

September 20, 2017

## **An Operator of Gas Processing Facilities Does Not Have a Possessory Lien Under the *Possessory Liens Act***

**By:** Nigel Bankes

**Case Commented On:** *Cansearch Resources Ltd v Regent Resources Ltd*, [2017 ABQB 535 \(CanLII\)](#)

Cansearch and Regent jointly owned the Joffre Facility under the term of an agreement for the construction, ownership and operation (CO & O) of that facility (2008). Cansearch was appointed as operator. The CO & O agreement afforded Cansearch as operator an operator's lien (cl 602(a)) in the following terms:

Effective from the Effective Date, Operator shall have a lien and charge, which is first and prior to any other lien, charge, mortgage or other security interest, with respect to the Function Unit Participations of each Owner in the Facility and such Owner's share of Facility Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by Operator for the Joint Account.

Cansearch never registered its Operator's Lien pursuant to the *Personal Property Security Act*, [RSA 2000, c P-7 \(PPSA\)](#).

The CO & O agreement permitted an owner to mortgage its interest provided that "any such mortgage shall expressly provide that the mortgagee shall hold its interest subject to all the terms and provisions of this Agreement, and shall also provide that upon realization of its security, the party acquiring the interest in the Facility shall be required to assume all obligations of the mortgagor under this Agreement...". In 2012 Alberta Treasury Branch (ATB) took security over Regent's assets under the terms of a general security agreement (GSA). ATB registered its GSA under the terms of the *PPSA*.

In 2015 Regent stopped paying its share of expenses resulting in the current claim by Cansearch against the Court appointed receiver for these unpaid expenses. Cansearch initially claimed priority under the operator's lien but during the proceedings conceded that the operator's lien must be subordinate to ATB's GSA. In the alternative, Cansearch then raised the argument that it had a lien under the terms of the *Possessory Liens Act*, [RSA 2000, c. P-19 \(PLA\)](#). Justice Campbell's decision deals with both arguments notwithstanding Cansearch's concession with respect to the operator's lien.

## The Operator's Lien

An operator's lien is a consensual or contractual lien that does not arise by operation of law. Accordingly it also qualifies as a security interest under the terms of s 3(1) of the *PPSA* and as such is subject to the "normal" first in time priority rule of s 35. Section 35 requires perfection of a security interest either through registration or possession. Cansearch never registered its security interest but neither had it perfected its interest by taking possession. "Possession only perfects a security interest ... if the secured party holds the collateral for the purpose of securing payment" per Justice Romaine in *Re Blue Range Resource Corp*, [1999] AJ No 1665 or as Justice Campbell put it in this case (at para 45):

In other words, for possession to be proven there must be evidence that the relevant property was held by Cansearch as collateral. For example, the Operating Agreement would need to explicitly state that Cansearch, as operator, possessed the property at the Joffre Facility as collateral. Cansearch provided no evidence to support any suggestion that it held any property as collateral and, therefore, it has not met the requirements for perfection by possession.

## A Possessory Lien Under the Terms of the Possessory Liens Act

A possessory lien is a lien that arises by operation of the law, initially the common law, but now codified by the *PLA*. Such a possessory lien arises in favour of a trade (e.g. a mechanic) who has possession of personal property for the purposes of effecting some work on the chattel with a view to its repair or improvement etc. In the language of s 2 of the *PLA*: "A person has a particular lien for the payment of the person's debt on a chattel on which the person has expended the person's money, labour or skill at the request of the owner of it and in so doing enhanced its value". Such a lien might claim priority under s 32 of the *PPSA*. In principle therefore Cansearch might be able to make a claim to a possessory lien if it could show (at para 55) that it had possession of Regent's chattels for the purpose of "maintaining, restoring or enhancing the subject chattel's value". The lien could be held over those particular chattels and up to the value of the improvements: see s 6 of the *PLA*, "A lien extends over all the property on which the lienholder has expended the lienholder's money, labour or skill, but no lien arises on account of a general balance due from the owner of the property to the lienholder."

Justice Campbell was prepared to assume (at para 60) that Cansearch would have made some improvements to Regent's share of the property under the terms of the CO & O Agreement:

I accept that Cansearch, as operator, was obligated by the Operating Agreement to maintain the equipment at the Joffre Facility. It clearly expended some amount of money, labour, or skill in fulfilling this obligation. It may have even enhanced the value of some of the relevant equipment in the process. I also accept that Cansearch may have maintained actual or constructive and continued possession by reason of its own undivided Ownership Interest in the Joffre Facility.

But that (at para 61) was not enough. "To satisfy its onus, Cansearch must identify specifically what equipment the possessory lien covers and establish that money, labour, or skill was expended in enhancing the value of that specific equipment. Yet Cansearch has only provided a preliminary description of equipment, which the Operator's Lien was intended to cover, coupled

with generalized invoices from the operation of the Joffre Facility that comprise the claimed Unpaid Expenses.” The generality of Cansearch’s claim suggested that it was conflating the coverage afforded by its operator’s lien with the narrower coverage of the possessory lien. In this case Cansearch had failed to establish the particular possessions of Regent’s that were benefited by its activities. It had also failed to establish which of the assets were personal property as opposed to real property and which of the claimed expenses were improvement related expenses rather than more general expenses. Justice Campbell concluded as follows (at para 70):

There is an important distinction between services related to general operational activities and those specifically related to performing work to enhance the value of chattels. Expenses for work or services relating to non-chattel items are unlikely to be expenses covered by a possessory lien, such as those identified in this case as being for land lease costs, roadway rentals, property taxes, royalty payments etc. In short, Cansearch’s generalized expenses are not enough to establish entitlement to a possessory lien because there is insufficient evidence to substantiate that the Unpaid Expenses represent money or services provided to enhance the value of specific identified chattels. Rather, much of the Unpaid Expenses appear to be part of the general balance due from Regent to Cansearch for its operational activities.

In sum, and on the facts and evidence led in this case, Cansearch had not been able to make out the elements of a possessory lien.

There are two lessons here for an operator. First, insofar as an operator’s lien is a security interest within the meaning of the *PPSA* it needs to be registered to take priority over subsequently registered security interests (unless it is in a position to perfect on the basis of possession). Second, to the extent that an operator seeks to establish a possessory lien it needs to recognize that the scope of any such lien is necessarily limited and also that it will need to do a careful job of connecting specific improvement expenses to particular personal property of which it is in possession. There may be another challenge that an operator faces in this context which is not mentioned by Justice Campbell. This additional challenge is that as co-owners both Cansearch and Regent are in possession (undivided possession) of all the property all of the time by virtue of co-ownership. This is thus quite different from the ordinary situation of a possessory lien in which A takes possession of B’s goods in order to effect improvements. A and B are not co-owners. It is difficult to speak of a co-owner taking possession of the goods of another co-owner except in the unusual situation of ouster.

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This post may be cited as: Nigel Bankes “An Operator of Gas Processing Facilities Does Not Have a Possessory Lien Under the *Possessory Liens Act*” (20 September, 2017), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2017/09/Blog\\_NB\\_Possessory\\_Lien.pdf](http://ablawg.ca/wp-content/uploads/2017/09/Blog_NB_Possessory_Lien.pdf)

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