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SETTING-UP LONG-TERM LEASES AND CONDITIONAL SALES CONTRACTS AGAINST THE TRUSTEE

THE SUPREME COURT OF CANADA QUASHES THE COURT OF APPEAL

Since the *Civil Code of Quebec* ("C.C.Q.") was amended in 1998, conditional sales contracts (art. 1745 C.C.Q.), leasing contracts (art. 1847 C.C.Q.) and long-term lease contracts (art. 1852 C.C.Q.) must be published at the *Registry of Real and Personal Moveable Rights* within fifteen days in order to have effect against third persons. Is the trustee in bankruptcy, who is sometimes seen as the successor to the debtor, and sometimes as a representative of his creditors, such a third person? This is the question which has been answered in the Supreme Court of Canada rulings rendered yesterday in the matters of *In Re Lefebvre*, *In Re Tremblay* and *In Re Ouellette*.

Those amendments have given rise to abundant, and sometimes contradictory, case law. However, with one exception, all the judgements rendered by the Court of Appeal came to the same conclusion: these contracts are essentially moveable security, and the trustee as a representative of the mass of creditors has the power to contest imperfect security. Failing publication within the prescribed delays prior to bankruptcy, the trustee takes the assets free and clear of any rights of property otherwise reserved by these contracts. Justice Beauregard as the lone dissenter in *In Re Tremblay*¹ was rather of the opinion that the purpose of such publication was merely to alert subsequent purchasers for value, and secured creditors, to the true owner of the asset. The requirement to publish does not transform the lease into moveable security, and the trustee as successor of the debtor has no greater rights of property in the leased asset than the debtor. Hence, failure to publish did not prevent the lessor from repossessing the asset.

In their unanimous judgments, the Supreme Court overturned the Court of Appeal and concluded in *Tremblay* and *Lefebvre*, that the lessor's right of ownership is not a form of security requiring publication to be effective against a trustee. The property rights vested in the trustee can be no greater than those of the debtor, except where the law expressly provides otherwise for the greater benefit of the creditors.

For the same reasons, the Supreme Court allowed the appeal in *Ouellette* with respect to the vendor's reservation of ownership. However, as recognized by the Court, the subsequent amendment of the *Bankruptcy and Insolvency Act's* definition of secured creditor to include the vendor of a conditional sales contract, now leads to a different result. An unpublished reservation of ownership is henceforth unopposable to the trustee.

The sea change caused by these two cases will certainly lead to a careful review of current files.

¹ which was heard at the same time as *In Re Lefebvre*.

