

CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS¹

Produced by the Legal Advisory Panel to the Aviation Working Group

Initial posting: 25 May 2021

Reference: Canada, case 2 [2019]		
Date of Judgment	7 October 2019	
Case:	<i>Third Eye Capital Corporation v Ranch Energy Corporation, 2019 ABQB 780</i> between Third Eye Capital Corporation, as plaintiff, and Ranch Energy Corporation, Opsmobil Inc., 1734163 Alberta Inc., 1859821 Alberta Inc., Opsmobil Group Inc., Opsmobil Construction Inc., Opsmobil Energy Services Inc., Air Dallaire Ltd. and K.L. Capital Corp, as defendants	
Relevant CTC/Protocol; (IR Rules & Procedures)	CTC Article 13 Article 29 Protocol Article XI	IR Rules and Procedures None
Relevant CTC Jurisdictions	Alberta, Canada	
CTC Related Facts, Conclusions and Analysis		
<p>I. <u>Facts</u></p> <ol style="list-style-type: none"> Opsmobil Group Inc. (the Respondent) was the owner of 2 helicopters, C-GEMU (Helicopter 1) and C-FXHP (Helicopter 2) and, together with Helicopter 1, the Helicopters and each, a Helicopter). On 1 April 2014, the Helicopters were financed by ECN Aviation Inc. (the Secured Lender). The Secured Lender registered its international interest in the Helicopters on the IR. 		

¹ Unless otherwise indicated, Article references in Arabic numerals are to those in the Convention on International Interests in Mobile Equipment (**Convention**), and Article references in Roman numerals are to those in the Protocol on Matters Specific to Aircraft Objects (**Protocol**). The Convention, as modified by the Protocol, is referred to as the **CTC**. Paragraph number references in parentheses below are to paragraph numbers in the Court's order.

3. On 23 December, 2015, Third Eye Capital Corporation (the **Applicant**), provided secured financing to the Respondent in relation to a third helicopter, C-GEMK (the **C-GEMK Helicopter**) including a power train installed on the C-GEMK Helicopter (the **Power Train**). The Respondent had registered its international interest in the C-GEMK Helicopter on the IR.
4. In January 2016, the Power Train was removed from the C-GEMK Helicopter and installed on Helicopter 2.
5. Between January 2016 and March 2018, the Secured Lender had inspected the Helicopters and had identified that parts had been removed, were repaired and replaced – including parts from the C-GEMK Helicopter.
6. On 1 April 2018, the Respondent defaulted on a loan repayment. On 11 May, the Secured Lender seized the Helicopters by way of enforcement of its security and made it subject to a bailment undertaking. It purported to include the component parts of Helicopter 2, including the Power Train.
7. On 4 July 2018, the Respondent obtained a stay order under the *Companies' Creditors Arrangement Act*, RSC 1985 (Canadian insolvency proceeding triggering Alternative A)
8. On 19 July, an order appointing a receiver was granted and such receiver requested that the Secured Lender take no further action.
9. On 19 November 2018, the Secured Lender sought an order of the court that the insolvency proceedings and stay order did not apply to it pleading its rights and remedies under the Cape Town Convention – including Alternative A. It claimed its rights to repossess arose 60days after the stay order granted on 14 July. It also claimed it had a priority interest in the Power Train over the Applicant's interest.
10. The Applicant claimed priority in respect of its interest in the Power Train to that of the Secured Lender.
11. On 27 February 2019, the court granted immediate possession of Helicopter 1 to the Secured Lender
12. On 7 October 2019, the court granted the Secured Lender consent to repossess Helicopter 2 other than the Power Train.
13. The court had to consider the following issues:
 - a. did the Cape Town Convention apply to the Power Train?
 - b. did the Applicant maintain a first priority claim to the Power Train?

II. **Conclusions**

12. The Court held that the Applicant maintained a first-priority security interest in the Power Train for the following reasons:
13. Firstly, the Court concluded that the Secured Lender's security interest registered on April 1, 2014 would take priority over the Applicant's later registered interest unless either the earlier registration did not include later-installed components, or an exception exists under the Cape Town Convention. (para 22)

14. Secondly, the Court examined Article 29(7)(a) and its interplay with the *Personal Property Security Act (Alberta)* (the **PPSA**) sections 38(2) and (3), noting that the Official Commentary states that “where applicable law so applies, items that have been financed and secured separately remain subject to that security interest and do not pass by accession to the owner of the, in this case, helicopter to which they become later installed”. “Applicable law” in this case is the PPSA and the Court notes that the PPSA provisions do so provide. (paras 23-27)
15. The Court proceeds to examine the rule under PPSA section 38(2) stating that a security interest in goods that attaches before the goods are installed or affixed to other goods (referred to as an “accession”) has priority with respect to the goods over the claim of a person with an interest in the whole. Since the Power Train remains separately identifiable and its removal would not destroy the identity of Helicopter 2 or the Power Train, the issue is one of accession. The question, therefore, is whether the Secured Lender falls within the exception found in PPSA section 38(3) that it acquired the goods “without knowledge” of the prior security interest. (paras 28-29)
16. Finally, the Court held that, after reviewing the facts, the Secured Lender did not meet its burden of establishing that it did not have constructive notice of the Applicant’s interest in the Power Train at the time it seized Helicopter 2 and that, therefore, the Power Train is excluded from its registered interest pursuant to Article 29(7)(a) of the Convention. (para 50)

III. Analysis

[Application of the Cape Town Convention]

17. The Court used the provisions of the Cape Town Convention, the Official Commentary, and the PPSA to reach its decision. Specifically, the Court applied Article 29 of the Cape Town Convention and Section 38 of the PPSA to determine priority of interest over the Power Train.

[Article 29]

18. The Court reaches its decision by analysing Article 29, and the accompanying guidance provided by the Official Commentary, to determine that as regards an “item” rather than an “object” under the Convention, Article 29(7)(a) refers to applicable law, which in this case is the local PPSA. The Court takes guidance from Professor Roy Goode’s note that Article 29(7)(a) is intended to ensure that rights in an item are not lost by installation of the item on an object if, under applicable law, those rights continue to exist after the installation. (para 26)

19. **[Alternative A]**

Though the Receiver ignored Alternative A timing for return of the Helicopters and did not respond to the Secured Lender’s repeated communications, the Secured Lender did not apply for a court order until November 2018 and did not argue the matter before the Court until December 2018. Meanwhile, the return of the Helicopters under Alternative A may have been impeded by the fact that (i) the Canada Revenue Agency asserted a deemed trust and (ii) another creditor asserted a garage keeper’s (hangar keeper’s) lien, over the Respondent’s property, including the Helicopters. The Court found that the Secured Lender was entitled to have repossessed the Helicopters when it originally tried (May 2018). Although the Court did not specifically cite the CTC, it held that the Secured Lender’s interest in both Helicopters, save for the Power Train on Helicopter 2, was not subject to the stay order.

IV. Annotations Reflecting Subsequent Judicial and Legislative Developments

20. The Secured Lender has appealed the 7 October 2019 decision. The appeal is based solely on the Secured Lender's claim that it has a first priority interest in the Power Train installed on Helicopter 2 as well as any parts that have been removed from Helicopter 2, whether or not such parts have subsequently been installed on another aircraft, and the Secured Lender's remedies under the Convention with respect to the same.