COURT FILE NUMBER	B303 389146
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ONSITE3D LTD., ONSITE3D INDUSTRIAL SERVICES LTD., and ONSITE3D DIGITAL SOLUTIONS LTD.
DOCUMENT	**BRIEF OF LAW OF THE APPLICANTS**

Clerk's Stamp

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Commercial List Chambers Application
scheduled for the 22 day of July, 2026
before the Honourable Justice J.S. Little

Table of Contents

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, ONSITE3D Ltd. ("**Onsite3D**"), ONSITE3D Industrial Services Ltd. ("**Onsite3D Industrial**"), and ONSITE3D Digital Solutions Ltd. ("**Onsite Digital**") (each an "**Applicant**" and collectively, the "**Applicants**" or the "**Onsite3D Group**").

2. The Applicants seek an order (the "**Order**") which will, among other things:

   (a) approve the interim lending agreement for debtor-in-possession financing (the "**DIP Term Sheet**") between the Applicant and Turtle Island Engineering & Consulting Ltd. (the "**Interim Lender**"), and grant a second-priority security interest or charge over the Property (as defined below) in favour of the Interim Lender to secure the payment and performance of the Applicants' indebtedness, liabilities and obligations under the DIP Term Sheet (the "**Interim Lender's Charge**"); and

   (b) declare that the Administration Charge and Interim Lender's Charge (collectively the "**BIA Charges**") rank in priority ahead of all other charges, security interests, liens, trusts, deemed trusts, and encumbrances against the property, assets and undertaking of the Applicants, with the Administration Charge ranking first and the Interim Lender's Charge ranking second.

3. The Order is necessary for the Applicants to obtain critical financing needed to fund operations through the Stay Period, as defined below.

II. FACTS

4. The Applicants are an Indigenous-owned business group recognized as a Certified Indigenous Business by the Canadian Council for Indigenous Business. The Applicants' business model combines engineering, construction, and procurement ("**EPC**") work, with the Onsite3D Group acting as an Indigenous prime contractor that can both manage projects and perform key technical work itself.[1]

5. Prior to filing the Notices of Intention to make a Proposal (the "**NOI**"), the Onsite3D Group was preparing for a business reorganization which was aimed at finding a buyer or partner for its manufacturing operations while focusing the companies' future growth on its digital engineering operations.[2]

6. The wind-down and attempted marketing and sale of the manufacturing platform has increased the cash burn of the Onsite3D Group significantly, as there has been no

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[1] Affidavit of Kyle Pickering, sworn July 20, 2026 (the "**First Pickering Affidavit**") at para 4.

[2] First Pickering Affidavit at para 5.

manufacturing revenue generated by Onsite3D Industrial, despite ongoing obligations to maintain physical assets and lease obligations.[3]

7. Although the Onsite3D Group continues to generate cash flow, this cash flow is insufficient to service its obligations.[4]

8. The Applicants each filed a NOI on June 22, 2026.[5]

9. On July 9, 2026 upon the Application of the Applicants, this Honourable Court granted, among other things, the following relief:

   (a) extension of the 30-day period within which the Applicants are required to file a proposal (the "**Stay Period**") for forty-five (45) days to September 5, 2026, pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act, ,* RSC 1985, c B-3 (the "***BIA***"); and

   (b) a first-priority security interest or charge in the amount of $250,000 (the "**Administration Charge**") over all of the real and personal property of the Applicants (the "**Property**") to secure the reasonable fees and disbursements (the "**Professional Fees**") of Ogilvie LLP, legal counsel to the Applicants, G. Chan & Associates Inc., the Proposal Trustee, and the Proposal Trustee's legal counsel, Sharek Logan & van Leenen LLP (collectively, the "**Administrative Professionals**") pursuant to Section 64.2(1) of the *BIA*, and authorizing payment of the Professional Fees in connection with the within proposal proceedings (the "**Proposal Proceedings**").

10. Following the filing of the NOIs, the Applicants and Proposal Trustee prepared 13-week projected cash flow statements for each of the companies (the "**Cash Flow Statements**") for June 22, 2026 to September 18, 2026 as required by the BIA.[6]

11. The Cash Flow Statements assume that the companies were able to obtain interim financing of $650,000 by the week ending July 17, 2026 to remain cash-flow positive.[7]

12. Since the NOI filing, the companies have been speaking to and negotiating with several potential interim lenders to secure the financing required to meet their obligations.[8]

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[3] First Pickering Affidavit at para 6.

[4] First Pickering Affidavit at para 7.

[5] First Pickering Affidavit at para 8.

[6] First Pickering Affidavit at paras 10-13, Exhibits A-C.

[7] First Pickering Affidavit at paras 14-15.

[8] First Pickering Affidavit at para 9.

13. Further, the companies have secured a Chief Financial Offer to support the restructuring process.[9]

14. To ensure compliance with Cash Flow Statement assumptions, the Applicants have entered into an interim lending sheet with the Interim Lender (the "**DIP Term Sheet**") which provided emergency funding for the Applicants' to meet critical Canada Revenue Agency ("**CRA**") and payroll remittances, and will fund the Applicant's operations and working capital requirements during the Proposal Proceedings, as well as the professional fees and expenses incurred in connection therewith.[10]

15. The Interim Lender requires a priority charge on the Property as a condition of advancing further funds to the companies.[11]

16. This interim financing is essential to sustain the Applicant's operations throughout the Stay Period, formulate a viable proposal, and avoid bankruptcy.[12]

III. ISSUES

17. The issues before this Honourable Court are:

(a) Should the DIP Term Sheet be approved?; and

(b) Should the Interim Lende's Charge be declared a priority charge?

IV. LAW AND ARGUMENT

A. The DIP Term Sheet Should be Approved

18. The Court may approve interim financing during the Stay Period pursuant to section 50.6(1) of the BIA.[13] In making that decision and exercising its discretion, the Court is mandated to consider all relevant factors including the Cash Flow Statements and those factors set out in subsection (5):

"(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

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[9] First Pickering Affidavit at para 9.

[10] First Pickering Affidavit at paras 16-17, Exhibit D.

[11] First Pickering Affidavit at para 21.

[12] First Pickering Affidavit at para 20.

[13] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 ("BIA"), s 50.6(1) [**Tab 1**].

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be."[14]

19. The Applicant has entered into a DIP Term Sheet, a copy of which is attached as Exhibit "D" to the First Pickering Affidavit. The principal terms are as follows:

(a) **Parties**: Onsite3D Ltd., Onsite3D Industrial Services Ltd., and Onsite3D Digital Solutions Ltd. as Borrowers and Turtle Island Engineering & Consulting Ltd. as DIP Lender;

(b) **Loan Amount**: Up to a maximum of CDN $1,000,000 to be made available in two installments:

(i) $150,000 to be made available no later than July 20, 2026 for the purpose of funding critical payments such as CRA remittances and employee payroll (the "**First Installment**"); and

(ii) $850,000 to be made available upon Court approval of the DIP Term Sheet and DIP Charge (the "**Second Installment**")

(collectively, the "**DIP Loan**");

(c) **Interest Rate**: 16% per annum on the daily outstanding balance, payable on the Termination Date;

(d) **Duration**: The DIP Loan matures on the earliest of: (i) December 22, 2026 (being six months from the date of the filing of the NOIs; (ii) the effective date of a Court-approved transaction affecting all or a material part of the Borrowers' assets or resulting in a change of ownership or control; (iii) the expiry, dismissal or termination of the stay of proceedings or BIA Proceedings, or the Borrower becoming bankrupt; or (iv) acceleration of the DIP Loan following an Event of Default;

(e) **Conditions Precedent to the First Installment**: (i) The representations and warranties of the Borrowers being true and correct as of the date given; and (ii) the DIP Term Sheet being executed by all parties; and

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[14] BIA, s 50.6(5) [**Tab 1**].

(f) **Conditions Precedent to the Second Installment**: (i) The representations and warranties of the Borrower being true and correct as of the date given; (ii) the issuance of a Court order approving the DIP Loan and the DIP Term Sheet, creating the DIP Charge in favour of the Interim Lender; and (iii) no event of default having occurred and being continuing.

20. The Applicants submit that each of the factors enumerated in s. 50.6(5) of the BIA weighs in favour of approving the DIP Term Sheet. We address each factor in turn below.

21. **Section 50.6(5)(a)** — Period of proceedings: The period during which the Applicants are expected to be subject to these proceedings is defined and reasonable. This Court has granted the Applicants' request for a 45-day extension of the Stay Period to September 5, 2026. The DIP Term Sheet provides for a termination date of six months following the date of the NOI filings, establishing a clear temporal boundary for the interim financing. The Cash Flow Statement covers the 13-week period from June 22, 2026 to September 18, 2026 , and demonstrates that the DIP financing is calibrated to the anticipated duration of the Proposal Proceedings. This is not an open-ended commitment; the financing is time-limited, purpose-specific, and aligned with a realistic restructuring timeline.

22. **Section 50.6(5)(b)** — Management of business and financial affairs during proceedings: The Applicants' business and financial affairs are being managed responsibly and with appropriate professional oversight during the Proposal Proceedings. The Applicants continue to operate as a going concern under the supervision of the Proposal Trustee. Since filing the NOI, the Applicants have cooperated fully with the Proposal Trustee and provided all requested information and documentation, and have hired a Chief Financial Officer to assist in the turnaround and restructuring phase. Expenditures have been limited to critical items including payroll, contracted labour, essential suppliers, and utilities. The Applicants and the Proposal Trustee have jointly prepared the Cash Flow Statements and are actively managing cash flow on an ongoing basis. These measures demonstrate that the Applicants' operations are being conducted in a disciplined and transparent manner, and that interim financing will be deployed prudently under appropriate professional oversight.

23. **Section 50.6(5)(c)** — Confidence of major creditors: The evidence before this Honourable Court supports the conclusion that the Applicants' management retains sufficient confidence to advance these proceedings. The Proposal Trustee has had direct and ongoing involvement with the Applicants' management since the filing of the NOI, was consulted throughout the negotiation of the DIP Term Sheet, and, so far as the Applicant is aware, is supportive of the DIP financing and the proposed priority ranking of the BIA Charges. No creditor has come forward to oppose the DIP financing or to challenge the Applicants' continued management of operations during the Stay Period. Onsite3D's largest creditor, 1146991 Alberta Inc. ("**114**"), is supportive of the DIP Loan. The Applicants have acted transparently and cooperatively throughout, providing all information requested by the Proposal Trustee and working diligently toward a viable restructuring. In the circumstances, this factor is satisfied.

24. **Section 50.6(5)(d)** — Enhancement of prospects for a viable proposal: The DIP financing will directly and materially enhance the prospects of a viable proposal being made. The Cash Flow Statements assumed interim financing was required by the week ending July 17, 2026 for the companies to remain cash-flow positive. Without interim financing, the Applicants will be unable to fund their ongoing operations, meet post-filing obligations to

essential suppliers and employees, or pay the Professional Fees necessary to formulate and present a proposal to its creditors. In the absence of the DIP facility, the Applicants will inevitably be forced into bankruptcy, resulting in significantly worse outcomes for all stakeholders. The DIP financing bridges the identified funding gap and provides the Applicants with the financial runway necessary to complete the identification and quantification of creditor claims, explore restructuring alternatives, and ultimately present a viable proposal. This factor is, in the Applicants' respectful submission, the most compelling basis for approval of the DIP Term Sheet.

25. **Section 50.6(5)(e)** — Nature and value of the debtor's property: The nature of the Applicants' property supports the approval of interim financing. The Applicants act as an Indigenous prime contractor with the assets and employees to manage and perform projects involving specialized technical work.[15] Onsite3D Digital has recently gained momentum through Indigenous procurement channels and strategic investor interest in Canada and the United States.[16] The companies have continued to apply for, and receive approval for new contracts which will provide value to the Estates.[17] The Applicants' property and operations have substantial value as a going concern, and the DIP financing is necessary to preserve that value during the Proposal Proceedings. A forced liquidation in bankruptcy would almost certainly result in a significant destruction of going-concern value to the detriment of all creditors.

26. **Section 50.6(5)(f)** — Material prejudice to creditors: No creditor will be materially prejudiced by the granting of the Interim Lender's Charge. The DIP facility is intended solely to fund ongoing operations and Professional Fees during the Proposal Proceedings — expenditures that benefit the creditor body as a whole by preserving the Applicants as a going concern and facilitating the proposal process. The alternative to interim financing is bankruptcy, which would result in a cessation of operations and the forced realization of the Applicants' assets at distressed values, yielding significantly reduced recoveries for all creditors. Any subordination of existing security interests occasioned by the Interim Lender's Charge is more than offset by the preservation of the very enterprise from which those creditors' recoveries must ultimately be derived.

With respect to Onsite3D Ltd.'s second-largest secured creditor, Capital Now Ventures Inc. ("**CNV**"), the Applicants are of the view that CNV will not be materially prejudiced by the granting of the DIP Charge. Without providing a formal opinion on the security of any creditor or making an admission as to the validity or enforceability of such security or amounts claimed thereunder, the Applicants, based on a preliminary analysis of the security held by CNV and 114 (which assumes that the security held by 114 and CNV is valid and enforceable) submit the following:

(a) 114's appears to have a general security interest over all present and after-acquired personal property of Onsite3D Ltd. registered first in time at the Alberta

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[15] First Pickering Affidavit at para 4.

[16] First Report of the Proposal Trustee dated July 7, 2026 (the "**First Report**") at para 21.

[17] First Pickering Affidavit at para 9.

Personal Property Registry ("**PPR**"), which secures an alleged indebtedness of approximately $14,0667,982 (the "**114 Security**");[18]

(b) CNV appears to have a general security interest over all present and after-acquired personal property of the companies registered at the PPR. CNV alleges it is owed approximately $1,800,069. The companies dispute this claim and it is the subject of ongoing litigation. CNV's PPR registration states that it holds priority ahead of 114 for accounts receivable due to a waiver given by 114 (the "**CNV Security**");[19]

(c) The CRA likely has a deemed trust claim over the Property of the companies for unremitted source deductions and GST for a combined amount of approximately $8,550,771 (the "**CRA Deemed Trust Claim**");[20]

(d) According to a factoring agreement between Onsite3D Ltd. and CNV, Onsite3D Ltd. sold, transferred, and irrevocably and absolutely assigned specific invoices to CNV in exchange for financing.

In *First Vancouver Finance v. M.R.N.,* 2002 SCC 49 (CanLII), [2002] 2 SCR 720 ("***First Vancouver Finance***"), the Supreme Court of Canada addressed the interaction between the Crown's deemed trust under section 227(4.1) of the *Income Tax Act* and the rights of a third-party purchaser (factor) of accounts receivable. The Court held that once an account receivable is sold/absolutely assigned by the tax debtor to a third-party purchaser for value in the ordinary course, the deemed trust is released from that specific asset and attaches only to the proceeds of the disposition remaining in the tax debtor's hands.[21]

The key principle of *First Vancouver Finance* is that factoring constitutes an absolute assignment/sale, not merely the creation of a security interest. Once sold, the specific receivable ceases to be "property of the tax debtor" and the deemed trust no longer attaches to it in the hands of the factor. The deemed trust does, however, continue to attach to the proceeds of that disposition that remain with or are received by the tax debtor.

Applying *First Vancouver Finance* and assuming that CNV holds valid and enforceable security, CNV, as purchaser/absolute assignee of specific invoices would likely hold a proprietary interest in those receivables (or their traceable proceeds) that is *not* "property of Onsite3D Ltd." for any purpose.

Under the BIA, property held by the debtor in trust for another is excluded from the debtor's estate pursuant to section 67(1)(a).

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[18] First Report at para 35.

[19] First Report at para 36.

[20] First Report at para 33.

[21] *First Vancouver Finance* at paras 39-46 [**Tab 2**].

However, once trust property is converted into property that cannot be traced (e.g., dissipated to pay other creditors or operating expenses), CNV's proprietary trust claim is extinguished and CNV is left with only a claim for damages.[22] Those damages would be secured by the CNV Security, again on the assumption that it is valid and enforceable.

In light of the above, the Applicants are of the view that CNV will not be prejudiced by the granting of the DIP Charge, as absent a successful tracing argument, CNV occupies a subordinate secured creditor position with very limited realistic prospect of meaningful recovery from the general estate—behind the CRA Deemed Trust, behind 114 on non-AR assets, and behind the DIP Charge and Administration Charge. CNV's only pocket of priority (as a secured creditor, not as a trust claimant) is Onsite3D's accounts receivable, where it ranks ahead of 114 by contract but behind CRA's Deemed Trust Claim.

If CNV can establish a proprietary or trust claim to the factored invoices, that property stands outside the property of the companies' estates and is therefore not subject to the DIP Charge.

27. **Section 50.6(5)(g)** — The Proposal Trustee's report: The Proposal Trustee's report filed with the Cash Flow Statements notes that assumptions in the Cash Flow Statements are reasonable and not inconsistent with the purpose of the projected cash flows.[23] The Proposal Trustee was consulted throughout the negotiation of the terms of the DIP Term Sheet and has been directly involved in the preparation of the Cash Flow Statements and the assessment of the Applicants' financing requirements. So far as the Applicants are aware, the Proposal Trustee is supportive of the DIP Term Sheet and the proposed priority ranking of the BIA Charges as necessary to facilitate the Proposal Proceedings and to avoid a bankruptcy that would be prejudicial to the interests of creditors.

28. Approval of the DIP Term Sheet is necessary because the Cash Flow Statements demonstrate the Applicants require interim financing to:

    (a) continue operations and meet post-filing obligations to essential suppliers, the Canada Revenue Agency, and employees;

    (b) fund the professional fees and disbursements of the Administrative Professionals and the Proposal Trustee; and

    (c) advance the formulation of a proposal for the benefit of the Applicants' creditors.[24]

29. Considering the foregoing, the Applicants submit that all of the factors enumerated in s 50.6(5) of the BIA weigh in favour of approving the DIP Term Sheet and granting the Interim Lender's Charge.

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[22] See, eg: *Graphicshoppe Ltd, Re,* [2005] O.J. No. 5184, 2005 CanLII 45183 (ONCA) at paras 34-38, 44, 49, 50, 53 [**Tab 3**], citing *British Columbia v Henfrey Samson Belair Ltd*., [1989] 2 SCR 24, 1989 CanLII 43 (SCC) at p 34-35 [**Tab 4**].

[23] First Report at Appendix D.

[24] First Pickering Affidavit at para 20.

B. The BIA Charges Should be Declared Priority Charges

30. Section 50.6(1) permits the Court to make an order declaring that all or a part of a debtor's property is subject to a security or charge in favour of a DIP lender.[25]

31. Section 50.6(3) states that the court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.[26]

32. This requires that notice be given to affected secured creditors of any application to grant priority charges.[27]

33. The Applicants are serving all known creditors with notice of this application.

34. The proposed priority ranking of the BIA Charges, with the Administration Charge ranking first and the Interim Lender's Charge ranking second, is necessary. Without it, the Proposal Proceedings will fail and creditors will be materially worse off.

35. The Interim Lender requires a priority charge as an express condition of providing DIP financing; without that facility, the Applicants cannot fund operations during the Stay Period.

V. CONCLUSION AND RELIEF SOUGHT

VI. For the foregoing reasons, the Applicants respectfully submit that this Honourable Court grant an order in the form of the DIP Financing Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21 DAY OF JULY, 2026

OGILVIE LLP

Kaitlynd Hiller

For: **Per: Susy Trace**
Counsel for the Applicant

OGILVIE LLP

Kaitlynd Hiller

Per: Kaitlynd Hiller
Counsel for the Applicant

[25] BIA, s 50.6(1) [**Tab 1**].

[26] BIA, s 50.6(3) [**Tab 1**].

[27] BIA, ss 50.5 and 64.2(1) [**Tab 1**].

VII. TABLE OF AUTHORITIES

1. Bankruptcy and Insolvency Act, RSC 1985, c B-3 [excerpts of]
2. *First Vancouver Finance v. M.R.N.*, 2002 SCC 49 (CanLII), [2002] 2 SCR 720
3. *Graphicshoppe Ltd, Re*, [2005] O.J. No. 5184, 2005 CanLII 45183 (ONCA)
4. *British Columbia v Henfrey Samson Belair Ltd*., [1989] 2 SCR 24, 1989 CanLII 43 (SCC)

TAB 1

CANADA

CONSOLIDATION

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

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reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

Trustee to file cash-flow statement

(6) The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the person making the proposal regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the person making the proposal.

Creditors may obtain statement

(7) Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(8) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(9) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

d'exactitude la situation financière du débiteur et la cause de ses difficultés financières ou de son insolvabilité, et il en fait rapport à l'assemblée des créanciers.

État de l'évolution de l'encaisse

(6) Le syndic qui dépose, à l'égard d'une personne insolvable, une proposition aux termes du paragraphe 62(1) est tenu de joindre à celle-ci :

a) un état établi par l'auteur de la proposition — ou une version révisée d'un tel état lorsqu'on en a déjà déposé un à l'égard de la même personne insolvable aux termes du paragraphe 50.4(2) —, appelé « l'état » au présent article, portant, projections au moins mensuelles à l'appui, sur l'évolution de l'encaisse de la personne insolvable, et signé par lui et par le syndic après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi et signé, en la forme prescrite, par le syndic;

c) un rapport contenant les observations — prescrites par les Règles générales — de l'auteur de la proposition relativement à l'établissement de l'état, établi et signé, en la forme prescrite, par celui-ci.

Copies de l'état

(7) Sous réserve du paragraphe (8), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(8) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable et que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(9) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable du préjudice ou des pertes subis par la personne qui s'y fie.

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor’s business and financial affairs are to be managed during the proceedings;

(c) whether the debtor’s management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor’s property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee’s report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Calling of meeting of creditors

51 **(1)** The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor’s books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

biens du débiteur au titre d’une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(5) Pour décider s’il rend l’ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l’égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d’une proposition viable à l’égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l’un ou l’autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

2005, ch. 47, art. 36; 2007, ch. 36, art. 18.

Convocation d’une assemblée des créanciers

51 **(1)** Le syndic convoque immédiatement une assemblée des créanciers — qui doit avoir lieu dans les vingt et un jours suivant le dépôt de la proposition auprès du séquestre officiel aux termes du paragraphe 62(1) — en adressant, de la manière prescrite, à chaque créancier connu et au séquestre officiel, au moins dix jours avant l’assemblée, les documents suivants :

a) un avis des date, heure et lieu de l’assemblée;

b) un état succinct des avoirs et obligations;

c) une liste des créanciers que vise la proposition, avec des réclamations se chiffrant à deux cent cinquante dollars ou plus, et des montants de leurs réclamations, connus ou indiqués aux livres du débiteur;

d) une copie de la proposition;

e) si elles n’ont pas déjà été envoyées, les formules prescrites — en blanc — devant servir à l’établissement d’une procuration, d’une preuve de réclamation ou, dans le cas d’un créancier garanti à qui la proposition a été faite, d’une preuve de réclamation garantie;

Security or charge relating to director’s indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct or, in Quebec, the director’s or officer’s gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee’s duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

Biens grevés d’une charge ou sûreté en faveur d’administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l’égard de laquelle a été déposé un avis d’intention aux termes de l’article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d’une charge ou sûreté, d’un montant qu’il estime indiqué, en faveur d’un ou de plusieurs de ses administrateurs ou dirigeants pour l’exécution des obligations qu’ils peuvent contracter en cette qualité après le dépôt de l’avis d’intention ou de la proposition.

Priorité

(2) Il peut préciser, dans l’ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s’il estime que la personne peut souscrire, à un coût qu’il estime juste, une assurance permettant d’indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l’ordonnance, que la charge ou sûreté ne vise pas les obligations que l’administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Biens grevés d’une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l’égard de laquelle a été déposé un avis d’intention aux termes de l’article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d’une charge ou sûreté, d’un montant qu’il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 65; 2004, c. 25, s. 35(F).

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement ou contribution par les créanciers doit stipuler que la réclamation de tout créancier qui décide de ne pas participer à la proposition sera évaluée par le tribunal et payée en espèces lors de l'approbation de la proposition.

L.R. (1985), ch. B-3, art. 65; 2004, ch. 25, art. 35(F).

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Limitation de certains droits

65.1 (1) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit de résilier ou de modifier un contrat — notamment de garantie — conclu avec cette personne ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif que la personne en question est insolvable ou qu'un avis d'intention ou une proposition a été déposé à son égard.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

Idem

(2) Lorsque le contrat visé au paragraphe (1) est un bail ou un accord de licence, l'interdiction prévue à ce paragraphe vaut également, avec les mêmes modalités, dans le cas où la personne insolvable n'a pas payé son loyer ou ses redevances, selon le cas, ou n'a pas effectué quelque

(d) the approval or deemed approval by the court of the consumer proposal operates to annul the bankruptcy and to revest in the consumer debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the consumer debtor, unless the terms of the consumer proposal otherwise provide.

1992, c. 27, s. 32; 1997, c. 12, s. 58.

PART IV

Property of the Bankrupt

Property of bankrupt

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;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a ***registered retirement savings plan***, a ***registered retirement income fund*** or a ***registered disability savings plan***, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the

c) le moment par rapport auquel les réclamations des créanciers sont déterminées est celui où le débiteur consommateur est devenu un failli;

d) l'approbation — effective ou présumée — de la proposition par le tribunal a pour effet d'annuler la faillite et de réattribuer au débiteur consommateur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition ne soient à l'effet contraire.

1992, ch. 27, art. 32; 1997, ch. 12, art. 58.

PARTIE IV

Biens du failli

Biens du failli

67 (1) 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;

b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situés et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;

b.1) dans les circonstances prescrites, les paiements qui sont faits au failli au titre de crédits de taxe sur les produits et services et qui ne sont pas des biens visés aux alinéas a) ou b);

b.2) dans les circonstances prescrites, les paiements prescrits qui sont faits au failli relativement aux besoins essentiels de personnes physiques et qui ne sont pas des biens visés aux alinéas a) ou b);

b.3) sans restreindre la portée générale de l'alinéa b), les biens détenus dans un ***régime enregistré d'épargne-retraite***, un ***fonds enregistré de revenu de retraite*** ou un ***régime enregistré d'épargne-invalidité***, au sens de la *Loi de l'impôt sur le revenu*, ou dans tout régime prescrit, à l'exception des cotisations aux régimes ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

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, y compris les remboursements qui lui sont dus

TAB 2

KeyCite treatment

Most Negative Treatment: Distinguished

Most Recent Distinguished: Canada v. Callidus Capital Corp. | 2015 FC 977, 2015 CF 977, 2015 CarswellNat 4410, 2015 CarswellNat 8223, [2015] G.S.T.C. 105, 28 C.B.R. (6th) 209, 5 P.P.S.A.C. (4th) 29, 13 E.T.R. (4th) 43, 257 A.C.W.S. (3d) 740 | (F.C., Sep 17, 2015)

2002 SCC 49
Supreme Court of Canada

First Vancouver Finance v. Minister of National Revenue

2002 CarswellSask 317, 2002 CarswellSask 318, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] 3 C.T.C. 285, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 2002 D.T.C. 6998 (Eng.), 2002 D.T.C. 7007 (Fr.), 212 D.L.R. (4th) 615, 288 N.R. 347, 45 C.B.R. (4th) 213, J.E. 2002-960, REJB 2002-28499

Her Majesty The Queen in Right of Canada, as represented by the Minister of National Revenue, Appellant v. First Vancouver Finance, Respondent and Great West Transport Ltd., Respondent [non-party]

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel JJ.

Heard: March 12, 2002
Judgment: May 23, 2002
Docket: 28062

Proceedings: additional reasons to [2002] G.S.T.C. 23 (S.C.C.); affirming [2000] 3 C.T.C. 93, [2000] 8 W.W.R. 386, 199 Sask. R. 9, 232 W.A.C. 9, [2001] G.S.T.C. 55 (Sask. C.A.); affirming [2000] 1 W.W.R. 713, [2000] 1 C.T.C. 99, 190 Sask. R. 286, [2001] G.S.T.C. 54 (Sask. Q.B.)

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Joel A. Hesje, *David M.A. Stack*, for Respondent, First Vancouver Finance

Subject: Income Tax (Federal); Insolvency; Goods and Services Tax (GST)

Related Abridgment Classifications

Tax

II Income tax
II.23 Administration and enforcement
II.23.i Collection of tax
II.23.i.ix Third party assessments

Tax

III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.13 Administration and enforcement
III.13.c Collection remedies
III.13.c.i Garnishment
III.13.c.i.A Validity of requirement to pay

Tax

III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.13 Administration and enforcement
III.13.c Collection remedies
III.13.c.i Garnishment
III.13.c.i.B Priority of requirement to pay

Royal Bank v. Sparrow Electric Corp., 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — considered

Royal Bank v. Tuxedo Transport Ltd., 1999 CarswellBC 612, 6 C.B.R. (4th) 285, [1999] 3 C.T.C. 393, 64 B.C.L.R. (3d) 158 (B.C. S.C. [In Chambers]) — referred to

Royal Bank v. Tuxedo Transport Ltd., 2000 BCCA 430, 2000 CarswellBC 1417, [2000] 3 C.T.C. 331, 2000 D.T.C. 6501, 79 B.C.L.R. (3d) 1, [2000] 9 W.W.R. 14, 18 C.B.R. (4th) 107, 190 D.L.R. (4th) 139, 140 B.C.A.C. 133, 229 W.A.C. 133 (B.C. C.A.) — followed

Statutes considered:

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

s. 317 [en. 1990, c. 45, s. 12(1)] — considered

s. 317(3) [en. 1990, c. 45, s. 12(1)] — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 153(1) — considered

s. 224 — considered

s. 224(1.2) — referred to

s. 227 — considered

s. 227(4) — considered

s. 227(4) [rep. & sub. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(5)(a) — considered

ADDITIONAL REASONS to judgment reported at 2002 CarswellSask 135, 2002 CarswellSask 136, [2002] G.S.T.C. 23, 219 Sask. R. 185, 272 W.A.C. 185 (S.C.C.), dismissing appeal by Minister of National Revenue from judgment which dismissed appeal and cross-appeal from determination of partnership's entitlement to funds received by Minister.

MOTIFS SUPPLÉMENTAIRES à l'arrêt publié à 2002 CarswellSask 135, 2002 CarswellSask 136, [2002] G.S.T.C. 23, 219 Sask. R. 185, 272 W.A.C. 185 (S.C.C.), qui a rejeté le pourvoi du ministre du Revenu national à l'encontre de l'arrêt qui avait rejeté le pourvoi et le pourvoi incident interjetés contre la décision que la société avait droit aux fonds perçus par le ministre.

***Iacobucci J.*:**

I. Introduction

1 This appeal concerns the interpretation of the deemed trust provisions in ss. 227(4) and 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"). At the hearing of this appeal, the Court dismissed the appeal with reasons to follow. The dispute is over certain property which came into the hands of the tax debtor after a deemed trust under s. 227(4.1) arose. The property was subsequently sold to a third party, after which time the Minister of National Revenue ("Minister") asserted an interest in the property on the basis that it continued to be subject to the deemed trust even after its sale.

2 As a result, the two specific issues to be resolved on this appeal are, first, whether property which comes into the tax debtor's hands after the deemed trust arises is subject to the trust, and, second, if so, whether the sale of trust property to third parties serves to release this property from the ambit of the trust.

3 Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

4 For the reasons set forth below, I find that the s. 227(4.1) deemed trust is similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty. The trust arises the moment the tax debtor fails to remit source deductions by the specified due date, but is deemed to have been in existence from the moment the deductions were made. As long as the tax debtor continues to be in default, the trust continues to float over the tax debtor's property. Thus, at any given point in time, whatever property then belonging to the tax debtor is subject to the deemed trust.

5 Viewed in this way, it is clear that, as property comes into possession of the tax debtor, it is caught by the trust and becomes subject to Her Majesty's interest. Similarly, property which the tax debtor disposes of is thereby released from the deemed trust. This mutuality of treatment between incoming and outgoing property relating to the deemed trust is supported by both the plain language of the provisions as well as their purpose and intent. Most importantly, Her Majesty's interest in the tax debtor's property is protected because, while property which is sold to third party purchasers is released from the trust, at the same time, the proceeds of disposition of the alienated property are captured by the trust. Moreover, commercial certainty is promoted owing to the fact that third party purchasers are free to transact with tax debtors or suspected tax debtors without fearing that Her Majesty may subsequently assert an interest in the property so acquired.

6 Accordingly, I would dismiss the appeal on the basis that, although the property acquired by the tax debtor after the deemed trust arose became subject to the trust, when this property was sold to a third party, it was thereby released from the ambit of the deemed trust. As such, after the sale, Her Majesty could no longer assert an interest in the property.

II. Facts

7 The respondent, First Vancouver Finance ("First Vancouver"), is engaged in the business of factoring accounts receivable. Great West Transport Ltd. ("Great West") is in the transportation business. On November 6, 1997, First Vancouver and Great West entered into a factoring agreement providing for the purchase by First Vancouver of Great West's accounts receivable at a discount. Pursuant to the agreement, First Vancouver became the owner of certain debts due to Great West.

8 Under the terms of the factoring agreement, First Vancouver purchased accounts through assignments entered into from time to time at Great West's option. First Vancouver did not purchase an individual account until it was submitted for approval, and it was not bound to purchase it up to that point. After purchase, the Great West invoices were forwarded to Great West's debtors, along with notification that the account had been sold and that subsequent payments should be made directly to First Vancouver. Among the accounts purchased were several owing by Canada Safeway Limited or its associated undertakings ("Canada Safeway").

9 As of the date of the factoring agreement, Great West owed money to the Minister because of unremitted payroll deductions and goods and services tax ("GST"). First Vancouver was aware from the time it began dealing with Great West in November of 1997 that Great West was in arrears in respect of its payroll deductions and GST accounts. First Vancouver had, as of November 10, 1997, made arrangements with the Minister to forward part of the purchase price of the accounts, in the form of bimonthly payments of $10,000, to the Minister which were to be applied to the arrears of Great West then outstanding. In addition, Great West remained directly responsible to the Minister for its ongoing payroll deductions and GST remittances as they became due.

While First Vancouver regularly made payments pursuant to its arrangement with the Minister, Great West failed to meet its ongoing tax obligations.

10 In January and February of 1999, Great West made 10 individual assignments to First Vancouver, relating to accounts receivable payable by Canada Safeway and its associated undertakings. On February 10, 1999, the Minister served Canada Safeway with Enhanced Requirement to Pay Notices ("RTP's"), as authorized by s. 224(1.2) of the *ITA* and s. 317(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended. In response, Canada Safeway made payments totalling $187,444.66 to the Minister relating to accounts which Great West had assigned to First Vancouver between January 4 and February 17, 1999. Two of the sets of Canada Safeway accounts, totalling $31,086.43, were assigned to First Vancouver on February 11 and February 17, 1999, after the RTP's had been issued. However, the remainder of the accounts had already been assigned to First Vancouver before February 10, 1999 when the RTP's were issued. At no time prior to the payments from Canada Safeway to the Minister did First Vancouver receive any notice that the Minister was claiming an interest in any Great West accounts purchased by First Vancouver.

11 In response to the Minister's actions, First Vancouver brought an application in the Saskatchewan Court of Queen's Bench to recover the amounts paid by Canada Safeway to the Minister pursuant to the RTP's.

12 Wimmer J. of the Court of Queen's Bench held that the monies owing on accounts factored prior to February 10, 1999, the date upon which Canada Safeway was served with the RTP's, were not subject to garnishment or to the deemed trust provisions of the *ITA*, or to any claim pursuant to the *Excise Tax Act*, and therefore that First Vancouver was entitled to these amounts. However, he held that the RTP's had captured the two accounts assigned after the RTP's were issued ("post-RTP accounts").

13 On appeal, the Saskatchewan Court of Appeal dismissed the appeal of the Minister and the cross-appeal of First Vancouver on the issue of the post-RTP accounts.

III. Relevant Statutory Provisions

14 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

> **227.** (4) **Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

IV. Judgments Below

A. Saskatchewan Court of Queen's Bench(1999), [2000] 1 W.W.R. 713, [2001] G.S.T.C. 54 (Sask. Q.B.)

15 On the preliminary issue of the ownership of the factored accounts, Wimmer J. relied upon the definition of a factoring agreement from *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963, [1996] G.S.T.C. 17 (S.C.C.), at pp. 985-86. In that case, Cory J. stated at para. 31 that, "A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration."

16 Wimmer J. observed that, according to *Canada Trustco Mortgage Corp.*, an absolute and unconditional assignment of book debts is beyond the reach of the Minister under garnishment provisions. He held further that the assignments from Great West to First Vancouver were absolute and unconditional because, upon completion of the assignments, Great West had no residual rights in the property and could not redeem or recover the accounts and, in that circumstance, Canada Safeway had no liability to Great West after there was a completed transfer of accounts. Although the Minister argued that the assignments were not absolute because under the factoring agreement First Vancouver had recourse to Great West if a customer disputed or failed to pay an account, Wimmer J. noted that the definition of factoring approved by Cory J. contemplated that a factor may acquire an absolute interest in book debts with or without recourse.

17 As a result, monies owing on accounts factored prior to February 10, 1999, the date upon which Canada Safeway was served with the RTP's, were not subject to garnishment under s. 224 of the *ITA* or s. 317 of the *Excise Tax Act*. However, the two accounts factored after February 10 were effectively intercepted by the RTP.

18 With respect to the deemed trust under s. 227(4.1) of the *ITA*, Wimmer J. applied the reasoning of Burnyeat J. of the British Columbia Supreme Court in *Royal Bank v. Tuxedo Transport Ltd.* (1999), 6 C.B.R. (4th) 285 (B.C. S.C. [In Chambers]). Since the Canada Safeway invoices came into existence after the Great West payroll deduction delinquencies arose and were assessed, the invoices were "after-acquired property" not subject to a s. 227(4.1) deemed trust in favour of Her Majesty. Wimmer J. acknowledged that *Tuxedo Transport Ltd.* was under appeal. However, he stated that, since the judgment came from a court of comparable jurisdiction, and as he was not satisfied it was wrong, he was prepared to follow that decision.

19 As a result, Wimmer J. held that amounts owing on accounts factored prior to February 10, 1999, the date upon which the Minister served Canada Safeway with the RTP's, were not subject to garnishment or to a deemed trust pursuant to ss. 224 and 227 of the *ITA*, or to any claim pursuant to s. 317 of the *Excise Tax Act*. Consequently, a declaration was made confirming First Vancouver's entitlement to the funds already paid by Canada Safeway to the Minister, with the exception of the funds covered by the two Canada Safeway accounts factored after February 10, 1999, along with costs.

B. Saskatchewan Court of Appeal, [2000] 8 W.W.R. 386, [2001] G.S.T.C. 55 (Sask. C.A.)

20 In a very brief oral decision, the Saskatchewan Court of Appeal dismissed the Minister's appeal, and First Vancouver's cross-appeal, both with costs, finding that the trial judge had not erred in the interpretation of the relevant statutory provisions or in the application of those provisions to the facts of the case.

V. Issues

21

> A. Is property acquired by an employer after a default in remitting payroll deductions ("after-acquired property") subject to the deemed trust in s. 227(4.1) of the *ITA*?
>
> B. Does the deemed trust under s. 227(4.1) continue to attach to property which has been sold by the tax debtor to a third party purchaser for value?

VI. Analysis

A. General Scheme and Background of the Section 227(4.1) Deemed Trust

22 The collection of source deductions has been recognized as "at the heart" of income tax collection in Canada: see *Pembina on the Red Development Corp. v. Triman Industries Ltd.* (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 51, *per* Lyon J.A. (dissenting), quoted with approval by Gonthier J. (dissenting on another issue) in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), at para. 36. Because of the importance of collecting source deductions, the legislation in question gives the Minister the vehicle of the deemed trust to recover employee tax deductions which employers fail to remit to the Minister.

23 It has also been noted that, in contrast to a tax debtor's bank which is familiar with the tax debtor's business and finances, the Minister does not have the same level of knowledge of the tax debtor or its creditors, and cannot structure its affairs with the tax debtor accordingly. Thus, as an "involuntary creditor", the Minister must rely on its ability to collect source deductions under the *ITA*: *Pembina on the Red Development Corp.*, *supra*, at pp. 33-34, *per* Scott C.J.M., approved by Cory J. in *Canada Trustco Mortgage Corp.*, *supra*, at paras. 16-18. For the above reasons, under the terms of the *ITA*, the Minister has been given special priority over other creditors to collect unremitted taxes.

24 This Court had occasion to interpret the deemed trust provisions in *Sparrow Electric Corp.*, *supra*. At that time, the relevant provisions were ss. 227(4) and 227(5) of the *ITA* which read as follows:

> (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> > (*a*) deemed by subsection (4) to be held in trust for Her Majesty, ...
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

25 In *Sparrow Electric Corp.*, both Royal Bank and the Minister claimed an interest in the proceeds of inventory of the tax debtor. In characterizing the nature of the deemed trust provisions, Gonthier J. (dissenting, but not on this issue) stated at para. 34 that, even if collateral was subject to a fixed charge at the time of a triggering event such as bankruptcy or liquidation, the deemed trust operated to attach the Minister's interest to such collateral as long as it was not subject to the fixed charge at the time the source deductions were made:

> Thus, s. 227(5) [now 227(4.1)] alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached <u>after</u> the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. [Emphasis in original.]

Royal Bank's interest was characterized as a fixed and specific charge over the inventory of the tax debtor. This had the effect of making the bank the legal owner of inventory as it came into possession of the tax debtor, subject to the debtor's equitable right of redemption. The majority of the Court concluded that, since the inventory was subject to the bank's security interest before the deductions giving rise to the deemed trust occurred, the bank's interest attached to the inventory in priority to Her Majesty's interest under the deemed trust.

26 However, in reaching this conclusion, the majority of the Court noted at para. 112 that Parliament was free to grant absolute priority to the deemed trust by adopting the appropriate language:

> Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind.

27 In response to *Sparrow Electric Corp.*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest ... in the amount so deducted, or withheld" were added to s. 227(4). As well, s. 227(4.1) [formerly s. 227(5)] expanded the scope of the deemed trust to include "property held by any secured creditor ... that but for a security interest ... would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured creditors to be held in trust "at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act". Finally, s. 227(4.1) now explicitly deems the trust to operate "from the time the amount was deducted or withheld".

28 It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words "notwithstanding any security interest" in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric Corp.*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.

29 As noted above, Parliament has also amended the deemed trust provisions in regard to the timing of the trust. Reference to events triggering operation of the deemed trust such as liquidation or bankruptcy have been removed. Section 227(4.1) now states that the deemed trust begins to operate "*at any time* [source deductions are] ... not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Thus, the deemed trust is now triggered at the moment a default in remitting source deductions occurs. Further, pursuant to s. 227(4.1)(*a*), the trust is deemed to be in effect "from the time the amount was deducted or withheld". Thus, while a default in remitting source deductions triggers the operation of the trust, the trust is deemed to have been in existence retroactively to the time the source deductions were made. It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.

30 In light of this overview of the context and operation of the s. 227(4.1) deemed trust, it remains to be determined, first, whether the trust captures property that the tax debtor acquires after the trust is deemed to come into existence, and, second, whether the sale by the tax debtor of trust property effectively releases such property from the purview of the deemed trust.

B. Does the Deemed Trust Attach to After-Acquired Property of the Tax Debtor?

31 As noted above, in coming to the conclusion that the deemed trust did not attach to after-acquired property of the tax debtor, the courts below relied on the B.C. Supreme Court decision in *Tuxedo Transport Ltd.*, *supra*. That decision has since been overturned by the B.C. Court of Appeal: *Royal Bank v. Tuxedo Transport Ltd.* (2000), 79 B.C.L.R. (3d) 1 (B.C. C.A.). In that case, Donald J.A., speaking for the court, characterized the trust as follows, at para. 11:

> Subsection 227(4) makes the trust operative at the time of the deductions. Subsection 227(4.1) acts to ensure that if deductions are still unpaid when assets come into the hands of the taxpayer, those assets will be deemed to be part of the trust. Beginning with the date the deductions are made the trust continues forward in time and attaches to any property of the debtor as it comes into existence. (at para. 11).

The Court of Appeal based this conclusion on the plain meaning of the language used in the statute, and was bolstered by its view that, to hold otherwise, would lead to "unacceptable results" (at para. 15), such as the following:

> Take the example of a company that makes a payroll deduction one day and receives a large payment the next. The company could carry on business using the unremitted deductions for its operating expenses and the deemed trust could not attach to the monies received shortly after the payday.

32 I am in essential agreement with the view taken by the B.C. Court of Appeal in *Tuxedo Transport Ltd.* In my view, the plain language of the provisions leads to the inevitable conclusion that the deemed trust attaches to after-acquired property. Most notably, s. 227(4.1) refers expressly to the "proceeds" of property which is subject to the trust and directs that "the proceeds of such property shall be paid to the Receiver General in priority to all ... security interests [in the property]". In addition, the section states that where, at any time, the debtor is in default to the Minister, that "property of the person ... *equal in value to the amount so deemed to be held in trust* is deemed" to be held in trust for Her Majesty (emphasis added). This language implies that Parliament has contemplated a fluidity with respect to the assets of the debtor to which the trust attaches. In particular, reference to the "proceeds" of trust property is an explicit indication that property acquired through the disposition of trust property by the tax debtor after the trust arises is included within the ambit of the trust.

33 I find additional support for this view in the fact that s. 227(4.1) deems the trust to be in effect "*at any time* [source deductions are] not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Further, in the event of default, the trust extends back "from the time the amount was deducted or withheld by the person". These words indicate that the intent of the section is to allow the trust to operate in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction. The language Parliament has chosen belies the suggestion that the deemed trust only captures property of the tax debtor in existence at some particular moment in time.

34 I find no contradiction in coming to the conclusion that after-acquired property can be subject to the trust even though the trust reaches back in time to a point before the acquisition of the property by the tax debtor. This is because the property so acquired will presumably have been taken in exchange for property of equal value which the debtor has disposed of. Thus, the acquired property can simply be viewed as replacing the initial subject matter of the trust. Moreover, since the trust is a deemed statutory trust, it is not governed by common law requirements, and, in this regard, the ongoing acquisition of trust property does not present a conceptual difficulty. I emphasize that it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law.

35 In addition to being supported by the clear wording of the provisions, this view accords with the purpose of the s. 227(4.1) deemed trust. In this respect, I agree with the B.C. Court of Appeal that Parliament could not have intended an employer who is in default one day and comes into a significant payment the next to thereby largely escape the operation of the deemed trust and continue to use the misappropriated funds in its business dealings. This would not accord with the Parliamentary intention to grant broad powers of collection to the Minister under the deemed trust.

36 As well, if the deemed trust were limited to property held by the employer at the time of the default, the Minister would have difficulty establishing that any particular part of the employer's property was subject to the deemed trust, and would be forced to engage in a significant degree of tracing. However, as noted by Gonthier J. in *Sparrow Electric Corp.*, at para. 37, one of the purposes of the deemed trust is to eliminate the need for tracing:

> After considering the matter, it is my view that it is not accurate to describe the mechanism of s. 227(5) as a means of "tracing"; indeed, it would seem that this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into. ... [Emphasis added.]

37 This observation holds true despite the subsequent amendments to the deemed trust provisions. As with the previous enactment of the section, s. 227(4.1) refers to property "*equal in value* to the amount so deemed to be held in trust" (emphasis added), and states that this property is subject to the trust "whether or not the property has in fact been kept separate and apart". Indeed, if anything, by deeming the trust to be effective "at any time" the debtor is in default, the amendments serve to strengthen

the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made. In this regard, the remarks of Gonthier J. in *Sparrow Electric Corp.*, at para. 31, are apposite:

> The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust. ... However, s. 227(5) [now s. 227(4.1)] has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat, supra*, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her". [Emphasis added.]

The reasoning adopted by the courts below would require substantial tracing, as the deemed trust would be restricted to include only property held by the tax debtor on the date the source deductions were made. With respect, this is not in accord with the language or purpose of the deemed trust.

38 In conclusion, based on the plain language of ss. 227(4) and 227(4.1) as supported by the purpose of the provisions and intentions of Parliament, the deemed trust created by these sections encompasses property which comes into the hands of the tax debtor after the trust arises. As a result, when Great West came into possession of the Canada Safeway invoices, the deemed trust, which had already arisen as a consequence of Great West's default in remittances, successfully attached to those invoices.

C. Does the Deemed Trust Continue to Operate on Property Which Has Been Sold by the Tax Debtor to Third Parties?

39 As a preliminary matter, I note that the Minister does not take issue with the chambers judge's holding, following *Canada Trustco Mortgage Corp.*, *supra*, that First Vancouver is not a secured creditor of Great West, but a third party purchaser of book debts. Thus, the question of the priority of secured creditors does not arise. The issue here is whether the alienation by Great West of the Canada Safeway invoices, which were subject to the deemed trust under ss. 227(4) and 227(4.1), served to release that property from the scope of the trust.

40 In my view, the scheme envisioned by Parliament in enacting ss. 227(4) and 227(4.1) is that the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default. As noted above, the trust has priority from the time the source deductions are made, and remains in existence as long as the default continues. However, the trust does not attach specifically to any particular assets of the tax debtor so as to prevent their sale. As such, the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property.

41 This interpretation finds support in both the words used in ss. 227(4) and 227(4.1) and the purpose of the deemed trust. In my opinion, s. 227(4.1) explicitly restricts the trust to property owned by the tax debtor by stating that the property of the tax debtor held in trust for Her Majesty "is property beneficially owned by Her Majesty ... and *the proceeds of such property* shall be paid to the Receiver General" (emphasis added). This reference to the proceeds of trust property is an acknowledgment in the very words of the *ITA* that Parliament contemplated that a tax debtor is free to alienate its property and that, when it does so, the trust releases the disposed-of property and attaches to the proceeds of sale. In addition, as discussed above, the trust does not attach to any specific property. Instead, by s. 227(4.1), the trust attaches to "property of the [tax debtor] ... equal in value to the amount [of the tax debt]". This language indicates, first, that the subject matter of the trust is focussed solely on the tax debtor's property, and, second, that it is anticipated that the character of the tax debtor's property will change over time.

42 Indeed, it is the logical corollary to my conclusion on the first issue, namely that the deemed trust attaches to after-acquired property of the tax debtor, that the trust also releases property alienated by the tax debtor. In this way, when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset; however, the property received by the tax debtor in exchange becomes subject to the deemed trust. As such, the trust is neither depleted nor enhanced; it simply floats over the property belonging to the tax debtor at any given time, for as long as the default in remittances continues.

43 Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the *ITA*. It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227(4.1) whereas secured creditors are. In *Pembina on the Red Development Corp.*, *supra*, Twaddle J.A. took note

of the "long-established principle of law that, in the absence of clear language to the contrary, a tax on one person cannot be collected out of property belonging to another" (p. 46). In *Sparrow Electric Corp.*, *supra*, at para. 39, Gonthier J. also referred to this principle, stating that:

> [T]his provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Section 227(4) and (5) are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) [now s. 227(4.1)] to permit the expropriation of the property of third parties who are not specifically mentioned in the statute. [Emphasis added.]

Thus, in the absence of an express reference to third party purchasers, there is no basis upon which to allow the Minister's interest in the tax debtor's property to continue once such property has been sold to third parties.

44 Although it is not necessary to resort to policy arguments, in my view it is worthwhile noting that to allow s. 227(4.1) to override the rights of purchasers for value would result in an unprecedented level of uncertainty. In fact, in oral argument counsel for the Minister conceded that such an interpretation would, in theory, allow the Minister to go so far as to assert an interest in assets sold by tax debtors to ordinary consumers. In my view, it is no exaggeration to say that adopting this interpretation of the deemed trust would have a general chilling effect on commercial transactions.

45 Furthermore, to allow the deemed trust to attach to property sold to third parties would be more likely to hinder, rather than help, the Minister's collection efforts. For example, in the case at bar, if First Vancouver had thought that it could not purchase Great West's assets free and clear of Her Majesty's claim, it would have been unlikely to have entered into the factoring agreement with Great West. As a result, Her Majesty would not have received the bimonthly payments of $10,000 from First Vancouver. More generally, the interpretation advocated by the Minister would likely frustrate the ability of a tax debtor to convert hard assets into cash in order to pay "the proceeds of such property ... to the Receiver General" as contemplated by s. 227(4.1), because prospective purchasers would fear that the Minister would assert an interest in these assets. The practical effect of this would be to freeze the tax debtor's assets and prevent it from carrying on business. In my view, this is clearly not a result intended by Parliament.

46 In summary, the deemed trust does not operate over assets which a tax debtor has sold in the ordinary course to third party purchasers. As such, once the Canada Safeway invoices had been factored to First Vancouver, the Minister was prevented from asserting its interest in these invoices.

VII. Conclusion

47 For the foregoing reasons, I would dismiss the appeal with costs.

Order accordingly.

Ordonnance en conséquence.

TAB 3

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Law Society of Upper Canada v. Mazzucco | 2009 CarswellOnt 200, 174 A.C.W.S. (3d) 1193, [2009] O.J. No. 193 | (Ont. S.C.J., Jan 19, 2009)

2005 CarswellOnt 7008
Ontario Court of Appeal

Graphicshoppe Ltd., Re

2005 CarswellOnt 7008, 2005 C.E.B. & P.G.R. 8178 (headnote only), [2005] O.J. No. 5184, 144 A.C.W.S. (3d) 355, 15 C.B.R. (5th) 207, 205 O.A.C. 113, 21 E.T.R. (3d) 1, 260 D.L.R. (4th) 713, 49 C.C.P.B. 63, 78 O.R. (3d) 401

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF THE BANKRUPTCY OF THE GRAPHICSHOPPE LIMITED, OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Moldaver, Armstrong, Juriansz JJ.A.

Heard: June 16, 17, 2005
Judgment: December 5, 2005 *
Docket: CA C42864, M32603

Proceedings: reversing *Graphicshoppe Ltd., Re* (2004), 2004 CarswellOnt 5430, C.E.B. & P.G.R. 8132, 6 C.B.R. (5th) 176, 43 C.C.P.B. 243, 74 O.R. (3d) 121 (Ont. S.C.J.)

Counsel: Harvey Chaiton, George Benchetrit for Appellant
Andrew Hatnay, Clio Godkewitsch for Respondents

Subject: Corporate and Commercial; Estates and Trusts; Insolvency; Civil Practice and Procedure; Property
Related Abridgment Classifications
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Pension plan that G Ltd. provided for its employees was defined contribution plan administered by insurer L — Employees contributed four per cent of their wages and G Ltd. contributed amount equal to one per cent — G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to L within thirty days of month end — In months preceding bankruptcy, G Ltd. failed to remit $92,889.45 of moneys that it had deducted from its 102 employees' pay — G Ltd. had one bank account that it used for all purposes — Employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account — Employees filed proof of claim for $92,889.45 with trustee in bankruptcy, relying on s. 67(1)(a) of Bankruptcy and Insolvency Act ("BIA") — Trustee disallowed employees' claim on basis that employees must be able to trace their money into property in possession of bankrupt on date of bankruptcy — Because G

Ltd. had converted trust moneys to other property or spent it on running its business, trust was destroyed and money in account on date of bankruptcy was not trust money — Employees successfully appealed to Registrar in Bankruptcy — Trustee's appeal of registrar's decision to Superior Court of Justice was dismissed — Trustee appealed to Court of Appeal — Appeal allowed — Trustee in bankruptcy correctly determined that employee contributions did not constitute trust funds under s. 67(1)(a) BIA — G Ltd. held its employee' pension contributions in trust when it deducted them from their pay — At that moment, trust property was identifiable and trust met requirements for trust under established principles of trust law — Shortly thereafter, however, trust property ceased to be identifiable — As of date of bankruptcy, none of employee contributions that had been deposited into G Ltd.'s bank account remained intact — Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

Estates and trusts --- Trusts — General principles — Nature of trust

Pension plan that G Ltd. provided for its employees was defined contribution plan administered by insurer L — Employees contributed four per cent of their wages and G Ltd. contributed amount equal to one per cent — G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to L within thirty days of month end — In months preceding bankruptcy, G Ltd. failed to remit $92,889.45 of moneys that it had deducted from its 102 employees' pay — G Ltd. had one bank account that it used for all purposes — Employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account — Employees filed proof of claim for $92,889.45 with trustee in bankruptcy, relying on s. 67(1)(a) of Bankruptcy and Insolvency Act ("BIA") — Trustee disallowed employees' claim on basis that employees must be able to trace their money into property in possession of bankrupt on date of bankruptcy — Because G Ltd. had converted trust moneys to other property or spent it on running its business, trust was destroyed and money in account on date of bankruptcy was not trust money — Employees successfully appealed to Registrar in Bankruptcy — Trustee's appeal of registrar's decision to Superior Court of Justice was dismissed — Trustee appealed to Court of Appeal — Appeal allowed — Trustee in bankruptcy correctly determined that employee contributions did not constitute trust funds under s. 67(1)(a) BIA — G Ltd. held its employees' pension contributions in trust when it deducted them from their pay — At that moment, trust property was identifiable and trust met requirements for trust under established principles of trust law — Shortly thereafter, however, trust property ceased to be identifiable — As of date of bankruptcy, none of employee contributions that had been deposited into G Ltd.'s bank account remained intact — Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

The pension plan that G Ltd. provided for its employees was a defined contribution plan administered by insurer L. The employees contributed four per cent of their wages and G Ltd. contributed an amount equal to one per cent. G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to the plan administrator within thirty days of the month end. In the months preceding bankruptcy, G Ltd. failed to do so: between February 2003 and the date of bankruptcy, November 20, 2003, G Ltd. failed to remit $92,889.45 of the moneys that it had deducted from its 102 employees' pay. G Ltd. had one bank account that it used for all purposes. The employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account. As G Ltd. continued to carry on business, the bank account balance fluctuated and, at one point, became negative. On the date of bankruptcy, however, there was $145,667.51 in the account. The closing balance resulted from transfers from T Ltd., which was factoring G Ltd.'s receivables. The employees filed a proof of claim for $92,889.45 with the trustee in bankruptcy. They relied on s. 67(1)(a) of the Bankruptcy and Insolvency Act ("BIA"), which provides that the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person. The trustee disallowed the employees' claim on the basis that the employees must be able to trace their money into property in the possession of the bankrupt on the date of bankruptcy. Because G Ltd. had converted the trust moneys to other property or spent it on running its business, the trust was destroyed and the money in the account on the date of bankruptcy was not trust money. The employees successfully appealed to Registrar in Bankruptcy. The trustee's appeal of the registrar's decision to the Superior Court of Justice was dismissed. The trustee appealed to the Court of Appeal.

Held: The appeal was allowed.

Per Moldaver J.A. (Armstrong J.A. concurring): The trustee in bankruptcy correctly determined that the employee contributions did not constitute trust funds under s. 67(1)(a) BIA. G Ltd. held its employees' pension contributions in trust when it deducted them from their pay. At that moment, the trust property was identifiable and the trust met the requirements for a trust under established principles of trust law. Shortly thereafter, however, the trust property ceased to be identifiable. The employee contributions were commingled with G Ltd.'s funds and, prior to the date of bankruptcy, they were converted into other property and were no longer traceable. As of the date of bankruptcy, none of the employee contributions that had been deposited into G Ltd.'s bank account remained intact. Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

Per Juriansz J.A. (dissenting): Under traditional principles of trust law, commingling the trust property with other assets does not destroy the trust. It simply affects whether proprietary as opposed to personal relief is available. In this case, there was no doubt that the pension contributions were the employees' money, and it was conceded that G Ltd. held that money in trust upon deducting it from the employees' pay. The commingling of the employees' money with its own in one bank account did not destroy the trust. It was open for the Superior Court of Justice to not apply the lowest intermediate balance rule and to find that the employees were entitled to reclaim their contributions in the amount of $92,899.45.

Annotation

In a result which even the majority conceded to be "harsh", the Ontario Court of Appeal has overturned the decision below which had applied the "deemed trust" rules in the Ontario *Pension Benefits Act* to extricate unremitted employee pension plan contributions from the bankrupt employer's estate. Many commercial insolvency lawyers had considered the earlier decision to be simply wrong in law, and indeed the majority's reasons for judgment at the Court of Appeal are much more consistent with well-established precedents like the Supreme Court of Canada's *Henfrey Samson* decision. That being said, the fact that this case involved EMPLOYEE contributions as opposed to EMPLOYER contributions makes this result all but impossible to justify to the man on the street. Recent amendments to the *Bankruptcy and Insolvency Act*, which will give special priority to employee pension plan contributions, will likely go a long way to limiting the effect of this decision on future insolvencies.

Gary Nachshen

Table of Authorities

Cases considered by *Juriansz J.A.*:

Anderson & Co., Re (1923), 4 C.B.R. 288, 25 O.W.N. 257, 1923 CarswellOnt 74 (Ont. S.C.) — referred to

Becker v. Pettkus (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — referred to

Bethlehem Steel Corp. v. Tidwell (1986), 66 B.R. 932 (U.S. Dist. Ct.) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — considered

Bryant Isard & Co., Re (1923), 4 C.B.R. 41, 24 O.W.N. 597, 1923 CarswellOnt 35 (Ont. S.C.) — considered

Bryant Isard & Co., Re (1925), 5 C.B.R. 393, [1925] 1 D.L.R. 847, 1925 CarswellOnt 3 (Ont. S.C.) — considered

Capra v. Grobstein (1929), 49 B.R. 495, 11 C.B.R. 250, 1929 CarswellQue 19 (C.A. Que.) — referred to

Clayton's Case, Re (1816), 35 E.R. 781, 1 Mer. 572, [1814-23] All E.R. Rep. 1 (Eng. Ch. Div.) — considered

Conrad, Re (1963), 6 C.B.R. (N.S.) 275, 1963 CarswellQue 58 (C.S. Que.) — referred to

Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustee of) v. Caisse populaire de Black-Lake (1986), 64 C.B.R. (N.S.) 156, 1986 CarswellQue 37 (C.S. Que.) — referred to

Cynar Dry Co., Re (2005), 2005 CarswellOnt 63, 8 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Diplock v. Wintle (1948), (sub nom. *Diplock, Re*) [1948] 2 All E.R. 318, [1948] 1 Ch. 465 (Eng. C.A.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, (sub nom. *TCT Logistics Inc. (Bankrupt), Re*) 194 O.A.C. 360 (Ont. C.A.) — considered

H. O. Kirkham & Co., Re (1938), 20 C.B.R. 223, [1939] 1 W.W.R. 425, 53 B.C.R. 278, 1938 CarswellBC 3 (B.C. S.C.) — referred to

Hallett's Estate, Re (1880), 13 Ch. D. 696, [1874-1880] All E.R. Rep. 793 (Eng. C.A.) — considered

Law Society of Upper Canada v. Toronto Dominion Bank (1998), 1998 CarswellOnt 4757, 169 D.L.R. (4th) 353, 116 O.A.C. 24, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) — considered

Lupton v. White (1808), 33 E.R. 817, 15 Ves. Jun. 432 — considered

Murdoch v. Murdoch (1973), [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423, 1973 CarswellAlta 156, 1973 CarswellAlta 119 (S.C.C.) — referred to

Nierenberg, Re (1979), 30 C.B.R. (N.S.) 267, 1979 CarswellOnt 211 (Ont. Bktcy.) — considered

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29, 1986 CarswellOnt 158 (Ont. C.A.) — considered

Ontario (Securities Commission) v. Greymac Credit Corp. (1988), 31 E.T.R. 1, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.)*) [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767, 29 O.A.C. 217, 87 N.R. 341, 65 O.R. (2d) 479, 1988 CarswellOnt 597, 1988 CarswellOnt 964 (S.C.C.) — referred to

Owen, Re (1985), (sub nom. *Burlingham v. First City Trust Co.*) 38 Sask. R. 104, 55 C.B.R. (N.S.) 161, 1985 CarswellSask 54 (Sask. Q.B.) — referred to

Plourde, Re (1979), 31 C.B.R. (N.S.) 308, 1979 CarswellQue 73 (C.A. Que.) — referred to

Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd. (1999), 1999 CarswellSask 435, 11 C.B.R. (4th) 107, (sub nom. *Pratchler Agro Services Inc. (Bankrupt) v. Cargill Ltd.*) 183 Sask. R. 157 (Sask. Q.B.) — referred to

Rathwell v. Rathwell (1978), [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 1978 CarswellSask 36, 1978 CarswellSask 129 (S.C.C.) — referred to

Reed v. Franco (1980), [1980] C.S. 391, 35 C.B.R. (N.S.) 149, 1980 CarswellQue 54 (C.S. Que.) — referred to

Reed v. Franco (1983), 49 C.B.R. (N.S.) 21, 1983 CarswellQue 41 (C.A. Que.) — referred to

Soucier, Re (1939), 20 C.B.R. 298, 1939 CarswellNB 1 (N.B. S.C.) — referred to

Tlustie, Re (1923), 3 C.B.R. 654, 23 O.W.N. 622, 1923 CarswellOnt 12 (Ont. S.C.) — considered

Ward-Price v. Mariners Haven Inc. (2001), 2001 CarswellOnt 1514, 199 D.L.R. (4th) 68, 42 R.P.R. (3d) 39, 57 O.R. (3d) 410, 159 O.A.C. 117 (Ont. C.A.) — considered

Cases considered by *Moldaver J.A.*:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — followed

Law Society of Upper Canada v. Toronto Dominion Bank (1998), 1998 CarswellOnt 4757, 169 D.L.R. (4th) 353, 116 O.A.C. 24, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) — distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29, 1986 CarswellOnt 158 (Ont. C.A.) — distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1988), 31 E.T.R. 1, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.)*) [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767, 29 O.A.C. 217, 87 N.R. 341, 65 O.R. (2d) 479, 1988 CarswellOnt 597, 1988 CarswellOnt 964 (S.C.C.) — referred to

Statutes considered by *Juriansz J.A.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 30 — referred to

s. 30(1)(d) — referred to

s. 67 — referred to

s. 67(1)(a) — considered

s. 136 — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Social Service Tax Act, R.S.B.C. 1979, c. 388

s. 18(1) — referred to

s. 18(2) — referred to

Statutes considered by *Moldaver J.A.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 67(1)(a) — considered

APPEAL by trustee in bankruptcy from judgment reported at *Graphicshoppe Ltd., Re* (2004), 2004 CarswellOnt 5430, C.E.B. & P.G.R. 8132, 6 C.B.R. (5th) 176, 43 C.C.P.B. 243, 74 O.R. (3d) 121 (Ont. S.C.J.) with respect to application of s. 67(1)(a) of *Bankruptcy and Insolvency Act*.

***Juriansz J.A.* (dissenting):**

1 This is an appeal by the Trustee in Bankruptcy ("Trustee") of Graphicshoppe Limited ("Graphicshoppe") from the judgment of Lax J. dated December 23, 2004. The question raised is whether former Graphicshoppe employees can recover their pension contributions that Graphicshoppe commingled with its own funds in a single bank account prior to its bankruptcy. The Trustee concedes that Graphicshoppe held the pension contributions as trustee when it deducted the pension contributions from the employees' pay. Lax J. dismissed the Trustee's appeal from the decision of the Registrar in Bankruptcy and allowed the employees to recover their pension contributions.

2 I would dismiss the appeal. I conclude that the employees are able to trace their pension contributions to the account and, in the circumstances, this provided a basis for Lax J. to allow the employees to assert a trust interest.

I. Background

(a) Facts

3 The pension plan that Graphicshoppe provided for its employees was a defined contribution plan administered by London Life. The employees contributed 4% of their wages and Graphicshoppe contributed an amount equal to 1%. Graphicshoppe deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to the plan administrator within thirty days of the month end. In the months preceding bankruptcy, Graphicshoppe failed to do so: between February 2003 and the date of bankruptcy, November 20, 2003, Graphicshoppe failed to remit $92,889.45 of the moneys that it had deducted from its 102 employees' pay.

4 Graphicshoppe had one bank account that it used for all purposes. The employees' money deducted from their pay was commingled with Graphicshoppe's own funds in that account. As Graphicshoppe continued to carry on business the bank account balance fluctuated and, at one point, became negative. On the date of bankruptcy, however, there was $145,667.51 in the account. The closing balance resulted from transfers from Textron Financial Canada, which was factoring the company's receivables.

5 The employees filed a proof of claim for $92,889.45 with the Trustee. They relied on s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), which provides:

> The property of a bankrupt divisible among his creditors shall not comprise
>
> > (a) property held by the bankrupt in trust for any other person,

6 Section 67(1)(a) does not stipulate priorities between trust beneficiaries and creditors. Rather, it provides that certain property held by a bankrupt shall not be available for distribution among creditors.

7 The employees were careful to claim a trust interest in the bank account only to the extent of their own pension contributions. They made no claim in respect of contributions the employer was supposed to have made to the pension plan on their behalf.

(b) Underlying Decisions

8 The Trustee disallowed the employees' claim on the basis that the employees must be able to trace their money into property in the possession of the bankrupt on the date of bankruptcy. Because Graphicshoppe had converted the trust moneys to other property or spent it on running its business, the trust was destroyed and the money in the account on the date of bankruptcy was not trust money.

9 The employees appealed to the Registrar in Bankruptcy. On appeal, the Trustee did not dispute that Graphicshoppe initially held the employees' contributions as trustee. Rather, the Trustee's position was that, once Graphicshoppe spent the money on operating its business, the subject matter of the trust was no longer certain because it could no longer be identified.

10 The Registrar concluded that there was a "common law" trust because the "three certainties" were established, namely: (1) certainty of intention; (2) certainty of subject matter; and (3) certainty of object. She found that the identical funds did not have to be in the bankrupt's bank account at the date of bankruptcy. She concluded that there was no tracing requirement and, provided that the employees' money was calculable or ascertainable, the "identifiable" aspect of the certainty of subject matter test was met.

11 The Trustee appealed the Registrar's decision to the Superior Court of Justice. Lax J. dismissed the Trustee's appeal. She agreed with the Registrar that there was certainty of subject matter under trust principles, because the collective agreement specified a defined percentage to be deducted from each employee and held on trust. She rejected the Trustee's argument that the trust was destroyed by the fact that Graphicshoppe had commingled the pension contributions with its own funds.

12 Lax J. then responded to the Trustee's argument that the lowest intermediate balance rule (sometimes referred to as the "LIBR") should be applied. She summarized the rule and its effect in the following terms:

> The Lowest Intermediate Balance Rule ("LIBR") has historically stood for the principle that where trust money has been mingled in a bank account and spent by a breaching trustee and new money originating from a different source is subsequently deposited into the mixed account, an injured beneficiary can only claim a proprietary interest over the lowest intermediate balance. It was assumed that the "new money" was not technically part of the injured beneficiary's trust and the application of LIBR prevented the beneficiary from recovering the full value of the trust.

13 If the LIBR were applied in this case, the employees would be entitled to nothing, because Graphicshoppe's account had a negative balance after their funds were deposited into the account.

14 Relying on this court's reasoning in *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (Ont. C.A.) ("*LSUC*"), Lax J. found she was not obliged to apply the lowest intermediate balance rule. Instead, she concluded:

> I am bound to search for the method of allocating the loss which is the more just, convenient and equitable in the circumstances. The contest here is between wronged trust beneficiaries, whose property was taken, and creditors of the bankrupt. In my view, it would be unjust and inequitable to apply the LIBR rule in these circumstances to deprive the employees of their own property and correspondingly benefit the creditors of the bankrupt's estate at their expense.

She therefore held that the employees could assert a proprietary interest over the mixed fund, dismissed the Trustee's appeal, and directed him to allow the employees' proof of claim and pay the amount of $92,899.45.

(c) Positions of the Parties and Issues

15 The appellant submits, first, that there was no trust for purposes of s. 67(1)(a) of the BIA. While the *Pension Benefits Act*, R.S.O. 1990, c. P.8, creates a provincial statutory deemed trust, s. 67(1)(a) applies only to a valid trust under the general principles of the law of equity. In this case, the appellant submits that there was no longer such a trust in existence on the date of bankruptcy.

16 While the appellant concedes that Graphicshoppe held its employees' pension contributions in trust when it deducted them from their pay, it submits that the trust was destroyed when Graphicshoppe commingled them with its own funds. For this proposition, it relies on the Supreme Court of Canada's decision in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) ("*Henfrey Samson*") and this court's decision in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.) ("*GMAC*").

17 The appellant's second argument is that there was no trust property remaining at the date of bankruptcy. The funds in the account were no longer traceable to or in any way attributable to the employees' pension contributions because Graphicshoppe had spent the employees' money. The money in the account was other money from a different source that had been later deposited. This was evident because the account had been in an overdraft position shortly before bankruptcy. The appellant submits that the money subsequently deposited into the account was not impressed with a trust under general principles of law.

18 Finally, if the employees did have a valid trust over the money in the account on the date of bankruptcy, the appellant submits that Lax J. erred by failing to take into account a payment of $77,812.87 paid to the employees as wages for the period prior to bankruptcy.

19 The respondents submit that the appeal should be quashed or stayed because the appellant filed and proceeded with the appeal without the inspectors' permission as required by s. 30 of the BIA.

20 In regard to the merits of the appeal, the respondents submit that commingling trust assets with other assets does not, in and of itself, destroy a trust. In this case, the trust continued to exist after the funds were commingled, because the trust property was sufficiently identifiable even though the trustee withdrew and spent money from the account. They contend that the appellant effectively relies upon the LIBR, which was, they submit, rejected by this court's decision in *LSUC*.

21 The respondents also submit that Graphicshoppe intended to replenish the trust funds that it improperly withdrew from the account. More specifically, they say that Graphicshoppe took the money to keep the company afloat when it was in financial difficulty but that, as new money came in, it replenished or restored the trust funds.

22 As I will later explain, I agree with the respondents that the effect of the appellant's second argument is that the lowest intermediate balance rule should be applied. Therefore, the positions of the parties raise the following five issues:

(1) Should the appeal be quashed or stayed because the appellant proceeded without the permission of the inspectors?

(2) Did commingling the pension contributions with the employer's funds in one bank account destroy the trust?

(3) Was the judge bound to apply the lowest intermediate balance rule?

(4) Was the trust replenished?

(5) Did the judge err by failing to take into account the payment of $77,812.87 to the employees?

II. Analysis

(1) Issue One: Should the appeal be quashed or stayed because the appellant proceeded without the permission of the inspectors?

23 Section 30(1) of the BIA provides:

> 30.(1) The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> . . . . .
>
> (d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

24 It is not disputed that the appellant filed and proceeded with this appeal without seeking the permission of the inspectors. Nevertheless, the permission of inspectors is not required for a trustee to have capacity to bring legal proceedings. Rather, obtaining the permission of the inspectors simply protects the estate from becoming liable for costs. A long line of jurisprudence makes it clear that trustees have the capacity to undertake litigation without the authorization of the inspectors, but if they do so they will be personally liable for costs if unsuccessful: *Anderson & Co., Re* (1923), 4 C.B.R. 288 (Ont. S.C.); *Capra v. Grobstein* (1929), 11 C.B.R. 250 (C.A. Que.); *Soucier, Re* (1939), 20 C.B.R. 298 (N.B. S.C.); *H. O. Kirkham & Co., Re* (1938), [1939] 1 W.W.R. 425 (B.C. S.C.); *Conrad, Re* (1963), 6 C.B.R. (N.S.) 275 (C.S. Que.); *Plourde, Re* (1979), 31 C.B.R. (N.S.) 308

(C.A. Que.); *Reed v. Franco* (1980), 35 C.B.R. (N.S.) 149 (C.S. Que.), aff'd (1983), 49 C.B.R. (N.S.) 21 (C.A. Que.); *Owen, Re* (1985), 55 C.B.R. (N.S.) 161 (Sask. Q.B.); *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustee of) v. Caisse populaire de Black-Lake* (1986), 64 C.B.R. (N.S.) 156 (C.S. Que.); and *Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd.* (1999), 11 C.B.R. (4th) 107 (Sask. Q.B.).

25 The cases cited by the respondents do not refute this established principle: *Bryant Isard & Co., Re* (1923), 4 C.B.R. 41 (Ont. S.C.); *Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.); *Bryant Isard & Co., Re*, [1925] 1 D.L.R. 847 (Ont. S.C.); and *Nierenberg, Re* (1979), 30 C.B.R. (N.S.) 267 (Ont. Bktcy.). These cases all deal with the requirement of inspector authorization when employing solicitors or accountants. The cases confirm that unauthorized costs must be borne by the trustee personally.

26 In *Cynar Dry Co., Re* (2005), 8 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), the Court set aside a release that a trustee had executed without first convening a meeting of inspectors to discuss the matter. However, the case is distinguishable from the jurisprudence set out above, because it dealt with the discontinuation of litigation rather than the commencement of litigation. While a trustee who initiates litigation without the inspectors' permission can reimburse the estate for any costs, there would be enormous difficulties encountered in requiring a trustee to compensate the estate for the consequences of the discontinuation of litigation. In my view, this distinction explains the result in *Cynar Dry Co., Re*.

27 Therefore, the respondents have not established that the appeal should be quashed or stayed.

(2) Issue Two: Did commingling the pension contributions with the employer's funds in one bank account destroy the trust?

28 As noted above, the appellant does not dispute that Graphicshoppe held the employees' contributions as trustee at the time it deducted the money from their pay. At that point, the three certainties required to establish a trust were satisfied.

29 The appellant's first argument is that the trust was destroyed, because its subject matter became uncertain when the pension contributions were commingled with the employer's funds in one bank account.

30 The appellant relies on the Supreme Court of Canada's decision in *Henfrey Samson* and, in particular, McLachlin J.'s statement at p. 34:

> 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.

31 The appellant also relies on this court's decision in *GMAC*, which was released after Lax J.'s decision. Feldman J.A., writing for the unanimous court, said at para. 20:

> In my view, the facts in this case regarding how the funds were held and accounted for are not distinguishable from the *Henfrey Samson Belair* case, and consequently, the legal result must also be the same. The funds relating to the carriers' fees collected by TCT prior to January 24, 2002 lost their character as trust funds when they were not segregated and were co-mingled with other TCT funds.

32 As I will discuss below, I do not regard *Henfrey Samson* and *GMAC* as changing the settled principles of trust law that: a trust is not destroyed when a trustee wrongfully mixes trust property with his or her own property; and the beneficiary may still be able to claim proprietary remedies in such a situation. Therefore, the more pertinent question is whether, on the facts of this case, the employees can claim a proprietary remedy despite the commingling of their funds with Graphicshoppe's. This question is addressed in the next section.

33 Before discussing *Henfrey Samson* and *GMAC*, I will briefly review what was considered to be the state of trust law prior to these decisions.

(a) Settled principles

34 As mentioned above, a fundamental concept of trust law is that, for a trust to come into existence, it must have three essential certainties: (1) certainty of the intention to create a trust; (2) certainty of the subject matter or trust property; and (3) certainty of the objects of the trust. If any one of these does not exist, the trust fails to come into existence: D.W.M. Waters *et al*., *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 132.

35 It is useful to bear in mind the distinction between the certainty of subject matter required to create a trust initially and the identification of property into which a claimant can subsequently "trace" trust property after it has been converted to other forms. The property that is the subject of the trust must be identified clearly in order for the trust to be validly created in the first place. That is certainty of subject matter.

36 It has long been a principle of trust law that a trust is not destroyed when a trustee wrongfully mixes trust property with his or her own. In *Lupton v. White* (1808), 33 E.R. 817, where the trustee had mixed the trust's lead ore with his own, the Lord Chancellor said at p. 819:

> If the result is, that the Master cannot take the account, it is clearly not for him, without a farther direction, to apply the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorized mixture upon his part.

37 It would be odd indeed if a trustee could, by its own wrongful acts in commingling trust property with its own, destroy the trust, cause its obligations to expire and make the trust property its own. As Lax J. noted, if that were the case, a wronged beneficiary could never assert even a personal remedy against a breaching trustee.

38 "Tracing" comes into play after the trust has been created and there has been a wrongful disposition of trust property and the beneficiary claims what has been substituted for the original trust property. At this stage, the claimant must be able to identify property as the substitute for the trust property in order to claim proprietary relief. If tracing is no longer possible — where, for instance, the plaintiff's money is spent on a dinner or squandered at the racetrack — the claimant may still seek personal relief, but will no longer have an effective proprietary remedy.

39 The right to trace into a mingled fund has long been part of the law of equity. One of the leading cases establishing the right to trace into a mingled fund is *Hallett's Estate, Re*, which dates back 125 years: (1880), [1874-1880] All E.R. Rep. 793 (Eng. C.A.). In A.W. Scott & W.F. Fratcher, *The Law of Trusts*, 4th ed. (Boston: Little Brown and Co., 1989) at para. 515, the authors state that this case is commonly cited for the principle that, "where a fiduciary, even though he is not a trustee of an express trust, wrongfully mingles money of his principal with money of his own, his principal is entitled to a charge on the mingled fund."

40 In the leading English text of *Underhill and Hayton Law Relating to Trusts and Trustees*, 15th ed. (London: Butterworths, 1995) at 869, David J. Hayton writes:

> Once a wrongdoing fiduciary has mixed trust funds with his own in a bank account an equitable lien or charge will automatically attach to that account and therefore to moneys paid out of that account, whether into other accounts (so purchasing a chose in action) or to purchase a painting or Whizzo shares ...

41 Canadian textbooks published since the Supreme Court's decision in *Henfrey Samson* continue to regard it as a settled principle that the equitable right to trace is available, even when the trustee has mixed trust property with his or her own property.

42 For example, Eileen E. Gillese and Martha Milczynski in *The Law of Trusts*, 2d ed. (Toronto: Irwin Law, 2005) at 173, state that:

> Even if the trust property has changed in form, equity still follows the property so long as it can be ascertained to be the product of the original property. That is, the property must remain identifiable in order to be traced. To be identifiable, it must be the original property, or the product or sale of the original property. *Equity permits the claimant to follow property into a mixed fund*, or through such a fund into property purchased with monies from that fund, because the claim is against the traced asset itself and is not dependent on establishing some claim to the entirety of the converted asset
>
> [emphasis added].

43 In the 2005 edition of *Waters' Law of Trusts in Canada*, the authors carefully review the principles that apply to the remedies of a beneficiary for recovering trust property when trust property has been mixed with other property. They say, at p. 1279, that these principles "apply not only to notional mixtures such as bank accounts, but to genuine physical mixtures of indistinguishable things, like sawlogs or grain."

44 In summary, certainty of subject matter is one of three certainties that must be established to create a trust. Where a trustee subsequently mingles trust moneys with other moneys in a mixed account, the beneficiary will be able to claim a proprietary remedy if the beneficiary's money can still be identified or traced. In other words, under traditional principles of trust law, commingling the trust property with other assets does not destroy the trust. Rather, it simply affects whether proprietary as opposed to personal relief is available.

45 I now turn to the question of whether the Supreme Court of Canada in its decision in *Henfrey Samson* or this court in *GMAC* intended to interfere with these settled principles.

(b) Henfrey Samson

46 *Henfrey Samson* was a constitutional case. The Supreme Court decided that s. 67 of the BIA, which excludes trust property held by the bankrupt from the bankrupt's estate, applies only to trusts arising under general principles of the law of equity and not to provincially created statutory "deemed trusts" that lack the attributes of such trusts. This is because the provinces lack constitutional competence to reorder the priorities stipulated by the BIA.

47 The specific issue in *Henfrey Samson* was whether a trust created pursuant to s. 18(1) of the *Social Services Tax Act*, R.S.B.C. 1979, c. 388, was a trust for purposes of s. 67(1)(a) of the BIA. Section 18(1) provides that a person who collects sales tax "shall be deemed to hold it in trust for Her Majesty in right of the Province".

48 The province took the position that sales tax that the bankrupt had collected, but failed to remit, was held in trust for the Crown pursuant to s. 18(1) and that, pursuant to s. 67(1)(a), the Crown was entitled to this amount out of the bankrupt's general estate before it was distributed to creditors.

49 In this context, a majority of the Supreme Court of Canada held that provincially created "deemed trusts" are subject to the rights of secured creditors and entitled to priority only as Crown claims under s. 136 of the BIA. Section 67(1)(a) will only apply if a statutory "deemed trust" meets the requirements for a trust under the general principles of trust law.

50 McLachlin J., writing for the majority, then turned her attention to whether, in the particular circumstances before the Court, the "statutory trust" constituted a trust under general principles. In concluding that there was no trust, she commented at p. 34:

> 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*
>
> [emphasis added].

51 The bankrupt had "mingled the tax collected with its other assets" and the Province, in accordance with s. 18(2) of the *Social Services Tax Act*, claimed a trust over all of the bankrupt's assets equal to the tax not remitted. It is essential to note that the Province did not, as did the employees in this case, identify an account into which the unremitted sales tax had been deposited or any other particular asset to which the tax money could be traced. McLachlin J. continued in the same paragraph:

> 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.

52 Section 18(2), which provides that the amount of taxes required to be collected and remitted "forms a lien and charge on the entire assets of" the deemed trustee, was of no assistance because it was provincial legislation that could not affect priorities under the BIA.

53 In my view, McLachlin J. was simply reiterating the settled principle of trust law that a beneficiary of a trust has no proprietary remedy if property impressed with a trust cannot be identified through tracing. At p. 35, she went on to say:

> 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. 67(1)]. 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(1)].

54 Therefore, I do not understand McLachlin J.'s comment at p. 34 as changing settled trust law that a beneficiary may still have a proprietary trust remedy, even though the trust funds have been commingled and converted to other property, provided that it is possible to trace the funds to identifiable assets. The point she was making is that, on the facts before the Court in *Henfrey Samson*, as no specific property impressed with a trust could be identified at the time of the bankruptcy, the province's claim against the bankrupt's entire assets failed.

(c) GMAC

55 Like *Henfrey Samson*, *GMAC* also involved a provincial statutory deemed trust and competing priorities on bankruptcy.

56 TCT Logistics Inc. and its related companies ("TCT"), which were in the business of warehousing and transporting goods by truck, went into bankruptcy. On bankruptcy, there was a dispute between GMAC, which held a general security over all of TCT's assets, and carriers contracted to transport individual loads.

57 Contrary to regulatory requirements, TCT failed to maintain a separate trust account for the moneys it received from its customers for the portion of its invoices that related to the charges of each carrier. The issue was whether, despite that regulatory noncompliance, the carriers' fees were trust funds within the meaning of s. 67(1)(a) of the BIA.

58 The carriers' claims fell into two categories: (1) amounts owed to the carriers in the accounts receivable that TCT had collected before January 24, 2002 (the date an interim receiver was appointed), which had not been segregated; and (2) amounts owed to the carriers out of the accounts receivable of TCT that the interim receiver collected after January 24, 2002 and kept in a segregated account.

59 This court held that the carriers' portions of the accounts receivable collected by the interim receiver after January 24, 2002 were held in trust for the carriers, but the funds collected before that date were not held in trust.

60 Feldman J.A. concluded at para. 20 that "funds relating to the carriers' fees collected by TCT prior to January 24, 2002 lost their character as trust funds when they were not segregated and were co-mingled with other TCT funds". Before January 24, 2002, TCT's accounting system recorded the amounts TCT owed to the carriers, but there never was a separate fund that TCT could be said to hold in trust according to general principles. When the customer paid the invoice, TCT deposited the entire amount in its general account.

61 The appellant in this case relies on Feldman J.A.'s comment at para. 20 to support the proposition that commingling destroys a trust. In my view, Feldman J.A.'s comment must be understood in its proper context.

62 As discussed above, *Henfrey Samson* established that a provincial statutory deemed trust is not a trust for purposes of s. 67(1)(a) of the BIA. However, it is important to note, as did Feldman J.A., that provincial deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating. She cited *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410 (Ont. C.A.), in which Borins J.A. found that the fact that a provincially created "deemed" trust may have lacked the three certainties of intention, object and subject matter did not affect its essential character as a trust. This is in accord with McLachlin J.'s observation in *Henfrey Samson*, at p. 35: "The provinces may define 'trust' as they choose for matters within their own legislative competence".

63 As such, there was an effective statutory deemed trust prior to bankruptcy. However, once bankruptcy occurred, the carriers had to establish that the funds that had been held in deemed trust satisfied equity's requirements for a trust in order to trigger application of s. 67(1)(a) of the BIA. The three certainties were not satisfied, because the payments for the carriers' services were at all times commingled with other TCT funds. But for the provincial legislation, the money in TCT's bank account could not be said to be that of the carriers. Rather, but for the legislation, the carriers only had a claim for payment for the services they had provided.

64 In my view, understood in context, Feldman J.A.'s comment at para. 20 does not support the proposition that commingling destroys a trust. Rather, she was addressing the particular issue before the court, which involved whether a provincial statutory deemed trust met equity's general requirements for a trust after bankruptcy occurred. She was not making a statement about the general requirements for trusts.

65 Therefore, I conclude that neither *GMAC* nor *Henfrey Samson* alters the established principle of trust law that the mere commingling of trust funds with the trustee's own funds does not destroy a trust and, as such, does not in itself eliminate a beneficiary's right to claim a proprietary remedy.

66 In this case, there is no doubt that the pension contributions were the employees' money, and it is conceded that Graphicshoppe held that money in trust upon deducting it from the employees' pay. I conclude that the commingling of the employees' money with its own in one bank account did not destroy the trust.

67 The next question is whether the transactions that occurred after the commingling leave the employees without a proprietary remedy because they cannot trace into the funds that remained in the account on the date of bankruptcy.

(3) Issue Three: Was the judge bound to apply the lowest intermediate balance rule?

68 The submission upon which the appellant placed his greatest reliance is that the employees cannot trace their pension contributions to the balance remaining in the bank account at the date of bankruptcy. The appellant points to the course of transactions in the account to argue that the closing balance in the account was directly traceable to deposits made by a company factoring Graphicshoppe's accounts receivable and not to the unremitted pension contributions.

69 While he did not use the term in this court, the appellant urges, as he did before Lax J., the application of the lowest intermediate balance rule. The appellant's argument that the employees cannot trace their money into the balance in the account on the date of bankruptcy is indistinguishable from the rule: deposits made to an account after it has been depleted cannot constitute trust money previously deposited.

70 The appellant submits: "Justice Lax did not have the discretion to allocate the loss in a manner which she deemed to be just, convenient and equitable in the circumstances". In effect, the appellant submits that Lax J. erred in relying on this court's decision in *LSUC* and in not applying the LIBR.

71 In my view, Lax J. properly relied on *LSUC*. Before reviewing that decision, however, it is necessary to review this court's decision in *Ontario (Securities Commission) v. Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (Ont. C.A.), aff'd [1988]

TAB 4

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

(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-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);

(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.

<u>Discussion</u>

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.

<u>Analyse</u>

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*).

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.

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

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 scheme for the distribution of the bankrupt's assets.

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.

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.

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

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.

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.

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.

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

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.

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.

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.*

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,

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.

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.

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.*

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 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