant to standardized conditions contained in the by-laws, rules or regulations of the futures exchange, and cleared and settled by a clearing house, to do one or more of the following at a price established by or determinable by reference to the agreement and at or by a time established by or determinable by reference to the agreement:

1. Make or take delivery of the underlying interest of the agreement.

2. Settle the obligation in cash instead of delivery of the underlying interest;

"trust indenture" means any security agreement by the terms of which a body corporate, with or without share capital and wherever or however incorporated,

(a) issues or guarantees debt obligations or provides for the issue or guarantee of debt obligations, and

(b) appoints a person as trustee for the holders of the debt obligations so issued, guaranteed or provided for;

"uncertificated security" means an uncertificated security as defined in the *Securities Transfer Act, 2006*;

"value" means any consideration sufficient to support a simple contract and includes an antecedent debt or liability.

1(1.1) [defined **"business day"** and **"reinstatement date"**; enacted 1996, c. 5, s. 1(1), in force April 3, 1996; repealed 1996, c. 5, s. 1(2), in force April 27, 1996, on publication of the "reinstatement date" of April 4, 1996, in the *Ontario Gazette* (p. 1071).]

1(2)Determination of control
For the purposes of this Act,

(a) a secured party has control of a certificated security if the secured party has control in the manner provided under section 23 of the *Securities Transfer Act, 2006*;

(b) a secured party has control of an uncertificated security if the secured party has control in the manner provided under section 24 of the *Securities Transfer Act, 2006*;

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided under section 25 or 26 of the *Securities Transfer Act, 2006*;

(d) a secured party has control of a futures contract if,

(i) the secured party is the futures intermediary with which the futures contract is carried, or

(ii) the futures customer, secured party and futures intermediary have agreed that the futures intermediary will apply any value distributed on account of the futures contract as directed by the secured party without further consent by the futures customer; and

(e) a secured party having control of all security entitlements or futures contracts carried in a securities account or futures account has control over the securities account or futures account.

1(3) [Enacted 1996, c. 5, s. 1(1), in force April 3, 1996; repealed 1996, c. 5, s. 1(2), in force April 27, 1996, on publication of the "reinstatement date" of April 4, 1996, in the *Ontario Gazette* (p. 1071).]

1991, c. 44, s. 7(1); 1996, c. 5, s. 1; 1998, c. 18, Sched. E, s. 193; 2006, c. 8, s. 123; 2006, c. 34, Sched. E, s. 1; 2010, c. 16, Sched. 5, s. 4(1)

Currency
Ontario Current to Gazette Vol. 148:15 (April 11, 2015)

Concordance References
Personal Property Security Act Concordance 1, Definitions

End of Document

Ontario Statutes
Personal Property Security Act
Part III — Perfection and Priorities

R.S.O. 1990, c. P.10, s. 20

S 20.

Currency

20.

20(1)Unperfected security interests

Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the *Creditors' Relief Act, 2010* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of any obligation and who gives value without knowledge of the security interest.

20(2)Idem

The rights of a person,

(a) who has a statutory lien referred to in subclause (1)(a)(i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

20(3)Purchase-money security interest

A purchase-money security interest that is perfected by registration,

(a) in collateral, other than an intangible, before or within 15 days after,

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is earlier; or

(b) in an intangible before or within 15 days after the attachment of the security interest in the intangible,

has priority over,

(c) an interest set out in subclause (1)(a)(ii) and is effective against a person described in clause (1)(b); and

(d) the interest of a transferee of collateral that forms all or part of a sale in bulk within the meaning of the *Bulk Sales Act*.

2006, c. 8, s. 132; 2010, c. 16, Sched. 4, s. 28, Sched. 5, s. 4(2), item 1

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Concordance References

Personal Property Security Act Concordance 26, Unperfected security interests

Personal Property Security Act Concordance 28, Purchase-money security interest

Ontario Statutes
Personal Property Security Act
Part III — Perfection and Priorities

R.S.O. 1990, c. P.10, s. 25

s 25.

Currency

25.

25(1)Perfecting as to proceeds

Where collateral gives rise to proceeds, the security interest therein,

(a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and

(b) extends to the proceeds.

25(2)Idem

Where the security interest was perfected by registration when the proceeds arose, the security interest in the proceeds remains continuously perfected so long as the registration remains effective or, where the security interest is perfected with respect to the proceeds by any other method permitted under this Act, for so long as the conditions of such perfection are satisfied.

25(3)Idem

A security interest in proceeds is a continuously perfected security interest if the interest in the collateral was perfected when the proceeds arose.

25(4)Idem

If a security interest in collateral was perfected otherwise than by registration, the security interest in the proceeds becomes unperfected ten days after the debtor acquires an interest in the proceeds unless the security interest in the proceeds is perfected under this Act.

25(5)Motor vehicles classified as consumer goods

Where a motor vehicle, as defined in the regulations, is proceeds, a person who buys or leases the vehicle as consumer goods in good faith takes it free of any security interest therein that extends to it under clause (1)(b) even though it is perfected under subsection (2) unless the secured party has registered a financing change statement that sets out the vehicle identification number in the designated place.

2000, c. 26, Sched. B, s. 16(3)

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Concordance References

Personal Property Security Act Concordance 34, Perfecting as to proceeds

End of Document

Ontario Statutes
Personal Property Security Act
Part III — Perfection and Priorities

R.S.O. 1990, c. P.10, s. 28

s 28.

Currency

28.

28(1)Transactions in ordinary course of business, buyers of goods

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

28(1.1)Same

Subsection (1) applies whether or not,

(a) the buyer took possession of the goods;

(b) the seller was in possession of the goods at any time;

(c) title to the goods passed to the buyer; or

(d) the seller took a security interest in the goods.

28(1.2)Same

Despite subsection (1.1), subsection (1) does not apply if the goods were not identified to the contract of sale.

28(1.3)Goods identified to contract

For the purposes of subsection (1.2), goods are identified to the contract of sale when they are,

(a) identified and agreed upon by the parties at the time the contract is made; or

(b) marked or designated to the contract,

(i) by the seller, or

(ii) by the buyer, with the seller's consent or authorization.

28(2)Idem, lessors of goods

A lessee of goods from a lessor who leases the goods in the ordinary course of business holds the goods, to the extent of the lessee's rights under the lease, free from any security interest therein given by the lessor even though it is perfected and the lessee knows of it, unless the lessee also knew that the lease constituted a breach of the security agreement.

28(2.1)Same

Subsection (2) applies whether or not,

(a) the lessee took possession of the goods; or

(b) the lessor was in possession of the goods at any time.

28(2.2)Same

Despite subsection (2.1), subsection (2) does not apply if the goods were not identified to the contract of lease.

28(2.3)Goods identified to contract

For the purposes of subsection (2.2), goods are identified to the contract of lease when they are,

(a) identified and agreed upon by the parties at the time the contract is made; or

(b) marked or designated to the contract,

(i) by the lessor, or

(ii) by the lessee, with the lessor's consent or authorization.

28(3)Same, purchasers of chattel paper

A purchaser of chattel paper who takes possession of it in the ordinary course of business and gives new value has priority over any security interest in it,

(a) that was perfected by registration if the purchaser did not know at the time of taking possession that the chattel paper was subject to a security interest; or

(b) that has attached to proceeds of inventory under section 25, whatever the extent of the purchaser's knowledge.

28(4)Idem, purchasers of instruments

A purchaser of collateral that is an instrument or negotiable document of title has priority over any security interest therein perfected by registration or temporarily perfected under section 23 or 24 if the purchaser,

(a) gave value for the interest purchased;

(b) purchased the collateral without knowledge that it was subject to a security interest; and

(c) has taken possession of the collateral.

28(5)Motor vehicles, transaction other than in ordinary course

Where a motor vehicle, as defined in the regulations, is sold other than in the ordinary course of business of the seller and the motor vehicle is classified as equipment of the seller, the buyer takes it free from any security interest therein given by the seller even though it is perfected by registration unless the vehicle identification number of the motor vehicle is set out in the designated place on a registered financing statement or financing change statement or unless the buyer knew that the sale constituted a breach of the security agreement.

28(6)Securities

A purchaser of a security, other than a secured party, who,

(a) gives value;

(b) does not know that the transaction constitutes a breach of a security agreement granting a security interest in the security to a secured party that does not have control of the security; and

(c) obtains control of the security,

acquires the security free from the security interest.

28(7)Same

A purchaser referred to in subsection (6) is not required to determine whether a security interest has been granted in the security or whether the transaction constitutes a breach of a security agreement.

28(8)No action against purchaser for value without notice of breach

An action based on a security agreement creating a security interest in a financial asset, however framed, may not be brought against a person who acquires a security entitlement under section 95 of the *Securities Transfer Act, 2006* for value and did not know that there has been a breach of the security agreement.

28(9)Same

A person who acquires a security entitlement under section 95 of the *Securities Transfer Act, 2006* is not required to determine whether a security interest has been granted in a financial asset or whether there has been a breach of the security agreement.

28(10)Same

If an action based on a security agreement creating a security interest in a financial asset could not be brought against an entitlement holder under subsection (8), it may not be brought against a person who purchases a security entitlement, or an interest in it, from the entitlement holder.

2000, c. 26, Sched. B, s. 16(4); 2006, c. 8, s. 136; 2006, c. 34, Sched. E, s. 9

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Ontario Current to Gazette Vol. 148:6 (February 7, 2015)

End of Document

Ontario Statutes
Personal Property Security Act
Part III — Perfection and Priorities

R.S.O. 1990, c. P.10, s. 30

s 30.

Currency

30.

30(1)Priorities, general rule

If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.

2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,

   i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and

   ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.

4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

30(2)Idem

For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

30(3)Future advances

Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

30(4)Exception

A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20(1)(a)(ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

(a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or

(b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

30(5)Proceeds

For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

30(6)Reperfected security interests

Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

30(6.1)Same, extended time

Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996.

30(7)Deemed trusts

A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

30(8)Exception

Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

1996, c. 5, s. 2

Currency

Ontario Current to Gazette Vol. 148:15 (April 11, 2015)

Concordance References

Personal Property Security Act Concordance 41, Priorities, general rule

End of Document

Ontario Regulations
Personal Property Security Act
Ont. Reg. 56/07 — General

O. Reg. 56/07, s. 1

s 1. Definition of "motor vehicle"

Currency

1.Definition of "motor vehicle"
For the purposes of the Act,

"motor vehicle" means an automobile, motorcycle, motorized snow vehicle and any other vehicle that is self-propelled but does not include,

(a) a street car or other vehicle running only upon rails,

(b) a farm tractor,

(c) an implement of husbandry,

(d) a machine acquired for use or used as a road-building machine, or

(e) a craft intended primarily for use in the air or in or upon the water.

Currency
Ontario Current to Gazette Vol. 148:6 (February 7, 2015)

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TRISURA GUARANTEE INSURANCE COMPANY -and- EBERSOLE EXCAVATING INC. AND D & S RAILWAY CONSTRUCTION INC.

Applicant

Respondents

Court File No. CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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