Collateral Matters

A Banking Law Newsletter

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Increased Requirements for Consumer Water Heater Transactions

By Daanish Samadmoten*

In 2011, 2012 and 2013, the second highest number of consumer complaints made to the Ontario Ministry of Consumer Services had to do with aggressive and deceptive door-to-door water heater rentals and sales. In response, the Ontario government passed amendments to the *Consumer Protection Act*, 2002 (the "**Act**") to allow for enhanced disclosure and consumer rights for water heater rentals. These long-awaited changes, along with Regulations setting out details of the new requirements, are set to come into force on April 1, 2015. The changes, which significantly alter the way in which water heaters are rented and sold door-to-door, can be grouped into three broad categories:

- Increased disclosure for consumers;
- A longer cooling-off period in which consumers can cancel an agreement without any reason; and
- Required and scripted telephone calls with consumers verifying the sale.

Increased Disclosure

New Regulations under the Act require specific information to be set out in all "Direct Agreements" (door-to-door transactions) involving the supply of water heaters (an "Agreement"). Subject to certain exceptions, the cover page of the Agreement must be a disclosure statement entitled "Water Heater Contracts – What You Need to Know" that provides basic information to the consumer about their rights. If the consumer initiates contact with the supplier or the consumer's existing water heater is subject to a product recall, different disclosure statements (containing similar information) are required.

Inside

On the page immediately following the disclosure statements, the Agreement must set out the following:

- the total amount payable under the Agreement, including taxes;
- an itemized list with the amounts for one time or additional charges, such as installation or late payment charges;
- a list of charges for terminating the Agreement; and
- if the Agreement is a lease, a reasonable estimate of the retail price of the water heater and the total amount payable under the lease based on a ten-year term.

Various other information is required as well, including which party will bear the costs associated with removing an existing water heater supplied by another company.

Longer Cooling-Off Period

Changes to the Act double the cooling-off period (i.e. the period in which a consumer may cancel an agreement without any reason) to 20 days after the consumer receives a written copy of a Direct Agreement involving the supply of water heaters. There are specific rules about where and how this right is to be communicated to the consumer within the Agreement. Moreover, subject to certain exceptions, the supplier under the Agreement may not supply the water heater until the cooling-off period has expired. If a supplier does so in violation of the Act, the goods are deemed to be unsolicited and the supplier is liable to the consumer for any charges they incur from third parties associated with the violation.

If the consumer initiates contact with the supplier or the consumer's existing water heater is subject to a product recall, the 20-day cooling-off period does not apply.

Verification of Sale

Finally, a new Regulation under the Act requires the supplier, subject to certain exceptions, to verify the Agreement with the customer by making scripted and recorded telephone calls between the 2nd and 15th day of the cooling-off period. An Agreement is not verified if the scripted verification call is never made or if the consumer indicates they are not verifying it. If the Agreement is not verified, it is cancelled.

If the consumer initiates contact with the supplier or the consumer's existing water heater is subject to a product recall, the Agreement does not need to be verified.

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Canadian Bankruptcy Considerations in the Context of a Sale of Receivables

By Mathew Goldstein and Stephen Crawford*

Factoring is a common way for businesses to monetize current assets. Typically, in a factoring transaction, an enterprise sells its accounts receivable to a third party (commonly a bank, but not always), which, in exchange for a discount on the value of the receivables, takes on the effort and time commitment related to collecting the accounts.

But what happens if the seller of the accounts receivable goes bankrupt? Could creditors of the seller, or a trustee in bankruptcy, liquidator, monitor or administrator of the seller, attempt to recover from the purchaser the accounts receivable that were transferred?

In certain circumstances, yes.

Pursuant to Canadian insolvency statutes (including the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act*, and applicable provincial laws governing creditors' rights generally), the sale and assignment of certain assets of a debtor during particular 'look-back periods' could be declared "void" or "voidable" and overridden or set aside by a Canadian court.[1] Most relevant is section 96 of the BIA, which provides that a transfer at undervalue – meaning, a disposition of property for which the seller received either no consideration or consideration that was <u>conspicuously</u> less than the fair market value of the property that was transferred – could be found to exist by a Canadian court if:

i. in the case of a determination that the seller was dealing with the purchaser at arm's length, the transfer occurred in the year prior to the date of the initial bankruptcy event, the debtor was insolvent at the time of the transfer (or rendered insolvent by it), and the debtor intended to defraud, defeat or delay a creditor; or

ii. in the case of a determination that the seller was <u>not</u> dealing with the purchaser at arm's length, if the transfer at undervalue occurred in the twelve months prior to the initial bankruptcy event (with no need to prove the debtor's intent or insolvency) or, if the transfer occurred within the five years prior to the

1 Note as well that there are a number of procedural steps that a seller of the accounts receivable may take to reduce risks associated with the bankruptcy of the seller, such as compliance with 'true sale' corporate procedures and registration of the transfer of the accounts under the applicable provincial personal property statutes. See "Assignments of Conditional Sale Contracts," at page 7.

initial bankruptcy event and the debtor was insolvent at the time of the transfer and intended to defraud, defeat or delay a creditor.[2]

If, pursuant to a BIA proceeding, a court determines that a transfer of accounts receivable was a transfer at undervalue, the court may give judgment against the purchaser for the difference between the consideration received by the seller and the fair market value of the property transferred, or the court may declare the transaction void as against a trustee in bankruptcy.[3]

What does the phrase "conspicuously less than fair market value" mean?

A review of the applicable case law offers little guidance with respect to how much of a discount on the price of an asset would constitute 'conspicuously less than fair market value.' For instance, it has long been clear that if a bankrupt seller received no consideration (or only nominal consideration) for a transfer of assets within the applicable look-back window, courts might unwind such transactions.[4] However, in the case of *Peoples v Wise*, the Supreme Court of Canada commented that "there is no particular percentage that definitively sets the threshold for a conspicuous difference … [but] the percentage difference is a factor."[5]

In various cases, discounts on the fair market value of assets of just over 6%[6] and 6.67%[7] were found not to be conspicuous; but in other circumstances, discounts of 17.5%[8], and 55%, 71%, 77% and 82%[9] were. As each case turns on its own unique facts, however, it cannot be said with certainty that the range of permissible discounts falls between the two poles. Perhaps the most helpful guidance can be distilled from the 2008 Quebec Court of Appeal case of Banque Nationale du Canada v. Produits Forestiers Turpin.[10] In Turpin, the transactions at issue were determined at trial to have involved a discount of just over 12%, which was deemed to be a conspicuous difference. On appeal, however, the court revised the fair market value of the assets such that the transfer price was found to be discounted somewhere between 4.84% and 9.84% – which discount was found not to be conspicuous.

An instructive aspect of Turpin is that the court took standard industry practice into account in determining the fair market value of the transferred asset (in this case, lumber). In doing so, the court relied on the testimony of officials of the purchaser, who testified that the purchaser assumed risks and costs that justified a markup from the standard industry price. Furthermore, because the lumber industry was based on long-term business relationships rather than "one-shot deals," and thus customers were willing to invest more in certain relationships, the court noted that "these characteristics have a certain impact on the determination of fair market value."[11]

Implications for Factors

Considering that most factoring transactions involve a discount to the nominal or stated value of the accounts receivable being purchased, factors need to be aware that discounts which are "conspicuous" may attract risk in a proceeding under a Canadian insolvency statute. Unfortunately, there is no fixed rule as to how much of a discount could be deemed to be a conspicuous difference from fair market value. Factors seeking to purchase the receivables of Canadian businesses should generally be aware of market norms which would justify the application of certain discounts. If the seller of the receivables is at risk of becoming insolvent or bankrupt, or if the seller is not at arm's length from the purchaser, then the purchaser should be particularly vigilant to ensure that the receivables are sold at or near their fair market price.

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2 *Bankruptcy and Insolvency Act, RSC 1985, c B-3* at s 96.

3 *Ibid.*

4 See, e.g., *Dover Financial Corp (Syndic de)*, 2012 QCCS 68; *Re Anderson*, 2012 BCSC 956; *Bank of Montreal v EL04 Inc.*, 2012 ONCA 80; *PricewaterhouseCoopers Inc. v Legge*, 2011 NBQB 255; *Grant Bros Contracting Ltd. v Grant*, 2005 NSSC 358; *Re Kostiuk* (1998), 6 CBR (4th) 46, [1998] BCJ No 2296; *Re Dilawri* (1995), 36 CBR (3d) 70 (Ont Gen Div).

5 *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 SCR 461 at para 85.

6 *Ibid* at para 88.

7 *Re Mendenhall* (1999), 107 OTC 11, 12 CBR (4th) 271, 92 ACWS (3d) 747.

8 *Skalbania (Trustee of) v Wedgewood Village Estates Ltd.* (1989), 60 DLR (4th) 43, [1989] 5 WWR 254 (BC CA).

9 *Re Mihalich*, 2013 ABQB 66.

10 *Banque Nationale du Canada v Produits forestiers Turpin inc.*, 2008 QCCA 1732. Note that the unofficial English translation of this Quebec case at http://canlii.ca/t/284ns was used and quoted for the purposes of this article.

11 *Ibid* at para 45.

The Constructive Trust and the Court of Appeal: A Cautionary Reminder That Even Perfected Security Interests are Imperfect

By Jeremy Nemers and Daanish Samadmoten*

The recent decision by the Court of Appeal for Ontario (the "**Court**") in *306440 Ontario Ltd. v. 782127 Ontario Ltd*.[1] serves as a cautionary reminder to secured creditors that their position may not always be at the top of the insolvency food chain, even when they have taken all the proper steps to perfect their security interests. A valid trust claim over property held by an insolvent debtor, including a so-called "constructive trust" that is impressed over the property by a court after the underlying insolvency event has occurred, will place such trust property out of reach of secured creditors, even when the latter hold perfected security interests. This is because the debtor, despite having day-to-day possession or control of the property as trustee, is not the property's true beneficial owner.

While serving as an unwelcome reminder to many, the Court's decision merely reflects a long-line of existing case law, the most uncontroversial aspects of which have long since been codified in statute. For example, the *Bankruptcy and Insolvency Act* recognizes the supreme nature of the trust, providing expressly that "*[t]he property of a bankrupt … shall not comprise … property held by the bankrupt in trust for any other person*."[2] Similarly, a court-appointed receiver, which also takes its mandate from statute,[3] is limited to deal only with the assets, properties and undertakings of the debtor, and therefore also falls short of reaching property held in trust for another.

Despite providing a grim reminder to secured creditors that they are vulnerable to trust claims, the Court also reminds potential constructive trust claimants of the high hurdle that they must surpass in order to establish their claim.

Background

Alrange Container Services ("**Alrange**") was a storer, servicer, and refurbisher of shipping containers. In some instances, Alrange would resell containers to third parties. By January 2013, Alrange's business was in dire financial straits, such that it was only near the end of that month when Alrange's bank account reflected a positive cash balance. On February 15, a secured creditor holding general security over Alrange for advances made on an operating loan successfully applied for the appointment of a receiver (the "**Receiver**"). Alrange later made an assignment in bankruptcy, at which time it owed the secured creditor approximately $750,000.00. There did not appear to have been any issues with the secured creditor's perfection of its security interest in Alrange's property.

In parallel with the above, one of Alrange's major international customers (a lessor for which Alrange stored, serviced, refurbished and resold containers pursuant to a written agreement), learned of Alrange's financial distress and started taking steps to inventory and recover its containers stored at Alrange's facility. The customer quickly realized that 127 containers were missing, that Alrange had sold these missing containers and that some of the sales were in violation of the written agreement between Alrange and the customer.

Instead of advancing an unsecured claim for damages for conversion or for breach of the written agreement, the customer asserted that Alrange had been unjustly enriched by receipt of proceeds from the sale of the customer's containers, such that the proper remedy was the imposition of a constructive trust over these proceeds.

The Decision

At first instance, the customer's claim was rejected. The motions judge concluded that there was no connection between the funds held by the Receiver and the proceeds from the sale of the customer's containers, both because the sale proceeds had been commingled with other funds in Alrange's account, and because the account balance remained below zero until near the end of the collection process. Moreover, the motions judge held that it would be unjust to impose a constructive trust in the circumstances due to the intervening interests of the secured creditor.

The customer appealed, and the appeal was allowed in part. Within the bankruptcy and insolvency context, the Court undertook a review of: (i) unjust enrichment as a cause of action; and (ii) the constructive trust as a remedy for unjust enrichment. In regards to unjust enrichment, the

1 2014 ONCA 548.
2 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 67(1)(a) [BIA].
3 BIA, *supra* note 2, s. 243(1); see also *Courts of Justice Act*, R.S.O. 1990, c. C-43 and associated jurisprudence.

Court applied the existing and well-known tripartite test of enrichment of the defendant, a corresponding deprivation of the plaintiff and an absence of juristic reason for the enrichment. The Court then examined the constructive trust as a remedy for unjust enrichment, and repeated the well-known (albeit sometimes difficult to apply) law that the "*constructive trust remedy only makes sense where the property that becomes the subject of the trust is closely connected to the loss suffered by the plaintiff and/or the benefit gained by the defendant*." The Court then emphasized that the need for a sufficient causal connection is even stronger in the purely commercial context, given the reasonable expectations of the parties. Only if this high threshold is met will a constructive trust be imposed, causing "*removal of trust property from the estate of a bankrupt, effectively trumping the priority scheme under Canadian bankruptcy legislation*."

In regards to the appeal before it, the Court concluded that a constructive trust remedy was inappropriate with respect to the proceeds of the container sales that were received prior to Alrange's bank account accumulating a positive balance. The customer could not trace any of the funds held by the Receiver to the proceeds of those sales, and thus the connection between the sale proceeds and the funds was "*far too remote and indirect to justify imposing a constructive trust*."

However, the Court did grant a constructive trust over the sale proceeds that were received after Alrange's bank account accumulated a positive balance and that related to the sale of five of the 127 containers. Not only was there unjust enrichment, in that the sale of these five containers was in violation of the written agreement between the customer and Alrange (thereby precluding any juristic reason for Alrange to have received and retained the proceeds from these sales), but these specific proceeds remained in Alrange's account and "*could be directly connected by the Receiver to the sale of five*" of the containers. The Court was therefore prepared to impose a constructive trust over this narrow band of sale proceeds, including the portion that represented Alrange's profits on these specific sales.

Key Takeaways

This decision serves as a reminder from Ontario's highest court to secured creditors that the size of the estate against which they are claiming may be affected by trust claims, and that these trust claims may not always take the standard form of the classical trust. It is therefore advisable for secured creditors to consider this when negotiating security for their loans. That is, for certain debtors, it may be appropriate to negotiate multiple options for enforcing security so as to provide better protection (i.e. by seeking guarantees, charges on real property, cross-collateralizations, etc.).

Furthermore, this decision may be worrisome for secured creditors because the theoretical concept of the constructive trust is prone to expansion. For example, while now trite law in Canada, the constructive trust as a remedy for unjust enrichment was a bold idea only a few decades ago, and was an expansion from the traditional English law of awarding a constructive trust to remedy certain forms of wrongful behaviour. Moving forward, at least one leading Canadian academic on trust law has now suggested that a constructive trust should be awarded in a third category of cases: to perfect stated intention and protect detrimental reliance.[4] While this proposed third category has yet to be addressed by Canadian courts, there is the potential for the constructive trust to continue to grow and evolve, thereby potentially further eroding the position of secured creditors.

The good news for secured creditors is that the Court maintained a narrow range of circumstances in which a court should find the requisite "*direct connection*" for a constructive trust between property and a claim in the commercial context. The Court was also clear in stating that the legitimate interests of a secured creditor is further justification for the "*requirement of a clear and direct connection between the money held*" and a specific claim "*as a condition precedent to the imposition of a constructive trust*" to remedy unjust enrichment. Thus, while the Court's decision serves a necessary cautionary reminder to secured creditors, the latter need not panic – at least not yet, and at least not in most cases.

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4 Albert Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 8th ed. (Toronto: Carswell, 2014) at 849.

Case Comment: *Benedict v. Ohwistha Capital Corp.*

By Stephen Crawford*

In its recent decision in *Benedict v. Ohwistha Capital Corp.*,[1] the Ontario Court of Appeal rejected a financing technique that had been intended to circumvent the prohibition in the *Indian Act* (the "**Act**") against any person, other than an Indian or a band, taking certain types of security on property situated on an Indian reserve. In a unanimous decision written by Justice Feldman, the court found that a conditional sales contract between the parties was actually a sham meant to allow the appellant to take security on some equipment in the context of a normal loan transaction – which could not be allowed. This prohibition is found in section 89(1) of the Act, and reads as follows:

> Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

However, there is an exception to this prohibition. Section 89(2) of the Act provides that the seller under a conditional sales contract may enforce its security notwithstanding the general prohibition in section 89(1):

> A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

The appellant in this case was an Aboriginal Capital Corporation ("**ACC**") that was created by the federal government for the purpose of facilitating financing for Aboriginal businesses. The appellant did not, however, fall within the definition of Indian for the purposes of the Act, and so section 89(1) applied to it.

The appellant approved a loan of $125,000 for the respondent, Lloyd Benedict, for his fish hatchery business. However, it wished to take security on certain equipment belonging to Benedict. In order to avoid the prohibition in section 89(1), the transaction was structured such that Benedict sold the equipment to an employee of the appellant for $125,000, then the equipment was sold back to Benedict under a conditional sales contract for the same amount plus interest. As the court noted in its judgment, although the contract was titled "Conditional Sales Contract," there was no specific reservation of title in its conditions – though it provided the right upon default of payment to take possession of the equipment.

1 *Benedict v. Ohwistha Capital Corp.*, 2014 ONCA 80.

Benedict defaulted on payment, went bankrupt and was later discharged from bankruptcy. After this discharge, the appellant seized the equipment. Benedict challenged the seizure based on section 89(1), and was successful both at trial and on appeal. This type of financing structure was found to be an unacceptable circumvention of the section 89(1) prohibition.

The court made note of recent Supreme Court of Canada jurisprudence relating to sections 89 and 90 of the *Indian Act*, both of which place restrictions on the freedom of alienation of certain property situated on a reserve. In the cases of *Mitchell v. Sandy Bay Indian Band*[2] and *McDiarmid Lumber Ltd. v. God's Lake First Nation*,[3] the court noted that the provisions contain an element of paternalism resulting from the Crown's fiduciary obligation to protect Aboriginal property. It further acknowledged that the provisions have the adverse effect of impeding Aboriginal business activity on reserve by making it more difficult to obtain financing. In her decision in *God's Lake*, Chief Justice McLachlin noted that the 1996 report of the Royal Commission on Aboriginal Peoples found that these sections are a "significant deterrent to financing business activity on reserve"4 and recommended that they be eliminated. Although the Supreme Court was unable to modify the statutory wording, the Chief Justice suggested that a narrow reading of these provisions is appropriate in order to counter this discriminatory effect.

However, although Justice Feldman did find that section 89(1) has a "significant discriminatory effect,"[5] she did not give it a narrow reading. Instead, she found that the transaction was such an obvious fiction that it undermined the provision's purpose. In so finding, she focused on the repeated use of the word "notional" throughout the agreed statement of facts – title was "notionally transferred," Benedict received a "notional payment" of $125,000, and Benedict "notionally bought back" the same equipment.[6] Justice Feldman summarized by calling the transaction a "pure fiction," and concluded that this was not an appropriate case to give section 89(1) a narrow reading.

While the discriminatory effect of section 89(1) continues to be worrisome, Justice Feldman explicitly left it to

2 *Mitchell v. Sandy Bay Indian Band*, [1990] 2 SCR 85.
3 *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58.
4 *Ibid* at para 42.
5 *Benedict, supra* note 1 at para 28.
6 *Ibid* at para 26.

Parliament to decide whether changes should be made to the statute to allow ACCs – which were set up by the federal government for the specific purpose of facilitating financing for Aboriginal businesses – to employ these types of lending practices.[7] It is possible that this could be done either by exempting ACCs from the rule in section 89(1), or by repealing the provision entirely (as the 1996 report of the Royal Commission on Aboriginal Peoples recommends).

Given the acknowledged need to give section 89(1) a narrow reading to counter its discriminatory effects, it may be possible to distinguish *Benedict* on the grounds that the transaction was simply improperly structured. The "Conditional Sales Contract" neglected to actually expressly reserve title in the equipment, and the use of the word "notional" throughout the agreed statement of facts in the case made it clear that the parties were merely trying to circumvent the statutory provision. It remains possible that a properly structured transaction involving a purchase of some of the debtor's property and a subsequent conditional sale back to the debtor could fall within the section 89(2) exception, if all steps of the transaction are properly followed. While *Benedict* casts some doubt in cases where title to the property originally belonged to the debtor, *Benedict* was a situation where the facts made it patently clear that the transaction was a sham.

7 *Ibid* at para 29.

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Assignments of Conditional Sale Contracts

By Stephen Crawford*

In the automotive industry, it is common practice for a car dealer to enter into a lease or conditional sales contract with a customer and then assign the right to receive the stream of payments from that contract to a financing company. However, this type of transaction, if not carried out properly, may create risk for the financing company as a result of the provisions of the *Personal Property Security* Act (the "**PPSA**"). If the financing company does not perfect its security interest under the PPSA, it may lose its right to the stream of payments if the dealer were to go bankrupt.

Section 2(b) of the PPSA provides that, subject to certain exceptions, the PPSA applies to a transfer of an account or chattel paper even if the transfer does not secure payment or performance of an obligation. Chattel paper is defined in the PPSA as a document that evidences both a monetary obligation and a security interest in or a lease of specific goods. This is the case with leases and conditional sales contracts. Pursuant to section 20(1)(b) of the PPSA, a trustee-in-bankruptcy has priority over unperfected security interests. Thus, the financing company purchasing the stream of payments under a lease or a conditional sales contract will need to perfect the assignment from the dealer. Perfection with respect to these types of instruments can be carried out by either registration or possession. In the current environment, possession is not usually practical, as the financing company would need to possess the only original copy of the contract, and it is often the case that multiple original copies are signed. As such, perfection by registration is usually a better option. This may still cause complications for the financing company, as PPSA searches then need to be done and any necessary waivers obtained. When a financing company deals with hundreds or even thousands of dealers, this can become prohibitively expensive and time–consuming.

But will perfection always be necessary in these types of transactions? The case of *Re Fifth Dimension Technologies Inc.*[1] involved a somewhat similar situation in which Hewlett-Packard ("**HP**") defeated the claim of a trustee-in-bankruptcy by successfully arguing that the PPSA should not apply to the transaction in question. At first blush, the case might seem to have application to the automotive context; but upon further analysis, it becomes clear that the exception used by HP in this case would not apply to the types of transactions that normally take place in the automotive industry. Perfection against a dealer is still necessary. Nevertheless, the case presents an alternative way to structure transactions that would make PPSA registration unnecessary.

The facts in *Fifth Dimension* are somewhat complex due to the nature of HP's distribution system. The government wished to lease some HP computer equipment for some of its Indian and Northern Affairs offices; but HP's distribution system forced this type of computer equipment to be sold to authorized distributors, who then sell it to resellers, who then sell it to the end user. The government was unable to purchase the equipment directly from HP or the authorized distributors. One reseller, Fifth Dimension Technologies (5D), won the contract with the government. Thus, after HP sold the equipment to the distributor, 5D purchased the equipment from the distributor. In order to facilitate this purchase, HP provided funds to 5D slightly in excess of the purchase price. 5D later went bankrupt, and the trustee-in-

1 *Re Fifth Dimension Technologies* (2002), 4 PPSAC (3d) 31, [2002] OJ No 1260 (Ont SCJ).

bankruptcy argued that the funds transferred from HP to 5D were a loan that would engage the PPSA. On the other hand, HP argued – and the court ultimately accepted – that HP was purchasing the equipment back from 5D and then leasing it to the government. In other words, HP had sold the computer equipment to the distributor, who sold it to 5D, who then sold it back to HP for a profit.

HP's argument in *Fifth Dimension* was heavily supported by the facts. This type of transaction was commonplace for HP, which was happy to provide a profit margin to resellers like 5D because the resellers had gone through the work of finding customers. In fact, the inclusion of a profit margin for 5D in the funds paid to it indicates an outright purchase, since it would make no commercial sense to loan 5D a profit margin. The relevant documentation, including financial records, invoices and a trust agreement signed by 5D and HP, along with the actions of the parties and the lack of any loan documentation, made it clear that the transaction was meant to be an outright sale. Justice Polowin also found the firsthand evidence of HP's employees more credible than the hearsay testimony of the trustee-in-bankruptcy.

This finding on the nature of the transaction is important because section 4(1)(i) of the PPSA provides an exception to the application of the PPSA that applied to this situation. Section 4(1)(i) provides that the PPSA does not apply to an assignment of an unearned right to payment to an assignee who is to perform the assignor's obligations under the contract. This exception contemplates the replacement of one account holder for another – similar to the replacement of one secured party for another. Thus, there is no need for registration because the underlying transaction will already have been registered under the PPSA (or, if there was no reason to register initially, then there will be no reason to register upon assignment).

Fifth Dimension is one of the only reported cases to use this provision of the PPSA to prevent the statute's application. The key difference between this case and the transactions that would normally take place in the automotive industry is that HP purchased the equipment outright and then leased it to the customer, rather than merely purchasing the right to a stream of payments. This would mean that, in our automotive example, the financing company would need to purchase title to the car – which is usually undesirable for a number of reasons relating to liability, insurance and tax. Thus, although this case presents an alternative way to structure transactions, a financing company purchasing the right to streams of payments under conditional sales contracts from a dealer will still need to register its security interest against the dealer, or else structure the transaction as a loan and security agreement directly with the underlying consumer.

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