Court File No. CV-23-00698576-00CL
CV-23-00698395-00CL
CV-23-00698632-00CL
CV-23-00698637-00CL
CV-23-00699067-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

KINGSETT MORTGAGE CORPORATION and DORR CAPITAL CORPORATION

Applicant

and

STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., TLSFD TAURASI HOLDINGS CORP. and STATEVIEW HOMES (HIGH CROWN ESTATES) INC.

Respondent

ATRIUM MORTGAGE INVESTMENT CORPORATION and DORR CAPITAL CORPORATION

Applicant

and

STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI and CARLO TAURASI

Respondent

DORR CAPITAL CORPORATION

Applicant

and

HIGHVIEW BUILDINGS CORP INC.

Respondent

DORR CAPITAL CORPORATION

Applicant

and

STATEVIEW HOMES (BEA TOWNS) INC.

Respondent

MERIDIAN CREDIT UNION LIMITED

Applicant

and

STATEVIEW HOMES (ELM & CO) INC.

Respondent

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

BOOK OF AUTHORITIES OF THE MOVING PARTY

September 19, 2024

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TO: THE SERVICE LIST

INDEX

Tab	Title
1.	*1864684 Alberta Ltd v 1693737 Alberta Inc*, 2016 ABQB 371
2.	*British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24
3.	*Cameron Stephens Mortgage Capital Ltd v 2011836 Ontario Corp*, 2024 ONSC 3507
4.	*Counsel Holdings Canada Limited v Chanel Club Limited* (1999), 43 OR (3d) 319 (CA)
5.	*DIMS Construction inc (Trustee of) v Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 SCR 564
6.	*Fleming v Massey*, 2016 ONCA 70
7.	*Harvey v Talon International Inc*, 2017 ONCA 267
8.	*Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240
9.	*Kingsett Mortgage Corp v Stateview Homes (Minu Towns) Inc*, 2023 ONSC 7105
10.	*Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202
11.	*The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9
12.	*Ward-Price v Mariners Haven Inc* (2001), 57 OR (3d) 410

Court of Queen's Bench of Alberta

Citation: 1864684 Alberta Ltd v 1693737 Alberta Inc, 2016 ABQB 371

Date: 20160714
Docket: 1501 05062
Registry: Calgary

2016 ABQB 371 (CanLII)

Between:

1864684 Alberta Ltd.

Plaintiff

- and -

1693737 Alberta Inc.

Defendant

Memorandum of Decision
of the
Honourable Madam Justice G.A. Campbell

The Application

[1] This application seeks the determination of creditors' entitlement to net sale proceeds (the "Proceeds") from the June 2015 sale of certain improved lands, located in Airdrie, Alberta (the "Land"). The Land consisted of a commercial condominium development that was being developed by 1693737 Alberta Ltd. (the "Developer"). The Land was sold in a court-supervised receivership. The Receiver paid the Proceeds into Court.

[2] There are four classes of creditors that could claim entitlement to the Proceeds.

[3] 1753435 Alberta Ltd., 1713527 Alberta Ltd., Lorrin Baerg, Garth and Betty-Jo Hopfe, Storehouse Holdings Ltd. and John and Kris Bennett (collectively "the Purchasers") claim priority entitlement to the Proceeds over all other creditors. The Purchasers claim priority under

a statutory trust created by s 14(3) of the *Condominium Property Act*, RSA 2000, c C-22. Their interests were registered against the title to the Land, albeit after several other interests had been registered.

[4] Of the three remaining classes of creditors, two argue that priority to the Proceeds should be based on the order in which the interests were registered against title to the Land pursuant to the *Land Titles Act*, RSA 2000, c L-4.

[5] Red Star Drywall Ltd., Abacus Construction Inc., Abacus Steel Inc., Tanas Concrete Industries Ltd., Defined Glass & Design Ltd., KDM Utilities Ltd. and Mid-West Contracting Ltd. (collectively "the Lienholders") claim priority entitlement to the Proceeds pursuant to their builders' liens (the "Builders' Liens") that were registered on the title to the Land.

[6] Kulwinder Sekhon (the "Caveat Holder") argues that priority to the Proceeds should be determined based on the order in which the interests were registered against title to the Land pursuant to the *Land Titles Act*.

[7] The fourth class of creditor, a Mortgagee, did not participate in this application.

Background

[8] For the purpose of this application, the parties agreed to a common set of factual assumptions. The factual assumptions are as follows:

1. Under agreements for purchase and sale, the Purchasers paid deposits to the Developer to purchase condominium units to be constructed on the Land as contemplated by s 14(3) of the *Condominium Property Act* the ("Deposits"). The agreements expressly provided that the Deposits were to be used to purchase the Land and construction of a commercial condominium unit and project on the Land.
2. Deposits were paid both before and after builders' liens were registered on title to the Land.
3. All Builders' Lien claims are valid and enforceable as registered. In a separate action, pursuant to an application by the owner of the Land[], the lien fund was set.
4. The caveat re agreement charging land is valid and enforceable as registered.
5. The Developer did not hold the Deposits in a separate trust account as required by the *Condominium Property Act*.
6. The Developer used the Deposits to fund the construction of the Condominium Project on the Land[].
7. The Developer was unable to complete the project, a Receiver [of the Land] was appointed and the Land[][was] sold in the receivership.
8. The Receiver paid the net sale proceeds from the sale of the Land[].into Court.

[9] The Developer itself was never assigned into or the subject of bankruptcy. The only asset of the Developer held in receivership by the Receiver was the Land. The Receiver did not sell any other property of the Developer.

2016 ABQB 371 (CanLII)

The Issue

[10] Although the parties in their briefs discussed the priority of the lien fund as a whole, the parties agree that the sole issue to be determined on this application is:

> Does the trust claim being advanced by the Purchasers, based upon the foregoing assumptions, have priority over the registrations on title to the Land?

[11] For the reasons that follow, the answer is No.

The Lienholders' and Caveat Holder's Position

[12] The Lienholders and Caveat Holder argue that the Proceeds currently being held by the Court stand in place of the Land sold by the Receiver. These Proceeds act as security for any validly registered encumbrance that existed against the Land prior to the receivership sale.

[13] The Lienholders and the Caveat Holder contend that priority to the Proceeds should be determined in accordance with the order of registration of encumbrances filed against the title to the Land. Relying on ***Romspen Investment Corporation v Certified Financial Services & Mortgage Corp***, 2014 ABCA 136, 240 ACWS (3d) 196, the Lienholders and the Caveat Holder argue that the legislative regimes set out in the *Land Titles Act*, the *Law of Property Act*, RSA 2000, c L-7 and the *Builders' Lien Act*, RSA 2000, c B-7, govern the priorities of the various claims against the Land (and subsequently the Proceeds), despite seemingly unfair or inequitable outcomes. Citing ***Bank of Montreal v 1323606 Alberta Ltd***, 2013 ABQB 596, 571 AR 353, these parties argue that the Torrens title registration system is meant to provide a clear and definite mechanism for evaluating the status of claims to interests in land. Registered interests take priority in the order they were registered, without any regard to unregistered interests. Allowing unregistered claims, such as the Purchasers' trust claim, to take priority over registered interests would frustrate the purpose of the Torrens system, undermine the authoritative nature of the *Land Titles Act* and wreak havoc for commercial certainty in land dealings.

[14] The Lienholders argue that the case relied on by the Purchasers, ***Iona Contractors Ltd v Guarantee Co of North America***, 2015 ABCA 240, 602 AR 295 [***Iona Contractors***], does not support the Purchasers' position. In their view, ***Iona Contractors*** deals with s 22 of the *Builder's Lien Act*, which deems the funds received from the owner to be trust funds in the hands of the recipient. In contrast, the Lienholders submit that s 14 of the *Condominium Property Act*, upon which the Purchasers rely, merely imposes an obligation upon a developer to hold purchase funds in trust in accordance with a purchase agreement. The Lienholders argue that s 14 does not deem a trust, but merely imposes an obligation to hold funds in trust.

[15] In short, the Lienholders and the Caveat Holder submit that the interests that were registered on title to the Land at the time of its sale trump any unregistered interest the Purchasers may have by equity or statute.

The Purchasers' Position

[16] The Purchasers argue that s 14(3) of the *Condominium Property Act* impresses a trust on the Deposits so that the Deposits never became the property of the Developer. As such, the

2016 ABQB 371 (CanLII)

Proceeds are not property available for distribution to other creditors. In support of this position, the Purchasers rely on the recent Court of Appeal decision in ***Iona Contractors***.

[17] The Purchasers also argue that the three-fold common law requirement for the creation of a trust (intention, certainty of object, and certainty of subject matter) is made out in these circumstances. As the trust monies were wrongfully used to develop the Land, the Purchasers argue that they are entitled to a continuing beneficial interest not merely in the trust property but in the proceeds thereof. They rely on ***Ward-Price v Mariners Haven Inc***, 57 OR (3d) 410, 2001 OJ No 1711, for this proposition.

[18] Relying on ***Japan Canada Oil Sands Ltd v Stoney Mountain Steel Corp***, 290 AR 251, [2001] AJ 533, the Purchasers argue that their interest, created by a statutory trust, is superior to and defeats secured creditors such as the Lienholders, the Caveat Holder and the Mortgagee.

2016 ABQB 371 (CanLII)

Applicable Law

[19] This application engages the interpretation and interplay of two provincial legislative regimes: (1) the consumer protection regime under the *Condominium Property Act* and (2) the Torrens land registry regime (which also fosters elements of consumer protection) under the *Land Titles Act*. In addressing this issue, it is important to understand the legislative intent of each statute. While only a few provisions from both statutes are directly applicable to the present application, these provisions are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation: ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.

[20] The contextual method of statutory interpretation assumes that there is horizontal consistency between statutes. Horizontal consistency means an interpretation favouring harmony between statutes should prevail. Apparent conflicts should be resolved so as to re-establish that harmony (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed (Cowansville, Québec: Les Éditions Yvons Blais Inc., 1991) at 288). As Professor Sullivan states, "the provisions of related legislation are read in the context of the others and the presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act" (Ruth Sullivan, *Sullivan on the Construction of Statutes* 6th ed (Markham, Ontario: LexisNexus Canada, 2014) at 417).

[21] I first discuss the legislative purpose of each statutory regime.

Consumer Protection under the *Condominium Property Act*

[22] The *Condominium Property Act* is remedial consumer protection legislation designed to protect purchasers of condominiums before their purchased condominium is built, recognizing that condominium purchasers are generally not in equal bargaining positions with developers. As our Court of Appeal explained in ***Condominium Corporation No 0321365 v 970365 Alberta Ltd***, 2012 ABCA 26 at paras 8-9, 519 AR 322 [***MCAP***]:

> The Legislature opted not to bar closing of purchase agreements where a unit or related common property is not substantially completed. Instead, the Legislature has sought to achieve its objective by statutorily mandating that developers hold

> back in trust from purchase proceeds sufficient funds to substantially complete sold units and their related common property. …
>
> In enacting this package of legislation, the Legislature was alive to several economic and social realities. On the one hand, it did not want to prevent developers from securing, on reasonable terms, the financing required to build and complete condominium projects. On the other, it recognized that consumers needed to be protected from hit and run developers, who promise much but deliver little, whether because of ineptitude, negligence, greed or worse yet, fraud. Through this statutory regime, the Legislature has provided some reasonable assurance that what developers agree to provide, and purchasers agree to buy, will be completed as promised.

[23] To protect condominium purchasers from these "hit and run" developers, s 14(3) of the *Condominium Property Act* creates a statutory trust and holdback provision that prohibits condominium developers from using condominium purchaser funds to develop the condominium. The legislative scheme requires the developer to hold purchase funds in trust until the certificate of title is issued to the condominium purchaser, unless the deposit money is paid out under one of the statutory exceptions.

[24] The Legislature expressly provided exceptions to the statutory trust and holdback provision in s 14. These exceptions recognize the need to achieve a balance between two competing objectives: (1) protecting condominium purchasers' rights and (2) permitting developers to obtain the financing necessary to complete the construction of new condominium projects: see ***MCAP***, McDonald J.A. dissenting on other grounds at paras 172 and 173.

[25] These exceptions relieve a developer of its obligation to hold the purchase funds in trust. For example, s 14(10) of the *Condominium Property Act* allows for the purchase funds to not be held in trust if the Minister approves the purchase arrangement. Section 67(1) of the *Condominium Property Regulations*, Alta Reg 168/2000 outlines the requirements for such arrangements. Sections 14(4) and (5) of the *Condominium Property Act* require the developer to only hold sufficient funds in trust to substantially complete the condominium development. However, in the present circumstances, none of these exceptions apply.

[26] To conclude, the *Condominium Property Act* is legislation enacted for specified parties, namely condominium purchasers, who are given certain rights and protections. The legislative regime set up under the *Condominium Property Act* obliges developers to hold money in trust that is paid to them by condominium purchasers. The purpose of this legislation is to ensure condominium purchasers are protected in respect of money paid until such time as one of the events stipulated in s 14 occur.

Certainty of Interest in Land Provided by The Torrens Land Registration System under the *Land Titles Act*

[27] The Torrens land registration system as codified in the *Land Titles Act* was recently reviewed by Justice Toploinski in ***Bank of Montreal v 1323606 Alberta Ltd***, 2013 ABQB 596 at paras 21-30, 571 AR 353:

2016 ABQB 371 (CanLII)

[21] In Alberta, interests in land are tracked by the Torrens title registration system.

[22] The Torrens system provides for efficient management of land title by requiring that any legal interest in land be recorded in a registry operated by the Land Titles Office of the Service Alberta Department. It is designed to meet a simple policy goal – to provide a clear, definitive mechanism to evaluate the status of land.

[23] This policy goal was explained by the Privy Council in *Gibbs v. Messer*, [1891] A.C. 248 at 254:

> The main object of the Act, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. ...

[24] The Torrens system protects any person relying on the register … and the rights afforded by it are substantive. [Citations deleted]

[25] Title as provided in a Torrens registry is absolute proof of ownership, with only limited exceptions. Justice Estey in *Canadian Pacific Railway Company v. Turta* (No. 2), 1954 CanLII 58 (SCC), [1954] SCR 427 at 443, [1954] 3 DLR 1 stated the principle in this manner:

> That one who is named as owner in an uncancelled certificate of title possesses an "indefeasible title against all the world", subject to fraud and certain specified exceptions, while one who contemplates the acquisition of land may ascertain the particulars of its title at the appropriate land titles office and deal with confidence, relying upon the information there disclosed. ...

[26] An acknowledged by-product of this approach to land title is that the Torrens system may, from time to time, impose hardships. This is particularly true when a person does not promptly register their title. Justice Estey continues:

> ... Moreover, it contemplates that those who acquire a registerable interest in land will, without delay, effect registration thereof and avoid possible prejudice. That such a system may from time to time impose hardships is obvious and, therefore, in addition to preserving actions against the wrongdoer, the legislature has provided an assurance fund out of which, in appropriate cases, compensation may be paid to those who suffer a loss.

[30] … There is no legal obligation to investigate possible unregistered claims which may be attached to land. In *Sibley v. British Columbia (Registrar of Land Titles)*, [1981] B.C.J. No. 43 (B.C.S.C.), Selbie L.J.S.C. said this at para. 33:

2016 ABQB 371 (CanLII)

> To the suggestion that the petitioners, personally or through their solicitor, should have, in effect, "double checked" the abandonment by contacting the party who put the Caveat on in the first place, I can only say that I know of no such duty on the part of a bona fide purchaser acting in good faith. That would be an intolerable burden to put on prospective purchasers -- to investigate every known, suspected or rumoured, prior unregistered claim before entering into their contract. The law provides a procedure for the protection of claimants and they ignore those procedures at their peril. ... [Emphasis added]

To require otherwise frustrates the legislative intent of the Torrens system: *Szabo v. Janeil Enterprises Ltd.*, 2006 BCSC 502 (CanLII) at para. 40, 55 B.C.L.R. (4th) 188.

[28] The Torrens registration system as codified in the *Land Titles Act* assures commercial certainty for those who deal with land. The system accepts that, in exchange for certainty of title, some meritorious claims to land may be defeated.

[29] In addition to transferring title from one individual to another, various interests can be registered on title. Builders' liens, mortgages and caveats are among these registerable interests. Section 15 of the *Land Titles Act* states that:

> The Registrar shall keep each certificate of title and shall record on it the particulars of all <u>instruments, caveats</u>, …and other matters by this Act required to be registered … on the certificate of title…[Emphasis Added]

[30] "Instruments" is given an extensive definition in s 1(k) of the *Land Titles Act*, and includes:

> a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, letters of administration, or an exemplification of letters of administration, mortgage or <u>encumbrance</u> [Emphasis Added]

[31] Encumbrance is further defined by s 1(e) of the *Land Titles Act* as:

> any charge on land created or effected for any purpose whatever, inclusive of … <u>builders' liens,</u> when authorized by statute, and executions against land, unless expressly distinguished [Emphasis Added]

[32] The *Builders' Lien Act* authorizes builders' liens to be registered according to the *Land Titles Act*. Therefore, builders' liens are incorporated into the Torrens registration system and individuals registering builders' liens on title are entitled to rely on the Torrens system as an accurate depiction of the land's title and the various interests affecting that land.

Analysis

[33] When the Land was sold under the court-supervised receivership, it was subject to various encumbrances and interests registered on its title. The Proceeds are the net sale proceeds of the Land. Although in a different form, the Proceeds stand in place of the Land (***Nova***

2016 ABQB 371 (CanLII)

Holdings Ltd v Western Factors Ltd (1965), 51 WWR 385, 51 DLR (2d) 235; *Builders' Lien Act*, RSA 2000, c B-7, s 54). The rights and priorities of the parties holding the encumbrances and registrations on the Land still apply; however, the security in this case has become the Proceeds instead of the Land.

[34] The question is who is entitled to the Proceeds realized from the sale of the Land.

[35] The *Land Titles Act* is a statute of general application to all lands situated in Alberta (***Hager v United Sheet Metal Ltd***, [1954] SCR 384 at para 147, [1954] 3 DLR 145). As such, its provisions govern all dealings with land except as may be repealed, altered, or modified by another provincial statute.

[36] The *Land Titles Act* provides a specific regime for determining priority of claims to interests in Land.

[37] Priorities between claimants who claim against the same land was always recognized at equity. Incorporating these equitable principles, the Torrens land registry system of this province explicitly recognizes priorities by statute. Sections 14(3) and 56 of the *Land Titles Act* specifically address priorities of competing registrations against land. Section 14(3) makes the order of registration the order of priorities, providing that:

> 14(3) For the purposes of priority between mortgages, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

[38] Section 56 states that:

> Instruments registered in respect of or affecting the same land have priority the one over the other according to section 14 and not according to the date of the execution.

[39] The Alberta Legislature, in s 203 of the *Land Titles Act*, has chosen expressly to recognize the priority of registered encumbrances over unregistered trust claims.

[40] Section 203 states:

> 203(1) In this section,
>
> (a) "interest" includes any estate or interest in land;
>
> (b) "owner" means
>
> (i) the owner of an interest in whose name a certificate of title has been granted,
>
> (ii) the owner of any other registered interest in whose name the interest is registered, or
>
> (iii) the caveator or transferee of a caveat in whose name the caveat is registered.

2016 ABQB 371 (CanLII)

> (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,
>
> > (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
> >
> > (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.
>
> ...

[41] Thus, the priority of interests, registered and unregistered, attached to a piece of land are to be determined in accordance with the *Land Titles Act*, except as they may be repealed, altered or modified by another statute, such as is argued in this case, the *Condominium Property Act*.

[42] It is of note that the *Law of Property Act* is consistent with the *Land Titles Act* in expressly legislating that a registered charge on land has priority over an unregistered charge on land: see *Law of Property Act*, s 64(2)(b).

[43] As the *Land Titles Act* contains specific provisions for determining priority of interests in land, the question becomes whether the *Condominium Property Act* repeals, modifies, alters or ousts these provisions of the *Land Titles Act*.

[44] Section 14(3) of the *Condominium Property Act* is engaged. It provides:

> 14(3) A developer shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

[45] The *Condominium Property Act* restricts contractual freedoms in order to ensure consumer protection. Section 80 states that:

> 80(1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void.

[46] Therefore, any contractual provision which purports to relieve a developer of its duty to hold purchase funds in trust is void. In this case, in violation of s 80(1), the agreement between the Developer and the Purchasers permitted the Developer to use the Deposits to develop the Land rather than hold the Deposits in trust.

2016 ABQB 371 (CanLII)

[47] The Developer violated *Condominium Property Act* s 14(3) and used the Deposits to pay costs associated with the development of the Land, including building costs. In doing so, the Developer breached the statutory trust. However, the Deposits ceased to be deposits when they were co-mingled with other funds and activities used to improve the Land. The Deposits were no longer uniquely identifiable and became inseparable from other funds and activities that added value to the Land, such as the work efforts undertaken by the Lienholders. Any trust interest associated with the Deposits became an interest in land subject to the *Land Titles Act* regime.

[48] As discussed above, the *Land Titles Act* requires the registration of interests in land in order to gain priority over others also claiming interests. It follows that the priority of the Deposits, which were capable of becoming registered interests in land, must have their priority dealt with according to the *Land Titles Act*.

[49] The *Condominium Property Act* is silent as to the effect of the *Land Titles Act* on a s 14(3) statutory trust interest and does not expressly provide that the trust interest is enforceable with priority without registration. While the *Condominium Property Act* expressly impresses a trust on deposit money, it does not do so on the condominium property itself nor does it specifically exclude the operation of the *Land Titles Act* generally, or specifically, ss 14 and 203(a) of the *Land Titles Act*. That is, s 14 of the *Condominium Property Act* does not alter or modify the express indefeasibility or priority regime provisions of the *Land Titles Act*.

[50] Contrary to the Purchasers' assertion, I do not find that the ***Iona Contractors*** decision helpful. The Purchasers argue that ***Iona Contractors*** establishes that a provincially created statutory trust takes priority over all creditors who have protected their claimed interest in land by registering their interests on title to the land. In my view, the factual differences between ***Iona Contractors*** and this case render that decision of no assistance to the Purchasers on this application. First, ***Iona Contractors*** does not address the land registry regime set up by the *Land Titles Act*, nor does it discuss the priority of an unregistered statutory trust over registered interests in land. Second, the decision was concerned with whether the provincial *Builder's Lien Act* was in operational conflict with the federal *Bankruptcy and Insolvency Act, RSC 1985, c B-3* for the purpose of determining whether the money held in a provincial statutory trust was to be included or excluded in the bankrupt's estate pursuant to paragraph 67(1)(a) of the *Bankruptcy and Insolvency Act*. This present application does not involve bankruptcy nor does it involve the interpretation of the *Bankruptcy and Insolvency Act*.

[51] Similarly, the ***Japan Canada Oil Sands Ltd v Stoney Mountain Steel Corp***, 290 AR 251, [2001] AJ 533 and ***Ward-Price v Mariners Haven Inc***, 57 OR (3d) 410, 2001 OJ No 1711, decisions relied on by the Purchasers are distinguishable on the facts and issues and are of no assistance in determining the issue in this application.

[52] In my view, the combined effect of ss 14, 56 and 203 of the *Land Titles Act* decides the issue.

[53] The Lienholders and the Caveat Holder are persons who took an encumbrance, as defined by s 1(e) of the *Land Titles Act*, from the Developer, who was the owner of the Land. The Lienholders and the Caveat Holder added value to the Land; the Lienholders through their work efforts and the Caveat Holder through its alleged injection of cash. These parties were able to review the registrations on the title to the Land prior to making their decision to add value to the

2016 ABQB 371 (CanLII)

Land. They then registered their interests on the title to the Land, in order to establish the priority of their claims and protect their interest. That same option was open to the Purchasers.

[54] Section 203(a) is clear that the Lienholders and the Caveat Holder were not required, for the purpose of obtaining priority for their interest, to inquire into how the purchase money for the Land was sourced or applied. They were also not affected by notice of any trust interest in the Land that was not registered by instrument, any rule of law or equity to the contrary notwithstanding.

[55] The legislative intent is to ensure that persons seeking to acquire new interests in land can rely on the existing title with no need to make any further inquiries about competing claims, title defects or equitable unregistered claims. In accordance with the *Land Titles Act* registry system, registered interests take priority by date of registration and therefore take priority over any unregistered interests. Thus, absent fraud as set out in the *Land Titles Act* (which fraud is neither alleged nor proven), the Purchasers' unregistered trust claims do not create an interest in land that would take priority over registered encumbrances. To do so would contradict the plain words of ss 14, 56 and 203 of the *Land Titles Act*.

[56] If the Legislature wished to give priority to an unregistered trust claim created by s 14(3) of the *Condominium Property Act* over registered interests on land notwithstanding the provisions of the *Land Titles Act* to the contrary, clear language would have been used. It did not do so. To suggest otherwise, would defeat the Legislature's intent in adopting the Torrens land registration system for determining priority of claims to interests in land and would undermine the commercial certainty created by our *Land Titles Act* registry system. In Alberta, all persons dealing with land are entitled to rely on the face of the certificate of title in determining the interests to that land. Absent fraud as set out in the *Land Titles Act*, priority created by registration should remain intact.

Conclusion

[57] It appears that there are not sufficient funds to pay all the encumbrancers on the Land in full. Undoubtedly, and regrettably, the Purchasers and other holders of encumbrances who registered later in time stand to suffer from the actions of the Developer.

[58] However, the Purchasers always had the right to protect the priority of their unregistered trust claim by registering their claim on title to the Land, which many Purchasers ultimately did, but only after other interests were registered on title to the Land. The Purchasers also retain their *in personam* right to seek a remedy from the Developer for breach of trust.

2016 ABQB 371 (CanLII)

[59] In conclusion, I find that the Purchasers' unregistered statutory trust claim does not take priority over the registered interests on the title to the Land. Instead, priority to the Proceeds is to be determined and set in accordance with registration under s 14(3) of the *Land Titles Act*.

Heard on the 09th day of June 2016.
Dated at the City of Calgary, Alberta this 14th day of July, 2016.

G.A. Campbell
J.C.Q.B.A.

Appearances:

Douglas S. Nishimura; Nicole T. Taylor-Smith; Mohamed Amery and Norm Anderson; Colin Harris
for the Applicant Purchasers

Anthony L. Dekens
for the Respondent Kulwinder Sekhon

Yvonne M. Williamson; Adrianna Worman; Chris Williams; Jodi Fraser; James Wilde; Julie V. Shepard
for the Respondent Lienholders

2016 ABQB 371 (CanLII)

Her Majesty The Queen in right of the Province of British Columbia *Appellant*

v.

Henfrey Samson Belair Ltd. *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: BRITISH COLUMBIA *v.* HENFREY SAMSON BELAIR LTD.

File No.: 20515.

1989: April 21; 1989: July 13.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy — Priority — Statutorily created trust for tax collected — Tax collected commingled with bankrupt's assets — All assets applied to reduce bank's indebtedness — Whether or not province should be given priority over other creditors because of statutorily created trust — Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j) — Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18.

Tops Pontiac Buick Ltd. collected provincial sales tax in the course of its business operations, as required by the *Social Service Tax Act*, and mingled the tax collected with its other assets. A creditor placed Tops in receivership and Tops then made an assignment in bankruptcy. The receiver sold the assets and applied the full proceeds to reduce the bank's indebtedness.

The province contended that the *Social Service Tax Act* created a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted, and that it had priority over the bank and all other creditors for this amount. The chambers judge

Sa Majesté La Reine du chef de la province de la Colombie-Britannique *Appelante*

c.

Henfrey Samson Belair Ltd. *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: COLOMBIE-BRITANNIQUE *c.* HENFREY SAMSON BELAIR LTD.

N° du greffe: 20515.

1989: 21 avril; 1989: 13 juillet.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite — Priorité — Fiducie créée par la Loi à l'égard des taxes perçues — Taxes perçues et confondues avec les biens de la faillie — Affectation de tous les biens de la faillie à la réduction de la créance de la Banque — La province doit-elle avoir priorité sur les autres créanciers en raison de la fiducie créée par la loi? — Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 47a), 107(1)j) — Social Service Tax Act, R.S.B.C. 1979, chap. 388, art. 18.

La société Tops Pontiac Buick Ltd. a perçu la taxe provinciale de vente dans le cours de ses opérations commerciales, comme elle était tenue de le faire en vertu de la *Social Service Tax Act*, et elle a confondu les montants de taxe perçus avec ses autres biens. Un créancier de Tops l'a placée sous séquestre et Tops a alors déclaré faillite et fait cession de ses biens. Le séquestre a vendu les biens et consacré la totalité du produit de cette vente à la réduction de la créance de la Banque.

La province a soutenu que la *Social Service Tax Act* crée une fiducie sur les biens de Tops jusqu'à concurrence du montant de taxe de vente perçu mais non remis et qu'à l'égard de ce montant, elle a priorité sur la Banque et sur tous les autres créanciers. Le juge en

1989 CanLII 43 (SCC)

held that the *Social Service Tax Act* did not create a trust and that the province had no priority under the *Bankruptcy Act*. The Court of Appeal held that the legislation created a statutory trust but the *Bankruptcy Act* did not confer priority on such a trust. At issue here is whether the statutory trust created by s. 18 of the British Columbia *Social Service Tax Act* gives the province priority over other creditors under the *Bankruptcy Act*.

Held (Cory J. dissenting): The appeal should be dismissed.

Per Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The statutory trust created by the provincial legislation is not a trust within s. 47(*a*) of the *Bankruptcy Act* but merely a Crown claim under s. 107(1)(*j*). Section 47(*a*), which concerns "property held by the bankrupt in trust for any other person", permits removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*. Section 107(1)(*j*), on the other hand, does not deal with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. If sections 47(*a*) and 107(1)(*j*) are read in this way, no conflict arises between them. This construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* conforms with the principle that provinces cannot create priorities under the *Bankruptcy Act* by their own legislation.

Section 18 of *Social Service Tax Act* deems a statutory trust at the moment the tax is collected. The trust property is identifiable at that time and the requirements for a trust under the principles of trust law are met. The money when collected would therefore be exempt from distribution to creditors by reason of s. 47(*a*). The trust at common law ceases to exist, however, when the tax money collected is mingled with other money so that it cannot be traced and is no longer identifiable. The province has a claim secured only by a charge or lien created by s. 18(2) of the *Social Service Tax Act*, and s. 107(1)(*j*) of the *Bankruptcy Act* would accordingly apply. Here, no specific property impressed with a trust could be identified and s. 47(*a*) of the *Bankruptcy Act* did not extend to the province's claim.

Per Cory J. (dissenting): The moneys collected as sales tax by a vendor belong to the province and the vendor is in every sense of the word a trustee for them. The province did not need to rely on the vendor's

chambre a statué que la *Social Service Tax Act* ne crée pas de fiducie et que la province n'a pas la priorité en vertu de la *Loi sur la faillite*. La Cour d'appel a statué que les dispositions législatives créent une fiducie, mais que la *Loi sur la faillite* ne confère pas de priorité à l'égard de cette fiducie. La question en litige est de savoir si la fiducie légale créée par l'art. 18 de la *Social Service Tax Act* de la Colombie-Britannique confère à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*.

Arrêt (le juge Cory est dissident): Le pourvoi est rejeté.

Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin: La fiducie créée par la loi provinciale est non pas une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*, mais simplement une réclamation de la Couronne au sens de l'al. 107(1)*j*). L'alinéa 47*a*), qui vise «les biens détenus par le failli en fiducie pour toute autre personne», permet de soustraire, du régime de répartition établi par la *Loi sur la faillite*, les biens qui peuvent être spécifiquement identifiés comme n'appartenant pas au failli selon les principes généraux du droit des fiducies. D'autre part, l'al. 107(1)*j*) porte non pas sur les droits conférés par le droit général, mais sur les créances établies par la loi en faveur du fisc fédéral et provincial. Interprétés de cette façon, les al. 47*a*) et 107(1)*j*) ne se contredisent pas. Cette interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* respecte le principe selon lequel les provinces ne peuvent, par leur propre loi, modifier l'ordre de priorité établi en vertu de la *Loi sur la faillite*.

Aux termes de l'art. 18 de la *Social Service Tax Act*, il y a fiducie légale réputée au moment de la perception de la taxe. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. Au moment de sa perception, la somme serait donc exclue, en raison de l'al. 47*a*), de la répartition des biens entre les créanciers. Cependant, il n'y a plus de fiducie, en *common law*, lorsque le montant de taxe perçu est confondu avec les autres sommes de sorte qu'il devient impossible de le retracer et de l'identifier. La province a une créance garantie seulement par un privilège créé par le par. 18(2) de la *Social Service Tax Act* et l'al. 107(1)*j*) de la *Loi sur la faillite* s'appliquerait donc. En l'espèce, il n'est possible d'identifier aucun bien précis sujet à une fiducie et l'al. 47*a*) de la *Loi sur la faillite* ne s'applique pas à la créance de la province.

Le juge Cory (dissident): Les sommes perçues par un marchand au titre de la taxe de vente appartiennent à la province et le marchand est, au sens strict du terme, un fiduciaire à l'égard des sommes ainsi perçues. La pro-

1989 CanLII 43 (SCC)

keeping separate bank accounts to protect its trust property but rather could and did implement a registration system that allowed it to specify precisely the amount owing through a system of bookkeeping. If the tax were not paid to the province then a vendor must have stolen the funds, converted them to its own use or most charitably lost the funds for which it would be responsible and for which it would be accountable to the province.

The *Bankruptcy Act* prevents the provinces from creating priorities but it does not prevent them from creating a deemed trust or lien. It protects funds which, at the moment they were paid, were truly trust funds and the validity of the trust need not be determined exclusively on the basis of common law. Since section 18 of the *Social Service Tax Act* and ss. 47(*a*) and 107 of the *Bankruptcy Act* do not conflict, the doctrine of federal paramountcy cannot apply and s. 18 should prevail. The property at issue which was subject to s. 18 of the *Social Service Tax Act* never at any time became the property of the bankrupt and was therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the *Bankruptcy Act*.

The trust, created by s. 18, contained the three essential characteristics required of a trust by equity: certainty of intention, subject matter and of objects. The statute established certainty of intention and of object and through the use of a clear formula established the trust property. A statutorily constituted trust has an advantage over a privately constituted trust in that it is recognized without the beneficiary's having to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies determined by this Court.

Cases Cited

By McLachlin J.

Applied: *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; **referred to**: *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113.

vince n'a pas eu besoin d'exiger que le marchand ouvre des comptes de banque distincts pour protéger ses fonds en fiducie. Elle a plutôt établi, ce qu'elle pouvait faire, un système d'enregistrement lui permettant de déterminer avec précision, par un régime de comptabilité, les sommes qui lui sont dues. Si la taxe n'est pas versée à la province, un marchand doit alors avoir ou volé ces sommes, ou les avoir détournées à son propre usage ou encore, si l'on est indulgent, avoir perdu les sommes dont il était responsable et comptable à la province.

La *Loi sur la faillite* empêche les provinces d'établir des priorités, mais elle ne les empêche pas d'établir une fiducie ou un privilège réputés. La Loi protège les sommes qui, dès leur versement, constituent véritablement des fonds en fiducie et il n'est pas nécessaire de déterminer la validité de la fiducie exclusivement en fonction de la *common law*. Puisqu'il n'y a pas de conflit entre l'art. 18 de la *Social Service Tax Act*, d'une part, et l'al. 47*a*) et l'art. 107 de la *Loi sur la faillite*, d'autre part, la théorie de la prépondérance de la loi fédérale ne peut s'appliquer et l'art. 18 devrait prévaloir. Le bien en cause, qui était visé par l'art. 18 de la *Social Service Tax Act*, n'est jamais devenu la propriété de la faillie et n'était donc pas sujet à répartition comme l'étaient les biens de la faillie en vertu de l'art. 107 de la *Loi sur la faillite*.

La fiducie créée par l'art. 18 comporte les trois caractéristiques essentielles requises d'une fiducie en *equity*: la certitude quant à l'intention, la certitude quant aux biens sujets à la fiducie et la certitude quant aux bénéficiaires. La Loi établit la certitude quant à l'intention et la certitude quant au bénéficiaire, de même qu'un moyen clair de déterminer le bien qui est en fiducie. Une fiducie établie par la loi offre un avantage sur une fiducie établie par un particulier en ce que son existence est reconnue sans que le bénéficiaire ait à engager l'action excessivement coûteuse en droit de suite sur les sommes confondues. Cet avantage ne devrait pas dépouiller les biens en fiducie légale de leur caractère fiduciaire ni les soustraire à l'application des principes énoncés par cette Cour.

Jurisprudence

Citée par le juge McLachlin

Arrêts appliqués: *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; **arrêt mentionné**: *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113.

1989 CanLII 43 (SCC)

By Cory J. (dissenting)

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250; *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487; *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Re Diplock's Estate*, [1948] Ch. 465, [1948] 2 All E.R. 318, aff'd *sub nom. Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(*a*), 107(1)(*j*).
Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1.
Business Corporations Act, S.A. 1981, c. B-15, s. 191(1).
Canada Pension Plan, R.S.C., 1985, c. C-8, s. 23(4).
Construction Lien Act, 1983, S.O. 1983, c. 6, s. 7.
Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113.
Health Insurance Act, R.S.O. 1980, c. 197, s. 18.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
Insurance Act, R.S.A. 1980, c. I-5, s. 123(1).
Insurance Act, R.S.O. 1980, c. 218, s. 359.
Mechanics' Lien Act, R.S.O. 1950, c. 227.
Pension Benefits Act, S.O. 1987, c. 35, s. 58.
Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14.
Revenue Act, R.S.B.C. 1979, c. 367.
Social Service Tax Act, R.S.B.C. 1979, c. 388, ss. 5, 6, 8, 9, 10, 18(1), (2), 27.
Social Services Tax Act Regulations, B.C. Reg. 84/58, Division 5.

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Hardy, Anne E. *Crown Priority in Insolvency*. Toronto: Carswells, 1986.
Waters, D. W. M. *Law of Trusts in Canada*, 2nd ed. Toronto: Carswells, 1984.

APPEAL from a judgment of the British Columbia Court of Appeal (1987), 13 B.C.L.R.

Citée par le juge Cory (dissident)

Royal Trust Co. c. Tucker, [1982] 1 R.C.S. 250; *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] R.C.S. 487; *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599; *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Re Diplock's Estate*, [1948] Ch. 465, [1948] 2 All E.R. 318, conf. sous l'intitulé *Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061.

Lois et règlements cités

Builders' Lien Act, R.S.A. 1980, chap. B-12, art. 16.1.
Business Corporations Act, S.A. 1981, chap. B-15, art. 191(1).
Employment Standards Act, R.S.A. 1980, chap. E-10.1, art. 113.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
Insurance Act, R.S.A. 1980, chap. I-5, art. 123(1).
Loi de 1983 sur le privilège dans l'industrie de la construction, L.O. 1983, chap. 6, art. 7.
Loi de 1987 sur les régimes de retraite, L.O. 1987, chap. 35, art. 58.
Loi sur l'assurance-maladie, L.R.O. 1980, chap. 197, art. 18.
Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 47*a*), 107(1)*j*).
Loi sur les assurances, L.R.O. 1980, chap. 218, art. 359.
Mechanics' Lien Act, R.S.O. 1950, chap. 227.
Real Estate Agents' Licensing Act, R.S.A. 1980, chap. R-5, art. 14.
Régime de pensions du Canada, L.R.C. (1985), chap. C-8, art. 23(4).
Revenue Act, R.S.B.C. 1979, chap. 367.
Social Service Tax Act, R.S.B.C. 1979, chap. 388, art. 5, 6, 8, 9, 10, 18(1), (2), 27.
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Hardy, Anne E. *Crown Priority in Insolvency*. Toronto: Carswells, 1986.
Waters, D. W. M. *Law of Trusts in Canada*, 2nd ed. Toronto: Carswells, 1984.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1987), 13 B.C.L.R.

1989 CanLII 43 (SCC)

(2d) 346; 40 D.L.R. (4th) 728; [1987] 4 W.W.R. 673; 65 C.B.R. (N.S.) 24; 5 A.C.W.S. (3d) 47, dismissing an appeal from a judgment of Meredith J. in chambers (1986), 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59. Appeal dismissed, Cory J. dissenting.

William A. Pearce and *J. G. Pottinger*, for the appellant.

Wendy G. Baker, Q.C., and *Gillian E. Parson*, for the respondent.

James M. Mabbutt, Q.C., for the intervener the Attorney General of Canada.

Janet E. Minor and *Timothy Macklem*, for the intervener the Attorney General for Ontario.

Yves de Montigny and *Madeleine Aubé*, for the intervener the Attorney General of Quebec.

Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia.

Richard Burns, for the intervener the Attorney General for New Brunswick.

W. Glenn McFetridge and *Dirk D. Blevins*, for the intervener the Attorney General of Manitoba.

Robert C. Maybank, for the intervener the Attorney General for Alberta.

W. G. Burke-Robertson, Q.C., for the intervener the Attorney General of Newfoundland.

The judgment of Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

McLACHLIN J.—The issue on this appeal is whether the statutory trust created by s. 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3.

Tops Pontiac Buick Ltd. collected sales tax for the provincial government in the course of its business operations, as it was required to do by the *Social Service Tax Act*. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops

(2d) 346, 40 D.L.R. (4th) 728, [1987] 4 W.W.R. 673, 65 C.B.R. (N.S.) 24, 5 A.C.W.S. (3d) 47, qui a rejeté l'appel d'une décision du juge en chambre Meredith (1986), 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59. Pourvoi rejeté, le juge Cory est dissident.

William A. Pearce et *J. G. Pottinger*, pour l'appelante.

Wendy G. Baker, c.r., et *Gillian E. Parson*, pour l'intimée.

James M. Mabbutt, c.r., pour l'intervenant le procureur général du Canada.

Janet E. Minor et *Timothy Macklem*, pour l'intervenant le procureur général de l'Ontario.

Yves de Montigny et *Madeleine Aubé*, pour l'intervenant le procureur général du Québec.

Reinhold M. Endres, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Richard Burns, pour l'intervenant le procureur général du Nouveau-Brunswick.

W. Glenn McFetridge et *Dirk D. Blevins*, pour l'intervenant le procureur général du Manitoba.

Robert C. Maybank, pour l'intervenant le procureur général de l'Alberta.

W. G. Burke-Robertson, c.r., pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement des juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LE JUGE McLACHLIN—Le présent pourvoi soulève la question de savoir si la fiducie légale établie par l'art. 18 de la *Social Service Tax Act*, R.S.B.C. 1979, chap. 388, confère à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3.

La société Tops Pontiac Buick Ltd. a perçu la taxe de vente pour le compte du gouvernement provincial dans le cours de ses opérations commerciales, comme elle était tenue de le faire en vertu de la *Social Service Tax Act*. Tops a confondu les montants de taxe perçus avec ses autres biens. Lorsque la Banque canadienne impériale de com-

1989 CanLII 43 (SCC)

made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

The province contends that the *Social Service Tax Act* creates a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

The Chambers judge held that the *Social Service Tax Act* did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the Province did not have priority because the *Bankruptcy Act* did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The Province now appeals to this Court.

The section of the *Social Service Tax Act* which the Province contends gives it priority provides:

18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

merce a placé Tops sous séquestre en raison de la débenture qu'elle détenait, Tops a déclaré faillite et fait cession de ses biens; le séquestre a vendu les biens de Tops et consacré la totalité du produit de cette vente à la réduction de la créance de la Banque.

La province soutient que la *Social Service Tax Act* crée une fiducie sur les biens de Tops jusqu'à concurrence du montant de taxe de vente perçu mais non remis (58 763,23 $) et qu'à l'égard de ce montant, elle a priorité sur la Banque et tous les autres créanciers.

Le juge en chambre a statué que la *Social Service Tax Act* ne crée pas de fiducie et que la province n'a pas la priorité. En appel, le séquestre a reconnu que les dispositions législatives créent une fiducie, mais il a soutenu que le juge en chambre avait eu raison de statuer que la province n'avait pas la priorité parce que la *Loi sur la faillite* ne confère pas de priorité à l'égard de cette fiducie. La Cour d'appel de la Colombie-Britannique a fait droit à cet argument. La province se pourvoit maintenant devant cette Cour.

L'article de la *Social Service Tax Act* qui, selon la province, lui donne la priorité est ainsi conçu:

[TRADUCTION] **18.** (1) Lorsqu'une personne perçoit une taxe en application de la présente loi

a) elle est réputée détenir cette taxe en fiducie pour le compte de Sa Majesté du chef de la province en vue de son paiement à Sa Majesté de la manière et au moment prescrits par la présente loi ou par son règlement d'application, et

b) la taxe perçue est réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue en vertu de la présente loi, qu'elle ait été ou non effectivement détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de cette personne.

(2) La taxe qui, en vertu de la présente loi,

a) est perçue et détenue en fiducie conformément au paragraphe (1); ou

b) qui doit être perçue et remise par un marchand ou un locateur;

emporte un privilège sur la totalité des biens

c) du patrimoine du fiduciaire en vertu de l'alinéa a);

1989 CanLII 43 (SCC)

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

The province argues that s. 18(1) creates a trust within s. 47(*a*) of the *Bankruptcy Act*, which provides:

47. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

The respondent, on the other hand, submits that the deemed statutory trust created by s. 18 of the *Social Service Tax Act* is not a trust within s. 47 of the *Bankruptcy Act*, in that it does not possess the attributes of a true trust. It submits that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) of the *Bankruptcy Act*, the priority to which falls to be determined according to the priorities established by s. 107.

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

The issue may be characterized as follows. Section 47(*a*) of the *Bankruptcy Act* exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(*j*) ranks Crown claims last. Section 18 of the *Social Service Tax Act* creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(*a*) of the *Bankruptcy Act* or a mere Crown claim under s. 107(1)(*j*).

d) de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa b); ou

e) du patrimoine de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa d).

La province soutient que le par. 18(1) crée une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*, dont voici le texte:

47. Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

a) les biens détenus par le failli en fiducie pour toute autre personne,

De son côté, l'intimée fait valoir que la fiducie réputée créée par l'art. 18 de la *Social Service Tax Act* n'est pas une fiducie au sens de l'art. 47 de la *Loi sur la faillite*, en ce qu'elle n'a pas les attributs d'une véritable fiducie. L'intimée soutient que la réclamation du montant de la taxe par la province est en réalité une créance assujettie à l'al. 107(1)*j*) de la *Loi sur la faillite*, dont le rang est déterminé selon l'ordre de priorité établi à l'art. 107.

107. (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli doivent être distribués d'après l'ordre de priorité de paiement suivant:

. . .

j) les réclamations, non précédemment mentionnées au présent article, de la Couronne du chef du Canada ou d'une province du Canada, *pari passu*, nonobstant tout privilège statutaire à l'effet contraire.

Analyse

On peut formuler ainsi la question en litige: l'al. 47*a*) de la *Loi sur la faillite* soustrait, du patrimoine attribué aux créanciers, les biens détenus en fiducie par le failli et accorde la priorité absolue aux bénéficiaires de la fiducie. Le paragraphe 107(1) détermine le rang des différents créanciers pour les fins de la répartition; l'al. 107(1)*j*) place les créances de la Couronne au dernier rang. L'article 18 de la *Social Service Tax Act* établit une fiducie à laquelle il manque un des attributs essentiels de la fiducie, savoir un bien sujet à la fiducie qui puisse être identifié ou retracé. La question qui se pose est de savoir si la fiducie établie par la loi provinciale est une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite* ou une simple réclamation de la Couronne au sens de l'al. 107(1)*j*).

1989 CanLII 43 (SCC)

In my opinion, the answer to this question lies in the construction of the relevant provisions of the *Bankruptcy Act* and the *Social Service Tax Act*.

In approaching this task, I take as my guide the following passage from Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 105:

> The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

With these principles in mind, I turn to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act*. The question which arises under s. 47(*a*) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(*a*), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.

Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this Court in *Deputy Minister of Revenue v. Rainville*, [1980] 1

Selon moi, la réponse à cette question dépend de l'interprétation des dispositions applicables de la *Loi sur la faillite* et de la *Social Service Tax Act*.

En m'attaquant à cette tâche, je m'inspire du passage suivant de l'ouvrage de Driedger intitulé *Construction of Statutes* (2e éd. 1983), à la p. 105:

> [TRADUCTION] La jurisprudence [...] indique qu'il faut interpréter ainsi les dispositions législatives pertinentes dans une affaire particulière:
>
> 1. Il faut interpréter l'ensemble de la Loi en fonction de tout son contexte pour déterminer l'intention du législateur (la Loi selon sa teneur expresse ou implicite), l'objet de la Loi (les fins qu'elle poursuit) et l'économie de la Loi (les liens entre les différentes dispositions de la Loi).
>
> 2. Il faut ensuite interpréter les termes des dispositions particulières applicables à l'affaire en cause selon leur sens grammatical et ordinaire, en fonction de l'intention du législateur manifestée dans l'ensemble de la Loi, de l'objet de la Loi et de l'économie de la Loi. S'ils sont clairs et précis, et conformes à l'intention, à l'objet, à l'économie et à l'ensemble de la Loi, l'analyse s'arrête là.

Gardant à l'esprit ces principes, j'aborde maintenant l'interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite*. L'alinéa 47*a*) de la Loi soulève la question du sens de l'expression «les biens détenus par le failli en fiducie pour toute autre personne». Selon leur sens ordinaire, ces mots renvoient à une situation où il existe des biens qui peuvent être identifiés comme étant détenus en fiducie. Ces biens doivent être retirés des autres biens que le failli détient avant leur répartition conformément à la *Loi sur la faillite* parce qu'en *equity* ils appartiennent à une autre personne. En adoptant l'al. 47*a*), le législateur a donc voulu permettre de soustraire, du régime de répartition établi par la *Loi sur la faillite*, les biens qui peuvent être spécifiquement identifiés comme n'appartenant pas au failli selon les principes généraux du droit des fiducies.

D'autre part, on a jugé que l'al. 107(1)*j*) porte non pas sur les droits conférés par le droit général, mais sur les créances établies par la loi en faveur du fisc fédéral et provincial. Cette Cour a déjà examiné l'objet de l'al. 107(1)*j*) dans l'arrêt *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S.

1989 CanLII 43 (SCC)

S.C.R. 35. Pigeon J., speaking for the majority, stated at p. 45:

> There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

If sections 47(*a*) and 107(1)(*j*) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(*a*). Following the reasoning of Pigeon J. in *Deputy Minister of Revenue v. Rainville*, such a claim would not fall under s. 107(1)(*j*) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

This construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* conforms with the principle that provinces cannot create priorities under the *Bankruptcy Act* by their own legislation, a principle affirmed by this Court in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785. As Wilson J. stated at p. 806:

> ... the issue in *Re Bourgault* [*Deputy Minister of Revenue v. Rainville*] and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced

35, où le juge Pigeon, s'exprimant au nom de la majorité, affirme à la p. 45:

> Il ne serait pas à propos de rechercher la portée exacte de l'expression «réclamations de la Couronne». Il est bien sûr qu'elle s'applique aux créances du fisc et il me paraît évident qu'elle ne saurait embrasser des créances garanties non par un privilège propre à Sa Majesté mais par un privilège dont toute autre personne peut jouir en vertu des principes généraux du droit tel que le privilège de vendeur, celui de constructeur, etc.

Interprétés de cette façon, les al. 47*a*) et 107(1)*j*) ne se contredisent pas. Si une réclamation fondée sur une fiducie est prouvée selon les principes généraux du droit, le bien sujet à la fiducie est soustrait à la répartition générale en raison de l'al. 47*a*). Selon le raisonnement du juge Pigeon dans l'arrêt *Sous-ministre du Revenu c. Rainville*, l'al. 107(1)*j*) ne s'appliquerait pas à une telle réclamation parce qu'elle est valide en vertu des principes généraux du droit et qu'elle ne constitue pas une créance garantie par un privilège propre à Sa Majesté.

Cette interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* respecte le principe selon lequel les provinces ne peuvent, par leur propre loi, modifier l'ordre de priorité établi en vertu de la *Loi sur la faillite*. L'arrêt de cette Cour *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, a consacré ce principe. Comme l'affirme le juge Wilson, à la p. 806:

> ... dans les arrêts *Re Bourgault* [*Sous-ministre du Revenu c. Rainville*] et *Re Black Forest Restaurant Ltd.*, le litige n'était pas de savoir s'il y avait eu création d'un droit de propriété en vertu des lois provinciales applicables. Il s'agissait de savoir si, même si elle créait un droit de propriété, la loi provinciale pouvait aller à l'encontre du plan de distribution prévu au par. 107(1) de la *Loi sur la faillite*. Ces arrêts ont décidé qu'elle ne le pouvait pas et que, même si la loi provinciale pouvait validement créer une sûreté pour des dettes sur les biens du débiteur en dehors de la faillite, dès qu'il y avait faillite, le par. 107(1) déterminait le statut et la priorité des réclamations expressément mentionnées dans cet article. Il n'était pas loisible au créancier de la faillite de dire: en vertu de la loi provinciale applicable, je suis un créancier garanti au sens des premiers mots du par. 107(1) de la *Loi sur la faillite* et en conséquence la priorité que l'alinéa pertinent du par. 107(1) accorde à ma réclamation ne s'applique pas à moi. En réalité, c'est

1989 CanLII 43 (SCC)

before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board* was concerned with provincial legislation purporting to give the province the status of a secured creditor for purposes of the *Bankruptcy Act*, the same reasoning applies in the case at bar.

To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

Practical policy considerations also recommend this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament, in enacting the *Bankruptcy Act*, of setting up a clear and orderly

la position adoptée par la Cour d'appel et plaidée devant nous par l'intimée. Cette position n'est pas étayée par l'interprétation législative du par. 107(1) puisque, si on interprétait l'article dans ce sens, il aurait pour effet de permettre aux provinces de déterminer les priorités en cas de faillite, ce qui relève de la compétence fédérale exclusive.

Bien que l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* ait porté sur une disposition législative provinciale qui avait pour objet de conférer à la province le statut de créancier garanti pour les fins de la *Loi sur la faillite*, le même raisonnement vaut pour l'espèce.

Interpréter l'al. 47*a*) comme s'appliquant non seulement aux fiducies établies en vertu du droit général, mais aussi aux fiducies légales établies par les provinces, qui ne possèdent pas les attributs des fiducies de *common law*, reviendrait à permettre aux provinces d'établir leur propre ordre de priorité applicable à la *Loi sur la faillite* et à ouvrir la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre.

Des considérations pratiques générales favorisent aussi cette interprétation de la *Loi sur la faillite*. Les difficultés que peut susciter l'application de l'al. 47*a*) aux cas où il n'est pas possible d'identifier un bien précis sujet à une fiducie sont considérables et contraires à l'équité et au bon sens. Par exemple, si les créances pour taxes sont égales ou supérieures aux sommes que détient le syndic de faillite, ce dernier sera dans l'impossibilité de se faire indemniser des frais engagés pour réaliser l'actif. Le syndic pourrait même contrevenir à la Loi en engageant des dépenses pour réaliser l'actif du failli. La présence de plus d'un créancier à l'égard du bien en fiducie soulèverait d'autres difficultés. Imaginons le cas de la personne qui aurait une réclamation fondée sur une fiducie, valide selon les principes généraux du droit, à l'égard d'un bien précis et qui se trouverait en concurrence avec Sa Majesté qui invoquerait l'existence d'une fiducie légale concernant ce même bien et tous les autres biens. La créance générale de Sa Majesté pourrait-elle avoir priorité sur le droit de propriété du créancier en vertu du droit des fiducies? Ou encore, le créancier en vertu

1989 CanLII 43 (SCC)

scheme for the distribution of the bankrupt's assets.

du droit des fiducies aurait-il priorité? Reconnaître l'existence d'une telle possibilité irait à l'encontre de l'intention clairement exprimée par le législateur, en adoptant la *Loi sur la faillite*, d'établir un régime clair et ordonné de répartition de l'actif d'un failli.

In summary, I am of the view that s. 47(*a*) should be confined to trusts arising under general principles of law, while s. 107(1)(*j*) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this Court, and by the policy considerations to which I have alluded.

En résumé, j'estime que l'application de l'al. 47*a*) devrait se limiter aux fiducies établies en vertu des principes généraux du droit, alors que l'al. 107(1)*j*) devrait s'appliquer aux seules créances pour taxes qui ne découlent pas du droit général, mais qui sont garanties «par un privilège propre à Sa Majesté» par voie législative. À mon avis, le texte des dispositions en cause, la jurisprudence de cette Cour et les considérations de principe auxquelles j'ai fait allusion appuient cette conclusion.

I turn next to s. 18 of the *Social Service Tax Act* and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

J'examinerai maintenant l'art. 18 de la *Social Service Tax Act* et la nature des droits qu'il crée. Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des autres cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)*b*) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n'y a pas de bien qu'on puisse considérer comme sujet à la fiducie. Aussi, pour cette raison, le par. 18(2) ajoute que la taxe impayée emporte un privilège sur la totalité des biens de celui qui l'a perçue, c'est-à-dire un droit tenant d'une créance garantie.

Applying these observations on s. 18 of the *Social Service Tax Act* to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* which

Si j'applique ces observations relatives à l'art. 18 de la *Social Service Tax Act* à l'interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* que j'ai

1989 CanLII 43 (SCC)

I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held . . . in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

précédemment retenue, la réponse à la question de savoir si le droit que l'art. 18 confère à la province est une «fiducie» au sens de l'al. 47*a*) ou une «réclamation de la Couronne» au sens de l'al. 107(1)*j*) dépend des faits de l'espèce. Si la somme perçue pour fins de taxe peut-être identifiée ou retracée, la situation correspond au sens ordinaire du mot «fiducie» et la somme est exclue, en raison de l'al. 47*a*), de la répartition des biens entre les créanciers. Par contre, si la somme a servi à acquérir d'autres biens et ne peut être retracée, il n'y a pas de «biens détenus [. . .] en fiducie» au sens de l'al. 47*a*). La province a une créance garantie seulement par un privilège et l'al. 107(1)*j*) s'applique.

In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(*a*) of the *Bankruptcy Act* should not be construed as extending to the province's claim in this case.

En l'espèce, il n'est possible d'identifier aucun bien précis sujet à une fiducie. Il s'ensuit qu'on ne saurait considérer que l'al. 47*a*) de la *Loi sur la faillite* s'applique à la créance de la province en l'espèce.

The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the *Bankruptcy Act* must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.*

La province soutient cependant qu'il lui est loisible de définir le mot «fiducie» comme elle l'entend puisque la propriété et les droits civils relèvent de sa compétence. À cette affirmation, il suffit de répondre que la définition applicable du mot «fiducie» pour les fins des exceptions prévues à la *Loi sur la faillite* est celle du législateur fédéral et non celle des législateurs provinciaux. Les provinces peuvent définir à leur gré le mot «fiducie» pour les matières relevant de leur compétence, mais elles ne peuvent imposer au Parlement la définition que la fiducie doit recevoir pour les fins de *Loi sur la faillite*: voir l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board.*

Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the *Social Service Tax Act*. The province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The province is left with a statutory deemed trust which does not give it the same property interest a common law trust would,

L'argument voulant que le montant de taxe perçu demeure la propriété de Sa Majesté en tout temps ne résiste pas non plus à l'analyse. S'il en était ainsi, le privilège que crée le par. 18(2) de la *Social Service Tax Act* en faveur de Sa Majesté serait parfaitement inutile. La province a un droit de fiducie et donc de propriété sur les montants de taxe perçus dans la mesure où ils peuvent être identifiés ou retracés. Dès que ces sommes perdent ce caractère, tout droit de propriété découlant de la *common law* ou de l'*equity* disparaît. Il reste à la province une fiducie légale réputée qui ne lui

1989 CanLII 43 (SCC)

supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

The province relies on *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113 (Ont. C.A.), where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(*a*) of the *Bankruptcy Act*. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in *Re Phoenix Paper Products Ltd.*, in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

The appellant raised a second question in the alternative, namely:

If the Province is divested of its trust property by reason of S. 18(1) being in conflict with S. 107(1)(j) of the *Bankruptcy Act*, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to S. 107 of the *Bankruptcy Act*?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

For the reasons stated, I conclude that s. 47(*a*) of the *Bankruptcy Act* does not apply in this case and the priority of the province's claim is governed by s. 107(1)(*j*) of the Act. I would decline to answer the alternative question posed by the appellant.

I would dismiss the appeal, with costs.

The following are the reasons delivered by

CORY J. (dissenting)—I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree

confère pas le même droit de propriété qu'une fiducie de *common law*, auquel s'ajoute un privilège sur la totalité des biens du failli en application du par. 18(2).

La province invoque l'arrêt *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113 (C.A. Ont.), dans lequel la Cour d'appel de l'Ontario a statué que le salaire dû pour des vacances confondu avec les autres biens d'un failli constituait un bien en fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*. Comme la Cour d'appel l'a souligné en l'espèce, quand, dans l'arrêt *Re Phoenix Paper Products Ltd.*, la Cour d'appel de l'Ontario a examiné les deux courants de jurisprudence divergents qui lui ont été soumis, elle n'avait pas eu l'occasion de prendre connaissance de l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* et de constater que ce dernier arrêt confirmait le courant de jurisprudence que la Cour d'appel de l'Ontario a alors rejeté.

L'appelante soulève une deuxième question à titre subsidiaire, savoir:

[TRADUCTION] Si la province est privée du bien en fiducie parce que le par. 18(1) et l'al. 107(1)j) de la *Loi sur la faillite* se contredisent, [ce] bien échoit-il au créancier garanti [la Banque] ou est-il attribué aux créanciers non garantis conformément à l'art. 107 de la *Loi sur la faillite*?

Cette question n'a été soulevée ni devant les tribunaux d'instance inférieure, ni lors de la demande d'autorisation de pourvoi. Elle vise des parties qui n'ont pas été mises en cause dans le présent pourvoi. Pour ces motifs, je refuse de l'examiner.

Conclusion

Pour ces motifs, je suis d'avis que l'al. 47*a*) de la *Loi sur la faillite* ne s'applique pas à l'espèce, mais que le rang de la créance de la province est régi par l'al. 107(1)*j*) de la Loi. Je refuse de répondre à la question subsidiaire soulevée par l'appelante.

Je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LE JUGE CORY (dissident)—J'ai lu avec beaucoup d'intérêt les motifs convaincants de ma collègue le juge McLachlin. Malheureusement, je ne

1989 CanLII 43 (SCC)

that s. 47(*a*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, does not apply in this case. If section 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the *Bankruptcy Act* must apply. In order to determine the effect of s. 18 it may be helpful to consider the *Social Service Tax Act* as a whole.

puis accepter que l'al. 47*a*) de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3, ne s'applique pas à l'espèce. Si l'article 18 de la *Social Service Tax Act* de la Colombie-Britannique, R.S.B.C. 1979, chap. 388, crée une fiducie valide, alors l'al. 47*a*) de la *Loi sur la faillite* doit s'appliquer. Afin de déterminer l'effet de l'art. 18, il peut être utile d'examiner l'ensemble de la *Social Service Tax Act*.

Scheme of the B.C. *Social Service Tax Act*

Économie de la *Social Service Tax Act* de la Colombie-Britannique

Registration under this Act is a condition precedent to carrying on a retail sales business in the Province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the Minister, the Commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act. In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

L'enregistrement prévu à cette loi constitue une condition préalable à l'exploitation d'un commerce de détail dans la province de la Colombie-Britannique. Sous réserve de certaines exceptions mineures non pertinentes en l'espèce, la Loi prescrit que personne ne peut vendre au détail un [TRADUCTION] «bien matériel personnel» dans la province sans être enregistré auprès du «commissaire», le fonctionnaire provincial chargé d'appliquer la Loi. Il suffit de souligner que l'expression «bien matériel personnel» est définie de manière très générale. Avec l'autorisation du Ministre, le commissaire peut annuler ou suspendre le certificat de quiconque est déclaré coupable d'infraction à la Loi, mettant ainsi fin au commerce de détail. C'est là la forme ultime de contrôle que la province exerce sur ceux qui perçoivent les taxes fixées en vertu de la Loi. De plus, le règlement d'application de la Loi prescrit l'examen minutieux de l'usage des certificats d'enregistrement délivrés aux marchands.

Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the Minister for the purposes of levying and collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the *Revenue Act*, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to ender their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in right of the Province and has failed to pay it to the province, the defaulting collector's property may be seized. As a *quid pro quo*, s. 8 of the *Social Service Tax Act* provides that vendors are to

Conformément à l'art. 5 de la Loi, les marchands au détail sont réputés être des mandataires du Ministre aux fins de l'imposition et de la perception de la taxe de vente. L'article 6 prévoit que ces mandataires sont réputés être des percepteurs d'impôt pour les fins de la *Revenue Act*, R.S.B.C. 1979, chap. 367, et qu'ils sont assujettis aux dispositions des art. 22 à 28 de cette loi. Les articles 22 à 28 prescrivent des peines pour les percepteurs d'impôt qui omettent de rendre compte comme l'exige la Loi. Conformément à l'art. 27, si un percepteur a reçu des sommes appartenant à Sa Majesté du chef de la province et qu'il ne les a pas versées à la province, il est passible de saisie de ses biens. En contrepartie, l'art. 8 de la *Social Service*

1989 CanLII 43 (SCC)

receive remuneration for the service they provide to the government by collecting the tax.

Tax Act prévoit que les marchands doivent être rémunérés pour les services qu'ils rendent au gouvernement en percevant la taxe.

Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the *Social Services Tax Act Regulations*, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than fifteen days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

Selon les art. 9 et 10 de la Loi, tout marchand est tenu de produire des déclarations et de tenir une comptabilité fiscale de la manière prescrite par le règlement et de consigner tous les achats et toutes les ventes effectués. La section 5 des *Social Services Tax Act Regulations*, B.C. Reg. 84/58, comporte des dispositions détaillées sur ces déclarations et cette comptabilité. Le règlement indique clairement qu'il doit y avoir une surveillance continue de la perception de la taxe de vente. Il faut préparer une déclaration mensuelle distincte pour chaque commerce et la produire dans les quinze jours qui suivent la fin du mois auquel elle se rapporte. Le règlement prescrit en détail la façon de calculer, dans chaque déclaration, la commission attribuée à chaque marchand pour la perception de la taxe de vente.

The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of account must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept separate and distinguishable from other entries made therein." (Emphasis added.) As well the tax must be shown as a separate item on all receipts given to purchasers. Section 27 of the Act provides wide powers for the inspection of these records.

Les exigences relatives à la tenue de livres et de relevés de compte soulignent la nature fiduciaire de cet arrangement. On exige notamment que les livres comptables comportent des comptes distincts pour (1) les ventes, (2) les achats, (3) les ventes non taxables, (4) les ventes taxables, (5) les montants de taxe perçus et (6) l'emploi de la taxe y compris la commission retenue. Le règlement insiste également pour que [TRADUCTION] «toutes les écritures relatives à la taxe dans ces livres comptables, déclarations et pièces ... [soient] séparées et distinctes des autres inscriptions qui y sont faites.» (Je souligne.) De même le montant de la taxe doit figurer séparément sur tous les récépissés remis aux acheteurs. L'article 27 de la Loi confère des pouvoirs étendus de vérification de ces livres.

It is against this background that s. 18 of the *Social Service Tax Act* must be considered. That section provides:

> **18.** (1) Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

C'est dans ce contexte qu'il faut interpréter l'art. 18 de la *Social Service Tax Act*, dont voici le texte:

> [TRADUCTION] **18.** (1) Lorsqu'une personne perçoit une taxe en application de la présente loi
>
> a) elle est réputée détenir cette taxe en fiducie pour le compte de Sa Majesté du chef de la province en vue de son paiement à Sa Majesté de la manière et au moment prescrits par la présente loi ou par son règlement d'application, et

1989 CanLII 43 (SCC)

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

It can be seen that the moneys collected by a vendor such as Tops as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales businesses and provided for a regulated means of record keeping and inspection. This system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

From the point of view of fairness, there would seem to be no objection to the provincial government's creating a lien or charge on the assets of

b) la taxe perçue est réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue en vertu de la présente loi, qu'elle ait été ou non effectivement détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de cette personne.

(2) La taxe qui, en vertu de la présente loi,

a) est perçue et détenue en fiducie conformément au paragraphe (1); ou

b) qui doit être perçue et remise par un marchand ou un locateur;

emporte un privilège sur la totalité des biens

c) du patrimoine du fiduciaire en vertu de l'alinéa a);

d) de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa b); ou

e) du patrimoine de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa d).

On peut constater que les sommes perçues par un marchand comme Tops, à titre de percepteur de la taxe de vente, ne deviennent jamais la propriété du marchand. La taxe de vente est payable par l'acheteur et elle est due à la province. Le marchand n'a jamais droit à cette somme, il est, au sens strict du terme, un fiduciaire à l'égard des sommes perçues au titre de la taxe de vente. Le marchand ne sert que d'intermédiaire pour le paiement de la taxe de vente à la province. La province n'a pas été jusqu'à exiger que le marchand ouvre des comptes de banque distincts pour protéger ses fonds en fiducie. Elle a plutôt instauré un système d'enregistrement de tous les commerces de détail et établi un régime réglementé de comptabilité et d'inspection. Ce système permet au gouvernement de déterminer avec précision les sommes qui lui sont dues et de vérifier ce qui advient de ces sommes d'un mois à l'autre.

Si la taxe n'est pas versée à la province, un marchand comme Tops doit alors avoir ou volé ces sommes, ou les avoir détournées à son propre usage ou encore, si l'on est indulgent, avoir perdu les sommes dont il était responsable et comptable à la province.

Sur le plan de l'équité, il ne semblerait pas y avoir d'empêchement à la création, par la province, d'un privilège ou d'une sûreté grevant les

1989 CanLII 43 (SCC)

the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does Section 18 Create a Valid Trust?

The question may be phrased more precisely by asking: If, as the chambers judge found, sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the *Bankruptcy Act* against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax nor is there a conflict between s. 18 of the *Social Service Tax Act* and s. 47(*a*) and s. 107 of the *Bankruptcy Act*. This is not a statutory ruse to evade the provisions of the *Bankruptcy Act*. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchasers, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this Court that the civil law of trust is not the same as that of common law. See *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250, at p. 261.

There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example,

biens du marchand pour le montant de la taxe de vente (les fonds en fiducie) qu'il est chargé de percevoir et de remettre à la province.

L'article 18 crée-t-il une fiducie valide?

On peut formuler la question de façon plus précise en se demandant si, après que le juge de première instance eut constaté que le montant de la taxe de vente [TRADUCTION] «avait été détourné par Tops qui l'avait confondu avec ses biens», c'en était fait de la fiducie. On a dit que même si la fiducie existait régulièrement au moment où les sommes ont été payées par les acheteurs, elle a cessé d'exister ou d'être valide dès que les sommes eurent été confondues de telle manière qu'il était difficile de les retracer. Commençons par affirmer de façon un peu simpliste qu'il n'y a rien dans la *Loi sur la faillite* qui empêche une province d'établir une fiducie ou un privilège réputés sur les biens du détaillant jusqu'à concurrence du montant de taxe de vente perçu et il n'y a pas d'incompatibilité entre, d'une part, l'art. 18 de la *Social Service Tax Act* et, d'autre part, l'al. 47*a*) et l'art. 107 de la *Loi sur la faillite*. Il n'y a pas là de subterfuge légal pour se soustraire aux dispositions de la *Loi sur la faillite*. Ce n'est qu'une tentative de protéger les fonds en fiducie qui sont destinés à l'usage et à l'avantage du public. Plutôt que d'insister pour qu'à chaque vente il y ait un versement distinct à la province, la Loi a établi un régime avantageux pour l'acheteur au détail, le détaillant, le monde des affaires et l'ensemble de la province. La Loi ne fait rien de plus que de protéger les sommes qui, dès leur versement, constituent véritablement des fonds en fiducie. Je ne suis pas certain non plus que la validité d'une fiducie puisse se déterminer exclusivement en fonction de la *common law*. Cette Cour a déjà affirmé que le droit civil des fiducies diffère de celui de la *common law*. Voir *Royal Trust Co. c. Tucker*, [1982] 1 R.C.S. 250, à la p. 261.

Il existe de nombreuses dispositions législatives provinciales qui créent des fiducies. Ce genre de disposition est courant dans une vaste catégorie de lois susceptibles de bénéficier aux salariés, aux acheteurs d'assurance, aux cotisants à des régimes d'assurance-santé et à plusieurs autres catégories de gens qui ne disposent pas de l'organisation ou

1989 CanLII 43 (SCC)

Pension Benefits Act, S.O. 1987, c. 35, s. 58; *Insurance Act*, R.S.O. 1980, c. 218, s. 359; *Health Insurance Act*, R.S.O. 1980, c. 197, s. 18; *Builders' Lien Act*, R.S.A. 1980, c. B-12, s. 16.1; *Construction Lien Act, 1983*, S.O. 1983, c. 6, s. 7; *Business Corporations Act*, S.A. 1981, c. B-15, s. 191(1); *Employment Standards Act*, R.S.A. 1980, c. E-10.1, s. 113; *Insurance Act*, R.S.A. 1980, c. I-5, s. 123(1); *Real Estate Agents' Licensing Act*, R.S.A. 1980, c. R-5, s. 14, and *Health Insurance Premiums Regulation*, Alta. Reg. 217/81.

du pouvoir de négociation nécessaire pour établir une fiducie en leur propre faveur. Voir, par exemple, les lois suivantes: *Loi de 1987 sur les régimes de retraite*, L.O. 1987, chap. 35, art. 58; *Loi sur les assurances*, L.R.O. 1980, chap. 218, art. 359; *Loi sur l'assurance-maladie*, L.R.O. 1980, chap. 197, art. 18; *Builders' Lien Act*, R.S.A. 1980, chap. B-12, art. 16.1; *Loi de 1983 sur le privilège dans l'industrie de la construction*, L.O. 1983, chap. 6, art. 7; *Business Corporations Act*, S.A. 1981, chap. B-15, par. 191(1); *Employment Standards Act*, R.S.A. 1980, chap. E-10.1, art. 113; *Insurance Act*, R.S.A. 1980, chap. I-5, par. 123(1); *Real Estate Agents' Licensing Act*, R.S.A. 1980, chap. R-5, art. 14, et *Health Insurance Premiums Regulation*, Alta. Reg. 217/81.

This Court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, at p. 494, the trust provisions of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, (now the *Construction Lien Act*) were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

Cette Cour a déjà statué qu'une province peut, pour favoriser ou protéger un principe de politique sociale, créer une fiducie légale. Dans l'arrêt *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] R.C.S. 487, à la p. 494, les dispositions en matière de fiducie de *The Mechanics' Lien Act*, R.S.O. 1950, chap. 227 (maintenant appelée *Loi sur le privilège dans l'industrie de la construction*) ont été confirmées. Les fiducies légales mentionnées plus haut fournissent la protection voulue à leurs bénéficiaires et favorisent la réalisation d'objectifs sociaux salutaires que les provinces ont le pouvoir de poursuivre.

Subsection 23(4) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the *Social Service Tax Act*. In *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599 (C.A.), Gale C.J.O., for a unanimous Court, noted that the Act deemed Pension Plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

Le paragraphe 23(4) du *Régime de pensions du Canada*, L.R.C. (1985), chap. C-8, crée une fiducie en des termes presque identiques à ceux de l'art. 18 de la *Social Service Tax Act*. Dans *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599 (C.A.), le juge en chef Gale de l'Ontario a, au nom de la cour à l'unanimité, souligné que, selon la Loi, les sommes relatives au Régime de pensions sont réputées être détenues de manière séparée et distincte du patrimoine de l'employeur qu'elles [TRADUCTION] «ai[ent] ou non effectivement été conservé[es] dans un compte séparé et distinct des propres fonds de l'employeur ou de la masse des biens» et il ajoute, à la p. 601:

[These words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the

[TRADUCTION] [Ces mots ont] été inséré[s] dans la Loi expressément dans le but de soustraire de la masse des biens du failli, par la création d'une fiducie, un

1989 CanLII 43 (SCC)

creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-3:

In the *Canada Pension Plan* the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O's judgment was cited with approval by Pigeon J. writing for the majority in this Court in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, at p. 1198, who stated: "I find the reasoning in *Deslauriers* wholly persuasive . . . ."

The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the *Bankruptcy Act*. Sections 47 and 107 of the Act provide:

47. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person;

. . .

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, by Dickson J., as he then was, in these words:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens

montant équivalent aux déductions et d'en faire la propriété du Ministre.

Puis il en conclut ceci, aux pp. 602 et 603:

[TRADUCTION] Dans le *Régime de pensions du Canada*, les fonds sont présumés être des biens exclus de façon absolue de la faillite de sorte qu'en vertu de la Loi, Sa Majesté n'est pas un créancier, mais est réputée détenir un bien qui n'appartient pas au failli.

Le juge Pigeon a, au nom de cette Cour à la majorité, cité et approuvé l'avis du juge en chef Gale dans l'arrêt *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182, à la p. 1198, en affirmant: «Je trouve le raisonnement suivi dans l'arrêt *Deslauriers* tout à fait convaincant . . .»

Les dispositions de l'art. 18 devraient donc prévaloir à moins d'incompatibilité avec celles de la *Loi sur la faillite*. Les articles 47 et 107 de la Loi sont ainsi conçus:

47. Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

a) les biens détenus par le failli en fiducie pour toute autre personne,

. . .

107. (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli doivent être distribués d'après l'ordre de priorité de paiement suivant:

. . .

j) les réclamations, non précédemment mentionnées au présent article, de la Couronne du chef du Canada ou d'une province du Canada, *pari passu*, nonobstant tout privilège statutaire à l'effet contraire.

La théorie de la prépondérance de la loi fédérale ne peut s'appliquer que s'il y un conflit véritable dans l'application des lois fédérale et provinciale. Ce principe a été énoncé dans l'arrêt *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, dans lequel le juge Dickson, maintenant Juge en chef, affirme à la p. 191:

En principe, il ne semble y avoir aucune raison valable de parler de prépondérance et d'exclusion sauf lorsqu'il y a un conflit véritable, comme lorsqu'une loi dit «oui» et que l'autre dit «non»; «on demande aux mêmes citoyens

1989 CanLII 43 (SCC)

are being told to do inconsistent things"; compliance with one is defiance of the other.

In this case there is no conflict as the property which was subject to s. 18 of the *Social Service Tax Act* never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the *Bankruptcy Act*. On a plain reading of s. 47 of the *Bankruptcy Act* there is no conflict created by the two statutes.

It is true that this Court has in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the *Bankruptcy Act*. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchasers for payment to the province. I do not think that the decision in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the *Bankruptcy Act*.

This appears to be the opinion expressed by Anne E. Hardy, the author of *Crown Priority in Insolvency* (1986). She concedes that in the interest of consistency with *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at p. 107 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this

d'accomplir des actes incompatibles»; l'observance de l'une entraîne l'inobservance de l'autre.

En l'espèce, il n'y a pas de conflit puisque le bien visé par l'art. 18 de la *Social Service Tax Act* n'est jamais devenu la propriété de la faillie et n'est donc pas sujet à répartition comme le sont les biens de la faillie en vertu de l'art. 107 de la *Loi sur la faillite*. Selon le sens clair de l'art. 47 de la *Loi sur la faillite*, il n'y a pas de conflit entre les deux lois.

Il est vrai que, dans l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, cette Cour a reconnu et souligné que les provinces ne peuvent, par leurs propres lois, établir un ordre de priorité en vertu de la *Loi sur la faillite*. Cependant, l'art. 18 n'établit pas de priorité. Il ne fait rien de plus que reconnaître la validité d'une fiducie. Il élimine ainsi la nécessité d'établir un compte de banque distinct pour les montants de taxe de vente perçus en y substituant un système d'enregistrement et de comptabilité qui permet de contrôler ces fonds qui n'appartiennent jamais au marchand fiduciaire. Cette dernière mesure n'affecte pas la validité de la fiducie relative aux sommes perçues des acheteurs pour fins de versement à la province. Je ne crois pas qu'on puisse considérer que l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, a changé le sens de l'expression «les biens d'un failli» figurant à l'art. 47 de la *Loi sur la faillite*.

Cela semble être l'avis qu'exprime Anne E. Hardy, dans son ouvrage intitulé *Crown Priority in Insolvency* (1986). Elle reconnaît que si l'on se conforme à l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, il faut tenir pour inopérante la disposition relative au privilège dans l'article qui traite de la fiducie réputée, en cas de faillite du fiduciaire. Néanmoins, elle exprime l'avis suivant, à la p. 107:

> [TRADUCTION] Donc, il est douteux d'adopter une interprétation qui restreint la portée de l'alinéa 47*a*) de la Loi sur la faillite aux fiducies qui existent dans les faits ou à celles qui ne profitent pas à la Couronne ou à un créancier dont la réclamation est mentionnée au paragraphe 107(1) de la Loi. Tant que la Loi n'aura pas été modifiée pour permettre aux tribunaux d'interpréter

1989 CanLII 43 (SCC)

approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.

As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types be deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should I think prevail.

Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say there had to be certainty of intention, certainty of subject matter and certainty of objects. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that thus trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the *Law of Trusts in Canada* (2nd ed. 1984), at pp. 119-22:

When the courts say that there must be certainty of subject-matter, they mean that the property must either

ainsi l'article 47, il ne leur sera probablement pas possible de le faire. L'arrêt *Coopers & Lybrand* semble donc critiquable. Les décisions plus nombreuses qui ont confirmé la validité des fiducies légales réputées, en cas de faillite, et refusé d'établir la priorité des réclamations qui y sont assujetties selon le paragraphe 107(1) de la Loi sont préférables.

Comme je l'ai déjà dit, il faut généralement confirmer les fiducies en cas de faillite du fiduciaire quelle que soit leur origine. Il est toutefois possible que certains types de dispositions relatives aux fiducies réputées doivent être tenus pour inopérants et qu'une fiducie valide ne voie pas le jour. Dans la plupart des décisions qui ont porté sur des fiducies depuis la décision *Re Bourgault*, on a établi des distinctions d'avec cette dernière puisque celle-ci ne traitait pas des dispositions portant fiducie ou du lien entre les fiducies visées par l'alinéa 47*a*) et le paragraphe 107(1) de la Loi sur la faillite. Certaines de ces décisions portaient sur des dispositions en matière de fiducie en vertu desquelles une somme réputée détenue en fiducie constituait un privilège et une sûreté grevant les biens du fiduciaire.

C'est l'avis qu'il faut, selon moi, adopter.

De plus, il semble que même si elle est imposée par la loi, la fiducie comporte toutes les caractéristiques essentielles requises d'une fiducie. Pour être valide en *equity*, la fiducie devait remplir trois conditions fondamentales: il devrait y avoir certitude quant à l'intention, certitude quant aux biens sujets à la fiducie et certitude quant aux bénéficiaires. On reconnaît que la Loi établit la certitude quant à l'intention et la certitude quant au bénéficiaire. L'intimée soutient qu'il ne peut y avoir de certitude quant aux biens sujets à la fiducie puisqu'il est impossible d'identifier les biens en fiducie et qu'en conséquence aucune fiducie, au sens traditionnel du terme, n'a vu le jour. Cependant, en l'espèce, les biens sujets à la fiducie ont été clairement identifiés au moment des ventes effectuées par le marchand (Tops). La seule question qu'il restait à résoudre était de savoir si les biens en fiducie pouvaient être identifiés de manière à ce que cette fiducie puisse avoir gain de cause dans une action en droit de suite. Le professeur Waters a abordé cette question dans l'ouvrage intitulé *Law of Trusts in Canada* (2ᵉ éd. 1984), aux pp. 119 à 122:

[TRADUCTION] Quand les tribunaux affirment qu'il doit y avoir certitude quant aux biens sujets à la fiducie,

1989 CanLII 43 (SCC)

be described in the trust instrument, or there must be "a formula or method given for identifying it."

. . .

In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as *the* trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [Emphasis in original.]

There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against the trustee.

Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those monies can be traced "either as a

ils veulent dire que ces biens doivent être décrits dans l'acte de fiducie ou qu'il doit «exister une formule ou méthode permettant de les identifier.»

. . .

Pour déterminer la certitude, les tribunaux s'intéressent à la certitude de notion plutôt qu'à la question de savoir s'il est trop difficile de vérifier quels sont les biens sujets à la fiducie.

Il distingue cette question de celle du droit de suite:

[TRADUCTION] Selon la jurisprudence, il n'y a aucune possibilité de vérification au départ s'il n'y a pas de biens précis définis comme étant *les* biens en fiducie. Du moment que cela a été fait et que la fiducie a vu le jour, son bénéficiaire peut exercer un droit de suite sur ces biens, peu importe que ceux-ci aient été transformés ou, s'il s'agit d'une somme d'argent, qu'elle ait été confondue avec d'autres fonds. [En italique dans l'original.]

Il n'y a pas de doute que la Loi établit un moyen clair de déterminer le bien qui est en fiducie, c'est-à-dire la taxe de vente, de sorte qu'il y a certitude quant au bien sujet à la fiducie. Les trois certitudes, savoir la certitude quant à l'intention, la certitude quant aux biens sujets à la fiducie et la certitude quant au bénéficiaire sont établies par la Loi. On ne saurait dire que les montants de taxe de vente perçus par Tops sont devenus sa propriété parce que les certitudes requises pour qu'il y ait fiducie en *equity* n'existent pas puisque la Loi les a validement établies.

On ne saurait dire non plus que les fonds en fiducie légale (la taxe de vente perçue) sont devenues la propriété de la faillie Tops du fait que celle-ci les a confondus, à tort, avec ses propres biens. En *equity*, les fonds ainsi confondus demeurent assujettis aux obligations découlant de la fiducie. Dans ce cas, le bénéficiaire disposait de deux recours possibles contre le fiduciaire en raison de la conduite injustifiée de ce dernier. Le bénéficiaire pourrait soit chercher à récupérer les biens en fiducie eux-mêmes par action en droit de suite ou il pourrait choisir de se faire indemniser de la perte par action intentée contre le fiduciaire.

Bien qu'il y ait une certaine controverse quant à savoir si, en *common law*, ces fonds sont susceptibles de droit de suite après avoir été confondus avec les propres fonds du défendeur, en *equity* ces

1989 CanLII 43 (SCC)

separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": *Re Diplock's Estate*, [1948] Ch. 465, at p. 521, [1948] 2 All E.R. 318, at p. 347 (C.A.), *per* Lord Green M.R.; aff'd *sub nom. Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts. See D. W. M. Waters, *supra*, at pp. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, and *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

If, as stated in *Deputy Minister of Revenue v. Rainville*, mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the sub-contractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

sommes peuvent faire l'objet d'un droit de suite [TRADUCTION] «soit à titre de sommes distinctes, soit à titre de sommes confondues ou à titre de bien caché dans les biens acquis avec ces sommes»: *Re Diplock's Estate*, [1948] Ch. 465, à la p. 521, [1948] 2 All E.R. 318, à la p. 347 (C.A.), le maître des rôles lord Greene, décision confirmée sous l'intitulé *Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) Les difficultés et, en fin de compte, le coût prohibitif de la comptabilité nécessaire fixent dans une large mesure les limites de l'action en droit de suite. Voir D. W. M. Waters, précité, aux pp. 1037 et suiv. Rien n'interdit qu'une fiducie établie par la loi offre un avantage sur une fiducie établie par un particulier en reconnaissant l'existence d'une fiducie à l'égard des biens détenus par le fiduciaire sans que le bénéficiaire ait à engager l'action excessivement coûteuse en droit de suite sur les sommes confondues. Cet avantage ne devrait pas dépouiller les biens en fiducie légale de leur caractère fiduciaire ni les soustraire à l'application des principes énoncés dans les arrêts *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35, *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061. Il semblerait donc que les fiducies établies par la loi remplissent les conditions de validité des fiducies reconnues en *equity*.

Si comme on le dit dans l'arrêt *Sous-ministre du Revenu c. Rainville*, il est possible de reconnaître un privilège de constructeur malgré l'impossibilité de retracer les sommes des sous-traitants dans les comptes confondus de l'entrepreneur général, il faut aussi reconnaître l'existence de la fiducie légale relative à la taxe de vente.

Cette conclusion ne crée pas non plus de problème pratique. Si le syndic de faillite proposé doit déterminer si les biens font l'objet d'une fiducie, il pourra s'adresser aux tribunaux pour faire trancher cette question dès le début des procédures. De plus, s'il surgit un différend entre ceux qui invoquent une fiducie, il pourra être résolu en fonction de l'ordre de priorité qui découle de la date à laquelle la fiducie a vu le jour.

1989 CanLII 43 (SCC)

Disposition

I conclude therefore that the trust described in s. 18 of the British Columbia *Social Service Tax Act* is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the *Bankruptcy Act* as that policy has been expounded in *Deputy Minister of Revenue v. Rainville*; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board* and *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)* for the following reasons:

(a) the sums constituting the trust were never the property of the bankrupt, but were transferred from purchasers of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchasers;

(b) the trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the *Social Service Tax Act* does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;

(c) the only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy

(i) does not negate the trusts;

(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in *Deputy Minister of Revenue v. Rainville*; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board* and *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*;

(d) the trust therefore properly falls within s. 47(*a*) of the *Bankruptcy Act* and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

I would therefore answer the constitutional question as follows:

Dispositif

Je conclus donc que la fiducie décrite à l'art. 18 de la *Social Service Tax Act* ne constitue nullement une réclamation contre les biens de la faillie de manière à entrer en conflit avec le principe sous-jacent du par. 107(1) de la *Loi sur la faillite*, énoncé dans les arrêts *Sous-ministre du Revenu c. Rainville, Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, pour les motifs suivants:

a) les sommes en fiducie ne sont jamais devenues la propriété de la faillie, mais elles sont passées des acquéreurs de véhicules à Sa Majesté du chef de la province, pour le compte de laquelle Tops agissait en qualité de fiduciaire, conformément à une obligation contractée par ces acquéreurs;

b) la fiducie a été constituée régulièrement parce qu'elle comportait les trois certitudes requises pour qu'il y ait fiducie en *equity*; l'art. 18 de la *Social Service Tax Act* ne dispense pas de satisfaire à ces trois certitudes, mais les respecte de la même manière qu'un acte de fiducie conventionnel doit le faire;

c) la seule différence pertinente entre cette fiducie légale et une fiducie conventionnelle expresse réside dans le recours réputé en droit de suite qu'accorde la Loi. L'existence de ce recours

i) ne rend pas la fiducie nulle;

ii) est surtout auxiliaire et ne soustrait donc pas la fiducie à l'application du principe énoncé dans les arrêts *Sous-ministre du Revenu c. Rainville*, *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*;

d) la fiducie relève donc de l'al. 47*a*) de la *Loi sur la faillite* et ne fait pas partie des biens du failli au sens que doit avoir cette expression selon le principe qui sous-tend le par. 107(1) de la Loi.

Je suis donc d'avis de répondre ainsi à la question constitutionnelle:

1989 CanLII 43 (SCC)

Are the provisions of s. 18(1) of the *Social Service Tax Act*, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(*j*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3?

Answer: No.

I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

Appeal dismissed, CORY J. *dissenting.*

Solicitor for the appellant: The Ministry of the Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Davis & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: The Department of the Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland. St. John's.

Les dispositions du par. 18(1) de la *Social Service Tax Act*, R.S.B.C. 1979, chap. 388 et ses modifications, sont-elles inopérantes pour le motif qu'elles sont incompatibles avec les dispositions de l'al. 107(1)*j*) de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3?

Réponse: Non

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et la décision rendue par le juge en chambre et d'ordonner de répondre ceci à l'exposé de cause: «la défenderesse a eu tort d'accorder à la Banque canadienne impériale de commerce la priorité sur la fiducie légale de la demanderesse».

Pourvoi rejeté, le juge CORY *est dissident.*

Procureur de l'appelante: Le ministère du Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intimée: Davis & Company, Vancouver.

Procureur de l'intervenant le procureur général du Canada: Le sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse: Le ministère du Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général du Manitoba: Gordon E. Pilkey, Winnipeg.

Procureur de l'intervenant le procureur général de l'Alberta: Le procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve: Le procureur général de Terre-Neuve, St. John's.

1989 CanLII 43 (SCC)

CITATION: Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp. et al., 2024 ONSC 3507
COURT FILE NO.: CV-23-00710795-00CL
DATE: 2024-06-18

ONTARIO

SUPERIOR COURT OF JUSTICE [Commercial List]

BETWEEN:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

– and –

2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP, 1000162801 ONTARIO CORP., AMERCAN CORPORATION and 1000199992 ONTARIO CORP.

Respondents

DATE HEARD: May 27, 2024

BEFORE: Justice Jana Steele

COUNSEL:

Jeff Larry and Ryan Shah for the Receiver, Albert Gelman Inc.

Wendy Greenspoon-Soer for the Applicant

Khaled Gheddai for the Respondents

ENDORSEMENT

Overview

[1] The Receiver, Albert Gelman Inc., seeks, among other things, Court approval to disclaim the 28 asset purchase agreements (“APSs”) under which buyers contracted pre-construction with the debtors to buy certain freehold properties. The Receiver also seeks an increase in the borrowing limit to fund the remaining work to complete the project.

[2] The Receiver’s motion is supported by the first secured lender, Cameron Stephens Mortgage Capital Ltd. (“CSMC”).

[3] The respondents oppose the Receiver's motion. The respondents are of the view that the Receiver has not taken appropriate steps to canvass all stakeholders and options before seeking to disclaim the APSs.

[4] One of the 28 purchasers, Hsin Yang Lee ("Lee"), filed evidence opposing the Receiver's motion but did not make oral submissions.

[5] None of the purchasers made oral submissions at the hearing.

[6] Affidavit evidence to oppose the Receiver's motion was also filed by a creditor of the debtors, Spectrum Realty Services Inc., Brokerage ("Spectrum"). Spectrum also did not make oral submissions.

[7] The debtors are real estate developers and the registered owners of the Jefferson Properties. The Jefferson Properties is the site of a 96-unit residential real estate development project known as Richmond Hill Grace (the "Project"), consisting of 60 stacked condominium townhome units and 36 freehold townhomes.

[8] The Project is only about 60-70% constructed.

[9] For the reasons set out below, the Receiver's motion is granted.

Background

[10] The Receiver was appointed by Order of Cavanagh J., dated December 21, 2023.

[11] At the time of the Receiver's appointment, the debtors were in the middle of constructing the Project. Under the appointment order, the Receiver was empowered to borrow $7,000,000. That borrowing limit was subsequently increased to $9,500,000, and then to $11,500,000.

[12] Following its appointment, the Receiver determined that stakeholder value would be maximized by completion of the Project. However, shortly after its appointment, the Receiver determined that there were construction, health and safety, and recordkeeping deficiencies with the Project.

[13] The Receiver shut down the Project on January 24, 2024, to assess the management of the Project. As part of this assessment, the Receiver obtained a report from a chartered quantity surveyor (the "Glynn Report") that assessed the cost to complete the Project at $23,000,000.

[14] After its appointment, the Receiver retained an independent construction representative, Camcos Management Inc., because the Receiver was uncomfortable with certain construction practices and processes implemented by the Project's existing construction manager. The Receiver decided not to renew the contract with the existing construction manager and, in consultation with Camcos and CSMC, retained a new construction manager.

[15] Before the appointment of the Receiver, the debtors had entered into 51 agreements of purchase and sale with respect to condominium townhome units (the "Condos") and 28 APSs with respect to the Freehold townhome units (the "Freehold Towns").

[16] In late March 2024, CSMC advised the Receiver that it would only continue to fund the completion of the Project if the Receiver disclaimed the 28 APSs in respect of the Freehold Towns.

Analysis

Should the Court authorize the Receiver to terminate and disclaim the 28 APSs with respect to the Freehold Towns?

[17] It is not disputed that the Court has the jurisdiction to authorize a receiver to disclaim agreements of purchase and sale in the context of real property developments: The Court has done so on numerous occasions, as set out in the Receiver's factum. For example: *Forjay Management Ltd. v. 0981478 BC Ltd.*, 2018 BCSC 527, 11 B.C.L.R. (6th) 395, at paras. 131-132; *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120, at paras. 31-38; and *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd*, 2020 BCSC 1013, 80 C.B.R. (6th) 118, at para. 57.

[18] In *Forjay Management*, at paras. 41-44, Fitzpatrick J. of the British Columbia Supreme Court set out the considerations for the Court in determining whether to authorize a receiver to disclaim pre-sale purchase agreements:

a. The respective legal priority positions as between the competing interests;

b. Whether a disclaimer would enhance the value of the assets, and, if so, whether a failure to disclaim would amount to a preference in favour of one party; and

c. If a preference would arise, whether the party seeking to avoid a disclaimer has established that the equities support that result.

[19] The Receiver submits that in this case, the above factors strongly support the Receiver's position. I consider each of the above factors in turn.

(i) Respective Legal Priority Positions

[20] CMSC is the debtors' senior secured creditor. As at January 8, 2024, the debtors' total indebtedness to CMSC was approximately $50.8 million. The debtors granted as security for CMSC's loan a charge/mortgage against the Jefferson Properties.

[21] The agreements of purchase and sale that were entered into by the Freehold buyers and the debtors contained the following language, pursuant to which the buyers subordinate their interest to any mortgages or construction financing of the debtors:

> The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary and agrees to

> execute all acknowledgments or postponements required to give full effect thereto.

[22] In addition, the Freehold buyers agreed to not register their agreements of purchase and sale on title to the property, and none of such agreements have been registered against title to the property.

[23] The purchaser that filed evidence, Hsin Yang Lee, argued that the deposits made pursuant to the Freehold APSs were trust funds under s. 81(1) of the *Condominium Act, 1998*, S.O. 1998, c. 19, and, therefore, such deposits should have priority over the secured creditors. Lee notes that the property was described in the agreement as a parcel of tied land consisting of a freehold unit and an interest in a common elements condominium corporation.

[24] The deposits made were in respect of the Freehold properties. The Freehold APSs are clear that the deposits made were not attributable to the common elements:

> That portion of the Purchase Price applicable to the common interest in the Condominium shall be Two ($2.00) Dollars which shall be payable as part of the monies due on the Unit Transfer Date from the Purchaser to the Vendor. **There is no deposit payable by the Purchaser for the purchase of the common interest in the Condominium.** [Emphasis added.]

[25] Because none of the Freehold deposits were attributable to the common elements, section 81 of the *Condominium Act*, which requires certain payments made to be held in trust, does not apply.

[26] As noted by the Receiver, the interpretation of the *Condominium Act* asserted by Mr. Lee would upset the legislative scheme of homebuyer protection. Under the regulations to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 ("ONHWPA"), the limits on compensation for lost deposits differ between freehold and condominium homes:

a. For freehold homes, the greater of (1) $60,000, and (2) the lesser of 10% of the sale price of the home and $100,000; and

b. For condominiums, $20,000 plus interest.

[27] Lee seeks the higher protection under the ONHWPA for freehold buyers and seeks the protection owing to condominium buyers under the *Condominium Act* (i.e., the requirement to hold certain funds in trust). As noted by the Receiver, the regulations under the ONHWPA provide for greater protection for freehold purchasers because entities selling new condominiums are required under the *Condominium Act* to hold purchaser deposits in trust. Likewise, the regulations under the ONHWPA provide lesser protection to condominium purchasers because of the requirement to hold the deposits in trust under the *Condominium Act*.

[28] I am satisfied that CSMC's position, as the party that provided mortgage and construction financing and the first secured creditor, takes legal priority over the Freehold purchasers' interests.

> *(ii) Whether a disclaimer would enhance the value of the assets, and, if so, whether a failure to disclaim would amount to a preference in favour of one party.*

[29] The Receiver submits that the disclaimers would enhance the value of the assets.

[30] The Receiver obtained two appraisals, conducted by professional appraisers CBRE Valuation & Advisory Services and Cushman & Wakefield. The appraisal reports were provided on a confidential basis to the Court. Both appraisal reports support the Receiver's conclusion that the existing Freehold APSs are below the current market value for the properties. The appraisals indicate that the current market value of the Freehold Towns is higher than the prices at which the properties were sold.

[31] The valuation reports also support the Receiver's conclusion that if the properties were sold on an "as-is, where-is" basis, the senior secured lender, CSMC, would suffer a material loss on its indebtedness.

[32] CSMC has indicated that it will only continue to fund the Project if the Freehold APSs are disclaimed. As no other party has been identified who would be willing to fund the completion of the Project, if CSMC refused to continue to fund, this would likely result in a situation where the Receiver would be unable to complete the Project. In such a scenario, the Project would be sold on an "as-is, where-is" basis, resulting in a significant loss to the debtors' estate.

[33] As noted by the Receiver, the Receiver's business judgment that the disclaimers will enhance the value of the estate is entitled to considerable deference: *Peoples Trust,* at para. 47.

> *(iii) If a preference would arise, whether the party seeking to avoid a disclaimer has established that the equities support that result.*

[34] It is my view that the equities do not support refusal of the Receiver's request to disclaim the Freehold APSs.

[35] The Receiver is required to take into account and balance the interests of all the debtor's stakeholders. In *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), at para. 40, Doherty J.A. stated:

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within

> the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.

[36] As noted above, the Receiver has determined that if it does not disclaim the Freehold APSs, the overall recovery in the receivership would be impaired, which would be to the detriment of the entire estate.

[37] However, certain stakeholders will suffer negative impacts if the 28 Freehold APSs are disclaimed. First, the parties that had contracted to buy properties will lose their ability to purchase the Freehold Towns pursuant to the terms of their agreements. In addition, these purchasers paid deposits to the debtors, which have been invested in the Project or otherwise spent. Although Tarion insures deposit monies on freehold purchases up to $100,000, deposit amounts paid by the purchasers in excess of $100,000 will likely be lost. The Receiver has calculated that the Freehold buyers will lose, on average, deposits of approximately $45,000 under the Freehold APSs.

[38] Second, Spectrum will suffer a loss of approximately $1.4 million, which are the commissions that were to be payable upon closing that are attributable to the Freehold Towns. Further, as noted in the affidavit evidence filed by Spectrum, co-operating brokers, who have assisted with the sale of the Freehold units, will also be deprived of their commission.

[39] The Receiver submits that the negative impact that will be suffered by the Freehold buyers if the agreements are disclaimed does not justify overriding the secured lender's legal priority and giving the Freehold purchasers a preference they would not otherwise have. In this regard, the Receiver notes, among other things, that the Freehold buyers agreed that their interests in the real property would be subordinate to the secured lenders', and Tarion's warranty program will cover a significant portion of the Freehold buyers' deposits.

[40] While the proposed disclaimer will certainly have some negative impact on the homebuyers and real estate agents, I agree with the Receiver that this does not justify overriding CSMC's priority and giving the homebuyers a preference that they would not otherwise enjoy.

[41] I am also persuaded by the Receiver's submission that where, as here, the properties are not complete, the Court cannot effectively direct the Receiver to borrower millions of dollars from CSMC to fund the completion of the construction of the Freehold Towns. The Receiver referred the Court to *Firm Capital Mortgage Fund*, where Morawetz J. (as he then was) stated, at paras. 28 and 29:

> [28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of

> construction ordered to bring the property into existence". (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.
>
> [29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[42] The Receiver's decision to disclaim the 28 Freehold APSs is "within the broad bounds of reasonableness." I am satisfied that the Receiver has acted fairly and considered the interests of all stakeholders. As noted above, this "does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver."

Should the Court approve the Requested Increase to the Borrowing Limit?

[43] As noted above, the Receiver seeks to increase the borrowing limit by $20,000,00, from $11,500,000 to $31,500,000.

[44] Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, permits the court to appoint a receiver to, among other things, "take any other action that the court considers advisable." The Court has interpreted this provision broadly, including authorizing borrowing by receivers: *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 25 Alta. L.R. (7th) 211, at para. 20; and *KEB Hana Bank Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881, at paras. 54-55.

[45] The order appointing the Receiver also provides that the borrowing limit may be increased by further Court order.

[46] The Receiver submits that approving the requested increase to the borrowing limit is the only way to complete the Project and thereby maximize stakeholder benefit. There is approximately $2.7 million currently held by the Receiver, which is not sufficient to complete the Project. The estimated cost to complete the Project, based on the Glynn Report, is at least $23 million.

[47] I am satisfied that it is appropriate in the circumstances to authorize the increase to the borrowing limit.

Should the Court approve the activities, fees and interim SRD of the Receiver and the fees of the Receiver's legal counsel?

[48] The Receiver seeks Court approval of its Second Report, the First Supplemental Report to the Second Report, the Second Supplemental Report to the Second Report and the activities set out in the reports. The principles set out by the Court regarding the approval of the activities of a receiver or monitor, and their reports, are well established: *Target Canada Co. Re,* 2015 ONSC 7574, 31 C.B.R. (6th) 311, at paras. 2 and 12; and *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400, at para. 66.

[49] The activities of the Receiver are set out in the reports and include:

a. Responding to correspondence and requests for information from the debtors and their principal, among others;

b. Working with the construction consultant to carry out an assessment of the Project, including identifying health and safety issues on the site;

c. Managing the review and remediations of health and safety issues;

d. Commissioning appraisals of the Project, and the 2 Glynn reports; and

e. Engaging in tendering processes for prospective trades and suppliers.

[50] As noted above, the senior lender, CSMC, supports the Receiver's activities.

[51] Jefferson Properties Limited Partnership and 2011836 Ontario Corp. oppose the conduct of the receivership. Among other things, the debtors suggest that the Receiver has not taken appropriate steps to canvass stakeholders and other options. The debtors also point to the lack of development on the Project since the Receiver's appointment.

[52] As noted by the Receiver, courts should defer to the reasonable exercise of business judgment by court appointed receivers: *Ravelston Corp. (Re)*, at para. 40.

[53] The Receiver states that it has been willing to try to accommodate the debtors, including providing certain requested information to the debtors and facilitating at least 4 site visits with potential financiers. This is supported by CSMC's evidence that "Wang and numerous financiers, developers and construction professionals have been given access to the site on multiple occasions."

[54] The Receiver is of the view that the course of action it is pursuing is the only alternative in the circumstances. Among other things, CSMC has indicated that it will only agree to increase funding to complete the Project if the proposal to terminate the 28 APSs is approved as requested by the Receiver.

[55] With regard to the lack of development on the Project, the Receiver identified serious concerns, as set out in its Report, including unpaid liens, lack of communications, health and safety issues, among other things, which caused the Receiver to halt work on the Project and assess.

[56] I am satisfied that the Receiver considered a range of options and was unable to find a viable alternative, which is why the Receiver has proceeded to ask the Court for the relief on this motion.

[57] I am satisfied that the Receiver's activities were necessary, appropriate and consistent with the Receiver's mandate. It is unfortunate that there was a stoppage of work on the Project further delaying its completion. However, I am satisfied that the Receiver, using its business judgment, determined that it was necessary and appropriate in the circumstances so that the issues with the Project could be remedied.

[58] I am also satisfied that the fees and disbursements of the Receiver and its counsel are fair, reasonable and justified in the circumstances. I note that fee affidavits have been filed. This has been a complicated matter given, among other things, the issues with the management of the construction up to the date of the Receiver's appointment.

Should the Court authorize the proposed sealing Order?

[59] The Receiver seeks an order sealing the confidential appendices pending the completion of the Project and the sale of all of the units. The confidential appendices contain the appraisals, the Second Glynn Report and a summary of budgetary information related to the Project.

[60] Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record. In addition to the jurisdiction under the *Courts of Justice Act*, the Court has the inherent jurisdiction to issue sealing orders: *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789, 100 O.R. (3d) 510, at para. 34.

[61] As noted by the Receiver, it is common to temporarily seal bids and other commercially sensitive material in an insolvency context when assets are to be sold under a court process.

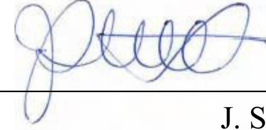
[62] The respondents oppose the requested sealing order taking the position that the Project's budget ought to be disclosed to the stakeholders so that they may assess the rationale for the increase to the borrowing limit. As was done with the Glynn Report, the Receiver is prepared to share the confidential appendices with stakeholders who sign a non-disclosure agreement. This is proportionate.

[63] The requested sealing order is limited in scope and in time. The proposed sealing order balances the open court principle and legitimate commercial requirements for confidentiality in the circumstances. In my view, the benefits of the requested sealing order outweigh the negative impact on the "open court" principle. If this information were released, it may impact the Receiver's ability to maximize value and maintain integrity of any future marketing and sale process. No stakeholder will be materially prejudiced by the time limited sealing order, which applies to only a limited amount of information.

[64] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, requirements, as modified in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 38.

[65] The Receiver is directed to provide the sealed confidential appendices to the Court clerk at the filing office in an envelope with a copy of this endorsement and the signed order (with the relevant provisions highlighted) so that the confidential appendices can be physically sealed.

[66] The Receiver's motion is granted. I have attached the signed order, which is effective immediately and without the necessity of issuing and entering.



J. Steele J.

Released: June 18, 2024.

CITATION: Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp. et al., 2024 ONSC 3507
COURT FILE NO.: CV-23-00710795-00CL
DATE: 2024-06-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

– and –

2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP, 1000162801 ONTARIO CORP., AMERCAN CORPORATION and 1000199992 ONTARIO CORP.

Respondents

REASONS FOR JUDGMENT

Steele, J.

Released: June 18, 2024

Counsel Holdings Canada Limited v. The Chanel Club Limited et al.

[Indexed as: Counsel Holdings Canada Ltd. v. Chanel Club Ltd.]

43 O.R. (3d) 319
[1999] O.J. No. 681
Docket No. C27207

Ontario Court of Appeal
Labrosse, Charron and Feldman JJ.A.
March 5, 1999

Mortgages -- Priorities -- Purchaser's lien -- Purchaser of condominium unit agreeing that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

Real property -- Agreements of purchase and sale -- Agreement obliging vendor to hold deposit in trust -- Vendor entitled to use deposit funds after deposit receipt delivered to purchaser under Ontario New Home Warranty Program -- Condominium Act, R.S.O. 1990, c. C.26 -- Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Real property -- Registration -- Priorities -- Purchaser's lien -- Actual notice -- Purchaser of condominium unit agreeing that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee

1999 CanLII 1653 (ON CA)

having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

NOTE: An appeal from the above-cited judgment of the Ontario Court (General Division) (Adams J.), reported at 33 O.R. (3d) 285, to the Court of Appeal for Ontario was dismissed on March 5, 1999. The court's endorsement was as follows:

BY THE COURT: -- This appeal involves a question of priority to the proceeds from the sale of property, The contest is between Counsel Holdings' first mortgage (registered) and ONHWP's subrogated rights of purchasers (unregistered) to recover their deposits paid under purchase agreements of condominium units of which Counsel Holdings had notice.

It is undisputed that Counsel Holdings has first priority under its mortgage except to the extent that it had actual notice of a prior interest. ONHWP relies on the purchase agreements to impute notice to Counsel Holdings. Paragraph 26 of the purchase agreements expressly subordinated the rights of purchasers to Counsel Holdings' mortgage. ONHWP argues, however, that Counsel Holdings cannot claim the benefit of the subordination clause because it is not a party to the purchase agreements.

In our view, the issue is not one of privity of contract but of notice. The trial judge correctly held that notice of an interest that is expressly stated to be subordinate to the mortgage is not actual notice of a "prior" interest and, therefore, cannot defeat Counsel Holdings' registered interest. Counsel relied on the case of Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4th) 289 (C.A.). However, that case is not of assistance to the appellant as it does not deal with the issue of notice.

Alternatively, ONHWP argues that, as a matter of construction, the subordination clause does not apply to the purchasers' equitable liens because the liens do not arise from

1999 CanLII 1653 (ON CA)

the contract but by operation of law. The trial judge was correct in rejecting this argument. The purchasers' claim to their deposits clearly arose under the purchase agreements and any rights flowing therefrom are subject to the terms of those agreements, including the subrogation clause.

The ground of appeal with respect to the deposits being subject to a trust claim, an argument that the trial judge held to be without merit, has been abandoned.

In the result, we agree with the trial judge's conclusions on the two issues raised on appeal. The appeal is dismissed with costs.

Harry C.G. Underwood, for appellant, Ontario New Home Warranty Program ("ONHWP").
Benjamin Zarnett and Graham D. Smith, for respondent.

1999 CanLII 1653 (ON CA)

Para. 12

Attorney General of Quebec, Commission de la construction du Québec and Commission de la santé et de la sécurité du travail *Appellants*

v.

Raymond Chabot inc., in its capacity as trustee in the bankruptcy of D.I.M.S. Construction inc. *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: D.I.M.S. Construction inc. (Trustee of) *v.* Quebec (Attorney General)

Neutral citation: 2005 SCC 52.

File No.: 29822.

2004: December 8; 2005: October 6.

Present: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy — Scheme of distribution — Right to compensation and right to retain — Provincial statutes requiring employer who retains services of contractor to pay amounts due from contractor to provincial bodies — Statutes entitling employer to be reimbursed by contractor or to retain amount paid out of sums employer owes contractor — Whether, in context of bankruptcy, provincial statutes incompatible with scheme of distribution established by federal bankruptcy legislation — Whether equitable set-off applicable in bankruptcy in Quebec — Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, s. 316 — Act respecting labour relations, vocational training and manpower management in the construction industry, R.S.Q., c. R-20, s. 54 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 97(3), 136 to 147.

Constitutional law — Division of powers — Bankruptcy — Scheme of distribution — Provincial statutes requiring employer who retains services of contractor to

Procureur général du Québec, Commission de la construction du Québec et Commission de la santé et de la sécurité du travail *Appelants*

c.

Raymond Chabot inc., ès qualités de syndic à la faillite de D.I.M.S. Construction inc. *Intimée*

et

Procureur général de l'Ontario *Intervenant*

Répertorié : D.I.M.S. Construction inc. (Syndic de) *c.* Québec (Procureur général)

Référence neutre : 2005 CSC 52.

N^{o} du greffe : 29822.

2004 : 8 décembre; 2005 : 6 octobre.

Présents : Les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite — Plan de répartition — Droit de compensation et de retenue — Lois provinciales obligeant l'employeur qui retient les services d'un entrepreneur à payer à des organismes provinciaux certains montants dûs par l'entrepreneur — Lois permettant à l'employeur d'être remboursé par l'entrepreneur ou de retenir le montant payé sur les sommes qu'il doit à l'entrepreneur — Dans le contexte d'une faillite, les lois provinciales sont-elles incompatibles avec le plan de répartition établi par la loi fédérale sur la faillite? — La compensation en equity est-elle applicable en matière de faillite au Québec? — Loi sur les accidents du travail et les maladies professionnelles, L.R.Q., ch. A-3.001, art. 316 — Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction, L.R.Q., ch. R-20, art. 54 — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 97(3), 136 à 147.

Droit constitutionnel — Partage des pouvoirs — Faillite — Plan de répartition — Lois provinciales obligeant l'employeur qui retient les services d'un

pay amounts due from contractor to provincial bodies — Statutes entitling employer to be reimbursed by contractor or to retain amount paid out of sums employer owes contractor — Whether provincial statutes inapplicable or inoperative by reason of being in conflict with scheme of distribution established by federal bankruptcy legislation — Constitution Act, 1867, s. 91(21) — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 97(3), 136 to 147 — Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, s. 316 — Act respecting labour relations, vocational training and manpower management in the construction industry, R.S.Q., c. R-20, s. 54.

The Commission de la santé et de la sécurité du travail ("CSST") established an assessment in respect of the activities of a contractor. The contractor did not pay the assessment and the CSST required three employers that had awarded contracts to the contractor to pay the assessment pursuant to s. 316 of the *Act respecting industrial accidents and occupational diseases* ("AIAOD"). The Commission de la construction du Québec ("CCQ") also demanded that the same employers pay unpaid wages owed by the contractor, pursuant to s. 54 of the *Act respecting labour relations, vocational training and manpower management in the construction industry* ("ALRCI"). One employer paid the CCQ before the contractor went bankrupt. After the bankruptcy, the trustee demanded that the three employers pay all amounts owing for work performed by the contractor. Two of the employers contested the claim, citing the demands for payment made by the CSST and the CCQ. The trustee applied to the Superior Court for a declaration that s. 316 AIAOD and s. 54 ALRCI do not apply in bankruptcy. The Superior Court dismissed the motion, but the Court of Appeal set aside that judgment.

Held: The appeal should be allowed. Section 316 AIAOD and s. 54 ALRCI do not alter the scheme of distribution under the *Bankruptcy and Insolvency Act* ("BIA").

In light of art. 1656(3) C.C.Q., a payment made in performance of the obligation imposed by the first paragraph of s. 316 AIAOD allows the employer to be substituted for the CSST in order to claim the amount of the assessment from the contractor. The right to retain referred to in the third paragraph of s. 316 adds nothing to the rights arising out of the subrogatory payment. That paragraph eliminates any doubt as to the employer's right to be reimbursed for the amount paid on the contractor's behalf and, where applicable, to effect compensation between the amount the employer owes the contractor and the amount the contractor owes the employer. [27] [30-31]

entrepreneur à payer à des organismes provinciaux certains montants dûs par l'entrepreneur — Lois permettant à l'employeur d'être remboursé par l'entrepreneur ou de retenir le montant payé sur les sommes qu'il doit à l'entrepreneur — Les lois provinciales sont-elles inapplicables ou inopérantes pour cause de conflit avec le plan de répartition établi par la loi fédérale sur la faillite? — Loi constitutionnelle de 1867, art. 91(21) — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 97(3), 136 à 147 — Loi sur les accidents du travail et les maladies professionnelles, L.R.Q., ch. A-3.001, art. 316 — Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction, L.R.Q., ch. R-20, art. 54.

La Commission de la santé et de la sécurité du travail (« CSST ») établit une cotisation en relation avec les activités d'un entrepreneur. Ce dernier ne paie pas et la CSST oblige trois employeurs qui ont accordé des contrats à l'entrepreneur à payer la cotisation en vertu de l'art. 316 de la *Loi sur les accidents du travail et les maladies professionnelles* (« LATMP »). La Commission de la construction du Québec (« CCQ ») demande également aux mêmes employeurs les salaires impayés par l'entrepreneur selon l'art. 54 de la *Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction* (« LRTIC »). Un employeur paie la CCQ avant la faillite de l'entrepreneur. Après la faillite, le syndic réclame aux trois employeurs les soldes dus pour les travaux exécutés par l'entrepreneur. Deux des employeurs contestent la réclamation et font état des demandes de paiement de la CSST et de la CCQ. Le syndic s'adresse à la Cour supérieure et lui demande de déclarer les art. 316 LATMP et 54 LRTIC inapplicables en matière de faillite. La Cour supérieure rejette la requête mais la Cour d'appel infirme ce jugement.

Arrêt : Le pourvoi est accueilli. Les articles 316 LATMP et 54 LRTIC ne modifient pas le plan de répartition établi par la *Loi sur la faillite et l'insolvabilité* (« LFI »).

Vu le par. 3° de l'art. 1656 C.c.Q., le paiement fait en exécution de l'obligation imposée par le premier alinéa de l'art. 316 LATMP permet à l'employeur d'être substitué à la CSST pour réclamer à l'entrepreneur le montant de la cotisation. Le droit de retenue énoncé au troisième alinéa de l'art. 316 n'ajoute rien aux droits qui résultent du paiement subrogatoire. Cet alinéa écarte tout doute sur le droit de l'employeur de se faire rembourser le montant payé pour l'entrepreneur et, s'il y a lieu, d'opérer compensation entre le montant qu'il doit à l'entrepreneur et celui que l'entrepreneur lui doit. [27] [30-31]

The compensation mechanism authorized by s. 316 AIAOD does not go beyond the framework of s. 97(3) BIA, which expressly recognizes certain cases of compensation. If the employer pays the CSST before the bankruptcy, and if the mutual debts of the employer and the contractor are certain, liquid and exigible, legal compensation is effected by operation of law and the debts are extinguished up to the amount of the lesser debt (arts. 1672 and 1673 C.C.Q.). Since the bankruptcy has not yet occurred when legal compensation is effected, the scheme of distribution under the BIA is not affected, because the claim against the employer is not part of the property vested in the trustee. If the employer's payment is made before the bankruptcy but the claim is not liquid at the time of the bankruptcy, the employer may, once the claim has been appraised, rely on s. 97(3) BIA, which dispenses with the trustee's status as a third party for the purposes of compensation and allows compensation to be set up as if the bankrupt were the plaintiff. The right to compensation thus has its basis in the BIA, not the civil law, which is more restrictive. If the payment is made after the bankruptcy, this subrogatory payment cannot give rise to compensation. Since s. 97(3) is an exception to the rule of equality between creditors, it must be interpreted narrowly. It must therefore be read in conjunction with ss. 121, 136(3) and 141 BIA as implicitly requiring that the mutual debts come into existence before the bankruptcy. The BIA does not depart from the rules established by arts. 1651 and 1681 C.C.Q., which provide that subrogation does not give the subrogated person any more rights than the subrogating creditor and that compensation may not be effected to the prejudice of third persons. The employer may nevertheless file a proof of claim to avail him or herself of subrogation to be reimbursed as an ordinary creditor for the amount paid to the CSST (s. 121 BIA). [43-45] [49] [54-57] [72]

Section 316 AIAOD does not subvert the scheme of distribution under the BIA. First, the right to be reimbursed is compatible with the BIA and, second, the right to retain can be exercised only in the circumstances provided for in the BIA, which is more open to compensation than Quebec civil law. Furthermore, from the perspective of *Husky Oil*, the s. 316 mechanism is compatible with the BIA. This is not a case involving a deemed payment or an employer acting as a mere agent. The claim accrues to the employer at the time of payment, and not by reason of the fact that the employer might be liable to pay should the contractor fail to do so. No right is granted to the CSST, as a third party, to the detriment of the body of creditors. Only an employer who has paid may exercise the right to retain, and the CSST is not affected by the employer's right to collect. Finally, because s. 97(3) BIA must be applied in

La compensation autorisée par l'art. 316 LATMP n'excède pas le cadre du par. 97(3) LFI, qui reconnaît expressément certains cas de compensation. Si le paiement de l'employeur à la CSST est fait avant la faillite et si les dettes réciproques entre l'employeur et l'entrepreneur sont certaines, liquides et exigibles, la compensation légale s'opère de plein droit et les dettes sont éteintes jusqu'à concurrence de la moindre des deux dettes (art. 1672 et 1673 C.c.Q.). Comme la faillite n'est pas encore survenue lors de l'opération de la compensation légale, le plan de répartition de la LFI n'est pas affecté parce que la créance contre l'employeur ne fait pas partie des biens dévolus au syndic. Si le paiement de l'employeur est fait avant la faillite, mais la créance n'est pas liquide au moment de la faillite, l'employeur pourra, une fois la créance évaluée, se prévaloir du par. 97(3) LFI qui met de côté, pour les besoins de la compensation, la qualité de tiers du syndic et permet d'opposer la compensation comme si le failli était le demandeur. Le droit de compensation découle alors de la LFI et non du droit civil, qui s'avère plus restrictif. Si le paiement est fait après la faillite, ce paiement subrogatoire ne peut donner lieu à la compensation. Comme le par. 97(3) LFI fait exception à la règle de l'égalité des créanciers, il doit recevoir une interprétation restrictive. Il doit donc être interprété en conjonction avec les art. 121, 136(3) et 141 LFI et requiert implicitement que les créances mutuelles doivent avoir pris naissance avant la faillite. La LFI n'écarte pas les règles des art. 1651 et 1681 C.c.Q. qui énoncent que la subrogation ne confère pas au subrogé plus de droits que n'en avait le subrogeant et que la compensation ne peut opérer au préjudice des tiers. L'employeur peut toutefois, en présentant une preuve de réclamation, se prévaloir de la subrogation pour se faire rembourser, à titre de créancier ordinaire, le montant qu'il a payé à la CSST (art. 121 LFI). [43-45] [49] [54-57] [72]

L'article 316 LATMP ne viole pas le plan de répartition de la LFI. D'une part, le droit de remboursement est compatible avec la LFI et, d'autre part, le droit de retenue ne peut être invoqué que dans les circonstances prévues à la LFI, qui est plus favorable à la compensation que le droit civil québécois. De plus, vu sous le prisme de l'arrêt *Husky Oil*, le mécanisme de l'art. 316 est compatible avec la LFI. Il ne s'agit pas d'un paiement présumé ou d'un cas où l'employeur agit comme simple agent percepteur. Le droit de créance échoit à l'employeur au moment du paiement et non en raison du fait qu'il serait éventuellement tenu au paiement si l'entrepreneur faisait défaut. Aucun droit n'est accordé à la CSST, comme tierce partie, au détriment de la masse des créanciers. Seul l'employeur qui a payé peut invoquer son droit de retenue et la CSST n'est pas affectée par ce droit de recouvrement de l'employeur. Finalement,

Quebec on the basis of civil law and not common law rules, equitable set-off is inapplicable in bankruptcy in Quebec. [58] [62-64]

Nor does s. 54 ALRCI subvert the scheme of distribution under the BIA. In the case of s. 54, the wages due from a contractor constitute a solidary obligation between the contractor and the employer. The employer who pays the wages may demand to be reimbursed by the contractor pursuant to art. 1536 C.C.Q. or may rely on legal subrogation pursuant to art. 1656(3) C.C.Q. The principles stated in relation to s. 316 AIAOD also apply to s. 54. [66-73]

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Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, ss. 306, 315, 316.

puisqu'il faut appliquer le par. 97(3) LFI au Québec en ayant recours aux règles du droit civil et non à celles de la common law, la compensation en equity est inapplicable en matière de faillite au Québec. [58] [62-64]

L'article 54 LRTIC ne viole pas non plus le plan de répartition de la LFI. Dans le cas de l'art. 54, le salaire dû par un entrepreneur est une obligation solidaire entre l'entrepreneur et l'employeur. L'employeur qui paie les salaires peut en réclamer le remboursement à l'entrepreneur suivant l'art. 1536 C.c.Q. ou se réclamer de la subrogation légale aux termes du par. 3° de l'art. 1656 C.c.Q. Les principes énoncés relativement à l'art. 316 LATMP sont également applicables à l'art. 54. [66-73]

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APPEAL from a judgment of the Quebec Court of Appeal (Robert, Nuss and Lemelin JJ.A.), [2003] R.J.Q. 1104, 227 D.L.R. (4th) 629, 30 C.L.R. (3d) 81, [2003] Q.J. No. 3660 (QL), affirming a decision of Trudeau J., [2000] R.J.Q. 3056, 2000 CarswellQue 2924. Appeal allowed.

Hugo Jean, for the appellant the Attorney General of Quebec.

Martine Sauvé, for the appellant Commission de la construction du Québec.

René Napert, for the appellant Commission de la santé et de la sécurité du travail.

Bernard Boucher et *Sébastien Guy*, for the respondent.

Robin K. Basu and *Sarah Wright*, for the intervener.

English version of the judgment of the Court delivered by

DESCHAMPS J. —

1. Introduction

The issue raised in the case at bar is whether the rights provided for in s. 316 of the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 ("AIAOD"), and s. 54 of the *Act respecting labour relations, vocational training and manpower management in the construction industry*, R.S.Q., c. R-20 ("ALRCI"), subvert the scheme of distribution provided for in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

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Wood, Roderick J. « Turning Lead into Gold : The Uncertain Alchemy of "All Obligations" Clauses » (2003), 41 *Alta. L. Rev.* 801.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Robert, Nuss et Lemelin), [2003] R.J.Q. 1104, 227 D.L.R. (4th) 629, 30 C.L.R. (3d) 81, [2003] J.Q. no 3660 (QL), qui a infirmé un jugement du juge Trudeau, [2000] R.J.Q. 3056, 2000 CarswellQue 2924. Pourvoi accueilli.

Hugo Jean, pour l'appelant le procureur général du Québec.

Martine Sauvé, pour l'appelante la Commission de la construction du Québec.

René Napert, pour l'appelante la Commission de la santé et de la sécurité du travail.

Bernard Boucher et *Sébastien Guy*, pour l'intimée.

Robin K. Basu et *Sarah Wright*, pour l'intervenant.

Le jugement de la Cour a été rendu par

LA JUGE DESCHAMPS —

1. Introduction

1 La question, en l'espèce, est de savoir si les droits prévus aux art. 316 de la *Loi sur les accidents du travail et les maladies professionnelles*, L.R.Q., ch. A-3.001 (« LATMP »), et 54 de la *Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction*, L.R.Q., ch. R-20 (« LRTIC »), portent atteinte au plan de répartition prévu à la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« LFI »).

2 Under s. 316 AIAOD, the Commission de la santé et de la sécurité du travail ("CSST") may, where a contractor's services are retained by an employer to whom the AIAOD applies, require the employer to pay an assessment due from the contractor. The same section provides that once the employer has paid the assessment, the employer is entitled to be reimbursed by the contractor and may retain the amount paid to the CSST out of any sums he or she owes the contractor. Section 54 ALRCI establishes a mechanism that, although based on solidarity, has the same effect; it permits the Commission de la construction du Québec ("CCQ") to bring claims against employers for unpaid wages owed by contractors with whom they have contracted.

L'article 316 LATMP permet à la Commission de la santé et de la sécurité du travail (« CSST ») d'obliger un employeur qui est assujetti à la loi et qui retient les services d'un entrepreneur à payer la cotisation due par cet entrepreneur. Selon ce même article, lorsque l'employeur a payé la cotisation, il a droit d'être remboursé par l'entrepreneur et peut retenir sur les sommes qu'il doit à cet entrepreneur le montant payé à la CSST. L'article 54 LRTIC établit un mécanisme ayant le même effet, mais fondé sur la solidarité, et permet à la Commission de la construction du Québec (« CCQ ») de réclamer à un employeur les salaires impayés par un entrepreneur avec qui il a contracté.

3 On November 4, 1998, the CSST established an assessment in respect of the activities of D.I.M.S. Construction inc. ("DIMS"), a contractor. DIMS did not pay the assessment. The CSST then demanded that three employers that had awarded contracts to DIMS pay the assessment in the proportion provided for in s. 316 AIAOD. It claimed amounts from the Ministère des Transports du Québec ("MTQ") on November 26, 1998, Pavage Chenail inc. ("Chenail") on November 30, 1998, and Compagnie de pavage d'asphalte Beaver ("Beaver"), a division of Groupe Devesco ltée, on February 10, 1999. According to the evidence in the record, none of the employers had paid the CSST when DIMS went bankrupt on April 1, 1999, after its creditors refused a proposal.

Le 4 novembre 1998, la CSST établit une cotisation en relation avec les activités de l'entrepreneur D.I.M.S. Construction inc. (« DIMS »). DIMS ne paie pas. La CSST réclame à trois employeurs qui ont accordé des contrats à cette firme le paiement de la cotisation dans la proportion établie par l'art. 316 LATMP. La réclamation est faite le 26 novembre 1998 au ministère des Transports du Québec (« MTQ »), le 30 novembre 1998 à Pavage Chenail inc. (« Chenail ») et le 10 février 1999 au Groupe Devesco ltée, division Compagnie de pavage d'asphalte Beaver (« Beaver »). Selon les pièces versées au dossier, aucun des employeurs n'aurait payé la CSST avant la faillite de DIMS qui survient le premier avril 1999 à la suite du rejet d'une proposition.

4 The CCQ demanded that the same employers pay unpaid wages owed by DIMS in respect of contracts performed for those employers. The exact dates these demands were made do not appear in the record, except in the case of Beaver, to which one was sent on February 12, 1999. According to one document in the record, Chenail paid the CCQ before DIMS went bankrupt.

La CCQ réclame aux mêmes employeurs les salaires impayés par DIMS à la suite de contrats exécutés pour ces employeurs. La date des réclamations faites par la CCQ n'est précisée au dossier que pour Beaver, soit le 12 février 1999. Selon un document produit au dossier, Chenail aurait payé la CCQ avant la faillite.

5 On April 23 and 29, 1999, Raymond Chabot inc., the trustee in the bankruptcy of DIMS, demanded that the three employers pay all amounts owing for work performed by DIMS. Chenail paid the trustee subject to a special indemnification agreement. The MTQ and Beaver contested the trustee's claim,

Les 23 et 29 avril 1999, Raymond Chabot inc., syndic à la faillite de DIMS, réclame aux trois employeurs les soldes dus pour les travaux exécutés par DIMS. Chenail paie le syndic sous réserve d'une convention d'indemnisation particulière. Le MTQ et Beaver contestent la réclamation du

citing the demands for payment made by the CSST and the CCQ. The trustee applied to the Superior Court for a declaration that s. 316 AIAOD and s. 54 ALRCI do not apply in bankruptcy. The trustee relied on *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which it was held that the withholding mechanism available to employers under Saskatchewan's *Workers' Compensation Act, 1979* had the effect of creating a priority that subverted the scheme of distribution under the BIA.

syndic. Ils font état des demandes de paiement de la CSST et de la CCQ. Le syndic s'adresse à la Cour supérieure et lui demande de déclarer les art. 316 LATMP et 54 LRTIC inapplicables en matière de faillite. Il invoque l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, qui a déclaré, au sujet de la *Workers' Compensation Act, 1979* de la Saskatchewan, que le mécanisme de retenue en faveur de l'employeur avait pour effet de créer une priorité qui contrevenait au plan de répartition établi par la LFI.

6

The Superior Court dismissed the trustee's case on the ground that Quebec's scheme differed from Saskatchewan's scheme: [2000] R.J.Q. 3056. The Court of Appeal came to the opposite conclusion, finding that s. 316 AIAOD and s. 54 ALRCI violated the principles stated in *Husky Oil*: [2003] R.J.Q. 1104. The Attorney General of Quebec, the CSST and the CCQ appealed, contending that the provision authorizing the CSST and the CCQ to demand that employers pay contractors' unpaid assessments was valid. They raised no arguments concerning the right of employers to be reimbursed or to set up compensation. Even though the employers are not parties to the case, both the right of the CSST and the CCQ to collect and the right to reimbursement are in issue here, because the trustee impugns s. 316 AIAOD and s. 54 ALRCI in their entirety. However, no specific arguments based on the contracts between the employers and the contractor are in issue, nor are the rights of any third parties, such as financial institutions or surety companies, that have rights in the amounts owed by the bankrupt under its contracts.

La Cour supérieure déboute le syndic pour le motif que le régime québécois diffère de celui de la Saskatchewan : [2000] R.J.Q. 3056. La Cour d'appel conclut au contraire que les art. 316 LATMP et 54 LRTIC violent les principes exposés dans l'arrêt *Husky Oil* : [2003] R.J.Q. 1104. Le procureur général du Québec, la CSST et la CCQ se pourvoient. Ils défendent la validité de la disposition autorisant la CSST et la CCQ à réclamer à un employeur les cotisations impayées par un entrepreneur. Ils ne soulèvent aucun argument concernant le droit des employeurs de se faire rembourser ou d'opposer compensation. Même si les employeurs ne sont pas parties au dossier, tant le droit de perception de la CSST et de la CCQ que le droit au remboursement sont mis en cause parce que le syndic attaque les art. 316 LATMP et 54 LRTIC dans leur ensemble. Par ailleurs, les arguments spécifiques qui trouveraient leur source dans les contrats liant les employeurs à l'entrepreneur ne font pas l'objet du débat, non plus que les droits de tiers comme les institutions financières ou les compagnies de cautionnement qui pourraient détenir des droits sur les soldes contractuels du failli.

7

The constitutional questions stated by this Court reflect the questions submitted to the Superior Court and the Court of Appeal:

1. Is s. 54 of *An Act respecting labour relations, vocational training and manpower management in the construction industry*, R.S.Q., c. R-20, inapplicable or inoperable in whole or in part, by reason of being in conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and in particular s. 136 thereof?

Les questions constitutionnelles formulées par la Cour reflètent celles soumises à la Cour supérieure et à la Cour d'appel :

1. L'article 54 de la *Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction*, L.R.Q., ch. R-20, est-il, en totalité ou en partie, inapplicable ou inopérant pour cause de conflit avec la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3, et, en particulier avec l'art. 136 de cette loi?

2. Is s. 316 of *An Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001, inapplicable or inoperable in whole or in part, by reason of being in conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and in particular s. 136 thereof?

8 The appellants contest the Court of Appeal's decision, arguing that Quebec's scheme can be distinguished from Saskatchewan's scheme. They submit that the first and third paragraphs of s. 316 AIAOD set up two successive, distinct and independent steps: one establishing an obligation to pay, and the other setting out the rights of an employer who pays a contractor's assessment. The appellants point out that it was the right to withhold payment in respect of a deemed debt that led the Court to conclude in *Husky Oil* that the debt was indivisible, and that no such right exists in Quebec law. They contend that neither the first paragraph of s. 316 AIAOD nor the civil law mechanisms upon which s. 54 ALRCI is based subvert the scheme of distribution under the BIA.

9 The trustee argues that the mechanisms set out in the Quebec provisions are essentially identical to the one provided for in Saskatchewan's legislation. The trustee adds that it would not be enough to declare that the third paragraph of s. 316 AIAOD is inapplicable, since the rules of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), give the first paragraph of this section the same effect as the third and make it inapplicable in bankruptcy. To show that such a declaration would be insufficient, the trustee also submits that equitable set-off would enable an employer who has paid the CSST or the CCQ to refuse to pay the trustee.

10 For the reasons that follow, I am of the view that s. 316 AIAOD and s. 54 ALRCI do not subvert the scheme of distribution established by s. 136 BIA. I would allow the appeal and restore the judgment of the Superior Court.

2. Analysis

11 Section 91(21) of the *Constitution Act, 1867*, gives Parliament jurisdiction over bankruptcy and

2. L'article 316 de la *Loi sur les accidents du travail et les maladies professionnelles*, L.R.Q., ch. A-3.001, est-il, en totalité ou en partie, inapplicable ou inopérant pour cause de conflit avec la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3, et, en particulier avec l'art. 136 de cette loi?

Les appelants attaquent le jugement de la Cour d'appel et plaident que le régime québécois se distingue de celui de la Saskatchewan. Selon eux, les premier et troisième alinéas de l'art. 316 LATMP mettent en place deux étapes successives, distinctes et indépendantes, l'une établissant une obligation de payer, l'autre précisant les droits de l'employeur qui a payé la cotisation de l'entrepreneur. Les appelants signalent que c'est le droit de retenue à l'égard d'une dette réputée qui a entraîné la conclusion d'indivisibilité dans *Husky Oil*, caractéristique qui ne se retrouve pas dans la loi québécoise. Selon eux, ni le premier alinéa de l'art. 316 LATMP, ni les mécanismes du droit civil sur lesquels est fondé l'art. 54 LRTIC ne violent le plan de répartition de la LFI.

Pour sa part, le syndic plaide que les mécanismes des dispositions québécoises sont, pour l'essentiel, identiques à celui de la loi de la Saskatchewan. Il fait valoir, de plus, qu'une déclaration d'inapplicabilité du troisième alinéa de l'art. 316 LATMP n'est pas suffisante parce que les règles du *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »), donnent au premier alinéa de cet article le même effet que le troisième alinéa et le rendent inapplicable en matière de faillite. Pour démontrer qu'une déclaration d'inapplicabilité du troisième alinéa serait insuffisante, il soutient aussi que le mécanisme de la compensation en equity autoriserait l'employeur qui aurait payé la CSST ou la CCQ à refuser de payer le syndic.

Pour les motifs qui suivent, je suis d'avis que les art. 316 LATMP et 54 LRTIC ne violent pas le plan de répartition établi par l'art. 136 LFI. J'accueillerais l'appel et rétablirais le jugement de la Cour supérieure.

2. Analyse

Le paragraphe 91(21) de la *Loi constitutionnelle de 1867* accorde au Parlement compétence en

insolvency. Parliament has exercised this jurisdiction to establish a scheme for distributing the property of bankrupts (ss. 136 to 147 BIA).

matière de faillite et d'insolvabilité. Conformément à cette compétence, le Parlement prescrit un plan de répartition des biens en cas de faillite (art. 136 à 147 LFI).

12

This Court has on many occasions ruled on conflicts between the BIA's order of priority and the orders resulting from various provincial statutes: see, *inter alia*, *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; and *Husky Oil*. Those decisions established that statutory provisions enacted by the provinces, although valid in the context of provincial law, are inapplicable in bankruptcy if they conflict with the BIA. It is well established that the BIA will prevail regardless of a province's intention. Given these principles, it is necessary to determine the effect of s. 316 AIAOD and s. 54 ALRCI. Since there are differences between the two mechanisms, I will consider them separately.

Notre Cour s'est prononcée à maintes reprises sur des cas de conflits entre l'ordre prescrit par la LFI et celui prévu par diverses lois provinciales : voir notamment *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, et *Husky Oil*. De ces arrêts, il ressort que les provinces peuvent adopter des dispositions législatives qui, quoique valides dans le contexte du droit provincial, sont inapplicables en matière de faillite si elles entrent en conflit avec la LFI. Il est établi que la LFI prévaut, peu importe l'intention des provinces. Compte tenu de ces règles, il importe de cerner l'effet des art. 316 LATMP et 54 LRTIC. Comme les deux mécanismes diffèrent, je les examinerai séparément.

13

I will begin by analysing the mechanism of s. 316 AIAOD, which is based on legal subrogation and compensation. The first step will be to review these concepts. Next, I will discuss the interaction between the right to retain under s. 316 AIAOD and the scheme of distribution under the BIA, and will distinguish the instant case from *Husky Oil*. I will also consider the application of equitable set-off in the case at bar. Lastly, I will discuss the mechanism of s. 54 ALRCI, which incorporates solidarity.

J'analyserai d'abord le mécanisme de l'art. 316 LATMP qui est fondé sur la subrogation légale et la compensation. Ces notions seront étudiées en tout premier lieu. Ensuite j'examinerai l'interaction entre le droit de retenue de l'art. 316 LATMP et le plan de répartition de la LFI et je distinguerai le présent cas de *Husky Oil*. Je considérerai aussi l'application de la compensation en equity en l'espèce. Finalement, je me pencherai sur le mécanisme de l'art. 54 LRTIC qui incorpore la solidarité.

2.1 *The Mechanism of Section 316 AIAOD*

2.1 *Le mécanisme de l'art. 316 LATMP*

14

Only the first and third paragraphs of s. 316 AIAOD are relevant to the proceeding before the Court. The second paragraph merely sets out the method for calculating the amount owed by the employer. The section reads as follows:

Seuls les premier et troisième alinéas de l'art. 316 LATMP sont pertinents au débat qui nous occupe. Le deuxième alinéa ne fait qu'établir le mode de calcul du montant dû par l'employeur. L'article se lit :

316. The Commission may demand payment of the assessment due by a contractor from the employer who retains his services.

316. La Commission peut exiger de l'employeur qui retient les services d'un entrepreneur le paiement de la cotisation due par cet entrepreneur.

In the case of the first paragraph, the Commission may establish the amount of the assessment according to the proportion of the price agreed upon for the work corresponding to the cost of labour, rather than the wages indicated in the statement made according to section 292.

The employer who has paid the amount of the assessment is entitled to be reimbursed by the contractor concerned and the employer may retain the amount due out of the sums that he owes the contractor.

15 The first paragraph of s. 316 AIAOD gives the CSST a recourse against an employer for an assessment due from a contractor whose services the employer has retained. The condition that must be met for the CSST to exercise this right is that the assessment be due from the contractor. For an assessment to be due, the CSST must establish the assessment (s. 306 AIAOD) and send the notice (s. 315 AIAOD). Under the AIAOD, the employer is the warrantor of the assessment due from the contractor to the CSST.

16 The parties disagree as to the real scope of the first paragraph. The trustee submits that the third paragraph adds nothing to the rights arising out of the employer's payment of the contractor's debt in accordance with the first paragraph of s. 316 AIAOD. The appellants contend that the two paragraphs have different functions: the first deals with the right to collect and could survive even if the third paragraph, which grants a right to be reimbursed and to retain, were to be found inapplicable. Does this last right arise automatically out of the payment of the assessment, as the trustee claims? To answer this question, it will be necessary to review the scope of the first paragraph of s. 316 AIAOD. After doing this, I will consider whether the right to retain subverts the scheme of distribution under the BIA and will conclude by explaining the differences between the provisions at issue in *Husky Oil* and s. 316 AIAOD, and the reasons why equitable set-off does not apply in Quebec.

2.1.1 Scope of the First Paragraph of Section 316 AIAOD

17 While the purpose of the first paragraph of s. 316 AIAOD is to give the CSST a recourse

Dans ce cas, la Commission peut établir le montant de cette cotisation d'après la proportion du prix convenu pour les travaux qui correspond au coût de la main-d'œuvre, plutôt que d'après les salaires indiqués dans la déclaration faite suivant l'article 292.

L'employeur qui a payé le montant de cette cotisation a droit d'être remboursé par l'entrepreneur concerné et il peut retenir le montant dû sur les sommes qu'il lui doit.

Le premier alinéa de l'art. 316 LATMP accorde à la CSST un recours contre un employeur pour la cotisation due par un entrepreneur dont il retient les services. La condition d'exercice du droit de la CSST est que la cotisation soit due par l'entrepreneur. Pour que la cotisation soit due, il faut qu'elle ait été établie par la CSST (art. 306 LATMP) et que l'avis ait été transmis par la CSST (art. 315 LATMP). La LATMP rend l'employeur garant de la cotisation due par l'entrepreneur à la CSST.

Les parties divergent d'opinion quant à la portée réelle du premier alinéa. Le syndic soutient que le troisième alinéa n'ajoute rien aux droits qui découlent du paiement par l'employeur de la dette de l'entrepreneur aux termes du premier alinéa de l'art. 316 LATMP. Les appelants, quant à eux, soutiennent que les deux alinéas ont des fonctions différentes : le premier traite du droit de perception et peut subsister indépendamment d'une déclaration d'inapplicabilité du troisième qui, pour sa part, confère le droit de remboursement et de retenue. Ce dernier droit découle-t-il automatiquement du paiement comme le prétend le syndic? Pour répondre à cette question, il faut étudier la portée du premier alinéa de l'art. 316 LATMP. J'examinerai par la suite si le droit de retenue viole le plan de répartition de la LFI pour enfin expliquer en quoi les dispositions étudiées dans *Husky Oil* diffèrent de l'art. 316 LATMP et pourquoi la compensation en equity ne s'applique pas au Québec.

2.1.1 Portée du premier alinéa de l'art. 316 LATMP

Si l'objet du premier alinéa de l'art. 316 LATMP est de conférer à la CSST un recours contre

against employers, the consequences of exercising this recourse cannot be disregarded. The employer's payment has consequences not only for the CSST, but also for the employer and the contractor. As a result of art. 1671 C.C.Q., paying the assessment has the effect of extinguishing the contractor's obligation to the CSST. Subrogation to the rights of the paid creditor is incidental to the payment and accordingly extinguishes the subrogating creditor's rights as regards the debtor. Under the general rules of civil law, those rights are then transferred to the person who made the payment. Article 1651 C.C.Q. reads as follows:

1651. A person who pays in the place of a debtor may be subrogated to the rights of the creditor.

He does not have more rights than the subrogating creditor.

18 The first paragraph of s. 316 AIAOD appears to make the application of subrogation possible, since the employer is obliged to pay when the assessment is due from the contractor. In this context, the employer is required to pay in the place of the original debtor and should be able to be subrogated to the rights of the creditor.

19 The C.C.Q. provides for two types of subrogation: conventional subrogation and legal subrogation (art. 1652 C.C.Q.). The case at bar does not involve conventional subrogation. The only possibility is legal subrogation. Article 1656 C.C.Q. provides that subrogation takes place by operation of law in the following five situations:

1656. Subrogation takes place by operation of law

(1) in favour of a creditor who pays another creditor whose claim is preferred to his because of a prior claim or a hypothec;

(2) in favour of the acquirer of a property who pays a creditor whose claim is secured by a hypothec on the property;

(3) in favour of a person who pays a debt to which he is bound with others or for others and which he has an interest in paying;

l'employeur, les conséquences découlant de l'exercice du recours ne peuvent pas être ignorées. Le paiement fait par l'employeur emporte des conséquences non seulement pour la CSST, mais aussi pour l'employeur et l'entrepreneur. En effet, le paiement, selon l'art. 1671 C.c.Q., a pour effet d'éteindre l'obligation de l'entrepreneur à l'égard de la CSST. La subrogation aux droits du créancier payé est un accessoire du paiement et éteint donc les droits du subrogeant à l'égard du débiteur. En vertu des règles générales du droit civil, ces droits sont désormais transférés à celui qui a fait le paiement. Ainsi, l'art. 1651 C.c.Q. prévoit :

1651. La personne qui paie à la place du débiteur peut être subrogée dans les droits du créancier.

Elle n'a pas plus de droits que le subrogeant.

Le premier alinéa de l'art. 316 LATMP semble permettre une application de la subrogation puisque l'employeur est obligé au paiement lorsque la cotisation est due par l'entrepreneur. Dans ce contexte, l'employeur est appelé à payer à la place du débiteur originel et devrait pouvoir être subrogé dans les droits du créancier.

Le C.c.Q. prévoit deux sources de subrogation : la subrogation conventionnelle et la subrogation légale (art. 1652 C.c.Q.). En l'espèce, il n'est pas question de subrogation conventionnelle. Il ne peut s'agir que de subrogation légale. L'article 1656 C.c.Q. prévoit que la subrogation s'opère par le seul effet de la loi dans les cinq circonstances suivantes :

1656. La subrogation s'opère par le seul effet de la loi :

1º Au profit d'un créancier qui paie un autre créancier qui lui est préférable en raison d'une créance prioritaire ou d'une hypothèque;

2º Au profit de l'acquéreur d'un bien qui paie un créancier dont la créance est garantie par une hypothèque sur ce bien;

3º Au profit de celui qui paie une dette à laquelle il est tenu avec d'autres ou pour d'autres et qu'il a intérêt à acquitter;

(4) in favour of an heir who pays with his own funds a debt of the succession for which he was not bound;

(5) in any other case provided by law.

20 The legislature has explicitly spelled out the right to subrogation in a number of statutes, sometimes departing from the conditions set out in the Civil Code, sometimes not: see, *inter alia*, the *Act to promote good citizenship*, R.S.Q., c. C-20, s. 11; the *Health Insurance Act*, R.S.Q., c. A-29, s. 18(1); the *Act respecting financial assistance for education expenses*, R.S.Q., c. A-13.3, s. 29; the *Building Act*, R.S.Q., c. B-1.1, s. 79.2. Because the express right to subrogation is not dealt with consistently, I conclude that the failure to mention subrogation explicitly in the first paragraph of s. 316 AIAOD does not mean that legal subrogation is unavailable under it. Of the five cases mentioned in art. 1656 C.C.Q., the third might apply.

21 While acknowledging the general scope of para. (3) of art. 1656 C.C.Q., Quebec commentators link this paragraph in particular to solidary or *in solidum* debts and to debts secured by suretyship: J.-L. Baudouin and P.-G. Jobin, *Les obligations* (5th ed. 1998), Nos. 916 to 918; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), at p. 603, No. 336. In the case at bar, solidarity is not mentioned in s. 316 AIAOD and cannot be presumed (art. 1525 C.C.Q.). Nor can the employer's obligation be characterized as being *in solidum* with the contractor, since the instant case does not involve two concurrent debts having the same object: *Prévost-Masson v. General Trust of Canada*, [2001] 3 S.C.R. 882, 2001 SCC 87, at para. 27. The contractor must first be obliged to pay. It might be thought that this is a legal suretyship under art. 2334 C.C.Q., but the suretyship referred to in that article is one that a debtor must furnish when obliged to do so by the legislature: *Traité de droit civil du Québec*, vol. 13, by H. Roch and R. Paré, 1952, at p. 594; *Droit civil québécois* (loose-leaf), vol. 6, by D.-C. Lamontagne et al., § 2334 500, at p. 1256 602; J. Deslauriers, *Précis de droit des sûretés* (1990), at p. 23; P. Ciotola, *Droit des sûretés* (3rd ed. 1999), at p. 21. In the case of s. 316 AIAOD, the obligation is imposed directly

4º Au profit de l'héritier qui paie de ses propres deniers une dette de la succession à laquelle il n'était pas tenu;

5º Dans les autres cas établis par la loi.

Le législateur énonce expressément le droit à la subrogation dans nombre de lois, dérogeant ou se tenant parfois aux conditions prévues par le Code civil : voir, notamment, la *Loi visant à favoriser le civisme*, L.R.Q., ch. C-20, art. 11; la *Loi sur l'assurance maladie*, L.R.Q., ch. A-29, art. 18(1); la *Loi sur l'aide financière aux études*, L.R.Q., ch. A-13.3, art. 29; la *Loi sur le bâtiment*, L.R.Q., ch. B-1.1, art. 79.2. Parce que le recours exprès à la subrogation n'est pas traité de façon uniforme, je conclus que, même si elle n'est pas explicitement mentionnée au premier alinéa de l'art. 316 LATMP, il ne s'ensuit pas que la subrogation légale en soit exclue. Des cinq cas mentionnés à l'art. 1656 C.c.Q., le troisième peut potentiellement trouver application.

Tout en reconnaissant la portée générale du par. 3º de l'art. 1656 C.c.Q., les auteurs québécois le relient surtout aux dettes solidaires ou *in solidum* et aux dettes cautionnées : J.-L. Baudouin et P.-G. Jobin, *Les obligations* (5e éd. 1998), nos 916 à 918; J. Pineau, D. Burman et S. Gaudet, *Théorie des obligations* (4e éd. 2001), p. 603, nº 336. En l'espèce, la solidarité n'est pas énoncée à l'art. 316 LATMP et elle ne peut être présumée (art. 1525 C.c.Q.). L'obligation de l'employeur ne pourrait non plus être caractérisée comme *in solidum* avec l'entrepreneur, car on ne retrouve pas ici de coexistence de deux dettes portant sur un même objet : *Prévost-Masson c. Trust Général du Canada*, [2001] 3 R.C.S. 882, 2001 CSC 87, par. 27. En effet, l'entrepreneur doit d'abord être tenu de payer. On pourrait, par ailleurs, croire qu'il s'agit du cautionnement légal prévu par l'art. 2334 C.c.Q., mais le cautionnement dont il est question à cet article est celui que doit fournir un débiteur lorsque le législateur le lui impose : *Traité de droit civil du Québec*, t. 13, par H. Roch et R. Paré, 1952, p. 594; *Droit civil québécois* (feuilles mobiles), vol. 6, par D.-C. Lamontagne et autres, § 2334 500, p. 1256 602; J. Deslauriers, *Précis de droit des sûretés* (1990), p. 23; P. Ciotola, *Droit des sûretés* (3e éd. 1999), p. 21. Dans le cas de l'art. 316 LATMP, l'obligation est

on the warrantor, not on the debtor. This cannot be a true case of suretyship, since a warrantor under the AIAOD has no choice in taking on the obligation, whereas consent is an essential aspect of suretyship, which is by definition a contract (art. 2333 C.C.Q.). The Superior Court judge's statement of the law to the effect that s. 316 AIAOD establishes a legal suretyship is therefore wrong.

imposée au garant lui-même et non au débiteur. Il ne peut s'agir d'un véritable cas de cautionnement puisque le garant de la LATMP n'a pas le choix de s'obliger alors que le consentement est essentiel au cautionnement qui est, par définition, un contrat (art. 2333 C.c.Q.). L'énoncé de droit du juge de la Cour supérieure suivant lequel l'art. 316 LATMP établit une caution légale est donc incorrect.

22

To conclude that the employer's payment to the CSST confers the benefit of legal subrogation, it would be necessary to rely on the generality of the words "bound . . . for others" used in para. (3) of art. 1656 C.C.Q. In *Salama v. Placements Triar inc.*, [2002] Q.J. No. 3372 (QL), the Quebec Court of Appeal, citing a passage from the work of Baudouin and Jobin, raised the possibility of giving para. (3) of art. 1656 C.C.Q. a broad scope (see also M. Tancelin, *Des obligations: actes et responsabilités* (6th ed. 1997), No. 1235). The historical evolution of this provision persuades me that such an interpretation is justified.

Pour conclure que le paiement de l'employeur à la CSST confère le bénéfice de la subrogation légale, il faut se fonder sur la généralité des termes « tenu[s] [. . .] pour d'autres » utilisés au par. 3° de l'art. 1656 C.c.Q. Se reportant à un extrait de l'ouvrage de Baudouin et Jobin, la Cour d'appel du Québec, dans *Salama c. Placements Triar inc.*, [2002] J.Q. n° 3372 (QL), a évoqué la possibilité de donner une portée large au par. 3° de l'art. 1656 C.c.Q. (voir aussi M. Tancelin, *Des obligations : actes et responsabilités* (6e éd. 1997), n° 1235). L'évolution historique de cette disposition me convainc qu'une telle interprétation est justifiée.

23

The wording of para. (3) of art. 1656 C.C.Q. is derived from art. 1156 of the *Civil Code of Lower Canada*, which was itself based on art. 1251 of the *Code Napoléon*. The *Code Napoléon* restated a principle of old French law to the effect that marine underwriters were subrogated to the rights of the insured: J. Mestre, *La subrogation personnelle* (1979), at p. 277, No. 240. It was only after a century of equivocation that French courts finally conceded that subrogation could operate in cases in which the person making the payment was bound to make payment owing to a distinct source of obligation. It was in the context of the law of damage insurance that the French case law evolved. At first, in an 1829 decision, the Cour de cassation refused to recognize an insurer's right to legal subrogation: Civ., March 2, 1829, D.1829.I.163 (*Assurances v. Lanquetin*).

Le texte du par. 3° de l'art. 1656 C.c.Q. trouve son origine dans l'art. 1156 du *Code civil du Bas Canada* qui lui-même était inspiré de l'art. 1251 du *Code Napoléon*. Or, ce dernier code reprend une règle de l'Ancien Droit français qui admettait que l'assureur maritime était subrogé aux droits de l'assuré : J. Mestre, *La subrogation personnelle* (1979), p. 277, n° 240. En fait, c'est après un siècle de tergiversations que les tribunaux français admirent finalement que la subrogation pouvait jouer dans des cas où la personne qui payait était tenue au paiement en raison d'une source obligationnelle distincte. L'évolution de la jurisprudence française s'est faite dans le contexte du droit de l'assurance de dommages. La Cour de cassation avait d'abord refusé à l'assureur le droit à la subrogation légale par un arrêt de 1829 : Civ., 2 mars 1829, D.1829. I.163 (*Assurances c. Lanquetin*).

24

Despite ruling out legal subrogation, the French courts did, however, allow insurers of damage to sue persons who caused damage, on the basis that they had committed a delictual fault causing damage to the insurer. The Cour de cassation came full circle nearly a hundred years later, noting that

Malgré l'exclusion de la subrogation légale, les tribunaux français autorisèrent cependant l'assureur de dommages à poursuivre l'auteur du sinistre en invoquant qu'il avait commis une faute délictuelle causant des dommages à l'assureur. La Cour de cassation boucla la boucle près de cent ans plus

subrogation in favour of insurers was accepted in maritime law: Civ., January 10, 1923, S.1924.I.257 (*Chem. de fer du Midi v. Comp. d'assur. marit. l'Alborada*). This evolution caused one French commentator to remark that the French courts had in so doing [TRANSLATION] "embarked on a creative tack, not hesitating to gradually break away from an overly ossified analysis of the Civil Code": Mestre, at p. 280, No. 245.

tard et rappela qu'en droit maritime, la subrogation en faveur de l'assureur était reconnue : Civ., 10 janvier 1923, S.1924.I.257 (*Chem. de fer du Midi c. Comp. d'assur. marit. l'Alborada*). Cette évolution a fait dire à un auteur français que la jurisprudence française s'était ainsi « engagée dans une voie créatrice, n'hésitant pas à se détacher progressivement d'une exégèse par trop sclérosante du Code civil » : Mestre, p. 280, n° 245.

25 In Quebec insurance law, the issue remained contentious until the 1974 reform, which explicitly granted the right to subrogation (*Act respecting insurance*, S.Q. 1974, c. 70 (which came into force on October 20, 1976), incorporated into the *Civil Code of Lower Canada*, art. 2576, now art. 2474 C.C.Q.): D. Lluelles, *Précis des assurances terrestres* (3rd ed. 1999), at p. 337; *Sherwin-Williams Co. of Canada Ltd. v. Boiler Inspection and Insurance Co. of Canada*, [1949] S.C.R. 187, at p. 191; *Trépanier v. Plamondon*, [1985] C.A. 242; *contra*: J.-G. Bergeron, *Les contrats d'assurance (terrestre)* (1989), vol. 1, at p. 423; C.-A. Bertrand, "Effets des subrogations et des transports aux assureurs" (1953), 13 *R. du B.* 285; *Agricultural Insurance Co. v. Cité de Montréal*, [1943] R.L. 151 (Sup. Ct.); *Compagnie d'Assurance du Québec v. Dufour*, [1973] C.S. 840.

Au Québec, en droit des assurances, la question est demeurée controversée jusqu'à la réforme de 1974 qui a conféré explicitement le droit à la subrogation (*Loi sur les assurances*, L.Q. 1974, ch. 70 (entrée en vigueur le 20 octobre 1976), intégré au *Code civil du Bas Canada*, art. 2576, maintenant l'art. 2474 C.c.Q.) : D. Lluelles, *Précis des assurances terrestres* (3e éd. 1999), p. 337; *Sherwin-Williams Co. of Canada Ltd. c. Boiler Inspection and Insurance Co. of Canada*, [1949] R.C.S. 187, p. 191; *Trépanier c. Plamondon*, [1985] C.A. 242; *contra* : J.-G. Bergeron, *Les contrats d'assurance (terrestre)* (1989), t. 1, p. 423; C.-A. Bertrand, « Effets des subrogations et des transports aux assureurs » (1953), 13 *R. du B.* 285; *Agricultural Insurance Co. c. Cité de Montréal*, [1943] R.L. 151 (C.S.); *Compagnie d'Assurance du Québec c. Dufour*, [1973] C.S. 840.

26 It must be recognized that the wording of para. (3) of art. 1656 C.C.Q. does not limit the paragraph's scope to obligations arising out of solidary or *in solidum* debts or debts secured by suretyship. To exclude statute-based obligations from its ambit is justified neither by the wording of the C.C.Q. nor by the historical evolution of the scope of the analogous provision in French law. Consequently, employers who pay a contractor's debt under s. 316 AIAOD may be subrogated to the rights of the CSST. As a result of subrogation, the CSST's right against the contractor is transferred to the employer. On making the payment, the employer takes the place of the CSST: *Forage Mercier inc. v. Société de Construction Maritime Voyageurs ltée*, [1998] Q.J. No. 2190 (QL) (C.A.). The employer acquires the claim from the time of payment, up to the amount paid: Pineau, Burman and Gaudet, at p. 604, No. 337, and at p. 606, No. 338.

Force est de reconnaître que la formulation du par. 3° de l'art. 1656 C.c.Q. n'est pas limitée aux cas où l'obligation découle d'une dette solidaire, *in solidum* ou cautionnée. Exclure de sa portée les cas où l'obligation découle d'une loi n'est justifié ni par le texte du C.c.Q. ni par l'évolution historique de la portée de la disposition similaire en France. En conséquence, l'employeur qui paie la dette de l'entrepreneur aux termes de l'art. 316 LATMP peut être subrogé dans les droits de la CSST. La subrogation transfère à l'employeur le droit que la CSST avait contre l'entrepreneur. Par suite du paiement, l'employeur remplace la CSST : *Forage Mercier inc. c. Société de Construction Maritime Voyageurs ltée*, [1998] A.Q. n° 2190 (QL) (C.A.); il acquiert la créance en date du paiement et ce, jusqu'à concurrence du montant payé : Pineau, Burman et Gaudet, p. 604, n° 337, et p. 606, n° 338. L'employeur peut donc réclamer à

Thus, the employer may demand that the contractor pay the amount of the assessment paid to the CSST.

But if the payment made in performance of the obligation imposed by the first paragraph of s. 316 AIAOD allows the employer to be substituted for the CSST in order to claim the amount of the assessment from the contractor, what does the third paragraph of the same section add? It enunciates the right to be reimbursed and to retain. The right to be reimbursed is nothing more than the right to demand payment. Thus, the right to reimbursement does not add to the claim accruing to the employer by reason of legal subrogation. What about the right to retain? It requires a more nuanced analysis.

The Quebec legislature has used the right to retain in ways that are disparate. In some situations, it may be a right granted to a body to set off an amount owing to a person against an amount owed by that person without actually mentioning the right to compensation: *Crop Insurance Act*, R.S.Q., c. A-30, s. 78.1. In other cases, the provision establishing the right to retain clearly states that the right is based on compensation: *Act respecting financial services cooperatives*, R.S.Q., c. C-67.3, s. 69. At times, the right to retain is a means of collecting an assessment out of the wages owed to an employee: s. 82(*c*)(4) ALRCI. In still other cases, a body is authorized to retain an amount until an obligation to do something has been performed: *Education Act for Cree, Inuit and Naskapi Native Persons*, R.S.Q., c. I-14, s. 13. Context is therefore essential to determining the legal nature of the right to retain granted by a given statutory provision in Quebec.

The right described in the third paragraph of s. 316 AIAOD is not a general right allowing an employer to refuse to pay a debt or retain an amount until a condition imposed on another person is met. The paragraph specifies that the right held by the employer is to retain "out of the sums that he owes the contractor" an amount equal to the amount paid

l'entrepreneur le montant de la cotisation qu'il a payée à la CSST.

27 Or, si le paiement fait en exécution de l'obligation imposée par le premier alinéa de l'art. 316 LATMP permet à l'employeur d'être substitué à la CSST pour réclamer à l'entrepreneur le montant de la cotisation, qu'apporte de plus le troisième alinéa de ce même article? Cet alinéa énonce le droit au remboursement et à la retenue. Le droit d'être remboursé n'est autre chose que le droit de réclamer le paiement. Le droit au remboursement n'ajoute donc pas au droit de créance échéant à l'employeur en raison de la subrogation légale. Qu'en est-il du droit de retenue? Une analyse plus nuancée est requise.

28 Le législateur québécois fait un usage hétéroclite du droit de retenue. Selon le contexte, il peut s'agir du droit pour un organisme de compenser un montant dû à une personne avec un montant dû par cette personne sans que le droit à la compensation ne soit mentionné explicitement : *Loi sur l'assurance-récolte*, L.R.Q., ch. A-30, art. 78.1; dans d'autres cas, le droit de retenue est formulé comme s'appuyant de façon expresse sur la compensation : *Loi sur les coopératives de services financiers*, L.R.Q., ch. C-67.3, art. 69; en d'autres occasions, le droit de retenue est un moyen de prélever une cotisation sur le salaire dû à un employé : LRTIC, art. 82*c*)(4); parfois encore, un organisme est autorisé à retenir un montant jusqu'à l'accomplissement d'une obligation de faire : *Loi sur l'instruction publique pour les autochtones cris, inuit et naskapis*, L.R.Q., ch. I-14, art. 13. Le contexte est donc essentiel pour pouvoir qualifier la nature juridique du droit de retenue conféré par une disposition législative québécoise.

29 Le droit décrit au troisième alinéa de l'art. 316 LATMP n'est pas un droit général permettant à un employeur de refuser d'acquitter une dette ou de retenir un montant jusqu'à l'accomplissement d'une condition imposée à une autre personne. Le texte précise qu'il s'agit du droit de l'employeur de retenir « sur les sommes qu'il [doit à

by the employer to the CSST. This right presupposes a mutual creditor-debtor relationship between the employer and the contractor. It also presupposes pecuniary obligations on the parts of both the employer and the contractor. When exercising the right to retain, the employer indicates that the debt owed to him or her by the contractor is being deducted from the amount the employer owes the contractor. In this way, the employer pays him or herself with the sums he or she owes. The two debts are discharged. The right to retain therefore corresponds to the right to compensation provided for in art. 1672 C.C.Q.:

> **1672.** Where two persons are reciprocally debtor and creditor of each other, the debts for which they are liable are extinguished by compensation, up to the amount of the lesser debt.
>
> Compensation may not be claimed from the State, but the State may claim it.

30 The right to retain referred to in the third paragraph of s. 316 AIAOD is thus merely a reiteration of the right to compensation arising out of the fact that the employer and the contractor have become both creditor and debtor to one another as a result of the subrogatory payment to the CSST.

31 This analysis leads necessarily to the conclusion, which means the trustee was correct on this point, that dividing up s. 316 AIAOD and retaining only the first paragraph is not a basis for distinguishing the Quebec scheme from Saskatchewan's scheme. If *Husky Oil* is to be distinguished in this case, it is not because the rights resulting from the first and third paragraphs are distinct from and independent of one another, as the appellants contend. What the third paragraph does is to eliminate any doubt as to the employer's right to be reimbursed for the amount paid on the contractor's behalf and, where applicable, to effect compensation between the amount the employer owes the contractor and the amount the contractor owes the employer.

32 Having completed this part of the analysis, I must now determine whether the right to retain subverts the scheme of distribution under the BIA.

l'entrepreneur] », un montant égal au montant qu'il a payé à la CSST. Ce droit présuppose une réciprocité de relation créancier-débiteur entre l'employeur et l'entrepreneur. Il s'agit aussi d'obligations pécuniaires tant pour l'employeur que pour l'entrepreneur. En exerçant son droit de retenue, l'employeur manifeste qu'il déduit du montant qu'il doit à l'entrepreneur le montant de la dette de l'entrepreneur à son endroit. Il se paie ainsi lui-même avec les sommes qu'il doit. Les deux dettes se trouvent payées. Le droit de retenue correspond au droit d'invoquer la compensation prévue à l'art. 1672 C.c.Q. :

> **1672.** Lorsque deux personnes se trouvent réciproquement débitrices et créancières l'une de l'autre, les dettes auxquelles elles sont tenues s'éteignent par compensation jusqu'à concurrence de la moindre.
>
> La compensation ne peut être invoquée contre l'État, mais celui-ci peut s'en prévaloir.

Le droit de retenue énoncé au troisième alinéa de l'art. 316 LATMP n'est donc que la réitération du droit à la compensation qui découle de la réciprocité des qualités de débiteur et de créancier de l'employeur et de l'entrepreneur par suite du paiement subrogatoire fait à la CSST.

Selon cette analyse, il faut conclure, donnant ainsi raison au syndic sur ce point, que la scission de l'art. 316 LATMP pour ne retenir que le premier alinéa ne permet pas de distinguer le régime québécois du régime de la Saskatchewan. Si *Husky Oil* doit être écarté, ce n'est pas parce que les droits résultant des premier et troisième alinéas sont distincts et indépendants l'un de l'autre comme le prétendent les appelants. Le troisième alinéa est cependant utile pour écarter tout doute sur le droit de l'employeur de se faire rembourser le montant payé pour l'entrepreneur et, s'il y a lieu, d'opérer compensation entre le montant qu'il doit à l'entrepreneur et celui que l'entrepreneur lui doit.

Ces éléments de l'analyse étant acquis, il y a lieu de vérifier si le droit de retenue viole le plan de distribution de la LFI.

2.1.2 Does the Right to Retain Subvert the Scheme of Distribution Under the BIA?

The trustee submits that the right to retain effectively guarantees the payment of amounts owed and in so doing subverts the scheme of distribution under the BIA. The syllogism put forward by the trustee is misleading. The scheme of distribution does not operate in a vacuum. If the BIA recognizes the right of creditors or debtors to avail themselves of mechanisms other than the one provided for in s. 136 BIA, which sets out the scheme of distribution, a provincial statute implementing such an alternative mechanism cannot be found to be inapplicable, because it would be perfectly compatible with the BIA. In discussing the scope of the first paragraph, we concluded that the right to retain is in fact a right to compensation. Since the BIA expressly recognizes certain cases of compensation, the real issue is whether the compensation mechanism authorized by the C.C.Q. and sanctioned by s. 316 AIAOD confers rights going beyond the framework of s. 97(3) BIA, which reads as follows:

97. . . .

(3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

The BIA thus incorporates, although without defining it, a compensation mechanism. To delimit this mechanism, it is necessary to refer not only to the BIA itself, but also to provincial law. Since the enactment of the *Federal Law–Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, it has been clear that in the province of Quebec, the civil law of Quebec is the suppletive law in bankruptcy matters. This means that in respect of aspects not governed by the BIA, the civil law rules of compensation apply. What are those rules?

Article 1672 C.C.Q. has already been quoted. Mutual debts are extinguished up to the amount of

2.1.2 Le droit de retenue viole-t-il le plan de répartition de la LFI?

33 Le syndic prétend que le droit de retenue a pour effet de garantir le paiement des montants dus et que, ce faisant, la disposition viole le plan de répartition de la LFI. Le syllogisme avancé par le syndic est trompeur. Le plan de répartition n'opère pas en vase clos. Si la LFI reconnaît le droit d'un créancier ou d'un débiteur de se prévaloir d'un mécanisme autre que celui de l'art. 136 LFI qui prévoit le plan de répartition, la loi provinciale qui met en œuvre un tel mécanisme différent ne peut être déclarée inapplicable, parce qu'elle serait alors tout à fait compatible avec la LFI. Dans l'examen de la portée du premier alinéa, nous avons conclu que le droit de retenue est en fait un droit de compensation. Comme la LFI reconnaît expressément certains cas de compensation, la véritable question est de savoir si la compensation autorisée par le C.c.Q. et consacrée par l'art. 316 LATMP accorde des droits qui excèdent le cadre du par. 97(3) LFI qui se lit :

97. . . .

(3) Les règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli, et aussi à toutes les actions intentées par le syndic pour le recouvrement des créances dues au failli, de la même manière et dans la même mesure que si le failli était demandeur ou défendeur, selon le cas, sauf en tant que toute réclamation pour compensation est atteinte par les dispositions de la présente loi concernant les fraudes ou préférences frauduleuses.

34 La LFI intègre donc, mais sans le définir, un mécanisme de compensation. Pour le circonscrire, il faut faire appel non seulement au texte de la LFI mais aussi au droit provincial. Depuis la *Loi d'harmonisation nº 1 du droit fédéral avec le droit civil*, L.C. 2001, ch. 4, il est clair que le droit civil québécois agit, dans la province de Québec, comme droit supplétif en matière de faillite. Ceci signifie qu'à l'égard des aspects qui ne sont pas régis par la LFI, les règles de la compensation du droit civil s'appliquent. Quelles sont ces règles?

35 L'article 1672 C.c.Q. a déjà été cité. Les dettes réciproques sont éteintes jusqu'à concurrence de

the lesser debt. Article 1673 C.C.Q. adds that when debts are certain, liquid and exigible, their mutual extinction takes place by operation of law. The article reads as follows:

1673. Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.

A party may apply for judicial liquidation of a debt in order to set it up for compensation.

36 There is another rule that is essential to understanding compensation in the context of insolvency. A debt owed to a party is an asset that is part of his or her patrimony. Since compensation has the effect of extinguishing mutual debts, the creditors of one or the other of the mutually indebted parties may be affected by the reduction or liquidation of the asset. Under Quebec civil law, compensation cannot be effected to the prejudice of a third person. Article 1681 C.C.Q. reads as follows:

1681. Compensation may neither be effected nor be renounced to the prejudice of the acquired rights of a third person.

If third persons have acquired rights before the right to compensation arises, art. 1681 C.C.Q. prohibits the application of compensation. The debt cannot be extinguished by compensation to the prejudice of the acquired rights of a third person. Without this rule, the asset would be reserved for one creditor — in this case, the employer — to the detriment of the principle of the equality of creditors (art. 2644 C.C.Q.), as in the case of a security: A. Bélanger, *Essai d'une théorie juridique de la compensation en droit civil québécois* (2004), at p. 144; G. Duboc, *La compensation et les droits des tiers* (1989), at p. 8, No. 4. In civil law, therefore, it may or may not be possible to exercise the right to retain, depending on whether or not the rights of third persons are affected. How does this apply in bankruptcy?

37 In the context of bankruptcy, trustees have a dual function: they represent both the bankrupt and the creditors. This dual role was considered recently in *Lefebvre (Trustee of)*, [2004] 3 S.C.R. 326, 2004

la moindre. L'article 1673 C.c.Q. énonce aussi que lorsque les dettes sont certaines, liquides et exigibles, l'extinction mutuelle a lieu de plein droit. Cet article se lit :

1673. La compensation s'opère de plein droit dès que coexistent des dettes qui sont l'une et l'autre certaines, liquides et exigibles et qui ont pour objet une somme d'argent ou une certaine quantité de biens fongibles de même espèce.

Une partie peut demander la liquidation judiciaire d'une dette afin de l'opposer en compensation.

Une autre règle est aussi essentielle à l'étude de la compensation dans un contexte d'insolvabilité. La créance due à une partie est un actif qui fait partie de son patrimoine. Comme la compensation a pour effet d'éteindre les dettes réciproques, les créanciers de l'une ou l'autre des parties mutuellement endettées peuvent être affectés par la réduction ou l'extinction des créances. Selon le droit civil québécois, la compensation ne peut avoir lieu au préjudice des tiers. L'article 1681 C.c.Q. prévoit :

1681. La compensation n'a pas lieu, et on ne peut non plus y renoncer, au préjudice des droits acquis à un tiers.

Si des tiers ont acquis des droits avant que ne s'ouvre le droit à la compensation, l'art. 1681 C.c.Q. en prohibe la mise en action. La créance ne peut être éteinte par la compensation au préjudice des droits acquis à des tiers. Sans cette règle, la créance serait réservée à un créancier, ici l'employeur, au détriment de la règle de l'égalité entre les créanciers (art. 2644 C.c.Q.), comme dans le cas d'une garantie : A. Bélanger, *Essai d'une théorie juridique de la compensation en droit civil québécois* (2004), p. 144; G. Duboc, *La compensation et les droits des tiers* (1989), p. 8, n° 4. En vertu du droit civil, le droit de retenue pourra donc ou non être mis en opération selon que les droits des tiers sont ou non affectés. Qu'en est-il en matière de faillite?

Dans un contexte de faillite, le syndic a une double fonction : il représente tantôt le failli, tantôt les créanciers. Ce double rôle du syndic a été étudié récemment dans *Lefebvre (Syndic de)*, [2004] 3

SCC 63. Some duties are consistent with a specific characterization of the trustee as the bankrupt's representative, so the trustee cannot be considered a third person in performing them. In most situations, however, as de Grandpré J. remarked in *Mercure v. Marquette & Fils*, [1977] 1 S.C.R. 547, at p. 555, the trustee's dual function must be borne in mind in assessing the rights and obligations of the trustee and the creditors.

38 At the time of bankruptcy, the contractor's claim against the employer constitutes property that is part of the patrimony that is divisible among the creditors within the meaning of s. 67 BIA:

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

. . .

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Section 71(2) BIA adds that the property vested in the trustee can no longer be alienated by the bankrupt from the date of bankruptcy:

71. . . .

(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

39 For the purposes of ss. 67(1) and 71(2) BIA, the trustee is consequently not only the bankrupt's successor, but also the representative of the creditors, on behalf of whom the trustee manages and

R.C.S. 326, 2004 CSC 63. Certaines fonctions se prêtent à une qualification spécifique à titre de représentant du failli et alors il ne sera pas considéré comme un tiers. Dans la majorité des situations, cependant, tel que le mentionnait le juge de Grandpré dans *Mercure c. Marquette & Fils*, [1977] 1 R.C.S. 547, p. 555, c'est en gardant à l'esprit sa double fonction que les droits et obligations du syndic et des créanciers sont appréciés.

Lors de la faillite, la créance de l'entrepreneur contre l'employeur constitue un bien qui fait partie du patrimoine attribué aux créanciers aux termes de l'art. 67 LFI :

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

. . .

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

De plus, conformément au par. 71(2) LFI, les biens dévolus au syndic ne peuvent plus être aliénés par le failli à compter de la faillite :

71. . . .

(2) Lorsqu'une ordonnance de séquestre est rendue, ou qu'une cession est produite auprès d'un séquestre officiel, un failli cesse d'être habile à céder ou autrement aliéner ses biens qui doivent, sous réserve des autres dispositions de la présente loi et des droits des créanciers garantis, immédiatement passer et être dévolus au syndic nommé dans l'ordonnance de séquestre ou dans la cession, et advenant un changement de syndic, les biens passent de syndic à syndic sans transport, cession, ni transfert quelconque.

Pour l'application des par. 67(1) et 71(2) LFI, le syndic n'est en conséquence pas seulement le successeur du failli, il est aussi le représentant des créanciers au nom de qui il gère et liquide les biens

liquidates the property vested in him or her. In this context, therefore, the trustee can be characterized primarily as a third person in relation to the bankrupt. If only these sections were taken into consideration, compensation could not be effected after bankruptcy, because bankrupts would no longer be in a position to use their property to pay their debts. Bankrupts would not be able to make payments or discharge debtors because they would no longer have the capacity to do so. They would therefore be unable to effect compensation, which is a mechanism for extinguishing debts, because they would no longer be the holders of their patrimonies. However, s. 97(3) BIA sets up a special scheme. Two aspects of this provision are relevant to our analysis of the right to retain under s. 316 AIAOD.

qui lui sont dévolus. La qualification de tiers par rapport au failli prédomine alors. Si seuls ces articles étaient pris en considération, la compensation ne pourrait pas opérer après la faillite parce que le failli n'est plus en mesure d'utiliser ses biens pour acquitter ses dettes. Le failli ne pourrait pas faire de paiement ni consentir une quittance parce qu'il n'y serait plus habilité. Il ne pourrait donc pas invoquer la compensation qui est un mécanisme d'extinction de dette car il n'est plus titulaire de son patrimoine. Le paragraphe 97(3) LFI aménage cependant un régime particulier. Deux aspects de cette disposition sont pertinents pour notre analyse du droit de retenue de l'art. 316 LATMP.

40 First, s. 97(3) BIA specifies that compensation applies to claims against the bankrupt's estate. Creditors must therefore meet the conditions set out in s. 121(1) BIA, the relevant portion of which reads as follows:

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Thus, a creditor who wishes to effect compensation must be able to prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy.

Premièrement, le par. 97(3) LFI précise que la compensation s'applique aux réclamations contre l'actif du failli. Le créancier doit donc remplir les conditions du par. 121(1) LFI dont la partie pertinente se lit :

> **121.** (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Ainsi, le créancier qui veut opposer compensation doit être en mesure de prouver une créance à laquelle le failli était assujetti en raison d'une obligation contractée antérieurement à la faillite.

41 Second, s. 97(3) BIA provides that compensation is effected in the same manner as if the bankrupt were a plaintiff or a defendant. Compensation is effected as if the bankrupt's patrimony had not vested in the trustee as a result of the bankruptcy. According to this provision, the mechanism established by s. 71(2) BIA does not apply in cases involving compensation. This rule sets aside the trustee's status as representative of the creditors. The argument that the trustee is a third person and that the bankrupt may no longer make payments as a result of the bankruptcy cannot be used to prevent a creditor who wishes to effect compensation from doing so.

Deuxièmement, le par. 97(3) LFI énonce que la compensation a lieu de la même manière que si le failli était le demandeur ou défendeur. La compensation a lieu comme si le patrimoine du failli n'avait pas, par la faillite, été dévolu au syndic. Cette disposition écarte, pour les besoins de la compensation, le mécanisme énoncé au par. 71(2) LFI. Cette règle met de côté la fonction du syndic comme représentant des créanciers. Le créancier qui veut invoquer compensation ne peut se faire opposer que le syndic est un tiers et que le failli n'est plus autorisé à faire un paiement en raison de sa faillite.

Bearing in mind these particular features of s. 97(3) BIA and the civil law rules that supplement them, three possible scenarios can be envisaged in the context of s. 316 AIAOD. In the first, the payment is made to the CSST before the bankruptcy, and the mutual debts are certain, liquid and exigible before the bankruptcy. In the second hypothetical situation, the payment is made before the bankruptcy, the employer is in debt to the contractor, but one of the conditions for legal compensation is not met. In the third scenario, the payment is made after the bankruptcy.

2.1.2.1 *Payment Is Made Before the Bankruptcy, and the Mutual Debts Are Certain, Liquid and Exigible Before the Bankruptcy*

From the moment when the employer pays the CSST, the employer's claim becomes certain, liquid and exigible. As a result of subrogation, the CSST's claim is transferred to the employer. Since the employer's right against the contractor arises out of the payment to the CSST, the existence of the employer's claim is from that moment recognized, or certain. Furthermore, since the CSST's assessment is for a specific amount, the claim is liquid. The claim is also exigible, since the CSST was entitled to demand payment from the employer. If the employer is also in debt to the contractor, and if that debt is liquid and exigible, legal compensation is effected by operation of law in accordance with art. 1673 C.C.Q., which is reproduced above, and the debts are extinguished up to the amount of the lesser debt.

In this context, by the operation of the rules of the C.C.Q., the employer asserts not a right to retain, but the extinction of his or her debt to the contractor. The employer may avail him or herself of this mechanism at any time. He or she relies on the fact that the extinction of the debt occurred at the moment the mutual debts met the conditions for legal compensation. Since the trustee takes possession of the bankrupt's property as it exists at the time of vesting (s. 71(2) BIA), the trustee will find that the bankrupt's patrimony includes no claim against the employer.

42 Ayant à l'esprit ces particularités du par. 97(3) LFI et les règles civilistes agissant à titre supplétif, trois situations peuvent être envisagées dans le contexte de l'art. 316 LATMP. Selon un premier scénario, le paiement à la CSST est fait avant la faillite et les dettes réciproques sont certaines, liquides et exigibles avant la faillite; selon une deuxième hypothèse, le paiement est fait avant la faillite, l'employeur est endetté envers l'entrepreneur, mais l'une des conditions de la compensation légale fait défaut et enfin, troisièmement, le paiement est fait après la faillite.

2.1.2.1 *Le paiement est fait avant la faillite et les dettes réciproques sont certaines, liquides et exigibles avant la faillite*

43 Dès le moment où l'employeur paie la CSST, sa créance devient certaine, liquide et exigible. En effet, par l'effet de la subrogation, la créance de la CSST est transférée à l'employeur. Comme le droit de l'employeur contre l'entrepreneur prend naissance lors du paiement à la CSST, la créance de l'employeur a, dès ce moment, une existence reconnue, c'est-à-dire certaine. De plus, puisque le montant de la cotisation à la CSST est déterminé, la créance est liquide. Elle est aussi exigible car la CSST était en mesure d'en exiger le paiement de l'employeur. Si, par ailleurs, l'employeur est lui-même endetté envers l'entrepreneur et que sa dette soit liquide et exigible, la compensation légale s'opère de plein droit et les dettes sont éteintes jusqu'à concurrence de la moindre des deux dettes, le tout selon l'art. 1673 C.c.Q. cité ci-dessus.

44 Dans ce contexte, par l'opération des règles du C.c.Q., l'employeur n'invoque pas véritablement un droit de retenue, mais bien l'extinction de sa dette à l'égard de l'entrepreneur. L'employeur peut s'en prévaloir à tout moment. Il soulèvera l'extinction survenue au moment où les dettes réciproques ont rempli les conditions de la compensation légale. Comme le syndic prend possession des biens du failli dans l'état où ils se trouvent au moment de leur dévolution (par. 71(2) LFI), il ne pourra que constater que le patrimoine du failli ne compte pas de créance contre l'employeur.

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Since in this scenario the bankruptcy has not yet occurred when legal compensation is effected, the scheme of distribution is not affected, because the claim against the employer is not part of the property vested in the trustee.

Comme la faillite, selon cette hypothèse, n'est pas encore survenue lors de l'opération de la compensation légale, le plan de répartition n'est pas affecté parce que la créance contre l'employeur ne fait pas partie des biens dévolus au syndic.

2.1.2.2 *Payment Is Made Before the Bankruptcy, the Employer Is in Debt to the Contractor, but One of the Conditions for Legal Compensation Is Not Met*

2.1.2.2 *Le paiement est fait avant la faillite, l'employeur est endetté envers l'entrepreneur mais l'une des conditions requises pour la compensation légale fait défaut*

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In the second scenario, the employer pays the amount of the contractor's unpaid assessment to the CSST before the bankruptcy. The employer's claim, which results from subrogation, is thus certain, liquid and exigible at the time of the bankruptcy. If one of the conditions for legal compensation is not met, it is necessarily related to the contractor's claim against the employer.

Selon cette deuxième hypothèse, l'employeur paie à la CSST avant la faillite le montant de la cotisation impayée par l'entrepreneur. La créance de l'employeur qui résulte de la subrogation est donc certaine, liquide et exigible au moment de la faillite. Si l'une des conditions de la compensation légale fait défaut, il s'agit nécessairement d'une condition reliée à la créance de l'entrepreneur contre l'employeur.

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There are a number of grounds that may be available to the employer to defend against a claim by the trustee. The employer could, for example, assert that the claim is not certain or is not exigible. In such a case, the employer would not be relying on the right to retain, but would be asserting that the claim does not exist or is not due. If the contractor's claim is certain and exigible but not liquid, the contractor may, if he or she is not bankrupt, apply to a court to liquidate the debt. In this case, the employer would be applying for judicial compensation pursuant to the second paragraph of art. 1673 C.C.Q.

Plusieurs moyens peuvent potentiellement être invoqués par l'employeur en défense à une réclamation du syndic. Il peut, par exemple, soulever que la créance n'est pas certaine ou qu'elle n'est pas exigible. Dans de tels cas, il invoque non pas son droit de retenue, mais l'inexistence de la créance ou son inexigibilité. Si la créance de l'entrepreneur est certaine et exigible, mais non liquide, l'entrepreneur peut, hors du contexte de la faillite, faire valoir son droit devant un tribunal qui a le pouvoir de liquider la dette. L'employeur invoque alors la compensation judiciaire suivant l'art. 1673, al. 2 C.c.Q.

48

In civil law, however, compensation may not be effected if the rights of third persons are affected (art. 1681 C.C.Q.). To allow compensation would be to permit a creditor to be paid in full for a claim out of his or her debt to the debtor. If third persons have acquired rights before compensation is effected, compensation is consequently not available.

En droit civil, la compensation ne peut cependant plus être opposée si les droits des tiers sont affectés (art. 1681 C.c.Q.). Permettre la compensation serait autoriser un créancier à être payé en entier pour sa créance à même la dette qu'il entretient envers le débiteur. Si des tiers ont acquis des droits avant l'opération de la compensation, elle est donc prohibée.

49

In bankruptcy, the claim against the employer is an asset vested in the trustee within the meaning of s. 71(2) BIA. If this claim is not liquid, the trustee can have it appraised and, if there is a

Dans le contexte de la faillite, la créance contre l'employeur est un actif dévolu au syndic aux termes du par. 71(2) LFI. Si cette créance n'est pas liquide, le syndic peut l'évaluer et, en cas de contestation,

dispute, institute legal proceedings (s. 30(1)(*d*) BIA). The employer may also rely on the special provision in s. 97(3) BIA, which dispenses with the trustee's status as a third party for the purposes of compensation and allows compensation to be set up as if the bankrupt were the plaintiff. The employer's right to compensation thus has its basis in the BIA, not the civil law, which because of art. 1681 C.C.Q. is more restrictive. In these circumstances, the right to retain under s. 316 AIAOD is not incompatible with the BIA, as it is merely an application of the BIA's provisions.

Quebec courts have on many occasions recognized the possibility of setting up compensation in bankruptcy matters: *In re Hil-A-Don Ltd.: Bank of Montreal v. Kwiat*, [1975] C.A. 157; *In re Le syndicat d'épargne des épiciers du Québec: Laviolette v. Mercure*, [1975] C.A. 599; *Goldstein v. Auerbach* (1991), 51 Q.A.C. 292. When the payment is made before the bankruptcy, the rights arising out of the subrogatory payment thus do not subvert the scheme of distribution under s. 136 BIA, because they can be implemented by means of a mechanism provided for in the BIA itself, in s. 97(3).

2.1.2.3 *The Employer's Payment Is Made After the Bankruptcy*

When the employer's payment is made after the bankruptcy, the question is whether the employer can exercise the right to retain or the right to compensation in the same manner as if the payment were made before the bankruptcy. In answering this question, it is helpful to refer to the legal relationship created by s. 316 AIAOD, which can be distinguished from the classic cases of conflicts between third persons and assignees. This is not a case, as provided for in art. 1680 C.C.Q., in which the debtor of an assigned claim seeks to set up against the creditor/assignee the same defence that would have been set up against the original creditor. Rather, this case concerns defences that the employer, the new creditor, wishes to set up against the contractor, the original debtor, at the time the contractor went bankrupt. The CSST owed the contractor nothing and could not therefore set up compensation. Following this line of reasoning,

demander au tribunal de trancher (al. 30(1)*d*) LFI). L'employeur peut aussi se prévaloir de la particularité du par. 97(3) LFI qui met de côté, pour les besoins de la compensation, la qualité de tiers du syndic et permet d'opposer compensation comme si le failli était le demandeur. Le droit de compensation de l'employeur découle alors de la LFI et non du droit civil, qui s'avère plus restrictif en raison de l'art. 1681 C.c.Q. Le droit de retenue de l'art. 316 LATMP, dans ces circonstances, n'est pas incompatible avec les dispositions de la LFI puisqu'il n'en est qu'une application.

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Les tribunaux québécois ont à maintes reprises reconnu la possibilité d'invoquer la compensation dans un contexte de faillite : *In re Hil-A-Don Ltd. : Bank of Montreal c. Kwiat*, [1975] C.A. 157; *In re Le syndicat d'épargne des épiciers du Québec : Laviolette c. Mercure*, [1975] C.A. 599; *Goldstein c. Auerbach* (1991), 51 Q.A.C. 292. Lorsque le paiement est fait avant la faillite, les droits découlant du paiement subrogatoire ne contreviennent donc pas au plan de répartition de l'art. 136 LFI parce qu'ils peuvent être mis en œuvre grâce à un mécanisme prévu par la LFI elle-même, le par. 97(3).

2.1.2.3 *Le paiement de l'employeur est fait après la faillite*

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Lorsque le paiement de l'employeur est fait après la faillite, la question qui se pose est de savoir si l'employeur peut se prévaloir de son droit de retenue ou de compensation de la même façon que si le paiement était fait avant la faillite. Pour répondre à cette question, il est utile de rappeler la relation juridique créée par l'art. 316 LATMP. Cette relation se distingue des cas classiques de conflits entre tiers et cessionnaires. Il ne s'agit pas d'un cas où le débiteur d'une créance cédée cherche à opposer au créancier cessionnaire les moyens qu'il aurait pu opposer au créancier originel comme le prévoit l'art. 1680 C.c.Q. Il s'agit plutôt ici des moyens que l'employeur, nouveau créancier, veut faire valoir à l'encontre de l'entrepreneur, débiteur originel, à un moment où l'entrepreneur a fait faillite. La CSST ne devait rien à l'entrepreneur. La CSST ne pouvait donc pas opposer compensation. Selon cette hypothèse, avant la faillite, l'employeur n'était pas

the employer was not a creditor of the contractor before the bankruptcy. The employer did not become a creditor until the subrogatory payment was made, that is, after the bankruptcy. The dual status of creditor and debtor did not arise until after the bankruptcy.

créancier de l'entrepreneur. Il ne l'est devenu que lors du paiement subrogatoire, c'est-à-dire après la faillite. La double qualité de créancier et de débiteur n'est survenue qu'après la faillite.

52

In the civil law of Quebec, a person who pays in the place of a debtor has no more rights than the subrogating creditor (art. 1651 C.C.Q.) on the one hand, while on the other hand, compensation cannot be effected to the prejudice of third persons (art. 1681 C.C.Q.). While it is difficult to liken the compensation mechanism to an additional right when considered from the standpoint of the debtor, the same cannot be said when the rights of third persons are taken into account. There is no question that third persons would be affected by compensation should it come into play. The effect of substituting creditors subsequent to the bankruptcy is such that the trustee must now deal with a creditor who is also a debtor of the bankruptcy, whereas the original creditor was not and would not therefore have been able to set up compensation. The employer's claim would, in a way, be secured by the amounts owed by the employer to the bankrupt, whereas the CSST's claim was not. In the civil law of Quebec, if third persons are affected, the employer cannot exercise the right to retain under s. 316 AIAOD, as this is prevented by arts. 1651 and 1681 C.C.Q.

Selon le droit civil québécois, d'une part, la personne qui paie à la place du débiteur n'a pas plus de droits que le subrogeant (art. 1651 C.c.Q.) et, d'autre part, la compensation ne peut avoir lieu au préjudice des tiers (art. 1681 C.c.Q.). Si le mécanisme de la compensation peut difficilement être assimilé à un droit additionnel lorsque examiné dans la perspective du débiteur lui-même, il en est autrement lorsque les droits des tiers sont pris en compte. Les tiers seraient indéniablement affectés par la compensation si elle devait entrer en action. En effet, par l'effet de la substitution de créancier survenue après la faillite, le syndic doit maintenant faire face à un créancier qui est aussi débiteur de la faillite alors que le créancier originel ne l'était pas et n'aurait donc pas pu lui opposer compensation. La créance de l'employeur serait en quelque sorte garantie par les sommes qu'il doit au failli alors que la créance de la CSST ne l'était pas. Selon le droit civil québécois, si les tiers sont affectés, l'employeur ne peut pas se prévaloir du droit de retenue de l'art. 316 LATMP parce qu'il en est empêché par l'effet des art. 1651 et 1681 C.c.Q.

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It is nevertheless helpful to again consider whether the BIA includes provisions that have the effect of allowing employers to exercise their right to retain. We have already seen that s. 97(3) BIA has two features that are relevant here: (1) the claims must be provable by means of a proof of claim, in accordance with s. 121 BIA, and (2) compensation may be effected as if the bankrupt were the plaintiff.

Il est cependant utile de vérifier à nouveau si la LFI comporte des dispositions qui font en sorte que l'employeur peut se prévaloir de son droit de retenue. Nous avons vu déjà que le par. 97(3) LFI comporte deux éléments qui sont ici pertinents : (1) les créances doivent pouvoir faire l'objet d'une preuve de réclamation selon l'art. 121 LFI et (2) la compensation peut avoir lieu comme si le failli était le demandeur.

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As a result of subrogation, an employer who pays after a bankruptcy is subrogated to the rights of the CSST and may assert a claim against the bankrupt as if the bankrupt were the defendant. Pursuant to s. 121 BIA, the employer may assert a claim to which the bankrupt is subject by reason of an

En raison du mécanisme de la subrogation, l'employeur qui paie après la faillite est subrogé dans les droits de la CSST et peut faire valoir une créance contre le failli comme si ce dernier était le défendeur. Conformément à l'art. 121 LFI, il peut faire valoir une créance à laquelle le failli

obligation incurred before the bankruptcy. Similarly, under s. 97(3) BIA, the trustee may assert a claim against the employer for payment of a debt owed to the bankrupt as if the bankrupt were the plaintiff. Thus, at first glance, these features of the BIA appear to allow compensation. As can be seen from a more thorough review, however, a subrogatory payment cannot give rise to compensation if it is made after the bankruptcy.

est assujetti en raison d'une obligation contractée antérieurement à la faillite. De même, selon le par. 97(3) LFI, le syndic peut réclamer à l'employeur le paiement de sa dette envers le failli comme si le failli était le demandeur. À première vue, donc, les particularités de la LFI semblent permettre la compensation. Un examen plus approfondi fait cependant voir que le paiement subrogatoire ne peut donner lieu à la compensation lorsqu'il est fait après la faillite.

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Few commentators have shown an interest in the effects of subrogation in bankruptcy matters, and the principles of Canadian bijuralism do not permit the importation of common law rules. The commentaries of authors from outside Quebec are nonetheless of interest for the purpose of reviewing the principles specific to the BIA (R. J. Wood, "Turning Lead into Gold: The Uncertain Alchemy of 'All Obligations' Clauses" (2003), 41 *Alta. L. Rev.* 801). Section 121 BIA allows the employer to exercise the rights that accrue to him or her by reason of the subrogatory payment. He or she holds no rights in addition to the rights conferred by the civil law. The employer has only those rights which the CSST could exercise. Just as the CSST could not set up compensation, neither can the employer if third persons are affected. Section 97(3) BIA does not provide that a claim may be transferred from one creditor to another so as to permit compensation where it could not otherwise be set up. Since s. 97(3) BIA is an exception to the rule of equality between creditors, it must be interpreted narrowly. It must therefore be read in conjunction with ss. 121, 136(3) and 141 BIA as implicitly requiring that the mutual debts come into existence before the bankruptcy.

Peu d'auteurs se sont intéressés à l'effet de la subrogation en matière de faillite et le bijuridisme canadien ne permet pas d'importer les règles de la common law. Les commentaires des auteurs de l'extérieur du Québec demeurent cependant intéressants pour l'étude des principes propres à la LFI (R. J. Wood, « Turning Lead into Gold : The Uncertain Alchemy of "All Obligations" Clauses » (2003), 41 *Alta. L. Rev.* 801). L'article 121 LFI permet à l'employeur d'exercer les droits qui lui échoient en raison de son paiement subrogatoire. Aucun droit additionnel ne lui est accordé en sus de ce que le droit civil lui confère. L'employeur n'a que les droits que la CSST pouvait exercer. Comme la CSST ne pouvait pas invoquer la compensation, l'employeur ne le peut pas non plus si les tiers sont affectés. Le paragraphe 97(3) LFI ne prévoit pas qu'une créance puisse être transférée d'un créancier à l'autre de façon à autoriser une compensation qui n'aurait pas autrement pu être invoquée. Comme le par. 97(3) LFI fait exception à la règle de l'égalité des créanciers, il doit recevoir une interprétation restrictive. Il doit donc être interprété en conjonction avec les art. 121, 136(3) et 141 LFI et requiert implicitement que les créances mutuelles doivent avoir pris naissance avant la faillite.

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What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting a

Ce qui distingue le paiement avant la faillite du paiement après la faillite est le fait que, dans le premier cas, la substitution de créancier a lieu avant le moment où le syndic acquiert les biens du failli. Lorsque le paiement est fait après la faillite, la substitution est postérieure à la faillite et le syndic est en mesure de s'y opposer. Les principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui

security that did not exist before the bankruptcy. To sum up, where subrogation is concerned, the BIA contains no provisions that depart from the civil law and can serve as a basis for extending the scope of application of compensation.

n'existait pas avant la faillite. En somme, quant à la subrogation, la LFI ne comporte pas de disposition qui déroge au droit civil et permette une application élargie de la compensation.

57 Because of the constraints inherent in the civil law, an employer may not retain the amounts paid to the CSST from the sums owed to a contractor if, when the payment was made, third parties had acquired rights. A payment made pursuant to s. 316 AIAOD does, however, entitle an employer to avail him or herself of subrogation to be reimbursed as an ordinary creditor for the amount paid. The right to reimbursement may be exercised in a manner respectful of the rights of third persons. The employer may file a proof of claim, just as the CSST could have done. This right is consistent with arts. 1651 and 1681 C.C.Q. and with s. 136 BIA. Furthermore, in *Husky Oil*, the Court recognized the validity of the right to make a simple claim to the trustee to be reimbursed (p. 503).

En raison des contraintes inhérentes au droit civil, l'employeur ne peut retenir sur les sommes dues à l'entrepreneur les montants qu'il a payés à la CSST si le paiement est fait alors que des tiers ont acquis des droits. Le paiement fait en vertu de l'art. 316 LATMP permet cependant à l'employeur de se prévaloir de la subrogation pour se faire rembourser, à titre de créancier ordinaire, le montant qu'il a payé. Le droit de remboursement peut être invoqué dans le respect des droits des tiers. L'employeur peut produire une preuve de réclamation, tout comme la CSST aurait pu le faire. Ce droit respecte tant les art. 1651 et 1681 C.c.Q. que l'art. 136 LFI. Dans *Husky Oil*, la Cour a d'ailleurs reconnu la validité du droit de présenter au syndic une simple demande de remboursement (p. 503).

58 The trustee's argument that s. 316 AIAOD subverts the scheme of distribution under the BIA cannot therefore be accepted. First, the right to reimbursement is compatible with the BIA and, second, if the right to retain cannot be exercised by an employer, it is because of the inherent constraints of the civil law rules governing subrogation and compensation. The right to retain is not in conflict with the BIA, because the only circumstances in which the right can be exercised are those provided for in the BIA, which is more open to compensation than Quebec civil law.

Par conséquent, la prétention du syndic voulant que l'art. 316 LATMP viole le plan de répartition de la LFI ne peut pas être acceptée. D'une part, le droit de remboursement est compatible avec la LFI et, d'autre part, lorsque le droit de retenue ne peut être invoqué par l'employeur, c'est en raison des contraintes inhérentes aux règles civilistes régissant la subrogation et la compensation. Le droit de retenue n'est pas en conflit avec la LFI parce que les seules circonstances où il peut être invoqué sont celles prévues à la LFI, qui est plus favorable à la compensation que le droit civil québécois.

2.1.3 Distinction Between Quebec's Scheme and Saskatchewan's Scheme

2.1.3 Distinction entre le régime québécois et le régime de la Saskatchewan

59 In accepting the trustee's arguments, the Court of Appeal saw in s. 316 AIAOD a right similar to the one considered by this Court in *Husky Oil*. The comparison is, in my view, inappropriate. In *Husky Oil*, the Court considered s. 133 of the *Workers' Compensation Act, 1979*, which established a deemed debt mechanism and allowed sums owed to a contractor to be withheld even

La Cour d'appel, acceptant ainsi les arguments du syndic, a vu dans l'art. 316 LATMP un droit similaire à celui étudié par la Cour dans *Husky Oil*. Le rapprochement est, à mon avis, injustifié. Dans *Husky Oil*, la Cour a étudié l'art. 133 de la *Workers' Compensation Act, 1979* qui établissait un mécanisme de dette présumée et autorisait la retenue de sommes dues à un entrepreneur avant

before the employer's claim against the contractor arose. Sections 133(1) and 133(3) read as follows:

133—(1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board.

. . .

(3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

The right to withhold granted to employers under the *Workers' Compensation Act, 1979* arose at the time when the employer was liable to pay, that is, before the payment was even made. According to the Court's interpretation, under that Act, employers did not impair their own capital. They acted as collection agents: "it is [their] duty . . . to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid . . .". The Court concluded from this that the Act established a deemed debt — as opposed to a real one — owed by the employer personally that, when combined with the right to withhold, constituted a security device that was incompatible with the BIA:

[I]t is clear that when s. 133(1) operates in combination with s. 133(3), the effect is to secure the claim of the Board against assets of the contractor. This is accomplished through the *combined* operation of the statutory deemed debt imposed on the principal in the event of the contractor's default *and* the right of the principal to withhold and be indemnified from monies owing to the contractor. Thus, the combined effect of the deemed

même la naissance de la créance de l'employeur contre l'entrepreneur. À ses paragraphes (1) et (3), l'art. 133 prévoyait :

[TRADUCTION]

133—(1) Si une personne, appelée le commettant dans le présent article, qu'elle exploite ou non une industrie visée par la présente loi, conclut un contrat avec une autre personne, appelée l'entrepreneur dans le présent article, pour l'exécution, par l'entrepreneur ou sous sa direction, de la totalité ou d'une partie d'un travail pour le compte du commettant, il incombe à ce dernier de veiller à ce que toute somme que l'entrepreneur ou un sous-traitant est tenu de verser à la caisse soit versée. Le commettant qui néglige de le faire est, à défaut de paiement, personnellement tenu de payer cette somme à la commission.

. . .

(3) Le commettant qui est tenu de faire un paiement à la commission en vertu du paragraphe (1) a le droit d'être indemnisé par toute personne qui aurait dû faire ce paiement et il a le droit de retenir, sur toute somme due à cette personne, un montant suffisant correspondant à cette indemnité.

60

Le droit de retenue accordé par la *Workers' Compensation Act, 1979* à l'employeur naît dès le moment où ce dernier est tenu au paiement, soit avant même que le paiement ne soit fait. Selon l'interprétation de la Cour, en vertu de cette loi, l'employeur n'entame pas son propre capital. Il est l'agent percepteur : « il [lui] incombe [. . .] de veiller à ce que toute somme que l'entrepreneur ou un sous-traitant est tenu de verser à la caisse soit versée ». La Cour en a conclu que la loi établissait non pas une dette réelle due par l'employeur personnellement, mais une dette réputée qui, conjuguée au droit de retenue, constituait un mécanisme de garantie incompatible avec la LFI :

. . . il est clair que l'application conjuguée des par. 133(1) et (3) a pour effet de garantir la réclamation de la Commission contre les biens de l'entrepreneur. C'est ce qui se produit lorsque l'on *conjugue* la dette réputée que la loi impose au commettant en cas de défaut de paiement de la part de l'entrepreneur *et* le droit du commettant de faire des retenues et de s'indemniser sur les sommes dues à l'entrepreneur. En conséquence, la

debt in s. 133(1) and set-off in s. 133(3) secures the Board's claim against the contractor's assets.

. . .

To repeat, it is the *combined effect* of the statutory deemed debt *and* the right to withhold (and then set off against) property of the bankrupt which secures the Board's claim against property of the bankrupt. It is for this reason that examining the constitutional validity of s. 133(1) separately from s. 133(3) fundamentally obscures the nature of the legal interest created. Such an approach misses that this is nothing but a straightforward security device triggered by the province for securing the Board's claim against the estate, in exactly the same way that breaking a contract of pledge into debt and bailment and examining the validity of these legal interests separately would obscure the essential character of pledge as a security device. [Emphasis in original; paras. 53 and 77.]

61 The Court did not reject all set-off mechanisms. Such an interpretation would obviously be inconsistent with the clear wording of s. 97(3) BIA and with the reasons for the Court's decision:

Differently put, in the bankruptcy context, the law of set-off simply allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Set-off is simply a defence to the payment of a debt, not a basis for validating statutory security devices which have the effect of securing the claims of *third parties* against the estate. . . . [Emphasis in original; para. 73.]

62 Section 316 AIAOD is consistent with the conditions placed on the application of compensation in *Husky Oil*. Only an employer who has paid may exercise the right to retain. This is not a case like *Husky Oil* involving a deemed payment or an employer acting as a mere agent. Nor does this case involve, as the trustee argues, a right to retain under a suspensive condition. The right resulting from the subrogatory payment comes into existence only when the payment is made. Mestre says that this rule is [TRANSLATION] "obvious, and results from the very spirit of the institution,

dette réputée, visée au par. 133(1), et la compensation prévue au par. 133(3) ont pour effet conjugué de garantir la réclamation de la Commission contre les biens de l'entrepreneur.

. . .

Je le répète, c'est l'*effet conjugué* de la dette réputée créée par la loi *et* du droit de rétention (et ensuite de compensation) applicable aux biens du failli, qui garantit la réclamation de la Commission contre les biens du failli. C'est pour ce motif qu'examiner la constitutionnalité du par. 133(1) séparément de celle du par. 133(3) dissimule radicalement la nature du droit créé. Une telle façon de procéder évite de constater qu'il ne s'agit de rien d'autre qu'un simple instrument de garantie déclenché par la province pour garantir la réclamation de la Commission sur l'actif, de la même façon que l'on éviterait de constater la nature essentielle du nantissement, comme instrument de garantie, si, pour en déterminer la validité, on examinait séparément les aspects « dette » et « dépôt » du contrat. [Souligné dans l'original; par. 53 et 77.]

La Cour n'a pas écarté tous les mécanismes de compensation. Une telle interprétation serait de toute évidence contraire à l'énoncé clair du par. 97(3) LFI et aux motifs de l'arrêt :

Autrement dit, dans le contexte de la faillite, les règles de la compensation permettent simplement au débiteur d'un failli, qui en est aussi le créancier, de s'abstenir de régler au complet la dette qu'il a envers la faillite, de crainte que celle-ci ne règle qu'une partie, et encore, de la dette du failli. La compensation n'est qu'un moyen de défense opposable au paiement d'une créance; elle n'est pas un moyen de valider des instruments de garantie créés par la loi, qui ont pour effet de garantir les réclamations de *tierces parties* sur l'actif de la faillite. . . [Souligné dans l'original; par. 73.]

Les conditions d'application de la compensation mises en évidence dans *Husky Oil* sont respectées par l'art. 316 LATMP. Seul l'employeur qui a payé peut invoquer son droit de retenue. Il ne s'agit pas, comme dans *Husky Oil*, d'un paiement réputé ou d'un cas où l'employeur agit comme simple agent. Il ne s'agit pas non plus, comme le plaide le syndic, d'un droit de retenue qui naîtrait sous condition suspensive. Le droit qui résulte du paiement subrogatoire ne naît qu'avec le paiement lui-même. Mestre dit de cette règle qu'elle est « d'évidence, et résulte de l'esprit même de

created for the benefit of those who pay the debts of others" (p. 374, No. 321). Subject to the right under the BIA to make a contingent claim (s. 135 BIA), a warrantor cannot file a proof of claim before payment: Trib. corr. Auxerre, February 24, 1953, *Rev. gén. ass. terr.* 1953.190 (*Mayet et Destoumieux v. Faillot*). The employer/warrantor may not exercise any right against the contractor/debtor before he or she has paid the CSST, the original creditor. In civil law terms, subrogatory rights cannot be conferred under a suspensive condition: Mestre, at p. 375, No. 322. The claim accrues to the employer at the time of payment, and not by reason of the fact that the employer might be liable to pay should the contractor fail to do so. Moreover, no right is granted to the CSST, as a third party, to the detriment of the body of creditors. The CSST is not affected by the employer's right to collect. From the perspective of *Husky Oil*, the mechanism of s. 316 AIAOD is compatible with the BIA.

2.1.4 Equitable Set-off

The trustee also argues that equitable set-off applies in bankruptcy in Quebec and leads to the same conflict as in *Husky Oil*. The trustee points out that the Court of Appeal has incorporated equitable set-off into Quebec civil law: *Structal (1982) inc. v. Fernand Gilbert ltée*, [1998] R.J.Q. 2686.

The applicability of equitable set-off was questionable even before the *Federal Law–Civil Law Harmonization Act, No. 1*: Bélanger, at p. 153; A. Bélanger, "L'application en droit civil québécois de l'inapplicable *equitable set-off* de *common law*" (1999), 78 *Can. Bar Rev.* 486; M. Lemieux, "La compensation dans un contexte de proposition et de faillite" (1999), 59 *R. du B.* 321. Since that Act came into force, however, it has been clear that s. 97(3) BIA must be applied in Quebec on the basis of civil law and not common law rules. Equitable set-off cannot make up for the non-application of civil law compensation and cannot be introduced into Quebec law by s. 97(3) BIA. In Quebec, the suppletive law is Quebec civil law and, more

l'institution, créée au profit de celui qui acquitte la dette d'autrui » (p. 374, n° 321). Sous réserve du droit prévu à la LFI de produire une réclamation éventuelle (art. 135 LFI), le garant ne peut pas produire de preuve de réclamation avant le paiement : Trib. corr. Auxerre, 24 février 1953, *Rev. gén. ass. terr.* 1953.190 (*Mayet et Destoumieux c. Faillot*). L'employeur/garant ne peut exercer aucun droit contre l'entrepreneur/débiteur avant d'avoir payé la CSST, créancier originel. Aux termes des mécanismes du droit civil, il n'existe pas de droit subrogatoire conféré sous condition suspensive : Mestre, p. 375, n° 322. Le droit de créance échoit à l'employeur au moment du paiement et non en raison du fait qu'il serait éventuellement tenu au paiement si l'entrepreneur faisait défaut. De plus, aucun droit n'est accordé à la CSST, comme tierce partie, au détriment de la masse des créanciers. La CSST n'est pas affectée par ce droit de recouvrement de l'employeur. Vu sous le prisme de l'arrêt *Husky Oil*, le mécanisme de l'art. 316 LATMP est compatible avec la LFI.

2.1.4 La compensation en equity

63 Le syndic plaide aussi que le recours à la compensation en equity, selon lui applicable en matière de faillite au Québec, conduit au même conflit que celui observé dans *Husky Oil*. Il signale que la Cour d'appel a intégré ce mécanisme au droit civil québécois : *Structal (1982) inc. c. Fernand Gilbert ltée*, [1998] R.J.Q. 2686.

64 La compensation en equity était déjà d'application douteuse avant la *Loi d'harmonisation n° 1 du droit fédéral avec le droit civil* : Bélanger, p. 153; A. Bélanger, « L'application en droit civil québécois de l'inapplicable *equitable set-off* de *common law* » (1999), 78 *R. du B. can.* 486; M. Lemieux, « La compensation dans un contexte de proposition et de faillite » (1999), 59 *R. du B.* 321. Or, depuis la promulgation de cette loi, il est clair qu'il faut appliquer le par. 97(3) LFI au Québec en ayant recours aux règles du droit civil et non à celles de la common law. La compensation en equity ne peut palier l'inapplication de la compensation du droit civil et ne peut être introduite au Québec par le par. 97(3) LFI. Le droit supplétif au Québec est le droit

specifically in this case, the rules governing compensation under the C.C.Q.

65 In short, the third paragraph of s. 316 AIAOD does nothing more than confirm the employer's right to be reimbursed, be it by filing a proof of claim under s. 121 BIA or by setting up compensation in accordance with s. 97(3) BIA. These two means are provided for in the BIA. Section 316 AIAOD grants no more rights than are permitted under the BIA. In no case is the scheme of distribution subverted.

2.2 *The Mechanism of Section 54 ALRCI*

66 The trustee also seeks to have s. 54 ALRCI declared inapplicable. This provision reads as follows:

> **54.** The wages due by a sub-contractor constitute a solidary obligation between the sub-contractor and the contractor with whom he has contracted, and between the sub-contractor, the sub-contractor with whom he has contracted, the contractor and every intermediary sub-contractor.
>
> Where the employer holds the appropriate licence issued under the Building Act (chapter B-1.1), such solidary obligation is extinguished six months after the end of the work carried out by the employer, unless the employee concerned filed a complaint with the Commission concerning his wages, a civil action was brought, or a claim was sent by the Commission pursuant to the third paragraph of subsection 1 of section 122 before the expiry of the six-month period.
>
> Such solidary obligation extends to the client having contracted, directly or through an intermediary, with a contractor who does not hold the appropriate licence issued under the Building Act, in respect of the wages due by the contractor and each of his sub-contractors.

67 Unlike the AIAOD, which grants a right to reimbursement and a right to retain without actually referring to the mechanism under the Civil Code, the ALRCI, by using the expression "solidary obligation", characterizes the obligation in terms that explicitly incorporate the rights and obligations provided for in the C.C.Q.'s provisions on solidarity.

civil québécois et plus spécifiquement ici, les règles sur la compensation prévue au C.c.Q.

En somme, le droit consacré par le troisième alinéa de l'art. 316 LATMP n'est rien d'autre que la reconnaissance du droit de l'employeur de se faire rembourser, que ce soit par le mécanisme du dépôt d'une preuve de réclamation prévu à l'art. 121 LFI ou par une défense de compensation conformément au par. 97(3) LFI. Ces deux moyens sont formulés à la LFI. L'article 316 LATMP n'accorde pas plus de droit que ceux qui sont autorisés par la LFI. En aucun cas, le plan de répartition n'est enfreint.

2.2 *Le mécanisme de l'art. 54 LRTIC*

Le syndic cherche aussi à faire déclarer inapplicable l'art. 54 LRTIC. Cette disposition se lit :

> **54.** Le salaire dû par un sous-entrepreneur est une obligation solidaire entre ce sous-entrepreneur et l'entrepreneur avec qui il a contracté, et entre ce sous-entrepreneur, le sous-entrepreneur avec qui il a contracté, l'entrepreneur et tout sous-entrepreneur intermédiaire.
>
> Lorsque l'employeur est titulaire de la licence requise en vertu de la Loi sur le bâtiment (chapitre B-1.1), cette solidarité prend fin six mois après la fin des travaux exécutés par cet employeur, à moins que le salarié n'ait déposé, auprès de la Commission, une plainte relative à son salaire, qu'une action civile n'ait été intentée, ou qu'une réclamation n'ait été transmise par la Commission suivant le troisième alinéa du paragraphe 1° de l'article 122 avant l'expiration de ce délai.
>
> Cette solidarité s'étend aussi au client qui a contracté directement ou par intermédiaire avec un entrepreneur qui n'est pas titulaire de la licence requise en vertu de la Loi sur le bâtiment, à l'égard du salaire dû par cet entrepreneur et par chacun de ses sous-entrepreneurs.

À la différence de la LATMP qui accorde un droit de remboursement et de retenue sans renvoi formel au mécanisme du Code civil, la LRTIC, en utilisant l'expression « obligation solidaire », caractérise l'obligation dans des termes qui incorporent explicitement les droits et obligations prévues aux dispositions du C.c.Q. régissant la solidarité.

The CCQ's solidary remedy entitles it to claim the amount of the wages from either the employer or the contractor, as it chooses. This is the effect of art. 1523 C.C.Q.:

> **1523.** An obligation is solidary between the debtors where they are obligated to the creditor for the same thing in such a way that each of them may be compelled separately to perform the whole obligation and where performance by a single debtor releases the others towards the creditor.

An employer who pays the wages of a contractor's employees may demand to be reimbursed by the contractor pursuant to art. 1536 C.C.Q.:

> **1536.** A solidary debtor who has performed the obligation may not recover from his co-debtors more than their respective shares, although he is subrogated to the rights of the creditor.

With regard to the employer's liability under s. 54 ALRCI, it is clear that the contractor remains ultimately liable for the entire debt. The employer may therefore recover the total amount paid to the CCQ from the contractor. Moreover, an employer who pays the CCQ may also, as is the case for payments to the CSST, rely on legal subrogation pursuant to para. (3) of art. 1656 C.C.Q.:

> **1656.** Subrogation takes place by operation of law
>
> . . .
>
> (3) in favour of a person who pays a debt to which he is bound with others or for others and which he has an interest in paying;

By virtue of the solidary obligation imposed by s. 54 ALRCI, together with the recursory action and subrogation, the employer may claim the amount paid to the CCQ from the contractor.

If the payment is made before the bankruptcy, the above reasoning concerning the right to retain under s. 316 AIAOD applies. Where an employer is in debt to the contractor and the debt meets the conditions for legal compensation, the mutual debts are extinguished by operation of law up to the amount

68 Le recours solidaire dont bénéficie la CCQ lui donne le droit de réclamer le montant des salaires à son choix de l'employeur ou de l'entrepreneur, tel qu'il ressort de l'art. 1523 C.c.Q. :

> **1523.** L'obligation est solidaire entre les débiteurs lorsqu'ils sont obligés à une même chose envers le créancier, de manière que chacun puisse être séparément contraint pour la totalité de l'obligation, et que l'exécution par un seul libère les autres envers le créancier.

69 L'employeur qui paye les salaires des employés de l'entrepreneur peut lui en réclamer le remboursement suivant l'art. 1536 C.c.Q. :

> **1536.** Le débiteur solidaire qui a exécuté l'obligation ne peut répéter de ses codébiteurs que leur part respective dans celle-ci, encore qu'il soit subrogé aux droits du créancier.

Dans le cas de la responsabilité de l'employeur aux termes de l'art. 54 LRTIC, il est clair que l'obligation ultime demeure celle de l'entrepreneur et ce, pour la totalité de la dette. L'employeur peut donc répéter de l'entrepreneur le montant total payé à la CCQ. Par ailleurs, l'employeur qui paie la CCQ, comme c'était le cas pour le paiement à la CSST, peut aussi se réclamer de la subrogation légale aux termes du par. 3° de l'art. 1656 C.c.Q. :

> **1656.** La subrogation s'opère par le seul effet de la loi :
>
> . . .
>
> 3° Au profit de celui qui paie une dette à laquelle il est tenu avec d'autres ou pour d'autres et qu'il a intérêt à acquitter;

70 En raison de l'obligation solidaire qui lui est faite par l'art. 54 LRTIC, du recours récursoire et de la subrogation, l'employeur peut réclamer de l'entrepreneur le montant payé à la CCQ.

71 Si le paiement est fait avant la faillite, le raisonnement tenu ci-haut concernant le droit de retenue conféré par l'art. 316 LATMP s'applique. Dans le cas où l'employeur est lui-même endetté envers l'entrepreneur et où cette dette remplit les conditions de la compensation légale, les dettes

of the lesser debt (arts. 1672 and 1673 C.C.Q.). In such a case, the patrimony vested in the trustee at the time of bankruptcy does not include the bankrupt's claim, which has been extinguished by legal compensation. Where the payment is made before the bankruptcy but the contractor's claim is not liquid, employers may avail themselves of s. 97(3) BIA to effect compensation between the amounts they owe and the amounts owed to them.

72 In the case of a post-bankruptcy payment to the CCQ, the employer will have to prove his or her claim against the estate in accordance with the rules of s. 121 BIA. Even if the employer is in debt to the bankrupt, the BIA does not allow the claim to be transferred to the detriment of the creditors. The BIA does not depart from the rules established by arts. 1651 and 1681 C.C.Q., which provide that subrogation does not give the subrogated person any more rights than the subrogating creditor and that compensation may not be effected to the prejudice of third persons. The employer is thus limited to proving the claim without being able to set up compensation for payments made after the bankruptcy.

73 The rules of the C.C.Q. with respect to subrogation add no new security and create no additional debts as regards the bankrupt. The impugned provisions violate neither the letter nor the spirit of *Husky Oil*. It should be noted that in that case, what was at issue was a mechanism by which employers could withhold amounts owed to debtors before being held personally liable for paying the assessments. In a way, the employer acted as a collection agent for the Workers' Compensation Board. The same is not true in the case of the ALRCI, which provides that employers are personally liable for wages not paid by their contractors.

3. Conclusion

74 This case was submitted to the Superior Court as a motion for directions in which a ruling was sought on the legal effect of s. 316 AIAOD and s. 54 ALRCI in the context of the BIA. The relevant questions of law have been addressed above. As mentioned in the facts related at the beginning of

réciproques sont éteintes de plein droit jusqu'à concurrence de la moindre (art. 1672 et 1673 C.c.Q.). En ce cas le patrimoine dévolu au syndic au moment de la faillite ne compte pas la créance du failli qui est éteinte par la compensation légale. Si le paiement est fait avant la faillite mais la créance de l'entrepreneur n'est pas liquide, l'employeur pourra se prévaloir du par. 97(3) LFI pour opposer compensation entre les sommes qu'il doit et celles qui lui sont dues.

Si le paiement à la CCQ est postérieur à la faillite, l'employeur devra prouver sa réclamation contre l'actif selon les règles de l'art. 121 LFI. En effet, même si l'employeur est lui-même endetté envers le failli, la LFI ne prévoit pas que la créance puisse être transférée au détriment des créanciers. La LFI n'écarte pas les règles des art. 1651 et 1681 C.c.Q. qui énoncent que la subrogation ne confère pas au subrogé plus de droits que n'en avait le subrogeant et que la compensation ne peut opérer au préjudice des tiers. L'employeur est donc limité à prouver sa réclamation sans pouvoir opposer compensation pour les paiements faits après la faillite.

Les règles du C.c.Q. concernant la subrogation n'ajoutent pas de nouvelle garantie et ne créent pas de dettes additionnelles à l'égard du failli. Les dispositions contestées n'enfreignent ni la lettre ni l'esprit de l'arrêt *Husky Oil*. Je rappelle que dans cet arrêt, la critique visait un mécanisme par lequel l'employeur pouvait retenir les sommes dues au débiteur avant d'être tenu personnellement de payer les cotisations. Il agissait en quelque sorte comme agent percepteur du Workers' Compensation Board. Tel n'est pas le cas en vertu de la LRTIC qui prévoit que l'employeur est personnellement responsable des salaires impayés par l'entrepreneur.

3. Conclusion

Le dossier a été soumis à la Cour supérieure sous forme de requête pour directives demandant de statuer sur l'effet juridique des art. 316 LATMP et 54 LRTIC dans le contexte de la LFI. Il s'agit là des questions de droit qui sont traitées ci-dessus. Par ailleurs, comme l'illustre les faits relatés au début

these reasons, the payments made by the employers, with the exception of Chenail's payment to the CCQ, were not made before the bankruptcy. The principles stated above will apply in determining the employers' rights, and there is no need to consider the specific facts of each case, especially since the employers have chosen not to take part in the debate.

For these reasons, I would allow the appeal, answer the two constitutional questions in the negative, restore the judgment of the Superior Court and dismiss the trustee's motion, with costs against the estate.

Appeal allowed with costs.

Solicitor for the appellant the Attorney General of Quebec: Department of Justice, Québec.

Solicitors for the appellant Commission de la construction du Québec: Ménard, Corriveau, Montréal.

Solicitors for the appellant Commission de la santé et de la sécurité du travail: Panneton, Lessard, Québec.

Solicitors for the respondent: Blake, Cassels & Graydon, Montréal.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

des motifs, sauf pour Chenail à l'égard de la CCQ, les employeurs n'ont pas fait les paiements avant la faillite. Leurs droits seront régis par les principes ici énoncés et il n'est pas nécessaire de se pencher sur les faits spécifiques à chaque cas, d'autant plus que les employeurs ont choisi de ne pas participer au débat.

75

Pour ces motifs, je suis d'avis d'accueillir l'appel, de répondre par la négative aux deux questions constitutionnelles, de rétablir le jugement de la Cour supérieure et de rejeter la requête du syndic, le tout avec dépens contre la masse.

Pourvoi accueilli avec dépens.

Procureur de l'appelant le procureur général du Québec : Ministère de la Justice, Québec.

Procureurs de l'appelante la Commission de la construction du Québec : Ménard, Corriveau, Montréal.

Procureurs de l'appelante la Commission de la santé et de la sécurité du travail : Panneton, Lessard, Québec.

Procureurs de l'intimée : Blake, Cassels & Graydon, Montréal.

Procureur de l'intervenant : Procureur général de l'Ontario, Toronto.

Fleming v. Massey et al.
[Indexed as: Fleming v. Massey]

Ontario Reports

Court of Appeal for Ontario,

Feldman, Juriansz and D.M. Brown JJ.A.

January 26, 2016

2016 ONCA 70 (CanLII)

128 O.R. (3d) 401 | 2016 ONCA 70

Case Summary

Workers compensation — Actions — Waiver — Employee who fell under Part X of Workplace Safety and Insurance Act ("WSIA") signing waiver releasing employer from liability for damages — Waiver void — Permitting individuals to contract out of provisions of Part X of WSIA contrary to public policy — Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sch. A.

The plaintiff was injured while working as a go-kart race director when a driver crashed into hay bales lining a corner of the track. The plaintiff had signed a waiver which purported to release his employer from liability for damages associated with participation in the event due to any cause. The plaintiff, who was an employee who fell under Part X of the *Workplace Safety and Insurance Act, 1997*, sued for damages for personal injuries. The trial judge granted summary judgment dismissing the action based on the waiver. The plaintiff appealed.

Held, the appeal should be allowed.

Absent some legislative indication to the contrary, it would be contrary to public policy to allow individuals to contract out of the protection of Part X of the *WSIA*. There is no legislative indication to the contrary. While Part X of the Act contains no provision equivalent to s. 16 of the Act, which prohibits waiving the entitlement to benefits under the insurance plan, the canon of construction *expressio unius est exclusio alterius* did not apply. The objective of the *WSIA* is to ensure that injured workers have access to compensation. The *WSIA* employs two different means to accomplish that objective. The first means provides workers with an insurance plan and completely eliminates workers' civil actions. In the part of the Act dealing with the first means, it was necessary to prohibit only the waiver of benefits under the insurance plan. The second means, Part X, makes numerous changes to the common law to achieve the same statutory objective by providing workers with rights of action for damages. Applying the implied exclusion principle to s. 16 to infer that a worker can waive the rights provided by Part X would fundamentally undermine what the legislature was trying to achieve in Part X. Section 116(1) of the *WSIA* provides that an injured worker shall not be considered to have voluntarily incurred the risk of injury in his or her employment solely on the grounds that, before he or she was injured, he or she knew about the defect or negligence that caused the injury. Understanding the word "solely" in s. 116(1) to indicate that the legislature intended to allow a worker, by clear waiver, to

voluntarily assume the risk of injury does not sit well with s. 116(2), which provides that an injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers. The common law principle was that a servant assumed all of the ordinary risks incident to his or her employment. Section 116(1) must be interpreted as a categorical rejection of the common law approach to the voluntary assumption of risk, rather than as allowing workers to contract out of Part X. [page402]

2016 ONCA 70 (CanLII)

Cases referred to

A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency, [2007] 3 S.C.R. 217, [2007] S.C.J. No. 42, 2007 SCC 42, 287 D.L.R. (4th) 4, 367 N.R. 264, J.E. 2007-1894, [2008] 1 C.T.C. 32, 2007 D.T.C. 5527, EYB 2007-124583, 160 A.C.W.S. (3d) 567; *Dunn v. Malone* (1903), 6 O.L.R. 484, [1903] O.J. No. 180 (Div. Ct.); *Hall v. Hebert*, [1993] 2 S.C.R. 159, [1993] S.C.J. No. 51, 101 D.L.R. (4th) 129, 152 N.R. 321, [1993] 4 W.W.R. 113, J.E. 93-903, 26 B.C.A.C. 161, 78 B.C.L.R. (2d) 113, 15 C.C.L.T. (2d) 93, 45 M.V.R. (2d) 1, 39 A.C.W.S. (3d) 1080; *Jamieson v. Harris* (1905), 35 S.C.R. 625, [1905] S.C.J. No. 15; *Jones v. New Brunswick (Attorney General)*, [1975] 2 S.C.R. 182, [1974] S.C.J. No. 91, 45 D.L.R. (3d) 583, 1 N.R. 582, 7 N.B.R. (2d) 526, 16 C.C.C. (2d) 297; *Manor v. Marshall*, [1955] O.R. 586, [1955] O.J. No. 574, [1955] 4 D.L.R. 584, [1955] O.W.N. 577 (C.A.); *Niedermeyer v. Charlton*, [2014] B.C.J. No. 763, 2014 BCCA 165, 355 B.C.A.C. 136, [2014] I.L.R. I-5600, 57 B.C.L.R. (5th) 71, [2014] 7 W.W.R. 753, 374 D.L.R. (4th) 79, 11 C.C.L.T. (4th) 60, 64 M.V.R. (6th) 183, 239 A.C.W.S. (3d) 811 (C.A.); *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, [1982] S.C.J. No. 2, 132 D.L.R. (3d) 14, 40 N.R. 159, J.E. 82-193, 82 CLLC Â17,005 at 1037, 3 C.H.R.R. D/781, 13 A.C.W.S. (2d) 1; *Priestley v. Fowler* (1837), 150 E.R. 1030, [1835-1842] All E.R. Rep. 449 (Exch.); *R. v. Roma*, [1942] B.C.J. No. 92, [1943] 1 D.L.R. 238, [1942] 3 W.W.R. 525, 78 C.C.C. 340 (S.C.); *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, [1929] S.C.J. No. 56, [1929] 4 D.L.R. 1028, 11 C.B.R. 205; *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, 208 D.L.R. (4th) 459, 151 O.A.C. 286, 2002 D.T.C. 6817, 110 A.C.W.S. (3d) 146 (C.A.); *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, [1985] S.C.J. No. 50, 21 D.L.R. (4th) 1, 61 N.R. 241, [1985] 6 W.W.R. 166, J.E. 85-893; 38 Man. R. (2d) 1, 15 Admin. L.R. 177, 8 C.C.E.L. 105, 85 CLLC 16167, 85 CLLC para. 17,020 at 16167 , 33 A.C.W.S. (2d) 1

Statutes referred to

Government Vessels Discipline Act, R.S.C. 1927, c. 203

Interest Act, 1897

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sch. A [as am.], s. 1 [as am.], Part III [as am.], ss. 16, 26(1), (2) [as am.], 28, 29, 31, Part X, ss. 113(1), 114, (1), (1)1, (1)2, (1)3, 115, 116(1), (2), (3), 117

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2016 ONCA 70 (CanLII)

APPEAL from the judgment of Byers J., [2014] O.J. No. 6196 (S.C.J.) dismissing an action for damages for personal injuries.

Paul J. Pape and *Joanna Nairn*, for appellant.

M. Susan Guzzo and *Katarina Germani*, for respondents. [page403]

The judgment of the court was delivered by

[1] **JURIANSZ J.A.**: — This is an appeal from a summary judgment dismissing the appellant's action against the respondents in which he sought damages for injuries suffered at a go-kart race at which he was the race director. The respondents are Andrew Massey, who drove the go-kart that injured the appellant; Lombardy Raceway Park, the track where the accident occurred; Lombardy Karting, which co-organized the race event; the National Capital Kart Club, which co-organized the race event and which arranged for Mr. Fleming to act as race director; and Lombardy Agricultural Society, which owns the property on which the track operated.

[2] On October 3, 2010, the respondents Lombardy Karting and the National Capital Kart Club held a go-kart event. During such events, a race director is required. Since the regular race director was not available, the appellant Derek Fleming filled the role. Mr. Massey was driving a go-kart that day and crashed into hay bales lining a corner of the track. Mr. Fleming was injured in the accident. The respondents argued that the appellant had signed a waiver releasing the respondents from liability for all damages associated with participation in the event due to any cause, including negligence.

[3] In brief reasons, the motion judge found that the appellant was not an employee but rather a volunteer who received a stipend, that he signed the waiver, that he knew generally what signing the waiver would mean and that the wording of the waiver was broad enough to cover all eventualities.

[4] The appellant submitted that the motion judge erred in finding the appellant understood the effect of the waiver when he signed it. While the appellant stated on discovery that he understood the effect of a waiver, counsel urged his evidence be interpreted to say he learned

what a waiver was during the litigation process. I am satisfied the record considered as a whole amply supports the conclusion the appellant signed the waiver knowing it was a legal document affecting his rights and that in all the circumstances the respondents could reasonably assume he understood and consented to it.

A. *The Public Policy Argument*

[5] The appellant's main submission is that the waiver was void because it violated public policy, as the appellant was an employee. Before us, the appellant recast the argument to rely on the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A ("*WSIA*"), [page404] a statute that he did not rely on before the motion judge.

[6] I agree with the appellant's argument that the motion judge erred in finding the appellant was not an employee. On discovery, the representative of the National Capital Kart Club admitted the appellant was a paid employee on the day of the accident. The respondents do not resile from that admission. I proceed to consider whether the waiver signed by the appellant is voided by the public policy of the *WSIA* because he signed it as an employee.

[7] The parties agree that the appellant is not an insured worker under the Act. That is because go-kart tracks are classified as "non-covered" by the Workplace Safety and Insurance Board and workers at such facilities are not insured unless the employer has applied for *WSIA* coverage. The respondent track has not applied for coverage. Consequently, the respondent track and the appellant fall under Part X of the Act. Section 113(1) provides:

> 113(1) [Part X] applies with respect to industries that are not included in Schedule 1 or Schedule 2 and with respect to workers employed in those industries.

[8] Workers under Part X, unlike insured workers, are allowed to sue their employers for workplace accidents. Section 114(1) provides:

> 114(1) A worker may bring an action for damages against his or her employer for an injury that occurs in any of the following circumstances:
>
> 1. The worker is injured by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business.
> 2. The worker is injured by reason of the employer's negligence.
> 3. The worker is injured by reason of the negligence of a person in the employer's service who is acting within the scope of his or her employment.

[9] The appellant submits that public policy prevents workers from contracting out of the protection afforded by s. 114. That public policy, explicitly stated in s. 1 of the Act, includes ensuring employees injured in workplace accidents receive compensation. The appellant submits that allowing Part X employers to require their employees to waive their right to seek compensation would frustrate this public policy goal. In advancing the argument, the appellant relies on the following proposition from *Halsbury's Laws of England*, 3rd ed., Vol. 36, that the Supreme Court of Canada cited with approval in its decision in [page405] *Ontario (Human*

2016 ONCA 70 (CanLII)

Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202, [1982] S.C.J. No. 2:

> 421. Contracting out. As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.
>
> By way of example of an exception to the general rule, *an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee*.

(Emphasis added)

[10] The appellant submits the waiver he signed should be declared void given the importance of the public policy in favour of workers' compensation.

[11] It must be said that the appellant did not make this argument to the motion judge, and that before us it was advanced only on a general level. Nevertheless, the argument raises an important question of public policy and we entertained it. After the hearing, it was necessary to ask the parties for written submissions on particular provisions of the statute.

[12] I begin with an overview of the legislation, including a review of its history.

(1) *Overview of the WSIA*

[13] At common law, before the advent of workers' compensation schemes, a worker's action against an employer to recover damages for an injury suffered in the workplace faced formidable hurdles.

[14] First, there was the doctrine of voluntary assumption of risk. The common law presumed the worker voluntarily assumed the ordinary risks of his or her employment. At common law, it is an implied term of a contract of service "that a servant takes upon himself the risks incidental to his employment": *Halsbury's Laws of England*, 2nd ed., Vol. 22, p. 176, s. 296. See, also, this court's decision in *Manor v. Marshall*, [1955] O.R. 586, [1955] O.J. No. 574, [1955] 4 D.L.R. 584 (C.A.).

[15] Second, the doctrine of common employment meant that the employer was not liable for a worker's injury that resulted from the negligence of a co-worker: *Priestley v. Fowler* (1837), 150 E.R. 1030, [1835-1842] All E.R. Rep. 449 (Exch.). [page406]

[16] Third, the employer was not responsible for workplace injuries caused by defects in machinery, equipment or tools used in the workplace.

[17] Fourth, in accordance with the general common law tort principle regarding contributory negligence, an injured worker who was just slightly negligent was barred any recovery from the employer: *Hall v. Hebert*, [1993] 2 S.C.R. 159, [1993] S.C.J. No. 51, at p. 205 S.C.R.

2016 ONCA 70 (CanLII)

[18] Fifth, in order for a worker's action to be successful, the worker had to prove the employer's personal negligence was the direct and proximate cause of the injury: *Jamieson v. Harris* (1905), 35 S.C.R. 625, [1905] S.C.J. No. 15.

[19] An older version of *Halsbury's* provided a concise summary of the common law:

> It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment. Apart from special contract or statute, therefore, he cannot call upon his master, merely upon the ground of their relation of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties, whether in consequence of the dangerous character of the work upon which he is engaged, or of the breakdown of machinery, or of the negligence or default of his fellow servants or strangers. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents.

(*Halsbury's Laws of England*, 2nd ed., Vol. 22, p. 176, s. 296)

[20] The common law's treatment of workplace injuries meant a great many workers and their survivors were unable to recover medical expenses, lost wages or damages. Workers voluntarily assumed the ordinary risks of their employment.

[21] The legislature responded in 1914 by enacting workers' compensation legislation. The overarching purpose of the legislation was to provide compensation and other benefits to workers injured at work regardless of fault. The main thrust of the legislation was to set up an administrative scheme that provided no-fault loss of earnings benefits for workplace injuries that completely displaced all common law rights of action that workers may have had against their employer. A small minority of workers were not included in the general scheme. They were given access to new statutory rights of action for damages.

[22] While the legislation has been amended many times, the basic scheme remains much the same. The *WSIA* is its present incarnation. Under the *WSIA*, the general rule is that an insurance fund guarantees payment of benefits to workers who suffer injuries in the workplace no matter how the injuries are caused. Employers fund the insurance plan. The scheme is administered by an independent agency. There are Schedule 1 [page407] and Schedule 2 employers. Employers in Schedule 1 industries are liable to contribute to the insurance fund and employers in Schedule 2 are individually liable to pay benefits under the insurance plan under the Act's general provisions.

[23] In exchange for certain and secure compensation for their injuries, workers in Schedule 1 and Schedule 2 industries give up their right to sue their employer for their injuries. Several sections of the Act provide for this trade-off. Section 26(1) provides that "[n]o action lies to obtain benefits under the insurance plan", but all claims for benefits will be determined by the board that administers the Act. Section 26(2) provides that "[e]ntitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise)" that a worker has or may have against the employer for or by reason of a workplace accident. Section 28 provides that workers are not entitled to commence an action against a Schedule 1 or Schedule 2 employer. Section 29 provides that an employer who is found to be at fault or negligent in respect of an

2016 ONCA 70 (CanLII)

accident or disease that gives rise to entitlement to benefits under the Act is not liable to pay any damages to a worker or to contribute to or indemnify another person who may be liable to pay such damages. Section 31 of the Act provides the appeals tribunal, established by the Act, the exclusive jurisdiction to determine whether the Act takes away a worker's right to commence an action.

[24] In short, the legislation makes absolutely clear that the general scheme that provides no-fault loss of earnings benefits to workers completely displaces all common law rights of action that workers may have had against their employer.

[25] Part X of the *WSIA* is a small exception to this general scheme. Part X applies to the small number of workers not employed in either Schedule 1 or Schedule 2 industries. Employers under Part X neither contribute to the insurance fund nor are liable to pay benefits. Rather, Part X provides workers with certain statutory rights of action for damages that abrogate some of the common law doctrines that restricted a worker's right to recover.

[26] First, s. 114(1)1 allows a worker to sue the employer for an injury resulting from "a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business". Second, s. 114(1)3 allows the worker to sue the employer for an injury caused by the negligence of persons in the employer's service acting within their scope of employment. Third, in some circumstances s. 115 allows an injured worker to sue the person for whom work is being done under a contract and the [page408] contractor and subcontractor, if any. Fourth, s. 116(3) provides that "contributory negligence by the worker is not a bar to recovery". Fifth, s. 116(2) provides that "[a]n injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers". Sixth, s. 116(1) curtails the common law doctrine of voluntary assumption of risk, but does not eliminate it. Section 114(1)2, which provides a worker may bring an action against his or her employer when injured by the employer's negligence, should also be noted. When considered in the context of the above-mentioned provisions, s. 114(1)2 allows a much broader action for an employer's negligence than was possible at common law.

[27] The legislation contains an additional measure to ensure workers receive the damages awarded. Section 117 of the *WSIA* deems any employer's insurance for its liability for damages to be for the benefit of the worker, and prohibits an insurer from paying insurance proceeds to the employer without the consent of the worker until the worker's claim has been satisfied.

[28] Plainly, Part X's statutory actions serve the general public policy of the *WISA* to ensure workers receive compensation for injuries they suffer in the workplace.

(2) *Interim conclusion*

[29] In my view, absent some legislative indication to the contrary, it would be contrary to public policy to allow individuals to contract out of the protection of the *WSIA*.

[30] *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, *supra*, and *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, [1985] S.C.J. No. 50, 21 D.L.R. (4th) 1, two cases in which the Supreme Court concluded individuals could not contract out of a particular public statute, both involved human rights codes. However, McIntyre J., writing for the

2016 ONCA 70 (CanLII)

unanimous court in *Etobicoke*, used language that makes clear the principle isn't limited to human rights legislation. He said, at pp. 213-14 S.C.R.:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.
>
> . . . . .
>
> *The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its [page409] individual members and clearly falls within that category of enactment which may not be waived or varied by private contract[.]

[31] In supporting his conclusion, McIntyre J. cited *R. v. Roma*, [1942] B.C.J. No. 92, [1942] 3 W.W.R. 525 (S.C.), a decision of the British Columbia Supreme Court in which Robertson J. found the *Government Vessels Discipline Act*, R.S.C. 1927, c. 203 to be [at para. 6] "a public Act designed as a matter of public policy to protect all seamen proposing to engage in service on government vessels" and that its provisions accordingly could not be waived.

[32] McIntyre J. also cited *Dunn v. Malone* (1903), 6 O.L.R. 484, [1903] O.J. No. 180 (Div. Ct.), a decision of the Divisional Court that concluded that the *Interest Act, 1897* was enacted on public policy grounds for the benefit of borrowers and its application could not be waived.

[33] Recently, the British Columbia Court of Appeal held that, given that the province had enacted a comprehensive universal automobile insurance scheme, it would be contrary to public policy to allow an owner/operator of a motor vehicle to contract out of liability for damages for injuries sustained in a motor vehicle accident. N.J. Garson J.A., writing for the majority in *Niedermeyer v. Charlton*, [2014] B.C.J. No. 763, 2014 BCCA 165, 374 D.L.R. (4th) 79, at para. 114, concluded:

> In my view, the ICBC regime is intended as a benefit for the public interest just as is human rights legislation. It would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow private parties to contract out of this regime. As such, to the extent that the Release purports to release liability for motor vehicle accidents it is contrary to public policy and is unenforceable. The judge erred in finding that the public policy interest exemplified in a compulsory universal insurance scheme was incapable of defeating society's interest in freedom of contract.

[34] I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.

2016 ONCA 70 (CanLII)

[35] I turn now to a consideration of whether there is in the *WSIA* some contrary legislative indication.

(3) *Section 16*

[36] The legislature did address the subject of waiver in s. 16 of the Act. Section 16 is found in Part III of the Act, which deals [page410] with "Insured Employment". Section 16 prohibits waiving the entitlement to *benefits under the insurance plan*. The section provides:

> 16. An agreement between a worker and his or her employer to waive or to forego any benefit to which the worker or his or her survivors are or may become entitled under the insurance plan is void.

[37] By contrast, Part X of the Act contains no provision equivalent to s. 16. This raises the question whether the canon of construction *expressio unius est exclusio alterius*, *i.e.*, the implied exclusion principle, applies. Should the legislature's narrow focus in s. 16 on prohibiting waiver of only the benefits under the insurance plan be understood as an implicit indication that the legislature did not intend to prohibit the waiver of the rights of action available under Part X?

[38] This court applied the implied exclusion principle in *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, 208 D.L.R. (4th) 459 (C.A.). In that case, the court was faced with the question whether the network, created by the amalgamation of three health facilities, was exempt from paying retail sales tax. The court held that the inclusion of an explicit tax exemption in the amalgamation legislation of another health care facility and the absence of such an exemption in the amalgamation legislation of the network indicated that the legislature did not intend the network to have an exemption.

[39] Writing for the court, Laskin J.A. cited, at para. 30, a principle explained by Professor Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 168:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly.

[40] Laskin J.A. explained, at para. 31, that "legislative exclusion can be implied when an express reference is expected but absent".

[41] However, there are many cases in which the principal is not applied. The Supreme Court declined to apply the principle in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, [1929] S.C.J. No. 56, [1929] 4 D.L.R. 1028. Writing for the court, Newcombe J. recognized, at p. 71 S.C.R., that the principle could prove useful but also observed that "while it is often a valuable servant, it is a dangerous master to follow". The context must always be considered and general rules of interpretation are not always in [page411] the mind of the drafter "so the axiom is held not to be of universal application".

[42] In *Jones v. Canada (Attorney General)*, [1975] 2 S.C.R. 182, [1974] S.C.J. No. 91, 45 D.L.R. (3d) 583, at pp. 195-96 S.C.R., Laskin C.J.C., writing for the court, said:

2016 ONCA 70 (CanLII)

> Heavy reliance was placed by the appellant upon the canon of interpretation expressed in the maxim *expressio unius est exclusio alterius*. This maxim provides at the most merely a guide to interpretation; it does not pre-ordain conclusions.

[43] More recently, the Supreme Court declined to apply the principle in *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada Revenue Agency*, [2007] 3 S.C.R. 217, [2007] S.C.J. No. 42, 2007 SCC 42. Rothstein J. wrote, at para. 15, that "arguments based on implied meaning must be viewed with caution". He approved of Professor Sullivan's statement, at p. 266 of her book:

> While reliance on implied exclusion for this purpose [determining if a provision is exhaustive] can be helpful, it can also be misleading. What the courts are looking for is evidence that a particular provision is meant to be an exhaustive statement of the law concerning a matter. To show that the provision expressly or specifically addresses the matter is not enough.

(Footnote deleted)

[44] Rothstein J. reiterated, at para. 16, that the modern approach to statutory construction is "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".

[45] Reading the *WSIA* as a whole, it is apparent its objective is to ensure injured workers have access to compensation. It employs two different means to accomplish that objective. The first means provides workers with an insurance plan and completely eliminates workers' civil actions. In the part of the Act dealing with the first means, it was necessary to prohibit only the waiver of benefits under the insurance plan. The second means, Part X, makes numerous changes to the common law to achieve the same statutory objective by providing workers with rights of action for damages. It seems to me that applying the implied exclusion principle to s. 16 to infer a worker can waive the rights provided by Part X would fundamentally undermine what the legislature is trying to achieve in Part X.

[46] Hence, I would conclude that a reading of the Act as a whole does not support interpreting s. 16 as impliedly indicating that the legislature intended to permit the waiver of the statutory actions created by Part X. The two different means by [page412] which the object of the Act is secured must each be interpreted on its own terms.

(4) *Section 116(1)*

[47] Section 116(1) of the *WSIA* provides:

> 116(1) An injured worker shall not be considered to have voluntarily incurred the risk of injury in his or her employment *solely* on the grounds that, before he or she was injured, he or she knew about the defect or negligence that caused the injury.

(Emphasis added)

[48] The original version of s. 116(1) in the 1914 Act, s. 106(4), provided:

2016 ONCA 70 (CanLII)

> 106(4) A workman shall not by reason *only* of his continuing in the employment of the employer with knowledge of the defect or negligence which caused his injury be deemed to have voluntarily incurred the risk of the injury."

(Emphasis added)

[49] The word "only" has been included in every version of the legislation from 1914 until the *WSIA* was enacted using the word "solely". I see no difference in the import of the two words.

[50] At first glance, the word "solely" in the present statute and the word "only" in the earlier versions might be taken to indicate the legislature did not entirely eliminate the common law principle of a worker's voluntary assumption of the ordinary risks in the workplace, but merely limited it.

[51] Understanding the word "solely" in s. 116(1) to indicate that the legislature intended to allow a worker, by clear waiver, to voluntarily assume the risk of injury does not sit well with s. 116(2). Section 116(2) provides:

> 116(2) An injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers.

[52] The word "solely" does not appear in s. 116(2) of the present Act and the word "only" did not appear in earlier versions of the legislation. The legislative scheme would lack coherence and make little sense if it allowed a worker to voluntarily assume the risk of the employer's negligence but not a co-worker's negligence. This is particularly so because s. 114(1)3 makes the employer responsible for damages caused by the negligence of the co-worker.

[53] The key, in my view, is to consider again the common law principle that the legislation swept aside. The common law principle was that a servant assumed all of the ordinary risks incident to his or her employment. By entering upon and continuing [page413] in the employer's service, the servant was presumed to take upon himself or herself the natural and ordinary risks and perils of the work.

[54] Eric Tucker explained the rationale for this principle in "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984), 22:2 Osgoode Hall Law Journal 218:

> An employee who was aware of a particular risk would be deemed to have negotiated for compensation in order to incur that risk. The terms of the contract would reflect the parties' valuation of the risk and therefore it would be unjust and improper for the court to make the employer pay twice by shifting losses from the employee onto the employer.

[55] Tucker identifies this principle, at p. 236, as "[t]he doctrine that most strongly expressed the dominance of the contractual concept in regulating health and safety". The effect of the principle was that the "sole" or "only" basis on which the courts applied the voluntary assumption of risk doctrine was that the worker knew they were engaged in dangerous work. It seems to me that the inclusion of the word "solely" or "only" in various versions of the legislation must have been intended as an emphatic rejection of the common law principle that the worker's knowledge could be the sole or only basis for invoking the voluntary assumption of risk doctrine. Admittedly, the language is awkward. However, ascribing a different meaning to the words of s. 116(1) would construe the statute to permit a worker to contract out of an employer's

2016 ONCA 70 (CanLII)

negligence, but not the negligence of co-workers for which the statute makes the employer responsible. As Professor Sullivan notes, "[e]ven when the ordinary meaning of a legislative text is clear, the courts are obliged to look to other indicators of legislative meaning as part of the work of interpretation. The presumption in favour of ordinary meaning is rebutted by evidence that another meaning was intended or is more appropriate in the circumstances": *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), at p. 45. In the circumstances, s. 116(1) must be interpreted as a categorical rejection of the common law approach to the voluntary assumption of risk, rather than as allowing workers to contract out of Part X.

2016 ONCA 70 (CanLII)

(5) *Conclusion*

[56] Other than for ss. 16 and 116(1), there are no other provisions of the *WSIA* that could be taken to indicate a legislative intent to permit individuals to contract out of the statute's provisions. There being no legislative indication to the contrary, I conclude it would be contrary to public policy to allow individuals to contract out of the provisions of Part X of the *WSIA*. [page414]

[57] I would allow the appeal, set aside the order of the motion judge granting summary judgment and allow the appellant's action to proceed to trial.

[58] I would set aside the motion judge's costs order but make no other order as to costs. The appellant did not advance the *WSIA* argument before the motion judge and advanced it in this court in a cursory fashion. Moreover, this case involved a novel and important general point of law.

Appeal allowed.

End of Document

Harvey et al. v. Talon International Inc. Yim et al. v. Talon International Inc. [Indexed as: Harvey v. Talon International Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair, G.J. Epstein and Huscroft JJ.A.

March 31, 2017

137 O.R. (3d) 184 | 2017 ONCA 267

Case Summary

Limitations — Real property — Application for return of deposit paid toward purchase of condominium unit falling within definition of action for recovery of land under Real Property Limitations Act — Applicable limitation period being ten years — Real Property Limitations Act, R.S.O. 1990, c. L.15.

Real property — Condominiums — Rescission — Notice of rescission — Technical approach to interpretation of requirements for rescission of agreement of purchase and sale under s. 74(7) of Condominium Act inappropriate as Act is consumer protection legislation — Applicants complying with requirements of s. 74(7) when they advised respondent [page185] in writing of their intention to "terminate" transaction based on material changes to revised disclosure statement provided by respondent and requested return of their deposits — Condominium Act, 1998, S.O. 1998, c. 19, s. 74(7).

Several years after entering into their respective agreements of purchase and sale ("APS") for condominium units, the applicants each provided the respondent with a written notice of their intention to "terminate" the transaction based on material changes to the revised disclosure statement that the respondent had provided to them. Both requested the return of their deposits. The next day, Y had her lawyer send a follow-up e-mail to the respondent indicating that she was exercising her right to rescind the APS. The respondent did nothing in response to those communications. Both applicants brought applications for an order that the respondent return their deposits. As a preliminary matter, Y moved to amend her notice of application to add a request that the court declare that the APS had been rescinded. The respondent defended on the basis that the applicants' purported notices of rescission did not meet the requirements in s. 74(7) of the *Condominium Act, 1998*. In Y's case, the respondent also argued that she was seeking the amendment more than two years after the date on which her claim for statutory rescission was discovered, so that the amendment was statute-barred under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The application judge found that the ten-year limitation period in the *Real Property Limitations Act, 1998*, S.O 1998, c. 19 ("*RPLA*") applied. She permitted the amendment. Taking into account the fact that the *Condominium Act* is consumer protection legislation, she held that the notices sufficiently complied with the requirements of s. 74(7) of the Act. The applications were allowed. The respondent appealed.

2017 ONCA 267 (CanLII)

2017 ONCA 267 (CanLII)

Held, the appeal should be dismissed.

An application for the return of a deposit under the *Condominium Act* is an action to recover land under s. 4 of the *RPLA*. The definition of "land" in s. 1 of the *RPLA* includes "money to be laid out in the purchase of land". A deposit under the *Condominium Act* is "money laid out in the purchase of land". The application judge did not err in finding that the ten-year limitation period in the *RPLA* applied, and that Y's application was not statute-barred.

The application judge correctly took into account the fact that the *Condominium Act* is consumer protection legislation when considering the issue of the requirements for a notice of rescission under s. 74 of the Act. Consumer protection legislation must be interpreted generously in favour of the consumer. It is not necessary that a notice under s. 74 use the word "rescind" or "rescission". As long as the purchaser's intention to undo the transaction based on a material change is clear, that is sufficient. The application judge did not make any palpable and overriding errors in concluding that both applicants complied with the notice requirements of s. 74(7). While both applicants used the word "terminate" rather than "rescind", both requested the return of their deposits, which is a remedy consistent with rescission and not with repudiation. As well, both notices referred to the materially different terms contained in the revised disclosure statement. The respondent had ten days to apply for a determination as to whether the alleged material changes were in fact material. Having failed to do so, it was now too late for the respondent to argue that the changes were not material.

779975 Ontario Ltd. v. Mmmuffins Canada Corp., [2009] O.J. No. 2357, 62 B.L.R. (4th) 137, 2009 CarswellOnt 3262 (S.C.J.); *Abdool v. Somerset Place Developments of Georgetown Ltd*. (1992), 10 O.R. (3d) 120, [1992] O.J. No. 2115, 96 D.L.R. (4th) 449, 58 O.A.C. 176, 27 R.P.R. (2d) 157, 35 A.C.W.S. (3d) 1139 (C.A.), **consd** [page186]

Other cases referred to

2240802 Ontario Inc. v. Springdale Pizza Depot Ltd., [2015] O.J. No. 1736, 2015 ONCA 236, 331 O.A.C. 282, 252 A.C.W.S. (3d) 456; *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135, [2014] S.C.J. No. 40, 2014 SCC 40, 2014EXP-1666, 371 D.L.R. (4th) 219, 67 Admin. L.R. (5th) 220, 458 N.R. 150, J.E. 2014-941, EYB 2014-237426, 240 A.C.W.S. (3d) 262; *Canson Enterprises Ltd. v. Boughton & Co*., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; *Casa Blanca Homes Ltd. v. Canada*, [2013] T.C.J. No. 306, 2013 TCC 338, [2013] G.S.T.C. 128, 234 A.C.W.S. (3d) 1071; *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, [2011] S.C.J. No. 1, 2011 SCC 1, 410 N.R. 127, EYB 2011-184979, 2011EXP-309, J.E. 2011-167, 14 Admin L.R. (5th) 1, 327 D.L.R. (4th) 513, 89 C.P.R. (4th) 1, 199 A.C.W.S. (3d) 1282; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991; *Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930* (2010), 102 O.R. (3d) 737, [2010] O.J. No. 4853, 2010

ONCA 751, 327 D.L.R. (4th) 498, 270 O.A.C. 130, 97 R.P.R. (4th) 171; *Lozcal Holdings Ltd. v. Brassos Developments Ltd.*, [1980] A.J. No. 857, 111 D.L.R. (3d) 598, 12 Alta. L.R. (2d) 227, 22 A.R. 131, 15 R.P.R. 8, 2 A.C.W.S. (2d) 395 (C.A.); *McConnell v. Huxtable* (2014), 118 O.R. (3d) 561, [2014] O.J. No. 477, 2014 ONCA 86, 41 R.P.R. (5th) 1, 42 R.F.L. (7th) 157, 370 D.L.R. (4th) 554, 315 O.A.C. 3, 237 A.C.W.S. (3d) 505; *Metropolitan Toronto Condominium Corp. No. 1067 v. L. Chung Development Co.*, [2012] O.J. No. 5684, 2012 ONCA 845; *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006, D.T.E. 98T-154, 76 A.C.W.S. (3d) 894; *Seidel v. Telus Communications Inc.*, [2011] 1 S.C.R. 531, [2011] S.C.J. No. 15, 2011 SCC 15, 301 B.C.A.C. 1, 412 N.R. 195, 2011EXP-936, J.E. 2011-498, EYB 2011-187826, 329 D.L.R. (4th) 577, [2011] 6 W.W.R. 229, 16 B.C.L.R. (5th) 1, 82 B.L.R. (4th) 1, 1 C.P.C. (7th) 221, 199 A.C.W.S. (3d) 1064; *Toronto Standard Condominium Corp. No. 1487 v. Market Lofts Inc.*, [2015] O.J. No. 815, 2015 ONSC 1067, 53 R.P.R. (5th) 67, 250 A.C.W.S. (3d) 335 (S.C.J.); *Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, [2014] O.J. No. 4947, 46 R.P.R. (5th) 1, 2014 ONCA 724, 328 O.A.C. 255, 246 A.C.W.S. (3d) 206; *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410, [2001] O.J. No. 1711, 199 D.L.R. (4th) 68, 42 R.P.R. (3d) 39, 104 A.C.W.S. (3d) 1144 (C.A.); *Weller v. Reliance Home Comfort Limited Partnership* (2012), 110 O.R. (3d) 743, [2012] O.J. No. 2415, 2012 ONCA 360, 291 O.A.C. 388, 350 D.L.R. (4th) 301, 215 A.C.W.S. (3d) 81; *Wilson v. Semon*, [2012] O.J. No. 3969, 2012 ONCA 558, affg 2011 CarswellOnt 15953 (S.C.J.)

Statutes referred to

Arthur Wishart Act (Franchise Disclosure) 2000, S.O. 2000, c. 3, ss. 6, (3), (6)

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2

Condominium Act, R.S.O. 1990, c. C.26 [rep.], s. 52

Condominium Act, S.O. 1967, c. 12 [rep.]

Condominium Act, S.O. 1974, c. 133 [rep.], s. 14

Condominium Act 1978, S.O. 1978, c. 84 [rep.]

Condominium Act, 1998, S.O. 1998, c. 19, s. 74 [as am.], (6) [as am.], (7), (8) [as am.], (9), (10) [page187]

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 4, Sch. [as am.]

Patent Act, R.S.C. 1985, c. P-4

Real Property Limitations Act, R.S.O. 1990, c. L.15, ss. 1, 4

2017 ONCA 267 (CanLII)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1

Authorities referred to

Driedger, Elmer, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983)

2017 ONCA 267 (CanLII)

APPEAL from the judgments of C.A. Gilmore J., [2016] O.J. No. 305, 2016 ONSC 371 (S.C.J.) and [2016] O.J. No. 292, 2016 ONSC 370 (S.C.J.) allowing applications for the return of deposits.

Symon Zucker and *Nancy Tourgis*, for appellant.

Michael W. Carlson, for respondents.

The judgment of the court was delivered by

[1] **G.J. EPSTEIN J.A.**: — This appeal involves the interpretation of provisions in two statutes -- the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act") and the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (the "*RPLA*"). This interpretive exercise arises out of two separate applications that were heard together. The applications concern the obligation of the appellant, Talon International Inc., to return deposits that the respondents -- Young Sook Yim and Paul Chung-Kyu Kim (collectively, "Ms. Yim")[1] in one application and Adrian B. Harvey and Harvey Legacy Holdings Ltd. (collectively, "Mr. Harvey") in the other -- paid toward the purchase of condominium units in Talon's development known as Trump Tower.

[2] Several years after entering into their respective agreements of purchase and sale (an "APS") with Talon, Ms. Yim and Mr. Harvey each provided written notices to Talon, advising of their intention to "terminate" the transaction. Both stated their basis for doing so as being, in part, what they viewed as material changes to the revised disclosure statement Talon had provided to them. Both requested the return of their deposits. The respondents take the position that their communications constituted valid notices to rescind their respective APS under s. 74(6) and (7) of the Act. Because Talon had not challenged, within the time the Act allows, either Ms. Yim's or Mr. Harvey's right to [page188] rescind, the respondents applied to the court for an order that Talon return their deposits. Talon defended on the basis that the respondents' purported notices to rescind did not meet the requirements of the Act.

[3] The application judge allowed both applications. She held that the notices sufficiently complied with the requirements of s. 74(7) of the Act. Each notice therefore triggered Talon's obligation to challenge the alleged material change set out within ten days of receipt, or to accept the claim for rescission. Because Talon did not challenge the respondents' claims for

rescission, the application judge ordered Talon to refund Ms. Yim's and Mr. Harvey's deposits, with interest.

[4] In Ms. Yim's case, Talon also argued that she was seeking to amend her notice of application to claim statutory rescission more than two years after the date on which such a claim was discovered. Her amendment was therefore statute-barred, pursuant to s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The application judge disagreed. She held that the ten-year limitation period in s. 4 of the *RPLA* governed claims for the refund of deposits advanced toward the purchase of condominium units. Ms. Yim's claim was, therefore, not out of time.

[5] In this appeal, Talon submits that the application judge erred in over-emphasizing the fact that the Act is consumer-protection legislation, and consequently provided an overbroad interpretation of s. 74(7) of the Act. And, in the case of Ms. Yim, Talon argues that the application judge erred in holding that her claim for the return of her deposit fell within the provisions of the *RPLA*. It further submits that Ms. Yim's application as a whole is statute-barred, as it was brought more than two years after discovery of the claim.

[6] I would dismiss both appeals. I agree with the application judge that it would be contrary to the purpose of the Act, as consumer protection legislation, to adopt a technical approach in interpreting what a purchaser must do to notify the declarant of an intention to rescind under s. 74(7). The section requires that "notice of rescission" be in writing, and that it be delivered to the declarant or his or her solicitor. By implication, the notice also must make it clear that the purchaser seeks to set aside the APS based on an identified material change. In my view, there is no reason to interfere with the application judge's conclusion that the notices delivered by Ms. Yim and Mr. Harvey satisfied these requirements.

[7] I also agree with the application judge that Ms. Yim's claim to recover her deposit fits within the definition of an action for the recovery of land under the *RPLA*. The applicable limitation [page189] period is therefore ten years, and Ms. Yim's application is not statute-barred.

Statutory Provisions

[8] The main issue in these appeals involves the interpretation of the provisions in the Act that give a purchaser the right to rescind his or her APS. These provisions are found in s. 74 of the Act, which provides that within ten days of receipt of a revised disclosure statement containing a material change or notice of change that is material, a purchaser has the right to rescind the APS. If the declarant takes the position that no material change has occurred, the declarant may bring an application to the Superior Court under s. 74(8) for a declaration on the question of materiality. Section 74(9) and (10) require that the declarant refund the purchaser's money with interest within ten days of receipt of the notice of rescission if no application has been made to the court on the issue of materiality, or if an application is made, within ten days of a determination that the change is material. The requirements of the notice of rescission are set out in s. 74(7), which provides:

> 74(7) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor.

2017 ONCA 267 (CanLII)

2017 ONCA 267 (CanLII)

Background to the Respondents' Notices

Ms. Yim v. Talon

[9] On May 4, 2007, Ms. Yim signed an APS to purchase from Talon suite 1702 at Trump Tower for $860,000. Pursuant to the terms of the APS, Ms. Yim provided deposits totalling $172,000 to Talon. She received the required disclosure from Talon.

[10] On February 18, 2012, a representative for Talon sent a letter to Ms. Yim and to her solicitor advising that the hotel unit maintenance agreement ("HUMA") was now available online.

[11] On February 23, 2012, after reviewing the HUMA, Ms. Yim had her solicitor send a letter to Talon's solicitor. This letter provided as follows:

> Further to the letter dated February 9, 2012 received from your client, Talon International Inc., regarding the extension of the proposed occupancy date from February 14, 2012, for above-noted suite, *my clients hereby give notice to terminate the [APS] dated May 4, 2007* and all amendments made thereto, effective immediately, *and to request the return of the deposits forthwith* to our firm made payable to Lee & Ma LLP in trust.
>
> The basis of this notice is premised on paragraph 13 of the underlying [APS], which provides that the Vendor's right to extend the closing date shall not "exceed twenty-four (24) months" in the aggregate. Given that the [page190] original occupancy closing date was scheduled to be March 20, 2009 (paragraph 2(a) in the [APS]), the Vendor's right to extend the closing date has expired on March 20, 2011, and is therefore no longer applicable.
>
> *In the alternative, the [HUMA], the full copy of which was provided at the last-minute, contains terms that are materially different from that indicated in the Disclosure, not to mention the substantive differences in the projected expenses.*
> Given that the condominium prices have surged in the past 4-5 years, I trust that your client is not in any way prejudiced by this notice. *Your prompt response and return of deposits is respectfully requested and expected.* Thank you.

(Emphasis added)

[12] On February 24, 2012, Ms. Yim had her counsel send a follow-up e-mail to Talon's representative, indicating that she was exercising her right to rescind the APS. This e-mail specifically referenced s. 74 of the Act, as well as the change in the HUMA.

[13] Talon took no steps in response to these communications. Ms. Yim issued her notice of application in this proceeding on December 10, 2014. By the time the application was heard, on December 14, 2015, Ms. Yim no longer relied upon the expiration of the vendor's right to extend the closing date, as mentioned in her February 23, 2012 letter. She now relied solely on the alternative position advanced in the letter, with respect to the HUMA's containing materially different terms from the disclosure.

Mr. Harvey v. Talon

[14] By way of an APS dated March 7, 2005, Mr. Harvey agreed to purchase a hotel condominium unit from Talon in Trump Tower for $727,000. Mr. Harvey provided deposits to Talon totalling $145,400. He received the required disclosure from Talon.

[15] On February 17, 2012, Talon's solicitor sent a letter to Mr. Harvey's solicitor. This letter made reference to the HUMA now being available on the Internet.

[16] On February 24, 2012, Mr. Harvey's solicitor faxed a note to Talon's solicitors, indicating that he had been instructed not to proceed with the interim closing. The solicitor noted that he was no longer acting for Mr. Harvey in any capacity. That evening, Mr. Harvey sent a letter to Talon's representative via e-mail. The letter stated as follows:

> Further to the letter dated February 9, 2012 received from your client, Talon International regarding proposed delivery of possession of the Hotel Unit on February 24, 2012 for the above mentioned Suite, *I hereby give notice to [page191] terminate the [APS] dated March 4, 2005* and all amendments effective immediately*, and to request the return of deposits forthwith* to the firm of Groll & Groll LLP payable in trust.
>
> The request is being made on the basis of [Mr.] Harvey never receiving a fully executed, accepted and initialled [APS].
>
> *In the alternative, the [HUMA], the full copy of which was provided at the last minute contains terms that are materially different from that indicated in the Disclosure and substantially different in the projected expenses.*
>
> Given the per square foot selling price achieved in today's market for this development is far in excess of this Unit, I trust Talon International is not in any way prejudiced by this notice. *Your prompt response and return of deposits is respectfully requested and expected.*

(Emphasis added)

[17] Talon took no steps in response. On February 13, 2014, Mr. Harvey issued a notice of application in this proceeding. By the time of the hearing of the application on December 14, 2015, Mr. Harvey no longer relied upon not having received a fully executed, accepted and initialled APS, as mentioned in his February 24, 2012 letter. Instead, he relied solely on the alternative position advanced in the letter, with respect to the HUMA's containing material different terms from those indicated in the disclosure.

The Application Judge's Reasons

Ms. Yim v. Talon

[18] As a preliminary matter, Ms. Yim moved to amend her notice of application to add a request that the court declare that the APS had been rescinded.

[19] Ms. Yim's notice of application, issued on December 10, 2014 made no mention of a claim based on rescission under the Act. Instead, she sought a declaration that Talon was in breach of the APS, a declaration that the APS was terminated and of no force and effect, and an order that Talon return the deposit. In the alternative, she sought an order granting relief from

2017 ONCA 267 (CanLII)

forfeiture of the deposit, and return of the deposit. Before the application judge, Ms. Yim brought a motion to amend her notice of application to add a claim for statutory rescission. Among the arguments raised by Talon in opposing the amendment was that the claim for rescission was statute-barred.[2] [page192]

[20] The application judge allowed the amendment. She held that Ms. Yim's claim for rescission fell within s. 4 of the *RPLA*, which provides for a limitation period of ten years. The claim for the return of a deposit pursuant to the Act fell within the *RPLA* as "an action to recover land". In the alternative, the application judge held that the proposed amendment to claim statutory rescission was not a new cause of action, but an alternative remedy based on the exact same facts set out by Ms. Yim in the original notice of application. Additionally, Ms. Yim's e-mail sent on February 24, 2012 had specifically mentioned rescission under the Act. In these circumstances, allowing the amendment would cause Talon no prejudice.

[21] The application judge then turned to whether the fact that Ms. Yim's failure to use the word "rescission" in her February 23 letter was fatal to her claim for the return of her deposit.

[22] The application judge started her analysis by noting that the Act was consumer protection legislation, and therefore should be interpreted liberally. The application judge reasoned [[2016] O.J. No. 305], at para. 40, that "keeping in mind the legislature's goal of protecting purchasers of condominiums, the court should not read in a requirement that all notices of rescission given under s. 74 of the Act include the precise term aerescission'".

[23] The application judge went on to hold that all s. 74(7) requires is that the notice of rescission be in writing, delivered to the declarant or its solicitor, and that it contain a ground of material change upon which rescission is based. Accordingly, the application judge concluded, at para. 46, that "[a]s long as the notice fulfills the statutory requirements and makes clear the purchaser's intention to undo or unmake the agreement, such as by requesting the return of their deposit, the notice should be considered sufficient". There is no requirement that notice be worded perfectly, or that it include the word "rescission".

[24] The application judge then addressed whether Ms. Yim's February 23, 2012 letter complied with this interpretation of s. 74 of the Act. She held that given Ms. Yim's use of the word "terminate" in the letter, there must be "strong evidence" indicating that Ms. Yim's intention in sending the letter was to rescind her APS. The application judge found three indications of the required "strong evidence" of Ms. Yim's intention to rescind. First, the letter referenced a material change, namely, the HUMA being "materially different" and containing "substantial differences" from projected expenses. Second, the application judge highlighted Ms. Yim's request for the return of her deposit, [page193] a request that would restore the parties to their original positions. Such a remedy was consistent with rescission, and not with repudiation of the contract.

[25] Third, the application judge also looked at the e-mail sent by Ms. Yim to Talon on February 24, 2012, the day after the initial letter. This e-mail had specifically referenced s. 74 of the Act. The application judge concluded that Ms. Yim's communications of February 23 and 24, read together, provided sufficient notice under the Act. Finally, in accordance with the requirements of s. 74(7), the letter had been in writing, and sent to the proper person. Given that Talon had not challenged Ms. Yim's right to rescind within ten days of receipt of her notice of

2017 ONCA 267 (CanLII)

rescission, Talon was required to return her deposit, with interest.

Mr. Harvey v. Talon

[26] The first issue the application judge addressed was whether the application was deficient with respect to relief sought. In his notice of application dated February 13, 2014, Mr. Harvey sought a declaration that Talon was in breach of the APS, a declaration that the APS was terminated and of no force and effect, and an order that Talon return the deposit. In the alternative, he sought an order granting relief from forfeiture of the deposit under the APS and the return of his deposit. Talon argued that the application was fatally flawed because it did not claim the relief of rescission, and therefore the court could not conclude that Mr. Harvey's letter of February 24, 2012 had been a notice of rescission.

[27] The application judge held that it would defeat the purpose of Rule 1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 if Mr. Harvey were precluded from pursuing relief on the basis that the notice of application was not framed exactly in accordance with the legislation or the rules. For nearly a year, Talon had been in possession of Mr. Harvey's affidavit, in which he had explicitly taken the position that his February 24, 2012 letter rescinded the APS. Further, Mr. Harvey had sought return of the deposit in his notice of application -- relief consistent with the remedy of rescission and not termination. The application judge reasoned that in such circumstances rescission was implicitly pleaded.

[28] The application judge then addressed whether Mr. Harvey's February 24, 2012 letter could be a proper notice of rescission, despite not using the word "rescind" or "rescission". Relying on the same reasoning as in Ms. Yim's case, the application judge concluded, at para. 46, that "[a]s long as the notice fulfills the statutory requirements and makes clear the purchaser's [page194] intention to undo or unmake the agreement, such as by requesting the return of their deposit, the notice should be considered sufficient".

[29] Next, the application judge held that Mr. Harvey's February 24, 2012 letter sufficiently conveyed his intention to rescind his APS. As Mr. Harvey had used the word "terminate" in his letter, the application judge looked for and found "strong evidence" of an intention to rescind. First, the letter made specific reference to the fact that the terms of the HUMA were materially different from the disclosure and substantially different from the projected expenses. Second, the request for a return of the deposit made it clear that Mr. Harvey sought to restore both parties to their original positions, and that he sought rescission rather than repudiation. Finally, the letter was in writing and was addressed to the proper person. It therefore complied with the requirements under s. 74 of the Act.

[30] Because Talon had not challenged Mr. Harvey's right to rescind within ten days as required under s. 74(8) of the Act, Mr. Harvey was entitled to the return of his deposit, with interest.

Issues

[31] The issues on these appeals can be characterized as follows:

(1) What is the standard of review?

2017 ONCA 267 (CanLII)

(2) What is the applicable limitation period?

(3) Did Ms. Yim's and Mr. Harvey's communication to Talon constitute notices to rescind for the purposes of s. 74 of the Act?

Analysis

Issue 1 -- What is the standard of review?

[32] What s. 74(7) of the Act means by the words "notice of rescission" is a question of law, and accordingly is reviewed on the correctness standard. Answering this question requires the interpretation of the Act, and it is well established that questions of statutory interpretation are questions of law (*Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135, [2014] S.C.J. No. 40, 2014 SCC 40, at para. 33). As stated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, at paras. 8-9, when there is a question of law, an appellate court is free to replace the opinion of the application judge with its own. [page195]

[33] The question of whether the actual notices provided by the respondents met the requirements of the Act is one of mixed fact and law, and reviewed on the palpable and overriding error standard. In her reasons, the application judge termed this question as one of fact. However, the application judge was applying the legal standard under s. 74(7) of the Act to the facts in front of her, and thus was dealing with a question of mixed fact and law (*Housen*, at para. 26).

[34] In answering this question, the application judge considered all the evidence the law required her to consider. In my view, she did not apply an incorrect standard or make an error in principle. Accordingly, her determination that the notices provided in this case were sufficient is entitled to deference, and should not be overturned absent palpable and overriding error (*Housen*, at paras. 26-37).

[35] Whether Yim's application was statute-barred is also a question of law, and thus reviewed by this court on the correctness standard. Leaving aside her alternative analysis, the application judge essentially held that the application as a whole was not brought out of time, as the ten-year limitation period in s. 4 of the *RPLA* applied, and not the two-year period from the *Limitations Act, 2002*.

[36] Here, there is no factual component to the dispute about whether the application is statute-barred. As analyzed below, I have concluded that the notice provided to Talon by Ms. Yim on February 23, 2012 was a notice of rescission under s. 74(7). Accordingly, the limitation period began to run ten days later, when Talon failed to return the deposit or make an application to Superior Court. Ms. Yim's application was launched more than two years later. The sole issue is thus whether an application for the return of a deposit is covered by the *RPLA*, in which case the application was not brought out of time, or by the *Limitations Act, 2002*, in which case the application was brought out of time. Answering this question requires the interpretation of s. 4 of the *RPLA* in order to determine whether an application for return of deposit pursuant to s. 74 of the Act fits within the definition of an action for the return of land.

[37] Accordingly, the limitation period issue is a question of law, without a factual component. If Ms. Yim's application for the return of her deposit fits within the ten-year limitation period in s.

2017 ONCA 267 (CanLII)

4 of the *RPLA*, the same would be true of other applications for statutory rescission pursuant to the Act. Thus, the application judge's determination on this issue is not entitled to deference. [page196]

Issue 2: What is the applicable limitation period?
The parties' submissions

[38] Talon submits that Ms. Yim's notice of application was issued nearly three years after her cause of action arose. Regardless of whether her communication to Talon was one of termination or one of rescission, Ms. Yim's application was brought out of time. Talon submits that the Act is not one of the statutes listed in the Schedule to the *Limitations Act, 2002* as retaining specific statutory limitation periods. Therefore, s. 4 of the *Limitations Act, 2002* applies and Ms. Yim's claim is statute-barred for being brought more than two years after the discovery of the claim.

[39] Ms. Yim argues that the application judge correctly held that her claim for rescission was one that fell within the provisions of the *RPLA.* The action was to recover her deposit -- a claim for "money to be laid out in the purchase of land", which is part of the definition of "land" within the *RPLA*. The claim therefore fell within the *RPLA.* Given the ten-year limitation period set out in s. 4 of the *RPLA*, the action was not statute-barred.

Applicable legal principles

[40] This is a matter of statutory interpretation. Statutory interpretation is governed by the approach described in Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; and adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21:

> Today there is only one principle or approach, namely, 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.

Principles applied

[41] Section 4 of the *RPLA* provides as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it. [page197]

[42] When those aspects of s. 4 of the *RPLA* that do not apply to this case are removed, it provides that

> No person shall bring an action to recover any land, but within ten years after the time at which the right to bring any such action first accrued to the person bringing it.

2017 ONCA 267 (CanLII)

2017 ONCA 267 (CanLII)

[43] Thus, there are three requirements in s. 4: an "action", to "recover", and what must be recovered is "land".

[44] An action is defined in s. 1 of the *RPLA* to include "any civil proceeding".

[45] "Recover" is defined in legal dictionaries as "gaining through a judgment or order". This was the definition adopted for the use of "recover" in s. 4 in *McConnell v. Huxtable* (2014), 118 O.R. (3d) 561, [2014] O.J. No. 477, 2014 ONCA 86, at paras. 16-20, specifically, at para. 17, where this court noted that the English Court of Appeal has held that the expression "to recover any land" in comparable legislation "is not limited to obtaining possession of the land, nor does it mean to regain something that the plaintiff had and lost. Rather, aerecover' means to aeobtain any land by judgment of the Court'".

[46] I agree with the application judge's approach on this point. This is clearly an action to recover.

[47] The remaining question is whether what Ms. Yim seeks to recover -- her deposit -- is "land". The definition of land in s. 1 of the *RPLA* is as follows:

> "land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency[.]

[48] In my view, the application judge was also correct in concluding that an application for the return of the deposit was an action for the recovery of "land"; specifically, the recovery of "money to be laid out in the purchase of land".

[49] In coming to this conclusion, the application judge relied primarily upon *McConnell*. In that case, a former common-law spouse sought a constructive trust giving her joint ownership of the home she had once shared with her former spouse, with an alternative claim for damages based on unjust enrichment. Rosenberg J.A., at para. 38, explained his conclusion that the *RPLA* applied: "the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the court. That the court might provide her with the alternative [page198] remedy of a monetary award does not take away from the fact that her claim is for a share of the property."

[50] Here, the application judge reasoned as follows, at para. 12 (Yim):

> Ms. Yim paid her deposit to secure an interest in land. She seeks to recover the money which represents that interest. I find that such an interest is more easily identified than a constructive trust interest (as in *McConnell*, *supra*), where the court must intervene and declare such an interest to exist based on certain legally accepted principles . . . The fact that the remedy is a monetary award should not preclude the court from finding that it is a recovery of land, as in *McConnell*, supra.

[51] In support of this conclusion, I note that several cases have clarified the relationship between claims for damages and claims covered by the *RPLA*. The Supreme Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, defined damages as [at para. 70] "a monetary payment awarded for the invasion of a right at common law". In *Toronto Standard Condominium Corp. No. 1487 v. Market Lofts Inc.*, [2015] O.J. No. 815, 2015 ONSC 1067 (S.C.J.), the plaintiff sought damages based off the defendant's failure to meet its obligations under a shared services agreement. Perell J., beginning at para. 49, noted that the fact that real property is incidentally involved in an action does not necessarily mean that the action is governed by the *RPLA*. Among the cases he cited was *Metropolitan Toronto Condominium Corp. No. 1067 v. L. Chung Development Co.*, [2012] O.J. No. 5684, 2012 ONCA 845. In that case, this Court made the following comment, at para. 7:

> Finally, we do not think that the [*RPLA*] applies to the case as framed by the appellant. In its Statement of Claim, the appellant frames its action as one for damages flowing from the respondents' negligence, breach of contract, conflict of interest, and breach of duty of care, fiduciary duty and statutory duty. None of these relates to the categories of actions encompassed by the [*RPLA*].

[52] Thus, had Ms. Yim's claim been one primarily seeking damages, for example, breach of contract, her application would be statute-barred. This would be true even if the claim for damages incidentally related to real property, specifically the condominium that was the subject of her APS. Claims for damages do not fit within the definition of "land" in the *RPLA.*

[53] However, Ms. Yim is not seeking damages. She advances a specific claim under a provision in the Act, a provision that only allows for the return of her deposit and interest, not damages. The Tax Court defined [at para. 22] a deposit in *Casa Blanca Homes Ltd. v. Canada*, [2013] T.C.J. No. 306, 2013 TCC 338 [page199] as "a pool of money retained until such time as it is applied in partial payment or forfeited". As noted [at para. 13] by the Alberta Court of Appeal in *Lozcal Holdings Ltd. v. Brassos Developments Ltd.*, [1980] A.J. No. 857, 111 D.L.R. (3d) 598 (C.A.), "[a] genuine deposit ordinarily has nothing to do with damages, except that credit must be given for the amount of the deposit in calculating damages".

[54] This leads me to the consideration of "money to be laid out in the purchase of land", a phrase on which there is scant jurisprudence. However, in my view an action for the return of a deposit fits comfortably within its plain meaning. Frankly, I struggle to understand what would fit within this phrase if not an action such as this.

[55] On the basis of the foregoing analysis, I conclude that Ms. Yim's application is not statute-barred. This is also true of the amendment of her initial application to specifically claim statutory rescission. As her application is covered by s. 4 of the *RPLA*, the applicable limitation period is ten years. The application is an action, which is defined as any civil action. She seeks "recovery", which has been defined as "gaining through a judgment or order". And the recovery she seeks is of "land", namely, her deposit, which is money laid out in the purchase of land.

[56] I would therefore not give effect to this ground of appeal.

2017 ONCA 267 (CanLII)

Issue 3: Did Ms. Yim's and Mr. Harvey's communications to Talon constitute notices to rescind for the purposes of s. 74 of the Act?

The parties' submissions

[57] Talon submits that the application judge ignored the clear wording of the communications sent by Ms. Yim and Mr. Harvey, which both reference "termination" of the APS. In finding that the Act does not prescribe a statutory form of a notice of rescission, the application judge failed to recognize that the Act specifically refers only and repeatedly to a "notice of rescission". There is an important legal distinction between termination and rescission. A party cannot assert inconsistent rights and having terminated the APS, the respondents cannot claim rescission of an agreement they have already terminated. Talon submits that the respondents themselves were in breach of the APS by terminating.

[58] Ms. Yim and Mr. Harvey argue that the application judge correctly interpreted the requirements for rescission under the Act. An examination of the object of the Act and the intention of [page200] the legislature supports a liberal interpretation of the phrase "notice of rescission". As long as the notice is in writing, sent to the right person, sets out a ground of material change upon which rescission is based, and makes clear the intention of a purchaser to unmake a transaction, it should be sufficient. A purchaser should not be required to explicitly use the term "rescission", if the notice nonetheless makes it sufficiently clear that this is what is sought.

A. *What is required for notice of rescission under s. 74 of the Act?*

[59] The next issue to be addressed is what is meant by the term "written notice of rescission" in s. 74(7) of the Act.

Applicable legal principles

[60] As in the case of the issue over the appropriate limitation period, this issue is one of statutory interpretation. The principles set out above apply with equal force to this issue.

Principles applied

[61] The application judge correctly considered this issue through the lens that the Act is consumer protection legislation.

[62] The fact that the Act is consumer protection legislation is well established. In *Ward-Price v. Mariners Havens Inc.* (2001), 57 O.R. (3d) 410, [2001] O.J. No. 1711 (C.A.), at para. 25, Borins J.A. stated that "it is well recognized that the Act is consumer protection legislation". More recently, in *Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930* (2010), 102 O.R. (3d) 737, [2010] O.J. No. 4853, 2010 ONCA 751, at para. 49, O'Connor A.C.J.O. stated that "[a] significant purpose of the Act is consumer protection". Rouleau J.A. cited this case in *Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, [2014] O.J. No. 4947, 2014 ONCA 724 when he acknowledged [at para. 44] that "consumer protection is a significant purpose of the *Condominium Act*".

2017 ONCA 267 (CanLII)

[63] The goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals, on par with companies or citizens who regularly engage in business. This court and the Supreme Court have identified guidelines for how consumer protection legislation is to be interpreted. The application judge referred to *Seidel v. Telus Communications Inc.*, [2011] 1 S.C.R. 531, [2011] S.C.J. No. 15, 2011 SCC 15 for the proposition that consumer protection legislation must be interpreted generously in favour of the consumer. This proposition [page201] comes directly from Binnie J., who was considering the British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BCPCA*"). At para. 37, he noted that the statutory purpose of the *BCPCA* was all about consumer protection. As such, its terms should be interpreted generously in favour of consumers. Another relevant Supreme Court case is *Celgane Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, [2011] S.C.J. No. 1, 2011 SCC 1. In that case, the court was considering the Federal Court's interpretation of a price-regulating provision in the *Patent Act*, R.S.C. 1985, c. P-4. Abella J. adopted the majority view of Evans J.A., who had held that because the provision could be interpreted in different ways, the one that best implemented the consumer protection objectives of such price-regulating provisions was the correct interpretation.

2017 ONCA 267 (CanLII)

[64] There is similar authority emanating from Ontario courts. In *Weller v. Reliance Home Comfort Limited Partnership* (2012), 110 O.R. (3d) 743, [2012] O.J. No. 2415, 2012 ONCA 360, at para. 15, Rosenberg J.A. noted that "[t]he main objective of consumer protection legislation . . . is to protect consumers". In *Wilson v. Semon*, 2011 CarswellOnt 15953 (S.C.J.), affd *Wilson v. Semon*, [2012] O.J. No. 3969, 2012 ONCA 558, Lederer J. noted that "consumer protection legislation, as its name implies, is designed to protect consumers".

[65] The legislative history of s. 74 of the Act provides further support for the identification of the statutory scheme dealing with rescission as consumer protection legislation. In *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120, [1992] O.J. No. 2115 (C.A.), Robins J.A. discussed s. 52 of the *Condominium Act*, R.S.O. 1990, c. C.26, which was roughly equivalent to s. 74 under the current Act. This provision allowed a purchaser to rescind an APS within ten days of receiving a material amendment to a disclosure statement, by giving "written notice of rescission" to the declarant or his or her solicitor.

[66] Robins J.A. noted that when the *Condominium Act* was initially enacted in 1967 (S.O. 1967, c. 12), it imposed no disclosure requirements on developers, and provided little protection to purchasers. The predecessor to s. 52 (and thus the ultimate predecessor of the current s. 74) was first enacted as part of the 1974 amendments to the *Condominium Act* (S.O. 1974, c. 133, s. 14). This provision introduced the concept of full disclosure into the Act. However, consumers apparently continued to experience problems. This led to further amendments in 1978 (S.O. 1978, c. 84), introducing s. 52, which was later carried over into the 1990 Act. In introducing the 1978 Act in the legislature on June 1, 1978, Larry Grossman, the [page202] Minister of Consumer and Commercial Relations, described it as a "form of consumer protection legislation". He stated that the Act would provide purchaser protection to consumers by requiring "tighter standards of disclosure between sellers and purchasers; allowing time for purchasers to become informed of their responsibilities; and clarifying purchasers' rights during the interim occupancy period".

2017 ONCA 267 (CanLII)

[67] Later in *Abdool*, in discussing what was required in the disclosure from the declarant, Robins J.A. made the following comments: "the vagueness of the requirements and the absence of statutory guidelines mandate a broad and flexible approach -- not a rigid or stringent one -- in determining whether a given disclosure statement is adequate". In my view, there is no reason why this reasoning about disclosure required from the vendor should not also be applied to the purchaser, in determining whether a given notice of rescission is adequate.

[68] Further support for the application judge's approach to interpreting what is required for notice of rescission under s. 74 of the Act can be found in how a right to rescind has been interpreted in another statute that has been identified as consumer protection legislation -- the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "*AWA*").

[69] To start, it is clear that the *AWA* is consumer protection legislation. In *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, [2015] O.J. No. 1736, 2015 ONCA 236, at paras. 49-50, I adopted the comments of the motion judge that "The [*AWA*] itself is in many ways consumer protection legislation. . . It is remedial legislation, which the Court may broadly apply."

[70] Section 6 of the *AWA* provides franchisees with the right to rescission via a statutory provision not dissimilar to that found in the Act. The franchisee can exercise its right to rescind by providing the franchisor with a "notice of rescission" within specified timeframes, where the franchisor provides late disclosure, or no disclosure. Following reception of such a notice, the franchisor has certain obligations towards the franchisee, which must be fulfilled within 60 days.

[71] Pursuant to s. 6(3), the only requirements for the franchisee's notice of rescission is the following: "Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor's address for service or to any other person designated for that purpose in the franchise agreement." This provision is substantially similar to the rescission provision found in s. 74(7) of the Act. [page203]

[72] The issue of what constitutes a "notice of rescission" under s. 6(3) of the *AWA* was considered in detail in *779975 Ontario Ltd. v. Mmmuffins Canada Corp.*, [2009] O.J. No. 2357, 2009 CarswellOnt 3262 (S.C.J.) by Strathy J. (as he then was). In that case, the franchisee started an action for common law rescission, based on alleged pre-contractual misrepresentations made by the franchisor. The statement of claim made no mention of the *AWA* or of the statutory rescission remedy. More than two years later, the franchisee commenced a second action, asking for a declaration that service of the statement of claim in the earlier action had been a "notice of rescission" under the *AWA*, thus interrupting the limitation period. At para. 45, Strathy J reasoned as follows:

> While s. 6 of the *AWA* does not specify the contents of the notice of rescission, it seems to me that the notice must at least be sufficient to bring home to the franchisor that the franchisee is exercising its statutory rights of rescission under the *AWA*, and to inform the franchisor that the clock has begun to run on the 60-day period in s. 6(6). In light of the very substantial obligations on franchisors to compensate franchisees for breach of the disclosure duty, the franchisor is entitled to know whether a violation of the *AWA* is being alleged and whether the franchisee is claiming remedies under that statute. The franchisor is not able to fulfill its statutory obligations unless the notice is at least adequate to inform it that the

> franchisee has rescinded the agreement. *The notice does not have to be in specific language, but it must at least make it clear that the franchisee is exercising its statutory right to rescind the franchise agreement and demanding the compensation to which it is entitled*.

(Emphasis added)

2017 ONCA 267 (CanLII)

[73] Ultimately, at paras. 49-50, Strathy J. concluded that the statement of claim in the first action was not sufficient to constitute "notice of rescission" to the franchisor within the meaning of the *AWA*. The statement of claim made no reference to the *AWA*, nor to the franchisor's failure to provide a disclosure document or statement of material change in time or at all, and there was nothing to indicate to the franchisor that the franchisee was claiming the relief set out in s. 6(6). The statement of claim did not purport to be an exercise of a statutory right by the franchisee -- on the contrary, it was simply an action for rescission and damages that had nothing to do with the *AWA*.

[74] The *Mmmuffins* case provides support for the application judge's conclusion that a notice of rescission under the Act does not need to include the word "rescind" or "rescission", or reference the relevant section of the Act. As Strathy J. made clear [at para. 45], the notice "does not have to be in specific language". What is required is that the notice indicates that the purchaser is exercising his or her statutory authority to "rescind" or "unmake" the APS based on a material change. [page204] Where the notice achieves this, the declarant can decide whether to apply to the Superior Court for a determination of the materiality of the change set out.

[75] I agree with the application judge's interpretation that a notice of rescission pursuant to s. 74(7) of the Act does not require the use of the words "rescind" or "rescission". As previously indicated, the Act is well established to be consumer protection legislation. It therefore must be interpreted generously in a manner that protects consumers. Consumers will not always be represented by counsel. Consumers will not always be familiar with words such as rescission and rescind. For consumers to be on a level playing field with developers in accessing the respective rights afforded them under the Act, they must be given considerable leeway in their use of language. As long as the purchaser's intention to undo the transaction based on a material change is clear, that is sufficient. That is all the declarant needs to understand in order to take advantage of the statutory rights then available to it.

B. *Did the respondents' correspondence constitute notice of rescission?*

[76] Given I agree with the application judge's view of the requirements of s. 74(7) of the Act, the final question to be asked is whether there is any reason to interfere with her conclusion that Ms. Yim's and Mr. Harvey's correspondence met these requirements. For the reasons that follow, I see no reason to interfere with the application judge's determination that the notices provided were sufficient to qualify as "notices of rescission".

[77] It is true that both notices utilized the word "terminate". However, both also included repeated requests that the deposit be returned. As the application judge noted (para. 56 of Mr. Harvey, para. 54 of Ms. Yim), return of deposit is a remedy consistent with rescission, and not with repudiation. As well, both notices referred to the materially different terms contained in the HUMA as a basis for undoing the transaction. The HUMA had just been disclosed to Ms. Yim

and Mr. Harvey a few days before their respective notices. They were well within the window to claim rescission based on a material change.

[78] Turning first to Ms. Yim, although it is true that she was represented by counsel, I do not see how this factor is relevant to a determination of whether the notice was sufficiently clear that Ms. Yim wanted to undo the transaction based on a material change. Regardless, Ms. Yim's counsel wrote a follow-up e-mail to Talon the day after the initial notice, making it clear that rescission pursuant to s. 74(7) of the Act was being sought. In my view, [page205] considering these factors as a whole, it was reasonable for the application judge to conclude that the notice provided in the case of Ms. Yim was sufficient to meet the requirements of the Act.

[79] I also agree with the application judge (para. 53 of Ms. Yim appeal) that the issue here is not whether the change to the HUMA actually was a material change. That issue does not come into play. Talon received valid notices of rescission under the Act, based on an alleged material change in the HUMA. Talon had ten days to make an application to Superior Court for a determination as to whether the alleged material change was in fact material. Having failed to do so, it is now too late for Talon to argue that the change was not material.

[80] I would therefore not give effect to this argument in the appeal involving Ms. Yim. Her notice was a valid notice of rescission under the Act.

[81] The case of Mr. Harvey warrants a similar analysis and the same conclusion.

[82] Mr. Harvey's letter of February 24 did not contain the word rescind, and did not reference s. 74 of the Act. Nor did he provide a follow-up communication the next day, unlike Ms. Yim. However, his letter did contain information sufficient to bring home to the declarant that s. 74 was being engaged. As noted by the application judge, Mr. Harvey both asked for the return of his deposit, and relied on the material differences in the HUMA. Given this, I see no error in the application judge's conclusion that Mr. Harvey's letter met the requirements under s. 74 of the Act. It was a valid notice of rescission.

Conclusion

[83] I have concluded that the application judge committed no errors of law in interpreting the Act, nor palpable and overriding errors in applying the law to the facts of this case. Accordingly, her conclusion that the notices provided were sufficient should not be disturbed on appeal. Given that both applications were commenced within the time required, Ms. Yim and Mr. Harvey are both entitled to an order requiring Talon to refund their deposits with interest, in accordance with s. 74(9) of the Act.

Disposition

[84] For these reasons, I would dismiss both appeals. I would order Talon to pay the cost of each respondent -- $15,000 in the Yim appeal and $10,000 in the Harvey appeal. These amounts include disbursements and applicable taxes.

2017 ONCA 267 (CanLII)

Appeal dismissed.

[page206]

Notes

1 Ms. Yim's husband, Mr. Kim, was added as an applicant subsequent to Ms. Yim's commencing her application. For ease of reference, I will refer to the applicants jointly as Ms. Yim.

2 From the record, it appears that Talon did not take the position, which it now advocates on appeal, that the application as a whole had been brought out of time in the first place.

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2017 ONCA 267 (CanLII)

In the Court of Appeal of Alberta

Citation: Iona Contractors Ltd. v Guarantee Company of North America, 2015 ABCA 240

Date: 20150716
Docket: 1401-0159-AC
Registry: Calgary

2015 ABCA 240 (CanLII)

Between:

Ernst & Young Inc. in its capacities as Receiver and Manager and Trustee in the Bankruptcy of Iona Contractors Ltd.

Respondent
(Applicant)

- and -

The Guarantee Company of North America

Appellant
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Keith Yamauchi

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Mr. Justice Yamauchi

Dissenting Reasons for Judgment Reserved of the Honourable Madam Justice Paperny

Appeal from the Order by
The Honourable Madam Justice K.M. Eidsvik
Dated the 10th day of June, 2014
Filed on the 3rd day of July, 2014

(2014 ABQB 347, Docket: 25-1475756)

2015 ABCA 240 (CanLII)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

2015 ABCA 240 (CanLII)

[1] This appeal relates to the entitlement to holdback funds that remain unpaid under a construction contract. The main players are:

- Iona Contractors, a now bankrupt contractor (represented by its bankruptcy trustee) that agreed to improve the north airfield for the Calgary Airport Authority;

- The Calgary Airport Authority which retained Iona, and owed the disputed sum of $997,716 remaining payable under the contract. Those funds are held in trust by the appellant's solicitors pending the resolution of this dispute;

- The appellant Guarantee Company of North America which issued a Labour and Material Payment Bond to the Airport Authority to ensure payment of Iona's obligations under the contract;

- A group of unpaid subcontractors, who Iona retained to perform work on the airfield, and who were subsequently paid out by Guarantee Company of North America under the Labour and Material Payment Bond;

- The Alberta Treasury Branches, Iona's secured creditor, which has a prior registered security interest against all of Iona's assets.

The chambers judge concluded that the Trustee in Bankruptcy of Iona Contractors was entitled to receive the unpaid funds from the Airport Authority, and to pay them to Alberta Treasury Branches: ***Iona Contractors Ltd. v Guarantee Co. of North America***, 2014 ABQB 347. The surety Guarantee Company of North America appeals.

Facts

[2] In 2009 Iona and the Airport Authority entered into a contract for the construction of improvements on the airport's north airfield. Under the contract, the Airport Authority required Iona to deliver a Performance Bond, and a Labour and Material Payment Bond to guarantee that suppliers of materials and labour to the project would be paid. The appellant Guarantee Company of North America is the surety under both bonds.

[3] By October 2010, work under the contract was substantially complete, but some of Iona's subcontractors remained unpaid. The Airport Authority withheld further payment. It used $182,869 ($105,000 + $77,869) of the remaining outstanding funds to complete deficiencies in the contract work, leaving $997,715.83 still in the Airport Authority's hands. Guarantee Company paid out $1.48 million under the Payment Bond to settle the outstanding accounts of Iona's

2015 ABCA 240 (CanLII)

subcontractors. It now claims the $997,715.83 that remains unpaid under the contract to recoup these payments.

[4] In December 2010, Iona applied for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. Iona was assigned into bankruptcy on March 18, 2011.

[5] Guarantee Company argues that it is entitled to the remaining funds as the subrogee of the subcontractors because:

(a) There is no money owed to Iona under the contract, because:

(i) Iona is in breach, and

(ii) the contract gives the Airport Authority the right to cure Iona's breaches by paying the unpaid subcontractors,

and alternatively,

(b) The remaining funds are impressed by a trust under the *Builders' Lien Act*, RSA 2000, c. B-7, s. 22.

Therefore, Guarantee Company argues, Iona's Trustee has no claim to the leftover funds.

[6] The Trustee argues that:

(a) The contract work was substantially completed, and Iona is entitled to payment of the remaining funds held back under the contract. It argues that the wording of the contract permitting the Airport Authority to cure Iona's breaches of the contract does not extend as far as paying unpaid subcontractors. In the alternative, any such payments would defeat the priority regime in the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 and are therefore impermissible, and

(b) The trust provisions of the *Builders' Lien Act*, if they apply, would also offend the priority regime in the *Bankruptcy and Insolvency Act*, and they cannot assist the surety Guarantee Company in the circumstances.

The Airport Authority takes no position, and has paid the money into trust.

[7] The chambers judge rejected both of Guarantee Company's arguments. On the contractual argument, she held at paras. 15-6, 26 that Iona was the only party with a contractual relationship with the subcontractors, and with a duty to pay the subcontractors. The Airport Authority had no "duty" to pay subcontractors. She held further at paras. 24-5 that the ability of the Airport Authority to hold back funds "required to have the Work completed", was not wide enough to cover the payment of unpaid subcontractors.

[8] With respect to the second argument, the chambers judge held at paras. 33-4 that the statutory trust created by s. 22 of the *Builders' Lien Act* conflicted with the priority regime in the *Bankruptcy and Insolvency Act*, and so was inoperative in these circumstances. She directed that the remaining holdback funds be paid to the Trustee, generating this appeal by Guarantee Company.

2015 ABCA 240 (CanLII)

Issues and Standard of Review

[9] The appellant Guarantee Company raises the same issues on appeal. The first issue is whether there are any funds owed to Iona under the contract, which depends on whether the Airport Authority had the ability to pay the unpaid subcontractors. The second issue is whether the trust provisions of the *Builders' Lien Act* conflict with the priority regime of the *Bankruptcy and Insolvency Act*.

[10] The standard of review of the interpretation of contracts depends on the issue raised and the legal and factual context: ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co***., 2015 ABCA 121 at paras. 12-9. No parole evidence was introduced to suggest that the parties turned their mind to how these contractual provisions would operate in the circumstances that have arisen in this appeal. The main dispute over the meaning of the contract is now between non-parties to the contract. The proper interpretation of the contract turns largely on its wording. Whether the bare wording of the contract is, in any event, rendered inoperative because of conflict with the *Bankruptcy and Insolvency Act* is a question of law. Whether the trust provisions of the *Builders' Lien Act* are operative in these circumstances is also a question of law. The appropriate standard of review in this appeal is correctness.

The Contractual Argument

[11] Guarantee Company argues that, under the terms of the contract, there is no money owing to Iona. It argues that the contract allows the Airport Authority to remedy breaches of the contract by Iona, which includes paying subcontractors that Iona did not pay.

[12] This argument is premised on the definition of "Work" in the contract:

> 1.1.54 "Work" means the total construction and related services required by the Contract to be performed and Products to be supplied under the Contract, and includes everything that is necessary to be done, furnished or delivered by the Contractor to perform the Contract.

Clause 13.1.1 places an obligation on Iona to pay its subcontractors, and so Guarantee Company argues that this is "something that is necessary to be done" under the contract. If Iona is in breach of that part of the "Work", then the Airport Authority is entitled to cure the default under clause 6.3.3(d):

2015 ABCA 240 (CanLII)

6.3.3 If any part of the Work is taken out of the Contractor's hands:

. . .

(d) the Contractor's right to any further payment that is due or accruing due (including any holdback or progress claim) for the Work taken out of the Contractor's hands is extinguished, save and except that portion (if any) which is not required by the Airport Authority to have the Work completed or to compensate it for any consequential damages or losses arising out of the taking of the Work or any part of it out of the Contractor's hands.

On this argument, if a subcontractor is not paid then the "Work" is not complete, and the Airport Authority is entitled to take paying the subcontractors "out of the Contractor's hands". If the Airport Authority pays the subcontractors directly, it can deduct the funds so used from what is otherwise owing to Iona.

[13] The Trustee does not accept this line of argument, primarily because it notes that there is no contractual relationship between the Airport Authority and the subcontractors, and therefore no "obligation" on the Airport Authority to pay subcontractors. That is true, but not directly relevant at this stage of the analysis. The Airport Authority has no "obligation" to do any of the "Work"; it was Iona that was obliged to improve the airfield and perform all of the covenants in the contract, including paying the subcontractors. The issue at this stage is not whether the Airport Authority has an "obligation" to pay the subcontractors (or otherwise complete the Work), but whether it has the "right" to do so under clause 6.3.3(d).

[14] As the chambers judge noted at para. 21, this argument is "compelling", but it is not necessary to resolve whether, on the wording of the contract, paying the subcontractors is "something that is necessary to be done under the Contract", and therefore part of the "Work". Even if the paying of the subcontractors was authorized under clause 6.3.3(d) prior to any bankruptcy, the provisions of that clause become inoperative after bankruptcy.

[15] There is nothing objectionable about a provision in a contract allowing the owner to complete work that was not performed by a bankrupt contractor, and to deduct the amount from what was otherwise owing to the contractor. Section 97(3) of the *Bankruptcy and Insolvency Act* allows such set-offs. After a bankruptcy, however, no such clause is effective to the extent that it gives a discretion to the owner to pay creditors of the bankrupt contractor otherwise than as authorized in the *Bankruptcy and Insolvency Act*: ***A.N. Bail Co. v Gingras***, [1982] 2 SCR 475 at pp. 485-7. It is at this stage of the analysis that it is relevant that the owner has no "obligation" to pay the subcontractors, but only the "right" or "discretion" under clause 6.3.3(d). After bankruptcy, that discretion cannot be exercised in such a way that it disturbs the priorities in the *Bankruptcy and Insolvency Act*.

2015 ABCA 240 (CanLII)

[16] This point was confirmed in ***Greenview (Municipal District No. 16) v Bank of Nova Scotia***, 2013 ABCA 302, 87 Alta LR (5th) 335, 556 AR 344 where the contract gave the owner municipality an explicit right to pay unpaid subcontractors:

> 1.2.35 The Contractor shall promptly pay . . . any subcontractor . . . . In the event of failure by the Contractor at any time to do so . . . the Department may retain out of any money due on any account to the Contractor from the Department such amount as the Department may deem sufficient to satisfy the same . . . . The Department may pay directly to any claimant such amount as the Department determines is owing, rendering to the Contractor the balance due after deducting the payments so made.

The Court noted at para. 41 that this clause gave the owner a wide discretion to pay any unpaid subcontractors. However, once a bankruptcy intervened, this discretion could no longer be exercised:

> . . . once bankruptcy occurs any monies owing become the property of the Trustee, and the terms of the contract do not replace the terms of the *BIA* to prefer some of Horizon's creditors over others. Once Horizon was placed in bankruptcy, all creditors stand on an equal footing vis-à-vis Horizon, and claims must be submitted in accordance with the provisions of the *BIA* section 69.3. Further, clause 1.2.35 embodies a discretion, not a commitment, on the part of Greenview, the exercise of which would reduce what Greenview might owe to Horizon either for work already billed or work to be billed.

As this passage notes, if the owner had an obligation to pay the subcontractors, and not just a discretion, the result would be different.

[17] The appellant argues that even if the Airport Authority merely had a discretion (and not an "obligation") to pay subcontractors under the contract, it does have such an obligation under the Labour and Material Payment Bond. The appellant argues that when the construction contract and the bond are read together, they disclose an obligation on the part of the Airport Authority to "mitigate" the exposure of the surety, which includes using the holdback funds to pay the subcontractors. Even if the agreements, when read together, disclose some intention to minimize the exposure of the surety, the private arrangements between the owner, the contractor, and the bonding company cannot affect the rights of third parties like the Trustee in bankruptcy and the secured creditor. Whatever rights the appellant may have were not registered at the Personal Property Registry, and cannot displace the rights of the secured party. Further, in ***Greenview*** the Court confirmed that the existence of a surety and a bonding arrangement did not change the outcome.

[18] It follows that the appellant is unable to succeed based on its argument that no money was due to Iona under the contract.

2015 ABCA 240 (CanLII)

The Trust Argument

[19] In the alternative, Guarantee Company argues that it is entitled to the disputed funds by virtue of the trust created by s. 22 of the *Builders' Lien Act*. It argues that the unpaid subcontractors are the beneficiaries of that trust, and that it is subrogated to their position. The Trustee replies that the trust created is inconsistent with the priorities set by the *Bankruptcy and Insolvency Act*, and so cannot assist Guarantee Company.

The Builders' Lien Act

[20] The general provisions of the *Builders' Lien Act* are well known. At common law, subcontractors have no claim against the owner of property that they improve, because there is no privity of contract between them. The *Builders' Lien Act* provides a partial remedy to that problem. It allows an unpaid subcontractor to file a lien against the owner's property, and potentially to sell the owner's property to satisfy its claim. The owner can post security in substitution for the lien, in which case the subcontractor's rights are transferred to the security. The owner can also limit its exposure by keeping statutorily mandated "holdbacks", which it can decline to pay to the contractor until it is satisfied that there are no liens. If necessary, the owner can pay the holdback into court, and allow the contractor and the subcontractors to litigate entitlement.

[21] The *Builders' Lien Act* therefore creates a comprehensive, integrated system that provides some assurance to subcontractors that they will get paid for improving land. A portion of that overall regime is a statutory trust found in s. 22:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit of those persons.
>
> (2) When a person other than a person who received the payment referred to in subsection (1)
>
> (a) is entitled to the money held in trust under this section, and
>
> (b) receives payment pursuant to that trust,
>
> the person, to the extent that the person owes money to other persons who provided work or furnished materials for the work or materials in respect of which the

payment referred to in clause (b) was made, holds that money in trust for the benefit of those other persons.

(3) A person who is subject to the obligations of a trust established under this section is released from any obligations of the trust when that person pays the money to

(a) the person for whom that person holds the money in trust, or

(b) another person for the purposes of having it paid to the person for whom the money is held in trust.

Neither the trust provisions, nor any other portion of the *Builders' Lien* statutory regime should be read in isolation. They are all a part of one comprehensive package relating to property and civil rights in the province.

[22] These trust provisions are narrow in their operation. They only apply when "a certificate of substantial performance is issued", as occurred here. That certificate is a precondition to the release of the holdback funds under s. 21, which to that point have been held by the owner to ensure that the subcontractors will be paid, and to satisfy the owner's obligation should a lien be filed. Section 22 ensures that when the remaining funds are paid out, they will end up in the hands of any unpaid subcontractors. Section 22 effectively uses the mechanism of a trust to avoid the diversion of the holdback funds, after the issue of the certificate of substantial completion, but before the funds actually reach the unpaid subcontractors. If, in this situation, the $997,716 had been paid by the Airport Authority to Iona or the Trustee, under the statute the recipient would have held the funds in trust for the subcontractors.

[23] It is obvious that the *Builders' Lien Act* could have an effect on the entitlement to payments on bankruptcy. A subcontractor which has a valid lien, or another valid claim under the *Builders' Lien Act,* might become entitled to a payment to which it would not be entitled as a mere unsecured creditor. No one has suggested that these provisions, relating as they do to property and civil rights in the province, necessarily offend the bankruptcy distribution regime.

[24] An added complication in this appeal is that airport lands fall under federal jurisdiction, and so cannot be liened. This is primarily because it would be incompatible with the regulation of airports to permit any portion of the airport lands to be sold to satisfy the liens. In this case, the parties agree that the trust provisions in s. 22 can nevertheless apply, and the appeal was argued on that basis: see ***Minneapolis-Honeywell Regulator Co. v Empire Brass Manufacturing Co.***, [1955] SCR 694; ***Canadian Bank of Commerce v T. McAvity & Sons Ltd.***, [1959] SCR 478; ***Kerr Interior Systems Ltd. v Kenroc Building Materials Co. Ltd.***, 2009 ABCA 240 at paras. 14, 17, 6 Alta LR (5th) 279, 457 AR 274. The trust provisions should not, however, be interpreted as if they were a "stand alone" trust; they are still a part of the overall scheme in the *Builders' Lien Act.*

2015 ABCA 240 (CanLII)

The Bankruptcy and Insolvency Act

[25] The *Bankruptcy and Insolvency Act* is federal legislation, the general provisions of which are also well known. It governs the orderly distribution of the estates of bankrupt persons, and in particular specifies the priority in which competing claims will be paid. Provisions like s. 72 confirm that the *Bankruptcy and Insolvency Act* operates against the background of property and civil rights created by provincial law. In the event of an operational conflict, the federal provisions prevail.

[26] The *Bankruptcy and Insolvency Act* incorporates numerous provisions that determine the priority of payments to claimants in a bankruptcy. In the most general terms, the scheme is:

> (a) Under s. 67(1), only "property of the bankrupt" is available for distribution to any class of claimants. Under s. 67(1)(a) property "held by the bankrupt in trust for any other person" is not considered to be property of the bankrupt, and so is not available to the creditors of the bankrupt.
>
> (b) Under s. 136(1), the scheme of distribution is made "subject to the rights of secured parties". Secured parties are thus entitled to enforce their security in accordance with provincial law, without regard to the scheme in the *Bankruptcy and Insolvency Act.*
>
> (c) Section 136 next lists, in order of priority between themselves, a dozen categories of claims that have priority over general unsecured claims. Priority is given to things like funeral expenses, costs of administration, some wage claims, etc.
>
> (d) Finally, s. 141 provides that all other claims will be payable rateably, subject to a few specific statutory exceptions.

The categorization of a claim for the purposes of relative priority is a matter of federal law. Thus, the provinces cannot define what is a "trust" or a "secured party" for the purposes of bankruptcy law; which claims are included in those various categories is a matter of federal law. This ensures the uniformity of bankruptcy law across Canada. But while uniformity of bankruptcy law is an important value, that does not mean that results will not vary from province to province. Since "property and civil rights" can vary depending on provincial law, a type of creditor in one province may be in a different position after bankruptcy than the same type of creditor in another province.

Interaction of the Federal and Provincial Law

[27] Because federal bankruptcy legislation is enacted against the background of provincial laws respecting property and civil rights, there will be occasions when a different outcome will result depending on which law is applied. As mentioned, in case of operational conflict federal law prevails. Obviously a deliberate attempt by a province to change the order of priority in bankruptcy will be ineffective, but an operational conflict can arise short of that.

2015 ABCA 240 (CanLII)

2015 ABCA 240 (CanLII)

[28] There have been a number of cases in which operational conflicts have arisen:

(a) In ***Quebec (Deputy Minister of Revenue) v Bourgault (Trustee of)***, [1980] 1 SCR 35 the provincial statute purported to create a priority for unpaid sales tax debts owed to the province, by deeming them to be a privileged debt. The relative priority for such claims was specifically dealt with in what is now s. 136(1)(j), which applied "notwithstanding any statutory preference to the contrary". This provincial attempt to create a new category of "privileged creditor" created an operational conflict with federal legislation, and was ineffective.

(b) In ***Deloitte Haskins and Sells Ltd. v Alberta (Workers' Compensation Board)***, [1985] 1 SCR 785 the provincial statute purported to create a charge on all of the property of the employer, thereby making the Board a secured creditor. The priority for Workers' Compensation Board claims was specifically dealt with in what is now s. 136(1)(h), and this attempt to create a secured claim was also ineffective.

(c) ***Federal Business Development Bank v Québec (Commission de la santé et de la sécurité du travail du Québec)***, [1988] 1 SCR 1061 was another attempt to turn a workers' compensation claim into a secured claim. This provision was also held to be ineffective, even if the enforcement of the secured claim took place outside the bankruptcy regime.

(d) The provincial statute in ***British Columbia v Henfrey Samson Belair Ltd.***, [1989] 2 SCR 24 attempted to create a priority for unpaid sales taxes. Rather than deeming the Crown's claim to be "secured", this legislation deemed a "trust" in support of the unpaid claim, in an attempt to withdraw the assets from the bankruptcy regime under s. 67(1)(a). This "trust" was held not to be a true trust for bankruptcy purposes, and the priority of the claim was governed by what is now s. 136(1)(j). While the provinces could define "trust" for purposes of provincial legislation, only the common law definition of a "trust" met the requirements for a trust under federal bankruptcy law.

(e) In ***Husky Oil Operations Ltd. v Canada (Minister of National Revenue)***, [1995] 3 SCR 453 the provincial statute did not purport to create either a secured claim or a trust. Rather it deemed the debtor of the bankrupt to be the surety or guarantor of the bankrupt's obligations to the Worker's Compensation Board. If the bankrupt did not pay the Board, the debtor had to pay, but it could then set off what it had paid against its debt owing to the bankrupt. The effect of the regime was to divert funds from the bankrupt's estate to pay the Board. This statutory technique was also held to create an operational conflict.

Some of these challenged provisions affected the payment priorities set out in the *Bankruptcy and Insolvency Act* more directly than the ones involved in this appeal. A feature of most of them was that they purported to create interests with priority that attached to all the assets of the bankrupt, not just to any discrete asset: see ***Henfrey Samson Belair*** at pp. 33-4.

2015 ABCA 240 (CanLII)

[29] In ***Husky Oil*** the Court set out certain principles for evaluating the effectiveness of provincial legislation after bankruptcy. It rejected two possible rules:

(a) First, it rejected (at para. 31) the "broader 'bottom line' approach", which postulated that any provincial law that affects the final result in bankruptcy would create an operational conflict. Such a broad rule was inconsistent with the accepted premise that property and civil rights were defined, in many fundamental ways, by provincial legislation.

(b) The Court also rejected (at para. 32) the "narrower 'jump the queue' approach", by which an operational conflict would only arise if there were a manifest intention to change priorities in bankruptcy. The scope of operational conflict was wider than this approach.

In the result, the Court endorsed a position between these extremes.

[30] ***Husky Oil*** sets out (at paras. 33, 40) six propositions underlying the proper approach:

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;

(4) the definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*.

(5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

2015 ABCA 240 (CanLII)

These propositions, unfortunately, do not establish where the line is between effective and inoperative provincial legislation. Many of them merely confirm that the terms and concepts used in the *Bankruptcy and Insolvency Act* must be determined by federal law, which prevails over provincial law. The first proposition, in particular, cannot be read as endorsing the explicitly rejected "broader 'bottom line' approach". Whether any provincial scheme is in operational conflict with the bankruptcy regime must be determined by examining the purposes and effect of the provincial legislation within its statutory context.

[31] Because ***Husky Oil*** rejected the "broader 'bottom line' approach", it is not sufficient to note that the impugned provincial legislation has some effect on priorities. It is only where provincial law interacts with federal bankruptcy law (i.e., somebody is insolvent) that the issue even arises. Obviously, if everyone is solvent, nobody cares about trusts, secured interests or priorities. If everyone is solvent, nobody cares about builders' liens either. Whether anybody has a secured or prior claim depends on provincial law over property and civil rights, so in one sense all priorities are set by provincial law. Merely noting that a provincial law has some effect on priorities is not determinative.

The Operational Validity of the Builders' Lien Act

[32] On what side of the line do the trust provisions in s. 22 of the *Builders' Lien Act* stand?

[33] An important consideration is that these trust provisions do not directly, intentionally, or primarily affect the order of payment in bankruptcy. They are part of a larger statutory scheme designed to create new civil rights for unpaid subcontractors. The holdback provisions and the trust provisions play a supportive role in the overall regime, and are primarily in place to prevent the unjustified erosion of the lien rights created by the statute. There is no attempt to use "form to override substance"; the trust is a legitimate part of the overall scheme. However, ***Husky Oil*** confirms that an intention to reorder priorities is not necessary to create an operational conflict.

[34] ***Henfrey Samson Belair*** at pp. 34-5 confirms that the definition of "trust" encompasses, at least, all common law trusts. The common law test for a trust requires three certainties: certainty of intention, certainty of objects and certainty of subject matter. In most common law trusts, the "intention" arises because (a) the settlor forms and declares an intention to hold property in trust, or (b) property is transferred to somebody with the intention that the recipient hold the property in trust. A statutory trust is imposed by law, so it is not "intentional" in that sense; for a statutory trust to meet the common law test for a trust, the general law must be applied by analogy.

[35] ***Henfrey Samson Belair*** at p. 34 concluded:

> In summary, I am of the view that s. 47(a) should be confined to <u>trusts arising under general principles of law</u>, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. (emphasis added)

Bassano Growers Ltd. v Diamond S. Produce Ltd. (Trustee of), 1998 ABCA 198 at para. 12, 66 Alta LR (3d) 296, 216 AR 328 interpreted ***Henfrey Samson Belair*** as accepting that some statutory trusts could qualify under the "general principles of law":

> This is not to say that a trust that meets the requirements of the general law, and therefore qualifies as a trust under s. 67(1)(a) of the BIA, may not have its genesis in a deemed or statutory trust. It must, however, satisfy the essential requirements of a valid trust under the general law in order to do so. Here, the purported trust fails to meet the necessity for certainty of subject-matter. (emphasis added)

The alternative interpretation of ***Henfrey Samson Belair*** would be that no statutory trust could ever qualify as a trust "arising under general principles of law", if only because statutory trusts are in one sense "involuntary". That alternative interpretation is, however, inconsistent with the specific findings in ***Henfrey Samson Belair*** at p. 34 about the statutory trust that was the subject of that decision:

> . . . At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. . . . There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt. (emphasis added)

The problem with the trust in ***Henfrey Samson Belair*** was that there was no certainty of subject matter, not that a statutory trust could never qualify as a "trust arising under general principles of law".

[36] In most statutory trust situations, only the third certainty will be in play. Certainty of intention and certainty of objects will usually be satisfied by the terms of the statute. If the statute uses the word "trust", the intention is clear: ***Re: 0409725 B.C. Ltd***., 2015 BCSC 561 at para. 22. Usually the intended beneficiary of the trust will also be obvious. The only potential for uncertainty is over the assets that are covered by the trust.

[37] The trusts created by s. 22 meet the requirements of the general principles of trust law:

(a) There is certainty of intention. The "intention" of s. 22 is clearly to create a trust;

(b) There is certainty of object. The beneficiaries of the trust are clearly the unpaid subcontractors;

2015 ABCA 240 (CanLII)

2015 ABCA 240 (CanLII)

(c) There is certainty of subject matter. Section 22 provides that once a certificate of substantial completion is issued, any "payment by the owner" is subject to the trust. At this stage the owner's primarily obligation will be to pay out the holdback, and its obligation to do so represents a discrete chose in action. That chose in action is the subject matter of the trust. If, as the Trustee postulates, the Airport Authority had written a cheque for $997,716 to Iona, that bill of exchange and those funds would have been trust assets in Iona's hands.

It follows that the provisions of s. 22 meet the requirements of a common law trust. There is no deliberate attempt to reorder priorities in bankruptcy, and the province is not attempting to achieve indirectly what it cannot do directly. These considerations, coupled with the fact that the trust provisions of s. 22 are merely a collateral part of a complex regime designed to create security for unpaid subcontractors, leads to the conclusion that there is no operational conflict.

[38] One of the objections to the statutory scheme in ***Henfrey Samson Belair*** was that the trust in question did not attach to any specific funds. It purported to attach to all the assets of the bankrupt tax collector as if it were a secured claim, like a type of general floating charge. The trust in s. 22 does not suffer from this deficiency, because it only attaches to the discrete sum of money paid by the owner after the certificate of substantial completion has been issued. The other assets of the owner (the Airport Authority) and the contractor (Iona) are unaffected. There is no attempt to throw a general trust over all the assets of the bankrupt.

[39] A number of decisions touch on this issue. In ***John M.M. Troup Ltd. v Ontario (Attorney General)***, [1962] SCR 487 the Court considered the provisions of Ontario's *Mechanics' Lien Act*. That statute purported to create a trust over "all funds received by a contractor on account of the contract price", and therefore had a wider reach than the Alberta statute involved here. The contractor had one account at the Royal Bank, into which it deposited funds it received from many projects all over the province. The Bank was sued for allegedly appropriating trust funds, but on the particular facts the Court held that the Bank could not reasonably have suspected that the funds were deposited in breach of any trust, or that there were any unpaid lien claimants. In response to an alternative argument about the validity of the trust, the Court held at p. 494: "It is suggested that the legislation is in conflict with federal legislation on banking and bankruptcy but in my opinion the conflict does not exist in either field." ***Troup*** supports the appellant's proposition that the trust provisions under the *Builders Lien Act* are effective even after bankruptcy. The decision is, however, inconclusive because the statement relied on is *obiter*, and must be read in the light of the subsequent decisions, discussed *supra*, paras. 28-30.

[40] In ***Duraco Window Industries (Sask.) Ltd. v Factory Window & Door Ltd.*** (1995), 135 Sask R 235, 34 CBR (3d) 196 the bankrupt deposited all of its receipts from several projects into a single bank account. On bankruptcy, there was a balance remaining in that bank account. Since the statute in question created a trust over "all amounts owing" to a contractor or subcontractor, an unpaid supplier argued that all of these funds were impressed with a trust. The court held that there was no certainty of intention, because there was no instrument that showed an intention by the

2015 ABCA 240 (CanLII)

supplier and the bankrupt to create a trust. If ***Duraco Window*** is correct, then no statutory trust will ever meet the common law test. If the wording of the statute creating a trust is not sufficient to demonstrate an intention to create a trust, no statutory trust will ever be effective, because the trustee and beneficiary are never involved at that stage. This is inconsistent with the decision in ***Henfrey Samson Belair*** which implies that some statutory trusts can be effective. The real problem with the trust created in ***Duraco Window*** is that it lacked certainty of subject matter, because it purported to throw a general trust over all of the assets of the bankrupt. It was impossible for any third party to tell which assets of the contractor were trust assets, and which were not.

[41] ***Roscoe Enterprises Ltd. v Wasscon Construction Inc.*** (1998), 169 Sask R 240, 161 DLR (4th) 725 was another decision arising out of a statutory trust over "all amounts owing" to a contractor or subcontractor. The balance of the funds owing to the bankrupt contractor had been paid into court, and the dispute was between the Trustee and the unpaid subcontractors. This decision also interpreted ***Henfrey Samson Belair*** as invalidating all statutory trusts, and followed ***Duraco Window***.

[42] In ***D&K Horizontal Drilling (1998) Ltd. (Trustee of) v Alliance Pipeline Ltd.***, 2002 SKQB 86, 216 Sask R 199, 33 CBR (4th) 217 the bankrupt contractor had substantially completed its contract at the date of its bankruptcy, leaving unpaid subcontractors. The owner paid the outstanding funds into court to vacate liens on the land. The court held at para. 23 that the liens were valid interests that could be enforced after bankruptcy, and that the funds in court were merely a substitute for that security. Accordingly, the subcontractors were entitled to the funds. It was not necessary to rely on the trust provisions in the statute, but in the alternative the court at para. 37 distinguished ***Duraco Window*** and ***Roscoe Enterprises*** on the basis that the funds in question in ***D&K*** were paid into court to discharge the liens.

[43] In ***Royal Bank of Canada v Atlas Block Co.***, 2014 ONSC 3062 at para. 36, 15 CBR (6th) 272, 37 CLR (4th) 286 it was held that "there is no apparent reason why a deemed trust under the [*Construction Lien Act*] should be treated differently than any other provincial statutory deemed trust for the purposes of para. 67(1)(a) of the *BIA*." ***Atlas Block***, like ***Duraco Window*** and ***Roscoe Enterprises***, reads the prior Supreme Court of Canada authorities as essentially holding that no statutory trust will be effective after bankruptcy. This approach, however, appears to be inconsistent with the decision in ***Husky Oil*** which specifically rejected the "broader 'bottom line' approach". If the Supreme Court believed that no statutory trust was ever effective, or that all provincial statutory trusts were indistinguishable for the purposes of bankruptcy law, it would have just said so in ***Henfrey Samson Belair***. In effect, the "broader 'bottom line' approach" would be the prevailing principle. On the contrary, the Court held at p. 34 that the statutory trust there did meet the first two requirements of a common law trust. By recognizing that there was room between the "broader 'bottom line' approach" and the "narrower 'jump the queue' approach", the Court essentially recognized that some provincial statutory trusts could be effective: ***Re: 0409725 B.C. Ltd.*** at para. 20. It is simply not enough to say that "all statutory trusts are the same".

2015 ABCA 240 (CanLII)

[44] The remaining issue is whether a trust must be in effect prior to the bankruptcy, in order to be effective after the bankruptcy. There is some passing suggestion in a few cases that a trust arising after bankruptcy is ineffective, but there is no binding authority to that effect. It is certainly true that no one can create a trust after bankruptcy in an attempt to withdraw assets from the estate and reorder priorities, but that does not mean that legitimate trusts that arise or are perfected after the bankruptcy are ineffective.

[45] Section 67(1)(a) does not impose any temporal limit on when the trust arises, and only requires that the property be "held by the bankrupt in trust for any other person". Requiring that the trust exist prior to the bankruptcy might generate anomalous results. For example, had the Airport Authority written the cheque for the holdback, and mailed it to Iona, the date of receipt might be critical. If the trust must be perfected before bankruptcy, and had Iona received and deposited the cheque the day before the bankruptcy, the trust would be valid. However, if the same cheque arrived and Iona deposited it the day after the bankruptcy, the trust would not be valid. That does not appear to be a commercially sensible result. Another example would arise if the bankrupt became a testamentary trustee of an estate as a result of a death or other event that occurred after the bankruptcy. Yet another example would be of a bankrupt lawyer who came into possession of trust property after his or her bankruptcy. There is no reason in principle why such trust assets should accrue to the benefit of the unsecured creditors of the bankrupt, rather than the intended beneficiaries of the trust.

[46] There is also uncertainty about the concept of the trust "existing" on the date of bankruptcy. It could mean simply that on the date of bankruptcy the trust instrument existed, or the class of beneficiaries existed, or that the trust property had come into existence and was identifiable, or some combination of those. In this case the "trust" clearly existed before Iona's bankruptcy, in the sense that the provisions of the *Builders Lien Act* were in place well before its bankruptcy. The disputed funds were "held back" in accordance with the legislation before Iona's bankruptcy. They were also "payable" before its bankruptcy. The only sense in which the trust did not "exist" on the date of bankruptcy is that the Airport Authority had not yet drawn the cheque to pay the holdback funds, nor had the deemed trustee received those funds. As noted, *supra* para. 22, the trust under the statute attaches to the holdback funds themselves when they are paid out.

[47] It can be accepted that a trust cannot be created after bankruptcy if its intent or effect is to defeat the order of priorities under the *Bankruptcy and Insolvency Act*. The trusts under the *Builders' Lien Act*, however, have none of those attributes. The lien rights arise the minute the work is done, and the funds which are captured by the trust were quantified in the hands of the Airport Authority on the date of bankruptcy: ***Andrea Schmidt Construction Ltd. v Glatt*** (1979), 25 OR (2d) 567 at para. 12, 104 DLR (3d) 130 affm'd (1980), 28 OR (2d) 672, 112 DLR (3d) 371 (CA). Nothing in this case about the timing of the formation of the trust or the bankruptcy would render the statutory trust invalid or inoperative.

2015 ABCA 240 (CanLII)

Involvement of the Surety

[48] In this case the subcontractors were not paid directly by Iona or the Airport. They were in fact paid by Guaranty Company under the Payment Bond. The intervention of the surety does not change the analysis, since the surety is subrogated to the rights of the unpaid subcontractors: ***E C & M Electric Ltd. v Medicine Hat General & Auxiliary Hospital & Nursing Home District No. 69*** (1987), 76 AR 281, 50 Alta LR (2d) 48. Once the appellant surety paid the subcontractors, it became entitled to enforce all of their rights under the *Builders' Lien Act*. The funds in question which were held by the Airport Authority are still intact, and available to discharge the trust. Those funds should now be paid to Guarantee Company.

Conclusion

[49] In conclusion, the disputed holdback funds are impressed by a trust under the *Builders Lien Act*, and are therefore not property of the bankrupt. The appeal is allowed, and the disputed funds should be paid to the appellant.

Appeal heard on April 8, 2015

Reasons filed at Calgary, Alberta
this 16th day of July, 2015

Slatter J.A.

I concur: Authorized to sign for: Yamauchi J.

2015 ABCA 240 (CanLII)

Dissenting Reasons for Judgment Reserved
of the Honourable Madam Justice Paperny

Introduction

[50] I would dismiss the appeal. For the reasons that follow, I agree with the disposition of my colleagues on the first issue. However, I respectfully disagree with their conclusion on the standard of review, and with their analysis and conclusion regarding the existence of a common law trust in these circumstances.

Background

[51] The Calgary Airport Authority (Airport) and Iona Contractors Ltd. (Iona) entered into a contract in 2009 for the construction of improvements on the Airport's north airfield (the Contract). By October 2010, work under the Contract was substantially complete and Iona applied to receive payment. The Airport, however, had received notice that some of Iona's subcontractors remained unpaid, and withheld further payment.

[52] In December 2010, Iona applied in Ontario for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. Iona was assigned into bankruptcy on March 18, 2011, and Ernst & Young Inc. was appointed Trustee.

[53] As a pre-condition to the Contract, the Airport required Iona to deliver a Performance Bond to guarantee the completion of the project, and a Labour and Material Payment Bond (Payment Bond) to guarantee that suppliers of materials and labour to the project would be paid. The appellant Guarantee Company of North America (GCNA) is surety with respect to both bonds.

[54] The Airport called on GCNA, as surety under the Payment Bond, to pay the outstanding accounts of Iona's subcontractors. GCNA paid out $1.48 million to subcontractors.

[55] The Airport had retained just over $1.1 million in holdback funds from Iona at the time of substantial completion. It used $105,000 to complete deficiencies remaining in the contract work, leaving $997,715.83 still in the Airport's hands (the Funds).

[56] The Trustee takes the position that the Funds are owed to Iona under the Contract and therefore should be paid to it as Trustee of Iona. The Trustee proposes to forward the Funds to Alberta Treasury Branches, Iona's secured lender.

[57] GCNA argues that it is entitled to the Funds as subrogee to the Airport. Its argument is twofold. First, GCNA argues that, because Iona breached the terms of the Contract, the Airport is

2015 ABCA 240 (CanLII)

entitled to withhold payment of the Funds. Accordingly, the Funds are not a debt payable to Iona and do not form part of Iona's estate on the bankruptcy. Instead, the Funds should be paid to GCNA, as subrogee to the Airport.

[58] Alternatively, if the Funds are due to Iona, they are impressed with a trust pursuant to the trust provisions of s 22 of the Alberta *Builders' Lien Act*, RSA 2000, c B-7 (*BLA*), and therefore do not form part of the bankrupt's estate by virtue of s 67 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 *(Bankruptcy Act)*.

[59] The chambers judge considered and dismissed both of these arguments. GCNA appeals.

Issues on Appeal

[60] GCNA argues the same two issues on the appeal:

1. Are the Funds a debt payable to Iona?
2. If the Funds are payable to Iona, are they impressed with a trust such that they are exempted from the bankrupt's property pursuant to s 67 of the *Bankruptcy Act*?

Standard of Review

[61] The Supreme Court has recently clarified that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": ***Creston Moly Corp. v Sattva Capital Corp.***, 2014 SCC 53 at para 50. Accordingly, the chambers judge's interpretation of the contractual documents at issue here is entitled to deference. I agree with my colleagues, however, that the impact of the *Bankruptcy Act* on the effect of the contract is a question of law to which the correctness standard applies.

[62] Likewise, the interaction of the *Bankruptcy Act* and the *BLA* raises questions of law. The chambers judge's characterization of whether the circumstances here give rise to a "trust" for purposes of s 67 of the *Bankruptcy Act* is a matter of mixed fact and law, and also entitled to deference absent palpable and overriding error or an extricable error of law.

Analysis

1. Are the Funds a debt payable to Iona under the Contract?

[63] GCNA argues that the Funds are not a debt payable to Iona and therefore do not form part of Iona's estate. The chambers judge disagreed, finding that the balance of the Funds (after deducting that portion paid by the Airport and GCNA to complete the project) is payable to Iona under the Contract. She ordered that net amount, $919,846.83, be paid to the Trustee.

2015 ABCA 240 (CanLII)

[64] GCNA makes several arguments based on the language of the Contract and the Payment Bond and on the general law of surety. They all lead to this: that the Airport is required to mitigate the surety's loss in making payments of some $1.48 million to subcontractors under the Payment Bond. Iona is not entitled to payment under the Contract to the extent that it has failed to meet its obligation to pay its subcontractors and suppliers. Accordingly, the remaining funds should be paid to GCNA, not to the Trustee.

[65] There are several relevant provisions in the Contract between Iona and the Airport, all of which were reviewed by the chambers judge.

[66] Under the Contract, the Airport has no duty to pay Iona's subcontractors and no contractual relationship with them: GC 1.4.1. Iona, as contractor, is required to enter into agreement with subcontractors and suppliers, and is further obliged to pay its subcontractors at least as often as the Airport is obliged to pay Iona: GC 3.12.1 and 13.1.1. Iona is also required to provide statutory declarations to the Airport regarding the status of any obligations or claims by subcontractors or otherwise arising under the Contract: GC 13.1.2.

[67] The Contract also deals with the situation where Iona becomes insolvent or commits an act of bankruptcy. In such circumstances, the Airport may take any part of the Work[1] out of the Contractor's hands (GC 6.3.1), and may then "employ such means as it sees fit to have the Work completed at the Contractor's cost and expense" (GC 6.3.2). The obligation of the Airport to make further payments to the Contractor in this situation is set out in GC 6.3.3(d):

> 6.3.3(d) the Contractor's right to any further payment that is due or accruing due (including any holdback or progress claim) for the Work taken out of the Contractor's hands is extinguished, *save and except that portion (if any) which is not required by the Airport Authority to have the Work completed or to compensate it for any consequential damages or losses arising out of the taking of the Work or any part of it out of the Contractor's hands.*
>
> [emphasis added]

[68] GC 13.7.1 gives the Airport the right to set-off costs incurred to complete the Work against any amount payable to Iona:

> 13.7.1 In addition to any right of set-off or deduction given or implied by law or the Contract, the Airport Authority may at any time set-off against any amount payable to the Contractor any amount payable by the Contractor to the Airport Authority either under the Contract or any other contract between the Contractor and the

[1] "Work" is defined as "the total construction and related services required by the Contract to be performed and Products to be supplied under the Contract, and includes everything that is necessary to be done, furnished or delivered by the Contractor to perform the Contract."

> Airport Authority under which the Contractor has an undischarged obligation to perform or supply work, labor or material or under which the Airport Authority has exercised its rights to take work out of the Contractor's hands.

[69] The Contract contemplates that the Airport was entitled to complete the Work at Iona's expense. It did so, in the amount of $105,000. The chambers judge also permitted the set-off of an additional $77,869, paid by GCNA on behalf of the Airport, for work necessary to complete the project. The Airport is expressly entitled to retain those amounts from any payments due to Iona under the Contract. What the Contract does not say is that the Airport is obliged to pay Iona's subcontractors (to the contrary, the Contract expressly places that obligation solely on Iona). Nor does it say that the Airport is entitled to pay the subcontractors and retain that amount from contractual payments otherwise due to Iona. As the chambers judge pointed out, the Contract could have provided for that course of action, but it does not.

[70] GCNA argues that Iona's breach of contract entitled the Airport to withhold <u>all</u> further payment. It says that Iona failed to satisfy its obligations under the Contract by failing to, *inter alia*, pay its subcontractors pursuant to GC 3.12.1 and provide the statutory declaration required pursuant to GC 13.1.2. It argues that payment of those subcontractors was part of Iona's responsibilities under GC 13.1.1, and so falls under the definition of "Work" in GC 1.1.54 because it was "necessary to be done ... by the Contractor to perform the Contract". When Iona did not pay, the Airport had the right (although not the obligation) to take that Work "out of the Contractor's hands" under GC 6.3.3(d) and pay the subcontractors. The funds so used were necessary to "have the Work completed", and so are not due to Iona.

[71] The chambers judge considered and rejected that argument, stating [at para 21]:

> Although GCNA's argument is compelling that Iona should not be allowed payment for its subcontractors when the Airport knows that Iona will not be able to fulfill its obligations to pay the subcontractors with these funds, the Contract does not support that this breach on the part of Iona would allow the Airport to withhold all payment as suggested by GCNA.

[72] The chambers judge concluded that GC 6.3.3(d) deals with the remedy for this breach. That provision does not say that <u>all</u> right to payment is extinguished. Rather, "that portion" of the payment that is not required by the Airport to finish the Work remains payable to Iona. She further noted that the Contract expressly allows the Airport to completely suspend payments for failure to pay certain other obligations, such as WCB and insurance: GC 9.22 and GC 10.1.7.

[73] GCNA argues further that the chambers judge's interpretation of the Contract is incomplete because she failed to read the Payment Bond and the Contract together. The Payment Bond provides that the Airport is a trustee for every Claimant under the Payment Bond (the subcontractors) and states, in part:

2015 ABCA 240 (CanLII)

2015 ABCA 240 (CanLII)

> The Principal [Iona] and the Surety [GCNA], hereby jointly and severally agree with the Obligee [Airport], as Trustee, that every Claimant who has not been provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed of materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with the Principal and have execution thereon ...

[74] The purpose of the trust language in the Payment Bond is to give the Claimants, though they are not party to the Payment Bond, the right to sue the surety under the Bond directly for payment of monies owing to them by the principal (Iona, in this case): see ***Citadel General Assurance Co. v Johns-Manville Canada Inc.***, [1983] 1 SCR 513; Donovan W M Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed, at 3.IV(e).

[75] The right of subrogation vis-à-vis the Claimants gives the surety the right to sue Iona on the contracts between Iona and the subcontractors. GCNA argues that the relationship among the parties under the Payment Bond also obliges the Airport, as a beneficiary under the Bond, to mitigate the surety's loss when it is required to make good the obligations of Iona under the subcontracts. The Airport, according to this theory, is required to exercise its rights and remedies against Iona under the Contract to mitigate any claims under the Bonds. In other words, the Airport must exercise its set-off rights against Iona to recover the funds paid out by GCNA.

[76] The difficulty with this argument is that nothing in the Contract or Payment Bond imposes an obligation on the Airport to pay the subcontractors directly. In the absence of a positive contractual obligation to pay subcontractors, Canadian authority makes clear that an owner cannot make such payments in the face of a contractor's bankruptcy, even if the contract gives it the option to do so: ***A.N. Bail Co. v Gingras***, [1982] 2 SCR 475.

[77] In ***A.N. Bail***, a construction contract granted the following rights to the owner, the Crown:

> 21 (1) Her Majesty may, in order to discharge lawful obligations of and satisfy lawful claims against the Contractor or subcontractor arising out of the execution of the work, pay any amount which is due and payable to the Contractor ... directly to the obligees of and the claimants against the Contractor or the subcontractor.
>
> (2) A payment made pursuant to subsection (1) is to the extent of the payment a discharge of Her Majesty's liability under the contract to the Contractor.

[78] The appellant contractor entered into a subcontract for masonry work with a company that subsequently became bankrupt. The subcontract incorporated the terms of Clause 21, set out

above. At the insistence of the Crown department, the contractor paid a supplier of the bankrupt directly, rather than paying the amount owing to the bankrupt's trustee.

[79] The question, as characterized by Chouinard J writing for the court, was "whether the contractual clause relied on can be applicable after the bankruptcy of the sub-contractor". In other words, could the owner (or the contractor), notwithstanding the intervening bankruptcy, rely on Clause 21 to make payment directly to a subcontractor or a supplier of materials, or must payment be made to the trustee of the bankrupt. The court noted that Clause 21 contains "only an option which the owner reserved in the principal contract, and appellant in its sub-contract: no obligation has been created": para 30.

[80] After considering several authorities, the Supreme Court concluded that, given the intervening bankruptcy, it was not open to the owner to pay the supplier directly and in preference to the trustee. Chouinard J said, at paras 40-42:

> [40] From the date of the bankruptcy also, the debt of [the subcontractor] against appellant passed into the hands of the trustee as part of the property of the bankrupt company, and only the trustee can obtain payment of it. ...
>
> [41] **It would be to disregard the *Bankruptcy Act* and deprive it of all meaning if the debtor of a bankrupt, instead of paying the trustee, were authorized, by contract or some other means, to pay one or other of the creditors of the bankrupt as he saw fit.**
>
> [42] I adopt the conclusion of Montgomery JA, speaking for the Court of Appeal:
>
>> The above clause of the general conditions may be perfectly valid and effective where there is no question of bankruptcy. I cannot, however, agree with Appellant that it can supplant the provisions of the *Bankruptcy Act* and entitle one unsecured creditor to be paid by preference, which would almost necessarily operated to the detriment of the other unsecured creditors. I regard this as contrary to the policy of the *Bankruptcy Act*.
>
> [emphasis added]

[81] The chambers judge here properly followed and applied the decision of the Supreme Court in ***A.N. Bail***, as well as the recent decision of this Court in ***Greenview (Municipal District No. 16) v Bank of Nova Scotia (Horizon Earthworks)***, 2013 ABCA 302. The facts in ***Horizon Earthworks*** are similar to those before us. ***Horizon Earthworks*** involved a priority dispute among a municipality (owner of the road construction project), a surety and a bank over funds being held back by the municipality from an insolvent contractor. Like this case, the contractual documents in ***Horizon Earthworks*** included a Performance Bond and a Payment Bond. At the time of the contractor's default, some $774,000.00 of the contract price remained unpaid and in the hands of

2015 ABCA 240 (CanLII)

2015 ABCA 240 (CanLII)

the municipality. The municipality made a claim under the Performance Bond and paid $383,000.00 to complete the project. The surety paid some of the sub-contractors and suppliers under the Payment Bond, but other subcontractors remained unpaid. It was common ground that the outstanding claims vastly exceeded the disputed amount.

[82] The municipality sought a direction as to whether it could pay the subcontractors directly out of the remaining funds. It argued that the bonds created a relationship between the municipality and the subcontractors to provide for payment, and also argued that the contract, bonds and an Indemnity and Security Agreement between Horizon and the surety together created a trust relationship whereby the funds are trust funds for the benefit of the subcontractors.

[83] The surety generally supported the municipality's position, but further argued that it was entitled to funds owing to subcontractors who may claim under the bond, by way of set-off and subrogation.

[84] This Court disagreed, concluding that the contracts did not impose a legal obligation on the municipality to pay the subcontractors directly. Accordingly, if the municipality owed money to the contractor at the time of bankruptcy, that account receivable became the property of the Trustee. In this respect, the Court relied on the reasoning of the Supreme Court in ***A.N. Bail***.

[85] As noted above, the contractual relationships in ***Horizon Earthworks*** included a Payment Bond, not present in ***A.N. Bail***. This Court rejected the argument that the existence of the Bond should lead to a different result, saying at para 43:

> In our view, the contractual arrangements here do not establish a relationship sufficient to distinguish *Bail*. Although there is language in the contracts between Horizon and Western Surety relating to unpaid funds being earmarked with a trust, Greenview [the municipality] is not a party to the Bonds or the ISA, and has no legal obligations under any of those agreements to pay unpaid creditors. While the Labour and Material Payment Bond says that Greenview, as Obligee under the Bonds, can bring claims on behalf of unpaid creditors, it does not require Greenview to do so. Nothing in any document places an obligation on Greenview to pay the unpaid creditors. Thus if Greenview owes money to Horizon at bankruptcy pursuant to the Harper Creek Contract, that account receivable becomes the property of the Trustee.

[86] The reasoning in ***Horizon Earthworks*** applies here. The Funds held by the Airport are payable to Iona, and therefore to the Trustee, and not to the subcontractors. The Airport has no obligation to pay the subcontractors and no legal relationship with them.

[87] GCNA relies on American jurisprudence which, it says, stands for the proposition that a surety is subrogated to and acquires the rights of the contractor whose obligation it discharged, the subcontractors whose claims it paid, and the owner who holds the balances and retention. The

2015 ABCA 240 (CanLII)

surety, GCNA argues, has a right to payment due the contractor when the surety completes the defaulted contractor's obligations. In particular, GCNA relies upon the following description of the right of subrogation in ***Pearlman v Reliance Insurance Company***, 371 US 132, pp 7-8: "... that the Government has a right to use the retained fund to pay the laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid the laborers and materialmen, would have become entitled to the fund; and the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it".

[88] Those authorities are not persuasive given that existing Canadian authority deals with the issue. The equitable doctrine of subrogation described by the British Columbia Court of Appeal in ***Canadian Indemnity Company v British Columbia Hydro and Power Authority*, **1976 CarswellBC 1227 at para 15; [1976] BCJ No 815 (QL) (CA) (also relied upon by GCNA) is said to entitle a surety, who carries out its obligations to pay or perform what a contractor has failed to pay or perform, to the rights of the person to whom the surety was obligated. In this case, those rights would include the right to use retained funds to complete the project, as was done. The chambers judge relied on the reasoning in ***Canadian Indemnity*** to include in that amount the cost of paying an electrical subcontractor to return to finish its work, and I would not interfere with that conclusion. It is clear from this Court's decision in ***Horizon Earthworks*,** however, that the surety's subrogated rights would not include repayment for fulfilling the contractor's obligation to pay the subcontractors. The Airport has no corresponding obligation to make those payments under the Contract and importantly, under the law as set out in ***Horizon Earthworks*** and ***A.N. Bail***, the Airport had no ability to use the Funds to make voluntary payments to subcontractors in priority to other creditors, in the face of Iona's bankruptcy. I also note the decision of ***St. Paul v Genereux Workshop (Bonnyville) Ltd.*** (1984), 12 DLR (4th) 238 (ABCA), where this Court declined to follow the American authorities relied upon by GCNA.

[89] The remaining Funds are a debt owing to Iona under the Contract as found by the chambers judge and are, therefore, payable to the Trustee. This ground of appeal must fail.

2. Are the Funds impressed with a trust and therefore exempt from the bankrupt's estate under the *Bankruptcy Act*?

[90] As an alternative argument, GCNA submits that, if the Funds are payable to Iona under the Contract, they are impressed with a trust by virtue of s 22 of the *BLA* such that they are excluded from the property of Iona pursuant to s 67(1)(a) of the *Bankruptcy Act*.

[91] Section 67 of the *Bankruptcy Act* exempts certain property held by a bankrupt from being divided among the bankrupt's creditors. One such exemption applies to "property held by the bankrupt in trust for any other person": s 67(1)(a). The Supreme Court of Canada described the intention behind this provision [then s 47(a)] in ***British Columbia v Henfrey Samson Belair Ltd.***, [1989] 2 SCR 24 at para 38:

2015 ABCA 240 (CanLII)

> Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s 47(a), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.

[92] Like other Canadian lien legislation, the *BLA* includes provisions that require contractors who receive monies in payment for a project subject to the *BLA* to hold those monies in trust for their subcontractors or suppliers. Section 22 of the *BLA* provides:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate issued, holds that money in trust for the benefit of those persons.

[93] GCNA argues that, by operation of this provision, monies paid to Iona are impressed with a trust within the meaning of s 67(1)(a) of the *Bankruptcy Act*, such that they are exempt from distribution in the bankruptcy proceedings.

[94] Given that the project in this case is an airport, a federal undertaking, a preliminary issue arises with respect to the applicability of the provincial *BLA*. The airport property cannot be subject to a builders' lien: *Construction Builders' and Mechanics' Liens in Canada*, Bristow et al, 7th ed (Toronto: Carswell, 2010) at 2.12.1-2; ***Greater Toronto Airports Authority v Mississauga (City)***, (2000), 50 OR (3d) 641 (CA); ***Vancouver International Airport v Lafarge Canada Inc.*** (2009), 82 CLR (3d) 285 (BCSC). However, the parties here agree that the trust provisions in s 22 can apply to a project even where the lien provisions of the *BLA* do not apply, citing ***Canadian Bank of Commerce v T. McAvity & Sons Ltd.***, [1959] SCR 478, 17 DLR (2d) 529. For purposes of this appeal, I am prepared to assume that s 22 of the *BLA* applies to payments made to Iona with respect to construction of the project, and to Iona's relationship with its subcontractors. I will therefore proceed to consider whether s 22 creates a trust within the meaning of the *Bankruptcy Act*.

[95] Statutory trusts are, as the name implies, creatures of statute enacted with a view to protecting the interests of the Crown or private interests that otherwise would have little

2015 ABCA 240 (CanLII)

protection. The Supreme Court of Canada has had occasion to consider whether deemed statutory trusts constitute valid trusts for the purpose of the *Bankruptcy Act*. In ***Henfrey Samson Belair***, a majority of the Supreme Court held that a "deemed trust" created by provincial legislation is not, without more, a trust within the meaning of s 67 of the *Bankruptcy Act*, nor is it entitled to priority under that *Act*. The provisions of s 67 are confined to trusts arising under general principles of law. McLachlin J, writing for the majority, interpreted the relevant provision of the *Bankruptcy Act* as follows (at para 42):

> To interpret s 47(a) [now s 67(a)] as applying not only to trusts as defined by the general law, but to statutory trusts created by provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

[96] McLachlin J went on to state that, depending on the facts of the case, monies collected under a statutory trust might meet the requirements for a trust under the general principles of trust law [at para 46]:

> If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of [the current s 67(a)]. If, on the other hand, the money has been converted to other property and cannot be traced, there is no 'property held ... in trust' under [s 67(a)].

[97] In ***Husky Oil Operations Ltd. v Minister of National Revenue***, [1995] 3 SCR 453, 128 DLR (4th) 1, the Supreme Court undertook a broad review of the effect of provincial legislation that may intrude into the federal sphere of bankruptcy. The majority set out a number of propositions that emerge from the court's quartet of decisions in this area, including ***Henfrey Samson Belair*** [at paras 33 and 40]:

> 1. Provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s 136(1) of the *Bankruptcy Act;*
>
> 2. While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;
>
> 3. If the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
>
> 4. The definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the

2015 ABCA 240 (CanLII)

> federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*;
>
> 5. In determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> 6. There need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of the provincial legislation is to do so.

[98] The goal, wrote Gonthier J, is to maintain a "nationally homogeneous system of bankruptcy priorities". Provincial laws can use the concept of "trust" for their own purposes, but they cannot affect bankruptcy priorities when doing so. ***Henfrey Samson Belair*** and ***Husky Oil*** provided that provincially created statutory trusts can only affect bankruptcy priorities when they also have all the attributes of trusts under the general principles of trust law, thus bringing them within the ambit of s 67(a) of the *Bankruptcy Act*. To conclude otherwise would be to permit provinces to create their own bankruptcy priorities outside the scheme, and to risk a situation of differing priorities in different jurisdictions.

[99] GCNA says that the governing authority with respect to trusts created under provincial builders' or mechanics' lien legislation is an earlier decision of the Supreme Court, ***John M.M. Troup Ltd., et al. v Royal Bank of Canada***, [1962] SCR 487, 34 DLR (2d) 556. In particular, GCNA relies on the following statement by the majority in *Troup* at para 11:

> As to bankruptcy, the creation of the trust by s. 3(1) [of the Ontario *Mechanics' Lien Act*] does affect the amount of property divisible among the creditors but so does any other trust validly created.

[100] There is a line of authority that has cited ***Troup*** for the proposition that lien legislation and the *Bankruptcy Act* are not operationally in conflict and therefore a lien act's trust provisions create a trust that falls within the exemption in s. 67(1)(a). These cases take the view that ***Troup*** and ***Henfrey Samson Belair*** are not in conflict: see, for example, ***D&K Horizontal Drilling (1998) Ltd. (Trustee of) v Alliance Pipeline Ltd.***, 2002 SKQB 86, [2002] 6 WWR 497; ***Re 0409725 BC Ltd.***, 2015 BCSC 561.

[101] In my view, the statement from ***Troup*** set out above cannot sit comfortably with the later reasoning of McLachlin J in ***Henfrey Samson Belair***. The dissent in ***Henfrey Samson Belair*** relied on ***Troup***, but the majority did not. Although ***Troup*** was not expressly overruled by the majority, McLachlin J clearly rejected the proposition that deemed statutory trusts could be valid trusts under bankruptcy legislation if they did not otherwise meet the requirements of general trust

2015 ABCA 240 (CanLII)

law. To the extent that ***Troup*** says that trusts created by lien legislation, without more, are valid trusts under the *Bankruptcy Act*, it has been overruled by ***Henfrey Samson Belair***.

[102] Even if this aspect of ***Troup*** has not been overruled, the brief statement in that case regarding trusts created by lien legislation is at best *obiter*. It is important to consider what was actually at issue in ***Troup***. A contractor had received monies for work done on a county project and deposited the cheque into its current account. The contractor had previously given its bank a general assignment of book debts. The bank used the deposited funds to pay down some of the contractor's indebtedness. It was alleged that the monies which were taken by the bank under the assignment were trust monies under the *Mechanics' Lien Act*, and accordingly the bank must account to the appellant lien holders who had claims under that *Act*. A majority of the Supreme Court held that the payment received by the bank was in the ordinary course of business and a bank that received monies, not through the assignment but through the ordinary course of business, can retain such funds unless it has notice not only that they are trust monies but also that the payment to the bank constitutes a breach of trust.

[103] One argument advanced by the bank was that the *Mechanics' Lien Act* was unconstitutional as being in conflict with federal legislation on banking and bankruptcy. The majority rejected this argument, stating that there was no conflict in either field. Importantly, there was no intervening bankruptcy on the part of the contractor, so the issue of whether there was an operational conflict between the lien legislation and the *Bankruptcy Act* was not directly before the court. The statement relied on by GCNA was made in that context and was, in my view, *obiter*.

[104] The correct approach to the question of whether a builders' lien trust is valid under the *Bankruptcy Act* is to assess the putative trust through the lens of general principles of trust law and, in particular, consider whether the three certainties (of intention, object, and subject matter) have been established. This approach is in keeping with the Supreme Court's direction in ***Henfrey Samson Belair*** and ***Husky Oil***. The issue is whether there exists a trust that survives the bankruptcy of the statutorily mandated trustee, pursuant to s 67(1)(a) of the *Bankruptcy Act*. There is no such valid trust unless it possesses all the elements of a trust under general law.

[105] This was the approach taken by this Court in ***Bassano Growers Ltd. v Diamond S. Produce Ltd. (Trustee of)***, 1998 ABCA 198. In that case, a chambers judge concluded that a deemed statutory trust in favour of potato growers who sold produce to a now bankrupt purchaser, without more, was not a "trust" within the meaning of s 67(1)(a). On the evidence, the chambers judge concluded that the existence of a trust under the general law could not be found for a lack of certainty of subject matter. In upholding that decision, this Court set out the relevant principles as follows at paras 8 – 10:

> [8] The chambers judge held that the trusts contemplated by s 67(1)(a) are only those that qualify as trusts under the general law, that is, only those that meet the conditions necessary for the creation of a valid trust under the general law. Because the funds in question were commingled and cannot be identified there is no

> certainty of subject matter, one of the essential requirements for a common law trust. ...
>
> [9] The circumstances of this case fall squarely within the rationale of the majority judgment of the Supreme Court of Canada in ... *Henfrey Samson* .... The *ratio* of *Henfrey Samson* has been applied in a number of subsequent judgments involving statutory trusts of various kinds created pursuant to provincial legislation [citations omitted].
>
> [10] The underlying principle of *Henfrey Samson* was concisely stated by the British Columbia Court of Appeal in *British Columbia v National Bank of Canada* ... at 232:
>
>> That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish that same end.

[106] Having concluded that a valid trust had not been created in the circumstances before it, the Court went on to note that a trust that has its genesis in a deemed or statutory trust may qualify under s 67(1)(a) in the right circumstances. However, to so qualify it must "satisfy the essential requirements of a valid trust under the general law". I agree.

[107] Neither ***Henfrey Samson Belair*** nor ***Bassano*** dealt with statutory trusts created under lien legislation. The deemed statutory trust in ***Henfrey Samson Belair*** was created under the *Social Service Tax Act*, RSBC C-431, and was intended to benefit the Crown. Later decisions have concluded that the principles set out in ***Henfrey Samson Belair*** apply to other statutory trusts, regardless of the nature of the deemed beneficiary: see ***Edmonton Pipe Industry Pensions Plan Trust Fund (Trustees of) v 350914 Alberta Ltd.***, 2000 ABCA 146, 187 DLR (4th) 23 at para 41; ***Bassano***; ***British Columbia v National Bank of Canada*** (1994), 30 CBR (3d) 215 at 232 (BCCA); ***Re Points of Call Holidays Ltd.*** (1991), 54 BCLR (2d) 384 (BCSC) at 389.

[108] I see no principled reason why the approach should be different with respect to lien legislation from that taken with respect to other deemed statutory trusts, particularly those intended to benefit private parties such as was the case in this Court's decisions in ***Bassano*** and ***Edmonton Pipe***. Moreover, courts in several jurisdictions have used this same approach in assessing whether trusts created under lien legislation are valid for purposes of the *Bankruptcy Act*: see ***0409725 BC Ltd***, 2015 BCSC 561; ***Royal Bank of Canada v Atlas Block Co.***, 2014 ONSC 3062, 15 CBR (6th) 272; ***Roscoe Enterprises Ltd. v Wasscon Construction Inc.*** (1998), 161 DLR (4th) 725, 169 Sask R 240 (SKQB); ***Re Factory Window and Door Ltd. (Duraco Window)***, [1995] 9 WWR 498, 135 Sask R 235 (SKQB). In all those cases, courts have examined the facts to assess whether the three certainties required to establish a valid trust under the general law are present.

2015 ABCA 240 (CanLII)

2015 ABCA 240 (CanLII)

[109] Most courts dealing with deemed statutory trusts seem to assume that certainty of intention has been established, perhaps implied by virtue of the statutory language that creates the trust[2]. That appears to have been the case in ***Henfrey Samson Belair***, where McLachlin J does not discuss the intention to create the trust. An exception is ***Duraco Window***, where Geatros J of the Saskatchewan Court of Queen's Bench expressed doubt that the parties intended to create a trust relationship with respect to the funds in the bankrupt contractor's bank account. Although the issue seems not to be entirely settled, for purposes of this appeal I have accepted that the creation of the statutory trust in s 22 of the *BLA* is sufficient to establish certainty of intention.

[110] The establishment of certainty of object is also generally straightforward; in trusts created under lien legislation, the object is the subcontractors sought to be protected by the legislation.

[111] Establishing sufficient certainty of subject matter has consistently been the main stumbling block to establishing a builders' lien trust as a valid trust under the *Bankruptcy Act*. That was the problem identified by the courts in, for example, ***Henfrey Samson Belair***, ***Bassano***, and in this case in the court below. In ***0409725 BC Ltd.***, a recent case from the British Columbia Supreme Court, Grauer J noted that the issue of certainty of subject matter is an evidentiary one. That is the case; in ***Henfrey Samson Belair***, McLachlin J stated that whether there exists a "trust" under the *Bankruptcy Act* "depends on the facts of the particular case": para 46. Whether certainty of subject matter exists is dependent on the facts and is, to some extent, a function of the statutory language and a question of timing.

[112] A review of cases where certainty of subject matter has been found shows that the court was able to point to a specific, identifiable *res* that formed the subject matter of the trust, thereby satisfying the requirements of ***Henfrey Samson Belair***. For example, in ***D&K***, a registered lien had been vacated and replaced by a payment into court prior to the bankruptcy.

[113] Similarly, in ***Kerr Interior Systems Ltd. v Kenroc Building Materials Co. Ltd.***, 2009 ABCA 240, [2009] 8 WWR 1, an owner paid money into court in order to vacate builders' liens filed by two subcontractors of the bankrupt. The Saskatchewan *Builders' Lien Act* was at issue in that case, which was decided by this Court. The majority found that, on the facts, both claimants were able to establish claims to amounts that were "readily ascertainable and identifiable" as at the relevant date. The dissenting judge held that in order to constitute a "trust" for purposes of the CCAA, the claim had to be sufficiently specific as at the relevant date in order to reach the position of a trust at law. One of the claimants had filed a lien under the Saskatchewan *BLA*, thereby making its claim sufficiently ascertainable. The other had not, and that trust claim was not sufficiently specific as of the relevant date.

[2] For a discussion of certainty of intention in this context, see Aline Grenon, "Common law and statutory trusts: In search of missing links" (1995) 15:2 Est & Tr J.

2015 ABCA 240 (CanLII)

[114] It is also worth noting that the Saskatchewan *Builders' Lien Act* is structured differently from the Alberta *BLA*. The owner, as well as the contractor, is made a trustee over all amounts in the owner's hands that are payable to the contractor. Under s 22 of the Alberta *BLA*, no trust comes into existence until payment is made to the contractor, who is the sole trustee. In this case, the funds were in the hands of the Airport at the time of the bankruptcy (and are still), so no *BLA* trust had come into existence.

[115] In cases where the requisite certainty of subject matter has been absent, it is often because funds from all sources flow into the putative trustee's account, resulting in commingling and an inability to trace the funds that are subject to the trust. In ***Atlas Block***, Penny J noted that the bankrupt contractor was under no obligation under the provisions of the relevant lien legislation to keep the putative trust funds separate and apart from other funds received. Because the funds were commingled with funds from other sources, there could be no certainty of subject matter as described in ***Henfrey Samson Belair***: paras 43 – 45. Similar reasoning was applied by the courts in ***0409725 BC Ltd***, ***Roscoe Enterprises***, and ***Duraco Window***.

[116] This is one of the latter cases. The chambers judge reviewed the evidence and submissions of counsel and concluded that, once the funds in the hands of the Airport were paid to Iona they would be immediately commingled with funds from other sources and any certainty of subject matter lost. That conclusion is supported by the language of s 22 of the *BLA*, which does not obligate a contractor who receives payment to segregate the funds. The same type of commingling was found to be fatal to the existence of a valid trust in ***Bassano*** and in ***Henfrey Samson Belair***, both cases that were binding on the chambers judge. There is no basis to interfere with her conclusion on the point.

[117] For these reasons, I would dismiss the second ground of appeal.

Conclusion

[118] For all the foregoing reasons, I would dismiss the appeal.

Appeal heard on April 8, 2015

Reasons filed at Calgary, Alberta
this 16th day of July, 2015

Paperny J.A.

Appearances:

H.A. Gorman, Q.C.
S. Jenkins (student-at-law)
for the Respondent

R.H. Shaban
J.W. MacLellan
for the Appellant

2015 ABCA 240 (CanLII)

Kingsett Mortgage Corp. v. Stateview Homes (Minu Towns) Inc.

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

J. Steele J.

Heard: November 2, 2023.

Judgment: December 20, 2023.

Court File Nos. CV-23-00698395-00CL,

CV-23-00698632-00CL, CV-23-

00698637-00CL, CV-23-00698576-00CL, CV-23-00699067-00CL

[2023] O.J. No. 5893 | 2023 ONSC 7105

RE: Kingsett Mortgage Corporation and Dorr Capital Corporation, Applicant, and Stateview Homes (Minu Towns) Inc., Stateview Homes (Nao Towns) Inc., Stateview Homes (On The Mark) Inc., and Stateview Homes (High Crown Estates) Inc. et al, Respondents, Dorr Capital Corporation Applicant, and Highview Building Corp Inc. Respondent, and Dorr Capital Corporation Applicant, and Stateview Homes (Bea Towns) Inc. Respondent, and Atrium Mortgage Investment Corporation and Dorr, Capital Corporation Applicant, and Stateview Homes (Nao Towns II) Inc., Dino Taurasi, and Carlo Taurasi, Respondents, and Meridian Credit Union Applicant, and Stateview Homes (Elm&Co) Inc., Respondent

(83 paras.)

Counsel

Adam Slavens, David Outerbridge, Mike Noel, Jonathan Silver for the Moving Party, Tarion Warranty Corporation.

Alan Merskey, Kiyan Jamal for the Receiver, KSV Restructuring Inc. (NAO Phase 1, Minu, On the Mark, High Crown and Taurasi Holdings Recieverships).

Jeffrey Larry, Daniel Rosenbluth for the Receiver, KSV Restructuring Inc. (NAO Phase 2, BEA, Highview and Elm Receiverships).

Sean Zweig, Joseph Blinick for Kingsett Mortgage Corporation.

Eric Golden for Dorr Capital Corporation.

George Benchetrit for Atrium Mortgage Corporation.

Vern W. DaRe for Meridian Credit Union Limited.

Geoff R. Hall for Toronto-Dominion Bank.

Kelly Smith Wayland for Canada Revenue Agency.

Stewart Thom for Reliance Comfort Limited Partnership d/b/a Reliance Home Comfort.

ENDORSEMENT

J. STEELE J.

OVERVIEW

1 This motion arises following the declaration of bankruptcy of the Stateview entities. The Stateview entities were residential real estate developers. When the Receiver was appointed over the assets of the Stateview entities, the home construction in respect of the residential projects, other than High Crown and On the Mark, had not started. Many purchasers, however, had made deposits to one of the Stateview entities in respect of a new home purchase (the "Purchasers"). The deposits made by the Purchasers have been spent by the Stateview entities. Tarion Warranty Corporation ("Tarion") seeks declaratory relief on behalf of these Purchasers. Tarion asks the court to declare that the deposits were subject to either an express trust or a constructive trust arising because of unjust enrichment, the beneficiaries of which express trust or constructive trust are the Purchasers. Because the deposits were not held by the Stateview entities in separate trust accounts, Tarion also seeks a remedial constructive trust and a charge elevating the Purchasers' ranking in priority.

2 Under the *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Warranties Act"), new home purchasers, who would otherwise lose their deposits if the vendor went bankrupt, are entitled to receive payment out of the guarantee fund administered by Tarion for the amount of the deposit (up to $100,000). Tarion has a statutory right of subrogation, which is why Tarion seeks declaratory relief on these issues.

3 The Receiver made submissions opposing the relief sought by Tarion. KingSett Mortgage Corporation ("KingSett"), a secured creditor of the Stateview entities, filed materials and made submissions in support of the Receiver's position. Several other secured creditors made brief oral submissions in support of the Receiver's position. The Canada Revenue Agency also supports the Receiver's position.

4 For the reasons set out below, Tarion's motion is dismissed.

5 Below I provide the detailed analysis on the issues. However, at a high level, the motion fails for a few reasons. First, the Purchasers all entered into agreements with the Stateview entities under which they agreed that the lenders that provided a secured mortgage or construction financing would have priority. To the extent that any priority argument could be raised, the Purchasers contracted that these lenders would have a priority over the Purchasers' interest. Second, Parliament sets out a statutory scheme of priorities in bankruptcy. That priority scheme recognizes super priorities for certain statutory deemed trusts. There is no statutory deemed trust in respect of the deposit funds. Further, unlike the applicable statute for condominiums (see s. 81 of the *Condominium Act, 1998*, S.O. 1998, c. 19), the applicable legislation for new homes does not require the recipient of the deposit funds to hold them in trust. There were also no express trusts created, other than in respect of limited agreements where there was an early termination provision. In these cases, however, the monies were not set aside and held in trust by the Stateview entities. Finally, the court is generally reluctant to grant an equitable remedy such as a constructive trust where doing so would upset the priority scheme set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In a bankruptcy, there can be many parties that are negatively impacted, and Parliament has established a priority scheme to deal with what money is available in the bankrupt's estate.

6 As submitted by Meridian, the first mortgagee on Stateview's Elm project, it is important that the law is interpreted in a way that supports certainty, predictability, and uniformity. The subordination clause in the pre-purchase agreements provides certainty to the lenders regarding their priority status. In terms of predictability, the lenders have lent millions of dollars based on the statutory regime, which does not provide for a statutory deemed trust for Purchaser deposit monies. Finally, the Purchasers are unsecured creditors, and under the BIA priority scheme secured creditors rank ahead.

Background

7 The moving party, Tarion, is a consumer protection agency that the Ontario government designated to administer the Warranties Act and the regulations thereunder (the "Warranties Regulations").

8 The Stateview entities owned and operated pre-construction residential development projects.

9 The Stateview entities were placed into receivership under section 243(1) of the BIA and section 101 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43* pursuant to orders granted on May 2, 2023, and May 18, 2023.

10 KSV Restructuring was appointed as the Receiver over the Stateview entities' assets.

11 The expectation is that there will not be sufficient money in the Stateview estates to pay the secured creditors in full.

12 The beneficiaries of the trust remedy requested in this motion are approximately 765 Purchasers who paid deposits to the Stateview entities in respect of new homes to be built. In total, the deposits amount to approximately $77 million.

13 Under the terms of the Pre-Sale Purchase Agreements, the Purchasers were not granted any security for the deposits over the Stateview entities' real or personal property.

14 The deposits paid by the Purchasers were held by the Stateview entities in standard mixed operating bank accounts and were used, in addition to other sources of financing, by the Stateview entities to fund their general operations and the development of the various projects. Most, if not all, of the deposits were spent by the Stateview entities prior to the commencement of the receivership proceedings.

15 Under the Warranties Act, if a new home purchaser is entitled to a refund of their deposit from a vendor and is unable to obtain such a refund, then the purchaser can make a claim from Tarion's guarantee fund up to a maximum of $100,000. Tarion then can assert a claim against the vendor.

16 KingSett is owed approximately $168 million by the Stateview entities.

Analysis

17 Tarion requests declaratory relief from the court. Tarion's view is that clarity is required regarding certain trust and other issues to confirm the protections applicable when purchasers make deposits in respect of freehold homes.

18 The Receiver did not raise an issue regarding whether it is appropriate for Tarion to seek declaratory relief.

19 I consider first whether the subordination clause in the Pre-Sale Purchase Agreements is a complete answer to Tarion's motion.

Does the Subordination Clause preclude the Purchasers from asserting a priority claim?

20 The Purchasers executed agreements in which they agreed that secured mortgages and construction financing would have priority over their interests, which precludes them from now asserting priority.

21 The Receiver submits that the Subordination Clause contained in the Pre-Sale Purchase Agreements precludes any express contractual trust, unjust enrichment constructive trust, and remedial constructive trust claims by the Purchasers. The relevant Subordination Clause provides:

> **The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for**

> **the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary**... **Without limiting the generality of the foregoing the Purchaser agrees that this Agreement shall be subordinated and postponed to the mortgages(s) assumed and/or arranged by the Vendor**... The Purchaser agrees to execute all necessary documents and assurances to give effect to the foregoing as required by the Vendor. Any breach by the Purchaser of this section shall be considered a material breach... Further the Purchaser hereby covenants and agrees that at any time prior to the Closing Date any default by him in the performance of any of his covenants or obligations contained herein shall entitle the Vendor, at its sole option, to terminate this Agreement and upon such termination, all monies paid to the Vendor hereunder shall be forfeited to the Vendor and this Agreement shall be at an end and the Purchaser shall not have any further rights hereunder... [emphasis added]

22 The Receiver submits that this language is included in the Pre-Sale Purchase Agreements to avoid priority disputes such as the one that is now before this court. The Receiver further submits that it is reasonable to assume that lenders required the inclusion of this language and/or relied upon it.

23 The Purchasers entered into Pre-Sale Purchase Agreements that contained explicit language acknowledging the priority of any construction financing or other mortgages that are secured on the property over the Purchaser's interest.

24 Tarion submits that the subordination clause only pertains to the Purchaser's interest in the "Property."[1] I disagree.

25 As set out above, the Purchaser acknowledges the priority of any construction financing or secured mortgages "over his interest as Purchaser." The word "Property" is used in the above provision to describe the security of the mortgagee not to limit what is covered by the Purchaser's agreement to subordinate. The Purchaser agreed to a complete subordination of his or her interest, which would include any interest in the deposit funds.

26 I agree that the subordination clause that was contractually agreed to by the Purchasers precludes the Purchasers from asserting a priority claim.

Trust Claims

27 Tarion has asked the court for declarations in respect of the trust issues in any event, which I next address.

28 I address first whether there was an express trust in respect of home buyers where the contracts contained an early termination provision. I determine that there was an express trust in respect of these Purchasers.

29 I next consider whether there was unjust enrichment. The unjust enrichment claim would apply in respect of those Purchasers where there is no express trust. I determine that there was no unjust enrichment because I am not satisfied that there is a lack of juristic reason.

30 Finally, I consider whether a remedial constructive trust ought to be imposed in respect of the Purchasers where I determined that there was an express trust. I determine not to impose a remedial constructive trust based on the record before me.

Was there an express trust in respect of certain home buyers?

31 Tarion asserts that the deposits made by the Purchasers in the Elm project (and potentially other home buyers if they had contracts with similar early termination provisions) were subject to an express trust. There are approximately 145 Purchasers in the Elm project, who have in aggregate deposited over $16 million.

32 I am satisfied that there was an express trust in respect of the contracts containing the early termination provisions.

33 Purchase agreements for freehold homes in Ontario are required to incorporate the standard form Addendum

pursuant to s. 9 of O. Reg. 165/08 passed under the Warranties Act. The Addendum is required to be attached to the agreement of purchase and sale and signed by the purchaser and vendor. The Addendum addresses numerous items, including conditions upon which a vendor may terminate the agreement. If the agreement is conditional on a certain sales threshold or conditional on the vendor obtaining financing (an "early termination provision"), schedule A to the Addendum contains language requiring the deposit amounts to be held in trust until the condition is waived or satisfied. Schedule A to the Addendum further provides that if the vendor fails to hold the deposit amounts in trust pending waiver or satisfaction of the early termination condition, the vendor will be deemed to hold the amounts in trust.[2]

34 Tarion argues that the Elm project contracts contain an early termination provision regarding satisfactory financing and, therefore, Stateview was required to hold the deposit amounts in trust, or was deemed to do so, under Tarion's standard form Addendum.

35 There was no evidence before the court as to whether the early termination provision regarding satisfactory financing in the Elm project had been satisfied.

36 The relevant provisions in Schedule A to the Addendum, where applicable, require the vendor to hold the deposit funds pursuant to a Deposit Trust Agreement. Where the funds are deemed to be held in trust under Tarion's Addendum, they are deemed to be held on the same terms as set out in the form of Deposit Trust Agreement. The Recitals to the Deposit Trust Agreement that was generally used by Tarion include the following:

> B. Each purchaser (a "Purchaser") of a home in the Freehold Project (a "Home" or collectively referred to as the "Homes") has paid or will pay directly to the Escrow Agent in trust deposit monies, including any sums for upgrades and extras (a "Deposit" and collectively referred to as the "Deposits") pursuant to the provisions of the agreement of purchase and sale in connection therewith (the "Purchase Agreement" and collectively referred to as the "Purchase Agreements");
>
> C. The Purchase agreements will include conditions ("Early Termination Conditions") described in subparagraphs 1(b)(i) or 1(b) (ii) of Schedule A to the mandatory addendum form (the "Addendum") required to be attached pursuant to Regulation 165-08 under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended, and all regulations enacted thereunder (the "ONHWP Act") thus pursuant to Section 1(c)(iv) of Schedule A to the Addendum the Deposits are required to be held in trust (the "Purchaser Trust") by the Vendor's lawyer (Escrow Agent) pursuant to the Addendum and subject to the interest of Tarion pursuant to a deposit trust agreement in form specified by Tarion or secured by other security acceptable to Tarion and arranged in writing with Tarion. This Agreement is the afore-mentioned deposit trust agreement.
>
> D. Subject to the contractual trust requirements - the Purchaser Trust - under Schedule A to the Addendum the Deposits are to be held in trust with the Escrow Agent until Tarion determines, in accordance with this Agreement, that the Deposit Funds can be released upon and subject to the terms of this Agreement;
>
> E. The Escrow Agent has agreed to hold all of the Deposits received by it from time to time pursuant to the provisions of the Purchase Agreements and this Agreement and to place and invest same in a separate, designated and segregated trust account at, account no. (the "Bank Account"), and to hold and monitor same in trust for Purchasers and Tarion in accordance with the terms and provisions of this Agreement. Interest accruing on all Deposits held in the Bank Account shall remain in the Bank Account and may only be released from and after the Purchaser Trust Termination Date to the Vendor upon the production of Replacement Security (as this term is later defined) or upon Tarion's written confirmation that security in respect of the Deposits is no longer required hereunder, and under those circumstances contemplated in Section 5.2 hereof same shall be paid or remitted to Tarion;
>
> F. The Deposits (together with all prescribed interest earned or accrued thereon, less any amounts released in accordance with the provisions of this Agreement) (the "Deposit Funds") placed or invested in the Bank Account shall constitute continuing security for the payment of the present and future indebtedness and/or liability of the Vendor (the "Secured Obligations") to Tarion in regard to the Freehold Project, arising out of or otherwise relating to (a) this Agreement; (b) an agreement between the Vendor

and Tarion with respect to the obligations of the Vendor (the "Vendor/Builder Agreement"); and/or (c) the ONHWP Act; and

G. After the provisions of Section 1(c)(iv) of Schedule A to the Addendum no longer apply and the contractual trust for the deposits no longer applies (the "Purchaser Trust Termination Date"), the parties have agreed that the sum of [xxx $ per home] the "Tarion Security Amounts") shall be maintained in trust for Tarion as security for the obligations of the Vendor in regard to the Freehold Project, arising out of or otherwise relating to (a) this Agreement; (b) an agreement between the Vendor and Tarion with respect to the Secured Obligations and from and after the Purchaser Trust Termination Date the term Deposits is deemed to be a reference to the amounts referred to in this paragraph G.

37 The Deposit Trust Agreements contained the following terms:

4.1 The Vendor covenants and agrees with Tarion that:

a. all Deposit Funds held by the Escrow Agent shall be (a) held in trust for the Purchaser pursuant to the Addendum; and (b) subject to the trust referred to in (a), held in trust for Tarion and subject to Tarion's security interest pursuant to this Agreement;

b. each of the Purchase Agreements shall provide and stipulate that all Deposits payable on account of the purchase price of any Home shall (prior to the Purchaser Trust Termination Date) be made payable to the Escrow Agent in trust, and as soon as the Vendor has received any funds representing Deposits, the Vendor shall within fifteen (15) business days after receipt of such funds deliver same to the Escrow Agent to be deposited in the Bank Account and held in accordance with the terms of the Addendum and this Agreement;

38 Tarion submits that the provisions in the Addendum are enough to meet the requirements for an express trust for the benefit of Purchasers who have agreements with an early termination provision. Tarion's position is that the three certainties required for an express trust are satisfied: certainty of intention, certainty of objects, and certainty of subject matter.

39 First, Tarion submits that the language in Schedule A to the Addendum sets out an intention to create a trust. Tarion submits that both the Purchasers and the applicable Stateview entity's intention that the deposits were to be held in trust was reduced to writing in the Addendum, which is required to be appended to the purchase agreement.

40 In some cases, the Addendum was attached to the purchase agreement. Where the Addendum was attached to the agreement and there was an early termination provision that had not been met, I am satisfied that there was certainty of intention to create a trust regarding the deposit funds.

41 I am also satisfied that there was certainty of intention where the Addendum was not attached to the purchase agreement. The Addendum is required under the Warranties Act to be attached. When the Stateview entities entered into the Builder/Vendor agreements with Tarion, the agreements specified that the vendor would ensure that the appropriate Addendum would be attached to each agreement of purchase and sale. As noted, the Addendum requires the vendor to hold the funds in trust until the applicable condition is met.

42 Second, Tarion argues that the objects are certain. The Stateview vendor is to hold the money in trust for the respective Purchaser. It is clear who is the beneficiary of each trust.

43 Finally, Tarion submits that the subject matter is certain. That is, until the applicable early termination condition is satisfied, all monies that are paid by the Purchaser to the Stateview vendor are to be held in trust by the Stateview vendor for the benefit of the Purchaser. The terms upon which the monies are held/released are further delineated in the Deposit Trust Agreement.

44 The Receiver submits that there is no evidence whether some of the deposits have been released or whether the early termination condition has expired. This is a question that would have to be determined in respect of each trust. It does not impact whether an express trust was created.

45 I am satisfied that there is certainty of subject matter. The monies paid by the Purchaser to the Stateview vendor are the subject matter of the trust. The applicable Stateview entity was required to hold that money in trust for the respective Purchaser in accordance with the trust terms.

46 I am satisfied that there was an express trust created in respect of the agreements that contained the early termination provision.

47 However, the deposit funds were not set aside and held in trust by the Stateview entities as required. Accordingly, where an express trust came into existence, and where the applicable termination condition has not been satisfied, and the trust funds have not been set aside and held in trust, the express trust terms would have been breached. Accordingly, below I discuss the requested remedy of constructive trust.

48 While I agree with Tarion that there was an express trust created in respect of the agreements that contained the early termination provision, it is not a statutory deemed trust. A statutory trust is a "trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property:" *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225 ("*Guarantee Company*"), at para. 18. For statutory deemed trusts, the legislation deems the trust into existence. As noted by the Supreme Court in *Canada v. Canada North Group Inc.*, 2021 SCC 30, 460 D.L.R. (4th) 309, at paras. 118 and 119, statutory deemed trusts are "unique legal vehicle[s]" and do "not have to fulfill the ordinary requirements of trust law."

49 The Warranties Act and Warranties Regulations do not create a statutory deemed trust. Instead, the Warranties Regulations require the parties to agree to create a trust and include deeming language if certain conditions are met. While the Schedule to the Addendum refers to the deposit amounts being deemed to be held in trust until the early termination provision is satisfied if the funds are not set aside in trust, this is not a statutory deemed trust. A statutory deemed trust is a creature of legislation and cannot be created by the parties agreeing to the terms of the Addendum. Although the Warranties Regulations require the Addendum, neither the statute nor the regulations deem a trust into existence or "impose a "statutory trust obligation", namely, an obligation on a person to hold in trust certain property:" *Guarantee Company*, at para. 19.

Was there unjust enrichment in respect of the Purchasers without an express trust?

50 As noted above, the agreements in respect of the Elm project contained an early termination provision. However, there was no evidence as to whether there were similar early termination provisions in the contracts for the other projects. Where the applicable agreement does not contain an early termination provision, an express trust would not have been created further to the terms of the contract/Addendum. Tarion asks the court to find that there was unjust enrichment in respect of those Purchasers who did not have an express trust.

51 I am not satisfied that there was unjust enrichment in respect of the Purchasers who did not have an express trust.

52 Tarion submits that the Stateview entities were unjustly enriched by their misappropriation of the deposits in respect of all Purchasers. Tarion's position is that all Purchasers are entitled to a constructive trust remedy or good conscience trust remedy because of the unjust enrichment.

53 For the court to find unjust enrichment, the court must be satisfied that there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment or deprivation: *Becker v. Pettkus*, [1980] 2 SCR 834, at p. 835.

54 The Stateview entities were clearly enriched with the deposits made by the Purchasers, and the Purchasers have been correspondingly deprived. The Purchasers provided the deposit monies to the Stateview entities in good faith toward the purchase of new build homes. These Purchasers no longer have their deposit funds and given the insolvency proceedings, are not going to have the home they contracted to purchase.

55 The issue is whether there is a juristic reason to allow the enrichment or deprivation. The Supreme Court of Canada in *Kerr v. Baranow*, [2011 SCC 10](), [[2011] 1 S.C.R. 269]() ("*Kerr*") described this element of the test for unjust enrichment as follows, at paras. 40 and 41:

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention unjust in the circumstances of the case.
>
> Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law. The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract". [Citations omitted.]

56 Tarion submits that there is no juristic reason justifying the enrichment or deprivation. Tarion points to the Purchase Agreements and submits that the Stateview entities were not permitted to take the benefit of the deposits paid by the Purchasers and give them nothing in return.

57 The Receiver submits that contract breaches in insolvencies are different because every creditor before the court has a claim. In an insolvency, for a party to have an absence of juristic reason for the enrichment or deprivation, the Receiver argues that there must be more than a breach of contract. The Receiver argues that in the absence of express statutory or contractual trusts, the Stateview entities were free to use the deposits in the everyday operation of their business, which they did.

58 The Receiver submits that the operation of the BIA is in and of itself a juristic reason that precludes the possibility of a constructive trust. The Alberta Court of Appeal in *Bassano Growers ltd. v. Price Waterhouse Ltd.* (1997), 6 CBR (4th) 188 ("*Bassano Growers*"), citing the British Columbia Court of Appeal in *British Columbia v. National Bank of Canada* [(1994), 30 C.B.R. (3d) 215](), noted that the operation of the BIA can be a juristic reason precluding a constructive remedy, at para. 19:

> Before a constructive trust can be imposed, unjust enrichment must be established, see *Becker v. Pettkus*, [[1980] 2 S.C.R. 834](). An unjust enrichment occurs where there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment and deprivation. The Applicants argue that Diamond S was unjustly enriched by virtue of the fact that the funds were retained by it upon bankruptcy. But this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the BIA. The British Columbia Court of Appeal was asked to find a constructive trust in *National Bank*, supra where taxes collected under a deemed trust had not been segregated from the tax collector's own funds. The Court found at 238-40 that there could be no unjust enrichment in such cases. In bankruptcy situations, the creditors who benefit from the failure of a s. 67(1)(a) trust claim are not "enriched," but merely recover what they are owed, and any deprivation experienced by the unsuccessful trust claimants results from the bankruptcy. In other words, **the operation of the BIA is a juristic reason which precludes the possibilities of awarding a constructive trust remedy**, *National Bank,* supra at 238. [emphasis added]

59 The Receiver further notes that, as highlighted in *Kerr*, one consideration for the court is the legitimate expectations of the parties. Here, the Purchasers entered into Pre-Purchase Agreements with clear subordination clauses. The expectation of the secured mortgagees would be that the Purchasers would not then assert a priority claim.

60 I agree with the Receiver. I am not satisfied that there is an absence of juristic reason in this case. The Stateview entities were free to use the deposit funds in their business because there was no express trust or

statutory trust over the deposit funds. The Stateview entities are now in bankruptcy and there are limited funds to go around. The BIA contemplates how creditors will be addressed in an insolvency. Similar to *Bassano Growers*, the fact that the deposit funds were retained by the Stateview entities upon bankruptcy does not give rise to an unjust enrichment. "[T]he operation of the BIA is a juristic reason which precludes the possibilities of awarding a constructive trust remedy."

61 In addition, the Purchasers agreed to subordinate their interests to the secured mortgagees and construction financing claimants. This is yet another reason why there is not an absence of juristic reason in this case.

62 Accordingly, the Purchasers have not established unjust enrichment.

63 Given that there is no unjust enrichment, the Purchasers that do not have an express trust cannot seek the imposition of a constructive trust.

Imposition of a constructive trust

64 I next consider whether the Purchasers would be entitled to a constructive trust over the deposit funds where an express trust arose and there was a breach of such express trust by Stateview. Because I have concluded that the Purchasers who do not have an express trust have not established unjust enrichment, there is no need to consider whether a constructive trust should be imposed for those Purchasers.

65 Where there has been a breach of an express trust, remedies may include damages or compensation, or recovery of the property through tracing. In this case, it was submitted that tracing would not be possible because of the status of the finances of the Stateview entities.

66 Tarion submits that the proper remedy for the Stateview entities' breach of an express trust in respect of certain Purchasers is to impress the proceeds from the sale of the real property with a constructive trust for the Purchasers' benefit.

67 A constructive trust is an equitable remedy that the court has jurisdiction to impose. The constructive trust is a proprietary remedy. It is granted over specified property. Where a constructive trust is granted, the property is removed from the bankrupt's estate, which effectively reorganizes the BIA priorities: *306440 Ontario Ltd. v. 782127 Ontario Ltd. (Alrange Container Services)*, *2014 ONCA 548*, *324 O.A.C. 21* ("*Alrange Container Services*"), at para. 24.

68 Here, Tarion asks the court to declare that the Purchasers are entitled to a constructive trust in the proceeds of sale from the real property as a remedy for breach of trust. The imposition of a constructive trust would effectively remove the property subject to the trust from the estate of the Stateview entity.

69 A constructive trust is available as a remedy where a party has been unjustly enriched to the prejudice of another party, or a party has obtained property by committing a wrongful act, such as a breach of a fiduciary obligation: *Soulos v. Korkontzilas*, *[1997] 2 S.C.R. 217* ("*Soulos*"), at para. 36.

70 A constructive trust arising from a wrongful act may be imposed by the court. As set out in *Soulos*, at para. 45, there are certain conditions that generally should be met before a constructive trust is ordered:

a. The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in the defendant's hands;

b. The assets in the defendant's hands must have resulted from agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;

c. The plaintiff must show a legitimate reason for seeking a proprietary remedy; and

d. There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.

71 In considering the above in the context of an insolvency proceeding, courts in Canada have given significant weight to the fourth factor, specifically the impact on other creditors: *Caterpillar Financial Services v. 360networks corporation*, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, at para. 66, *KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd.*, *2000 BCCA 458*, *190 D.L.R. (4th) 47*, at para. 71, and *Creditfinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377 ("*Creditfinance*"), at para. 44. If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high:" *Creditfinance*, at paras. 32 and 33.

72 In the instant case, there will likely not be enough funds for the secured creditors. Accordingly, any remedial constructive trust awarded by this court would upset the priority scheme under the BIA and effectively take funds from the secured creditors to pay certain unsecured creditors.

73 In *Ascent Ltd. (Re)*, [2006] 18 C.B.R. (5th) 269 (ON SC) ("*Ascent*"), this court imposed a constructive trust in an insolvency proceeding. However, in that case the court had made an order that Ascent set aside $24,374 and hold it in trust for a certain creditor pending certain events. Ascent did not set aside and hold the funds in trust as had been ordered. Accordingly, when Ascent was assigned into bankruptcy, the affected creditor argued that the proper remedy was a declaration of constructive trust over Ascent's assets sufficient to provide the creditor with the $24,374 that had been ordered by the court to be held in trust. The court found that there was unjust enrichment. In the court's analysis of whether there was juristic reason, the court emphasized that there was an intervening Court Order requiring the funds to be set aside and held in trust. The court stated, at para. 15, that the failure to comply with the Court Order was the source of the unjust enrichment. In determining that a constructive trust was an appropriate remedy, the court also referred to the failure to comply with the Court Order, and stated, at para. 17:

> It is also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment. [Emphasis added.]

74 Unlike *Ascent* there was no court order in the instant case requiring the Stateview entities to hold the deposit funds in trust. There was an express trust, and the Stateview entities, in their capacity as trustee, failed to adhere to the terms of the trust.

75 Further, a constructive trust, which is not otherwise available, cannot be imposed by the court for the purpose of altering the priority scheme under the BIA: *Barnabe v. Touhey*, [1995] 26 O.R. (3d) 477 (C.A.).

76 For a court to order a constructive trust remedy in a bankruptcy case, there must be a close and causal connection between the property over which the party seeks the constructive trust and the misappropriated trust property. The Court of Appeal in *Alrange Container Services*, stated at paras. 26 and 27:

> The very nature of the constructive trust remedy demands a close link between the property over which the constructive trust is sought and the improper benefit bestowed on the defendant or the corresponding detriment suffered by the plaintiff. Absent that close and direct connection, I see no basis, regardless of the nature of the restitutionary claim, for granting a remedy that gives the plaintiff important property-related rights over specific property. A constructive trust remedy only makes sense where the property that becomes the subject of the trust is closely connected to the loss suffered by the plaintiff and/or the benefit gained by the defendant. [...]

Professor Paciocco goes on to argue that the requirement of a close connection between the property over which the trust is sought and the product of the unjust enrichment is particularly strong in the commercial context. He observes, at p. 333:

In the commercial contest where there should be a hesitance to award proprietary relief, a purer tracing process is justifiable. This approach accurately describes the prevailing trend in Canadian case law.

77 Tarion acknowledges that a close causal connection to the property is required. Tarion cited *British Columbia Securities Commission v. Bossteam E-Commerce Inc.*, 2017 BCSC 787 ("*Bossteam*") as support for their position that establishing a close causal connection does not necessarily require forensic tracing. *Bossteam* involved an award of a constructive trust for fraud, and this award meant that defrauded investors benefitting from the trust were given priority over other creditors. This award was granted notwithstanding the fact that there was no tracing because the court found evidence of a close causal connection between the property in the bank account and the investor's money: *Bossteam*, at para. 36.

78 Tarion submits that there is a close causal connection between the deposit monies and the proceeds of sale from the real property. Tarion points to Mr. Pollack's affidavit where he stated that certain monies funded from KingSett, the High Crown Real Property first mortgagee, and Purchaser deposits were for the purpose of paying development charges and cash in lieu of parkland dedication in connection with the High Crown Real Property. However, Mr. Pollack further stated that approximately half of those funds were inappropriately diverted for other purposes. The Receiver submits that Tarion has not provided any material evidence as to how the Purchaser deposits were used to improve or acquire the real property. The Receiver further notes that Tarion's assertion is contradicted by Tarion's other allegation that the deposits were misused in ways that were unconnected to the real property projects.

79 I am not satisfied that Tarion has established a close causal connection between the deposits and the proceeds from the sale of the real property such that a proprietary remedy is appropriate in the circumstances.

80 In addition, I am not satisfied that "extraordinary circumstances" exist in this case such that a constructive trust ought to be ordered. As noted, a remedial constructive trust would upset the BIA priority scheme. Here we have a situation where, on the one hand, if the Stateview entities had not breached the trusts, the creditors would not have had access to the deposits. However, on the other hand, had the Stateview entities not breached the trusts, the Stateview entities may have appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities.

81 In my view the fact that the Purchasers agreed to the Subordination Clause in the Pre-Sale Purchase Agreements is also a factor weighing against the ordering of this remedy.

82 As noted above, the express trusts are individual trusts that arose between each individual Purchaser and the respective Stateview entity. There was not evidence before the court on each trust relationship. Accordingly, I am not foreclosing the possibility of the court in an individual case determining that a constructive trust remedy could be appropriate in the specific circumstances.

Disposition

83 Tarion's motion is dismissed.

J. STEELE J.

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1 "Property" is defined to mean the Dwelling and the POTL collectively. The POTL is the freehold parcel-of-tied land.

2 The Vendor of a home is permitted to make the Purchase Agreement conditional as follows:

b. upon:

i. Subject to paragraph 1(c), receipt by the Vendor of confirmation that sales of homes in the Freehold Project have exceeded a specified threshold by a specified date;

ii. Subject to paragraph 1(c), receipt by the Vendor of confirmation that financing for the Freehold Project on terms satisfactory to the Vendor has been arranged by a specified date;

[...]

c. the following requirements apply with respect to the conditions set out in subparagraph 1(b)(i) or 1(b)(ii):

[...]

iv. until the condition is satisfied or waived, all monies paid by the Purchaser to the Vendor, including deposit(s) and monies for upgrades and extras: (A) shall be held in trust by the Vendor's lawyer pursuant to a deposit trust agreement (executed in advance in the form specified by Tarion Warranty Corporation, which form is available for inspection at the offices of Tarion Warranty Corporation during normal business hours), or secured by other security acceptable to Tarion and arranged in writing with Tarion, or (B) failing compliance with the requirement set out in clause (A) above, shall be deemed to be held in trust by the Vendor for the Purchaser on the same terms as are set out in the form of deposit trust agreement described in clause (A) above.

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The Ontario Human Rights Commission and Bruce Dunlop and Harold E. Hall and Vincent Gray (*Respondents*) *Appellants*;

and

The Borough of Etobicoke (*Appellant*) *Respondent*.

File No.: 16269.

1981: May 13; 1982: February 9.

Present: Laskin C.J. and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil rights — Alleged discrimination on basis of age — Firemen dismissed at age 60 pursuant to collective agreement — Whether or not mandatory retirement a bona fide occupational qualification — The Ontario Human Rights Code, R.S.O. 1970, c. 318, ss. 4(1),(6), 14a, 14d, as amended.

This appeal concerned the construction of s. 4(6) of *The Ontario Human Rights Code*. Appellants Hall and Gray, firemen employed by Etobicoke, each filed a complaint under the Code because of their forced retirement at age sixty pursuant to a clause in a collective agreement. A one-man board of inquiry (Dunlop) found appellants' forced retirement to be a refusal to employ contrary to s. 4(1)(*b*) of the Code, and ordered their reinstatement with compensation subject to their possessing the physical and mental capacities required to perform their jobs. The Divisional Court's judgment allowing an appeal from the board of inquiry was upheld at the Court of Appeal.

Held: The appeal should be allowed.

The employer has not shown that compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. A *bona fide* occupational qualification must be imposed honestly, in good faith, and in the sincerely held belief that it is imposed in the interests of adequate performance of the work involved with reasonable dispatch, safety and economy and not for ulterior or extraneous reasons that could defeat the Code's purpose. The qualification must be objectively related to the employment concerned, ensuring its efficient and economical performance without endangering the employee or others. Evidence as to the duties to be performed and the relationship between

La Commission ontarienne des droits de la personne, Bruce Dunlop, Harold E. Hall et Vincent Gray (*Intimés*) *Appelants*;

et

La municipalité d'Etobicoke (*Appelante*) *Intimée*.

N° du greffe: 16269.

1981: 13 mai; 1982: 9 février.

Présents: Le juge en chef Laskin et les juges Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Libertés publiques — Prétendue mesure discriminatoire fondée sur l'âge — Pompiers congédiés à l'âge de 60 ans conformément à la convention collective — La retraite obligatoire est-elle une exigence professionnelle réelle? — The Ontario Human Rights Code, R.S.O. 1970, chap. 318, art. 4(1),(6), 14a, 14d, et modifications.

Le présent pourvoi porte sur l'interprétation du par. 4(6) de *The Ontario Human Rights Code*. Les appelants Hall et Gray, des pompiers au service de la municipalité d'Etobicoke, ont tous deux porté plainte en vertu du Code en raison de leur mise à la retraite obligatoire à l'âge de soixante ans conformément à une clause d'une convention collective. Le commissaire enquêteur (Dunlop) a conclu que la mise à la retraite obligatoire des appelants équivalait à un refus de les employer contrairement à l'al. 4(1)*b*) du Code, et il a ordonné leur réintégration avec indemnité à la condition qu'ils possèdent les aptitudes physiques et mentales nécessaires à l'exécution de leurs tâches. La Cour d'appel a maintenu l'arrêt de la Cour divisionnaire qui a accueilli l'appel de la décision du commissaire enquêteur.

Arrêt: Le pourvoi est accueilli.

L'employeur n'a pas prouvé que la retraite obligatoire est une exigence professionnelle réelle de l'emploi en question. Une exigence professionnelle réelle doit être imposée honnêtement, de bonne foi et avec la conviction sincère qu'elle est imposée en vue d'assurer la bonne exécution du travail en question d'une manière raisonnablement diligente, sûre et économique et non pour des motifs inavoués ou étrangers susceptibles d'aller à l'encontre du Code. La restriction doit se rapporter objectivement à l'emploi en question et en assurer l'exécution efficace et économique sans mettre en danger l'employé ou d'autres personnes. Il est nécessaire de présenter des éléments de preuve relativement aux tâches à accomplir

1982 CanLII 15 (SCC)

the aging process and the safe, efficient performance of those duties is imperative, with statistical and medical evidence being of more weight than the impressions of persons experienced in the field.

As the Code was enacted for the general benefit of the community and its members, its provisions cannot be waived or varied by a collective agreement.

Re Ontario Human Rights Commission and City of North Bay (1977), 21 O.R. 607 (Ont. C.A.), affirming 17 O.R. (2d) 712, considered; *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1; *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587; *Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *R. v. Roma*, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193; *Dunn v. Malone* (1903), 6 O.L.R. 484, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of the Divisional Court allowing an appeal from an order made by a board of inquiry appointed pursuant to *The Ontario Human Rights Code*. Appeal allowed.

J. Polika, Q.C., for the appellants.

Douglas K. Gray and *R. Ross Dunsmore*, for the respondent.

The judgment of the Court was delivered by

MCINTYRE J.—This appeal concerns the construction of *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, s. 4(6), as amended, in a case where it is alleged that a mandatory retirement at age sixty, provided for in a collective agreement, contravenes the provisions of the Code by discriminating against certain employees on the basis of age.

The individual appellants Hall and Gray were employed by the respondent municipality as firefighters. The terms of their employment were contained in a collective agreement which provided that the firefighters would be compulsorily retired at age sixty. Hall and Gray attained that age and

et au rapport entre le vieillissement et l'exécution sûre et efficace de ces tâches, une preuve de nature statistique et médicale étant plus convaincante que les impressions de personnes expérimentées en la matière.

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Puisque le Code a été adopté dans l'intérêt général de la collectivité et de ses membres, on ne peut, par convention collective, renoncer à ses dispositions ni les modifier.

Jurisprudence: arrêt examiné: *Re Ontario Human* b *Rights Commission and City of North Bay* (1977), 21 O.R. 607 (C.A. Ont.) confirmant 17 O.R. (2d) 712; arrêts mentionnés: *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1; *Equitable* c *Life Assurance Society of the United States v. Reed*, [1914] A.C. 587; *Re Estate of Charles Millar, Deceased*, [1938] R.C.S. 1; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *R. v. Roma*, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 d W.W.R. 193; *Dunn v. Malone* (1903), 6 O.L.R. 484.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario qui a rejeté un appel d'une décision de la Cour divisionnaire qui a accueilli l'appel d'une e ordonnance d'un commissaire enquêteur nommé conformément à *The Ontario Human Rights Code*. Pourvoi accueilli.

J. Polika, c.r., pour les appelants.

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Douglas K. Gray et *R. Ross Dunsmore*, pour l'intimée.

Version française du jugement de la Cour rendu par

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LE JUGE MCINTYRE—Le présent pourvoi porte sur l'interprétation de *The Ontario Human Rights Code*, R.S.O. 1970, chap. 318, par. 4(6), et modifications, dans le cas où on allègue que la retraite h obligatoire à soixante ans, prévue dans une convention collective, va à l'encontre des dispositions du Code pour le motif qu'elle constitue pour certains employés une mesure discriminatoire fondée sur i l'âge.

Les appelants Hall et Gray étaient des pompiers au service de la municipalité intimée. Leurs conditions de travail étaient énoncées dans une convention j collective qui fixait à soixante ans l'âge de la retraite obligatoire des pompiers. Dès qu'ils eurent atteint cet âge, Hall et Gray furent licenciés. Ils

1982 CanLII 15 (SCC)

their employment was terminated. Each filed a complaint under *The Ontario Human Rights Code*. The Minister of Labour, pursuant to the provisions of s. 14*a* of the Code, appointed one Bruce Dunlop as a board of inquiry. He decided after a hearing that the compulsory retirement of the appellants amounted to a refusal to employ, or to continue to employ them, contrary to s. 4(1)(*b*) of the Code. He rejected the employer's defence that the compulsory retirement at age sixty constituted a *bona fide* occupational qualification and requirement for the position or employment within s. 4(6) of the Code. He ordered the reinstatement of the appellants provided that they continued to possess the requisite physical and mental capacities to carry out their jobs. He ordered, as well, compensation for loss of earnings from the date of retirement to the date of reinstatement.

An appeal was taken by the respondent to the Divisional Court (O'Leary, Osborne JJ., Cory J. dissenting). O'Leary J., for the majority, in allowing the appeal adopted the test for a *bona fide* occupational qualification and requirement which had been propounded by Professor R. S. McKay, acting as a board of inquiry in another case concerning the firefighters of the City of North Bay. That case raised the same issue which presents itself here. On the appeals in the *North Bay* case the McKay test was adopted in the Divisional Court and the Court of Appeal (see: *Re Ontario Human Rights Commission and City of North Bay* (1977), 17 O.R. (2d) 712 in the Divisional Court and 21 O.R. (2d) 607 in the Court of Appeal). The McKay test provides that to be a *bona fide* qualification and requirement the limitation complained of must be imposed honestly, that is in good faith, and not based on any extraneous or ulterior motive, and it must bear a reasonable relationship to the circumstances of the employment. He said: "In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason 'based on the practical reality of the work a day world and of life'."

ont tous deux porté plainte en vertu de *The Ontario Human Rights Code*. Conformément aux dispositions de l'art. 14*a* du Code, le ministre du Travail a nommé Bruce Dunlop commissaire enquêteur. Le commissaire a conclu, à l'issue d'une audience, que la mise à la retraite obligatoire des appelants équivalait à un refus de les employer ou de continuer à les employer, contrairement aux dispositions de l'al. 4(1)*b*) du Code. Il a rejeté le moyen de défense de l'employeur selon lequel la retraite obligatoire à soixante ans constitue une exigence professionnelle réelle (*bona fide*) du poste ou de l'emploi, au sens du par. 4(6) du Code. Il a ordonné la réintégration des appelants pourvu qu'ils conservent les aptitudes physiques et mentales nécessaires à l'exécution de leurs tâches. Il a en outre ordonné le versement d'une indemnité pour la perte de revenu subie entre la date de la mise à la retraite et celle de leur réintégration.

L'intimée a formé un appel auprès de la Cour divisionnaire (les juges O'Leary et Osborne, le juge Cory étant dissident). Le juge O'Leary, qui a accueilli l'appel au nom de la majorité de la Cour, a adopté le critère de l'exigence professionnelle réelle proposé par le professeur R. S. McKay, en sa qualité de commissaire enquêteur dans une autre affaire concernant les pompiers de la ville de North Bay. Cette affaire soulevait une question identique à celle dont nous sommes saisis en l'espèce. Dans les appels relatifs à l'affaire *North Bay*, la Cour divisionnaire et la Cour d'appel ont retenu le critère McKay (voir: *Re Ontario Human Rights Commission and City of North Bay* (1977), 17 O.R. (2d) 712 en Cour divisionnaire et 21 O.R. (2d) 607 en Cour d'appel). Le critère McKay prévoit que pour constituer une exigence réelle, la restriction dont on se plaint doit être imposée honnêtement, c'est-à-dire de bonne foi, ne pas se fonder sur un motif étranger ou inavoué et avoir un lien raisonnable avec les conditions de travail. Voici ce qu'il a dit: [TRADUCTION] «En d'autres termes, même s'il est indispensable qu'une restriction soit adoptée ou imposée honnêtement ou sincèrement, elle doit en outre reposer, en fait et logiquement, «sur la réalité pratique du milieu de travail et du quotidien».»

1982 CanLII 15 (SCC)

Professor Dunlop, in the case at bar, propounded his test in these words:

The meaning of "bona fide" that seems most consistent with this objective would be "real" or "genuine" i.e. that there is a sound reason for imposing an age limitation and the onus of establishing this justification for discrimination is on the person alleging it to be justified.

In a further hearing, called to deal with compensation to be paid, the employer argued that Professor Dunlop had applied an incorrect test, asserting that he should have applied the test developed in the *North Bay* case by Professor McKay. In his supplementary reasons, dated December 7, 1978, Professor Dunlop expressed the opinion that the test he had formulated, and that of Professor McKay, were in essence the same, aimed at the same result and endeavouring to deal with the same problems. He declined to alter his earlier disposition in favour of the complainants. A further appeal to the Court of Appeal was dismissed when the court simply adopted the majority reasons of O'Leary J. in the Divisional Court. The appellants appealed to this Court by leave, granted November 3, 1980.

The Ontario Human Rights Code commences with a preamble, which declares the purpose of the enactment and declares public policy in Ontario, in the following words:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature;

AND WHEREAS it is desirable to enact a measure to codify and extend such enactments and to simplify their administration;

En l'espèce, le professeur Dunlop a énoncé son critère en ces termes:

[TRADUCTION] Le sens de l'expression «bona fide» [utilisée dans le texte anglais] qui semble le plus compatible avec cet objectif serait celui de «réel» ou «véritable», c'est-à-dire qu'il y a un motif valable pour imposer une limite d'âge, et l'obligation de justifier la mesure discriminatoire incombe à celui qui la prétend justifiée.

Au cours d'une autre audience, convoquée pour traiter de l'indemnité à verser, l'employeur a fait valoir que le professeur Dunlop avait appliqué un critère erroné et qu'il aurait dû appliquer le critère énoncé par le professeur McKay dans l'affaire *North Bay*. Dans des motifs supplémentaires, en date du 7 décembre 1978, le professeur Dunlop a exprimé l'avis que le critère qu'il avait formulé et celui du professeur McKay sont essentiellement identiques, qu'ils visent au même résultat et à régler les mêmes problèmes. Il a refusé de modifier sa décision antérieure en faveur des plaignants. La Cour d'appel, alors saisie, a rejeté l'appel et tout simplement adopté les motifs énoncés, au nom de la majorité, par le juge O'Leary en Cour divisionnaire. Les appelants se sont pourvus devant cette Cour après en avoir reçu l'autorisation le 3 novembre 1980.

Le préambule de *The Ontario Human Rights Code*, qui énonce l'objet de la Loi et la politique générale de l'Ontario, se lit comme suit:

[TRADUCTION] CONSIDÉRANT que la reconnaissance de la dignité inhérente à tous les membres de la famille humaine et de leurs droits égaux et inaliénables constitue le fondement de la liberté, de la justice et de la paix dans le monde et que cette reconnaissance est conforme à la Déclaration universelle des droits de l'homme proclamée par les Nations Unies;

CONSIDÉRANT que l'Ontario a pour principe que toutes les personnes sont libres et égales en dignité et en droits, quels que soient leur race, leurs croyances, leur couleur, leur sexe, leur état civil, leur nationalité, leur ascendance ou leur lieu d'origine;

CONSIDÉRANT que ces principes sont confirmés en Ontario par un certain nombre de lois adoptées par l'Assemblée législative;

ET CONSIDÉRANT qu'il est souhaitable d'adopter une mesure tendant à codifier ces lois, à étendre leur portée et à simplifier leur administration;

1982 CanLII 15 (SCC)

Part I prohibits discrimination in general terms and the publication of signs or notices indicating an intention to discriminate for any purpose because of race, creed, colour, sex, marital status, nationality, ancestry or place of origin. Section 2 forbids discrimination on those bases in respect of admission to and use of public facilities, while s. 3 prohibits similar discrimination in respect of rental of commercial or housing accommodation. Section 4, which is the section in issue in the case at bar, prohibits discrimination in connection with employment. Subsection (1) is expressed in these terms:

> **4.**—(1) No person shall,
>
> (*a*) refuse to refer or to recruit any person for employment;
>
> (*b*) dismiss or refuse to employ or to continue to employ any person;
>
> (*c*) refuse to train, promote or transfer an employee;
>
> (*d*) subject an employee to probation or apprenticeship or enlarge a period of probation or apprenticeship;
>
> (*e*) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;
>
> (*f*) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee; or
>
> (*g*) discriminate against any employee with regard to any term or condition of employment,
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

An exception to the application of the above provisions is provided in subs. (6), which is reproduced hereunder:

> (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a *bona fide* occupational qualification and requirement for the position or employment.

La Partie I interdit la discrimination en termes généraux et la publication, à quelque fin que ce soit, d'enseignes ou d'avis indiquant une intention discriminatoire fondée sur la race, la croyance, la couleur, le sexe, l'état civil, la nationalité, l'ascendance ou le lieu d'origine. L'article 2 interdit la discrimination fondée sur ces motifs, quant à l'accès aux installations publiques et à leur utilisation alors que l'art. 3 interdit toute discrimination semblable à l'égard de la location de locaux commerciaux ou de logements. L'article 4, sur lequel porte le litige en l'espèce, interdit la discrimination en matière d'emploi. Le paragraphe (1) se lit comme suit:

> [TRADUCTION] **4.**—(1) Nul ne doit,
>
> *a*) refuser de proposer ou de recruter une personne en vue d'un emploi;
>
> *b*) congédier ni refuser d'employer ou de continuer à employer une personne;
>
> *c*) refuser de former, de muter un employé ou de lui accorder une promotion;
>
> *d*) soumettre un employé à un stage ou à un apprentissage ni proroger une période de stage ou d'apprentissage;
>
> *e*) établir ou maintenir une classification ou une catégorie d'emplois dont la définition ou l'application empêche l'embauche d'une personne ou le maintien d'une personne dans un emploi;
>
> *f*) maintenir des lignes de progression distinctes aux fins de promotion ou des listes d'ancienneté distinctes qui ont pour effet de nuire à un employé; ni
>
> *g*) assujettir un employé à une distinction injuste quant à une condition de travail,
>
> en raison de la race, des croyances, de la couleur, de l'âge, du sexe, de l'état civil, de la nationalité, de l'ascendance ou du lieu d'origine de la personne ou de l'employé.

Une exception à l'application des dispositions précitées est prévue au par. (6) qui se lit comme suit:

> [TRADUCTION] (6) Les dispositions du présent article relatives à un acte discriminatoire, à une restriction, à une condition ou à une préférence pour un poste ou un emploi fondés sur l'âge, le sexe ou l'état civil ne s'appliquent pas lorsque l'âge, le sexe ou l'état civil constituent une exigence professionnelle réelle du poste ou de l'emploi.

1982 CanLII 15 (SCC)

Part II continues the Ontario Human Rights Commission and outlines its duties. Part III provides for the resolution of complaints. Section 14 and the subsequent sections in Part III set out the procedure to be followed in dealing with complaints. In s. 14*d* a right of appeal to the courts is given. The scope of the judicial appeal created by s. 14*d* is broad and is expressed in these terms:

14*d*.—(1) Any party to a hearing before a board may appeal from the decision or order of the board to the Supreme Court in accordance with the rules of court.

(2) Where notice of an appeal is served under this section, the board shall forthwith file in the Supreme Court the record of the proceedings before it in which the decision or order appealed from was made, which, together with a transcript of the oral evidence taken before the board if it is not part of the record of the board, shall constitute the record in the appeal.

(3) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

(4) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

Part IV provides for prosecution for breaches of the Act and Part V provides for definitions, that of the word 'age' appearing in these terms: " 'age' means any age of forty years or more and less than sixty-five years".

The case at bar involves complaints of discrimination in respect of employment on account of age. It was common ground that the compulsory retirement at age sixty constituted a refusal to employ or continue to employ the complainants. While discrimination on the basis of age is in terms forbidden in s. 4 of the Code, in accordance with subs. (6) an employer may discriminate on that basis where age is a *bona fide* occupational qualification and requirement for the position or employ-

La Partie II maintient l'existence de la Commission ontarienne des droits de la personne et énonce ses fonctions. La Partie III porte sur le règlement des plaintes. L'article 14 et les articles suivants de la Partie III énoncent la procédure à suivre en matière de traitement des plaintes. L'article 14*d* prévoit un droit d'appel aux tribunaux judiciaires. Le droit d'appel prévu à l'art. 14*d* est de portée générale et il est énoncé comme suit:

[TRADUCTION] **14*d*.**—(1) Toute partie à une audience devant une commission d'enquête peut en appeler de la décision ou de l'ordonnance de cette commission auprès de la Cour suprême, conformément aux règles de pratique de cette cour.

(2) Lorsqu'un avis d'appel est signifié en vertu du présent article, la commission d'enquête dépose sans délai devant la Cour suprême le dossier des procédures qui se sont déroulées devant elle et au cours desquelles a été rendue la décision ou l'ordonnance qui fait l'objet de l'appel. Ce dossier, ainsi que la transcription des témoignages entendus devant la commission si elle ne fait pas partie de son dossier, constituent le dossier d'appel.

(3) Le Ministre a le droit de se faire entendre, par procureur ou autrement, à l'audition d'un appel formé en vertu du présent article.

(4) Il peut être interjeté appel en vertu du présent article sur des questions de droit ou de fait, ou des questions mixtes de droit et de fait, et la cour peut confirmer ou infirmer la décision ou l'ordonnance de la commission ou lui ordonner de rendre une décision ou ordonnance qu'elle est habilitée à rendre en vertu de la présente loi et la cour peut substituer son opinion à celle de la commission.

La Partie IV concerne les poursuites relatives aux infractions à la Loi et la Partie V définit certains termes dont l'«âge»: [TRADUCTION] « «âge» s'entend de quarante ans ou plus et moins de soixante-cinq ans».

La présente instance porte sur des plaintes de discrimination en matière d'emploi fondée sur l'âge. Il est reconnu que la retraite obligatoire à soixante ans constitue un refus d'employer ou de continuer à employer les plaignants. Même si l'art. 4 du Code interdit formellement la discrimination fondée sur l'âge, un employeur peut, en vertu du par. (6), établir une distinction pour ce motif lorsque l'âge est une exigence professionnelle réelle du poste ou de l'emploi en question. Lorsque l'exi-

1982 CanLII 15 (SCC)

ment involved. Where such *bona fide* occupational qualification and requirement is shown the employer is entitled to retire employees regardless of their individual capacities, provided only that they have attained the stated age. It will be seen at once that under the Code non-discrimination is the rule of general application and discrimination, where permitted, is the exception.

Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

Two questions must be considered by the Court. Firstly, what is a *bona fide* occupational qualification and requirement within s. 4(6) of the Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? In my opinion, there is no significant difference in the approaches taken by Professors Dunlop and McKay in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

gence professionnelle réelle est établie, l'employeur a le droit de mettre les employés à la retraite indépendamment de leurs aptitudes personnelles, à la seule condition qu'ils aient atteint l'âge prescrit. On constate donc immédiatement qu'aux termes du Code, la non-discrimination est la règle générale et la discrimination, lorsqu'elle est permise, est l'exception.

Lorsqu'un plaignant établit devant une commission d'enquête qu'il est, de prime abord, victime de discrimination, en l'espèce que la retraite obligatoire à soixante ans est une condition de travail, il a droit à un redressement en l'absence de justification de la part de l'employeur. La seule justification que peut invoquer l'employeur en l'espèce est la preuve, dont le fardeau lui incombe, que la retraite obligatoire est une exigence professionnelle réelle de l'emploi en question. La preuve, à mon avis, doit être faite conformément à la règle normale de la preuve en matière civile, c'est-à-dire suivant la prépondérance des probabilités.

La Cour doit examiner deux questions. En premier lieu, qu'est-ce qu'une exigence professionnelle réelle au sens du par. 4(6) du Code et, en second lieu, l'employeur a-t-il démontré que les dispositions relatives à la retraite obligatoire qui font l'objet de la plainte peuvent être ainsi qualifiées? A mon avis, les positions adoptées respectivement par les professeurs Dunlop et McKay en la matière ne diffèrent pas sensiblement et je ne vois aucune objection sérieuse à leur description de l'élément subjectif du critère qui doit être appliqué pour répondre à la première question. Pour constituer une exigence professionnelle réelle, une restriction comme la retraite obligatoire à un âge déterminé doit être imposée honnêtement, de bonne foi et avec la conviction sincère que cette restriction est imposée en vue d'assurer la bonne exécution du travail en question d'une manière raisonnablement diligente, sûre et économique, et non pour des motifs inavoués ou étrangers qui visent des objectifs susceptibles d'aller à l'encontre de ceux du Code. Elle doit en outre se rapporter objectivement à l'exercice de l'emploi en question, en étant raisonnablement nécessaire pour assurer l'exécution efficace et économique du travail sans mettre en danger l'employé, ses compagnons de travail et le public en général.

1982 CanLII 15 (SCC)

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned. As far as the subjective element of the matter is concerned, there was no evidence to indicate that the motives of the employer were other than honest and in good faith in the sense described. It will be the objective aspect of the test which will concern us. We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.

Faced with the uncertainty of the aging process an employer has, it seems to me, two alternatives. He may establish a retirement age at sixty-five or over, in which case he would escape the charge of discrimination on the basis of age under the Code. On the other hand, he may, in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredictable individual human failure involved in continuing all employees to age sixty-five may be such that an arbitrary retirement age may be justified for application to all employees. In the case at bar it may be said that the employment falls into that category. While it is no doubt true that some below the age of sixty may become unfit for firefighting and many above that age may remain fit, recognition of this proposition affords no assistance in resolving the second question. In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a *bona*

La réponse à la seconde question dépend en l'espèce, comme dans tous les cas, de l'examen de la preuve et de la nature de l'emploi concerné. Quant à l'élément subjectif de la question, aucune preuve ne démontre que les motifs de l'employeur n'étaient pas honnêtes et sincères au sens qui a été décrit. Nous nous intéresserons donc à l'aspect objectif du critère. Chronologiquement, nous vieillissons tous au même rythme, mais le vieillissement, au sens fonctionnel du terme, se fait à des rythmes très différents et il est difficilement prévisible. Lorsque le souci de la capacité de l'employé est surtout d'ordre économique, c'est-à-dire lorsque l'employeur s'intéresse à la productivité, et que les conditions de travail ne requièrent aucune qualification particulière susceptible de diminuer sensiblement avec l'âge, ou ne comportent pour les employés ou le public aucun danger exceptionnel qui peut augmenter avec l'âge, il peut être difficile, voire impossible, d'établir que la retraite obligatoire à un âge déterminé, sans égard à la capacité d'une personne en particulier, peut valablement être imposée en vertu du Code. Dans un emploi de ce genre, à mesure que la capacité décline, et que ce déclin devient évident, les employés peuvent être, à juste titre, congédiés ou mis à la retraite.

Devant l'incertitude du vieillissement, deux solutions, à mon avis, s'offrent à l'employeur. Il peut fixer l'âge de la retraite à soixante-cinq ans ou plus, et le cas échéant, il ne peut être accusé de discrimination fondée sur l'âge aux termes du Code. D'autre part, il peut, en ce qui concerne certains types d'emplois, en particulier ceux qui ont trait à la sécurité publique comme c'est le cas des pilotes de ligne aérienne, des conducteurs de trains et d'autobus, des policiers et des pompiers, estimer que le risque d'erreur humaine imprévisible que comporte le maintien de tous les employés à leur poste jusqu'à soixante-cinq ans peut justifier l'application à tous les employés d'un âge de retraite fixé arbitrairement. On peut affirmer que l'emploi dont il est question en l'espèce entre dans cette catégorie. Même s'il ne fait aucun doute que certaines personnes âgées de moins de soixante ans peuvent devenir inaptes au travail de pompier et que maintes personnes plus âgées sont encore aptes à la tâche, la reconnaissance de cette prémisse n'aide aucunement à résoudre la seconde

1982 CanLII 15 (SCC)

fide occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.

The employer argued that firefighting was a dangerous occupation which required physical strength, stamina and alertness beyond most other occupations. It contended that there were such dangers and hazards that young and fit men were required, and that the adequate performance of all members of a firefighting unit was essential to preserve public safety and that of the employees themselves. The arbitrary retirement age was therefore justified as a reasonable measure to assure the maintenance of adequate fire protection in the municipality and, at the same time, to avoid the dangers which could result from keeping all members employed until age sixty-five.

In dealing with the evidence Professor Dunlop remarked that it was largely "impressionistic". He considered that something more was required to discharge the burden of proof and noted the insufficiency of general assertions and expressions of witnesses, some with long experience in firefighting, to the effect that firefighting was a "young man's game". He remarked upon the absence of any scientific evidence to support the employer's position and concluded against the employer, saying:

> While these are sound reasons for allowing a firefighter to retire at the age of 60, they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe.

question. Dans un métier où, comme en l'espèce, l'employeur cherche à justifier la retraite par la sécurité publique, le commissaire enquêteur et la cour doivent, pour décider si on a prouvé l'existence d'une exigence professionnelle réelle, se demander si la preuve fournie justifie la conclusion que les personnes qui ont atteint l'âge de la retraite obligatoire présentent un risque d'erreur humaine suffisant pour justifier la mise à la retraite prématurée dans l'intérêt de l'employé, de ses compagnons de travail et du public en général.

L'employeur a fait valoir que le métier de pompier est un métier dangereux qui exige plus de force physique, de résistance et de vigilance que la plupart des autres métiers. Il a allégué que les risques et le danger présents exigent des hommes jeunes et en bonne forme physique, et qu'il est nécessaire d'obtenir un bon rendement de tous les membres d'une équipe de pompiers pour assurer la sécurité du public et celle des employés eux-mêmes. L'établissement arbitraire de l'âge de la retraite se justifie donc comme une mesure raisonnable qui permet d'assurer le maintien d'un bon service de protection contre les incendies dans la municipalité et, en même temps, d'éviter les dangers susceptibles de découler du maintien en fonction de tous les employés jusqu'à l'âge de soixante-cinq ans.

Lorsqu'il a examiné la preuve, le professeur Dunlop a fait remarquer qu'elle était très [TRADUCTION] «impressionniste». Il a estimé qu'il faut une preuve plus étoffée pour s'acquitter du fardeau de la preuve et il a souligné l'insuffisance des affirmations et des déclarations générales des témoins, dont certains avaient beaucoup d'expérience dans la lutte contre les incendies, que le métier de pompier est [TRADUCTION] «une affaire de jeune homme». Il a fait remarquer l'absence de preuve scientifique à l'appui de la thèse de l'employeur et il a conclu de manière défavorable à l'employeur en disant:

> [TRADUCTION] Même si ce sont là de bonnes raisons de permettre à un pompier de prendre sa retraite à 60 ans, elles ne me semblent pas justifier la mise à la retraite obligatoire en l'absence de données scientifiques ou statistiques qui prouvent que, passé l'âge de 60 ans, les pompiers deviennent moins efficaces et moins sûrs.

1982 CanLII 15 (SCC)

He also gave it as his opinion that the main or one of the main reasons the arbitrary retirement age had been established was to create uniformity throughout the municipalities in the Province of Ontario. There was evidence that some sixty per cent had established such a retirement policy and, as well, that the union representing the firefighters had pressed for the early retirement as a benefit for employees.

In the Divisional Court the evidence was canvassed and the majority of the court took a different view. It commented on the reference made by the board of inquiry to scientific evidence and seemed to be of the opinion that the decision turned on its absence. The majority then concluded that on all the evidence before the board the respondent had made out a justification showing that the compulsory retirement was a *bona fide* occupational qualification and requirement under s. 4(6).

The majority of the Divisional Court thus chose to review the evidence and substitute its views for those of the board of inquiry on the conclusions to be drawn. In this, as has been pointed out above, it was supported by the Court of Appeal. The majority of the Divisional Court apparently acted under the broad powers given the court upon an appeal from a decision or order of a board of inquiry in s. 14*d*(4) of the Code. The appellate court is specifically empowered to review the evidence and substitute its own findings for those of the board of inquiry and, while I acknowledge the importance of the general principle expressed by Hughes J. in the *North Bay* case, at p. 716, regarding interference with findings of fact made at first instance, it cannot be said, as was argued by the appellant before us, that it will always be error for an appellate court acting under the broad powers so conferred to negate findings made below. However, in the circumstances of this case, with the utmost deference to the views of the majority in the Divisional Court and to those of the Court of Appeal, I am of the view that the evidence adduced before the board of inquiry was inadequate to discharge the burden of proof lying

Il a également exprimé l'avis que la principale ou l'une des principales raisons de l'établissement arbitraire de l'âge de la retraite était de réaliser l'uniformité entre les municipalités de la province de l'Ontario. Il a été démontré qu'environ soixante pour cent de ces municipalités ont adopté une telle politique en matière de retraite et également, que le syndicat qui représente les pompiers avait réclamé la retraite anticipée en tant qu'avantage pour les employés.

La Cour divisionnaire a examiné la preuve minutieusement et, à la majorité, a adopté un point de vue différent. Elle a fait des observations concernant la mention, par le commissaire enquêteur, de la preuve scientifique et elle a semblé estimer que la décision reposait sur l'absence d'une preuve de cette nature. Elle a alors conclu à la majorité que, d'après l'ensemble de la preuve déposée devant le commissaire enquêteur, l'intimée avait établi une justification en prouvant que la retraite obligatoire était une exigence professionnelle réelle au sens du par. 4(6).

Ainsi, la Cour divisionnaire a choisi, à la majorité, d'examiner la preuve et de substituer sa propre opinion à celle du commissaire enquêteur quant aux conclusions à tirer. Comme je l'ai déjà souligné, la Cour d'appel a confirmé cette décision en ce sens. La Cour divisionnaire à la majorité semble avoir agi en vertu des pouvoirs généraux que lui confère le par. 14*d*(4) du Code en matière d'appel d'une décision ou ordonnance d'une commission d'enquête. Le tribunal d'appel est expressément habilité à examiner la preuve et à substituer ses propres conclusions à celles de la commission d'enquête et, bien que je reconnaisse l'importance du principe général énoncé par le juge Hughes dans l'arrêt *North Bay*, à la p. 716, concernant la modification des constatations de fait d'une cour de première instance, on ne peut dire, comme l'appelant l'a fait valoir ici, qu'une cour d'appel qui agit en vertu des pouvoirs généraux qui lui sont ainsi attribués, commet toujours une erreur si elle nie les conclusions de l'instance inférieure. Toutefois, compte tenu des circonstances de l'espèce et avec grands égards pour l'opinion exprimée à la majorité par la Cour divisionnaire et celle de la Cour d'appel, j'estime que

1982 CanLII 15 (SCC)

upon the employer. In my opinion, the appeal must succeed and the judgment of the board of inquiry be restored.

It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty-five under the provisions of s. 4(6) of the Code. In the final analysis the board of inquiry, subject always to the rights of appeal under s. 14*d* of the Code, must be the judge of such matters. In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. Many factors whould be involved and it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported. The aging process is one which has involved the attention of the medical profession and it has been the subject of substantial and continuing research. Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject.

I am by no means entirely certain what may be characterized as "scientific evidence". I am far from saying that in all cases some "scientific evidence" will be necessary. It seems to me, however, that in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is "a young man's game". My review of the evidence leads me to agree with the board of inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as "impressionistic"

la preuve soumise au commissaire enquêteur était insuffisante pour libérer l'employeur du fardeau de la preuve qui lui incombait. A mon avis, le pourvoi doit être accueilli et la décision du commissaire *a* enquêteur doit être rétablie.

Il serait imprudent de tenter de formuler une règle fixe concernant la nature et le caractère suffisant de la preuve requise pour justifier la *b* retraite obligatoire avant l'âge de soixante-cinq ans en vertu des dispositions du par. 4(6) du Code. En dernière analyse et toujours sous réserve du droit d'appel prévu à l'art. 14*d* du Code, le commissaire enquêteur doit être le juge en cette *c* matière. A l'examen de la question d'un âge de retraite obligatoire, il semble nécessaire de présenter des éléments de preuve relativement aux tâches à accomplir et au rapport entre le vieillissement et *d* l'exécution sûre et efficace de ces tâches. Un bon nombre de facteurs doivent être considérés et il semble essentiel que la preuve porte sur les aspects détaillés des tâches à accomplir, les conditions régnant sur les lieux de travail et l'effet de ces *e* conditions sur les employés, en particulier sur ceux qui ont atteint ou qui atteindront bientôt l'âge qu'on veut prescrire pour la retraite. Le phénomène du vieillissement a retenu l'attention des médecins et a fait l'objet de recherches importan- *f* tes et suivies. Lorsqu'une limitation de la période d'emploi doit, pour être valide, reposer sur la preuve que l'extension de cette période après un certain âge fait naître un danger pour la sécurité *g* publique, il paraît nécessaire que l'employeur, pour s'acquitter du fardeau de la preuve qui lui incombe, produise une preuve à ce sujet.

Je ne suis pas du tout certain de ce qu'on peut *h* qualifier de «preuve scientifique». Je ne dis absolument pas qu'une «preuve scientifique» sera nécessaire dans tous les cas. Il me semble cependant que, dans des cas comme celui en l'espèce, une preuve de nature statistique et médicale qui s'ap- *i* puie sur l'observation et l'étude de la question du vieillissement, même si elle n'est pas absolument nécessaire dans tous les cas, sera certainement plus convaincante que le témoignage de personnes même très expérimentées dans la lutte contre les *j* incendies, portant que le travail de pompier est «une affaire de jeune homme». L'examen que j'ai fait de la preuve m'amène à souscrire aux conclusions du commissaire enquêteur. Tout en étant

1982 CanLII 15 (SCC)

and were of insufficient weight. The question of sufficiency and the nature of evidence in such matters has been discussed in various cases, and of particular interest are: *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1.

A further argument must be dealt with. The respondent in paragraph 38 of its factum, noting that the mandatory retirement had been agreed upon in the collective agreement with the union representing the appellants, submitted:

It is submitted that where the parties engage in the statutorily-required bargaining, and as a result thereof agree, in good faith, on a standard retirement age based, in part, on the particular rigours and demands of the job of fire-fighting, then the resulting qualification and requirement must be considered to be "bona fide" in the absence of evidence that the limitation was inserted for an ulterior purpose.

While this submission is that the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of *The Ontario Human Rights Code*.

Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy. In *Halsbury's Laws of England*, 3rd ed., vol. 36, p. 444, para. 673, the following appears:

673. Waiver of statutory rights. Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.

persuadé que la preuve et les opinions entendues ont été soumises honnêtement, c'est avec raison, à mon avis, qu'on a dit qu'elles étaient «impressionnistes» et qu'elles n'étaient pas concluantes. La question de la suffisance et de la nature de la preuve en la matière a été analysée dans divers arrêts, dont en particulier: *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1.

Il reste un autre point à examiner. Lorsqu'elle fait remarquer que la retraite obligatoire a été acceptée dans la convention collective passée avec le syndicat qui représente les appelants, l'intimée fait valoir, au paragraphe 38 de son exposé, ce qui suit:

[TRADUCTION] Nous prétendons que lorsque les parties entrent en négociation conformément aux exigences de la loi et qu'il en résulte une entente de bonne foi sur un âge de retraite normalisé qui se fonde en partie sur les rigueurs et les exigences particulières du travail de pompier, l'exigence qui en résulte doit alors être considérée comme «réelle» en l'absence de preuve que la restriction a été insérée dans un but inavoué.

Alors que cet argument porte que cette condition, stipulée dans une convention collective, doit être considérée comme une exigence professionnelle réelle, j'estime que ce serait permettre aux parties de renoncer par contrat aux dispositions de *The Ontario Human Rights Code* que de l'entériner.

Même s'il n'apporte aucune restriction formelle à une renonciation de ce genre, le Code est néanmoins une loi publique qui énonce une politique générale de l'Ontario, comme on le constate en lisant le texte législatif lui-même et son préambule. Il ressort clairement de la doctrine, tant canadienne qu'anglaise, que les parties n'ont pas la faculté de renoncer par contrat aux dispositions de telles lois et que les contrats à cet effet sont nuls parce que contraires à l'ordre public. Dans *Halsbury's Laws of England*, 3e éd., vol. 36, p. 444, par. 673, on lit:

[TRADUCTION] **673. Renonciation aux droits prévus par la loi.** Les personnes en faveur desquelles la loi impose des obligations peuvent renoncer par contrat à leur droit à l'exécution de ces obligations, à moins que ce ne soit contraire à l'ordre public ou encore aux dispositions ou à l'économie générale de la loi qui impose cette obligation particulière, ou que les obligations ne soient imposées dans l'intérêt public.

1982 CanLII 15 (SCC)

And in the fourth edition of the same work the following is to be found in vol. 9, p. 289, para. 421:

421. Contracting out. As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.

By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.

English authority expressing this principle is to be found in *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587. The question of the enforcement of a contract contrary to public policy is generally dealt with by Duff C.J. in *Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1, where reference is made to *Fender v. Mildmay*, [1937] 3 All E.R. 402, and other authorities. Examples of the application of the principle are such cases as *R. v. Roma*, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193, and *Dunn v. Malone* (1903), 6 O.L.R. 484. *The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.

For these reasons I would allow the appeal with costs and reinstate the order of the board of inquiry.

Appeal allowed with costs.

Solicitor for the appellants: H. Allan Leal, Toronto.

Solicitors for the respondent: Hinks, Morley, Hamilton, Stewart, Storie, Toronto.

Et dans la quatrième édition de cet ouvrage, on lit au vol. 9, p. 289, par. 421:

[TRADUCTION] **Renonciation.** En règle générale, une personne peut, dans un contrat valide, renoncer aux avantages que lui accorde une loi du Parlement ou, comme on dit, elle peut renoncer à l'application de la loi, à moins qu'il ne puisse être établi qu'il serait contraire à l'ordre public de permettre ce contrat. La loi peut toutefois imposer des conditions en des termes tels qu'on ne puisse y renoncer par contrat; et, dans certains cas, il est expressément prévu qu'un tel contrat sera nul.

A titre d'exemple d'exception à la règle générale, un contrat entre un employeur et un employé par lequel ce dernier accepte de renoncer à une obligation que la loi impose à l'employeur pour des motifs de sécurité ne lie généralement pas l'employé.

La jurisprudence anglaise énonce ce principe dans l'arrêt *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587. Le juge en chef Duff traite de façon générale de la question de l'exécution d'un contrat contraire à l'ordre public dans l'arrêt *Re Estate of Charles Millar, Deceased*, [1938] R.C.S. 1, qui renvoie notamment à l'arrêt *Fender v. Mildmay*, [1937] 3 All E.R. 402. On trouve des exemples de l'application du principe dans les arrêts *R. v. Roma*, [1942] 3 W.W.R. 525, *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193 et *Dunn v. Malone* (1903), 6 O.L.R. 484. La législature de l'Ontario a adopté *The Ontario Human Rights Code* dans l'intérêt de l'ensemble de la collectivité et de chacun de ses membres, et il est évident que cette loi tombe dans la catégorie des lois auxquelles on ne peut renoncer ou qu'on ne peut modifier par contrat privé; par conséquent, cet argument ne peut être admis.

Pour ces motifs, je suis d'avis d'accueillir le pourvoi avec dépens et de rétablir l'ordonnance du commissaire enquêteur.

Pourvoi accueilli avec dépens.

Procureur des appelants: H. Allan Leal, Toronto.

Procureurs de l'intimée: Hinks, Morley, Hamilton, Stewart, Storie, Toronto.

1982 CanLII 15 (SCC)

The Guarantee Company of North America et al. v. Royal Bank of Canada et al.
[Indexed as: Guarantee Company of North America v. Royal Bank of Canada]

Ontario Reports

Court of Appeal for Ontario

Hoy A.C.J.O., Doherty, Sharpe, L.B. Roberts and Fairburn JJ.A.

January 14, 2019

144 O.R. (3d) 225 | 2019 ONCA 9

2019 ONCA 9 (CanLII)

Case Summary

Bankruptcy and insolvency — Property of bankrupt — Trusts — Provincially created statutory trusts preserving bankrupt's assets from distribution to ordinary creditors under s. 67(1)(a) of Bankruptcy and Insolvency Act so long as statutory trust satisfies general principles of trust law — Statutory trust created by s. 8(1) of Construction Lien Act ("CLA") satisfying requirement for certainty of intention — Debts for construction project choses in action that supply requisite certainty of subject matter — Commingling of CLA funds from various projects not negating certainty of subject matter where funds were identifiable and traceable — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1) (a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

Constitutional law — Distribution of legislative authority — Paramountcy — No operational conflict existing between s. 8(1) of Construction Lien Act and s. 67(1)(a) of Bankruptcy and Insolvency Act — Doctrine of paramountcy not applying — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

Construction law — Trust fund — Trust funds under s. 8(1) of Construction Lien Act excluded from distribution to bankrupt contractor's creditors pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

A priority dispute arose between Royal, a secured creditor of a bankrupt construction contractor, GCNA, a bond company and secured creditor of the bankrupt, and certain employees of the bankrupt, represented by the unions. RBC took the position that funds paid to the receiver by owners that were "trust funds" within the meaning of s. 8 of the *Construction Lien Act* formed part of the bankrupt's estate available to creditors. GCNA and the unions took the position that the funds were trust funds that had to be excluded from the bankrupt's property pursuant to s. 67(1)(*a*) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The receiver brought a motion for advice

and directions to resolve the dispute. The motion judge found that the funds were not excluded under s. 67(1)(*a*) and were available for distribution to creditors. GCNA appealed.

Held, the appeal should be allowed.

The decision of the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* contemplates provincially created statutory trusts preserving assets from distribution to ordinary creditors under s. 67(1)(*a*) of the *BIA*, provided the statutory trust satisfies the general principles of trust law. A statutory provision that deems a trust into existence can give rise to the certainty of intention required to create a trust. The statutory trust created by s. 8(1) of the *CLA* satisfies the requirement for certainty of intention. There is no operational conflict [page226] between s. 8(1) of the *CLA* and s. 67(1) (*b*) of the *BIA*. Section 8(1) is not in pith and substance legislation in relation to bankruptcy and insolvency. Rather, it is an integral part of the scheme of holdbacks, liens and trusts, designed to protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid. That purpose exists outside the bankruptcy context. In the absence of an operational conflict, the doctrine of paramountcy did not apply. Debts for a project subject to the *CLA* are choses in action that supply the required certainty of subject matter. The commingling of *CLA* funds from various projects in this case did not mean that the required certainty of subject matter was not present because the funds remained identifiable and traceable. The funds were not property of the bankrupt available for distribution to the bankrupt's creditors.

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, J.E. 89-1098, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, 2 T.C.T. 4263; *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785, [1985] S.C.J. No. 35, 19 D.L.R. (4th) 577, 60 N.R. 81, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 31 A.C.W.S. (2d) 297; *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, [1995] S.J. No. 452, [1995] 9 W.W.R. 498, 135 Sask. R. 235, 34 C.B.R. (3d) 196, 23 C.L.R. (2d) 239, 57 A.C.W.S. (3d) 541 (Q.B.); *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, [1988] S.C.J. No. 44, 50 D.L.R. (4th) 577, 84 N.R. 308, J.E. 88-745, 14 Q.A.C. 140, 68 C.B.R. (N.S.) 209, EYB 1988-67858, 9 A.C.W.S. (3d) 397; *GMAC Commercial Credit Corp. -- Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, 194 O.A.C. 360, 7 C.B.R. (5th) 202, 137 A.C.W.S. (3d) 247 (C.A.); *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, 128 D.L.R. (4th) 1, 188 N.R. 1, [1995] 10 W.W.R. 161, J.E. 95-1945, 137 Sask. R. 81, 35 C.B.R. (3d) 1, 24 C.L.R. (2d) 131, EYB 1995-67967, 58 A.C.W.S. (3d) 182; *Iona Contractors Ltd. v. Guarantee Co. of North America*, [2015] A.J. No. 787, 2015 ABCA 240, 19 Alta. L.R. (6th) 87, 26 C.B.R. (6th) 173, 44 C.L.R. (4th) 165, [2015] 9 W.W.R. 469, 387 D.L.R. (4th) 67, 602 A.R. 295, 255 A.C.W.S. (3d) 30 [Leave to appeal to S.C.C. refused [2015] S.C.C.A. No. 404]; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.) [Leave to appeal to S.C.C. granted [2006] S.C.C.A. No. 490, appeal discontinued on October 31, 2007]; *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, [1979] S.C.J. No. 93, 105 D.L.R. (3d) 270, 30 N.R. 24, 33 C.B.R. (N.S.) 301, [1979] 3 A.C.W.S. 707; *Roscoe Enterprises Ltd. v. Wasscon*

2019 ONCA 9 (CanLII)

Construction Inc., [1998] S.J. No. 487, 161 D.L.R. (4th) 725, [1999] 2 W.W.R. 564, 169 Sask. R. 240, 41 C.L.R. (2d) 54, 80 A.C.W.S. (3d) 1147 (Q.B.), **consd**

British Columbia v. National Bank of Canada, [1994] B.C.J. No. 2584, 119 D.L.R. (4th) 669, [1995] 2 W.W.R. 305, 52 B.C.A.C. 180, 99 B.C.L.R. (2d) 358, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 51 A.C.W.S. (3d) 766 (C.A.) [Leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 18, 34 C.B.R. (3d) 302], **distd**

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2019 ONCA 9 (CanLII)

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2019 ONCA 9 (CanLII)

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2019 ONCA 9 (CanLII)

APPEAL from the order of B.A. Conway J., [2018] O.J. No. 911, 2018 ONSC 1123, 57 C.B.R. (6th) 103 (S.C.J.) on a motion for advice and directions.

Josh Hunter and *Hayley Pitcher*, for appellant Attorney General of Ontario.

Matthew B. Lerner and *Scott M.J. Rollwagen*, for appellant Guarantee Company of North America.

Sam Babe and *Miranda Spence*, for respondent Royal Bank of Canada.

Raymond M. Slattery, for respondent A-1 Asphalt Maintenance Ltd. (receiver of).

Paul Cavalluzzo and *Alex St. John*, for intervenor LIUNA Local 183.

The judgment of the court was delivered by

[1] **SHARPE J.A.**: — This appeal arises from a priority dispute between certain creditors and employees of a bankrupt company, A-1 Asphalt Maintenance Ltd. ("A-1"). The issue is whether the funds owing to or received by a bankrupt contractor and [page229] impressed with a statutory trust created by s. 8(1) of the *Construction Lien Act*,R.S.O. 1990, c. C.30 ("*CLA*") are

excluded from distribution to the contractor's creditors, pursuant to s. 67(1)(*a*) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[2] As I will explain, to decide this issue it is necessary to give careful consideration to several decisions of the Supreme Court of Canada, in particular, *British Columbia v. Henfrey Samson Belair Ltd.*,[1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, and to the decision of this court in *GMAC Commercial Credit Corp. -- Canada v. T.C.T. Logistics Inc.* (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589 (C.A.).

[3] For the following reasons, I conclude that *Henfrey* contemplates provincially created statutory trusts preserving assets from distribution to ordinary creditors under the *BIA*, s. 67(1)(*a*), provided the statutory trust satisfies the general principles of trust law. The general principles of trust law require certainty of intention to create a trust and certainty of subject matter in addition to certainty of object. I conclude that the statutory trust created by the *CLA*, s. 8(1) satisfies the requirement for certainty of intention to create a trust. I reject the contention that by creating the required element of certainty of intention, the *CLA*, s. 8(1) creates an operational conflict between the *CLA*, s. 8(1) and the *BIA*, s. 67(1)(*a*), triggering the doctrine of federal paramountcy. I conclude that debts for a project subject to the *CLA* are choses in action that supply the required certainty of subject matter. I further conclude that the commingling of *CLA* funds from various projects does not mean that the required certainty of subject matter was not present because the funds remained identifiable and traceable.

Facts

[4] A-1 is an Ontario corporation, engaged in the paving business. A-1 filed a notice of intention to make a proposal under the *BIA* on November 21, 2014. It subsequently failed to file a proposal and was deemed bankrupt on December 22, 2014.

[5] At the time of A-1's bankruptcy, it had four major ongoing paving projects, three with the City of Hamilton (the "city") and one with the Town of Halton Hills (the "town"). All four contracts had outstanding accounts receivable for work performed by A-1. The bankruptcy judge directed the receiver to establish a "paving projects account" and a general post-receivership account. The order provided that all receipts from the four paving projects were to be deposited into the paving projects account. It also provided that the "segregation of receipts by the Receiver [page230] between the two Post Receivership Accounts shall be without prejudice to the existing rights of any party and shall not create any new rights in favour of any party". A subsequent order directed that receipts from other paving projects were also to be deposited in the paving projects account.

[6] The city and the town paid $675,372.27 (the "funds") to the receiver, who deposited the funds into the paving projects account. That amount represented debts owing to A-1 by the city and the town when A-1 filed its notice of intention to make a proposal. While the receiver commingled the trust funds received from A-1's various paving projects in the paving projects account, the allocation of the funds in the paving projects account to each specific project is identifiable because of the receiver's careful accounting.

2019 ONCA 9 (CanLII)

[7] It is common ground that the funds are "trust funds" within the meaning of s. 8 of the *CLA*, which provides:

8(1) All amounts,

(*a*) owing to a contractor or subcontractor, whether or not due or payable; or

(*b*) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

[8] There is a priority dispute between

(1) Royal Bank of Canada ("RBC") as a secured creditor of A-1 pursuant to a general security agreement;

(2) Guarantee Company of North America ("GCNA"), a bond company and secured creditor of A-1 that had paid out 20 *CLA* lien claims (totalling $1,851,852.39) to certain suppliers and subcontractors of A-1 and is subrogated to those claims; and

(3) certain employees that worked on the four projects, as represented by LIUNA Local 183 and IUOE Local 793 (together, the "unions") (claiming a total of $511,949.14). [page231]

[9] RBC takes the position that the funds form part of A-1's estate available to creditors. GCNA and the unions take the position that the funds were s. 8(1) *CLA* trust funds that must be excluded from A-1's property on bankruptcy, pursuant to s. 67(1)(*a*) of the *BIA*. That section provides:

67(1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person[.]

[10] The receiver brought a motion for advice and directions to resolve the priority dispute and served a notice of constitutional question identifying the potential conflict between the *CLA* and *BIA*. The Attorney General of Ontario intervened in response.

[11] On the motion, it was common ground that if the funds were not trust funds, pursuant to s. 67(1)(*a*), RBC and GCNA would share the remaining funds pro rata as secured creditors. The unions could make a claim to any remaining funds under s. 136(1)(*d*) of the *BIA*.

Decision of the Motion Judge: [2018] O.J. No. 911, 2018 ONSC 1123 (S.C.J.)

2019 ONCA 9 (CanLII)

[12] The motion judge delivered a handwritten endorsement at the conclusion of argument holding that the funds were not excluded from A-1's estate available for distribution to creditors.

[13] She noted that the constitutional issue of the validity of provincial statutory trusts in bankruptcy had been resolved by the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd*. That case held that trusts established by provincial law that meet the general principles of the law of trusts will be excluded from the bankrupt's estate pursuant to s. 67(1)(*a*) of the *BIA*. It is common ground that those principles are certainty of intention, object and subject matter.

2019 ONCA 9 (CanLII)

[14] The motion judge stated [at para. 9] that she was not suggesting that the statutory trust created by the *CLA* could never be recognized as "a true trust for purposes of . . . the *BIA*". However, the motion judge concluded that on the facts of this case GCNA had failed to establish sufficient certainty of subject matter and that the funds were not therefore held in trust within the meaning of s. 67(1) (*a*). She reached that conclusion for two reasons. First, she stated, at para. 6, that the "funds owed to A-1 by the City/Town are not necessarily identifiable, do not necessarily come from any particular fund or account and are simply payable by the City/Town from its own revenues or other sources". Second, she found, at para. 7, that once the funds were paid, "there was no established means for [page232] [A-1] to hold these monies separate from other funds and maintain their character as trust funds". The orders of the bankruptcy judge were [at para. 2] "completely neutral" and "did not create any rights nor did they take away any rights, as explicitly stated in the orders".

[15] The motion judge was of the view that *GMAC Commercial Credit Corporation -- Canada v. T.C.T. Logistics Inc.* required a form of segregation of funds to maintain a trust. She relied on that case to reject the proposition that the receiver's careful accounting records that were capable of identifying the funds in the paving projects account could establish certainty of subject matter. As the amounts owing for the various projects had been commingled, the absence of segregation was sufficient to destroy the certainty of subject matter required under the general principles of trust law.

[16] The motion judge concluded that the s. 67(1)(*a*) exemption for property held in trust did not apply. She therefore found that GCNA was only entitled to a *pro rata* share of the funds as a secured creditor and that the unions were entitled to their share as unsecured creditors.

Issues

[17] The following issues arise on this appeal:

(1) Can a statutory deeming provision give rise to certainty of intention?

(2) Were the debts of the city and the town choses in action that supplied the required certainty of subject matter for a trust?

(3) Did commingling of the funds mean that the required certainty of subject matter was not present?

(4) Does RBC's security interest have priority even if the trust created by s. 8(1) of the *CLA* survives in bankruptcy?

2019 ONCA 9 (CanLII)

Analysis

Statutory trusts

[18] As a preliminary matter, it will be helpful to define the terminology involving statutory trusts. In *Henfrey*, McLachlin J. referred to a "deemed statutory trust": p. 34 S.C.R. A "deemed statutory trust" is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property. The legislation purports to deem the trust into existence independently of the subjective intentions of or actions taken by the trustee. For example, the [page233] legislation at issue in *Henfrey*, s. 18 of the *Social Service Tax Act*,R.S.B.C. 1979, c. 388, established that a merchant who collected sales tax was [at p. 38 S.C.R.] "deemed to hold it in trust" for the provincial Crown. Deemed statutory trusts may be in favour of either the Crown or private parties: *GMAC*, para. 14. The subject matter of deemed statutory trusts also varies. Some statutes establish a trust over specific sums of property owing to or received by the trustee. In contrast, other statutes purport to establish a general floating charge over the assets of the trustee for the sum of the trust moneys.

[19] Even if a statute does not deem a trust into existence, it may impose a "statutory trust obligation", namely, an obligation on a person to hold in trust certain property: *GMAC*, paras. 13, 17, 21-22. Statutes that create deemed statutory trusts often also impose statutory trust obligations, such as an obligation to segregate the trust property or hold it in a trust account: *GMAC*, at para. 17.

[20] Section 8 of the *CLA* both creates a deemed statutory trust and imposes statutory trust obligations on the contractor or subcontractor. The language of s. 8 makes clear that it deems a trust into existence independently of the trustee's actions or intentions. Section 8(1) provides that the amounts in ss. 8(1)(*a*) and (*b*) "*constitute* a trust fund" and s. 8(2) establishes that the contractor or subcontractor "*is* the trustee of the trust fund *created by subsection (1)*" (emphasis added). Thus, s. 8(1) purports to deem a trust into existence independently of any actions by the contractor or subcontractor. Section 8(2) also imposes a statutory trust obligation on the contractor or subcontractor not to appropriate or convert any part of the trust fund until all subcontractors and suppliers have been fully paid for their work.

Positions of the parties

[21] It is common ground on this appeal that to qualify as a "trust" that is excluded from A-1's property for distribution to creditors pursuant to s. 67(1)(*a*) of the *BIA*, the deemed statutory trust created by s. 8(1) of the *CLA* must satisfy the general principles of trust law: *Henfrey*. The general principle of trust law we must consider is that to establish a trust, three elements must be present, certainty of intention, certainty of subject matter and certainty of object: see Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), at pp. 41-47.

[22] GCNA, supported by the Attorney General of Ontario and LIUNA Local 183, submits that the three certainties are present in s. 8(1). Certainty of intention is clear from the language of the [page234] statute that the amounts specified "constitute a trust fund". Certainty of object is spelled out as the statute specifies that the trust fund is "for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed

amounts by the contractor or subcontractor". Certainty of subject matter is made out as the statute clearly specifies that the subject of the trust is "all amounts, owing to a contractor or subcontractor" and "all amounts, received by a contractor or subcontractor . . . on account of the contract or subcontract price of an improvement".

[23] RBC disputes both certainty of intention and certainty of subject matter.

(1) Can a statutory deeming provision give rise to certainty of intention?

[24] The motion judge did not deal with the issue of certainty of intention in her reasons. She appears to have assumed that it was created by s. 8(1). However, on appeal, RBC's principal argument to uphold the motion judge's decision is that s. 8(1) cannot supply that element. RBC argues that under the general principles of trust law, it is necessary to prove that the settlor had the actual subjective intention to create a trust.

[25] RBC's argument in relation to certainty of intention appears to rest upon a broad proposition, namely, that the three elements of certainty of subject matter, object and, in particular, intention, must be established on facts independent of any statutory deeming provisions.

[26] This argument requires some consideration of the relationship between the provincial power to legislate in relation to property and civil rights in the province (*Constitution Act, 1867*,30 & 31 Vict., c. 3, s. 92(13)) and the federal head of power in relation to bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)).

(a) *Constitutional validity of s. 8(1) of the CLA*

[27] While RBC did not explicitly challenge the constitutional validity of s. 8(1) and accepted that it applies outside of the bankruptcy context, it did assert that the purpose of s. 8(1) is to alter priorities upon bankruptcy. The implication of RBC's argument about the purpose of s. 8(1) of the *CLA* is that the provision is unconstitutional because its pith and substance fits within the federal power of bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867*.

[28] There is no issue that the *CLA* as a whole is valid provincial legislation in relation to property and civil rights in the [page235] province. The *CLA* aims to ensure that parties who supply services and materials to construction projects are paid by creating an integrated scheme of holdbacks, liens and trusts. This scheme protects subcontractors who are vulnerable due to their lack of privity of contract with the owner who benefits from the improvements they perform. Holdbacks require the owner and other contractors to withhold payments in order to ensure that funds are available to pay subcontractors and suppliers. Liens give subcontractors and suppliers the right to assert a claim directly against the property they have improved. Trusts protect the interests of subcontractors and suppliers by protecting funds owing to or received by those to whom they have supplied their services or materials.

[29] In support of its submission that the purpose of the s. 8(1) statutory trust is to alter priorities in bankruptcy, RBC cites statements from two documents prepared by Ontario's Ministry of the Attorney General prior to the legislature's enactment of the *CLA* in 1983: *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, November 1980) and the *Report of the Attorney General's Advisory Committee on the Draft*

2019 ONCA 9 (CanLII)

Construction Lien Act (Toronto: Ministry of the Attorney General, April 1982). In particular, RBC relies on the statement in the *Report of the Attorney General's Advisory Committee*, at p. xxxiv, suggesting that the primary purpose of the s. 8(1) trust is to "prevent contract monies from being misappropriated, and protect those monies from the claims of other creditors in the event of a bankruptcy".

[30] While the s. 8(1) trust may have the effect of protecting construction contract moneys in the event of bankruptcy, I cannot agree that s. 8(1) is in pith and substance legislation in relation to bankruptcy and insolvency. The statement in the *Report of the Attorney General's Advisory Committee* is admissible but "must not be given inappropriate weight": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014), at para. 23.58. A broader and more general protective purpose has been recognized both in academic writing and in the decisions of this court. Kevin McGuinness, "Trust Obligations Under the *Construction Lien Act*" (1994), 15 C.L.R. 208, at p. 227, states that the purpose of the s. 8(1) trust is to "isolate the contract moneys as they flow down the construction pyramid" and serve to preserve that pool of funds "during the period while payments are trickling down the pyramid to the persons ultimately entitled to the money concerned". As this court explained in *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.* (1999), 42 O.R. (3d) 749, [1999] O.J. No. 245 (C.A.), at p. 755 O.R., these statutory trusts [page236] "exist by statute at each level of the contract pyramid for the benefit of those adding value to the land involved". They are "superimposed" on the contacts entered into by the "owner, contactor and subcontractors . . . for the benefit of all those on the next level in the pyramid below the trustee". Similarly, in *Sunview Doors Ltd. v. Pappas* (2010), 101 O.R. (3d) 285, [2010] O.J. No. 1043, 2010 ONCA 198, at para. 99, this court explained:

> The object of the Act is to prevent unjust enrichment of those higher up in the construction pyramid by ensuring that money paid for an improvement flows down to those at the bottom. In seeking to protect persons on the lower rungs from financial hardship and unfair treatment by those above, the Act is clearly remedial in nature . . . The purpose of s. 8 is to impress money owing to or received by contractors or subcontractors with a statutory trust, a form of security, to ensure payment of suppliers to the construction industry.

[31] RBC argues that the trust provisions are separate and independent from other provisions of the *CLA.* This submissionfails to recognize that the trust provisions complement the other *CLA* remedies even outside of bankruptcy or insolvency. As this court stated in *Sunview Doors*, at para. 51, citing the Supreme Court's decision in *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.*, [1955] S.C.R. 694, [1955] S.C.J. No. 48, at p. 696 S.C.R., the legislature enacted the trust provisions because it recognized that the lien provisions only provided a partial form of security to suppliers. The lien provisions failed to protect suppliers at the bottom of the pyramid in situations where the owner of the land had already paid the contractor. The trust provisions complement the lien provisions by providing security to suppliers at the bottom of the pyramid in these situations.

[32] I agree with the Attorney General of Ontario and LIUNA Local 183 that the s. 8(1) trust must be seen as an integral part of the scheme of holdbacks, liens and trusts, designed to protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid. That purpose exists outside the bankruptcy context. As Slatter J.A. recognized in *Iona Contractors Ltd. v. Guarantee Co. of*

2019 ONCA 9 (CanLII)

North America, [2015] A.J. No. 787, 2015 ABCA 240, 387 D.L.R. (4th) 67, leave to appeal to S.C.C. dismissed [2015] S.C.C.A. No. 404, the trust provisions of construction lien legislation cannot be seen in isolation and are part of a comprehensive package to protect construction subcontractors: paras. 21-22. Any effects that s. 8(1) may have on protecting contract moneys in the event of bankruptcy are purely incidental and do not detract from the provision's provincial pith and substance: see *Lacombe*,at para. 36. Accordingly, the s. 8(1) trust is a matter that is the proper subject [page237] of legislation relating to property and civil rights in the province: *John M.M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, [1962] S.C.J. No. 29, at p. 494 S.C.R.

2019 ONCA 9 (CanLII)

(b) *Does the doctrine of paramountcy apply?*

[33] As valid provincial legislation, the *CLA* benefits from a presumption of constitutionality and should be interpreted to avoid conflict with federal legislation where possible. If there is conflict, the doctrine of paramountcy applies, the federal legislation prevails and the provincial legislation is inoperative. Paramountcy is triggered by a conflict between provincial and federal legislation, namely, where there is an operational conflict such that it is impossible to comply with both laws or where the operation of the provincial law frustrates the purpose of the federal enactment: *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, [2015] S.C.J. No. 51, 2015 SCC 51, at para. 18.

[34] Determining whether there is operational conflict requires analyzing how s. 8(1) of the *CLA* intersects with the *BIA*. The *BIA* is valid federal legislation dealing with bankruptcy and insolvency. It has the dual purpose of ensuring the orderly and equitable distribution of the assets in the event of insolvency and enabling the rehabilitation of those who have suffered bankruptcy: *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, at para. 7. A central element of the *BIA*'s regime for the orderly and equitable distribution of assets is a scheme that stipulates what property is available for distribution to creditors and provides for an appropriate ranking of priorities among creditors.

[35] The *BIA* establishes a national regime of insolvency and bankruptcy law. Parliament has the authority under s. 91(21) to define terms in the *BIA* without reference to provincial law: *Husky Oil*, at para. 32. As McLachlin J. held in *Henfrey*, the definition of "trust" which is operative for the purposes of the *BIA* is that of Parliament, not the provincial legislatures: p. 35 S.C.R. I agree with the motion judge's conclusion that *Henfrey* "squarely addressed" the paramountcy issue. *Henfrey* held that Parliament only intended s. 67(1)(*a*) of the *BIA* to apply to trusts arising under general principles of law, namely, trusts that meet the three certainties: p. 34 S.C.R.

[36] It follows that if a province purports to legislate into existence a trust that lacks one or more of the three certainties, the trust will not survive in bankruptcy: *Henfrey*, at p. 35 S.C.R. A provincial deemed statutory trust that lacks one or more of the three certainties would be in operational conflict with the meaning of trust in s. 67(1)(*a*). Section 67(1)(*a*) would include the [page238] property subject to the deemed statutory trust in the property of the bankrupt divisible among its creditors but the provincial deemed statutory trust would remove the property from the bankrupt's estate. This would make it impossible for the receiver to comply with both the *BIA*

and the provincial legislation deeming the trust into existence. By virtue of paramountcy, the provincial legislation in question would be inoperative in bankruptcy.

[37] The question is whether allowing the *CLA* to establish certainty of intention is contrary to *Henfrey*. If it is, then the deemed statutory trust under s. 8(1) lacks certainty of intention, the statutory deemed trust is in operational conflict with s. 67(1)(*a*) of the *BIA* as interpreted by *Henfrey*, the paramountcy doctrine applies and the s. 8(1) *CLA* trust is inoperative in bankruptcy.

[38] In my view, *Henfrey* contemplates and requires courts to look to the deeming language of a statute to determine whether there is certainty of intention. Accordingly, no conflict between the s. 8(1) *CLA* trust and the *BIA* arises, and the paramountcy doctrine is not triggered, on the basis that the deemed statutory trust lacks certainty of intention. I reach this conclusion for five reasons, which I outline below.

(i) *It is appropriate to look to provincial statutory law to determine the content of BIA categories*

[39] First, it is appropriate to look to provincial statutory law to determine whether a trust satisfies the three certainties required under *Henfrey*.

[40] RBC submits that allowing a statute to supply certainty of intention would run contrary to the policy concern expressed in *Henfrey* about avoiding a "differential scheme of distribution" from province to province: *Henfrey*, at p. 33 S.C.R.

[41] I would reject this submission. The Supreme Court has recognized that the application of the national regime of insolvency and bankruptcy will vary to some extent from province to province due to differences in provincial law in relation to property and civil rights: *Husky Oil*, at para. 38. Because property and civil rights are determined by provincial law, the *BIA* cannot and does not operate as a water-tight compartment. Its application to a significant degree depends upon provincial law definitions of various forms of property. As stated in *Husky Oil*, at para. 30, the *BIA* "is contingent on the provincial law of property for its operation" and "is superimposed on those provincial schemes when a debtor declares bankruptcy". This means that "provincial law necessarily affects the 'bottom line'" in bankruptcy, and this, said the court, "is contemplated by the [*BIA*] itself". [page239]

[42] Accordingly, it is appropriate to look to provincial law to determine whether a trust satisfies the three certainties required for it to operate in bankruptcy. The *BIA* refers to but does not define what is meant by "a trust", yet the category of "trust" is recognized by the *BIA*'s scheme of priorities. As the Supreme Court of Canada stated in *Husky*, it is the "substance of the interest created" by the provincial law that is "relevant for the purpose of applying the *Bankruptcy Act*": at para. 40. Section 72 of the *BIA* contemplates the integration of the *BIA* with provincial legislation by providing that the *BIA* "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with [the *BIA*]". The Supreme Court has held that this provision demonstrates that Parliament intends provincial law to continue to operate in the bankruptcy and insolvency context unless it is inconsistent with the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 S.C.R. 419, [2015] S.C.J. No. 53, 2015 SCC 53, at para. 49.

2019 ONCA 9 (CanLII)

[43] In my view, the rules, principles and concepts of provincial law must include provincial statutory law. There is nothing in the *BIA* that would exclude provincial statutory law from consideration. This means that a court dealing with bankruptcy will necessarily apply provincial statutory law relating to property and civil rights.

(ii) *Henfrey contemplates that the statute can supply certainty of intention*

[44]Second, *Henfrey* itself contemplates that the statute deeming the trust into existence can provide the required certainty of intention. At issue in *Henfrey* was whether the deemed statutory trust created by s. 18 of the *Social Service Tax Act* gave the province priority over the claims of secured and other creditors in bankruptcy. The Act required a merchant to collect the sales tax, *deemed* the tax collected to be held in trust and *deemed* the taxes collected "to be held separate from and form no part of the person's money, assets or estate, whether or not" these tax moneys were held in a segregated account. The merchant in *Henfrey* went into bankruptcy and the province claimed priority over other creditors by virtue of the deemed statutory trust. The issue was whether the deemed statutory trust was a "trust" that removed the property from the estate of the bankrupt available for general distribution to creditors pursuant to s. 47(*a*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (what is now s. 67(1)(*a*) of the *BIA*).

[45] Writing for the 6-1 majority, McLachlin J. recognized, at p. 32 S.C.R., "the principle that provinces cannot create priorities [page240] under the *Bankruptcy Act* by their own legislation". McLachlin J. added, at p. 33 S.C.R.:

> To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

[46] McLachlin J. concluded, at p. 34 S.C.R., "that s. 47(*a*) should be confined to trusts arising under general principles of law . . .". Applying that proposition to the case before her, she found, at p. 34 S.C.R.:

> *At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law.* The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

(Emphasis added)

2019 ONCA 9 (CanLII)

[47] This passage supports the proposition that provinces can create trusts by statute that will survive bankruptcy by legislating the requirements for a trust under the general principles of trust law. When the tax in *Henfrey* was collected, the requirements for a trust under the principles of trust law were met. Had the province been able to assert its claim at that moment, before conversion of the trust property, it would have succeeded.

[48] RBC does not accept that *Henfrey* supports the proposition that a statute can establish any of the three certainties. RBC points out that in *Henfrey*, it was "conceded that the statute establishes certainty of intention and of object" (at p. 44 S.C.R., *per* Cory J. dissenting). The reasons in *Henfrey* do not explain the basis for this concession. However, RBC contends that the merchant's subjective intent to create a trust must have been inferred from the fact that, as required by statute, the merchant had registered with the province and that registration amounted to an intentional act from which an intention to create a trust may be inferred.

[49] I find this argument unpersuasive for two reasons. First, it played no role in the majority's reasons, a fact that RBC conceded [page241] in oral argument. As GCNA submitted in oral argument, if the majority wanted to adopt the position RBC is arguing for, it would have said so directly. Second, even if the merchant's intention was relevant, the merchant had no choice. If he wanted to carry on business as a merchant in British Columbia, he had to register and he had to collect the tax. By doing so, he was simply complying with the law. It seems to me entirely artificial to suggest that his actions were any more voluntary than the actions of a contractor under Ontario's *CLA* regime who is deemed by statute to be a trustee of certain funds and required by statute not to convert or appropriate them.

[50] As Gillese explains, at p. 42: "To satisfy the certainty of intention requirement, the court must find an intention that the trustee is placed under an imperative obligation to hold property on trust for the benefit of another." The essential point is that the trustee is placed under an imperative obligation. I can see no reason in principle why that imperative obligation cannot be created by statute for the purposes of s. 67(1)(*a*) of the *BIA*.

[51] GCNA's position finds support in the decision of Slatter J.A. in *Iona Contractors*. At issue in that case were holdback funds, impressed with a statutory trust under Alberta's *Builders' Lien Act*, R.S.A. 2000, c. B-7, s. 22. After carefully considering *Husky Oil*, *Henfrey* and several other cases dealing with the interaction of the *BIA* and provincial law, Slatter J.A., at para. 35, rejected the contention that as statutory trusts are "in one sense 'involuntary'", they cannot qualify as trusts "arising under general principles of law". He found that proposition to be incompatible with *Henfrey* where McLachlin J. stated, at p. 34 S.C.R., that at the moment the tax was collected, "the trust meets the requirements for a trust under the principles of trust law". Slatter J.A. added, at para. 36:

> In most statutory trust situations, only the third certainty will be in play. Certainty of intention and certainty of objects will usually be satisfied by the terms of the statute. If the statute uses the word "trust", the intention is clear . . . Usually the intended beneficiary of the trust will also be obvious. The only potential for uncertainty is over the assets that are covered by the trust.

(Citation omitted)

2019 ONCA 9 (CanLII)

(iii) *The CLA trust neither creates an operational conflict nor engages the Henfrey policy concerns*

[52] Third, the s. 8(1) *CLA* trust neither creates an operational conflict with the *BIA* nor engages the *Henfrey* policy concerns. I draw this conclusion because the s. 8(1) trust neither attempts to create a general floating charge over all of the bankrupt's [page242] assets nor attempts to obtain a higher priority for the provincial Crown.

[53] RBC's argument centres on the policy concern about provinces reordering priorities in the *BIA*. RBC submits that the *Henfrey* court was concerned to prevent a province from elevating the priority of a Crown claim by deeming it to be a trust claim: *Henfrey*, at p. 33 S.C.R. RBC maintains that the court resolved this concern by holding that the provincial Crown could only obtain a higher priority by benefiting from rights that could be "obtained by anyone under general rules of law": *Henfrey*, at pp. 31-32 S.C.R., quoting *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, [1979] S.C.J. No. 93, at p. 45 S.C.R. RBC argues that this excludes consideration of statutory intention because private parties cannot legislate certainty of intention into existence like the provincial legislature can.

[54] There is a well-established line of cases holding that an operational conflict arises where the application of provincial legislation would reorder the priorities prescribed by Parliament in the *BIA*. The leading case is *Husky Oil*,where a provincial statute deemed a debtor of a bankrupt to be a guarantor of money owed by the bankrupt to the Worker's Compensation Board. If the debtor was called upon to pay, it could set-off the amount it paid against the debt it owed to the bankrupt. As this had the effect of diverting funds from the bankrupt's estate to pay the board it created an operational conflict with the *Bankruptcy and Insolvency Act*, and was held to be inoperative. Similarly, Québec statutes that deemed debts for unpaid provincial taxes or worker's compensation claims to be "privileged" conflicted with the priority given the debt in the *Bankruptcy Act*, R.S.C. 1970, c. B-3, and were therefore inoperative: *Rainville*; *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, [1988] S.C.J. No. 44. In another case, a provincial statute that created a charge on all an employer's property for unpaid worker's compensation claims conflicted with the priority the *Bankruptcy Act*, R.S.C. 1970, c. B-3gave to such a claim and was therefore inoperative: *Deloitte Haskins and Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785, [1985] S.C.J. No. 35.

[55] In my opinion, these cases do not support RBC's contention that provincial legislation cannot supply the three certainties of a trust, including certainty of intention. None of those cases involved a statutory trust conferring a trust interest in specific property related to a valid scheme under provincial legislation. Nor did those cases involve a deemed statutory trust in favour of private parties. In each case, the effect of the provincial statute [page243] was to give the province or a provincial agency a general charge and priority over all of the property of the bankrupt. That created an operational conflict with the *BIA* scheme of priorities and, under the doctrine of paramountcy, the provincial law was inoperative.

[56] The amendments Parliament has made to s. 67 of the *BIA* confirm the distinction that I have drawn between provincial legislation that creates a priority in favour of the province and the type of statutory trust at issue in this case. In 1992, Parliament amended s. 67 to add s. 67(2), a provision that deals with deemed trusts: *An Act to amend the Bankruptcy Act and to amend the*

2019 ONCA 9 (CanLII)

Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 33. Section 67(2) provides that subject to certain exceptions set out in s. 67(3), "any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty" shall not exclude the property under s. 67(1)(*a*) unless it would be excluded "in the absence of that statutory provision". The Supreme Court has held that this amendment reflects Parliament's intention to rank the Crown with ordinary creditors in most bankruptcy scenarios: *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, [2009] 3 S.C.R. 286, [2009] S.C.J. No. 49, 2009 SCC 49, at paras. 12-15.It is significant that Parliament singled out deemed trusts in favour of the Crown for exclusion from the protection s. 67(1)(*a*) offers and left untouched deemed trusts in favour of other parties.

[57] Nor is the policy concern about the reordering of priorities in favour of the province that the *Henfrey* court identified relevant to the trust that s. 8(1) of the *CLA* creates.

[58] *Husky Oil* holds that an intention to intrude into the federal sphere of bankruptcy is not required for provincial legislation to be inapplicable. Provinces are not entitled to indirectly improve the priority of a claim and the provincial legislation will be inapplicable if its effect is to conflict with the order of priorities in the *BIA*. Accordingly, the fact that the purpose of s. 8(1) is not to intrude into the federal sphere of bankruptcy or to alter priorities is not determinative.

[59] The concern in *Husky Oil* is with provincial attempts to "create a general priority": para. 34. The majority explained *Deloitte Haskins* and *Henfrey* as cases in which the province had sought to create a "general priority . . . which had the *effect* of altering bankruptcy priorities" (emphasis in original).

[60] As the majority in *Husky Oil* noted, the problem in *Henfrey* was that the effect of the statute was to attach the label "trust" to all of the debtor's assets. The statute did not give the province a trust claim in relation to a specific fund or in relation to [page244] specific property but rather a priority based upon what amounted to a general charge to the extent of its claim over all the merchant's assets: *Husky Oil*, at paras. 27, 35-36, 40. The province's claim was not based upon a trust that complied with the general principles of trust law but rather on a provincially created priority that was incompatible with Parliament's scheme under the *BIA*.

[61] The deemed statutory trust that s. 8(1) of the *CLA* creates benefits private parties in the Ontario construction industry, not the provincial Crown. Ontario is thus not creating any "personal preference" for itself: *Henfrey*, at p. 32 S.C.R., quoting *Rainville*, at p. 45 S.C.R. To the contrary, any subcontractor or supplier in the construction industry can obtain trust protection under s. 8(1) in accordance with the "general rules of law" that the *CLA* establishes. Significantly, the passage from *Rainville* that *Henfrey* quotes refers to "a builder's privilege" as a security interest that "may be obtained by anyone under general rules of law": *Henfrey*, at p. 32 S.C.R., quoting *Rainville*, at p. 45. The builder's privilege was a security interest that Quebec legislation, art. 2013 of the *Civil Code of Lower Canada*, created over immoveable property in favour of construction industry participants who performed work on that property. It arose independently of the subjective intentions of the parties in the construction transaction, and was thus similar to the deemed statutory trust that s. 8(1) of the *CLA* creates.

[62] Moreover, s. 8(1) of the *CLA* impresses specific property with the trust and does not create a general priority. The court in *Henfrey* referred to "cases where no specific property

2019 ONCA 9 (CanLII)

impressed with a trust can be identified" as raising policy considerations that weighed against protecting such deemed statutory trusts under the predecessor provision to s. 67(1)(*a*) of the *BIA*: p. 33 S.C.R. However, the trust that s. 8(1) of the *CLA* creates does not attempt to create a general floating charge over the bankrupt's assets that would constitute a prohibited "general priority". Instead, it impresses specific property -- the funds owing to or received by the contractor or subcontractor -- with the trust.

[63] Accordingly, I conclude that there is no operational conflict between s. 8(1) of the *CLA* and the *BIA*. I agree with and adopt as applicable to the case at bar Slatter J.A.'s conclusion in *Iona Contractors*, at para. 37:

> [T]he provisions of s. 22 meet the requirements of a common law trust. There is no deliberate attempt to reorder priorities in bankruptcy, and the province is not attempting to achieve indirectly what it cannot do directly. These considerations, coupled with the fact that the trust provisions of s. 22 are merely a collateral part of a complex regime designed to create security for unpaid subcontractors, leads to the conclusion that there is no operational conflict. [page245]
>
> The decision of the British Columbia Supreme Court in *0409725 B.C. Ltd. (Re)*, [2015] B.C.J. No. 714, 2015 BCSC 561, 3 P.P.S.A.C. (4th) 278, at para. 22, is to a similar effect:
>
> Applying the analysis of McLachlin J in *Henfrey*, certainty of intention is sufficiently provided by the statute in the circumstances of this case. That conclusion in no way intrudes into federal jurisdiction, and indeed, all parties conducted themselves on that basis.

(iv) *The CLA trust does not frustrate the purpose of the BIA*

[64] There is no frustration of the purpose of the *BIA* that would render s. 8(1) of the *CLA* inoperative. I agree with LIUNA Local 183 that excluding s. 8(1) *CLA* trust funds from distribution to A-1's creditors is consistent with the objective of the *BIA* to provide for the equitable distribution of the bankrupt's remaining assets. As I have already mentioned, the purpose of the *CLA* trust is to create a "closed system" to protect those suppliers and contractors down the construction pyramid and to ensure that the funds are not diverted prior to reaching their beneficial owner. The *CLA* scheme is directed at equity and at preventing the "unjust enrichment of those higher up in the construction pyramid": *Sunview Doors Ltd.*, at para. 99.To allow s. 8(1) *CLA* trust funds to be distributed to creditors of a bankrupt contractor would provide an "unexpected and unfair windfall" to those creditors: see *Norame Inc. (Re)* (2008), 90 O.R. (3d) 303, [2008] O.J. No. 1580, 2008 ONCA 319, at para. 18.

(v) *The cases RBC relies on are distinguishable*

[65] Fifth, the cases that RBC relies upon are distinguishable.

[66] RBC submits that this court held in *GMAC* that deemed statutory trusts can never survive in bankruptcy.

[67] At issue in *GMAC* was a regulation, *Load Brokers*, O. Reg. 556/92, under the *Truck Transportation Act*, R.S.O. 1990, c. T.22. Section 15 of the *Load Brokers* regulation stated that load brokers "shall hold in trust" money received by the load broker on account of carriage

2019 ONCA 9 (CanLII)

charges and "shall" maintain separate trust accounts for such funds. TCT, the bankrupt, had failed to maintain separate accounts, and a priority dispute arose between the carriers who claimed a trust and TCT's secured creditor.

[68] RBC relies on para. 17 of the *GMAC* decision. There, the court stated that a "consistent line of cases from the Supreme Court of Canada", including *Henfrey*, "excludes statutory deemed trusts from the ambit of s. 67(1) (a)". The court also stated that Parliament had only elected to carve out exceptions from this exclusion for certain deemed trusts in favour of the Crown by [page246] enacting s. 67(3). Accordingly, it concluded that even if s. 15 of the Regulation created a deemed trust in addition to a mere statutory trust obligation, this trust would not be a trust under s. 67(1) (*a*) of the *BIA*.

2019 ONCA 9 (CanLII)

[69] In my view, the passage that RBC relies on from *GMAC* is distinguishable for the following three reasons.

[70] First, the passage from *GMAC* that RBC relies on was not a necessary basis for the court's decision. The court in fact declined to decide whether s. 15 of the Regulation even created a deemed statutory trust: para. 17. It instead decided the case on the basis that commingling destroyed the required element of certainty of subject matter, an issue discussed later in these reasons: *GMAC*, paras. 18-20.

[71] Second, the statements in para. 17 of *GMAC* must be read in light of the court's previous discussion of the holding in *Henfrey*. At para. 15, the *GMAC* court described *Henfrey* as holding that deemed statutory trusts do not operate in bankruptcy only if they "do not conform to general trust principles". Thus, the court did not intend to state that deemed statutory trusts are never operative in bankruptcy. Indeed, as I will explain later in these reasons, the *Load Brokers* regulation did not create a deemed statutory trust but merely a statutory trust obligation that TCT did not comply with.

[72] Third, the court's reliance on s. 67(2) and (3) of the *BIA* must be read in light of the Supreme Court's subsequent interpretation of those provisions in *Desjardins*. The *GMAC* court took the view that Parliament intended to allow only certain deemed statutory trusts in favour of the Crown to survive in bankruptcy by enacting s. 67(3). The court thus seems to have assumed that Parliament intended to only protect deemed statutory trusts in favour of the Crown and not those in favour of private parties. Such an assumption runs contrary to *Desjardins*, where the Supreme Court held that Parliament enacted s. 67(2) and (3) to limit the Crown's priority and rank the Crown with ordinary creditors in most bankruptcy scenarios: at paras. 12-15. Properly interpreted, s. 67(2) thus excludes deemed statutory trusts in favour of the Crown that would otherwise qualify as trusts under *Henfrey* principles from protection under s. 67(1)(*a*). Section 67(3) sets out an exception to this exclusion. The s. 67(2) exclusion does not apply to deemed statutory trusts in favour of private parties, which may thus qualify as trusts under s. 67(1)(*a*) if they satisfy the requirements of *Henfrey*.

[73] RBC also relies on *British Columbia v. National Bank of Canada*, [1994] B.C.J. No. 2584, 119 D.L.R. (4th) 669 (C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 18, 34 C.B.R. (3d) 302, [page247] where the court stated, at p. 685 D.L.R., that provincial legislation cannot "create the facts necessary to establish a trust under general principles of trust law". The court

accordingly rejected the province's argument that the provincial legislation supplied certainty of intention.

[74] However, this blanket statement from *National Bank* cannot be reconciled with *Henfrey* itself. The effect of taking this statement at face value would be that provincial deemed statutory trusts could never exist in bankruptcy. However, as *Iona Contractors* recognized, *Henfrey* affirmed that provincial statutory trusts can survive in bankruptcy and that the statute at issue in *Henfrey* did create a valid trust at the moment of collection: *Iona Contractors*, at para. 35, citing *Henfrey*, at p. 34 S.C.R.

[75] Moreover, *National Bank* is distinguishable on the facts. The statute at issue in that case, the *Tobacco Tax Act*, R.S.B.C. 1979, c. 404, s. 15, purported to create a lien and charge in favour of the provincial Crown in respect of amounts collected for a tobacco tax "on the entire assets" of the person and "having priority over all other claims of any person". That plainly could not survive under the general principles of trust law because it lacked certainty of subject matter and is precisely the type of charge that has been held to interfere with the *BIA* scheme: see *Husky Oil*, at paras. 35-36, 41. As McLachlin J. stated in *Henfrey*, such a general floating charge in fact "tacitly acknowledges" that there is no certainty of subject matter: p. 34 S.C.R.

[76] In addition, RBC relies on two Saskatchewan Court of Queen's Bench decisions which purported to apply *Henfrey* to find that deemed statutory trusts for the construction industry, established by Saskatchewan's *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1,did not operate in bankruptcy: see *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, [1995] S.J. No. 452, 34 C.B.R. (3d) 196 (Q.B.); *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.*, [1998] S.J. No. 487, 161 D.L.R. (4th) 725 (Q.B.). However, the court in *Duraco* only reached this conclusion because it interpreted *Henfrey* as requiring courts to analyze whether the three certainties were met "without regard" to the terms of the statute: at para. 9. The court then held that the deemed trust did not survive in bankruptcy because the parties did not subjectively intend to create a trust: paras. 11-13. The *Roscoe* court simply followed the *Duraco* court's analysis: at paras. 25-31. For the reasons stated above, this is a misreading of *Henfrey*. The court in *Henfrey* did look to the terms of the statute when it analyzed whether the deemed statutory trust satisfied the general principles of trust law: p. 34 S.C.R. [page248]

[77] RBC also cites *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.), at para. 46, leave to appeal to S.C.C. granted [2006] S.C.C.A. No. 490, appeal discontinued on October 31, 2007, where this court described a deemed statutory trust as "a legal fiction". There again, however, the statutory "trust" was a fiction as it amounted to nothing more than a general floating charge on all assets and could not satisfy the general principles of trust law.

8,12,00(vi) *Conclusion*

[78] I conclude, accordingly, that *Henfrey* contemplates that a provincial statute can supply the required element of certainty of intention for a statutory trust and that the trust created by the

2019 ONCA 9 (CanLII)

CLA, s. 8(1) does not give rise to an operational conflict with the *BIA*, s. 67(1) (*a*). Accordingly, the doctrine of paramountcy does not apply.

(2) *Were the debts of the city and the town choses in action that supplied the required certainty of subject matter for a trust?*

[79] As I have mentioned, the problem frequently encountered with deemed statutory trusts is that while they use the label "trust", they do not actually create a trust but rather purport to confer a priority over all of the bankrupt's assets. For the following reasons, I conclude that the motion judge erred by finding that the requirement of certainty of subject matter was not met in this case.

[80] Gillese explains the requirement for certainty of subject matter as follows, at p. 43:

> It must be possible to determine precisely what property the trust is meant to encompass. The subject matter is ascertained when it is a fixed amount or a specified piece of property; it is ascertainable when a method by which the subject matter can be identified is available from the terms of the trust or otherwise.

To a similar effect is this court's decision in *Angus v. Port Hope (Municipality)*, [2017] O.J. No. 3481, 2017 ONCA 566, at para. 112, leave to appeal to S.C.C.C. refused [2017] S.C.C.A. No. 382.

[81] The motion judge ruled [at para. 6] that because the funds the city and the town owed to A-1 "do not necessarily come from any particular fund or account and are simply payable by the City/Town from its own revenues or other sources", the requisite certainty of subject matter to establish a trust at common law was absent.

[82] The amounts owed by the city and the town on account of the paving projects were debts. It is well-established that a debt is [page249] a chose in action which can properly be the subject matter of a trust. In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, at para. 29, the court stated: "A debt obligation is a chose in action and, therefore, property over which one can impose a trust." This proposition is supported by the decision of the House of Lords in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 3 W.L.R. 10, [1991] 2 A.C. 548 (H.L.). See, also, Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 161.

[83] It follows that it does not matter that neither the city nor the town had created segregated accounts or specifically earmarked the source of the funds they would use to pay the debts they owed for the paving projects. The statutory trust attaches to the property of the contractor or subcontractor, namely, the debt, not to the funds the debtor will use to pay that debt.

[84] Section 8(1) embraces "all amounts, owing to a contractor or subcontractor, whether or not due or payable". That language designated precisely what property the trust is meant to encompass. A-1 owned those debts. They constituted choses in action which are a form of property over which a trust may be imposed. It follows that at the moment of A-1's bankruptcy, the trust created by s. 8(1) was imposed on the debts owed by the city and the town to A-1.

(3) *Did commingling of the funds mean that the required*

2019 ONCA 9 (CanLII)

certainty of subject matter was not present?

[85] In my respectful view, the motion judge erred by ruling that because the money paid to satisfy the individual debts owing to A-1 on account of the paving projects had been commingled with the money paid to satisfy other paving project debts in the paving projects account, the requisite certainty of subject matter was not made out.

[86] The evidence clearly establishes that the funds paid for each paving project were readily ascertainable and identifiable. They were commingled only to the extent they had all been paid into the same account, but they had not been converted to other uses and they did not cease to be traceable to the specific project for which they had been paid.

[87] Commingling of this kind does not deprive trust property of the required element of certainty of subject matter. Commingling of trust money with other money can destroy the element of certainty of subject matter, but only where commingling makes it impossible to identify or trace the trust property. [page250]

[88] McLachlin J. explained this in *Henfrey* when she stated in relation to the deemed statutory trust imposed on money collected by a merchant under British Columbia's *Social Service Tax Act* that the trust attached the moment the tax is collected. Accordingly, "[i]f the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of 'trust' and the money is exempt from distribution to creditors" in the merchant's bankruptcy: pp. 34-35 S.C.R. McLachlin J. went on to explain that the problem with deemed statutory trusts is that very often, the trust property "ceases to be identifiable": p. 34 S.C.R. She then stated, at pp. 34-35 S.C.R., that the property ceases to be identifiable in the following circumstances:

> The tax money is mingled with other money in the hands of the merchant *and converted to other property so that it cannot be traced.* At this point it is no longer a trust under general principles of law . . . [If] the money has been converted to other property and cannot be traced, there is "no property . . . held in trust" under [the predecessor provision to s. 67(1)(a) of the *BIA*].

(Emphasis added)

[89] Subsequent jurisprudence confirms this statement of the law. In *Husky Oil*, the majority confirmed that *Henfrey* identified the key question as whether the trust property could be identified and traced: para. 25. This court also followed McLachlin J.'s statement of the law in *Graphicshoppe (Re)* (2005), 78 O.R. (3d) 401, [2005] O.J. No. 5184 (C.A.), where Moldaver J.A. (as he then was) stated, at para. 123:

> For present purposes, I am prepared to accept that *Henfrey Samson* falls short of holding that commingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the *BIA*. Once however, the trust funds have been converted into property that cannot be traced, that is fatal. And that is what occurred here.

[90] The motion judge considered herself bound by the decision of this court in *GMAC* to find that any commingling of trust property was fatal to certainty of subject matter. In fairness to the

2019 ONCA 9 (CanLII)

motion judge, I agree that there are *dicta* in *GMAC* that could be taken to support that proposition, and it appears that it has been read in the same way in other cases: *Bank of Montreal v. Kappeler Masonry Corp.*, [2017] O.J. No. 5928, 2017 ONSC 6760 (S.C.J.), at para. 3; and *Royal Bank of Canada v. Atlas Block Co.*, [2014] O.J. No. 2936, 2014 ONSC 3062, 15 C.B.R. (6th) 272 (S.C.J.), at paras. 35-36. However, for the following reasons, it is my view that GMAC should not be read as standing for the proposition that any commingling will be fatal to the existence of a trust.

2019 ONCA 9 (CanLII)

[91] As described previously, the issue in *GMAC* concerned s. 15 of the *Load Brokers* regulation, which required load brokers to hold in trust for carriers' money received by the load broker on [page251] account of carriage charges and to maintain separate accounts for such funds. TCT, the bankrupt, had failed to maintain separate accounts, and a priority dispute arose between the carriers who claimed a trust and TCT's secured creditor. The court held that, as TCT had not maintained a separate account but had commingled the money it received for carriage charges, there was no trust for the purposes of s. 67(1)(*a*) of the *BIA*. The court stated, at para. 19: "Once the purported trust funds are co-mingled with other funds, they can no longer be said to be 'effectively segregated' for the purpose of constituting a trust at common law." Significantly, the authority cited for that proposition is *Henfrey*, and the court goes on to cite the same passage from *Henfrey* that I have referred to above, at para. 46, stating that when the "tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced", it ceases to be subject to any trust. The *GMAC* court went on to state, at para. 20, that the facts before the court were not distinguishable from those of *Henfrey* and that the legal result must also be the same.

[92] In my view, *GMAC* is distinguishable from the case at bar.

[93] First, the *Load Brokers* regulation at issue in *GMAC* did not create a deemed statutory trust. Admittedly, the *GMAC* court did not find it necessary to decide this point: para. 17. However, this conclusion clearly follows from examining the text of s. 15 of the regulation and comparing it to other provisions that create deemed statutory trusts. The regulation did not use deeming language such as found in s. 18 of the *Social Service Tax Act* at issue in *Henfrey*. Instead, it used the obligatory language of "shall", stating that the load broker "shall" hold in trust money received and "shall" maintain a trust account. This language indicates the regulation obligates the load broker to take steps that will bring a trust into existence but the regulation itself does not bring the trust into existence.

[94] This distinction between deemed statutory trusts and statutory trust obligations explains the result in *GMAC*. The regulation only obligated the load broker to hold the funds received in a separate account. If TCT complied with this obligation, that would give rise to a trust. However, TCT did not comply with this obligation and instead deposited all funds received into a single account. Accordingly, TCT did not perform the actions required to create a trust. The fact that the moneys TCT received may have been capable of being traced due to the computerized accounting records it maintained does not alter the conclusion that no trust arose. As GCNA submitted in oral argument, while tracing is available once a trust exists, tracing is incapable of creating a trust. [page252]

[95] The distinction between deemed statutory trusts and mere statutory trust obligations also explains why a trust did attach to moneys received by the receiver on behalf of TCT following

the receiver's appointment. The receiver had deposited payments received into a separate account pursuant to court orders: *GMAC*, para. 33. The court found that the receiver was required to comply with s. 15 of the regulation and hold the funds on trust: *GMAC*, para. 36. Accordingly, the court found that the payments the receiver collected were held on trust because the receiver was required to comply with the regulation and did in fact comply with it by holding the funds in a separate account: *GMAC*, para. 38. The receiver's action of complying with the statutory trust obligation by depositing the funds into a separate account thus brought the trust into existence.

2019 ONCA 9 (CanLII)

[96] In contrast, s. 8(1) of the *CLA* operates quite differently than s. 15 of the *Load Brokers* regulation. It does impose a deemed statutory trust rather than merely create a statutory trust obligation on the contractor to hold money on trust in a separate account. Section 8(1) declares that the amounts owing to the contractor "constitute a trust fund" independently of the contractor's subjective intention or actions. The s. 8(1) trust is imposed from the time the moneys are owed to the contractor, not just after they are received. Accordingly, the fact that s. 8(1) and (2) did not require the segregation of amounts received is not determinative because the statute itself, not the act of complying with a statutory obligation to segregate funds, created the trust.

[97] Second, the statement that once the purported trust funds are commingled with other funds, they cease to be trust funds must be read in the light of the fact that when making it, the court was explicitly following *Henfrey.* In *Henfrey*, as I have explained, McLachlin J. made it clear that it was only when commingling is accompanied by conversion and tracing becomes impossible that the required element of certainty of subject matter is lost.

[98] In my view, *GMAC* should not be read as standing for the proposition that all deemed statutory trusts cease to exist if there is any commingling of the trust funds.

[99] I am fortified in that conclusion by a considerable body of authority in addition to *Henfrey* that stands for the proposition that commingling alone will not destroy the element of certainty of subject matter under the general principles of trust law. I have already mentioned *Graphicshoppe,* where this court clearly rejected that proposition. A.H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at pp. 207-208, [page253] states that when trust property is deposited into a mixed account, "the trust is not necessarily defeated. The rules of tracing allow the beneficiary to assert a proprietary interest in the account." In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, [2009] 1 S.C.R. 504, [2009] S.C.J. No. 15, 2009 SCC 15, the Supreme Court held that mixing of the funds does not necessarily bar recovery and that it is possible to trace money into bank accounts as long as it is possible to identify the funds: at para. 85. The funds are identifiable if it can be established that the money deposited in the account was the product of, or substitute for, the original thing: at para. 86. As the Alberta Court of Queen's Bench recently held, in *Imor Capital Corp. v. Horizon Commercial Development Corp.*, [2018] A.J. No. 43, 2018 ABQB 39, 56 C.B.R. (6th) 323, at para. 58:

> . . . [the bankrupt's] co-mingling of trust funds with its own is not fatal to the trust. It must be determined whether, despite the co-mingling, the trust funds can be identified or traced.

The following cases are to the same effect: *Hallett's Estate (Re)* (1880), 13 Ch. D. 696 (C.A.); *Kayford Ltd. (Re)*, [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Ch.); *Kel-Greg Homes Inc. (Re)*, [2015] N.S.J. No. 417, 2015 NSSC 274, 365 N.S.R. (2d) 274, at paras. 51-59; *0409725 B.C. Ltd.*, at paras. 24-34; *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co.*, [2009] A.J. No. 675, 2009 ABCA 240, 54 C.B.R. (5th) 173, at para. 18.

(4) *Does RBC's security interest have priority even if the trust created by s. 8(1) of the CLA survives in bankruptcy?*

[100] On appeal, RBC submits that its security interest takes priority over the deemed statutory trust in s. 8(1) of the *CLA* even if this court finds that the *CLA* trust is valid under s. 67(1)(*a*) of the *BIA*. RBC relies on the Supreme Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, [1997] S.C.J. No. 25 in support of this argument. In that case, the majority found that a bank's security interest under the *Bank Act*, S.C. 1991, c. 46 and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 took priority over a deemed statutory trust in favour of the federal Crown established by s. 227(4) and (5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[101] RBC did not advance this argument before the motion judge. Nor did RBC introduce its general security agreement with A-1 into the record.

[102] Accordingly, I would decline to consider this argument. A respondent on appeal cannot seek to sustain an order on a basis [page254] that is both an entirely new argument and in relation to which it might have been necessary to adduce evidence before the lower court: see *R. v. Perka*, [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, at p. 240 S.C.R.; *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* (2016), 129 O.R. (3d) 391, [2016] O.J. No. 779, 2016 ONCA 131 (in Chambers), at para. 9. RBC's proposed argument is both new and requires evidence that RBC has not adduced. In both *Sparrow Electric* and *GMAC*, the court considered the specific provisions of the security agreement in determining whether the security attached to the trust funds: see *Sparrow Electric*, at paras. 71-72, 90; *GMAC*, at para. 26. This court is unable to consider the specific provisions of RBC's security agreement with A-1 because it is not part of the record.

Disposition

[103] For these reasons, I would allow the appeal, set aside the order below and make an order

(1) that by operation of s. 67(1)(*a*) of the *BIA*, the funds satisfy the requirements for a trust at law and so are not property of A-1 available for distribution to A-1's creditors; and

(2) that the balance of the motion concerning GCNA's priority dispute with the unions be remitted to the Superior Court for disposition.

[104] GCNA is entitled to costs awarded against RBC fixed at $30,000 for the motion and at $45,000 for this appeal, both amounts inclusive of disbursements and taxes.

2019 ONCA 9 (CanLII)

Appeal allowed.

End of Document

2019 ONCA 9 (CanLII)

Ward-Price v. Mariners Haven Inc. et al; Clement, Eastman, Dreger, Martin & Meunier et al., Third Parties

[Indexed as: Ward-Price v. Mariners Haven Inc.]

57 O.R. (3d) 410
[2001] O.J. No. 1711
Docket No. C34484

Court of Appeal of Ontario
McMurtry, C.J.O., Borins and MacPherson JJ.A.
May 8, 2001*

2001 CanLII 24088 (ON CA)

* Note: This judgment was recently brought to the attention of the editors.

Real property -- Condominiums -- Deposits -- Interest -- Prescribed security -- Developer obliged to pay interest on deposit moneys -- Obligation to pay interest a debt and a trust obligation -- Trust not ceasing when prescribed security obtained -- Condominium Act, R.S.O. 1980, c. 84, s. 53(3) -- O. Reg. 121, R.R.O. 1980 (Condominium Act), s. 33.

Trusts and trustees -- Statutory trust -- Section 53 of Condominium Act imposing statutory trust on developer with respect to purchase moneys -- Provision of security under section not terminating trust obligation imposed on developer on entire amount of purchase moneys received from purchaser -- Condominum Act, R.S.O. 1980, c. 84, s. 53.

In April 1987, WP, the plaintiff in an intended class action, signed an agreement to purchase a unit in a condominium being developed by the defendant Mariners Haven Inc. ("Mariners"). The agreement required her to pay the purchase price of $340,000 before taking possession. Mariners placed the deposit into a trust account until the funds were insured with the

Ontario New Home Warranty Program and the Mortgage Insurance Company of Canada. Then, Mariners paid the funds to the defendant William H. Kaufman Inc. ("WHK") in partial payment of a building loan. The defendants WK and SS were directors, officers and shareholders of Mariners and WHK.

WP took early possession of her condominium unit, and final closing took place in August 1989. On closing, the interest payable on her deposit, as required by s. 53(3) of the Condominium Act, was not paid. WP sued for interest in the amount of $36,761.50. Her claim against Mariners was stayed because of its bankruptcy. Her claim against WK and SS was based on the allegation that WK and SS knowingly assisted in a breach of a statutory trust in failing to pay interest and knowingly received trust funds. She claimed that she was entitled to an equitable tracing of the moneys that were paid to WHK.

Mariners, WHK, WK and SS issued a third party claim against the law firm of SCE, the solicitors for Mariners and WHK. The third parties, who delivered a defence to the main action, moved for a summary judgment dismissing WP's claim. Cumming J. held that the obligation of the developer to retain the purchase money in trust account came to an end upon the delivery of the prescribed security. The summary judgment was granted, and WP appealed.

Held, the appeal should be allowed with costs.

Section 53(3) of the Condominium Act deems the developer to be the debtor of the purchaser in respect of the interest payable by the developer on purchase money while the purchaser is in interim occupancy. There is also a statutory trust imposed by s. 53(1). This statutory trust includes a trust imposed on a developer with respect to the interest payable under s. 53(3). Reading s. 53 in its entirety, depending on the circumstances, WP, as purchaser, was entitled to equitable proprietary interests in the purchase money and interest thereon. Given that the beneficiary of a trust has the right to trace assets that have been wrongfully distributed, and given that the tracing includes any interest that the assets may have

2001 CanLII 24088 (ON CA)

earned, it follows that a trust imposed by statute, or a trust deed, on the assets of a trust necessarily constitutes a trust imposed on the interest. The provision of security under s. 53(1) does not terminate the trust obligation imposed on the developer by s. 53(1) on the entire am ount of purchase monies it receives from a purchaser. Such an interpretation would defeat the purpose of the statutory trust imposed by the legislation. While it is correct that payment of the purchase money to either the developer or the purchaser under s. 53(1), or the delivery of security to the purchaser under s. 53(1)(b) permits the developer to remove the purchase money from the separate trust account in which it must be held, neither terminates the trust created by s. 53(1). That trust remains until the termination of the agreement of purchase and sale and the return of the purchase money, with interest, to the purchaser under s. 53(2), or the payment of the purchase money to the appropriate party under s. 53(1)(a). Accordingly, the appeal should be allowed with costs, and the summary judgment should be set aside.

Cases referred to

Ackland v. Yonge-Esplanade Enterprises Ltd. (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560, 27 R.P.R. (2d) 1 (C.A.); British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1; Counsel Holdings Canada Ltd. v. Chanel Club Ltd. (1999), 43 O.R. (3d) 319n, 27 R.P.R. (3d) 228 (C.A.), affg (1997), 33 O.R. (3d) 285 (Gen. Div.); Deslauriers Construction Products Ltd., Re, [1970] 3 O.R. 599, 13 D.L.R. (3d) 551, 14 C.B.R. (N.S.) 197 (C.A.); Diplock, Re, [1950] 2 All E.R. 1137, [1951] A.C. 251, 66 (pt. 2) T.L.R. 1015, 94 Sol. Jo. 777 (H.L.), affg [1948] Ch. 465 (C.A.) (sub nom. Ministry of Health v. Simpson); Foskett v. McKeown, [2001] A.C. 102 (H.L.)

Statutes referred to

Condominium Act, R.S.O. 1980, c. 84, s. 53
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.1

2001 CanLII 24088 (ON CA)

Class Proceedings Act, 1992, S.O. 1992, c. 6

Rules and regulations referred to

O. Reg. 121, R.R.O. 1980 (Condominium Act), s. 33
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 20.04(2)

Authorities referred to

Bennion, F.A.R., Statutory Interpretation (Toronto: Butterworths, 1997)
Goode, R.M., "The Right to Trace and its Impact on Commercial Transactions" (1976), 92 L.Q.R. 360
Waters, D.W.M., Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984)

APPEAL from a judgment of Cumming J. (2000), 48 O.R. (3d) 785, 32 R.P.R. (3d) 177 (S.C.J.) on a motion for summary judgment.

J. Gardner Hodder, for appellant (plaintiff).
D. Michael Brown, for respondents (defendants).
Jeff Carhart, for Ernst and Young Trustee in Bankruptcy of William H. Kaufman.
Jack Berkow and Alexandra Lev-Farrell, for respondents (third parties).

The judgment of the court was delivered by

[1] BORINS J.A.: -- The issue in this appeal is whether the motion judge was correct in holding that the obligation imposed on a developer by the Condominium Act, R.S.O. 1980, c. 84, s. 53(3) [See Note 1 at end of document] and R.R.O. 1980, Reg. 121, s. 33 [See Note 2 at end of document] to pay interest during interim occupancy on moneys paid by a purchaser of a residential condominium unit does not impose a trust obligation on the developer. Although the Act uses the term "proposed declarant", for simplicity in these reasons, I will [use] the word

2001 CanLII 24088 (ON CA)

"developer".

Background

[2] This appeal arises out of an intended class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6, which remains to be certified. On April 13, 1987, Wendy Ward-Price ("the appellant") entered into an agreement of purchase and sale with Mariners Haven Inc. ("Mariners") for the purchase of a condominium unit. The agreement required that the appellant pay the entire purchase price of $340,000 prior to taking possession of the unit, but made no provision for the payment of interest on her deposit. Mariners placed the deposit into a trust account and insured the funds with the Ontario New Home Warranty Program and the Mortgage Insurance Company of Canada. Subsequently, Mariners paid the deposit funds to William H. Kaufman Inc. ("WHK") in partial repayment of a building loan. From January 1988 to December 31, 1990, contemporaneous with most of the closings, Mariners made loan repayments to WHK exceeding $12,000,000.

[3] The appellant took early possession of her unit on July 15, 1988. By declaration registered on June 27, 1989, the condominium was registered as Simcoe Condominium Corporation No. 94. The final closing took place on August 16, 1989, at which time the appellant became the registered owner of her unit. Interest payable on her deposit, as required by s. 53(3) of the Act, was not calculated on the statement of adjustments and was not paid. This action was brought to recover the interest payable on her deposit, as well as on the deposits paid by the other members of the purchaser class.

[4] In addition to Mariners, the defendants are William H. Kaufman, Stuart Snyder and WHK. At the relevant time, Mr. Kaufman and Mr. Snyder were directors, officers and shareholders of Mariners and WHK, as well as directors, officers and shareholders of corporations which controlled, directly or indirectly, Mariners and WHK. It is alleged, in the alternative, that they were recipients of material benefits from Mariners which are answerable to the appellant's claim. Mariners is without assets and the action against WHK has been

2001 CanLII 24088 (ON CA)

stayed pursuant to s. 69.1 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended.

[5] In her statement of claim, the appellant seeks a deposit interest entitlement of $36,761.50. Her claim against Mr. Kaufman and Mr. Snyder is founded on the allegation that s. 53(1) of the Condominium Act imposes a statutory trust on the interest payable on all money received by Mariners on account of the purchase price and that Mariner's was in breach of trust in failing to pay interest on that money. The appellant alleges that if she and the other purchasers had been credited with interest on closing or had been paid interest, WHK would have received less money from Mariners toward the repayment of its loans. She alleges that Mr. Kaufman and Mr. Snyder knowingly assisted Mariners in its breach of trust and knowingly received trust funds flowing from the breach of trust. She alleges that WHK was a knowing recipient of trust money. Hence, the appellant claims that she is entitled to an equitable tracing of the moneys that were paid to WHK by Mariners.

[6] The defendants Mariners, WHK, Mr. Kaufman and Mr. Snyder issued a third party claim against the law firm of Sims Clement Eastman, the successor to the law firm Clement, Eastman, Dreger, Martin and Meunier, the solicitors for Mariners and WHK, seeking contribution and indemnity with respect to all damages for which they are found liable to the appellant and to the members of the class.

[7] The third parties delivered a statement of defence to the main action and moved under rule 20.04(2) for summary judgment dismissing the appellant's claim. They submitted that s. 53(1) of the Condominium Act does not impose a trust on the interest payable on money received by a developer on account of the purchase price of a unit.

[8] In a decision reported as Ward-Price v. Mariners Haven Inc. (2000), 48 O.R. (3d) 785, 32 R.P.R. (3d) 177 (S.C.J.), Cumming J. agreed with the third parties. The motion judge issued summary judgment dismissing the appellant's claim "to the extent [that] it is based upon breach of trust" (supra, at p. 794 O.R.). The plaintiff appeals from this judgment. Counsel

2001 CanLII 24088 (ON CA)

for the defendants Mariners, Mr. Kaufman and Mr. Snyder filed a factum and made submissions in support of the position taken by the respondent third parties.

The Relevant Legislation

[9] Section 53 of the Condominium Act [R.S.O. 1980] states:

53(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, notwithstanding the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

(a) its disposition to the person entitled thereto; or

(b) delivery of prescribed security to the purchaser for repayment.

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declarant on account of the purchase price from the day the purchaser

2001 CanLII 24088 (ON CA)

enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser.

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1).

(Emphasis added)

[10] Section 33 of Regulation 121 states:

33. The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall,

(a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

(b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st of September of that year.

(Emphasis added)

Reasons of the Motion Judge

[11] In his reasons, the motion judge reviewed the background of the plaintiff's claim and the remedy she seeks on behalf of herself and the other condominium unit purchasers. At p. 790 O.R., he set out the respondents' position, a position which was repeated before this court:

The third party law firm submits that although Mariners had an obligation pursuant to s. 53(1) of the Act to hold the deposits in trust, that obligation ceased when Mariners

2001 CanLII 24088 (ON CA)

obtained the prescribed security through the insurance. It is their position that the delivery to the purchasers of the insurance permitted the moneys held in trust to then be released and that the trust created by s. 53(1) thereby ceased to exist. The third party submits that the obligation to pay interest under s. 53(3) is not a trust obligation. Accordingly, the third party submits there is no genuine breach of trust issue for trial.

[12] At p. 790 O.R., the motion judge provided the following analysis of the purpose of s. 53 and the obligations which the section imposes on a developer:

The underlying policy of s. 53 is to protect consumer purchasers who generally are not in equal bargaining positions with developers.

Section 53(1) provides for the creation of a trust by statute. Moneys paid towards the purchase price are to be held in the requisite trust account "until" one of the two events in s. 53(1)(a) and (b) occurs. Disposition of the trust moneys may be made to the developer at closing, upon completion of the developer's obligations under the purchase contract: s. 53(1)(a). However, if the developer was unable to close the transaction, the purchaser would be entitled to the return of trust moneys.

The developer is entitled to the interest that has been earned on the money in the trust account: s. 53(4). However, this entitlement is subject to the stipulations imposed by s. 53(2) and (3).

Section 53(2) protects a purchaser who is entitled to the return of moneys paid by requiring the developer to pay interest at the prescribed rate on those moneys.

Section 53(3) imposes an interest obligation upon the developer when the purchaser enters into possession of the unit before a final closing and a deed or transfer acceptable for registration is delivered to the purchaser.

2001 CanLII 24088 (ON CA)

(Emphasis added)

[13] In concluding that s. 53(3) imposes a debt obligation with respect to interest payable on purchase moneys paid by purchasers, rather than a trust obligation, the motion judge considered the reasons of Adams J. in Counsel Holdings Canada Ltd. v. Chanel Club Ltd. (1997), 33 O.R. (3d) 285 (Gen. Div.), affd (1999), 43 O.R. (3d) 319n, 27 R.P.R. (3d) 228 (C.A.) and the reasons of Morden A.C.J.O. in Ackland v. Yonge-Esplanade Enterprises Ltd. (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560 (C.A.).

[14] At p. 791 O.R., the motion judge made the following reference to Counsel, noting that:

> Adams J. dealt with the competing claims of condominium purchasers and a mortgagee for priority with respect to the funds of an insolvent developer in receivership. In that case, prescribed security through deposit receipts had been delivered to the purchasers. Adams J. found that ". . . there could be no breach of trust once deposit receipts were issued to the purchasers" (at p. 296).

Although this court dismissed an appeal from the judgment of Adams J., an appeal from his finding on whether the deposits were subject to a trust claim was abandoned.

[15] The motion judge then considered the judgment in Ackland, which dealt with a developer's obligation under s. 53(3) to pay interest on all funds received by it on account of the purchase price of a unit, where a purchaser enters into possession or occupation of the unit before closing. The issue in Ackland was the proper rate of interest payable by the developer on the funds as stipulated by s. 33 of Regulation 121. Cumming J. observed that the developer in Ackland was obliged by s. 53(3) to pay the purchaser interest during the period of interim occupancy. At p. 792 O.R., he quoted the following passages from the reasons for judgment of Morden A.C.J.O. in Ackland, at pp. 106-07 O.R.:

> . . . the trust obligation clearly extends to the duty to pay

2001 CanLII 24088 (ON CA)

interest based on the higher rate [introduced by the Province of Ontario Savings Office], particularly where the proposed declarant may enjoy an increased personal benefit from paying . . . [the interest due under s. 53(3)] on the basis of the lower rate [being the historical rate set by the Province of Ontario Savings Office].

. . . . .

. . . while the basic relationship between a purchaser and a proposed declarant may be contractual s. 53(1) clearly imposes on the proposed declarant, with respect to the money we are concerned with in this appeal, the duty of a trustee and it is with this particular aspect of the relationship only that we are concerned . . . this fiduciary relationship is of direct relevance in interpreting the scope of the obligation to pay interest on the money held in trust.

(Emphasis added)

[16] The motion judge continued at pp. 792-93 O.R.:

Plaintiff's counsel in the case at hand submits that Ackland is authority for his submission that s. 53(3) in itself creates or recognizes a trust with respect to the interest payable to the purchaser under that provision.

I do not agree with this submission as to the decision in Ackland which is, of course, binding on this court. In my view, Morden A.C.J.O.'s quoted statement recognizes the statutory trust which is clearly created by s. 53(1). The corpus of the moneys held in trust pursuant to s. 53(1) belongs beneficially to the purchaser, and not the developer, until one of the two circumstances contemplated by s. 53(1) occurs and terminates the trust.

A trust involves a fiduciary relationship and imposes duties upon the trustee. This fiduciary relationship is relevant "in interpreting the scope of the obligation to pay interest on the money held in trust": Ackland, at p. 107. In interpreting the Regulation as to the prescribed rate

2001 CanLII 24088 (ON CA)

intended to apply to s. 53(3), the statutory trust created by s. 53(1) provides an instructive backdrop.

The result in Ackland is logical and fair, particularly when the declarant can earn interest on the corpus of the trust at a higher rate than the rate which the developer in Ackland proposed to pay to the purchaser.

In my view, Ackland is not authority for the plaintiff's assertion that s. 53(3) creates a trust with respect to the interest entitlement. It is only s. 53(1) that creates a trust. The Court of Appeal in Ackland held that in interpreting the Regulations to determine the proper prescribed interest rate for the purpose of applying s. 53(3), the statutory trust created by s. 53(1) is relevant.

In the case at hand, the trust created by s. 53(1) was terminated by reason of s. 53(1)(b) upon the purchase and delivery of the "prescribed security" through the deposit receipts. This was done prior to the interim occupancy by the purchasers and before the developer became obligated to pay interest during the occupancy period prior to final closing.

In my view, and I so find, the obligation to pay interest under s. 53(3) is not a trust obligation. Rather, it is a debt obligation created by statute.

[17] The motion judge concluded at p. 793 O.R.:

Thus, the overall scheme of s. 53 provides that upon the termination of the trust created by s. 53(1) through the delivery of the prescribed security (and the release of the trust moneys to the developer), there is insurance in place to protect the purchaser in the event of a claim for interest under s. 53(3).

For the reasons given, in my view, there is no trust obligation under s. 53(3). Since there is no trust obligation, there is no genuine issue for trial with respect to breach of trust.

2001 CanLII 24088 (ON CA)

Analysis

[18] In my view, the motion judge erred in interpreting s. 53(3) as creating a debt obligation, and not a trust obligation, in respect of the interest payable by a developer under that subsection. I have no doubt that s. 53(3) constitutes a developer as a debtor of the purchaser in respect to interest payable by the developer on purchase money while the purchaser is in interim occupancy. However, as I will explain, that does not extinguish the statutory trust imposed by s. 53(1) on "all money received by . . . a proposed declarant from a purchaser on account of a sale or agreement of purchase and sale" of a unit. This includes a trust imposed on a developer on the interest payable on that money under s. 53(3). In my opinion, this conclusion is supported by the reasons of Morden A.C.J.O. in this court's decision in Ackland.

[19] In this action, the appellant seeks to vindicate her property right in the interest payable to her on money held in trust for her by the developer. She intends to establish that the respondents are in receipt of property, or its traceable proceeds, which belongs beneficially to her. It is, therefore, necessary to consider in more detail the appellant's claim and the legal principles on which she relies.

[20] Stated simply, the appellant submits that when the developer failed to pay her interest on her purchase money as required by s. 53(3) for the time that she was in interim occupancy of her unit, the developer breached the trust imposed on the purchase money by s. 53(1). Central to this submission is the claim that interest payable on the purchase money is trust property because the purchase money is trust property; in failing to pay interest, the developer therefore misappropriated trust property. The appellant's prime remedy for this breach of trust is against the developer personally for compensation for the loss to the trust resulting from the failure to pay interest. However, as the developer is financially unable to provide compensation, as the beneficiary of the trust, the appellant asserts a proprietary remedy to make good the loss. By seeking to recover the misappropriated trust property from the respondents, the appellant seeks

2001 CanLII 24088 (ON CA)

restitution from the respondents on the ground that property in which she has a right of ownership can be followed or traced into their hands. See D.W.M. Waters, Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 1033 et seq.; R.M. Goode, "The Right to Trace and Its Impact on Commercial Transactions" (1976), 92 L.Q.R. 360, 528; In re Diplock, [1948] Ch. 465 (C.A.), affd sub nom. Ministry of Health v. Simpson, [1950] 2 All E.R. 1137, [1951] A.C. 251 (H.L.). As Lord Millett stated in Foskett v. McKeown, [2001] 1 A.C. 102 at p. 127 (H.L.):

> A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice.

[21] Generally, the appellant's claim is based on her equitable proprietary interest in identified property. However, it is helpful to identify her interest more precisely. She has an absolute equitable interest in the purchase money by virtue of the statutory trust imposed by s. 53(1) and, by virtue of s. 53(3), she has an equitable interest in the interest payable on that money while she was in interim occupancy of her unit. This case does not involve any question of constructive or resulting trusts. The only trust in issue is the express statutory trust created by s. 53(1). Although it may be argued that this trust lacks, in some respects, the three certainties of intention, object and subject-matter, this does not effect its essential character as a trust. As McLachlin J. pointed out in British Columbia v. Henfrey Samson Blair Ltd., [1989] 2 S.C.R. 24 at p. 35, 59 D.L.R. (4th) 726, at p. 742: "The provinces may define 'trust' as they choose for matters within their own legislative competence . . .".

[22] Reading s. 53 in its entirety, depending on the circumstances, the appellant, as purchaser, is entitled to equitable proprietary interests in the purchase money and interest thereon. Had the transaction been terminated as a result of the developer's default, the appellant would have had an equitable proprietary interest in the purchase money, as

2001 CanLII 24088 (ON CA)

well as in the interest payable thereon by virtue of s. 53(2). However, because the transaction closed after the appellant was in interim occupancy, the developer obtained an equitable interest in the purchase money while, by virtue of s. 53(3), the appellant acquired an equitable proprietary interest in the interest payable on that money while she was in interim occupancy.

[23] It is the appellant's position that her equitable proprietary interest arising from the statutory trust [is] enforceable against whomever for the time being holds the property. On the authority of Ministry of Health v. Simpson, supra, the appellant asserts that if, as a result of tracing, it can be determined that the interest moneys have come into the possession of the respondents in circumstances in which the law permits her to obtain recovery, she has an absolute proprietary interest in such moneys.

[24] In my view, should the developer, as trustee, breach that trust by making wrongful use of the funds, it makes sense to interpret s. 53(3) both in the context of the entire section and in conformity with the proprietary remedy available to the purchaser. Given that the beneficiary of a trust has the right to trace assets that have been wrongfully distributed, and given that the tracing includes any interest which the assets may have earned, it follows that a trust imposed by statute, or a trust deed, on the assets of a trust necessarily constitutes a trust imposed on the interest. This is particularly true in this case, where, by statute, the trustee must account to the beneficiary for the interest. The legislature is presumed to know the remedy for breach of trust and to have drafted s. 53 in accordance with that remedy. See F. Bennion, Statutory Interpretation (Toronto: Butterworths, 1997) at pp. 827-30. Therefore, s. 53(3) should be interpreted to conform with the proprietary remedy availab le to the purchaser should the developer breach the trust imposed on the purchase money by s. 53(1).

[25] In interpreting s. 53, the nature and purpose of the Condominium Act is also helpful. It is well recognized that the Act is consumer protection legislation. The trust created by s.

2001 CanLII 24088 (ON CA)

53(1) is for the protection of purchasers. Subsections (2) and (3) further protect purchasers by ensuring, in the circumstances provided for, that they receive interest on their deposits. As the motion judge recognized at p. 791 O.R., it has been held, including by this court in Ackland at p. 105 O.R., that the purpose of s. 53(3) "is to provide an incentive [to the developer] to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has [taken] occupancy". Applying a purposive approach to the interpretation of s. 53(3) therefore provides further support for my view that s. 53(3) is to be interpreted to give effect to the trust created by s. 53(1).

[26] As I understand the reasons of the motion judge, he adopted the view of Adams J. in Counsel, that the obligation of the developer to retain the purchase money in a trust account comes to an end upon the delivery to the purchaser of the prescribed security referred to in s. 53(1)(b). I do not take issue with this interpretation of s. 53(1)(b). It makes good commercial sense to interpret s. 53(1)(b) as providing that once security is received by a purchaser, the amount of purchase moneys covered by the security can be removed from the trust account by the developer. I agree with Adams J.'s conclusion at p. 295 O.R. that "[t]he purpose of [the prescribed security] is to permit a vendor to release deposit funds from trust." Reading this statement in the context of his reasons, Adams J. meant that the developer could remove from the statutory trust account the amount corresponding to the coverage provided by the insurance. However, it is my view that the provision of security under s. 53(1)(b) does not terminate the trust obligation imposed on the developer by s. 53(1) on the entire amount of purchase moneys it receives from a purchaser. Such an interpretation would defeat the purpose of the statutory trust imposed by the legislation. That trust is imposed on the entirety of the purchase moneys, including the interest payable on the purchaser moneys pursuant to subsections 53(2) and (3), which the developer, as trustee of the purchase moneys, must pay thereon.

[27] To be sure, s. 53(1) is not a model of legislative

2001 CanLII 24088 (ON CA)

drafting. Nonetheless, it should be read as affecting two objects: (1) imposing a trust on the developer for the benefit of a purchaser on all money received from the purchaser on account of the purchase price; and (2) requiring the developer to hold the money in a separate trust account until (a) its disposition to the person entitled to the money, or (b) the delivery of the prescribed security to the purchaser. While it is correct that payment of the purchase money to either the developer or the purchaser under s. 53(1)(a), or the delivery of security to the purchaser under s. 53(1)(b) permits the developer to remove the purchase money from the separate trust account in which it must be held, neither terminates the trust created by s. 53(1). That trust remains until the termination of the agreement of purchase and sale and the return of the purchase money, with interest, to the purchaser under s. 53(2), or the payment of the purch ase money to the appropriate party under s. 53(1)(a). While I agree with the motion judge that s. 53(3) imposes a debt obligation on the developer to pay interest on purchase money, because the provision of security under s. 53(1)(b) does not terminate the trust, the debt obligation imposed by s. 53(3) is a debt obligation to pay interest on trust funds.

[28] Moreover, there is nothing in the statutory language of either s. 53(2) or s. 53(3) which provides that the developer's obligation to pay interest on the purchase money terminates with the delivery of the prescribed security under s. 53(1)(b). This supports my opinion that the entire amount of the purchase money continues to be impressed with a trust, including interest payable thereon, until the interest is paid.

[29] I find further support for my view that the purchase money trust created by s. 53(1) is not terminated by s. 53(1)(b) in s. 33 of Regulation 121, which is a helpful aid in interpreting s. 53(3). Section 33 stipulates the rate of interest payable under subsections 53(2) and (3) "on money held in trust" under subsection 53(1). If the legislature had intended for the trust to be terminated, in whole or in part, on the occurrence of the circumstances contained in subsection 53(1)(a) or (b), the legislation would have provided that after the prescribed security has been given to a purchaser, interest

2001 CanLII 24088 (ON CA)

is no longer payable.

[30] In my view, it does not make commercial sense to deprive the purchaser of interest on money of which he or she is the beneficial owner during the time that the developer continues to have the use of it. It is only on the closing of the purchase and sale or the failure of the transaction to be completed as a result of the purchaser's default that the money ceases to be the property of the purchaser and becomes the property of the developer. To interpret s. 53(3) to produce the result that the statutory trust impressed on the purchase money fails to extend to interest which that money has earned would simply not accord with commercial reality.

[31] A convenient way to test my interpretation of s. 53(1)(b) is to ask what effect, if any, on the trust imposed on the purchase money would result from the developer's failure to hold the money in a separate trust account. The answer, in my view, is that it would have no effect. Because the legislation has said that the purchase money is trust money, it is immaterial whether the purchase money is in fact kept separate and apart from the developer's own money: cf. Re Deslauriers Construction Products Ltd., [1970] 3 O.R. 599, 13 D.L.R. (3d) 551 (C.A.). Similarly, the purchase money continues to be held in trust by the developer even when the developer is entitled to remove it from a trust account upon the provision of the security prescribed by s. 53(1)(b).

[32] Moreover, to hold that the statutory trust imposed on the purchase money for the purchaser's protection is terminated on the provision of security under s. 53(1)(b) would render the trust meaningless. The trust is intended to create a broader range of remedies for a purchaser than would be available if only a debtor-creditor relationship existed. It does this by providing the traditional remedies available to a beneficiary when there has been a breach of trust. Indeed, the trust is also intended to protect the purchaser in the event of the developer's insolvency, which is the situation in this case.

[33] In Ackland, as in this case, a developer was required to pay interest on several purchasers' deposits during the period

2001 CanLII 24088 (ON CA)

of the purchasers' interim possession of their units. The sole issue in Ackland was the amount of "the prescribed rate" of interest the developer was required to pay under s. 53(3), as stipulated by s. 33 of Regulation 121.

[34] Ackland was an appeal from a decision of Keenan J. In Ackland, Morden A.C.J.O. found it helpful to interpret s. 33 in the context of s. 53 of the Act, to which it applied. The specific issue was whether the proper interest rate was the rate that was in effect when the regulation was enacted, or the higher rate that was in effect at the time the developer was required to pay interest on the purchase moneys. Morden A.C.J.O. held that the proper interpretation of s. 33 required payment of the higher interest rate.

[35] In reaching his conclusion, Morden A.C.J.O. applied a number of propositions found in several recognized authorities on statutory interpretation. In addition, he found that an analysis of the purpose of the regulation was helpful in its interpretation. At p. 105 O.R., he stated:

> The new account, on the facts of this case, clearly comes within the purpose of the regulation -- which is to provide an incentive for the proposed declarant to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has entered into occupation. In Berman v. Karleton Co. Ltd. (1982), 37 O.R. (2d) 176, 24 R.P.R. 8 (H.C.J.), Gray J. said at p. 184 O.R., pp. 19-20 R.P.R.:
>
>> The intent of the Act is clearly that the purchaser be paid interest on money paid to the vendor on account of purchase price during the interim occupancy period before a registrable deed or transfer is delivered. The reason for doing so is to protect purchasers of proposed condominium units from abuses by vendors who delay in registering declarations by providing an incentive to register quickly.

Morden A.C.J.O. went on to add, at p. 106 O.R., that interpreting s. 33 to require the developer to pay a low rate of interest would diminish the effect of the incentive against

2001 CanLII 24088 (ON CA)

delay.

[36] Morden A.C.J.O. continued at pp. 106-07 O.R.:

There is a further aspect of the provision's purpose, one related to a matter of legal context. The money for which the interest is paid is held by the proposed declarant as a trustee in a separate trust account. The money held in trust, belongs, beneficially, to the purchaser and not to the proposed declarant. It is the most fundamental duty of a trustee to administer the trust solely in the interest of the beneficiary and a trustee is not permitted to profit at the expense of the beneficiary: see Scott on Trusts, 3rd ed. (1967), Vol. I at p. 39, and Vol. II at pp. 1297-98. I think that the trust obligation clearly extends to the duty to pay interest based on the higher rate, particularly where the proposed declarant may enjoy an increased personal benefit from paying it on the basis of the lower rate. This legal consideration is an important part of the context for determining the proper application of s. 33.

This point is succinctly made by Cavarzan J. in Kates v. Camrost York Development Corp., supra:

> It seems to me to be consistent with the intent and purpose of the Condominium Act which protects trust moneys deposited by the applicant and which permits the respondent to earn and keep interest on those trust moneys [s. 53(4)] that the applicable rate, the higher or lower one, be determined by the amount held in trust.

With respect to the trust aspect point, Keenan J. said:

> While the relationship of the developer declarant and the condominium purchasers gives rise to obligations of a fiduciary nature, such as holding deposits in trust, it is not per se a fiduciary relationship. It is primarily a contractual relationship and the rights and obligations are set out in the contract. A statutory obligation is separate and while it may impose a duty on the declarant for the protection of the purchaser, it does not impose a duty on

2001 CanLII 24088 (ON CA)

the declarant to extend the scope of the duty beyond that which is clearly recited in the statute.

With respect, while the basic relationship between a purchaser and a proposed declarant may be contractual, s. 53(1) clearly imposes on the proposed declarant, with respect to the money we are concerned with in this appeal, the duty of a trustee and it is with this particular aspect of the relationship that we are concerned. As I have said, this fiduciary relationship is of direct relevance in interpreting the scope of the obligation to pay interest on the money held in trust.

(Emphasis added)

[37] In my view, it is clear that Morden A.C.J.O. was of the opinion that the duty of a developer imposed by s. 53(3) to pay interest on the purchase money of which the developer is a trustee is the duty of a trustee. I am entirely satisfied that this conclusion was not obiter dictum. It is clear from the final sentence of the passage quoted above that his conclusion that the combined effect of subsections 53(1) and (3) is to impose a trust duty on a developer was a necessary finding in the interpretation of s. 33. Indeed, one of the reasons why Morden A.C.J.O. held that the developer was required to pay interest at the higher statutory rate was because it was required to pay interest on trust moneys under s. 33. Even though it is not indicated whether s. 53(1)(b) security had been provided, I do not believe that the provision of security would have affected the result reached by Morden A.C.J.O. as the interest was payable on trust moneys. It was part of the developer's obligation as trustee of the purchase moneys to pay interest.

[38] In referring to Morden A.C.J.O.'s reasons in Ackland quoted earlier, the motion judge reproduced only the penultimate sentence of the first paragraph in the above passage and part of the final paragraph thereof. It appears that he was of the view that the developer's duty as trustee to pay interest was terminated when it provided the appellant with the approved security referred to in s. 53(1)(b). As I have

2001 CanLII 24088 (ON CA)

explained, the provision of the security did not affect the statutory trust that was impressed on the purchase money paid by the appellant. The Condominium Act constituted the developer the trustee of the money for the benefit of the purchaser. The trust impressed on the money continued whether the money remained in a trust account or was, in effect, replaced by a prescribed form of security. As s. 53(1) states, the trust [is] for the benefit of "the person entitled thereto in respect of the agreement" for the purchase and sale of the unit. Depending on the circumstance, "the person entitled thereto" means either the developer, if the sale is completed and any interest on the purchase money payable to the purchaser pursuant to s. 53(3) has been paid or the sale has not been completed because of the purchaser's default, or the purchaser, if the sale has not been completed because of the developer's default and interest on the purchase money payable to the purchaser pursuant to s. 53(2) has been paid.

Conclusion

[39] For these reasons, I would allow the appeal with costs, set aside the summary judgment dismissing the appellant's claim based on breach of trust and dismiss the motion with costs. As it was not unreasonable for the respondent to bring the motion, the costs of the motion and the appeal are on a party and party basis.

Appeal allowed with costs.

Notes

Note 1: Now R.S.O. 1990, c. C.26, s.53.

Note 2: Now R.R.O. 1990, Reg. 96, s. 35(2).

2001 CanLII 24088 (ON CA)