Court File No.: CV-18-597922-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

CWB MAXIUM FINANCIAL INC.

Plaintiff

- and -

1970636 ONTARIO LTD. o/a MT. CROSS PHARMACY, UMAIR N. NASIM, SHRIKANT MALHOTRA, 1975193 ONTARIO LTD. dba MTN RX & HEALTH AND ANGELO KIRKOPOULOS

Defendants

BOOK OF AUTHORITIES OF THE PLAINTIFF
(Returnable June 14, 2018)

January 2, 2018 **MILLER THOMSON LLP**
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Lawyers for the Plaintiff

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Tab 1

CITATION: Bank of Montreal v Carnival National Leasing Limited, 2011 ONSC 1007
COURT FILE NO.: CV-10-9029-00CL
DATE: 20110215

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BANK OF MONTREAL, Applicant

AND:

CARNIVAL NATIONAL LEASING LIMITED and CARNIVAL AUTOMOBILES LIMITED, Respondents

BEFORE: Newbould J.

COUNSEL: John J. Chapman and Arthi Sambasivan, for the Applicants
Fred Tayar and Colby Linthwaite, for the Respondents
Rachelle F. Mancur, for Royal Bank of Canada

HEARD: February 11, 2011

ENDORSEMENT

[1] Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

[2] Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver

of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

[3] The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

[4] The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

[5] BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

[6] The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

[7] Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

[8] Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

[9] On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

[10] It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

[11] Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

[12] Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles

financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

[13] On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. C.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

[14] Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

[15] I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have

justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

[16] In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

[17] The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

[18] Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

[19] In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million

on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

[20] Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

[21] In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

[22] BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

[23] Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

[24] In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that

permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

[25] It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[26] *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in

Anderson v. Hunking 2010 ONSC 4008 cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.* 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

[27] In *Bank of Nova Scotia v. Freure Village on Clair Creek,* Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

[28] In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, (1995), 30 C.B.R. (3d) 49, in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

> 28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

[29] See also *Bank of Nova Scotia v. D.G. Jewelry Inc.*, (2002) 38 C.B.R. (4th) 7 in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in Royal Bank v. Zutphen Brothers, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
> ...
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

[30] This is not a case like *Royal Bank v. Chongsim Investments Ltd* (1997) 32 O.R. (3d0 565 in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create

a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

[31] Carnival relies on a decision in *Royal Bank of Canada v. Boussoulas* [2010] O.J. No. 3611, in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

[32] In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

[33] Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

[34] It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold

out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

[35] In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

[36] In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a

consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

[37] While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

[38] In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Newbould J.

DATE: February 15, 2011

Tab 2

CITATION: Lisec America, Inc. v. Barber Suffolk Ltd., 2012 ONCA 37
DATE: 20120120
DOCKET: C53360

COURT OF APPEAL FOR ONTARIO

Blair and LaForme JJ.A. and Benotto J. (*ad hoc*)

BETWEEN:

Lisec America, Inc.

Applicant
(Appellant)

and

Barber Suffolk Ltd. and Roynat Capital Inc.

Respondents
(Respondent in Appeal)

Brett Harrison and Jeffrey Levine, for the appellant

Craig J. Hill, for the respondent Roynat Capital Inc.

No one appearing for the respondent Barber Suffolk Limited

Heard: October 14, 2011

On appeal from the order of Justice Frank Marrocco of the Superior Court of Justice, dated February 9, 2011.

R.A. Blair J.A.:

OVERVIEW

[1] The issue on this appeal is whether Lisec America Inc. or Roynat Capital Inc. holds a prior perfected and first ranking security interest in a large $1.4 million piece of equipment known as a waterjet glass cutting machine (the "Waterjet").

[2] Both parties argue that a proper and commercially reasonable interpretation of the governing legislation – the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA") – supports their position. In a nutshell, here is how the dispute arose.

[3] Lisec sold the Waterjet to Barber Suffolk Ltd. and, in accordance with the agreement, later delivered it to the Collingwood facility of a related company, Barber Glass Industries Inc. Prior to delivery, Lisec perfected its security interest in the machine by registering a financing statement against Barber Suffolk. At the same time, Lisec had also sold two other pieces of equipment to Barber Glass – a Cutting Line and a Vertical IG Line. They were delivered to Barber Glass in Collingwood at the same time, and Lisec registered a financing statement against Barber Glass in order to perfect its security interest in that equipment as well.

[4] What Lisec did not know was that Barber Suffolk had sold its interest in the Waterjet to Barber Glass on the day of the original sale.

[5] Barber Glass was in need of additional financing at the time when the equipment was delivered. It arranged that financing through Roynat Capital. Aware of Lisec's PPSA registration against Barber Glass, Roynat requested Lisec either to confirm the

details of its security interest or, if paid in full, to register a discharge of it. Lisec discharged the registration, still unaware of the transfer from Barber Suffolk to Barber Glass. It did so on the understanding that it would receive payment for the Cutting Line and the Vertical IG Line out of the proceeds of the new financing. Roynat then advanced close to $9.5 million to Barber Glass and registered a PPSA financing statement against Barber Glass to perfect its own security interest in the Waterjet.

[6] Barber Glass was subsequently placed into receivership. Lisec and Roynat each claim to be entitled to a prior security interest in the Waterjet on the basis of the priority of perfection by registration regime set out in the PPSA. Lisec says that its properly perfected interest in the Waterjet through the Barber Suffolk registration remained perfected, in spite of the unknown transfer of the machine to Barber Glass, because of the saving provisions of ss. 39 and 48(2) of the Act. Roynat appears to agree that would be the case but for the intervention of the registration of Lisec's discharge of its security interest against Barber Glass. Roynat submits, however, that the discharge caused Lisec's security interest in the Waterjet to become unperfected and therefore to be superceded by the Roynat registration on the basis of the priority of registration regime set out in s. 30(1), rule 1.

[7] Lisec applied to the Superior Court of Justice to settle the issue. Marrocco J. ruled in favour of Roynat. Lisec appeals from that order. For the reasons that follow, I would allow the appeal.

THE FACTS DEVELOPED

[8] The Barber Glass group of companies is in the business of supplying glass products to the transportation industry, heavy equipment manufacturers, the architectural market and the furniture market – and has done so for over 100 years. Barber Glass and Barber Suffolk are related companies in that group, although Barber Suffolk is not in a similar business. Barber Glass operates three facilities, one in Collingwood (for processing oversized glass orders) and two in Guelph (a manufacturing facility and a retail facility).

[9] On July 16, 2007, Lisec sold the Waterjet to Barber Suffolk. The equipment purchase agreement provided for a Purchase Money Security Interest (a "PMSI") in favour of Lisec. At the same time, Lisec also sold additional equipment to Barber Glass – the Cutting Line and the Vertical IG Line – destined for the Barber Glass facility in Collingwood.

[10] Unbeknownst to Lisec, Barber Suffolk in turn sold the Waterjet to Barber Glass on July 16, 2007.

[11] A year later, all three pieces of equipment were delivered and, in accordance with the equipment purchase agreement, Lisec delivered the Waterjet to Barber Glass' Collingwood facility as well. On June 19, 2008 – before delivering the equipment – Lisec registered a financing statement against Barber Suffolk to perfect its PMSI in the Waterjet. It also registered a financing statement against Barber Glass to perfect its

PMSI in the two pieces of equipment sold to Barber Glass. Neither registration, on its face, indicated any particular collateral description.

[12] Lisec did not know when the equipment was delivered that Barber Suffolk had earlier transferred its interest in the Waterjet to Barber Glass.

[13] Barber Glass was looking for additional financing at about the same time. It approached Lisec asking Lisec to release its security interest in the Barber *Glass* equipment so that Barber Glass could obtain additional financing. The new financing was to result in Lisec invoices respecting the Cutting Line and the Vertical IG Line being paid.

[14] Enter Roynat Capital, which was to provide the refinancing. Having learned of the June 19, 2008 Lisec registration against Barber Glass, Roynat's solicitors contacted Lisec by a letter dated June 23, 2008 asking for confirmation of the details of its security interest and requesting that, "if in fact the registration has been paid in full," Lisec discharge its registration. Lisec did not respond to the letter, but on July 9, 2008, it registered a financing change statement discharging its registration against Barber Glass.

[15] On the basis of that discharge, Roynat proceeded to advance $9.5 million to Barber Glass pursuant to a Debenture dated July 7, 2008. The Debenture specifically granted Roynat a security interest in the Waterjet. Roynat in turn perfected that security interest by registering a financing statement sometime thereafter. Some of Barber Glass' indebtedness to Lisec was repaid out of the funds advanced.

[16] Barber Glass' financial difficulties began to mount, however, and on November 10, 2010 it was placed in receivership. Lisec shortly learned for the first time that Barber Suffolk had earlier sold the Waterjet to Barber Glass and that the Waterjet was considered in the receivership as an asset of Barber Glass. On November 17, 2010, Lisec claimed a PMSI in the Waterjet and on November 29, 2010, it registered a financing statement showing Barber Glass as the new debtor in respect of its security interest in that machine.

[17] As part of the Barber Glass receivership proceedings the receiver is seeking to sell Barber Glass' assets. Lisec objected to the inclusion of the Waterjet in the asset sale, and applied to the Superior Court of Justice for a determination of its right and entitlement in the machine. As noted above, the application judge dismissed its application.

THE REASONS OF THE APPLICATION JUDGE

[18] The application judge accepted Lisec's argument that its PMSI over the Waterjet had not become unperfected as a result of the transfer of the machine from Barber Suffolk to Barber Glass. Lisec did not know about the transfer until the receivership occurred and properly registered a financing change statement within 30 days of learning about it, and its perfected security was therefore preserved by the operation of s. 48(2) of the PPSA.

[19] That was not the end of the matter for the application judge, however. He reasoned that because Lisec had registered a financing statement against Barber Glass,

because the wording of that financing statement was sufficiently broad to capture the Waterjet as well as the two other pieces of equipment sold to Barber Glass, and because Lisec had discharged the Barber Glass registration without qualification, the effect of that discharge was to unperfect Lisec's PMSI in the Waterjet. Lisec's subsequent attempt to continue to perfect that interest by its November 29, 2010 registration was to no avail because Roynat had perfected *its* security interest in the machine after the discharge and before the subsequent Lisec registration.

ANALYSIS

[20] For purposes of the analysis, a brief resumé of the chronological timeline may be helpful:

July 16, 2007:	Lisec sells the Waterjet to Barber Suffolk and two other pieces of equipment to Barber Glass
July 16, 2007:	Barber Suffolk transfers its interest in the Waterjet to Barber Glass
June 19, 2008:	Lisec perfects its security interests by registering PPSA financing statements against both Barber Suffolk and Barber Glass (thinking it is doing so against Barber Suffolk in relation to the Waterjet and against Barber Glass in relation to the other two pieces of equipment)
June 28, 2008:	All three pieces of equipment are delivered to the Barber Glass facility in Collingwood

July 9, 2008:	Lisec discharges its registration against Barber Glass, at Barber Glass' and Roynat's request
After July 9, 2008:	Roynat registers a PPSA financing statement against Barber Glass, perfecting its security interest against the Waterjet, and thereafter advances its financing
November 10, 2010:	Barber Glass is placed in receivership
November 17, 2010:	Lisec claims a PMSI in the Waterjet
November 29, 2010:	Lisec registers a financing change statement after learning that the Waterjet had been sold by Barber Suffolk to Barber Glass

Did the Unknown Transfer Affect Lisec's Registration Against Barber Suffolk?

[21] The application judge correctly determined that the unknown transfer from Barber Suffolk to Barber Glass did not unperfect Lisec's PMSI in the Waterjet because Lisec properly registered a financing change statement against Barber Glass within 30 days of learning of the transfer. This conclusion follows from the operation of subsection 48(2) of the PPSA, which states:

> Where a security interest is perfected by registration and the debtor, without the prior consent of the secured party, transfers the debtor's interest in all or part of the collateral, the security interest in the collateral transferred becomes unperfected thirty days after the later of,

> (a) the transfer, if the secured party had prior knowledge of the transfer and if the secured party had, at the time of the transfer, the information required to register a financing change statement; and
>
> (b) the day the secured party learns the information required to register a financing change statement,
>
> unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

[22] The purpose of this provision is to protect creditors who have taken all proper steps to perfect their security under the PPSA from losing their priority because of an unknown transfer of the protected asset to another debtor. Since the PPSA regime protects priority by means of registration against the name of the debtor, the Act provides a secured party in such circumstances with a grace period after becoming aware of the transfer to preserve its priority by registering a financing change statement against the new debtor as well. Accordingly, since Lisec registered its financing change statement within 30 days of learning the information required to do so, the effect of s. 48(2) is that Lisec's security interest in the Waterjet – as protected by the Barber Suffolk registration – remained perfected and entitled to priority over any registrations made against Barber Glass, and covering the same collateral, during the period between the transfer and the registration of Lisec's subsequent financing change statement.

[23] Were that the only issue, therefore, Lisec would clearly have priority over Roynat in the dispute over security in the Waterjet. But that is not the only issue. Lisec's

discharge of its registration against Barber Glass – a registration that was never intended to apply to the Waterjet – muddies the waters.

[24] I turn to that issue now.

Discharge of the Barber Glass Registration

[25] The application judge concluded that the effect of Lisec's discharge of its registration against Barber Glass on July 9, 2008, was to unperfect its PMSI in the Waterjet. Since Roynat had perfected a security interest in the assets of Barber Glass – including the Waterjet – before Lisec registered its subsequent financing change statement, it followed that the Roynat registration took priority.

[26] The rationale for this conclusion was that Lisec's registration against Barber Glass, even though not intended to protect its interest in the Waterjet, was nonetheless broad enough to do so. It covered all of Barber Glass' goods, inventory, equipment and accounts. The application judge reasoned that "creditors should understand that the registration of a discharge of a generally-worded financing statement unperfects all security interests in the collateral described in the financing statement," and that any security interest they hold in the assets of the debtor in question will become subordinated.

[27] The difficulty with this reasoning is that creditors in the position of Lisec have no reason to believe that the contested collateral in a situation like this – the Waterjet, here – is amongst the assets over which the creditor has agreed to release its interest. That said,

the other interest at play – the second creditor in the position of Roynat – advanced its funds and perfected its security interest in the second debtor's collateral without knowing that the first creditor claimed a security interest in the collateral; indeed, in this case, Roynat had every reason to believe that Lisec did not, since Lisec has expressly discharged its registration against the collateral at Roynat's request before it advanced its funds.

[28] Herein lies the dilemma. Whatever the result, an innocent provider of credit will suffer a loss. The application judge was dealing with a case of first impression. I have been able to find no other case where the effect of an intervening discharge by the first creditor against the assets of the second debtor in circumstances such as this has arisen.

[29] Respectfully, however, I disagree with the conclusion of the application judge. I say this for two reasons.

Lisec's Security Interest in the Waterjet Did Not Attach Through Barber Glass

[30] First, I am not persuaded – as the application judge and the parties appear to have accepted – that the Lisec registration against Barber Glass operated to perfect a Lisec security interest in the Waterjet enforceable against Barber Glass. Lisec did not have a security interest in the Waterjet that could have been perfected in that fashion because Barber Glass never granted it one.

[31] Registrations under the PPSA do not operate in the air. They operate to protect a security interest in collateral that has "attached."[1] Section 11 of the PPSA provides that a security interest is not enforceable against a third party unless it has attached. Section 19 requires that, to be perfected, a security interest must (a) have attached, and (b) been perfected in accordance with the Act. A security interest cannot attach, however, unless (amongst other things) the debtor has signed a security agreement containing a description of the collateral in which the security interest has been given: see s. 11(2).

[32] Here, Barber Suffolk and Barber Glass did not grant Lisec a general security agreement or other instrument that would have provided security over all of their assets. They executed equipment purchase agreements granting security interests in specific pieces of equipment – in the case of Barber Suffolk, the Waterjet; in the case of Barber Glass, the Cutting Line and the Vertical IG Line. At no time did Barber Glass sign a security agreement granting Lisec a security interest in the Waterjet. As Professor Ziegel and David Denomme note, "[w]here collateral is transferred by a debtor to another person the new debtor has not created a security interest in [the first secured creditor's] favour; he merely holds an interest in collateral subject to the prior security interest": Jacob S. Ziegel & David L. Denomme, *The Ontario Personal Property Security Act Commentary and Analysis*, 2d ed. (Toronto: Butterworths, 2000) at pp. 253-54.

[1] The notion of attachment recognizes that a security interest is proprietary in nature and must therefore fasten to specific collateral: see Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005), at p. 164; Roy Goode, *Legal Problems of Credit and Security,* 3d ed. (London: Sweet & Maxwell Ltd., 2003) at p. 59; Richard H. McLaren, *The 2012 Annotated Ontario Personal Property Act* (Toronto: Thomson Canada Ltd., 2011) at pp. 143-44.

[33] As Mr. Quast observed in his December 20, 2010 affidavit filed on behalf of Lisec, "[the Barber Glass registration] was entirely unrelated to Lisec's PMSI in the Barber Suffolk Equipment", i.e., the Waterjet. Accordingly, although Lisec's security interest in the Waterjet both attached and was perfected by registration against Barber Suffolk, Lisec never had a security interest in the Waterjet that attached through Barber Glass and therefore that could be perfected through a registration against Barber Glass.

[34] On this analysis, Lisec's registration against Barber Glass could not have perfected a security interest in the Waterjet. Given the wording of the security agreements in question, the fact that Barber Glass ultimately became the owner of the machine does not alter this result. It follows, then, that if Lisec's registration against Barber Glass did not cover the Waterjet, neither it nor its discharge could have had an impact on the operation of ss. 39 and 48(2) in preserving the priority of Lisec's security interest in the Waterjet. The state of affairs is not different than if there had been no Barber Glass registration in the first place.

The Lisec Registration and Discharge Against Barber Glass Are Irrelevant In Any Event

[35] There is a second reason why Lisec's priority must prevail.

[36] The application judge's conclusion that the intervening Barber Glass discharge operated to unperfect Lisec's security interest in the Waterject for purposes of Roynat's priority is premised on the view that Lisec's Barber Suffolk registration somehow became subsumed in its Barber Glass registration and therefore that Lisec's discharge of

the Barber *Glass* registration operated to discharge the Barber *Suffolk* registration. In my view, that is not the case.

[37] Lisec's Barber Suffolk registration is a stand-alone registration. It is not dependent upon nor was it replaced by the Barber Glass registration – assuming for the purposes of this discussion that the latter also sheltered Lisec's security interest in the Waterjet, upon the transfer from Barber Suffolk to Barber Glass.

[38] There is nothing in the PPSA that precludes a secured creditor from having a perfected security interest in collateral in more than one way or through registration against more than one entity. In short, even if the Barber Glass registration did encompass Lisec's security interest in the Waterjet (which, for the reasons articulated above, I do not think it did), the discharge of the Barber *Glass* registration did not take with it the discharge of the Barber *Suffolk* registration; nor does the preservation of the Barber *Suffolk* priority through the operation of ss. 39 and 48(2) constitute an effective revival of the Barber *Glass* registration.

[39] The Barber Suffolk registration remained in place and remained perfected at all material times as a result of the operation of s. 48(2) of the PPSA. The Lisec/Barber Glass registration and discharge are red herrings in the analysis, in my view, and the Lisec/Barber Suffolk registration therefore takes priority over the Roynat registration. In this way the priority provisions of rule 1 of s. 30(1) of the PPSA continue to be respected: priority of registration does prevail. It is simply Lisec's priority of registration that

prevails, not Roynat's. By operation of s. 48(2), the Barber Suffolk registration is deemed to be a prior registration against the Barber Glass equipment.

[40] On this interpretation, there is no need to engage in the debate about whether the common law doctrine of *nemo dat quod non habet* continues to play a parallel role in the determination of priority disputes involving security interests, or whether it has been ousted by the terms of the PPSA, as counsel have invited us to do. Suffice it to say, as the Supreme Court of Canada has recently noted, in *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3, at para 41, "the PPSA resolves priority disputes through a detailed set of priority rules rather than on the basis of title or the form of a transaction."

[41] To the extent that *nemo dat* principles would otherwise have been applicable in these circumstances, it seems to me that they have been incorporated into – and are given effect through – the upshot of ss. 9, 39 and 48(2) of the Act, taken together: (i) a security agreement is effective according to its terms against third parties (s. 9); (ii) the rights of a debtor in collateral may be transferred, but no transfer prejudices the rights of the secured party under the security agreement or otherwise (s. 39); and (iii) a registered priority does not become unperfected by an unknown transfer to a third party if the secured party registers a financing change statement within 30 days of learning of the information required to do so (s. 48(2)). Nothing further is required for these purposes.

[42] Nor does anything in this approach conflict with the well-accepted purpose of the PPSA which, as Gonthier J. noted in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at p. 436, is "to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities."

[43] It is true that lenders in the position of Roynat are vulnerable in situations such as this case presents. But the legislature has given a clear indication through the operation of s. 48(2) of the PPSA that lenders in the position of Lisec are to prevail. There is no lack of certainty or predictability when the provisions of the Act as a whole are properly applied.

[44] I note, in concluding, that on this interpretation, Roynat is in no worse position than it would have been in had there never been an intervening Lisec/Barber Glass registration. Having conducted a search that would have revealed no prior registration, Roynat would have made its advance. Section 48(2) would have operated to preserve Lisec's priority through the Barber Suffolk registration, however, once Lisec registered its financing change statement within the allotted 30-day period after acquiring knowledge of the transfer of interest, as it did.

DISPOSITION

[45] For the foregoing reasons, I would allow the appeal, set aside the order below, and declare that Lisec's security interest in the Waterjet ranks first in priority to Roynat's security interest in the Waterjet.

[46] Lisec is entitled to its costs of the appeal, fixed in the amount of $15,000 all inclusive, as agreed between counsel.

"R.A. Blair J.A."
"I agree H.S. LaForme J.A."
"I agree M.L. Benotto J. (*ad hoc*)"

RELEASED: January 20, 2012

Tab 3

Re Axelrod
Re Seax Management Ltd.

[Indexed as: Axelrod (Re)]

20 O.R. (3d) 133
[1994] O.J. No. 2277
Action No. C17764

Court of Appeal for Ontario,
Blair, Griffiths and Arbour JJ.A.
October 12, 1994

Personal property security -- Dental charts, patient files and records may be charged as security under general security agreement.

A, a dental surgeon, and his management company were indebted to M-D, a corporation engaged in the financing of health professionals. The indebtedness was secured by a general security agreement that granted, among other things, a security interest in records, files, patient lists, and patient files. After the bankruptcy of A and his management company, M-D moved for and was granted an order to enforce its security against the patients' lists and files. The order included a plan to protect the confidentiality of the records. Under the plan, M-D would take possession of the records and transfer them to a named dentist who would notify each patient in a letter that asked the patient to call or write if the patient wished the records to be transferred to another dentist. The order allowed A to have access to the patient lists and files for the purposes of any matter arising under the Health Disciplines Act, R.S.O. 1990, c. H.4, but restrained him from contacting existing patients of the practice. A appealed; he argued that M-D was not entitled to take possession of the confidential patient records and that the motions court judge had erred in

enjoining him from contacting his existing patients and in ordering that a letter be sent that did not refer to the new location of his practice.

Held, the appeal should be dismissed with costs.

There is a fiduciary relationship between a dentist (or doctor) and a patient, which includes a duty of confidentiality, and under O. Reg. 853/93 (Dentistry Act, 1991, S.O. 1991, c. 24), it is professional misconduct for a dentist to give "information about a patient to a person other than the patient or his or her authorized representative except with the consent of the patient or his or her authorized representative or as required by law". The question then was whether a dentist can pledge his or her proprietary interest in the patient's medical records while respecting the right of confidentiality. The answer to this question was that a dentist may use patient records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient's best interests. Just as a dentist may sell his or her practice subject to protecting patient confidences, a dentist may pledge patient records. This involves a duty on the part of the dentist to seek and obtain the patient's consent to the transfer of files in execution of the security; this mirrors the duty a dentist would have on the sale of a dental practice. With M's co-operation, it was possible for him to carry out his contractual obligations while at the same time protecting the confidentiality of the patients in the content of the files.

The motions court judge did err by prohibiting A from contacting his existing patients. When a dentist sells or pledges the patient list, he or she is taken to have parted with his or her own interest subject to the patient's right of confidentiality. Here, the patient's interest in having access to a dentist of his or her choice was adequately protected by the letter to be sent to the patients. Accordingly, the appeal should be dismissed.

Cases referred to

Goodman v. Newman (1986), 34 B.L.R. 23, 13 C.P.R. (3d) 48

(Ont. H.C.J.) [revd (1988), 21 C.P.R. (3d) 260 (Ont. C.A.)]; Josephine V. Wilson Family Trust v. Swartz (1993), 16 O.R. (3d) 268, 23 C.B.R. (3d) 88, 107 D.L.R. (4th) 160 (Gen. Div.); Kiedynk v. Doe (1991), 79 Alta. L.R. (2d) 72 (Q.B.); Kronick v. Lamarche-Craven, [1991] O.J. No. 907 (Gen. Div.); McInerney v. MacDonald, [1992] 2 S.C.R. 138, 126 N.B.R. (2d) 271, 93 D.L.R. (4th) 415, 137 N.R. 35, 317 A.P.R. 271, 12 C.C.L.T. (2d) 225, 7 C.P.C. (3d) 269; Norberg v. Wynrib, [1992] 2 S.C.R. 226, 68 B.C.L.R. (2d) 29, 92 D.L.R. (4th) 449, 138 N.R. 81, [1992] 4 W.W.R. 577, 12 C.C.L.T. (2d) 1

Statutes referred to

Dentistry Act, 1991, S.O. 1991, c. 24
Health Disciplines Act, R.S.O. 1990, c. H.4, s. 37(1) para. 30
Hospitals Act, R.S.A. 1980, c. H-11, s. 40
Personal Property Security Act, R.S.O. 1990, c. P.10

Rules and regulations referred to

O. Reg. 853/93 (Dentistry Act, 1991), s. 2 para. 17

APPEAL from an order of Ground J. (1994), 16 O.R. (3d) 649, 24 C.B.R. (3d) 149, 111 D.L.R. (4th) 540 (Gen. Div.), enforcing a security interest in dental records, patient files and records.

Symon Zuker, for appellant, Dr. Samuel S. Axelrod.

William D. Dunlop, for respondent, Medi-Dent Service.

The judgment of the court was delivered by

ARBOUR J.A.: -- This appeal involves the single issue of whether a creditor may enforce its security under a general security agreement against the patient's list and records of a dentist.

The Facts

The salient facts are not in dispute. The respondent Medi-Dent Service (Medi-Dent) is engaged in the financing of health professionals in Ontario and elsewhere in Canada. The appellant Dr. Axelrod (Axelrod) is a dental surgeon licensed to practise in Ontario. He was adjudged bankrupt on November 18, 1993. Axelrod and his wholly owned management company, which was also adjudged bankrupt, are indebted to Medi-Dent in the amount of $346,630. That indebtedness is secured by a general security agreement (GSA) entered into on February 20, 1993 which grants, inter alia, a general security interest in all of the equipment, book debts, records, files, patient lists and patient files of Axelrod's practice. The security interest was properly perfected as required by the Personal Property Security Act, R.S.O. 1990, c. P.10.

Medi-Dent views Axelrod's patient lists and files as the most valuable part of his practice. Accordingly, Medi-Dent brought a motion for an order that it is entitled to enforce its security against the patients' lists and files, subject to Axelrod's duty to protect the confidentiality of the information contained in the patient's records. Medi-Dent undertook to protect the patients' confidentiality and proposed a detailed plan to do so. The plan was essentially accepted by the motions court judge and incorporated in his order.

The Order

The motion was heard by Ground J. who gave detailed reasons for an order that Medi-Dent is entitled to enforce its GSA against Axelrod's property. His reasons are reported in Re Axelrod (1994), 16 O.R. (3d) 649, 24 C.B.R. (3d) 149 (Gen. Div.). Ground J.'s order also contained the following provisions:

-- that Medi-Dent, through its agents or representative, be permitted to carry on all or part of Axelrod's practice;

-- that Medi-Dent, to the exclusion of Axelrod, occupy the property covered by the GSA;

-- that Medi-Dent take possession of the patient lists and patient files and other records of Axelrod, and that these be transferred to a dentist licensed and qualified to practise in the Province of Ontario (the incoming dentist);

-- that the incoming dentist shall notify each patient named in the patient lists and patient files by sending to them the following letter.

Dear Patient (Name)

I wish to advise you that effective February , 1994, I have taken over the dental practice of Dr. Samuel S. Axelrod at 26 Gibbons Street, Oshawa, Ontario. All patient records remain at that location.

I look forward to continuing to treat you with the high level of dental care you have grown to expect.

If you wish to have your dental records transferred to another dentist, please call or write to me at the above address.

Yours truly,

[Qualified Dentist]

-- that Axelrod shall have the right to full access to the patient lists and files for the purpose of any matter arising under the Health Disciplines Act, R.S.O. 1990, c. H.4;

-- that Axelrod is restrained from entering the premises to which the GSA relates;

-- that Axelrod is restrained from soliciting or contacting existing patients of the dental practice.

This order reflected the conditions that Medi-Dent had proposed as a means of protecting the confidentiality interest

of Axelrod's patients while enforcing its GSA against Axelrod's patient lists and files.

We were advised that the parties had agreed to a preservation of the status quo pending appeal and that the order had not yet been enforced.

The Issues

The appellant raises two issues. He argues that Ground J. erred in holding that the GSA entitled Medi-Dent to take possession of the confidential patient records. He also contends that Ground J. erred in enjoining him from contacting his own patients and in ordering that a letter be sent to the patients without reference to the new location of his practice.

The appellant does not dispute the fact that he entered into the GSA with Medi-Dent. The appellant willingly and voluntarily entered into the agreement with the respondent. There is nothing to suggest that that contract was defective or otherwise invalid. Therefore, the only live issue before this court is whether the appellant's fiduciary obligations vis--vis his patients preclude him from pledging the patient list and files as security.

The relationship between doctor and patient is one that is inherently grounded in trust. McLachlin J., in Norberg v. Wynrib, [1992] 2 S.C.R. 226 at p. 271, 92 D.L.R. (4th) 449, held that, "[a]ll the authorities agree that the relationship of physician to patient . . . falls into that special category of relationships which the law calls fiduciary".

Trust is at the heart of a fiduciary relationship. As between physician and patient this trust is a function of the unequal distribution of power between the parties. The physician is possessed of expertise and knowledge, while the patient is typically in a position of vulnerability and need. McLachlin J. described the nature of this trust, at p. 272, as:

. . . the trust of a person with inferior power that another person who has assumed superior power and responsibility will

exercise that power for his or her good and only for his or her best interests.

In the present case, the appellant owes a duty to his patients to serve their best interests. "Best interests" are not strictly limited to medical needs, but also encompass privacy and confidentiality. As McLachlin J. said (at pp. 272-73):

> The beneficiary entrusts the fiduciary with information or other sources of power over the beneficiary, but does so only within a circumscribed area, for example entrusting his or her lawyer with power over his or her legal affairs or his or her physician over his or her body.

In her discussion of the physician-patient fiduciary relationship, McLachlin J. referred to McInerney v. MacDonald, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415. That case involved a patient's right of access to the contents of her own medical file. La Forest J. accepted that the physician, institution, or clinic responsible for compiling a medical record owns the physical record. He held, however, that certain duties arose from the special relationship of trust and confidence between doctor and patient which lead to a fiduciary duty on the part of the doctor. This duty includes allowing the patient to have access to his or her own medical record. Since the information contained in a medical record originates essentially from the patient, the patient retains a beneficial interest in, and maintains control over, the information contained in the record. With respect to the fiduciary duty of confidentiality, La Forest J. said at pp. 149-50:

> In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others. That being said, certain

duties do arise from the special relationship of trust and confidence between doctor and patient. Among these are the duty of the doctor to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. (Picard, supra, at pp. 3 and 8; Ellis, supra, at pp. 10-1 and 10-12, and Hopper, supra, at pp. 73-74). When a patient releases personal information in the context of the doctor-patient relationship, he or she does so with the legitimate expectation that these duties will be respected.

In McInerney, supra, there was no regulatory legislation governing the patient's right of access to her medical record. The Supreme Court held that, subject to the supervisory jurisdiction of the court, the patient was entitled, upon request, to inspect and copy all information contained in her medical file, and that the onus was on the physician to justify denying access.

In this case, the parallel duty of confidentiality expressed in McInerney is the subject of statutory legislation. Section 2 para. 17 of O. Reg. 853/93, made under the Dentistry Act, 1991, S.O. 1991, c. 24, states that it is professional misconduct for a dentist to give "information about a patient to a person other than the patient or his or her authorized representative except with the consent of the patient or his or her authorized representative or as required or allowed by law". Section 2 para. 17 was enacted in 1993 and is phrased more broadly than the preceding s. 37(1) para. 30 of R.R.O. 1990, Reg. 547, made under the Health Disciplines Act, supra, which merely prohibited the giving, without the patient's consent, of information concerning a patient's dental condition or any professional service performed for a patient to any person.

This case presents an apparent conflict between the dentist's commercial obligations under the GSA and his fiduciary professional obligations. The issue is essentially whether a dentist can pledge his or her proprietary interest in the patient's medical records while concurrently respecting the patients' right of confidentiality as expressed in McInerney, supra, and reflected in the regulations dealing with professional misconduct. In Josephine V. Wilson Family Trust v.

Swartz (1993), 16 O.R. (3d) 268, 23 C.B.R. (3d) 88, Blair J. held that the information in dental records is confidential and that the patient has a trust-like beneficial interest in them. He was of the view that dental records cannot be pledged as an asset of a dentist, despite the fact that the physical record belongs to the dentist. If the records were used by the dentist as an asset for the purpose of raising financing, the patients' legitimate expectation of confidence, he said, could not be respected. The issue in Swartz presented itself slightly differently than it does in the present case in that the GSA did not specifically purport to apply to the patient files. The issue before Blair J. was, in part, whether the GSA should be interpreted to extend to the patient's charts and records.

Both Blair J. in Swartz, supra, and Ground J. in the present case, purported to apply the principles set out in McInerney, supra. I agree with them that there is no difference between medical and dental records with respect to a patient's right of confidentiality. Both doctors and dentists are practitioners under the Health Disciplines Act, supra. As Blair J. noted, information disclosed by a patient to a dentist may be just as sensitive as information provided to a physician. After referring to the patient's legitimate expectation that information revealed to a dentist would be treated in confidence, Blair J. held that such expectation cannot be properly protected if the dentist is allowed to use the records as pledged assets. He said in Swartz, supra, at p. 275:

> It is an impossibility, in this context, to disengage the physical records themselves -- which the Supreme Court of Canada has said are the "property" of the practitioner -- from the contents of those records -- which give them their true character, and in which the Supreme Court of Canada has said the patient has a "trust-like `beneficial interest'." In my view, while the dental records may be the physical property of the dentist, they are property affixed with an inseverable trust of confidentiality in favour of the patient. Just as trust property is not property belonging to a bankrupt, the dental records are not property which belongs to the dentist for purposes of pledging as part of his or her "undertaking, assets and property".

Ground J. in the present case disagreed with that conclusion. He said:

> With great respect, I have some difficulty with the concept that the relationship of trust which undoubtedly exists between doctor or dentist and patient results in the patients' files or records being analogous to trust property for purposes of the B.I.A., that is to say, property in which the bankrupt holds a bare legal title but has no beneficial interest. It seems to me that the case law already establishes that the files or records are property beneficially owned by the medical practitioner. The full use and enjoyment of that property by the medical practitioner is, however, subject to common law and statutory rights of the patient with respect to maintaining confidentiality and with respect to access. Property interests subject to certain restrictions or rights of third parties are capable of being charged. In my view, so long as such rights are preserved by the creditor realizing upon its security, that creditor ought not to be deprived of realization and enforcement rights granted pursuant to a security agreement.

In my respectful view, the approach taken by Ground J. is consistent with the dentist's entitlement to dispose of his or her assets while at the same time respecting his or her professional obligation to fully protect the confidential information contained in the patients' files. I see no difference between a dentist's entitlement to sell his or her practice, and a dentist's entitlement to pledge records. Both can be accomplished in a manner compatible with a dentist's professional responsibilities, as long as the dentist acts with the utmost good faith and loyalty in protecting the patient's confidence.

The doctor may use the records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient's best interests. As McLachlin J. wrote in Norberg, supra, at p. 274:

> The freedom of the fiduciary is limited by the obligation he

or she has undertaken -- an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, at p. 606.

The dentist can only pledge his assets to the extent of his or her interest in them. A dentist who pledges his or her patient files has a continuing duty of utmost good faith and loyalty to the patients when the creditor executes on the security. This involves a duty on the part of the dentist who has pledged his or her patients' records, to seek and obtain the patient's consent to the transfer of files in execution of the security. This mirrors the duty a dentist would have if he or she were to sell his or her dental practice.

Medi-Dent recognizes that its security is subject to the patients' consent to be treated by the incoming dentist that it wishes to put in place taking over the appellant's practice. The appellant argues that the pledging of his assets was illegal because it necessitates a breach of confidentiality. This is only so, in my opinion, if he is in breach of his duty of utmost good faith and loyalty towards his patients, and of his ethical duty to protect the confidence of his patients. The appellant pledged his patient lists and files in order to obtain credit. He was entitled to do so, in the same way as he was entitled to sell his practice. Superimposed on this, however, is the appellant's statutory obligation, under s. 2 para. 17 of O. Reg. 853/93, made under the Dentistry Act, 1991, supra, not to disclose information about a patient without the patient's consent. The appellant also faces a contractual obligation, under the terms of the GSA, to give physical possession of his patient lists and files to the respondent. That obligation can, in my judgment, be carried out while at the same time protecting the confidentiality interest of the patients in the content of their files. An incompatibility only arises if the dentist is unwilling to discharge his obligation of utmost good faith and loyalty to his patients, in a manner consistent with the obligations that he has incurred in the legitimate pursuit of his own financial interest.

The appellant's unwillingness to write to his patients to

inform them that he will turn over their files to a new dentist who is taking over his practice, unless he receives other instructions from them, should not defeat the right of a bona fide creditor to execute on its security, if this can be done with maximum protection for the confidentiality of the information contained in the patients' files.

The appellant's unwillingness to contact his patients in order to assist the respondent in executing on its security creates an additional problem if the duty of confidentiality extends to a duty to keep the patient's identity confidential. In other words, is the dentist duty-bound to keep the very existence of the dentist-patient relationship confidential, except with the patient's consent, or except when otherwise compelled by law to disclose the existence of that relationship? (See, for example, Kiedynk v. Doe (1991), 79 Alta.. L.R. (2d) 72 (Q.B.), where a duty of confidentiality expressed in the Hospitals Act, R.S.A. 1980, c. H-11, s. 40, was held to prohibit disclosure of the identity of a patient.) The language of s. 2 para. 17 of O. Reg. 853/93 appears broad enough to encompass a duty to keep the dentist-patient relationship in confidence, even to another dentist, except with the consent of the patient. Without the appellant's co-operation, it would be impossible in this case to protect that confidence. This is something that the appellant may have to answer for to the appropriate authorities. Meanwhile, the best accommodation of the rights of the creditor and rights of the patients is reflected in Ground J.'s order.

It remains to consider the appellant's argument that Ground J. erred in prohibiting Axelrod from contacting those patients. In Kronick v. Lamarche-Craven, [1991] O.J. No. 907 (Gen. Div.), Somers J. referred with approval to the decision of Potts J. in Goodman v. Newman (1986), 34 B.L.R. 23, 13 C.P.R. (3d) 48 (Ont. H.C.J.). Somers J. held that after the sale of a dental practice which contained a restrictive covenant in place for three years, the vendor dentist was free to communicate with his patients, at the expiration of the period provided for in the contract, for the purpose of informing them of the new location of his practice. In both cases, it was held that patients should have a freedom of choice and not be

"handcuffed" to a practice.

When a dentist sells or pledges his patient list, as the appellant did in this case, I think that he or she should be held to have parted with his or her own interest in the patient list, subject to his or her patients' rights to confidentiality and access. In my view, the patient's right to access to his or her record includes a right of access for the purpose of determining which dentist the patient wishes to consult in the future. The interest of the patient in having access to a dentist of his or her choice is adequately protected in this case, by the letter that the incoming dentist would send to the patients notifying them of the change. That letter contains no indication of whether the appellant was continuing to practise at another location. However, it invites patients to obtain their records if they wish to retain a dentist other than the one who has taken over the appellant's practice. Should patients inquire about the possibility of a continued relationship with the appellant, the incoming dentist would have to assist them by providing them with whatever information was available to him or her about the appellant's whereabouts.

The order prohibiting Dr. Axelrod from contacting his former patients is consistent with the fact that he specifically pledged not only his patient records, but also his patient list. In the circumstances of this case, I think that the order of Ground J. adequately protects the various interests at issue.

Finally, I wish to add that the central interest advanced in this case, that is the interest of the patients, was not properly represented. By arguing that the GSA violated his patients' rights, the appellant was essentially attempting to avoid the consequences of the obligations which he willingly undertook. It would have been vastly preferable to have the patients' interests independently represented, possibly through notice of the proceedings to the Royal College of Dental Surgeons. At this stage of the proceedings, however, I think that the patients' interests will be sufficiently protected by a copy of the order, as well as a copy of these reasons beings served upon the College, which will then be at liberty to act

in accord with its statutory mandate.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

Tab 4

Re Axelrod
Re Seax Management Ltd.

[Indexed as: Axelrod (Re)]

16 O.R. (3d) 649
[1994] O.J. No. 137
Action No. 31-204990-T

Ontario Court (General Division)
Ground J.
January 31, 1994

Personal property security -- Dental charts, patient files and records may be charged as security under general security agreement.

Personal property security -- Licence agreement providing for non-exclusive right to occupy premises for carrying on a dental practice -- Licence to occupy may be charged as security under general security agreement.

A was a dentist, and S Ltd. was his wholly-owned management company. Before August 17, 1993, A carried on his dental practice in premises in the City of Oshawa leased from K Corp. The lease provided for automatic termination upon the bankruptcy or insolvency of A. On August 17, A was insolvent; that day, A, S Ltd., K Corp., and R Corp., a company owned by A's wife, entered an agreement that acknowledged the termination of the lease pursuant to its terms and provided for a new lease between K Corp. and R Corp. On August 18, 1993, the new lease was signed, and on August 20, 1993, R. Corp. and A entered into a licence agreement under which A was given a non-exclusive right to occupy the Oshawa premises for carrying on a dental practice.

M-D was in the business of financing the practices of health professionals, including dentists. M-D had a loan agreement with A and S Ltd. and its security included a general security agreement that granted a general security interest in, among other assets, all files including patient lists and patient files and in contractual rights, including leases and licences.

On November 18, 1993, A and S Ltd. were adjudged bankrupt; they owed M-D $346,630. M-D moved for an order to enforce its security against the patient lists and patient files and to restrain A from attending at the Oshawa premises for the purpose of carrying on his dental practice. To enforce its security but to preserve the confidentiality of the records, M-D proposed a scheme involving the appointment of a qualified dentist to act as custodian and it proposed writing the patients about the disposition of their files. M-D argued that the August agreements were void as constituting a settlement or a fraudulent preference. In the alternative, M-D argued that it had a security interest in the licence agreement.

A, S Ltd., and R Corp. resisted the motion and argued that medical records were not subject to seizure and that M-D had no security interest in the licence agreement.

Held, the motion should be granted.

Patient files or records are property beneficially owned by the medical practitioner. The use of this property is subject to the patient's common law and statutory rights about access and confidentiality. Property interests subject to restrictions or rights of third parties are capable of being charged. So long as these rights are preserved by the creditor when realizing upon its security, the creditor ought not to be deprived of realization and enforcement rights granted under a security agreement. The manner of enforcement proposed in this case satisfactorily preserved confidentiality and access rights. Accordingly, M-D was entitled to realize on its security.

On the evidence before the court, A was insolvent and the original lease automatically terminated on August 17, 1993.

Under the licence agreement, A was granted a licence and his interest was charged under the general security agreement. Accordingly, M-D was entitled to enforce its security interest by entering into possession and restraining A from entering into possession of the premises. It was not necessary to decide whether the August agreements constituted a settlement or a fraudulent preference.

Josephine V. Wilson Family Trust v. Swartz (1993), 16 O.R. (3d) 268 (Gen. Div.), not folld

Other cases referred to

Bacher v. Obar (1989), 28 C.C.E.L. 160 (Ont. H.C.J.); Confederation Life v. Pickering, Ont. Gen. Div., Browne J., April 19, 1993; Lamothe v. Mokleby (1979), 4 Sask. R. 352, 106 D.L.R. (3d) 233 (Q.B.); McInerney v. MacDonald, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415, 137 N.R. 35, 7 C.P.C. (3d) 269, 12 C.C.L.T. (2d) 225, 126 N.B.R. (2d) 271, 317 A.P.R. 271; Peters v. Palmer (1985), 53 Nfld. & P.E.I.R. 152, 156 A.P.R. 152 (Nfld Dist. Ct.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as renamed by 1992, c. 27, s. 2), ss. 91(1), 95(1), 96
Personal Property Security Act, R.S.O. 1990, c. P.10

Authorities referred to

Picard, Legal Liability of Doctors and Hospitals in Canada (Toronto: Carswell, 1978), pp. 290-91
Rozovsky, Canadian Dental Law (Toronto: Butterworths, 1987), p. 46
Sharpe, The Law and Medicine in Canada, 2nd ed. (Toronto: Butterworths, 1987), p. 203

MOTION to enforce a security interest in dental records, patient files and records.

Ian R.A. Macmillan, for Dr. Samuel S. Axelrod, Seax Management Ltd., and Ricpam Investment Corp.

William D. Dunlop, for Medi-Dent Service, a division of Commcorp Financial Services Inc.

GROUND J.: -- This is a motion brought by Medi-Dent Service, a division of Commcorp Financial Services Inc. ("Medi-Dent"), a creditor of Dr. Samuel S. Axelrod ("Axelrod"), and Seax Management Ltd. ("Seax") for an order that Medi-Dent is entitled to enforce its security against property of Axelrod to the extent that such property includes "patient lists" and "patient files" and further for an order restraining Axelrod from attending at premises at 26 Gibbons Street in the City of Oshawa (the "Oshawa premises") for the purpose of carrying on his dental practice.

FACTS

Medi-Dent is engaged generally in the financing of the practices of health professionals, including dentists, in the Province of Ontario and other Provinces of Canada. Axelrod is a fully qualified and licensed dentist in the Province of Ontario. Seax is a company incorporated pursuant to the laws of the Province of Ontario and is wholly owned by Axelrod. Seax was at all material times a management company with respect to the dental practice conducted by Axelrod. Pursuant to order of the Registrar in Bankruptcy dated November 18, 1993, both Axelrod and Seax were adjudged bankrupt. At the date of the bankruptcy Axelrod and Seax were indebted to Medi-Dent in the amount of $346,630.49.

The indebtedness owed to Medi-Dent was incurred pursuant to a loan agreement entered into between Axelrod and Medi-Dent dated the 12th day of July, 1990, as amended from time to time (the "loan agreement") and was evidenced by promissory notes executed on that date and subsequently on the 1st day of February, 1993. As security for the indebtedness to Medi-Dent,

both Axelrod and Seax entered into security agreements, the current one being dated February 20, 1993 (the "GSA"), granting a general security interest in all of the equipment, book debts, inventory, raw materials, contractual rights, including leases and licences, as well as all books of accounts, records, invoices, writings, files, including patient lists and patient files, of the practice and other books and records relating thereto.

The security provision of the GSA stated that Axelrod and Seax granted to Medi-Dent a security interest in all the personal property, assets and undertaking of Axelrod and Seax then owned or thereafter acquired with respect to or arising of the dental practice carried on at 26 Gibbons Street, Oshawa, Ontario or any other premises from which Axelrod and Seax carry on a dental practice including without limiting the generality of the foregoing: "all contractual rights, permits, licences of every kind or nature, including any lease" and "all books of accounts, records, invoices, writings, files, including patient lists and patient files and other books and records relating thereto".

Axelrod carried on his dental practice at the Oshawa premises pursuant to a lease from Kniznik Corporation ("Kniznik"). Prior to the date of bankruptcy, Axelrod and Seax, on August 17, 1993, entered into an agreement (the "Ricpam Agreement") with Kniznik Ricpam Investment Corp. ("Ricpam"), a company wholly owned by Axelrod's wife, the effect of which was to acknowledge the termination of the lease pursuant to the terms thereof and to provide for a new lease from Kniznik to Ricpam. On August 18, 1993, Kniznik entered into a new lease of the Oshawa premises with Ricpam and shortly thereafter, on August 20, 1993, Ricpam and Axelrod entered into an agreement (the "licence agreement") pursuant to which Axelrod was given a non-exclusive right to occupy the Oshawa premises and to use the equipment at such premises for the purpose of carrying on a dental practice.

ISSUES

This motion raises two issues. First, is Medi-Dent, in

realizing upon its security pursuant to the GSA, entitled to take possession of and dispose of the patient lists and patient files (the "records") of Dr. Axelrod? Second, is Medi-Dent, in enforcing its security pursuant to the GSA, entitled to enter upon, occupy and use the Oshawa premises and to restrain Axelrod from making use of these premises for the purpose of carrying on his dental practice?

SUBMISSIONS

Counsel for Medi-Dent submits that Axelrod has a proprietary interest in the records, that such interest may be conveyed, mortgaged or charged and that he has charged whatever interest he has in the records in favour of Medi-Dent pursuant to the GSA. Counsel for Medi-Dent submits that the records are the sole property of Axelrod subject only to a patient's right of access to his or her file and Axelrod's obligation to preserve, in favour of the patient, the confidentiality of his or her file. In the material before the court, Medi-Dent sets out how it intends to preserve such right of access and confidentiality. The affidavit of Mr. Carl Crechiolo, the general manager, risk management, of Medi-Dent states as follows in paras. 16, 17, 18 and 19 thereof:

16. Medi-Dent Service is fully cognizant of the fact that the patient lists and files over which it has security are of a confidential nature. In this regard, Medi-Dent Service proposes to appoint a fully qualified licensed dentist for the Province of Ontario to assist it in the realization of its security and to act as Custodian for the files. Medi-Dent Service undertakes to maintain the integrity of the confidential aspect of the files, and further undertakes not to allow anyone other than the fully qualified licensed dentist for the Province of Ontario to have access to this information with the consent and on the instruction of the individual patient.

17. In this regard, Medi-Dent Service proposes to write to each and every patient on the patient list over which it holds a security interest, to obtain the consent of the said patient and instruction from the said patient as to the

disposition of his or her file. It is proposed that the file will be disposed of by either releasing it directly to the patient or allowing the dentist appointed by Medi-Dent Service to administer service with respect to the file.

18. Further, Medi-Dent Service proposes to allow Dr. Axelrod full access to the said files for any purposes required pursuant to the Health Disciplines Act, or any other governing Ontario or Canadian Statute, that require him or her, from time to time, to perform certain obligations.

19. Medi-Dent Service is prepared to enter into other undertakings as required by the Court for the purposes of preserving the confidentiality and/ or other proprietary rights that the patient has in his or her records.

It is the submission of counsel Medi-Dent that it is in the best interest of all parties that the dental practice be maintained as a going concern and that one of the most valuable assets of the dental practice is its good will, represented in part by the records, which can best be maintained by little or no disruption in the daily functioning of the medical practice. Counsel further submits that the manner in which Medi-Dent proposes to enforce its security interest in the records is analogous to the way in which such records would be handled if Axelrod were to sell his practice to another dental practitioner. Medi-Dent is prepared to give such further undertakings as the court may require with respect to the records including an undertaking that it would not take physical possession of the records itself but would provide that they would be delivered to another dental practitioner and that the form of letter to be sent to patients would be approved by the court.

With respect to the Ricpam agreement and the licence agreement, counsel for Medi-Dent submits that they are void pursuant to s. 91(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "B.I.A."), as constituting a settlement made by the bankrupts within one year prior to the date of bankruptcy or pursuant to ss. 95(1) and 96 of the B.I.A. as constituting a fraudulent preference made by the

bankrupts within 12 months prior to the date of bankruptcy to a related person. In the alternative, counsel for Medi-Dent submits that the licence agreement grants Axelrod a licence to use the Oshawa premises and that the benefit of such licence has been charged in favour of Medi-Dent pursuant to the GSA and passes to Medi-Dent upon default under the GSA.

Counsel for Axelrod, Seax and Ricpam relies in particular upon the recent decision of Mr. Justice Blair in the Josephine V. Wilson Family Trust v. Swartz (unreported, November 18, 1993) [now reported ante, at p. 268], to the effect that the records are not property of Axelrod capable of being pledged in that they are analogous to trust property and are not "property of the bankrupt" for purposes of the B.I.A. He submits that the sale analogy is not valid in that, in the case of the sale of a practice, both the vendor and purchaser write jointly to the patient or the vendor alone writes to the patient seeking instructions as to the disposition of the patient's file. He submits that, although the records are physically capable of being seized, they may not, based on the current law in this province, be seized.

With respect to the Ricpam agreement and the licence agreement, counsel for Axelrod, Seax and Ricpam notes that pursuant to the provisions of the original lease between Kniznik and Axelrod, the lease automatically terminated upon the bankruptcy or insolvency of Axelrod. He further submits that if the Ricpam agreement creates a licence, a licence is not "property" within the meaning of the Personal Property Security Act, R.S.O. 1990, c. P.10 ("P.P.S.A."), and accordingly the registration by Medi-Dent under the P.P.S.A. did not perfect a security interest in the licence created by the licence agreement. He points out that the licence agreement was entered into on August 20, 1993, and that the bankrupts had no property interest in the Oshawa premises after August 19, 1993, and accordingly the agreements do not constitute a "settlement" under s. 91 of the B.I.A. Also, the agreements do not constitute a fraudulent preference under s. 95 of the B.I.A. because there is no evidence that Kniznik was a creditor of Axelrod at the time that the agreements were entered into.

The Records

It is not disputed that the GSA by its terms purports to create a charge on the records in favour of Medi-Dent. The general language of the charging section refers to "all the personal property, assets and undertaking with respect to or arising from the dental practice" and specifically makes reference to "patient lists and patient files". The issue accordingly becomes whether the records are property of the bankrupt capable of being charged in favour of Medi-Dent.

In Lamothe v. Mokleby (1979), 4 Sask. R. 352, 106 D.L.R. (3d) 233, the Saskatchewan Court of Queen's Bench was dealing with the dispute arising under an agreement for the sale of a dental practice. On the subject of ownership of patient records, MacPherson J. stated as follows at pp. 353-54:

> No authority can be found by counsel or by me on the subject of the ownership of clinical records in dentistry. Inasmuch as the law regards dentistry in many respects as a branch of medicine, then one may look to medical authority. In the Canadian text, Malpractice Liability of Doctors and Hospitals, Meredith, 1956, the author says at page 10:
>
> > Medical notes made by a doctor in private practice are for his own use in treating a case and belong to him.
> >
> > . . . The patient himself has no legal right to [their] possession or ownership.

Much the same is said in the more recent English text, Law Relating to Hospitals and Kindred Institutions, Speller, at page 322. Neither text quotes any authority. My brief search of American law shows that it is similar.

. . . . .

On all the evidence I find that Buckley was carrying on an individual practice of dentistry. Thus the clinical charts

were his and not the property of either defendant.

In Peters v. Palmer (1985), 53 Nfld. & P.E.I.R. 152, 156 A.P.R. 152, another case dealing with a dispute arising out of the break-up of a dental practice, the Newfoundland District Court followed Lamothe v. Mokleby, supra. Adams C.J.D.C. stated at pp. 170-71:

> There is a paucity of case law on the issue of ownership of clinical records in circumstances where dentists practise together. Counsel for both Peters and the defendants found only one case touching on the issue: Lamothe v. Mokleby (1979), 106 D.L.R. (3d) 233, a decision of McPherson J., of the Saskatchewan Court of Queen's Bench. It is interesting to note in that case that the learned judge observed on the lack of authority on the subject. There appears to be no doubt, as he observed in his judgment, that in the case of medical practitioners the patient has no legal right to possession or ownership of medical records. See also The Doctor and the Law (1979) by H.E. Emson, M.D., and The Physician and Canadian Law (2nd Ed.) by T.D. Marshall, LL.B., M.D. In my view the same applies in the dental profession.

In Bacher v. Obar (1989), 28 C.C.E.L. 160 (Ont. H.C.J.), yet another case arising out of a dispute on the break-up of a dental practice, Saunders J. stated at pp. 174-75:

> Patient records present little difficulty. On termination, Dr. Obar was entitled to obtain from Bo-Jay the records of patients he had treated who continued to require his services. The patients do not have a right to their records but, in my opinion, the dentist must have that right. Lack of access to records could severely compromise treatment.

A number of texts on the subject of health law also confirm that patient records are the property of the practitioner. Picard, Legal Liability of Doctors and Hospitals in Canada (Toronto: Carswell, 1978), states as follows at pp. 290-91:

> The position with respect to a doctor's office records of a patient is less clear. Like the hospital, the doctor is the

> owner of the records, but the patient may still be entitled to the information contained in them. This is based on a theory that the information in the record is part of what the patient "purchases" from the doctor. Of course, the opposing argument is that the patient is paying only for services and treatment, not information, and therefore has no access to the information as a matter of right.

See also Rozovsky, Canadian Dental Law (Toronto: Butterworths, 1987), at p. 46, and Sharpe, The Law and Medicine in Canada, 2nd ed. (Toronto: Butterworths, 1987), at p. 203.

Finally, the Supreme Court of Canada in McInerney v. MacDonald, [1992] 2 S.C.R. 138 at pp. 138-39 [in the headnote], 93 D.L.R. (4th) 415, stated as follows:

> The patient is not entitled to the records themselves. The physical medical records of the patient belong to the physician.
>
> The physician-patient relationship is fiduciary in nature and certain duties arise from that special relationship of trust and confidence. These include the duties of the doctor to act with utmost good faith and loyalty, to hold information received from or about a patient in confidence, and to make proper disclosure of information to the patient. The doctor also has an obligation to grant access to the information used in administering treatment. This fiduciary duty is ultimately grounded in the nature of the patient's interest in the medical records. Information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. While the doctor is the owner of the actual record, the information is held in a fashion somewhat akin to a trust and is to be used by the physician for the benefit of the patient.

Accordingly, there is, in my view, no doubt that a medical practitioner has an ownership or proprietary interest in patient files and records which is capable of being conveyed or charged.

Two recent decisions of this court have, however, cast doubt upon the right of a creditor to seize such records. In the Josephine V. Wilson Family Trust v. Swartz, supra, R.A. Blair J. stated at pp. 11-13 [pp. 275-76 ante]:

> This brings me to a consideration, then, of the quality of the interest of the patient in the dental charts and records. Some medical textbooks and cases speak in terms of the patient having a "propriety" or "property" interest, or something akin to such an interest in such records: see, for example, Mitchell v. St. Michael's Hospital (1980), 29 O.R. (2d) 185, 112 D.L.R. (3d) 360 (H.C.J.). Mr. Justice La Forest felt it unnecessary, in McInerney, supra, to characterize the patient's interest in such a fashion, preferring instead to protect the patient through the fiduciary concept and to characterize the patient's interest in the information contained in the records as a "trust-like `beneficial interest' " (p. 152).
>
> I find this latter concept helpful in analyzing the true quality of the dental records from the point of view of their utilization as pledged assets. It is an impossibility, in this context, to disengage the physical records themselves -- which the Supreme Court of Canada has said are the "property" of the practitioner -- from the contents of those records -- which give them their true character, and in which the Supreme Court of Canada has said the patient has a "trust-like `beneficial interest' ". In my view, while the dental records may be the physical property of the dentist, they are property affixed with an inseverable trust of confidentiality in favour of the patient. Just as trust property is not property belonging to a bankrupt, the dental records are not property which belongs to the dentist for purposes of pledging as part of his or her "undertaking, assets and property".
>
> I am fortified in this conclusion, as well, by the proviso in R.R.O. 1990, Reg. 547, s. 37(1) para. 32, that it constitutes professional misconduct for a dentist to fail to continue to provide professional services to a patient until the services are no longer required or until the patient has

had a reasonable opportunity to arrange for the services of another member. Pledging his or her dental records as security could well place a dentist in a position, in the event of default under the security document, where compliance with this regulation would be jeopardized.

While this latter proviso, together with professional misconduct rule prohibiting disclosure of a patient's dental information and the general preservation of secrecy stipulation in s. 41 of the Health Disciplines Act, cannot in themselves deprive what is otherwise pledgable property of that characteristic, they are supportive of a construction which views the records as property affixed with a trust preserving the confidentiality emphasized by them.

(Emphasis added)

Browne J. came to a similar conclusion in an unreported decision, Confederation Life v. Pickering, released by endorsement on April 19, 1993. The endorsement reads as follows:

I agree with submissions made that the medical records as physical things are the property of the doctor but that the information therein is that of the patient as discussed in McInerney v. MacDonald, [1992] 2 S.C.R. 138. These records are things capable of being seized. I accept the position advanced that they may not be seized. For this conclusion I find assistance in s. 37(1) para. 30 of Reg. 547 (Health Disciplines Act), which prohibits giving of information absent the patient's consent unless required by law. The result is that the records are not subject to seizure being the answer to point 1.

In addition I do not find the language of the security agreement, which is general language, to be specific enough to permit seizure even if I had found otherwise as to issue 1.

With great respect, I have some difficulty with the concept that the relationship of trust which undoubtedly exists between

doctor or dentist and patient results in the patients' files or records being analogous to trust property for purposes of the B.I.A., that is to say, property in which the bankrupt holds a bare legal title but has no beneficial interest. It seems to me that the case law already establishes that the files or records are property beneficially owned by the medical practitioner. The full use and enjoyment of that property by the medical practitioner is, however, subject to common law and statutory rights of the patient with respect to maintaining confidentiality and with respect to access. Property interests subject to certain restrictions or rights of third parties are capable of being charged. In my view, so long as such rights are preserved by the creditor realizing upon its security, that creditor ought not to be deprived of realization and enforcement rights granted pursuant to a security agreement. I am satisfied that the proposed manner of enforcement by Medi-Dent preserves such confidentiality and access rights. I am not convinced that the patient's right to have confidentiality maintained is affected by the fact that the dental practitioner appointed by Medi-Dent will write to the patient regarding the disposition of his or her file rather than Dr. Axelrod writing to the patient. In any event, this court could order Dr. Axelrod to write to the patients. Such an order has not been sought by Medi-Dent in this case but on further motion I would be prepared to so order. My order will include a provision that Medi-Dent itself not take physical possession of the records but that physical possession be taken by a qualified dental practitioner appointed by Medi-Dent. I understand Medi-Dent is prepared to abide by such an order. It is not clear to me that the creditor in either Wilson v. Swartz, supra, or Confederation Life v. Pickering, supra, submitted to the court an enforcement procedure which clearly protected the patients' rights to maintenance of confidentiality and to access.

Accordingly, I find that Medi-Dent is entitled to realize upon its security on the records in the manner set forth by Medi-Dent in the materials filed with this court and outlined above.

The Oshawa Premises

The lease between Kniznik and Axelrod contained the following provision:

> (h) THAT, if the term hereby granted or the goods and chattels of the Lessee or any assignee or sub-tenant shall be at any time seized or taken in execution or attachment, or if the Lessee or any such assignee or sub-tenant shall make an assignment for the benefit of creditors or shall become bankrupt or insolvent, or make a proposal to it's creditors, or without the consent of the Lessor being first obtained in writing, shall make a sale under the Bulk Sales Act, in respect of goods on the premises, or being a company shall become subject to any legislative enactment relating to liquidation or winding up, either voluntary or compulsory, the said term shall immediately become forfeited and void, and an amount equivalent to the next ensuing three months rent shall be at once due and payable.

Accordingly, the lease automatically terminated upon the insolvency or bankruptcy of Axelrod. The only evidence before this court as to Dr. Axelrod's status as of August 17, 1993 is contained in para. 6 of his affidavit where he states "at that time my income was insufficient to pay my debts and my liabilities greatly exceeded my assets". The Ricpam agreement acknowledging the termination of the lease is dated August 17, 1993 and I conclude that, as of that date, Axelrod was insolvent and the lease between Kniznik and Axelrod was terminated. It then becomes necessary to determine the nature of the rights created in Axelrod pursuant to the licence agreement. The licence agreement in essence grants Axelrod a non-exclusive right to possession of the Oshawa premises for the purpose of carrying on his dental practice and a right to use the equipment located at the Oshawa premises. It is common ground that this equipment is equipment owned or leased by Ricpam and is not equipment charged in favour of Medi-Dent, although some of the office furniture, supplies and other items in the Oshawa premises may well be subject to the charge in favour of Medi-Dent. In my view, what is granted to Axelrod under the licence agreement is clearly a licence and accordingly his interest under that licence is charged in favour of Medi-Dent pursuant to cl. 2(d) of the GSA which

creates a charge upon "all contractual rights, permits, licences of every kind or nature, including any lease" and that Medi-Dent is entitled to enforce its security interest in such licence by entering into possession of the Oshawa premises and restraining Axelrod from entering into possession of such premises. I would note in passing that the licence granted to Axelrod pursuant to the licence agreement may be terminated at any time by either party upon written notice to the other.

Although it may be moot, I am not satisfied that the Ricpam agreement can be set aside as a settlement under s. 91(1) of the B.I.A. or as a fraudulent preference under s. 95(1) of the B.I.A. With respect to s. 91(1) it does not appear to me that any "property" has been settled for the purposes of this subsection. It is submitted by counsel for Medi-Dent that the remaining term of the original lease was, in effect, settled by the bankrupts in entering into the Ricpam Agreement and the subsequent licence agreement. It seems to me however that the leasehold interest of Axelrod automatically terminated upon his insolvency which, according to the only evidence before this court, occurred prior to August 17, 1993. Accordingly, in my view, Axelrod held no interest under the original lease which could constitute "property" settled pursuant to the Ricpam agreement and the licence agreement. Similarly, I am of the view that the bankrupts did not by virtue of such agreements convey, transfer or charge any property for purposes of s. 95(1) of the B.I.A. In any event, even if a property interest was found to exist, there is no evidence before this court that Kniznik, as landlord, was a creditor of the bankrupts as of the date of the Ricpam agreement and the licence agreement. I do not accept the submissions of counsel for Medi-Dent that a landlord is always in the category of a creditor of the tenant. If rent is payable in advance and is current and if no other payments are due and owing to the landlord pursuant to the terms of the lease, in my view, the landlord is not a creditor of the tenant. Accordingly, I find that the Ricpam agreement and the licence agreement are not void as against the trustee under s. 91(1) of the B.I.A. or under s. 95(1) of the B.I.A.

Accordingly, an order will issue on the terms set forth in paras. 1 to 5 of the notice of motion and further providing

that the enforcement of Medi-Dent's security interest in the records will be carried out in the manner set forth in the materials filed with this court so as to clearly maintain confidentiality and preserve rights of access to the records and further that Medi-Dent will not itself take possession of the records but that possession will be taken by a qualified dental practitioner appointed by Medi-Dent.

Counsel may speak to me regarding the costs of this motion.

Order accordingly.

Tab 5

Re Gauntlet Energy Corporation (Companies' Creditors Arrangement Act), 2003 ABQB 718

Date: 20030820
Action No.0301-09612

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

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,* R.S.A. 2000, c.B-9

AND IN THE MATTER OF
GAUNTLET ENERGY CORPORATION

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE C.A. KENT

APPEARANCES:

Anthony J. Jordan, Q.C. of Gowlings
for the Applicants, Pulse Data Inc.

Douglas Nishimura of Burnet Duckworth & Palmer LLP
for Gauntlet Energy Corp.

Sean F. Collins of Miller Thomson LLP
for Alberta Treasury Branches

Josef G.A. Kruger of Borden Ladner Gervais LLP
for Pricewaterhouse Coopers Inc.

INTRODUCTION

[1] Gauntlet Energy Corporation (Gauntlet) and Pulse Data Inc. (Pulse) entered into three Project Management Agreements (Agreements) regarding seismic surveys. Before paying Pulse all of the monies owed under these Agreements, Gauntlet entered into CCAA proceedings. At issue are the rights and entitlements of Gauntlet; Pulse; Gauntlet's operating lender, Alberta Treasury Branches (ATB); and other of Gauntlet's creditors to the seismic data (Data) compiled as per the Agreements.

ISSUES:

[2] There are four issues to be decided:

1. Do the contracts in question create security interests for the purposes of the ***Personal Property Security Act,*** **R.S.A. 2000, c. P-7 [PPSA]**?

2. Is the Data in question personal property for the purposes of the PPSA?

3. What is the order of priority of the secured parties, namely Alberta Treasury Branches and Pulse Data Inc.?

4. Under the ***Companies' Creditors Arrangement Act*****, R.S.C. 1985, c. C-36 [CCAA]**, does the Court have jurisdiction to order a sale of the Data?

FACTS:

[3] Gauntlet Energy Corporation explores for and produces petroleum and natural gas. Pulse Data Inc. collects and markets seismic data. Between December 20, 2002, and February 25, 2003, the two companies entered into three Project Management Agreements whereby Pulse would collect seismic data for Gauntlet. Within the oil and gas industry, these Agreements are known as "Proprietary Agreements" because they were conducted by Pulse for Gauntlet's exclusive use. A proprietary agreement is different from a "Non-Exclusive Survey" under which the seismic contractor reserves the right to licence the collected data to any customer.

[4] The first Agreement (Snowfall) was entered into on December 20, 2002. The total price commitment which is an estimate only was $1,389,300.00 plus GST. To date,Gauntlet has paid $1,394,162.55 plus GST which includes some interest. A small amount remains owing.

[5] An Agreement for seismic survey of the Manterra area was also executed on December 20, 2003. The total price commitment was $5,591,300.00 plus GST. To date Gauntlet has paid $5,032,170.00 plus GST.

[6] Finally, on February 25, 2003, the parties executed the Skaro Agreement, with a total price commitment of $1,323,750.00 plus GST. Nothing has been paid.

[7] The three contracts are drafted on nearly identical terms, Para. 2(a) of each contains a clause which says: "Upon final payment as set out in Schedule "B", Ownership of the data shall pass to the Purchaser." Pulse has admitted that according to this clause Gauntlet will take exclusive possession of the Data once it pays the price owing on each Agreement. In the meantime, as required by the Agreements, Pulse has delivered to Gauntlet the original "Master Data" under each Agreement.

[8] Previous to its dealings with Pulse, Gauntlet granted a security interest to the Alberta Treasury Branches. On December 17, 2001, ATB extended a Revolving Production Loan Facility to Gauntlet, extended and amended on June 11, 2002. As security for the loan, ATB received a General Security Agreement (**GSA**) over all present and after-acquired personal property and a Debenture, both dated July 14, 1998. The GSA and Debenture had been granted by Gauntlet's predecessor, Scorpion Energy Corporation. ATB registered its security interest in the Alberta Personal Property Registry on July 10, 1998. To date, Gauntlet owes $42,672,803.07 on the loan.

[9] On June 17, 2003, Gauntlet entered into CCAA proceedings.

POSITION OF THE PARTIES:

1. Gauntlet

[10] Gauntlet contends that the Pulse Agreements are standard conditional sales agreements included in the PPSA regime by virtue of s. 3(1) of the Act. It argues that the Data is personal property in the form of an intangible and that, as a result, the PPSA governs the priority of Gauntlet's secured creditors. Because Pulse failed to register its security interest within 15 days of the attachment of its interest, as required by s. 34(2) its purchase-money security interest lacks super-priority. Consequently, ATB takes priority under the residual rule of s. 35(1) since it registered its general security agreement prior to Pulse. The purported subordination clause in ATB's GSA is of no effect because it is vague and inconclusive, allowing ATB to maintain its priority over Pulse.

2. Pulse

[11] Pulse argues that the Data is not personal property. Instead, as confidential information it is *sui generis* and is not governed by the PPSA. Because Gauntlet has yet to pay the full price for any of the Data, the Data remains Pulse's property and Gauntlet has no right to copy or distribute it. Further, neither the PPSA nor the CCAA provide the Court with jurisdiction to order that the Data be sold or disposed of in any way, other than by Pulse.

3. Alberta Treasury Branches:

[12] ATB supports Gauntlet's contentions that the Pulse Agreements are conditional sales agreements within the scope of the PPSA, that the Data is intangible personal property and that ATB ranks ahead of Pulse as a prior secured creditor.

LEGISLATION

***Personal Property Security Act,* R.S.A. 2000, c. P-7**:

> **s. 1(1)(x)** "intangible" means personal property other than goods, chattel paper, a security, a document of title, an instrument and money.

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

(i) a security interest taken or reserved in collateral to secure payment of all or part of its purchase price,

(ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights,

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

(iv) the interest of a person who delivers goods to another person under a commercial assignment, 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.

S. 1(1)(tt) "security interest" means

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

s. 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.

s. 34(2) A purchase-money security interest in

(b) an intangible or, subject to section 28, its proceeds, that is perfected not later than 15 days after the day the security interest in the intangible attaches has priority over any other security interest in the same collateral given by the same debtor.

s. 35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:

(i) the registration of a financing statement, without regard to the date of attachment of the security interest, or

(ii) possession of the collateral under section 24, without regard to the date of the attachment of the security interest,
(iii) perfection under section 5, 7, 26, 29 or 77, whichever is earlier...

ANALYSIS

[13] Pulse made a preliminary argument that priorities under the PPSA are irrelevant since the contest here is between itself, the creditor, and Gauntlet, the debtor. Priorities under the PPSA are only relevant as between creditors. Generally speaking that is so. However, this issue came to a head because Pulse sent a letter to Gauntlet in early July indicating that it intended to market the seismic data. That precipitated an application by Gauntlet to enjoin Pulse from selling the Data on the basis that the property was now Gauntlet's. Gauntlet wanted to market the Data with the proceeds being paid to ATB, a creditor with a superior claim. That is the background against which this application was heard.

1. Do the Agreements create security interests for the purposes of the PPSA?

[14] Section 1(1)(tt) of the PPSA provides that a security interest for the purposes of the PPSA "secures payment or performance of an obligation", and s. 3(1)(a) provides that the Act applies to everything which "in substance creates a security interest, without regard to its form and without regard to the person who has title to collateral". Conditional sales are specifically cited as security interests under the Act in s. 3(1)(b).

[15] ***Gladue v. Asset Recovery Management & Sales*, [1997] A.J. No. 1251 (Q.B.)**, defines a conditional sales contract as "one in which the amount of the purchase price is paid over time and the seller retains title to the chattel until completion of the payments." (Para 9) The ***Gladue*** contract was held to be such a sales agreement because one of its terms provided that "title to and ownership of the Goods shall remain with the Merchant and shall not pass to the Customer until the Time Balance and any other monies owing hereunder by the Customer have been paid in full." That paragraph is similar to paragraph 2(a) of the Pulse/Gauntlet agreements. In my view these agreements are clearly conditional sales contracts within the scope of the PPSA quite simply because they provide for payment of the purchase price over time with title remaining with Pulse until payment is complete.

[16] Pulse argues, however, that since the purchase price has not been paid Gauntlet does not yet own the Data and hence is not free to dispose of it under CCAA proceedings. Rather, Pulse is the owner and therefore ought to be able to sell the Data. Professors Ronald C.C. Cuming and Roderick J. Wood in their text, the ***Alberta Personal Property Security Act Handbook*, 4th ed. (Toronto: Carswell, 1998) at 51** address the scope of the PPSA in regards to conditional sales contracts as follows:

> It is the view of the authors that a PPSA security interest is a charge conceptually equivalent to the English equitable charge or the hypothec of Roman law. However,

> as the security interest is provided for by statute, it is a legal charge. A security agreement results in a hypothecation of the collateral. A security interest does not involve any dealing with the title to or ownership of it. To view a PPSA security interest as a legal charge or hypothec is to accept ... in the context of a security lease or conditional sales contract that ownership in the goods that are the subject-matter of the transaction vests upon execution of the agreement in the buyer or "lessee." At the same time the seller or "lessor" acquires a charge on those goods.

[17] In the context of this case, upon execution of the Agreement and pending completion of performance, Professors Cuming and Wood would say that title to the Data remained with Pulse but for PPSA purposes, ownership of the Data vested in Gauntlet.

[18] Case law reflects the view of Professors Cuming and Wood. In ***Giffen (Re)*, [1998] 1 S.C.R. 91**, the appellant leased a car from the respondent leasing company. The lease was for a term of greater than a year and was therefore a deemed security interest under the PPSA. The lessor, however, failed to register its security interest in the Personal Property Registry. Giffen later declared bankruptcy and the lessor seized and resold the vehicle. Giffen's Trustee in Bankruptcy brought a motion claiming entitlement to the proceeds of the sale, basing its claim on a section of the British Columbia PPSA giving a Trustee in Bankruptcy priority over an unsecured creditor. The lessor contested the Trustee's claim, arguing that title had never passed to the lessee and so the lessor, as owner, had superior standing to the trustee.

[19] The Supreme Court allowed the appeal and held for the Trustee. Iacobucci J. stated at paras. 25 - 26 that

> [a]t the outset, it is important to note that the Court of Appeal's holding in the present appeal rests on the principle that the "property of the bankrupt" shall vest in the trustee... and that only the property of the bankrupt shall be distributed among the bankrupt's creditors.... In the opinion of the Court of Appeal, the bankrupt, as lessee, did not have a proprietary interest in the car, and since the trustee obtains its entitlements to the contents of the bankrupt's estate through the bankrupt, the trustee cannot assert a proprietary interest in the car. In my view, the Court of Appeal, with respect, erred fundamentally in focussing on the locus of title and in holding that the lessor's common law ownership interest prevailed despite the clear meaning of s. 20(b)(i) [the applicable section of the PPSA].
>
> The Court of Appeal did not recognize that the provincial legislature, in enacting the PPSA, has set aside the traditional concepts of title and ownership to a certain extent.

[20] This change from traditional concepts is illustrated at s. 12(2) of the PPSA, which states that "[f]or the purposes of subsection 1(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment."

[21] In ***Giffen***, the Supreme Court held that these rights include a proprietary interest, regardless of whether or not the lessee has title. At para. 37 the Court said, "[f]rom the perspective of both the PPSA and the [***Bankruptcy and Insolvency Act***] the bankrupt, as lessee, can be described as having a proprietary interest in the car." At para. 52, the Court again emphasized this point:

> Provincial legislatures, faced with a policy choice involving the competing interests of the true owner and those of third parties dealing with the ostensible owner, have decided that the true owner must forfeit title, when faced with a competing interest, if she failed to register her interest as required.

[22] In the Alberta Court of Appeal's decision in ***Gimli Auto Ltd. v. BDO Dunwoody Ltd.*** **(1998), 219 A.R. 166**, Coté J.A. echoes this position at para. 6, stating that the ***Giffen*** Court held that "the P.P.S.A. replaces common-law rules such as nemo dat, and title versus possession, with new statutory priority rules." Again at para. 9 he says, "[t]he whole point of the P.P.S.A. is to overrule certain contractual or property rights: Re Giffen, supra." In ***Gimli***, the PPSA priority rules were applied to a priority dispute between motor vehicle lessors and the lessee's Trustee in Bankruptcy. The Trustee was held to have priority over the lessors, as the lessors had not perfected their prior interests by registration.

[23] Master Quinn in ***Re Thomas*** **[2001], A.J. No. 1192 (Alta. Q.B.)**, applied the PPSA to a conditional sales agreement. Again he emphasized that the PPSA replaced the common law so that common law concepts should not be applied where to do so would conflict with the statute. At paras. 11-12, he says:

> According to Cuming and Wood [*supra* at 150-51] where a sale of a chattel involves financing the new law pursuant to the P.P.S.A. is engaged and the old concept of ownership of the chattel becomes obsolete. The party who was the owner under the old law becomes a secured party under the P.P.S.A., and must perfect his security by registration in the P.P.S.A. registry....
>
> The best position Grove Dodge [the vendor] could have attained was that of a secured creditor but it never attained that status because it did not register at the P.P.S.A. registry.

[24] In ***National Bank of Canada v. Merit Energy Ltd.,*** **[2001] A.J. No. 776 (Alta. Q.B.)** LoVecchio J. acknowledges the change made by the PPSA regime when he states at para. 30 that "the structure of the PPSA would be undermined by the application of the principle of nemo dat quod non habet (that you cannot give what you do not have)."

[25] The Agreements between Gauntlet and Pulse are conditional sales agreements. Gauntlet takes a proprietary interest in the Data but Pulse remains titled owner of the Data until Gauntlet fulfills its

payment obligation. Pulse's interests under the Agreements constitute security interests under the PPSA. The fact that Pulse retains title until payment is received in full, and payment has not yet been received, is irrelevant to a determination of priorities under the Act. There is one further issue to determine, however, in order to decide whether the PPSA does, in fact, govern the priorities in this case: the Data must qualify as personal property under the Act.

2. Is the Data in question personal property for the purposes of the PPSA?

[26] In order for the PPSA to apply, not only must the Agreements be found to create security interests, but the Data must be found to be personal property. The PPSA definition of "personal property" is somewhat inconclusive, including "goods, chattel paper, a security, a document of title, an instrument, money or an intangible." In the case at hand, the Data is neither goods, a chattel paper, a security, a document of title, an instrument, nor money. The issue, therefore, is whether it falls under the residual category of intangibles.

a. Intangibles

[27] PPSA intangibles have remained largely undefined. At p. 30, Wood and Cuming define the category as follows:

> This definition operates as a residual category of collateral. Personal property that does not fall within the other six categories of collateral ... falls within the definition of an intangible. For example, rights arising under patent or copyright law are intangible property. Franchise rights, trade names and a general interest in a limited partnership interest are intangibles. Computer software is very likely an intangible since it does not fit within any one of the other categories of collateral.

[28] Traditionally, courts have defined "property" very broadly. In ***Re Lumness* (1919), 51 D.L.R. 114 (Ont. C.A.)**, a wills case, Riddel J. adopted the definition in ***Jones v. Skinner* (1835), 5 L.J.N.S. Ch. 87-90,** stating at p. 124 that "'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have."

[29] In ***Roenisch v. Roenisch* (1990), 103 A.R. 30 (Alta. Q.B.)**, Lutz J. held at pp. 37-38 that:

> "Property" is nowhere defined in the ***Matrimonial Property Act***. In ***McAlister v. McAlister* (1982), 41 A.R. 227**... Dea J., considered the meaning of "property" under Alberta's Act in the context of pension entitlement. In arriving at the conclusion that a pension is property and therefore subject to distribution, he defined "property" thusly (at p. 160):
>
> > "In Alberta no such distinctions or restrictions exist with respect to the assets themselves. It is 'property' which is the subject of the

> legislation. And, without more, that includes real and personal, corporeal and incorporeal, full and partial interests...."

[30] Therefore, it is generally accepted that the definition of "property" encompasses a very broad range of entities. Does the definition of "property" include information generally and seismic information specifically? In ***Petro Canada v. Her Majesty the Queen*, [2003] DTC 94** (T.C.C.), seismic information was simply assumed to be property. The case involved the purchase and sale of seismic data and focused on whether the purchase price could be deducted as a Canadian Exploration Expense tax credit. In its analysis of whether the expense was indeed a tax credit, the Court never addressed whether the Data was property, but treated it as such throughout the decision.

[31] Equally, in the present case it is evident that the oil and gas industry believes that seismic data can be bought and sold. Indeed, the Agreements in question are commonly known as "Proprietary Agreements", a name indicating the industry's belief that proprietary rights must attach to seismic data.

[32] In terms of the PPSA, there is no case law addressing the issue of whether seismic information is intangible personal property under the Act. In terms of information generally, however, there is authority that medical information falls within the ambit of the Ontario PPSA.

[33] In ***Re Axelrod* (1995), 20 O.R. (3d) 133 (C.A.), aff'ing (1994), 16 O.R. (3d) 649 (Gen. Div.)**, it was held that a dentist's patient records were personal property capable of being pledged as security in a financing agreement. Due to the fiduciary relationship and the duty of confidentiality between doctor and patient, the records were, however, subject to the dentist's continuing duty of good faith towards his patients. As explained by Arbour J.A. (as she then was) at p. 139:

> I see no difference between a dentist's entitlement to sell his or her practice, and a dentist's entitlement to pledge records. Both can be accomplished in a manner compatible with a dentist's professional responsibilities, as long as the dentist acts with the utmost good faith and loyalty in protecting the patient's confidence.
>
> The doctor may use the records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient's best interests.

[34] At trial, Ground J. pointed to Supreme Court authority (***McInerney v. MacDonald*, [1992] 2 S.C.R. 138**) and health law texts as support for his conclusion, at p. 656, that "there is, in my view, no doubt that a medical practitioner has an ownership or proprietary interest in patient files and records which is capable of being conveyed or charged."

[35] There are striking similarities between the Data and the medical information in ***Axelrod***. In both instances, intangible information is contained in tangible records. Both cases revolve around the applicability of the PPSA. Both cases deal with confidential information. The significant difference between the two is that in the ***Axelrod*** case, there was a third party, the patient, to whom

a duty of confidentiality was owed. In this case the issue of confidentiality is between Pulse and Gauntlet. There is no third party. In my view that makes this case even stronger in the sense that it cannot be argued that the presence of a third party somehow makes the information something other than property.

b. Confidential Information

[36] Despite the Court's view in ***Axelrod*** that records containing confidential patient information can constitute personal property capable of being pledged under the PPSA, Pulse argues that while the records are property, the information contained in them is not. Pulse contends that the Data is "Confidential Information" and is neither property nor governed by the PPSA.

[37] "Confidential Information" is defined by Sopinka J., dissenting in part, in ***Lac Minerals v. International Corona Resources*, [1989] 2 S.C.R. 574 at 610** (citing ***Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.)**):

> The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[38] Pulse argues that the Data qualifies as "confidential information" as per this definition, because Pulse employed a process in gathering the information and anyone else wishing to obtain the same information would have to employ that same process. I agree that the Data is confidential information. The real question remains whether it is property.

[39] For the purposes of criminal law, confidential information is not property: ***R. v. Stewart*, [1988] 1 S.C.R. 963**. In ***Stewart***, the Supreme Court overruled a decision of the Ontario Court of Appeal to find that confidential information may not be the subject of theft. At p. 983, Lamer J. stated for the Court that:

> Confidential information should not be, for policy reasons, considered as property by the courts for the purposes of the law of theft. In any event, were it considered such, it is not capable of being taken as only tangibles can be taken. It cannot be converted, not because it is an intangible, but because, save very exceptional far-fetched circumstances, the owner would never be deprived of it.

[40] In dicta, Lamer J. explained the dual nature of information. He noted that in some circumstances information may be property even though on the facts of ***Stewart*** it was not. As at pp. 974-75:

> It can be argued ... that confidential information is property for the purposes of civil law. Indeed, it possesses many of the characteristics of other forms of property: for example, a trade secret, which is a particular kind of confidential information, can be sold, licenced or bequeathed, it can be the subject of a trust or passed to a trustee in bankruptcy.... As the term "property" is simply a reference to the cluster of rights assigned to the owner, this protection could be given in the form of proprietary rights. The cases demonstrate that English and Canadian civil law protect confidential information. However, the legal basis for doing so has not been clearly established by the courts. Some cases have treated confidential information as property, and thus have entitled the owner to exclude others from the use thereof.... On the other hand, the courts have recognized certain rights with respect to confidential information in the guise of an equitable obligation of good faith.

[41] In my view the ***Stewart*** case is distinguishable because it is a criminal case. The same principles do not apply. What can be gleaned from the Court's comments, however, is that in different contexts, information will be considered differently. In a criminal setting, information is not property. In civil settings, information may or may not be property. While there is little consistency in the case law on the classification of information in civil suits, it appears that where a breach of good faith or fiduciary duty is at issue, the focus is on the breach rather than whether or not the information is property.

[42] This approach is demonstrated in ***Matrox Electronic Systems v. Gaudreau*, [1993] Q.J. No. 1228 (Que. Sup. Ct. Gen. Div.).** Former employees illegally used trade secrets to develop a software product nearly identical to, and in competition with, that of their former employer. On the facts of the case, the employees were found liable for breach of confidence. In coming to this conclusion, the Court considered whether the information was property. While the Court noted at para.59 that "[i]nformation does not really fit into the civil law concept of property", it did not rule out the possibility that in certain circumstances information could be property. On the facts and the nature of the cause of action, the real wrong was not taking the information which implies a concept of property but rather breaching a confidence which does not.

[43] In ***Cadbury Schweppes v. FBI Foods*, [1999] 1 S.C.R. 142**, FBI Foods wrongly used a Cadbury subsidiary's recipe to produce an identical food product. FBI was held liable for breach of confidence, however the Court noted that breach of confidence was not the only possible remedy. At para. 20:

> The equitable doctrine, which is the basis on which the courts below granted relief, potentially runs alongside a number of other causes of action for unauthorized use or disclosure of confidential information, including actions sounding in contract, tort

and property law. In ***Lac Minerals***, *supra*, it was suggested that the action for breach of confidence should be characterized as a *sui generis* hybrid that springs from multiple roots in equity and the common law, *per* Sopinka J., dissenting, at p. 615:

> "The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is *sui generis* relying on all three to enforce the policy of the law that confidences be respected."

[44] As in ***Matrox***, liability was based on breach of a duty, specifically, that of confidence. However, the Court emphasized that confidential information is a *sui generis* concept and will be considered differently in different cases with different facts. In doing so, the Court commented that, based on the appropriate facts, a property law action could apply to cases of misuse of confidential information. (See para. 26).

[45] The cases cited above indicate that confidential information is a unique entity which must be classified based on the facts of each particular case. None indicate that confidential information may never be considered property. None involve security interests. In short, none of the cases considered were decided on similar facts to the case at hand, where the Data in question is subject to a conditional sales agreement, creates a security interest and is very similar to information which has elsewhere been treated as property (***Petro-Canada***, ***Axelrod***).

[46] The case at hand, unlike ***Matrox*** and ***Cadbury***, does not involve the issue of a breached equitable duty. Instead, it involves a determination of priority as between creditors. Based on these circumstances, the Data can be regarded as personal property. Accordingly, the PPSA applies and priority disputes must be settled in accordance with PPSA priority rules. In evaluating Pulse's claim to the Data, therefore, the common law notions of ownership and title do not apply. Instead, Gauntlet holds a proprietary claim to the Data, subject to Pulse's security interest.

3. What is the order of priority of the secured parties, namely Alberta Treasury Branches and Pulse Data Inc.?

a. Purchase-Money Security Interest

[47] The Agreements constitute "purchase-money security interests" as per s. 1(1)(ll) of the Act, because Pulse reserved an interest in the Data in order to secure payment for the Data. As a result, were specified requirements under the Act complied with, Pulse would have received "super-priority", i.e. priority over certain prior secured creditors.

[48] To achieve this super-priority in the Data, an intangible, Pulse was required to register its interest "not later than 15 days after the day the security interest in the intangible attaches" (s.34(2)(b)). Pulse did not register those interests within the 15 day time frame and, as a result, did not receive super-priority. Accordingly, the default rule in s. 35(1) applies and because ATB registered its general security interest prior to Pulse, ATB takes priority.

b. Subordination Clause

[49] The s.35(1) default rule may not apply in the presence of a subordination clause. Cuming and Wood describe such an agreement as follows, at pp. 67-68:

> Under a subordination agreement a party (the subordinating or "junior" creditor) agrees to postpone her rights against the debtor until the claim of the other party (the "benefiting" or "senior" creditor) is satisfied.... A subordination agreement may involve subordination to a specific creditor or creditors or subordination to an entire class of benefiting creditors.

[50] In allowing for the enforcement of a subordination clause, the PPSA has changed the law to permit a party who is not privy to the agreement to enforce the clause. In ***Euroclean Canada v. Forest Glade Investments Ltd.*** **(1985), 16 D.L.R. (4th) 289 at 301-02 (Ont. C.A.)**, Houlden J.A. held for the Court that the Ontario equivalent to s. 40 of the Alberta PPSA "is intended to confer a statutory right on a secured party to waive the priority given him by the P.P.S.A. and to confer a corresponding right on the beneficiary of such a waiver to enforce it, even though he is not a party to the agreement which created it or has no knowledge of its existence."

[51] Pulse argues that such a clause is present in the GSA between Gauntlet and ATB and that Pulse, as beneficiary of the clause, may enforce it to claim priority over ATB. This purported subordination agreement is contained at para. 4(b) of the ATB General Security Agreement and reads as follows:

> Until Default, or until ATB provides written notice to the contrary to the Debtor, the Debtor may deal with the Collateral in the ordinary course of the Debtor's business in any manner not inconsistent with the provisions of this Agreement, provided that the Debtor may not, without the prior written consent of the ATB:
>
> (b) Create or incur any Security Interest, lien, assessment, or encumbrance upon any of the Collateral which ranks or purports to rank, or is capable of being enforced in priority to or equally with the Security Interest granted under this Agreement, except Purchase Money Security Interests and Leases incurred in the ordinary course of the Debtor's business.
>
> Nothing in this paragraph creates a postponement or subordination of any priority of ATB in any of the Collateral in favour of any present or future holder of a security interest in any of the Collateral.

[52] ***Chiips Inc. v. Skyview Hotels Ltd.*** **(1994), 155 A.R. 281 (Alta. C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 444,** sets out Alberta law on the interpretation of subordination clauses. After reviewing previous case law on the subject, Foisy J.A. states at para. 19 that:

> we know two things: first, where a general security holder specifically states that a subsequent security holder "shall rank in priority to the charge hereby created", that subsequent holder will be entitled to enforce the provisions of that agreement per s. 40 of the P.P.S.A. Second, clauses in security agreements which fall far short of that type of express wording ... will not be enforceable under s. 40.

[53] Harradance J.A. explained at para. 49 that:

> the parameters are clear. An explicit and specific waiver clearly gives rise to a valid subordination clause. A vague and nonspecific 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?

[54] ***Chiips*** was followed most recently in ***DCD Industries (1995) Ltd. (Re)*****, [2002] A.J. No. 1594 (Alta. Q.B.).** As stated by Wilson J. at para. 9,

> [o]n the authority of Chiips, I hold that the wording of the purported subordination clause is critical in assessing the rights of the parties. The clause must contain wording that is intended to deal with the priority of interests and to subordinate one interest to the other."

[55] Further, at para. 11 Wilson J. notes that an

> important difference between merely "permissive" language and a clause that is intended to affect priorities has been recognized by Professors Cuming and Wood in the Alberta Personal Property Handbook, *supra* at 384:
>
> > "A distinction should properly be drawn between a subordination clause and a negative covenant with a permissive provision ... the fact that the security agreement permits the debtor to create the interest should not be taken to imply that the secured party intends to subordinate his claim to that interest."

[56] Looking to the clause at issue, it is evident that the wording is neither specific nor explicit. In fact, the clause appears to be is vague and self-contradictory. The first paragraph of part (b) purports to allow the Debtor to create Purchase Money Security Interests which may be enforced in priority equal or superior to the ATB General Security Agreement. The following paragraph, however, states that nothing in the clause creates a subordination of ATB's claim in any way. On the continuum referred to in ***Chiips***, this clause is not an enforceable subordination clause.

4. Under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 [CCAA], does the Court have jurisdiction to order a sale of the Data?

[57] Pulse argues that even if the Data is personal property subject to the PPSA and as a result Gauntlet has a proprietary interest, the Court cannot and ought not allow for a sale of the property by Gauntlet. Essentially Pulse says that the purpose of the CCAA is to permit insolvent companies to continue in operation and propose a compromise to creditors. If the requisite majority approves the proposed compromise then it can be imposed on all competitors. Although s.11(4) of the CCAA has been interpreted very widely, it ought not be interpreted so widely as to permit the Court to breach the agreements between Gauntlet and Pulse. If Gauntlet had not been under CCAA protection, Gauntlet would not obtain title to the Data before paying for it. Gauntlet ought not to be allowed to take steps because it is under CCAA protection that it could not do outside of that protection.

[58] That argument does not accord with the purpose of the CCAA or the jurisprudence that has developed around it. Interference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible. It is obvious that debtor companies are only able to take advantage of CCAA proceedings when they are unable to meet the terms of their credit arrangements and those arrangements must be altered. In ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1998), 63 Alta. L.R. (2d) 361 (Alta.Q.B.)** Forsyth J. said at p. 376:

> ... I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties would be effective only for a relatively short period of time.

[59] In ***Norcen***, Forsyth J. refused to grant leave to remove Oakwood as operator under its agreement with Norcen Energy Resources on the basis that it had become insolvent contrary to its agreement with Norcen.

[60] In ***Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 676 (Alta.C.A.)** the Court was asked to determine whether or not a chambers judge under CCAA proceedings had the discretion to alter the procedure for resolving disputes between the parties in a situation where the parties had agreed to arbitrate their disputes under contract. The Alberta Court of Appeal said that the chambers judge had that jurisdiction. At para. 50 Hunt J. emphasized that the language of s.11(4) was very broad and expansive. At para. 34 she said:

> If the Appellants can be considered creditors under the CCAA, there is little doubt that the chambers judge had the power to affect their rights in the way he did. It is obvious that the contractual rights of a creditor can be affected permanently under the CCAA. To take a simple example, a plan of arrangement or compromise that is

approved by the requisite number of creditors can alter permanently the contractual rights of even those creditors that have not approved the plan (CCAA, s.6).

[61] In ***T. Eaton Co. (Re)*** **(1999), 14 C.B.R. (4th) 288 (Ont. S.C.J.)** Farley J. said at para. 7:

> It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases, and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to proceedings followed by courts to this date.

[62] A final, more extreme example is seen in ***Playdium Entertainment Corp. (Re.)*** (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), additional reasons (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J.). The extent of the contractual interference warrants a closer look at the circumstances of the case.

[63] Spence J. held he had jurisdiction from both s. 11(4) of the CCAA and inherent jurisdiction to force Famous Players to assign a contract to a new corporation to whom the debtor company's assets were being transferred. The contract required the consent of Famous Players to any assignment, which was not to be unreasonably withheld. Spence J. found that Famous Players was not being unreasonable; they had the possibility of a better deal with another company, and they feared non-compliance with a particular provision of the contract if it was assigned.

[64] Spence J. found, however, that even though Famous Players could not be forced to go along with the assignment outside of CCAA proceedings, it would be appropriate to force the assignment within the proceedings, so long as the order complied with the purpose and spirit of the CCAA regime. He analysed the following factors: whether the debtor has made a sufficient effort to obtain the best price and has not acted improvidently; whether the proposal takes into consideration the interest of the parties; a consideration of the efficacy and integrity of the process by which the orders were obtained; and whether there has been unfairness in the working out of the process.

[65] Spence J. concluded that while Famous Players could recover any of its losses resulting from the assignment through litigation, if the assignment was denied, Playdium would have no recourse and would become bankrupt. The factors favoured the forcing of the assignment.

[66] Additional reasons were released two weeks following the initial decision, specifically relating to the Court's jurisdiction under the CCAA. Spence J. stated that it was based on both s. 11(4)(c) of the statute and inherent jurisdiction and relied on several cases in that regard. He acknowledged that s. 11(4)(c) did not fully encompass the jurisdiction to force the assignment, but said that the inherent jurisdiction to do so was "simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute". Spence J. concluded that the decision was also consistent with a liberal and purposive interpretation of the CCAA (para. 42).

[67] These are examples of when a court will interfere with contractual arrangements within the context of CCAA proceedings. So long as the court exercises its discretion sparingly so as to affect third party rights as minimally as possible, such interferences are necessary to carry out the purposes of the CCAA. In this case, having decided that the Data is property within the PPSA regime with ATB having priority, there is no reason not to order that Gauntlet be permitted to sell the Data. The sale shall be conducted by the Monitor. Any proposed sale must be brought back to the Court for approval. At that time, any residual issues with respect to the allocation of the proceeds may be addressed.

HEARD August 13, 2003.
DATED at Calgary, Alberta this 20th day of August, 2003.

J.C.Q.B.A.

CWB MAXIUM FINANCIAL INC. Plaintiff	and	1970636 ONTARIO LTD. o/a MT. CROSS PHARMACY , **et al.** Defendants	Court File No.: CV-18-597922-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES OF THE PLAINTIFF
(Returnable June 14, 2018)

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