

## The Rights of Lessors and Instalment Sellers: The Supreme Court of Canada Shall Render a Decision Shortly

By Pierre Denis, Corinne Lemire and Benjamin David Gross

*The Supreme Court recently authorized three motions for authorization to appeal decisions made by the Court of Appeal of Quebec, decisions dealing with failure to register or late registration of the rights of lessors and instalment sellers at the Register of Personal and Movable Real Rights in a bankruptcy context. These decisions shook the very foundations, not only practitioners, but those business people interested in the results of such decisions, that is lessors and instalment sellers. Industry players panicked for good reason, as the Court of Appeal's decision plagued an industry with uncertainty. It is useful to remind our readers of the content of the decisions now being appealed and the importance of the decisions to follow.*

### The Three Decisions

In *Faillite de : Alfred Lefebvre et Francine Lefebvre (Fortin) : Services Daimlerchrysler Canada Inc. et Lebel, Services Daimlerchrysler Canada Inc.* ("Services") was the assignee of a lease contract between Jules Baillot & Fils Ltée and Alfred Lefebvre dated April 19, 1999. Services was the owner of a vehicle leased to Mr. Lefebvre. Mr. Lefebvre assigned his property for the benefit of his creditors on November 1<sup>st</sup>, 2000. Services produced a proof of preferred claim under the *Bankruptcy and Insolvency Act*, which was contested by the trustee in Bankruptcy because the lease had been registered late, that is after the date of the bankruptcy.

In *Faillite de Stéphane Ouellet : Banque Nationale du Canada et Samson Bélair Deloitte et Touche inc., Syndic*, the National Bank of Canada (the "Bank") was the assignee of two (2) instalment sales contracts to which Mr. Ouellet was a party. One of these contracts was signed on August 25, 1997 for a mobile home, while the other was signed on April 8, 1998 for a leisure vehicle (*véhicule de promenade*). Both contracts stipulated that the Bank had a reservation of ownership in said vehicles. On December 1<sup>st</sup>, 2000, Mr. Ouellet assigned his property for the benefit of his creditors. The Bank filed a proof of preferred claim under the *Bankruptcy and Insolvency Act*, which was refused by the trustee in bankruptcy because of late registration of the instalment sales at the Register, that is after the date of the bankruptcy.

In *Martin Tremblay et Kathy Purcell: GMAC Location Limitée et Raymond Chabot Inc.*, GMAC Leasing Ltd. ("GMAC") was the assignee of a lease contract between Martin Chevrolet and Mr. Tremblay dated September 28, 1998. On the same date, GMAC purchased the vehicle leased to Mr. Tremblay from Marlin Chevrolet. On December 13, 2000, Mr. Tremblay received a notice of taking in possession for a long-term lease from GMAC, in conformity with the *Consumer Protection Act*. Mr. Tremblay assigned his

property for the benefit of his creditors on December 14, 2000. GMAC files a proof of preferred claim under the *Bankruptcy and Insolvency Act*, which was refused by the trustee in bankruptcy on the basis of the late registration of the lease agreement at the Register, that is after the date of bankruptcy.

In summary, the following are a few of the determinations made by the Court of Appeal that shall be debated before the Supreme Court of Canada:

The Court of Appeal decided that a long-term lease and an instalment sale are akin to movable security:

- Does, the decision of the Court of Appeal to qualify title to property as a movable security not transform the very nature of the concept of title to property?

According to the Court of Appeal, the absence of registration or late registration, that is after the expiry of the fifteen (15) day grace period after the contract is signed, transfers title to the good into the debtor's patrimony, causing the rights of the lessor or instalment seller to be ineffective (inopposable) against the trustee in bankruptcy in the case of a bankruptcy:

- Once again, this position renders title to property subject to registration at the Register.
- In the case of a lease, the *Civil Code of Quebec* mentions only that the "Rights resulting from a lease" are subject to such registration. Is title to the property akin to a right resulting from a lease? Not only does the Court of Appeal give the lessee more rights than those existing under the lease, but it confers upon the trustee more rights than the insolvent debtor had in and to such sold or leased goods.



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The decisions of the Supreme Court of Canada will not only affect lease contracts and instalment sale contracts, but will also have an impact on leasing contracts, as the rules applicable to these under the *Civil Code of Quebec* are similar to those applicable to lease contracts and instalment sale contracts.

The authorizations to appeal to the Supreme Court do not mention, among others, arguments relating to Section 2 of the *Bankruptcy and Insolvency Act*. Indeed, the Court of Appeal's decisions determined that a "reservation of ownership" and the "rights resulting from the lease" were "security interests". If this were the case, then each of the vendor or lessor (in either a leasing or ordinary lease) would become "secured creditors" under Section 2 (f) of the BIA. We note that with the coming into force of Bill S-4 on May 10, 2001, titled

*Federal Law-Civil Law Harmonization Act, No. 1*, this had already become a reality for instalment sales. However, leaseings and leases had not been included in this definition. By equating leaseings and leases to security interests, has the Court of Appeal effectively made lessors under these transactions "secured creditors" under the BIA making the leased property part of the lessee's (under a leasing or an ordinary lease) owned assets? Can the Federal or Provincial Crown now argue that since title retention devices are tantamount to "security", the Crown superpriorities effectively attach the movable property under these title retention devices? Also, the issue regarding these decisions may affect one word of the Crown is not raised. Various interested parties could yet make motions to intervene before the Supreme Court of Canada relating to these matters to support any of these arguments.

It is with angst that practitioners, lessors and instalment sellers wait for the results of these appeals that, we hope, will shed light on the present uncertain and chaotic situation that exists for long-term leases, leaseings and instalment sales.

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