

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

CUTLER FOREST PRODUCTS INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE
ACT, R.S.O 1990 C. C.43, AS AMENDED

FACTUM OF THE RECEIVER

(Motion Returnable November 25, 2022)

November 17, 2022

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in its capacity as Court-appointed Receiver
of Cutler Forest Products Inc.

TO: Service List

Court File No. CV-22-00684833-00CL

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PART I – THE MOTION

The Fuller Landau Group Inc. ("**Fuller**") in its capacity as Court-appointed receiver (the "**Receiver**") appointed pursuant to the Order of the Honourable Justice Dietrich dated August 4, 2022 (the "**Receivership Order**") of the Property, as defined in the Receivership Order, of Cutler Forest Products Inc. (the "**Debtor**"), seeks relief, including the following:

1. An Order:
 - a. That the time for service, filing and confirmation of the Notice of Motion and the Motion Record be abridged so that this motion is properly returnable today, and hereby dispensing with further service and confirmation hereof;
 - b. Approving the Second Report of the Receiver dated November 14, 2022 (the "**Second Report**"), and the activities of the Receiver and its legal counsel, Harrison Pensa LLP ("**HP**") set out therein;
 - c. Approving the professional fees and disbursements of the Receiver and those of its independent legal counsel, HP, as set out in the Second Report, and the payment of same;
 - d. Seeking the Court's direction with respect to the priority of Royal Bank of Canada ("**RBC**") and PACCAR Leasing Company, a division of PACCAR Financial Services Ltd. ("**Paccar**") to the proceeds of the Paccar Vehicles, as defined below, and if appropriate that the Paccar Vehicles or any one of them be

included as Purchased Assets under the Approval and Vesting Order of this Court dated October 12, 2022; and,

- e. Should this Court find that RBC's interest is in priority to that of Paccar in the Paccar Vehicles, the immediate return by Paccar, at its own cost, of one of the Paccar Vehicles, the 2021 Kenworth T880 Tandem Axle Tractor, VIN 1XKZD40X4MJ972656 Paccar Vehicle, currently in Paccar's possession, to the Receiver.

The Position of the Receiver

2. Case law concerning the operation of the priority provisions of the PPSA in relation to "true" leases is underdeveloped in Ontario. The Receiver requires the assistance of the Court, to determine the issue of priority as between RBC and Paccar. The Receiver is entitled to seek such direction pursuant to the provisions of the Receivership Order, and section 67 of the Personal Property Security Act (Ontario) (the "**PPSA**").
3. The Receiver has concluded, after review of the Paccar Leases, the Master Lease Agreement, and the PPSA registrations of both RBC and Paccar, that RBC holds a priority perfected security interest in the Paccar Vehicles, and that Paccar has failed to perfect a PMSI in any of the Paccar Vehicles.
4. The Receiver seeks direction with respect to its conclusion that the Paccar Vehicles form part of Cutler's Property within the meaning of the Receivership Order, and that, subject to the issue of priority between RBC and Paccar, the Receiver is entitled to market and sell same.
5. The Receiver requests that the Court consider the following factors in deciding this matter, which were considered by the Receiver in its review of the Paccar Leases:
 - a. The Paccar Leases, whether they are "true" leases or financing leases, fall under, and are governed by, the priority provisions of the PPSA, including those provisions governing Purchase Money Security Interest's ("PMSI's");
 - b. The Debtor's leasehold interest in the Paccar Vehicles is sufficient to bring the Paccar Vehicles within the Property of the Debtor under the Receivership Order;
 - c. The Receiver is entitled to sell property of a debtor despite the existence of title reservation clauses in a lease or security document;
 - d. Paccar's PPSA registrations are insufficient to provide it with a PMSI in the

Paccar Vehicles, for the following reasons:

- i. With regard to the Peterbilt 337 Single Axle Straight Truck, VIN 2NP2HM7X0JM466679 and the 2021 Kenworth T880 Tandem Axle Tractor, VIN 1XKZD40X4MJ972656:
 1. In registering against itself as debtor (and failing to name an actual debtor), Paccar failed to perfect any security interest in the relevant Paccar Vehicles, and did not perfect any interest against the Debtor, in particular;
 2. In amending its registrations on September 2, 2022, subsequent to the issuance of the Receivership Order, Paccar may have perfected its interest in the above Paccar Vehicles as against the Debtor, but it did so outside the period in which it could have obtained a PMSI in priority to RBC's interest;
 - ii. With regard to the 2021 Kenworth T270 S/A Truck, VIN 2NKHHM6H4NM980633:
 1. Paccar failed to register against Motor Vehicle collateral in its PPSA registration;
 2. Paccar failed to register its interest in the above Paccar Vehicle until more than fifteen (15) days had passed since the Debtor took possession of the Paccar Vehicle as a debtor. As such, Paccar did not obtain a PMSI in priority to RBC's interest; and,
 - e. As Paccar does not possess a PMSI in any of the Paccar Vehicles, the prior-in-time general security registration of RBC provides RBC with priority over Paccar in relation to the Paccar Vehicles and their proceeds under the PPSA.
6. Pursuant to the Receivership Order and to section 67 of the PPSA, the Receiver may apply to this Court for advice and directions in the discharge of its powers and duties thereunder.
 7. Each of RBC and Paccar claim priority in relation to the Vehicles (as defined below) and/or their proceeds.
 8. The Receiver has considered Paccar's position at law and has advised Paccar's counsel that it has concerns with Paccar's position. The Receiver has concluded that

there is good authority under the provisions of PPSA and certain other authorities for the Court to conclude that RBC has a priority claim over the Paccar Vehicles.

9. The Receiver requires the direction of the Court in this regard in order to determine whether the Vehicles should be included in the Transaction, with the proceeds falling to the Debtor's estate, or whether the Vehicles should be returned to Paccar.

PART II – FACTS/OVERVIEW

The Debtor and the Appointment of the Receiver

10. On August 4, 2022, RBC applied for and obtained the Receivership Order, appointing Fuller Landau as court-appointed receiver of the Property (as defined in the Receivership Order) of the Debtor.

Reference: Second Report, at para 1 and Appendix "A" thereto

The Transaction and the Approval and Vesting Order

11. On October 12, 2022, the Receiver obtained an Approval and Vesting Order (the "**Approval and Vesting Order**"), approving a sale transaction (the "**Transaction**") which resulted in the sale of the majority of the Debtor's Property.

Reference: Second Report, at para 3 and Appendix "C" thereto

12. Should the Court find that RBC holds a priority interest in any or all Paccar Vehicles, then such Paccar Vehicle will be included in the Transaction as a Purchased Asset. Should the Court find that Paccar does hold a PMSI in the Paccar Vehicle(s), they will be returned to Paccar by the Receiver, at Paccar's request.

Reference: Second Report, at para 11

RBC Security and Leased Assets

13. RBC is the senior lender of the Debtor with valid security and a priority registration under the Ontario *Personal Property Security Act* ("**PPSA**").

Reference: Second Report, at para 9 and Appendix "D" thereto

14. Certain assets in the Debtor's possession were leased by the Debtor from various lessors (the "**Leased Assets**", "**Lessors**", respectively), and were excluded from the Transaction pending a determination of whether the Lessors held a Purchase-Money Security Interest ("**PMSI**") in their respective Leased Assets.

Reference: Second Report, at paras 10-11

15. The Receiver has recognized valid PMSI's of all Lessors, with the exception of Paccar.

Reference: Second Report, at para 12

The Paccar Vehicles and Paccar Leases

16. Paccar is Lessor of the following motor vehicles to the Debtor:

- a. 2018 Peterbilt 337 Single Axle Straight Truck, VIN 2NP2HM7X0JM466679 (the "**Peterbilt**"), leased pursuant to Paccar Lease No. 102220-351REFI for a term of 36 months;
- b. 2021 Kenworth T880 Tandem Axle Tractor, VIN 1XKZD40X4MJ972656 (the "**T880**"), leased pursuant to Paccar Lease No. 102220-T880 for a term of 84 months; and,
- c. 2021 Kenworth T270 S/A Truck, VIN 2NKHHM6H4NM980633 (the "**T270**"), leased pursuant to Paccar Lease No. 102220-T270CH for a term of 84 months.

(collectively, the "**Paccar Vehicles**" and the "**Paccar Leases**")

Reference: Second Report, at paras 13 and 18, and Appendix "F" thereto

17. The Paccar Leases themselves form schedules to a governing Canadian Vehicle Lease and Service Agreement dated October 22, 2020 as between Paccar and the Debtor, as amended by Amending Agreement dated October 28, 2020 (collectively, the "**Master Lease Agreement**").

Reference: Second Report, at paras 19-20 and Appendix "G" thereto

18. The Receiver has concluded that the Paccar Leases, fall within the scope of the PPSA. The Receiver has not concluded whether the Paccar Leases constitute financing leases governed by Part V of the PPSA (which Part generally deals with the rights and remedies on default and not priority); however, has concluded that this distinction is not relevant to the issue of priority under the PPSA in relation to which the Receiver seeks directions herein.

Reference: Second Report, at para 21

19. Relevant terms of the Master Lease Agreement include:

- a. A Lease commences on the earlier of (i) delivery of the relevant vehicle to the lessee, or (ii) 48 hours after the date on which Paccar notifies the lessee that the vehicle is ready for pickup; and,

Reference: Second Report, at Appendix “G” thereto, section 1

- b. Paccar retains an ownership interest in the Paccar Vehicles at all times, and has taken a security interest in same “for collateral and security purposes”.

Reference: Second Report, at Appendix “G” thereto, section 10

PPSA Registrations and claimed PMSI

20. The details of the date on which the Debtor took possession of the Paccar Vehicles as debtor, as well as details regarding Paccar’s PPSA registrations relating to the Paccar Vehicles (which are further expanded on in Part III, below) are as follows:

Vehicle	Date of Possession by the Debtor¹	Date of PPSA registration	Secured Party	Debtor(s) (Original Registration)	Additional Debtor(s) (by Amendment)
Peterbilt	November 12, 2020	May 12, 2017	Paccar (as PACCAR Leasing Company, a division of PACCAR Financial Services Ltd.)	Paccar (as PACCAR Leasing Company)	Cutler Forest Products Inc. (by amendment dated September 2, 2022)
T880	November 9, 2020	February 25, 2020	Paccar (as PACCAR Leasing Company, a division of PACCAR Financial Services Ltd.)	Paccar (as PACCAR Leasing Company)	Cutler Forest Products Inc. (by amendment dated September 2, 2022)
T270	March, 2021	August 10, 2021	Paccar (as PACCAR Leasing Company, a division of PACCAR Financial Services Ltd.)	Paccar (as PACCAR Leasing Company) Cutler Forest Products Inc.	None

Reference: Second Report, at paras 23-26 and Appendices “H” to “J” thereto

Motion Record of Paccar, Affidavit of Marlene Ginn Nee Watt, at Exhibit “I” thereto, pp. 71, 74, and 77

¹ Date of possession as a debtor within the meaning of the PPSA. Pursuant to the terms of the Paccar Leases, the Debtor was provided with an in-service notification document on or about the date on which the Debtor took possession of the relevant Paccar Vehicle.

21. Each of the VINs for the Paccar Vehicles was correctly stated in the relevant registration, which are each subsequent in time to the PPSA general security registration of RBC made on April 2, 2007.

Reference: Second Report, at paras 27-28

Reference: Second Report, at para 34

22. The Receiver takes the position, after review of the Leases, the Master Lease Agreement, and the PPSA registrations of both RBC and Paccar that RBC holds a priority perfected security interest in the Paccar Vehicles, and that Paccar has failed to perfect a PMSI in any of the Paccar Vehicles. Directions are sought on this issue.

Reference: Second Report, at para 35

Repossession by Paccar

23. Despite having prior notice of RBC's August 4, 2022 Receivership application, on or about August 10 or August 11, 2022, Paccar or its agents or employees entered onto the Debtor's premises and took possession of the Paccar Vehicles, without the Receiver's knowledge or consent. On August 11, 2022, the Receiver both hand-delivered a copy of the Receivership Order to Paccar, and requested the return of the Paccar Vehicles to the Receiver.

Reference: Second Report, at paras 37-39

24. On August 12, 2022, two of the three Paccar Vehicles were returned to the Receiver's possession; however, Paccar has failed or refused to return the T880 to the Receiver, in spite of the language of the Receivership Order, numerous demands for such return by the Receiver and/or its counsel, and Paccar's own written representations.

Reference: Second Report, at paras 39-41 and Appendices "L" and "M" thereto

25. Should this Court find that RBC has priority over Paccar to the Paccar Vehicles and their proceeds, the Receiver is requesting an Order compelling Paccar to immediately return the above-noted Paccar Vehicle to the Receiver, at its own cost.

Reference: Second Report, at para 46.

Approval of Accounts

26. Each of the Receiver and its counsel, HP, has properly incurred fees and disbursements as detailed in the Second Report, and are required to pass their

accounts from time to time pursuant to the Receivership Order. The Receiver seeks the approval of the Professional Fees, and payment of same, as defined in the Second Report.

Reference: Second Report, at paras 42 and 45,46 and Appendices “N” and “O” thereto

PART III – ISSUES, LAW, AND ARGUMENT

Issues

27. This motion raises the following issues:
- a) Should the activities of the Receiver and its counsel, as set out in the Second Report, be approved?
 - b) Should the Professional Fees of the Receiver and its counsel, HP, be approved?
 - c) The issue of priority as between RBC and Paccar raises the following sub-issues:
 - i. Are the Paccar Leases governed by the PPSA, and specifically, the PPSA provisions thereof?
 - ii. Does Paccar hold a PMSI in the Paccar Vehicles, or any of them?
 - iii. Does either of Paccar or RBC hold a priority interest in the Paccar Vehicles and/or their proceeds?
 - iv. Do the Paccar Vehicles form part of the Property of the Debtor under the Receivership Order, and is the Receiver entitled to sell the Paccar Vehicles, should RBC be found to have priority?
 - v. Was Paccar entitled to repossess and hold the T880, and should it be compelled to return this vehicles to the Receiver?

The Receiver’s Activities

28. The Receiver’s activities as set out in the Second Report were undertaken in furtherance of the Receiver’s duties and are consistent with the Receiver’s powers, pursuant to the Receivership Order. The Receiver has acted reasonably and in the best interests of the Debtor’s stakeholders, and this Court has the inherent jurisdiction to approve such activities.

Reference: [Bank of America Canada v. Willann Investments Ltd. \(1993\) 20 C.B.R. \(3d\) 223 \(ONSC\), at paras. 3 and 4](#)

29. All of the Receiver's activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible. It is respectfully submitted that the Receiver's activities, and those of its counsel, should be approved by this Court.

Professional Fees and Disbursements of the Receiver and its Counsel

30. The Receiver respectfully submits that the Fees and Disbursements of the Receiver and the Receiver's Counsel, as detailed in the First Report, should be approved.
31. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable.

Reference: [Bank of Nova Scotia v. Diemer, 2014 ONCA 851, at paras. 33 and 45.](#)

32. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the respective party's standard rates and charges, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and by its counsel in connection with the receivership.

Paccar Vehicles and Priority

The Paccar Leases are Governed by the PPSA

33. Paccar has taken the position that the Paccar Leases, being "true" leases, are not governed by the provisions of the PPSA.
34. While Ontario case law under the PPSA is underdeveloped in relation to "true" leases, both the language of the statute itself and the related commentary are, in the Receiver's submission, unambiguous.

The PPSA

35. The PPSA defines a debtor as, *inter alia*, a "lessee of goods under a lease for a term of more than one year".

Reference: *Personal Property Security Act (Ontario), R.S.O. 1990, c. P.10 ("PPSA") at s. 1(1).*

36. Further, the definition of both a “Security interest” in general, and a PMSI in particular, includes “*the interest of a lessor of goods under a lease for a term of more than one year*”.

Reference: *PPSA at s. 1(1)*.

37. Section 2(a) of the PPSA states that the PPSA applies to, *inter alia*,

- a. *every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest...*

Reference: *PPSA at s. 2(a)*.

38. Finally, section 2(c) of the PPSA, which was amended effective on January 1, 2007 states that the PPSA applies to:

- a. *a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation* (emphasis added).

Reference: *PPSA at s. 2(c)*.

39. In addition to the clear language of the PPSA, the related commentary on the 2007 amendments reinforces the position that the PPSA, with the sole exception of Part V thereof, applies equally to both financing leases and “true” leases.

40. Prior to 2007, “true” leases for a term greater than one year were not governed by the PPSA; however, such leases were explicitly included pursuant to the 2007 amendments:

- a. *... regardless of whether the lease secures payment for an obligation. By including leases of goods for a term of more than one year ... the previous focus on factors such as the identity of the lessor, the value of purchase options or the intentions of parties to determine whether a transaction requires registration of a financing statement, or other acts to perfect the lessor’s interests, has been rendered obsolete.* (emphasis added)

Reference: [McLaren, Richard, 2022-2023 Annotated Ontario Personal Property Act, at pp. 61-62 \(“Annotated PPSA”\).](#)

41. One effect of these amendments was to place the PPSA in “lock-step” with other provincial PPSA’s with regard to the issue of “true” leases.

Reference: [Annotated PPSA at pp. 61-62.](#)

42. With regard to PMSI's in particular, the noted amendments
- a. ... broadened the definition of purchase-money security interest to include interests of a lessor of goods for a term of more than one year. This reflects the inclusion of certain types of true leases in the scope of the PPSA. (emphasis added).

Reference: [Annotated PPSA at pg 21.](#)

43. Further, while Part V of the PPSA does not apply to "true" leases – which Part is not, in the Receiver's position, relevant to the issues at hand – such "true" leases are "included within the scope of the Act for every other purpose" (emphasis added).

Reference: [McLaren, Richard, Secured Transactions in Personal Property, 3rd Edition, at s. 3:19](#)

44. The Receiver respectfully submits that PPSA clearly governs both financing leases, and "true" leases for a period of longer than one year. As the Paccar Leases are for a term of longer than one year, the PPSA, with the potential exception of Part V thereof, governs, regardless of their status. In particular, the PMSI provisions of the PPSA also govern the Paccar Leases.

Paccar Failed to Perfect a PMSI in the Paccar Vehicles

45. It is the Receiver's position that the PMSI provisions of the PPSA govern the priority of the security interests of Paccar and RBC in the Paccar Vehicles, for the reasons set out above. It is the Receiver's further position that Paccar failed to perfect a PMSI in the Paccar Vehicles.

General – Requirements for a PMSI

46. Section 33 of the PPSA provides that a PMSI in collateral other than inventory is perfected and takes priority over any other security interest in the same collateral given by the same debtor if the PMSI is perfected by registration under the PPSA before, or within 15 days after, the debtor takes possession of the collateral as a debtor.

Reference: *PPSA at s. 33(2).*

General – Requirements for Perfection

47. A security interest is perfected when (i) it has attached; and (ii) "all steps required for perfection under any provision of this Act have been completed", regardless of the order of occurrence.

Reference: *PPSA at s. 19.*

48. Until perfected, a security interest in collateral is subordinate to the interest of, *inter alia*, a person with a perfected security interest in the same collateral or who has priority under any other Act.

Reference: *PPSA at s. 20(1)(a)(i).*

49. A security interest in collateral also attaches to the proceeds of that collateral.

Reference: *PPSA at s. 25(1)(b).*

Application to Paccar Leases and Paccar Vehicles

50. The Receiver submits that Paccar failed to perfect a PMSI in any of the Paccar Vehicles. The Receiver takes the position that the same factors apply to each of the Peterbilt and the T880 Paccar Vehicles, and will address these vehicles together. The Receiver will address the T270 separately.

Peterbilt and T880

51. With regard to the Peterbilt, the Receiver points to the following with regard to Paccar's claimed PMSI:
- a. The Debtor took possession of the Peterbilt on or about November 12, 2020 as a debtor;
 - b. Paccar made a PPSA registration dated May 12, 2017 which identified itself as ("PACCAR Leasing Company, a division of PACCAR Financial Services Ltd.") as both secured party, and (as "PACCAR Leasing Company") as debtor; and,
 - c. No separate debtor was identified in the PPSA registration.

Reference: *Second Report at paras 23-24*

52. With regard to the T880, the Receiver points to the following with regard to Paccar's claimed PMSI:
- a. The Debtor took possession of the T880 on or about November 9, 2020 as a debtor;
 - b. Paccar made a PPSA registration dated February 25, 2020 which identified itself as both secured party, and as debtor;
 - c. No separate debtor was identified in the PPSA registration.

Reference: *Second Report at paras 23 and 25*

53. Paccar did not amend its registrations relating to the Peterbilt or the T880 to include the Debtor until September 2, 2022, subsequent to the appointment of the Receiver.

Reference: *Second Report at paras 24- 25*

54. Paccar takes the position that by way of the above-noted registrations, it perfected its interest in the Peterbilt and T880 prior to the date on which the Debtor took possession of these Paccar Vehicles as debtor. Paccar takes the further position that, despite failing to name a debtor in its registrations, its security interest in the relevant Paccar Vehicles was perfected by the inclusion of the VIN for each of the Peterbilt and T880.

55. The Receiver respectfully submits that Paccar failed to perfect a security interest against the Debtor, or any debtor within the meaning of section 1(1) of the PPSA, at the time of the initial registrations against the Peterbilt or T880, despite the clear requirements of s. 45 and 46 of the PPSA, which require the registration of a financing statement to perfect an interest by registration containing the required information, including a debtor.

Reference: *PPSA, at ss. 1(1), 45, 46.*

56. As a result of these defective registrations, no security interest was perfected as against the Debtor at the time in which the Debtor took possession of the Peterbilt and/or T880 as a debtor within the meaning of the PPSA. As indicated by the RBC Security Opinion, dated prior to the addition of the Debtor as a debtor to the PPSA registrations, a PPSA search of the Debtor would not have indicated any interest of Paccar in the Peterbilt or T880 to other secured creditors.

Reference: *Second Report at Appendix "D".*

57. The Receiver requests the Court to consider that Paccar cannot on the curative provisions of the PPSA under s. 46.1 to validate its improper registrations on the basis that a proper VIN was included, as the application these provisions requires both (i) a named debtor within the meaning of the PPSA, and (ii) substantial compliance with the requirements of s. 46(1) of the PPSA.

Reference: *PPSA, at s. 46.1 and 46(1).*

58. The Receiver submits that by failing to name a debtor in its initial registrations as against the Peterbilt and T880 Paccar Vehicles, Paccar failed to perfect an interest in the Peterbilt or T880 Paccar Vehicles under the PPSA. Such an interest was only

perfected on September 2, 2022 with the amendment of the respective registrations to include the Debtor as a debtor, outside the 15-day period required for Paccar to obtain a PMSI in the Peterbilt and T880.

59. The Receiver submits that by failing to perfect its interest within the time period required to obtain a PMSI, Paccar's interest in the Paccar Vehicles is subsequent in priority to that of RBC, which held a prior perfected general security interest in all of the Debtor's property.

T270

60. With regard to the T270, the Receiver points to the following with regard to Paccar's claimed PMSI:

- a. The Debtor took possession of the T270 in or about March 2021 as a debtor;
- b. Paccar made a PPSA registration dated August 10, 2021, as against both itself and the Debtor; and,
- a. Paccar did not register against "Motor Vehicle" collateral.

Reference: Second Report at paras 23 and 26

61. By failing to register against Motor Vehicle collateral, the Receiver submits that Paccar's registration is contrary to the Minister's Order to the PPSA and is void as a result thereof for failing to comply with the requirements of the PPSA. Further, by failing to perfect any interest in Motor Vehicle collateral, Paccar's interest in this collateral is unperfected, while RBC does hold a prior perfected security interest in all Motor Vehicle collateral of the Debtor.

Reference: Minister's Order – Personal Property Security Act 1990, at s. 3(g).

62. Further, if Paccar is found to have a perfected interest, it failed to perfect its interest in the T270 within 15 days after the Debtor took possession of the T270 as a debtor and does not hold a PMSI in the T270 as a result thereof.

Reference: PPSA, s. 33(2).

63. The Receiver has concluded that Paccar's interest in the Paccar Vehicles is subsequent in priority to that of RBC, which held a perfected general security interest in all of the Debtor's property.

The Paccar Vehicles Form Part of the Debtor's Property

64. Paccar has taken the position that, if the Paccar Leases are “true” leases, the Paccar Vehicles do not form part of the Property of the Debtor within the meaning of the Receivership Order and cannot be sold or disposed of by the Receiver as a result. Paccar takes the further position that, regardless of the priority provisions of the PPSA, RBC does not hold any priority interest in the Paccar Vehicles or their proceeds.
65. In the decision of the Supreme Court in *Giffen, Re, Giffen*, a bankrupt individual had subleased a car from her employer, who had leased it from the primary lessor. The lessor failed to perfect its security interest in the vehicle by registration, prior to the bankruptcy. The vehicle was sold, and the lessor disputed the sale on the grounds that the trustee could not possess a better claim to the vehicle than the bankrupt, who held no ownership interest.

Reference: [Giffen, Re, \[1998\] 1 S.C.R. 91 \(“Giffen”\) at paras 3-7.](#)

66. In response to the lessor's position, the Court made, *inter alia*, the following findings:
- a. That the bankrupt did not hold title in the vehicle was not determinative of the issue, and that the PPSA “set aside the traditional concepts of title and ownership to a certain extent”, and that “the rights of parties to a transaction that creates a security interest are explicitly not depending upon either the form of the transaction or upon traditional questions of title” (at paras 25-26)
 - b. That the dispute was “one of priority to the [vehicle] and not ownership in it” (at para 28);
 - c. That the interest of a lessor in a lease for a term of more than one year fell within the ambit of the PPSA (at para 30-31);
 - d. That the lessee/debtor held rights in the vehicle by virtue of possession, and that the lessor had a corresponding security interest (reservation of title) which could be defeated by the prior-ranking claims of third parties (at para 32);
 - e. That the term “property” was broad enough to include a leasehold interest (at para 34);
 - f. That a person with an interest rooted in title, which is not perfected by registration, is vulnerable to competing priority claims (at para 38);

- g. That the effect of the PPSA was to give the trustee “full rights to the car when the bankrupt had only a right of use and possession” (at para 44); and,
- h. That the effect of the PPSA was that “the true owner must forfeit title, when faced with a competing interest, if [it] failed to register [its] interest as required.”, which statement included “true” leases (at para 52).
67. While *Giffen* was ultimately decided under a provision of the British Columbia PPSA which gave priority to the interest of a trustee in property over that of an unperfected security interest, the Receiver submits that the findings therein are equally applicable to the dispute at hand.
68. The Receiver further submits that this decision clearly stands for the principle that (i) the PPSA has “replaced” the common-law principle that one cannot transfer better title than one possesses, and (ii) “true” leases form security interests which are correspondingly subject to the priority provisions of the PPSA.
69. The Court’s findings in *Giffen* were cited approvingly, and expanded upon, by the decision of the Saskatchewan Court of Appeal in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, wherein the Court found that the priority provisions of the PPSA, including but not limited to those relating to the priority of a trustee in bankruptcy, applied to “true” leases.
- Reference:** [*Paccar Financial Services Ltd. v. Sinco Trucking Ltd. \(Trustee of\)*, 1989 CarswellSask 32, at paras 43-44.](#)
70. In the decision of the Alberta Court of Queen’s Bench *Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc* Big Eagle, Wells Fargo as primary secured lender sought and obtained the appointment of a Receiver over Big Eagle Hydro-Vac Inc. (the “**Big Eagle Debtor**”). The Big Eagle Debtor had leased two pieces of equipment. Each lease was terminated prior to the Receiver’s appointment but had not been repossessed by the lessor. The lessor did not properly perfect its interest in the equipment until subsequent to the receivership, and was also registered subsequent to Wells Fargo.
- Reference:** [*Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc.*, 1989 2015 ABQB 546 \(“Big Eagle”\), paras 4-7, 13, 18, 26-30](#)
71. The Court recognized that the lessor held and retained title to the leased equipment, and went on to state that the lessor’s interest could still be defeated by that of Wells

Fargo, as a prior-ranking secured creditor, pursuant to the priority provisions of the PPSA.

Reference: [Big Eagle, paras 35-42](#)

72. The Court determined that Wells Fargo held an attached, perfected security interest in the Big Eagle Debtor's interest as lessee in possession of in the equipment in priority to the lessor, and that the lessor could have protected its priority position had it acquired a perfected PMSI. The Court also determined that the priority provisions of the PPSA, which affected the rights of third parties, could not be contracted out of by Big Eagle and the lessor alone.

Reference: [Big Eagle, paras 59-62](#)

73. The Court ordered the Receiver to proceed with the sale of the leased equipment, and distribute same to Wells Fargo.

Reference: [Big Eagle, para 63.](#)

The Receiver is Entitled to Sell the Paccar Vehicles

74. The Receiver submits that the findings in the above-noted case law, including *Giffen* and *Big Eagle*, stand clearly for the position that the Receiver is entitled to sell the Paccar Vehicles and distribute the proceeds to RBC in accordance with its priority security interest in same.
75. Further, the Receiver submits that it is acting squarely within its powers under the Receivership Order in proceeding with such a sale, for the benefit of the Debtor's creditors.

Reference: [Big Eagle, paras 59-62](#)

76. While decided under extra-provincial PPSA's, the 2007 amendments to the Ontario PPSA which added "true" lease to the range of security interests governed by the PPSA brought the Ontario PPSA "in lockstep" with these statutes, and "rendered obsolete" the differences between financing leases and "true" leases for the purposes of determining priority.
77. While underdeveloped, support for this position may also be found in Ontario case law. In an unreported decision dated July 22, 2008, Wilton-Siegel J. addressed the

proposed sale of certain equipment subject to financing leases in favour of G.E. under the *Companies Creditors Arrangement Act*, the terms of which contemplated the retention of title by G.E.

Reference: [*Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co., Endorsement of Wilton-Siegel J. dated July 22, 2008 \("Hard-Rock"\)*](#)

78. In *Hard-Rock*, the Court stated that that,
- a. *First the Court has the authority ... to order the transfer of property free and clear of a creditor's security interest in the property to another party in return for a monetization of the security interest... that is the effect of the vesting orders in the present proceeding notwithstanding the retention of title clause in the relevant security agreements ... retention of title is not necessarily retention of the complete rights of ownership.*

Reference: [*Hard-Rock, at paras 5-6*](#)

79. The Receiver submits that this Court also has jurisdiction to order such a sale pursuant to the provisions of Section 67 of the Ontario PPSA, which grants this Court broad powers to determine priority and dispose of collateral as between parties.

Reference: *PPSA, s. 67.*

80. The Receiver submits that the Paccar Vehicles form part of the Property of the Debtor pursuant to the provisions of the PPSA, which, as stated in *Giffen*, upends traditional determinations of rights based on title in favour of one based on competing security interests. The Receiver further submits that it is entitled, as its counterpart was in *Big Eagle*, to monetize the Debtor's lessee's interest in the Paccar Vehicles, and distribute the proceeds of same to RBC, pursuant to its priority interest.

The T880 Must be Returned to the Receiver

81. Paccar has taken the position that, as Part V of the PPSA does not apply to the Paccar Leases, Paccar was within its rights to repossess the T880 and is not obligated to return it to the Receiver.
82. Pursuant to the Receivership Order, no proceeding or enforcement process may be commenced or continued absent the written consent of the Receiver or leave of the Court, and all rights and remedies relating to the Debtor, the Receiver, or the Property are stayed.

Reference: *Receivership Order, Second Report, at Appendix "A" thereto, paras 9-10*

83. Should Paccar be found to have priority over RBC with regard to the Paccar Vehicles, the return of the T880 would be moot; however, should RBC be found to have priority, the Receiver submits that Paccar should be ordered to remedy its breach of the Receivership Order by immediately returning the T880 to Receiver, at its own expense.

PART IV – ORDER REQUESTED

84. The Receiver seeks the directions and relief as set out herein and in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2022



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in its capacity as Court-appointed Receiver
of Cutler Forest Products Inc.

SCHEDULE "A"**LIST OF AUTHORITIES**

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
3. *Giffen, Re*, [1998] 1 S.C.R. 91
4. *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, 1989 CarswellSask 32
5. *Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc.*, 1989 2015 ABQB 546
6. *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co., Endorsement of Wilton-Siegel J. dated July 22, 2008*
7. McLaren, Richard, *2022-2023 Annotated Ontario Personal Property Act*
8. McLaren, Richard, *Secured Transactions in Personal Property, 3rd Edition*

**SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS, & BY-LAWS**

Personal Property Security Act, RSO 1990, c P.10

Definitions and interpretation

1(1)

“debtor” means,

- (a) a person who,
 - (i) owes payment or other performance of the obligation secured, and
 - (ii) owns or has rights in the collateral, including a transferee of or successor to a debtor’s interest in collateral,

- (b) if the person who owes payment or other performance of the obligation secured and the person who owns or has rights in the collateral are not the same person,
 - (i) in a provision dealing with the obligation secured, the person who owes payment or other performance of the obligation secured,
 - (ii) in a provision dealing with collateral, the person who owns or has rights in the collateral, including a transferee of or successor to a debtor’s interest in collateral, or
 - (iii) if the context permits, both the person who owes payment or other performance of the obligation secured and the person who owns or has rights in the collateral, including a transferee of or successor to a debtor’s interest in collateral,

- (c) a lessee of goods under a lease for a term of more than one year, or

- (d) a transferor of an account or chattel paper;

“security interest” means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

Application of the Act, general

2 Subject to subsection 4 (1), this Act applies to,

- (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
 - (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and

 - (ii) an assignment, lease or consignment that secures payment or performance of an obligation;

(c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

Perfection

19 A security interest is perfected when,

- (a) it has attached; and
- (b) all steps required for perfection under any provision of this Act have been completed,

regardless of the order of occurrence.

Unperfected Security Interests

20 (1) Except as provided in subsection (3), until perfected, a security interest,

- (a) in collateral is subordinate to the interest of,
 - (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act,

Perfecting as to proceeds

25 (1) Where collateral gives rise to proceeds, the security interest therein,

- (b) extends to the proceeds.

Purchase-money security interests other than inventory

33 (2) Except where the collateral or its proceeds is inventory or its proceeds, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the same collateral given by the same debtor if the purchase-money security interest,

- (a) in the case of collateral, other than an intangible, was perfected before or within 15 days after,
 - (i) the debtor obtained possession of the collateral as a debtor, or
 - (ii) a third party, at the request of the debtor, obtained or held possession of the collateral,
- whichever is earlier; or

(b) in the case of an intangible, was perfected before or within 15 days after the attachment of the purchase-money security interest in the intangible

Registration of financing statement

45 (1) In order to perfect a security interest by registration under this Act, a financing statement shall be registered.

Consumer goods

45 (2) Where the collateral is consumer goods, the financing statement referred to in subsection (1) shall not be registered before the security agreement is signed by the debtor and, where a financing statement is registered in contravention of this subsection, the registration of the financing statement does not constitute registration or perfection under this Act.

Collateral other than consumer goods

45 (3) Where the collateral is not consumer goods, the financing statement referred to in subsection (1) may be registered before or after the security agreement is signed by the debtor.

Subsequent security agreements

(4) Except where the collateral is consumer goods, one financing statement may perfect one or more security interests created or provided for in one or more security agreements between the parties, whether or not,

(a) the security interests or security agreements are part of the same transaction or related transactions; or

(b) the security agreements are signed by the debtor before the financing statement is registered.

Registration requirements

46 (1) A financing statement or financing change statement that is to be registered shall contain the required information presented in a required format.

Electronic transmission

46 (2) A financing statement or financing change statement in a required format may be tendered for registration by direct electronic transmission to the registration system's database. 2006, c. 34, Sched. E, s. 15 (1).

Classification of collateral

46 (2.1) Except with respect to rights to proceeds, where a financing statement or financing change statement sets out a classification of collateral and also contains words that appear to limit the scope of the classification, then, unless otherwise indicated in the financing statement or financing change statement, the secured party may claim a security interest perfected by registration only in the class as limited.

46 (2.2), (2.3) Repealed:

Authorized person

46 (3) A financing statement or financing change statement in a required format may be tendered for registration by direct electronic transmission only by a person who is, or is a member of a class of persons that is, authorized by the registrar to do so

Errors, etc.

46 (4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission. R.S.O. 1990, c. P.10, s. 46 (4).

Effect of registration

46 (5) Registration of a financing statement or financing change statement,

(a) does not constitute constructive notice or knowledge to or by third parties of the existence of the financing statement or financing change statement or of the contents thereof; and

(b) does not create a presumption that this Act applies to the transaction to which the registration relates.

Copy to debtor

46 (6) Within 30 days after the date of registration of a financing statement or financing change statement, the secured party shall deliver a copy of a verification statement to the debtor.

Copy not required

46 (6.1) A copy of a verification statement is not required if the debtor has waived in writing the right to receive a copy.

Same

46 (6.2) Subsection (6.1) applies where the financing statement or financing change statement to which the verification statement relates is registered on or after the day subsection 7 (2) of Schedule 12 to the Burden Reduction Act, 2017 comes into force.

Penalty

46 (7) Where the secured party without reasonable excuse fails to deliver a copy required under subsection (6), the secured party shall pay \$500 to the debtor which sum is recoverable in the Small Claims Court.

Deemed not likely to be misled by errors or omissions

46.1 (1) For the purposes of subsection 46 (4), in the case of a financing statement or financing change statement in respect of collateral that is or includes a motor vehicle, as defined in the regulations, a reasonable person shall be deemed not likely to be misled materially, insofar as the security interest in the motor vehicle is concerned, by the fact that the statement has one or more errors or omissions described in subsection (2) of this section, if,

- (a) the motor vehicle's vehicle identification number is set out correctly in the designated place on the statement;
- (b) the statement sets out at least the name of one debtor and, if the debtor is a natural person, his or her date of birth; and
- (c) the statement otherwise substantially complies with the requirements that apply for the purposes of subsection 46 (1).

Errors or omissions to which subs. (1) applies

46.1 (2) The following are the errors or omissions to which subsection (1) applies:

1. Regarding any debtor named in the statement, the debtor's name is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection 46 (1).
2. Regarding any debtor named in the statement who is a natural person, the date of birth of the debtor is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection 46 (1).

Court orders and directions

67 (1) Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,

- (a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34 (3) or 35 (4);
- (b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under Part V, section 17 or subsection 34 (3) or 35 (4);
- (c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;
- (d) relieve any party from compliance with the requirements of Part V, section 17 or subsection 34 (3) or 35 (4), but only on terms that are just for all parties concerned;
- (e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

(f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and

(g) despite subsection 59 (6), if the secured party has taken security in both real and personal property to secure payment or performance of the debtor's obligation, make any order necessary to enable the secured party to accept both the real and personal property in satisfaction of the obligation secured or to enable the secured party to enforce any of its other remedies against both the real and personal property, including an order requiring notice to be given to certain persons and governing the notice, an order permitting and governing redemption of the real and personal property, and an order requiring the secured party to account to persons with an interest in the real property or personal property for any surplus.

Compensation for loss or damages

67 (2) Where a person fails to discharge any duties or obligations imposed upon the person by Part V, section 17 or subsection 34 (3) or 35 (4), the person to whom the duty or obligation is owed has a right to recover compensation for any loss or damage suffered because of the failure and which was reasonably foreseeable, and, where the collateral is consumer goods, the debtor has a right to recover in any event an amount equal to the greater of \$500 or the actual loss or damages.

Void provisions

67 (3) Except as otherwise provided in this Act, any provision in any security agreement which purports to exclude any duty or obligation imposed under this Act or to exclude or limit liability for failure to discharge duties or obligations imposed by this Act is void.

Minister's Order – Personal Property Security Act 1990

Content of Financing Statement

3.
 1. A financing statement shall set out in the appropriate place according to the information being entered,

(g) if a motor vehicle is included in the collateral, an indication that it is included

ROYAL BANK OF CANADA

Applicant

-and-

CUTLER FOREST PRODUCTS INC

Respondent

Court File No. CV-21-00684833-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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