Court File No. […]

ONTARIO COURT OF APPEAL

BETWEEN:

STARMARK PROPERTY MANAGEMENT LIMITED

Appellant

- and -

ATLANTIC INTERNATIONAL EQUIPMENT SALES

Respondent

FACTUM

SUBMISSIONS OF THE APPELLANT, STARMARK PROPERTY MANAGEMENT LIMITED

Part I – The Facts

A) OVERVIEW

1. This is an appeal in relation to the determination of the ownership of an automotive Spray Booth. The contest is between:

   (a) the Appellant, Starmark Property Management Limited, which is landlord of the property on which the Spray Booth is located, and which levied distress on the Spray Booth, and

   b) the Respondent, Atlantic International Equipment Sales ("Atlantic"), which claims to be the title owner of the Spray Booth pursuant to an unsecured conditional sales agreement.

2. The Appellant Starmark Property Management Limited appeals from a judgment of the Ontario Court (General Division) rendered by the Honourable Mr. Justice Dambrot on June 18, 1997. In that judgment, the learned Trial Judge held in favour of the Respondent Atlantic and declared that:

   (a) the distraint of the Spray Booth by Starmark Property Management Limited was unlawful;

   (b) the subsequent sale of the Spray Booth by Starmark Property Management Limited was invalid.

(B) FACTUAL BACKGROUND

3. The Respondent Atlantic is the manufacturer and owner of an automotive Spray Booth. Pursuant to a conditional sales agreement dated March 15, 1996, Atlantic sold the booth to third parties, namely H.K. Auto Centre ("H.K. Auto"), Wilson Fu and Chris Nguyen ("Fu and Nguyen").

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 2

4. At the time of the agreement, Atlantic did not register the transaction under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA") as required. Under the agreement, title to the Spray Booth was to remain in Atlantic until the purchase price was paid in full.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 2

5. The H.K. Auto, Fu and Nguyen breached the payment provisions of the agreement.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 2

6. The Appellant Starmark Property Management Limited ("the Landlord") owns the premises in which the booth is situated. The Landlord leased the premises to H.K. Auto on February 21, 1996.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 3

7. The lease provided that all affixed improvements made by the lessee, other than the lessee's trade fixtures, would become the lessor's property at the end of the term of the lease, without compensation.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 3.

8. H.K. Auto defaulted on its lease. The Landlord levied a distress on the premises. Owing to the size and bulk of the Spray Booth, the distraint was a constructive one.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 3

9. In early October, 1996, Atlantic demanded possession of the Spray Booth, which the Landlord refused.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 4

10. On October 9, 1996, the Landlord agreed to sell those assets which were subject to distraint to another party, who also offered to lease the premises. No formal lease has yet been entered into between the Landlord and this other party.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 4.

11. On November 4, 1996, Atlantic registered the conditional sales agreement against H.K. Auto, and against Fu and Nguyen on November 14, 1996.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 4

(C) JUDGMENT OF THE HONOURABLE MR. JUSTICE DAMBROT

12. The matter was heard in the Ontario Court (General Division) by The Honourable Mr. Justice Dambrot on June 18, 1997. The learned Trial Judge held as follows:

a) the Spray Booth is a fixture;

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, at p. 18

b) the Spray Booth is in fact a trade fixture, which is exempt from distress pursuant to the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, s. 32;

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, at pp. 20, 21

c) section 34(1)(b) of the PPSA does not operate to afford the Landlord priority, since Atlantic's interest had already "attached" before the Spray Booth was installed.

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, at p. 19

d) the distraint of the Spray Booth by the Landlord was unlawful;

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, at p. 23

e) the purported sale of the Spray Booth by the Landlord was invalid;

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, at pp. 17, 24

f) Atlantic is entitled to possession of the automotive Spray Booth, upon giving to the Landlord both notice of its intention to reacquire possession, and security, if demanded, for the cost of repairs to the landlord's premises;

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, p. 23

g) even if the Spray Booth is a chattel rather than a fixture, the Landlord's lien arising from the distraint did not have priority over the unperfected security interest of Atlantic;

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, p. 10

h) the combined effect of the caselaw and s. 4(1) of the PPSA is not that the Landlord (as lienholder), automatically has priority over the interests of the Atlantic (the security holder), but rather simply that the PPSA does not apply to the determination of priority between the two parties.

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, p. 8

i) even if the Spray Booth is a chattel, then under s. 31(2) of the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, the Landlord only had the right to sell the tenant's **interest** in the booth under the conditional sales contract — essentially the obligation to pay the outstanding balance of the purchase price — and not the whole chattel.

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, p. 11

j) thus if the Spray Booth is a chattel, then the Landlord's purported sale of the whole Spray Booth to another party was invalid.

Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, p. 12

(D) FINDINGS APPEALED FROM

13. The specific issues in this appeal are:

    (a) Whether the Honourable Mr. Justice Dambrot erred in characterizing the Spray Booth as a trade fixture;
    (b) Whether the Honourable Mr. Justice Dambrot erred in holding that trade fixtures are subject to distraint;
    (c) Whether in law, trade fixtures can revert to the status of chattel in the proper circumstances, and thus become subject to distraint; and
    (d) Whether the Honourable Mr. Justice Dambrot erred in determining that the Landlord, as lienholder, did not have automatic priority over Atlantic, the holder of an unperfected security interest.

Part II – The Law

(1) ISSUE A — CHARACTERIZATION OF THE SPRAY BOOTH AS FIXTURE

14. It is respectfully submitted that while the learned Trial Judge was correct in his assessment that the Spray Booth was a fixture, the learned Trial Judge erred in going on to find that it was a "trade fixture" and was therefore not subject to distraint.

(a) Spray Booth as Fixture

15. In his decision dated June 18, 1997, learned Trial Judge held that the Spray Booth is a fixture. This conclusion is in keeping with the decision in *Cormier v. Federal Business Development Bank*, [1983] O.J. No. 924 p. 8 (Co. Ct.), in which a similar Spray Booth was also held to be a fixture. It is also consistent with the well-established test in Ontario which states that articles affixed to land, even slightly, are considered part of the land.

> ***Cormier v. Federal Business Development Bank, [1983] O.J. No. 924 at p. 8 (Co. Ct.)***
> ***Re Deloitte & Touche and 1035839 Ontario Inc. (1996), 28 O.R. (3d) 139 at 146, 147 (Gen. Div.)***

16. True fixtures are not subject to the Landlord's remedy of distress, but rather become part of the land, and therefore the Landlord's property, in the normal course.

> ***Cormier v. Federal Business Development Bank, [1983] O.J. No. 924 at p. 8 (Co. Ct.)***
> ***Stack v. T. Eaton Co. et al. (1902), 4 O.L.R. 335 at 338 (C.A.).***

(b) Spray Booth as "Trade Fixture"

17. However, the learned Trial Judge went on to conclude that the Spray Booth was in fact a "trade" fixture, and cited the decision in *Cormier v. Federal Business Development Bank*, [1983] O.J. No. 924 as precedent. It is respectfully submitted that the learned Trial Judge erred in so doing.

18. The question of whether or not the Spray Booth was a "trade fixture" may depend in part on whether the tenants in this case were, in fact, "engaged in trade" so as to make the Spray Booth a fixture used in that particular business. The learned Trial Judge appears to have directed his attention to this issue only briefly.

***Howell v. Listowell Rink & Park Co.* (1887), 13 O.R. 476 at 491 (C.A.)**
Judgment of the Honourable Mr. Justice Dambrot, dated June 18, 1997, at pp. 20, 21

19. In matters of landlord and tenant law, the determination of whether a particular item is a chattel, a fixture or a trade fixture is a determination of fact and law which is often influenced by the intention of the parties. The test has been stated as follows:

> "As a controlling consideration in the modern cases it is usually stated that whether an article or structure is part of the realty is primarily a question of the intention with which it was annexed or put in position, it being part of the realty if there was an intention to make it a permanent accession to the land, and only then."

***Coleman v. Monahan*, [1927] 2 D.L.R. 209 at 212 (N.B. App. Div.)**

20. Likewise, the determination of whether a fixture is in fact a trade fixture also hinges on the intention of the parties with respect to that item.

Howell v. Listowell Rink & Park Co. (1887), 13 O.R. 476 (C.A.) at 476.

21. It is respectfully submitted that, as it applies to this case, the learned Trial Judge misconstrued the decision in *Cormier v. Federal Business Development Bank*, [1983] O.J. No. 924 (Co. Ct.) as it relates to the status of fixtures versus chattels. That case involved the competing interests of the landowner and a party with a security interest under a chattel mortgage. The landlord in *Cormier* was not seeking to exercise rights of distraint, but rather was attempting to retain possession of the Spray Booth by virtue of the fact that it was a fixture and therefore remained with the land. The court in *Cormier* was simply not alive to the issue of whether a trade fixture can be subject to distraint, which is one of the central issue at hand.

***Cormier v. Federal Business Development Bank*, [1983] O.J. No. 924 at para. 3 (Co. Ct.)**
Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 4

22. Thus, it is respectfully submitted that the decision in *Cormier v. Federal Business Development Bank* [1983] O.J. No. 924 (Co. Ct.), as it relates to whether the Spray Booth is a "trade fixture" or merely a "fixture", is limited to its own particular facts.

***Cormier v. Federal Business Development Bank*, [1983] O.J. No. 924 at para. 3 (Co. Ct.)**

(2) ISSUE B — WHETHER TRADE FIXTURES ARE SUBJECT TO DISTRAINT

23. Assuming that the Spray Booth was indeed a trade fixture, it is respectfully submitted that the learned Trial Judge erred in finding that trade fixtures are not subject to landlord's distraint.

(a) Canadian Law Respecting Distraint of Fixtures

24. After finding that the Spray Booth was a trade fixture, the learned Trial Judge went on to conclude that it was "settled law" that such trade fixtures are not subject to distress.

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 4

25. It is respectfully submitted that the Canadian law on this point is not "settled", as learned Trial Judge states. In fact, authoritative precedent is scarce and there is some uncertainty on the issue.

Williams and Rhodes, Canadian Law of Landlord and Tenant, 6th edition, at p. 8-65ff

26. It is respectfully submitted that the learned Trial Judge misinterpreted the prevailing Canadian view respecting fixtures as expressed by learned authors Williams and Rhodes in *Canadian Law of Landlord and Tenant, 6th edition*, at p. 8-65. The authors state (as was quoted by the learned Trial Judge in his reasons):

> "Fixtures, so long as they continue as such, are absolutely exempt from distress, whether they are irremovable ('landlord's fixtures'), or severable by a tenant ('tenant's fixtures'). "

Williams and Rhodes, Canadian Law of Landlord and Tenant, 6th edition, at p. 8-65ff
Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 20

27. However, the learned authors go on to mention the decisions in *Davy v. Lewis* (1859), U.C.Q.B. 21 (C.A.) *and Howell v. Listowell Rink & Park Co.* (1886), 13 O.R. 476 (C.A.), and *Hellawell v. Eastwood* (1851), 155 E.R. 554, all of which cast some doubt on or at least appear to be exceptions to this purported rule.

Williams and Rhodes, Canadian Law of Landlord and Tenant, 6th edition, at p. 8-65ff
Davy v. Lewis (1859) U.C.Q.B. 21 (C.A.)
Howell v. Listowell Rink & Park Co. (1886), 13 O.R. 476 (C.A.)
Hellawell v. Eastwood (1851), 155 E.R. 554 6 Ex. 295

28. Recent Canadian decisions have illustrated that trade fixtures can be subject to distraint in the proper circumstances.

Mac Investments and Consultants Ltd. v. Gittens/Casey Management Co., [1993] N.J. No. 263 (Nfld. Sup. Ct. — T.D.).
Purple Daisy Ltd. v. Frobisher Developments Ltd., [1990] N.W.T.J. No. 89
Gartamk Investments Ltd. v. Rees, [1990] A.J. No. 941 (Alta. Q.B.).

(b) Learned Trial Judge's Misinterpretation of Precedent

29. It is submitted that, respecting the ability to distrain trade fixtures, the decisions of *Davy v. Lewis* (1859), U.C.Q.B. 21 (C.A.), and *Howell v. Listowell Rink & Park Company* (1886), 13 O.R. 476 (C.A.), which were disregarded in the reasons for decision of the learned Trial Judge, are not distinguishable on the facts or at law from the case at hand. It is respectfully submitted that these decisions are equally authoritative to the cases holding to the contrary.

Davy v. Lewis (1859), U.C.Q.B. 21 (C.A.)
Howell v. Listowell Rink & Park Co. (1886), 13 O.R. 476 (C.A.)
Williams and Rhodes, Canadian Law of Landlord and Tenant, 6th edition, at p. 8-65ff

30. Although it also concerns a Spray Booth, it is submitted that the *Cormier v. Federal Business Development Bank*, [1983] O.J. No. 924 (Co. Ct.) has only limited relevance to the case at hand, since it features no direct consideration of whether a trade fixture was

subject to the landlord's right of distraint. It is submitted that the result in *Cormier* might have been different, had there existed a landlord's distress situation in that case as well.

> ***Cormier v. Federal Business Development Bank, [1983] O.J. No. 924 at para. 3 (Co. Ct.)***

(3) ISSUE C — WHETHER TRADE FIXTURES CAN REVERT TO THE STATUS OF CHATTEL AND THUS BECOME SUBJECT TO DISTRAINT

31. It is respectfully submitted that, even if the Spray Booth is a trade fixture which can be removed by the tenant, upon doing so the Spray Booth becomes a chattel which is subject to distraint by the Landlord.

(a) Reversion to Status of Chattel

32. Tenant's fixtures can be severed to resume their character as chattels, unless there is express stipulation or trade custom to the contrary. The Spray Booth, being a trade fixture, could be removed from the property and revert to its status as chattel.

> ***Re Deloitte & Touche Inc. and 1035839 Ontario Inc. (1996), 28 O.R. (3d) 140 at 150 (Gen. Div.).***
> ***Cormier v. Federal Business Development Bank, [1983] O.J. No. 924 at para. 6 (Co. Ct.)***
> ***Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997 at pp. 18, 19***

33. Subject to other provisions of the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, tenant's chattels are distrainable. Thus, it is respectfully submitted that, despite its current status as trade fixture, the Spray Booth can be removed from the property, revert to its status as chattel, and then become subject to distraint again.

> ***Landlord and Tenant Act, R.S.O. 1990, c. L.7, s. 31.***

34. This is in keeping with long-standing Ontario precedent in *Howell v. Listowell Rink and Park Company*, (1887), 13 O.R. 476 (C.A.), in which it was held that a trade fixture is liable to be distrained if both the freehold and the fixture can be restored to the same condition they were in prior to the distress.

> ***Howell v. Listowell Rink and Park Company (1887), 13 O.R. 476 at 492 (C.A.)***

35. The decisions in *Cashman Holdings v. Canada Trustco* (1990), 1 C.B.R. (3d) 80 (B.C.S.C.) and *Bruce v. Smith*, [1923] 3 D.L.R. 887 (Alta. S.C. App. Div.) are distinguishable on their facts, and in any event are not binding on this Court.

> ***Cashman Holdings v. Canada Trustco (1990), 1 C.B.R. (3d) 80 (B.C.S.C.)***
> ***Bruce v. Smith, [1923] 3 D.L.R. 887 (Alta. S.C. App. Div.)***

(b) No Rational Distinction Between Chattel and Severed Trade Fixture

36. The learned Trial Judge admits in his decision dated June 18, 1997 that there is likely no rational distinction between the difference between chattels, which can be subject to distraint, and trade fixtures, which cannot. The learned judge states:

> "While this different treatment of chattels and trade fixtures, which may only be distinguished from each other by the presence of a few screws, may in some

cases seem less than entirely rational, it is the settled view of the law and I adopt it."

Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 21

37. In light of this admittedly tenuous distinction, it is respectfully submitted that there is no defensible basis for treating chattels and trade fixtures differently. If chattels are not exempt from distress then neither should trade fixtures like the Spray Booth be exempt.

(4) ISSUE D — LANDLORD HAVING AUTOMATIC PRIORITY STATUS, AS LIENHOLDER

38. It is respectfully submitted that the learned Trial Judge erred in determining that the Landlord, as lienholder, did not have automatic priority over Atlantic, the holder of an unperfected security interest.

(a) The extent of tenant's "interest" and the landlord's right to distrain

39. The Landlord, in its capacity as a landlord of a rental property, generally has the right to distrain the goods and chattels of its tenants pursuant to the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, s. 31 (the "LTA").

Landlord and Tenant Act, R.S.O. 1990, c. L.7, s. 31.

40. Generally speaking, a distress gives the landlord the right to take and hold possession of the goods located in the leased premises, until rent is paid. The landlord is also entitled to sell the distrained goods.

Commercial Credit Corporation v. Harry Shield (1981), 32 O.R. (2d) 703 at p. 703 (C.A.) aff. (1980), 29 O.R. (2d) 106 (H.C.J.)
Landlord and Tenant Act, R.S.O. 1990, c. L.7, ss. 31, 53

41. Section 31(2) of the LTA limits the right of distress to the goods and chattels of the tenant or person liable for the rent, with certain exceptions. That subsection states, in part, that the landlord:

"... shall not distrain for rent on the goods and chattels of any person except the tenant ... but this restriction does not apply ... to the interest of the tenant in any goods or chattels on the premises in the possession of the tenant under a contract for purchase, or by which the tenant may or is to become the owner thereof upon performance of any condition ..."

Landlord and Tenant Act, R.S.O. 1990, c. L.7, s. 31(2)

42. The LTA does not define the term "interest" or "interest of the tenant" for the purposes of s. 31(2) of the Act.

Landlord and Tenant Act, R.S.O. 1990, c. L.7, s. 31(2)

43. An "interest" is defined in Black's Law Dictionary as "The most general term that can be employed to denote a right, claim, title, or legal share in something."

Black's Law Dictionary, abridged 5th edition (West Publishing, 1983).

44. It is therefore submitted that, by virtue of the partial payment of the price, the tenant aquired "an interest" in the goods, and thus the goods are subject to distress to the full extent of the arrears.

(b) The Priority of Landlord's Lien

45. It is respectfully submitted that the Trial Judge was unduly restrictive in determination of the combined effect of s. 4(1) of the PPSA and s. 32(1) of the LTA on chattels subject to distraint.

46. Section 4(1) of the PPSA states in part:

> "This Act does not apply,
>
> (a) to a lien given by statute or rule of law, except as provided in subclause 20 (1) (a) (i) or section 31; …"
>
> ***Personal Property Security Act, R.S.O. 1990, c. P.10, s. 4(1)(b)***

(i) The Effect of the Caselaw

47. Aside from the fact that it involved a chattel mortgage rather than a conditional sales agreement, the decision in *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd. et al*. (1981), 32 O.R. (2d) 703 (C.A.) is virtually indistinguishable to the facts at hand respecting the priority position of the Landlord. Since the tenant's title was derived by way of mortgage, and thus fell within the wording of the exception in the LTA, the landlord in *Commercial Credit* had priority.

> ***Commercial Credit Corporation Ltd. v. Harry D. Shields Ltd. et al. (1981), 32 O.R. (2d) 703 at p. 703 (C.A.) aff. (1980), 29 O.R. (2d) 106 (H.C.J.)***

48. It is respectfully submitted that, in the absence of distinguishing facts, the decision in *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd. et al.* (1981), 32 O.R. (2d) 703 (C.A.), being a decision of the Ontario Court of Appeal, is binding precedent respecting the case at hand.

(ii) Expression of Legislative Intent

49. The exception in s. 4(1)(b) of the PPSA is an expression of legislative intention that in all cases, an unperfected security interest is subordinate to the interest of a person who has a lien given by rule of law.

> ***Leavere v. Port Colborne (1995), 22 O.R. (3d) 44 at 50 (C.A.)***
> ***Personal Property Security Act, R.S.O. 1990, c. P.10, s. 4(1)(b)***

50. It is respectfully submitted that the legislative intent of the LTA is to give landlords the same benefit of priority. The court states in *Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at 53 (C.A):

> "Because the statute authorizes distress upon chattels subject to security agreements I am constrained to conclude that the lien which arises upon the exercise of that right must take priority over the security agreements. It would, in

my view, amount to an absurdity if the statute authorized distress upon chattels covered by security agreements but did not intend as well that the lien created by the exercise of the right of distress was to have priority over the security agreement."

***Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at 53 (C.A.)**
***Landlord and Tenant Act*, R.S.O. 1990, c. L.7**

51. This conclusion is supported by analogy to the decision in *Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 (C.A.) where that court found that the *Municipal Act* provisions expressed a legislative intent that municipalities were entitled to levy by distress upon the chattels in possession of the person taxed, eventhough the chattels are subject to security agreements.

***Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at 53 (C.A.)**

(iii) "Automatic" Priority

52. Generally speaking, under common law, priorities are determined in accordance with the chronological order of the encumbrances. The Landlord's lien, given by common law, is an encumbrance upon the property to which it attaches.

***Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at p. 49 (C.A.)**

53. That common-law rule can be displaced by statute.

***Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at p. 49 (C.A.)**

54. In *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd. et al.* (1981), 32 O.R. (2d) 703 (C.A.), it was assumed that, on the facts of that case, the lien given by a rule of law had automatic priority over the chattel mortgage.

***Commercial Credit Corporation Ltd. v. Harry D. Shields Ltd. et al.* (1981), 32 O.R. (2d) 703 at p. 703 (C.A.) aff. (1980), 29 O.R. (2d) 106 (H.C.J.)**
Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at p. 8

55. In *Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 (C.A.) that assumption was challenged; the appellants in that case contended that if the PPSA did not apply, then the common-law rule, that encumbrances rank in the order they are created, must be applied.

***Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at p. 49 (C.A.)**
Judgment of the Honourable Mr. Justice Dambrot dated June 18, 1997, at pp. 8, 9
***Personal Property Security Act*, R.S.O. 1990, c. P.10**

56. It is respectfully submitted that in the instant case, the Landlord's lien was first to arise, so the common law rule would still afford the Landlord priority. Moreover, even taking into account the exception in *Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 at p. 49 (C.A.), the Landlord would still enjoy priority by virtue of the distraint provisions in s. 31(2) of the LTA, as has been discussed above.

***Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 (C.A.)**
***Landlord and Tenant Act*, R.S.O. 1990, c. L.7**

57. In *Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 (C.A.), the court determined the priority between a security holder on the one hand, and a distraining municipality on the other. The court found that the common law rule was displaced by the existence of a statutory provision under the *Municipal Act* which gave the municipalities priority over the security holder.

Leavere v. Port Colborne (1995), 22 O.R. (3d) 44 at 51 (C.A.)

58. It is submitted that, as in *Leavere v. Port Colborne* (1995), 22 O.R. (3d) 44 (C.A.), the effect of LTA, s. 31(2) is also to give the Landlord automatic priority over the security holder.

Landlord and Tenant Act, R.S.O. 1990, c. L.7, s. 31(2)
Leavere v. Port Colborne (1995), 22 O.R. (3d) 44 at 51 (C.A.)

Part III – Relief Requested

IT IS RESPECTFULLY REQUESTED that the appeal be allowed, that the distraint and sale of the Spray Booth by the Appellant be declared lawful, and that costs be awarded to the Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

[date]

[counsel, etc.]