

In the Court of Appeal of Alberta

Citation: 102125001 Saskatchewan Ltd v Hutchings, 2025 ABCA 333

Date: 20251006
Docket: 2303-0260AC
Registry: Edmonton

Between:

102125001 Saskatchewan Ltd.

Respondent/Cross-Appellant

- and -

Alphonse Hutchings, Susan Hozjan, Clifford Maron, Lucille Turpin also known as Lucile Turpin, Hault Construction Co. Ltd., Hutchings Concrete Alberta Inc., CSM Consulting Inc., and 1315897 Alberta Ltd.

Appellants/Cross-Respondents

The Court:

**The Honourable Justice Jack Watson
The Honourable Justice Frans Slatter
The Honourable Justice Jo'Anne Strekaf**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice M.J. Lema
Dated the 8th day of November, 2023
Filed on the 3rd day of January, 2024
(2023 ABKB 630, Docket: 2103 15849)

Memorandum of Judgment

The Court:

[1] This appeal and cross-appeal arise out of a sale and leaseback transaction between a Saskatchewan credit union and the appellants, who were based in Alberta. The initial issue on the appeal is whether LeRoy Credit Union, directly or through its agents, was “carrying on any business” in Alberta. The secondary issue is whether any transactions in Alberta conducted by Leroy Credit Union or its subsidiary, the respondent 1021225001 Saskatchewan Ltd, are enforceable against the appellants. The chambers judge held that LeRoy Credit Union was carrying on business in Alberta, but despite that the underlying transactions were enforceable: *102125001 Saskatchewan Ltd v Hutchings*, 2023 ABKB 630, 74 Alta LR (7th) 140. The issue on the cross-appeal is whether the respondent, which was assigned and sought to enforce the security, is subject to the prohibitions in Alberta’s *Credit Union Act*.

Facts

[2] LeRoy Credit Union (now Prairie Centre Credit Union (2006) Ltd) is a Saskatchewan credit union. It is not registered to do business in Alberta.

[3] LeRoy Credit Union entered into sale and lease back transactions with the appellants, who were based in Alberta. LeRoy Credit Union would purchase assets located in Alberta from the appellants and then lease them back to the appellants for their continued use. At the end of the lease the appellants were entitled to buy back the assets at a nominal price. This arrangement was simply one form of chattel security agreement.

[4] LeRoy Credit Union utilized 1417691 Alberta Ltd., a broker in Alberta, to identify potential borrowers in Alberta and arrange the necessary paperwork.

[5] LeRoy Credit Union commenced enforcement proceedings on the transactions after about 40% of the lease payments had been made. The appellants responded by citing s. 228 of the *Credit Union Act*, RSA 2000, c. C-32:

Extra-provincial institutions

228 An institution incorporated under the laws of a jurisdiction other than Alberta that has purposes similar to those referred to in section 26(1) and that complies generally with the mode of operation set out in section 26(2) shall not carry on any business in Alberta except

- (a) registering, pursuant to the applicable legislation of Alberta, a security that was lawfully taken by it as part of a wider transaction conducted in and under the laws of another jurisdiction,
- (b) realizing such a security, taking title to and possession of the property secured, registering title to it, holding it pending its disposal and disposing of it,
- (c) otherwise taking steps that are necessary for the purposes of collecting or enforcing an obligation that is owed to it under a transaction referred to in clause (a), and
- (d) transacting business that is incidental to any business referred to in clause (a), (b) or (c).

[emphasis added]

[6] The appellants argued that by entering into the sale and lease back transactions LeRoy Credit Union was carrying on business in Alberta, and the underlying transactions were unenforceable.

[7] In response to this defence, LeRoy Credit Union incorporated the respondent 102125001 Saskatchewan Ltd. and assigned all the sale and leaseback agreements to it. 102125001 Saskatchewan Ltd. then commenced these enforcement proceedings.

The Decision under Appeal

[8] The underlying issues came before a chambers judge who noted that there was no definition of “carrying on any business in Alberta” in the statute. He accordingly applied the test found in a series of cases such as *H.M.B. Holdings Ltd v Antigua and Barbuda*, 2021 SCC 44, [2021] 3 SCR 285 and *Chevron Corp. v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69, which confirmed the traditional test in *Adams v Cape Industries Plc.*, [1990] 1 Ch 433. Applying that test, the chambers judge found that entering into the sale and leaseback transactions did not constitute carrying on business in Alberta, primarily because LeRoy Credit Union did not have any physical presence in Alberta: reasons at paras. 14, 36.

[9] Further, the use of the Alberta based broker 1417691 Alberta Ltd. did not amount to LeRoy Credit Union carrying on business in Alberta, because the Alberta broker was carrying on its own business, not the business of LeRoy Credit Union: reasons at paras. 16, 29, 36-37.

[10] However, even though LeRoy Credit Union was not carrying on business in Alberta by entering into the sale and leaseback agreements, in taking “downstream steps, such as registering

and enforcing security” it was carrying on business within the provisos found at the end of s. 228: reasons at para. 41. Even though entering into the sale and leaseback agreements was not carrying on business in Alberta, a lender could “step into” Alberta by “emerging from [a] shadow zone” when enforcing those agreements: reasons at paras. 45-48. This was the proper interpretation to be placed on the wording “a wider transaction conducted in and under the laws of another jurisdiction” found in s. 228(a). The consequence was that transactions conducted with Alberta residents under Alberta law were in breach of the statute, but transactions conducted with Alberta residents under Saskatchewan law were permitted: reasons at para. 54. The transactions here were all made or formed in Saskatchewan: reasons at para. 74. However, the sale and leaseback contracts specified that Alberta law would govern, which meant that these were all Alberta contracts: reasons at para. 79.

[11] The conclusion in the reasons under appeal was summarized:

82 Given that Alberta - Saskatchewan difference in the “made in” and “governed under” law, the post-transaction “carrying on any business in Alberta” steps - registering and enforcing security -- were not open to LCU or 102. It would only have been if the “wider [underlying] transactions” had been both made in Saskatchewan and governed by Saskatchewan law that s. 228 would permitted LCU and now 102 to register and enforce security in Alberta.

83 The result is that, in carrying out those post-transaction activities against the backdrop of the split-jurisdiction “wider transaction” here, LCU and now 101 have “carried on any business in Alberta” contrary to s. 228.

On the interpretation adopted, the chambers judge concluded that the statute invites out of province lenders to “lend money to Alberta residents if you want, outside lenders, but do not expect to register or enforce your security here if you make your contracts in and under Alberta law”: reasons at para. 54.

[12] On the subsequent issue of the enforceability of the sale and leaseback agreements, the reasons under appeal followed *Love’s Realty & Financial Services Ltd v Coronet Trust*, 1989 ABCA 63 at para. 39, 65 Alta LR (2d) 362. The reasons held:

129 Applying *Loves Realty*, I find that Alberta did not expressly or implicitly invalidate the security registrations or prevent enforcement here (i.e. despite the s. 228 contraventions), invalidation of such steps would do nothing material to advance the legislative intentions underlying the CUA, and harsh and disproportionate consequences would result to 102, and a vast windfall would spill to the borrowers, if the security registrations and enforcement were invalidated and prevented.

While some cases supported the traditional view that an illegal contract was void, “one can refuse to apply the traditional rule in a case where to apply it would have a harsh effect and is not required to affirm the legislative policy”: *Love’s Realty* at para 39.

[13] The *Credit Union Act* does not (unlike other statutes) expressly invalidate any contracts entered into in breach of its provisions. While the “saving provision” in s. 42(4) does not apply to non-Alberta actors, it also did not invalidate contracts entered into by them: reasons at paras. 101-102. There are no other provisions of the statute that support unenforceability: reasons at paras 105-106.

[14] Further, enforcing the loan agreements would not be inconsistent with the purposes of the *Credit Union Act*. The statute is intended to regulate the credit union industry in the public interest. Even though the primary purposes of a credit union are to accept deposits from and lend funds to its members, finding these agreements to be unenforceable would not enhance the regime. There was no evidence that any Alberta credit union, or the Alberta public at large, was jeopardized or undercut by these transactions: reasons at para. 111. The appellants were all aware that they were dealing with a Saskatchewan credit union. There are specific sections of the *Credit Union Act* that deal with enforcement: ss. 221, 224, and 227. Finally, the shortfall to LeRoy Credit Union of approximately \$1.6 million would be exceptionally harsh. The parallel windfall to the appellants is unjustified: reasons at paras. 117-20, 131.

Issues and Standard of Review

[15] There are two issues in this appeal:

- (a) Did LeRoy Credit Union carry on any business in Alberta by entering into the sale and leaseback transactions?
- (b) Assuming LeRoy Credit Union did carry on business in Alberta, are the resulting agreements unenforceable?

Both issues in this appeal are matters of statutory interpretation, and the standard of review is correctness.

Carrying on Business in Alberta

[16] The meaning of the phrase “carry on any business in Alberta” must be interpreted in context and in its grammatical and ordinary sense harmoniously with the scheme of the *Credit Union Act*, the object of the *Act*, and the intention of the Legislature.

[17] The reasons under appeal relied on cases interpreting the phrase “carry on business” in an entirely different context. The cases relied on, such as *H.M.B. Holdings, Chevron Corp.* and *Adams*, concerned when a domestic court should assert jurisdiction over a defendant with limited

or no connection to the domestic forum. As explained in *H.M.B. Holdings* at para. 38: “In *Chevron*, this Court followed the *Adams* approach and explained how the term ‘carrying on business’, *as part of traditional presence-based jurisdiction at common law*, should be interpreted in Canada” (emphasis in original). The focus in *Adams* on a physical presence in the jurisdiction was directly tied to the propriety of the domestic court taking jurisdiction over the foreign defendant.

[18] The circumstances here are different. The prohibition in s. 228 does not concern whether an Alberta court should take jurisdiction over the parties or the transactions.

[19] As used in the *Credit Union Act*, the phrase “carry on any business in Alberta” must be interpreted in a functional way, having regard to the objectives of the statute and the role of s. 228 in it. Section 228 is more closely related to provisions like s. 279(1) of the *Business Corporations Act*, RSA 2000, c. B-9, which requires extra-provincial corporations to be registered within 30 days “after it commences carrying on business in Alberta”. This latter statute has a helpful provision in s. 277 which lists some factors deemed to be carrying on business. However, ss. 294 and 295 expressly provide that a failure to register does not render any transactions invalid.

[20] “Carry on any business in Alberta” must reflect the purposes of the *Credit Union Act*. The *Act* specifies in s. 26:

26(1) The purposes of a credit union are, subject to the restrictions set out in this Act and the regulations, to provide on a co-operative basis financial services wholly or primarily for its members, and its principal purposes are to receive deposits from, and to make loans to, its members.

The credit union is to operate on a cooperative basis, and all income is to be distributed to its members or used to develop the business. What it means to “carry on business” must be determined in this context.

[21] The phrase “carry on any business” is used elsewhere in the *Act*. For example,

46(1) A credit union or its subsidiary or affiliate shall not carry on any business unless the carrying on of that business is authorized by or under this section and is otherwise consistent with this section.

...

(3) A credit union may carry on

- (a) except as prescribed, the businesses of taking deposits and lending money and any other businesses that are incidental to such deposit-taking and loan-making businesses, . . .

Entering into sale and leaseback transactions would be authorized by this provision and would constitute the carrying on of business by an Albertan credit union. Likewise, if a Saskatchewan credit union was to engage in the same types of transactions in Alberta, that would potentially constitute carrying on business in Alberta.

[22] In summary, the context of the *Credit Union Act* does not support applying the definition of “carry on business” used in the test for “traditional presence-based jurisdiction at common law”.

[23] In this case the assets that were the subject of the sale and leaseback transactions were all located in Alberta. So were the appellants. While LeRoy Credit Union had no physical presence in Alberta, the transactions were all negotiated in Alberta. The agreements themselves specified that they were governed by Alberta law, but in the circumstances, it is unlikely that designating them as falling under Saskatchewan law would have changed the analysis. Considered holistically LeRoy Credit Union was carrying on business in Alberta by lending money to Albertans in reliance on security found in Alberta.

[24] The appellants emphasize that the statute prohibits carrying on “any” business in Alberta, but that does not change the overall analysis. In this context “carry on business” and “carry on any business” have the same meaning. Whether the transactions being enforced are isolated or part of a larger pattern of transactions does not change the outcome.

[25] Further, the validity of the transactions must be measured in the hands of LeRoy Credit Union, not its nominee. Since 102125001 Saskatchewan Ltd. is not a purchaser for value without notice, its intervention cannot change the ultimate outcome. This would dispose of the respondent’s cross-appeal.

[26] In addition, it is not a harmonious and supportable interpretation of the statute to find that the sale and leaseback transactions were not “carrying on business”, but if the resulting security interests were registered or enforced in Alberta, they would become such a “business” by “stepping into Alberta from a shadow zone”. The proper interpretation of the provisos in s. 228 of the *Credit Union Act* is that it is permissible to register in Alberta security interests created in other provinces. That would be prudent if there was a risk that the security might be moved to Alberta. These provisos confirm that it is the underlying security transaction that determines whether business is being carried on in Alberta, not the consequential registration of security interests in assets that might be relocated to Alberta.

[27] In summary, the decision under appeal correctly concluded that the sale and leaseback transactions were contrary to s. 228, but not for the reasons given.

Enforceability of the Agreements

[28] The decision under appeal concluded that the agreements in question were not authorized by s. 228 but nevertheless held they were enforceable.

[29] The appellants argue on appeal that because the sale and leaseback transactions were unlawful, they were unenforceable. There is certainly authority to that effect, although as pointed out in 1989 in *Love's Realty* the law has moved away from that rigid position. The “classical model” that unlawful contracts are void “fails to account for the reality that today a finding of illegality is dependant, not only on the purpose underlying the statutory prohibition, but also on the remedy being sought and the consequences which flow from a finding that a contract is unenforceable”: *Still v Canada (Minister of National Revenue)*, [1998] 1 FC 549 at para. 43, 154 DLR (4th) 229. The “modern” principle was summarized in *Still* at para. 48 as:

...where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.

[30] The modern approach as summarized in *Ironside v Smith*, 1998 ABCA 366 at para. 40, 70 Alta LR (3d) 393 is to examine whether:

- (a) the statute prohibits enforcement of the contract,
- (b) enforceability is required to affirm the legislative policy of the statute, and
- (c) a failure to enforce the contract will result in harsh consequences.

See also *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7 at para. 42, [2004] 1 SCR 249. The appellants acknowledge this approach but argue that the chambers judge misapplied the various tests.

[31] Despite the appellants' arguments to the contrary, there is nothing in the statute that deems transactions by foreign credit unions to be void. The statute is at best silent. The inference of unenforceability must come from the bald proposition that foreign credit unions are not to conduct any business in Alberta. Section 221 provides penalties for breaches of the statute. Section 224 specifies the applicable penalties. These provisions do not declare any of the underlying transactions to be void.

[32] Section 228 relates in part to the regulatory integrity of the credit union system, and in particular that credit unions operating in Alberta fall under the mandate of the Credit Union

Deposit Guarantee Corporation. This relates more to the deposit taking side of the credit union business, not the lending side. However, allowing an unreasonable windfall to benefit borrowers like the appellants, who knew they were dealing with a Saskatchewan credit union, would be contrary to the viability of the statute. Finding the sale and leaseback transactions to be unenforceable would be inconsistent with the overall scheme, while doing nothing to protect the Alberta credit union system.

[33] This is not a case where a statute specifically nullifies the debt or implies that the debt should be treated as invalid. Accordingly, the common law test is applicable to an argument as to the effect of contractual illegality: compare *Energizer Supermarket Ltd v Holiday Snacks Ltd (Trinidad and Tobago)*, [2022] UKPC 16 at paras 32-35, 40-45. At para 41, the Court cited from *Patel v Mirza*, [2016] UKSC 42 at para 120, [2016] 3 WLR 399 where it was said:

120 The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

[34] Similarly, see *Central Credit Union Limited v Lewis*, 2014 PECA 1 at para 36, 346 Nfld & PEIR 248:

36 Ultimately, we would dispose of this ground of appeal by falling back on the related public policy consideration. A statutory non-compliance may, but not necessarily does, relieve a borrower from his obligations. Faced with this kind of claim, if a breach of the legislative provision was proven, a court would need to assess the nature and consequences of the Credit Union non-compliance and the relief sought to be obtained by the member borrower, all in the context of the purpose of the governing legislation, and the rights, obligations and expectations of the parties to the impugned transaction. That is a synopsis of the modern approach

to statutory illegality, which is stated in a number of case authorities and discussed by Professor John D. McCamus in *The Law of Contracts*, Chapter 12 Illegality, pp. 428-493, more particularly at pp. 459-469.) Also see: *Love's Realty & Financial Services Ltd. v. Coronet Trust* (1989), 57 D.L.R. (4th) 606 (Alta. C.A.); *Sidmay Ltd. v. Wehttam Investments Ltd.* (1967), 61 D.L.R. (2d) 358 (Ont. C.A.), aff'd [1968] S.C.R. 828 (S.C.C.); and *Still v. Minister of National Revenue* (1997), [1998] 1 F.C. 549 (Fed. C.A.).

[35] As expressed in para 37 of that case as to the debtor Lewis, the debtors here cannot dispute debt or interest and, rather, seek “to be absolved of [their] obligations due to the Credit Union” due to non-compliance with a provision of the provincial Credit Union Act. The Court of Appeal in *Lewis* responded by saying “it would be an unjust consequence to vitiate the loans or to order any forgiveness of interest on that basis”. In the case at bar, the Legislature has not signaled an intention to wipe the debt or interest away on that basis.

[36] The appellants accept their argument would result in a windfall to them, but they posit that LeRoy Credit Union was a sophisticated organization that should have conducted its business in keeping with the statute. There is no evidence that LeRoy Credit Union deliberately acted in defiance of the Alberta statute, but their continued conduct of sale and leaseback transactions of this type was, at best, casual. Nevertheless, allowing the appellants to accept large sums of money from LeRoy Credit Union, and then decline to pay it back based on a failure to be properly registered in Alberta would be a harsh penalty.

[37] On balance, the appellants have failed to disclose any reviewable error in the chambers judge’s reasons on this point. The prohibition in the statute on “doing any business” relates to the business itself, not to the enforceability of the underlying agreements and accordingly both the debt and the interest agreed to by the parties under the agreement remain enforceable.

Cross-appeal

[38] Having dismissed the appeal, the cross-appeal is moot and need not be addressed, beyond the comments above at paragraph 25.

Costs

[39] The respondents seek solicitor and client costs pursuant to the security documents. This appeal and cross-appeal resulted from Leroy Credit Union’s failure to comply with the *Credit Union Act*. Its subsidiary was not a purchaser for value without notice. In such circumstances it is appropriate in our view that the parties each bear their own costs in this Court and in the Court of King’s Bench.

Conclusion

[40] In conclusion, the appeal and cross-appeal are dismissed. The parties shall each bear their own costs in this Court and in the proceedings below.

Appeal heard on September 4, 2025

Memorandum filed at Edmonton, Alberta
this 6th day of October, 2025

Watson J.A.

Authorized to sign for: Slatter J.A.

Strekaf J.A.

Appearances:

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