KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 135**

Date: **2024 07 19**
File No.: QBG-RG-01582-2016
Judicial Centre: Regina

BETWEEN:

CALIDON FINANCIAL SERVICES INC.

PLAINTIFF

- and -

ROBERT IRA LACHLAN MACKAY

DEFENDANT

Counsel:

Craig A. Savoie	for the plaintiff
David G. MacKay	for the defendant

JUDGMENT
July 19, 2024

MORRIS J.

I. INTRODUCTION

[1] In March 2014, the defendant, Robert Ira Lachlan MacKay [Mr. MacKay], signed an agreement entitled "lease contract" [Contract] with the plaintiff, Calidon Financial Services Inc. [Calidon], with respect to a combo-vac truck. A combo-vac truck is a large truck that has pressure washing and vacuum functions which can be used independently, or together. Mr. MacKay was unable to make the monthly payments under the Contract after December 15, 2014, and the combo-vac truck was sold by way of an auction. Calidon received the proceeds from the auction sale, but this still left a large deficiency owing pursuant to the Contract.

[2] Calidon sued Mr. MacKay for the deficiency, and eventually brought a summary judgment application. The parties agree that their dispute may be resolved using the summary judgment process. The primary issues are:

a) Whether the Contract is a true lease agreement or a conditional sale contract; and

b) If the Contract is a conditional sale contract, whether Calidon is entitled to pursue any remedies pursuant to the Contract pursuant to the exception in s. 18(2)(c) of *The Limitation of Civil Rights Act*, RSS 1978, c L-16 [*LCR Act*].

[3] The summary judgment application also raises the enforceability of the Contract's terms with respect to interest and solicitor-client costs.

[4] The parties filed affidavit evidence. Amongst the evidence, each party tendered a proposed expert with respect to the use of combo-vac trucks in the oil and gas industry, and production in the industry more generally. The experts were cross-examined.

[5] For the reasons that follow I have determined that both Calidon's summary judgment application and its underlying action must be dismissed. The relief it seeks is barred by s. 18(1) of the *LCR Act*.

II. BACKGROUND

a. The Contract

[6] The Contract was for a 60 month term and listed Little Bear Oilfield Services Inc., Bernie Kopera and Mr. MacKay as lessees. Calidon is only pursuing Mr. MacKay because, as acknowledged by the parties, he is the "last man standing".

[7] The Contract required a $42,100 downpayment and 59 monthly payments thereafter of $7,893.84. At the end of the 60 month term, Mr. MacKay had an option to purchase the combo-vac truck for $100.

[8] The Contract included an acceleration clause. Upon Mr. MacKay defaulting on any payment, all payments under the Contract became immediately due upon demand.

[9] The Contract also included a cost of credit disclosure statement, which indicated that the cost of borrowing over the 60 month term was $86,096.56. This was based on $421,740.00 being financed at 8.49% per annum interest, leaving a residual obligation of $100 to buy the combo-vac truck at the end of the term.

[10] The Contract required Mr. MacKay to pay all provincial sales tax, goods and services tax and any other applicable taxes, and to keep the combo-vac truck in good repair and insured, at his cost.

b. Evidence from the proposed experts

[11] Calidon tendered Steven Hansen [Mr. Hansen] as an expert to give opinion evidence regarding the typical use of a combo-vac truck in the oil and gas industry. In providing his opinion, he was provided invoices and job tickets from Mr. MacKay's production to review.

[12] Mr. Hansen's evidence may be summarized as follows:

a) Combo-vac trucks are used for a wide variety of oilfield services, including cleaning of equipment at worksites (buildings, pumpjacks, equipment), bleeding down pressure and catching fluid from piping through use of the vacuum function, and thawing out frozen equipment where the combo-vac truck has a steaming component.

b) Combo-vac trucks are not used to pump oil from the ground. However, they are used to clean up sites and maintain equipment that is directly involved in producing and transporting oil (e.g., wellheads, valves or piping).

c) Based on his examination of documents from Mr. MacKay's production, he determined that the combo-vac truck had likely been used to clean up oil production sites and to maintain equipment or support the maintenance of equipment at such sites.

[13] I consider the above evidence to be admissible, applying the criteria in *R v Mohan*, [1994] 2 SCR 9 [*Mohan*].

[14] Mr. MacKay tendered Terence Jones [Mr. Jones] as an expert. The statement of expertise for Mr. Jones proposed him as an expert "on the validity of the claim of the uses for a combo-vac truck in petroleum exploration and/or production" (Affidavit of Terence Jones, sworn February 15, 2023, Exhibit D). While this description was somewhat poor, Mr. Jones produced a report opining on several areas. During the hearing, Calidon confirmed that it did not object to Mr. Jones opining on how the oil and gas industry is organized (into different sectors), the type of equipment that is used in the industry, and how combo-vac trucks are used in the industry, and otherwise.

[15] Mr. Jones' evidence may be summarized as follows:

a) The oil and gas industry has been organized into distinct sectors since the early 20th century. Some companies, known as integrated companies, participate in all sectors through different business units.

b) The upstream sector is the exploration and production sector that

produces crude oil and natural gas. It requires bespoke equipment that has to be specifically designed to safely handle the type and quantity of fluid produced from a particular reservoir. Equipment that directly handles hydrocarbons is known as process equipment. Equipment that does not directly handle hydrocarbons, such as electrical gear, is known as utility equipment.

c) The midstream sector processes, stores, markets and transports oil and gas. Typical midstream sector equipment includes oil pumps, gas compressors, pipelines and storage tanks, amongst other equipment.

d) The downstream sector is involved in refining and marketing. Downstream facilities often have very similar types of process equipment as found in upstream and midstream facilities, as well as various types of utility equipment.

e) The oilfield services sector provides services to the oil and gas industry, but does not typically produce oil and gas itself; it provides services to those companies that do.

f) Combo-vac trucks are used in a variety of industries. Within the oil and gas industry, they are commonly used for equipment and facility cleaning, thawing out above and below ground pipelines and sewers, emptying septic tanks, safely exposing underground obstructions and cleaning catch basins, culverts and storm drains. They are used in more or less the same manner in other industries such as mining, pulp and paper and food preparation, as well as by municipalities. Combo-vac trucks are not specifically designed to handle petroleum and natural gas; they are designed to provide cleaning and waste disposal

services in many industries.

[16] The above evidence is admissible, based on the criteria in *Mohan*.

III. ANALYSIS

a. I am able to decide the application on the basis of the evidence before me.

[17] While the parties have agreed that I am able to decide the application on the basis of the evidence before me and that there is no genuine issue requiring a trial, that is not the end of the matter. I must come to this conclusion. That said, I am in agreement with the parties.

b. The Contract is a conditional sale contract.

[18] The parties approached the issue of whether the Contract is a true lease or a conditional sale contract by examining the considerations described in *Mercado Capital Corporation v Neudorf*, 2007 SKQB 56, 292 Sask R 238 [*Mercado*] and *Canadian Western Bank v Baker*, 1999 SKQB 252, 186 Sask R 267 [*Baker*]. I agree that this is the proper approach.

[19] These considerations may be summarized as follows:

a) A significant down payment is not characteristic of a true lease agreement: *Mercado* at para 4, *Baker* at para 19.

Here, there was a significant downpayment of $42,100, which is suggestive of a conditional sale.

b) The payment of taxes and insurance by a lessee and a lessee's obligation to repair is evidence that an agreement may be

characterized as a conditional sale: *Mercado* at para 4, *Baker* at para 20.

Mr. MacKay was obliged to pay taxes and insurance and had an obligation to repair.

c) The existence of an acceleration clause for all payments upon default indicates that a lease is in reality a conditional sale: *Mercado* at para 4, *Baker* at para 18.

Here, there is such an acceleration clause.

d) An option to purchase the property at significantly less than fair market value at the end of the term is a clear indication of a conditional sale: *Mercado* at para 4, *Baker* at paras 16-17.

The parties agreed that the option to purchase the combo-vac truck for $100 represented an option to purchase it for significantly less than its fair market value at the end of the term.

[20] Based on the foregoing, I am satisfied that the Contract is a conditional sale contract, and not a true lease.

[21] This means that s. 18 of the *LCR Act* applies. Subsection 18(1) states:

> **18**(1) When an article, the selling price whereof exceeds $100, is hereafter sold, and the vendor, after delivery, has a lien thereon for all or part of the purchase price, **the vendor's right to recover the unpaid purchase money shall be restricted to his lien upon the article sold, and his right to repossession and sale thereof**, notwithstanding anything to the contrary in any other Act or in any agreement or contract between the vendor and purchaser.
>
> [Emphasis added]

[22] If this provision applies, Calidon cannot pursue any of the remedies it

seeks in its action against Mr. MacKay.

[23] Subsection 18(2) exempts certain sales from the operation of s. 18(1). Calidon submits that the sale of the combo-vac truck is exempted by s. 18(2)(c):

> (c) **the sale of** aeroplanes or parts thereof, aeroplane engines or parts thereof, mining machinery, equipment or material, or machinery, **equipment** or material **used in the** exploration for or **production of petroleum** or natural gas;
>
> [Emphasis added]

[24] As such, Calidon submits that the restriction in s. 18(1) is inapplicable to the Contract.

c. The exception in s. 18(2)(c) of the *LCR Act* does not apply.

[25] At the outset, the parties have been unable to point to any jurisprudence interpreting the exception in s. 18(2)(c). They submit that this appears to be the first time the court has been asked to do so.

[26] The parties focus their arguments on how terms such as "production" and "gas or oil well equipment" have been interpreted in regulations enacted pursuant to different iterations of the *Income Tax Act*, RSC 1985, c 1 (5th Supp).

[27] Calidon takes the position that the exceptions in the *LCR Act* must be interpreted narrowly, based on *National Trust Co. v Mead*, [1990] 2 SCR 410 [*Mead*]. Regardless, however, Calidon submits that "production of petroleum" in s. 18(2)(c) includes the maintenance necessary to keep production going. Since the combo-vac truck was used to maintain equipment or to support the maintenance of equipment at oil production sites, it is "equipment used in the production of petroleum" within the meaning of s. 18(2)(c). As such, the restriction in s. 18(1) is inapplicable to the Contract.

[28] Mr. MacKay's position is that *Mead* means that the exception in s.

18(2)(c) must be interpreted narrowly against himself, as an individual. "Production" within the meaning of s. 18(2)(c) ends at the point of extraction of oil or gas from the ground. If the Legislature had intended "production" to include all activity whatsoever in the oilfield industry, it would not have specifically included "exploration" as well as "production" in s. 18(2)(c). The combo-vac truck was most often dispatched merely to clean buildings and equipment, provide clean water, vacuum up water or thaw valves. Combo-vac trucks are not specialized equipment used in the production of oil or gas. The sale of the combo-vac truck could not have been what is contemplated within the meaning of the exception.

[29] When interpreting s. 18(2)(c) of the *LCR Act*, the court must give effect to the modern principle of statutory interpretation, which is incorporated into s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2:

> **2-10**(1) The words of an Act and regulations authorized pursuant to 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 the Legislature.
>
> (2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[30] The Court of Appeal has provided guidance on how to apply the modern principle, in *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77, 480 Sask R 235:

> [59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.
>
> …
>
> [62] As noted, even where the court's initial impression of a legislative provision is readily arrived at, the court is required to

> consider the broader context to read the provision "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board), 2006 SCC 4 at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:
>
> > This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan [Ruth Sullivan, *Sullivan on the Construction of Statues*, 6th ed (Markham: LexisNexis, 2014)], at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

[31] For convenience, I reproduce s. 18(2)(c) below:

> **18**(2) Subsection (1) does not apply to:
>
> …
>
> (c) the sale of aeroplanes or parts thereof, aeroplane engines or parts thereof, mining machinery, equipment or material, or machinery, equipment or material used in the exploration for or production of petroleum or natural gas;

[32] On initial impression, the property contemplated in s. 18(2)(c) appears to be specialized and industry-specific. It includes:

a) Aeroplanes or parts thereof, and aeroplane engines or parts thereof;

b) Mining machinery, equipment or material; and

c) Machinery, equipment or material used in the exploration for or production of petroleum or natural gas.

[33] The industries involved – aerospace, mining, and the exploration for and production of oil and gas – are capital-intensive. Typically, these are industries which

corporations do business in, not individuals.

[34] The temporal focus of the provision is the time when the article is sold, not afterward. This accords with providing commercial certainty to the buyer and seller at the time of the sale.

[35] The provision has been around for a relatively long time. As of 1939, it only contemplated the aerospace and mining industries. Clause 21(2)(c) of *The Limitation of Civil Rights Act, 1939,* SS 1939, c 93 (since rep), exempted:

> (c) the sale of aeroplanes or parts thereof, aeroplane engines or parts thereof, or mining machinery, equipment or material[.]

[36] In 1954, the words "or machinery, equipment or material used in the exploration for or production of petroleum or natural gas" were added to the provision (which had by then become s. 18(2)(c)): *An Act to amend The Limitation of Civil Rights Act*, SS 1954, c 19, s 1.

[37] According to the *Hansard* containing the Attorney General's second reading speech, the amendment was made at the request of the oil industry:

> **SECOND READING**
>
> **Bill No. 68 — An Act to amend The Limitation of Civil Rights Act.**
>
> **Hon. J.W. Corman, Q.C. (Attorney General):** — This is an Act curtailing the enforcement of certain civil rights. It sounds like our legislation, but it was passed in 1943.
>
> **Mr. Loptson (Leader of the Opposition):** — I suppose it is one of those that doesn't mean anything.
>
> **Hon. Mr. Corman:** — Well, I don't know whether that means anything or not, but in any event, it was considered good Liberal legislation. I am not making a political speech; I am in agreement with it.
>
> Among other things it does provide that where an article is sold under a lien note or a conditional sales agreement, the remedy of the vendor

> shall be only the right of repossession. He cannot sue for the purchase price.
>
> **Mr. Loptson:** — We passed that in 1938.
>
> **Hon. Mr. Corman:** — Well, I think probably it is pretty good legislation.
>
> **Mr. Loptson:** — Even before that — in 1934 I think it was. You couldn't sue if you had seized the article.
>
> **Hon. Mr. Corman:** — That's right. You cannot sue either before or after you repossess, in the ordinary case. There is no suggestion that we change that; but an exception was made, in 1943, when the Act was passed, and I believe it was copied from Acts passed before that, possibly from 1934 or 1935, in the case of mining machinery, mining equipment or mining material. In respect of those goods the vendor had the right of repossession and the right to sue for the purchase price.
>
> **The oil industry have made representations that in regard to equipment required in connection with the exploration and production of petroleum and natural gas, the same provision should be made.** We agree that if mining equipment should be exempted from the exemption, then machinery and equipment used in the exploration for oil and gas should also be exempted. And, after a long speech about very little, I would move Second Reading of this Bill.
>
> The question being put, it was agreed to, and the Bill referred to a Committee of the Whole at the next sitting.
>
> The Assembly adjourned at 6.00 o'clock p.m.
>
> Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 12th Leg, 2nd Sess (19 March 1954) at 22-23.
>
> [Emphasis added]

[38] The 1954 amendment may have helped corporations (*i.e.*, "the oil industry") buy machinery and equipment required for oil exploration and production, by increasing vendors' remedies against them in cases of default.

[39] Notably, the ability of a corporation to waive the protections of the *LCR Act* did not come into effect until 1959: *An Act to amend The Limitation of Civil Rights Act*, SS 1959, c 35, s 8.

[40] As such, before 1959, s. 18(2)(c) was the sole means through which vendors could escape the operation of s. 18(1) with respect to their sales of specialized machinery, equipment or material to corporations involved in the exploration for or production of oil and gas (or corporations involved in the aerospace or mining industries).

[41] The purpose of the *LCR Act* has been commented upon in various cases.

[42] In *Disney Farms Ltd. v Canadian Imperial Bank of Commerce* (1984), 34 Sask R 137 (QB) [*Disney Farms*], Malone J. described why the ability to waive the application of the *LCR Act* is valuable to a corporation, and stated that the statute's primary purpose is to protect individuals:

> **[8]** … the *Limitation of Civil Rights Act* has permitted bodies corporate to waive the entire provisions thereof. A similar waiver provision is also found in the *Land Contracts (Actions) Act of Saskatchewan*, R.S.S. 1978, c. L-3. In my opinion the purpose of these provisions is to facilitate corporate financing that otherwise may not be available if lenders could not realize upon their security on default by a corporate borrower. I am also of the opinion that the provisions of the *Limitation of Civil Rights Act* were primarily intended to benefit and protect individuals, as distinct from limited companies, who usually are more sophisticated in the management of their affairs and require larger amounts of capital to maintain their operations. It would also be inconsistent to allow limited companies to waive substantive rights granted by the Act but not permit a similar waiver of what I consider to be procedural provisions of the Act.

[43] In *Mead*, the Supreme Court referenced the above passage from *Disney Farms*, stating at p. 423:

> I think it is clear that the policy concerns animating the protection of individuals from personal liability for mortgage deficiencies are not particularly compelling when applied to corporations. The meaning to be attributed to the provisions of the Act should reflect these policy concerns. Thus, any exception to the principle in s. 2 that individual mortgagors be insulated from personal liability should be construed as narrowly as possible.

[44] *Disney Farms* and *Mead* confirm that the *LCR Act* is primarily aimed at providing protection from creditors for individuals, who typically have limited capital. Corporations can waive the *LCR Act* in its entirety.

[45] Accordingly, a very broad interpretation of s. 18(2)(c) that would permit individuals to easily lose the benefit of s. 18(1) would not correspond with the *LCR Act*'s public policy purpose.

[46] Further, an individual should be able to ascertain, when entering a conditional sale contract, if the article they are buying is subject to the exception in s. 18(2)(c). This suggests that the "machinery, equipment or material used in the exploration for or production of petroleum or natural gas" should be reasonably identifiable as such at the time of the sale. It would be inimical to the *LCR Act's* public policy purpose if an individual could unwittingly lose the protection of s. 18(1) for their general purpose equipment, such as their mobile welding rig/truck, by thereafter using it at an oil or gas site.

[47] The rule of statutory interpretation known as *ejusdem generis*, also known as the "limited class rule", assists with interpreting s. 18(2)(c). The limited class rule has been described as follows: "…when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it": *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029 at 1040, cited in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at para 8.64.

[48] The principle of *ejusdem generis* supports that a narrow interpretation of "machinery, equipment or material used in the exploration for or production of petroleum or natural gas" is appropriate. These words follow the preceding descriptions of industry-specific equipment: "aeroplanes or parts thereof" and "aeroplane engines or

parts thereof", and "mining machinery, equipment or material". In my view, the Legislature's choice to use the language it did, rather than "petroleum or natural gas exploration or production machinery, equipment or material" was a matter of readability rather than an intention to include a much broader class of articles in the exception for the oil and gas industries than for the aerospace and mining industries.

[49] I have considered the cases the parties have referenced which address terms such as "production" and "gas or oil well equipment" in other enactments.

[50] In *Texaco Exploration Co. v The Queen*, [1976] 1 FC 323 (Fed Ct) [*Texaco*], Collier J. interpreted the "production" of gas narrowly - as ceasing at the wellhead – in the context of the applicable regulations under the *Income Tax Act*, RSC 1952, c 148 (since rep): *Texaco* at 335. After the wellhead what occurred was not the production of gas, but rather the processing of it.

[51] In *Terroco Industries Ltd. v Minister of National Revenue*, 1992 CarswellNat 504 (WL) (Tax Ct) [*Terroco*], a "hot oil truck" was determined to constitute "equipment… acquired to be used in a gas or oil field in the production therefrom of natural gas or crude oil", thereby qualifying it for favourable tax treatment as "gas or oil well equipment": *Terroco* at para 17. Notably, the hot oil truck enhanced the production from existing wells and permitted the completion of new wells by pumping hot crude oil into wells. It was described as follows:

> **17** … Mr. O'Connor's unchallenged evidence is that the hot oil unit is used 85 per cent of its working time to enhance or stimulate the recovery of oil from producing wells and 15 per cent of its working time to assist in the completion of a new well. …

[52] The evidence before me does not disclose the combo-vac truck as having a similar singular purpose with respect to oil production.

[53] I consider the type of equipment contemplated by s. 18(2)(c), with respect

to the oil and gas production industry, to be equipment that is directly involved in the production of oil or natural gas (whether "production" ceases at the wellhead, or continues beyond), and not general purpose equipment that may be used to maintain such equipment. It is clear that combo-vac trucks are not directly involved in oil or natural gas production. They may be used to clean and maintain equipment that is.

[54] The combo-vac truck was probably used to clean and maintain equipment that was used in the production of oil. However, this is insufficient to bring it within the meaning of the exception in s. 18(2)(c). All equipment, including oil-producing equipment, eventually requires maintenance. In considering the creditor protection purpose of the *LCR Act*, it would be inappropriate to lump general purpose "maintenance" equipment in with "production" equipment in s. 18(2)(c) when the former can be reasonably categorized discretely from the latter. This is the case for the combo-vac truck. The exception in s. 18(2)(c) does not apply to the Contract.

[55] For all of the foregoing reasons, I conclude that the exception in s. 18(2)(c) of the *LCR Act* does not apply to the sale of the combo-vac truck. Calidon cannot maintain its action against Mr. MacKay because of s. 18(1) of the *LCR Act*.

III. RELIEF

[56] Calidon's summary judgment application is dismissed, as is its underlying action against Mr. MacKay.

[57] Mr. MacKay is entitled to party and party costs on column 1.

J.
M.J. MORRIS