Court of King's Bench of Alberta

Citation: 102125001 Saskatchewan Ltd v Hutchings, 2023 ABKB 630

Date: 20231108
Docket: 2103 15849
Registry: Edmonton

Between:

102125001 Saskatchewan Ltd.

Plaintiff

- and -

Alphonse Hutchings, Suan Hozjan, Clifford Maron, Lucille Turpin also known as Lucile Turpin, Hault Construction Co. Ltd., Hutchings Concrete Alberta Inc., CSM Consulting Inc., and 1315897 Alberta Ltd.

Defendants

Reasons for Judgment
of the
Honourable Justice M. J. Lema

I. Introduction

[1] Did a Saskatchewan credit union breach Alberta's *Credit Union Act* by lending money to various Alberta borrowers? If so, are the loans unenforceable as a result? If so, do the borrowers nonetheless still have to repay the monies, under unjust-enrichment principles?

[2] The loans were secured by sale-and-leaseback transactions, with the borrowers able to reacquire the assets in question after making the necessary payments and making a final (nominal-amount) option-to-purchase payment.

[3] The applicant 102 is the assignee of the Saskatchewan credit union. Per it, the transactions here did not breach the *CUA*; if they did, the loans are still enforceable; and, if they are unenforceable, unjust-enrichment principles oblige the borrowers to repay the monies.

[4] Per the borrowers, the loan transactions breached the *CUA*'s prohibition on out-of-Alberta credit unions carrying on business here, the transactions are unenforceable as a result, and no unjust-enrichment adjustments are warranted here.

[5] I find that negotiating and entering into the loan transactions themselves did not constitute carrying on any business in Alberta; however, registering security and pursuing enforcement did constitute such carrying on business i.e. the lessor contravened the *CUA*; despite that contravention, the security registrations are valid and the proposed enforcement is permitted; and the necessary findings to reach these conclusions are available and appropriate in the present summary-judgment context.

II. Background

[6] Here are the core facts:

1. Leroy Credit Union (now called Prairie Centre Credit Union) is a Saskatchewan credit union;
2. it retained an Alberta loan broker (1417691 Alberta Ltd) to send it potential borrowers, paying it commissions for loans made;
3. via that broker, LCU came into contact with (among others) three different sets of would-be borrowers, all Alberta corporations or individuals;
4. LCU agreed to lend money to each group, via sale-and-leaseback transactions, which were completed, with funds advanced by LCU. In each transaction, the borrowers sold personal property (vehicles, equipment and other business assets) to LCU, which it leased back to them in exchange for a series of required payments and an end-of-term option to repurchase the equipment;
5. the original transactions all occurred in 2016, with refinancings (on the same essential terms) in 2017;
6. the amounts borrowed in the three sets of loans were (collectively) approximately $2.6 million;
7. by approximately 2019, the borrowers had all repaid roughly 40 per cent of the borrowed monies, before all ceasing to make further payments;
8. in response to formal demands (including notices of intention to enforce security under the *Bankrutpcy and Insolvency Act*), the borrowers, via their then-counsel, pointed to s. 228 of the Alberta *Credit Union Act*, which bars out-of-Alberta credit unions from carrying on any business in Alberta other than registering security here, enforcing that security, and otherwise following up on that security in Alberta where the security is "lawfully taken by [the credit union] as part of a wider transaction conducted in and under the laws of another jurisdiction." Per the borrowers, in making the loans here LCU breached that provision, rendering the loans unenforceable;

9. each of the loans here appears to have been negotiated across the Alberta-Saskatchewan border, with the final-form loan documents being sent by LCU to each set of Alberta borrowers for execution by them and then returned to Saskatchewan, and with LCU then advancing the net loan amounts to the borrowers in Alberta. Per each loan, the governing law was Alberta, per the borrowers all having Alberta residences or places of business;

10. LCU then assigned the leases in each transaction to 102125001 Saskatchewan, a corporation related to it, with 102 then renewing the demands for payment; and

11. after receiving the same (loans unenforceable) stance, 102 commenced these proceedings to enforce the loans.

[7] I heard the application on the Commercial List on October 27, 2023 and reserved judgment.

III. Law and analysis

[8] Here is s. 228 *CUA*:

> An institution incorporated under the laws of a jurisdiction other than Alberta that has purposes similar to those referred to in section 26(1) and that complies generally with the mode of operation set out in section 26(2) **shall not carry on any business in Alberta except**
>
> (a) registering, pursuant to the applicable legislation of Alberta, a security that was lawfully taken by it as part of a wider transaction conducted in and under the laws of another jurisdiction,
>
> (b) realizing such a security, taking title to and possession of the property secured, registering title to it, holding it pending its disposal and disposing of it,
>
> (c) otherwise taking steps that are necessary for the purposes of collecting or enforcing an obligation that is owed to it under a transaction referred to in clause (a), and
>
> (d) transacting business that is incidental to any business referred to in clause (a), (b) or (c). [emphasis added]

1. LCU an extra-provincial credit union

[9] All agreed that LCU falls within the opening phrases of s. 228, subjecting it to the "shall not carry on any business in Alberta" rule, subject to the noted exceptions.

2. Did LCU "carry on any business" in Alberta?

[10] The first question is whether LCU carried on any business in Alberta.

A. No definition of "carry[ing] on any business in Alberta"

[11] The *CUA* does not define what it means to carry on business, or carry on any business, in Alberta.

B. Common-law test for "carrying on business"

[12] 102 argued that a physical presence is required and that the broker's presence is insufficient. It pointed to ***HMB Holdings Ltd v Antigua and Barbuda***, 2021 SCC 44, which outlined the common-law test for carrying on business in a jurisdiction:

> ... to determine whether a defendant is carrying on business in a jurisdiction, the court must inquire into whether it has **some direct or indirect presence in the jurisdiction, accompanied by a degree of business activity that is sustained for a period of time.** Whether or not a corporation is "carrying on business" is a question of fact, and in order to determine whether this definition is met, the court should consider the 10 *Adams* [*v Cape Industries Plc*, [1990] 1 Ch 433] indicia .... And **some kind of actual presence in the form of maintenance of physical premises will be compelling**, and a virtual presence that falls short of an actual presence will not suffice. [para 41] [emphasis added]

[13] Per ***HMB Holdings***, the presence may be that of the business entity in question or that of a representative acting on its behalf:

> Before *Chevron*, courts generally relied on English cases, and in particular the English Court of Appeal's decision in *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433, to interpret the **meaning of "carrying on business"**. In *Adams*, Lord Justice Slade, writing for a unanimous court, held that English courts will be likely to treat a foreign corporation as **present within the jurisdiction of the courts of another country only if either: (1) it has established and maintained at its own expense, whether as owner or lessee, a fixed place of business of its own** in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents; **or** (2) **a representative** of the foreign corporation has for more than a minimal period of time **been carrying on the corporation's business** in the other country at or from some fixed place of business (p. 530). In both of these two cases, the foreign corporation's presence can be established only if it can be said that its business has been transacted at or from the fixed place of business. [para 36] [emphasis added]

[14] The borrowers did not assert that LCU itself had a physical presence in Alberta. In any case, no evidence showed any such presence by it.

[15] The focus turns to LCU's broker in Alberta i.e. whether its on-the-ground presence in Alberta should be treated as LCU's own. Here is ***HMB Holdings*** on this aspect (including the noted *Adams* factors):

> In cases involving a **representative**, the question of **whether the representative has been carrying on the foreign corporation's business or has been doing no more than carry on their own business will necessitate an investigation of the functions they have been performing and all aspects of the relationship between them and the foreign corporation** (p. 530). In particular, the following questions are relevant to the assessment of whether the representative has been carrying on the foreign corporation's business:

(a) whether or not the **fixed place of business** from which the representative operates was **originally acquired for the purpose of enabling them to act on behalf of the foreign corporation;**

(b) whether the foreign corporation has **directly reimbursed the representative** for the **cost of their accommodation** at the fixed place of business and the **cost of their staff**;

(c) what **other contributions, if any**, the foreign corporation makes to the **financing of the business carried on by the representative;**

(d) whether the representative is **remunerated by reference to transactions (e.g., by commission), by fixed regular payments or in some other way;**

(e) what **degree of control** the foreign corporation exercises over the running of the business conducted by the representative;

(f) whether the representative **reserves part of their accommodation and part of their staff for conducting business related to the foreign corporation;**

(g) whether the representative **displays the foreign corporation's name at their premises or on their stationery**, and if so, whether the representative does so in a way as to indicate that they are a representative of the foreign corporation;

(h) **what business, if any, the representative transacts as principal** exclusively on their own behalf;

(i) whether the representative **makes contracts with customers or other third parties in the name of the foreign corporation or otherwise in such manner as to bind it;** and

(j) if so, whether the representative **requires specific authority in advance before binding the foreign corporation to contractual obligations** (pp. 530-31).

Lord Justice Slade further held that even this list of questions is **not exhaustive** and that the **answer to any of them is not necessarily conclusive as to whether a representative has been carrying on a foreign corporation's business in a certain jurisdiction** (p. 531).

[16] Per 102, the answers to the *Adams* questions were "no" or "none" i.e. LCU and the broker did not have the highlighted connections, aside from LCU paying the broker a commission on loans advanced.

[17] 102 acknowledged that, on certain (number unspecified) occasions, the broker purported to bind LCU, by signing the lease documents. However, such was at odds with the brokerage agreement, which specifically forbade the broker from signing contracts or otherwise binding LCU. Per the brokerage agreement:

> ... The Broker may not enter into contracts on behalf of [LCU], incur any liability on behalf of [LCU, or otherwise bind [LCU] in any way. [part of s. 2]

[18] On this point, the borrowers argued:

> It is 102's evidence that every one of the leases entered into with Alberta counterparties **were entered into by the same broker on [LCU's] behalf**. [footnote 50 – Exhibit D – Answers to Written Interrogatories of 102, Answer 8].

[19] I disagree. Here is the footnoted answer:

> In response to question 6, all of the leases referred to in question 3 were **brokered by** 1417691 Alberta Ltd [i.e. the broker] or corporations that, to the best of my knowledge, were related to or affiliated with 14177691 Alberta Ltd. ... [emphasis added]

[20] I do not see anything in the evidence to infer that "brokered by" here meant the leases in questions were signed by the broker or otherwise that the broker bound LCU to them.

[21] In fact, the "standard drill" was that LCU itself decided whether to commit to a given proposed lease contract, as reflected in this undertaking response from a 102 witness:

> ... [The broker] provided lease referral services to [LCU] pursuant to a broker agreement with [LCU]. In providing these services, [the broker] would typically be approached by a potential lessee, or may have solicited a potential lessee regarding a potential lease of equipment. [The broker] would then likely have approached [LCU] to determine if [LCU] would want to enter into a lease transaction with the potential lessee. **If such interest existed, [the broker] would likely have prepared the lease agreement and various paperwork in connection therewith for [LCU] and the potential lessee to review.** [The broker] would likely have acted as liaison between the potential lessee and [LCU] to the extent 'LCU] requested any information, such as financial information about the potential lessee. **[The broker] would likely have arranged for the lessee to sign the appropriate documents pertaining to the lease and then sent these documents to [LCU] for a final review and signature such that [LCU] could enact the lease and advance funds to the seller of any equipment to be leased.** ... [undertaking response no. 12 (of 38) of Sheryl Hilash, corporate representative of 102] [emphasis added]

[22] This approach was confirmed by Ms. Hilash (102's witness) in questioning:

> Q: ... What I'm saying is ... you'd agree with me, though, that [LCU] entered into agreements directly with the borrower ... in this case the [defendant borrowers]; correct?
>
> A: I would agree that's what the documentation says, yes. [transcript of questioning on January 10, 2023, p 67, lines 17-24]

[23] In other words, 102 made the final decision to crystallize a proposed lease i.e. accept the would-be borrower's offer to borrow monies on the proposed terms.

[24] No evidence showed the frequency of occasions where the broker purported to sign for LCU or otherwise bind LCU.

[25] In any case, no evidence showed that LCU felt obliged to accept or otherwise take on any such leases i.e. that LCU would otherwise have declined to accept the proposed financing offer coming from the would-be borrower in question. Or that any such borrowers perceived that LCU was somehow bound by any purported signing by the broker i.e. that the lease did not require LCU's own endorsement to become binding.

[26] All in all, I do not see any material evidence of the broker binding LCU within the meaning of the ninth or tenth *Adams* factors (whether representative entered into contracts on outsider's behalf and, if so, whether specific authority was required).

[27] As for the eighth factor (the extent, if at all, to which the representative transacts business on its own behalf), which 102 did not address, I note that, per s. 1 of the brokerage agreement, LCU "engage[d] the Broker as the **non-exclusive Broker** of [LCU] ..."

[28] The evidence also showed the broker playing a separate and distinct role in some leases, namely, supplying the equipment to be leased (i.e. in contrast to other leases where the borrower's own property was sold to LCU and leased back to it): see para 20(c) of Ms. Hilash's affidavit sworn August 16, 2023.

[29] While the evidence is meagre, I find that the broker had other dimensions to its business i.e. it did not exist solely to represent the LCU in Alberta.

[30] When all the dust settles, the only *Adams* factor engaged here is that LCU paid the broker commissions for successful loan projects.

[31] Noting that, per the SCC in ***HMB Holdings***, the *Adams* factors are not exhaustive, the borrowers pointed as well to the following:

> ... the evidence on the record discloses clearly that [LCU] was, for several years leading up to this Action, engaged in a significant volume of similar transactions, with numerous counterparties in Alberta, and with significant sums of money at issue. [part of para 55 of the borrowers' brief, as particularized in bullet points to this paragraph, reflecting lease numbers and amounts advanced in 2016, 2017, and 2021].

[32] However, the frequency and scale of the leasing transactions is neutral; it is how and by whom they were assembled that matters, which is what the *Adams* factors are aimed at.

[33] The borrowers also argued that s. 228 poses a different test for business carrying-on, with the prohibition being against "carry[ing] on **any** business in Alberta."

[34] Per the borrowers, that phrase calls for a different analysis than the ***HMB Holdings*** focus on whether a given entity "carries on business" in a given jurisdiction.

[35] I do not see a material distinction here. The "carries on business" test focuses on physical presence (entity itself or its representative) and the duration of that presence. It does not focus on the nature or scope of the business activity. As I see it, if an entity "carries on

any business" in a jurisdiction, it can equally be said that it "carries on business" in the jurisdiction. And vice versa.

C. Conclusion on "carrying on any business in Alberta (lending transactions themselves)

[36] I conclude that the ***HMB Holdings*** analysis applies here, that LCU did not have any physical presence of its own in Alberta, that the only *Adams* factor engaged here is LCU paying commissions to its broker, and that that factor is insufficient, on its own, to characterize the LCU's and its broker's activities, even viewed collectively, as the carrying on of business, or even any business, in Alberta, at least in the negotiating, papering, executing, and otherwise finalizing of the lease contracts in question.

[37] Given the light connection (*Adams*-factor-wise) between LCU and its broker in the negotiation and papering of these lease contracts, and LCU's exclusive formal role in accepting financing proposals, which latter role (per the evidence) occurred exclusively in Saskatchewan (as discussed further below), the lease contracts in question resulted from activities falling outside the net of "carrying on any business in Alberta."

D. Per s. 228, certain post-transaction activities are "carrying on ... in Alberta"

[38] I do accept one facet of the borrowers' arguments here, namely, that the exceptions in s. 228 illuminate what else might constitute such business activity, and LCU and 102 have "carried on any business" in Alberta in two limited fashions resulting from those exceptions.

[39] Recall the wording of s 228 (reproduced again):

> An institution incorporated under the laws of a jurisdiction other than Alberta that has purposes similar to those referred to in section 26(1) and that complies generally with the mode of operation set out in section 26(2) **shall not carry on any business in Alberta except**
>
> (a) registering, pursuant to the applicable legislation of Alberta, a security that was lawfully taken by it as part of **a wider transaction conducted in and under the laws of another jurisdiction**,
>
> (b) realizing such a security, taking title to and possession of the property secured, registering title to it, holding it pending its disposal and disposing of it,
>
> (c) otherwise taking steps that are necessary for the purposes of collecting or enforcing an obligation that is owed to it under a transaction referred to in clause (a), and
>
> (d) transacting business that is incidental to any business referred to in clause (a), (b) or (c). [emphasis added]

[40] I have already held that, in entering into the lease contracts with Alberta borrowers, LCU did not "carry on any business" in Alberta, with the ***HMB Holdings*** analysis applying and yielding a "not so carrying on" conclusion.

[41] However, the exceptions to s. 228 tell us that, in taking of downstream steps, such as registering and enforcing security, an outside party will "carry on any business in Alberta."

[42] That is, while the negotiation, finalization, and creation of the underlying contracts themselves did not result from such carrying on of business, an outside lender may "step into" Alberta when registering security in respect of such contracts and in enforcing such security i.e. will end up "carrying on any business in Alberta" by taking such steps here.

[43] The reach of "carrying on any business in Alberta" to such steps does not implicitly mean that the underlying transactions themselves were the result of such carrying on. As explained above, by not defining "carrying on any business in Alberta" i.e. in leaving that core determination to the common law test, Alberta opened the door to outside lenders making loan transactions with Alberta residents, as long as (as found above) the lender and its in-Alberta representatives were not caught by the *Adams*-factor test.

[44] Recall that Alberta did not bar outside credit unions from lending money to Alberta residents or prohibit the making of loan contracts for such purposes. Instead, it imposed a general bar on carrying on any business in Alberta. As already found, where loan transactions by outside credit unions with Alberta residents are accomplished in the absence of such carrying on, the transactions themselves are valid, in the sense of not running afoul of s. 228.

[45] But via s. 228's exceptions, Alberta characterized the identified post-transaction steps (registering and enforcing security, etc) as "carrying on any business in Alberta." For such steps, Alberta departed from the common-law test for "carrying on business" or "carrying on any business" and focused on the nature of particular steps. If an outside lender takes any of the identified steps e.g. registering security, enforcing security, or otherwise, it is treated as "carrying on any business in Alberta" in the taking of such step(s).

[46] In taking such steps, as here, outside lenders necessarily "step into the Alberta arena."

[47] The evidence shows that LCU registered its security in the Alberta Personal Property Registry. And that LCU began enforcement steps "on the ground" in Alberta, issuing notices of intention to enforce security to the borrowers here. And that, after the assignment to it, 102 began enforcement-focused legal proceedings in Alberta.

[48] In taking such steps, LCU and 102 showed up "on the ground" in Alberta i.e. emerging from shadow zone from which, per the *Adams* factors, they were permitted to enter into lending contracts with Alberta borrowers without a material physical presence in Alberta.

E. Application of s. 228's exceptions here

[49] Section 228 first implicitly defines such steps (registering and enforcing security, etc) as "carrying on any business in Alberta."

[50] It then draws the following line: if the security registration and enforcement steps are in relation to a "wider transaction conducted in and under the law of another jurisdiction", those steps are authorized i.e. are permitted to the outside lender.

[51] However, if they are in relation to a "wider transaction conducted in and under the law of Alberta", they are off-side steps i.e. are not sheltered by the exceptions.

[52] Practically, the inducement is for outside lenders to make their loans transactions with Alberta borrowers outside of Alberta, with outside-jurisdiction law applying to such loans.

[53] Conversely, the consequence for an outside lender making its loan transactions with Alberta residents in Alberta and with Alberta law governing them is that the gateway to security registration and enforcement is closed.

[54] In other words, lend money to Alberta residents if you want, outside lenders, but do not expect to register or enforce security here if you make your contracts in and under Alberta law.

[55] Note: by "outside lender", I am referring to outside credit unions, given s. 228's focus on credit unions or credit-union-like lenders.

[56] All to say: when the focus shifts to security realization and enforcement, the question becomes whether the underlying transaction was "conducted in and under outside law", versus "conducted in and under Alberta law."

F. "Transaction conducted in ... another jurisdiction"

[57] I first examine the concept of a "transaction *conducted* in ... another jurisdiction."

[58] That term "conducted" is not defined in the *CUA*. Or in the *Interpretation Act*.

[59] The most common occurrences of "conduct a transaction" or "conducting a transaction", per CanLII searches of those terms, are in criminal-law cases e.g. "conducting" a drug transaction or other illegal transaction. In this context, "conducting" is synonymous with "making" or "forming."

[60] In non-criminal cases, the phrases are also synonymous with "making" or "forming" a transaction or agreement: see, for example, ***Re: Estate of Bessie Bloom***, 2004 BCSC 70 (para 58); ***Smith v National Money Mart***, 2010 ONSC 1334 (para 70); ***Jetz v Calgary Olympic Development Assn***, 2002 ABQB 887 (para 13); ***Marine Atlantic Inc v Topsail Sailing***, 2014 NLCA 41 (para 15); ***Montreal Trust Co v Tottrup***, 1991 CanLII 5910 (ABQB) (para 43); ***Porter Ramsay v Early Frost Investments Ltd***, 2009 BCSC 381 (para 14); ***Caisse populaire Desjardins de Côté-des-Neiges v Banque Toronto-Dominion***, 2011 QCCA 1148 (para 29); ***Gagne v MNR***, 2005 TCC 310 (para 27); ***Prevost v MNR***, 1994 CanLII 19472 (TCC) (p 2706); ***Hatcher v Sheikhan***, 2019 ONSC 3890 (para 27); ***Northcott v Cornerstone United Inc***, 2017 ABPC 201 (para 20); and ***Harris v Computershare Trust Company of Canada***, 2001 ONSC 169 (para 48).

[61] I conclude that "transactions conducted in ... another jurisdiction" means transactions made or formed in another jurisdiction.

[62] The borrowers offered limited submissions on this point, asserting only that "[t]he Transactions were all *carried out* in Alberta between an Alberta-based broker and the [borrowers] (all of whom were located in Alberta). Security interests were registered in Alberta. All of the Leased Equipment has always been located in Alberta" (emphasis added).

[63] The borrowers did not point to any particular evidence on the "all carried out in Alberta" point. I assume they are referring to their submissions (discussed earlier) that the broker negotiated *and* made the leasing contracts on LCU's behalf. As discussed above, that overstates the broker's role i.e. with LCU formally having the final say over whether a given lease proposal would be accepted by it.

[64] There is no doubt that the borrowers were all in Alberta, that the broker did its work in Alberta, and that the equipment sold and leased back was all in Alberta.

[65] But the focus here is on where the transactions were "conducted" i.e. (in light of the above interpretation of that term) where they were made or formed. In other words, it does not matter where the negotiations for the contract occurred, where the lender's representative who assisted in those negotiations was located, where the underlying assets were, or any other factor – only where the leasing contracts were made or formed.

[66] Were the loan transactions here made or formed in another jurisdiction, or in Alberta?

[67] Per the Supreme Court of Canada in ***Lapointe Rosenstein Marchand Melancon LLP v Cassels Brock & Blackwell LLP***, 2016 SCC 30:

> In Ontario, a contract is formed based on an offer by one party, accepted by the other, or an exchange of promises, supported by consideration: *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55 (CanLII), [2007] 3 S.C.R. 679, at para. 16; John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 31-32. **Where the contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place**: see McCamus, at pp. 77-78; see also S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 108-9. [para 40] [emphasis added]

[68] I am not aware of any Alberta law at odds with those principles, and here we have contracting parties located in different jurisdictions (LCU in Saskatchewan and the borrowers in Alberta).

[69] And, while the broker performed certain steps in the negotiation of the loan transactions ("[brokering] the leases, [sourcing] the transaction, [preparing] the necessary paperwork, and [liaising] between the [borrowers] and [LCU] – 102's main brief at para 39), 102's evidence was that LCU "entered into the [loan] agreements directly with the borrowers" (Ex A – January 10 questioning transcript at 67: 17-24).

[70] In any case, the evidence shows that, whether coming directly from LCU or via the broker, the borrowers received draft loan documents in Alberta (described as "an enclosed lease contract"). They were instructed to execute the lease contract and associated paperwork and to return "the contract ... for processing", along with a cheque for "down payment, GST, and Lease Administration Fee" and a void cheque for the auto debit program. (See, for example, the LCU letter to 1315897 Alberta Ltd. and accompanying materials forming exhibit 3 to the affidavit of Sheryl Hilash August 16, 2023.)

[71] All indicators are that, in executing these documents in Alberta, the borrowers were formalizing a financing offer, which had to be reviewed and accepted by LCU before becoming a binding contract.

[72] This is confirmed by the above-referenced evidence (per undertaking #12) of LCU's witness i.e. that the signed-by-borrower lease documents were submitted to LCU for final review and signing by it, following which LCU would "enact" the financing i.e. proceed with advance the loaned funds.

[73] Applying the above analysis, execution by LCU was the "last essential act of contract formation", making Saskatchewan (i.e. LCU's home base) the jurisdiction of contract making or formation.

[74] Accordingly, the first branch of the s. 228 exception is satisfied for LCU here i.e. with the loan contracts made or formed in Saskatchewan.

[75] The question becomes, per the second branch of the exception, whether the contracts "conducted [or made or formed] *under the laws* of another jurisdiction.

G. "Transaction conducted under the laws of another jurisdiction"

[76] The separate focus of "conducted under the laws of another jurisdiction (i.e. in distinction to "conducted in ... another jurisdiction") is whether it is Alberta law or the laws of another jurisdiction that govern the transactions.

[77] Here the borrowers are correct in submitting that these transactions were governed by Alberta law.

[78] All the lease contracts state that the governing law of the contract is that of the province in which the borrowers are resident i.e. Alberta for all of them. Per s 12 of the standard lease terms and conditions:

> The law of the province of the Lessee's address shown on Page 1 hereof [all showing Alberta addresses] shall govern all matters relating to the validity, effect and enforcement of this Lease.

[79] That is, Alberta law governs these contracts.

[80] 102 did not argue that "conducted under the laws of another jurisdiction" should be interpreted any other way (i.e. that it referred to something other than the governing law of the contract) or that, so interpreted, the governing law was not Alberta.

[81] Accordingly, despite the contracts being conducted (or made or formed) in Saskatchewan, they were all "conducted under" the laws of Alberta.

H. Conclusion on whether s. 228 contravened

[82] Given that Alberta – Saskatchewan difference in the "made in" and "governed under" law, the post-transaction "carrying on any business in Alberta" steps – registering and enforcing security -- were not open to LCU or 102. It would only have been if the "wider [underlying] transactions" had been both made in Saskatchewan and governed by Saskatchewan law that s. 228 would permitted LCU and now 102 to register and enforce security in Alberta.

[83] The result is that, in carrying out those post-transaction activities against the backdrop of the split-jurisdiction "wider transaction" here, LCU and now 101 have "carried on any business in Alberta" contrary to s. 228.

[84] What is the consequence, if any, of LCU's and 102's carrying on of security-registration and -enforcement activities in Alberta contrary to s. 228?

3. Are the loans enforceable despite the breaches of s. 228?

[85] Per 102, the loans are nonetheless enforceable, primarily because the *CUA* does not expressly make them unenforceable and enforcing the loans is not at odds with the policy objective(s) of the *CUA*. Plus harsh consequences will otherwise result.

[86] Per the borrowers, the loans are not enforceable. While the *CUA* does not expressly make them unenforceable, it implicitly does so, following various statutory signals (discussed further below) and the policy, or one of the policies, of the *CUA* being to restrict such lending activities to Alberta credit unions.

[87] Per ***Love's Realty & Financial Services Ltd v Coronet Trust***, 1989 ABCA 63 (para 39), the courts are to apply the "modern approach" when determining the impact of statutory contravention on a transaction or the steps in question. That is, determine if the statute expressly makes the offending transaction unenforceable; if not, explore whether enforcing the transaction would be at odds with the policy objective(s) of the statute; and, if not, determine whether failing to enforce the transaction would produce harsh consequences.

[88] I find that the loans are enforceable under that analysis, for the following reasons.

A. *CUA* does not expressly invalidate s. 228-contravening steps

[89] The first question is whether the *CUA* expressly renders unenforceable or invalid steps contravening s. 228.

[90] Here the borrowers emphasize ss 42(4) *CUA* (reproduced here):

> An act of a credit union, including the transfer or receipt of property by it, is not invalid by reason only that the act is contrary to this Act, the regulations or its articles or bylaws or is inconsistent with its purposes or the mode of operation referred to in section 26(2).

[91] I accept the borrowers' position that the benefit of this saving provision is reserved for "credit unions" and that, per the *CUA* definition of that term (para 1(1)(p)), that term means exclusively Alberta credit unions.

[92] 102 did not argue that LCU is a "credit union" within the meaning of the *CUA* or otherwise that either LCU or it can shelter under ss. 42(4) i.e. find validity for its security registration or enforcement steps under that provision i.e. despite the s. 228 contravention.

[93] Per 102, the impact of ss. 42(4) is to show that Alberta did not regard breach of the *CUA* as sufficient cause for unenforceability whether the offside entity is an Alberta credit union or not.

[94] Per the borrowers, the necessary consequence of ss. 42(4) is that the acts of non-Alberta credit unions in contravention of the *CUA* are invalid.

[95] Effectively, per the borrowers, ss. 42(4) has a mirror-image reading, as follows:

> An action of an out-of-Alberta credit union, including the transfer or receipt of property by it, is invalid by reason only that the act is contrary to this Act or is inconsistent its purposes [i.e. the purposes of a credit union] or the mode of operation referred to in section 26(2).

[96] In other words, by not extending the reach of ss. 42(4)'s saving words to external credit unions, Alberta implicitly invalidated their actions contravening the *CUA* or inconsistent with a credit union's purposes or statutory mode of operation.

[97] I disagree.

[98] It was Alberta's choice to provide the noted saving effect to certain actions by an Alberta credit union i.e. to remove the argument that, by reason only of a contravention or purpose-inconsistent action, the action is necessarily invalid.

[99] When it comes to the impact (invalid or not) of contraventions of external credit unions, Alberta could have extended the same saving effect as seen in ss. 42(4) i.e. it could have extended the saving reach of that provision to "all credit unions" or "any entity" or otherwise reaching beyond Alberta credit unions only.

[100] But it was equally open to Alberta to expressly *invalidate* contravening actions of external actors, as seen in many Alberta statutes declaring void or unenforceable all manner of transactions i.e. for breaches of statutory provisions e.g. ***Reform of Agencies, Boards and Commissions Compensation Act***, SA 2016, c R-8.5 (para 6(1)(c)); ***Hospitals Act***, RSA 2000, c H-12 (ss 44(3)); ***Public Utilities Act***, RSA 2000, c P-45 (para 101(2)(d)); ***Public Sector Services Continuation Act***, SA 2013 c P-41.5 (ss 8(2)); ***Pooled Registered Pension Plans Act***, SA 2013 c P-18.5 (ss 53(2)); and ***Gaming, Liquor and Cannabis Act***, RSA 2000, c G-1 (ss 65(2), 66(3), and 90.15(2) and para 90.16(c)).

[101] Instead, Alberta was silent on the "invalidity or not" impact of contraventions by external actors: it did not extend the saving power, but equally it did not expressly invalidate them.

[102] Accordingly, I reject the borrowers' argument that, via ss. 42(4), Alberta made steps contravening s. 228 necessarily unenforceable or invalid.

[103] The borrowers did not point to any other *CUA* provision expressly (or possibly expressly) making s. 228-contravening steps unenforceable or invalid.

[104] They did, however, point to a number of *CUA* provisions that, per them, implicitly make the s. 228-contravening steps here invalid.

[105] The borrowers' arguments here (p 13 of their brief) and my comments on them are outlined below:

a. the *CUA*'s prohibition on extra-provincial institutions carrying on <u>any</u> business in s. 228 is categorical, except for enumerated, narrow exceptions. As detailed above, the narrowness and content of the exceptions, including the Legislature's attention to what <u>may</u> be enforced, serve to illuminate the breadth and stringency of the prohibition;

> **COMMENT**: this does not illuminate the implicit-intention point here. The narrowness of the exceptions and their unavailability to LCU and 102 only mean we have a contravention (already understood); they do not help us understand whether the Legislature intended unenforceability as a result.

b. the fact that the exceptions in section 228 all relate to registering and enforcing security "lawfully taken by it as part of a wider transaction

conducted in and under the laws of another jurisdiction" shows that the Legislature only contemplated extra-provincial credit unions enforcing security in Alberta to the extent they were doing so pursuant to contracts validly concluded elsewhere. This is a strong indication that the Legislature turned its mind to the circumstances in which an out-of-province credit union could enforce security resulting from contracts it entered into. These circumstances do not include when the transaction is concluded in and under the laws of Alberta, as was the case with the Transactions and Agreements at hand;

COMMENT: same comment as above. I have already found that LCU and 102 do not shelter under s. 228's exceptions. The focus here is to explore whether Alberta intended unenforceability as a result, which is not illuminated by reiterating the (inapplicable) exceptions;

c. the apparent "saving provision" in section 42(4) of the *Act* does not apply to out-of-province credit unions. It was within the Legislature's purview to select a more expansive definition of "credit union, or to draft section 42(4) in a manner that would actually "save" the acts of an out-of-province credit union. The fact it did not do so is telling and gives a strong indication that the Legislature intended for contracts entered into by out-of-province credit unions not to be saved;

COMMENT: as explained above, it is equally telling that Alberta did not expressly invalidate statute-contravening actions of outside credit unions. Again, this argument simply reiterates the existence of the contravention, not whether Alberta intended unenforceability as a consequence; and

d. it is also significant that there is no path available under the *Act* for [LCU] to become complaint, as opposed to other jurisdictions, which have provided such a path [footnoting s 309 of *The Credit Union Act*, SS 1998, c C;-45.2, authorizing continuance into Saskatchewan of an outside credit union].

COMMENT: I disagree. Section 228 provides a "pathway" by which LCU, if it wished to continue lending to Alberta borrowers, could lawfully register security in Alberta against Alberta assets and enforce that security, namely, by making the lending contracts in Saskatchewan and making the contracts governed by Saskatchewan law. Section. 228 would then open the door to security registration and enforcement in Alberta i.e. for such made-in-Saskatchewan and made-under-Saskatchewan-law contracts.

[106] All told: the borrowers failed to highlight, and, in any case, I do not see, any implicit-intention indicators in the *CUA* i.e. that Alberta intended to prevent security-registration and enforcement here i.e. beyond the simple fact of the s. 228 contraventions themselves.

[107] The question becomes whether allowing those steps to be pursued (i.e. not treating them as unenforceable or invalid) would undercut one or more policy objectives of the *CUA*.

B. Legislative intent behind *CUA* not undercut if s. 228-contravening steps allowed

[108] The parties differed in their perceptions of the legislative intent for the *CUA*.

[109] Per 102:

> The purpose of the *Credit Union Act* is to regulate entities that "provide on a co-operative basis financial services wholly or primarily for its members, and its principal purposes are to receive deposits from, and to make loans to, its members." [citing ss 26(1) *CUA*] Review of the legislative debate accompanying the passing of the *Credit Union Act* indicates that the intention of the *Act* is to ensure the stability and viability of the credit union system in Alberta as a whole. [*Alberta Hansard* citation omitted]. The purpose of the *Credit Union Act* is not to provide statutory protections to lessees of equipment. The *Credit Union Act*'s intention of ensuring the stability and viability of the credit union system in Alberta overall is not furthered by rendering the Leases unenforceable. Equipment [lessees] are not the class of persons "whom the statute intended to protect", and should not be permitted to rely on alleged illegality to render the Lease unenforceable. [citing ***Love's Realty*** at para 31]. [102's main brief, p 12, para 52]

[110] Per the borrowers:

> In *Horizon [Resource Management Ltd v Blaze Energy Ltd*, 2011 ABQB 658 (rev'd on other grounds: 2013 ABCA 139], the Court held that **when considering the purpose of the legislation, courts will "take into account the party whom the legislation was intended to protect, and often provide a remedy to those parties in accordance with the public policy aims of the legislation**. Under the public policy approach then, courts must 'determine the policy behind the statute in question, to discover whether it is in accordance with that policy to hold the allegedly offending contract to be illegal and invalid.'" [*Horizon* at para 514]
>
> **Read as a whole, the purpose of the [*CUA*] is to protect the Alberta public, who ultimately backstop the credit union system in Alberta, as well as members of Alberta credit unions**. This is accomplished by way of a complete code which governs how credit unions may incorporate and operate in Alberta. As part of this complete code, the Legislature imposed a prohibition on out-of-province credit unions carrying on <u>any</u> business unless in accordance with narrow exceptions described above.
>
> The Applicant has stated that the purpose of the *Act* is to regulate entities that "provide on a co-operative basis financial services wholly or primarily for its members, and its principal purposes are to receive deposits from, and to make loans, to its members", citing section 26(1) of the *Act*.
>
> With respect, this is not the purpose of the *Act*. The excerpt the Applicant quotes from the *Act* describes the <u>purposes of an Alberta credit union</u>, and not the <u>purposes of the *Act*</u> writ large. The Applicant has omitted the statutory language which precedes the excerpt. In full, section 26(1) reads:

26(1) The purposes of a credit union are, subject to the restrictions set out in this Act and the regulations, to provide on a co-operative basis financial services wholly or primarily for its members, and its principal purposes are to receive deposits from, and to make loans to, its members. (emphasis added)

Moreover, the Applicant has also omitted **that the purposes of a credit union set out in the *Act* exist expressly in the greater context of "restrictions set out in this *Act* and the regulations.**" As such, it would be an error for this Court to adopt the Applicant's statement of the purpose of the *Act*: not only is this section describing the purposes of a credit union and not the *Act* as whole, the Applicant's statement of legislative purpose also ignores the fact that restrictions are set out in the *Act* which the Legislature clearly stated in section 26(1) also inform the purposes of an Alberta credit union.

While section 26(1) can have some bearing on the understanding of the *Act*'s purpose, the manner in which the Applicant portrays this section in its submissions omits relevant context from the section, and the *Act* as a whole.

The [borrowers] submit the following evidence from through the *Act* as a whole, shows that **the purpose of the *Act* is to protect the Alberta public and members of the Alberta credit unions through a high degree of regulation of the credit union industry.**

- [References to s 7, ss 152(1) and ss 152(9) concerning the Credit Union Stabilization Corporation] This demonstrates that the credit union system is Alberta is ultimately backstopped, to some degree, by the Alberta taxpayer.
- Section 21 sets out a list of detailed information that applicants to incorporate a new credit union are required to provide to the responsible Minister.
- Section 22(c) provides the Minister with a broad discretion to refuse applications for new credit unions in the event the Minister "considers that the application is contrary to the public interest." This evinces an overriding concern for the public interest.
- Section 24(1) provides that a credit union may not commence business until the Minister has approved it to do so. Section 24(2) then prescribes a list of requirements that a credit union must meet before the Minister may approve the commencement of the business.
- Section 26(1) [discussed earlier] As "credit union" is a defined term in the *Act*, this limits the scope to Alberta credit unions. By implication, the purposes of credit unions contemplated under the *Act* are to provide services to their own members, as opposed to out-of-province credit unions providing services to parties in Alberta.

- Section 46 stipulates restrictions on the types of business that a credit union may validliy carry on.

In addition to the above, the [borrowers] specifically refer to their submissions with respect to the "saving" provision and the prohibition in section 228 as further evidence that **the Legislature's intent was to exclude out-of-province credit unions from operating in Alberta, subject to very narrow exceptions.**

In sum, the [borrowers] submit that unenforceability is required to affirm legislative intent**. The *Act* would be wholly undermined by allowing a Saskatchewan credit union to carry on business in this province, as [LCU] has done.** If the Court allows substantial enforcement of the Agreements, [this] would send the message that out-of-province credit unions could, for all intents and purposes, ignore the prohibition in the *Act* and that the Alberta courts will lend their aid in enforcing contracts entered into despite the prohibition. There is no evidence on the record that the Crown has, to date, taken steps to enforce the penalties in the *Act* as against [LCU]. Even if there were, enforcement of the Agreements in the face of the penalties would render the penalties a mere license fee. [Borrower's brief, pp. 14-16] [emphasis added]

[111] I conclude that, whichever party's sketch of legislative intent is accepted, barring the security registration and enforcement steps here would not jeopardize or undercut legislative intent in any material way:

1. focusing first on Alberta credit unions, no evidence showed that any were authorized to provide financing leases of the type provided by LCU here: see ss. 13(2) of the *Credit Union (Principal) Regulation*, AR 249/1989 (approval needed before participating in such financing). Or, if authorized, that any could offer such financing i.e. in light of the limits imposed by ss. 13(2) of that *Regulation*. As well, no evidence showed that, in any case (assuming authorization and lending capacity), any Alberta credit union would have been prepared to offer such, or equivalent, financing to the borrowers here, whether on the same terms offered by LCU or different terms. In other words, no evidence showed that LCU providing the financing here deprived any Alberta credit unions of any business opportunities;
2. in any case, no evidence shows that, if LCU had not provided the financing here, the borrowers would necessarily have looked to one or more Alberta credit unions for the financing, with no evidence showing that credit unions have the sole right to provide sale-and-leaseback or equivalent financing i.e. other (non-credit-union) Alberta lenders may have been the source of any alternative financing sought;
3. in fact, with the s. 228 prohibition aimed exclusively at external credit unions (i.e. and not other forms of external lenders), the borrowers may have looked beyond Alberta credit unions and other Alberta lenders altogether, seeking financing from external (non-credit-union) lenders;
4. no evidence showed any particular prejudice or disadvantage to any given Alberta credit union arising from the financings in question;

5. turning to credit union members generally, the evidence was that none of the borrowers here were members of any Alberta credit union. No evidence showed that any of them had intended or even considered becoming credit union members in Alberta i.e. whether as part of seeking financing or otherwise;
6. no evidence showed that LCU or its broker targeted Alberta credit union members for possible financing at any stage;
7. no evidence showed that the financings by LCU in question had any particular impact on Alberta credit union members in general or any individual member;
8. as for the Alberta public at large, with no evidence of any prejudice or disadvantage to any Alberta credit union or credit union members, it is hard to see any prejudice or disadvantage to the Alberta public at large i.e. in the sense emphasized by the borrowers i.e. of the public at large (i.e. or at least Alberta taxpayers) having any kind of ultimate responsibility for or backstopping of Alberta credit unions;
9. per s. 228, the *CUA* expressly recognizes that external credit unions may lend monies to Alberta residents and businesses, and it authorizes security registration and enforcement here, as long as the loan transactions are made in the outside jurisdiction and governed by that jurisdiction's law. If these made-in-Saskatchewan leasing contracts had also been governed by Saskatchewan law, nothing in the *CUA* would have prevented the Saskatchewan credit union from registering security against Alberta assets of such borrowers or enforcing its security here;
10. as discussed earlier, nothing in the *CUA* invalidates lending transactions between external credit unions and Alberta residents, even where the leasing contracts are governed by Alberta law i.e. where they are the result of activities falling beneath the threshold of "carrying on any business in Alberta." The limited consequence, per s. 228, is that security registrations and enforcement are not permitted. Imposing that consequence may send a message to external credit unions i.e. to ensure that their lending to Alberta residents is per transactions both made in their home jurisdictions *and* governed by their law. But those consequences have no rational connection to the state or welfare of Alberta's credit unions or their members or Alberta taxpayers generally;
11. the borrowers here all chose to enter into these financing transactions with LCU, presumably aware (per (at minimum) the lease paperwork) that LCU was a Saskatchewan credit union. No evidence showed that the borrowers somehow thought they were dealing with an Alberta credit union or other form of Alberta lender;
12. the borrowers did not raise any other validity concerns about the leasing contracts, LCU's security registrations, or 102's enforcement efforts. For instance, they did not point to any substantive *CUA* statutory or regulatory provisions (e.g. concerning permitted transactions for credit unions, permitted terms for such transactions, interest rate restrictions, authorized security or otherwise) i.e. that would or could have made these leasing contracts void, voidable, unenforceable,

restricted or otherwise modified if they had been made with an Alberta credit union;

13. the borrowers apparently did not give notice of the within application to any umbrella association of Alberta credit unions, or any subset of them, or any individual credit union, or any association of credit-union members, or subset, or any individual credit union member, or the Government of Alberta, or anyone else who might have applied for intervenor status or otherwise sought to weigh in on perceived prejudice or disadvantage to Alberta credit unions, credit union members, or Alberta taxpayers arising from LCU's lending activities here; and

14. to the extent Alberta wishes to police contraventions of s. 228 by external credit unions, it has options: see ss 221 (general offence provisions), 224 (penalties), and 227 (orders to comply).

[112] All to say: barring security registration and enforcement here would do nothing material to advance Alberta's legislative overall legislative intention(s) for the *CUA*.

C. Invalidating security registrations and enforcement here would produce harsh results

[113] Next is whether denying security registration and enforcement here would produce harsh consequences.

[114] Here I accept 102's calculations of net loan amounts, loan payments to date, and the estimated fair market value of the assets in question, which the borrowers effectively did not challenge.

[115] In a nutshell, in each borrowing scenario, there is a vast gulf, in the hundreds of thousands of dollars, between the amounts net advanced to the borrowers by LCU and the payments made by the borrowers to date, with the same vast gulf between those payments to date and the estimated fair market value of the assets possessed by the borrowers.

[116] Viewed collectively, and taking the figures provided the borrowers themselves:

> On the basis of the information produced by the Applicant [not challenged by the borrowers], the total amount of funds actually disbursed to the [borrowers] under the Agreements is approximately $2,568,150. [borrowers' brief, para 30]
>
> The total value of the payments made by the [borrowers] to [LCU] [with the record showing no payments made to 102] is equal to $968,000, including GST. [para 39]

[117] In other words, an apparent shortfall (not adjusting for the effects of interest) of at least $1,600,150.

[118] And here I accept 102's position on the irrelevance of other lending transactions on which LCU may have been able to achieve full recovery. The focus of the harsh-consequences analysis is on the result, or the would-be result, of the asserted invalidity of the security registrations and enforcement proposed in respect of these specific transactions.

[119] As for any "harsh result" to the borrowers here i.e. stemming from finding the security registrations here to be valid and enforcement of that security to be permitted, the borrowers having to live up to their leasing-contract commitments i.e. make the contracted-for

payments on the loans advanced to them, does not qualify as "harsh result" within the meaning of this test.

[120] Instead, such outcome would prevent a massive windfall from spilling their way.

[121] As for the borrowers' argument that any harshness experienced by LCU or 102 would or could be mitigated by either or both of them claiming capital cost allowance in respect of these assets sold and lease back in these leasing contracts, as explained (per the borrowers) by an expert retained by them, who filed an expert report on October 2, 2023 on this aspect and who was cross-examined by 102's counsel on October 23, 2023, I find the CCA aspect to be a red herring.

[122] Fundamentally, the borrowers did not explain how the possible availability of CCA deductions for 102 make any incremental difference here. Presumably, such deductions would have been available to 102 whether or not the borrowers were performing, or not performing, their obligations under the leasing contracts.

[123] Contrast that to the leasing payments due from the borrowers themselves. Whether or not CCA deductions are available to 102, and even assuming 102 could apply those deductions against other income (i.e. with 102 not restricted to deducting such amounts from income earned from these leases), 102 is still out the over $1.6 million in payments (at minimum) due to it.

[124] And I did not understand the expert's report to stand for the proposition that 102 would be made entirely whole by the making of such (possible) deductions.

[125] In any case, in cross-examination, the accounting expert acknowledged making various assumptions about the underlying facts which, as shown on cross-examination, are not necessarily accurate.

[126] See, for instance, the exchanges and acknowledgments at pages 10 ("not an expert with respect to the operation of credit unions"), 14 ("not an expert in what would be a reasonably commercial manner for a credit union to act in" and "not an expert in what's reasonably commercial for a credit union to do"), 18 ("assumed that the plaintiff/lessor will account for the leases using guidance from accounting standards" and "not aware of whether there were other accounting standards that are possible for an organization to use …"), 19 ("if some other accounting standard applies, you'd have to revisit your opinion – yes"), ("don't, in fact, know if [LCU] used the [assumed] standard, correct? Yes"), 21 ("not qualified to provide any expert evidence on what the fair market value of equipment may or may not be at any particular time" and "assumption … of purchase option price of $10,000 … isn't quite accurate because not each of the lease agreements state that there's a purchase option price of $10,000; correct? Yes"), and 26 ("[no knowledge of certain interest rate for comparison receivables]").

[127] In my view, these acknowledgments, and others made during cross-examination, cast a material shadow on the reliability of the expert's analysis of the potentially available CCA i.e. even assuming it were a material factor here.

[128] All to say: I find that harsh consequences would befall 102 if the security registrations here were invalidated and the proposed enforcement of that security by it were barred.

D. Conclusion on validity of security registrations and proposed enforcement steps

[129] Applying ***Loves Realty***, I find that Alberta did not expressly or implicitly invalidate the security registrations or prevent enforcement here (i.e. despite the s. 228 contraventions), invalidation of such steps would do nothing material to advance the legislative intentions underlying the *CUA*, and harsh and disproportionate consequences would result to 102, and a vast windfall would spill to the borrowers, if the security registrations and enforcement were invalidated and prevented.

[130] When all the dust settles, the only factor causing the s. 228 contravention here was LCU electing Alberta (versus Saskatchewan) law to govern these leasing contracts.

[131] Given that minor blemish, it would be unreasonable, in all the circumstances here, if the outcome were a closed door to security recognition and enforcement and thus a massive windfall for the borrowers.

[132] The net result is that the security registrations are valid and the security can be enforced, despite LCU's contravention of s. 228.

[133] In light of this result, I do not examine 102's alternative argument on unjust enrichment, which it made in the event the security registrations were invalidated and the proposed enforcement barred.

4. Summary judgment

[134] 102 seeks an order against the various borrowers (described in para 1 of 102's application, under "Remedy claimed or sought"):

> (a) declaring that [it] has a valid and enforceable security interest in the Leased Equipment [defined later in the application];
>
> (b) declaring that the [borrowers] are in default of their obligations to the Applicant under their respective Leases [also defined later];
>
> (c) authorizing the Applicant to instruct a civil enforcement agency of its choosing to instruct a bailiff to repossess the Leased Equipment and deliver [it] to a location of the Applicant's choosing;
>
> (d) authorizing the Applicant to dispose of the Leased Equipment pursuant to the process described in section 60 of the *Personal Property Security Act*, RSA 2000, c P-7;
>
> (e) ordering that any proceeds (less costs of realization) of such sale be paid into Court pending further application for distribution; and
>
> (f) granting the Applicant the costs of this action on a solicitor-client basis.

[135] The borrowers assert that summary judgment granting these orders is inappropriate here, for four reasons:

> 1) asserted uncertainty over the proper owner and location of certain pieces of equipment listed in one lease (LCU073 (later LCU087), apparently (per the borrower in question) reflected in 102's own records;

2) asserted uncertainty over the amount of funds initially advanced to the borrowers;

3) asserted uncertainty over the extent to which 102 may benefit from possibly available capital cost allowance deductions; and

4) an issue possibly arising from 102 having not obtained title to the leased equipment from LCU i.e. despite having obtained assignments of the leases, no evidence showed that LCU had, via bills of sale, transferred title to the leased assets to 102.,

[136] Per 102:

1) the principal of the borrower for lease LCU073 (later LCU087) signed a form of estoppel certificate acknowledging receipt of the equipment in question;

2) the record is sufficient to show the amount of LCU's initial advances and, in any case, given the massive shortfall here by anyone's measure, 102 is entitled to proceed with seizures and sales, with any question as to the precise amount owing to 102 to either be agreed as between the parties or determined by a court when deciding on the eventual distribution of the net proceeds realized;

3) the CCA aspect is equally a red herring here, for the reasons raised above, all aside from the unreliability of the CCA evidence here; and

4) 102 obtained sufficient assignments of LCU's security position.

[137] I find as follows on these points:

1) the possible uncertainty over whether the borrower in question received the equipment in question via the sale-and-leaseback transactions will go to the overall quantum of that borrower's debt to 102. For instance, if its contention is that it sold a given piece of equipment to LCU and did not receive it in the lease-back segment of the transaction, that equipment will presumably not be among its assets to be seized by 102. Instead, if proved in proceedings over the distribution of the sale proceeds, that borrower may be entitled to a reduction in the quantum of its overall debt. All to say: this is not a reason to deny 102 any element of its proposed relief;

2) here too I accept 102's position: no evidence points to any prospect that the borrowers are not in fact indebted to 102 for material amounts. 102 is entitled to enforce its security to recover those material amounts, with disputes over the precise quantum to be decided later;

3) the CCA aspect is equally immaterial here; and

4) I find that 102 has or can obtain sufficient rights to proceed with the seizure and sale of the equipment in question i.e. whether under its existing assignment or as rounded out by any bills of sale obtained from LCU i.e. given the "further assurances" clause (s. 6) of the Assignment of Leases dated April 15, 2021. For greater certainty, I will direct that 102

> can proceed with the proposed enforcement steps if the borrowers' counsel acknowledges that 102 has sufficient right and authority to pursue its proposed enforcement i.e. in light of the existing assignment and the scope of the further-assurances clause and, failing such acknowledgment, 102 obtaining and producing to the borrowers' counsel a bill or bills of sale for the equipment in question, from LCU, under the further-assurances provision.

[138] 102 is entitled to an order as requested, with the addition of the "further assurances" aspect in para 137(4) above. And also the addition of clause stating that the order is without prejudice to the borrowers' rights under Part 5 ("Rights and Remedies on Default") of the *Personal Property Security Act*.

IV. Costs

[139] 102 is entitled to costs of the application. The scale (Schedule C, solicitor-client, or otherwise) and quantum of those costs shall be addressed by letter (maximum 2.5 pages, excluding any supporting materials e.g. cases, draft bills of costs, etc), with 102's letter due by November 17 and the borrowers' by Nov 24, 2023.

[140] I thank counsel for their excellent written and oral submissions.

Heard by Webex on the 27th day of October, 2023.
Dated at Edmonton, Alberta this 8th day of November, 2023.

M. J. Lema
J.C.K.B.A.

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