

Ranchman's Receivership: Exploring Different Proprietary Rights in the Memorabilia

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Article Commented On: [Natalie Valleau, "Prized saddles, trophies and more picked up by rodeo families after Ranchman's closure"](#), *CBC News* (2 October 2020)

Last month, one of Calgary's iconic country bars closed its doors. Ranchman's had been a part of Calgary's western culture for close to 50 years, having first opened its doors April 27, 1972.

As is typical in receivership proceedings, the lender, the Bank of Montreal (BMO), seized Ranchman's assets, including historic saddles and other memorabilia that hung from the building's rafters. These memorabilia had been loaned to the bar by rodeo stars (referred to in this post as the "owners"); in exchange for food and drink, these owners allowed the bar to display the items, but on the understanding that they could take their property back whenever they wanted. Jim Gladstone, a champion calf-roper, commenced this practice after his 1977 world championship, wherein he took his champion saddle to Ranchman's and, in exchange for not having to stand in line, pay cover, etc., he allowed Ranchman's to display his saddle for free. Over the years, the bar acquired more memorabilia and trophies under the same conditions.

Upon reading about BMO's decision to release the memorabilia to the owners (which came as a big relief to them and their families), I wondered whether BMO had concluded that it had no legal rights to retain the memorabilia, or had simply wanted to avoid a potential public relations nightmare (regardless of rights). Although BMO's decision has rendered this point moot, I wanted to explore whether Ranchman's could have had an interest in the memorabilia (referred to below as "collateral" or "property"), which would then have determined BMO's legal rights in it. I write this post based solely on the facts garnered from a few newspaper articles (see [here](#); [here](#); and [here](#)).

Characterizing the Transaction

One of the receiver's tasks, upon seizing assets, is to determine whether they are subject to claims, liens or charges. These can arise under legislation, at common law or in equity. Potentially applicable is the Alberta *Personal Property Security Act*, [RSA 2000, C P-7](#) (PPSA), which would determine whether the memorabilia was subject to security interests, and if so, resolve the priority of the parties to the property. Additionally, the common law principles on bailment, further set out below, could apply.

The facts show that a possessory interest was transferred from the owners to the bar, which raises several questions. Did that create security interests in the memorabilia? Were the transfers

pursuant to leases? If so, were they security leases (and therefore governed by the PPSA) or true leases (to which principles of bailment might apply)? To answer those questions, we need to look to the PPSA.

Importantly in a PPSA analysis, title is not determinative in deciding who has an interest in the property, meaning it does not matter that title to the memorabilia did not transfer to the bar. The PPSA specifically states that a transaction must be assessed substantively, “without regard to its form and without regard to the person who has title to the collateral” (s 3). Instead, the courts must “focus... on the economic rights and obligations of the parties of the transaction” (see Cuming, Walsh & Wood, *Personal Property Security Law*, 2nd ed (Canada: Irwin Law, 2012) at 127).

If security interests did not arise, then the transactions fall outside the PPSA. At that point, the rights and obligations of the lessor (the property owner), and the defaulting lessee, are determined by common law (see Cuming, Walsh & Wood, p 125), in which case, the owners would be entitled to recover the memorabilia.

It appears, based on the facts in the articles, that this is likely a bailment transaction.

Bailment?

At common law, transferring possession of personal property with the expectation that the property will be returned creates a bailment interest (whereas a transfer of land creates a lease interest) (see Alison Clarke & Paul Kohler, *Property Law, Commentary and Materials* (Cambridge University Press, 2005) at 609).

A bailment requires the bailed property to be returned to the bailor, who is usually the owner, or dealt with according to the bailor’s instructions at the end of the bailment. The bailed goods themselves, in their original or an altered form, must be returned and nothing else will do: *Punch v Savoy’s Jewellers Ltd. et al.*, [1986 CanLII 2759 \(ON CA\), 26 DLR \(4th\) 546](#) at 551. A bailment is created simply by someone – the bailee -- voluntarily taking into custody the personal property of another person – the bailor.

An essential element of a bailment is the possession of the personal property by the bailee. In this case, Ranchman’s was in possession of the memorabilia. That memorabilia were delivered to Ranchman’s by its owners under agreements that allowed Ranchman’s to keep the memorabilia under certain conditions, and to return it to its owners when asked to do so. There seems no doubt that possession passed to Ranchman’s. And there seems little doubt that Ranchman’s had to return the original memorabilia to its owners.

Security Agreement?

Alternatively, if the agreements between the owners and Ranchman’s gave rise to security interests, the owners would have needed to take certain steps to ensure their interests in the property had priority, without which, other secured parties (here, presumably BMO) would have

priority (most likely pursuant to an after-acquired property clause in the general security agreement).

The PPSA governs, *inter alia*, “every transaction that in substance creates a security interest” (s 3(1)(a)), and defines a “security interest” to be “an interest in personal property that secures the payment or performance of an obligation” (s 2).

In this case, some elements meet the requirements for a security interest, but it is not a perfect fit. The owners provided personal property (the memorabilia) to the bar for display in exchange for the bar providing them with various food and drink items, and services, such as not having to stand in line to get in (the obligation). Did the personal property “secure” the obligation, which is to say, were the owners able to seize their property if the bar reneged on its end of the bargain? Presumably, though that was not the only reason the owners could reclaim their property; according to the interviews given in the articles, they could do so anytime they wanted.

The term “attachment” denotes the creation of the security interest; as a proprietary interest, a security interest must attach to the personal property. Attachment can occur when the two steps under s 12 are satisfied: value is given (here, it is the exchange of the property for display and the access to food/drink items and services) and the debtor (Ranchman’s) has rights in the collateral.

What kind of rights must a debtor have in the collateral for BMO’s security interest to attach to the property (the memorabilia)? The PPSA does not tell us, though case law tells us that it must be a proprietary right, and that it does not need to be full ownership. It also needs to be more than possession if it is to have more than a nominal effect; although possession is a proprietary right, if the debtor only has the right to simple possession, then principles of the common law, including *nemo dat quod non habet* (no one can give that which he does not have), which are preserved by the PPSA (s 66(3)), will apply. In other words, the security interest will attach only to the possessory interest, allowing the true owner (here, the owners) to prevail over a secured party (here, BMO). The case law tends to settle on a proprietary right that allows the debtor to have some degree of control or authority over the collateral. This standard promotes the goal of commercial certainty.

What types of rights did Ranchman’s have in the memorabilia? Did the bar appear to have anything more than a right to simple possession of the items? On one hand, it is possible that a potential third-party lender might have assumed the items belonged to Ranchman’s, or at least that Ranchman’s had sufficient rights in them so as to use them as collateral for their own loans. The displays had been there for years, decades in some instances. Also, any plaques may have indicated key facts about the trophies: who won them, where and when, but may not have included ownership information. On the other hand, however, if the items were there solely for display, presumably the bar was not doing anything with them that may have indicated control or authority over them to a third party, like offering the items for sale or altering them.

A security interest arises upon meeting the two requirements for attachment, but it would only be enforceable between the owners and the bar. For the owners to assert any potential security interests over a third party, there would also need to be signed, written agreements between the

owners and the bar describing the memorabilia, of which there is no indication in the articles. Upon the attachment of a security interest, a creditor becomes an unperfected secured creditor.

An unperfected secured creditor must take one further step in order to prevail against other secured creditors; it must perfect its security interest (s 19), which is usually accomplished by registering the interest in the Personal Property Registry. A perfected security interest does not give the creditor a *perfect* position, but it does place it in the best possible position in relation to the collateral. Each secured creditor's outcome will ultimately depend on whether the collateral is subject to other security interests, and when those interests were registered. Priority as between perfected secured creditors generally depends on the date of registration (s 35), though there are exceptions (for example, purchase money security interests, s 34).

True Lease v Security Lease

Transferring a possessory interest raises the possibility of a lease. The PPSA governs financing leases, but not true leases. Fundamentally, a true lease is an agreement to use the goods (effectively a bailment, as explained above), whereas a financing lease (security lease) is for the goods themselves (sale).

Under the PPSA, financing leases can fall under one of two categories: leases that are, in substance, security leases, and leases that meet the definition of "lease for a term of over one year", even if they do not in fact secure the payment and performance of an obligation (s 3). The definition also requires the lessors to be regularly engaged in the business of leasing goods. The PPSA applies to the former because they create security interests, and is deemed to apply to the latter, though if it later turns out that the lease is substantively not a security lease, the enforcement provisions of the PPSA will not apply (s 55(1)).

Although some (maybe all) of the agreements for the memorabilia could meet the time requirement for a "lease for a term of over one year", they may not be able to meet the rest of the definition, in which case, they would not be deemed to fall under s 3 of the PPSA. However, they may nonetheless be governed by the legislation if, in substance, they create a security interest. That conclusion would take us back to the above discussion on security interests.

Determining the type of lease is not always obvious, though certain features are more indicative of one than the other. Security leases will have longer terms, usually extending as long as the economically useful life of the goods (which is why the PPSA is deemed to apply to leases for a term of more than one year), and open-ended terms. These features were present in these agreements. Additional features that point to security leases, and which were likely not present in this case, include the vesting of ownership at the end of the lease term, either automatically or as an option to purchase (which would require the lessee to pay a nominal amount, having already paid for the goods throughout the term of the lease). Other features in these transactions are characteristic of bailment, or true leases. Under the agreements, the transfer of possession of the memorabilia was for a particular purpose – to display, not to sell, and the owners could take the property back whenever they wished. As such, these transactions appear to be true leases, meaning they fall outside the PPSA, and would be governed by principles of common law, leading us back to the initial discussion on bailment.

Conclusion

If security interests had been created between the owners and the bar, but had not been perfected, BMO would have been able to assert legal rights in the memorabilia. If, however, the owners were bailors, they would have been entitled to have their memorabilia transferred back to them upon the bailee's (the bar's) receivership.

According to the facts, this seems like a classic bailment. As discussed, a debtor such as Ranchman's needs to have more than a possessory interest in the memorabilia for it to be the subject to BMO's security. If Ranchman's rights were limited to simple possession, then a BMO security interest would attach only to Ranchman's possessory interest as a bailee (s 66(3)), allowing the true owners – the bailors -- to prevail over BMO.

Whatever the relationships may have been, it is interesting to explore the types of rights that could arise from seemingly simple and straightforward agreements.

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