

sion throughout the various levels of the judiciary may take place soon, and we will never have to plow through a Trend type of judgment.

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## SEIZURE—CONDITIONAL SALES—CONTRACTS—LIEN NOTES

### I. Preliminary

There would appear to be some disparity in practice in various jurisdictions in Alberta in process involving seizures under conditional sales contracts and lien notes. As a result a re-examination of procedures under the Seizures Act<sup>1</sup> is desirable.

The conditional vendor stands in a position materially different from that of most other creditors as a result of the provisions of Section 19 of the Conditional Sales Act.<sup>2</sup> A conditional vendor gets only one try at recovery of his debt, whereas an execution creditor may continue execution and debt recovery process until his debt is fully paid. Similarly, a chattel mortgagee<sup>3</sup> may claim for deficiencies even after completing a seizure<sup>4</sup>; whereas a conditional vendor may not. As a result, solicitors acting for conditional vendors should be fully conscious of methods allowed under the Seizures Act to maximize returns from distress sales.<sup>5</sup> The purpose of this article is to delineate and comment upon those methods.

The Seizures Act provides three ways in which sales can be conducted by the creditor personally.<sup>6</sup> Generally, sales by public auction or tender, when made through the Sheriff's Office, do not produce the best medium for maximizing returns. Furthermore, the conditional vendor who in the normal course of his business deals in the type of chattels seized can generally make far more advantageous sales privately than can be made by Sheriff's "fire sale". So long as the debtor is protected from fraud or dishonesty (and the Seizures Act provides adequately for such protection), achieving private sales in the case of conditional sales contracts will normally give the creditor the best possible relief without detriment or loss to the debtor.

The procedure and remedies under the Act fall into two categories. One includes cases where no notice of objection is filed, and the other cases where there is objection.

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<sup>1</sup> R.S.A. 1955, c. 387.

<sup>2</sup> R.S.A. 1955, c. 54, as amended by c. 15, 1965.

<sup>3</sup> Except as to a chattel mortgagee governed by Section 19 of The Conditional Sales Contract Act.

<sup>4</sup> *Alec v. Higgins* (1962) 41 W.W.R. 321; 33 D.L.R. (2d) 63, *aff'ing* 35 W.W.R. 378 (B.C.C.A.).

<sup>5</sup> The need for such consideration bears not only on the remedies sought and granted, but upon the amount of redemption opportunity allowed to conditional sales contract debtors. For example, allowing such debtors long adjournments on applications for orders for removal and sale without providing for adequate assurance of payment of at least the probable depreciation of the chattels during the adjournment period can result in direct and irrecoverable loss to the creditor. It is suggested that solicitors seek, and the courts require, as a condition of any such adjournment, that there be immediate or prompt payment on account of an amount sufficient to cover depreciation during the adjournment period.

<sup>6</sup> Sale under Section 30(1) (b), private sale by court leave under Section 29(1) and (5) and sale after delivery up to the creditor under Section 29(4) (b).

## II. Procedures Where No Notice of Objection Filed

### A. Sale under Section 30(1)(b)

As a private sale can (if the safeguards of the Act are observed) generally produce the best price and thus benefit both the creditor and the debtor,<sup>7</sup> it is suggested that the remedy first sought be that of a private sale under Section 30(1)(b). That section provides for sale by someone other than the sheriff, either by public auction, tender or private sale, upon 5 days' notice in writing being given to the debtor:

- 30 (1) Where no notice of objection is received by the sheriff within 14 days after the seizure of goods, . . .  
 (b) if he is entitled to do so, the creditor may sell the goods seized or cause the same to be sold by some person other than the sheriff, either by public auction, sale by tender or private sale, upon giving to the debtor five days' notice in writing of his intention to exercise his rights to do so,

This remedy will be available only if (1) no notice of objection is filed and (2) the creditor is entitled to sell. The latter requirement is met by the terms of most conditional sales contracts and lien notes in provisions which give the creditor the express right to repossess or remove and sell in the event of default. That the conditional vendor who has a contractual right to sell can exercise such right without the approval of the sheriff or the court is made clear by Patterson, D.C.J., in *Re Seizures Act, Re Delta Acceptance Corporation Limited*.<sup>8</sup>

Some problems arise in the interpretation of Section 30(1)(b). Firstly, it is not entirely clear from the Act whether or not the 5 days' notice shall be a notice of a specific sale. If a private sale is intended, must the creditor first arrange the actual sale and then serve the notice on the debtor? It is submitted not, although the point is open to dispute. The subsection states firstly the right of the creditor:—to sell by someone other than the Sheriff (either by auction, tender or private sale) and then goes on to require notice only of "his intention to exercise his rights to do so". It is submitted that it should suffice to state in the notice that the rights under the contract and under Section 30 of the Act will be exercised, describing the goods, the particulars of seizure, and whether sale will be by auction, tender or private sale. It may be desirable also to state the agency that will conduct the sale, but more should not have to be stated.

The above view is supported by the fact that Section 30(1)(c)<sup>9</sup> provides for the sheriff reserving the requirement of approval of a sale, in special circumstances, which reservation would have little meaning or value if the actual sale had to be arranged before the 5-day notice is issued.

In cases dealing with Conditional Sales Contracts Acts of the early 1900's, the Courts required that notice of an actual or specific sale be

<sup>7</sup> The latter is benefitted if there is some equity realized on the sale.

<sup>8</sup> (1961) 35 W.W.R. 93.

<sup>9</sup> "30. (1) Where no notice of objection is received by the sheriff within 14 days after the seizure of goods, . . . (c) upon the application in writing to the sheriff by the debtor stating that in his opinion the value of the goods seized is greater than the amount of the creditor's claim and costs, the sheriff, if he is satisfied that it is proper in the circumstances to do so, may direct that the goods seized be sold only subject to his approval and in that event no sale of the goods shall be made by the creditor until the approval of the sheriff has been obtained and the proceeds of the sale shall be paid to the sheriff to be dealt with by him according to law."

given.<sup>10</sup> However, the provision in our Seizures Act is significantly different from the legislation considered in those cases which dealt with the creditor's right, after effecting a private sale, to sue the debtor for deficiencies. In order to retain such right the creditor had to give notice in writing to the debtor "of the intended sale".<sup>11</sup> It is submitted that whereas the words "the intended sale" may refer to an individual or particular sale; the words in Section 30(1)(b) of the Seizures Act, which refer to notice of "his intention to exercise his rights" to effect a sale by someone other than the sheriff, require only a general notice of intention.

This point was dealt with by Sissons, C.J.D.C. (as he then was) in the case of *Re Seizures Act: re GMAC*,<sup>12</sup> who concluded in *obiter dicta* that the notice of intention to sell must be a notice of a specific sale.<sup>13</sup> The case involved a seizure under a conditional sales contract where an Order for removal and sale was granted after notice of objection was filed. The order authorized the sheriff to deliver the chattel up to GMAC, the creditor, with leave to GMAC to sell. As the court rightly held, Section 30(1)(b) should not have applied or been available. However, the court went on to state that a notice under Section 30(1)(b) must particularize the intended sale, relying upon *North-West Thresher Co. v. Bates* to support such ruling.

In *Gray-Campbell Co. Ltd. v. Morrison*,<sup>14</sup> Stuart J.A., referred to the *North-West Thresher Co. v. Bates* case as follows:

It is also unnecessary to resolve the doubt as to the meaning of the phrase 'the intended sale' as used in Section 3[11?] of The Conditional Sales Act, R.S.A. 1922, C. 150, requiring 5 days' notice to be given—a doubt referred to by Harvey, J. in *North-West Thresher Co. v. Bates*, 13 W.L.R. 657. Whether that phrase means merely 'the intention to sell' or means that the particulars of the proposed sale must be given is here immaterial because it is clear that in any case the statute was not complied with so far as the second, i.e., the private, sale is concerned.

The wording of Section 30(1)(b) of The Seizures Act is clearly closer to the first alternative mentioned by Stuart J.A., than to the second; and it is submitted that the first alternative interpretation should have been given to the present legislation by His Honour Chief Judge Sissons.

There are two additional conclusions reached by His Honour in the *GMAC* case that merit examination in relation to the interpretation of Section 30(1)(b). He stated at page 591 that the sheriff should not deliver up possession of the goods until after he has received the statutory declaration of the creditor as to the terms of the sale made. Whether or not His Honour Chief Judge Sissons was right on this point under the wording of the Act as it then stood<sup>15</sup> the situation is

<sup>10</sup> *Thompson v. Sholinder* [1928] 1 W.W.R. 386; *North-West Thresher Co. v. Bates* (1910) 13 W.L.R. 657. See also *Motor Car Loan Co. v. Bonser* [1928] 1 W.W.R. 801, (B.C.C.A.), and *I.A.C. v. Code* [1931] 1 D.L.R. 980 (Ont. C.A.).

<sup>11</sup> See Section 7 of the Conditional Sales Ordinance, C.O. 1898 Ch. 44 referred to in the *North West Thresher Co. case, supra*, which provided that "the goods or chattels shall not be sold without 5 days' notice of the intended sale being first given to the buyer or bailee or his successor in interest".

<sup>12</sup> (1954) 12 W.W.R. (N.S.) 585.

<sup>13</sup> *Id.* at 592.

<sup>14</sup> [1924] 2 W.W.R. 112 at 113 to 114.

<sup>15</sup> At the time of the judgment the legislation, set out below, did not contain an equivalent provision to the present section 30 (1a):

"30. In case no notice of objection is received by the sheriff within fourteen days after the seizure of goods,—

(a) the sheriff may upon the instruction of the creditor proceed to sell the goods seized in the manner prescribed by this Act; or

(b) if he is entitled so to do, the creditor may sell the goods seized or cause the same to be sold by

different under the present legislation. Section 30 (1a) of the present Act clearly envisages the delivery of the goods into the possession of the creditor for the purposes of affecting a sale, and hence before any statutory declaration is filed under Section 30(2).

His Honour also stated<sup>16</sup> that "the sheriff is also entitled to the same notice of the sale [as the debtor] as he has possession of the goods and is entitled to any surplus from the sale." This statement follows the statement that notice of a particular sale must be given to the debtor. If notice of a particular sale is not required, as the writer respectfully submits to be correct, then giving notice to the sheriff as well as the debtor should be unnecessary. The sheriff obtains sufficient notice of an intention to exercise the rights given under Section 30 when the creditor files with the sheriff proof of service of the notice on the debtor.<sup>17</sup> Nowhere in the present Section 30(1)(b) can there be found any express requirement of service of notice upon the sheriff and it is submitted that no useful function can be served by implying such a requirement.

The writer respectfully submits that the proper general view of Section 30 is to be found in the words of Patterson D.C.J. in *Re Seizures; Re Delta Acceptance Corp. Ltd.*<sup>18</sup> Patterson D.C.J. says the following:

The sheriff, who was the agent of the creditor for the purposes of the seizure, in effect takes the position that he will constitute the creditor his agent for the purposes of sale. This would be the situation were the goods seized under a writ of execution as in such a case the right of sale rests with the sheriff or an agent appointed by him. The circumstances, however, are different in a case of a conditional sales contract or chattel mortgage where the instrument itself reserves to the creditor the right of resale. In this case the right of resale is clear at common law and is also a matter of contract between the parties. Section 18 of The Seizures Act provides that the distress can only be carried out by the sheriff or his representatives and accordingly the creditor's right at common law and under the contract to repossess the goods himself has been removed by statute but nowhere in the Act is the right of resale removed provided no notice of objection is filed by the debtor and provided the creditor, by his contract, is entitled to resell.

A further problem under Section 30(1)(b) arises from the fact that some sheriffs' offices in Alberta are proceeding under Section 30 even where a notice of objection has been filed. For example, in a recent seizure in Northern Alberta, after a notice of objection was filed, an order for sale was obtained providing simply for sale "according to law" by the sheriff. The sheriff in that case wrote to the creditor and advised the creditor that he could pick up the seized goods and pro-

some person other than the sheriff, either by public auction or private sale, upon giving to the debtor five days' notice in writing of his intention to exercise his right so to do, and in such case shall within thirty days after the making of any sale file with the sheriff of the judicial district in which the seizure was made a statutory declaration setting out the particulars of the sale, the amount realized thereby, and the necessary and proper disbursements and fees in connection therewith which disbursements and fees shall not exceed those which a sheriff would have been entitled to charge if the sale had been effected by the sheriff; and in case the proceeds of the sale exceed the amount for which the seizure was made together with the disbursements, or in case the said amount with disbursements was realized by the sale of a part only of the goods seized, the creditor shall immediately thereafter deliver the excess and any goods unsold to the sheriff to be delivered by him to the persons lawfully entitled thereto.

- (c) upon the application in writing to the sheriff by the debtor stating that in his opinion the value of the goods seized is greater than the amount of the creditor's claim and costs, the sheriff being satisfied that it is proper in the circumstances so to do, may direct that the goods seized shall be sold only subject to his approval and in that event no sale of the goods shall be made by the creditor until the approval of the sheriff has been obtained and the proceeds of the said sale shall be paid to the sheriff to be dealt with him according to law."

<sup>16</sup> *Re Seizures Act: Re G.M.A.C.*, *supra*, n. 12 at 592.

<sup>17</sup> Presumably the sheriff is entitled to proof of service of the notice upon the debtor before delivering up the chattels to the creditor.

<sup>18</sup> (1961) 35 W.W.R. 93 at 94.

ceed with private sale under the combined authority of the order for sale and Section 30. The writer respectfully submits that such sheriff's view of the matter was wrong, and this opinion is supported by a passage from the judgment, of Patterson D.C.J. in *Re Seizure Act; Re Delta Acceptance Corporation Limited*, where he says:<sup>19</sup>

The debtor, by filing a notice of objection, *could have ensured that the sale would be by court order*. He has elected not to do so and Section 30 applies and permits the creditor to effect the sale hereunder.

It is submitted that if the court, after notice of objection, wishes to order or allow private sale, it will and must do so in express words.<sup>20</sup> Section 30 is prefaced by the words "where no notice of objection is received . . .", and unless that condition exists, Section 30 should have no application.

There are occasions when some sheriffs will, after entry of an order for sale properly permit the creditor to take possession of and arrange private sale of the goods, but they are occasions on which the order for sale expressly states that sale may be made by the sheriff "*or the applicant with the consent of the sheriff.*"<sup>21</sup> This is not a matter of invoking Section 30 of the Act; rather, it is the exercise of express directions for sale given in the order (which directions the court is entitled to give under Section 29, Subsections (4)(a) and (5) of the Act).

Turning to the procedure subsequent to sale, as set out in Section 30 of the Act, subsection (2) requires the creditor (a) to file with the sheriff, within 30 days after the sale, a statutory declaration giving particulars of the sale, and (b) to account for any surplus realized on the sale.<sup>22</sup> The creditor or his solicitor should be careful to follow the requirements of the subsection strictly and to include in the statutory declaration all the particulars set out in the section, as failure to do so may render the sale invalid.

#### B. Sale by Sheriff Where Section 30(1)(b) Remedy Not Pursued

If for any reason sale cannot be made privately by the creditor under Section 30, then if no notice of objection is filed by the debtor the creditor must be satisfied with sale by public auction or tender under Sections 30(1)(a) and 14(1) of the Act.<sup>23</sup> Unfortunately, where in such case a sale is made by the sheriff rather than the creditor, it would appear that the creditor cannot bid or tender upon the sale. Section 29(5) provides for the court to allow bidding in, but it deals with the situation where a notice of objection is filed. The cases make it clear that leave is required to bid in, at least where sale is held pursuant

<sup>19</sup> *Id.* (Italics added).

<sup>20</sup> *Gray-Campbell case, supra*, n. 15. This view is also supported in the *G.M.A.C. case, supra*, n. 13.

<sup>21</sup> Such orders have been acted upon by the sheriff's office in Edmonton in the manner suggested herein.

<sup>22</sup> 30. (2) Where the creditor makes or effects the sale under clause (b) of subsection (1), the creditor

- (a) shall within 30 days after the sale file with the sheriff of the judicial district in which the seizure was made a statutory declaration setting out
  - (i) the particulars of the sale,
  - (ii) the amount realized by the sale, and
  - (iii) the necessary and proper disbursements and fees in connection with the sale, which shall not exceed those that a sheriff would have been entitled to charge if the sale had been effected by the sheriff,
- and
- (b) shall immediately after the sale, where the proceeds of the sale exceed the amount for which the seizure was made together with the disbursements, or where such amount with disbursements is realized by the sale of a part only of the goods seized, deliver the excess and any goods unsold to the sheriff to be delivered by him to the persons lawfully entitled thereto.

<sup>23</sup> Except for the remedy available under Section 33 if such sale is abortive.

to Court Order<sup>24</sup> and the writer can suggest no reason why the rule should not apply where there is no order for sale.

This can create problems for the creditor since there is no power in the court to grant an order for sale (nor presumably for leave to bid in) if no notice of objection is filed.<sup>25</sup>

In order to avoid a "fire sale", if a private sale cannot be arranged under Section 30, the creditor, when instructing sale, might try asking the sheriff to set an upset price equal to the creditor's reasonable estimate of the value of the goods. Under Section 32 of the Act the Sheriff has power to adjourn sales if bids or tenders are inadequate. However, adjourning the sale may achieve no more than adding to the sale costs and the sheriff may be reluctant to set anything but conservative reserves. Yet, this appears to be the only acceptable means open to the creditor to control the terms of sale; and it is hoped that the various sheriffs' offices would be persuaded by reasonable requests of the creditor.

### III. Procedure Where Notice of Objection Filed

Where a notice of objection is filed, of course, an application for removal or sale must be made to the Court. There are basically two courses open under The Seizures Act in respect to conditional sales contracts.

The first, and by far the preferable, is the course or remedy set out in Section 29(4)(b). That subsection permits the court to direct that the goods seized be delivered up to the creditor in full satisfaction of the contract debt (or a part if the judge deems it proper):

29 (4) Upon the hearing of the application the evidence may be taken either viva voce or by affidavit as the judge may direct, and the judge . . .

(b) may in the order provide, with the consent of the creditor, where the goods seized are subject to a conditional sale agreement or are the goods to recover the price of which the seizure is made, that the goods be delivered up to the creditor in satisfaction of all sums payable under the seizure or such part thereof as the judge deems proper.

If the creditor can obtain outright possession of the goods, then he can arrange to place the chattels in the hands of a dealer in used equipment and have the time and opportunity to seek out an advantageous sale on the normal used chattels market.

Care should be taken in seeking and obtaining this remedy. It should not be granted where there appears to be any equity at all in the chattels seized.

Where, however, there is clearly no equity (and the creditor's solicitor should be sure that evidence of this may be found in his affidavit materials) then this particular remedy should be pursued. It does, after all, no more than permit the creditor to maximize the return on his security without detriment to the debtor.

The second course open to the creditor where a notice of objection has been filed is, of course, to apply for an order for removal and sale according to law. Such an order may take one of three basic forms.

First, it may take the form of a simple order for sale. This requires

<sup>24</sup> See *Gray-Campbell Co. Ltd. v. Morrison*, *supra*, n. 15 at 114 (Stuart, J.A.).

<sup>25</sup> *R.S. Reid and Company v. Lindy's Limited* (1958) 24 W.W.R. 620; 12 D.L.R. (2d) 526.

a sale by auction or tender without leave to bid in and leaves the creditor without any useful control over the sale made.

The second form is that referred to under Section II A of this article, which provides that the goods may be sold by the sheriff or the applicant with the consent of the sheriff. Such an order, if granted as to a conditional sales contract containing a right to repossess, will permit release of the chattels to the creditor for the purpose of private sale, subject, of course, to the consent of the sheriff.

A third alternative would involve use of the usual form of order for sale according to law, together with an order granting leave to the creditor to bid or tender upon any sale. Such leave is permitted by Section 29(5) of the Act, and will allow the creditor to make a bid at a price that will protect the creditor's interests:<sup>26</sup>

29 (5) Where the judge orders a sale, he may give directions as to the manner, time and place of the sale and such other directions as to him seem proper and convenient, and may give leave to any party to bid or submit a tender, as the case may be, at the sale.

The writer submits that the creditor's solicitor should apply for an order combining (a) an order for private sale with the consent of the sheriff with (b) an order that, in the event the sheriff conducts the sale, rather than the applicant, then the applicant shall have leave to bid in. By such an order, the creditor will be able to bid in if the sheriff for any reason refuses to consent to any private sale proposed by the creditor, and thus have some degree of control over the sale in any eventuality.

The notice of motion used in each case, should, of course, particularize the relief sought. It is suggested that solicitors include in any notice of motion issued under Section 29, a claim for delivery up under Section 29(4)(b) and an alternative claim for an order for sale, with leave to bid in and leave to sell with the sheriff's consent. By such means his notice of motion will suffice to cover both a situation in which the debtor claims no equity and one in which equity is or becomes apparent.

#### IV. Summary

In summary then, there are seven remedies available to the distraining conditional vendor. They include the following:

- (1) Where no notice of objection filed:
  - (a) notice of sale by someone other than the sheriff pursuant to Section 39(1)(b), or
  - (b) sale by sheriff's public auction or tender, subject (or not subject) to an upset price.
- (2) Where notice of objection is filed, an order for:
  - (a) delivery up to the applicant in full satisfaction of the debt, or
  - (b) removal and sale
    - (i) in simple form

<sup>26</sup> See also *Soice v. Hoffner* [1927] 2 W.W.R. 1, 2 D.L.R. 1148, when Walsh, J. with considerable doubt held that the court can grant leave to bid in; and *Steel & Machinery Company v. Paulerrou* [1927] 3 W.W.R. 145, where Simmons, C.J.T.D. affirmed such power as subsequently reaffirmed by Walsh, J., in [1928] 1 W.W.R. 976; see, *contra*, *McCormick v. Haworth* [1929] 1 W.W.R. 129; 2 D.L.R. 835, where the Saskatchewan Court of Appeal held that a chattel mortgagee cannot bid in upon a sale under distress. In view of the provisions of Section 29(5) of the Alberta Seizures Act, this Saskatchewan decision should not apply. In any event, the McCormick case does not appear to deal with a situation in which leave to bid in was granted by court order. Further, the rule may be different for chattel mortgages than it is for conditional sales contracts, although a rationale for such a distinction would be difficult to find.

- (ii) with leave to the applicant to sell with the sheriff's consent,
- (iii) with leave to the applicant to bid in, or
- (iv) with both remedies (ii) and (iii) available.

It is hoped that all of these remedies will be kept in mind by solicitors, and that the special value of private sales will be recognized with greater frequency in relation to conditional sales contract seizures.

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## CONSTITUTIONAL LAW—B.N.A. ACT—DISTRIBUTION OF POWERS —THE ASPECT TEST AND THE EMERGENCY DOCTRINE

And God said unto Noah: "Build an Ark of two compartments and into compartment No. 91 place all the large animals and into compartment No. 92 place all the small animals." And Noah accordingly built the ark with its two compartments and placed therein the animals as directed. And God saw what Noah had done and said: "It is good".

But, Behold, some of the small animals in compartment 92 by the process of natural growth and development became big animals whereupon Noah, mindful of the scheme of allocation in the original instructions, transferred these animals to compartment 91. But Lo, divers of the small animals in compartment 92 became afflicted with the malady elephantitis and grew to an enormous size, whereupon Noah, mindful as aforesaid, transferred these animals to compartment 91. But Lo again, these afflicted animals having recovered from their malady were once more reduced to their normal size whereupon Noah, mindful as aforesaid, retransferred these animals to compartment 92. And God was heard to say: "It is good".

And Lord Watson in turn, influenced by the biblical text, declared: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada".

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## THE BUILDERS' LIEN ACT—NATURE OF THE LIEN—EFFECT OF THE ACT—PROBLEMS ARISING FROM THE ACT

### I. HISTORY OF THE "BUILDERS'" OR "MECHANICS'" LIEN

Suppliers of services and materials for the improvement of real property have a lien on that property. The law relating to this lien has