Citation: Kobi's Auto Ltd v 5174245 Manitoba Ltd et al, 2018 MBCA 134
Date: 20181211
Docket: AI17-30-08970

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

KOBI'S AUTO LTD.	***R. E. Olschewski*** *and* ***C. M. Kahan*** *for the Appellant*
(Plaintiff) Appellant	
	No appearance
- and -	*for the Respondent S. Pecanac*
5174245 MANITOBA LTD. operating as TARTAN TOWING and the said TARTAN TOWING, RICKVINDER BRAR, SATNAM BRAR, ROB CAMPBELL and SONJA PECANAC	***T. E. Bock*** *and* ***A. D. Pollock*** *for the remaining Respondents*
(Defendants) Respondents	*Appeal heard:* ***October 31, 2018***
	Judgment delivered: ***December 11, 2018***

On appeal from 2017 MBQB 38

MAINELLA JA

Introduction

[1] The typical thought that comes to mind when one sees the wheel-lift of a tow truck hoisting someone's unlawfully parked vehicle is either one of pity or jubilation; it is not the law of liens. Nevertheless, that law regulates this common occurrence. In addition to a parking ticket, the vehicle may be

towed creating a lien that entitles the tow-truck operator to retain the vehicle indefinitely until paid for moving and/or storage costs and charges.

[2] This lien is not recognised at common law. The tow-truck operator does not improve an unlawfully parked vehicle, is not under a legal obligation to receive goods, nor is the work done at the request—either expressly or by implication—of the vehicle's owner (see ELG Tyler & NE Palmer, *Crossley Vaines on Personal Property*, 5th ed (London, UK: Butterworths, 1973) at 140). Rather, the lien is created by statute, section 243(3) of *The Highway Traffic Act*, CCSM c H60 (the *HTA*).

[3] There are three legal characteristics to this statutory lien. First, it is a possessory as opposed to non-possessory lien. For the lien to come into existence, the vehicle must be possessed because of a request made by a peace officer or otherwise authorised person to remove the vehicle from where it is unlawfully parked (see sections 243(2)-(3) of the *HTA*). Second, the lien is particular as opposed to general, meaning that the right to retain the vehicle continues only until all costs and charges incurred in moving and/or storing the vehicle have been paid. If that occurs, the lienholder cannot continue to possess the vehicle even if he, she or it has other outstanding claims against the vehicle's owner. Third, the lien may be enforced under *The Garage Keepers Act*, CCSM c G10 (the *GKA*). Sections 243(2)-(3) of the *HTA* and the relevant provisions of the *GKA* (sections 3, 9-12 and Form 3) to decide this appeal are contained in the appendix to my reasons.

[4] The plaintiff appeals a judgment dismissing a claim for conversion based on the alleged wrongful sale of a vehicle by a tow-truck operator, the corporate defendant (Tartan), who was a lienholder under section 243(3) of the *HTA*. That lien was created when Tartan towed an illegally parked 2004

BMW sedan (the vehicle) which the plaintiff had leased to the defendant, Sonja Pecanac (Pecanac). As I will explain, after the vehicle was towed, what can be described as a comedy of errors ensued, ultimately resulting in Tartan causing the vehicle to be auctioned under the *GKA* without the plaintiff's knowledge.

[5] After a trial, the judge dismissed the claim because he concluded that, in the circumstances, the *GKA* did not entitle the plaintiff to notice of the sale as the vehicle's owner, but only as a security holder. Because the plaintiff failed to properly register its security interest, Tartan had done nothing wrongful in failing to notify the plaintiff of the vehicle's sale.

[6] For the following reasons, I would allow the appeal.

Background

The Lease of the Vehicle

[7] On October 9, 2013, Pecanac entered into a four-year lease of the vehicle with the plaintiff. The total amount of the lease was $21,192. She paid a deposit of $6,000 and was required to make bi-weekly payments of $309.63. At the end of the lease, she had an option to purchase the vehicle for $1, plus applicable taxes. According to the contract, during the period of the lease, "title to the vehicle shall remain at all times" with the plaintiff.

[8] The character of the lease of the vehicle as to whether it was a true lease or a financing lease is not at issue (see *Smith Brothers Contracting Ltd, Re*, 1998 CarswellBC 678 (SC)). It was an agreed fact at the trial that the plaintiff was the "owner of the vehicle." Given this admission, it is not necessary in this case to discuss the applicability of the true lease/financing

lease analysis as to whether a party is the "owner of the vehicle" for the purposes of the notice requirement under section 12 of the *GKA*.

The Towing of the Vehicle by Tartan

[9] On November 23, 2014, the vehicle was ticketed on a residential street by a peace officer with the Winnipeg Parking Authority (the WPA) for a parking infraction. At the request of the peace officer, Tartan towed the vehicle to its downtown compound where it was stored. As is the normal procedure, Tartan advised the police and the WPA it had towed and stored the vehicle.

Tartan's Towing Operations

[10] Tartan tows between 30,000 to 35,000 vehicles each year in Winnipeg. In most cases, the driver or owner retrieves the vehicle from one of Tartan's compounds after paying the required costs and charges. Every couple of months, Tartan engages an auctioneer to sell unclaimed vehicles at public auction under section 9 of the *GKA* to recoup the costs and charges incurred in moving and/or storing vehicles. Each year, approximately 600 to 700 vehicles are sold in this way. In about one third of such cases, Tartan is unable to identify the vehicle's owner.

[11] Under its towing and storage contract with the City of Winnipeg (the City), Tartan is not permitted to enter a vehicle. This prevents Tartan from searching the inside of the vehicle for documents which may identify the owner. Absent the consent of the vehicle's owner or a court order, because of the requirements of *The Freedom of Information and Protection of Privacy Act*, CCSM c F175 (*FIPPA*), officials with the WPA, police and Manitoba

Public Insurance (MPI) will not disclose to Tartan who the owner of a vehicle is.

The Comedy of Errors

[12] After considerable effort and inquiries to locate the vehicle, Pecanac learned from the police that Tartan had the vehicle. Over the course of approximately December 2014 and January 2015, she and her son had four telephone conversations with representatives of Tartan as to the release of the vehicle. Pecanac could not afford the differing amounts quoted. Tartan does not keep records of inquiries about detained vehicles so the defendant, Rob Campbell (Campbell), who runs Tartan's day-to-day business, was not aware that Pecanac had called asking to have the vehicle returned. Tartan never told Pecanac that, if she did not reclaim the vehicle, it would be sold at auction. Oddly, Pecanac never told the plaintiff that Tartan had the vehicle and continued to make payments on the lease up until the time it was auctioned months later.

[13] Campbell testified that ascertaining the owner of a vehicle when it is picked off the street is very difficult. At one time, this problem was addressed by Tartan being provided with the vehicle owner information from the WPA, the police or MPI. However, due to the *FIPPA*, those public bodies stopped passing along that personal information to Tartan. Campbell made inquiries with various officials as to how Tartan could notify a vehicle's owner of its potential sale in accordance with sections 10 and 12 of the *GKA* and was told that, so long as Tartan gave "fair notice" by advertising the sale of a vehicle in *The Manitoba Gazette*, that would satisfy the owner notice requirements of the *GKA*. There was no evidence at the trial that Tartan ever sought any formal legal advice for this business practice.

[14] The form of notice Tartan provides in *The Manitoba Gazette* is limited to the identity of the vehicles to be sold and the time and place of public auction. Such notice does not contain all of the information contained in Form 3 of the schedule to the *GKA* that section 12 of the *GKA* requires be given to the vehicle's owner before its sale by a lienholder. Form 3 requires that the vehicle's owner be given written notice not only of the lienholder's intention to sell, but also of the amount of the debt claimed and the owner's right to extinguish the lien and regain possession of the vehicle by paying monies into court if the indebtedness giving rise to the lien is disputed.

[15] On January 17, 2015, Tartan published a notice in *The Manitoba Gazette* of an auction to take place under the *GKA* on April 11, 2015. The notice identified 109 vehicles to be sold, one of which was the one owned by the plaintiff. The notice identified the vehicle's make, model and vehicle identification number (VIN). The plaintiff's employees did not engage in the practice of reading such auction notices and were not aware of Tartan's intention to sell the vehicle.

[16] After entering into the lease with Pecanac, the plaintiff failed to properly register its security interest in the vehicle in the Personal Property Registry (the PPR) maintained under *The Personal Property Security Act*, CCSM c P35 (the *PPSA*). The plaintiff misidentified the correct VIN in its registration of its security interest in the vehicle.

[17] On February 23, 2015, Campbell did a search of the PPR in relation to the vehicle, as was his normal practice, in order to notify any security holders under section 11(2) of the *GKA*. The search revealed a lien on the vehicle from the WPA for outstanding parking tickets and that Pecanac was

the debtor. Because of the plaintiff's VIN registration error, this PPR search did not alert Tartan to the plaintiff's security interest in the vehicle.

[18] Notice of the auction, including a list of the vehicles to be sold, was posted on the front door of Tartan's place of business in conformity with the requirements of section 11(1) of the *GKA*. The auction was also advertised online and in local media.

[19] Tartan did not provide a notice to the plaintiff (or anyone else) of the sale of the vehicle in the form required by section 12 of the *GKA*.

The Auction of the Vehicle and Ensuing Litigation

[20] On April 11, 2015, the vehicle was sold at public auction for $9,000. The defendant, Satnam Brar (S. Brar), was the successful bidder. He purchased the vehicle on behalf of Tartan to be used for corporate purposes. After a delay of several weeks in obtaining a key for the vehicle from the manufacturer, the vehicle was started and the global positioning system in it activated, thereby notifying the plaintiff of its location. On May 12, 2015, the plaintiff contacted Tartan and demanded the return of the vehicle. Tartan refused and advised the plaintiff it had purchased the vehicle at the auction.

[21] On June 3, 2015, the plaintiff filed its statement of claim. It sued Pecanac for defaulting on the lease. It sued Tartan and three of its directors, Campbell, S. Brar and Rickvinder Brar (R. Brar), for conversion.

[22] Prior to the trial, Tartan paid the plaintiff $6,641.77. This amount represented the surplus of the auction sale of the vehicle after payment to Tartan of $1,233.23 for moving and storing the vehicle and all of the costs related to the vehicle's auction (see section 11(3) of the *GKA*).

The Trial and the Judge's Decision

[23] Pecanac did not defend the claim against her and was noted in default. The judge granted judgment in favour of the plaintiff against Pecanac for $24,664.40.

[24] The claims against R. Brar and Campbell in their personal capacities were discontinued at trial.

[25] The trial proceeded on the basis that all of the elements of the tort of conversion were admitted except for proof that Tartan's interference with the plaintiff's right to possess the vehicle was "wrongful" (*Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 31; *373409 Alberta Ltd (Receiver of) v Bank of Montreal*, 2002 SCC 81 at para 8; *Urbanmine Inc et al v St Paul Fire and Marine Insurance Company et al*, 2017 MBCA 42 at para 38; and *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51 at para 3).

[26] Appropriately, Tartan conceded that a mistake, even if innocent, as to the legal consequences of its positive and intentional interference with the plaintiff's possession of the vehicle was not a defence to the claim of conversion (see *384238 Ontario Ltd v The Queen* (1983), 8 DLR (4th) 676 at 683-88 (FCA); *Boma Manufacturing Ltd* at para 31; *373409 Alberta Ltd* at para 8; and *Urbanmine Inc* at para 39).

[27] In his reasons, the judge summarised the sale process for a vehicle by a lienholder under the *GKA* as follows (at para 58):

> - A notice in substantially the form prescribed by the ***GKA*** is to be sent to the owner of the vehicle (section 12).

- The sale may occur after the expiration of 60 days from the date notice is given to the owner (section 10).

- Notice of the sale shall appear in *The Manitoba Gazette* (section 11(1)).

- Notice of the sale shall be posted and kept posted for a period of at least two weeks on the outside of a front door of the garage keeper's premises and shall state the name, so far as known, of the owner and the name of the auctioneer (section 11(1)).

- At least two weeks prior to the sale, written notice of the sale shall be given to any person who has registered in the PPR a financing statement that relates to the vehicle which is indexed in the PPR under the VIN (section 11(2)).

[28] The judge framed the question of statutory interpretation he had to answer as being (at para 59): "Assuming [the plaintiff] was entitled to notice, was it entitled as owner (section 12 of the ***GKA***) or as a secured party (section 11 of the ***GKA***)?" (emphasis added).

[29] He rejected the plaintiff's argument that it was entitled to notice of the sale of the vehicle as both the owner and as a security holder. In his view, the enforcement provisions of the *GKA* had to be interpreted in light of the fact that the lease of the vehicle was subject to the "regime established by the ***PPSA***" (at para 60). The judge reasoned that, because of this fact, it was "incumbent" (at para 61) on the plaintiff, by virtue of the *PPSA* and section 19 of the Manitoba, *Personal Property Registry Regulation*, Man Reg 80/2000, to correctly register its interest in the vehicle by, among other things, the vehicle's VIN.

[30] The judge decided that all Tartan was legally obliged to do (and did) was "search, by VIN, in the PPR and notify those parties with a registered security interest in the [vehicle]" (at para 62). He accepted Campbell's

evidence that, but for the plaintiff's PPR registration error, Tartan would have notified the plaintiff in accordance with section 11(2) of the *GKA* given its usual practice of notifying all known secured parties. The judge noted that the unfortunate result could have been avoided had the plaintiff been more prudent and reviewed *The Manitoba Gazette* or been more proactive with Pecanac when she fell into some arrears on the lease between December 2014 and April 2015. In making those observations, he stated that he was "not suggesting that by advertising in *The Manitoba Gazette*, a garage keeper is somehow relieved from its other notice obligations" (at para 63).

[31] In the event he was wrong in his interpretation of the *GKA* and Tartan was liable for conversion, he assessed the plaintiff's damages in the amount of $10,177.69.

The Arguments on Appeal

[32] The plaintiff argues that the judge's interpretation of the *GKA* was incorrect. It says that the *GKA* requires strict, not substantial, compliance before the remedy of sale is available to a lienholder. It submits that the judge asked the wrong question when he said the issue before him was to decide whether Tartan had to give notice under either section 11 or 12 of the *GKA*. According to the plaintiff, the *GKA* required Tartan to do both. Thus, while Tartan did nothing wrong in failing to provide notice to all the known secured parties in accordance with section 11(2), the judge ignored the plain meaning of sections 10 and 12 of the *GKA* of Tartan's obligation to notify the vehicle's owner.

[33] Tartan asserts that the judge's interpretation of the *GKA* was correct because Tartan did not know who the owner of the vehicle was and had no

lawful means to determine ownership. It submits that section 12 of the *GKA* does not apply for two reasons.

[34] First, it agrees with the judge that the plaintiff's right to notice was part and parcel of its right as a security holder. According to Tartan, the plaintiff's PPR registration error cannot be held against Tartan when it acted reasonably in searching the PPR.

[35] Second, Tartan says section 12 of the *GKA* does not apply to a tow-truck operator exercising his, her or its lien rights pursuant to section 243(3) of the *HTA* because a pre-condition of section 12 applying, according to the statutory language, is that there has been a detention of a vehicle under section 3 of the *GKA* or there has been a seizure of the vehicle under section 7 of the *GKA* (only the former need be discussed in the circumstances). Tartan says the language of the *GKA* is based on the assumption a garage keeper knows who a vehicle's owner is because he or she has performed a service on the vehicle at the owner's request. That circumstance does not exist in the case of liens created under the section 243(3) of the *HTA* for tow-truck operators because, as Campbell's evidence highlights, frequently, in cases of vehicles towed for parking violations, the owner cannot be identified.

[36] Tartan submits that the judge's interpretation of section 12 of the *GKA* is correct because there has to be some lawful means for tow-truck operators to be compensated for towing and/or storage costs if the owner cannot be lawfully identified. Otherwise, the purpose of the lien created by section 243(3) of the *HTA* would be defeated as the City would be left with choosing between the two evils of not removing illegally parked vehicles because there is no way to pay for the public service being done by a private tow-truck operator or having to assume the financial burden of storing

indefinitely those illegally parked vehicles that are never claimed by their owners. Tartan says that cannot have been the Legislature's intention.

Discussion and Conclusion

The Approach to Statutory Interpretation and the Standard of Review

[37] The parties agree that the modern proper approach to statutory construction is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21). To that I would also add that section 6 of *The Interpretation Act*, CCSM c I80, requires that:

> **Rule of liberal interpretation**
> 6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[38] The parties further agree that the judge's interpretation of the *GKA* raises a question of law; therefore, the standard of review is one of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

Legal Liens—The Relevant Principles

[39] A legal lien is passive in nature. It provides the right to retain but does not confer a right of sale to satisfy the debt owed (see *Smart v Sandars* (1848), 136 ER 1132 at 1135 (CP (Eng)); *Thames Iron Works Co v Patent Derrick Co* (1860), 70 ER 676 at 677-78 (Ch (Eng)); and *Larner v Fawcett*, [1950] 2 All ER 727 at 729 (CA (Eng))). The wrongful sale of chattels subject to a lien makes the lienholder liable for conversion (see *Mulliner v Florence*

(1878), 3 QBD 484 (CA (Eng))). As Brett LJ observed in *Mulliner*, "in the case of a wrongful sale the lien is destroyed" (at p 492).

[40] A summary of the principles regarding liens and lienholders' rights was provided by Philp JA in *Wallace (Rural Municipality) v Mead Petroleums & Farms Ltd et al*, 2005 MBCA 3 as follows (at para 23):

> From the case law that has tracked the development of liens and the rights of lienholders in Canada, certain principles relevant to the issues on this appeal are clear. A first principle is that the means of enforcing a statutory lien must be found within the statute. See, for example, *Town of Athabasca v. Shaw*, [1917] 3 W.W.R. 505 (Alta. Master), aff'd [1917] 3 W.W.R. 1001 (Alta. S.C. (T.D.)) (referred to by Menzies J., at para. 29), *Workmen's Compensation Board v. White Motor Company of Canada, et al.* (1971), 3 N.B.R. (2d) 565 at 575 (S.C. (A.D.)), and *British Columbia* (*Workers' Compensation Board) v. Canadian Imperial Bank of Commerce* (1998), 157 D.L.R. (4th) 193 at para. 42 (B.C.C.A.). Secondly, where a statute creates a lien, but does not provide any method for its enforcement, the rights of a lienholder will be limited to those that attached to a common law lien. See *Re Clemenshaw*; *Workmen's Compensation Board v. Canadian Credit Men's Trust Association Ltd.* (1962), 36 D.L.R. (2d) 245 at 248 (B.C.C.A.), and *Re MacMillan Bloedel Ltd. et al. and Director of Employment Standards*, at p. 760. Thirdly, a lien creates a right *in rem*; it "does not in itself create a debt, or an obligation to discharge the lien." See *British Columbia (Workers' Compensation Board)*, at paras. 43 and 54. Fourthly, a judgment declaring a lienholder's right to a lien is not a pecuniary judgment. See *Westburne Industrial Enterprises Ltd. et al. v. Lougheed Towers Ltd.* (1985), 61 B.C.L.R. 187 (C.A.). Finally, "[a] common law lien cannot be the subject of an action, though, of course, an action could be brought on the debt and a judgment could be recovered through execution against the asset." See *British Columbia (Workers' Compensation Board)*, at para. 39.

[41] To this list I would add the further observation that, where a lien is created by statute, the entitlement to the lien will be strictly construed but, when a claimant's lien rights are established, the law will be liberally

interpreted to accomplish the objective of the enactment (see *Clarkson Co Ltd v Ace Lumber Ltd*, [1963] SCR 110 at 114; and section 6 of *The Interpretation Act*).

[42] In the absence of a statutory right to sell, the remedy for a legal lienholder concerned about the inconvenience and expense of storing a chattel, or the possibility of it perishing or depreciating until the debt is paid, is to seek the permission of the Court to sell the chattel (see *Larner* at p 730). Rule 45.01(2) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*), provides a wide discretion to the Court to make an interim order of sale prior to the dispute over the indebtedness giving rise to the lien being decided:

> **Perishable property**
> 45.01(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

[43] In summary, the power of a lienholder to sell a chattel to satisfy a debt owed is extraordinary. Absent meeting the requirements of the *GKA*, a lienholder cannot sell a detained vehicle to satisfy the debt owed without the permission of the Court. A wrongful sale of a chattel makes the lienholder liable for conversion.

Interpretation of the Statutory Notice Obligations under the GKA to Exercise the Power of Sale

[44] The objective of the power of sale conferred under section 9 of the *GKA* is to provide a lienholder with a remedy that does not otherwise exist—a power of sale without judicial approval. This statutory remedy provides a more expedient and less costly alternative than retaining the vehicle until paid

the debt owed or seeking the permission of the Court to sell it. The exercise of this right is subject to compliance with several prescribed rules as to the timing of when the sale can occur (section 10); the procedure for the sale by auction (section 11(1)); the form of notice to the owner (section 12); the form of notice to security holders (section 11(2)); the application of proceeds of the sale (section 11(3)); the disposition of surplus proceeds (section 11(4)); and the effect of a sale on other security (section 11(5)).

[45] I agree with the judge that a security holder's failure to properly register his, her or its interest under the *PPSA* does not affect the lienholder's power of sale under the *GKA* because of a failure to give notice under section 11(2) of the *GKA*. The wording of section 11(2) of the *GKA* makes that clear.

[46] Section 11(2) requires that, before notice must be given to a security holder, the financing statement in the PPR must be "indexed . . . under the serial number of the motor vehicle." The plaintiff failed to do that. It would defeat the objective of the *GKA*—to provide the remedy of sale without the necessity of judicial approval—if the lienholder could not exercise that remedy because of error committed not by the lienholder, but by an unknown security holder.

[47] I further agree with the judge that a lienholder is not required to give formal notice of sale to a lessee like Pecanac. Under the *GKA*, notice of sale need only be given to the vehicle's owner and any properly registered security holder.

[48] However, I must respectfully disagree with the judge and the supplementary arguments advanced ably by Mr. Bock that notice to the

plaintiff, in its capacity as an owner, pursuant to section 12 of the *GKA* was not required in the circumstances. The crucial undisputed fact here is that the plaintiff was the "owner of the vehicle" within the meaning of section 12 of the *GKA*. The mere fact that, because the lease was more than one year and, thus, as the judge correctly noted, was "subject to the regime established by the ***PPSA***" (at para 60), does not mean that the requirements of section 12 of the *GKA* could be ignored. Section 12(1) of the *GKA* is clear that the lienholder is "not entitled to sell the motor vehicle" unless the requisite notice is given to "the owner of the vehicle" in "accordance with the provisions of [the *GKA*]" (emphasis added).

[49] I have concluded, for several reasons, that the proper interpretation of the *GKA* makes it mandatory that notice be given to a vehicle's owner by a lienholder exercising the remedy of sale under the *GKA*. In the absence of such notice occurring (in the form required by the legislation), any subsequent sale destroys the lien and makes the lienholder liable for conversion to the vehicle's owner.

[50] First, section 10 (which is based on compliance with section 12) and section 11 of the *GKA* are directed to different audiences: owners and security holders. The Legislature has afforded more notice rights to owners than to security holders. Section 10 mandates that a sale cannot occur until 60 days after notice is given to the owner. According to section 12, the form of notice to the owner, Form 3 of the schedule to the *GKA*, has particular requirements that do not have to be given to a security holder under section 11(2). Notice to a security holder is less formal than to the owner as there is no prescribed form and may occur much closer to the sale date (within 14 days).

[51] Second, the reason why a sale can occur without judicial supervision is because the Legislature has crafted a procedure that balances the rights of the lienholder, the owner and any third parties, such as secured creditors or other persons holding a security interest as defined by the *PPSA*. In interpreting this law, the interests of one of these parties cannot be ignored.

[52] Campbell mistakenly proceeded on the premise that substitutional notice by publishing a notice of sale in *The Manitoba Gazette* was sufficient to meet Tartan's legal obligations of notifying the owner. No reasonable reading of the *GKA* can support that conclusion. It is unfortunate that Tartan did not seek proper legal advice before changing its business practice to deal with stricter enforcement of privacy legislation. The only accepted substitute for personal service on the owner of the statutory form (Form 3) is notice by registered mail to the latest known address of the owner (see section 12(2)). Notice in *The Manitoba Gazette* is not the notice to the owner of a vehicle required under section 12 of the *GKA*.

[53] The language regarding notice as to the exercise of the power of sale under comparable legislation is instructive to interpreting the notice provisions of the *GKA*. Another statute creating a statutory lien, *The Warehousemen's Liens Act*, CCSM c W20, also allows for the sale of chattels by the lienholder to satisfy a debt owed. However, that *Act*, unlike the *GKA*, relaxes the lienholder's notice requirements to the chattel's owner. Under *The Warehousemen's Liens Act*, if the notice provisions of that *Act* have not been "strictly complied with", the Court may overlook that fact so long as it is satisfied that the provisions have been "substantially complied with" (section 6).

[54] The *GKA* has no such comparable provision and has traditionally been seen as one where, with the exception of a late registration of a financing statement in the PPR under section 5(7) of the *GKA* (see *Prairie Mack Sales (1990) Ltd v Dueck Builder Mart*, 1992 CarswellMan 20 (QB); and *Formo Motors Ltd v Chmil*, 1995 CarswellMan 71 (CA)), there must be rigorous compliance with any condition set by the Legislature that extends or enlarges what the common law would otherwise permit (see *Mountain School District No 28 v General Brake & Clutch Service Ltd*, 1979 CarswellMan 62 at paras 7-8 (QB)).

[55] In my judgment, the judge overlooked the significance of the fact that Tartan was not relying on a PPR search as its way of notifying the vehicle's owner of the sale. Campbell was clear in his evidence that, once notice was published in *The Manitoba Gazette*, Tartan was of the belief that it had complied with sections 10 and 12 of the *GKA*. The PPR search was done solely for the purpose, as it should be, of complying with the requirements of section 11(2) of the *GKA* which is focussed on a different audience—security holders.

[56] Third, the judge's focus on Tartan's PPR search fails to take into account the fact that a PPR search is of no value in many cases as vehicles do not necessarily have security interests registered against them. Again, it must be said that a lienholder's sale of a chattel to collect on a debt is an extraordinary right that does not exist at common law. For good reason, the Legislature has set a high bar for the form of notice required to a vehicle's owner. The PPR is not a database of vehicle ownership; it is a database of security interests as defined by the *PPSA*. The implication of the judge's interpretation is that all a lienholder has to do is search the PPR and he, she or

it has satisfied his, her or its notice obligations under the *GKA*. That interpretation is contrary to the plain meaning of the language in sections 10 and 12 of the *GKA*.

[57] It should not be forgotten that, when a tow-truck operator removes an illegally parked vehicle, he, she or it is acting at the request of law enforcement and is essentially performing a public service. Like any public service, transparency and accountability are demanded. The notice required under section 12 of the *GKA* provides clarity for everyone. Any interpretation of the *GKA*, which fails to respect this informational right given to vehicle owners by the Legislature, is, in my view, incorrect.

[58] Fourth, the argument that there is no legal way to identify the owner of a vehicle is unpersuasive. If Tartan could not comply with the requirements of section 12 of the *GKA* by notifying the owner because it did not know who it was, it had other options. It could continue to retain the vehicle, as is its lienholder right. It could have also sought the permission of the Court to sell the vehicle.

[59] The witness who testified at the trial from MPI said MPI could provide a tow-truck operator with vehicle ownership information if there was a court order. The effect of an order under *QB r* 45.01(2) is that any public body possessing personal information relating to the owner of a vehicle (for example, the owner's name and latest address) can legally disclose that information to a tow-truck operator in order for him, her or it to sell the vehicle under terms set by the Court (see section 44(1)(m) of the *FIPPA*).

[60] While I acknowledge that a lienholder going to court for permission to sell a vehicle may be less efficient and more costly than the non-judicial

remedy created by the *GKA*, the tow-truck operator will be entitled to have any reasonable costs associated with having to go to court reimbursed out of the proceeds of the sale of a vehicle. No doubt, if an order for sale is sought by a lienholder, the Court, subject to the judge's discretion afforded by *QB r* 45.01(2), will look to the process set out in the *GKA* as a road map as to how to fairly structure a sale of a vehicle to satisfy a debt owed to a lienholder.

[61] Finally, I am not persuaded by the argument that section 243(2) of the *HTA* has the effect of making notice to a vehicle's owner under section 12 of the *GKA* unnecessary. This was not an interpretation the judge endorsed, nor do I.

[62] That argument from Tartan ignores the fact that the remedies for the enforcement of its statutory lien are not limited to the remedy of a sale (either authorised by a judge or by virtue of section 9 of the *GKA*), but also include the remedy of detaining the vehicle indefinitely until paid. A possessory lien is "a remedy in rem exercisable upon the goods, and its exercise requires no intervention by the courts" (*Tappenden v Artus* (1963), [1964] 2 QB 185 at 195 (CA (Eng))). The lien provides its holder with the lawful right to interfere with possessory rights of the chattel owner and provides a defence to an action for recovery (*ibid*).

[63] Therefore, once Tartan began to store the vehicle, its legal right to do so indefinitely was based on section 3 of the *GKA*. Section 9 of the *GKA* also makes it clear that, unless there is a detention of a vehicle under section 3, there is no power of sale under section 9. Therefore, absent section 3 of the *GKA* applying, Tartan would have had no power to sell the vehicle to enforce its lien without first obtaining the permission of the Court. Accordingly, because Tartan was enforcing its lien under section 3 of the *GKA*, once it

decided to exercise its power of sale under the *GKA*, it was required by section 12(1)(a) to notify the plaintiff in conformity with the requirements of that section and within the time period set by section 10.

[64] Leaving aside the plain meaning of the statute, the interpretation proposed by Tartan would discriminate against owners of vehicles. They would not be entitled to notice of a sale of their vehicles but a security holder would. Such an interpretation of the *GKA* would lead to an absurd result and, thus, must be avoided because that could not be what the Legislature intended (see *Rizzo* at para 27).

[65] In summary, in my respectful view, the judge erred when he concluded that the "[plaintiff's] right to receive notice in this fact situation was as a secured party under section 11 of the ***GKA***, not as an owner under section 12 of the ***GKA***" (at para 62). As the power of sale by a lienholder is an extraordinary remedy, the *GKA* requires strict compliance with sections 10 and 12, not substantial compliance or what Campbell described as fair notice. Because that did not occur, Tartan is liable for conversion despite it being done innocently.

[66] The plaintiff's case for conversion against S. Brar is based on an argument as to how the financing of the vehicle's purchase at the auction occurred. I see no merit to that claim and would not hold him liable in a personal capacity. The appropriate outcome here is for Tartan alone to be liable for the tort committed. Before discussing the consequences of allowing the plaintiff's appeal on the judgment against Pecanac, I wish to make two additional comments.

[67] The first comment relates to the unsatisfactory state of the law. There is a great deal of common sense in Campbell's evidence that the effect of the current application of privacy legislation has gone too far, making it unreasonably difficult for tow-truck operators to provide assistance to the WPA to remove unlawfully parked vehicles. There is a gap in the legislation or, at a minimum, the administrative practices of the City that, when a tow-truck operator is moving and/or storing a vehicle at the request of a peace officer, who can lawfully access the identity of the vehicle's owner to prepare a parking ticket, that information cannot be shared with the tow-truck operator for his, her or its assistance in enforcing the law. Some reasonable accommodation by policy or lawmakers of this problem is necessary.

[68] My second comment is about some unfortunate evidence the judge heard. One of the witnesses testified that, when vehicles go to auction, they are "owned" by Tartan and the money from the auction is "going to be Tartan's". This is a misunderstanding of the law. Tow-truck operators are not modern-day privateers.

[69] A lien does not affect ownership rights, only the right of possession. All the lienholder has is the right under section 11(3) of the *GKA* to apply the proceeds from the auction to the debt owed and any reasonable costs associated to the sale. Nothing more. Surplus monies must be paid to creditors and then the vehicle's owner and, failing that, paid into court and, if unclaimed within one year, paid over to the Province.

[70] While there is no evidence to suggest anything untoward has occurred to date, it is appropriate, given the evidence the judge heard, to state, for the purposes of clarity, that lienholders exercising the power of sale granted under section 9 of the *GKA* must apply the proceeds and dispose of

any surplus in strict conformity with the *GKA* and keep appropriate records should later an objection be raised or an audit occur. To do otherwise risks significant legal consequences to the lienholder.

The Judgment Against Pecanac

[71] Mr. Olschewski properly conceded at the hearing of the appeal that the default judgment obtained against Pecanac would need to be adjusted if the appeal was allowed. Sections 26(1) and (4) of *The Court of Appeal Act*, CCSM c C240, give this Court broad authority to give any judgment which ought to have been pronounced or other order as deemed just in the circumstances, even in favour of a party who has not appealed.

[72] The plaintiff will be fully compensated for its losses in relation to the vehicle by the sum of what Pecanac paid before the lease was frustrated by the unexpected event of the auction sale (see SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at paras 368, 373), the monies Tartan paid to the plaintiff prior to the trial and by the judge's damages award. To allow the judgment against Pecanac to stand would, given the circumstances here, be contrary to the common law rule against double recovery in an action for tort and amount to a windfall for the plaintiff (see *Ratych v Bloomer*, [1990] 1 SCR 940 at 962; and *Cunningham v Wheeler; Cooper v Miller; Shanks v McNee*, [1994] 1 SCR 359 at 396).

Disposition

[73] I would allow the appeal, set aside the judgment and award judgment in favour of the plaintiff against Tartan for $10,177.69. The plaintiff will have its costs in this Court and the Court below on a tariff basis.

[74] I would set aside the judgment against Pecanac and dismiss the plaintiff's claim against her without costs.

[75] I direct the Registrar of this Court to send, by ordinary mail, a copy of these reasons and the Certificate of Decision to Pecanac at her last-known address as disclosed by the pleadings.

Mainella JA

I agree: Monnin JA

I agree: Pfuetzner

APPENDIX

Provisions—*The Highway Traffic Act*, CCSM C H60

UNLAWFULLY PARKED VEHICLES

Removal of parked vehicle, etc.

243(2) Where a peace officer has reasonable and probable cause to believe that an unattended vehicle is

(a) in violation of subsection 90(1), (3) or (9), section 93 or 230, or of any rule made under any of those provisions, or in violation of section 122, 123 or 222; or

(b) apparently abandoned on or near a highway; or

(c) a motor vehicle on a highway without the number plate or plates required to be displayed on it under *The Drivers and Vehicles Act* or the regulations under that Act;

he or she may take the vehicle into his custody and cause it to be taken to, and stored in, a suitable place.

Costs of moving and storage

243(3) Costs and charges incurred in moving or storing a vehicle or both, under subsections (1) and (2) are a lien on the vehicle that may be enforced under *The Garage Keepers Act* by the person who moved or stored the vehicle at the request of the peace officer or other authorized person.

Provisions—*The Garage Keepers Act*, CCSM C G10

Right of detention and priority

3 Where a garage keeper has in his custody or possession a motor vehicle or farm vehicle, or any part thereof, or accessory or equipment pertaining thereto that belongs to a person who is indebted to him for any service, and, subject to subsection 5(1), the garage keeper has had such custody or possession since the time the service was rendered, he may detain it in his custody or possession; and, subject to section 8, the right of detention provided by this section has priority over, and is not subject to, any lien, security interest, as defined in *The Personal Property Security Act*, bill of sale, or other charge or encumbrance of whatever nature or kind, upon or in respect of the motor vehicle, farm vehicle, or part, accessory, or

equipment, pertaining thereto, existing at the time of the detention except a lien under this Act with respect to which a financing statement has been registered as provided herein.

Power of sale

9 Where a motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, has been seized under section 7, or where a motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto has been detained under section 3, if, after the expiration of the period mentioned in section 10, indebtedness with respect to which the lien arose has not been paid, the garage keeper may sell the motor vehicle or farm vehicle, or part, accessory or equipment at public auction.

When vehicle may be sold

10 The sale as aforesaid may be held at any time after the expiration of 60 days after the day on which the notice is given to the owner under section 12.

Procedure for sale by auction

11(1) Before any such sale is held, the garage keeper shall insert in one issue of *The Manitoba Gazette*, and post and keep posted during the period of at least two weeks on the outside of a front door of his garage, a notice of the intended sale, stating the name, so far as known, of the owner of any motor vehicle or farm vehicle, or part, accessory, or equipment pertaining thereto to be sold, a general description of the motor vehicle or farm vehicle, or part, accessory, or equipment pertaining thereto to be sold, the time and place of sale, and the name of the person who is to act as auctioneer.

Notice to other security holders

11(2) Where a garage keeper intends to sell a motor vehicle under section 9, he shall, at least two weeks before the date of the intended sale, give notice of the intended sale in writing to any person who has registered in The Personal Property Registry established under *The Personal Property Security Act* a financing statement that relates to the motor vehicle or an accession thereto which is indexed in the registry under the serial number of the motor vehicle.

Application of proceeds

11(3) After the sale the garage keeper shall apply the proceeds of the sale in payment of the amount due to him as aforesaid, the cost of accommodation during the period of detention at the rates agreed upon for accommodation, the cost of seizure, where the article to be sold has been seized under section 7, the costs of advertising, the fee of the auctioneer, and all other reasonable costs of the sale.

Disposition of surplus, if any

11(4) The garage keeper shall pay over the surplus, if any, to the person entitled thereto on application being made by him therefor; and, if application therefor is not forthwith made, he shall immediately pay the surplus into the Court of Queen's Bench to be kept there for the person entitled for one year, after which time, if that person does not appear or claim the amount so kept, it shall be paid over to the Minister of Finance and form a part of the Consolidated Fund.

Effect of sale on other security

11(5) Where a garage keeper sells a motor vehicle or farm vehicle, or a part, accessory or equipment pertaining thereto, under this section, the sale discharges the lien of the garage keeper and, if the sale is made to a bona fide purchaser for value, discharges also any security interest in the motor vehicle or farm vehicle, or part, accessory or equipment pertaining thereto, in respect of which a financing statement has been registered under *The Personal Property Security Act* other than a financing statement in respect of an interest, charge, lien or encumbrance to which the garage keeper's lien is subject under section 8, and terminates the interest of the owner in the motor vehicle or farm vehicle or part, accessory or equipment pertaining thereto.

Notice to debtor

12(1) Unless, at the time of, or within a reasonable time after

(a) the detention of the motor vehicle, farm vehicle, accessory or equipment under section 3; or

(b) the seizure of the motor vehicle, farm vehicle, accessory or equipment under section 7;

the garage keeper gives the owner of the vehicle a notice in Form 3 of the Schedule, or a notice to like effect, the garage keeper is not entitled to sell the motor vehicle, farm vehicle, accessory or equipment, as the case may be, in accordance with the provisions of this Act.

Notice by registered mail

12(2) Where, at the time of receiving the motor vehicle, farm vehicle, accessory or equipment for service or at any time prior to the completion of the service, the garage keeper has given written notice to the owner that he intends to rely upon the rights of a lienholder under this Act in collecting the account for the service, the notice required under subsection (1) may be given by sending it to the owner by registered mail to the latest address of the owner known to the garage keeper and in that case the notice shall be conclusively deemed to have been given to the owner on the third day after the day on which it is posted.

FORM 3

NOTICE TO OWNER

To:

(name and address of owner)

being the owner of

(here describe the motor vehicle, farm vehicle, accessory or equipment in respect of which the lien is claimed).

TAKE NOTICE THAT

(name and address of garage keeper)

intends to rely on the rights of lienholder under *The Garage Keepers Act*, including the right to sell the motor vehicle (farm vehicle, accessory or equipment) described above if the account of $ for service to (storage of) the motor vehicle (farm vehicle, accessory or equipment) is not paid within 60 days after the giving of this notice.

You have the right under section 13 of *The Garage Keepers Act* to pay the amount of the account, plus 10% thereof or $50. whichever is the lesser, into court and upon compliance with the provisions of that section respecting notice to the garage keeper, the lien of the garage keeper will cease to exist and custody of the motor vehicle (farm vehicle, accessory or equipment) will be returned to you.

DATED this day of , [20] .

(signature of garage keeper)