January 20th, 2010

The Animal Keepers Act: Perennial Problems of Priority

By Jonnette Watson Hamilton

Cases Considered:

Rachar v. Litvak, 2009 ABQB 441

This is the first case to consider the *Animal Keepers Act*, S.A. 2005, c. A-40.5, a piece of legislation which came into force in November of 2005. It replaced a 101-year-old statute, the *Livery Stable Keepers Act*, R.S.A. 2000, C.L-14, which was originally enacted in 1884 as an ordinance of the North-West Territories and applied to the area that would become Alberta. According to the Alberta Ministry of Agriculture and Rural Development, the *Animal Keepers Act* "provides a person who boards or cares for an animal a means of collecting outstanding bills owed by the owner of such animals with priority over all other liens, bills of sales, etc. without the use of costly, complicated legal processes." The new Act seems to live up to this description. While extensively used by the cattle industry and other keepers of livestock, neither this Act nor its predecessor have been the subject of much judicial consideration. Those rare disputes that have been taken to court tend to involve issues of priority among creditors, as does this case.
Harlan Rachar owned cattle (and it is only cattle, horses, swine, sheep, bison, deer, elk, goats, mules and asses that are within the scope of the *Animal Keepers Act* under section 1(a)). Foothills Livestock Co-op held security on Rachar's cattle. Rachar placed these cattle on land that was provided, but not owned, by Donald Litvak from 2004 to 2007. During the summers the cattle were put out to pasture on the land provided by 1060495 Alberta Ltd., a company owned and managed by Litvik. During the winters, Rachar would feed and water his cattle regularly on the land provided by Litvak and he used Litvak's food, water and equipment to do so. If the cattle needed medical attention it would be Rachar's responsibility to provide it.

Litvak was not paid and therefore claimed a lien on Rachar's cattle under the *Livery Stable Keepers Act* for the period up to November 1, 2005, and another lien under its successor, the *Animal Keepers Act* for the period after that date. Litvak claimed in his own name only and not as agent for 1960495 Alberta Ltd. Foothills Livestock Co-op and Rachar contested Litvak's claims which, if successful, would have priority over the Co-op's security.

The first question addressed by Master John T. Prowse was whether Litvik was limited to a lien under the *Livery Stable Keepers Act* because the transitional provision in the *Animal Keepers Act* provided at section 13(2): "A lien that is created under the former Act continues as if the former Act were not repealed, and the former Act continues to apply in respect of those liens." Prowse

held (at para. 5) that Litvak's relationship to Rachar's cattle before November 2005 might give him a lien under the *Livery Stable Keepers Act* and his relationship in November 2005 and thereafter might give him a lien under the *Animal Keepers Act*. In other words, Litvak could, theoretically, hold concurrent liens under both acts.

However, the Master found that Litvak did not have a lien under the *Livery Stable Keepers Act* because he did not post a notice as required by section 7 of that Act until March of 2006. (Section 7 of the old Act provided that "Every livery stable keeper . . . shall hang or post a copy of this Act in a conspicuous place in every stable owned or operated by the keeper and in case of non-compliance with this section the keeper is not entitled to the benefit of this Act.") Prowse held that the notice had to be posted while Litvak was stabling, boarding or caring for the animals, not afterwards. Prowse gave no reason for so holding and the issue had been a live one when the Alberta Law Reform Institute issued its *Report on Liens*, Report No. 13 (September 1992) (at page 27):

> It is unclear if the time for determining compliance with this notice provision is the time of execution of the contract, the time when the lien is asserted against the debtor or some other point in time.

Reasons could have been advanced for requiring that the notice be posted at the time of execution of the contract based on the purpose of the statutes' requirement for notice. It seems it would be more difficult to justify compliance while the animals were in the animal keepers' possession, but in this case it makes no difference to the result.

In any event, because the notice provision in the *Livery Stable Keepers Act* was not complied with, only the *Animal Keepers Act* was relevant. The most interesting issue raised by the Co-op was whether Litvak was an "animal keeper." Normally, an animal keeper brings another person's cattle onto his or her land and also feeds and cares for those cattle. In this case Litvak brought the cattle onto land owned by his company and made feed, water and equipment available on that land. It was Rachar, however, who actually fed and watered the cattle.

What is an "animal keeper," formerly known as a livery stable keeper or an agister (an officer of the king's forest, who had the care of cattle and collected the money for that care)? Under the *Animal Keepers Act*, an "animal keeper" is defined in section 1(b) as "a person who receives payment for boarding, feeding or caring for an animal that is owned by another person" (emphasis added). Litvak argued that it was only necessary for a lien claimant to either board, or feed, or care for an animal, relying on the conjunction "or" in section 1(b). Rachar and the Co-op argued that the spirit and intent of the Act required a person to be a "keeper" of an animal in order to have a lien, and in the unique factual circumstances of this case, it was Rachar, not Litvak, who was caring for and hence "keeping" the cattle in question. The Master agreed with neither of these arguments.

Instead, he held (at para. 17) that custody and possession of the cattle were the key requirements under the *Animal Keepers Act*, just as they had always been for all common law and statutory

possessory liens. While the definition of an "animal keeper" is "a person who receives payment for boarding, feeding or caring for an animal that is owned by another person" and there is no requirement in that definition that the person boarding, feeding or caring for an animal have custody and possession of it, Prowse characterized the animal keeper's lien as a statutorily authorized possessory lien. He found support for this in section 2(2) of the Act which states:

> In addition to all other remedies provided by law, an animal keeper may detain in the animal keeper's custody and possession the animal and any gear in relation to the animal and may sell the animal or gear by public auction or in any other commercially reasonable manner. (emphasis added)

The origins of the *Animal Keepers Act* are evident in this remedy provision and Prowse is entirely correct that custody and possession is the main requirement of any common law and statutory possessory lien, which is what livery stable keeper liens have always been. Nevertheless, section 2(2) seems a slender thread on which to have to make possession the key requirement of the modern *Animal Keepers Act*. It seems likely that, in its eagerness to modernize the *Livery Stable Keepers Act* and make it more straightforward, the legislature simplified the definition of who was entitled to claim the lien a little too much. According to the Minister who introduced the new Act, the changes were intended to mean that animal keepers could implement the Act themselves "at minimal cost and with little involvement from the legal system or government" (*Alberta Hansard* 2005, Issue 17 at 541 (26th Leg./1st Sess. 2005)).

There was little evidence of Litvak's possession of the cattle but it was an uncontradicted fact that Rachar could not remove his cattle without Litvak's permission. Prowse therefore held (at para. 19) that Litvak was an "animal keeper" because he had custody and possession of the cattle. The limited scope of services that Litvak provided did not take him outside the definition.

Litvak therefore had a lien for the food and boarding he provided on and after November 1, 2005. And that lien took priority over the Co-op's security under section 10 of the *Animal Keepers Act*. As was the case with the *Livery Stable Keepers Act*, the lien has priority over any security interest or other charge or encumbrance.

Why does the lien have priority? At common law, a lien is defined as a right to retain the property of another until a debt or other claim is satisfied. The lien is available only if the lien claimant's services improved the goods and only so long as the lien claimant had possession of the goods. See the *Report on Liens* at 6 and 11. It is the improvement of the goods that has traditionally justified the priority given to a possessory lien at common law.

Shortcomings with this common law concept led to the enactment of lien statutes that enlarged the categories of people entitled to liens, gave a right of sale to lien claimants and recognized liens even when the claimant did not have possession of the goods. One of the classes of people entitled to a lien by statute was the class of livery stable keepers (*Report on Liens* at 26). They had not been entitled to a common law lien because their services did not improve the goods (or

so held *Judson v. Ethdge* (1833), 1 Cr. & M. 743,149 E.R. 598) and because they did not maintain possession continuously.

Oddly enough, it is the idea that a stable keeper or animal keeper adds value to the animals he keeps that has been used by modern law reformers to justify the continued priority of their liens. In the Uniform Law Conference of Canada's (ULCC) *Report on Commercial Liens 1994* it was suggested that the law could abolish possessory commercial liens and leave lien claimants to their own devices, which could include the taking of a security agreement under the *Personal Property Security Act* (*PPSA*) of each province. However, this type of "modernization" was not the approach taken in Ontario in its *An Act to revise and consolidate the law related to Repairers' and Storers' Liens* S.O. 1979, c. 17; nor was it recommended by either the Alberta Law Reform Institute in its *Report on Liens* or the Law Reform Commission of British Columbia in its Working Paper No. 68: *Liens for Logging Work*. In the Alberta *Report on Liens*' recommendations, the animal keeper's lien was treated like a repairer's lien and seen as a lien of a "person who has expended labour or skill for the purpose of improving, restoring or maintaining its condition or properties." The ULCC concluded (in Part VI) that "there was a rational basis to retain separate rights for those who improve or add value to chattels and to keep a separate statute for such liens as distinct from deeming such liens security interests under the *PPSA*. Persons who improve or add value are generally not in the same position as persons who lend money or sell property."

Although the *Animal Keepers Act* did simplify the language and make it easier for animal keepers to use the Act "with little involvement from the legal system or government," it is interesting to note that when the legal system does get involved, it uses traditional elements such as possession and custody and traditional justifications such as the addition of value.