TAB F

TATC File No. C-3335-41
MoT File No. RAP5504-60784 P/B

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Rubbert Aerial Spraying Inc., Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:
Canadian Aviation Regulations, SOR/96-433, paragraph 700.02(2)(d)

Review Determination
Howard M. Bruce

Decision: November 6, 2009

Citation: *Rubbert Aerial Spraying Inc. v. Canada (Minister of Transport)* 2009 TATCE 32 (review)

Heard at Regina, Saskatchewan, on April 8 and 9, 2009

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant has contravened paragraph 700.02(2)(*d*) and subsection 605.94(1) of the *Canadian Aviation Regulations*. The assessed monetary penalties of $220 000 and $7 500 for a total amount of $227 500 are upheld. The total amount of $227 500 is payable to the Receiver General for Canada and must be received by the Tribunal within 35 days of service of this determination.

File Nos.: C-3335-41

C-3336-33

I. BACKGOUND

A. Rubbert Aerial Spraying Inc. (File No. C-3335-41)

[1] On January 23, 2007, the Minister of Transport issued a notice of assessment of monetary penalty in the total amount of $227 500 to the applicant, Rubbert Aerial Spraying Inc., for

contravening paragraph 700.02(2)*(d)* and subsection 605.94(1) of the *Canadian Aviation Regulations* (CARs), pursuant to section 7.7 of the *Aeronautics Act* (Act).

[2] It is alleged that on various occasions between May 30 and August 28, 2006, in the province of Saskatchewan, the applicant, as a commercial aerial applicator, operated a Piper PA25-235 aeroplane, bearing Canadian registration marks C-FHNZ, to conduct aerial work involving the dispersal of products for different farmers, when it did not hold and comply with an air operator certificate providing authorization to do so, contravening paragraph 700.02(2)*(d)* of the CARs (44 counts at $5 000 per count, for a total of $220 000).

[3] It is also alleged that on various occasions between May 31 and August 27, 2006, at various locations in the province of Saskatchewan, the applicant, being the person responsible for making an entry in a journey log of an aircraft, a PA25-235, bearing Canadian registration C-FHNZ, failed to enter the particulars set out in column I of an item in schedule 1, subsection 605.94(1) of the CARs, in the journey log at the time set out in column II of the item. Specifically, the applicant failed to enter the air time of each flight or series of flights and cumulative total air time daily, on completing each flight or series of flights. Consequently, the Minister of Transport assessed a monetary penalty of $7500 against the applicant, for contravening subsection 605.94(1) of the CARs.

[4] On February 19, 2007, the Transportation Appeal Tribunal of Canada received a request for review from the applicant.

B. Lorin Edgar Rubbert (File No. C-3336-33)

[5] On January 23, 2007, Transport Canada issued a notice of assessment of monetary penalty in the amount of $5000 to the applicant, Lorin Edgar Rubbert, for contravening paragraph 401.03(1)*(a)* of the CARs, pursuant to section 7.7 of the Act.

[6] It is alleged that on various occasions between May 31 and August 28, 2006, in various locations in the province of Saskatchewan, the applicant exercised the privileges of a flight crew licence when he did not hold the appropriate licence. Specifically, he acted as pilot-in-command of an aircraft, a PA25-235, bearing Canadian registration C-FHNZ, for hire or reward when he did not hold a commercial pilot licence.

[7] On February 19, 2007, the Transportation Appeal Tribunal of Canada received a request for review from the applicant.

II. LEGISLATION

[8] The definition of the word "farmer" is found as follows under section 700.01 of the CARs:

"farmer" - means a person whose primary source of income is derived from the tillage of the soil, the raising of livestock or poultry, dairy farming, the growing of grain, fruit, vegetables or tobacco, or any other operation of a similar nature.

[9] Paragraphs 401.03(1)*(a)* and 700.02(2)*(d)* and subsections 605.94(1) and 700.02(3) of the CARs provide the following:

401.03(1) No person shall act as a flight crew member or exercise the privileges of a flight crew permit, licence or rating or a foreign licence validation certificate unless

(a) subject to subsection (2) and sections 401.19 to 401.27, the person is the holder of, and can produce while so acting and while exercising those privileges, the appropriate permit, licence or rating and a valid and appropriate medical certificate.

605.94 (1) The particulars set out in column I of an item in Schedule I to this Division shall be recorded in the journey log at the time set out in column II of the item and by the person responsible for making entries set out in column III of that item.

700.02 (2) Subject to subsections (3) and (4), no person shall, unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to do so, operate an aeroplane or helicopter to conduct aerial work involving

. . .

(d) the dispersal of products.

(3) A person who does not hold an air operator certificate may conduct aerial work involving the dispersal of products if

(a) the person is a farmer;

(b) the person owns the aircraft that is used to disperse the products;

(c) the products are dispersed for agricultural purposes; and

(d) the dispersal of the products takes place within 25 miles of the centre of the person's farm.

III. MINISTER OF TRANSPORT'S EVIDENCE

(1) Ed Balon

[10] Ed Balon is the owner of Balon's Aerial Spray Ltd. in the Wakaw district of Saskatchewan. He is a farmer and holds an air operator certificate (AOC).

[11] Mr. Balon indicated that in the summer of 2006, the farmers in the Wakaw district were dealing with a severe infestation of Bertha armyworm which began at the beginning of August. The only way to effectively deal with the situation and avoid large scale damage to crops was for farmers to proceed with aerial spraying of pesticides.

[12] In the first week of August 2006, Mr. Balon became concerned with the fact that three individuals from Southern Saskatchewan, including Mr. Rubbert, were spraying products in the Wakaw district, as he believed that some of them were "flying farmers", the term used to describe farmers that do not hold an AOC but can still proceed with the aerial application of products if they remain within the 25-mile limit provided for in subsection 700.02(3) of the CARs.

[13] Mr. Balon testified that, according to his understanding, a farmer who owns an aircraft can only conduct aerial spraying operations within a 25-mile radius from his farm, unless an exemption is obtained from Transport Canada. Mr. Balon indicated that he believed that some of these individuals did not have an AOC, and that they were clearly beyond the 25-mile limit from their farms. He specified that the outbreak of Bertha armyworm was not severe enough to necessitate the granting of exemptions, and that there were sufficient AOC holders to supply the spraying demand. In fact, Mr. Balon was himself calling other operators looking for work.

[14] Mr. Balon indicated that he was frustrated because these pilots could be operating without an AOC. This created an unfair economic advantage because the cost of obtaining and maintaining an AOC is much higher.

[15] Mr. Balon spoke of his concerns to another pilot and aerial applicator, Joe Varjassy. At the time, Mr. Balon was under the impression that the director and pilot of Rubbert Aerial Spraying, Mr. Rubbert, who was the outgoing president of the Saskatchewan Aerial Applicators Association, held an AOC. Following this conversation, Mr. Varjassy told him that he would be contacting Transport Canada to file a complaint.

(2) Wayne Silzer

[16] Wayne Silzer describes himself as a self-employed businessman. He is the owner of Fly-On Ag Services Inc., a commercial aerial applicator and also a farmer in the Lake Lenore district.

[17] Mr. Silzer recalled that in August 2006, there was a severe outbreak of Bertha armyworm in the area, and that he had limited success finding pilots to help him meet the large demand for aerial application of products. He also recalled getting several calls from Mr. Balon, informing him that things were not going well in the Wakaw district.

[18] In the first week of August 2006, Mr. Rubbert called him to ask to borrow some equipment. As the outbreak became more serious and he was overloaded with work, Mr. Silzer later contacted Mr. Rubbert to see if he was interested in helping him with some aerial spraying work. Mr. Silzer indicated that he had no knowledge of the applicant's status with Transport Canada.

[19] Rubbert Aerial Spraying, through its representative, Mr. Rubbert, and two other pilots, Raymond Blerot and Dwight Monteyne, conducted some aerial spraying operations for Fly-On Ag Services and provided assistance checking fields.

[20] There were problems with some of the fields sprayed by Rubbert Aerial Spraying, but there was nothing out of the norm. Mr. Silzer recalled having a discussion with Mr. Rubbert, while

sitting in a hangar and finding out that neither Rubbert Aerial Spraying nor his pilots held an AOC. After reviewing the CARs, Mr. Silzer believed that they were still within legal boundaries, as he tried to keep them within 25 miles of his base of operations.

[21] Mr. Silzer became aware that Transport Canada was concerned with the applicants' involvement in his operations. He received a call from Inspector Richard Gagnon of Transport Canada, who informed him that, in his view, the use of the applicants' services was illegal. He demanded that they cease their services immediately.

[22] Mr. Silzer was disappointed that Inspector Gagnon did not assist him in obtaining an exemption for the applicant, and he even called the office of the Minister of Agriculture and Agri-Food Canada, but to no avail.

[23] Mr. Silzer identified different forms produced as evidence (exhibits M-6 to M-22). These forms had been prepared and used by Fly-On Ag Services. Mr. Silzer described and discussed their content. He also indicated that he accepted these documents as being a true and accurate reflection of the aerial application work done for Fly-On Ag Services by Rubbert Aerial Spraying.

[24] According to Mr. Silzer, there was an understanding that Rubbert Aerial Spraying would receive compensation for its services and expenses. Once all the work was completed, Mr. Silzer insisted on settling his account with Rubbert Aerial Spraying. It is at this time that a pilot acre report (exhibit M-3) was submitted to Mr. Silzer by Rubbert Aerial Spraying. Mr. Silzer accepted this report and an expense report (exhibit M-5) as a true and accurate account of the work that Rubbert Aerial Spraying had performed for him. Mr. Silzer then proceeded to write a cheque to Oxbow Crop Care Inc. at the request of Mr. Rubbert. However, Mr. Rubbert called later to ask that Mr. Silzer write the cheque of $65 679.75 to the order of Rubbert Aerial Spraying Inc. (exhibit M-4).

(3) Gustave Gaudet

[25] During the summer of 2006, Gustave Gaudet worked for Wendland Ag Services Ltd., a business that sells chemicals and pesticides and also provides the service of matching farmers with aerial applicators for the dispersal of the products they purchase.

[26] The primary aerial applicator for the previous several years was Provincial Airways, owned and operated by Bill Nyman. In the summer of 2006, due to an abnormal outbreak of Bertha armyworm, Wendland Ag Services had to apply pesticides to over 30 000 acres which was well over their average for this period. To make matters worse, Mr. Nyman had to reduce his operations due to personal family matters. As a replacement, he sent Mr. Rubbert who used the services of two other pilots, namely Messrs. Blerot and Monteyne, to provide aerial application services.

[27] Mr. Gaudet testified that Rubbert Aerial Spraying completed the dispersal of products in the Wakaw area before leaving to work for another operator. Mr. Gaudet was asked to describe and

discuss the content of the Wendland Ag Services aerial applications worksheets that were introduced as evidence (exhibits M-23 to M-26).

[28] After the aerial application for Wendland Ag Services had been completed, Mr. Rubbert provided to Wendland Ag Services a pilot acre report (exhibit M-27). Mr. Gaudet reviewed this report and stated that it was a true and accurate reflection of the aerial services provided by Rubbert Aerial Spraying.

(4) Brian McFarlane

[29] Brian McFarlane is a civil aviation inspector with Transport Canada, and is also a farmer in the north-east region of Saskatoon, where there was an outbreak of Bertha armyworm in the late summer of 2006.

[30] At the beginning of August 2006, Mr. McFarlane had his fields sprayed by an aerial applicator and he declared that he had no difficulty in finding an aerial applicator. Mr. McFarlane drew a box on the map produced as evidence (exhibit M-65) to indicate the area of the outbreak.

[31] The Transport Canada office in Saskatoon received a complaint regarding the presence of illegal aerial applicators operating in the Wakaw area. Mr. McFarlane was sent to the area to obtain more information. During his visit, he saw the applicant's aircraft C-FHNZ and took a picture of it (exhibit M-28). Mr. McFarlane testified that he also saw the aircraft of Messrs. Blerot and Monteyne.

(5) James Welwood

[32] James Welwood is a superintendant with Transport Canada. His primary duties are to assess the validity of complaints and assign the various cases to his investigators. The lead investigator in the present matter was originally Mr. Richard Gagnon who continued the investigation until his departure on long-term leave in 2008.

[33] Inspector Welwood was actively involved in the investigation regarding the applicants, and in particular, participated in the drafting and execution of the search warrant executed on the applicants' premises. This search warrant was executed by a team of four or five investigators and a Royal Canadian Mounted Police (RCMP) officer. Mr. Welwood's duties during the search were to collect and record the documents seized during the execution of the warrant. During his testimony, he described and discussed various documents that were seized on the applicants' premises (exhibits M-29 to M-64).

(6) Michael Yaholnitsky

[34] Michael Yaholnitsky is a commercial aerial applicator operating in the Wakaw area. He confirmed that in the summer of 2006 there was an outbreak of Bertha armyworm and he started getting numerous calls from farmers looking for aerial applicators.

[35] Mr. Yaholnitsky stated that he received a call from Mr. Rubbert, offering his services for aerial application. After the call, he looked in the Saskatchewan Aerial Applicators Association Directory to obtain some information on Mr. Rubbert. He saw that he was registered as a flying farmer not holding an AOC, which he found odd, as Mr. Rubbert had always represented himself as having an AOC. Mr. Yaholnitsky testified that he only uses the services of AOC holders, and that he had enough operators available to complete all his work in 2006. According to Mr. Yaholnitsky, the outbreak of 2006 was not severe enough to warrant the granting of exemptions to flying farmers.

(7) Joe Gaudry

[36] Joe Gaudry is a civil aviation inspector with the Winnipeg office of Transport Canada. He has been an inspector for 10 years.

[37] On August 2, 2006, his office received a complaint from Mr. Varjassy about three aerial applicators in the Wakaw district, including the applicant. He explained that they were operating illegally, as they did not hold an AOC.

[38] A search of the Transport Canada database allowed Mr. Gaudry to confirm that the aircraft C-FHNZ was registered to Mr. Rubbert (exhibit M-38) and that Mr. Rubbert held a private pilot licence (exhibit M-66). During the investigation in the present matter, Mr. Gaudry confirmed that the initial lead inspector was Richard Gagnon, and that he was asked to assist in data gathering. He was officially the number two investigator in the file, and took the lead role when Mr. Gagnon took a leave of absence. He also confirmed having made a complete search of all Transport Canada databases and found that Mr. Rubbert did not hold an AOC.

[39] Inspector Gaudry testified that on August 3, 2006, he flew to Wakaw to proceed with his investigation. He contacted Wendland Ag Services who confirmed that they had used Rubbert Aerial Spraying as an aerial applicator. He tried unsuccessfully to reach Mr. Rubbert. On August 5, 2006, he interviewed Messrs. Balon and Varjassy.

[40] Mr. Gaudry proceeded to search the Saskatchewan Corporate Registry and found that Rubbert Aerial Spraying lists crop spraying as the nature of its business, and that Mr. Rubbert is the president of this corporation. He also completed a search for Rubbert Farms Inc. and confirmed that Lorna Rubbert was the sole shareholder and director of the corporation. The excerpts in the registry were produced as exhibit M-67.

[41] Mr. Gaudry was able to obtain more details during his discussion with the representatives of Wendland Ag Services. Upon consulting the second page of the pilot acre report prepared by the applicant (exhibit M-27), the name Bob Hefferman was missing. The reason was that Provincial Airways was doing the aerial spraying work for Wendland Ag Services but had to leave and asked the applicant to complete the work. However, Provincial Airways was paid for the services rendered to Mr. Hefferman.

[42] Wendland Ag Services confirmed to Mr. Gaudry that following the reception of the pilot acre report from Rubbert Aerial Spraying (exhibit M-27), they reviewed the document and

considered it to be a true and accurate reflection of the services rendered by the applicant, and on the basis of this document, a cheque in the amount of $8 347.50 was made to the applicant.

[43] Mr. Gaudry produced a copy of an excerpt from the 2006 directory of the Saskatchewan Aerial Applicators Association, which lists Mr. Rubbert as a flying farmer and warehouse operator, not as a commercial operator (exhibit M-69).

[44] In addition, Mr. Gaudry produced a copy of an excerpt from the 2006 directory of the Canadian Aerial Applicators Association in which there are two entries for Mr. Rubbert, the first as being a commercial operator and the second as a flying farmer (exhibit M-70). This description seemed inaccurate to Mr. Gaudry, as neither Mr. Rubbert nor Rubbert Aerial Spraying owns a farm and does not meet the definition of a farmer in section 700.01 of the CARs. Even if they did meet the requirements, the exception in paragraph 700.02(3) of the CARs would not apply, as they would have been beyond the 25-mile limit.

IV. MINISTER'S CLOSING STATEMENT

[45] The Minister's representative argues that Mr. Rubbert is not a flying farmer and that the exception provided in subsection 700.02(3) of the CARs does not apply. Rubbert Aerial Spraying is not engaged in farming operations and cannot use this exception.

[46] According to the Minister, the evidence clearly establishes that Rubbert Aerial Spraying is a corporate structure which offers commercial services, namely crop spraying, and as it does not hold an AOC, all such aerial work performed is in contravention of paragraph 700.02(2)(*d*) of the CARs. The Minister has provided evidence of such aerial work. The Minister also submits that Rubbert Aerial Spraying failed to record flights from May 31 to August 27, 2006, thus acting in contravention of subsection 605.94(1) of the CARs.

[47] The Minister's representative states that, to be able to fly for hire or reward, according to subsection 401.03(1) of the CARs, one must hold a commercial pilot licence. Mr. Rubbert does not hold such a licence and the evidence demonstrates that he flew for hire or reward.

[48] The assessed amounts for each contravention are reasonable considering that the applicants acted in blatant disregard for the applicable regulations.

V. ANALYSIS

A. Rubbert Aerial Spraying Inc. (File No. C-3335-41)

[49] To render a determination regarding the contraventions of paragraph 700.02(2)(*d*) and subsection 605.94(1) of the CARs, it is necessary to examine the applicable legislative provisions and determine if the Minister has proven the essential elements of each contravention on the balance of probabilities.

(1) Paragraph 700.02(2)(d) of the CARs (44 Counts)

[50] With respect to the 44 counts relating to paragraph 700.02(2)(*d*) of the CARs, the Tribunal applies the following logic:

- subsection 700.02(2) of the CARs specifies that an AOC is required for any person doing aerial work;

- subsection 101.01(1) of the CARs defines "aerial work" as "a commercial air service other than an air transport service or a flight training service";

- subsection 3(1) of the Act defines "commercial air service" as "any use of aircraft for hire or reward" and this same section defines "hire or reward" as "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for use of an aircraft".

[51] Thus, if the Tribunal concludes that the applicant was using the aircraft for hire or reward resulting in the dispersal of products without an AOC, there would be a contravention of paragraph 700.02(2)(*d*) of the CARs.

[52] In determining the admissibility of evidence, the most important criterion is that of pertinence. The evaluation of the probative value of the evidence will then determine what weight, if any, the Tribunal will give to the evidence, with respect to the whole of the evidence which is presented by both parties.

[53] After evaluating the pertinent evidence, the Tribunal concludes that the applicant cannot be considered as a farmer, as defined by section 700.01 of the CARs, due to the fact that the applicant's primary source of income is not derived from the tillage of the soil, the raising of livestock or poultry, dairy farming, the growing of grain, fruit, vegetables or tobacco, or any other operation of a similar nature. Indeed, the Saskatchewan Corporate Registry lists crop spraying as the nature of the applicant's business. In addition, there is no evidence that the applicant owns a farm. The exception provided in subsection 700.02(3) of the CARs would not have been applicable.

[54] To establish a contravention of paragraph 700.02(2)(*d*) of the CARs, the Minister must prove the following elements:

- the applicant, Rubbert Aerial Spraying, does not hold an AOC;

- the applicant, Rubbert Aerial Spraying, conducted aerial work involving the dispersal of products.

[55] The secretary certificate (exhibit M-31) leads the Tribunal to conclude that the applicant did not hold an AOC during the period of the alleged contraventions of paragraph 700.02(2)(*d*) of the CARs.

[56] The next step is assessing the evidence regarding the alleged contraventions to determine if the Minister has proven that the alleged aerial work took place. In making this determination, the

pilot acre report and the invoice sent to Wendland Ag Services and the pilot acre report and the invoice sent to Fly-On Ag Services lead the Tribunal to conclude that the applicant used the services of at least three pilots during the course of its business in the present matter, namely Messrs. Rubbert, Blerot and Monteyne. These documents are business documents produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving these facts.

(a) Counts 1 to 22

[57] The aerial work order forms (exhibits M-36, M-37 and M-40 to M-59) are business documents produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving these allegations. These documents include information relating to the dispersal of products by the applicant and the amount charged for these services.

[58] These documents prove, to the Tribunal's satisfaction, that the applicant conducted aerial work, namely the dispersal of products, as alleged by the Minister in the notice of assessment of monetary penalty. On this basis, the Tribunal concludes that the Minister has proven, on the balance of probabilities, that the applicant conducted aerial work without holding an AOC and thus, contravened paragraph 700.02(2)(*d*) of the CARs, in counts 1 to 22.

(b) Counts 23 to 26

[59] The aerial work order forms produced as exhibits M-60 to M-63 are business documents produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving these allegations. These documents include information relating to the dispersal of products by the applicant and the amount charged for these services.

[60] The pilot acre report and the invoice sent to Wendland Ag Service (exhibit M-27) are also business documents produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving these allegations. These documents clearly specify the fact that dispersal of products was done by the applicant.

[61] In addition, the aerial application worksheets from Wendland Ag Services (exhibits M-23 to M-26) and the testimony of Mr. Gaudet, establish the fact that this work was done by the applicant. The fact that a cheque (exhibit M-68) was made to the applicant following the reception of his invoice (exhibit M-27) proves that the applicant received compensation for its services.

[62] These documents and the testimony of Mr. Gaudet prove to the Tribunal's satisfaction that the applicant conducted aerial work, namely the dispersal of products, as alleged by the Minister in the notice of assessment of monetary penalty.

[63] On this basis, the Tribunal concludes that the Minister has proven, on the balance of probabilities, that the applicant conducted aerial work without holding an AOC and thus, contravened paragraph 700.02(2)(*d*) of the CARs, as alleged in counts 23 to 26.

(c) Counts 27 to 40

[64] The custom application field order forms produced as exhibits M-6 to M-19 are business documents produced and used by Fly-On Ag Services in the ordinary course of its business. Mr. Silzer testified that it was an accurate reflection of the work done by the applicant. This document includes information relating to the dispersal of products by the applicant.

[65] The pilot acre report and the invoice sent to Fly-On Ag Services (exhibit M-3) are business documents produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving these allegations. These documents clearly specify the fact that dispersal of products was done by the applicant.

[66] In addition, the testimony of Mr. Silzer confirms the fact that the applicant was paid for this aerial work by a cheque (exhibit M-4), which was made to the applicant following the reception of his invoice.

[67] These documents and the testimony of Mr. Silzer prove to the Tribunal's satisfaction that the applicant conducted aerial work, namely the dispersal of products, as alleged by the Minister in the notice of assessment of monetary penalty.

[68] On this basis, the Tribunal concludes that the Minister has proven, on the balance of probabilities, that the applicant conducted aerial work without holding an AOC and thus, contravened paragraph 700.02(2)(*d*) of the CARs, as alleged in counts 27 to 40.

(d) Counts 41 to 43

[69] The pilot acre report and the invoice sent to Fly-On Ag Services (exhibit M-3) are business documents produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving these allegations. These documents clearly specify the fact that dispersal of products was done by the applicant.

[70] In addition, the testimony of Mr. Silzer confirms the fact that the applicant was paid for this aerial work by a cheque (exhibit M-4) which was made to the applicant following the reception of his invoice.

[71] These documents and the testimony of Mr. Silzer prove to the Tribunal's satisfaction that the applicant conducted aerial work, namely the dispersal of products, as alleged by the Minister in the notice of assessment of monetary penalty.

[72] On this basis, the Tribunal concludes that the Minister has proven, on the balance of probabilities, that the applicant conducted aerial work without holding an AOC and thus, contravened paragraph 700.02(2)(*d*) of the CARs, as alleged in counts 41 to 43.

(e) Count 44

[73] The aerial work order form produced as exhibit M-64 is a business document produced and used by the applicant in the ordinary course of its business and thus, admissible as evidence in proving this allegation. This document includes information relating to the dispersal of products by the applicant and the amount charged for these services.

[74] This document proves to the Tribunal's satisfaction that the applicant conducted aerial work, namely the dispersal of products, as alleged by the Minister in the notice of assessment of monetary penalty.

[75] On this basis, the Tribunal concludes that the Minister has proven, on the balance of probabilities, that the applicant conducted aerial work without holding an AOC and thus, contravened paragraph 700.02(2)(*d*) of the CARs, as alleged in count 44.

(2) Subsection 605.94(1) of the CARs — Count 45

[76] With respect to the alleged contravention by Rubbert Aerial Spraying, the evidence, in the present matter, proves that aircraft C-FHNZ made numerous flights between May 31 and August 27, 2006. The applicant clearly omitted to enter in the journey logbook the air time of each flight or series of flights and cumulative total air time daily, as stipulated in subsection 605.94(1) of the CARs (exhibit M-30).

[77] The Tribunal concludes that the applicant was the person responsible for making these entries as he had control of the aircraft during this period, and that the Minister has proven, on the balance of probabilities, that the applicant contravened subsection 605.94(1) of the CARs.

B. Lorin Edgar Rubbert (File No. C-3336-33)

[78] To render a determination regarding the contravention of subsection 401.03(1) of the CARs by Mr. Rubbert, it is necessary to examine the applicable legislative provisions and determine if the minister has proven the essential elements of the contravention on the balance of probabilities.

[79] The Minister must prove the following elements:

- The applicant, Lorin Edgar Rubbert, did not hold a commercial pilot licence; and
- The applicant, Lorin Edgar Rubbert, acted as a pilot-in-command of an aircraft for hire or reward.

[80] The Transport Canada database excerpt (exhibit M-66) indicates that the applicant held a private pilot licence and that he did not hold a commercial pilot licence at the time of the alleged contravention. The Tribunal concludes that the applicant did not hold a commercial pilot licence during the period when the alleged contravention took place.

[81] The Minister has submitted that the applicant acted as pilot-in-command of an aircraft for hire or reward on various multiple occasions between May 31 and August 28, 2006.

[82] After analyzing the documentary evidence, and in particular the pilot acre report (exhibit M-3), as well as the testimony of Mr. Silzer, the Tribunal concludes that the evidence presented proves that the applicant acted as the pilot-in-command with respect to aerial work done for different clients.

[83] The final step is to determine if the applicant, Lorin Edgar Rubbert, acted for hire or reward during the rendering of these services. Subsection 3(1) of the Act defines "commercial air service" as "any use of aircraft for hire or reward" and defines "hire or reward" as "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for use of an aircraft".

[84] To correctly determine if the applicant acted for hire or reward, it is necessary to clearly define the corporate structure of Rubbert Aerial Spraying. The excerpt from the Saskatchewan Corporate Registry (exhibit M-67) indicates that Rubbert Aerial Spraying has a single shareholder, Mr. Rubbert, and that he and Lorna Rubbert are the two directors of the corporation.

[85] The Tribunal refers to the decision Billings Family Enterprises Ltd. v. Canada (Minister of Transport), [2006], TATC file no. P-3114-41 (appeal), which deals with the notion of hire or reward when more than one entity is involved:

[38] It is our decision that the offence of operating an ATS without an AOC was committed by BFEL, the registered owner of the aircraft, the legal entity that had custody and control of the aircraft. Challenger Inspections Ltd. (CIL), an operation that shares some of the same directors as BFEL, demanded and received payment for flights of the aircraft that were in the custody and control of BFEL. Although there was no agreement in evidence between the owner of the aircraft, BFEL, and CIL, there was a corporate relationship between the two entities.

[39] Given BFEL had custody and control of the subject aircraft, it is incumbent upon them to ensure that the aircraft is operated in compliance with the CARs. CIL was charging for the flights carried out by BFEL aircraft. Although there is no direct proof that any of the funds flowed from CIL to BFEL for a direct benefit, to suggest that BFEL operated its aircraft and received no benefit is not believable. It is our decision that BFEL, the registered owner having custody and control of the subject aircraft, received indirect benefit for the operation of its aircraft.

[86] It is vital to note that aircraft C-FHNZ, used by Rubbert Aerial Spraying during these operations, is the property of the applicant (exhibit M-38). The evidence, in the present file, is that Rubbert Aerial Spraying Inc. was compensated by Wendland Ag Services (exhibit M-68) and by Fly-On Ag Services (exhibit M-4) for the aerial spraying work done by the applicant.

[87] Similarly to what the Tribunal stated in the *Billings* decision, to suggest that the applicant piloted his own aircraft for the benefit of Rubbert Aerial Spraying, a corporation of which he is the sole shareholder, without receiving some type of benefit, is simply not believable. The Tribunal concludes that the applicant acted for hire or reward when he acted as pilot-in-command of his aircraft during the aerial spraying operations conducted by Rubbert Aerial Spraying.

[88] The Minister has proven, on the balance of probabilities, that the applicant acted as the pilot-in-command of an aircraft for hire or reward while he did not hold a commercial pilot licence. The Tribunal concludes that in doing so, the applicant contravened paragraph 401.03(1)*(a)* of the CARs.

VI. SANCTION

1. A. Rubbert Aerial Spraying (TATC file no. C-3335-41)

[89] The Tribunal considers that the issuance of an AOC is a fundamental requirement by the Minister to ensure that commercial operations are carried out in a manner that is safe for the pilots, clients and the general public.

[90] The directory of the Saskatchewan Aerial Applicators Association (exhibit M-69) and the directory of the Canadian Aerial Applicators Association (exhibit M-70) indicate that Mr. Rubbert is a member of these associations. In addition, Mr. Yaholnitsky testified that Mr. Rubbert was a member of the Saskatchewan Aerial Applicators Association. This leads the Tribunal to conclude that Mr. Rubbert should have been aware of the necessity of holding an AOC to carry out his operations.

[91] The Tribunal cannot help but note that in the directory of the Canadian Aerial Applicators Association, Mr. Rubbert is listed as a flying farmer and a commercial operator, indicating quite clearly that he is aware that there is a distinction between these two types of operation.

[92] Mr. Rubbert operated his business and conducted aerial work without holding an AOC showing a blatant disregard for the applicable legislation. For this motive, there is no reason to interfere with the Minister's original assessment of $5 000 per count for a total monetary penalty of $220 000.

[93] The same principle applies to count 45, being the contravention of subsection 605.94(1) of the CARs. The accurate entry in an aircraft journey log is a most fundamental requirement that every pilot and aerial operator is aware of.

[94] The failure to maintain an up-to-date log book is a serious offence, which puts the safety of the pilots and the general public at risk. It is another example of complete disregard for the applicable legislation. Thus, there is no reason to interfere with the Minister's original assessment of $7 500.

B. Lorin Edgar Rubbert (TATC file no. C-3336-33)

[95] The Tribunal considers that holding a commercial pilot licence before acting as pilot-in-command of an aircraft for hire or reward is a fundamental requirement that the Minister imposes in order to ensure that the operation of commercial aircraft is carried out in a manner that is safe for pilots, clients and the general public.

[96] Despite the fact that the Minister has proven, on the balance of probabilities, various occasions where the applicant was in contravention of paragraph 401.03(1)*(a)* of the CARs and that a separate penalty for each occurrence could be assessed, the decision was made to proceed with an assessment on only one occurrence. There is no reason to interfere with the Minister's original assessment of $5 000.

VII. DETERMINATION

A. Rubbert Aerial Spraying Inc. (File No. C-3335-41)

[97] The Minister of Transport has proven, on a balance of probabilities, that the applicant has contravened paragraph 700.02(1)(*d*) and subsection 605.94(1) of the CARs. The assessed monetary penalties of $220 000 and 7 500 for a total amount of $227 500 are upheld.

B. Lorin Edgar Rubbert (File No. C-3336-33)

[98] The Minister of Transport has proven, on a balance of probabilities, that the applicant has contravened paragraph 401.03(1)(*a*) of the CARs. The assessed monetary penalty of $5 000 is upheld.

November 6, 2009

Howard M. Bruce

Member

TAB G

TATC File No. W-3351-41
MoT File No. SAP-5504-61527 P/B

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Air Mikisew Ltd., Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:
Canadian Aviation Regulations, SOR/96-433, subsection 605.94(1)

Review Determination
Richard F. Willems

Decision: August 12, 2009

Citation: *Air Mikisew Ltd. v. Canada (Minister of Transport)*, 2009 TATCE 21 (review)

Heard at Edmonton, Alberta, on November 26-28, 2008, and February 24 and 25, 2009

Held: The Minister of Transport did not prove that Air Mikisew Ltd. contravened subsection 605.94(1) of the *Canadian Aviation Regulations*. Therefore, I dismiss the monetary penalty of $5000, as imposed by the Minister.

I. BACKGROUND

[1] On February 21, 2007, the Minister of Transport assessed a monetary penalty against the applicant, Air Mikisew Ltd. It is alleged that, as an operator, the applicant contravened subsection 605.94(1) of the *Canadian Aviation Regulations* (CARs), in accordance with subsection 8.4(2) of the *Aeronautics Act* (Act). Schedule A of the notice of assessment of monetary penalty provides the following:

On or about the 14th day of September, 2006, at or near Fort McMurray, Alberta, in accordance with section 8.4(2) of the *Aeronautics Act*, vicariously being the person responsible for making an entry in a journey log, for aircraft C-GZAM, you did fail to make the entry in accordance with schedule 1 of section 605.94(1) of the *Canadian Aviation Regulations*, more specifically, a

maintenance entry in the journey log book following a reported defect with the right-hand generator system, a contravention of section 605.94(1) of the *Canadian Aviation Regulations.*

MONETARY PENALTY – $5000

TOTAL MONETARY PENALTY – $5000

[2] Following the incident of September 14, 2006, a civil aviation daily occurrence report no. 2006C2417 (CADOR, exhibit M-5) was issued by Nav Canada.

II. LAW

[3] Subsection 8.4(2) of the Act reads as follows:

8.4(2) The operator of an aircraft may be proceeded against in respect of and found to have committed an offence under this Part in relation to the aircraft for which another person is subject to be proceeded against unless, at the time of the offence, the aircraft was in the possession of a person other than the operator without the operator's consent and, where found to have committed the offence, the operator is liable to the penalty provided as punishment therefor.

[4] Subsection 605.94(1) of the CARs provides the following:

605.94(1) The particulars set out in column I of an item in Schedule I to this Division shall be recorded in the journey log at the time set out in column II of the item and by the person responsible for making entries set out in column III of that item.

III. EVIDENCE

A. Minister of Transport

(1) Danny R. Hrynyk

[5] Danny R. Hrynyk is the principal maintenance inspector (PMI), Maintenance and Manufacturing, Transport Canada, who was assigned to oversee Air Mikisew's operations. He was made aware that an incident had taken place at Fort McMurray, Alberta, involving a Beech 99 aircraft, registered as C-GZAM, and operated by Air Mikisew. He called Air Mikisew's quality assurance manager, Shawn Bennett, to find out the details of this incident. Mr. Bennett was not aware of the incident but indicated that he would interview the company personnel involved. He found out that the right generator light had illuminated on an initial take-off roll. The crew, while taxiing, had managed to reset the generator and attempted another departure. The same condition was observed on the next take-off run. The captain decided to take the aircraft back to maintenance personnel, who checked the system for operation, and did voltage and load checks. No fault was found. No further lights came on, and the aircraft was dispatched for service. Mr. Bennett informed Inspector Hrynyk that he had not been aware of this incident because no entry had been made in the journey log book.

[6] Mr. Bennett agreed to send Inspector Hrynyk copies of all the documents generated by this internal company investigation. Once having received the journey log page for September 14, 2006, the internal maintenance quality discrepancy report and the incident report (exhibit M-3), Inspector Hrynyk believed that there may have been a contravention of subsection 604.95(1) of the CARs, since no entries had been made in the journey log book.

[7] Inspector Hrynyk testified as to the procedures required by the CARs and the Air Mikisew manuals, which must be followed by aircrew and maintenance personnel with regards to defects and the actions to correct or defer them once it has been established that the aircraft has a defect. Inspector Hrynyk explained that a defect must be recorded in the journey log book by the person who finds it, and then signed off as repaired by the person authorized under the aircraft maintenance organization (AMO) to do the repairs, or deferred if it qualifies as a minor defect. This must be done before the aircraft is dispatched on the next trip.

(2) Shawn Bennett

[8] Mr. Bennett's version on how the incident was discovered is very similar to Inspector Hrynyk's. He testified that he had many dealings with Inspector Hrynyk and that they always had a good working relationship. He also indicated that he had not felt under any pressure to get the information surrounding the alleged incident, and that he had done so voluntarily. Mr. Bennett also said that it was normal to hear from the PMI prior to receiving incident reports from the company's safety management system (SMS), because of normal delays in the company's operations. Mr. Bennett agreed that this incident happened but seemed to have doubts that a maintenance action took place.

(3) Mitch Paulhus

[9] Mitch Paulhus is a civil aviation safety inspector, Maintenance and Manufacturing, Transport Canada. At the time of the incident, he was with the Aviation Enforcement Branch. On September 29, 2006, he received a detection notice from Inspector Hrynyk (exhibit M-5), and he began the investigation of the incident.

[10] During his testimony, Inspector Paulhus had a different version of the incident, starting from the point the aircraft was back at the hangar. He indicated that the pilot sought the experience of a licensed aircraft maintenance engineer (AME), Donald Schnurr. They ground ran the aircraft to try and duplicate the problem. When they could not duplicate the problem, the captain, Leonardus Dirven, proceeded to carry on with his flight, and subsequently took off after that.

[11] Inspector Paulhus'opinion is that there was a defect on the aircraft. That defect was the loss of the right generator. The *Pilot Operating Manual* (POM; revised November 2007, exhibit M-20 at 1-13) states that two generators are required for all phases of flight on the Beech 99A aircraft. Because the generator failure is an airworthiness limitation, it requires an inspection by an AME and the proper sign-off (Binder on references and definitions, exhibit M-9, tabs 15 and 24). Under cross-examination, Inspector Paulhus mentioned that he did not look into the training procedures for any of the Air Mikisew personnel involved in the incident.

(4) Roger Leblanc

[12] Roger Leblanc is now the principal operations inspector (POI) responsible for Transport Canada's oversight of Air Mikisew's flight operations and has been in this position since January 2007. He was briefed on Air Mikisew by the outgoing POI but seems not to have been given much information on the incident of September 14, 2006. When asked, under cross-examination, if he had done some review of the matters that occurred at Air Mikisew on September 14, 2006, he replied that he did not and that he learned about it through some of his counterparts prior to becoming the POI.

[13] On March 6, 2007, Graham Davis sent an email to Inspector Leblanc, asking him to review Air Mikisew's template for SMS, and asking that Air Mikisew be allowed to operate under the spirit of SMS (exhibit A-4).

[14] During his testimony, Inspector Leblanc explained that 705 operators are now working under a fully implemented SMS, and that 703 and 704 operators are submitting a safety information plan and, once accepted by Transport Canada, will be allowed to operate under the spirit of SMS. Once approved, these operators would not go through the traditional enforcement process, having the same liberty as the 705 operators. Inspector Leblanc approved Air Mikisew's application in February 2008.

(5) Leonardus Dirven

[15] Captain Dirven was the pilot-in-command (PIC) of the Beech 99 aircraft at Fort McMurray on September 14, 2006. He explained that on the start and taxi to the runway, the aircraft was running normally. However, on power application from low idle, the right generator light illuminated. The power levers were returned to idle and the aircraft taxied off the runway to assess the problem. The flight crew discussed the issue, reset the generator, which at that point stayed on line, and the decision was made to attempt another take-off. The same light illuminated on power application, the take-off was terminated, and the decision was made to go back to the hanger. In his words, Captain Dirven explained

. . . [W]e just wanted to confirm the system with the engineer. Since we were at our base, let's go talk to the engineer, see if we can get some clarification on the system. Talked to Don Schnurr. He said, well, put it to high idle and if the generator holds, it's good and the system is working properly by the maintenance manual. We did that. Flew the trip, and we didn't have any problems. (Transcript, vol. 1 at 312)

[16] Captain Dirven flew the Beech 99 aircraft for numerous flights until September 18, 2006. This same generator light continued to illuminate on several occasions. However, by using high idle, as suggested by Mr. Schnurr, the system worked as intended. On September 18, 2006, Captain Dirven, at the request of Transport Canada, prepared an incident report about the incident of September 14, 2006.

[17] Captain Dirven stated that he was asked to make the entry "Generator will not parallel" on September 19, 2006, in the defect section of log serial no. 40885 of the journey log book for

C-GZAM aircraft (exhibit M-22). When asked why the defect was reported on September 19, 2006 in the journey log book, when it related to the generator problem he had experienced on September 14, 2006, Captain Dirven explained that he acted from what he knew of the aircraft and what he had been told by the engineer, which was confirmed later when he read the maintenance manual. The system was still working within limits, and it was decided to adjust it before it gets out of limits. Captain Dirven mentioned that this type of adjustment is a common practice in the aviation sector.

(6) Donald Schnurr

[18] Mr. Schnurr is an AME with Air Mikisew. He testified that he was approached in the hangar by Captain Dirven on September 14, 2006, concerning a generator light flashing on the Beech 99 aircraft. After a brief discussion about the problem, they walked out to the aircraft. Captain Dirven got in the aircraft while Mr. Schnurr stood outside. Captain Dirven started the aircraft and did a run-up; with a thumb up, Mr. Schnurr signalled that the aircraft was now working properly. The aircraft taxied away, and Mr. Schnurr went back to what he had been doing. In his mind, the aircraft did not have a problem, and he did not have to sign it off because he had not done anything to it. In addition to that, the pilot had indicated that the system was working.

B. Applicant

(1) Graham Davis

[19] Mr. Davis is the current general manager of Air Mikisew. He was hired by the company to sort out issues subsequent to a Transport Canada audit in September 2004. He explained how, after the 2004 audit, with the help of Storm Aviation and a consultant, Michael C. Weir, the company manuals and training policies and procedures were changed and brought up-to-date.

[20] Mr. Davis indicated that in a letter dated September 12, 2005, he was informed by Transport Canada that all corrective actions and follow-ups had been completed, and that the September 2004 audit was considered closed (exhibit A-19).

[21] Mr. Davis stated that pilots and AMEs now receive initial and recurrent training, as per the Transport Canada approved company manuals. This training is monitored on a 30-day rotation by the operations administration person who reports to him. Mr. Schnurr was given his initial indoctrination training, and as proof of his subsequent training, he received on June 19, 2006, an aircraft certification authority certificate (exhibit A-3). As far as Captain Dirven's training, Mr. Davis indicated that both initial and recurrent training were done. Neither Transport Canada nor Air Mikisew had a training file on Captain Dirven.

[22] Mr. Davis was questioned at length about the delegation of authority. He stated that he is a very hands-on manager. He insisted that the chain of command does exist, and that once employees have been hired and properly trained, they are expected to perform their assigned duties. In this case, the captain was not sure if the aircraft had a defect. He elected to consult with maintenance personnel about the operation of a system due to his relative inexperience on this

type of aircraft. That having been done, he decided that there was no defect and continued the flight.

[23] Mr. Davis testified that although he or other pilots may have reacted to the situation in another manner, he accepts Captain Dirven's decision. He also accepts the fact that the pilot did not necessarily report a problem to the AME. The AME was asked about how the system should function, and he provided some advice. The pilot ran the aircraft using that advice and the aircraft operated normally, which he communicated to the AME, and taxied away. In the minds of the pilot and the AME, the aircraft did not have a defect. Mr. Davis indicated that he concurs with the AME's decision. However, he insisted that, if the aircraft had a defect, he would have expected the company policy to be followed, as per recording defects and maintenance performed.

(2) Michael C. Weir

[24] Mr. Weir was qualified as an expert witness based on his extensive background with Transport Canada and subsequent work as a consultant with aviation companies and their audits. In addition to these qualifications, he has spent many years operationally flying in civil and military aviation.

[25] Mr. Weir testified that at Storm Aviation, he was involved in the recovery plan to return Air Mikisew to a company operating within the parameters required by Transport Canada and the CARs. By all accounts, Air Mikisew followed these recommendations and, as a result, its air operator certificate was reinstated. In agreement with Transport Canada, a follow-up audit was done in January of 2005 (exhibit A-20).

[26] Mr. Weir stated that, at the time of the completion of the audit, Air Mikisew was in full compliance with all the regulations and documents approved by Transport Canada, and in some cases exceeded them. He indicated that this audit was only related to flight operations and had nothing to do with the AMO. He mentioned that section 4 of the *Maintenance Control Manual* (MCM, dated April 4, 2004, exhibit M-4) provides details on the procedures to be used with regards to aircraft defects.

IV. DISCUSSION

[27] The aircraft certification authority training for Mr. Schnurr shows that his training required by Transport Canada has been provided by the company and was up-to-date at the time of the incident. This training was done by Mr. Bennett while he was employed by Air Mikisew.

[28] It seems that Air Mikisew has been diligent in training its personnel. Mr. Bennett explained that all Air Mikisew's employees received initial and recurrent training on company procedures, which included the policy on aircraft defects. Inspector Hrynyk testified that he did not have any issues with the company manuals that deal with training, or the training policies. Inspector Paulhus mentioned that he had no issues with the company manuals, and also indicated that he did not look into company training during his investigation. This tells me that he was not worried about it. As for Captain Dirven, he testified that his training as far as it applies to this incident

was done. I have not seen the record of this training. Neither Air Mikisew nor Transport Canada brought this forward as an exhibit. However, Transport Canada did not argue that Captain Dirven was not trained.

[29] Mr. Davis explained that much time and effort have taken place to ensure that Air Mikisew's personnel was trained to and above Transport Canada standards. Mr. Weir indicated that when he had completed his work with Air Mikisew, everything was up to Transport Canada standards. In the letter of September 12, 2005, he was informed by Transport Canada that the audit of 2004 was considered closed. This letter confirms the effort that Air Mikisew put into the changes it wanted to put into place under the guidance of Storm Aviation and the direction of the new management team headed by Mr. Davis. A big part of this new management strategy is not amending the old company operations manual but building a new one from the ground up, and from what I can see, trying to follow it.

[30] Under cross-examination, Mr. Davis mentioned that he is a hands-on manager, and that he takes responsibility for the actions of his employees. He also indicated that he cannot be there 24 hours a day, and that section 2 of the company operations manual spells out the duties of the various company's personnel. I have seen nothing to indicate that these company policies were not followed. As a manager, one cannot be watching over employees 24 hours a day. Once they have been trained, and management is satisfied that they understand their function at the company, they must be trusted to do their job. It would be impossible to operate an air service without that trust in employees, due to the fact that they could, on any given day, be spread out, in this company's case, over western Canada.

[31] Could Mr. Davis have done more on September 14, 2006 to prevent this incident? From what I have seen, Air Mikisew had in place all the policy training needed for operations that day. On September 18, 2006, Steve Webster, Air Mikisew's chief pilot issued *Directive 06-13* to all aircrew reminding them of their responsibilities for reporting aircraft deficiencies (exhibit A-24). Mr. Davis indicated, and Mr. Bennett agreed, that while *Directive 06-13* reminded aircrew of their duties as far as reporting defects, the maintenance personnel had also been reminded, at that time, of the regulations and company procedures as they apply to aircraft defects and subsequent maintenance release. This again shows me that the company had its own unofficial safety program at the time of the incident.

[32] Section 711 of the company's personnel and policy manual describes the company's policy for progressive discipline (exhibit A-25). Again, it shows that the company is trying to create an environment where issues are corrected and do not reoccur.

[33] The next issue that we need to address is if there was a defect and was it reported. It has been established that if there was a defect, it should have been reported in the journey log book and addressed by the maintenance personnel. Both parties agree to that point, including Mr. Schnurr and Captain Dirven.

[34] According to Captain Dirven, he spoke to the company's AME, Mr. Schnurr, to confirm how the system should operate, after his second low energy rejected take-off (RTO), due to the right generator light indicating that it was not powering the bus at low revolutions per minute

(RPM). He testified that Mr. Schnurr advised him to run the engine at high idle and if it held, the system was okay. Captain Dirven boarded the aircraft while Mr. Schnurr waited outside. After taking the advice, Captain Dirven gave Mr. Schnurr a thumb up signal, which they had agreed, would indicate to Mr. Schnurr that the generator light was remaining off, using high idle. Mr. Schnurr returned to the hanger. In his mind, the pilot has found that, when running the engine at high idle, the generator stays on line and the system is running normally.

[35] When checking the POM for the Beech 99 aircraft, I did not find a limitation which prohibits the use of high idle, or for that matter, any N_1 speed from low to high idle. On page 10-16A of the POM, one finds the following statement.

. . . Generator paralleling is effective only for electrical loads above 0.14 per generator and engine speeds greater than 53% N_1. Should one generator fall off the line while taxiing, the off line generator will be restored when the electrical load is increased above 0.14 and the engine speed is raised to 60% N_1. The generator control switch should not be cycled to restore parallel operation of both generators. Lack of paralleling below 0.14 electrical load is not serious since the maximum load placed on the remaining generator, should the opposite generator switch off, is insufficient to cause generator over-load . . .

[36] Captain Dirven testified that he believed the N_1 was below 60% when he started his rolling take-off. Although the word "taxiing" is used in the POM, one must look at the N_1 percentage to understand what is meant. As we can see, the POM describes the generator light on under those lower N_1 conditions as being normal; in fact, it advises not to even cycle the switch to parallel the generators. Mr. Schnurr understood the system, Captain Dirven took his advice, and the light remained out while in high idle.

[37] Captain Dirven, by starting and running the aircraft in high idle, was performing normal pilot functions and proved that the light would stay off. At this point, he believed there was no defect, indicated this to Mr. Schnurr, and completed his flight.

[38] Finally, we need to look at the letter sent to Inspector Paulhus by Mr. Schnurr on November 22, 2006 (exhibit M-12). During his testimony, Mr. Schnurr explained his letter as follows:

Well, as stipulated here, it's accurate. All I did is write something here to Transport Canada to tell them that there was no defects, there was no entry in the logbook, the pilot hadn't made the entries into the logbook, the pilot gave me the thumb to tell me the aircraft was fine, I didn't have to maintain it, so basically I just wrote this up." (Transcript, vol. 1 at 416 and 417)

[39] I accept this statement to show Mr. Schnurr's explanation of the incident and his actions that took place on September 14, 2006. Based on the testimonies of Captain Dirven and Mr. Schnurr, I find that the aircraft did not have a defect and that maintenance was not required.

V. DETERMINATION

[40] The Minister of Transport did not prove that Air Mikisew Ltd. contravened subsection 605.94(1) of the CARs. Therefore, I dismiss the monetary penalty of $5000, as imposed by the Minister.

August 12, 2009

Richard F. Willems

Member

TAB H

2007 CarswellOnt 7595, 2007 ONCA 810, 37 C.B.R. (5th) 185, 289 D.L.R. (4th) 684, 13 P.P.S.A.C. (3d) 57

2007 CarswellOnt 7595, 2007 ONCA 810, 37 C.B.R. (5th) 185, 289 D.L.R. (4th) 684, 13 P.P.S.A.C. (3d) 57

1231640 Ontario Inc., Re

IN THE MATTER OF THE BANKRUPTCY OF 1231640 ONTARIO INC. (formerly known as The State Group Limited) OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

THE ROYAL BANK OF CANADA, in its capacity as administrative agent for certain lenders (Appellant) and PRICEWATERHOUSECOOPERS LLP, TRUSTEE OF THE ESTATE OF 1231640 ONTARIO INC., A BANKRUPT and ST. PAUL GUARANTEE INSURANCE COMPANY (Respondents)

Ontario Court of Appeal

K.M. Weiler, K. Feldman, H.S. LaForme JJ.A.

Heard: May 10, 2007
Judgment: November 26, 2007
Docket: CA C45883

Proceedings: affirming *1231640 Ontario Inc., Re* (2006), 23 C.B.R. (5th) 92, 2006 CarswellOnt 4406 (Ont. S.C.J.)

Counsel: Peter H. Griffin, Matthew Sammon for Appellant, Royal Bank of Canada in its capacity as Administrative Agent for Certain Lenders

John D. Marshall for Respondent, St. Paul Guarantee Insurance Company

Alex MacFarlane for Respondent, PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited)

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Loss of secured status — Effect of P.P.S.A.

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from comply-

ing with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

Personal property security --- Perfection of security interest — Registration — Maintaining perfection — Changes and amendments — Change of debtor name

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

Personal property security --- Perfection of security interest — Registration — Errors in completing financing statements — Wrong or incomplete name of debtor — Miscellaneous

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become un-

perfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

The bank held a first registered general security interest over the personal property of the debtor and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the Bankruptcy and Insolvency Act ("BIA"). A court order appointing P Inc. as interim receiver was issued. Following its appointment, the interim receiver sold the substantial assets of the debtor in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale, the receiver sold the debtor's name triggering s. 48(3) of the Personal Property Security Act ("PPSA"). Both the bank and a subsequent secured creditor had knowledge of the sale of the debtor's name and failed to register a financing change statement. P Inc. subsequently assigned the debtor into bankruptcy and P Inc. was appointed trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received a substantial income tax refund. The bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim with P Inc. as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee. The motion judge held that the appointment order did not have the effect of precluding the bank from maintaining the perfected status of its security interest following the appointment of the interim receiver. The motion judge concluded that the bank's security interest became unperfected. The motion judge found that a s. 47 BIA receiver was not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and s. 20(20(b) of the PPSA. The motion judge held that P Inc. only became a person who represents the creditors of of the debtor upon its appointment as trustee in bankruptcy. Because at that time the bank's security interest was unperfected, it was and remained ineffective against the trustee from that date. The bank appealed.

Held: The appeal was dismissed.

Per Feldman J.A. (LaForme J.A. concurring): The bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b). The motion judge was correct that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) and the term "receiver" should not be read into the legislation. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not a priority contest with any creditor on behalf of unsecured creditors. The effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time. Neither these subsections nor the order appointing the interim receiver had the effect of exempting the bank from the requirement of complying with s 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the bank's security interest was not effective against the trustee in bankruptcy. Because the bank's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was perfected on the date of the appointment of the trustee and its security interest was therefore ineffective against the trustee. The bank lost its priority over the other creditor that also lost its secured standing and they were both unperfected on the date of the appointment of the trustee and both their security interests were therefore ineffective against the trustee.

Per Weiler J.A. (dissenting): The motion judge was correct in holding that the appointment order did not give the bank an implied exemption from complying with the requirement to file financing change statement upon learning that the receiver sold the debtor's name. The bank could have applied to the court to obtain the receiver's consent to

lift the stay or to file the requisite PPSA registration. The motion judge erred in concluding that the interim receiver was not a person who represents the creditors of the debtor within the meaning of s. 20(1)(b). In light of the wording of and history of the section, the opinion of scholars, the existing jurisprudence, and having regard to the section as a whole, to related provisions, and to the purpose of the section, P Inc.'s appointment as a s. 47 BIA receiver made it a person who represents the creditors of the debtor. The motion judge was incorrect in concluding that the s. 47 BIA receiver was effectively a representative of the bank alone. The receiver owed a fiduciary duty to all the creditors and had vast powers over the property of the debtor. The motion judge's conclusion that the rights referred to in s. 20(2) were proprietary rights akin to those exercised by the trustee in bankruptcy ignored the fact that the PPSA was not about title to property or rights against the debtor, but was about notice to and priorities between creditors. Pursuant to s. 20(2), the time for determination of priorities was the date of the receiver's appointment, and on that date, the bank had properly perfected its first security interest. The s. 47 BIA receivership did not end when the trustee in bankruptcy was appointed. Although the bank was not exempt from its obligation to file a financing change statement or a fresh financing statement upon learning of the debtor's name change, its failure to do so did not result in loss of its priority. The date for determining the effectiveness in the bank's security interests was when the court appointed the interim receiver and this date for determining priorities did not change with the appointment of the receiver as a trustee in bankruptcy.

Cases considered by *K.M. Weiler J.A.* (Dissenting in Part):

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd. (1987), 1987 CarswellOnt 155, 63 C.B.R. (N.S.) 1 (Ont. C.A.) — considered

Canadian Pacific Air Lines Ltd. v. C.A.L.P.A. (1993), 93 C.L.L.C. 14,062, 17 Admin. L.R. (2d) 141, 160 N.R. 321, [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1, 1993 CarswellNat 816, 1993 CarswellNat 1385 (S.C.C.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 75, 2005 CarswellSask 442, 2005 SKQB 294 (Sask. Q.B.) — referred to

Donaghy v. CSN Vehicle Leasing (1992), 4 Alta. L.R. (3d) 40, 4 P.P.S.A.C. (2d) 37, [1992] 6 W.W.R. 70, 14 C.B.R. (3d) 256, (sub nom. *Donaghy (Bankrupt), Re)* 132 A.R. 155, 1992 CarswellAlta 292 (Alta. Q.B.) — referred to

Giffen, Re (1998), 45 B.C.L.R. (3d) 1, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re)* 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re)* 164 W.A.C. 161, 155 D.L.R. (4th) 332, 222 N.R. 29, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Ivaco Inc., Re (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856 (S.C.C.) — referred to

Lefebvre, Re (2001), 2001 CarswellQue 2642, (sub nom. *Lefebvre (Syndic de))* [2001] R.J.Q. 2679 (Que. S.C.) — referred to

Lefebvre, Re (2003), 2003 CarswellQue 446, [2003] R.J.Q. 819, (sub nom. *Lefebvre (Syndic de), Re)* 229 D.L.R. (4th) 697 (Que. C.A.) — referred to

Lefebvre, Re (2004), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 253 (Eng.), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 353 (Fr.), 2004 SCC 63, 2004 CarswellQue 2831, 2004 CarswellQue 2832, (sub nom. *Lefebvre (Trustee of), Re)* 244 D.L.R. (4th) 513, (sub nom. *Lefebvre (Trustee of), Re)* [2004] 3 S.C.R. 326, 7 C.B.R. (5th) 243, 1 B.L.R. (4th) 19 (S.C.C.) — considered

Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée (2004), 2004 CarswellOnt 4973, 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.) — referred to

National Bank of Greece (Canada) c. Katsikonouris (1990), 1990 CarswellQue 118, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* 74 D.L.R. (4th) 197, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* [1990] 2 S.C.R. 1029, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* 50 C.C.L.I. 1, (sub nom. *Panzera v. Simcoe & Erie Cie d'assurance)* [1990] I.L.R. 1-2663, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 115 N.R. 42, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 32 Q.A.C. 25, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* [1990] R.D.I. 715, 1990 CarswellQue 84 (S.C.C.) — considered

PSINet Ltd., Re (2002), 2002 CarswellOnt 211, 30 C.B.R. (4th) 226, 3 P.P.S.A.C. (3d) 208 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135, 85 O.R. (3d) 175 (Ont. C.A.) — referred to

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1991), 1991 CarswellMan 24, 8 C.B.R. (3d) 19, [1991] 6 W.W.R. 764, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (No. 2))* 2 P.P.S.A.C. (2d) 257, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing (Receivership) (No. 2))* 77 Man. R. (2d) 257 (Man. Q.B.) — considered

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1992), [1992] 6 W.W.R. 97, 4 P.P.S.A.C. (2d) 31, 14 C.B.R. (3d) 1, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 81 Man. R. (2d) 247, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 30 W.A.C. 247, 1992 CarswellMan 23, 94 D.L.R. (4th) 611 (Man. C.A.) — referred to

Sperry Inc. v. Canadian Imperial Bank of Commerce (1982), 1982 CarswellOnt 219, 40 O.R. (2d) 54, 2 P.P.S.A.C. 225, 141 D.L.R. (3d) 119, 44 C.B.R. (N.S.) 69 (Ont. H.C.) — referred to

Sperry Inc. v. Canadian Imperial Bank of Commerce (1985), 50 O.R. (2d) 267, 17 D.L.R. (4th) 236, 8 O.A.C. 79, 55 C.B.R. (N.S.) 68, 4 P.P.S.A.C. 314, 1985 CarswellOnt 167 (Ont. C.A.) — considered

Sun Life Assurance Co. of Canada v. Royal Bank (1995), 129 D.L.R. (4th) 305, 1995 CarswellOnt 1168, 37 C.B.R. (3d) 89, 10 P.P.S.A.C. (2d) 246 (Ont. Gen. Div. [Commercial List]) — considered

Thomson v. Canada (Department of Agriculture) (1992), (sub nom. *Thomson v. Canada (Minister of Agriculture)*) 133 N.R. 345, 3 Admin. L.R. (2d) 242, (sub nom. *Thomson v. Canada (Deputy Minister of Agriculture)*) [1992] 1 S.C.R. 385, (sub nom. *Thomson v. Canada (Deputy Minister of Agriculture)*) 89 D.L.R. (4th) 218, 1992 CarswellNat 544, 51 F.T.R. 267 (note), 1992 CarswellNat 651 (S.C.C.) — considered

Toronto Dominion Bank v. Fortin (1978), [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111, 1978 CarswellBC 273 (B.C. S.C.) — referred to

TRG Services Inc., Re (2006), 2006 CarswellOnt 7024, 26 C.B.R. (5th) 203, 11 P.P.S.A.C. (3d) 139 (Ont. S.C.J.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Cases considered by *K. Feldman J.A.*:

Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of) (2006), 25 C.B.R. (5th) 273, 10 P.P.S.A.C. (3d) 191, 2006 CarswellAlta 1036, 2006 ABQB 572 (Alta. Q.B.) — considered

Giffen, Re (1998), 45 B.C.L.R. (3d) 1, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re)* 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re)* 164 W.A.C. 161, 155 D.L.R. (4th) 332, 222 N.R. 29, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — considered

Koval, Re (2003), 48 C.B.R. (4th) 103, 2003 CarswellOnt 5112 (Ont. S.C.J.) — referred to

Lefebvre, Re (2004), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 253 (Eng.), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 353 (Fr.), 2004 SCC 63, 2004 CarswellQue 2831, 2004 CarswellQue 2832, (sub nom. *Lefebvre (Trustee of), Re)* 244 D.L.R. (4th) 513, (sub nom. *Lefebvre (Trustee of), Re)* [2004] 3 S.C.R. 326, 7 C.B.R. (5th) 243, 1 B.L.R. (4th) 19 (S.C.C.) — referred to

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — considered

Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of) (1989), 9 P.P.S.A.C. 7, 57 D.L.R. (4th) 438, [1989] 3 W.W.R. 481, 73 C.B.R. (N.S.) 28, (sub nom. *Paccar Financial Services Ltd. v. Touche Ross Ltd.)* 74 Sask. R. 181, 1989 CarswellSask 32 (Sask. C.A.) — referred to

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1991), 1991 CarswellMan 24, 8 C.B.R. (3d) 19, [1991] 6 W.W.R. 764, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (No. 2))* 2 P.P.S.A.C. (2d) 257, (sub nom. *RoyNat Inc. v. Ja-Sha Trucking & Leasing (Receivership) (No. 2))* 77 Man. R. (2d) 257 (Man. Q.B.) — considered

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1992), [1992] 6 W.W.R. 97, 4 P.P.S.A.C. (2d) 31, 14 C.B.R. (3d) 1, (sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2))* 81 Man. R. (2d) 247,

(sub nom. *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receivership) (No. 2)*) 30 W.A.C. 247, 1992 CarswellMan 23, 94 D.L.R. (4th) 611 (Man. C.A.) — referred to

Toronto Dominion Bank v. Usarco Ltd. (2001), 196 D.L.R. (4th) 448, 24 C.B.R. (4th) 303, 2001 CarswellOnt 525, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70 (Ont. C.A.) — referred to

TRG Services Inc., Re (2006), 2006 CarswellOnt 7024, 26 C.B.R. (5th) 203, 11 P.P.S.A.C. (3d) 139 (Ont. S.C.J.) — considered

Statutes considered by *K.M. Weiler J.A.* (Dissenting in Part):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 46 — referred to

s. 47 — considered

s. 47(2)(c) — considered

s. 47.1 [en. 1992, c. 27, s. 16(1)] — referred to

s. 69(1) — referred to

s. 69.3 [en. 1992, c. 27, s. 36(1)] — referred to

s. 70(1) — considered

s. 71 — considered

s. 244 — considered

s. 244(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — referred to

s. 12(2) — referred to

s. 20(b)(i) — referred to

Personal Property Security Act, R.S.M. 1987, c. P35

s. 20(b) — referred to

Personal Property Security Act, R.S.O. 1980, c. 375

s. 22(1)(a)(iii) — considered

s. 22(2) — considered

s. 22(3) — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

Pt. V — referred to

s. 1(1) "collateral" — referred to

s. 1(1) "debtor" (a)(ii) — considered

s. 1(2) — referred to

s. 11 — referred to

s. 20 — considered

s. 20(1)(b) — considered

s. 20(1)(c) — considered

s. 20(1)(d) — considered

s. 20(2) — considered

s. 20(2)(b) — considered

s. 20(3) — referred to

s. 30 — referred to

s. 30(1) — considered

s. 30(6) — considered

s. 48(3) — considered

s. 52(2) — referred to

s. 60(1)(a) — considered

Securities Transfer Act, 2006, S.O. 2006, c. 8

Generally — referred to

s. 123(9) — referred to

Statutes considered by *K. Feldman J.A.* and *H.S. LaForme J.A.*:

Assignments and Preferences Act, R.S.O. 1990, c. A.33

s. 7 — considered

s. 8 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 47(1) — considered

s. 47(3) — referred to

s. 47.1(3) [en. 1992, c. 27, s. 16(1)] — referred to

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 71 — considered

s. 71(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

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

Generally — referred to

s. 20(a) — referred to

s. 20(a)(i) — considered

s. 20(a)(ii) — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359

s. 20 — referred to

s. 20(b) — referred to

Personal Property Security Act, R.S.M. 1987, c. P35

s. 20(b) — referred to

s. 22 — considered

s. 22(1)(a)(iii) — considered

s. 22(2) — considered

s. 65 — considered

Personal Property Security Act, S.N.B. 1993, c. P-7.1

s. 20(2) — referred to

Personal Property Security Act, S.N.1998, c. P-7.1

s. 21(1) — referred to

Personal Property Security Act, S.N.S. 1995-96, c. 13

s. 21(2) — referred to

Personal Property Security Act, R.S.O. 1980, c. 375

s. 22(1)(a)(iii) — considered

s. 22(2) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

s. 20 — considered

s. 20(1) — considered

s. 20(1)(a) — considered

s. 20(1)(a)(i) — considered

s. 20(1)(b) — considered

s. 20(1)(c) — considered

s. 20(1)(d) — considered

s. 20(2) — considered

s. 20(2)(b) — considered

s. 26(2) — considered

s. 30(6) — considered

s. 48(3) — considered

s. 60 — considered

Personal Property Security Act, R.S.P.E.I. 1988, c. P-3.1

s. 20(2) — referred to

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2

s. 20(2)(b) — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from decision reported at *1231640 Ontario Inc., Re* (2006), 23 C.B.R. (5th) 92, 2006 CarswellOnt 4406 (Ont. S.C.J.), dismissing creditor's claim to priority under *Personal Property Security Act*.

***K.M. Weiler J.A.* (Dissenting in Part):**

Introduction

1 This appeal concerns a priority dispute between two creditors of an insolvent company, The State Group Limited (now 1231640 Ontario Inc. but referred to here as "State"), over funds totalling approximately $5.5 million. The majority of the disputed amount resulted from an income tax refund to State of approximately $4.5 million.

2 The priority dispute requires a consideration of the role of a receiver appointed by the court pursuant to s. 47 of the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). It also requires the court to interpret the phrase "a person who represents the creditors of the debtor" in s. 20(1)(b) and the phrase "rights of a person....in respect of the collateral" in s. 20(2)(b) of the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

3 On one side of the priority dispute is the appellant, the Royal Bank of Canada ("the Bank"), which acted as the administrative agent for a syndicate of lenders to State. The loan was secured by a general security agreement. All parties agree that the terms of the general security agreement between the Bank and State cover all the assets of State, including the tax refund. On the other side of the dispute is the respondent, St. Paul Guaranty Insurance Company ("St. Paul"). St. Paul also holds a general security agreement over all of the assets of State, which would include the tax refund. In the middle is PricewaterhouseCoopers Inc. ("PWC"), who acted as both the s. 47 *BIA* receiver and as the trustee in bankruptcy.

4 At this juncture, it may be helpful to provide a brief overview of the priority regime established by the *PPSA*. The *PPSA* creates a regime that enables creditors to record written agreements giving them a security interest in a debtor's property, known as "collateral".[FN1] A security interest is not enforceable against a third party unless the requirements of the *PPSA* are met.[FN2] Because multiple secured creditors can acquire security interests in the same collateral, the concept of "perfection" is used to order the priorities among them. The basic rule is that perfected security interests have priority over those that are unperfected. One method of perfection is for the creditor to take actual possession of the collateral.[FN3] The most common method of perfection, however, is by registration of a financing statement in the Ontario Personal Property Security Registry ("PPSR"). Generally, the first person to register has a first priority secured interest that is effective against third parties, including other secured parties.[FN4] Perfection may last as long as the period chosen for registration lasts, generally some time longer than the length of the security agreement, or until there is a change affecting the collateral.

5 In this case, the Bank had a first priority secured interest. St. Paul's security interest was registered after the Bank's and thus was subordinate to that of the Bank.

6 On November 14, 2001, the Bank obtained a court order appointing PWC as an interim receiver pursuant to s. 47 of the *BIA* ("Appointment Order").[FN5]

7 A s. 47 *BIA* receiver is appointed by the court when a debtor is insolvent and a creditor gives notice that it intends to enforce its security pursuant to s. 244 of the *BIA*. The applicant creditor must satisfy the court that the appointment of the receiver is necessary to protect the debtor's estate or the interest of the creditor who sent the s. 244 notice. Thus, the receiving order is not made in the context of an application for a bankruptcy order or in a situation where the debtor seeks to avoid bankruptcy by making a proposal to its creditors. The appointment is for "such term as the court may determine" and allows the receiver to take possession of the debtor's property that is subject to the security interest, to exercise control over it, and to take such action as the appointment order provides. The appointment order usually provides, as this order does, that third parties are prevented from taking or continuing any legal proceedings against the debtor without leave of the court.

8 Pursuant to the Appointment Order allowing it to do so, PWC sold State's name on November 14, 2001. The next day, the name of the debtor company was changed to 1231640 Ontario Inc. Section 48(3) of the *PPSA* provides that if the secured creditor learns that the debtor has changed its name, the secured creditor's interest in the collateral becomes unperfected unless the secured creditor takes possession of the collateral[FN6] or files a financing change statement giving the new name of the debtor within thirty days.[FN7] If the secured creditor fails to file a financing change statement within thirty days, it can reperfect its interest by filing a fresh financing statement. [FN8]

9 The Bank conceded that it would have been aware of State's name change at least by the time PWC made a second sale of State's assets on December 6, 2001. The Bank did not file, or seek leave of the court to file, a financing change statement within thirty days of becoming aware of the name change, nor did it file a fresh financing statement after that date. St. Paul also filed nothing. The proceeds of the December 6, 2001 sale and a further sale on December 24, 2001 are not in dispute on this appeal.

10 The Appointment Order permitted PWC to assign State into bankruptcy, which it did on January 31, 2002. By this date, the previously perfected security interests of both creditors had become unperfected.

11 Following the assignment into bankruptcy, PWC received the income tax refund owing to State in the amount of approximately $4.5 million. The Bank claimed that it was entitled to the proceeds because when PWC was appointed a receiver on November 14, 2001, it had a properly perfected first security interest. St. Paul contended that the relevant date for determining priorities was the date that PWC was appointed trustee in bankruptcy, *i.e.*, January 31, 2002, and that as of this date, the Bank had lost its priority because it had failed to file a financing change statement as required by s. 48(3) and had also failed to file a fresh financing statement thereafter. PWC sought the direction of the court on the priority issue.

12 Before the motion judge, the Bank argued that it was implicitly exempted from having to file a financing change statement as required by s. 48(3) of the *PPSA* in light of the terms of the Appointment Order. In the alternative, the Bank argued that because its security interest was perfected at the time of PWC's appointment as receiver, it did not lose its priority because a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. Since s. 20(2)(b) provides that "[t]he rights of a person... under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect", the relevant date for determining the priority dispute is the date of the receiver's appointment. At that date, the Bank's security interest was perfected and the Bank's failure to make a further filing when PWC sold State's name did not result in a loss of its priority.[FN9]

13 The motion judge rejected both of the Bank's arguments. He concluded that the November 14, 2001 court order appointing PWC as interim receiver did not have the effect of exempting the Bank from having to comply with s. 48(3) of the *PPSA* by filing a financing change statement within thirty days of learning that PWC had sold State's name.

14 With respect to the Bank's alternative argument, the motion judge held that PWC, as a receiver under s. 47 of the *BIA*, was not "a person who represents the creditors of the debtor" under s. 20(1)(b) of the *PPSA*, but rather was appointed for the protection of the Bank's interests. He observed that the assets of the debtor did not vest in PWC, nor did the liabilities of the debtor become PWC's liabilities, as is the case with a trustee in bankruptcy. He further held that PWC did not have the authority to settle or compromise liabilities owed to the creditors of the debtor. The motion judge reasoned that the application of the *ejusdem generis* principle of statutory interpretation applied to the interpretation of s. 20(1)(b). He held that "a person who represents the creditors of the debtor" must be of like kind or class as a trustee in bankruptcy or an assignee for the benefit of creditors. Given the distinctions he had observed between a receiver and the representatives specified in s. 20(1)(b), he held that a s. 47 *BIA* receiver is not "a person who represents the creditors of the debtor."

15 Accordingly, the motion judge concluded that pursuant to s. 20(2)(b), the effective date of the appointment of a person with representative status, and the date that the representative's rights in respect of the collateral are to be determined, is the date PWC was appointed as trustee in bankruptcy, namely January 31, 2002. At that time, both St. Paul and the Bank were unperfected secured creditors. Pursuant to the priorities under the *BIA*, as unperfected secured creditors, the Bank and St. Paul were entitled to share rateably in the income tax refund. Since the Bank's claim was for $29 million and St. Paul's was for some $88 million, the result of the motion judge's decision is that St. Paul would be entitled to the bulk of the refund.

The Issues

16 This appeal requires me to consider two issues:

1. Did the Appointment Order implicitly give the Bank an exemption from complying with s. 48(3) of the *PPSA*?

2. Did the Bank's failure to file a financing change statement or fresh financing statement result in a loss of its priority as a secured creditor?

17 On the first issue, like the motion judge, I conclude that the obligation to make filings under the *PPSA* continued and that the Appointment Order did not exempt the Bank from complying with s. 48(3) of the *PPSA*. My colleagues agree.

18 My colleagues and I disagree on the answer to the second question, whether the Bank lost its priority as a secured creditor. The answer depends on the date chosen for the determination of priorities. If, as I conclude, a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, then in light of the combined operation of ss. 20(1)(b) and 20(2)(b), the relevant date for determining the Bank's priority status is the date of the appointment of PWC as interim receiver. On that date, the Bank's security interest was perfected and had priority over that of St. Paul.

19 In answering the second question, it is also necessary to address an alternative argument put forward by PWC. According to PWC, the Bank's priority status had to be determined all over again as of the date PWC was appointed trustee in bankruptcy on January 31, 2002. PWC argues that the s. 47 *BIA* receivership ended when it was appointed trustee in bankruptcy and that the s. 47 *BIA* receiver had no proprietary interest in the disputed assets. I reject PWC's position and conclude that the s. 47 *BIA* receivership did not end with PWC's appointment as trustee and that the Bank retained its priority over the tax refund following State's assignment into bankruptcy by PWC.

Analysis

1. Did the Appointment Order implicitly give the Bank an exemption from compliance with s. 48(3) of the PPSA?

20 The Bank submits that to require it to comply with s. 48(3) of the *PPSA* by filing a financing change statement after it learned PWC sold State's name is inconsistent with the spirit of the Appointment Order, which had the effect of maintaining the existing priorities among creditors. The Bank also submits that exempting it from compliance with s. 48(3) does no injustice to the policy underlying the *PPSA*. The registration regime established by the *PPSA* is intended to provide a means of giving notice to interested parties of existing security interests in the debtor's property so that they can govern their dealings with the debtor accordingly. Interested parties can search the PPSR against the debtor's name for existing registrations against that debtor and its collateral. Although the *PPSA* requires that the debtor's name must appear correctly on a registration in order for that registration to be effective, the policy reason for requiring a secured creditor to maintain the perfection of its security interest disappears on a s. 47 *BIA* receivership. Under that type of receivership, the secured creditor is in the process of enforcing its security and the debtor is deprived of possession of its property and is not in a position to grant further security interests.

21 The Bank further argues that to require it to comply with s. 48(3) would effectively require it to act in a manner that is contrary to the wording of the Appointment Order. The Bank relies on s. 7 of the order appointing PWC, which stays any "legal proceeding, enforcement process, extra-judicial proceeding or other proceeding against or in respect of the Debtor or the Property". Similarly, s. 8 of the Order restrains the enforcement or exercise of certain rights, including registration, against the debtor or the property. The Bank argues that these provisions pre-

vented it from registering a financing change statement.

22 The motion judge rejected the Bank's submissions. He held that even if the Bank was correct that the policy considerations requiring registration were no longer applicable in the circumstances, the court could not override the provisions of the legislation unless there was a legislative gap, which he concluded there was not. Insofar as the Appointment Order was concerned, he held that even if the filing of a financing change statement was a "proceeding" that was stayed under s. 7 or restrained under s. 8, the Bank could have applied to lift the stay and the court would likely have allowed the application. Thus, the terms of the Order did not preclude the Bank from filing the required financing change statement to maintain its perfected status prior to the assignment in bankruptcy.

23 The motion judge's approach was intended to protect the integrity of the registration requirements of the *PPSA*. I agree that nothing in the Appointment Order or in the *PPSA* exempts the Bank from having to comply with the filing requirements of the *PPSA*. As indicated by the motion judge, if the filing of a financing statement was a "proceeding" that was stayed by the Appointment Order, an application to lift the stay would likely have been successful since no other creditor would be prejudiced. The reason that an application to lift the stay would likely be successful even after the expiry of the thirty day period for filing a financing change statement is reinforced by the existence of s. 30(6) of the *PPSA*. That subsection permits re-registration of a security interest that has become unperfected.[FN10] See *PSINet Ltd., Re*, [2002] O.J. No. 271 (Ont. S.C.J. [Commercial List]).

24 Alternatively, instead of bringing an application to lift the stay for the limited purpose of allowing it to either maintain or to reperfect its security interest, s. 31 of the Appointment Order provides that any interested party may apply to vary or amend the order on seven days notice. The Bank could thus have applied to the court to amend the initial Appointment Order so as to enable the Bank to obtain the receiver's consent to lifting the stay or to filing the requisite *PPSA* registration.

25 I note that the *Standard Template Receivership Order* ("the Model Order") prepared by a subcommittee of the Commercial List Users Committee in conjunction with the Canadian Bar Association Insolvency section contains standard language ordering that all rights and remedies against the debtor, the receiver, or affecting the property are stayed except with leave of the court or "except with the written consent of the Receiver" and further that nothing shall "prevent the filing of any registration to preserve or perfect a security interest." The wording of the Model Order provides further support for my conclusion that the motion judge was correct in holding that the Appointment Order did not give the Bank an implied exemption from complying with the requirement to file a financing change statement as required by s. 48(3) upon learning that PWC had sold State's name.

2. Did the Bank's failure to file a financing change statement result in a loss of its priority as a secured creditor?

26 The resolution of this issue requires me to determine whether a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*, as well as to interpret the meaning of the words "rights of a person" in s. 20(2).

27 For ease of reference, the relevant portions of s. 20 are as follows:

> 20 (1) Except as provided in subsection (3),[FN11] until perfected, a security interest,
>
> . . . . .
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
>
> . . . . .

(2) The rights of a person,

. . . . .

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

28 The Bank submits that the motion judge erred in holding that an interim receiver appointed by the court under s. 47 of the *BIA* is not "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. If the receiver is a "person" within the meaning of s. 20(1)(b), then the date for determining the parties' priorities is the date that PWC was appointed as a s. 47 *BIA* receiver. On that date, the Bank had a properly perfected security interest.

29 St. Paul's position is that the motion judge was correct in holding that an interim receiver is not a "person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The trustee in bankruptcy, not the s. 47 *BIA* receiver, is the representative of the creditors and the date for determining priorities is the date of the trustee's appointment. On that date the Bank did not have a properly perfected security interest. In the alternative, St. Paul agrees with the position of PWC.

30 PWC agrees with the Bank that an interim receiver is a representative of the creditors for the purposes of s. 20(1)(b). However, PWC submits that even if the Bank's security interest was effective as against the interim receiver, once the estate funds vested in the trustee in bankruptcy, the interim receivership ended. The relevant date for determining the effectiveness of the Bank's security interest then became January 31, 2002, when its status as trustee in bankruptcy took effect. As of January 31, 2002, the Bank's security interest was no longer perfected. The Bank responds that the receivership and the bankruptcy are not two separate processes, but one continuous process and that the date for determining priorities did not change when the trustee in bankruptcy was appointed.

31 I first confront the issue of whether a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). In my view, the motion judge erred in concluding that an interim receiver is not such a person. In reaching this conclusion, I am guided by the following considerations:

(a) the relevant principles of statutory interpretation;

(b) the history of the legislative provision and the view of commentators on the meaning of s. 20(1)(b);

(c) the fiduciary role and the powers of the s. 47 *BIA* receiver;

(d) the word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession;

(e) the overall scheme of the *PPSA*, including s. 20 as a whole and s. 30(6); and

(f) the purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed.

32 I now discuss each of these considerations supporting my conclusion that a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). I will then go on to address PWC's alternative argument.

(a) The relevant principles of statutory interpretation

33 Section 20(1)(b) renders any security interest in the debtor's collateral ineffective against "a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy" until that security interest is perfected. All provinces have legislation governing priorities between and among secured and unsecured creditors.[FN12] However, no other province uses the general words, "a person who represents the creditors of the debtor" as found in s. 20(1)(b) of the Ontario legislation. The *PPSA* does not define "a person who represents the creditors of the debtor". Consequently, resort must be had to ordinary principles of statutory interpretation to determine the meaning of this phrase.

34 The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at p. 1; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26. In order to maintain harmony within the scheme of the Act, the same word must consistently be given the same meaning throughout a statute. See Sullivan, *supra*, at p. 163; *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.). The principle is also one of the Drafting Conventions adopted by the Uniform Law Commission of Canada in s. 21(5) and s. 34(2). See Sullivan, *supra*, Appendix I at pp. 619, 623. The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". See Sullivan, *supra*, at p. 21; *Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) at 735.

35 Words take their meaning from the context in which they are found. Thus, in interpreting a statutory provision, among the considerations to which the court will have regard are the immediate context of the words in the section, any adjacent and closely related provisions, the Act as a whole, the history of the legislation and other external sources. See Sullivan, *supra*, at pp. 261-62.

(b) Having regard to the history of the legislative provision, a s. 47 BIA receiver is not excluded from being "a person who represents the creditors of the debtor"

36 The predecessor version of the *PPSA* included a receiver in the list of persons who represent the creditors of the debtor. Section 22 of the *Personal Property Security Act*, R.S.O. 1980, c. 375, stated:

> 22 (1) Except as provided in subsection (3),[FN13] an unperfected security interest is subordinate to,
>
> (a) the interests of a person,
>
> . . . . .
>
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...
>
> . . . . .
>
> (2) The rights of a person under subclause (1)(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the security interest.

The question is, therefore, whether the removal of the word "receiver" from the current version of the Act, and the

substitution of the word "includes" for the word "as" indicates that the legislature intended to exclude an interim receiver from the category of persons referred to in the section.

37 In my opinion, the removal of the word "receiver" is not indicative of any legislative intention to exclude receivers appointed under s. 47 of the *BIA* from the category of persons included under s. 20(1)(b). I say this for four reasons.

38 First, the earlier version of the *PPSA* was limitative, not expansive. The use of the word "as" in the phrase "a person who represents the creditors of the debtor *as* assignee ... trustee in bankruptcy, or receiver" meant that only the three categories of persons mentioned were included: see R. McLaren, *Secured Transactions and Personal Property in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1989) at pp. 5-160 to 5-161.

39 What the legislature intended to do and did do in amending s. 20(1)(b) was to expand the category of persons representing the creditors of the debtor. The word "including" in the current legislation is a term of extension. See Sullivan, *supra*, at p. 181; see also *National Bank of Greece (Canada) c. Katsikonouris*, [1990] 2 S.C.R. 1029 (S.C.C.) at 1041, where LaForest J. wrote that the word "including" is normally "designed to enlarge the meaning of preceding words, and not to limit them." Accordingly, the examples that follow the word "including", namely, an assignee for the benefit of creditors and a trustee in bankruptcy, are not meant to be exhaustive. Further, an interpretation of legislation that narrows the scope of general words so that there is nothing but the enumerated items to which they can apply must be rejected. See Sullivan, *supra*, at p. 179. Limiting the meaning of s. 20(1)(b) to an assignee for the benefit of the creditors and a trustee in bankruptcy would leave no other persons to whom the general words, "a person who represents the creditors of the debtor" could apply.

40 Second, there is a presumption against implicit alteration of law. The legislature is presumed not to change existing law or to depart from established practices beyond that which is expressly stated. Failing to explicitly alter the law results in the law remaining undisturbed. See Sullivan, *supra*, at pp. 395-96. The legislature would have had to use more precise language to exclude all receivers from the category of persons "who represent the creditors of the debtor" if it wished to have done so.

41 Third, the commentary of Mr. Fred M. Catzman, Q.C., the former chair of the Attorney General's advisory committee on the *PPSA*, lends some insight into why the term "receiver" was removed from the current legislation. In reference to the previous legislation, he stated that the term "receiver" is a generic term and, in his opinion, whether the receiver represented the interests of the creditors depended on whether the receiver was appointed by court order. If appointed by private agreement, the receiver represented only the interests of the creditor appointing it. See F. M. Catzman *et al.*, *Personal Property Security Law In Ontario* (Toronto: Carswell, 1976) at p. 114. Where, as here, legislative change is preceded by a report of a person or body that has investigated a condition and made a recommendation, the courts are entitled to take judicial notice of it. While the commentary cannot be used as direct evidence of legislative intent, the court may use it to draw inferences about the meaning of particular provisions. See Sullivan, *supra*, at pp. 484-85. Removing the word "receiver" was intended to exclude a privately-appointed receiver, whose role is to protect the interests of a single secured creditor, from the class of persons contemplated by s. 20(1)(b).

42 Fourth, the interpretation of legal scholars with expertise in the particular statute under consideration has become an authoritative source for consideration by courts. See Sullivan, *supra*, at p. 502. The unanimous opinion of academics and other commentators respecting s. 20(1)(b) is that the phrase "a person who represents the creditors of the debtor" is not limited to assignees or trustees in bankruptcy. In *The Ontario PPSA Commentary and Analysis* (Markham, Ont.: Butterworths, 2000) at p. 163, under the heading "Trustee in bankruptcy and other representative creditors", Jacob S. Ziegel and David L. Denomme write in reference to s. 20(1)(b):

> It is clear from the structure of clause (b) that it is not meant to be confined to an assignee for the benefit of

creditors and a trustee in bankruptcy but also covers other creditors' representatives.

43 Frank Bennett states in *Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53:

> .... even though there is no reference to a receiver in s. 20(1), it is clear that a court-appointed receiver comes within the subsection... The court-appointed receiver is an officer of the court with fiduciary duties to *all* creditors and the debtor although its appointment was initiated by the secured party.
>
> [Emphasis added.]

Richard McLaren writes in *Secured Transactions and Personal Property in Canada, supra*, at p. 5-162:

> A receiver is not listed in the revised Act [R.S.O. 1990, c. P.10] as a type of creditor's representative, but it is likely that court-appointed receivers will still qualify as a representative of creditors. Receiver is a generic term describing a person having the attributes characteristic of a receiver in chancery: one must be an officer judicially appointed and responsible to the court with the object of preserving property pending litigation to decide the rights of the parties. Once appointed by the court, the receiver is answerable to the court and to all interested parties. Given the cited case law decisions on the characteristics of a receiver, a liquidator under the *Winding-Up and Restructuring Act*, the *Business Corporations Act* or the *Bank Act* would qualify as a receiver.
>
> Given that privately-appointed receivers only represent one or some of the creditors and that they are not judicially appointed, it has been held that they do not come within the ambit of s. 20(1)(b). [Citations omitted.][FN14]

44 I am not aware of any scholarly opinion to the contrary. The unanimous opinion of scholars appears to be that the phrase used in s. 20(1)(b), "a person who represents the creditors of the debtor", is not limited to an assignee or trustee in bankruptcy. Further, in the opinion of two of the authors cited above, the phrase includes a court-appointed receiver.

(c) The fiduciary role and powers of the s. 47 BIA receiver

45 The motion judge concluded that a receiver appointed by the court under s. 47 of the *BIA* is effectively the representative of the Bank alone. In my opinion, his conclusion on this issue is in error. A s. 47 *BIA* receiver owes a duty to all of the creditors of the debtor.[FN15] For example, a s. 47 *BIA* receiver was described by Cumming J. in *Ravelston Corp., Re*, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]), aff'd (2007), 85 O.R. (3d) 175 (Ont. C.A.), as an officer of the court, who owes a duty not only to the court, but also to all persons interested in the debtor's assets, property and undertakings. These duties must be carried out honestly and in good faith. The receiver's role, like that of a trustee in bankruptcy, is "that of a fiduciary to all interested stakeholders." He concluded at para. 67:

> A court-appointed receiver under the *BIA* or [*Courts of Justice Act*], as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. [Citations omitted.]

46 In addition to the fiduciary relationship to all creditors, the s. 47 receiver typically has vast powers over the property of the debtor and performs functions similar to those of a trustee in bankruptcy, albeit without relying on a change in the locus of title. The powers of the s. 47 receiver were discussed by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (Ont. Gen. Div. [Commercial List]). At para. 3, Farley J. noted how amendments to the *BIA* in 1992 had affected the rights of secured creditors by the re-

quirement in s. 244 to give notice to the debtor of an intention to enforce its security and to refrain from taking action for ten days, but providing for the remedy of a s. 47 receiver.

47 After quoting the provisions of s. 47, and noting that the interim receivership in *Curragh* had continued for much longer than ten days, Farley J. observed that the object of the s. 47 receivership process appeared to be to maintain the mining property in question, while marketing it with a view to selling it, and that the s. 47 receivership would likely continue until the mine was sold. He concluded that "it would seem that in many practical aspects in these circumstances that the [interim receiver] is functioning as a quasi-receiver and manager/trustee in bankruptcy." He pointed out that the 1992 amendments to the *BIA* dealt more extensively with insolvency as contrasted with bankruptcy and that pre-amendment cases dealing with the powers of the interim receiver had to be analyzed with care.[FN16] Farley J. concluded that the regime providing for the appointment of a s. 47 *BIA* receiver was flexible and that the court could allow the interim receiver to exercise control over the business in question as opposed to limiting its powers for narrow purposes such as the sale of perishable goods. In addition, he observed at para. 6 that because s. 47(2)(c) allows the interim receiver to apply to the court for directions, "it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case."

48 In deciding whether the s. 47 receiver falls within s. 20(1)(b), it is also relevant to consider that such a receiver has exclusive control over the assets and affairs of the company and, in this regard, the receiver displaces the board of directors and the company's managers: *Toronto Dominion Bank v. Fortin* (1978), 85 D.L.R. (3d) 111 (B.C. S.C.) at 113; *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 75 (Sask. Q.B.). Further, the s. 47 receiver has the power to settle liabilities and can be a successor employer, that is, it can stand in the shoes of the owner towards the employees of the company: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.). In addition, s. 47(2)(c) of the *BIA* empowers the interim receiver to "take such other action as the court considers advisable."

49 Frank Bennett, in *Bennett on Bankruptcy*, *supra*, at p. 119-20, contrasts the appointment of a s. 47 interim receiver with that of receivers appointed in the context of an application for a bankruptcy order under s. 46 or pending the proposal process under s. 47.1 of the *BIA* as follows:

> There does not appear to be any limitation on this appointment. There is no defined end of the interim receivership and the word "interim" is clearly a misnomer of the receiver's powers and duties that are more akin to a court-appointed receiver and manager under provincial legislation.

50 As these cases illustrate, the role played by the s. 47 *BIA* receiver is akin to that of a trustee in bankruptcy in the sense that the s. 47 *BIA* receiver owes a fiduciary duty to all of the creditors and typically has vast powers over the property of the debtor. Furthermore, as in a bankruptcy, the exercise of the s. 47 *BIA* receiver's powers and duties is overseen by the court to ensure that the creditors of the debtor are not prejudiced.

51 My colleague Feldman J.A. cites the case of *TRG Services Inc., Re*, [2006] O.J. No. 4521 (Ont. S.C.J.), in which it was held that a monitor under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is not a representative of creditors within the meaning of s. 20(1)(b) of the *PPSA*. The role of a court-appointed s. 47 *BIA* receiver stands in sharp contrast to that of a court-appointed monitor. A monitor's powers are limited and a court-appointed monitor does not stand in the shoes of the company nor owe fiduciary duties to creditors. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) at paras. 49-50, leave to appeal to S.C.C. granted, (2007) (S.C.C.).

(d) The word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession

52 A person "who represents the creditors of the debtor" under s. 20(1)(b) must be a person exercising rights, because s. 20(2) refers to the time when "[t]he rights of a person... in respect of the collateral under clause 1(b)" are

to be determined. The *PPSA* does not define the word "rights" or the phrase "rights of a person...in respect of the collateral". In my opinion, the word "rights" in the *PPSA* is used more broadly than referring to title alone.

53 The motion judge was of the opinion that the rights referred to in s. 20(2) are proprietary rights akin to those exercised by a trustee in bankruptcy. He concluded that a receiver is not the type of representative of creditors included in s. 20(1)(b) because, unlike with the trustee in bankruptcy, title to the debtor's assets does not vest in a s. 47 *BIA* receiver. In my opinion, the motion judge erred in interpreting the word "rights" in s. 20(2) as meaning proprietary rights limited to the traditional concepts of title and ownership.

54 The motion judge's conclusion ignores the fact that the *PPSA* is not about title to property or rights against the debtor, but is about notice to and priorities between creditors. In *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 28, Iacobucci J. was critical of the British Columbia Court of Appeal's approach to a priority dispute under the B.C. *Personal Property Security Act* because that court "did not look past the traditional concepts of title and ownership." He held that the dispute could not be resolved through the determination of who had title because the dispute was one of priority to the collateral and not ownership in it.

55 As noted by Tamara M. Buckwold and Ronald C.C. Cuming in their article, cited with approval in *Giffen*, *supra* at para. 26, "The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?" (1997) 12 B.F.L.R. 476 at 470:

> The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the [Personal Property Security] Act itself.

56 Other legal scholars have made similar comments. In *2006 Ontario PPSA & Commentary*, (Markham, Ont.: Butterworths, 2006) at p. 3, editors Jennifer G. Legge and Daphne J. MacKenzie explain that "neither the application [of the Act] nor priority contests among creditors with an interest in personal property collateral are governed by title." In his *2008 Annotated Ontario Personal Property Security Act*, *supra* at p. 247, Richard McLaren states in regard to the general priority rules that are to be applied if no other provision of the Act is applicable: "The general priority scheme set up in s. 30(1) disregards the pre-Act law and its reverence for legal title in collateral."[FN17] By focusing on where title was held in interpreting s. 20(1)(b), the motion judge ignored the overall context of the *PPSA*.

57 I am of the opinion that the phrase "rights of a person" in s. 20(2) refers to the entitlement of the person under s. 20(1)(b) to exercise its powers, such as the power to take possession of the debtor's assets. In *Giffen, Re*, *supra*, Iacobucci J. held at para. 34 that the right to possession is a right to property or a proprietary right under the *BIA*. He stated: "In my opinion, the bankrupt's right to use and possession of the car constitutes 'property' for the purposes of the *BIA*..."[FN18]

58 This interpretation of "rights of a person" in s. 20(2) is also in harmony with the use of the phrase "rights" in other sections of the *PPSA*, as well as scholarly comment on the word "rights" as used in the *PPSA* context.

59 Although title to a debtor's property does not vest in a receiver, s. 60(1) of the *PPSA* states:

> 60. (1) Nothing in this Act prevents,
>
> (a) the parties to a security agreement from agreeing that the secured party may appoint a receiver or receiver and manager and, except as provided by this Act, determining the *rights* and duties of the receiver and manager by agreement [Emphasis added.]

As the word "rights" is specifically used in relation to receivers in s. 60(1), the argument that "person" in s. 20(2) must have proprietary rights akin to those of a trustee in bankruptcy cannot succeed.

60 Zeigel and Denomme also discuss the word "rights" in relation to one of the prerequisites for attachment under s. 11 of the *PPSA*: that the debtor have "rights" in the collateral. See *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 124-27. They begin by saying that the section merely states the obvious, namely, that if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor. One subheading asks the question: "Is it sufficient that the debtor only has a 'power' to transfer rights in the collateral?" The authors conclude that the power to vest a good title in the goods of a third party is a sufficient right to create a security interest. They also ask the question whether anything turns on the distinction between "power" and "rights" and conclude at p. 127 that nothing turns on the distinction:

> "Rights" is used elliptically in paragraph [11(2)(c)] to describe collateral to which the secured party's security interest is capable of attaching, and is not concerned with the purity of the debtor's title.

61 In addition, under s. 1 of the *PPSA*, a "debtor" is defined as: "a person who ... owns or has rights in the collateral, including a transferee of or a successor to a debtor's interest in collateral." The construction of this definition makes it clear that the word rights has a broader meaning than ownership.

62 I would adopt the same approach to interpreting the word "rights" in s. 20(2). In my opinion, the phrase "a person who represents the creditors of the debtor" is not limited to persons with the same proprietary rights in the collateral as an assignee for the benefit of creditors and a trustee in bankruptcy, but includes a receiver appointed by the court pursuant to s. 47 of the *BIA* who has the right to take possession of the collateral and the right to sell it. If "rights" in s. 20(2) were read as only referring to ownership rights, then the phrase "including" in s. 20(1)(b) would have no significance because only the named representatives hold title in the debtor's collateral. My interpretation of the word "rights" in s. 20(2) as referring to the receiver's rights to possess and sell the debtor's collateral gives effect to the phrase "including" in s. 20(1)(b).

(e) The overall scheme of the PPSA including s. 20 as a whole and s. 30(6)

63 In *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 170-71, Ziegel and Denomme consider what happens when a properly perfected security interest becomes unperfected, or in other words, when it lapses. After noting that the current s. 20 does not deal with the question of what happens to a lapsed registration, the authors say that the question would have been resolved in favour of the secured party whose perfected interest had lapsed, for a number of reasons. One reason is that under the pre-PPSA statutes, the lapsed registration did not affect the validity of pre-lapse interests. The underlying reason was that priority between competing consensual interests was determined on the basis of a reliance theory. The authors then consider what the approach to priorities would be under the current s. 20(1)(b). They note that one of the arguments in favour of not giving any effect to the lapsed interest is to protect the integrity of the registration system. In opposition to this position, they note that in ss. 20(1)(c) and (d),[FN19] the general rule that a security interest is not effective until perfected only applies where there is a transferee for value who does not know of the security interest at the time of the transfer.

64 The authors conclude that the argument in favour of subordinating lapsed interests in determining priorities so as to protect the integrity of the registration system is further undermined by s. 30(6) of the *PPSA*.[FN20] Under that section, a secured creditor may reperfect a security interest in the debtor's collateral that was perfected but has become unperfected. The effect of reperfecting is to restore the secured creditor to the position it had prior to becoming unperfected, subject only to the rights of a person acquired during the period of unperfection. There is no time limit for reperfecting in s. 30(6) and Ziegel and Denomme consider the reperfection requirement to be little more than a formality that "might as well be dispensed with." These provisions show that when a previously perfected security interest lapses, the integrity of the registration system is not the ultimate value to be protected.

65 As mentioned, s. 30(6) of the *PPSA* also contains an exception. The exception is "...that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period." Use of the generic word "person" encompasses legal entities other than a secured or unsecured creditor. See Ziegel and Denomme, *supra*, at p. 259. Since the word "rights" in the *PPSA* has a broader meaning than proprietary rights and is to be given a consistent meaning throughout the *PPSA*, the reference to "rights in all or part of the collateral during the period when the security interest was unperfected" includes the rights in the collateral acquired by the s. 47 *BIA* receiver to take possession of a debtor's property and to sell it. On my interpretation of s. 30(6), if St. Paul had attempted to reperfect its security interest by registering a fresh financing statement after the appointment of PWC as a s. 47 *BIA* receiver, the exception would apply because the s. 47 *BIA* receiver acquired rights in the collateral, namely the right to possession of all present and future money and the right to sell the debtor's assets on behalf of all creditors and distribute the proceeds. Thus, my interpretation of s. 20(1)(b) is consistent with the interpretation of rights in the collateral under other sections of the *PPSA*.

(f) The purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed

66 The purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the creditors at the time "a person who represents the creditors of the debtor" is appointed. This conclusion flows from the Supreme Court's rulings on the relationship between provincial security interest legislation and federal bankruptcy legislation.

67 One of the clearest and most trenchant explanations of s. 20(1)(b) and its relationship to the *BIA* is found in Anthony Duggan and Jacob Ziegel's commentary on the decision of Iacobucci J. in *Giffen, Re*, *supra*. See "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007) 57 U.T.L.J. 227 at 231-34. In that case, Telecom Leasing Canada Ltd. ("TLC") leased a car to B.C. Tel, who leased it to its employee, Carol Giffen. Leases of more than one year are subject to the B.C. *PPSA* irrespective of who has title and even though the lease does not secure payment or performance of an obligation. Neither TLC nor B.C. Tel filed a financing statement. Giffen went bankrupt. Even though Giffen did not have title to the car, the Supreme Court held that pursuant to the B.C. *PPSA*, title to the car vested in the trustee in bankruptcy.

68 Commenting on this decision, Duggan and Ziegel state:

> The *PPSA* registration requirements serve a publicity function. "Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral." From this perspective, s. 20(b)(1) of the *PPSA* presents a puzzle: the trustee in bankruptcy is not in the position of an innocent third party, he does not rely on the register for the purpose of any dealings with the debtor, and so he is not prejudiced by a secured party's failure to perfect a security interest. Therefore, why should an unperfected security interest be ineffective against him? According to *Giffen, Re*, [1998] 1 S.C.R. 91, the answer relates to the rights of execution creditors and the like. *PPSA* s. 20(a) provides that an unperfected security interest is subordinate to execution creditors. An execution creditor may be prejudiced by an unperfected security interest, and *PPSA* s. 20(a), provides a remedy by giving the execution creditor priority over the secured party. If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70. In effect, "the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings." *PPSA* s. 20(b)(i) is a kind of *quid pro quo*. It compensates unsecured creditors for the loss of their priority rights under s. 20(a) by giving the corresponding priority to the trustee in the trustee's capacity as the creditors' representative. *In summary, the purpose of the PPSA s. 20 (b)(i) is "to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security interests which they enjoyed prior to the bankruptcy of the debtor."*