1993 CarswellOnt 218
Ontario Court of Justice (General Division)

Abraham v. Canadian Admiral Corp. (Receiver of)

1993 CarswellOnt 218, 1993 C.E.B. & P.G.R. 8147 (headnote only), [1993] O.J. No. 1401, 13 O.R. (3d) 649, 20 C.B.R. (3d) 257, 41 A.C.W.S. (3d) 190, 48 C.C.E.L. 58

GARRY B. ABRAHAM, et al. v. COOPERS & LYBRAND LIMITED (receiver and manager for CANADIAN ADMIRAL CORPORATION LTD.) and NATIONAL BANK OF CANADA

Wilson J.

Heard: January 18-22, 25, May 18 and June 2, 1993
Judgment: June 22, 1993
Docket: Doc. 20117/87

Counsel: *Ian G. Scott* and *Martin J. Doane*, for plaintiffs.
Joseph W. Mik and *J. Alan Aucoin*, for defendants.
Hart Schwartz, for intervenor, Attorney General of Ontario.

Subject: Corporate and Commercial; Insolvency; Employment; Property; Civil Practice and Procedure; Contracts

Action by former employees for compensation for accrued vacation pay and pension benefits not paid prior to closure of employer.

***Wilson J.*:**

1 In this action, 1,200 unionized employees and 11 salaried employees are seeking compensation for vacation pay and pension benefits accrued and not paid prior to the closure of Canadian Admiral Corporation Ltd. ("Admiral"). In advancing their claim, the plaintiffs rely on the statutory deemed trust and lien provisions of s. 23 of the *Pension Benefits Act*, R.S.O. 1980, c. 373 and s. 15 of the *Employment Standards Act*, R.S.O. 1980, c. 137. The rights and priorities of the provincial statutory trusts and liens must be determined in light of the claims of the National Bank of Canada (the "bank") pursuant to security held by the bank under s. 178 of the *Bank Act*, being Pt. I of s. 2 of *Banks and Banking Law Revision Act*, 1980, S.C. 1980-81-82-83, c. 40. The effect, if any, of the subsequent bankruptcy of Admiral must be considered.

2 The novel and complex aspect of this case involves the application of the law to the facts. This case is virtually on all fours with aspects of the decision of Carruthers J. in *Armstrong v. Canadian Admiral Corp. (Receiver of)* (sub nom. *Armstrong v. Coopers & Lybrand Ltd.*) (1986), 53 O.R. (2d) 468 (S.C.), affirmed (1987), 61 O.R. (2d) 129 (C.A.), leave to appeal to S.C.C. refused (sub nom. *National Bank of Can. v. Armstrong* (1988), 87 N.R. 398 (note) ("*Armstrong*"). Armstrong dealt with the entitlement of 55 employees to vacation pay arising out of the receivership of Admiral in 1981. The decision of Carruthers J. was adopted by the Ontario Court of Appeal.

3 The issue for determination is the effect of three Supreme Court of Canada decisions upon *Armstrong: Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 ("*Hall*"); *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de developpement)*, (sub nom. *Federal Business Development Bank v. Québec (Commission de la santé & de la sécurité du travail)*) [1988] 1 S.C.R. 1061 ("*FBDB*"); and *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 ("*Henfrey Samson*").

4 It is the position of the defendants that *Armstrong* has been implicitly overruled by the Supreme Court of Canada by these decisions. It is the position of the plaintiffs that *Armstrong* has not been overruled, and that I am therefore bound by it. The constitutional principle of paramountcy must be considered in the context of the three recent Supreme Court of Canada decisions.

5 The Attorney General of Ontario became involved as intervenor in response to a notice of constitutional question served by the defendants on May 15, 1992. The Attorney General of Ontario supports the position of the plaintiffs that the *Bank Act* determines the priority between the parties and that the plaintiffs' claims, pursuant to the *Pension Benefits Act* and the *Employment Standards Act*, have priority to those of the bank.

Part I — The Facts

6 The agreed statement of facts has been considered by me in assessing the factual matters in issue. I am indebted to counsel for their efforts in narrowing the factual issues. The following is a summary of the essential uncontested facts.

7 Admiral manufactured household appliances at several plants in Canada, including plants located in Mississauga (the "Mississauga plant") and Cambridge (the "Cambridge plant"). Since 1979, the bank had valid security pursuant to s. 178 of the *Bank Act* (now s. 427 of the *Bank Act*, S.C. 1991, c. 46). On November 4, 1981, Coopers and Lybrand Limited ("Coopers and Lybrand"), as agents for the bank, took possession of the assets of Admiral, including the Cambridge and Mississauga plants. Effective November 4, 1981, the employment of all employees was terminated and Admiral ceased carrying on business. The

possession by the agents for the bank was a result of the default by Admiral under the *Bank Act* security agreement. Beginning November 4, 1981, Coopers and Lybrand, as agents for the bank, immediately began the process of realizing upon the assets. On November 23, 1981, Admiral was petitioned into bankruptcy by other creditors.

8 Coopers and Lybrand went into possession on November 4, 1981, prior to Admiral's bankruptcy, but continued to realize upon the assets for an extended period of time after the bankruptcy. As at May 13, 1989, the bank had realized upon net assets of $45,772,474.67. There remained a shortfall in excess of $11,000,000, plus interest, owing to the bank.

9 The 1,200 unionized employees were subject to collective bargaining agreements at each of the Cambridge and Mississauga plants (the "collective bargaining agreements"). The collective bargaining agreements provide a calculation for vacation pay entitlement based upon years of service and for employer pension benefit contributions. These calculations form the basis of the plaintiffs' claims. The bank was aware that Admiral was subject to the collective bargaining agreements but was not aware of the specific terms concerning the calculation of vacation pay or pension benefits.

10 With respect to the Cambridge plant, the parties acknowledge that the following calculations are correct, although the defendants do not acknowledge that the amounts are owing:

> (a) Accrued vacation pay for the Cambridge plant union employees in the amount of $134,504.13 based upon the collective bargaining agreement years of service.
>
> (b) Accrued vacation pay for the Cambridge plant union employees in the amount of $86,534.62, based upon the 4% calculations specified by the *Employment Standards Act*.
>
> (c) Admiral owed $72,000 to the pension fund, calculated as of November 4, 1981, for unpaid employer pension contributions accrued at both the Cambridge and Mississauga plants.

11 There are two contested factual issues. With respect to vacation pay, the defendants state that no vacation pay is owing in connection with the Mississauga plant. Secondly, the defendants do not concede that there were sufficient appliances assembled at the Mississauga and Cambridge plants between July 1, 1981 and November 4, 1981 upon which the plaintiffs' security interest, if found to be enforceable, could attach.

Part II — The Legal Issues

12 The plaintiffs and defendants raise the following legal issues.

13 1. What is the applicable section of the *Limitations Act*, R.S.O. 1980, c. 240? Is this claim for damages based upon a statute coming within s. 45(1)(*h*) of the *Limitations Act* and, hence, barred by the two-year limitation period? Or, is the claim an action upon a "specialty" coming within s. 45(1)(*b*) and, hence, not barred because the limitation period is twenty years?

14 2. The defendants advanced two estoppel arguments.

15 Firstly, the plaintiffs in the bankruptcy proceedings in 1981 pursued their rights as preferred creditors. They now seek in this action recognition of their rights as secured creditors. Are they estopped by their previous conduct?

16 Secondly, what is the effect, if any, of the plaintiffs' acknowledgement in a written agreement with Inglis (the purchase of some of the Admiral assets) that the collective bargaining agreements in question were null and void? Can the plaintiffs now enforce these collective bargaining agreements in this proceeding?

17 3. If vacation pay is owing to the employees of the Mississauga plant, how is it to be calculated upon termination? Is vacation pay calculated as 4% of earnings from employment or are the employees' rights determined by the more advantageous calculations based upon years of service as specified in the collective bargaining agreements?

18 4. What are the priorities of the parties under the *Bank Act*? The employees rely on the provincial statutory trusts and liens created by provincial legislation and the bank relies on its s. 178 *Bank Act* security. Determination of this issue requires an analysis of the ratio of the *Armstrong* decision, and a determination as to whether *Hall* implicitly overruled *Armstrong*.

19 5. What is the effect of the subsequent bankruptcy, if any, on the priorities of the claims crystallized under the *Bank Act*? Coopers and Lybrand, as agents for the bank, took possession of the assets of Admiral realizing upon the *Bank Act* security on November 4, 1981. On November 23, 1981, another creditor petitioned Admiral into bankruptcy. Does the *Bank Act* or the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (now the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3) prevail? The determination of this issue requires a review of s. 47 of the *Bankruptcy Act* and an analysis of the applicability of the *FBDB* decision to the facts of this case.

20 6. If the *Bankruptcy Act* overrides the *Bank Act*, what are the priorities of the parties under the *Bankruptcy Act*? A determination of this issue involves the following considerations:

(i) In light of the bank's possession and liquidation of its security on November 4, 1981, does the *Bank Act* security fall within the definition of "property of the bankrupt" in s. 47 of the *Bankruptcy Act* on November 23, 1981?

(ii) *Henfrey Samson* relates to statutory trusts. Does the presence of the statutory lien retain the employees' status as secured creditors or does their claim fall within the ambit of s. 107(1)(*d*) of the *Bankruptcy Act*, dictating that they must advance their claim as preferred creditors?

(iii) If the subsequent bankruptcy of Admiral is relevant to the priorities under the *Bank Act*, what is the effect of s. 178(6) of the *Bank Act* which requires the bank to make certain payments to employees in the case of a debtor's subsequent bankruptcy?

(iv) *Henfrey Samson* requires a statutory deemed trust to be identifiable or traceable to be recognized in bankruptcy proceedings. As well, common law trusts are recognized in bankruptcy. On the facts of this case, does a common law trust arise against the bank as a result of the bank taking possession and liquidating assets on November 4, 1981? The plaintiff relies on the doctrine of *trustee de son tort*. Alternatively, is there an enforceable common law constructive trust in favour of the plaintiffs?

Part III — Findings on Contested Factual Issues

Vacation Pay for Mississauga Plant

21 What, if any, is the vacation pay owing to the employees of the Mississauga plant?

22 The plaintiffs are 1,200 unionized employees and 11 salaried employees. It was agreed between counsel that a sample number of employees would be called from each group from the Mississauga plant to explain the calculation of vacation pay entitlements on behalf of all the plaintiffs. Three hourly employees, Cynthia Blackmore, Rona Soederhuyzen and Peter Murcar, gave evidence concerning the collective bargaining agreement. Nick Vuk and Fred Soederhuyzen gave evidence as representatives of the salaried employees. In addition, Elizabeth McKnight and Karen O'Blenis from the personnel and payroll department gave evidence about the method of calculating vacation pay.

23 The correct interpretation of the documentation substantiating the plaintiffs' vacation entitlement claim for the Mississauga plant, outlined at Schedule "C" of the statement of claim and Tab 4 of Exhibit "1" (the Mississauga vacation schedule), is at the heart of the first factual dispute. At first blush, and without the explanation by the representatives from the personnel and payroll department, the Mississauga vacation schedule is difficult to understand.

24 The union employees' entitlement to vacation pay is stipulated in paragraph 18.01 of the Mississauga collective bargaining agreement. A schedule of increasing vacation entitlement is calculated based upon years of service. The initial calculation for employees with five years of service or less is 4% of annual pay or two weeks paid vacation. Employees were entitled to increases at specific intervals based upon years of service, the maximum entitlement for long term employees being 12%, or six weeks paid vacation.

25 It is undisputed that the 11 salaried employees' vacation benefits mirrored the union employees' entitlement based upon years of service, although there was no written contract to this effect. The terms of the union contract and the *Employment Standards Act* provide that the plaintiffs' vacation entitlement accumulates in arrears. The vacation pay entitlement crystallizes after a year of complete service. The prior year gives rise to vacation pay entitlements in the succeeding year. The union contract year begins July 1 and concludes June 30 of the following year.

26 With a few minor exceptions noted later, all of the plaintiffs received their vacation entitlements for the union contract period ending June 30, 1981. The primary issue in dispute is the vacation entitlement of employees of the Mississauga Plant from July 1 to November 4, 1981.

27 The plaintiffs are in the somewhat difficult position of proving that they did not receive vacation pay. The employees were told by Admiral, on November 4, 1981, that their employment was terminated. The instructions of Coopers and Lybrand after the termination announcement was made were that the employees were to im mediately vacate the building. Most plaintiffs did not return, and, with the exception of one plaintiff, Peter Murcar, they did not personally have supporting documentation in the form of pay stubs to substantiate their claims. The plaintiffs proved the facts through viva voce testimony and through a review of the documents provided by the defendants, with particular emphasis on the Mississauga vacation schedule. The evidence was not clear as to who prepared the Mississauga vacation schedule. It was either prepared by Admiral or, alternatively, perhaps by Coopers and Lybrand. It is clear, however, that the document was in the possession of Coopers and Lybrand as a result of their work as agents of the bank.

28 The confusion in the interpretation of the Mississauga vacation schedule arises from negative figures appearing in column 7 called "vac to pay". The evidence of the payroll staff is that this figure is a comparative figure. It represents a calculation of vacation pay accrued and earned for the current union contract year contrasted with vacation pay paid in the previous year. A negative figure in the "vac to pay" column indicates that more vacation pay was earned and paid in the previous union contract year than in the partial year to date, from July 1, 1981 to November 4, 1981. The defendants, on the other hand, submit that the negative

figure in the "vac to pay" column is a calculation of the amount owed by the employee to the employer. As I will endeavour to show, I accept the explanation of the comparative meaning of the "vac to pay" column given by the payroll staff.

29 In looking at the Mississauga vacation schedule, the calculation of the plaintiffs' loss is represented by the sum total of the handwritten figures in the far right of the schedule as it appears at Tab 4 of Exhibit "1". This critical calculation was omitted from the Mississauga vacation schedule attached to the statement of claim as Schedule "C". The defendants' confusion and concern about the calculations in the Mississauga vacation schedule is, therefore, understandable.

30 Once the meaning of the Mississauga vacation schedule is understood, the calculation of the amount owing is specified and ascertainable. Each union and salaried employee's entitlement to vacation pay is the product of the employee's earnings for the year to date times a percentage calculated based on the number of years of completed service as calculated in sections 18.01 and 18.06(g) of the collective bargaining agreement. The total of the plaintiffs' claim based upon the Mississauga vacation schedule is for the period of July 1 to November 4, 1981.

31 The defendants chose not to call any evidence on the factual issues. A brief of documents was filed by the parties as Exhibit "10", Volumes 1 and 2.

32 There are several documents relating to vacation pay which are important in assessing the viability of the defendants' position. These include documents which were prepared by Coopers and Lybrand with calculations of vacation pay accrued, which closely accord with the calculations on the Mississauga vacation schedule. Some documents were submitted that were in the possession of Coopers and Lybrand but may not have been prepared by them.

33 Coopers and Lybrand were aware of the issue of vacation pay prior to taking possession of Admiral's assets. Exhibit "10", Tab 17, is a telex dated October 29, 1981 outlining the strategy to be taken by Coopers and Lybrand when they went into possession of Admiral on November 4, 1981. Page 5 of that document confirms that the employees' salaries and fringe benefits would be paid and "vacation pay liability will be considered in due course."

34 Exhibit "10", Tab 2, is an excerpt of a report prepared by Coopers and Lybrand, dated November 27, 1981, shortly after they went into possession as agents for the bank. The unfunded employee deductions and benefits for the Mississauga plant for vacation pay, as calculated in the Coopers and Lybrand report, are as follows:

35 Vacation Accrual — July 1 — October 31, 1981 ..... $187,848

36 1981 Vacations Owed to June 30, 1981 4,656

37 Exhibit "10", Tab 8, is a detailed handwritten calculation of vacation pay owing for 1980-1981. The evidence given by Nick Vuk and Fred Soederhuyzen about vacation pay owed to each of them individually is confirmed by the calculations which appear opposite their names in this document. The evidence was not clear as to whether a representative from Coopers and Lybrand or from Admiral prepared this document.

38 Exhibit "10", Tab 10, appears to make it clear that the vacation pay entitlements were cross-checked by the accounting staff of either Admiral or Coopers and Lybrand in December 1981.

39 The abrupt and unexpected closure of Admiral was clearly a traumatic event in the lives of the plaintiffs who gave evidence. Their evidence of the events surrounding the plant closure was vivid. Immediately or shortly after the closure, many employees raised concerns about their vacation pay. I find that all of the witnesses were credible and gave their evidence in a straightforward, totally believable fashion. Understandably, given the passage of time, some of the finer details were hazy. Interpreting the Mississauga vacation schedule was difficult, as the plaintiffs did not prepare the complex document. Taken as a whole, however, I find that the thrust of their evidence was unequivocal. The union and salaried employees of the Mississauga plant did not receive their vacation pay accrued during the period beginning July 1, 1981 to the date of the plant closure on November 4, 1981.

40 The defendants make the submission that for three of the 1,200 employees, an unexplained amount is shown in the comparative "vac to pay". It is of note that the date of hire for these three employees was after the beginning of the current union contract year and, therefore, there should logically be no entry in the "vac to pay" column. The defendants, therefore, submit that the "vac to pay" column must represent something other than a comparison of vacation benefits accrued in the previous year compared with the current year, therefore undermining the plaintiffs' evidence. A plausible explanation was given by the representatives from the payroll department that perhaps, in these isolated cases, an employee worked for a short period of time during the previous year, giving rise to an entry in the "vac to pay" column, and was rehired. This would effectively change the employee's start date recorded on the Mississauga vacation schedule and effectively explain the entry. This answer is consistent with the overwhelming weight of the evidence, including the documentary reports prepared by Coopers and Lybrand, or in their possession, which show the vacation pay owing.

41 Based upon the plaintiffs' evidence and a review of the documents, I find that none of the plaintiffs from the Mississauga plant received their vacation entitlements for the period July 1 to November 4, 1981. A small number of employees have back pay owing from the pervious contract year. There are some minor discrepancies between the calculations in

the Mississauga vacation schedule and the documents prepared by or in the possession of Coopers and Lybrand. I find that the amount owed for the Mississauga plant for the period July 1 to November 4, 1981, is $193,339.09. I accept the calculation of the amounts owed for the previous year ending June 30, 1981 as $4,656 which is the amount reflected in the Coopers and Lybrand report found at Exhibit "10", Tab 2.

The Assembly of Appliances at Admiral — July 1, 1981 to November 4, 1981

42 The contest between the employees and the bank relates to security rights in after-acquired property. It is the view of the plaintiffs that, after inventory and parts were brought to Admiral and as work was performed by the employees, lien rights were created in their favour. The lien rights attached to after-acquired property consisting of the parts assembled into appliances. The plaintiffs state that a portion of the assets realized by the bank was, in fact, their property. The plaintiffs claim that their property is the amounts owed pursuant to statutory deemed trusts and liens established by the *Employment Standards Act* and the *Pension Benefits Act*.

43 The defendants' first position is that the *Bank Act* security has absolute priority over the plaintiffs' claim. Their alternative position is that the plaintiffs have failed to prove there were sufficient appliances assembled between July 1 and November 4, 1981 upon which the plaintiffs' security interest, if found to be enforceable, could attach. The turnaround time for parts and the number of appliances assembled between July 1, 1981 and November 4, 1981, therefore, must be analyzed.

44 The evidence of Nick Vuk, the assembly line manager of refrigerators and micro-range products in the Mississauga plant, is important. The Admiral operations at the Mississauga plant consisted of five assembly lines which produced refrigerators, dryers, stoves and other appliances. Mr. Vuk had kept copies of all of the production records for the Mississauga plant for the period in question. Most of the inventory and parts had a 4-5 day turnaround from arrival of parts to assembled appliances which were shipped to their wholesale destination. Compressors were the exception and arrived twice a month. Screws were ordered in volume on a monthly basis.

45 Records were kept each day as to projected production and actual production achieved on the various assembly lines.

46 Although the overtime for 1981 ended during the last week of March 1981, the assembly lines were busy through to November 1981, and additional staff was hired right up to the time of Admiral's closure.

47 Without doubt, the labour conducted by the employees added value to the products. The evidence of Mr. Vuk was that the labour cost per unit approximated $35 including overhead.

The added value over inventory cost and labour cost of the wholesale price of an appliance, as a result of the labour, was estimated by Mr. Vuk as being approximately $100 per appliance. He was familiar with the figures as, in his position as assembly line manager, he was aware of per unit costs of parts and labour. Employees were given the opportunity of purchasing Admiral products for wholesale prices. He had personally purchased goods at the wholesale prices.

48 A significant number of appliances were assembled at the Mississauga and Cambridge plants between July 1 and November 4, 1981.

49 Exhibit "12B" outlines actual assembly line production for the Mississauga plant from July 1, 1981 to October 31, 1981. Exhibit "13" is a summary of the unfinished work in progress on hand shortly after the Mississauga plant closure. There were five assembly lines at the Mississauga plant. Assembly lines 1 to 3 were for refrigerators of differing sizes and quality. The fourth and fifth assembly lines were for dryers and micro-ranges. For example, assembly line number 1 at the Mississauga plant produced 19,099 refrigerator units for the four-month period. Using Mr. Vuk's estimate of average cost per unit of $300 to $350 for parts and labour, it is obvious that there was ample after-acquired property created at the Mississauga plant upon which the plaintiffs' lien could attach during the period in question.

50 The evidence concerning the Cambridge plant was less abundant. In Exhibit "12B", the projected assembly of appliances for the Cambridge plant for November 1981 is outlined. There were three assembly lines for washing machines, dryers and dishwashers. To interpret the projections for the Cambridge plant, I rely on both the Cambridge plant projections, and the record of actual production for the Mississauga plant. Exhibit "12B" outlines daily records of actual production for the Mississauga plant on each assembly line, compared to projected production.

51 I note that for the Mississauga plant, actual production closely resembled or exceeded projections for the period July 1 to October 31, 1981. I note further that projections for Mississauga for November were consistent with past production during the four-month period in question, taking into account the summer vacation of three weeks. For example, in Exhibit "12B", the projected production for line 1 for Mississauga for November was 5,000 units. The average production for line 1 for the period July 1 to October 30 was 4,774 units (19,099 divided by 4). The projected production for assembly line 1 for Mississauga for November 1981, therefore, closely reflected actual production for the previous four months. I infer that the average actual production for July 1 to October 31 is slightly lower than projected production for November due to the 3-week plant shutdown during July and August.

52 I conclude by inference that the projected production for the Cambridge plant reflects past production achieved. Therefore, during the period July 1 to November 4, 1981, at both the Mississauga and Cambridge plants, more than sufficient after-acquired property was created in the form of assembled appliances upon which the plaintiffs' security interest, if found to be enforceable, could attach.

Part IV — Statutory Framework

53 It is important to understand the competing statutory regimes.

54 The plaintiffs rely on sections 15, 29, and 31 of the *Employment Standards Act* and subsections 23(3) and (4) of the *Pension Benefits Act*.

55 Sections 15, 29 and 31 of the *Employment Standards Act* provide as follows:

> 15. Every employer shall be deemed to hold vacation pay accru ing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.
>
> . . . . .
>
> 29. — (1) Every employer shall give to each employee a vacation with pay of at least two weeks upon the completion of each twelve months of employment.
>
> (2) The amount of pay for such vacation shall be not less than an amount equal to 4 per cent of the wages of the employee in the twelve months of employment for which the vacation is given and in calculating wages no account shall be taken of any vacation pay previously paid.
>
> . . . . .
>
> 31. Where the employment of an employee ceases before the completion of a twelve month period of employment or the employee has not been given a vacation with pay pursuant to section 29, the employer shall pay to the employee an amount equal to 4 per cent of the wages of the employee in any twelve month period or periods or part thereof and in calculating wages no account shall be taken of any vacation pay previously paid.

56 Subsections 23(3) and (4) of the *Pension Benefits Act* provide as follows:

> (3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

> (*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or
>
> (*b*) the amount has been kept separate and apart by the employer,
>
> and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.
>
> (4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

57 What are the features of the provincial legislation in question? The legislation involves laws of general application applicable to all employees in the province without distinction. It is agreed that the relevant statutory provisions are intra vires of the province. They were enacted pursuant to the provincial constitutional authority of property and civil rights. Looking at s. 15 of the *Employment Standards Act* and s. 23(3) of the *Pension Benefits Act*, it is clear that there is both a trust and a separate lien created to protect the employees. The provincial statutory provisions elevate the employees' entitlement beyond simple debt in a creditor/debtor relationship. The provincial legislation creates a lien against assets in the amount of the trust claim.

58 The priority of the plaintiffs' claim advanced pursuant to the provincial legislation must be considered in the context of the relevant sections of the *Bank Act* or the *Bankruptcy Act*.

The Bank Act

59 The three relevant statutory provisions of the *Bank Act* are sections of 178, 179 and 186. They are reproduced below:

> 178. (1) A bank may lend money and make advances,
>
> . . . . .
>
> (*b*) to any person engaged in business as a manufacturer, on the security of goods, wares and merchandise manufactured or produced by him or procured for such manufacture or production and of goods, wares and merchandise used in or procured for the packing of goods, wares and merchandise so manufactured or produced,
>
> . . . . .

and the security may be given by signature and delivery to the bank by or on behalf of the person giving the security of a document in the form set out in the appropriate schedule or in a form to the like effect.

(2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described

> (*a*) of which the person giving security *is the owner* at the time of the delivery of the document, or
>
> (*b*) of which that person *becomes the owner at any time* thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,

the following rights and powers, namely,

> (*c*) if the property is property on which security is given under paragraph (1)(*a*), (*b*), (*e*), (*f*) or (*i*), under paragraph (1)(*c*) or (*h*) consisting of agricultural implements or under paragraph (1)(*j*) consisting of forestry implements, *the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which such property was described*,

. . . . .

(3) Where security on any property is given to a bank under any of paragraphs (1)(*c*) to (*j*), *the bank, in addition to and without limitation of any other rights or powers vested in or conferred on it, has full power*, right and authority, through its officers, employees or agents, in the case of

> (*a*) *non-payment* of any of the loans or advances for which the security was given,

. . . . .

to take possession of or seize the property covered by the security, ...

179. (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and those rights and powers of the bank in respect of the property covered by a security given to the bank under section 178 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which such property was described, have, subject to subsection 178(4) and subsections (2) and (3) of this section, priority over all rights subsequently acquired in, on or in respect of such property...

. . . . .

> (4) In the event of non-payment of any debt, liability, loan or advance, as security for the payment of which a bank has acquired and holds a warehouse receipt or bill of lading or has taken any security under section 178, the bank may sell all or any part of the property mentioned therein or covered thereby and apply the proceeds against such debt, liability, loan or advance, with interest and expenses, returning the surplus, ...
>
> . . . . .
>
> (7) Where goods, wares and merchandise are manufactured or produced from goods, wares and merchandise, or any of them, mentioned in or covered by any warehouse receipt or bill of lading acquired and held by a bank or any security given to a bank under section 178, the bank has the same rights and powers in respect of the goods, wares and merchandise so manufactured or produced, as well during the process of manufacture or production as after the comple tion thereof, and for the same purposes and on the same conditions as it had with respect to the original goods, wares and merchandise.
>
> . . . . .
>
> 186. (1) A bank may acquire and hold any warehouse receipt or bill of lading as security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person, in the course of its banking business.
>
> (2) Any warehouse receipt or bill of lading acquired by a *bank under subsection (1) vests in the bank, from the date of the acquisition thereof*,
>
> > (*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and
> >
> > (*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise. (emphasis added)

60 The issue for determination is the priority of the parties to the after-acquired property. The bank security was given prior in time to when the plaintiffs' trusts and liens arose. Is the bank security subject to the plaintiffs' statutory trusts and liens? These issues will be discussed in depth in reviewing the *Armstrong* and *Hall* decisions.

The Bankruptcy Act

61 It is the defendants' submission that the provisions of the *Bankruptcy Act* prevail, superseding the priorities determined pursuant to the *Bank Act*. The relevant statutory provisions of the *Bankruptcy Act* are s. 47 and s. 107(1)(*d*) reproduced below:

> 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,
>
> (*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,
>
> but it shall comprise
>
> (*c*) all *property* wherever situated *of the bankrupt at the date of his bankruptcy* or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such *powers* in or over or *in respect of the property* as might have been *exercised by the bankrupt for his own benefit*. R.S., c. 14, s. 39.
>
> . . . . .
>
> 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:
>
> . . . . .
>
> (*d*) *wages, salaries, commissions or compensation* of any clerk, servant, travelling salesman, *labourer or workman* for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars in each case; ... (emphasis added)

Part V — The Threshold Legal Issues

Limitations Issue

62 The plaintiffs commenced this action on June 3, 1987, almost six years after their employment was terminated by Admiral. The defendants submit that the statutory claim of the plaintiffs is barred by the two-year limitation period provided for in s. 45(1)(*h*) of the *Limitations Act*. The plaintiffs and the Attorney General of Ontario state that s. 45(1)(*h*) is not applicable to the facts of this case. They submit that this is an action upon a specialty and, therefore, that the twenty-year limitation period in s. 45(1)(*b*) of the *Limitations Act* applies.

63 The following are the relevant sections of s.45(1) of the *Limitations Act*:

> 45. — (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> . . . . .
>
> (*b*) an action upon a bond, or other specialty, ...
>
> . . . . .
>
> within twenty years after the cause of action arose,
>
> . . . . .
>
> (*h*) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose; ...

64 What is an action upon a specialty? The Court in *R. v. Williams*, [1942] A.C. 541 (P.C.) describes the concept of specialty as follows at p. 555:

> The word "specialty" is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt or a debt due from the Crown or under statute: see *Royal Trust Co. v. Attorney General for Alberta*. [Citation omitted.]

65 The decision of *Carlyle v. Oxford (County)* (1914), 30 O.L.R. 413 (C.A.) ("*Carlyle*") appears to be the root of the Ontario case law concerning the meaning of specialty. In *Carlyle*, the plaintiff brought an action to recover arrears of salary. He had been paid less than the minimum prescribed by the *Public Schools Act*. His personal representative continued the action after his death. In dealing with the issue of limitations, the Court held that the plaintiff's claim was upon a specialty and the cause of action was not statute barred. The action was one of debt on the statute, the Court said, and, hence, an action upon a specialty. The obligation to pay imposed by the statute was absolute and did not depend on contract. This approach was followed in *Ontario (Teachers' Pension Plan Board) v. York University* (1990), 74 O.R. (2d) 714 (H.C.).

66 Simply put, a statutory obligation creating or recognizing a debt is a specialty and a debt "on a statute" with a twenty-year limitation.

67 What is the distinction between a specialty action of a debt "on a statute", and "an action for a penalty, damages or a sum of money given by any statute", as outlined in s. 45(1)(*h*)?

68 I was presented with somewhat convoluted arguments about the distinction between rights "on a statute" and "given by a statute". It appears from reviewing the cases that the defendants' emphasis on the words "given by any statute" in s. 45(1)(*h*) may be misapplied. The intended scope of s. 45(1)(*h*) of the *Limitations Act* has been considered in obiter

comments given by the Ontario Court of Appeal. In *Tabar v. Scott* (sub nom. *West End Construction Ltd. v. Ontario (Minister of Labour)*) (1989), 34 O.A.C. 332 (C.A.), Finlayson J.A. states, at p. 342, that the section is limited to penal actions:

> If I was obliged to consider the matter from this perspective, I do not think I could ignore the reasons of Lindley, M.R., in *Clanmorris*. When a judge of his experience and reputation stated so baldly that the genesis of s. 45(1)(h) referred to "penal actions" and based that assertion on "the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured", it hardly lies in my mouth to contradict him. Certainly no one else has. Despite *Robinson v. Essex*, I do not think that s. 45(1)(h) has any application to the remedies sought under the Code. Even if the complaint of Tabar can be construed as an "action", it is not a penal action and s. 45(1)(h) does not apply.

69 The obiter comments of Finlayson J.A. were followed in *Superior Propane Inc. v. Tebby Energy Systems* (1992), 9 O.R. (3d) 769 (Ont. Ct. (Gen. Div.)). Section 45(1)(*h*) is interpreted as being limited to penal actions. Justice Austin (as he then was) concludes at p. 775:

> As the present action is not penal in any way, shape or form and has nothing to do with any sum of money given by any statute, it is unlikely that it was intended to apply to claims for contribution or indemnity under s. 2 of the *Negligence Act*.

70 I, therefore, conclude that the plaintiffs' claim is a specialty action pursuant to s. 45(1)(*b*) of the *Limitations Act* and the limitation period is twenty years.

The Effect of the Employees' Agreement with Inglis

71 As outlined in the agreed statement of facts, Inglis Limited ("Inglis") purchased the assets of Admiral from the secured creditors in March 1982. At that time, Inglis entered into collective bargaining agreements with some of the employees of Admiral which contained the clause "any agreements and understandings between Canadian Admiral Corporation, Ltd. and the Union are null and void and of no further force and effect" (the "agreement"). The defendants submit that the agreement had the effect of discharging Admiral from its obligations under its collective bargaining agreements with the employees and, accordingly, that Admiral was no longer liable to the employees for vacation pay and pension benefits for the period in which they were employed by Admiral.

72 The purpose of the agreement signed by the employees was to avoid Inglis being characterized as a successor corporation. Not all of the plaintiffs in this proceeding signed the agreement and not all of Admiral's employees were hired by Inglis.

73 The defendants urge me, in effect, to treat the agreement as a release upon which they can rely. I do not think this is the correct characterization of the clause in question. The defendants were not a party to the agreement. The doctrine of privity of contract prevents the defendants as third parties from relying upon the agreement as either a shield or a sword. See *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228.

74 The intended scope of the clause was to protect Inglis, not the defendants. I note that, at about the time the agreement was entered into, the plaintiffs were taking steps to attempt to enforce their rights to vacation pay and pension benefits in the context of Admiral's bankruptcy proceedings. I find that the facts of this case do not fall within the narrow exception to the general rule specified in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. There is no express or implied stipulation by the contracting parties that the clause was intended to benefit the defendants as implicit or unexpressed third party beneficiaries.

75 Furthermore, and perhaps more importantly, the obligations of Admiral to pay vacation pay and pension benefits are statutory ones. The collective bargaining agreements merely provide the basis for the calculation of benefits owed. The plaintiffs in this proceeding assert their claims based upon recovery of debts stipulated in s. 15 of the *Employment Standards Act* and section 23 of the *Pension Benefits Act*.

76 I conclude, therefore, that the defendants cannot rely upon the agreement with Inglis.

The Effect of the Plaintiffs' Claim in Bankruptcy

77 In the bankruptcy proceedings in 1981, the plaintiffs pursued their rights as preferred creditors under s. 107(1)(*d*) of the *Bankruptcy Act*. They now seek recognition of their status as secured creditors under the provincial legislation. Are they estopped by their previous conduct?

78 To be estopped from advancing a claim as a secured creditor, the facts must disclose that the actions of the creditor amounted to an unequivocal, unconditional and irrevocable surrender of the security. See *Andrew v. FarmStart* (1988), 54 D.L.R. (4th) 406 (Sask. C.A.); leave to appeal to Supreme Court of Canada refused. No such facts are present in the evidence before me.

79 From a review of the cases, it is clear that filing a proof of claim as an unsecured creditor is not an irrevocable or unconditional act: I rely upon *Re Mount James Mines (Quebec) Ltd.* (1980), 33 C.B.R. (N.S.) 227 (Ont. S.C.); *Cadillac Explorations Ltd. v. Kilborn Engineering Ltd.* (1983), 51 B.C.L.R. 221 (C.A.); *Young v. Royal Bank* (1978), 20 O.R. (2d) 708 (H.C.); and *Re Canadian Exotic Cattle Breeders' Co-operative* (1979), 14 B.C.L.R. 183 (S.C.).

80 I, therefore, conclude that the claim advanced by the plaintiffs in the bankruptcy proceedings in 1981 does not preclude them from pursuing their claim as secured creditors in this action.

Calculation of Vacation Pay

81 Is the vacation pay owing at the Mississauga and Cambridge plants calculated upon termination at the rate of 4% or based upon years of service?

82 Sections 4 and 5 of the *Employment Standards Act* must be considered. They provide:

> 4. — (1) An employment standard shall be deemed a minimum requirement only.
>
> (2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard. 1974, c. 112, s. 4.
>
> 5. — (1) Where terms or conditions of employment in a collective agreement as defined in the *Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

83 The relevant provision of the collective bargaining agreement for the Mississauga plant is

> 18.07 Any employee who voluntarily quits, or is *laid off, will be entitled to the vacation benefits as per the terms of the Collective Bargaining Agreement*. (emphasis added)

84 For the Cambridge plant the relevant provisions of the collective bargaining agreement are:

> 11.03 (A) Employees who have been *laid off*, retire, or terminate voluntarily or for health reasons during the vacation year, *will be paid vacation pay to the amount of 4, 6, 8, 10 or 12 percent, whichever figure is applicable* to his gross earnings for the vacation year.
>
> (B) *Employees who cease to be employees (except as per (A) above) shall receive four percent (4%)*, or whichever is applicable, of his gross earnings of the vacation year. (emphasis added)

85 The defendants take the position that involuntary termination is not covered by the collective bargaining agreements, and, therefore, the less favourable 4% provisions of the *Employment Standards Act*, or s. 11.03(B), apply. "Laid off", according to the defendants, relates to a temporary, not a permanent, termination of employment. The plaintiffs, on the other hand, contend that the collective bargaining agreements apply, and that the plaintiffs' claim is covered by the term "laid off" in the collective bargaining agreements.

86 Can "involuntary termination" and "laid off" be read as synonymous terms? The following are two definitions of "layoff": the first is from the D.A. Dukelow and B. Nuse, *Dictionary of Canadian Law* (Scarborough: Carswell, 1991) and the second is taken from *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990). They are as follows:

> LAY-OFF var. LAYOFF. n. 1. Temporary or *indefinite termination* of employment because of lack of work.
>
> *Layoff. A termination* of employment at the will of employer. Such may be temporary (e.g. caused by seasonal or adverse economic conditions) *or permanent*. (emphasis added)

87 It is clear from the definitions that the term "layoff" or "laid off" contemplates both temporary and permanent loss of employment and would include involuntary termination.

88 The decision of *Gray v. Canada (Attorney General)* (1977), 18 N.R. 393 (Fed. C.A.) reviews the meaning of the term "layoff" in the context of a collective agreement. Heald J. states, at p. 397:

> The generally accepted definition of "lay-off" when used as a labour term is: "Temporary, prolonged, or final separation from employment as a result of lack of work" (C.C.H. Canadian Limited — *Canada Labour Terms* 1975 6th Edition, p. 44).

89 In my opinion, the term "laid off", which appears in the collective bargaining agreements, includes both temporary and permanent involuntary termination of employment. I, therefore, find that the employees' vacation pay entitlements in the case of the Cambridge plant are governed by s. 11.03(A) with their vacation pay entitlements being calculated in accordance with the collective bargaining agreement. I make a similar finding for the employees of the Mississauga plant. Accordingly, the employees' entitlements to vacation pay are to be calculated in accordance with the terms specified in section 18 of the collective bargaining agreement based upon years of service.

Part VI — The Bank Act, Armstrong and the Hall Decision

90 The defendants state that *Armstrong* was implicitly overruled by the Supreme Court of Canada by the effect of the *Hall, FBDB* and *Henfrey Samson* decisions. As well, it is their position that Carruthers J. in *Armstrong* relied upon decisions, including *Re Phoenix Paper Products Ltd.* (1983), 44 O.R. (2d) 225 (C.A.) ("*Phoenix Paper*"), which were explicitly overruled by the Supreme Court of Canada. Therefore, the defendants argue that the critical legal ratio underlying *Armstrong* is no longer valid law.

91 An overview of the *Armstrong* decision will be followed by an analysis of the *Hall* decision. The ratio of *Armstrong* will then be considered in the context of the reasons for judgment in *Hall*.

The Issues and Facts in Armstrong

92 *Armstrong* involved the claims of 55 employees of Admiral. Their first claim was for vacation pay. To advance this claim, the plaintiffs relied on s. 15 of the *Employment Standards Act* as do the plaintiffs in this action. In the alternative, the employees in *Armstrong* claimed for vacation pay pursuant to s. 178(6) of the *Bank Act*. The plaintiffs in this action make the same alternative claim. The second claim by the plaintiffs in *Armstrong* was for severance and termination payments. A parallel claim is not being advanced by the plaintiffs in this action.

The Findings of Carruthers J.

93 At the heart of the Carruthers J. decision is his description of how vacation pay accrues at p. 474 [53 O.R. (2d)]:

> Of importance to me is that s. 15 specifically provides that this amount, which I conclude accrues due to the employee on each day of employment, is deemed to be held in trust for the employee by the employer whether or not it has, in fact, been kept separate. Of equal importance to me is that the same section specifically provides that the amount so held in trust constitutes a lien and charge upon the assets of the employer. This situation also exists on each day of the employee's employment.

94 The *Armstrong* case was presented and argued by the parties on the basis that the *Bank Act* determined priorities.

95 As outlined by Carruthers J. on p. 475, the floating and qualified nature of the *Bank Act* security permitted Admiral to carry on business including the acquisition of inventory and assembly of products for sale in the ordinary course of business. The deemed statutory trusts and liens arose daily as work was performed and attached as assets were acquired by Admiral. The amounts claimed by the plaintiffs, therefore, became a lien or charge upon Admiral's assets prior to their assignment to the bank.

96 The crux of this case revolves around the respective rights of the parties to after-acquired property. Carruthers J. explained the sequential process of the parties acquiring rights in after-acquired property. I pause, therefore, to review his explanation of the qualified nature of *Bank Act* security and s. 178 of the *Bank Act*.

97 Section 178 security gives to a bank both the rights and obliga tions of an owner. The assignment to the bank of the rights in after-acquired property is, therefore, subject to the plaintiffs' trust and liens. Carruthers J. held at pp. 479-480:

> It is clear that when a bank first takes the goods of a manufacturer as security under s. 178 and the goods are then in existence, the *bank cannot receive any greater right or title to those goods than the manufacturer itself possessed*. It is anticipated by the *Bank Act* that in the ordinary course of the manufacturer's business those goods will be disposed of and replaced by "after-acquired property" ...
>
> To my mind, it is only the process of *attachment which is automatic, and that only occurs after Admiral "becomes the owner" of the after-acquired property*. ... Admiral first *is the "owner"*, or first "*becomes the owner*" *of the goods described in the banks' security documents*. Admiral then assigns its interests in those goods to the bank, albeit, "automatically", in most cases, on after-acquired property. The *Bank Act* does recognize that a bank can have directly delivered to it the warehouse receipt or bill of lading of goods delivered to the debtor. *It is only by the assignment that the bank becomes vested with all the right and title of the debtor, which, in this case, is the manufacturer, Admiral.*
>
> *Here, there can be no question that Admiral had no right and title at any time to the amount of the deemed trust created under s. 15 of the E.S.A. Likewise, Admiral during the currency of the banks' security, could not assign to the banks the interest covered by the lien or charge placed upon its assets by virtue of the provisions of s. 15 of the E.S.A.* (emphasis added)

98 Carruthers J., therefore, found in favour of the plaintiffs, recognizing their claim pursuant to s. 15 of the *Employment Standards Act*. Carruthers J. further concluded that, if he had not found the employees entitled to vacation pay pursuant to s. 15 of the *Employment Standards Act*, he would have recognized their claim as being included in the definition of "wages, salaries or other remuneration", in s. 178(6)(*a*) of the *Bank Act*.

99 On the second issue relating to the claim for severance and termination payments, Carruthers J. dismissed the plaintiffs' claims. He found, first, that Coopers and Lybrand was not a successor employer within the meaning of s. 13(1) or (2) of the *Employment Standards Act*. Coopers and Lybrand's sole intention was to liquidate assets on behalf of the bank. Further, Carruthers J. found that s. 178(6) was not applicable as Coopers and Lybrand had gone into possession prior to the bankruptcy.

Decision of the Ontario Court of Appeal

100 The Ontario Court of Appeal's decision of Houlden J.A. upholds the decision of Carruthers J. in *Armstrong*.

101 On the issue of vacation pay, the Court concurred with the reasons of Carruthers J. and confirmed at p. 131 [61 O.R. (2d)] that:

> *the lien created by s. 15 of the Employment Standards Act attached to the after-acquired property of Admiral immediately upon its acquisition, and as a consequence the banks' charge under s. 178 extended only to the after-acquired property of Admiral not covered by the lien*. (emphasis added)

102 On the issue of termination and severance payments, the Court of Appeal concurred with the result reached by Carruthers J. that Coopers and Lybrand were not legally responsible for payment of termination and severance pay. The Court concluded that termination and severance payments are not "wages, salaries or other remuneration owing in respect of the period of three months next preceding the making of such order or assignment" pursuant to s. 178(6) of the *Bank Act*. The Court concurred with the reasoning of Carruthers J. that Coopers and Lybrand were not successor employers and that s. 13 of the *Employment Standards Act* had no application to the facts of the case.

Analysis of the Hall Decision Followed by a Discussion of Whether Hall Implicitly Overrules Armstrong

103 In assessing the impact, if any, of *Hall* upon the *Armstrong* decision, it is necessary to focus on the facts of *Hall* and understand the three constitutional questions posed to the Supreme Court of Canada.

104 In *Hall*, the respondent, a Saskatchewan farmer, had granted mortgages in favour of the appellant bank. As well, the bank held a security interest in equipment pursuant to s. 88 (the predecessor section to s. 178) of the *Bank Act*. The bank seized the equipment pursuant to the *Bank Act* and moved to enforce its security rights under the mortgage. By way of defence, the respondent stated that the bank was in breach of the notice requirements of the provincial *Limitation of Civil Rights Act*, and sought to have the foreclosure proceedings dismissed and the bank's security declared null and void in accordance with the provisions of the provincial legislation.

105 The provincial legislation required notice of intention to seize to be served prior to steps being taken to realize on bank security, and required the Courts to supervise any sale. In case of default of the notice requirement, the provincial legislation purported to render

the *Bank Act* security null and void and unenforceable. The provincial legislation provided a further draconian requirement. If the *Bank Act* security was declared null and void, then the bank became obliged to repay the debtor all amounts paid from the date the bank security was granted.

106 The chambers judge found that the provincial legislature did not have authority to enact the legislation which had the effect of negating a federally created security agreement, even if the provincial legislation was held to be competent to limit the manner in which it could be enforced.

107 The majority of the Saskatchewan Court of Appeal disagreed with the findings of the chambers judge. They were of the opinion that the provincial legislation did not affect the debtor's indebtedness or liability to pay, but merely imposed notice obligations upon the bank and provided a procedure for enforcement.

108 The three constitutional questions posed to the Supreme Court of Canada in *Hall* were [p. 130]:

> 1. Are ss. 19 to 36 of *The Limitations of Civil Rights Act*, R.S.S. 1978, c. L-16, *ultra vires* the Legislature of Saskatchewan in whole or in part?
>
> 2. Are ss. 178 and 179 of the *Banks and Banking Law Revision Act*, 1980, S.C. 1980-81-82-83, c. 40, *ultra vires* the Parliament of Canada in whole or in part?
>
> 3. Do ss. 178 and 179 of the *Banks and Banking Law Revision Act*, 1980, S.C. 1980-81-82-83, c. 40, conflict with ss. 19 to 36 of *The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16, so as to render inoperative ss.19 to 36 in respect of security taken pursuant to s. 178 by a chartered bank?

109 The first issue was dealt with summarily. It was found that, absent issues of conflict with the federal legislation, the provincial legislation was intra vires and within the ambit of the provincial powers of property and civil rights.

110 The defendants place great weight upon the analysis of La Forest J. of the second and third issues in support of their argument that *Hall* has implicitly overruled *Armstrong*. They raise the following questions.

111 1. Does Justice La Forest's historical analysis of the *Bank Act*, endorsing a uniform and nationwide security mechanism free from provincial lending regimes, mean that *Bank Act* security will have priority over competing provincial trusts or liens?

112 2. Paramountcy must be considered in the context of the federal legislative purpose. Does recognition of subsequent provincial trusts and liens frustrate the enunciated test of the federal legislative purpose of the *Bank Act*?

113 3. The *Bank Act* constitutes a complete code defining and providing for the realization of *Bank Act* security. Does this mean the priorities created under provincial legislation will not be recognized when competing with *Bank Act* security?

Issue 2 in Hall — Are Sections 178 and 179 of Bank Act Ultra Vires

114 The constitutional challenge in *Hall* is enunciated by La Forest J. as follows at p. 144:

> As I noted earlier, the basis of the respondent's challenge to the constitutionality of ss. 178 and 179 [of the *Bank Act*] is founded on the proposition that the federal banking power cannot extend to allowing Parliament to define the procedures for realization and enforcement of a federal security interest.

115 La Forest J. elaborates on the historical background and the cases supporting the view that there is a need for a convenient and consistent national banking system, which is in the interests of both manufacturers and banks. He states at p. 146:

> As we saw earlier, the creation of this security interest was predicated on the pressing need to provide, on a nationwide basis, for a uniform security mechanism so as to facilitate access to capital by producers of primary resources and manufacturers. Such a security interest, precisely because it freed borrower and lender from the obligation to defer to a variety of provincial lending regimes, facilitated the ability of banks to realize on their collateral. This in turn translated into important benefits for the borrower: lending became less complicated and more affordable.

116 Notwithstanding the need for a national banking system, La Forest J. recognizes that in Canadian federation, provincial and federal jurisdictions are not capable of division into discrete watertight compartments. La Forest J. states at pp. 145-146:

> Thus it is clear that *there can be no hermetic division between banking as a generic activity and the domain covered by property and civil rights. A spillover effect in the operation of banking legislation on the general law of the provinces is inevitable*. Viscount Simon makes this very point in his judgment in *Attorney-General for Alberta v. Attorney-General for Canada, supra*, at p. 517. The fact that a given aspect of federal banking legislation cannot operate without having an impact on property and civil rights in the provinces cannot ground a conclusion that that legislation is *ultra vires* as interfering with provincial law where the matter concerned constitutes an integral element of federal

> legislative competence; see *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, at pp. 768-69, per Beetz J. (emphasis added)

117 La Forest J. concludes at p. 147 that rights to enforce bank security are not mere appendages to the legislation, but rather, "must be viewed as the very linchpin of the security interest that Parliament, in its wisdom, has created. Far from being incidental, these provisions are integral to, and inseparable from, the legislative scheme". La Forest J., therefore, concludes that the manner of enforcement of *Bank Act* security pursuant to s. 178 is integral to the exercise of federal jurisdiction in the field of banking.

118 After reaching his conclusion that the federal legislation is intra vires, La Forest J. elaborates that, contrary to the view expressed by the majority of the Saskatchewan Court of Appeal, his finding is in no way undermined by the decision of the Supreme Court of Canada in *Royal Bank v. Nova Scotia (Workmen's Compensation Board)*, [1936] S.C.R. 560 ("*Royal Bank v. Workmen's Compensation*"). This finding of La Forest J. is an important one in assessing whether *Hall* implicitly overrules *Armstrong*.

119 *Royal Bank v. Workmen's Compensation* recognized a provincial statutory lien as having priority over the Royal Bank's prior *Bank Act* security. The issue in *Royal Bank v. Workmen's Compensation* is, in my view, very close to the issue in this case.

120 La Forest J., at p. 148, cites with approval an excerpt of Davis J. from *Royal Bank v. Workmen's Compensation* as follows:

> ... I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security, were property in the province of Nova Scotia
>
> > used in or in connection with or produced in or by the industry with respect to which the employer (was) assessed though not owed by the employer
>
> and became subject to the lien of the provincial statute the same as the goods of other owners ... *It is a provincial measure of general application for the benefit of workmen employed in industry in the province and is not aimed at any impairment of bank securities though its operations may incidentally in certain cases have that effect*. (emphasis added)

He confirms at p. 147 that the case "simply settled that, in applying a provincial tax on property, a bank, as a property owner in respect of property assigned to it by operation of the *Bank Act* security, *must be treated like any other property owner*" (emphasis added). *Bank Act* security serves to vest "in the bank all the right and title to goods, wares and merchandise covered by the holder or owner thereof" (p. 133).

121 I therefore find that La Forest J.'s historical analysis of the importance of consistent nationwide security does not mean that *Bank Act* security will necessarily have priority over competing provincial trusts or liens.

Issue 3 in Hall — The Paramountcy Analysis

122 La Forest J. then considers issues of operational conflict and paramountcy. In considering paramountcy, he enunciates two principles upon which the defendants place emphasis. Firstly, the paramountcy test must be considered in the context of the intended legislative purpose. Secondly, the *Bank Act* constitutes a complete code for the definition and realization upon *Bank Act* security. In the view of the defendants, an extension of these principles to the facts of this case results in the plaintiffs' priority being defeated.

123 In considering the test for duplicative provincial legislation, La Forest J. cites with approval, at p. 151, the often quoted passage of Dickson J. (as he then was) in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 ("*Multiple Access*") at p. 191:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

Paramountcy, therefore, is invoked when "it is impossible to comply with both legislative enactments" (p. 151).

124 La Forest J. goes on to cite with approval the principle that duplicative federal and provincial legislation may represent, in the words of Professor Lederman, the "ultimate in harmony" in a federal system. He outlines the principle giving rise to the test for paramountcy being an "actual conflict in operation" between federal and provincial legislation. The following excerpt from Dickson J.'s judgment in *Multiple Access* at p. 151 of La Forest J.'s reasons elaborates upon this important principle:

> *[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament*. (emphasis added.)

125 La Forest J. finds in *Hall*, however, that there is an actual conflict in operation between the *Bank Act* and *The Limitation of Civil Rights Act*. He states at p. 153: "There could be no clearer instance of a case where compliance with the federal statute necessarily entails defiance of its provincial counterpart."

Federal Legislative Purpose

126 La Forest J. interprets the paramountcy test with regard to the federal legislative purpose.

127 The view of the majority of the Saskatchewan Court of Appeal that the effect of the provincial legislation was merely to delay enforcement of the banks' rights was resoundingly rejected by La Forest J. The legislative purpose of the *Bank Act* must be considered as follows as stated by La Forest J. at p. 154:

> In this instance, as I have already noted, Parliament's legislative purpose in defining the unique security interest created by ss. 178 and 179 of the *Bank Act* was manifestly that of creating a security interest susceptible of uniform enforcement by the banks nationwide, that is to say a lending regime *sui generis* in which, to borrow the phrase of Muldoon J. in *Canadian Imperial Bank of Commerce v. R., supra*, at p. 159, the "bank obtains and may assert its right to the goods and their proceeds against the world, *except as only Parliament itself may reduce or modify those rights*" (emphasis added). This, of course, is merely another way of saying that Parliament, in its wisdom, wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on provincial legislation governing the realization and enforcement of security interests.

128 At p. 155 of his reasons, La Forest J. adds the requirement that paramountcy must be interpreted in light of the legislative purpose:

> *The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose*. Absent this compatibility, dual compliance is impossible. Such is the case here. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal. (emphasis added.)

Does recognition of subsequent provincial trusts and liens frustrate the enunciated federal legislative purpose of the *Bank Act*?

129 The statements of La Forest J. respecting the federal legislative purpose of the *Bank Act* must, in my view, be considered in light of the test of paramountcy. La Forest J. acknowledges that duplicative federal and provincial legislation may represent the "ultimate in harmony" in a federal system. He recognizes the balance implicit in the dual nature of Canadian federalism. The legislation in *Hall* was not duplicative legislation capable of co-existence, but rather a clear example of operational conflict. The inability of the two pieces of legislation in *Hall* to co-exist was obvious and jarring.

130 The statement of legislative purpose deals primarily with enforcement and realization of *Bank Act* security as well as the definition of the security. It does not purport to deal with competing priorities. In my view, the defendants' invitation to read this exten sion into the statement of legislative purpose is not consistent with the earlier position of La Forest J. which confirms the viability of the *Royal Bank v. Workmen's Compensation* decision. Implicitly, he acknowledges the principle that *Bank Act* ownership is qualified and that the bank cannot have rights higher than or different from that of an owner when he refers to *Royal Bank v. Workmen's Compensation*. I therefore find that the statements of La Forest J. outlining the legislative purpose of the *Bank Act* are not frustrated by the recognition of provincial statutory trusts or liens which may have priority over *Bank Act* security.

Complete Code

131 La Forest J. then considers the issue from the perspective of operational conflict, and introduces the principle that the *Bank Act* forms a complete code. The defendants place emphasis on this principle. La Forest J. states that the *Bank Act* forms a complete code that both defines and provides for the realization of *Bank Act* security interests. He states at p. 155: "There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation."

132 La Forest J. finds that the definition of *Bank Act* security interest and the realization procedure must be regarded as a "single whole". In light of this finding and his test of legislative purpose, he finds, not surprisingly, that the *Bank Act* fully occupies a field in the regime of realization of *Bank Act* security. As there is clear operational conflict between the provincial and federal legislation, the duplicative paramountcy analysis may, in the view of La Forest J., have been unnecessary.

133 On either constitutional analysis, La Forest J. therefore finds that the respondents' claim in *Hall* fails. Firstly, it fails the test of paramountcy; this is a case of duplicative provincial and federal legislation, and there is clear operational conflict. Secondly, it fails because the federal field, which constitutes a complete code, is fully occupied and the provincial legislation is in conflict with that code.

134 Do La Forest J.'s statements in *Hall* about a complete code mean that provincial legislation may not rank in priority to *Bank Act* security? I think not. The qualified nature of *Bank Act* security is not altered in *Hall* as is made explicit by La Forest J. when he confirms, at p. 147, *Royal Bank v. Workmen's Compensation* and the principle that the bank "must be treated like any other property owner." A complete code defining and providing a mechanism for realization does not imply that provincial priorities are defeated.

135 Accordingly, I find that La Forest J.'s finding that the *Bank Act* constitutes a complete code does not prevent valid provincial legislation from creating enforceable interests and priorities, which may rank in priority to *Bank Act* security.

136 The facts and issues in *Hall* are very different from this case. Caution must be utilized in applying legal principles enunciated in a specific context and applying them broadly to radically different facts and issues.

137 I therefore conclude that the assertions put forward by the defendants, considered either individually or cumulatively, do not support the proposition that *Hall* implicitly overruled *Armstrong*. I am reinforced in my conclusion by the Ontario Court of Appeal decision in *Bank of Nova Scotia v. International Harvester Credit Corp.* (1990), 74 O.R. (2d) 738 (C.A.) ("*IHCC*"). *IHCC* was decided after *Hall*. Houlden J.A. refers to *Hall* in his reasons and adopts at pp. 753-754 the description of *Bank Act* security enunciated by La Forest J. in *Hall*. *IHCC* recognized the priority of a conditional vendor's interest over a *Bank Act* s. 178 interest even though the security interest of the vendor was unperfected under the PPSA when the *Bank Act* security was given.

Did Carruthers J. rely on decisions in Armstrong that were overruled by the Supreme Court of Canada, thereby undermining the legal basis of the decision?

138 Much emphasis was placed by the defendants upon the fact that Carruthers J. relied upon decisions that have been subsequently overruled by the Supreme Court of Canada. The conclusion I am invited to make is that the legal ratio underlying Carruthers J.'s decision has been overruled. Those decisions are *Re Dairy Maid Chocolates Ltd.* (1972), 17 C.B.R. (N.S.) 270 (Ont. S.C.) ("*Dairy Maid Chocolates*") and *Phoenix Paper*. It is important to note that these decisions were not overruled by *Hall* but rather by *Henfrey Samson*.

139 The distinctions between *Hall* and *Henfrey Samson* are obvious and important. *Hall*, like *Armstrong*, deals with the priorities of the parties' rights under the *Bank Act*. *Henfrey Samson* interprets rights and priorities in the context of bankruptcy. What is the effect of *Henfrey Samson* overruling the line of authorities culminating in *Phoenix Paper*, in the context of bankruptcy, when we consider the *Armstrong* case and the issues relating to the *Bank Act*?

140 Much emphasis has been placed by the defendants on the fact that the Ontario Court of Appeal decision in *Phoenix Paper* has been overturned by the Supreme Court of Canada. McLachlin J. in *Henfrey Samson* comments that the finding in *Phoenix Paper*, that accrued vacation pay funds co-mingled with other assets of the bankrupt qualified as a trust within the meaning of s. 47, was overturned by the decision of *Deloitte Haskins & Sells Ltd. v. Alberta*

(Workers' Compensation Board), [1985] 1 S.C.R. 785 ("*Deloitte*"). At p. 36, she says [[1989] 2 S.C.R.]:

> 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.

141 It is important to note that the *Deloitte* decision was rendered prior to the *Armstrong* decision.

142 *Henfrey Samson* acknowledges that provincial statutes creating liens and trusts may be valid outside bankruptcy. It is the unambiguous priority provisions outlining the status of preferred creditors in s. 107 of the *Bankruptcy Act* that prevents the creditor from attaining the status of secured creditor by reason of a provincial lien. Further, there may be instances when provincial trusts are recognized in the context of a bankruptcy. These distinctions will be explored in detail when the *Henfrey Samson* decision is reviewed.

143 Looking at the reasons of Carruthers J. in *Armstrong*, it is clear that *Phoenix Paper* and *Dairy Maid Chocolates* are referred to in two places. First, at p. 473, Carruthers J. states that he finds the analysis in the two decisions "helpful". He then goes on to elaborate on the method of accrual of vacation pay under the provincial legislation. The excerpt outlining the accrual of vacation pay is quoted earlier in these reasons. I am of the view that the analysis which Carruthers J. found helpful, outlining the method of accrual of vacation pay, has not been overruled by *Hall*. The ratio of Carruthers J. as to how the trust and lien provisions apply, in my view, is a correct one. I am invited by the defendants to find that, as the *Bank Act* security pre-dates the statutory trusts and liens, the *Bank Act* security has absolute priority. The comments of La Forest J. concerning ownership, and his discussion about *Royal Bank v. Workmen's Compensation*, confirm in my view that this is not the correct interpretation of either *Hall* or the qualified nature of *Bank Act* security.

144 The second time Carruthers J. refers to *Phoenix Paper* is to confirm by analogy a conclusion already reached. Carruthers J. at p. 476 reaches the conclusion about the nature of *Bank Act* security based upon case law which was not overruled by *Hall* or *Henfrey Samson*, including the cases noted in the following passage:

> I have considered a number of reported decisions in order to determine the nature and extent of the security given under s. 178 of the *Bank Act*. These include: *Bank of*

Montreal v. Guaranty Silk Dyeing & Finishing Co. Ltd. (at trial and on appeal), [1934] O.R. 625, [1934] 4 D.L.R. 394, 16 C.B.R. 104, and [1935] O.R. 493, [1935] 4 D.L.R. 483, 16 C.B.R. 363, respectively; *Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia*, [1936] S.C.R. 560, [1936] 4 D.L.R. 9; *Flintoft v. Royal Bank of Canada*, [1964] S.C.R. 631, 47 D.L.R. (2d) 141, *sub nom. Re Canadian Western Millwork Ltd.*, 49 W.W.R. 301; and *Rogerson Lumber Co. Ltd. v. Four Seasons Chalet Ltd. et al.* (1980), 29 O.R. (2d) 193, 113 D.L.R. (3d) 671, 12 B.L.R. 93. From these authorities, it appears clear that, by the words of s. 178(2)(*c*), "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading", the bank, in whose favour security is given under s. 178 of the *Bank Act*, is vested with all the right and title of the owner by whom the goods recovered by the security are assigned to it. In short, the bank is considered to be the owner of the goods assigned to it under s. 178. This ownership, however, is not absolute. The bank cannot deal with the goods as its own in the absence of default under the loan; and the bank loses title upon the repayment in full of the loan, when the goods must be returned. In addition, during the course of the loan, and prior to there being a default, the borrower, in this case, Admiral, is given the right to sell the goods covered by the banks' security in the ordinary course of business and, in turn, give good title to its purchasers.

145 After reaching his conclusion, Carruthers J. states, at p. 480, that his reasons "appear consistent to those reached by Tarnopolsky J.A. in the *Phoenix Paper Products* case." It appears clear that Carruthers J. does not rely on *Phoenix Paper* in reaching his conclusion, but rather finds comfort in its consistent position in the case of a bankruptcy based upon the law as it then was. I therefore find that Carruthers J. does not rely upon decisions which were subsequently overruled by the Supreme Court of Canada in *Henfrey Samson*. Apart from the recent enactment in s. 67(3) of the *Bankruptcy and Insolvency Act*, statutory trusts that do not meet the test stipulated in *Henfrey Samson* will not be recognized in bankruptcy. However, *Phoenix Paper* being overruled does not, in my view, have a ripple effect to change priorities determined under the *Bank Act*.

146 I conclude, after considering all of the defendants' submissions, that, under the *Bank Act*, I am bound by the decision in *Armstrong*. I find that the employees' provincial deemed trusts and statutory liens for vacation pay and pension benefits are valid and have priority over the claims of the bank. This conclusion may be modified if the provisions of the *Bankruptcy Act*, rather than the *Bank Act*, apply to the facts of this case. I therefore turn to the consideration of the Supreme Court of Canada's decisions relating to the *Bankruptcy Act*.

Part VII — The Bankruptcy Act and the FBDB and Henfrey Samson Decisions

147 It is the defendants' view that the combined effect of two Supreme Court of Canada decisions defeats the plaintiffs' priority. These decisions are *FBDB* and *Henfrey Samson*.

148 The application of these cases is a two-step process. First, *FBDB* and the *Bankruptcy Act* must be considered. In the defendants' view, *FBDB* requires the issue of priorities to be dealt with in accordance with the *Bankruptcy Act*, rather than the *Bank Act*, contrary to the *Armstrong* decision. The second step is to apply *Henfrey Samson*. According to the defendants, the plaintiffs' claim fails because the employees' status as secured creditors is lost in light of the doctrine of paramountcy and the provisions of s. 107(1)(*d*) of the *Bankruptcy Act* which defines the queue of preferred creditors. Both Supreme Court of Canada cases must apply for the defendants to succeed in their arguments.

The Issue in FBDB

149 The defendants state that applying *FBDB* to the facts of this case will result in the *Bankruptcy Act* superseding the *Bank Act* and priorities between creditors being defined by the *Bankruptcy Act*. The plaintiffs state that *FBDB* does not apply to the facts of this case as the bank obtained full ownership of Admiral's assets subject to *Bank Act* security by going into possession and crystallizing its rights of ownership on November 4, 1981. Therefore, the property subject to the *Bank Act* security was not the "property of a bankrupt" on November 23, 1981, when Admiral was petitioned into bankruptcy. It is the plaintiffs' view, therefore, that the *Bankruptcy Act* and *FBDB* do not apply to the facts of this case.

150 Whether *FBDB* applies to the facts of this case requires an analysis of the nature of s. 178 of the *Bank Act* security and an analysis of the bank's ownership rights following the bank's seizure and liquidation of assets.

Facts of FBDB

151 The facts are succinctly outlined by Lamer J., as he then was, at p. 1064 of the *FBDB* decision [[1988] 1 S.C.R.]:

> On August 14, 1979, Structal Inc. entered into a trust deed with the Royal Trust Company to secure the payment of a bond for $1,800,000 issued to appellant. In July 1982, as Structal Inc. did not meet its obligations, the Royal Trust Company took possession of the debtor's property in its capacity as trustee and mandatary of appellant. Three months later, Structal Inc. made an assignment of all its property, in accordance with the provisions of the *Bankruptcy Act*. Royal Trust, acting as trustee, brought a hypothecary action in the civil division of the Superior Court to have the immovables of Structal Inc. sold by the Court. The trustee in bankruptcy did not appear and Royal Trust was authorized to proceed with the judicial sale of the property. Before the sale took place, respondent registered a privilege under s. 110 of the *Workmen's Compensation Act*, R.S.Q., c. A-3, on the immovables owned by Structal Inc. Section 110(1) provides:

> 110. (1) The amount of any assessment or compensation for which an employer is liable shall constitute a privileged claim on all the moveable and immoveable property of such employer and of the principal contemplated by subsection 3 of section 11 of this act, ranking immediately after law costs without registration.

The debtor's immovables were sold in June 1983. The deputy prothonotary prepared an order of distribution in accordance with the rules of Quebec law; respondent ranked fourth and appellant seventh. Appellant challenged the scheme of collocation, alleging that it should have been prepared in accordance with the relevant provisions of the *Bankruptcy Act*, in particular the scheme of distribution set out in s. 107 of the Act. The action was allowed by the Superior Court. Respondent appealed this decision and the Court of Appeal allowed the appeal, approving the order of collocation prepared by the deputy prothonotary: hence the appeal to this Court.

152 It was argued by the debtor that the possession by Royal Trust of the immovable prior to the bankruptcy had the effect of removing the immovable from the bankrupt's estate. Lamer J. did not agree with this analysis. He stated at pp. 1067-1068:

> With respect, I cannot accept this reasoning. The immovable, encumbered to appellant and seized by the trustee, is part of the "property of a bankrupt" mentioned in s. 107 of the *Bankruptcy Act*. Under s. 2 of the Act, the word "property" includes immovables situated in Canada or elsewhere. The phrase "property of a bankrupt" is also defined in s. 47 of the *Bankruptcy Act*:
>
> > 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,
> >
> > (*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,
>
> but it shall comprise
>
> > (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
> >
> > (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

These two definitions clearly show that the immovable in the case at bar is property of the bankrupt within the meaning of the *Bankruptcy Act. Even if the trustee takes*

> *possession of the immovable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered immovable cannot claim to have a right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec*. (emphasis added)

153 At p. 1068, Lamer J. cites with approval the decision of *Place Desjardins Inc. c. Perras Fafard Gagnon Inc.*, [1985] C.A. 212 (Qué.) in support of his conclusion that the immovable is "property of the bankrupt" within the meaning of s. 47 of the Act, regardless of the rights conferred on the trustee by the security:

> À mon point de vue, la prise de possession n'a rien changé quant à la propriété des biens.
>
> En effet, le droit du fiduciaire, s'il n'est pas payé, c'est de faire vendre les biens et d'être payé à même le produit.
>
> La prise de possession et l'administration ne sont que des étapes préliminaires en vue de la réalisation de la garantie.
>
> *In my opinion, the taking of possession changed nothing as regards ownership of the property*.
>
> The right of a trustee if he is not paid is to have the property sold and to be paid from the proceeds.
>
> Taking of possession and administration are only stages preliminary to realizing on the guarantee. [translation] (emphasis added)

154 Lamer J. found his opinion reinforced by sections 49, 57, 98, 101 and 102 of the *Bankruptcy Act*. He applied *Quebec (Deputy Minister of Revenue) c. Rainville*, [1980] 1 S.C.R. 35 ("*Re Bourgault*") and *Deloitte* as authoritative on the issue of whether the provincial or federal priority scheme will prevail. At p. 1071, he writes the following:

> These cases stand for the following proposition: in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied. If a bankruptcy occurs, the order of priority is determined by the ranking in s. 107 of the Act, and any debt mentioned in that provision must therefore be given the specified priority.

155 The public policy aspects of the decision are outlined by Lamer J. in the final paragraph of his judgment at p. 1072 as follows:

> Once the bankruptcy has occurred, the federal statute applies to all creditors of the debtor.

> It is true that such a solution may encourage secured creditors to bring about the bankruptcy of their debtor in order to improve their title. On the other hand, this solution has obvious advantages. As soon as the bankruptcy occurs the *Bankruptcy Act* will be applied: the mere fact that a creditor is mentioned in s. 107 of the Act suffices for such creditor to be ranked as a preferred creditor and in the position indicated in that provision. As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.

Does FBDB apply to the facts of this case?

156 It is clear from the reasons of Lamer J. that the immovable was still owned by the bankrupt at the date of the bankruptcy, notwithstanding the possession of the trustee of the immovable prior to bankruptcy. The immovable therefore clearly fell within the definition of "property of a bankrupt" contemplated by sections 47(*c*) and (*d*) of the *Bankruptcy Act*. The finding of Lamer J. that the bankrupt retained ownership of the immovable at the date of the bankruptcy is, in my view, fundamental to his decision. The key distinction between *FBDB* and this case focuses on ownership, and whether the property in this case subject to *Bank Act* security is property of the bankrupt at the time of bankruptcy.

157 To assess the applicability of *FBDB* to this case, the nature of *Bank Act* security must be explored. It has been described as a "floating charge" not vesting absolute ownership in the bank. In this case, what rights of ownership are vested by granting *Bank Act* security in the bank and what rights of ownership are retained by Admiral? What happens upon default and the bank exercising its *Bank Act* right of possession and liquidation?

158 La Forest J. in *Hall* describes the nature of *Bank Act* security. He states at pp. 133-134:

> I find the most precise description of this interest to be that given by Professor Moull in his article "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242, at p. 251. Professor Moull, correctly in my view, stresses that the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out. He states, at p. 251:
>
> > The result, then, is that a bank taking security under section 178 effectively *acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower*. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of

> course, but *the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time*.
>
> (emphasis added)

159 The qualified nature of *Bank Act* security was, in my view, recognized by La Forest J., as outlined earlier in these reasons, when he confirms that holders of *Bank Act* security must be treated as any other property owner, when he considers *Royal Bank v. Workmen's Compensation*.

160 The policy reason for the qualified nature of *Bank Act* security is enunciated by McLachlin J. (as she then was) in *British Columbia v. Federal Business Development Bank* (1987), 17 B.C.L.R. (2d) 273, [1988] 1 W.W.R. 1, 65 C.B.R. (N.S.) 201, 43 D.L.R. (4th) 188 (C.A.) at p. 221 [D.L.R.]:

> Why did the courts reject the concept of a fixed charge with a licence to deal? In doing so, they undeniably limited the freedom of debtor and creditor to contract as they might choose in an age when freedom of contract was paramount. The answer, it may be suggested, lies in the effects which recognition of such a concept would have upon the rights of third parties and general commercial activity, as well as the perceived injustice of allowing the debtor to trade freely while remaining immune from the normal incidents of legal process.

She writes further at pp. 224 and 225:

> It would be unfair and inconsistent to permit a debenture holder to grant to a debtor the right to carry on business, while insulating him from the usual legal incidents of doing business, such as seizure and sale by creditors and liens incidental to the business imposed by statute.
>
> Any other conclusion would be contrary to ordinary commercial expectations and detrimental to the public interest.

161 The principle that priorities under the *Bank Act* are to be determined subject to equitable remedies and the common law further emphasizes the qualified nature of *Bank Act* security. The principle is recognized in the recent decision *Mercantile Bank of Canada v. Leon's Furniture Ltd.* (1992), 11 O.R. (3d) 713 (Ont. C.A.). This decision arises too from the failure of Admiral in 1981. Austin J.A. concludes, at p. 723, on behalf of the Court of Appeal:

> The issue at the heart of the present case is whether set-off lies against security held pursuant to s. 178 of the *Bank Act*. Montgomery J. decided that, while the literal meaning of the language of the section would give the banks an absolute right, regard should be

had for the principle that legislation is not presumed to override the common law. He referred to *Craies on Statute Law*, 7th ed. (1971), pp. 339-40, and added [at p. 463 O.R., p. 12 B.L.R.]:

> A court should be reluctant to interpret any statute in a manner that would negate rules of equity which are intended to avoid unconscionability or injustice in the absence of clear and express language.

I agree. There is no clear or express language in the *Bank Act* which would preclude the application of equitable set-off.

162 The distinction between *Bank Act* security, which assigns legal title to the lender, and the hypothecary system in Quebec has been described by Davis J. in *Royal Bank v. Workmen's Compensation* at pp. 566-567 as follows:

> This type of security is peculiar, so far as I know, to our *Bank Act* and it may be that in view of the civil law of the province of Quebec, the draftsman of the Act refrained from setting up the English form of mortgage involving the equitable doctrines (unknown to the Quebec civil law) of redemption and foreclosure. In Quebec, the hypothecary system of the Roman law prevails. The mortgagor merely hypothecates or charges the land in favour of the mortgagee, in effect acknowledging the indebtedness as a personal obligation, but retaining the title in himself; on default, the mortgagee may recover judgment on the obligation and bring the property to sale at the hands of the sheriff and is entitled to be paid the amount of the hypothec as a preferred claim out of the proceeds of the sale.

163 *Bank Act* security vests ownership in the bank. This ownership is contrasted by Davis J. with a mortgage in Quebec under the hypothecary system where title and ownership are retained by the debtor. Davis J.'s description pinpoints the distinction between *Bank Act* security assigning rights of ownership to the bank, applicable in this case, and the type of security being considered by Lamer J. in *FBDB* where ownership is retained by the bankrupt debtor.

164 In the case at hand, did the rights of ownership vest in the bank as a consequence of its possession on November 4, 1981? Is the property, subject to s. 178 *Bank Act* security, property of Admiral within the meaning of s. 47 of the *Bankruptcy Act* on November 23, 1981, when Admiral was petitioned into bankruptcy?

165 *Bank Act* security, as a warehouse receipt or bill of lading, results in the assignment to the bank by the debtor of all the rights of ownership in both existing and after-acquired property. The debtor, Admiral, prior to November 4, 1981, had a licence to produce and to sell inventory in the ordinary course of business, free from claims by the bank, conditional

upon Admiral maintaining the loan in good standing. Admiral also had the right to repay the bank debt in accordance with the security agreement, and have ownership restored to it. Admiral defaulted on the bank loans. In consequence, Coopers and Lybrand on November 4, 1981 went into possession. The floating bank charge crystallized at that time. Admiral's licence to conduct business in the usual course was extinguished. Admiral's right to repay the bank loan and have ownership restored to it was extinguished. All incidents of ownership crystallized in favour of the bank, subject only to the bank's obligation to account for any surplus. In this case, there was no surplus.

166 This is confirmed by s. 179(4) of the *Bank Act* which provides that seizure pursuant to the *Bank Act* constitutes a sale analogous to a power of sale:

> (4) In the event of non-payment of any debt, liability, loan or advance, as security for the payment of which a bank has acquired and holds a warehouse receipt or bill of lading or has taken any security under section 178, the bank may sell all or any part of the property mentioned therein or covered thereby and apply the proceeds against such debt, liability, loan or advance, with interest and expenses, returning the surplus, if any, to the person by whom such security was given; but *such power of sale* shall ... [conform to the requirements set out in clauses (*a*) and (*b*)]
>
> and any sale of property by a bank under this subsection vests in the purchaser *all the right and title in and to the property* that the person from whom security was taken under section 186 had when the security was given or that the person from whom security was taken under section 178 had when the security was given and that he acquired thereafter. (emphasis added)

167 In light of the bank's prior possession, was that property, subject to *Bank Act* security, "property of a bankrupt" within the meaning of s. 47 of the *Bankruptcy Act* on November 23, 1981? I think not. The only conclusion that can be reached is that on November 23, 1981 all the rights of Admiral in the property were extinguished subject only to the bank's obligation to account for surplus. The property subject to *Bank Act* security was owned by the bank subject to the plaintiffs' trust and lien on November 23, 1981. Therefore, it does not fall within the ambit of "property wherever situated of the bankrupt" within s. 47(*c*) of the *Bankruptcy Act* or rights "as might have been exercised by the bankrupt" pursuant to s. 47(*d*). It may be argued that the surplus falls within the ambit of the *Bankruptcy Act*. In this case, there was no surplus and the issue, therefore, does not arise. I find, therefore, that the *Bankruptcy Act* does not apply and priorities are therefore to be determined under the *Bank Act*.

168 My conclusion is reinforced by the recent Ontario Court of Appeal decision, *Re Evelyn Stevens Interiors Ltd.* (sub nom. *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.*) (1993), 12 O.R. (3d) 385 (C.A.). The issue in the appeal was the interpretation

and ambit of s. 9 of the *Workers' Compensation Act* and s. 136 of the *Bankruptcy Act*. Grange J., on behalf of the Court, states at p. 392:

> The principle is simple. The money owing under s. 9(3) is not property of the bankrupt and never comes into the hands of the trustee. The Board is not required to make a claim under s. 136 of the *Bankruptcy Act*. The money comes to it under s. 9 of the *Workers' Compensation Act*. It is the *Bankruptcy Act* itself and not the provincial legislation that recognizes rights of set-off.

Relationship between the Bank Act and the Bankruptcy Act

169 Consideration of the nature and purpose of *Bank Act* security further reinforces my conclusion.

170 *FBDB* does not involve *Bank Act* security, but rather immovable property governed by Quebec law. This case requires the Court to consider the relationship between two federal statutes — the *Bank Act* and the *Bankruptcy Act*.

171 As previously discussed, *Hall* does not, in my view, implicitly overrule *Armstrong*, but does, clearly and unequivocally, enunciate that the *Bank Act* provides a complete national code for the realization of *Bank Act* security. The historical and national importance of this unique security was discussed in detail by La Forest J. in *Hall* as outlined earlier in this judgment. The defendants invite me to find that a subsequent bankruptcy supersedes the priorities established by the *Bank Act* and relevant provincial legislation. The reordering of priorities may create financial advantages or disadvantages for the bank. Without doubt, if the subsequent bankruptcy of a debtor, at any point in the future, has the effect of superseding *Bank Act* priorities and rights, tremendous uncertainty will result in the field of banking. The nature of *Bank Act* security would, in my view, be undermined.

172 The *Bank Act* and the *Bankruptcy Act* are two discrete alternative federal codes, each with different options, advantages and consequences. In interpreting the relationship between the two statutes, certainty and predictability in each regime must be considered.

173 It is clear upon reviewing Exhibit "10", tab 17, which is the memo dated October 29, 1981, that the decision by the bank to go into possession under the *Bank Act* and realize on its security was well planned. The bank may well have had distinct advantages as it was first in possession. The ability of the bank to quickly and independently realize upon its security in case of default is integral to the legislative purpose of the *Bank Act* as enunciated by La Forest J. in *Hall*. In assessing the rights and obligations of the parties, it may be said that timing is everything. By the bank exercising its option to move into possession and liquidate pursuant to the *Bank Act* security, its rights and obligations crystallized and priorities fell to be determined pursuant to the *Bank Act*.

174 Predictability and certainty of *Bank Act* security would be undermined if a bank, at a future time, becomes subject to the *Bankruptcy Act* regime with differing priorities and liabilities.

175 For the reasons given, I conclude that *FBDB* is not applicable to the facts of this case. The property subject to *Bank Act* security was not within the ambit of s. 47 of the *Bankruptcy Act* on November 23, 1981. As a result of its possession and liquidation as of November 4, 1981, full rights of ownership are vested in the bank. Further, I cannot conclude that the effect of *FBDB* displaces the significant and unique national security provided in the *Bank Act* in the case of a subsequent bankruptcy of the debtor.

176 Therefore, I find that the deemed trust provisions and statutory liens provided for in s. 15 of the *Employment Standards Act* and s. 23 of the *Pension Benefits Act* are valid enforceable provincial liens having priority to the bank's security under s. 178 of the *Bank Act*.

177 I am aware that my reasons may be subject to review by a higher court. If I am found to be wrong in part or parts of my analysis, then there are other issues which have been raised. I will outline the issues and suggest what my resolution would have been had I found that the *Bankruptcy Act*, as opposed to the *Bank Act*, applied to the facts of this case.

178 I, therefore, turn to the consideration of the effect of the *Bankruptcy Act* and the *Henfrey Samson* decision upon *Armstrong*.

The Henfrey Samson decision

179 The defendants state that the *Bankruptcy Act* applies and that the *Henfrey Samson* decision is clear that statutory deemed trusts are in conflict with s. 107(1)(*d*) of the *Bankruptcy Act* and are, therefore, unenforceable. It is the position of the plaintiffs that, if the *Bankruptcy Act* does apply to determine the priorities of the parties, then there are five alternative submissions to be canvassed which may result in priority being given to the plaintiffs' provincial trusts and liens.

180 The issue and facts in *Henfrey Samson* are succinctly outlined by McLachlin J. at pp. 28-29 as follows:

> 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 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.

181 Section 18 of the provincial *Social Service Tax Act* gives the province a deemed statutory trust, whether or not the tax collected is segregated or co-mingled.

182 In interpreting the scope of s. 47 of the *Bankruptcy Act*, McLachlin J. recognizes trusts established under general principles of law as contrasted with statutory deemed trusts. She states at pp. 32-33:

> 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.
>
> . . . . .
>
> 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.

183 The tax funds in question in *Henfrey Samson* were co-mingled with other funds and were not capable of being identified or traced. The trust created by the provincial statute in McLachlin J.'s words "bears little resemblance to a true trust". The requirement of an identifiable or traceable fund as a prerequisite for recognizing provincial trusts is clearly enunciated at pp. 35-36 as follows:

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

184 McLachlin J. adopts the reasoning in *Deloitte*. The finding of the Ontario Court of Appeal in *Phoenix Paper* that vacation pay co-mingled with other funds constitutes a trust within s. 47(*a*) of the *Bankruptcy Act* was found to have been overruled by *Deloitte*.

185 The plaintiffs raise five arguments in connection with the *Bankruptcy Act*.

1. The property subject to Bank Act security is not the property of the bankrupt and, hence, does not fall within the ambit of s. 47 of the Bank Act

186 As outlined in the analysis of the *FBDB* decision, I accept this argument and find that the bank's ownership of assets, subject to the provincial liens, crystallized when the bank seized its security and began liquidation on November 4, 1981. Another court may not agree with this conclusion and, therefore, I proceed to consider the other issues raised by the plaintiffs.

2. The statutory lien places the plaintiffs in the position of secured creditor

187 It is the position of the plaintiffs that the lien provisions of s. 15 of the *Employment Standards Act* and s. 23 of the *Pension Benefits Act* preserve the plaintiffs' claim as secured creditors, notwithstanding the reasoning of McLachlin J. in *Henfrey Samson* concerning trusts. The plaintiffs state that the statutory lien is distinct from the statutory trust.

188 What is the status of the plaintiffs' lien? Section 2 of the *Bankruptcy Act* defines "secured creditor" as including a lien:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, *lien* or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, ... (emphasis added)

189 Section 50(6) of the *Bankruptcy Act* (now s. 72(1)) adopts the principle that provincial legislation relating to property and civil rights is not superseded by the *Bankruptcy Act* unless there is conflict between the federal and provincial legislation. This section may be taken as supporting the principle of coexistence, where possible, between the provincial and federal legislation. Section 50(6) of the *Bankruptcy Act* states:

> The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

190 The Supreme Court of Canada's decision in *Deloitte* states that, in light of the doctrine of paramountcy, provincial statutes cannot alter or defeat priorities created for distribution of creditors pursuant to the *Bankruptcy Act*.

191 In *Deloitte*, the Court found that, outside of a bankruptcy, s. 78(4) of the *Workers' Compensation Act* lien provisions are valid, can stand alone and have a legitimate sphere of influence. However, in the case of bankruptcy, when the provincial statutory liens fall within the queue of defined preferred creditors in s. 107, that section prevails and determines the priorities of the parties. The statutory liens cease to be of any force and effect. The view was expressed by the Court in *Deloitte* that a contrary interpretation of s. 107(1) would effectively allow the provinces to determine priorities in bankruptcy which is a field of exclusive federal jurisdiction.

192 I find, having regard to sections 2 and 50(6) of the *Bankruptcy Act* and considering the ratio in *Deloitte*, that prima facie the plaintiffs' lien gives rise to a claim as secured creditors. Their secured claim will be recognized so long as the subject matter of the statutory lien does not fall within the queue of defined preferred creditors in s. 107 of the *Bankruptcy Act*. I turn, therefore, to consider this issue. Do vacation pay and pension benefits fall within the queue of defined preferred claims in s. 107(1)(*d*) — "wages, salaries, commissions or compensation"?

Vacation Pay

193 *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) defines wages, in part, as "Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, *vacation pay*, ... and any other similar advantage received from the individual's employer or directly with respect to work for him."

194 *Re S.A. Baker & Son Ltd.* (1952), 32 C.B.R. 147 (Ont. S.C.) is the only case dealing with the meaning of "wages, salaries, commissions or compensation" in s. 107(1)(*d*) of the *Bankruptcy Act*. In that case, the Registrar of the Ontario Supreme Court held that a claimant was entitled under a predecessor of that section to the same priority for vacation pay as for wages, namely, for services rendered during three months next preceding the bankruptcy.

195 The case law considering the meaning of "wages" deals mostly with provincial labour legislation but not with the *Bankruptcy Act*. *Mills-Hughes v. Raynor* (1988), 47 D.L.R. (4th) 381 (Ont. C.A.) was a case involving a corporation petitioned into bankruptcy. The employees claimed against the directors for bonuses, vacation pay and termination and severance pay pursuant to the *Canada Business Corporations Act* which provided that directors of a corporation are personally "liable to employees of the corporation for all debts ... for services performed for the corporation". Note that s. 107(1)(*d*) uses similar language: "for services rendered". The Court held that vacation pay, upon termination, is

a debt due to the employees for services performed and not a claim which flows from the termination of employment.

196 The following cases considering the meaning of wages in the context of the *Employment Standards Act* and the *Labour Standards Act* also confirm the view that wages include vacation pay: *Pay Less Gas Co. (1972) v. British Columbia (Director of Employment Standards)* (1991), 38 C.C.E.L. 115 (B.C. S.C.); *Kenroc Building Materials (1978) Ltd. v. Regina (City)* (1982), 138 D.L.R. (3d) 189 (Sask. C.A.); *Todoshichuk v. Marchenski Lumber Co.*, [1983] 5 W.W.R. 162 (Sask. Q.B.), affirmed [1985] 5 W.W.R. 72 (Sask. C.A.); *Bott v. Mel-City Electric Ltd.* (1987), 64 Sask. R. 219 (C.A.); *NEC Corp. v. Steintron International Electronics Ltd.*, [1986] B.C.J. No. 2333 (B.C. S.C.); and *Inco Ltd. v. United Steelworkers of America* (1984), 6 C.C.E.L. 263 (Ont. Div. Ct.).

197 I, therefore, conclude that vacation pay falls within the definition of s. 107(1)(*d*) "wages, salaries, commissions or compensation".

Pension Contributions

198 The case law is not as clear as to whether pension benefits accrued fall within s. 107(1)(*d*). In *Noren v. Tarsands Machine & Welding Co. (1975)* (1982), 24 R.P.R. 290 (Alta. Q.B.), engineers employed by the contractor under a collective agreement claimed builders' liens for wages under the *Builders' Lien Act* (Alberta) which defined wages as "money earned by a labourer for work done". The Court held that pension contributions were not wages since they were not deducted from amounts payable to the employee.

199 In *Demont v. Cornwallis Realties Ltd.* (1989), 57 D.L.R. (4th) 147 (N.S. C.A.), an opposite conclusion was reached. The Court held that funds established for the benefit of carpenters under a collective agreement, which included a pension plan paid by the employers, were "wages" under the *Mechanics' Lien Act*. The definition of wages was similar to that in *Noren* in that it meant "money earned by a mechanic or labourer for work done". It was held that the definition of "wages" was sufficiently broad to include the supplementary benefits paid by the employer.

200 Since the two cases on point reach opposite conclusions, I, therefore, look to the nature of pension benefits for guidance. The submissions made by the intervenor, Mr. Schwartz, on behalf of the Attorney General of Ontario, are of assistance.

201 Pensions are complex creatures of statute. The contribution by an employer to a plan does not coincide with the employee's ultimate benefit. The nature of a pension benefit may be contingent in the case of a non-contributory plan. Without completing the requisite years of service, the employee may receive nothing. There are different types of pension plans, including defined contribution plans and defined benefit plans with differing statutory

organizations, obligations and consequences. This case includes a defined contribution plan requiring Admiral to contribute $0.35 per hour worked for each eligible employee to be paid to the C.U.C. Pension Fund of Canada. The amount owed is quantifiable and has been agreed to between the parties. By contrast, a defined benefit plan calculates contribution based upon differing actuarial assumptions and there may be significant difficulties in quantification. The amounts owed by an employer are to the plan on behalf of the employees, and are not direct payments to the employees.

202 Because of the unique and complex nature of pension benefits, I would find that they do not fit within the intended scope of the definition of "wages, salaries, commissions or compensation" owed to employees, as defined by 107(1)(*d*) of the *Bankruptcy Act*.

203 I would find, as I have said, that vacation pay falls within the definition of s. 107(1)(*d*) of the *Bankruptcy Act*. Accordingly, if the *Bankruptcy Act* applies, the plaintiffs' claim for vacation pay is a preferred claim and not a secured claim. I would reach an opposite conclusion with respect to pension benefits. I would find that pension benefits do not fall within the definition in s. 107(1)(*d*) of the *Bankruptcy Act*. As pension benefits are not part of the defined queue, there is no conflict or paramountcy issue and the plaintiffs may advance their claim relying upon their lien as secured creditors.

3. Applicability of s. 178(6) of the Bank Act

204 Counsel for the plaintiffs and the Attorney General submit that, if vacation pay and pension contributions fall within the meaning of "wages, salaries, commissions or compensation" in s. 107(1)(*d*) of the *Bankruptcy Act*, then, pursuant to s. 178(6) of the *Bank Act*, the plaintiffs' claim has priority to the bank in respect of the three-month period preceding the bankruptcy. Section 178(6) of the *Bank Act* reads, in part, as follows:

> (6) Notwithstanding subsection (2) and notwithstanding that a notice of intention by a person giving security on property under this section has been registered pursuant to this section, where, under the *Bankruptcy Act*, a receiving order is made against, or an assignment is made by, such person,
>
> > (*a*) claims for *wages, salaries or other remuneration* owing in respect of the period of three months next preceding the making of such order or assignment, ...
> >
> > . . . . .
>
> have priority to the rights of the bank in a security given to the bank ...

205 No case has been decided on the meaning of "wages, salaries or other remuneration" under s. 178(6) of the *Bank Act*.

206 The defendants, in my view, find themselves in an awkward position. They take the position that the meaning of "remuneration" under s. 178(6) of the *Bank Act* is more restricted than the meaning of "compensation" under s. 107(1)(*d*) of the *Bankruptcy Act*. They advocate, therefore, that vacation pay falls within the queue for the purpose of s. 107(1)(*d*), but does not fall within the ambit of s. 178(6).

207 I am not persuaded that there is a substantive distinction between the words "compensation" and "remuneration". The following definitions are illuminating.

208 *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) defines compensation and remuneration as follows:

> *Compensation.* ... *Remuneration* for services rendered, whether in salary, fees, or commissions. ...
>
> *Remuneration*. Payment; reimbursement. Reward; recompense; salary; *compensation*. (emphasis added)

The definitions of compensation and remuneration in the *Shorter Oxford English Dictionary*, 3rd ed. (Oxford: Clarendon Press, 1973), also indicate that the terms appear to be used interchangeably:

> *Compensation.* ... Recompense, *remuneration*, amends ...
>
> *Remunerate.* ... To *recompense* or repay (a person) ... [emphasis added]

209 The defendants submit that the plain and ordinary meaning of the words "wages, salaries or other reumeration" does not include vacation pay and rely on the following cases for that proposition: *Northland Fisheries Ltd. v. W.A. Scott & Sons Ltd.*, [1975] 5 W.W.R. 183 (Man. Q.B.) and *Federal Business Development Bank v. Active Enterprises Ltd.* (1979), 34 C.B.R. (N.S.) 61 (Sask. Q.B.). However, the overwhelming weight of the case law previously reviewed in the context of s. 107(1)(*d*) of the *Bankruptcy Act* supports the position that wages include vacation pay.

210 Case law confirms that s. 178(6) applies to give priority to employees for three months remuneration when the bank takes possession or disposes of property subject to *Bank Act* security, so long as the possession or disposition takes place after the receiving order or assignment: *Canadian Bank of Commerce v. Turcotte*, [1957] Que. Q.B. 127 (C.A.). This test was adopted by Carruthers J. in *Armstrong*.

211 I pause to note that the conclusion I would reach based upon the facts before me differs from the conclusion reached by Carruthers J. in *Armstrong* concerning the applicability of

s. 178(6). It is clear from the agreed statement of facts, paragraph 18, that the disposition of the property subject to *Bank Act* security continued long after Admiral's bankruptcy. Paragraph 18 states, "Although Coopers and Lybrand took possession of the Bank's security on November 4, 1981, realization took place over a number of years and was not completed until long after Admiral became bankrupt." Based upon the fact that the disposition of assets occurred after Admiral's bankruptcy, I would find that s. 178(6) does apply. I would conclude on this issue that s. 178(6) protects vacation pay that accrues for a period of three months preceding the bankruptcy.

212 At my request, counsel attended before me on May 18 and June 2, 1993 to make submissions concerning the quantification of the s. 178(6) *Bank Act* claim for wages.

213 It is agreed between counsel that the period of September 4, 1981 to November 4, 1981 falls within the s. 178(6) three-month period preceding bankruptcy, as the receiving order was made against Admiral on December 4, 1981. The agreement between counsel ends at this point.

214 The defendants' first position is that the plaintiffs have not proven the wage loss specifically attributable to the September 4 to November 4, 1981 period. They state, therefore, that the plaintiffs' s. 178(6) claim should be dismissed. With this submission, I respectfully disagree. The loss will have to be estimated as accurately and as fairly as possible for the 1,200 employees from the evidence available. The records to calculate the actual s. 178(6) claim either do not exist or are not available to the plaintiffs. It must be remembered that the defendants took possession of Admiral and their records on November 4, 1981 and the plaintiffs, effectively, were locked out. Difficulty in quantifying damages does not relieve a court of its obligation to do so.

215 The defendants' second position is that the costs of realization should be deducted from the amounts owed on a prorated basis prior to the payment of the plaintiffs' claim. The total amount realized by the bank was $56,814,008.07, and the costs of realization were $11,041,533.40. The expense of realization, therefore, represents 19.43% of the total amount realized. The defendants urge me to apply the prorated share of the realization costs, or 19.43%, to reduce the plaintiffs' claim. The defendants rely on a portion of s. 178(6) which provides as follows:

> [A]nd if the bank takes possession or in any way disposes of the property covered by the security, the bank is liable for such claims *to the extent of the net amount realized on the disposition of such property, after deducting the cost of realization*, and the bank is subrogated in and to all the rights of the claimants to the extent of the amounts paid to them by the bank. (emphasis added)

216 Both counsel agreed that there are no cases on point. I do not agree with the defendants' interpretation of s. 178(6). I interpret the provision to mean that the bank is entitled to deduct all of its realization costs from amounts collected prior to the obligation of the bank to pay the s. 178(6) claims. As the recovery exceeded expenses in an amount sufficient to pay the plaintiffs' claim, the expenses of realization are not relevant.

217 Two alternative methods were suggested by counsel to calculate the s. 178(6) claim, as follows:

> (a) The s. 178(6) claim would be a prorated percentage of the total claim based upon the number of days permitted under the s. 178(6) claim compared to the entire claim period from July 1 to November 4, 1981. By this method of calculation, suggested by the plaintiffs' counsel, the s. 178(6) claim represents 46% of the total claim.
>
> (b) The payroll documents of Peter Murcar will be analyzed to calculate the actual vacation pay accumulated during the s. 178(6) period. These calculations would be extrapolated to apply to the 1,200 employees. By this method of calculation, suggested by the defendants' counsel, the s. 178(6) claim represents 45% of Peter Murcar's total claim.

218 There is very little difference between the two methods of calculation. The alternative approaches corroborate the probable accuracy of the estimated calculation of vacation pay. I prefer to adopt the more conservative calculation and, therefore, I concur with the defendants' calculation of 45% of the total claim as reflected in Peter Murcar's pay stubs. In accordance with the calculations prepared by the defendants in Schedule "3", 45% of the collective bargaining agreement entitlement for the Mississauga plant employees is $87,002.59. The Cambridge plant employees' 45% entitlement under the collective bargaining agreement is $60,526.86. The employees' combined entitlement is, therefore, $147,529.45.

4. If s. 107(1)(d) applies, should the reading down doctrine apply to any claims of the plaintiffs not covered by s. 107(1)(d)?

219 Counsel for the plaintiffs and the Attorney General submit that, if vacation pay and pension contributions fall within s. 107(1)(*d*) of the *Bankruptcy Act*, the provincial legislation can properly be read down. They submit that the balance of the claims not falling within s. 107(1)(*d*) remains nonetheless valid claims which are secured by liens pursuant to the *Employment Standards Act* and the *Pension Benefits Act*. In effect, the plaintiffs are requesting that the claim be split such that the wages "for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars" would fall within s. 107(1)(*d*) of the *Bankruptcy Act*, and the balance of the claim by each employee would retain its status as a secured claim. This construction, they argue, accords with the

"reading down" doctrine which requires that, where possible, courts interpret statutes as constitutionally valid.

220 The principle of reading down is enunciated by P.W. Hogg in *Constitutional Law of Canada*, 3rd ed. [looseleaf] (Scarborough: Carswell, 1992) at p. 16-18 as follows:

> Once it has been determined that a federal law is inconsistent with a provincial law, the doctrine of federal paramountcy stipulates that the provincial law must yield to the federal law. The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency. Notice that the paramountcy doctrine applies only to the extent of the inconsistency. The doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law, unless of course the inconsistent parts are inseparably linked up with the consistent parts.

221 Section 107(3) of the *Bankruptcy Act* must be considered. It provides that "A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him." It is the position of the plaintiff that the words "entitled to rank" are permissive, not mandatory, and, therefore, any part of the claim not specified in the queue maintains its secured status due to the lien. It appears that this argument and the reading down principle have never been considered in the context of the *Bankruptcy Act*.

222 As the English version of s. 107(3) is unclear, I turn to the French text which reads:

> (3) Tout créancier dont le présent article restreint les droits *prend* rang comme créancier non garanti, quant à tout solde de réclamation qui lui est dû. [emphasis added]

This translates to:

> Every creditor whose rights are restricted by this section ranks as unsecured creditor, with respect to every balance of claim owing to him.

223 It appears clear that "prend rang", which translates literally to "takes rank", is mandatory rather than permissive in nature. The unequivocal language in the French text sheds light on the intended meaning of the English text. I find further guidance in a statement by Pigeon J. in *Re Bourgault*. He states at p. 45: "Furthermore, subs. 3 shows that s. 107 does derogate from the rights of some secured creditors by providing that a secured creditor whose 'rights are restricted' ranks as an 'unsecured creditor'."

224 I, therefore, conclude, based upon the clear language in the French text and the statement of Pigeon J., that the words "entitled to rank" in s. 107(3) are mandatory, not

permissive. I would find, therefore, that the constitutional principle of reading down is not applicable in this case.

5. Can the plaintiffs' claims be characterized as a trust claim?

225 Two alternative trust claims are advanced. The first is against the bank as a result of its possession on November 4, 1981 and the crystallization of the rights of the parties. The plaintiffs state that the bank, as of November 4, 1981, stands in the relationship of *trustee de son tort* for funds owed to the plaintiffs as to that date. Alternatively, the plaintiffs state that they have a valid enforceable constructive trust claim falling within the ambit of a common law trust recognized by *Henfrey Samson*.

Trustee de son tort

226 D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at p. 399 explains "trustee de son tort" as follows:

> A person who was not appointed a trustee, but who takes it upon himself "to possess and administer trust property for the beneficiaries," will be treated as if he were a trustee. He is known as a trustee *de son tort*. He becomes a trustee by imposition of law. Though he may subject himself to actions at law, he is not liable because he has taken upon himself the *office* of a trustee, but because he has possessed and administered trust property contrary to the terms of the trust of which he is aware or ought to be aware. In other words, he is treated as if he were a properly appointed trustee from the moment that he starts to possess and administer that property, knowing actually or constructively that it is trust property, and he becomes liable if he acts in a way which would be a breach of trust in a properly appointed trustee.

227 The thrust of the plaintiffs' position is that, when the bank went into possession, the employees' rights crystallized with priorities determined under the *Bank Act*. The bank's rights were subject to those of the plaintiffs. The bank's security, therefore, became impressed with a trust in favour of the plaintiffs, even if the *Bankruptcy Act* subsequently applies.

228 *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1983), 41 O.R. (2d) 294 (H.C.), affirmed (1984), 46 O.R. (2d) 362 (C.A.) ("*Ontario Wheat Producers' Marketing Board*") is the only case which deals with the principle of trustee de son tort in the context of a bank enforcing its security. In that case, the bank appropriated funds under its s. 88 security (now s. 178). The bank was held liable as constructive trustee rather than *trustee de son tort* in that it knowingly assisted in a dishonest and fraudulent design. At p. 308, the trial judge, Maloney J., adopted the description of the two types of trusts enunciated by Ungoed-Thomas J., at p. 1095, in *Selangor United Rubber Estates, Ltd. v. Cradock (bkpt.) (No. 3)*, [1968] 2 All E.R. 1073 (Ch.) ("*Selangor United Rubber*"):

> It is essential at the outset to distinguish two very different kinds of so-called constructive trustees: (i) Those who, though not appointed trustees, take on themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them. (ii) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of.

After citing from *Selangor United Rubber*, Maloney J. wrote as follows at p. 308:

> Although the plaintiff Wheat Board sought to characterize the Bank as a trustee *de son tort*, I do not think that characterization is applicable here. It cannot be said that the Bank was in possession of the property with the intent to administer it for the Board. The Bank stepped in to protect its own rights.

229 In the case at bar, the defendants knew or ought to have known that the assets seized were impressed with statutory trusts and were subject to statutory liens. The bank's own security documentation expressly contemplated such employee charges and the bank was aware that Admiral, as a manufacturer of consumer goods, used employees to produce those goods and that such employees had entitlements pursuant to the *Employment Standards Act* and the *Pension Benefits Act*. As evidenced by Exhibit "10", tab 17, the bank, by their agent Coopers and Lybrand, knew of the plaintiffs' claim to vacation pay.

230 I would conclude that when Coopers and Lybrand went into possession on behalf of the bank, they did so intending to protect the bank's interests. They were, however, aware of the claim of the plaintiffs for vacation pay owing. Coopers and Lybrand and the bank, in my view, fall within the ambit of a *trustee de son tort*. Although not appointed as trustee, they administered property of the plaintiffs aware of the existence and quantum of the claim. The plaintiffs' rights crystallized in priority to the rights of the bank under the *Bank Act*. I note that my conclusion on this point is dependent upon any findings as to the nature of *Bank Act* security and priorities determined under the legislation being correct. I would, therefore, grant to the plaintiffs a declaration that Coopers and Lybrand and the bank stand in the position of *trustee de son tort* with respect to the plaintiffs' claim.

Constructive Trust or Resulting Trust

231 The plaintiffs advance an alternative trust argument pursuant to the doctrines of constructive or resulting trusts. Would such a claim fall within the *Henfrey Samson* test of a trust claim recognized under general principles of common law?

232 McLachlin J. in *Henfrey Samson*, at p. 32, adopts the distinction of Pigeon J. in *Re Bourgault* that unsecured claims of the Crown must be contrasted with a "privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege". Are employees' claims for vacation pay and pension benefits accrued like a builder's or a vendor's privilege under the general rules of law, or are they to be characterized like a Crown claim for taxes?

233 The dilemma I am faced with is that there is some merit in viewing the plaintiffs' claim as being based upon the principle of a common law lien, akin to a builder's or a vendor's privilege. This may give rise to a claim based upon constructive trust. Conversely, I am faced squarely with the fact that s. 107(1)(*d*) of the *Bankruptcy Act* specifies that the plaintiffs' claim shall be as preferred creditors for limited amounts. A finding of constructive trust may undermine the legislative purpose of the *Bankruptcy Act*.

234 Pennell J. explores the nature of a common law lien in *Debor Contracting Ltd. v. Core Rentals Ltd.* (1982), 40 O.R. (2d) 24 (H.C.). He states at p. 30:

> At common law, a lien is given to an artisan or mechanic who performs labour and furnishes material upon any chattel in the alteration or improvement of it. The bestowing of labour in the credit of the chattel makes it a security for the prospective account of the mechanic or artisan. The lien may, however, be lost in several ways. If the work is not done on the credit of the chattel itself but solely on the credit of the owner, there is a waiver of the lien. That case is not here. A lien is also lost if possession is lost.

Further, Pennell J. finds at p. 31 that "The common law creates a lien. The *Mechanics' Lien Act* (the "*Act*") defines the remedy to realize it." The nature of a common law lien is also explored in *Bank of Montreal v. Canada Packers Inc.* (1986), 55 O.R. (2d) 332 (Ont. Dist. Ct.), affirmed (1987), 61 O.R. (2d) 725 (Div. Ct.). These recent cases adopt the underlying principles of the common law lien enunciated in *Bank of Montreal v. Guaranty Silk Dyeing & Finishing Co.*, [1935] O.R. 493 (C.A.).

235 The plaintiffs seek to rely on the principles of unjust enrichment, enunciated in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 and *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38. To qualify, there must be a finding of an enrichment, a corresponding deprivation, and the absence of any juristic reason to justify the deprivation. I would have no difficulty with the first two criteria. There has been, in my view, an unjust enrichment received by the bank as a result of the plaintiffs' labour. Their labour may perhaps be characterized as a common law lien.

There has been a corresponding deprivation of the plaintiffs as they remain unpaid. The third criteria, however, presents for the plaintiffs an insurmountable hurdle. Certain constructive trust claims may be valid and enforceable in the context of bankruptcy. There is precedent for this in the decision of *Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129 (Gen. Div.). However, in this case, the subject matter giving rise to the trust claim is within the queue of defined preferred creditors. I find that, when the subject matter of the trust is defined within the s. 107 queue, a constructive trust claim cannot elevate the plaintiffs' claim to that of a secured creditor without circumventing the intended legislative purpose of the *Bankruptcy Act*. The juristic reason why the plaintiffs' claim cannot succeed is that the legislature has enunciated a national code for the distribution of the bankrupt's estate. It would not, in my view, be appropriate for a court to re-order clear statutory priorities specified in the queue of preferred creditors in the *Bankruptcy Act* by a finding of constructive trust.

236 Certainty and predictability in determining creditor priorities must be protected. To allow open-ended constructive trust claims to be advanced for matters within the 107 queue, in the words of McLachlin J. in *Henfrey Samson* would "defy fairness and common sense". It would encourage protracted litigation in bankruptcy proceedings with unpredictable results.

237 Alternatively, I concur with the reasons of Saunders J. in *Re I.B.L. Industries Ltd.* (1991), 2 O.R. (3d) 140 (Bktcy.) ("*I.B.L.*"). The issue arose in *I.B.L.* as to whether vacation pay and pension contributions owed by the bankrupt fell within the meaning of s. 67(*a*) (formerly s. 47(*a*)) of the *Bankruptcy Act*. Saunders J. applied the test in *Henfrey Samson* and found that the union's claim must fail as there was no identifiable property held by the bankrupt. As the plaintiffs' claim failed to qualify on the threshold issue, Saunders J. did not decide whether the facts of the case supported a finding of constructive trust claim. I would reach a parallel conclusion on the threshold issue in this case.

Interest

238 The plaintiffs seek compound interest on their claims. In light of my findings, I decline such a request. Further, there has been extensive delay in this matter and it would not be appropriate to impose upon the defendants the added burden of compound interest. Prejudgment interest shall, therefore, be calculated in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Part VIII — Conclusions

239 My findings on the numerous issues raised may be summarized as follows.

240 1. The union and salaried employees of the Mississauga plant did not receive their vacation pay for the period July 1 to November 4, 1981. The amounts owing for this period are $193,339.09. There remains $4,656 owing for the previous union contract year.

241 2. Based upon the assembly of appliances at the Admiral Mississauga and Cambridge plants, there were sufficient appliances assembled upon which the plaintiffs' security interest could attach.

242 3. The term "laid off" in the collective bargaining agreements contemplates both temporary and permanent termination of employment. The vacation pay of the employees, after they were laid off, is, therefore, to be calculated based upon years of service stipulated in the collective bargaining agreements and recognised by s. 5(1) of the *Employment Standards Act*. The 4% minimum defined by the *Employment Standards Act* is not applicable.

243 4. The nature of the plaintiffs' claim is a specialty. It is a debt stipulated by statute. Section 45(1)(*b*) of the *Limitations Act* provides a twenty-year limitation period. Section 45(1)(*h*) of the *Limitations Act* is not applicable. The plaintiffs' claim, initiated in June of 1987 is, therefore, not statute barred.

244 5. The plaintiffs pursued their rights as preferred creditors in Admiral's bankruptcy. This does not prevent the plaintiffs from seeking a declaration in this action that they stand as secured creditors. There was no action of the plaintiffs representing an unconditional surrender of their security.

245 6. An unspecified number of plaintiffs who were hired by Inglis signed the agreement acknowledging that the collective bargaining agreements with Admiral were null and void. I find that the defendants cannot rely on the agreement. They were not parties to the agreement and cannot rely upon it as a shield. The facts of this case do not fall within the narrow exceptions of the rule of privity of contract. Further, although the plaintiffs' rights are based upon calculations specified in the collective bargaining agreements, they represent recovery of debts stipulated in a statute.

246 7. I find that *Hall* does not implicitly overrule *Armstrong*. The statements of La Forest J. about the national importance, a complete code and the legislative purpose of the *Bank Act* must be considered in the context of the issues in *Hall*. In *Hall*, the constitutionality of s. 178 and s. 179 of the *Bank Act* were being challenged by the province. La Forest J. in *Hall* explicitly recognizes the qualified nature of *Bank Act* ownership relevant to this case. A secured creditor must be treated in his words "like any other property owner". He endorses the earlier Supreme Court of Canada decision of *Royal Bank v. Workmen's Compensation* which recognizes the provincial Worker's Compensation statutory trust and lien in priority to *Bank Act* security.

247 8. I find that Carruthers J. in *Armstrong* did not rely on decisions which were subsequently overruled by the Supreme Court of Canada. The *Henfrey Samson* decision

stipulates requirements of statutory trusts and priorities determined under the *Bankruptcy Act*. The decision does not apply to priorities determined under the *Bank Act*.

248 9. Therefore, under the *Bank Act*, I conclude, based upon *Armstrong*, that the plaintiffs' claim has priority to the claim of the bank. Each day, as work is performed and appliances assembled, the plaintiffs' statutory trust arises and the lien attaches on appliances passing through the Admiral plants. The rights assigned by *Bank Act* security are Admiral's rights of ownership. Admiral's rights are subject to the trust and lien claims of the plaintiffs. The *Bank Act* security gives no higher rights of ownership than those possessed by Admiral as owner.

249 10. I find that the subsequent bankruptcy of Admiral, effective November 23, 1981, had no effect upon the priorities determined on November 4, 1981, when rights under the *Bank Act* crystallized. The property subject to *Bank Act* security was not property of the bankrupt within the meaning of s. 47 of the *Bankruptcy Act* at the date of Admiral's bankruptcy. The ratio of *FBDB* is not applicable to the facts of this case.

250 11. If a higher court does not agree with the findings and conclusions outlined above, I outline what my response would be to the submissions of the parties if the *Bankruptcy Act* determines the priorities between the parties:

(i) Implicit in my conclusions is the finding that the property subject to *Bank Act* security is not property of the bankrupt within the meaning of s. 47 of the *Bankruptcy Act* on November 23, 1981. I would concur, therefore, with the plaintiffs' submission.

(ii) A statutory lien may preserve the plaintiffs' claim as a secured creditor so long as the claim does not fall within the statutory queue of defined preferred creditors stipulated by s. 107 of the *Bankruptcy Act*. I find that vacation pay falls within the ambit of "wages, salaries, commissions or compensation", as defined by s. 107(1)(*d*) of the *Bankruptcy Act*. Paramountcy dictates that the provincial legislation must yield and will be rendered inoperative with respect to vacation pay. I reach the opposite conclusion with respect to pension benefits. I conclude that they do not form part of the queue. As there is no conflict between the provincial and federal legislations, the provincial lien with respect to pension benefits retains its status as a secured claim and the employees' priority for pension benefits is established.

(iii) I would find that s. 178(6) of the *Bank Act* requires the bank to pay vacation pay benefits accrued for a three-month period prior to the bankruptcy. Although the bank went into possession prior to the bankruptcy, it continued to dispose of property subsequent to the date of bankruptcy. The plaintiffs' entitlement is calculated as $147,529.45.

(iv) In light of my findings as to the nature of the *Bank Act* security, I would find that Coopers and Lybrand and the bank became *trustee de son tort* as a result of taking possession of the *Bank Act* security.

(v) The plaintiffs advance an alternative constructive trust claim. I would find that, if the subject matter of the constructive trust falls within the queue of defined preferred creditors, it is not appropriate for the courts to impose a constructive trust and redefine clear unequivocal legislative priorities. Alternatively, I would concur with the reasoning of Saunders J. in *I.B.L.* I would find that the trust fails on the threshold issue as the trust funds are co-mingled and not traceable.

251 12. I reject the plaintiffs' request for compound interest. Simple interest is ordered based upon the provisions of the *Courts of Justice Act*.

252 I wish to thank all counsel for their thorough yet cogent submissions. A mutually convenient appointment may be arranged through my secretary to canvas the issue of costs.

Action allowed.

End of Document

TAB 3

Bank of Montreal *Appellant*

v.

Innovation Credit Union *Respondent*

Indexed as: Bank of Montreal *v.* Innovation Credit Union

2010 SCC 47

File No.: 33153.

2010: April 19; 2010: November 5.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Commercial law — Priorities — Unregistered provincial security interest taken in farm equipment owned by debtor — Bank Act security subsequently taken in same goods without notice of existing security — Property seized by Bank on default — Whether priority should be given to provincial security interest or Bank Act security interest — Bank Act, S.C. 1991, c. 46, ss. 427(2), 428, 435(2) — Personal Property Security Act, 1993, S.S. 1993, c. P-6.2, ss. 20(3), 66.

At issue is a priority dispute between a prior unregistered security interest taken under Saskatchewan's *Personal Property Security Act, 1993* ("*PPSA*") in farm equipment owned by the debtor, and a subsequent security interest in the same collateral taken and registered under the federal *Bank Act*.

Innovation Credit Union took a *PPSA* security interest dated October 7, 1991, and registered on June 28, 2004. The Bank of Montreal, between 1998 and January 2004, took *Bank Act* security over much of the same property. The farmer, however, did not disclose either the Credit Union's loans or its security interest and the Bank's searches of both the *PPSA* and *Bank Act* security registries disclosed no prior security interests. After the debtor defaulted, the Bank seized and sold some of his property covered by its security.

Banque de Montréal *Appelante*

c.

Innovation Credit Union *Intimée*

Répertorié : Banque de Montréal *c.* Innovation Credit Union

2010 CSC 47

N° du greffe : 33153.

2010 : 19 avril; 2010 : 5 novembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit commercial — Priorité de rang — Sûreté provinciale non enregistrée sur du matériel agricole appartenant au débiteur — Garantie régie par la Loi sur les banques prise subséquemment sur les mêmes biens sans que la sûreté préexistante soit connue — Saisie par la banque par suite du défaut du débiteur — Ordre de priorité entre la sûreté provinciale et la garantie régie par la Loi sur les banques — Loi sur les banques, L.C. 1991, ch. 46, art. 427(2), 428, 435(2) — Personal Property Security Act, 1993, S.S. 1993, ch. P-6.2, art. 20(3), 66.

Le pourvoi porte sur un conflit de priorité entre une sûreté antérieure non enregistrée consentie en vertu de la *Personal Property Security Act, 1993* de la Saskatchewan (« *PPSA* »), sur du matériel agricole appartenant au débiteur et une garantie subséquente sur les mêmes biens prise et enregistrée sous le régime de la *Loi sur les banques* du Canada (« *LB* »).

Innovation Credit Union a obtenu une sûreté au titre de la *PPSA* le 7 octobre 1991 et l'a enregistrée le 28 juin 2004. Entre 1998 et janvier 2004, la Banque de Montréal a obtenu une garantie sur une bonne partie des mêmes biens en vertu de la *LB*. L'agriculteur n'a pas révélé les prêts consentis et la sûreté obtenue par Innovation Credit Union; les recherches faites par la Banque dans les registres des sûretés établis en vertu de la *PPSA* et de la *LB* n'ont révélé l'existence d'aucune sûreté antérieure. Par suite du défaut du débiteur, la Banque a saisi et vendu certains des biens visés par sa garantie.

The Credit Union brought an application before the Court of Queen's Bench pursuant to s. 66 of the *PPSA* seeking a declaration that it had a priority claim over the proceeds of the disposition. The applications judge held that the priority rule in s. 428 of the *Bank Act* gave the *Bank Act* security interest priority not only over subsequently acquired rights in respect of the property but also over subsequently acquired priority rights. The Court of Appeal allowed the appeal, holding that the proper interpretation of ss. 427(2) and 435(2) of the *Bank Act* leads to the application of provincial property law to determine the effect of a prior security interest. The first-in-time *PPSA* security interest had priority over the *Bank Act* security because the Bank acquired no greater interest than the debtor had at the time the *Bank Act* security was taken. The Bank's security interest was therefore subject to the Credit Union's prior interest, regardless of the fact that the latter was unperfected.

Innovation Credit Union s'est adressée à la Cour du Banc de la Reine en application de l'art. 66 de la *PPSA* pour se faire reconnaître la priorité sur le produit de l'aliénation des biens. Le juge des requêtes a conclu que, selon la règle de priorité établie par l'art. 428 de la *LB*, la garantie obtenue au titre de la *LB* primait non seulement les droits subséquemment acquis sur les biens, mais aussi les droits de priorité subséquemment acquis. La Cour d'appel a accueilli l'appel en statuant que, si l'on interprète bien les par. 427(2) et 435(2) de la *LB*, il faut appliquer le droit des biens provincial pour établir l'effet d'une sûreté antérieure. La sûreté préexistante, régie par la *PPSA*, avait priorité sur la garantie relevant de la *LB* parce que la Banque n'avait pas acquis un intérêt supérieur à celui que détenait le débiteur au moment où il lui a consenti sa garantie. La garantie de la banque était donc subordonnée à la sûreté antérieure d'Innovation Credit Union, même si cette sûreté n'avait pas été parfaite.

Held: The appeal should be dismissed.

Arrêt : Le pourvoi est rejeté.

The focal point for resolving a priority dispute involving a *Bank Act* security and provincial interests, such as *PPSA* security interests, is the *Bank Act* itself. The *Bank Act* security provisions are valid federal legislation which cannot be subject to the operation of provincially enacted priority provisions. Where the *Bank Act* contains an express priority provision that is applicable to a particular priority dispute, that provision will govern. Where the priority dispute is between a *Bank Act* security interest and a conflicting security interest acquired *prior* to the bank taking its security in the collateral, the priority rule set out in s. 428 does not assist in resolving the dispute. In such cases, the provisions of the *Bank Act* nonetheless govern. Here, the priority dispute must be resolved by determining what proprietary rights were granted to the Bank under s. 427(2) of the *Bank Act*.

La clé d'un conflit de priorité entre une garantie régie par la *LB* et une sûreté régie par une loi provinciale, telle la *PPSA*, se trouve dans la *LB* elle-même. Les dispositions de la *LB* régissant les garanties sont des dispositions législatives fédérales valides qui ne peuvent être subordonnées à l'application de dispositions édictées par une province en matière de priorité. Dans les cas où la *LB* contient une disposition expresse applicable à un conflit de priorité donné, c'est cette disposition qui prime. La règle de priorité établie par l'art. 428 de la *LB* ne permet pas de régler un conflit entre une garantie régie par la *LB* et une sûreté concurrente obtenue *avant* que la banque prenne sa garantie sur les biens. Il demeure toutefois que ce conflit doit être résolu par l'application des dispositions de la *LB*. Pour ce faire, en l'espèce, il faut déterminer quels droits propriétaux ont été conférés à la Banque en application du par. 427(2) de la *LB*.

As the combined effect of ss. 427(2) and 435(2) is that the Bank can acquire no greater interest in the collateral than the debtor has at the relevant time, it becomes necessary to determine the nature of the debtor's interest in the collateral at the time the Bank took its security interest. The question which arises, therefore, is the nature of the interest already conveyed to the Credit Union under the *PPSA*. Because the security regime contained in the *Bank Act* is property-based, the right claimed by the competing Credit Union must be characterized as a matter of property law. While the provinces cannot legislate in order to oust the bank's rights, they can alter the law as it relates to property and civil rights. Saskatchewan did so

Comme l'effet conjugué des par. 427(2) et 435(2) ne permet pas à la Banque d'acquérir sur les biens un intérêt supérieur à celui que détenait le débiteur lui-même au moment pertinent, il faut déterminer la nature de l'intérêt que le débiteur détenait sur les biens lorsque la Banque a obtenu sa garantie. D'où la nécessité de déterminer la nature de l'intérêt déjà transmis par le débiteur à Innovation Credit Union en vertu de la *PPSA*. Puisque le régime de garantie établi par la *LB* est axé sur la propriété, le droit concurrent revendiqué par Innovation Credit Union doit être défini sous l'angle du droit des biens. Les législatures provinciales ne peuvent pas écarter les droits de la banque, mais elles peuvent

when it enacted the *PPSA*. While the *PPSA* does not contain any provisions which identify the nature of a *PPSA* security interest in proprietary terms, the effect of the legislation is to create a statutory interest which is analogous to an inchoate property right. At the time the debtor gave the Bank its *Bank Act* security interest, Innovation Credit Union already held a valid security interest in the nature of a fixed charge. The lack of perfection did not affect this interest.

The existing statutory scheme under the *Bank Act* does not permit the judicial creation of a first-to-register or, alternatively, a first-to-perfect priority rule as proposed by the Bank. Such a rule would have to be enacted by Parliament if it saw fit to do so. Under the common law, a priority dispute between two legal interests in the same property is determined in accordance with the maxim *nemo dat quod non habet*. Sections 427(1) and 435(2) of the *Bank Act* operate in the same way. The application of these provisions to the present case grants priority to Innovation Credit Union's interest.

Cases Cited

Applied: *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; **referred to:** *Royal Bank of Canada v. Radius Credit Union Ltd.*, 2010 SCC 48, [2010] 3 S.C.R. 38; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569; *Landry Pulpwood Co. v. Banque Canadienne Nationale*, [1927] S.C.R. 605; *Giffen (Re)*, [1998] 1 S.C.R. 91.

Statutes and Regulations Cited

Bank Act, S.C. 1890, c. 31, s. 74.
Bank Act, S.C. 1991, c. 46, ss. 425(1), 427, 428, 435(2).
Civil Code of Lower Canada.
Civil Code of Québec, S.Q. 1991, c. 64, Book Six.
Federal Law—Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, preamble.
Interpretation Act, R.S.C. 1985, c. I-21, s. 8.1.
Personal Property Security Act, S.S. 1979-80, c. P-6.1 [rep. S.S. 1993, c. P-6.2, s. 72].
Personal Property Security Act, 1967, S.O. 1967, c. 73.
Personal Property Security Act, 1993, S.S. 1993, c. P-6.2, ss. 2(1)(pp), (qq), 3(1)(a), 4, 9(2), 10, 12, 18, 20(2), (3), 25, 35(1), 59, 60, 66, 72.
Uniform Commercial Code [2000 rev.], art. 9.

modifier les règles de droit en matière de propriété et de droits civils. La Saskatchewan l'a fait en édictant la *PPSA*. Bien que la *PPSA* ne précise pas la nature d'une sûreté consentie sous son régime sous l'angle de la propriété, la loi crée un intérêt légal analogue à un droit de propriété virtuel. Lorsque le débiteur a consenti à la Banque sa garantie en application de la *LB*, Innovation Credit Union détenait déjà une sûreté valide de la nature d'une charge fixe. Le défaut de parfaire la sûreté n'avait pas d'incidence sur cet intérêt.

Le régime législatif en vigueur établi par la *LB* ne permet pas aux tribunaux de créer une règle conférant priorité au premier enregistrement ou à la première sûreté parfaite, comme le demande la Banque. C'est au législateur qu'il reviendrait d'édicter pareille règle, s'il le jugeait à propos. Selon les règles de la common law, la solution à un conflit de priorité entre deux intérêts en common law dans le même bien tient à la maxime *nemo dat quod non habet*. Les par. 427(1) et 435(2) de la *LB* ont le même effet. Leur application en l'espèce donne priorité à la sûreté d'Innovation Credit Union.

Jurisprudence

Arrêts appliqués : *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; **arrêts mentionnés :** *Banque Royale du Canada c. Radius Credit Union Ltd.*, 2010 CSC 48, [2010] 3 R.C.S. 38; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Royal Bank of Canada c. Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569; *Landry Pulpwood Co. c. Banque Canadienne Nationale*, [1927] R.C.S. 605; *Giffen (Re)*, [1998] 1 R.C.S. 91.

Lois et règlements cités

Acte des banques, L.C. 1890, ch. 31, art. 74.
Code civil du Bas Canada.
Code civil du Québec, L.Q. 1991, ch. 64, Livre sixième.
Loi d'harmonisation nº 1 du droit fédéral avec le droit civil, L.C. 2001, ch. 4, préambule.
Loi d'interprétation, L.R.C. 1985, ch. I-21, art. 8.1.
Loi sur les banques, L.C. 1991, ch. 46, art. 425(1), 427, 428, 435(2).
Personal Property Security Act, S.S. 1979-80, ch. P-6.1 [abr. S.S. 1993, ch. P-6.2, art. 72].
Personal Property Security Act, 1967, S.O. 1967, ch. 73.
Personal Property Security Act, 1993, S.S. 1993, ch. P-6.2, art. 2(1)(pp), (qq), 3(1)(a), 4, 9(2), 10, 12, 18, 20(2), (3), 25, 35(1), 59, 60, 66, 72.
Uniform Commercial Code [rév. 2000], art. 9.

Authors Cited

Canada. Law Commission. *Modernizing Canada's Secured Transactions Law: The Bank Act Security Provisions*. Ottawa: The Commission, 2004.

Cuming, Ronald C. C. "Case Comment: *Innovation Credit Union v. Bank of Montreal* — Interface between the *PPSA* and Section 427 of the *Bank Act*: Desirable Policy vs. Hard Legal Analysis" (2008), 71 *Sask. L. Rev.* 143.

Cuming, Ronald C. C., and Roderick J. Wood. "Compatibility of Federal and Provincial Personal Property Security Law" (1986), 65 *Can. Bar Rev.* 267.

Cuming, Ronald C. C., Catherine Walsh and Roderick J. Wood. *Personal Property Security Law*. Toronto: Irwin Law, 2005.

Moull, William D. "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242.

Poirier, Marc-Alexandre. "Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law: A Bijural Perspective" (2003), 63 *R. du B.* 289.

Saskatchewan. Law Reform Commission. *Tentative Proposals for a New Personal Property Security Act*. Saskatoon: The Commission, 1990.

Uniform Law Conference of Canada. *Uniform Law Conference of Canada — Commercial Law Strategy*, vols. 1 and 2. Ottawa: The Conference, 2005 (loose-leaf updated 2010).

Ziegel, Jacob S. "Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act" (1986-87), 12 *Can. Bus. L.J.* 73.

Ziff, Bruce. *Principles of Property Law*, 4th ed. Toronto: Thomson, 2006.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Sherstobitoff, Jackson and Smith JJ.A.), 2009 SKCA 35, 324 Sask. R. 160, 451 W.A.C. 160, 306 D.L.R. (4th) 407, [2009] 8 W.W.R. 473, 51 C.B.R. (5th) 163, 14 P.P.S.A.C. (3d) 149, [2009] S.J. No. 147 (QL), 2009 CarswellSask 156, reversing a decision of Zarzeczny J., 2007 SKQB 471, 306 Sask. R. 227, [2008] 4 W.W.R. 143, 39 C.B.R. (5th) 260, 12 P.P.S.A.C. (3d) 223, [2007] S.J. No. 679 (QL), 2007 CarswellSask 748. Appeal dismissed.

Rick M. Van Beselaere and *Peter T. Bergbusch*, for the appellant.

Donald H. Layh, *Q.C.*, and *Shawn M. Patenaude*, for the respondent.

Doctrine citée

Canada. Commission du droit. *La Loi sur les banques et la modernisation du droit canadien des sûretés*. Ottawa : La Commission, 2004.

Conférence pour l'harmonisation des lois au Canada. *Conférence pour l'harmonisation des lois au Canada — Stratégie du droit commercial*, vol. 1 et 2. Ottawa : La Conférence, 2005 (feuilles mobiles mises à jour 2010).

Cuming, Ronald C. C. « Case Comment : *Innovation Credit Union v. Bank of Montreal* — Interface between the *PPSA* and Section 427 of the *Bank Act* : Desirable Policy vs. Hard Legal Analysis » (2008), 71 *Sask. L. Rev.* 143.

Cuming, Ronald C. C., and Roderick J. Wood. « Compatibility of Federal and Provincial Personal Property Security Law » (1986), 65 *R. du B. can.* 267.

Cuming, Ronald C. C., Catherine Walsh and Roderick J. Wood. *Personal Property Security Law*. Toronto : Irwin Law, 2005.

Moull, William D. « Security Under Sections 177 and 178 of the Bank Act » (1986), 65 *R. du B. can.* 242.

Poirier, Marc-Alexandre. « Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law : A Bijural Perspective » (2003), 63 *R. du B.* 289.

Saskatchewan. Law Reform Commission. *Tentative Proposals for a New Personal Property Security Act*. Saskatoon : The Commission, 1990.

Ziegel, Jacob S. « Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act » (1986-87), 12 *Rev. can. dr. comm.* 73.

Ziff, Bruce. *Principles of Property Law*, 4th ed. Toronto : Thomson, 2006.

POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (les juges Sherstobitoff, Jackson et Smith), 2009 SKCA 35, 324 Sask. R. 160, 451 W.A.C. 160, 306 D.L.R. (4th) 407, [2009] 8 W.W.R. 473, 51 C.B.R. (5th) 163, 14 P.P.S.A.C. (3d) 149, [2009] S.J. No. 147 (QL), 2009 CarswellSask 156, qui a infirmé une décision du juge Zarzeczny, 2007 SKQB 471, 306 Sask. R. 227, [2008] 4 W.W.R. 143, 39 C.B.R. (5th) 260, 12 P.P.S.A.C. (3d) 223, [2007] S.J. No. 679 (QL), 2007 CarswellSask 748. Pourvoi rejeté.

Rick M. Van Beselaere et *Peter T. Bergbusch*, pour l'appelante.

Donald H. Layh, *c.r.*, et *Shawn M. Patenaude*, pour l'intimée.

The judgment of the Court was delivered by

CHARRON J. —

1. Overview

[1] At issue in this appeal, as well as in its companion case, *Royal Bank of Canada v. Radius Credit Union Ltd.*, 2010 SCC 48, [2010] 3 S.C.R. 38, are competing security interests taken pursuant to the provisions of the *Bank Act*, S.C. 1991, c. 46, and Saskatchewan's *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2 ("*PPSA*"). In order to resolve the dispute, it is necessary to consider the interaction between the old and somewhat archaic *Bank Act* security scheme on the one hand and the modern provincial regime under the *PPSA* on the other. The *PPSA*, as well as other provincial personal property statutes in Canada, has radically changed the conception of security interests as they were understood at the time the *Bank Act* was enacted over a century ago. Conflicts arising from the interaction between the two regimes, not surprisingly, have been numerous and wide-ranging. Indeed, there appears to be a broad consensus that the difficulties are not entirely soluble without legislative reform. However, legislative action has not been forthcoming in this area. It therefore falls to this Court to decide the present cases and to provide some guidance in this muddled area of law.

[2] In this case, the priority dispute is between a prior unregistered security interest taken under the *PPSA* in agricultural implements owned by the debtor at the time, and a subsequent security interest in the same collateral taken and registered under the *Bank Act*. In first instance, the applications judge held that because the Credit Union had not perfected its security interest through registration under the *PPSA*, the Bank's security had priority. In his view, the priority rule specified by s. 428 of the *Bank Act*, which gives a *Bank Act* security interest priority over subsequently acquired rights in respect of the property, also gives the bank priority over subsequently acquired *priority* rights (2007 SKQB 471, 306 Sask. R. 227). The Court of

Version française du jugement de la Cour rendu par

LA JUGE CHARRON —

1. Aperçu

[1] Il est question, dans le présent pourvoi et dans l'affaire connexe, *Banque Royale du Canada c. Radius Credit Union Ltd.*, 2010 CSC 48, [2010] 3 R.C.S. 38, de sûretés concurrentes prises en application de la *Loi sur les banques*, L.C. 1991, ch. 46 (« *LB* »), et de *The Personal Property Security Act, 1993* de la Saskatchewan, S.S. 1993, ch. P-6.2 (« *PPSA* »). Pour régler le litige, il faut examiner l'interaction entre, d'une part, le régime de garantie, vieux et quelque peu archaïque, établi par la *LB* et, d'autre part, le régime provincial moderne créé par la *PPSA*. Celle-ci, ainsi que d'autres lois provinciales en matière de sûretés mobilières, ont changé radicalement la manière dont on percevait les sûretés lorsque la *LB* a été adoptée, il y a plus d'un siècle. Comme il fallait s'y attendre, l'interaction entre les deux régimes a donné lieu à de multiples conflits, d'une grande diversité. En fait, il semble exister un large consensus sur l'impossibilité de résoudre entièrement les difficultés qui surgissent sans une réforme législative. Or, aucune mesure législative en ce sens ne semble imminente. La Cour doit donc trancher les deux affaires qui lui sont soumises et fournir quelques indications dans ce domaine nébuleux du droit.

[2] En l'espèce, le pourvoi porte sur un conflit de priorité entre une sûreté antérieure non enregistrée consentie en application de la *PPSA* sur du matériel agricole mobilier appartenant au débiteur et une garantie subséquente sur les mêmes biens, obtenue et enregistrée sous le régime de la *LB*. En première instance, le juge des requêtes a décidé que, comme la Coopérative de crédit n'avait pas parfait sa sûreté en l'enregistrant comme le prévoit la *PPSA*, la sûreté de la banque avait priorité. De l'avis du juge, la règle de priorité prévue par l'art. 428 de la *Loi sur les banques*, prévoyant qu'une garantie consentie en vertu de cette loi prime les droits subséquemment acquis sur le bien, donne aussi priorité à la garantie de la Banque sur les droits *de priorité* acquis

Appeal for Saskatchewan allowed the appeal, finding that this reading of s. 428 cannot be supported. Rather, the proper interpretation of ss. 427(2) and 435(2) of the *Bank Act* leads to the application of provincial property law to determine the effect of a prior security interest. Here, the first-in-time *PPSA* security interest had priority over the *Bank Act* security because the Bank acquired no greater interest than the debtor himself had at the time the *Bank Act* security was taken. The Bank's security interest was therefore subject to the Credit Union's prior interest, regardless of the fact that the latter was unperfected (2009 SKCA 35, 324 Sask. R. 160).

[3] On appeal before this Court, the Bank of Montreal argues that no proprietary interest in the collateral was conveyed to the Credit Union under its *PPSA* security agreement and that, consequently, it acquired an unencumbered interest in the debtor's property at the time the *Bank Act* security was taken. Alternatively, it argues that the first-in-time principle should not apply to give priority to the first to execute a security agreement as banks have no way of discovering the existence of undisclosed and unregistered *PPSA* interests. As giving such interests priority over subsequent *Bank Act* interests would expose banks to unreasonable commercial risk, the rule should be modified so as to give priority to the first to register its security agreement.

[4] In my view, the Bank's contention that no interest affecting the debtor's title was conveyed to the Credit Union under its prior, albeit unperfected, security agreement cannot be supported in law. The Court of Appeal was correct in its interpretation of the *Bank Act*. At the time that the Bank of Montreal took its *Bank Act* security, the debtor had already given the Credit Union a security interest in that collateral under the *PPSA*. As I will explain, the statutory interest acquired by the Credit Union is correlative to a proprietary right at common law

subséquemment (2007 SKQB 471, 306 Sask. R. 227). La Cour d'appel de la Saskatchewan a accueilli l'appel, concluant que cette interprétation de l'art. 428 ne peut être étayée. Si l'on interprète bien les par. 427(2) et 435(2) de la *LB*, il faut appliquer le droit des biens provincial pour établir l'effet d'une sûreté antérieure. En l'occurrence, la première sûreté, régie par la *PPSA*, avait priorité sur la garantie relevant de la *LB* parce que l'intérêt acquis par la Banque n'était pas supérieur à celui que détenait le débiteur lui-même au moment où il lui a consenti cette garantie. La garantie de la Banque était donc subordonnée à la sûreté antérieure de la Coopérative de crédit, sans égard au fait que la sûreté de la Coopérative de crédit n'avait pas été parfaite (2009 SKCA 35, 324 Sask. R. 160).

[3] En appel devant la Cour, la Banque de Montréal fait valoir qu'aucun intérêt propriétal dans les biens n'a été conféré à la Coopérative de crédit par le contrat de sûreté conclu sous le régime de la *PPSA* et que, par conséquent, la Banque a acquis un intérêt non grevé sur les biens du débiteur quand elle a obtenu sa garantie sous le régime de la *LB*. Subsidiairement, la Banque de Montréal fait valoir que la règle de la priorité chronologique ne devrait pas s'appliquer de manière à donner priorité au premier contrat de sûreté conclu, car les banques n'ont aucun moyen de constater l'existence de sûretés consenties sous le régime de la *PPSA* qui ne sont ni révélées ni enregistrées. Puisque le fait de donner priorité à ces droits sur ceux acquis subséquemment en vertu de la *LB* exposerait les banques à des risques commerciaux déraisonnables, il faudrait modifier la règle de façon à donner priorité au premier contrat de sûreté enregistré.

[4] À mon avis, la prétention de la Banque qu'aucun intérêt affectant le titre du débiteur n'a été accordé à la Coopérative de crédit lorsqu'elle a obtenu sa sûreté antérieure, mais non parfaite, ne peut être étayée en droit. La Cour d'appel a interprété correctement la *LB*. Lorsque la Banque de Montréal a pris sa garantie en vertu de la *LB*, le débiteur avait déjà accordé une sûreté sur ce bien à la Coopérative de crédit sous le régime de la *PPSA*. Comme je vais l'expliquer ci-dessous, l'intérêt acquis par la Coopérative de crédit en application de la loi correspond à un

and the Bank therefore took its security interest subject to it. The Bank's argument that this interpretation leads to commercially absurd results echoes the numerous cries for legislative reform and is not without merit. However, in its current manifestation, I see no satisfactory interpretation of the existing statutory scheme that would permit the judicial creation of a first-to-register or, alternatively, a first-to-perfect, priority rule as proposed by the Bank.

[5] I would dismiss the appeal.

2. The Facts and the Proceedings Below

[6] James Buist, a Saskatchewan farmer, obtained a loan from Innovation Credit Union. In order to obtain this loan, he provided the Credit Union with a security interest governed by the *PPSA* in all of his present and after-acquired personal property pursuant to a security agreement dated October 7, 1991. The Credit Union did not register this security interest until June 28, 2004.

[7] After the loans were provided by the Credit Union, the Bank of Montreal lent Buist money. In order to secure its loan, the Bank entered into security agreements with Buist between 1998 until January 2004, validly taking *Bank Act* security over much of the same property that the Credit Union had earlier taken a security interest in. Buist had not disclosed the existence of the loans from the Credit Union or the Credit Union's security interest when he sought financing from the Bank. While the Bank performed searches of both the *PPSA* and *Bank Act* security registries, no prior security interests appeared in the course of that search, as the Credit Union's security interest had not been registered.

[8] Buist ultimately defaulted on his loans and, in December 2004, the Bank seized some of Buist's property covered by its *Bank Act* security. The Credit Union brought an application before the

droit propriétal en common law, de sorte que la garantie obtenue par la Banque lui est subordonnée. L'argument de la Banque selon lequel cette interprétation donne des résultats absurdes sur le plan commercial fait écho aux nombreuses demandes de réforme législative et n'est pas dénué de fondement. Toutefois, dans l'état actuel des choses, aucune interprétation acceptable du régime législatif actuel ne permettrait aux tribunaux d'établir une règle conférant priorité au premier enregistrement ou, subsidiairement, à la première sûreté parfaite, comme le propose la Banque.

[5] Je suis d'avis de rejeter l'appel.

2. Les faits et les décisions des juridictions inférieures

[6] James Buist, un agriculteur de la Saskatchewan, a contracté un prêt auprès de l'Innovation Credit Union (la « Coopérative de crédit »). Pour obtenir ce prêt, il a consenti à la Coopérative de crédit une sûreté sur tous ses biens actuels et futurs sous le régime de la *PPSA* en signant un contrat de sûreté daté du 7 octobre 1991. La Coopérative de crédit n'a enregistré cette sûreté que le 28 juin 2004.

[7] M. Buist a emprunté de l'argent à la Banque de Montréal après avoir contracté son emprunt auprès de la Coopérative de crédit. Pour garantir son prêt, la Banque a conclu des contrats de sûreté avec M. Buist entre 1998 et janvier 2004, obtenant ainsi une garantie valable en application de la *LB* sur une bonne partie des biens déjà visés par la sûreté de la Coopérative de crédit. Dans ses demandes de financement, M. Buist n'avait pas révélé à la Banque l'existence des prêts qu'il avait obtenus de la Coopérative de crédit et de la sûreté qu'il lui avait consentie. La Banque a fait des recherches dans les registres des sûretés établis sous le régime de la *PPSA* et de la *LB*, mais ces recherches n'ont révélé l'existence d'aucune sûreté antérieure, puisque la sûreté de la Coopérative de crédit n'avait pas été enregistrée.

[8] M. Buist a fini par cesser de rembourser ses prêts et, en décembre 2004, la Banque a saisi certains des biens de M. Buist visés par sa garantie régie par la *LB*. La Coopérative de crédit s'est adressée à

Court of Queen's Bench pursuant to s. 66 of the *PPSA* seeking a declaration that it had a priority claim over the proceeds of the disposition of that property.

[9] The applications judge, Zarzeczny J., ruled in favour of the Bank of Montreal, holding that the unregistered *PPSA* interest was subordinate to the Bank's *Bank Act* interest. Zarzeczny J. found that the priority rule specified by s. 428 of the *Bank Act* — which gives a *Bank Act* security interest priority over "all rights subsequently acquired in, on or in respect of that property" — also gives the bank priority over subsequently acquired priority rights. On this basis, Zarzeczny J. held that a security interest under the *PPSA* would only have priority over a subsequently taken *Bank Act* interest where the *PPSA* interest had been perfected prior to the bank taking its security interest under the *Bank Act*. Because the Credit Union obtained priority through registration only *after* the Bank had taken its *Bank Act* interest, Zarzeczny J. gave priority to the Bank under s. 428.

[10] In addition to its being a reasonable interpretation of the text of the *Bank Act*, Zarzeczny J. viewed this interpretation as best promoting two policy goals reflected in the Act. First, it provides a means of achieving compatibility and resolving future conflicts between the *PPSA* and the *Bank Act*. Second, it promotes commercial and business lending efficacy and predictability.

[11] The Saskatchewan Court of Appeal unanimously overturned Zarzeczny J.'s decision. Jackson J.A., writing for the court, conducted a thorough review of the jurisprudence, and ultimately decided that s. 428 of the *Bank Act* did not resolve the case, as Zarzeczny J. had concluded. Rather, she turned to ss. 427(2) and 435(2) of the *Bank Act* to resolve the dispute. Jackson J.A. held that under those provisions, when the Bank took its *Bank Act* security, it acquired only the right and title that the debtor had to give. At the time that the Bank of Montreal took its *Bank Act* security, the debtor had already

la Cour du Banc de la Reine en application de l'art. 66 de la *PPSA* pour se faire reconnaître la priorité sur le produit de l'aliénation des biens.

[9] Le juge Zarzeczny, qui a instruit la demande, a tranché en faveur de la Banque de Montréal, statuant que la sûreté non enregistrée sous le régime de la *PPSA* était subordonnée à la garantie obtenue par la Banque en vertu de la *LB*. Le juge Zarzeczny a conclu que la règle de priorité établie par l'art. 428 de la *LB* — prévoyant qu'une garantie obtenue au titre de la *LB* prime « tous les droits subséquemment acquis sur [les] biens » — donne aussi priorité à la garantie d'une banque sur les droits de priorité acquis subséquemment. Pour ce motif, le juge Zarzeczny a décidé qu'une sûreté régie par la *PPSA* n'a priorité sur une garantie prise subséquemment en vertu de la *LB* qu'à condition d'avoir été parfaite avant que la banque n'obtienne sa garantie. Comme la Coopérative de crédit n'a obtenu priorité en enregistrant sa sûreté qu'*après* l'obtention par la Banque de sa garantie en vertu de la *LB*, le juge Zarzeczny a accordé priorité de rang à la Banque en application de l'art. 428.

[10] En plus de considérer raisonnable l'interprétation susmentionnée du texte de la *LB*, le juge Zarzeczny s'est dit d'avis qu'elle favorisait l'atteinte de deux objectifs de principe intégrés à la loi. Premièrement, elle permettait d'harmoniser la *PPSA* et la *LB*, et de régler les conflits éventuels entre ces deux lois. Deuxièmement, elle contribuait à l'efficacité et à la prévisibilité en matière de prêts commerciaux.

[11] La Cour d'appel de la Saskatchewan a infirmé à l'unanimité la décision du juge Zarzeczny. La juge Jackson, s'exprimant au nom de la cour, a fait une analyse approfondie de la jurisprudence et a décidé, en définitive, que l'art. 428 de la *LB* ne réglait pas le dossier, comme l'avait conclu le juge Zarzeczny. La Cour d'appel s'est plutôt fondée sur les par. 427(2) et 435(2) de la *LB* pour résoudre le conflit. La juge Jackson a déclaré que, selon ces dispositions, la Banque a seulement acquis les droit et titre que le débiteur pouvait lui transmettre lorsqu'elle a pris sa sûreté en vertu de la *LB*. À ce moment-là, le

given the Credit Union an interest in that collateral by granting it a *PPSA* security interest. The Bank's interest in the collateral was therefore subject to the Credit Union's prior interest and the Credit Union had priority over the proceeds.

[12] The Bank of Montreal now appeals with leave to this Court.

3. Analysis

[13] While the *Bank Act* and the *PPSA* both allow creditors to make secured loans by taking security interests in a debtor's collateral, they have different historical origins and employ radically different conceptual frameworks. I will therefore briefly outline the history and structure of each of these statutory frameworks as a background for the discussion that follows.

3.1 *The Bank Act*

[14] The statutory scheme currently grounded in s. 427 of the *Bank Act*, which allows federally regulated banks to take security interests in certain classes of debtors' property for the purpose of taking collateral, has been a feature of the Canadian secured lending landscape in roughly its current form since the enactment in 1890 of s. 74 of *The Bank Act*, S.C. 1890, c. 31: see W. D. Moull, "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242, at p. 243. For nearly a century prior to the enactment of statutes like Saskatchewan's *PPSA*, the *Bank Act* afforded federally regulated banks a mechanism of providing secured loans to borrowers, which was undoubtedly superior to the mechanisms for taking security which existed at that time at common law and equity. This in turn had the effect of greatly facilitating the making of loans to Canadian businesses in need of capital. Indeed, as Justice La Forest remarked in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 140, what is now the s. 427 security interest has "played a primordial role in facilitating access to capital by several groups that play a key role in the national economy".

débiteur avait déjà accordé un intérêt sur les biens à la Coopérative de crédit en lui consentant une sûreté sous le régime de la *PPSA*. La garantie de la Banque sur les biens était donc subordonnée à la sûreté antérieure de la Coopérative de crédit, et celle-ci avait la priorité sur le produit de l'aliénation des biens.

[12] La Banque de Montréal interjette maintenant appel devant la Cour.

3. Analyse

[13] La *LB* et la *PPSA* permettent toutes deux aux créanciers de consentir des prêts garantis en prenant des sûretés sur les biens d'un débiteur, mais ces lois ont des origines et des cadres conceptuels radicalement différents. Je vais donc exposer brièvement l'historique et la structure de chacune pour situer l'analyse qui suit.

3.1 *La Loi sur les banques*

[14] Le régime législatif qui est aujourd'hui fondé sur l'art. 427 de la *LB* et qui permet aux banques, de compétence fédérale, de prendre des sûretés sur certaines catégories de biens des débiteurs afin d'obtenir des garanties, fait partie intégrante du secteur du crédit garanti au Canada essentiellement dans sa forme actuelle depuis l'adoption, en 1890, de l'art. 74 de l'*Acte des banques*, L.C. 1890, ch. 31 : voir W. D. Moull, « Security Under Sections 177 and 178 of the Bank Act » (1986), 65 *R. du B. can.* 242, p. 243. Pendant près d'un siècle avant l'adoption de lois comme la *PPSA* de la Saskatchewan, la *LB* a fourni aux banques, de compétence fédérale, un mécanisme leur permettant de consentir des prêts garantis qui était assurément supérieur aux mécanismes que leur offraient alors la common law et l'equity pour obtenir une sûreté. Ce mécanisme a eu pour effet de faciliter considérablement l'obtention de prêts par les entreprises canadiennes ayant besoin de capitaux. En fait, comme le juge La Forest l'a fait remarquer dans *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121, à la p. 140, la garantie maintenant prévue par l'art. 427 a « joué un rôle primordial en permettant à plusieurs groupes qui jouent un rôle-clé dans l'économie nationale d'obtenir plus facilement des capitaux ».

[15] The general structure of the regime governing *Bank Act* security can be summarized as follows. Section 427(1) authorizes banks to lend money to a variety of borrowers for a range of purposes and to take security in specified classes of property when making such loans. Section 427(2) states that the bank acquires certain rights and powers in the property upon the delivery of a document giving security to the bank in respect of that property. More specifically as it relates to this appeal, s. 427(2)(*c*) grants the bank taking a *Bank Act* security "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described"; in turn, s. 435(2) specifies that the effect of acquiring a warehouse receipt or bill of lading is to vest in the bank all the right and title of the owner of the goods. As we shall see, ss. 427(2)(*c*) and 435(2) are of critical importance on the issue that occupies us as, by their terms, the bank can acquire no greater interest in the collateral than the debtor himself has at the relevant time. Section 427(4) then states that unless the bank registers a notice of intention with the appropriate authority, its security interest will be void as against third parties. Finally, s. 427(3) provides the bank with an efficient mechanism of accessing its collateral by allowing the bank to seize property in the event of the debtor's non-payment of a loan to the bank.

[16] The *Bank Act* contains relatively few provisions which explicitly address whether a *Bank Act* security has priority over other interests in the same property. On the question that occupies us, it is particularly noteworthy that while s. 428 expressly gives a *Bank Act* security interest priority over "all rights subsequently acquired in, on or in respect of that property", the *Bank Act* is silent with respect to conflicting third party interests acquired *prior* to the attachment of the bank's security in the collateral. In the result, the *Bank Act* leaves most priority disputes to be resolved by considering whether, on the basis of applicable principles of property law, the proprietary rights granted to the bank under s. 427(2) have precedence over the competing proprietary interests. On this basis, the *Bank Act* can be characterized as a property-based security regime. This approach stands in stark contrast with modern

[15] La structure générale du régime de garanties établi par la *LB* peut être résumée comme suit. Le paragraphe 427(1) autorise les banques à consentir des prêts à divers emprunteurs à différentes fins et à prendre une garantie sur des catégories particulières de biens lorsqu'elles consentent ces prêts. Selon le par. 427(2), la banque acquiert certains droits et pouvoirs sur les biens sur remise d'un document lui accordant une garantie à l'égard de ces biens. Plus précisément, en ce qui concerne le présent appel, l'al. 427(2)*c*) accorde à la banque qui obtient une garantie sous le régime de la *LB* « les mêmes droits que si la banque avait acquis un récépissé d'entrepôt ou un connaissement visant ces biens »; quant au par. 435(2), il précise que le récépissé ou le connaissement confère à la banque qui l'acquiert les droit et titre qu'avait le propriétaire des biens. Comme nous le verrons plus loin, l'al. 427(2)*c*) et le par. 435(2) revêtent une importance capitale pour la question qui nous occupe, car la banque ne peut acquérir sur le bien, aux termes de ceux-ci, un intérêt supérieur à celui que détenait le débiteur au moment pertinent. Le paragraphe 427(4) ajoute que la banque ne pourra pas opposer sa garantie aux tiers, à moins d'avoir enregistré un préavis auprès de l'autorité compétente. Enfin, le par. 427(3) fournit à la banque un moyen efficace de réaliser sa garantie en lui permettant de saisir les biens dans l'éventualité où un prêt ne lui serait pas remboursé.

[16] La *LB* contient relativement peu de dispositions traitant expressément de la question de savoir si une garantie obtenue sous le régime de cette loi a priorité sur d'autres sûretés sur le même bien. Quant à la question qui nous occupe, il importe particulièrement de noter que, même si l'art. 428 accorde explicitement la priorité à une garantie régie par la *LB* sur « tous les droits subséquemment acquis sur [les] biens », cette loi ne dit rien sur les intérêts concurrents acquis par des tiers *avant* que la garantie de la banque ne grève les biens. Par conséquent, la *LB* n'offre pas d'autre moyen de régler la plupart des conflits de priorité que l'examen de la question de savoir si, selon les principes applicables du droit des biens, les droits propriétaux conférés à la banque par le par. 427(2) l'emportent sur les intérêts propriétaux concurrents. On peut donc considérer la *LB* comme un régime de sûretés axé sur la

provincial personal property security statutes such as the *PPSA*, to which I now turn.

3.2 *The Personal Property Security Act*

[17] Although of recent origin, provincial personal property security statutes provide the dominant legal framework for secured lending throughout Canada. Based in part on Article 9 of the American *Uniform Commercial Code* (2000 rev.), every territory and common law province has now adopted its own personal property security act ("*PPSA*"), beginning with Ontario in 1967, *Personal Property Security Act, 1967*, S.O. 1967, c. 73. Quebec has its own civil law regime which has also undergone relatively recent changes with the proclamation of the new *Civil Code of Québec*, S.Q. 1991, c. 64, in 1994 (now R.S.Q., c. C-1991). While different jurisdictions adopting their own *PPSA*s have modified certain provisions of the statute in order to tailor the Act to respond to particular circumstances or meet specific objectives, the broad structure of these statutes is essentially the same in each enacting jurisdiction. Saskatchewan first enacted such a statute in 1980 with *The Personal Property Security Act*, S.S. 1979-80, c. P-6.1. This earlier statute was repealed with the enactment of *The Personal Property Security Act, 1993*, s. 72 with which we are concerned in the present case.

[18] The Saskatchewan *PPSA*, like all other provincial personal property security statutes, has greatly clarified, simplified, and rationalized the law of secured lending in personal property by essentially rendering irrelevant the distinctions between the wide variety of instruments which existed at common law and in equity for taking security interests in another person's personal property. It does so by employing a functional approach to determining what security interests are covered by its provisions. Section 3(1)(a) of the *PPSA* stipulates that the Act applies "to every transaction that in substance creates a security interest, without regard to its form and without regard to the person

propriété. Cette approche se distingue nettement de celle adoptée dans les lois provinciales modernes en matière de sûretés mobilières comme la *PPSA*, dont je vais parler maintenant.

3.2 *The Personal Property Security Act*

[17] Bien qu'elles existent depuis peu, les lois provinciales régissant les sûretés mobilières établissent le cadre juridique dominant du crédit garanti partout au Canada. S'inspirant en partie de l'art. 9 du *Uniform Commercial Code* (rév. 2000) des États-Unis, tous les territoires et toutes les provinces de common law ont adopté leur propre loi en matière de sûretés mobilières, à commencer par la *Personal Property Security Act, 1967*, S.O. 1967, ch. 73, de l'Ontario en 1967. Le Québec dispose de son propre régime de droit civil, qui a aussi subi des modifications relativement récentes à l'occasion de l'entrée en vigueur du nouveau *Code civil du Québec*, L.Q. 1991, c. 64, en 1994 (maintenant L.R.Q., ch. C-1991). Bien que les différents ressorts qui ont édicté leur propre loi en matière de sûretés mobilières en aient modifié certaines dispositions afin de l'adapter à une situation particulière ou à des objectifs précis, la structure générale de chacune de ces lois est essentiellement la même. La Saskatchewan a adopté pour la première fois une loi de ce genre en 1980 en édictant *The Personal Property Security Act*, S.S. 1979-80, ch. P-6.1. Cette ancienne loi a été abrogée et remplacée par *The Personal Property Security Act, 1993* en cause en l'espèce (art. 72).

[18] À l'instar de toutes les autres lois provinciales en matière de sûretés mobilières, la *PPSA* de la Saskatchewan a grandement clarifié, simplifié et rationalisé le droit du crédit garanti sur des biens personnels en enlevant essentiellement toute pertinence aux distinctions entre la vaste gamme d'instruments utilisés en common law et en equity pour la constitution d'une sûreté mobilière sur le bien d'autrui. Elle emploie à cette fin une approche fonctionnelle pour déterminer quelles sûretés tombent sous le coup de ses dispositions. L'alinéa 3(1)a) de la *PPSA* prévoit qu'elle s'applique [TRADUCTION] « aux opérations qui constituent essentiellement une sûreté, quelles que soient leur forme et la personne

who has title to the collateral". "Security interest" is in turn defined at s. 2(1)(qq) to include "an interest in personal property that secures payment or performance of an obligation", subject to certain exceptions which are not relevant here. These provisions have the effect of extending the provisions of the *PPSA* to almost anything which serves the function of a security interest.

[19] Contemporary personal property security statutes, such as the Saskatchewan *PPSA* at issue here, also employ a conceptual framework which is radically different from that employed by the *Bank Act* and common law mechanisms of secured lending. In contrast with the property-based regime in the *Bank Act*, contemporary personal property security statutes have followed what can be characterized as a priority-based approach. The *PPSA* does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity of redemption to resolve priority disputes. Rather, for those interests that come within the scope of the Act, the *PPSA* provides a compendium of rules establishing priority rankings both as between different security interests as well as between security interests and other interests in the collateral, with no regard to the question of who actually has title to the collateral.

[20] A security interest under the *PPSA* is also enforceable against a third party. Section 10 specifies the criteria that must be met for a security interest to be enforceable against third parties in respect of the property. In a case such as this one where the collateral is tangible equipment, the principal requirement pursuant to s. 10(1)(d) is that there must be a signed security agreement that contains a description of the collateral. One of the central concepts in the *PPSA*, is the idea of attachment. As between competing security interests under the *PPSA*, attachment is of central importance since it defines when the creditor acquires an interest in specified property. In cases where the debtor owns the property at the time of execution of the security agreement, the creditor obtains a security interest in the property upon extending or promising to extend credit to the debtor, unless the parties have agreed to postpone the time of

ayant un droit de propriété sur les biens grevés ». Selon la définition donnée à l'al. 2(1)qq), « tout intérêt dans des biens personnels qui garantit le paiement ou l'exécution d'une obligation » constitue une sûreté, sous réserve de certaines exceptions qui ne sont pas pertinentes en l'espèce. Selon ces dispositions, la *PPSA* s'applique à pratiquement tout ce qui joue le rôle d'une sûreté.

[19] Les lois actuelles en matière de sûretés mobilières, comme la *PPSA* de la Saskatchewan en cause ici, emploient aussi un cadre conceptuel radicalement différent de celui de la *LB* et des mécanismes de crédit garanti qu'offre la common law. Contrairement au régime axé sur la propriété qui est établi par la *LB*, les lois actuelles en matière de sûretés mobilières peuvent être considérées comme axées sur la priorité de rang. La *PPSA* offre des solutions aux conflits de priorité qui ne reposent ni sur la notion de titre en common law, ni sur les concepts de droit bénéficiaire ou de droit de rachat reconnus par l'equity. Elle établit plutôt, dans les limites de son champ d'application, un code de règles établissant un ordre de priorité entre différentes sûretés ainsi qu'entre les sûretés et les autres intérêts sur les biens donnés en garantie, sans égard à l'identité du détenteur du titre sur les biens.

[20] Une sûreté constituée sous le régime de la *PPSA* est aussi opposable aux tiers. L'article 10 précise les critères auxquels une sûreté doit répondre pour être opposable aux tiers selon les biens en cause. Dans un cas comme celui-ci, où la sûreté vise du matériel tangible, l'al. 10(1)d) exige principalement l'existence d'un contrat de sûreté signé contenant une description des biens. La question de savoir si la sûreté a grevé les biens et à quel moment est un des concepts clés de la *PPSA*. Dans le cas de sûretés concurrentes prises sous le régime de la *PPSA*, cette question revêt une importance capitale, car elle détermine le moment où le créancier a acquis un intérêt dans un bien particulier. Lorsque le débiteur est propriétaire du bien lors de l'exécution du contrat de sûreté, le créancier obtient une sûreté sur le bien en consentant ou en promettant de consentir du crédit au débiteur, sauf si les parties ont convenu de reporter le moment où les biens

attachment. More precisely, s. 12 of the *PPSA* provides that a security interest attaches to property when:

12. (1) . . .

(a) value is given;

(b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party; and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10;

unless the parties have specifically agreed to postpone the time of attachment, in which case it attaches at the time specified in the agreement.

[21] A security interest that is attached to property will be either unperfected or perfected. Like attachment, perfection is also a concept central to the *PPSA*. The significance of perfection in the *PPSA* scheme is that a perfected security interest generally takes priority over an unperfected security interest: s. 35(1)(b). Indeed, subject to certain exceptions, the security interest in collateral that is perfected first in time generally gives the secured creditor the strongest possible claim a secured creditor can have under the *PPSA*. While there are myriad mechanisms for perfecting security interests that need not be discussed in any detail here, it suffices to note that the registration of a financing statement is one of the most important mechanisms of perfecting a security interest: s. 25. Unlike the *Bank Act*, however, the *PPSA* does not void a secured creditor's rights *vis-à-vis* third parties if the security interest is not registered.

[22] The *PPSA* provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the

seront grevés. Plus précisément, l'art. 12 de la *PPSA* prévoit qu'une sûreté grève les biens dans les circonstances suivantes :

[TRADUCTION]

12. (1) . . .

a) une prestation est fournie à son égard;

b) le débiteur a des droits sur les biens grevés ou le pouvoir de transférer ces droits à un créancier garanti;

c) sauf aux fins de l'exercice de droits entre les parties au contrat de sûreté, elle est opposable conformément à l'article 10;

à moins que les parties ne conviennent expressément de reporter la date à laquelle la sûreté prendra effet, auquel cas les biens ne deviennent grevés qu'à la date indiquée dans le contrat.

[21] Une sûreté grevant un bien peut être parfaite ou non. À l'instar du grèvement, la perfection est un concept clé de la *PPSA*. Si la perfection revêt de l'importance dans le régime de la *PPSA*, c'est qu'une sûreté parfaite a généralement priorité sur une sûreté non parfaite : al. 35(1)b). En effet, sous réserve de certaines exceptions, la sûreté qui a été parfaite en premier confère au créancier garanti les droits les plus étendus qu'il peut acquérir sous le régime de la *PPSA*. Il existe une foule de mécanismes de perfection d'une sûreté qui n'ont pas à être analysés en détail ici, mais il suffit de signaler que l'enregistrement d'un état de financement est l'un des plus importants : art. 25. Toutefois, contrairement aux conséquences prévues dans la *LB*, le défaut d'enregistrement d'une sûreté sous le régime de la *PPSA* n'emporte pas la nullité des droits du créancier garanti vis-à-vis des tiers.

[22] La *PPSA* prévoit un éventail détaillé de règles pour résoudre les conflits de priorité entre des sûretés concurrentes; la perfection et diverses règles de priorité chronologique déterminent le rang des sûretés à défaut d'une règle plus précise applicable à une situation donnée : par. 35(1). Bien que la sûreté confère au créancier garanti un intérêt opposable à la fois au débiteur et aux tiers, la *PPSA* reconnaît

debtor and against third parties, the *PPSA* recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to third parties' interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2) and (3). Thus, within the domain of application of the Act, the *PPSA* provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property.

[23] The *PPSA* is not, however, a fully comprehensive code. Section 4 of the *PPSA* lists a number of interests to which the *PPSA* does not apply. Of relevance to this case is s. 4(k) which provides that the Act does not apply to "a security agreement governed by an Act of the Parliament of Canada . . . including an agreement governed by sections 425 to 436 of the *Bank Act*". More will be said later about this provision.

3.3 *The Troubled Relationship Between the Bank Act and the PPSA*

[24] The scheme governing *Bank Act* security interests has not been without its critics, with commentators highlighting in particular the lack of a coherent interface between the archaic concepts underlying the *Bank Act* and the modern principles embodied in the provincial personal property security statutes: see e.g. M.-A. Poirier, "Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law: A Bijural Perspective" (2003), 63 *R. du B.* 289, at pp. 395-400; Law Reform Commission of Saskatchewan, *Tentative Proposals for a New Personal Property Security Act* (1990); R. C. C. Cuming, "Case Comment: *Innovation Credit Union v. Bank of Montreal* — Interface between the *PPSA* and Section 427 of the *Bank Act*: Desirable Policy vs. Hard Legal Analysis" (2008), 71 *Sask. L. Rev.* 143.

[25] Indeed, there appears to be a broad consensus as to the need to reform the scheme so as to

à d'autres personnes intéressées leurs intérêts dans les biens en subordonnant les droits des créanciers garantis à ceux de tiers dans certaines circonstances. Par exemple, les sûretés non parfaites sont subordonnées aux droits d'un syndic de faillite et, dans certaines situations, à ceux des acquéreurs à titre onéreux qui n'en connaissaient pas l'existence : par. 20(2) et (3). En conséquence, la *PPSA* prévoit, dans les limites de son champ d'application, un ensemble complet de règles déterminant l'ordre de priorité des droits des créanciers et des tiers sur un bien particulier.

[23] La *PPSA* ne constitue cependant pas un code tout à fait exhaustif. L'article 4 de la *PPSA* énumère un certain nombre de situations dans lesquelles cette loi ne s'applique pas. En l'espèce, l'al. 4k) est pertinent, car il prévoit que la *PPSA* ne s'applique pas à [TRADUCTION] « un contrat de sûreté régi par une loi du Parlement du Canada [. . .] y compris tout accord régi par les articles 425 à 436 de la *Loi sur les banques* ». Je parlerai davantage de cette disposition plus loin.

3.3 *La relation difficile entre la Loi sur les banques et la PPSA*

[24] Le régime applicable aux garanties relevant de la *LB* a fait l'objet de critiques. Des commentateurs ont souligné en particulier l'absence de cohérence entre les concepts archaïques qui sous-tendent la *LB* et les principes modernes consacrés dans les lois provinciales en matière de sûretés mobilières : voir, p. ex., M.-A. Poirier, « Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law : A Bijural Perspective » (2003), 63 *R. du B.* 289, p. 395-400; Law Reform Commission of Saskatchewan, *Tentative Proposals for a New Personal Property Security Act* (1990); R. C. C. Cuming, « Case Comment : *Innovation Credit Union v. Bank of Montreal* — Interface between the *PPSA* and Section 427 of the *Bank Act* : Desirable Policy vs. Hard Legal Analysis » (2008), 71 *Sask. L. Rev.* 143.

[25] En fait, il semble exister un large consensus sur la nécessité de modifier le régime de la *LB*

harmonize it with the provincial *PPSA* regimes, and some commentators have gone so far as to suggest its total repeal, arguing that such a scheme is unnecessary in light of contemporary personal property security statutes in the provinces: see J. S. Ziegel, "Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act" (1986-87), 12 *Can. Bus. L.J.* 73, at pp. 91-95; Uniform Law Conference of Canada, *Uniform Law Conference of Canada — Commercial Law Strategy* (loose-leaf); Law Commission of Canada, *Modernizing Canada's Secured Transactions Law: The Bank Act Security Provisions* (2004), at pp. 26-30.

[26] There is no question that the provisions relating to *Bank Act* security interests have given rise to interpretive difficulties, this appeal and its companion case being examples. However, the *Bank Act* remains an integral part of the Canadian landscape of secured lending, and courts are bound to resolve these difficulties as best as can be done on the basis of the modern approach to statutory interpretation and in light of applicable constitutional principles: see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

3.4 *Resolving Priority Disputes Between the Bank Act and the PPSA*

[27] The Saskatchewan Court of Appeal in *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569, at pp. 586-87, formulated three basic rules for resolving priority issues of this sort: "(1) set aside the PPSA from the analysis and determine the priority as if the PPSA did not exist; (2) determine the priority pursuant to [applicable provisions of the *Bank Act*] to the extent it is possible to do so; (3) where appropriate, apply the first-in-time priority rule". This framework of analysis was approved and applied by the Court of Appeal in this case. While this approach did not lead the Court of Appeal into error in deciding this case, it is important to note that, strictly interpreted, this formulation does

pour l'harmoniser avec ceux des lois provinciales en matière de sûretés mobilières, et certains commentateurs sont allés jusqu'à proposer son abrogation pure et simple, faisant valoir l'inutilité d'un tel régime au regard des lois provinciales en vigueur en matière de sûretés mobilières : voir J. S. Ziegel, « Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act » (1986-87), 12 *Rev. can. dr. comm.* 73, p. 91-95; Conférence pour l'harmonisation des lois au Canada, *Conférence pour l'harmonisation des lois au Canada — Stratégie du droit commercial* (feuilles mobiles); Commission du droit du Canada, *La Loi sur les banques et la modernisation du droit canadien des sûretés* (2004), p. 29-32.

[26] Il n'y a aucun doute que les dispositions régissant les garanties prises sous le régime de la *LB* ont suscité des problèmes d'interprétation, comme le démontrent la présente affaire et l'affaire connexe. La *LB* fait toutefois encore partie intégrante du domaine du crédit garanti au Canada, et les tribunaux n'ont d'autre choix que de résoudre ces difficultés du mieux qu'ils peuvent en employant la méthode moderne d'interprétation des lois et en tenant compte des principes constitutionnels applicables : voir *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26.

3.4 *La résolution des conflits de priorité entre la Loi sur les banques et la PPSA*

[27] Dans *Royal Bank of Canada c. Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569, p. 586-587, la Cour d'appel de la Saskatchewan a formulé trois règles de base pour résoudre les conflits de priorité de cette nature : [TRADUCTION] « (1) exclure la PPSA de l'analyse et établir la priorité comme si cette loi n'existait pas; (2) établir, dans la mesure du possible, la priorité selon les [dispositions applicables de la *LB*]; (3) appliquer, s'il y a lieu, la règle de priorité chronologique ». La Cour d'appel a approuvé et appliqué ce cadre d'analyse en l'espèce et, bien qu'il ne l'ait pas menée à un résultat incorrect dans la présente affaire, il faut souligner que les règles formulées, interprétées strictement, ne concordent pas parfaitement avec les

not accurately reflect the applicable constitutional principles at play. It is correct to say, as directed under step (2), that the focal point for resolving a priority dispute involving a *Bank Act* security and provincial interests, such as *PPSA* security interests, is the *Bank Act* itself: *Landry Pulpwood Co. v. Banque Canadienne Nationale*, [1927] S.C.R. 605, at p. 615. The *PPSA* should not be set aside in all respects, however, as step (1) above might be read to suggest. Rather, step (1) means simply that the internal priority rules of the *PPSA* have no bearing on determining a priority dispute between *Bank Act* and *PPSA* security interests. However, the *PPSA* retains importance in resolving the priority dispute at issue here. I will explain.

[28] As the Court held in *Hall*, the *Bank Act* security provisions are valid federal legislation which cannot be subject to the operation of provincially enacted priority provisions (*Hall*, at pp. 154-55). Because provinces cannot enact provisions that would affect the priority of a validly created federal security interest, the conceptual framework for resolving disputes between *PPSA* security interests and *Bank Act* security interests is necessarily that supplied by the *Bank Act*.

[29] Thus, where the *Bank Act* contains an express priority provision that is applicable to a particular priority dispute, that provision will govern. For example, s. 428(1) provides that a *Bank Act* security interest has priority over rights subsequently acquired in the property, as well as priority over unpaid vendors. In such cases, s. 428(1) usually provides the total answer and the analysis can end there. Where the priority dispute is between a *Bank Act* security interest and a conflicting interest acquired *prior* to the bank's taking its security in the collateral, there is no specific priority provision in the *Bank Act*. In such cases, the provisions of the *Bank Act* nonetheless govern. These priority disputes are resolved by determining what proprietary rights were granted to the bank under s. 427(2) of the *Bank Act*. As noted earlier and explained more

principes constitutionnels en jeu. Il est exact de dire, conformément à l'étape (2), que la clé d'un conflit de priorité entre une garantie régie par la *LB* et une sûreté relevant d'une loi provinciale, telle la *PPSA*, se trouve dans la *LB* elle-même : *Landry Pulpwood Co. c. Banque Canadienne Nationale*, [1927] R.C.S. 605, p. 615. Il ne faut cependant pas écarter complètement la *PPSA*, comme le laisse peut-être entendre l'étape (1). En effet, cette étape signifie simplement que les règles de priorité internes de la *PPSA* n'ont aucune incidence sur la résolution d'un conflit de priorité entre une garantie relevant de la *LB* et une sûreté relevant de la *PPSA*. Toutefois, la *PPSA* demeure importante dans la résolution du conflit de priorité en cause ici. J'expliquerai pourquoi.

[28] Comme l'a affirmé la Cour dans *Hall*, les dispositions de la *LB* régissant les garanties sont des dispositions législatives fédérales valides qui ne peuvent être subordonnées à l'application de dispositions édictées par une province en matière de priorité (*Hall*, p. 154-155). Comme les provinces ne peuvent adopter des dispositions qui influeraient sur la priorité d'une sûreté valable créée sous un régime fédéral, le cadre conceptuel applicable à la résolution d'un conflit entre une sûreté relevant de la *PPSA* et une garantie régie par la *LB* est forcément celui établi par la *LB*.

[29] Par conséquent, dans les cas où la *LB* contient une disposition expresse applicable à un conflit de priorité donné, c'est cette disposition qui prime. Par exemple, selon le par. 428(1), une sûreté relevant de la *LB* prime les droits subséquemment acquis sur les biens, de même que les droits des vendeurs impayés. En pareil cas, le par. 428(1) fournit habituellement une solution complète et l'analyse peut se terminer à ce stade. Dans le cas d'un conflit de priorité opposant une garantie régie par la *LB* à une sûreté concurrente acquise *avant* que la banque ne prenne sa garantie sur les biens, la *LB* ne contient aucune disposition particulière à appliquer pour déterminer laquelle a priorité. Il demeure toutefois que le conflit de priorité doit être résolu par l'application des dispositions de la *LB*. Pour ce faire, il faut déterminer quels droits propriétaux ont été

fully below, the combined effect of ss. 427(2) and 435(2) is that the bank can acquire no greater interest in the collateral than the debtor has at the relevant time.

[30] In determining what interest the debtor may have already conveyed to another creditor and, in such circumstances, what interest he or she had left to convey to the bank at the time of execution of the *Bank Act* security agreement, it becomes necessary to resort to the provincial property law, either at common law or under applicable provincial statutes. It is at this point that resorting to the *PPSA* becomes relevant. It is true that the internal priority rules of the *PPSA* cannot be invoked to resolve the dispute. However, it does not follow that the provincial security interest created under the *PPSA* does not exist outside these priority rules. Nor can the fundamental changes brought about by the *PPSA* be ignored in determining the nature of the prior competing interest. Far from being irrelevant under the *Bank Act*, provincial property law plays a complementary role in defining the rights granted under the *Bank Act*: see *Agricultural Credit Corp.*; R. C. C. Cuming and R. J. Wood, "Compatibility of Federal and Provincial Personal Property Security Law" (1986), 65 *Can. Bar Rev.* 267, at p. 274; R. C. C. Cuming, C. Walsh and R. J. Wood, *Personal Property Security Law* (2005), at p. 589.

[31] While the provinces cannot legislate in order to oust the bank's rights, they can alter the law as it relates to property and civil rights in the province. This is what the common law provinces did when they enacted the *PPSA*s, and what Quebec did in 1994 when it adopted the *Civil Code of Québec*, Book Six. Just as the prior rules of the *Civil Code of Lower Canada* relating to security interests no longer apply, the prior rules of the common law have been significantly altered by statute. Thus, in determining the nature of any competing provincial security interest, resort has to be made to the relevant provincial statute and the *Bank Act* has to be read in harmony with it. This approach

conférés à la banque en application du par. 427(2) de la *LB*. Comme je l'ai déjà mentionné et comme je l'expliquerai plus en détail ci-dessous, l'effet conjugué des par. 427(2) et 435(2) ne permet pas à la banque d'acquérir sur le bien un intérêt supérieur à celui que détenait le débiteur lui-même au moment pertinent.

[30] Or, pour déterminer quel intérêt le débiteur a peut-être déjà transmis à un autre créancier et, le cas échéant, quel intérêt il peut encore céder à la banque au moment de la conclusion du contrat de garantie régi par la *LB*, il faut se reporter aux règles du droit des biens provincial, qu'elles soient issues de la common law ou d'origine législative. C'est à ce stade que le recours à la *PPSA* devient pertinent. Certes, il n'est pas possible de résoudre le conflit en appliquant les règles de priorité internes établies par la *PPSA*. Il ne s'ensuit toutefois pas que la sûreté provinciale créée en application de la *PPSA* n'existe pas au-delà de ces règles de priorité. De plus, en établissant la nature du droit concurrent antérieur, on ne peut faire abstraction des modifications fondamentales apportées par la *PPSA*. Loin d'être dénué de pertinence sous le régime de la *LB*, le droit provincial des biens joue un rôle complémentaire dans la définition des droits conférés par la *LB* : voir *Agricultural Credit Corp.*; R. C. C. Cuming et R. J. Wood, « Compatibility of Federal and Provincial Personal Property Security Law » (1986), 65 *R. du B. can.* 267, p. 274; R. C. C. Cuming, C. Walsh et R. J. Wood, *Personal Property Security Law* (2005), p. 589.

[31] Les législatures provinciales ne peuvent pas écarter les droits de la banque, mais elles peuvent modifier les règles de droit applicables dans leur province respective en matière de propriété et de droits civils. C'est ce que les provinces de common law ont fait lorsqu'elles ont édicté leurs lois en matière de sûretés mobilières, et le Québec a fait de même en 1994 quand il a promulgué le *Code civil du Québec*, Livre sixième. À l'instar des anciennes règles du *Code civil du Bas Canada* concernant les sûretés qui ne s'appliquent plus, les anciennes règles de la common law ont été considérablement modifiées par voie législative. Ainsi, pour établir la nature d'une sûreté provinciale concurrente, il

is reflected in the preamble to the *Federal Law—Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 ("*Harmonization Act*"):

WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

. . .

WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

Section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended by s. 8 of the *Harmonization Act* specifically provides for the application of the "rules, principles and concepts in force in the province at the time the enactment is being applied".

[32] Indeed, the relationship between the *Bank Act* and provincial property law is in many ways analogous to the way in which this Court in *Giffen (Re)*, [1998] 1 S.C.R. 91, at para. 64, characterized the relationship between federal bankruptcy law and provincial law:

> Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the [*Bankruptcy and Insolvency Act*] is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy.

In much the same way, the *Bank Act* is dependent on provincial property law in order to give content to its provisions and to identify precisely the rights of the parties in a priority dispute involving *Bank Act* security.

faut tenir compte de la loi provinciale applicable et interpréter la *LB* en harmonie avec cette loi provinciale. Cette méthode est conforme au préambule de la *Loi d'harmonisation nº 1 du droit fédéral avec le droit civil*, L.C. 2001, ch. 4 (« *Loi d'harmonisation* ») :

Attendu :

. . .

qu'une interaction harmonieuse de la législation fédérale et de la législation provinciale s'impose et passe par une interprétation de la législation fédérale qui soit compatible avec la tradition de droit civil ou de common law, selon le cas;

. . .

que, sauf règle de droit s'y opposant, le droit provincial en matière de propriété et de droits civils est le droit supplétif pour ce qui est de l'application de la législation fédérale dans les provinces;

L'article 8.1 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, modifié par l'art. 8 de la *Loi d'harmonisation*, prévoit explicitement le recours aux « règles, principes et notions en vigueur dans cette province au moment de l'application du texte ».

[32] À vrai dire, la relation entre la *LB* et le droit provincial des biens est à bien des égards analogue à la relation entre le droit fédéral de la faillite et le droit provincial telle que la Cour l'a décrite dans *Giffen (Re)*, [1998] 1 R.C.S. 91, au par. 64 :

> Bien que la faillite soit clairement une matière fédérale et bien qu'il ait été établi que seul le législateur fédéral pouvait arrêter l'ordre de priorité en matière de distribution, il faut nécessairement se référer aux lois provinciales en matière de propriété et de droits civils pour définir les termes utilisés dans la *LFI* et les droits des parties impliquées dans la faillite.

Il faut, pour des raisons essentiellement semblables, se référer au droit provincial des biens pour établir le contenu des dispositions de la *LB* et déterminer avec précision les droits des parties à un conflit de priorité concernant une garantie régie par la *LB*.

4. Application to This Case

[33] Nothing turns on the particular wording of the respective security agreements in this appeal and it is therefore not necessary to set out the relevant parts of each security agreement. It suffices to say that it is common ground between the parties that the Credit Union obtained from Buist a valid *PPSA* security interest that attached to the collateral in question on October 7, 1991, therefore at a time *prior* to the Bank acquiring its security interest under the *Bank Act*. The applications judge nonetheless reasoned that because the Credit Union took priority through perfection only years later after the Bank took its *Bank Act* interest, s. 428(1) of the *Bank Act* gave the Bank priority over the Credit Union's subsequently acquired priority rights. He therefore concluded that s. 428(1) was determinative of the priority dispute.

[34] I agree with the Court of Appeal that the approach adopted by the applications judge cannot be supported. First, his conclusion that s. 428(1) was determinative of the priority issue ignores the fact that the Credit Union had an existing valid security interest in the collateral, albeit unperfected at the time the Bank acquired its interest. On the question whether the Bank's security interest has priority over this *prior* unperfected *PPSA* interest, it is clear that s. 428(1) has no application. Second, the applications judge may be correct in holding that s. 428(1) would give the Bank priority over any *additional* rights that the Credit Union might have acquired through perfection. Under the *PPSA*, however, the time of perfection or the lack of perfection does not determine the nature or validity of the interest. Rather, the concept of perfection plays a role in determining which of two or more competing security interests takes priority *under the PPSA*. This priority scheme cannot be invoked to resolve the dispute in this appeal. This dispute must be resolved by examining what rights were acquired by the Bank when it took its security interest and determining whether those rights were subject to the Credit Union's prior *PPSA* interest. This requires a more detailed examination

4. Application en l'espèce

[33] Le sort du pourvoi ne tient en rien au libellé respectif des deux contrats de sûreté, de sorte qu'il n'est pas nécessaire d'en reproduire les extraits pertinents. Il suffit de dire que les parties conviennent que la Coopérative de crédit a obtenu de M. Buist, en application de la *PPSA*, une sûreté valide qui a grevé les biens en cause le 7 octobre 1991, soit *avant* que la Banque n'acquière sa sûreté en vertu de la *LB*. Le juge des requêtes a néanmoins estimé que, comme la Coopérative de crédit n'a parfait sa sûreté pour acquérir son droit de priorité que plusieurs années après l'obtention par la Banque de sa garantie en application de la *LB*, le par. 428(1) de cette loi donnait priorité à la Banque sur les droits subséquemment acquis par la Coopérative de crédit. Le juge a donc conclu que le par. 428(1) permettait de trancher le conflit de priorité.

[34] Je conviens avec la Cour d'appel que le raisonnement du juge des requêtes ne saurait tenir. Premièrement, sa conclusion selon laquelle le par. 428(1) permettait de trancher la question de la priorité ne prend pas en considération le fait qu'une sûreté valable sur les biens existait en faveur de la Coopérative de crédit, même si cette sûreté n'avait pas été parfaite lorsque la Banque a obtenu sa garantie. Or, la question de savoir si la garantie de la Banque l'emporte sur cette sûreté non parfaite *antérieure* prise au titre de la *PPSA* ne relève manifestement pas de l'application du par. 428(1). Deuxièmement, le juge des requêtes a peut-être eu raison de décider que le par. 428(1) donnerait priorité à la Banque sur tout droit *supplémentaire* éventuellement acquis par la Coopérative de crédit du fait de la perfection de sa sûreté. Toutefois, sous le régime de la *PPSA*, ni le moment de la perfection de la sûreté, ni le défaut de perfection n'ont une incidence sur la nature ou la validité de la sûreté. La notion de perfection joue plutôt lorsqu'il s'agit de déterminer laquelle de plusieurs sûretés concurrentes l'emporte sur les autres *en application de la PPSA*. On ne peut recourir à ce régime de priorité pour régler le conflit en l'espèce. Il faut plutôt à cette fin analyser les droits que la Banque a acquis quand

of the nature of the Bank's security interest under s. 427(2) of the *Bank Act*.

4.1 *The Nature of the Security Interest Conveyed Under the Bank Act*

[35] Section 427(2) specifies what rights and powers are conveyed to the bank when it takes a security interest under the *Bank Act* as follows:

> **427.** . . .
>
> (2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described
>
> (*a*) of which the person giving security is the owner at the time of the delivery of the document, or
>
> (*b*) of which that person becomes the owner at any time thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,
>
> the following rights and powers, namely, ...

[36] The "rights and powers" which vest in the bank are then defined differently depending on the nature of the collateral. When acquiring a security interest in the types of property listed in s. 427(2)(*c*), the bank acquires "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described". When taking a security interest in the types of property listed in s. 427(2)(*d*), the bank acquires, in addition to the rights granted to it under s. 427(2)(*c*), "a first and preferential lien and claim thereon for the sum secured and interest thereon". For the purposes of the present case, it is not necessary to decide what rights a bank acquires when it receives a "first and preferential lien", as none of the collateral in dispute in this case is covered by s. 427(2)(*d*). It all consists of "agricultural implements" as defined in s. 425(1) of the *Bank Act*, which in turn falls within the scope of s. 427(2)(*c*). By contrast, collateral that consists of "agricultural equipment", which by

elle a pris sa garantie et décider si ces droits étaient subordonnés à la sûreté prise antérieurement par la Coopérative de crédit sous le régime de la *PPSA*. Cette analyse suppose un examen plus détaillé de la nature de la garantie prise par la banque en vertu du par. 427(2) de la *LB*.

4.1 *La nature de la garantie consentie en application de la Loi sur les banques*

[35] Le paragraphe 427(2) indique en ces termes quels droits et pouvoirs sont conférés à la banque quand elle prend une garantie en vertu de la *LB* :

> **427.** . . .
>
> (2) La remise à la banque d'un document lui accordant, en vertu du présent article, une garantie sur des biens dont le donneur de garantie :
>
> *a*) soit est propriétaire au moment de la remise du document,
>
> *b*) soit devient propriétaire avant l'abandon de la garantie par la banque, que ces biens existent ou non au moment de cette remise,
>
> confère à la banque, en ce qui concerne les biens visés, les droits et pouvoirs suivants . . .

[36] Les « droits et pouvoirs » conférés à la banque varient selon la nature des biens en cause. Lorsqu'elle prend une garantie sur les types de biens énumérés à l'al. 427(2)*c*), la banque acquiert « les mêmes droits que si la banque avait acquis un récépissé d'entrepôt ou un connaissement visant ces biens ». Lorsqu'elle prend une garantie sur les types de biens énumérés à l'al. 427(2)*d*), la banque acquiert, en sus des droits qui lui sont accordés par l'al. 427(2)*c*), « un gage ou privilège de premier rang sur ces biens pour la somme garantie avec les intérêts y afférents ». Pour les besoins de la présente affaire, il n'est pas nécessaire de décider quels droits acquiert une banque lorsqu'elle reçoit un « gage ou privilège de premier rang », car aucun des biens en litige dans la présente affaire n'est visé par l'al. 427(2)*d*). Tous les biens consistent en du « matériel agricole mobilier », au sens du par. 425(1) de la *LB*, qui tombe sous le coup de l'al. 427(2)*c*). En revanche, les biens consistant en du « matériel agricole immobilier » qui, selon

definition under s. 425(1) is "usually affixed to real property", falls within the scope of s. 427(2)(*d*). Based on the record, it would appear that none of the collateral seized by the Bank is of a kind that is "usually affixed to real property". In any event, I would agree with the Court of Appeal that the reference to the creation of a first and preferential lien does not increase the priority position of a bank. Jackson J.A. explained as follows, at para. 42:

> The reference to the creation of a "first and preferential lien" does not increase the priority position of a bank vis-à-vis another secured creditor of personal property for this reason: it is contrary to the other, explicit priority rules contained in the *Bank Act*. Thus, this aspect of s. 427(2) has been interpreted, not as a priority rule per se, but as a statement of the nature of the interest acquired, and for the purposes of addressing conflicts between a bank and the holder of an underlying interest in real property upon which agricultural equipment or crops are affixed, for example.

(See Moull, at pp. 252-53; Poirier, at p. 314.)

[37] The question then becomes one of identifying what rights a bank acquires when it receives "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described". This question is answered by s. 435(2) of the *Bank Act*, which specifies that the effect of a warehouse receipt or bill of lading is to give the bank all the right and title of the owner of the goods. It provides as follows:

> **435.** . . .
>
> (2) Any warehouse receipt or bill of lading acquired by a bank under subsection (1) vests in the bank, from the date of the acquisition thereof,
>
> (*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and
>
> (*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise.

la définition donnée à ce terme au par. 425(1), est « habituellement fix[é] à des biens immeubles » tombent sous le coup de l'al. 427(2)*d*). D'après le dossier, aucun des biens saisis par la Banque n'appartiendrait à la catégorie des biens « habituellement fixés à des biens immeubles ». Quoi qu'il en soit, je suis d'accord avec la Cour d'appel que la mention de la création d'un gage ou privilège de premier rang n'accroît pas la priorité d'une banque. La juge Jackson a expliqué cela comme suit au par. 42 :

> [TRADUCTION] La mention de la création d'un « gage ou privilège de premier rang » n'accroît pas la priorité d'une banque vis-à-vis d'un autre créancier détenant une sûreté sur les biens personnels pour la raison suivante : cela va à l'encontre des autres règles de priorité, explicites, qui figurent dans la *Loi sur les banques*. Par conséquent, cet élément du par. 427(2) a été interprété, non pas comme une règle de priorité en soi, mais comme une description de la nature du droit acquis, et aux fins du règlement des conflits entre une banque et le titulaire d'un droit sous-jacent sur un bien immobilier auquel sont fixés, par exemple, du matériel agricole ou des récoltes.

(Voir Moull, p. 252-253; Poirier, p. 314.)

[37] Il faut alors établir quels droits acquiert une banque quand elle se voit accorder « les mêmes droits que si la banque avait acquis un récépissé d'entrepôt ou un connaissement visant [l]es biens ». Cette question trouve réponse dans le par. 435(2) de la *LB*, lequel précise qu'un récépissé d'entrepôt ou un connaissement a pour effet d'accorder à la banque les droit et titre du propriétaire des biens. Ce paragraphe prévoit ce qui suit :

> **435.** . . .
>
> (2) Tout récépissé d'entrepôt ou connaissement confère à la banque qui l'a acquis, en vertu du paragraphe (1), à compter de la date de l'acquisition :
>
> *a*) les droit et titre de propriété que le précédent détenteur ou propriétaire avait sur le récépissé d'entrepôt ou le connaissement et sur des effets, denrées ou marchandises qu'il vise;
>
> *b*) les droit et titre qu'avait la personne, qui les a cédés à la banque, sur les effets, denrées ou marchandises qui y sont mentionnés, si le récépissé d'entrepôt ou le connaissement est fait directement en faveur de la banque, au lieu de l'être en faveur de leur précédent détenteur ou propriétaire.

[38] The precise nature of the rights and powers vested in the bank under these provisions was the object of some debate. This debate was settled by this Court in *Hall*. La Forest J., writing for the Court, described the combined effect of these provisions as follows:

> The nature of the rights and powers vested in the bank by the delivery of the document giving the security interest has been the object of some debate. . . . I find the most precise description of this interest to be that given by Professor Moull in his article "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242, at p. 251. Professor Moull, correctly in my view, stresses that the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out. [Emphasis added; pp. 133-34.]

La Forest J. adopted the following explanation by Professor Moull, at p. 251:

> The result, then, is that a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time. [Emphasis added.]

[39] In this appeal, the debtor owned the collateral in question at the time he gave the Bank its security interest and there is no issue that the Bank acquired the debtor's interest in the property and that its interest vested at the time the security agreement was executed. The question of what interest the bank acquires at the time of delivery of the security document in respect of any assigned after-acquired property is discussed in the companion case.

[40] As the Bank effectively acquired legal title to whatever rights the debtor held in the assigned property, it becomes necessary to determine the nature of the debtor's proprietary interest in the

[38] La nature précise des droits et pouvoirs conférés à la banque en application des dispositions précitées a fait l'objet de certaines discussions, qui ont été réglées par la Cour dans *Hall*. Le juge La Forest, s'exprimant au nom de la Cour, a décrit ainsi l'effet conjugué de ces dispositions :

> La nature des droits conférés à la banque par la remise du document accordant la sûreté a fait l'objet de certaines discussions. [. . .] J'estime que la description la plus précise de cette sûreté est celle que donne le professeur Moull dans son article intitulé « Security Under Sections 177 and 178 of the Bank Act » (1986), 65 *R. du B. can.* 242, à la p. 251. Le professeur Moull souligne, à juste titre à mon avis, que l'effet de la sûreté est de conférer à la banque le titre de propriété sur le bien en question lorsque la sûreté est [consentie]. [Je souligne; p. 133-134.]

Le juge La Forest a fait sienne l'explication qui suit, offerte par le professeur Moull :

> [TRADUCTION] Il en résulte donc que la banque qui prend une sûreté en vertu de l'art. 178 acquiert effectivement le titre en common law sur l'intérêt de l'emprunteur dans les biens présents et à venir offerts en garantie. Le droit de la banque grève ces biens dès que la sûreté est consentie ou dès que l'emprunteur les acquiert et les biens demeurent grevés jusqu'à ce que la banque accorde mainlevée, sans égard aux changements survenus dans leurs attributs ou leurs éléments. L'emprunteur conserve évidemment un droit de rachat en equity, mais la banque acquiert effectivement le titre en common law sur tous les droits que l'emprunteur détient, à un moment ou à un autre, sur les biens offerts en garantie. [Je souligne; p. 251.]

[39] Dans le présent appel, le débiteur était propriétaire des biens visés au moment où il a consenti la garantie à la Banque, et il ne fait aucun doute que la Banque a acquis l'intérêt du débiteur sur les biens et que cet intérêt lui a été conféré à la conclusion du contrat de sûreté. J'analyse, dans l'arrêt connexe, la nature de l'intérêt qui est dévolu à la banque lorsque le document qui lui est remis lui accorde une garantie sur des biens à venir.

[40] Comme la Banque a effectivement acquis le titre en common law sur les droits du débiteur dans les biens affectés à la garantie, il faut établir la nature de l'intérêt propriétal que détenait le débiteur

collateral at the time that the Bank took its security interest under s. 427. Buist owned the property, but he had already given the Credit Union a *PPSA* security interest in the collateral in question. He could not convey to the Bank any greater interest than what he himself had left in the property. The question becomes: What is the nature of the interest already conveyed to the Credit Union by Buist under the *PPSA*?

4.2 *The Nature of the PPSA Security Interest*

[41] The *PPSA* does not contain any provisions which identify the nature of a *PPSA* security interest in proprietary terms. This is because, as discussed above, for those interests to which the *PPSA* applies, the *PPSA* resolves priority disputes through a detailed set of priority rules rather than on the basis of title or the form of a transaction. However, because the *PPSA*'s internal provisions do not apply to *Bank Act* security, and because the security regime contained in the *Bank Act* is property-based, it is necessary for the purposes of deciding the priority dispute in this case to characterize the *PPSA* security interest as a matter of property law: see Cuming and Wood, at p. 274.

[42] Two characteristics of the *PPSA* are relevant for the present case. First, it is clear that *PPSA* security interest, just as the *Bank Act* security interest, is a statutorily created interest and, as such, an interest recognized at law. While some of the historical forms of security created equitable rather than legal interests, the effect of the *PPSA*'s functional approach, which covers all of these antecedent security interests, is to treat them all equally as "security interests" under the *PPSA*. This conclusion is also the consensus found in the academic commentary, and I see no reason to depart from it: see Cuming and Wood, at p. 275; Poirier, at p. 360.

[43] Second, it is clear that having a *PPSA* security interest in collateral does not give a creditor full right and title to the collateral. Rather, a *PPSA* security interest gives the secured creditor an interest in the property to the extent of the debtor's

dans les biens lorsque la Banque a pris sa garantie en vertu de l'art. 427. M. Buist était propriétaire des biens, mais il avait déjà consenti à la Coopérative de crédit une sûreté régie par la *PPSA* sur les biens en question. Il ne pouvait pas conférer à la Banque un intérêt supérieur à celui qu'il conservait lui-même dans le bien. Il faut donc déterminer quelle est la nature du droit que M. Buist avait déjà conféré à la Coopérative de crédit en application de la *PPSA*.

4.2 *La nature de la sûreté relevant de la PPSA*

[41] Aucune disposition de la *PPSA* ne précise la nature d'une sûreté créée au titre de cette loi sous l'angle de la propriété. Il en est ainsi parce que, comme je l'ai déjà signalé, la *PPSA* règle les conflits de priorité entre des sûretés créées sous son régime au moyen d'un ensemble détaillé de règles de priorité plutôt qu'en fonction du titre ou de la forme d'une opération. Cependant, puisque les dispositions internes de la *PPSA* ne s'appliquent pas à une garantie relevant de la *LB*, et que le régime de garantie établi par la *LB* est axé sur la propriété, il faut considérer la sûreté régie par la *PPSA* sous l'angle de la propriété pour trancher le conflit de priorité en l'espèce : voir Cuming et Wood, p. 274.

[42] Deux caractéristiques de la *PPSA* sont pertinentes en l'espèce. En premier lieu, il est clair qu'une sûreté régie par la *PPSA*, tout comme une garantie régie par la *LB*, est une sûreté d'origine législative et, à ce titre, une sûreté reconnue en droit. Bien que certaines des anciennes formes de sûreté aient eu pour effet de conférer des intérêts en equity plutôt que des intérêts en common law, l'approche fonctionnelle adoptée dans la *PPSA* englobe toutes les sûretés qui existaient autrefois et les traite sur un pied d'égalité, comme des « sûretés » au sens de cette loi. Cette conclusion fait aussi consensus chez les auteurs de doctrine et je ne vois aucune raison de m'en écarter : voir Cuming et Wood, p. 275; Poirier, p. 360.

[43] En deuxième lieu, il est évident qu'une sûreté relevant de la *PPSA* ne confère pas au créancier les droit et titre absolus sur les biens en cause. Une sûreté de ce genre accorde plutôt au créancier un intérêt dans le bien dont la portée correspond à celle

obligation. Upon the debtor's default, the secured creditor has no interest in the collateral beyond the satisfaction of the debtor's obligation as well as reasonable costs of seizing and disposing of the collateral to satisfy the obligation: ss. 59 and 60.

[44] The Bank's argument, as I understand it, respecting the nature of the interest conveyed to the Credit Union under the *PPSA* and the consequential effect of that conveyance on Buist's interest as owner appears to be twofold. First, the Bank argues that because the *PPSA* secured creditor does not acquire the debtor's right and title to the collateral, Buist's interest as owner is not lost as a result of his grant of a security interest and that he thus remains free to convey that full interest to the Bank under s. 427 of the *Bank Act*. As the Bank puts it in its factum: "A debtor retains the right and title to the goods, but encumbers the collateral by the grant of a security interest. The security interest clogs or encumbers the right and title but does not convey the debtor's right and title" (para. 49). Second, the Bank acknowledges that "[t]his is not to suggest that the grant of a security interest does not affect a debtor's right and title nor is it to suggest that the grant of a security interest would be of no consequence and no binding affect [*sic*] upon a bank taking *Bank Act* security." The Bank urges the Court to find that the impact and sustainability of the *PPSA* security interest *vis-à-vis* the bank that acquires a *Bank Act* security falls to be determined on the basis of a first-in-time-to-register principle (Factum, para. 53).

[45] I will deal firstly with the Bank's contention that no proprietary interest was conveyed to the Credit Union under its prior security agreement because the agreement was not registered. I cannot accept this contention. The notion that no proprietary interest is conveyed until some later event occurs (i.e. registration), thereby allowing intervening interests to attach and take priority until such event occurs, would effectively characterize the *PPSA* security interest as analogous to a type of floating charge, an argument which was rejected

de l'obligation du débiteur. En cas de défaut du débiteur, le créancier garanti n'a aucun intérêt dans le bien au-delà de l'exécution de l'obligation du débiteur et des frais raisonnables de saisie et d'aliénation des biens engagés pour l'exécution de cette obligation : art. 59 et 60.

[44] À ce que je comprends, l'argument de la Banque sur la nature de l'intérêt conféré à la Coopérative de crédit en application de la *PPSA* et sur ce qui advient en conséquence de l'intérêt de M. Buist en tant que propriétaire semble comporter deux volets. Premièrement, la Banque fait valoir qu'étant donné que le créancier garanti au titre de la *PPSA* n'acquiert pas les droits et titre du débiteur sur le bien, M. Buist ne perd pas son intérêt de propriétaire des biens en consentant une sûreté et demeure ainsi libre de transmettre ce plein intérêt à la Banque en vertu de l'art. 427 de la *LB*. Comme la Banque l'affirme dans son mémoire : [TRADUCTION] « Un débiteur conserve les droit et titre sur les biens, mais grève les biens offerts en garantie en consentant une sûreté. La sûreté entrave ou grève les droit et titre du débiteur, mais n'a pas pour effet de les transmettre » (par. 49). Deuxièmement, la Banque admet que « [c]ela ne veut pas dire que la concession d'une sûreté n'a aucune incidence sur les droit et titre d'un débiteur et qu'elle n'a ni conséquence ni force obligatoire pour une banque qui obtiendrait une garantie sous le régime de la *Loi sur les banques*. » La Banque exhorte la Cour à conclure que l'effet et la validité de la sûreté régie par la *PPSA* pour la banque qui acquiert une garantie sous le régime de la *LB* doivent être établis en fonction du principe du premier enregistrement (mémoire, par. 53).

[45] Je traiterai d'abord de la prétention de la Banque qu'aucun intérêt propriétal n'a été transmis à la Coopérative de crédit par son contrat de sûreté antérieur étant donné que ce contrat n'a pas été enregistré. Je ne puis retenir cette prétention. La thèse voulant qu'aucun intérêt propriétal ne soit transmis avant qu'un évènement quelconque ne survienne (p. ex. l'enregistrement), ce qui permettrait que d'autres sûretés grèvent les biens et aient priorité, établirait en fait une analogie entre la sûreté relevant de la *PPSA* et une charge flottante, analogie que la

by this Court in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. I will review the relevant findings of the Court in that case.

[46] In *Sparrow Electric*, the Royal Bank secured a loan made to Sparrow Electric with a general security agreement under the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("Alberta *PPSA*"), covering Sparrow's present and after-acquired property and with *Bank Act* security created by an assignment of inventory under s. 427 of the *Bank Act* over the same collateral. A question arose whether the Royal Bank's security interests took priority over a deemed statutory trust which had subsequently attached to moneys deducted by Sparrow from wages but not remitted to the Crown. Much of the Court's analysis is not of relevance to this appeal; in particular, the discussion about the nature of the competing Crown interest and the effect of a licence agreement entered into by the parties (which was the question over which the Court ultimately divided) need not be reviewed here. *Sparrow Electric* is of interest, however, because in resolving the priority dispute, it became necessary for the Court to determine the nature of both the Royal Bank's security interest under the *Bank Act* and the nature of its security interest under the Alberta statute. There was much debate at the time as to whether the Bank's security interest under each statute should be characterized as either a floating, or a fixed and specific charge. Gonthier J. (dissenting, but not on this point) explained the significance of the distinction between a fixed and a floating charge as follows (at para. 46):

> The critical significance of the characterization of an interest as being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral. For this reason, if a statutory trust or lien attaches during this time, it will attach to the debtor's interest and take priority over a subsequently crystallized floating charge. However, if a security interest can be characterized as a fixed and specific charge, it

Cour a rejetée dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411. Je vais analyser les conclusions pertinentes tirées par la Cour dans cet arrêt.

[46] Dans l'affaire *Sparrow Electric*, la Banque Royale avait garanti un prêt consenti à Sparrow Electric, d'une part, au moyen d'une convention de sûreté générale lui accordant une sûreté, sous le régime de la *Personal Property Security Act* de l'Alberta, S.A. 1988, ch. P-4.05 (la « loi albertaine »), sur les biens que Sparrow possédait alors ou qu'elle acquerrait par la suite et, d'autre part, au moyen d'une cession de biens figurant dans un inventaire lui accordant une garantie sur les mêmes biens en vertu de l'art. 427 de la *LB*. La question s'est posée de savoir si les sûretés de la Banque Royale avaient priorité sur une fiducie légale réputée applicable aux retenues salariales effectuées par Sparrow, mais non versées à la Couronne. Une bonne partie de l'analyse de la Cour est hors de propos en l'espèce; plus particulièrement, il n'est pas nécessaire d'étudier ici la nature du droit concurrent de la Couronne et l'effet d'un accord de licence conclu entre les parties (la question au sujet de laquelle la Cour était divisée en fin de compte). L'arrêt *Sparrow Electric* est cependant digne d'intérêt parce que, pour régler le conflit de priorité, la Cour a dû établir la nature de la garantie prise par la Banque Royale en vertu de la *LB* et de sa sûreté relevant de la loi albertaine. La question de savoir si la sûreté prise par la Banque en application de chacune des lois devait être qualifiée de charge flottante ou de charge fixe et spécifique a été amplement débattue. Le juge Gonthier (dissident, mais non sur ce point) a expliqué comme suit, au par. 46, l'importance de la distinction entre une charge fixe et une charge flottante :

> L'importance cruciale de qualifier un droit de fixe ou de flottant réside, évidemment, dans le fait que cette qualification décrit la mesure dans laquelle on peut dire qu'un créancier possède un droit de propriété sur le bien donné en garantie. Plus particulièrement, pendant la période où un privilège sur les biens figurant dans un inventaire est flottant, le créancier ne possède aucun droit de propriété sur ces biens donnés en garantie. C'est pour cette raison que, si une fiducie ou un privilège légal grève ces biens pendant cette période, cette fiducie ou ce privilège légal grèvera le droit du débiteur et aura priorité de rang sur le

will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor's equity of redemption in the collateral . . . . [Emphasis added.]

[47] As we can see, the Bank's contention in this appeal that the *PPSA* creditor acquired no interest that would affect the title to the collateral echoes the argument made in *Sparrow Electric*. In *Sparrow Electric*, it was argued that the security interest did not "crystallize" until such time as the debtor acquired the property. Much in the same way, it is argued here that the creditor under the *PPSA* did not obtain an interest that affected the title to the collateral until such time as registration later occurred. The Court unequivocally rejected any notion that the *PPSA* security interest taken by the Royal Bank under the Alberta *PPSA* only crystallized upon the happening of a future event. After reviewing the relevant case law and academic commentaries, Gonthier J. concluded that the general security agreement taken under the Alberta *PPSA* could only be characterized as a fixed charge. (As we shall see in the companion appeal, the Court reached the same conclusion in respect of the *Bank Act*'s security interest over both present and after-acquired property.) He found support in this conclusion from the fact that the academic literature was unanimous that *PPSA* legislation treats *all* charges, including floating securities, as fixed charges. The *PPSA* security interest over all present and future inventory of the debtor was described as "correlative to the notion of a creditor's having legal proprietary rights in the collateral" (para. 60), a right which "represents a proprietary interest over a dynamic collective of present and future assets" (para. 63 (emphasis added; emphasis in original deleted)). He further commented on how this legislative creation of a fixed charge over both present *and future* assets challenged our traditional conception of a fixed charge. The peculiar nature of a *PPSA* security interest over after-acquired property is discussed further in the companion *Royal Bank* appeal.

privilège flottant subséquemment cristallisé. Cependant, si une garantie est qualifiée de privilège fixe et spécifique, elle aura priorité de rang sur un privilège légal subséquent; dans ce cas, tout ce que le privilège peut grever, c'est le droit de rachat que le débiteur possède sur le bien donné en garantie . . . [Je souligne.]

[47] Comme nous pouvons le constater, la prétention de la Banque en l'espèce selon laquelle le créancier bénéficiant d'une sûreté en vertu de la *PPSA* n'acquiert aucun intérêt qui affecterait le titre des biens donnés en garantie fait écho à l'argument avancé dans *Sparrow Electric*. Dans cet arrêt, on a fait valoir que la sûreté ne s'est « cristallisée » que lorsque le débiteur a acquis le bien en question. Dans le même ordre d'idées, on fait valoir en l'espèce que le créancier bénéficiant d'une sûreté en vertu de la *PPSA* n'a pas obtenu d'intérêt affectant le titre sur les biens avant l'enregistrement effectué plus tard. La Cour a rejeté sans équivoque la thèse selon laquelle la sûreté prise par la Banque Royale en vertu de la loi albertaine en matière de sûretés mobilières ne s'est cristallisée que lorsqu'un événement à venir est survenu. Après avoir analysé la jurisprudence pertinente et la doctrine, le juge Gonthier a conclu que la sûreté générale prise en application de la loi albertaine devait impérativement être qualifiée de charge fixe. (Comme nous le verrons dans l'appel connexe, la Cour est arrivée à la même conclusion à l'égard de la garantie sur les biens actuels et à venir obtenue en vertu de la *LB*.) Il a appuyé cette conclusion sur l'avis unanime des auteurs de doctrine que la loi en matière de sûretés mobilières traite *toutes* les charges, y compris les sûretés flottantes, comme des charges fixes. La sûreté consentie en vertu de la loi en matière de sûretés mobilières sur tous les biens actuels ou à venir de l'inventaire du débiteur a été considérée comme « correspond[ant] à la notion d'un créancier qui a les droits de propriété sur le bien donné en garantie » (par. 60), un droit qui « représente un droit de propriété sur un ensemble dynamique d'éléments d'actif présents et futurs » (par. 63 (je souligne; soulignement dans l'original omis)). Il a ajouté que la création par la loi d'une charge fixe sur des éléments d'actif présents *et futurs* mettait en question notre conception traditionnelle d'une charge fixe. Le caractère particulier d'une sûreté créée au titre de la *PPSA* sur les biens à venir est analysé plus à fond dans l'affaire connexe *Banque Royale*.

[48] In my view, it is not open to the Bank in this appeal to now argue that the statutory interest conveyed to the Credit Union is not analogous to a proprietary right. At the time Buist gave the Bank of Montreal its *Bank Act* security interest, Innovation Credit Union already held a valid security interest in the nature of a fixed charge. This means that any subsequent interest could only be taken in respect of Buist's equity of redemption in the property.

[49] Nor can I accept the argument that the lack of perfection affects this characterization. Under the *PPSA*, the time of perfection, or the lack of perfection, determines which of two or more competing security interests takes priority. It does not determine the nature or validity of the interest. With the introduction of the *PPSA*, the legislation no longer declares unregistered interests void. Section 10 of the *PPSA* specifies what criteria must be met for a security interest to be enforceable against third parties. As the Bank acknowledges at para. 22 of its factum: "The principal requirement in a situation such as this, where the collateral is tangible equipment, is that pursuant to s. 10(1)(d) there must be a signed security agreement that contains a description of the collateral." It is not disputed that this requirement is met in this case.

[50] I now turn to the Bank's submission that the dispute should be resolved according to a first-to-register priority rule.

4.3 *Resolving the Priority Dispute*

[51] As determined above, this dispute is between two competing valid legal interests in the same collateral. Under the common law, a priority dispute between two legal interests in the same property is determined in accordance with the maxim *nemo dat quod non habet*: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at pp. 432-34. Simply put, under this rule where A conveys legal title to property first to B and subsequently to C, legal title vests in B. Since A no longer has legal title to give to C, A cannot transfer title to C. Thus, as between two competing legal interests in property,

[48] À mon avis, la Banque ne peut pas faire valoir maintenant dans le présent appel que l'intérêt légal transmis à la Coopérative de crédit n'est pas analogue à un droit propriétal. Lorsque M. Buist a consenti à la Banque de Montréal sa garantie en application de la *LB*, la Coopérative de crédit détenait déjà une sûreté valide de la nature d'une charge fixe. Cela veut dire que toute sûreté subséquente ne pouvait être prise que sur le droit de rachat de M. Buist relativement aux biens.

[49] Je ne puis retenir non plus l'argument que le défaut de parfaire la sûreté influe sur cette qualification. Sous le régime de la *PPSA*, le moment où la sûreté a été parfaite, ou le défaut de la parfaire, détermine laquelle de deux sûretés concurrentes prend rang avant l'autre, mais ce facteur n'a pas d'incidence sur la nature ou la validité de la sûreté. Depuis l'adoption de la *PPSA*, le défaut d'enregistrement n'emporte plus la nullité de la sûreté. L'article 10 de la *PPSA* indique à quels critères une sûreté doit répondre pour être opposable aux tiers. La Banque admet ce qui suit au par. 22 de son mémoire : [TRADUCTION] « Dans une situation comme celle-ci, où les biens constituent du matériel tangible, la principale exigence, suivant l'al. 10(1)d), est l'existence d'un contrat de sûreté signé qui contient une description des biens. » Il n'est pas contesté que cette règle est respectée en l'espèce.

[50] J'examinerai maintenant la prétention de la Banque que le conflit doit être tranché selon la règle de priorité du premier enregistrement.

4.3 *La résolution du conflit de priorité*

[51] Comme je l'ai déjà indiqué, le conflit en l'espèce oppose deux sûretés concurrentes valides visant les mêmes biens. Selon les règles de la common law, la solution à un conflit de priorité entre deux intérêts en common law dans le même bien tient à la maxime *nemo dat quod non habet* : voir B. Ziff, *Principles of Property Law* (4e éd. 2006), p. 432-434. En termes simples, cette règle prévoit que, si A cède le titre en common law sur un bien à B, et ensuite à C, le titre est dévolu à B. Puisque A n'a plus de titre en common law à donner à C, il ne peut pas lui transmettre pareil titre. Ainsi, en

the *nemo dat* rule gives priority to the first party to take a legal interest in the property. The application of the common law rule to the present case grants priority to Innovation Credit Union's interest. As we have seen, the *Bank Act* establishes a property-based security scheme under which, by the combined effect of ss. 427(2) and 435(2), the Bank can receive no greater interest in the property than the debtor has. As such, these provisions operate in the same way as the common law *nemo dat* rule. At the time the Bank took its *Bank Act* security interest, the Credit Union already held a statutory interest in the same collateral which, in proprietary terms, is correlative to a fixed charge. Therefore, the Bank could only take its interest subject to this prior interest.

[52] The Bank of Montreal submits that the *nemo dat* rule should not be applied in the circumstances of this case, as it leads to commercially unreasonable results. As banks taking *Bank Act* security have no way of discovering the existence of undisclosed and unregistered *PPSA* interests, giving such interests priority over subsequent *Bank Act* interests would expose banks to unreasonable commercial risk. The Bank therefore urges the Court to adopt a rule that would give priority to the party that is first in time to *register* its interest.

[53] The Bank's argument echoes the cry by many commentators for legislative reform. Of course, it would be open to Parliament to amend the *Bank Act* and to add expressly a priority rule which would subordinate a prior unperfected *PPSA* interest to a subsequent *Bank Act* interest. However, such a rule can only be judicially created if it is not contrary to the provisions of the *Bank Act* in its existing manifestation. In my view, the adoption of a first-to-register rule would run contrary to ss. 427(2) and 435(2). The failure to register does not take anything away from the nature and validity of the Credit Union's prior interest. As Professors

présence de deux intérêts en common law concurrents dans un bien, la règle *nemo dat* accorde priorité de rang à la première partie à acquérir un intérêt en common law dans le bien. L'application de la règle de la common law dans le présent dossier a pour effet de donner priorité de rang à l'intérêt de la Coopérative de crédit. Comme nous l'avons constaté, la *LB* établit un régime de sûreté axé sur la propriété selon lequel, par suite de l'effet conjugué des par. 427(2) et 435(2), la Banque ne peut recevoir dans les biens un intérêt supérieur à celui que détenait le débiteur lui-même. Ces dispositions s'appliquent donc de la même manière que la règle *nemo dat* de la common law. Lorsque la Banque a pris sa sûreté en vertu de la *LB*, la Coopérative de crédit avait déjà acquis sur le même bien un intérêt légal qui, sous l'angle de la propriété, correspondait à une charge fixe. En conséquence, la Banque ne pouvait prendre sa sûreté que sous réserve de cette sûreté antérieure.

[52] La Banque de Montréal soutient que l'application de la règle *nemo dat* doit être écartée dans les circonstances, car elle donne des résultats déraisonnables sur le plan commercial. Puisque les banques prenant une garantie sous le régime de la *LB* n'ont aucun moyen de découvrir l'existence de sûretés relevant de la *PPSA* qui n'ont été ni révélées, ni enregistrées, le fait d'accorder la priorité aux sûretés de ce genre sur les garanties subséquentes régies par la *LB* exposerait les banques à des risques commerciaux déraisonnables. La Banque presse donc la Cour d'adopter une règle conférant priorité à la première sûreté *enregistrée*.

[53] L'argument de la Banque fait écho aux demandes de réforme législative de nombreux commentateurs. Bien entendu, le législateur peut décider de modifier la *LB* et d'ajouter expressément une règle de priorité qui aurait pour effet de subordonner une sûreté antérieure non parfaite prise au titre de la *PPSA* à une garantie subséquente régie par la *LB*. Toutefois, les tribunaux ne peuvent pour leur part établir une telle règle que si elle ne va pas à l'encontre des dispositions actuelles de la *LB*. À mon avis, l'adoption d'une règle conférant priorité au premier enregistrement irait à l'encontre des par. 427(2) et 435(2). Le défaut d'enregistrement n'affecte en rien

Cuming, Walsh, and Wood note, at p. 590 of their text, *Personal Property Security Law*, the property-based framework employed by the *Bank Act* does not reasonably allow for a distinction to be made between perfected and unperfected *PPSA* interests, nor is there any priority rule which specifically creates a distinction in treatment:

> The effect of [s. 427(2)] is that a bank takes the debtor's property subject to any pre-existing interest held by a third party. This means that a prior PPSA security interest will have priority over a subsequent *Bank Act* security. This holds true even if the prior PPSA security interest was not perfected. There is nothing in the *Bank Act* that subordinates a prior PPSA security interest for lack of perfection.

[54] Thus, the Court cannot override the provisions of the *Bank Act*. For this reason alone, the Bank's plea for a first-to-register rule cannot be accepted. However, a first-to-register rule gives rise to further difficulties.

[55] A first-to-register rule rests on a notion that registration constitutes "notice to all", a concept which has been abolished under the *PPSA*. As Jackson J.A. explained at para. 31:

> Registration, in the context of the *PPSA*, does not serve this purpose. While its incidental purpose is to permit prospective creditors to search debtor names, and certain types of personal property by virtue of serial numbers, the fundamental effect of registration is to establish priorities by virtue of the time of registration, and for the purposes of the *PPSA* only. Registration no longer constitutes actual or constructive notice in the context of the *PPSA*. Section 47 of the *PPSA* abolishes that concept.

[56] I agree that any notion that registration constitutes notice to all runs contrary to the express language of s. 47 of the *PPSA*. It provides as follows: "Registration of a financing statement in the registry is not constructive notice or knowledge of

la nature et la validité de la sûreté antérieure de la Coopérative de crédit. Comme l'ont fait remarquer les professeurs Cuming, Walsh et Wood à la p. 590 de leur ouvrage intitulé *Personal Property Security Law*, le cadre axé sur la propriété qui est établi par la *LB* ne permet pas vraiment de faire une distinction entre les sûretés parfaites et les sûretés non parfaites prises au titre de la *PPSA*, et il n'existe pas non plus de règle de priorité prévoyant explicitement un traitement distinct :

> [TRADUCTION] Par application du [par. 427(2)], une banque obtient le bien du débiteur sous réserve de toute sûreté préexistante détenue par un tiers. Ainsi, une sûreté antérieure relevant de la PPSA aura priorité sur une garantie subséquente régie par la *Loi sur les banques*. Cela vaut même si la sûreté antérieure relevant de la PPSA n'a pas été parfaite. Rien dans la *Loi sur les banques* n'abaisse le rang de priorité d'une sûreté antérieure non parfaite sous le régime de la PPSA.

[54] La Cour ne peut donc passer outre les dispositions de la *LB*. Pour ce seul motif, il est impossible d'acquiescer au plaidoyer de la Banque en faveur d'une règle conférant priorité au premier enregistrement. Cette règle pose toutefois problème à d'autres égards.

[55] Une règle conférant priorité au premier enregistrement a pour prémisse que l'enregistrement constitue « un avis à tous », un concept qui a été aboli sous le régime de la *PPSA*. Comme la juge Jackson l'a expliqué au par. 31 :

> [TRADUCTION] L'enregistrement dans le contexte de la *PPSA* ne sert pas cet objectif. Bien qu'il ait accessoirement pour objectif de permettre à des créanciers éventuels de faire une recherche sur un débiteur à partir de son nom, et sur certains types de biens personnels à partir de leur numéro de série, l'enregistrement a pour effet fondamental d'établir l'ordre de priorité en fonction du moment de l'enregistrement, et ce, seulement pour l'application de la *PPSA*. L'enregistrement ne constitue plus un avis réel ou présumé dans le contexte de la *PPSA*. L'article 47 de la *PPSA* abolit ce concept.

[56] Je suis d'accord pour dire que la thèse selon laquelle l'enregistrement constitue un avis à tous va à l'encontre du libellé exprès de l'art. 47 de la *PPSA*. Cet article prévoit ce qui suit : [TRADUCTION] « Les tiers ne sont pas réputés avoir connaissance de

its existence or contents to any person." There is no requirement to file the underlying security documentation under the *PPSA* or to submit it for scrutiny. Indeed, s. 25 of the *PPSA* allows for advance registration of a financing statement before a security agreement is entered into. Thus, the existence of a registered financing statement does not mean that a *PPSA* security interest necessarily exists. It only provides notice that one may exist or may be acquired in the future. As such, the notice registration adopted under the *PPSA* differs from the pre-*PPSA* registries or other title registers which provide *prima facie* proof of the security interest.

[57] It may be argued that this feature of the *PPSA* would not create insurmountable problems in applying a first-to-register rule, as s. 18 of the *PPSA* empowers certain persons, including creditors, to require the secured creditor to provide a copy of the security agreement and information on the current status of the financing. However, the existence of these disclosure provisions does not address the further difficulty arising from the fact that it is the notion of *perfection* that is central to the *PPSA* priority scheme, not registration. Although registration is an important mechanism for perfecting a security interest, it is far from the only mechanism. Therefore, if the proposed first-to-register rule is intended to establish a priority rule over all *unperfected PPSA* security interests, it misses the mark, as some unregistered *PPSA* interests will be nonetheless perfected. The adoption of a first-to-*perfect* rule instead might resolve this particular difficulty but, in order to resolve the dispute on that basis, it would be necessary to resort to the entire *PPSA* perfection scheme. No one contends that the internal *PPSA* priority rules can be invoked to resolve the dispute. The reasons why that cannot be done are plain to see.

[58] Consider how a first-to-*register* rule would operate to resolve a dispute between a prior provincial security interest and a subsequent *Bank Act*

l'existence ou du contenu d'un état de financement du seul fait de son enregistrement au Bureau d'enregistrement. » Il n'est pas obligatoire de déposer les documents relatifs à la sûreté en application de la *PPSA* ni de les soumettre pour examen. En fait, l'art. 25 de la *PPSA* permet d'enregistrer un état de financement avant la signature du contrat de sûreté. Donc, l'existence d'un état de financement enregistré ne signifie pas qu'une sûreté relevant de la *PPSA* existe nécessairement, mais indique seulement qu'il est possible qu'une sûreté de ce genre existe ou soit obtenue plus tard. Le système d'enregistrement de la *PPSA* diffère de ceux qui l'ont précédé et des autres registres des titres fournissant une preuve *prima facie* de l'existence de la sûreté.

[57] On peut soutenir que cette caractéristique de la *PPSA* ne poserait pas d'obstacles insurmontables à l'application d'une règle conférant priorité au premier enregistrement, vu que l'art. 18 de la *PPSA* permet à certaines personnes, dont les créanciers, d'exiger du créancier garanti qu'il leur transmette une copie du contrat de sûreté et des renseignements à jour sur l'état de la dette. L'existence de ces dispositions relatives à la communication ne règle cependant pas la difficulté attribuable au fait que c'est la notion de *perfection*, et non d'enregistrement, qui est la clé du régime de priorité établi par la *PPSA*. L'enregistrement est un mécanisme important de perfection d'une sûreté, mais il en existe bien d'autres. Par conséquent, si la règle proposée conférant priorité au premier enregistrement a pour but d'établir une priorité sur toutes les sûretés *non parfaites* au titre de la *PPSA*, elle n'atteint pas son objectif, car certaines sûretés non enregistrées relevant de la *PPSA* seront néanmoins parfaites. Une règle conférant priorité à la première sûreté *parfaite* règlerait peut-être ce problème précis, mais il faudrait se reporter à l'ensemble du régime de perfection de la *PPSA* pour résoudre le conflit sur cette base. Personne ne soutient qu'il est possible d'invoquer les règles internes de priorité de la *PPSA* afin de résoudre le conflit. Les raisons pour lesquelles il est impossible de le faire sont évidentes.

[58] Songeons à la manière dont la règle conférant priorité au premier *enregistrement* s'appliquerait pour régler un conflit entre une sûreté provinciale

interest. Under one scenario, the prior provincial security interest would take precedence because it was registered first under the *PPSA*. The problem here is that it is not open to the province to impair the rights granted to the bank under the *Bank Act*. Therefore, if the provincial interest is to take precedence on the basis of registration or other form of perfection, it cannot be because of some provincially legislated priority rule. Under the second scenario, the *Bank Act* security interest would take precedence over the prior provincial interest because it was first registered under the *Bank Act*. In essence, this is the approach adopted by the applications judge in this case. As explained earlier, such an approach ignores the effect of ss. 427(2) and 435(2) of the *Bank Act*.

[59] Finally, while it is open to the province to recognize *Bank Act* security interests as falling within the scope of the *PPSA* and to allow for registration of such interests under the provincial scheme, Saskatchewan has not done so. To the contrary, it has expressly excluded *Bank Act* security interests from the scope of its legislation. Section 4(k) of the *PPSA* provides as follows:

4 Except as otherwise provided in this Act or the regulations, this Act does not apply to:

. . .

(k) a security agreement governed by an Act of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including an agreement governed by sections 425 to 436 of the *Bank Act* (Canada).

[60] As explained by Jackson J.A. in the court below, this provision was enacted in 1993 in order to prevent banks from registering their *Bank Act* security interests under the *PPSA*, thereby getting the benefit of the provincial statute without being bound by it. In my view, the adoption of a first-to-register rule which would give priority to the *Bank*

antérieure et une sûreté subséquente prise au titre de la *LB*. Dans un premier scénario, la sûreté provinciale antérieure l'emporterait parce qu'elle a été enregistrée en premier sous le régime de la *PPSA*. Le problème qui se pose ici est que la province n'a pas le pouvoir de restreindre les droits conférés à la banque en vertu de la *LB*. En conséquence, si la sûreté doit avoir la priorité du fait de son enregistrement ou d'une autre forme de perfection, ce ne peut être en application d'une règle de priorité quelconque établie par le législateur provincial. Dans un deuxième scénario, la garantie prise au titre de la *LB* l'emporterait sur la sûreté provinciale antérieure parce qu'elle a été enregistrée en premier sous le régime de cette loi. Il s'agit essentiellement du raisonnement adopté par le juge saisi de la demande en l'espèce. Comme je l'ai déjà expliqué, ce raisonnement ne tient pas compte de l'effet des par. 427(2) et 435(2) de la *LB*.

[59] Finalement, bien que la province ait le pouvoir de reconnaître que les garanties prises au titre de la *LB* tombent sous le coup de la *PPSA* et d'autoriser l'enregistrement de ces sûretés en vertu du régime provincial, la Saskatchewan ne l'a pas fait. Au contraire, elle a expressément exclu les garanties visées par la *LB* de la portée de sa loi. L'alinéa 4k) de la *PPSA* prévoit ce qui suit :

[TRADUCTION]

4 Sauf disposition contraire de la présente loi ou du règlement, la présente loi ne s'applique pas :

. . .

k) à un contrat de sûreté régi par une loi du Parlement du Canada qui traite des droits des parties au contrat ou des droits des tiers que touche une sûreté créée par le contrat, y compris tout accord régi par les articles 425 à 436 de la *Loi sur les banques* (Canada).

[60] Comme la juge Jackson, de la Cour d'appel, l'a expliqué, l'alinéa 4k) a été adopté en 1993 pour empêcher les banques d'enregistrer leurs garanties prises au titre de la *LB* sous le régime de la *PPSA* et d'obtenir ainsi le bénéfice de la loi provinciale sans pour autant être liées par elle. À mon avis, l'adoption d'une règle conférant priorité au premier

Act security interest over a prior unregistered *PPSA* interest would effectively permit the Bank to take the benefit of the *PPSA* priority rules contrary to the manifest intention of the Saskatchewan legislature.

[61] In its current manifestation, I see no satisfactory interpretation of the existing statutory schemes that would permit the judicial creation of a first-to-register or first-to-perfect priority rule as proposed by the Bank. Such a rule would have to be enacted by Parliament, if it saw fit to do so.

[62] The Bank presents one additional argument based, not on the interpretation of the *Bank Act*, but on the combined effect of ss. 4(k) and 20(3) of the *PPSA*. I turn to this alternative argument.

4.4 *Section 20(3) of the PPSA*

[63] The Bank of Montreal advanced an alternative argument for the first time in its factum before this Court. Specifically, it argues that, on the facts of the present case, s. 20(3) of the *PPSA* has the effect of subordinating an unperfected security interest to a *Bank Act* security interest.

[64] As mentioned earlier, the *PPSA* recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to certain third parties' interests. Section 20(3) is one such rule which, under certain circumstances, subordinates the rights of the holder of an unperfected *PPSA* interest to third parties who acquire the collateral for value without notice. The *PPSA* at the time read as follows:

20 . . .

(3) A security interest in goods, chattel paper, a document of title, an instrument, an intangible or

enregistrement qui ferait primer une garantie prise au titre de la *LB* sur une sûreté antérieure non enregistrée régie par la *PPSA* permettrait effectivement à la Banque de bénéficier des règles de priorité de la *PPSA*, contrairement à l'intention manifeste de la législature de la Saskatchewan.

[61] J'estime qu'on ne peut attribuer aux régimes législatifs, tels qu'ils existent actuellement, une interprétation acceptable qui permettrait aux tribunaux d'établir une règle conférant priorité au premier enregistrement ou à la première sûreté parfaite, comme le demande la Banque. C'est au législateur qu'il reviendrait d'édicter pareille règle, s'il le jugeait à propos.

[62] La Banque présente un autre argument qui repose, non pas sur l'interprétation de la *LB*, mais sur l'effet conjugué de l'al. 4k) et du par. 20(3) de la *PPSA*. Je passe maintenant à cet argument subsidiaire.

4.4 *Le paragraphe 20(3) de la PPSA*

[63] La Banque de Montréal a avancé un argument subsidiaire pour la première fois dans son mémoire adressé à la Cour. Plus précisément, elle fait valoir que, dans le contexte factuel du présent pourvoi, le par. 20(3) de la *PPSA* a pour effet de subordonner une sûreté non parfaite à une garantie régie par la *LB*.

[64] Comme je l'ai déjà mentionné, la *PPSA* reconnaît les intérêts d'autres personnes sur les biens donnés en garantie en subordonnant les intérêts des créanciers garantis à ceux de certains tiers. Le paragraphe 20(3) établit ainsi une règle qui, dans certaines circonstances, subordonne les droits du détenteur d'une sûreté non parfaite au titre de la *PPSA* à ceux d'une personne qui acquiert les biens à titre onéreux sans connaître l'existence de la sûreté. Voici ce que disait ce paragraphe à l'époque pertinente :

[TRADUCTION]

20 . . .

(3) Une sûreté dont des objets, un acte mobilier, un titre, un instrument, un bien immatériel ou de l'argent

money is subordinate to the interest of a transferee who:

(a) acquires the interest pursuant to a transaction that is not a security agreement;

(b) gives value; and

(c) acquires the interest without knowledge of the security interest before the security interest is perfected.

[65] The Bank submits that ss. 20(3)(b) and (c) are clearly satisfied, as the granting of the loan constituted the giving of value, and it took the *Bank Act* interest without knowledge of the Credit Union's prior security interest. So far, I agree.

[66] As the Bank recognizes, the most significant hurdle preventing it from taking advantage of this provision is s. 20(3)(a), which requires that the Bank have acquired its "interest pursuant to a transaction that is not a security agreement". Under the definitions of "security agreement" and "security interest" in the *PPSA*, an agreement creating a *Bank Act* security would clearly fall within the definition of a "security agreement": ss. 2(1)(pp) and (qq). However, the Bank of Montreal argues that the effect of s. 4(k) of the *PPSA* which, as we have seen, specifies that the *PPSA* is not applicable to security interests created under the *Bank Act*, is to exclude a *Bank Act* security interest from the *PPSA* definition of "security interest". This, the Bank submits, means that the requirement in s. 20(3)(a) is satisfied, thereby allowing the Bank to benefit from this subordination provision.

[67] In my view, the Bank's argument does not accord with the plain wording of the provision or the underlying legislative intention. The text of s. 4(k) specifies that the *PPSA* "does not apply to" *Bank Act* security. On the plain wording of the provision, it seems to me that the only coherent reading is that a *Bank Act* security does indeed fall within the definition of a "security interest" under the *PPSA*, but that s. 4(k) excludes the provisions of the Act as having any applicability to such security.

sont grevés est subordonnée à l'intérêt du destinataire d'un transfert si les conditions suivantes sont réunies :

a) le destinataire du transfert acquiert son intérêt aux termes d'une opération qui n'est pas un contrat de sûreté,

b) il fournit une prestation,

c) il acquiert son intérêt sans connaître l'existence de la sûreté avant que celle-ci ne soit parfaite.

[65] La Banque soutient que les al. 20(3)b) et c) sont manifestement respectés, car elle a fourni une prestation en consentant le prêt, et elle a obtenu sa garantie au titre de la *LB* sans connaître l'existence de la sûreté antérieure de la Coopérative de crédit. Jusqu'à présent, je suis d'accord.

[66] Comme l'admet la Banque, l'obstacle le plus important qui l'empêche de tirer profit de cette disposition est l'al. 20(3)a), qui l'oblige à acquérir son [TRADUCTION] « intérêt aux termes d'une opération qui n'est pas un contrat de sûreté ». Selon les définitions incluses aux al. 2(1)pp) et qq) de la *PPSA*, qui précisent ce qui constitue une sûreté et un contrat de sûreté, un contrat créant une garantie sous le régime de la *LB* serait manifestement un contrat de sûreté au sens de la *PPSA*. La Banque de Montréal fait toutefois valoir que, par application de l'al. 4k) de la *PPSA*, qui comme nous l'avons vu soustrait une garantie créée en vertu de la *LB* de l'application de la *PPSA*, une telle garantie ne constitue pas une sûreté au sens de la *PPSA*. D'après la Banque, cela signifie que la condition établie à l'al. 20(3)a) est respectée, ce qui lui permet de tirer profit de cette disposition de subordination.

[67] À mon avis, l'argument de la Banque n'est pas compatible avec le libellé clair de la disposition ni avec l'intention sous-jacente du législateur. Aux termes de l'al. 4k), la *PPSA* [TRADUCTION] « ne s'applique pas à » une garantie régie par la *LB*. Il me semble que le libellé clair de cet alinéa ne peut logiquement recevoir qu'une interprétation : une garantie régie par la *LB* constitue bel et bien une sûreté au sens de la *PPSA*, mais l'al. 4k) déclare les dispositions de la *PPSA* inapplicables à ce type de garantie.

[68] Considerations relating to legislative intention also run against the Bank's proposed interpretation of ss. 20(3) and 4(k). While a provision which is substantially similar to the current s. 20(3) has been a feature of the Saskatchewan *PPSA* since its enactment in 1980, s. 4(k) of the *PPSA*, which specifically excludes *Bank Act* security interests from the scope of the statute, was only added to the *PPSA* in 1993. At the time that s. 20(3), or its equivalent predecessor, was first enacted, it clearly did not and was not intended to apply to *Bank Act* security, as the provision expressly provided that it only applied to interests that were *not* security interests and there was no question that *Bank Act* securities fell within the definition of a "security interest" under the *PPSA*. Given that the purpose of s. 4(k) was to exclude *Bank Act* security from the priority scheme of the *PPSA*, it seems to be contrary to legislative intention to interpret s. 4(k) as having the effect of making a previously inapplicable priority rule apply to *Bank Act* security. However, this is precisely what the Bank of Montreal's interpretation would require the Court to conclude. Section 9(2), also enacted in 1993, further evidences the Legislature's intention of preventing banks who take a *Bank Act* security from taking a *PPSA* security interest in the same collateral and thereby getting the benefit of both Acts. Section 9(2) provides as follows:

9 . . .

(2) A security interest in collateral ceases to be valid with respect to that collateral to the extent that and for so long as the security interest secures payment or performance of an obligation that is also secured by a security in favour of that secured party on that collateral created pursuant to sections 425 to 436 of the *Bank Act* (Canada).

[69] I therefore conclude that s. 20(3) does not operate to subordinate the Credit Union's *PPSA* interest to the Bank's *Bank Act* interest.

[68] Les considérations liées à l'intention du législateur militent aussi contre l'interprétation du par. 20(3) et de l'al. 4k) préconisée par la Banque. La *PPSA* de la Saskatchewan contient une disposition essentiellement semblable à l'actuel par. 20(3) depuis son entrée en vigueur en 1980, mais son al. 4k), qui soustrait expressément la garantie régie par la *LB* à l'application de la *PPSA*, n'a été ajouté qu'en 1993. Lorsque le par. 20(3), ou son ancêtre, a été adopté initialement, il ne fait aucun doute qu'il ne s'appliquait pas et n'était pas censé s'appliquer à une garantie régie par la *LB*, puisque le libellé de cette disposition en limitait expressément l'application aux intérêts qui *n*'étaient *pas* acquis aux termes d'un contrat de sûreté et qu'il ne faisait aucun doute qu'une garantie régie par la *LB* constituait une sûreté au sens de la *PPSA*. Puisque l'al. 4k) avait pour objet d'exclure la garantie créée en vertu de la *LB* du régime de priorité établi par la *PPSA*, il semble contraire à l'intention du législateur d'interpréter cet alinéa comme ayant pour effet d'appliquer à une garantie régie par la *LB* une règle de priorité qui lui était inapplicable auparavant. Or, c'est exactement la conclusion que la Cour devrait tirer selon l'interprétation proposée par la Banque de Montréal. Le paragraphe 9(2), également adopté en 1993, démontre aussi l'intention de la législature provinciale d'empêcher les banques qui prennent une garantie au titre de la *LB* de prendre une sûreté en vertu de la *PPSA* sur le même bien et de tirer ainsi parti des deux lois. Le paragraphe 9(2) prévoit ce qui suit :

[TRADUCTION]

9 . . .

(2) Une sûreté sur un bien cesse d'être valide à l'égard de ce bien dans la mesure où elle garantit l'exécution d'une obligation dont l'exécution est aussi garantie par une sûreté sur le même bien créée en faveur du même créancier en vertu des articles 425 à 436 de la *Loi sur les banques* (Canada).

[69] Je conclus donc que le par. 20(3) n'a pas pour effet de subordonner la sûreté prise par la Coopérative de crédit en vertu de la *PPSA* à la garantie obtenue par la Banque au titre de la *LB*.

5. Conclusion

[70] In summary, a proper interpretation of the *Bank Act* gives an earlier unperfected *PPSA* interest priority over a subsequent *Bank Act* interest, and there is no provision in the *PPSA* which subordinates an unperfected *PPSA* interest to a *Bank Act* interest.

[71] For these reasons, I would dismiss the appeal with costs to the Credit Union throughout.

Appeal dismissed with costs.

Solicitors for the appellant: Balfour Moss, Regina.

Solicitors for the respondent: Layh & Associates, Langenburg, Saskatchewan.

5. Conclusion

[70] En résumé, la *LB*, correctement interprétée, donne à une sûreté antérieure non parfaite relevant de la *PPSA* priorité sur une garantie subséquente régie par la *LB*, et aucune disposition de la *PPSA* ne subordonne une sûreté non parfaite visée par cette loi à une garantie consentie en application de la *Loi sur les banques*.

[71] Pour ces motifs, je suis d'avis de rejeter l'appel avec dépens en faveur de la Coopérative de crédit devant toutes les cours.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Balfour Moss, Regina.

Procureurs de l'intimée : Layh & Associates, Langenburg, Saskatchewan.

TAB 4

2000 CarswellOnt 1063
Ontario Court of Appeal

Bulut v. Brampton (City)

2000 CarswellOnt 1063, [2000] O.J. No. 1062, 131 O.A.C. 52, 15 P.P.S.A.C. (2d) 213, 16 C.B.R. (4th) 41, 185 D.L.R. (4th) 278, 48 O.R. (3d) 108, 95 A.C.W.S. (3d) 1018

In the Matter of the Bankruptcy of Everingham Brothers Limited of the City of Brampton in the Province of Ontario

In the Matter of the Bankruptcy of 764388 Ontario Limited of the City of Brampton in the Province of Ontario

Nicholas Bulut, Appellant and Corporation of the City of Brampton, Emco Limited, Everingham Brothers Limited, Sun Life Assurance Company of Canada, Respondents

1238157 Ontario Inc., Appellant and Corporation of the City of Brampton, Everingham Brothers Limited, Sun Life Assurance Company of Canada P.D. Merrell Bailiff Inc., Respondents

Charron, Rosenberg, MacPherson JJ.A.

Heard: September 17, 1999
Judgment: April 3, 2000
Docket: CA C29850, C30139

Counsel: *Harvin D. Pitch*, for Appellants.
Peter L. Biro and *Jonathan N. Eades*, for Respondent, Sun Life Assurance Company of Canada.

Subject: Insolvency; Corporate and Commercial

APPEALS from order holding that mortgagee was secured creditor and lien holder had right to enforce its lien rights in priority to other security interests.

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

1 This is an appeal from the order of MacKenzie J. in which he determined the priorities among certain secured creditors of two bankrupt companies. MacKenzie J. declared that the respondent, the mortgagee in possession of certain premises, had priority over two creditors with perfected security interests on the assets of the companies. For the reasons that follow,

I would dismiss the appeal of the appellant Nicholas Bulut and allow the appeal of the appellant 1238157 Ontario Inc.

The Facts

The parties

2 This appeal arises out of the bankruptcy of two companies, Everingham Brothers Limited and 764388 Ontario Limited. 764388 Ontario Limited operated as Royal Spas and I will refer to it as Royal Spas in these reasons. Everingham owned commercial premises at 5 Tilbury Court in Brampton. Everingham was a manufacturer of stainless steel cookware and therefore it had various presses and dies as well as inventory on the premises. Royal Spas leased space in the Tilbury property where it carried on the manufacture and distribution of hot tubs and whirlpool spas. It too had equipment and inventory on the premises. Everingham and Royal Spas were controlled by Nicholas Bulut and his family. Nicholas Bulut was the president of both companies.

3 The respondent Sun Life Assurance Company of Canada holds the first mortgage granted by Everingham on the Tilbury property. The original loan secured by the mortgage was $2,250,000 and the mortgage was registered against the Tilbury property in January 1992.

4 Nicholas Bulut became a secured creditor of Everingham under the following circumstances. In 1991, Everingham granted a security interest to the Royal Bank to secure a loan for $568,000. The financing statement was registered in accordance with the *Personal Property Security Act*, R.S.O. 1990, c. P. 10 in November 1991. Bulut purchased the Royal Bank interest in the security on November 25, 1996 and the Bank assigned the security to Bulut. On November 26, 1996, a financing change statement was registered under the *PPSA*. On June 30, 1995, Everingham granted a security interest to Bulut to secure a revolving line of credit to be advanced by Bulut. This security was registered on April 2, 1997. At that time the line of credit stood at approximately $100,000. There is no suggestion that Bulut did not advance the funds for which the security interests were granted in either case. Thus, by April 1997 Bulut was a secured creditor of Everingham in the amount of approximately $650,000.

5 The other appellant in this case is 1238157 Ontario Inc. ("123. Inc."). It became a secured creditor of Royal Spas under the following circumstances. In April 1995, Royal Spas granted a security interest to Nicholas Bulut to secure a $2,000,000 revolving line of credit. In April 1997, that line of credit stood at just under $1,300,000. On May 14, 1997, Bulut registered his security interest in accordance with the *PPSA*. On May 23, 1997, Bulut assigned his security interest to 123 Inc. and a financing change statement was registered a year later on March 24, 1998. 123 Inc. is controlled by the Bulut family and Nicholas Bulut's son is a director of that company. On June 26, 1995, Royal Spas granted a general security agreement to

National Bank of Canada to secure a $250,000 loan. A financing statement was registered in accordance with the *PPSA*. On May 16, 1997, 123 Inc. purchased the National Bank's interest and the general security agreement was assigned to it. A financing change statement was registered on May 20, 1997. Thus, by May 1997, 123 Inc. was a secured creditor of Royal Spas for approximately $1,500,000.

The court proceedings

6 In January 1996, Everingham went into default under the mortgage to Sun Life. On April 2, 1997, Dyson J. granted possession of the Tilbury property and leave to issue a writ of possession to Sun Life. Sun Life took possession on April 25, 1997 and changed the locks. At this point, Sun Life did not have any security interest in the personal property of the bankrupts. The core of the dispute in this appeal centres on the attempts by Everingham and Royal Spas to recover possession of their chattels in the Tilbury property. To further complicate matters, on May 2, 1997, a bailiff acting on behalf of the City of Brampton levied distraint upon Everingham's personal property for arrears in the payment of business taxes of approximately $80,000.

7 Shortly after Sun Life took possession, Everingham and Royal Spas brought a motion for an order for recovery of their personal property. On May 9, 1997, Thomas J. made an order that on or before May 15, 1997, Everingham and Royal Spas pay $35,000 into court on account of occupation costs, costs of security guards and utilities. In the meantime, they were to have access to the premises from 6:00 a.m. to 9:00 p.m. Monday to Friday of each week. They were also entitled to use the packaging machines. Everingham and Royal Spas were to be responsible for the cost of security guards, utilities and occupation costs in an amount to be determined by Thomas J. The $35,000 was paid in accordance with this order.

8 From this time on, there was a continuing dispute between Sun Life and Everingham and Royal Spas about access to the property. One difficulty was that the City of Brampton claimed to have a secured interest in the personal property of Everingham and it and another creditor, Aristech Chemical International Limited, obtained court orders enjoining Everingham and Royal Spas from in any way dealing with Everingham's personal property. Further, it appears relatively clear that Everingham and Royal Spas were not particularly interested in vacating the premises. Rather, Everingham hoped to reach a settlement with Sun Life. Several agreements were reached but never carried out by Everingham.

9 A critical order in the appeal is the order made by MacKenzie J. on June 4, 1997, in response to a further motion by Everingham and Royal Spas for an order to permit recovery of their personal property. Nicholas Bulut swore an affidavit in support of this motion. In effect, Everingham and Royal Spas sought an extension of time to realize on

their inventory and remove their personal property. The order of June 4, 1997 included the following provisions:

> 1. The occupancy costs (consisting of rent and security services) was fixed at $1,305 per day from and including April 25, 1997.
>
> 2. The $35,000 paid into court was to be paid out to Sun Life on account of the occupancy costs.
>
> 3. The shortfall of $17,200 as of June 4, 1997 was to be paid by June 16, 1997. Thereafter, the occupancy costs were to be paid on a weekly basis.
>
> 4. Everingham and Royal Spas were to have to August 1, 1997 to remove their equipment, inventory and trade chattels subject to the following:
>
> > (a) any sale that may take place by Aristech pursuant to MacKenzie J.'s order of the same date;
> >
> > (b) provided that Everingham and Royal Spas make the payments referred to in para. (3.).

10 The fifth paragraph of the order is the most important. It purported to create a charging order and was in the following terms:

> 5. THIS COURT ORDERS that if the Plaintiffs [Everingham and Royal Spas] fail to make the payment referred to in paragraph 3 of the Order the Defendant [Sun Life] shall be at liberty to exercise its right under the writ of possession herein and that any arrears in payment of occupancy costs shall be a charge on the said equipment, inventory and trade chattels in the same manner and to the same extent as a landlord's distress subject to any rulings as to the entitlement and priorities of the parties on the motion contemplated under paragraph 9 of my Order of even date in Court File No. 87-CV-428-CM, with liability for the occupancy costs on the proceeds of sale by Aristech only from June 4, 1997 to the date of vacant possession. [Emphasis added.]

11 While Everingham and Royal Spas paid the shortfall of $17,200 they did not pay any of the occupancy costs thereafter. They were also not able to remove their equipment and inventory from the premises.

12 On September 17, 1997, Everingham filed a Notice of Intention to file a proposal with the official receiver pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.-3. On October 3, 1997, on motion by Sun Life, MacKenzie J. lifted the stay of proceedings under the *BIA* to allow Sun Life to sell Everingham's assets if the occupancy costs were not paid by Everingham by October 17, 1997. MacKenzie J.'s order contains the following:

> THIS COURT ORDERS AND DECLARES that Sun Life has a charge on the assets of Everingham in the possession of Sun Life on the Premises (the "Assets") and that Sun Life shall be entitled to distrain against the Assets in accordance with the terms of the Occupation Order for the amounts payable to it as occupancy costs accruing at the rate of $1,305.00 per day from June 4, 1997 to the date when Sun Life receives vacant possession of the Property and to, subject to the provisions of this Order, proceed to sell such portion of the Assets as described hereinafter. [Emphasis added.]

13 Everingham failed to file a proposal and therefore became bankrupt on October 17, 1997 (effective September 17, 1997).

14 On October 23, 1997, Bulut, as security holder of Everingham, and 123 Inc., as security holder of Royal Spas, served notice on Sun Life that they intended to exercise their security interest over the collateral and chattels of Everingham and Royal Spas in accordance with the *PPSA*. Sun Life served its own notice refusing to recognize these security interests and objected to Bulut and 123 Inc. (the appellants) realizing on their security. Ultimately, the assets of Everingham and Royal Spas were sold by an interim receiver and the proceeds now stand in court to the credit of these proceedings.

15 Royal Spas made a voluntary assignment in bankruptcy on March 31, 1998.

16 On April 8, 1998, Bulut and 123 Inc. brought a motion for a declaration that their security interests had priority over the occupancy costs payable to Sun Life in accordance with the charging order of June 4, 1997. MacKenzie J. heard the motion and issued orders on May 14, 1998 in respect of Everingham and June 3, 1998 in respect of Royal Spas. It is these orders that are subject to this appeal.

The orders under appeal

17 The orders made by MacKenzie J. may be summarized as follows:

> i. Sun Life is a "secured creditor" within the meaning of the *BIA*.
>
> ii. The charge on the assets of Everingham and Royal Spas respecting the occupancy costs created by the order of June 4, 1997 constitutes a "lien" within the meaning of the *PPSA*, which lien is enforceable "in the same manner and to the same extent as a landlord's distress".
>
> iii. Sun Life, as a secured creditor and lien holder, is outside the priorities regimes stipulated under the *BIA* and the *PPSA*.

iv. Sun Life has the right to enforce its lien rights for its occupancy costs in priority to the security interests of Bulut and 123 Co. in the assets of Everingham and Royal Spas respectively.

v. The sale of the assets of Everingham and Royal Spas was to proceed forthwith.

18 MacKenzie J. gave the following reasons for these orders. In his reasons in relation to Everingham he held that the charge created by the June 4, 1997 order made Sun Life a secured creditor, applying *Re Sara* (1985), 56 C.B.R. (N.S.) 282 (Ont. Bktcy.). He held that the charging order also gave Sun Life a lien "by operation of law". (Since the parties are agreed that the *Personal Property Security Act* does not apply to determine the priorities, I need not decide whether this is a correct characterization of the charging order.) Further, by reason of the order of October 3, 1997, Sun Life "in enforcing its rights has the status of a landlord distraining, either actually or constructively". As to the question of priorities among the secured creditors, MacKenzie J. held as follows:

Since Sun Life is outside the ambit of both the *BIA* and the *PPSA* regimes in terms of priorities, Sun Life has priority over Bulut in satisfying the charge or lien in its favour with respect to occupancy costs.

19 MacKenzie J. held, however, that there were no grounds for piercing the corporate veil "to impose personal liability on Bulut".

20 In supplementary reasons on May 28, 1998, MacKenzie J. held that,

[t]he charge and lien created under the June 4th, 1997 order for occupancy costs refers to a landlord's distress right only for purposes of describing the means of enforcement; it does not state nor could it reasonably imply that the charge or lien created could only apply to the costs of the means of enforcement...

21 In his reasons on June 3, 1998 in relation to Royal Spas, MacKenzie J. dealt with other arguments from the appellants concerning the question of priorities. He rejected the argument that the first-in-time rule should apply to the secured creditors, relying upon the decision of this court in *Merrell v. A. Sung Holdings Ltd.* (1995), 22 O.R. (3d) 44 (Ont. C.A.). He reasoned that Sun Life was "in possession" of the chattels of Royal Spas and the order of June 4, 1997 authorized Sun Life to "enforce its lien by means analogous to a landlord's right of distress upon chattels".

22 MacKenzie J. also held in the June 3, 1998 reasons that, even if Sun Life did not have priority, he would have granted it an order that the appellants could only realize on their

security interests upon paying all of the occupancy costs outstanding under the June 4, 1997 order. He reasoned as follows:

> The basis for such alternative relief is that it would be just and equitable for 123 Co. and N. Bulut to pay such costs since the evidence establishes a continuing and concerted course of action between and among Mr. N. Bulut, Mr. S. Bulut and their respective corporations, including 123 Co. herein, in delaying the payment of occupancy costs relating to personal property of Royal Spas and Everingham in respect of which Messrs. Bulut and their respective corporations now claim an interest as secured parties, and which personal property Sun Life has effectively warehoused for one year at a cost of $1,305.00 per day. In my view, it would be a just, in the sense of fair or equitable, term that the said Messrs. Bulut and their respective corporations in their capacities as secured parties of Everingham and Royal Spas should pay to Sun Life the occupancy costs for this collateral prior to their having any rights in and to the same vis-à-vis any security interest holders or claimants other than Sun Life.

The Positions of the Parties

23 For the purposes of this appeal, the appellants concede that Sun Life is a secured creditor and that accordingly the priorities are to be determined outside the scheme of the *BIA*.[1] Similarly, as indicated, the parties conceded that the *PPSA* does not apply. They also concede that it is possible for a judge to make a charging order giving the person a priority over other secured creditors.[2] However, they submit that the charging order of June 4, 1997 did not give Sun Life such a priority and that accordingly the normal rule of priorities of secured creditors applies. That rule is simply that priorities are based on the "first in time" and the security interests of Bulut and 123 Inc. were prior in time to the June 4, 1997 charging order. Finally, in the absence of a finding of fraud or some other reason to pierce the corporate veil, the appellants submit that there were no grounds in equity for giving the respondent priority over the appellants.

24 The respondent supports the motion judge's order principally on the basis of equity. It submits that the motions judge had an inherent equitable jurisdiction to do justice between the parties. Sun Life had been thrust into the position of unwilling creditor, required to warehouse and protect the goods of the bankrupts for the benefit of the creditors. It suggests that there is an analogy to a solicitor's lien, which can take priority in some circumstances over the claims of secured creditors. In support of its position, counsel for the respondent carefully reviewed the facts to demonstrate that Mr. Bulut, as the directing mind of the bankrupts, had no real intention of causing the bankrupts to remove their property from the premises. Rather, he was attempting to force Sun Life into an improvident settlement of its claim on the mortgage.

Analysis

25 The reasons of the motions judge raise two issues. First, did the charging order of June 4, 1997 give Sun Life a priority at law over secured creditors? Second, if not, did the motions judge have an equitable jurisdiction to, in effect, give Sun Life a priority over the claims of the secured creditors that were related to the bankrupts? The phrase "related to" is mine, but as I understand his reasons the motions judge would have denied a priority to the appellants because of the conduct of Mr. Bulut and his son in causing the bankrupts not to pay the occupancy costs.

Issue One: The position at law

26 In his reasons of May 14, 1998, the motions judge held that:

> Since Sun Life is outside the ambit of both the *BIA* and the *PPSA* regimes in terms of priorities, Sun Life has priority over Bulut in satisfying the charge or lien in its favour with respect to occupancy costs.

27 The motions judge did not otherwise explain why the respondent's charge should take priority over the claims of other secured creditors. In his reasons of June 3, 1998, the motions judge expanded on his initial reasons. He rejected the applicability of the first-in-time rule and relied upon this court's reasons in *Merrell v. A. Sung Holdings Ltd.*. In my view, *Merrell* does not support the motions judge's holding. The issue in that case was whether a municipality distraining on a taxpayer's chattels for arrears of business taxes is entitled to those chattels as against a creditor of the taxpayer with a registered perfected security interest in those chattels. Galligan J.A., writing for the court, held that the *PPSA* did not apply because of s. 4 of that Act, which provides that the Act does not apply to a lien given by statute or rule of law. He then noted at pp. 48-9 that at common law priorities are determined in accordance with the chronological order of the encumbrances. The creditors in *Merrell* relied upon this rule since their security interests were registered before the exercise of the right of distress by the municipality created the lien upon the taxpayer's chattels. Galligan J.A. adopted the following statement of the common-law rule from *Spence on Equitable Jurisdiction of the Court of Chancery* (1850), vol. 2, at p. 727:

> It has already been stated that the general rule, though not without exceptions as will presently appear, is, that statutes, judgments and recognizances, at law and in equity, and equitable charges of every kind, in equity, all rank according to their dates: therefore, in the absence of particular circumstances, the successive periods of their execution or attainment constitute the order in which they will be directed to be satisfied.

28 However, Galligan J.A. held at p. 52 that it has always been recognized that this common-law rule could be displaced by the provisions of a statute and this was the effect of s. 400(2)(c)(ii) of the *Municipal Act*, R.S.O. 1990, c. M.45. That provision gave the municipality the right to levy unpaid taxes by distress upon any goods and chattels in the possession of the taxpayer where title to the goods and chattels is claimed, "by way of mortgage or otherwise". The security interests claimed by the creditors in that case were so similar to mortgages that they could be included in the word "otherwise". Galligan J.A. found that the legislature had clearly intended that the municipalities were entitled to levy by distress upon chattels in the possession of a person taxed although the chattels were subject to security agreements. At p. 53, he held that it would "amount to an absurdity if the statute authorized distress upon chattels covered by security agreements but did not intend as well that the lien created by the exercise of the right of distress was to have priority over the security agreement".

29 In my view, the decision in *Merrell* supports the position of the appellants in this case with respect to the effect only of the June 4th order. There is no statutory exception to prevent the ordinary rule from applying — that secured interests of all kinds rank according to their dates. In this case, the appellants' perfected security interests all preceded the charging order of June 4, 1997.

30 The motions judge, however, relied upon *Merrell* by analogy. He referred to the following excerpt from the reasons at p. 53 and held that by substituting "rule of law" [being the June 4th charging order] for "statute" or "statutory", the same result could be achieved. The passage referred to by the motions judge is as follows:

> The municipalities' liens arose when the municipalities took possession of the chattels in exercise of their statutory power to distrain. Because the statute authorizes distress upon chattels subject to security agreements I am constrained to conclude that the lien which arises upon the exercise of that right must take priority over the security agreements. It would, in my view, amount to an absurdity if the statute authorized distress upon chattels covered by security agreements but did not intend as well that the lien created by the exercise of the right of distress was to have priority over the security agreement. The power to distrain upon chattels subject to security agreements would be rendered nugatory if the security agreements were not required to rank behind the liens which had arisen by rule of law.

31 The difficulty with the analogy is that, while the legislature by express language clearly intended that the municipality have the right to distrain upon chattels subject to security agreements, the wording of the June 4th order does not expressly give that right. For convenience, I repeat the relevant part of the charging order:

> ... any arrears in payment of occupancy costs shall be a charge on the said equipment, inventory and trade chattels in the same manner and to the same extent as a landlord's distress ...

32 While the order makes the arrears a charge on the assets of the [now] bankrupts and provides as means for realizing on the charge, "in the same manner and to the same extent as a landlord's distress", it did not expressly give the order priority over the secured interests of the appellants who, it should be pointed out, were not parties to the June 4, 1997 proceedings. My interpretation of the order is bolstered by the supplementary reasons of the motions judge on May 28, 1998 where he held:

> The charge and lien created under the June 4th, 1997 order for occupancy costs refers to a landlord's distress right only for purposes of describing the means of enforcement; it does not state nor could it reasonably imply that the charge or lien created could only apply to the costs of the means of enforcement...

33 Even if the use of the phrase, "in the same manner and to the same extent as a landlord's distress" was intended to describe the priority of the charging order, it cannot give the respondent a priority over the perfected security interests of the appellants. In *Commercial Credit Corp. v. Harry D. Shields Ltd.* (1981), 32 O.R. (2d) 703 (Ont. C.A.) affirming (1980), 29 O.R. (2d) 106 (Ont. H.C.), this court held that through the combined operation of the common law and s. 31(2) of the *Landlord and Tenant Act*, R.S.O. 1970, c. 236 [now *Commercial Tenancies Act* R.S.O. 1990, c. L.7, s. 31(2)] a landlord could levy distress on goods found on the demised premises including goods subject to a chattel mortgage. However, this priority arises not simply because the landlord has a right of distress, but depends upon the landlord taking possession of the chattels pursuant to its right of distress.

34 However, on October 3, 1997, after Everingham filed its Notice of Intention to file a proposal with the official receiver pursuant to the *Bankruptcy and Insolvency Act*, MacKenzie J. made a further order lifting the automatic stay of proceedings in favour of Sun Life. This order included the paragraph set out above which I repeat for convenience:

> THIS COURT ORDERS AND DECLARES that Sun Life has a charge on the assets of Everingham in the possession of Sun Life on the Premises (the "Assets") and that Sun Life shall be entitled to distrain against the Assets in accordance with the terms of the Occupation Order for the amounts payable to it as occupancy costs accruing at the rate of $1,305.00 per day from June 4, 1997 to the date when Sun Life receives vacant possession of the Property and to, subject to the provisions of this Order, proceed to sell such portion of the Assets as described hereinafter. [Emphasis added.]

35 In my view, the only reasonable interpretation of this order is that Sun Life was deemed to have taken possession of the assets of Everingham pursuant to its right of distress. Everingham appealed this order but the appeal was dismissed by the Registrar of this court for failure to perfect. [3] The order of October 3rd therefore stands and whether or not it was based on a correct interpretation of the June 4th order, it gave Sun Life priority over Bulut. I would therefore dismiss Bulut's appeal.

36 The appeal of 123 Inc. stands in a different position. It was not affected by the order of October 3rd, which related only to the assets of Everingham. 123 Inc.'s security was on the assets of Royal Spas.

Issue Two: The position in equity

37 In view of my conclusion on the first issue, this part of the analysis only directly concerns the dispute between 123 Inc. as secured creditor of Royal Spas and Sun Life's claim to a charge on the assets of Royal Spas. In his reasons of May 14, 1998, dealing only with Everingham, the motions judge held that there were not sufficient grounds to pierce the corporate veil to impose personal liability on Bulut. In his reasons of June 3, 1998, dealing with Royal Spas, the motions judge did not make any such comment in respect of Mr. Bulut or his son as regards 123 Inc. On the other hand, there is nothing to distinguish the two cases. I did not understand the respondent to argue that the order of June 3, 1998 could be upheld on the basis that the motions judge had pierced the corporate veil to, in effect, make 123 Inc. or its principals responsible for the debts incurred by Royal Spas under the charging order.

38 The issue then is whether the order of June 3rd can be supported on the basis of an equitable jurisdiction. MacKenzie J. held that Bulut and 123 Inc. could not realize on their security interests until they had paid the occupancy costs under the June 4, 1997 charging order. For convenience, I repeat his reasons for that disposition:

> The basis for such alternative relief is that it would be just and equitable for 123 Co. and N. Bulut to pay such costs since the evidence establishes a continuing and concerted course of action between and among Mr. N. Bulut, Mr. S. Bulut and their respective corporations, including 123 Co. herein, in delaying the payment of occupancy costs relating to personal property of Royal Spas and Everingham in respect of which Messrs. Bulut and their respective corporations now claim an interest as secured parties, and which personal property Sun Life has effectively warehoused for one year at a cost of $1,305.00 per day. In my view, it would be a just, in the sense of fair or equitable, term that the said Messrs. Bulut and their respective corporations in their capacities as secured parties of Everingham and Royal Spas should pay to Sun Life the occupancy costs for

> this collateral prior to their having any rights in and to the same vis-à-vis any security interest holders or claimants other than Sun Life. [Emphasis added.]

39 The financial affairs of Everingham and Royal Spas were complex. In addition to the security interests of the appellants, various other creditors sought to establish that they had secured interests. In particular, the City of Brampton claimed that it was a secured creditor after it exercised its right of distress on the goods of Everingham for business taxes. That dispute did not involve Royal Spas, so far as I can tell. However, it seems to have been a factor that prevented Sun Life from exercising its rights under the charging order. On September 24, 1997, MacKenzie J. held that Brampton was not a secured creditor [reported at(1997), 3 C.B.R. (4th) 311 (Ont. Bktcy.)]. Brampton appealed that decision to this court and the appeal was dismissed in reasons reported at(1999), 43 O.R. (3d) 594 (Ont. C.A.).

40 With respect to Royal Spas, on July 2, 1997, Manton J. made an order prohibiting Bulut and related persons from entering the premises for any purpose or from obstructing any liquidation or sale of the machinery and equipment of Royal Spas.

41 Thus, because of various legal proceedings and court orders, Sun Life, which was simply seeking vacant possession of the premises, became the custodian of the appellants' property. The motions judge considered it fair and equitable that 123 Inc. and Bulut, rather than any of the other parties, bear the burden of Sun Life's costs for preserving the appellants' property. If the motions judge had the jurisdiction to make that determination, he is entitled to deference from this court: *R. v. Barrie (City)* (1969), [1970] 1 O.R. 200 (Ont. C.A.) at 206.

42 In I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23 at p. 51, the author described the inherent jurisdiction of the court as that reserve or fund of powers, "which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".[4] Aside from such general statements about a court of equity's right to do justice between the parties, we were referred to no case that would justify the order made by the judge in this case.

43 Counsel for Sun Life sought to analogize its position to that of a solicitor who is entitled to an order charging funds that have been recovered or preserved by the action of the solicitors. In *Budinsky v. Breakers East Inc.* (1993), 15 O.R. (3d) 198 (Ont. Gen. Div.) at 206-9, Ground J. held that the charging order should rank ahead of the other secured creditor, although the latter's security preceded the charging order of the solicitors. Ground J. fully reviewed the authorities, including the decision of Romer J. in *Scholey v. Peck*, [1893] 1 Ch. 709 (Eng. Ch. Div.) where at p. 711 he explained the rationale for giving the solicitor priority over the secured creditor:

> Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the Plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of *Greer v. Young* [(1883), 24 Ch. D. 545]. I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the Plaintiff, but also against the mortgagee, who is taking the benefit of the action, over whose mortgage they must have priority. [Emphasis added.]

44 In my view, this is not an apt analogy. This is not a case where, but for the actions of Sun Life, 123 Inc. would have lost its security. As mortgagee in possession of the realty, Sun Life had certain rights. On April 2, 1997, Dyson J. granted Sun Life possession of the Tilbury property and leave to issue a writ of possession. The writ was issued and Sun Life took possession and changed the locks.

45 In any event, on May 9, 1997 the first of two orders was made requiring Everingham and Royal Spas to pay occupancy costs. In the second order, of June 4, 1997, MacKenzie J. ordered Everingham and Royal Spas to pay $1,305 per day in occupancy costs "to and including the date of vacant possession". These costs were to be paid on a weekly basis. They were also required to pay the arrears to that date. Those arrears were paid on June 19, 1997.

46 The order also provided that Everingham and Royal Spas had until August 1, 1997 to remove their equipment, inventory and trade chattels from the premises. However, pursuant to the order if Everingham and Royal Spas failed to make the arrears payment or the weekly payments, Sun Life was "at liberty to exercise its right under the writ of possession". Finally, the order provided that the occupancy costs were a charge on the equipment, inventory and trade chattels in the same manner and to the same extent "as a landlord's distress". None of the weekly payments were made and Sun Life could therefore have taken steps to obtain vacant possession or, at the very least, exercise its right of distress and sell the goods, presumably in accordance with s. 53 of the *Commercial Tenancies Act*. It did not do so. Instead, it entered into negotiations with the mortgagor in an attempt to reach some solution. This was its choice. It seems to me that the problem with Sun Life's position is captured in an excerpt from its counsel's affidavit where he says:

> Sun Life never wished the occupancy costs claim to keep escalating; however, it could not, without giving up possession of the assets, and therefore, giving up its security without payment, cap the amount owing pursuant to the June 4 and October 3 Orders.

47 At least under the June 4th order, Sun Life had the right to attempt to collect the occupancy charges by exercising its rights under the writ of possession. That would have capped the occupancy charges and it could have done so a week after June 19, 1997, when

Everingham and Royal Spas failed to pay that week's costs. Alternatively, it could stand by and let the occupancy costs accrue knowing that the occupancy costs were a charge on the assets. The risk it ran in pursuing that course of action was that, if there was not sufficient value in the assets to cover both the secured claims and the occupancy charges, under the first-in-time rule, it would not recover the occupancy charges. This was a matter within Sun Life's control. The matter is different from the case where a solicitor is given a charging order over property that would not have otherwise been available. The solicitors are given priority because, without their action, the property would not be available to the creditors. Sun Life has not preserved assets that would not have been available. The assets were available.

48 My concern with the motions judge's equitable remedy is that it is based on nothing more than his assessment that "it would be a just, in the sense of fair or equitable" result. No doubt, in cases where parties are in a relationship of, or akin to, trust, a certain degree of generality or uncertainty is necessary and is tolerable. See *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at 236-37. Sun Life, Everingham and Royal Spas were not in such a relationship, nor was Sun Life in a vulnerable position. In my view, this degree of uncertainty is not to be encouraged in matters associated with bankruptcy and insolvency.

49 The result reached by the motions judge resembles the doctrine of equitable subordination. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), at 609, Iacobucci J. left open the question of whether such a doctrine should be recognized in Canada. This court has similarly left the matter open in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (Ont. C.A.).

50 In *Canada Deposit Insurance Corp.*, Iacobucci J. held that assuming Canadian courts have the power in insolvency matters to subordinate otherwise valid claims to those of other creditors on equitable grounds relating to the conduct of these creditors *inter se*, there were insufficient grounds to justify the exercise of the power in that case. He referred to the requirements for a successful claim of equitable subordination as developed in the United States as follows at p. 609:

> the claimant must have engaged in some type of inequitable conduct;
>
> the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
>
> equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

51 It should be borne in mind that the motions judge did not "pierce the corporate veil", nor did he find that the security interest held by 123 Inc. was not *bona fide*. Thus, the "claimant"

for the purposes of the doctrine is 123 Inc. It did not engage in any kind of inequitable conduct, nor did its conduct result in injury to Sun Life.

52 In *P. V. Baker & P. St. J. Langan, Snell's Equity*, 29th ed. (1990), at p. 57 the authors describe the circumstances in which persons may lose a *prima facie* claim to which they would otherwise be entitled under the first-in-time rule:

> A person with a prima facie claim to priority for his interest may lose it through his own misconduct. The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud, or by estoppel, or through his gross negligence; and the owner of a prior equitable interest may be postponed if his conduct is inequitable. [Emphasis added.]

53 The motions judge made no finding of fraud against 123 Inc., nor was there any evidence of estoppel or gross negligence that would disentitle 123 Inc. from asserting its prior secured interest.

Disposition

54 Accordingly, I would dismiss Mr. Bulut's appeal. I would allow the appeal by 1238157 Ontario Inc., set aside paragraph 4 of the order of MacKenzie J. dated June 3, 1998 and in its place provide that the rights of Sun Life are subject to the security interest of 1238157 Ontario Inc. The appellants were represented by the same counsel in this court. Accordingly, I would make no order for costs in this court. 1238157 Ontario Inc. is entitled to its costs before MacKenzie J.

***MacPherson J.A.* (*Charron J.A.* concurring):**

55 I have had the benefit of reading the reasons prepared by Rosenberg J.A. I agree with his summary of the facts and the positions of the parties and with his statement of the issues.

56 Rosenberg J.A. would dismiss Nicholas Bulut's appeal, essentially on grounds of *res judicata*. I agree with his proposed disposition but would dismiss Mr. Bulut's appeal on the merits.

57 Rosenberg J.A. would allow 1238157 Ontario Inc.'s appeal. With respect, I disagree.

58 I will attempt to set out, in brief fashion, my reasons for the above conclusions. Essentially, I agree with the reasons and conclusions of MacKenzie J. in the two decisions which are the subject of these appeals.

Analysis

59 There is a good deal in the legal analysis in my colleague Rosenberg J.A.'s judgment with which I agree. In order to move quickly to the crucial point of difference, I will record in summary form the points on which I agree with Rosenberg J.A.'s analysis.

60 First, the appellant Nicholas Bulut ("Bulut") is a secured creditor of Everingham Brothers Ltd. ("Everingham"). Bulut registered his security under the *Personal Property Security Act* ("PPSA") on April 2, 1997.

61 Second, the appellant 1238157 Ontario Inc. ("123 Co.") is a secured creditor of 764388 Ontario Ltd. carrying on business as Royal Spas ("Royal Spas"). Through a variety of transactions with Bulut and the National Bank of Canada, 123 Co. held a registered security interest in Royal Spas by May 23, 1997.

62 Third, there is nothing to suggest that Bulut's and 123 Co.'s security interests in Everingham and Royal Spas are not legitimate.

63 Fourth, Bulut and his family controlled Everingham, Royal Spas and 123 Co. at all times relevant to this appeal. Royal Spas leased space at Everingham's premises in Brampton.

64 Fifth, the respondent Sun Life Assurance Company of Canada ("Sun Life") held a first mortgage on Everingham's property at 5 Tilbury Court in Brampton. The mortgage was registered in January 1992 and secured an original loan of $2,250,000. Everingham defaulted on the mortgage in January 1996. Sun Life took possession on April 25, 1997 and changed the locks. At this juncture, Sun Life had no security interest in the personal property at Everingham's premises.

65 Sixth, as expressed by Rosenberg J.A., "a critical order in the appeal is the order made by MacKenzie J. on June 4, 1997." Moreover, "the fifth paragraph of the Order is the most important" because it purported to create a charging order over personal property in favour of Sun Life and against both Everingham and Royal Spas. The relevant portion of paragraph 5 of the Order is:

> 5. THIS COURT ORDERS ... that any arrears in payment of occupancy costs shall be a charge on the said equipment, inventory and trade chattels in the same manner and to the same extent as a landlord's distress...

66 Seventh, as can be seen from the relevant dates set out above, Bulut's and 123 Co.'s security interests under the *PPSA* arose before Sun Life's security interest created by court order (April 20 and May 23 versus June 4, 1997).

67 Eighth, for reasons explained by Rosenberg J.A. and MacKenzie J., neither the *Bankruptcy and Insolvency Act* ("*BIA*") nor the *PPSA* resolves the question of whose security interests have priority.

68 I turn now to where my analysis diverges from that of Rosenberg J.A.

69 After MacKenzie J. made his order on June 4, 1997, the financial situations at Everingham and Royal Spas became increasingly gloomy. Everingham became bankrupt on October 17, 1997. Royal Spas followed suit on March 31, 1998.

70 The question then arose: which security interest had priority, Sun Life's or Bulut's and 123 Co.'s? On April 1, 1998, Bulut and 123 Co. brought a motion for a declaration that their security interests had priority over Sun Life's. On April 2, 1998, Sun Life brought a 'mirror' motion seeking a declaration in its favour.

71 MacKenzie J. heard the motions and decided in favour of Sun Life. His reasons on the Sun Life-Bulut priority question (May 14, 1998) were sparse: "Since Sun Life is outside the ambit of both the *BIA* and the *PPSA* regimes in terms of priorities, Sun Life has priority over Bulut in satisfying the charge or lien in its favour with respect to occupancy costs."

72 However, the motions judge provided more elaborate reasons when he analyzed the Sun Life-123 Co. priority question (June 3, 1998). In these reasons, he found in favour of Sun Life on two bases — first, reasoning by analogy from this court's decision in *Merrell v. A. Sung Holdings Ltd.* (1995), 22 O.R. (3d) 44 (Ont. C.A.); second, applying equitable principles to require 123 Co. (and, by parity of reasoning, Bulut) to pay occupancy costs before collecting under its (their) security interest(s). In broad terms, and acknowledging that there is an overlap between the two reasons, I would describe the motions judge's first reason as dealing with *how* Sun Life could be given priority, and his second reason as explaining *why* Sun Life should be given priority.

73 On the question of 'how', the starting point, as the motions judge recognized, was that the priorities regimes in the *BIA* and *PPSA* did not apply. Accordingly, the priorities issue had to be resolved by the application of common law principles.

74 *Prima facie*, the common law principle that applies to priorities between secured interests is the 'first in time' rule: see McLaren, *Secured Transactions in Personal Property in Canada*, 2nd ed., looseleaf (Scarborough: Carswell, 1989) at p. 5-202.

75 However, the 'first in time' rule is not an absolute rule. It can be overridden by statute: see McLaren, *Secured Transactions in Personal Property in Canada*, at p. 5-202. An example is s. 400 (2)(c)(ii) of the *Municipal Act*, R.S.O. 1990, c. M. 45, which allows municipalities

to distrain upon the chattels of persons who have not paid municipal taxes even though the chattels are subject to security interests which arose before the tax liability: see *Merrell v. A. Sung Holdings Ltd.*, *supra*.

76 A second line of exception to the 'first in time' rule is provided by equity. In *Spence on the Equitable Jurisdiction of the Courts of Chancery*, the author identified the 'first in time' rule as "the general rule" (Vol. II, at p. 727). However, he stated that the rule was qualified by the notion of 'the better equity' and that "the circumstance of priority of time alone does not give a better equity" (Vol. II, at p. 737).

77 In *Snell's Principles of Equity*, 29th ed. by P.V. Baker and P. St. J. Langan (London: Sweet & Maxwell, 1990) the authors explain (at p. 57) the circumstances in which the holder of a *prima facie* priority can lose it:

> A person with a prima facie claim to priority for his interest may lose it through his own misconduct. The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud, or by estoppel, or through gross negligence; and the owner of a prior equitable interest may be postponed if his conduct is inequitable.

78 The motions judge recognized the 'first in time' rule. However, he determined that Sun Life had a better equity. The mechanism he chose to give effect to this determination was reasoning by analogy from this court's decision in *Merrell v. A. Sung Holdings Ltd.*. He said that what the statute did in *Merrell* he could do by "rule of law" — i.e. by judicial application of common law and equitable principles — in this litigation. Since the priority issue had to be determined outside the framework of the *BIA* and the *PPSA*, I can find no fault in the motions judge's approach.

79 Turning to the question of 'why' Sun Life's interest was entitled to be given priority over Bulut's and 123's interests, the motions judge provided a clear reason:

> [T]he evidence establishes a continuing and concerted course of action between and among Mr. N. Bulut, Mr. S. Bulut and their respective corporations, including 123 Co. herein, in delaying the payment of occupancy costs relating to personal property of Royal Spas and Everingham in respect of which Messrs. Bulut and their respective corporations now claim an interest as second parties, and which personal property Sun Life has effectively warehoused for one year at a cost of $1,305.00 per day.

80 In my view, the motions judge's reasons for applying equitable principles to give Sun Life priority over Bulut and 123 Co. are sound. The record before the motions judge amply supports his analysis and conclusion. I will mention just a few of the factors that, in my view, suggest that the motions judge was correct.

81 First, the Bulut family were the principals and directing minds of Everingham, Royal Spas and 123 Co. One does not need to pierce corporate veils to agree with the motions judge's description of "Mr. N. Bulut, Mr. S. Bulut and their respective corporations."

82 Second, Everingham had a huge mortgage from Sun Life. It defaulted on this mortgage in January 1996. Bulut acquired the major part of his security interest in Everingham (approximately $550,000 of a total interest of $650,000) *after* Everingham's default on the mortgage. Similarly, 123 Co. acquired its security interest in Royal Spas (approximately $1,500,000) in May 1997. Royal Spas was a tenant of Everingham. It is obvious that Bulut and 123 Co. acquired their security interests with full knowledge that Everingham and Royal Spas were in serious financial trouble, especially vis-à-vis Sun Life.

83 Third, Sun Life's security interest in the personal property at Everingham's premises was obtained in a court proceeding launched by Everingham and Royal Spas in which they sought to obtain their personal property (i.e. equipment and inventory) from Everingham's premises. On May 1, 1997, Nicholas Bulut, the President of both Everingham and Royal Spas, swore an affidavit in support of the motion. At the time Bulut was a secured creditor of both Everingham and Royal Spas. In his affidavit, Bulut spoke on behalf of Everingham and Royal Spas. However, importantly, he also spoke explicitly in his capacity as holder of security interests in the personal property of Everingham and Royal Spas. Bulut stated:

> 15. ... The items of personal property are owned by Everingham and Royal Spas and Everingham and Royal Spas are lawfully entitled to possession of such property. The items of personal property belonging to these corporations are themselves secured under a General Security Agreement. I, Nicholas Bulut, hold the security interest in these items of personal property belonging to Everingham and Royal Spas. I am content, Royal Spas is content and Everingham [5] is content if the items of personal property simply are released to all three of us and we can sort out our respective interests in the personal property.

84 In other words, Bulut was openly representing not only Everingham and Royal Spas, but also himself in his capacity as holder of security interests in the personal property of Everingham and Royal Spas. He was seeking relief from the court in both of these capacities.

85 Fourth, the motions judge provided Everingham, Royal Spas and Bulut with the relief they sought, provided Everingham and Royal Spas paid occupancy costs of $1,305 per day from April 25, 1997 to the date on which the personal property was removed. This order was not appealed. Yet, almost immediately, the companies stopped making occupancy cost payments. Further, the companies made no serious efforts to remove their personal property. In short, the companies *and* Bulut (explicitly) and 123 Co. (by strong and fair inference)

sought relief from the court, obtained it, did not appeal the court order — and then promptly ignored it.

86 For these reasons, I agree with the motions judge that Bulut's and 123 Co.'s conduct disentitles them to obtain a priority over Sun Life. In the language of *Snell's Principles of Equity*, *supra*, their misconduct estops them from claiming a priority.

87 I conclude with a final observation. It is true, as Rosenberg J.A. notes, that the motions judge's orders resemble the doctrine of equitable subordination and that the Supreme Court of Canada and this court have expressly left open the question of whether this doctrine should be introduced into Canadian law: see *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.); and *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (Ont. C.A.).

88 There is a crucial difference between those cases and this appeal. In those cases, the issue before the courts was whether the doctrine of equitable subordination should be introduced into *statutory* regimes for determining priorities between creditors. There is, as the courts recognized, a serious issue as to whether courts should modify explicit priorities created by statute, even if the modification arose through the application of equitable principles.

89 The situation in the present appeal is entirely different. No statutory regime, including the *BIA* and the *PPSA*, determines the priority issue as between Sun Life and Bulut and 123 Co. That issue must be determined under common law principles. In that context, there is nothing wrong with a motions judge doing what common law judges have done for centuries, namely considering common law and equitable principles together in an attempt to reach a fair result. That is what the motions judge did on these motions.

Disposition

90 For the above reasons, I would dismiss the appeals. I would award the respondent its costs of the appeal.

Footnotes

1 In addition to *Re Sara*, see *McLean Co. v. Newton* (1926), 8 C.B.R. 61 (Man. C.A.)

2 See *Birch (Trustee of) v. Lacasse Enterprises Inc.* (1991), 2 O.R. (3d) 465 (Ont. Gen. Div.).

3 With the consent of the trustee, Bulut brought an application for an extension of time to perfect the appeal. That application was dismissed.

4 In *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.) at para. 29, Lamer C.J.C. described this as the "seminal article on the core or inherent jurisdiction of superior courts".

5 123 Co. is not mentioned in this paragraph. That is because on May 1, 1997, when Bulut swore his affidavit, Bulut held the security interest in the personal property of both Everingham and Royal Spas. On May 23, he assigned his security interest in Royal Spas to 123 Co., another family company. In my view, it is no stretch to infer that what Bulut said *qua* secured creditor on May 1 could be imputed to 123 Co. three weeks later.

End of Document

TAB 5

BLACK'S LAW DICTIONARY®

Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

BY

THE PUBLISHER'S EDITORIAL STAFF

Coauthors

JOSEPH R. NOLAN

Associate Justice, Massachusetts Supreme Judicial Court

and

JACQUELINE M. NOLAN-HALEY

Associate Clinical Professor,
Fordham University School of Law

Contributing Authors

M. J. CONNOLLY
Associate Professor (Linguistics),
College of Arts & Sciences, Boston College

STEPHEN C. HICKS
Professor of Law, Suffolk University
Law School, Boston, MA

MARTINA N. ALIBRANDI
Certified Public Accountant, Bolton, MA

ST. PAUL, MINN.
WEST PUBLISHING CO.
1990

Library of Congress Cataloging-in-Publication Data

Black, Henry Campbell, 1850-1927.
[Law dictionary]
Black's law dictionary / by Henry Campbell Black. — 6th ed. / by the publisher's editorial staff ; contributing authors, Joseph R. Nolan ... [et al.]
p. cm.
ISBN 0-314-76271-X
1. Law—United States—Dictionaries. 2. Law—Dictionaries.
I. Nolan, Joseph R. II. Title.
KF156.B53 1990
340'.03—dc20 90-36225
CIP

ISBN 0-314-76271-X

ISBN 0-314-77165-4 deluxe

Black's Law Dictionary 6th Ed.
2nd Reprint—1990

to be levied among the different taxable persons, establishing the proportion due from each. Northwestern Imp. Co. v. Henneford, 184 Wash. 502, 51 P.2d 1083, 1085. It fixes the liability of the taxpayer and ascertains the facts and furnishes the data for the proper preparation of the tax rolls. Dallas Joint Stock Land Bank of Dallas v. State, Tex.Civ.App., 118 S.W.2d 941, 942.

The process whereby the Internal Revenue Service imposes an additional tax liability. If, for example, the IRS audits a taxpayer's income tax return and finds gross income understated or deductions overstated, it will assess a deficiency in the amount of the tax that should have been paid in light of the adjustments made. *See also,* Deficiency; Deficiency assessment; Jeopardy assessment.

Assessment base. Total assessed value of all property in an assessment district.

Assessment company. In life insurance, a company in which a death loss is met by levying an assessment on the surviving members of the association.

Assessment contract. One wherein the payment of the benefit is in any manner or degree dependent on the collection of an assessment levied on persons holding similar contracts. *See also* Assessment insurance.

Assessment district. In taxation, any subdivision of territory, whether the whole or part of any municipality, in which by law a separate assessment of taxable property is made by the officers elected or appointed therefor.

Assessment for benefits. A burden levied under the power of taxation. Jackson v. City of Lake Worth, 156 Fla. 452, 23 So.2d 526, 528. *See* Assessment.

Assessment fund. The assessment fund of a mutual benefit association is the balance of the assessments, less expenses, out of which beneficiaries are paid.

Assessment insurance. Exists when benefit to be paid is dependent upon collection of such assessments as may be necessary for paying the amounts to insured. Keen v. Bankers Mut. Life Co., 230 Mo.App. 1072, 93 S.W.2d 85, 90. Type of mutual insurance where the policyholders are assessed whenever there is a loss.

Assessment list. The list of taxable persons and property furnished by the assessor to the board of equalization, board of assessment, or similar body. *See* Assessment roll.

Assessment period. Means taxable period. Johnson City v. Clinchfield R. Co., 163 Tenn. 332, 43 S.W.2d 386, 387.

Assessment ratio. For purposes of taxation of property is the ratio of assessed value to fair market value. Campbell Chain Co. of Cal. v. Alameda County, 12 C.A.3d 248, 90 Cal.Rptr. 501, 504.

Assessment roll. In taxation, the list or roll of taxable persons and property, completed, verified, and deposited by the assessors.

Assessment work. Under the mining laws of the United States, the holder of an unpatented mining claim on the public domain is required, in order to hold his claim, to do labor or make improvements upon it to the extent of at least one hundred dollars in each year. 30 U.S. C.A. § 28. This is commonly called by miners "doing assessment work."

Assessor. An officer chosen or appointed to appraise, value, or assess property. A person learned in some particular science or industry, who sits with the judge on the trial of a cause requiring such special knowledge and gives his advice.

Asset Depreciation Range (ADR). The range of depreciable lives allowed by the Internal Revenue Service for a specified depreciable asset. The ADR system applies to assets placed in service after 1970 and before 1980, at which time the ADR system was replaced by the Accelerated Cost Recovery System (ACRS). However, the ADR system has been revived under The Tax Reform Act of 1986 and is now used to assign class lives to assets depreciated under Modified Accelerated Cost Recovery System (MACRS). *See* Accelerated Cost Recovery System.

Asset dividend. *See* Dividend.

Assets /æsets/. Property of all kinds, real and personal, tangible and intangible, including, *inter alia,* for certain purposes, patents and causes of action which belong to any person including a corporation and the estate of a decedent. The entire property of a person, association, corporation, or estate that is applicable or subject to the payment of his or her or its debts.

See also Dead asset; Marshalling assets.

Accrued assets. Assets arising from revenues earned but not yet due.

Assets entre mains. L. Fr. Assets in hand; assets in the hands of executors or administrators, applicable for the payment of debts.

Assets per descent. That portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestors.

Bankruptcy. The property or effects of debtor in bankruptcy proceedings available for payment of his debts.

Capital assets. For income tax purposes, a capital asset is defined as all property held by a taxpayer (*e.g.* house, car, stocks, bonds), except for certain assets listed in I.R.C. § 1221. Under the tax laws however, a given asset may be treated as a capital asset for one purpose, and as an ordinary asset for another.

Broadly speaking, all assets are capital except those specifically excluded by Internal Revenue Code. Major categories of non-capital assets include: property held for resale in the normal course of business (*i.e.* inventory), trade accounts and notes receivable, depreciable property and real estate used in a trade or business (*i.e.* I.R.C. "§ 1231 assets"). I.R.C. § 1221.

TAB 6

2006 CarswellOnt 4675
Ontario Superior Court of Justice [Commercial List]

General Chemical Canada Ltd., Re

2006 CarswellOnt 4675, [2006] O.J. No. 3087, 150 A.C.W.S. (3d) 16, 22 C.B.R. (5th) 298, 23 C.E.L.R. (3d) 184, 53 C.C.P.B. 284

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Plaintiffs) and GENERAL CHEMICAL CANADA LTD. (Defendant)

Mesbur J.

Heard: May 29, 30, 2006
Judgment: July 28, 2006
Docket: 05-CL-6160

Counsel: Ashley John Taylor for Interim Receiver, PricewaterhouseCoopers Inc.
Robert Staley, Kevin Zych, Alan Gardner for Plaintiffs
Mark Zigler, Andrew Hatnay for Morneau Sobeco Limited Partnership in its capacity as Administrator of General Chemical Canada Ltd.'s pension plans
Ronald Carr for Ministry of the Environment
Tim Hogan for Sherway Contracting
Tyco Manson for Honeywell ASCA

Subject: Insolvency; Corporate and Commercial; Environmental

MOTION by interim receiver for interim payment to creditor.

***Mesbur J.*:**

Nature of the motions and the positions of the parties

1 This series of motions arose out of the interim receiver, PricewaterhouseCoopers (PwC) moving to request the court's authorization to make an interim distribution of $3.75 million to the plaintiffs ("Harbert") as secured creditor of the defendant, General Chemical. The funds in question are a portion of the $6.5 million that has been generated from General Chemical's working capital assets, that is, its cash, accounts receivable and inventory, as opposed to being derived from any of its real estate assets. Harbert supports the interim

receiver's motion, while the Administrator of General Chemical's two pension plans, and the Ministry of the Environment (MOE) both oppose it.

2 The Administrator takes the position that it has a lien over General Chemical's assets in relation to unpaid pension contributions and plan solvency issues, and that its lien takes priority over Harbert's alleged security. On this basis, it says there should be no interim distribution to Harbert. The Administrator goes even further, and says, first, that the Harbert secured loan transaction is really an equity acquisition disguised as debt, and should be treated as what it really is, and enjoy no priority at all. Second, it says that even if the transaction created valid security for Harbert, in priority to all or part of what it says is the Administrator's lien, the equities of the case require that Harbert's security be subordinated to the interests of the pension plan. The Administrator moves for declarations that it has a valid lien and charge on General Chemical's assets, and is a secured creditor ranking in priority to Harbert.

3 The MOE says that General Chemical and PwC as interim receiver have both statutory and court-ordered obligations to comply with provincial environmental safety requirements. It says they have failed to do so, and as a result, there are significant potential environmental cleanup costs, that exceed General Chemical's financial assurance under the *Environmental Protection Act*[1] (EPA). The MOE says that General Chemical has an obligation to meet those costs, and takes the position that until the environmental obligations have been quantified, it is premature to make any distribution to anyone, since to do so may have the result of leaving no assets to meet the costs of any environmental cleanup.

4 In order to understand the positions of the parties, it will be helpful to outline some of the history of the General Chemical, and its American parent, their respective restructuring efforts, and General Chemical's underlying business.

Some background facts

5 General Chemical produces calcium chloride, a chemical that is used primarily for melting ice in winter, and controlling dust in summer. It is a Canadian company, and is a wholly owned subsidiary of an American company, General Chemical Industrial Products Inc. ("Industrial"). General Chemical's business operations create significant chemical by-products, which in turn, create environmental issues in and around their plant facilities.

6 General Chemical's Canadian operations are centred primarily in a plant in Amherstberg, Ontario.

Industrial's Chapter 11 proceedings

7 In December of 2003, General Chemical's parent, Industrial, entered Chapter 11 protection pursuant to the United States Bankruptcy Code. Harbert was an Industrial bondholder. As such, it was a creditor of Industrial, and thus participated in the Chapter 11 proceedings. Industrial's initial debtor in possession (DIP) financing had been provided by JP Morgan Chase Bank in December of 2003. The DIP facility consisted of both a revolving line of credit, which the parties refer to as the Revolver, and a term loan facility.

8 Under the JP Morgan Chase Revolver, General Chemical is described as a primary borrower, and is entitled to take advances under the facility. Industrial is also a primary borrower, with similar rights. Each company provided security and also cross-guaranteed the obligations of the other. The term loan was advanced only to Industrial, secured against Industrial's assets, with General Chemical guaranteeing those obligations, and providing security for its guarantee.

9 JP Morgan continued as DIP lender until March of 2004, when it no longer was prepared to participate in Industrial's restructuring. At that point, Harbert took over that role.

Harbert's financing of Industrial and General Chemical

10 On March 31, 2004, General Chemical entered into a number of financing arrangements with Harbert. These also comprised a revolving loan facility and a term loan facility. Both were structured in the same way as the JP Morgan Chase Bank loans. Both were secured against the assets of both General Chemical and Industrial. Both companies cross-guaranteed the other's liabilities.

11 As was the case with the JP Morgan Chase financing, the Harbert term loan was made to Industrial only, with Industrial granting security in relation to the term loan, and General Chemical guaranteeing the term loan as well. General Chemical's guarantee was secured against General Chemical's assets.

12 The Revolver was stated as being to both General Chemical and Industrial. Harbert advanced $9 million to General Chemical on March 31, 2004, which in turn was used to pay JP Morgan Chase, to retire the Revolver. This had the effect of paying off Industrial's DIP financing, and provided exit capital for Industrial to emerge from Chapter 11 protection on April 1, 2004. Industrial's restructuring was successful, and it continues to operate as an active company.

13 After the $9 million advance on March 31, 2004, General Chemical drew down on the Revolver between April 4, 2004 and January 10, 2005, for an additional $7.5 million. During the same period, General Chemical made repayments totalling just over $3,070,000 on the Revolver.

14 Harbert registered all the necessary financing statements under the *Personal Property Security Act*[2] (PPSA) on March 31, 2004. All parties concede that Harbert's security instruments have been properly registered under the PPSA, and that on that basis, Harbert has a technically perfected security interest in General Chemical's personal property, with effect on March 31, 2004.

General Chemical's CCAA proceedings

15 General Chemical has not fared as well as Industrial. In January of 2004, it began to accumulate some arrears in its two pension plans. It also had difficulties in paying its accounts payable, its inter-company debt and its lenders. By January of 2005 it was in CCAA protection, with the usual stay of proceedings while it attempted to restructure or liquidate. From January to September of 2005 General Chemical actively tried to sell the company as a going concern. Unfortunately, their efforts failed, due in large part to ongoing environmental issues at the Amherstberg facility. For the purpose of these motions it is General Chemical's financial problems in relation to environmental costs and pension arrears that are most relevant.

Environmental issues at General Chemical

16 As part of its manufacture of calcium chloride, certain by-products of the process are sent to a large depression on the Amherstberg property. This is called the Soda Ash Settling Basin, or SASB. The SASB is a contaminated site, with significant costs to remedy. These range from an estimated $3.5 million to as high as $64 million. Harbert's security expressly excludes the SASB. It is obviously more liability than asset.

17 These potential environmental clean up costs were a significant factor in General Chemical's inability to restructure with a viable going concern sale. Environmental issues continue to be an ongoing issue.

18 The MOE has significant powers in terms of forcing compliance with environmental standards. One of its tools, utilized with enterprises with significant environmental concerns, is obtaining what is called a Financial Assurance from a contaminating company. In the case of General Chemical, it has been dealing with the MOE under a Provisional Certificate of Approval, which was issued by the Director of the MOE to General Chemical in April 1997. Among other things, it requires General Chemical to provide for the closure of the SASB, and for financial assurance for the costs of closing it.

19 The amount of the Financial Assurance is subject to annual review. Based on the information General Chemical provided to the MOE in March of 2004, the Director accepted $3.4 million in financial assurance at that time. The Ministry now takes the position that the

costs of properly closing the SASB will be far in excess of the financial assurance amount, and may be as high as $64 million. Apparently the closure would take place over a number of years, and the cost is highly dependent on the supply of gypsum, which is required to cap the SASB.

20 The initial CCAA order had the usual broad stay provisions. However, as far as the MOE's position was concerned, paragraph 8 of the initial order contained the following exceptions to the stay:

> THIS COURT ORDERS that notwithstanding any other provision herein, but subject to paragraphs 9 and 10 herein:
>
> (a) with respect to Her Majesty the Queen in right of Ontario ("her Majesty"), as represented by the respective Ministers of Labour ("MOL") and of the Environment ("MOE"), and the Attorney General ("MAG"), each of which includes their respective employees and agents, this Order does not:
>
> (i) alleviate or alter in any way the obligations of the Applicant or any of its directors, officers and employees under any workplace health and safety statutes or regulations or instruments thereunder, administered by MOL or MOE, respectively;
>
> (ii) prohibit, restrain or in any way interfere with the exercise of the jurisdiction of MOE or MAG with respect to matters involving existing or imminent significant environmental effects (the "Environmental Matters"); or
>
> . . . . .
>
> (iii) without detracting from the generality of paragraph 8(a), MOE, MAG and the Environmental Review Tribunal are permitted to immediately and at any time, with respect to Environmental Matters, exercise their powers and perform their duties under environmental statutes and regulations and instruments thereunder and the *Provincial Offences Act* (Ontario), including, without limitation, obtaining warrants and the commencement of enforcement proceedings thereunder;

21 The MOE's right to review General Chemical's financial assurance and require changes to it was, however, stayed by the CCAA order. In fact, the MOE sought of lifting of the stay for that very purpose in August of 2005. At that time it requested the authority to amend General Chemical's Provisional Certificate of Approval to require further financial assurance from General Chemical concerning the cost of closing the SASB, and to have that additional financial assurance provided in cash. The MOE's motion was denied.

22 In addition to these environmental cleanup issues, General Chemical also had problems maintaining proper funding for its pension plans.

The General Chemical Pension Plans

23 General Chemical maintains two separate pension plans for its employees. One is a plan for its salaried employees, and the other is for its unionized employees. I will refer to the first as the "Salaried Plan", and other as the "Union Plan". Both plans are defined benefit pension plans, and both are completely employer-funded.

24 The *Pension Benefits Act*[3] (PBA) requires pension plans to calculate the necessary amounts to fund what are called current service costs, and special payments. Actuaries conduct actuarial valuations of the pension plan's assets and liabilities in order to determine, on an annual basis, the amounts necessary to pay these current service costs, and the special payments. Included in the special payments are calculations to determine if there is any unfunded liability in the plan, or solvency deficiency. The actuary is also required to calculate what are called wind-up payments. Wind-up payments are to ensure the plan will have sufficient assets to provide the promised benefits to employees if the plan is wound up.

25 Until about January of 2004 General Chemical was making all the necessary payments due under the plans. It made the monthly payments of $495,448 under the Union Plan, and $35,833 under the Salaried Plan. These monthly payments included both the current service costs and special payments. In January 2004, General Chemical first fell into arrears, paying only $86,743 to the Union Plan, and nothing to the Salaried Plan. At March 31, 2004, the date Harbert's security was perfected, there was a total of $1,356,230 owing to the Union Plan, and a total of $107,499 owing to the Salaried Plan.

26 In 2005, General Chemical did not pay any special payments to either pension plan. The initial CCAA order permitted the company, but did not require it, to make payments to the plans during the CCAA process, except for the special payments. At the end of October, 2005, there were outstanding special payments owed to the Union Plan in the amount of $4,130,510 and to the Salaried Plan in the amount of $159,790, for a total outstanding of $4,290,300.

27 In addition to these sums, the Administrator points out that since General Chemical is now bankrupt, the PBA in section 69(1)(c) permits the Superintendent to make an order requiring the pension plans to be wound up, in whole or in part. The actuaries also make a calculation concerning the amount required to fund the plans on a winding up. The Administrator has calculated that the net deficiency, as of the date of bankruptcy was $47,648,626 for the Union Plan, and $14,178,692 for the Salaried Plan. As of the date of these motions, the Superintendent had not yet made any order pursuant to s. 69(1)(c), and thus

there is currently no requirement for the winding up of the plans, although such an order is anticipated and will be requested by the Administrator.

The appointment of an interim receiver and General Chemical's Bankruptcy

28 By November of last year, it became apparent to Harbert that General Chemical's restructuring efforts were not likely to succeed. Their attempts at a going concern sale failed. Harbert therefore moved to terminate the CCAA proceedings, and have an interim receiver appointed pursuant to s. 47 of the *Bankruptcy and Insolvency Act*. At the same time, General Chemical wished to assign itself into bankruptcy. By this point, the Superintendent of Financial Services had taken over General Chemical's pension plans. The Superintendent opposed the appointment of an interim receiver and a bankruptcy, as did the MOE. They did so primarily on the basis that their positions might be diminished by a bankruptcy and the imposition of the provisions of the *Bankruptcy and Insolvency Act.* They wished their rights to be determined in the context of CCAA proceedings, rather than under the BIA.

29 On the motions before Campbell J. the Superintendent also sought payment of unremitted employer pension contributions to General Chemical's pension plans. Although current service payments were up to date at the time of the hearing before Campbell J, other payments were not.

30 On November 18, 2005 Campbell J appointed the interim receiver and made the bankruptcy order, notwithstanding the Superintendent's and MOE's opposition. He rejected the Superintendent's motion for payment of funds to the pension plan prior to terminating the CCAA proceeding. He faulted the Superintendent for failing to move for the relief it sought earlier in the process. Having found that there was nothing improper in the CCAA proceedings, he granted the orders, stating that to do otherwise "would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions."

31 Justice Campbell found that the relief the MOE sought was similar to that of the Superintendent. He dismissed their motion for much the same reason, finding that since the MOE did not raise its objections while there was a prospect of a going concern sale, it should not be permitted to effect a pre-emptive position by postponing a bankruptcy. He did, however, comment on the unsettled state of the law regarding the "constitutional interplay between the provincial environmental legislation and federal bankruptcy and insolvency law."

The appointment of an Administrator pursuant to the PBA

32 Every pension plan must have an administrator. Prior to its bankruptcy, General Chemical was the administrator of its two pension plans. Once General Chemical was in CCAA protection, the Superintendent of Financial Services took over as the administrator of General Chemical's two pension plans. After General Chemical's bankruptcy, the Superintendent appointed Morneau Sobeco Limited as the Administrator of the General Chemical pension plans.

The current proposed distribution

33 PwC, in its role as General Chemical's interim receiver, has now collected $6.5 million from General Chemical's general operations. Since the funds do not come from any of General Chemical's real estate holdings, and since Harbert is the only creditor with security against all General Chemical's operations, PwC proposes to distribute $3.75 million of those funds to Harbert.

34 The MOE views a distribution now as being premature. Although the MOE concedes any secured claim it has attaches only to General Chemical's land, it still maintains that both General Chemical and the Receiver have an obligation to take care of the cost of the environmental cleanup before any funds are paid out to any creditor. It says that to allow any money to be paid out to any creditor before the environmental issues can be resolved will have the result of saddling the citizens of the Province of Ontario with these costs, if there are no funds remaining to pay the cost of cleanup.

35 As far as the pension plan deficiencies are concerned, the Administrator takes the position that it has priority over Harbert, for the various reasons I have set out in paragraph 2 above.

36 It is against this general factual background that I turn to the applicable law and an analysis of it.

The law and analysis

37 Disposing of the issues here requires an analysis of the interplay among the provisions of the *Bankruptcy and Insolvency Act*, the *Pension Benefits Act*, the *Environmental Protection Act*, and the *Personal Property Security Act*. I will set out briefly the most salient features of each of these statutes that bear on these motions. In this context, it must be remembered that the BIA, as federal legislation, occupies the field of bankruptcy and insolvency, and has paramountcy over the other statutes, which are all provincial legislation. Central to this discussion is the concept that provincial legislation may not, either directly or indirectly, seek to reorder the priorities set out in the BIA. [4]

38 For the purpose of the discussion, it is important to remember that the BIA does two things. First, it allows a secured creditor to give notice and have a receiver appointed pursuant to the terms of its security in order to realize on the security. [5] Second, it sets out a scheme of priorities, which governs payment to the various creditors. The general rule is that unsecured creditors are paid subject to the rights of secured creditors. As to secured creditors, the order of payment is generally made on the basis of the timing of their respective securities in the same collateral, with those creditors having the earliest security being paid first. Unsecured creditors share in whatever remains, on a *pari passu* basis. There are some special rules giving special protection concerning environmental issues, and also concerning wage claims. There are also special rules concerning Crown claims, preferred creditors, and how they are dealt with.

39 As to environmental issues, the Crown's claim "for costs of remedying any environmental condition or environmental damage affecting real property" is given priority under section 14.06(7) of the *Bankruptcy and Insolvency Act*, and is a statutory exception to the general scheme under the BIA. Any claim by either the federal or provincial Crown for the costs of remedying any environmental condition or damage affecting real property is "secured by a charge on the real property and on any other real property of the debtor that is contiguous" to the real property, and "is related to the activity that caused the environmental damage or charge." Subsection 14.06(7)(a) makes the Crown's charge enforceable in the same way as a mortgage or charge on real property, and subsection (b) makes this Crown charge against the realty rank above any other claim, right or charge against the property.

40 The EPA permits the MOE to issue orders to a polluter to clean up polluted property. This right extends, in some limited circumstances, to issuing these kinds of orders to interim receivers or trustees in bankruptcy, but only in exceptional circumstances, namely, where there is danger to the health or safety of any person, there is an impairment or serious risk of impairment of the quality of the natural environment, or there is injury or damage or serious risk of injury or damage to any property or to any pant or animal life. [6] Unless these exceptional circumstances exist, the MOE is prohibited from issuing orders to receivers or trustees unless the order arises from the gross negligence or wilful misconduct of the receiver or trustee. [7]

41 The PBA is designed to protect the pension rights of workers in Ontario. It sets up various methods by which unpaid pension payments are to be secured. It creates what is called a "deemed trust" against the employer's assets in an amount equal to the unpaid payments. [8] It goes further, and creates a lien in favour of the pension administrator. This is described as a "lien and charge" on the employer's assets, in an amount equal to the amounts deemed to be held in trust by the deemed trust provisions. [9]

42 The PPSA sets up a scheme for "perfection" of security interests in personal property. An unperfected security interest will be subordinated to a perfected security interest in the same collateral. [10] While registration of a financing statement is the way to perfect general security agreements, such as those at issue in this case, this does not apply to certain statutory liens, which do not require registration. [11] The PPSA, and thus its registration requirements, do not apply to either statutory liens, or deemed trusts arising out of a statute. Thus, the PPSA does not apply to the deemed trusts or statutory liens established by the PBA in favour of the pension administrator. In situations where a debtor is bankrupt, however, the PPSA says that these statutory liens arise on the effective date of the bankruptcy. [12]

43 I propose to discuss the law, and analyse the positions of the parties by first considering the validity of the MOE's position. Having done that, I will consider the Administrator's position, first by determining whether it has a lien. If I decide that it does, I will then consider whether its lien has priority in whole or in part over Harbert's security. I will also decide whether, as the Administrator suggests, the Harbert transaction is really equity acquisition, not debt. Lastly, I will consider the Administrator's submission that even if Harbert has priority, its priority should be subordinated to the interests of the pension plans for equitable reasons.

The MOE's position

44 One of the roles of the MOE is to protect the public against environmental hazards. For this reason, the MOE is given special status in the BIA. As stated above, it has security on the contaminated property, and any contiguous property related to the activity that caused the contamination. The MOE's security is enforceable in the same way as a mortgage, and has priority over any other security in the same property.

45 Here, the MOE has valid concerns about the sufficiency of its security on realty to cover all the considerable cleanup costs relating to the SASB. Its position is that the current Financial Assurance it has from General Chemical is insufficient to meet any shortfall from the secured real property to pay the cleanup costs. In fact, in the CCAA proceedings, the MOE sought unsuccessfully to have the CCAA stay lifted to increase General Chemical's Financial Assurance. What it is seeking to do here, in delaying any distribution, is much the same.

46 Apart from its security, the MOE is an unsecured creditor like any other, and must prove its claim in the General Chemical bankruptcy. To permit the MOE to delay distribution to a secured creditor would give the MOE a quasi-priority to other unsecured creditors, and would defeat or delay the legitimate interests of secured creditors. I have been pointed to no precedent that would permit the court to do so.

47 The MOE argues that the court should apply similar principles here to those applied in CCAA proceedings, in considering whether a distribution should be made. The CCAA proceedings have been terminated. General Chemical is in bankruptcy, and its first secured creditor has had an interim receiver appointed. I fail to see how CCAA principles are applicable here.

48 Here, the assets that have generated the funds to be paid out are not derived from any real property that General Chemical owns. The MOE can have no lien or priority in relation to these funds.

49 The MOE suggests that somehow both General Chemical and the Receiver have an additional obligation to meet the unsecured liability for environmental cleanup. As I see it, this position runs contrary to both the initial CCAA order, the current order appointing the interim receiver, and the provisions of the BIA.

50 The initial CCAA order provided that General Chemical's obligations concerning any statutes or regulations administered by the MOE were not alleviated or altered in any way by the CCAA stay. The order also did not prohibit the MOE from exercising its jurisdiction with respect to "matters involving existing or imminent significant environmental effects". There is no suggestion General Chemical has failed to comply with any statutes or regulations. There is also no evidence of any imminent environmental effects.

51 The order appointing the interim receiver contains the following provision:

> 9. THIS COURT ORDERS that all rights and remedies against the Debtor or affecting the Property are hereby stayed and suspending pending written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (a) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (b) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environmental or other mandatory statutory or regulatory provisions of applicable law ... or (e) prevent the Ministry of the Environment from issuing orders or other instruments pursuant to the *Environmental Protection Act* in respect of this Property.

52 Lastly, the BIA itself has provisions concerning the rights and obligations of trustees and receivers concerning environmental issues. These are found in section 14.06. First, section 14.06(1.1) provides that the section applies equally to a bankruptcy trustee, a proposal trustee and an interim receiver within the meaning of subsection 243(2).

53 The section goes on to state in subsection (2) that a trustee is not personally liable for any environmental damage that arose prior to the trustee's appointment, or after the trustee's

appointment unless the condition arose because of the trustee's gross negligence or wilful misconduct.

54 The MOE suggests that the provisions of the order appointing the interim receiver are sufficient to require both General Chemical and the receiver to comply with all provisions of the *Environmental Protection Act*, including complying with orders issued by the MOE. It says that because the current financial assurance is insufficient to meet the costs of cleanup for the SASB, it should be able to require an increase in the financial assurance, and require the company to pay it. This may well be correct, as far as it goes. The position fails to consider, however, the status of the obligation in relation to the rights of secured creditors. The provisions of the order do not create a secured claim for the MOE's orders, nor do they suggest the MOE has priority over the interests of secured creditors.

55 As I read these provisions, and consider their interrelationships, I am drawn to the conclusion that first, none of General Chemical, the interim receiver or the trustee have any personal obligation to pay the cost of environmental cleanup; and second, the MOE can be nothing more than an unsecured creditor in the General Chemical bankruptcy for cleanup costs to the extent General Chemical's real property and the existing financial assurance are insufficient to meet those costs. As a result, I see no basis on which the court can delay the requested distribution on the bases advanced by the MOE.

56 In coming to this conclusion I have considered the MOE's argument concerning the applicability of the *Panamericana* decision [13] from the Alberta Court of Appeal. In *Panamericana*, the Alberta Court of Appeal found that a bankrupt company had an inchoate liability for the ultimate abandonment (or clean closure) of certain oil wells. The court found that the liability for the wells passed to the receiver-manager, who had been appointed pursuant to a secured creditor's security under s. 47 of the BIA. The court held that the Alberta statutory requirements concerning abandonment did not directly conflict with the scheme of distribution under the BIA, and thus the doctrine of paramountcy had no application. Even though this result meant less money for distribution in the bankruptcy, the court imposed the obligation.

57 At first glance, the reasoning in *Panamericana* seems somewhat compelling. However, it must be kept in mind that it was decided before section 14.06(7) of the BIA was enacted. It seems to me that section 14.06(7) now specifically legislates concerning the issue of priority of any environmental cleanup costs. That being the case, the provisions of the BIA must take precedence over any provincial legislation. The field has now been occupied, and any provincial effort to extend further rights to the Crown in respect of environmental contamination must be viewed as being in conflict with the provisions of the federal statute.

58 In addition, Harbert points out that *Panamericana* can also be distinguished on the basis that in *Panamericana* the interim receiver had taken possession of the contaminated wells pursuant to the secured creditor's security. Here, the Harbert security does not include the SASB, and thus the interim receiver is not in possession of the contaminated site.

59 As to the MOE's suggestion that the receiver and the company have freestanding personal obligations to remedy the contamination, that argument must also fail, in light of the fact that there is no suggestion the receiver has created environmental problems through gross negligence or wilful misconduct.

60 For these reasons, I reject the MOE's suggestion that an interim distribution should be delayed. I turn now to the more complex and vexing questions raised by the position of the Administrator.

Does the Administrator have a lien?

61 The Administrator relies on section 57(5) of the PBA to support its position that it has a valid lien against General Chemical's assets. Section 57 of the PBA deals with both trust obligations of employers regarding pension contributions, and the creation of a lien and charge in favour of a plan administrator.

62 Since both of General Chemical's pension plans are employer-funded, it is not necessary to consider section 57(1), which deals with the employer's obligation to hold employee contributions in trust until they are paid into the plan. In employer-funded plans, there are trust provisions relating to employer contributions. These are set out in section 57(3), which reads as follows:

> An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension pan an amount of money equal to the to the employer contributions due and not paid not the pension fund.

63 In subsection (4), section 57 goes on to make provision for what happens on a wind up of a pension plan. Section 57(4) says:

> Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

64 In the context of subsection (4), it must be remembered that General Chemical's pension plans have not yet been wound up, although the Administrator expects that the Superintendent of Financial Services will no doubt request their winding up.

65 Lastly, in section 57(5), the PBA creates a lien and charge on an employer's assets in an amount equal to the amounts deemed to be held in trust under the trust provisions of sections 57(1), (3) and (4). Section 57(5) provides:

> The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

66 Since General Chemical is now bankrupt, these provisions must be considered in the context of the BIA. All parties agree that the trust provisions created by sections 57(3) and (4) do not create true "trusts" of the sort contemplated by section 67(1)(a) of the BIA. That section excludes from the bankrupt's property, "property held by the bankrupt in trust for any other person". In *British Columbia v. Henfrey Samson Belair Ltd.* [14] the Supreme Court of Canada held that s. 67(1)(a) did not apply to statutory deemed trusts that lack the common law attributes of a trust. One of these attributes is that the property be kept separate, and not commingled with the bankrupt's own property. Clearly, a deemed trust does not meet this necessary criterion. Part of the court's reasoning was that to permit a provincially created statutory trust to operate as a "true" trust would permit provinces "to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province." [15]

67 Here, the question is whether the PBA's section 57(6) lien is similarly tainted. The Administrator takes the position that the lien is quite independent of the deemed trust provisions, and is no different than other provincially created statutory liens that create secured creditor status in a bankruptcy. For example, the Administrator points to the lien on cattle created by the British Columbia *Cattle Lien Act*, the lien on real property in favour of the Law Society created by Ontario's *Legal Aid Act*, a lien on horses or other animals created under Ontario's *Innkeepers Act*, or municipality that has a lien on real property for overdue taxes. All of these create secured debt under the BIA. [16] A significant difference, however, between these liens and the PBA statutory lien is that all these others are registered, [17] or require possession [18] of the collateral in order to be effective.

68 Harbert says that the lien provisions of the PBA were designed specifically to do indirectly what the trust provisions could not; that is, protect unpaid pension payments as secured claims in a bankruptcy. Harbert says two things suggest that the lien was expressly created to attempt to do indirectly what the trust provisions had failed to do directly.

69 First, Harbert points to Ontario's 1980 *Report of the Royal Commission on the Status of Pensions in Ontario.* This Report noted that although the PBA "purports" to create a trust for unpaid contributions, the Act "makes no provisions for the enforcement of the trust by

statutory lien or other such means, and it is doubtful if the trust as presently constituted is enforceable." The Report also recognized that "to the extent that such legislation falls within the federal bankruptcy jurisdiction, any provincial initiative to enforce the trust may be beyond the legislative authority of the province". The Report went on to state that existing bankruptcy legislation did not give any special protection to pension contributions, and that pension plan trustees could claim as ordinary creditors only. [19] The Report discussed proposed amendments to the BIA that might remedy the situation, but concluded at the present time there was no mechanism to protect these unpaid claims on a bankruptcy or insolvency. The Report therefore recommended that it would "seem advisable for the Government of Ontario to create by statute a lien to enforce the trust protection ... We recommend that legislation for this purpose be passed as soon as possible." [20]

70 I am drawn to the conclusion, therefore, that the lien provisions were enacted to try to enforce the deemed trust provisions on bankruptcy, and thus circumvent the difficulties encountered by the PBA trust provisions on bankruptcy. That being the case, it appears the lien provisions are an indirect attempt by the province to do indirectly what it could not do directly, and to legislate priorities for unpaid pension plan contributions. This is a matter solely within the sphere of federal legislation. [21]

71 Second, Harbert notes that Bill C-55, if proclaimed in force by the federal government, will amend the BIA to create a "Pension Charge" over all of a debtor's assets to secure first, any unremitted employee pension contributions, second, any unpaid employer-defined pension and contributions, and third, any unpaid normal costs as required by the applicable pension legislation. The proposed amendments in Bill C-55 exclude funding deficiencies under defined benefit plans from the proposed Pension Charge. Bill C-55 has not yet been proclaimed in force. I assume, however, that it is designed to alter the current state of the law. That being the case, I must conclude that the Pension Charge provisions are intended to create a charge where none existed before. That being the case, I am drawn to the conclusion that under the current provisions of the BIA there can be no lien or charge related to unpaid pension contributions. The proposed amendments must be designed to remedy something. Parliament will only pass or amend legislation for an intelligible purpose. [22]

72 As I see it, under the current BIA, the Administrator has no enforceable lien under the BIA. I am supported in this view by the decision of Farley J. in *Ivaco Inc., Re*. [23] In *Ivaco Inc.*, Farley J expressly held that "an administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy ... Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA lien." Campbell J followed this reasoning in his decision in this case to appoint the interim receiver. I, too, accept and follow their reasoning, and must conclude the Administrator has no lien.

73 If I am wrong on the issue of whether there is a lien or not, I will also consider the Administrator's position as if a lien were created, and address the issues of priority of such a lien in the context of all the arguments the Administrator has submitted.

Would a lien have priority over Harbert's security?

74 The question of priority is dependent on many things. As far as Harbert is concerned, their rights are easy to determine. There is no question that their security interest was perfected on March 31, 2004. The real question is whether the pension plan administrator would have had lien rights prior to this date, and if so, in what amount.

75 The BIA sets out a scheme of distribution among secured, preferred and unsecured creditors. It does not, however, determine the priorities of secured creditors among themselves. In bankruptcy, priorities between competing secured creditors in the same collateral are determined according to the "first in time" rule, subject to the principles of equity. Therefore, where the equities between two competing secured creditors are equal, the creditor whose security arose first will have priority over the other.

76 It is clear that Harbert's security was effective March 31, 2004, when it was perfected under the PPSA. As between Harbert and the Administrator, the question, then, is if the Administrator had a lien, did it have a lien prior to March 31, 2004, and if so, in what amount.

77 The Administrator's lien is described in s. 57(5) of the PBA as being "in an amount equal to the amounts deemed to be held in trust." The deemed trusts are in "an amount of money equal to the employer contributions due and not paid into the pension fund." According to the Administrator's material, the employer contributions due and not paid as of March 31, 2004 totalled $1,356,230 for the Union Plan, and $107,499 for the Salaried Plan. Thus, the amount of the Administrator's lien that would have predated Harbert's security totalled $1,463,729. That, however, is not the end of the inquiry. The next issue is to consider the positions of the parties at the date of the bankruptcy, and to determine what was owing to each on that date in respect of their March 31 2004 secured debt.

78 In the case of the Administrator, matters are complicated by the fact that between March 31, 2004 and the date of the bankruptcy, further deficiencies accrued in both plans, and significant payments were also made. The question is whether the payments should be applied to the earliest deficiencies or not. The Administrator takes the position that it can decide where to apply the payments, while Harbert suggests that the court should apply the rule in *Clayton's* case [24], and credit the payments against the earliest deficiencies.

79 For the Union Plan, General Chemical should have paid $495,448 per month to cover both the current service costs and special payments due under the plan. As I have stated, at

March 31, 2004, there were arrears of $1,356,230 in relation to this plan. Following March 31, 2004, General Chemical made some monthly payments to the Union Plan, but they were never in the total amount due. In June, September and December, they made no payments at all. By the end of December, the cumulative total of the arrears was $2,452,485. General Chemical did, however, make significant payments in both October and November of 2004. They paid $1,577,694 in each of those months, or $1,082,246 more than the amount due in each of those months. If those payments are applied to the oldest arrears, then General Chemical would have paid off the amount owing on the portion of the Administrator's lien that would have priority over Harbert.

80 Similarly, for the Salaried Plan, General Chemical made significant payments in both October and November of 2004. These payments exceeded the total monthly obligation for these two months by $113,472. Again, if these excess payments are applied to the earliest arrears, they would have discharged the Administrator's prior lien.

81 The question, therefore, is how the excess October and November payments should be allocated. The general rule, enunciated in *Clayton's Case, Re*, is that the court matches the repayment of various related debts so that the earliest payment goes toward the satisfaction of the earliest debts. This is also referred to as the "first in first out" rule. Cumming J. helpfully enunciated the rule in the *Sagaz* case[25] as follows:

> The rule is that when a debtor makes a payment to a creditor he may appropriate it to any debt owed to that creditor he pleases. The creditor must apply the payment accordingly. If the debtor does not so appropriate his payment, then the creditor has the right to do so to any debt he wishes. However, in the event there is no appropriation made by either party and there is one continuous account of several items, the rule is that the payment will be credited against the indebtedness according to the priority of time.

82 Here, there is no evidence from either General Chemical or the pension plans that either indicated any intention of how the payments were to be allocated when they were paid. It is true that the Administrator now seeks, some 18 months after the last payment was made, to allocate it to later debt. Surely the intention must be manifest at or around the time the payment is made, not so long after the fact. Absent any evident intention from anyone at the time the payments were made, I apply the general rule, and find the payments were made to reduce the earliest pension indebtedness, thus retiring any lien for which the Administrator would have had priority.

83 I therefore conclude that even if the Administrator had a lien in priority to Harbert, it would have been discharged by the payments made in October and November of 2004. Harbert would be entitled to be paid on its security first, with the balance of the Administrator's lien ranking behind Harbert.

84 This leaves the Administrator's remaining two arguments. First I will consider its argument that the Harbert financing was really an equity acquisition, rather than true debt.

Is the Harbert transaction really equity, not debt?

85 The Administrator suggests that because Harbert became the majority shareholder of Industrial as part of its financing, with the right to appoint three members of its Board of Directors, its financing of Industrial was essentially an equity purchase, rather than debt. The Administrator says that as a result, Harbert is not really a creditor, and should have no priority at all. I disagree.

86 As Harbert points out, the initial DIP financing JP Morgan Stanley Chase provided was in virtually identical terms to the financing Harbert replaced it with. All the financing was court-approved in the Chapter 11 proceedings in the USA. Contrary to what the Administrator says, all the loans were cross-collateralized on the assets of both Industrial and General Chemical.

87 The Administrator also suggests that General Chemical did not receive any benefit from the Harbert loans, but rather, all money was advanced to Industrial, but secured only on the assets of General Chemical. The evidence does not bear this out. As I have already mentioned, all the loans were cross-collateralized on the assets of both Industrial and General Chemical. Also, the Revolver records show General Chemical draws on the facility quite apart from the $9 million used to repay the Industrial DIP loan. There were both draws, and repayments throughout the period from April 2004 to January of 2005, all of which suggests to me that General Chemical was using the facility for corporate purposes, in the usual fashion revolving lines of credit are used. Lastly, the Guarantee and Security Agreement, executed by both Industrial and General Chemical expressly recites that both borrowers "are engaged in related businesses, and...will derive substantial direct and indirect benefit from the making of the extensions of credit under the Credit Agreement." [26] Similarly, the Introductory Statement to the Revolver loan states that the proceeds of the loans will be used to repay all outstanding obligations under the DIP facility, and "for working capital and other general corporate purposes of the Borrowers and their respective subsidiaries." [27] I conclude from all of this that General Chemical received direct benefit from the Harbert's loan facility.

88 The Administrator also suggests that the Harbert financing documents lack true indicia of debt, such as repayment terms, interest and the like. This is not the case. The Revolver sets interest rates, and payment dates. It requires both Industrial and General Chemical to repay both principal and interest. The Revolver also requires principal payments in the amount of 75% of what is defined as "Excess Cash Flow", to ensure speedier repayment of the debt. All of these things point to true debt, not an equity acquisition.

89 As a result, I cannot conclude that the Harbert financing was designed solely to finance an equity investment in Industrial, as opposed to being a true loan to General Chemical. This aspect of the Administrator's argument must therefore fail.

Do the equities require an inversion of priorities?

90 The Administrator takes the position that even if Harbert is a secured lender, with priority over the Administrator, the equities require the subordination of Harbert's security to the position of the Administrator, and thus of the pension plans. The equitable jurisdiction of the bankruptcy court is likely broad enough to permit this. [28]

91 In *Christian Brothers of Ireland in Canada*, the court relied on three requirements for a successful claim of equitable subordination, as these had been articulated in both the American case of *Mobile Steel* [29], and by the Supreme Court of Canada in *Canadian Deposit Insurance Corp.* [30] These requirements are the following:

> (1) The Claimant must have engaged in some type of inequitable conduct;
>
> (2) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the Claimant; and
>
> (3) Equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

92 It should be remembered, however, that equitable subordination has been used sparingly by Canadian courts. Inequitable conduct requires the court to conduct a broad inquiry into the conduct of the parties to determine what is right and just in all the circumstances. The test is a "sense of simple fairness." [31] Equitable subordination is not used, however, to "adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the Court perceives the result as inequitable." [32] The court must therefore be careful not to approach the question on the basis of who the competing creditors are (i.e., the "innocent and vulnerable" employees, as opposed to the "sophisticated and wealthy" lender), but rather by the nature of their respective claims.

93 In support of its position concerning "inequitable conduct", the Administrator relies on the fact that as a result of the March 31, 2004 transaction, Harbert become the controlling shareholder of Industrial, General Chemical's parent. The Administrator claims that the Harbert $9 million advance was used to pay off Industrial's DIP loan, rather than directly benefit General Chemical. It says that as a result it would be inequitable for Harbert to be given priority over General Chemical's assets, when General Chemical did not benefit from

the advance on the Revolver. To allow this would be at the expense of the members and retirees of the pension plans.

94 The essence of the Administrator's claim in relation to this part of the test is that General Chemical had no benefit from the Harbert loans. As I have already stated, the evidence does not bear this out. I am persuaded on the basis of Appendices "C" and "D" to the Monitor's twelfth report to the court (attached to the Interim Receiver's first report to the court), that General Chemical itself took draws on the Revolver, quite apart from the $9 million draw used to repay the Industrial DIP loan. That being the case, General Chemical did benefit from the loans.

95 It therefore cannot be said that it would be inequitable for Harbert to be given priority for its loans to General Chemical. Since the Administrator must meet all three elements of the test, its failure to meet this branch is sufficient to dispose of the issue of equitable subordination. For the sake of completeness, however, I will deal with the two remaining aspects of the question as well.

96 As to the requirement for injury to creditors or an unfair advantage to Harbert, the Administrator says that the true nature of the Harbert loans gives Harbert an unfair advantage over the other General Chemical creditors. There is no question that as first secured lender, Harbert has an advantage over the other creditors. That is the nature of having this kind of security. It is true that the interests of General Chemical's innocent and vulnerable employees and pensioners will be adversely affected by Harbert's priority. I cannot see, however, that Harbert's advantage is an *unfair* advantage, of the sort contemplated by the case law. This part of the argument must fail as well.

97 Lastly, equitable subordination is only permitted where it would not run contrary to the statutory scheme in the *Bankruptcy and Insolvency Act*. As the Administrator points out, Canadian courts have shown a willingness to apply the principle of equitable subordination where the ranking provisions of the BIA are not applicable. [33] As the court put it in *Bulut*, the court will not apply the doctrine of equitable subordination to alter a *statutory* scheme for determining priorities among creditors. Here, if the Administrator had a lien, the issue of priority between its security and Harbert's would lie outside the BIA. The BIA does not set out a scheme of priorities among secured creditors; it merely says that secured creditors are to be paid in priority to unsecured creditors.

98 While the Administrator could meet the third branch of the test, its failure to meet the other two is sufficient to defeat the claim for equitable subordination. As a result, I do not view this as an appropriate case to employ the doctrine of equitable subordination.

Disposition

99 For these reasons, the interim receiver's motion is granted, and an order will go authorizing the interim receiver to pay out to Harbert the sum of $3.75 million on account of their secured debt, from the $6 million proceeds the interim receiver currently holds. The interim receiver's motion for similar relief and for the approval of the Receiver's First Report to the Court and the activities of the Receiver described therein is also granted. The Administrator's motion is dismissed.

100 As the parties have agreed, there will be no costs of any of the motions.

Motion granted.

Footnotes

1 R.S.O. 1990 c. E.19

2 R.S.O. 1990 c. P.10

3 R.S.O. 1990 c. P.8

4 *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.)

5 See sections 244 and 47 of the BIA. Where a secured creditor has given, or is about to give notice, of its intention to enforce its security under s. 244(1) of the BIA, the court may appoint a trustee as interim receiver over the debtor's property, if the court is satisfied that the appointment is necessary to protect the debtor's estate or the interests of the creditor. Here, C. Campbell J appointed PwC in that capacity, pursuant to Harbert's s. 47 notice.

6 EPA, s. 168.20(1)

7 EPA, s. 168.19(1)

8 PBA, s. 57(1),(3) and (4)

9 PBA, s. 57(5)

10 *Personal Property Security Act*, section 20(1)(a)(i)

11 PPSA, ss 4(1)(a) and (b)

12 PPSA, section 20(2)(a)(i)

13 *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 8 C.B.R. (3d) 31 (Alta. C.A.)

14 [1989] 2 S.C.R. 24 (S.C.C.)

15 *Ibid.* at 33

16 See, for example, *Canadian Exotic Cattle Breeders' Co-operative, Re* (1979), 103 D.L.R. (3d) 112 (B.C. S.C.); *Calla, Re* (1975), 9 O.R. (2d) 755 (Ont. Bktcy.); *Rauf, Re* (1974), 5 O.R. (2d) 31 (Ont. Bktcy.); *Rockland Chocolate & Cocoa Co., Re* (1921), 61 D.L.R. 363 (Ont. S.C.); *Condominium Plan No. 762 0380 v. Edmonton (City)* (2001), 24 C.B.R. (4th) 9 (Alta. Q.B.)

17 for example, s. 48(1) of the *Legal Aid Services Act*, *1998* .S.O. 1998 c. 26 permits the Corporation to register a lien against the land of the person to whom a legal aid certificate is provided. S. 48(2) permits the lien to be enforced in the same manner as a mortgage.

18 *Cattle Lien Act*, R.S.B.C. 1960, c44; section 3 of the *Innkeepers Act*, R.S.O. 1970 c.223, now R.S.O. 1990 c. I.7, the former *Mechanics and Wage Earners' Line Act*, R.S.O. 1914 c.140, as referred to in *Rockland Chocolate & Cocoa Co., Re*, above

19 Report of the Royal Commission on the Status of Pensions in Ontario, Vol. 2 pp 148-149

20 *Ibid.*

21 *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.)

22 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham:Butterworths, 2002) at 472-473

23 (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), leave to appeal allowed 10 November 2005. For other cases taking a similar view, see *Graphicshoppe Ltd., Re* (2005), 78 O.R. (3d) 401 (Ont. C.A.); *United Air Lines Inc., Re* (2005), 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]); *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.)

24 *Clayton's Case, Re* (1816), 1 Mer. 572 (Eng. Ch. Div.)

25 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2000] O.J. No. 77 (Ont. S.C.J.), aff'd [2000 CarswellOnt 3414 (Ont. C.A.)]

26 Guarantee and Security Agreement dated March 31, 2004, recitals, page 512 of Harbert's responding motion record.

27 Introductory Statement to the Revolving Credit Agreement among General Chemical Industrial Products Inc., General Chemical Canada Ltd. As Borrowers, and The Banks Party Hereto, and HSBC Bank USA, as Administrative Agent and Canadian Administrative Agent, dated as of March 31, 2004, found at page 190 of Harbert's responding motion record.

28 Section 183 of the BIA vests the bankruptcy court with equitable jurisdiction. See *Christian Brothers of Ireland in Canada* (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]) in which the court held there is no jurisdictional or constitutional impediment to the court utilizing the concept of equitable subordination if it feels it is appropriate to do so.

29 *Matter of Mobile Steel Co.*, 563 F.2d 692 (U.S. C.A. 5th Cir. 1977), Court of Appeal for the First Circuit, per Clark J.

30 *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1992), 97 D.L.R. (4th) 385 (S.C.C.)

31 *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.)

32 *First Truck Lines, Inc., Re*, 48 F.3d 210 (U.S. C.A. 6th Cir. 1995)

33 See *Christian Brothers of Ireland in Canada*, supra, and *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108 (Ont. C.A.)

End of Document

2007 ONCA 600
Ontario Court of Appeal

General Chemical Canada Ltd., Re

2007 CarswellOnt 5497, 2007 C.E.B. & P.G.R. 8258 (headnote only), 2007 ONCA 600, 160 A.C.W.S. (3d) 217, 228 O.A.C. 385, 31 C.E.L.R. (3d) 205, 35 C.B.R. (5th) 163, 61 C.C.P.B. 266

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Plaintiffs / Respondents) And GENERAL CHEMICAL CANADA LTD. (Defendant / Respondent)

S.T. Goudge, R.A. Blair, J. MacFarland JJ.A.

Heard: March 21-22, 2007
Judgment: September 6, 2007
Docket: CA C45784, C45800

Proceedings: affirming *General Chemical Canada Ltd., Re* (2006), 53 C.C.P.B. 284, 22 C.B.R. (5th) 298, 2006 CarswellOnt 4675, 23 C.E.L.R. (3d) 184 (Ont. S.C.J. [Commercial List])

Counsel: Mark Zigler, Andrew J. Hatnay, Fred L. Myers, Lawrence J. Swartz for Appellant, Morneau Sobeco Limited Partnership in its capacity as administrator of General Chemical Canada Ltd.'s pension plans
Ronald Carr for Appellant, Ministry of Environment
Ashley John Taylor for Pricewaterhouse Coopers Inc., interim receiver of General Chemical Canada Ltd.
Richard B. Swan, Robert Staley, Linda Visser for Respondents, Harbinger Capital Partners Fund, L.P., Harbinger Capital Partners Master Fund I, Ltd.
Tycho M.J. Manson for Honeywell ASCa Inc.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure; Environmental

APPEALS by administrator of bankrupt's pension plans and Ministry of Environment from judgment reported at *General Chemical Canada Ltd., Re* (2006), 53 C.C.P.B. 284, 22 C.B.R. (5th) 298, 2006 CarswellOnt 4675, 23 C.E.L.R. (3d) 184 (Ont. S.C.J. [Commercial List]), granting interim receiver's motion for interim distribution of funds to secured creditor.

Editor's Note

This decision adds to the small but growing body of jurisprudence on the interplay between pension law and insolvency law, in particular where there are unremitted contributions to an underfunded pension plan and the employer has been placed into bankruptcy. The Court of Appeal upheld the decision of the Superior Court, albeit on somewhat different grounds, which shift in reasoning may cause a touch of confusion when working through any similar fact situations which might arise in the future.

***S.T. Goudge J.A.*:**

1 The respondents, the two Harbert Funds ("Harbert") [1] , are a secured creditor of General Chemical Canada Ltd. ("GCCL"), which was placed in bankruptcy effective November 18, 2005. Its interim receiver has accumulated $6.5 million from GCCL's operating assets, including cash, accounts receivable and inventory, and seeks the court's authorization to make an interim distribution from these funds to Harbert, as secured creditor, in the amount of $3.75 million.

2 This proposal is opposed by the administrator of GCCL's two pension plans and by the Ontario Ministry of the Environment ("MOE").

3 The administrator says that, pursuant to s. 57(5) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), it holds a lien over GCCL's assets in relation to GCCL's unpaid pension contributions, and this gives it priority over Harbert's security.

4 MOE says that GCCL has failed to comply with provincial environmental safety requirements, and there will therefore be significant cleanup costs that exceed GCCL's financial assurance given under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("EPA"). MOE says that GCCL and its interim receiver have an obligation to meet these costs, and that any distribution at this stage is premature and may leave no assets for environmental remediation.

5 At first instance, the motion judge found against both the administrator and MOE, and authorized the interim distribution to Harbert. Both the administrator and MOE have appealed. The appeals were argued together, although they each raise their own issues. I therefore propose to address each separately.

6 In each case, I agree with the result reached by the motion judge, although for somewhat different reasons.

The Administrator's Appeal

7 Until January 2005, when it discontinued operations, GCCL manufactured calcium chloride at its plant in Amherstburg, Ontario. On March 31, 2004, Harbert advanced $9 million to GCCL, secured against GCCL's operating assets. No one questions that Harbert's security instruments were properly registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), and constitute a perfected security interest in GCCL's personal property as of that date.

8 However, GCCL developed financial problems, and on January 19, 2005, it was ordered under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*").

9 By November 2005, it became clear that GCCL's attempt to restructure while under *CCAA* protection was unlikely to succeed. Effective November 18, 2005, pursuant to the order of C. Campbell J. of the Superior Court of Justice, GCCL made an assignment in bankruptcy and an interim receiver of certain of its assets was appointed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

10 GCCL maintained two pension plans for its employees, one for its salaried employees and one for its unionized employees. Both are defined benefit plans and both are completely employer funded.

11 Until about January 2004, GCCL was making the contributions due under both plans. At that point, it began to fall into arrears, and by March 31, 2004, the date Harbert's security was perfected, that shortfall was $1,356,230 for the union plan and $107,499 for the salaried plan.

12 After March 31, 2004, while GCCL made several sporadic payments to both plans, the shortfalls continued to grow. The only exception to this pattern occurred in October and November 2004 when GCCL made payments to both plans in excess of the required contributions for those months. That excess amounted to $2,164,492 for the union plan and $113,472 for the salaried plan. Thereafter, the shortfalls continued to grow, although nothing in the *CCAA* order prohibited GCCL from making the required contributions.

13 The *PBA* requires that every pension plan have an administrator. Up until its bankruptcy on November 18, 2005, GCCL served in that role for both plans. However on December 8, 2005, the Ontario Superintendent of Financial Services, in his capacity as the regulator of Ontario registered pension plans, appointed Morneau Sobeco Limited Partnership (the "Administrator") as the administrator of both plans pursuant to s. 71 of the *PBA*.

14 This proceeding arose because the interim receiver has now collected $6.5 million from GCCL's general operations. These funds do not come from any of GCCL's real estate holdings. Since it views Harbert as the only creditor with security against GCCL's operating assets, the interim proposes to distribute $3.75 million of those funds to Harbert as secured creditor.

15 The Administrator opposes the motion approving that payment because of the security it says it has under the *PBA*. At the same time, the Administrator moved for a declaration that its security pursuant to s. 57(5) of the *PBA* makes it a secured creditor ranking ahead of Harbert's security.

16 The motion judge granted the interim receiver's motion and dismissed that of the Administrator. She found that the lien created by s. 57(5) of the *PBA* was not enforceable under the *BIA* because it was an attempt by the province to do indirectly what it could not do directly, namely to legislate priority under the *BIA* for unpaid pension plan contributions.

17 She drew support for this conclusion from Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess., 38th Parl., 2005 (assented to 25 November 2005), which has been passed by the federal Parliament but not proclaimed, and which would create a "pension charge" over a debtor's assets for unpaid pension plan contributions of the kind in issue here. The motion judge concluded that since this amendment must be designed to alter the current state of the law, no such security presently exists.

18 The motion judge went on to find that even if the Administrator held a lien effective for *BIA* purposes, the rule in *Clayton's Case, Re* (1816), 1 Mer. 572, 35 E.R. 781 (Eng. Ch. Div.), should be applied, and absent any evident intention at the time of the excess contributions paid by GCCL in October and November 2004 as to which particular deficiencies they were to apply to, they should be applied to reduce the earliest pension indebtedness. This would eliminate all shortfalls prior to the effective date of Harbert's security for which the Administrator might have had priority.

Analysis

19 The important section of the *PBA* for the Administrator's appeal is s. 57. Section 57(1) applies to employee contributions required under a pension plan and hence is not relevant here, where both plans are completely employer funded. The same is true of s. 57(4), which applies where a pension plan is wound up, since that has not yet happened in this case.

20 The critical subsections are ss. 57(3) and 57(5). They read as follows:

> (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> . . . . .
>
> (5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

21 The *BIA* sets out a scheme of priorities governing payment by creditors in the event of a bankruptcy. Section 67(1)(a) excludes from the bankrupt's property any property held by the bankrupt in trust for another person. Then, in distributing the bankrupt's estate, those meeting the definition of "secured creditor" in s. 2 of the *BIA* are paid first, generally on the basis that the earliest security is paid first. Then, s. 136(1) sets out a list of other creditors who, subject to the rights of secured creditors, are to be preferred and paid in the priority listed in that subsection. Finally, unsecured creditors share *pari passu* in what remains.

22 The critical definition in the *BIA* is that of "secured creditor" defined in s. 2. It reads:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrumental held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
>
> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> (b) any of
>
> (i) the vendor or any property sold to the debtor under a conditional or instalment sale,
>
> (ii) the purchaser of any property from the debtor subject to a right of redemption, or
>
> (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

> if the exercise of the person's rights is subject to the provision of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; [emphasis added]

23 There is no doubt that once GCCL began to fall short of its required contributions to both pension funds in January 2004, s. 57(3) of the *PBA* applied and GCCL was deemed to hold in trust for the beneficiaries of those plans an amount equal to its unpaid contributions.

24 However, the Administrator concedes that this section does not create a trust as contemplated by s. 67(1)(a) of the *BIA* and excludes nothing from the estate of GCCL for the purposes of distribution under the *BIA*. All parties to this appeal agree that that consequence is dictated by *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.). That case held that s. 67(1)(a) of the *BIA* does not apply to statutory deemed trusts that lack the common law attributes of a trust, such as the requirement that the property be kept separate and not commingled with the bankrupt's own property.

25 The Administrator's argument, however, is simply that the lien and charge accorded to it by s. 57(5) of the *PBA* is separate from the deemed trust created by s. 57(3), and is effective for the purposes of the *BIA*, even if the deemed trust is not.

26 For this argument to succeed, however, the first step is that, as holder of a s. 57(5) statutory lien, the Administrator must meet the definition of secured creditor in the *BIA*.

27 In my view, it cannot do so. The Administrator does not hold a charge or lien as security for a debt due or accruing due to the Administrator from the debtor GCCL.

28 The *PBA* provides that the Administrator is the person that administrates the pension plan. The Administrator is to ensure that the pension plan, and the pension fund maintained to provide benefits under the plan, are administered in accordance with the *PBA* and its regulations (s. 19(1)). In doing so, the Administrator must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person (s. 22(1)). Section 56(1) requires the Administrator to ensure that all contributions due under the pension plan are paid to the pension fund when due. To facilitate this, the Administrator is given the right to commence legal proceedings to obtain payment of contributions due under the pension plan (s. 59).

29 Section 55(2) sets out the employer's obligation to make contributions under a pension plan. It reads as follows:

> (2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer,

> shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,
>
> (a) to the pension fund; or
>
> (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

30 None of these provisions suggest that the contributions owed by GCCL are a debt due to the Administrator. Rather, GCCL's legal obligation was to make the contributions to the pension funds that were required under the pension plans. Nor is there even any indication that the contributions are owed to the Administrator to be held in trust for the pension funds. Rather, the legislation contemplates that those contributions are owed to the pension funds pursuant to the pension plans, and are not the property of the Administrator.

31 The Administrator's right to commence legal proceedings simply permits it to seek to compel the employer to pay the contributions to the pension funds due under the pension plans.

32 The consequence of this is that the lien and charge accorded to the Administrator secures the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. It does not secure a debt owed to the Administrator. Hence s. 57(5) does not qualify the Administrator as a secured creditor for the purposes of the *BIA*.

33 That conclusion is sufficient to dispose of the Administrator's appeal, and makes it unnecessary to decide whether, if s. 57(5) of the *PBA* qualifies the Administrator as a secured creditor for the purposes of the *BIA*, that section is rendered inapplicable because its effect is to reorder the priorities for payment set out in the *BIA*.

34 The motion judge found that s. 57(5) has this effect. Relying on *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), she held that s. 57(5) does not give the Administrator an enforceable lien under the *BIA*. As I have indicated, I need not address this issue. Although it was not argued, my reluctance to do so is heightened because it does not appear that a notice of constitutional question was served, even though the issue squarely raises the constitutional applicability of s. 57(5) of the *PBA* in these circumstances.

35 As I have said, the motion judge also decided that even if s. 57(5) of the *PBA* gives the Administrator a lien and charge that is effective for *BIA* purposes, the debt thus secured should be treated as having been fully discharged by the overpayments made in October and November 2004. The motion judge reached that conclusion by applying the general principle in *Clayton's Case, Re* to treat these excess payments as being applied to the earliest arrears in GCCL's required contributions, consequently eliminating the shortfall that existed on

March 31, 2004. This would exhaust the effect of any priority the Administrator's secured claim would have over Harbert's secured claim because it arose before Harbert registered its security on March 31, 2004. Any secured claim by the Administrator for GCCL contributions required after that date but not paid would rank after Harbert's secured interest.

36 Given my conclusion that the Administrator is not a secured creditor for *BIA* purposes, I need not address this issue either. In any event, on the assumption she makes of constitutionality, I would not interfere with the motion judge's conclusion. In my view, it was open to her on the facts before her to adopt the evidentiary presumption suggested by the rule in *Clayton's Case, Re*. Since there is no evidence from GCCL, the then administrator, concerning what indebtedness the overpayments in October and November 2004 were intended to apply to, and that the present Administrator was not in place when those overpayments were received or applied, I would conclude that the motion judge could properly resort to the default presumption suggested by the general principle. Nor do I see any equitable basis for not doing so. This is not a case where there is any suggestion that such a conclusion would reflect any attempt by GCCL to adversely affect pension plan members.

37 To summarize, I would dismiss the Administrator's appeal for the reasons I have given.

The MOE Appeal

38 At the root of the MOE opposition to the distribution ordered by the motion judge is one simple fact. In manufacturing calcium chloride at its Amherstburg plant, GCCL produced by-products that were deposited in what was called the Soda Ash Settling Basin ("SASB"). It is now a contaminated site and remedial costs could reach $64 million. The MOE is anxious to see that GCCL assets are available to pay for this clean up.

39 The MOE has a number of regulatory tools to use to protect the environment. In 1997, it issued a Provisional Certificate of Approval to GCCL which *inter alia* required GCCL to provide for the closure of the SASB and assurance that the costs of the closure would be paid for by the company. The latter was provided by a financial assurance that was subject to annual review by the MOE. In March 2004, the MOE accepted $3.4 million as the appropriate amount required of GCCL. Since then, the MOE has vastly increased its estimate of the cost of clean up, to as much as $64 million.

40 The *CCAA* order stayed the MOE's right to review and increase GCCL's financial assurance. In August 2005, the MOE sought the lifting of the stay to permit it to increase that amount, but it was unsuccessful.

41 The November 18, 2005 order appointing the interim receiver did not exempt either the receiver or GCCL from compliance with environmental regulations, nor did it prevent the

MOE from issuing orders in respect of the SASB. However, that order expressly excluded the SASB from the property of GCCL over which the interim receiver was appointed.

42 It is uncontested that Harbert's security does not extend to the SASB. Rather, it expressly excludes it. Moreover, the MOE does not assert a security interest in GCCL's operating assets over which Harbert does have security. Section 14.06(7) of the *BIA* does give the MOE a security interest in the bankruptcy in GCCL's contaminated real property and any contiguous property related to the activity that caused the environmental damage. This security ranks above any other security against the same property.

43 However, it is the MOE's position that the decision to distribute on an interim basis should be guided by what is fair and reasonable having regard to all stakeholders, akin to the considerations applied under the *CCAA*. It argues that the "polluter pays" principle for environmental remediation requires no distribution until there can be an assurance that GCCL's assets are sufficient to clean up the SASB.

44 The motion judge found against the MOE and concluded that, in her discretion, the distribution should proceed. She held that the MOE was an unsecured creditor in relation to the GCCL operating assets that generated the funds to be paid out, that to permit the MOE to effect a delay in distribution would be to give it a *quasi* priority over other unsecured creditors, and in any event it has security over the SASB. She also found no evidence of any imminent environmental effects or any non-compliance by GCCL with any environmental regulations.

45 In this court, the MOE repeats its arguments below and raises, as it did there, the case of *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the *BIA*, and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.

46 I agree with the motion judge that the reasoning in that case has been overtaken because of subsequent amendments to the *BIA*. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim. Neither were in effect at the time of *Panamericana*. To give effect to provincial environmental legislation in the face of these amendments to the *BIA* would impermissibly affect the scheme of priorities in the federal legislation.

47 Beyond that, I see no basis to interfere with the discretion of the motion judge to order the interim distribution. Harbert is the only creditor secured against the GCCL operating assets that generated the funds for distribution. In that regard, the MOE is an

unsecured creditor. The MOE does, however, have security against GCCL's real property, as provided by the *BIA*. Harbert's security does not extend to the SASB, nor does the interim receiver have possession of that real property. The motion judge found no evidence of non-compliance with environmental orders nor any threat of imminent environmental harm. In these circumstances, I see nothing unreasonable in the interim distribution going forward.

48 I would therefore dismiss the MOE appeal. In the result, both appeals are dismissed.

49 Neither the Administrator nor Harbert sought costs. While the receiver sought costs against the MOE, the latter neither sought costs nor invited an adverse costs award. In the circumstances, I would order no costs to any party.

***R.A. Blair J.A.*:**

I agree.

***J. MacFarland J.A.*:**

I agree.

Appeals dismissed.

Footnotes

1 The two Harbert Funds have since changed their names to Harbinger Capital Partners Fund, L.P. and Harbinger Capital Partners Master Fund I, Ltd.

TAB 7

H. L. (E.) 1904 MIDLAND RAILWAY v. SHARPE. Lord James.

chooses not to afford himself comforts beyond the necessaries of life obtains over his fellow-workman who is more luxurious in his habits. I cannot understand how it can be said that that is not an "earning." One could give many instances. For example, if a workman were told, "You will receive so much wages if you are in uniform, and you will have to find your own uniform," then it is a gross sum that he receives; the application of a certain part of it to a particular output, namely, the payment for the uniform, does not render the money which he receives any the less "earnings." So in the same way here. If the man is told by the railway company, "You will receive, if you are away from home, so much, and having received it, do what you will with it; we, the railway company, do not ask you to account for it." It seems to me to be quite clear that the sum so received is an "earning," although, no doubt, at the time when the sum was fixed, the object of fixing the higher rate was to meet a corresponding expense. That is not the question: the question is "earnings" as against "profits"; and, looking at the application of that word in this case, it seems to me, my Lords, as I have said, quite clear that the judgment of the Court of Appeal is correct.

LORD ROBERTSON. My Lords, the contract with this guard is that, plus what is called his wages, he is entitled to so much for each night he is away from home; and no inquiry is made whether that sum has been spent on board and lodging, or spent at all. This being so, it seems to me that, not the less because the purpose of these extra payments was to meet the cost of board and lodging has this man a right to the money, and not the less because they bear the name "allowances' does the guard earn them each time he, on the service of his employers, has to spend the night away from home. And if he earns them they are "earnings."

Order of Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 17, 1904.

Solicitors: *Beale & Co.; Arthur Toovey, for Flint & Sons, Derby.*

[HOUSE OF LORDS.]

ILLINGWORTH . . . . . APPELLANT;

AND

HOULDSWORTH AND ANOTHER . . . RESPONDENTS.

H. L. (E.) 1904 *July* 1.

Company — Mortgage — Assignment of Present and Future Book Debts — Registration of Mortgage — Companies Act, 1900 (*c.* 48), *s.* 14, *sub-s.* 1 (*d*).

A company, by way of security to guarantors, assigned by deed all its present and future book and other debts, with the benefit of all securities for the same, to a trustee in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but declared that the trustee should at any time, if required by the guarantors, give notice of this assignment to the company's debtors, but that it should not be incumbent on the trustee to give notice unless he thought fit; with provisions that the trustee might at any time give notice, appoint a receiver and exercise the statutory power of sale, but meanwhile should not be answerable for allowing the company to receive the book debts:—

Held, that upon the true construction of the deed it was clearly intended that the company should carry on its business in the ordinary way and receive the book debts for that purpose, and that the deed was "a floating charge" within the meaning of s. 14 of the Companies Act, 1900, and void for want of registration in a question between the trustee and a creditor of the company.

The decision of the Court of Appeal, *Houldsworth* v. *Yorkshire Woolcombers Association*, [1903] 2 Ch. 284, affirmed.

BY a trust deed of 1900 the Yorkshire Woolcombers Association specifically mortgaged its freeholds and leaseholds to secure its debenture stock, and charged in favour of the trustees, by way of floating security, all its other property and assets both present and future and its undertaking, but not its uncalled capital. Clause 21 contained a power allowing the association (until the trust to enter, sell, &c., should be exercisable) to sell, specifically mortgage, or otherwise deal with the property and assets by way of floating security.

Guarantees having been given to the bankers of the association to secure a large overdraft, by a mortgage of

October 25, 1902, after reciting the overdraft, and that the association would from time to time require advances from the bank; that the guarantors had requested the association to discharge them from their liability, but had agreed not to take any immediate steps to obtain their discharge on having the indemnity and specific security thereinafter appearing, the association covenanted to indemnify the guarantors by assigning to the appellant all the book and other debts now owing, or which might at any time during the continuance of the security become due and owing to the association, and the full benefit of all the securities for the present and future book and other debts, in trust for the guarantors in proportion to their respective liabilities, subject to redemption. The mortgage also contained a clause as to taking possession which is fully set out in the report below, and the effect of which is stated in the head-note of this appeal.

On November 21, 1902, the appellant appointed a receiver of the book and other debts, and gave notice to the debtors of the mortgage and the appointment.

On November 25 a receiver was appointed by the Court in an action brought by the respondents as trustees under the deed of 1900 against the association to enforce the security created by that deed.

The appellant having applied for an order (inter alia) giving him liberty to collect the book debts, Farwell J. refused the application, being of opinion (1.) that the mortgage of book debts in the deed of October 25, 1902, was not a specific mortgage or charge within the meaning of clause 21 of the trust deed of 1900; and (2.) that it was a floating charge on property of the company within the meaning of s. 14 of the Companies Act, 1900; and this decision was affirmed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) (1)

Hence this appeal.

Neville, K.C., and *E. P. Hewitt*, for the appellant. The mortgage of 1902 is a specific assignment of a definite portion of the assets. It is not a charge upon the undertaking or upon the whole of the property, and is therefore not a floating charge within s. 14 of the Companies Act, 1900. It is a specific charge on the book debts, and is a valid and specific charge on a particular and properly defined portion of the assets, and so has priority over the debenture trust deed.

(1) [1903] 2 Ch. 284.

[They cited *Tailby* v. *Official Receiver* (1); *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (2)]

Upjohn, K.C., and *A. H. Montgomery*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, it does not appear to me that this case is susceptible of much discussion, nor do I think it necessary to give an abstract definition of what a floating security is; it is enough to say that this instrument is one, and I think it is one for many reasons. In the first place you have that which in a sense I suppose must be an element in the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the company, and that other book debts should come in and take the place of those that had disappeared. That, my Lords, seems to me to be an essential characteristic of what is properly called a floating security. The recitals, I agree with Cozens-Hardy L.J., are not without their importance. They shew an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way—that the book debts shall be at the command of, and for the purpose of being used by, the company. Of course, if there was an absolute assignment of them which fixed the property in them, the company would have no right to touch them at all. The minute after the

(1) (1888) 13 App. Cas. 523, 541. (2) [1897] A. C. 81.

H. L. (E.) 1904 ILLINGWORTH v. HOULDSWORTH. Earl of Halsbury L.C.

execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of fact it seems to me that the whole purport of this instrument is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what we mean by a floating security.

It appears to me, notwithstanding the argument we have heard, that it is impossible to doubt that the bargain between the parties which is evidenced by this instrument is one which could only be carried out at all by its being a floating security such as I have indicated, and which must comprehend those incidents.

I am not able to deduce more from the instrument itself than the Court of Appeal have done, and I entirely agree with the judgment pronounced by them, and it appears to me that this appeal ought to be dismissed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the judgment of Farwell J., affirmed by the Court of Appeal, is perfectly correct.

With regard to the criticism which Vaughan Williams L.J. passed, not I think unkindly, on some words of mine in the *Manila Case* (1), I only wish to observe that what I said was intended as a description, not as a definition, of a floating security. I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

(1) [1897] A. C. 81.

I agree that this is a clear case, and that the appeal should be dismissed with costs.

H. L. (E.) 1904 ILLINGWORTH v. HOULDSWORTH.

LORD JAMES. My Lords, I concur.

LORD LINDLEY. So do I.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 1, 1904.

Solicitors: *Leslie Hardy, for Frank Taylor, Bradford; George Trenam, for Addleshaw, Warburton & Co., Manchester.*

[HOUSE OF LORDS.]

ROBINSON GOLD MINING COMPANY AND OTHERS . . . . . } APPELLANTS;

AND

ALLIANCE INSURANCE COMPANY RESPONDENTS.

H. L. (E.) 1904 *July* 7.

Insurance (Marine)—Policy—Property of Alien Enemy—Loss before Commencement of War—Seizure by Enemy's Government of Property of its own Subject in anticipation of War—Warranty free of Capture, Seizure, and Detention.

Gold, the property of a company registered under the laws of the South African Republic, was insured against "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines to the United Kingdom, subject to a warranty "free of capture, seizure, and detention, whether before or after declaration of war." During transit the gold was taken possession of by the Government of the Republic on its own territory in anticipation of war with Great Britain, and in accordance with the laws of the Republic, and was afterwards appropriated by the Government:—

Held, that there was a "seizure" of the gold within the meaning of the warranty, and that the insurers were not liable on the policy.

The decision of the Court of Appeal, [1902] 2 K. B. 489, affirmed.

IN October, 1899, gold of the value of 211,000*l.* belonging to the appellants was sent by rail from Johannesburg to

TAB 8

2011 ONCA 265
Ontario Court of Appeal

Indalex Ltd., Re

2011 CarswellOnt 2458, 2011 C.E.B. & P.G.R. 8433 (headnote only), 2011 ONCA 265, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, [2011] O.J. No. 1621, 104 O.R. (3d) 641, 17 P.P.S.A.C. (3d) 194, 201 A.C.W.S. (3d) 553, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Applicants / Respondents)

J.C. MacPherson, E.E. Gillese, R.G. Juriansz JJ.A.

Heard: November 23-24, 2010
Judgment: April 7, 2011
Docket: CA C52187, CA C52346

Proceedings: reversing *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])

Counsel: Andrew J. Hatnay, Demetrios Yiokaris for Appellants, Former Executives
Darrell L. Brown for Appellants, United Steelworkers
Mark Bailey for Superintendent of Financial Services
Hugh O'Reilly, Adam Beatty for Intervenor, Morneau Sobeco Limited Partnership
Fred Myers, Brian Empey for Sun Indalex Finance, LLC
Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting Canada ULC
Harvey Chaiton, George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure; International

APPEALS by pension claimants from judgment reported at *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List]), dismissing pension claimants' motions for declaration that sale proceeds were subject to deemed trusts in favour of pension plan beneficiaries.

***E E. Gillese J.A.*:**

1 A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

2 The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

3 The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

4 The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

5 Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

Overview

6 Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

7 On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

8 On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

9 On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

10 On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

11 At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

12 Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

13 The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies. [1]

14 The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

15 In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

16 Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

17 By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

18 The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

19 On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

20 Morneau was granted intervenor status. It supports the appellants.

21 The Superintendent also appeared. He, too, supports the appellants.

22 Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

23 The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

24 George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

25 For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

26 Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

27 Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada.

Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

28 Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

29 Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

30 The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

31 The Salaried Plan contains a defined benefit and defined contribution component.

32 Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

33 All current service contributions have been made to the Salaried Plan.

34 Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

35 The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

36 As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

37 The Executive Plan is underfunded.

38 As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a windup basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

39 In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

40 Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

41 On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

42 At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

43 On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and Corporate Governance During the CCAA Proceedings

44 Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

45 Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

46 FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

47 On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

48 On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

49 On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The Initial Order, as amended (April 3 and 8, 2009)

50 On April 3, 2009, pursuant to the order of Morawetz J. [2009 CarswellOnt 9396 (Ont. S.C.J. [Commercial List])], Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

51 On April 8, 2009 [2009 CarswellOnt 1998 (Ont. S.C.J. [Commercial List])], the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

52 Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

53 Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

54 On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

55 Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

56 At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

57 Indalex brought two motions that were heard on July 20, 2009 [2009 CarswellOnt 9397 (Ont. S.C.J. [Commercial List])], by Campbell J. (the *CCAA* judge).

58 First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

59 As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

60 Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

61 Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA*), which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

62 The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under

the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

63 The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

64 It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

65 On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US $17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

66 The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

67 By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

68 The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' Motion

69 The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

70 Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

71 The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

72 The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

73 The CCAA judge concluded:

> [49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.
>
> [51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

74 Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> [55] ... In my view, **a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.

[Emphasis added.]

75 He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

The Issues

76 The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

77 The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator. [2]

78 The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

79 The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

80 Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding UP a Pension Plan

81 To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

82 A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

83 In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

> 1. *Current service or "normal cost" contributions* — the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active

> employees. These must be made in monthly instalments within 30 days after the month to which they relate.
>
> 2. *Special payments* — a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a 5 year period to fund the deficiency.

84 It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

85 The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

86 Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

87 Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer [3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

88 The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

> • The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

• A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

• No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

• Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

89 Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

90 Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing

must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

91 Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

92 It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

93 The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> **57.** (4) **Where a pension plan is wound up** in whole or in part, **an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust** for the beneficiaries of the pension plan **an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.**
>
> [emphasis added]

94 The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [4]

95 Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

96 The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

97 It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date — all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

98 It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

99 This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

100 Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

101 There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

102 This interpretation accords with a contextual analysis of s. 57(4).

103 As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees'

interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

104 Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[5] safeguard the rights of pension plan beneficiaries,[6] and ensure the solvency of pension plans so that pension promises will be fulfilled.[7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

105 Much reference has been made to the two cases in which s. 57(4) has been discussed: *Ivaco Inc., Re* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), aff'd (2006), 83 O.R. (3d) 108 (Ont. C.A.), and *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

106 Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

107 Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco*

was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

108 The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

109 Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

110 Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument — the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

111 Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

112 In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach Its Fiduciary Obligation?

113 The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

114 The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

115 Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> [79] There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

116 For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

117 It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. [10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

118 The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. [11] The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power. [12]

119 It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

120 Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> **Care, diligence and skill**
>
> **22.** (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **Special knowledge and skill**
>
> (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> . . .
>
> **Conflict of interest**
>
> (4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

121 In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*. [13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pension Comm.) (*Imperial Oil*), the Pension Commission of Ontario grappled with this statutorily sanctioned conflict in roles.

122 In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

123 The Superintendent accepted the amendments for registration.

124 Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

125 A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

126 Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

127 The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

128 The PCO acknowledged that the *PBA* allows an employer to wear "two hats" — one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator

> for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

129 The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

130 The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

131 I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

132 However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real

knowledge of what was transpiring and had no power to ensure that their interests were even considered — much less protected — during the DIP negotiations.

133 In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

134 First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

135 In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

136 Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

137 In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in

Imperial Oil to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

138 I turn next to the question of breach.

139 As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. [14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

140 Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

141 The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (Ont. C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

142 The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

143 Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

144 Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

145 Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

146 The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

147 The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

148 I do not accept this submission for three reasons, the first two of which can be shortly stated.

149 First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes

no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712 (S.C.C.), at paras. 36-37.

150 Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

151 Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

152 The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at para. 8.

153 The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.), at para. 72.

154 The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

155 The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.), at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

156 This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

157 Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

158 The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291 (Ont. C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order — brought on an urgent basis to deal with seemingly desperate circumstances — when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

159 As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the *CCAA* judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction — but that is for another day."

160 The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue. [15]

161 Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the

Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

162 Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

163 In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

164 At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

165 Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540 (Ont. C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

166 I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage

the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

167 Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

168 Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

Do The Principles of Cross-Border Insolvencies Apply?

169 The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

170 While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How Is the Reserve Fund to Be Distributed?

The Salaried Plan

171 Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

172 The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> **30. (7) A security interest** in an account or inventory and its proceeds **is subordinate to the interest of a person who is the beneficiary of a deemed trust** arising under the Employment *Standards Act* or **under the *Pension Benefits Act*.** [emphasis added]

173 The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

174 The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

175 There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

176 The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings. [16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

177 Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), at para. 75 and *Nortel Networks Corp., Re* (2009), 99 O.R. (3d) 708 (Ont. C.A.), at para. 38, leave to appeal to S.C.C. refused, (S.C.C.).

178 In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

179 While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

180 Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

181 What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that

the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

182 Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors — along with those other considerations — would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately $6.75 million.

183 As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

184 There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

185 A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the

oral hearing of the appeals. The parties were invited to make written submissions on the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

186 *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

187 It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

188 First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful — they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

189 Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements. [17]

190 Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

191 The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.).

192 However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful.* [18] Here, as I have noted, the *CCAA* proceedings were successful.

193 Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach" [19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion". [20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings — greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

194 The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees". [21]

195 In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did — go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

196 Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*.[22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

197 However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

198 It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

199 The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by

Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

200 I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

201 Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

202 In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case — one in which there is unjust enrichment — is not relevant to these appeals, the first is.

203 At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;

> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

204 As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

205 As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

206 In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Disposition

207 Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand

that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

208 If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

***J.C. MacPherson J.A.*:**

I agree.

***R.G. Juriansz J.A.*:**

I agree.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) - (5), 70(1), 74(1), 75(1), (2), 76

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Care, diligence and skill

22. (1)The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2)The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3)Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4)An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5)Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6)No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7)An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8)An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

Wind Up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

Wind up report

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

Combination of age and years of employment

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

Pension Benefits Act, *Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)*

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Appeals allowed.

Footnotes

1 The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

2 The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

3 Or, in the case of a multi-employer plan, the administrator.

4 *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26.

5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 13, relying on *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.

6 *Ibid.*

7 *Boucher c. Stelco Inc.*, [2005] 3 S.C.R. 279 (S.C.C.), at para. 24.

8 At para. 26.

9 At para. 11.

10 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273 (S.C.C.), at paras. 39-41.

11 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at para. 32.

12 *Ibid.*, at para. 30; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 646.

13 In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

14 On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

15 To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

16 See, for example, *Intertan Canada Ltd., Re* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

17 See para. 178 of these reasons.

18 See, for example, para. 23.

19 At para. 13, for example.

20 See, for example, para. 14.

21 *Century Services*, at para. 60.

22 At para. 78.

End of Document

TAB 9

1985 CarswellOnt 884
Ontario Supreme Court, High Court of Justice

King Seagrave Ltd. v. Canada Permanent Trust Co.

1985 CarswellOnt 884, 20 D.L.R. (4th) 623, 32 A.C.W.S. (2d) 334, 51 O.R. (2d) 667, 9 C.C.E.L. 31

KING SEAGRAVE LTD. v. CANADA PERMANENT TRUST CO. et al.

Pennell J.

Judgment: August 30, 1985

Counsel: *C.H. Morawetz, Q.C.* and *H.J. Dickie, Q.C.*, for applicant.
C.S. Ritchie, Q.C., for respondent members of the pension plan.

Subject: Employment; Corporate and Commercial; Insolvency

APPLICATION for a determination of entitlement to pension proceeds.

***Pennell J.*:**

1 On this application the Court must determine as between a corporate employer and its employee who is entitled to the "surplus" in a discontinued pension plan.

2 The facts are agreed upon as stipulated in the record.

3 The applicant, King Seagrave Limited ("King Seagrave"), is a corporation which was engaged in the manufacture of fire fighting equipment. On January 1, 1963 King Seagrave, in the confidence of its early success, inaugurated a pension plan for its hourly rated employees (the "Plan").

4 The respondents are former employees of King Seagrave and the members of the Plan (the "members").

5 On August 23, 1980 occurred a business casualty, always possible but never expected: King Seagrave went into receivership. Ernst Whinney Inc. was appointed the receiver (the "Receiver"). To the winding-up of the Plan the Pension Commission of Ontario gave its assent, and it so befell that the Plan became dead paper. But unexpectedly life was breathed again into it. The resuscitation came from within itself: a preliminary actuarial examination

commissioned by the Receiver revealed a substantial "surplus" in the Plan. This surplus is defined as the excess of funds in the Plan over the amount calculated to be the present value of the maximum benefit payable to the members under the Plan. It is agreed that the surplus amounted to $249,328 as of August 23, 1982, the official date of the winding-up of the Plan.

6 This surplus is the circulation which keeps a brief vigour in the body of the Plan. It is held by the Canada Permanent Trust which has been the Trustee of the Plan (the "Trustee") since its inception pursuant to a trust agreement dated January 1963 made between King Seagrave and the Trustee. Though a nominal respondent, the Trustee has taken no part in these proceedings. The parties at grips with each other in this litigation are King Seagrave through its Receiver and the members of the Plan. The question before me is what disposition the Trustee shall make of the surplus fund in the Plan.

7 Three documents govern its operation: The Plan which describes definite benefits; the Trust Agreement; and the Pension Benefits Act, R.S.O. 1980, c. 373 (the "Act") and the regulations passed thereunder. I shall refer to these three documents as the Triad. Substantially, mine is the hazardous task of interpretation.

8 The facts are less complicated than the controversy that has grown out of them. The contention, on the one hand, is that the Plan is a trust settled by King Seagrave and that the Triad makes no provision for the distribution of a surplus; accordingly King Seagrave as settlor of the trust and sole contributor of funds to the Plan is entitled to the surplus by operation of the principles of resulting trust. The contention, on the other hand, is that the cumulative effect of the Triad requires that the surplus be distributed among the members. The Court's determination invokes a choice between the one view and the other.

9 A first question is, how was the funding surplus created? It is a veiled fact. The agreed statement of facts does not tell us, but it does indulge in a choice of several probabilities:

10 (1) That the amount of the annual contribution which King Seagrave was required to make in order to fund the Plan was determined by the calculations of an actuary retained by King Seagrave for that purpose; that a pension plan is dynamic and changes inevitably occur; that various and varying factors enter into the actuarial estimates to meet the potential liabilities of the fund; and that the use of conservative actuarial assumptions resulted in a surplus in the fund; or

11 (2) That King Seagrave may have made additional contributions to the Plan, as it was entitled to do, which would be deemed to be in prepayment of the required contributions. Whether in fact such additional contributions were made there is no basis in the record; or

12 (3) That unanticipated high interest on income stimulated the surplus.

13 In my view it is not necessary to and I do not decide the source of the surplus. I think it could have no material bearing on the ultimate result of this application. The Plan requires that all contributions be made by the employer, King Seagrave, and in fact all contributions were made by King Seagrave. It is common ground that pursuant to s. 23(3) of the Act the Plan is a trust.

14 Article I of the Plan defines the purposes to be served. It states in substance that "the Plan has been established for the purpose of providing old age and disability retirement income security to hourly rated employees." Essentially the claim of the applicant is dependent upon an interpretation of the Plan as one conferring only express benefits on the employee respondents: on that basis the surplus should belong to the applicant since the express benefits were fully provided for upon termination of the Plan.

15 In the Plan the entitlement of the members is set out in terms of benefits which are specific and unequivocal. To recite all the articles referring to benefits would prolong the discussion unduly. Suffice it to say that the benefits provided by the Plan are stated in arts. V to XIV inclusive. Of these, arts. IV, V, and XIV are particularly germane to the argument of the applicant.

16 Article IV (3) reads as follows:

> **Article IV — Contributions**
>
> (3) Deposits by the Company with the Trustee of contribution computed in accordance with Section 1 of this article shall be in complete discharge of the Company's financial obligations under this Plan.

17 Article V (2) reads thus:

> **Article V — The Trust Fund**
>
> (2) The Trust fund shall be used to pay benefits as provided in the Plan ... No part of the principal or income of the Fund shall in any event be used for, or diverted to, purposes other than those provided in the Plan.

18 Article XIV (1) provides as follows:

> **Article XIV — Termination of The Plan**
>
> (1) In the event of discontinuance of the Plan the assets then remaining in the Fund, after providing the expenses of the Plan, shall be allocated by the Board (of Trustees) to the extent that they be sufficient for the purposes of payment of retirement benefits

> (the amount of which shall be computed on the basis of credited service to the date of discontinuance of the Plan) in the following order of precedence:

There follows cls. (a) to (f) which constitute a scheme of priorities of obligations to the members in the event of termination of the Plan. For example, cl. (a) confers first priority of payment of retirement benefits to employees who shall have retired under the Plan prior to its discontinuance; and at the other end of the scale cl. (f) provides retirement benefits at age 65 to employees below the age of 50 on the date of discontinuance of the Plan; but cl. 1 continues:

> after having made out provisions in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for employees in the next category, such benefits shall be provided for each employee on a pro-rated basis.

19 This scheme of priorities in the event of termination provided by Article XIV (1) of the Plan makes no provision for the allocation of a surplus after the express benefits have been provided.

20 The fundamental contention of the applicant, King Seagrave, is that the Plan is a trust settled by it for the purpose of providing defined pension benefits (a "defined benefits plan"); that there is no express provision in the Plan for distribution of a surplus upon termination of the Plan; since the benefits have been set down in the Plan with so much precision the inescapable conclusion is that the Plan limits the employer's financial obligation to the payment of such sums as may be necessary to pay for the defined benefits; that this interpretation is reinforced by the fact that the scheme of priorities in the event of termination provided by art. XIV (1) makes no provision for allocation of any surplus; that had it been intended to allocate a surplus to members it is highly unlikely that the Plan would be silent on the point; that the purposes of the trust have now been exhausted since more funds exist in the Plan than are required for providing benefits in accordance with the provisions of the Plan; and that the surplus should revert to the settlor of the trust, King Seagrave, pursuant to the law of trusts.

21 Ingenious indeed that argument is; however, there is a persuasive argument to the contrary. On behalf of the members two reasons are advanced why the employer's claim must fail. The first is to be found in art. XIV (6) of the Plan which provides as follows:

> **Article XIV — Termination of the Plan**
>
> (6) In the event of the termination of this agreement, no part of the corpus or income of the Fund can be used for, or diverted to, purposes other than the exclusive use of the beneficiaries and employees served by the Plan.

Fund is defined in Article II (3) as follows:

> **Article II — Definitions**
>
> (3) 'Trust Fund' or 'Fund' means the Retirement Income Trust Fund established by payments made by the Company in accordance with Article IV.

22 The respondents argue that under the empire of art. XIV (6) the applicant irrevocably committed itself to disavowal of the recapture right.

23 A reading of art. 2(c) of the Trust Agreement (it is said) reinforces this conclusion. The opening words of the article authorizes the Trustee to pay out of the trust fund income tax, expenses of administration and other specified expenses. The burden of the respondents' argument is cast upon the concluding words. The concluding words are:

> ALWAYS PROVIDED that no part of the Trust Fund may be used for, or diverted to, any purposes other than those connected with the exclusive benefit of members of the Plan and their beneficiaries under the Plan and no capital or income of the Trust Fund may in any event revert to the Company provided that all payments made in accordance with ARTICLE 4 shall be deemed to comply with this sub-paragraph (c) of ARTICLE 2.

24 The meaning of "Trust Fund" for the purposes of the Agreement is explained in Article 2(a) of the Agreement. Article 2(a) reads as follows:

> ARTICLE 2 (a) The Company by this Agreement establishes with the Trustee a fund (herein called "the trust fund") comprising all cash and property acceptable to the Trustee now and hereafter received by it in trust for the purposes of the Plan, together with all proceeds, investments, reinvestments and income and profits arising therefrom less all payments, deductions and withdrawals therefrom authorized hereunder. Payments and transfers of cash and property by the Company to the Trust Fund shall be absolute and irrevocable.

The respondents assert that the Plan and the Trust Agreement give forth a harmony of intent in express language which prohibits reversion of the surplus to the employer.

25 To this reasoning the answer put forward on behalf of the applicant runs in this wise; it involves repetition on a modest scale of its earlier contention: the construction of art. XIV (6) is to be weighed in association with art. XIV (1) and the other parts of the Plan and Trust Agreement; that dismemberment of the sections of various articles of the Plan and Trust Agreement may be necessary in aid of the process of analysis, but in the end there must be a reading or synthesis that will bring them together as parts of a whole; that the scheme of priorities in the event of termination provided by art. XIV (1) makes no provision for the

allocation of a surplus; that a reading of the Plan as a whole approves the inference that the question of a surplus was never contemplated; that in the Plan is written expressly the benefits the employee members are to receive so that there is no gap between what they wrote and what in reason they must have meant; and that in reason the phrase "the corpus or income of the Fund" as used in art. XIV (6) means only such funds that are necessary to ensure full payment of the benefits expressly provided under the Plan.

26 Prudence dictates that I postpone a choice between these rival constructions until I have directed attention to the respondents' further argument. It is to be found in s. 14(4) of Reg. 746, R.R.O. 1980 ("Reg. 746/80"). If, as the applicant concedes, the Plan omits to answer the question how a surplus is to be distributed s. 14(4) of Reg. 746/80 (it is said) fills in the gap. Section 14(4) reads as follows:

> 14. (4) Notwithstanding the terms of the plan, where a pension plan is terminated or wound up, no part of the assets of the plan shall revert to the benefit of the employer unless,
>
> (a) provision has been made for payment of all pension benefits and other benefits under the terms of the plan to employees, former employees, pensioners, dependants and estates;
>
> (b) in calculating benefits for the purposes of clause (a), all benefits provided to members of the plan in respect of service shall be treated as fully vested as of the date of termination or winding up without regard to age or service conditions for vesting under the terms of the plan;
>
> (c) where proceedings for termination or winding up of the plan are commenced on or after the 1st day of January, 1982, the pension plan provides for such reversion to the employer.

27 It should here be stated that Reg. 746/80 was in force at the time of the termination of the Plan. I am not concerned here with a later amendment which became effective August 9, 1983, namely Reg. 500/83.

28 The meaning of the word "assets" as used in s. 14(4) cuts deep into the contest of opposing arguments. The word "assets" has chameleonic qualities; it varies in colour and significance according to the light of the particular surroundings.

29 Counsel for the applicant invokes the view that s. 14(4) should be given a "purposive construction", reading assets to mean only "such of the Plan's fund as are required to provide the express benefits conferred under the Plan". With respect that construction has not the same appeal to me. If the meaning suggested by the applicant is adopted, a paraphrase of s.

14(4) would be thus: "no part of the funds necessary to provide the benefits specified under the Plan shall revert to the benefit of the employer unless all funds necessary for that purpose have been paid to the employees, and where the Plan is terminated on or after January 1, 1982 the Plan itself provides for such reversion". To read the section thus would nullify it of meaning and rob it of its efficacy as an instrument to be used in the distribution of pension funds.

30 The word "assets" generally means everything available: see Black's Legal Dictionary. True enough the search for its meaning must not end with a glance at a dictionary. I accept the submission that it should be given a purposive construction. It is here used without qualification to protect the security of the employees in the Plan. Considered contextually I think the word "assets" was used in an all-embracing sense, that is, to mean all the funds in the trust over which the Trustee has dominion as trustee. In that view of its meaning s. 14(4) reads simply and logically: the employer is not entitled on termination to receive any of the funds standing to the credit of the Plan unless provision has been made for payment of all benefits provided under the Plan — and after January 1, 1982 unless the Plan provides for such reversion to the employer.

31 That construction seems more plainly displayed when consideration is directed to the history of the regulation. Section 14(4) of Reg. 746/80 is an amendment of s. 11(1) of R.R.O. 1970, Reg. 654 ("Reg. 654/70"). The latter provided as follows:

> 11. (1) Notwithstanding the terms of the plan, where a pension plan is terminated or wound up, no part of the assets of the plan shall revert to the benefit of the employer until provision has been made for all pensions and other benefits in respect of service up to the date of such termination or winding-up to members of the plan and for all benefits to former employees, pensioners, dependants and estates, and the provisions of section 14 shall apply to any funds held for the purpose of effecting such provision.

32 I note in passing that s. 14 referred to in s. 11(1) above bears no relation to s. 14 of Reg. 746/80.

33 The word "assets" was transported out of s. 11(1) of Reg. 654/70 into s. 14(4) of Reg. 746/80 freighted, as I read it, with the broad and liberal meaning imposed upon it by the purpose to safeguard employees' pension security. By the introduction of s. 14(4) of Reg. 746/80, the Legislature can be seen to have provided a further safeguard: commencing in 1982 an employer who wished to claim any plan assets on termination of a pension plan set up for his employees would have to include a term to that effect in the plan.

34 The respondents make the point that there is no reference in the Plan to a reversion of a surplus and accordingly such an omission is a bar to reversion. I shall presently state my view of this contention.

35 Secion 14(4)(c) was no thoughtless or unreasonable innovation. The belief is easily entertained that awareness of the economic loss generally inherent in the discontinuation of an employee's pension plan, especially for those who have not yet qualified for a full pension, preceded the enactment of s. 14(4)(c). However the Legislature did not act with an eye single to the interests of the employees. Reg. 746/80 came into effect on November 16, 1981. The official date of the winding-up of the Plan here was August 23, 1982. Notice and opportunity to amend to provide for reversion of a surplus was thus afforded the applicant. Once s. 14(4)(c) is given that construction the sharp edge is taken off it.

36 The learning of counsel took me to a number of cases construing termination clauses of employee's pension plans. I mention some which figured prominently in the presentation of the case: Campbell v. Ferrco Engineering Ltd. (1984), 4 C.C.L.I. 268; Washington-Baltimore Newspaper Guild, Loc. 35 v. Washington Star Co., 555 F. Supp 257; Re C.D. Morger Co. Trust Fund, 441 F. Supp. 11-28 (1977); Martin & Robertson Administration Ltd. v. Pension Comm. of Man., Man. Q.B., Nitikman J., February 21, 1980 (unreported [summarized 2 A.C.W.S. (2d) 248]. I hope counsel will acquit me of incivility if I do not set out their details and the contentions displayed in applying them to the case at hand; the reason is that I think I can deal with them with reasonable brevity. I add that I have read them all, more than once.

37 These cases would take the Court a very considerable distance on the road to the conclusion that the applicant seeks. However, in my view, decisive they are not. Apart from the diversity between the termination clauses construed in those cases and the one in the plan before me, there is lacking the common denominator of s. 14(4)(c) that would bring them into complete harmony. That is not to say there is no similarity.

38 It is time to make an end. A choice is necessary between alternative constructions neither of which is certain. I have great difficulty in finding in the Plan persuasive disclosure of an intention to return the surplus to the applicant. I read the Plan in the belief that the question of a surplus was not before the minds of the parties at its making. To this view silence on the point gives support and explains the omission of a reference to it. I incline to the view that this application falls to be determined by the effect of s. 14(4)(c) of Reg. 746/80. That section has already been stated but must be repeated:

> 14. (4) Notwithstanding the terms of the plan, where a pension plan is terminated or wound up, no part of the assets of the plan shall revert to the benefit of the employer unless,
>
> (c) where proceedings for termination or winding up of the plan are commenced on or after the 1st day of January, 1982, the pension plan provides for such reversion to the employer.

39 Imperative is s. 14(4)(c). There was no attempt to adapt the Plan at hand to the necessity of s. 14(4)(c). A simple unilateral amendment in conformity with s. 34 of the Act would have been the antidote to its effect. In its absence I think the applicant employer may not claim the surplus.

40 For the reasons above given I feel constrained to make an order declaring the members of the Plan entitled to the funding surplus. If effect be given to this order the scheme of distribution will be determined on another application.

41 My gratitude to all counsel for the assistance of their able arguments on a matter of some public importance is general and undifferentiated.

42 The applicant and respondent are entitled to their costs, the respondents on a solicitor and client basis, payable out of the funds of the Plan.

Order accordingly.

TAB 10

COMMERCIAL INSOLVENCY IN CANADA

Kevin P. McElcheran, LL.B.
Blake, Cassels & Graydon LLP

LexisNexis®
Butterworths

Commercial Insolvency in Canada

July 2005

Members of the LexisNexis Group worldwide

Canada	LexisNexis Canada Inc, 123 Commerce Valley Drive East, MARKHAM, Ontario
Argentina	Abeledo Perrot, Jurisprudencia Argentina and Depalma, BUENOS AIRES
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst and Verlag Orac, VIENNA
Chile	Publitecsa and Conosur Ltda, SANTIAGO DE CHILE
Czech Republic	Orac sro, PRAGUE
France	Éditions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A
USA	LexisNexis, DAYTON, Ohio

Library and Archives Canada Cataloguing in Publication

McElcheran, Kevin P. (Kevin Peter), 1952-
Commercial insolvency in Canada / Kevin P. McElcheran.

Includes bibliographical references and index.
ISBN 0-433-44296-4

1. Bankruptcy—Canada. 2. Debtor and creditor—Canada.
I. Title.

KE1485.M34 2005 346.7107'8 C2005-902900-5
KF1501.ZA2M34 2005

Printed and bound in Canada.

Any purchaser from a lien claimant that sells an article pursuant to RSL legislation obtains good title free and clear of the interests of the persons entitled to notice of the sale. Provided that the purchaser buys the article in good faith, it will obtain title to the article free of such interests even if the lien claimant has failed to comply with RSL legislation.

(iii) Statutory Liens and Deemed Trusts

Many federal and provincial statutes contain special provisions that are designed to enhance the collection of certain kinds of claims from the debtor. Most of these claims relate to obligations of the debtor to the Crown either for direct obligations or more commonly for remittances of amounts collected or withheld by the debtor on behalf of the Crown. Special provisions are also created for certain other kinds of creditor claims, such as arrears owing to public utilities and claims for employees for vacation pay. *PPSA* legislation has limited application to these statutorily created interests.

The terms of the statutory claims vary from statute to statute and depend on the particular language of the statute in each case. The most common devices used to provide these statutory protections are the statutory lien and the deemed trust. A statutory lien creates a statutory form of security over the debtor's assets. In the case of a deemed trust, debtor's assets sufficient to satisfy the government claim under the statute are "deemed" to be held in trust by the debtor separate and apart from its other assets, whether or not the debtor actually segregated any assets with respect to the claim. A more apt description would be "fictional" rather than "deemed" trust. Another technique used in some tax statutes is to require a secured party or receiver to remit the taxes owing by the debtor to the tax authorities before any proceeds of security are distributed to the secured creditor.

Although many government claims are protected by both a "deemed trust" and a "statutory lien", they are fundamentally different in character. A lien is a form of security in the sense that it provides the government with access to assets of the debtor to recover payment of a debt. A deemed trust attempts to redefine the property of the debtor so as to exclude sufficient assets in its possession to satisfy the government claim and to "deem" such assets to be the property of the government.

Because the assets subject to the lien remain the property of the debtor, the question of the priority of a competing security interest must be answered by reference both to the statute and to general principles of law. These principles exclude the priority regimes included in *PPSA* legislation which expressly apply only to *PPSA* security interests.

TAB 11

Dauphin Plains Credit Union Limited (*Plaintiff*) *Appellant*;

and

Xyloid Industries Ltd. (*Defendant*);

and

Her Majesty The Queen (*Applicant*) *Respondent.*

1979: November 7; 1980: March 18.

Present: Martland, Ritchie, Pigeon, Beetz, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Receivership — Revenue — Deductions from wages prescribed by three federal statutes — Deductions effected by debtor company on wages paid — Funds not remitted nor kept separate — Appointment of receiver — Wages earned prior to appointment paid by receiver pursuant to Payment of Wages Act of Manitoba — Wages paid less deductions — No remittance by receiver of amount deducted — Priority of claims as between Crown and secured creditor — The Payment of Wages Act, 1975 (Man.), c. 21, ss. 1(h), 7(1) — Income Tax Act, 1970-71-72 (Can.), c. 63, s. 153(1)(a), (3), 227(4), (5) — Canada Pension Plan, R.S.C. 1970, c. C-5, s. 24(3), (4) — Unemployment Insurance Act, 1970-71-72 (Can.), c. 48, s. 71(2), (3).

As security for debts in excess of $1,000,000, the appellant credit union (Dauphin) obtained from the defendant company (Xyloid) debentures whereby a first fixed and specific charge was created on all its real and immovable property with a floating charge on all of its other assets. On March 31, 1977, the appellant obtained the appointment of a receiver of "all the undertaking, property and assets" of the defendant. In due course, the receiver realized the assets of the company and distributed the net proceeds of such realization, less the sum of $7,416.57, which upon the discharge of the receiver was directed to be held until the validity and priority of the claims of the respondent Crown under certain federal statutes was determined by the Court.

Prior to the appointment of the receiver, Xyloid had paid wages to its employees and effected the deductions prescribed by the *Income Tax Act* of Canada, the *Canada Pension Plan* Act and the *Unemployment Insurance Act*. However, Xyloid did not remit the amounts

Dauphin Plains Credit Union Limited (*Demanderesse*) *Appelante*;

et

Xyloid Industries Ltd. (*Défenderesse*);

et

Sa Majesté La Reine (*Requérante*) *Intimée.*

1979: 7 novembre; 1980: 18 mars.

Présents: Les juges Martland, Ritchie, Pigeon, Beetz, Estey, McIntyre et Chouinard.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Mise sous séquestre — Revenu — Déductions du salaire prévues par trois lois fédérales — Déductions faites par la compagnie débitrice sur le salaire payé — Fonds non remis ni gardés à part — Nomination d'un séquestre — Salaire gagné avant la nomination payé par le séquestre conformément à The Payment of Wages Act du Manitoba — Salaire payé moins déductions — Aucun versement par le séquestre des montants déduits — Priorité des réclamations entre Sa Majesté et le créancier garanti — The Payment of Wages Act, 1975 (Man.), chap. 21, art. 1h) et 7(1) — Loi de l'impôt sur le revenu, 1970-71-72 (Can.), chap. 63, art. 153(1)a), (3), 227(4),(5) — Régime de pensions du Canada, S.R.C. 1970, chap. C-5, art. 24(3),(4) — Loi sur l'assurance-chômage, 1970-71-72 (Can.), chap. 48, art. 71(2),(3).

En garantie de dettes de plus de $1,000,000 la Caisse (Dauphin) avait obtenu de la société défenderesse (Xyloid) des obligations qui créaient un premier privilège fixe et spécifique sur tous ses biens immeubles et un privilège général sur tout le reste de son actif. Le 31 mars 1977, l'appelante a obtenu la nomination d'un séquestre pour «la totalité de l'entreprise, des biens et de l'actif de» la défenderesse. En temps utile, le séquestre a réalisé l'actif de la société et en a distribué le produit net, moins la somme de $7,416.57, dont à la libération du séquestre, on a ordonné la retenue jusqu'à ce que la validité et le rang des réclamations de l'intimée, Sa Majesté, en vertu de certaines lois fédérales soient établis par la Cour.

Avant la nomination du séquestre Xyloid a versé du salaire à ses employés et effectué les déductions prescrites par la *Loi de l'impôt sur le revenu* du Canada, le *Régime de pensions du Canada* et la *Loi sur l'assurance-chômage*. Xyloid n'a cependant pas remis à l'inti-

so deducted to the respondent nor did it keep such deductions or withholdings separate and apart from its "own moneys or from the assets of . . ." Xyloid. After his appointment the receiver paid to the employees of Xyloid wages earned prior to his appointment, as required by *The Payment of Wages Act* of Manitoba. This payment was made less the prescribed deductions but the receiver made no remittance to the respondent in respect of the aforementioned federal statutes.

The only issue arising was what priority, if any, did the respondent enjoy by virtue of the said statutes over the claims of Dauphin as the secured creditor of Xyloid with reference to the moneys held by the receiver in the amount of $7,416.57.

The trial judge held that the Crown had failed to establish priority for any portion of the amount claimed and ordered that the receiver pay out to Dauphin the entire sum of $7,416.57. The Manitoba Court of Appeal, reversing the judgment of the trial judge, directed that Dauphin do pay to the Crown the sum of $6,278.81. With leave of this Court, Dauphin appealed from the judgment of the Court of Appeal.

Held (Estey and Chouinard JJ. dissenting in part): The appeal should be allowed only to the extent of deducting from the amount allowed by the judgment of the Court of Appeal the sum claimed for income tax deductions made prior to the date of the receiving order, that is, $2,550.78, with the appropriate adjustment for interest and penalties.

Per Martland, Ritchie, Pigeon, Beetz and McIntyre JJ.: The appeal failed in respect of the deductions made by the receiver out of wages paid under *The Payment of Wages Act*. Dauphin was, in effect, contending that *The Payment of Wages Act* authorized the receiver to make the income tax deduction for the benefit of the debenture holder. This was a complete subversion of the purpose of such a deduction. Section 153 of the *Income Tax Act* is the only law under which anyone can make a deduction for income tax, but this section goes on to provide in subs. (4) that the amount so deducted shall be held "in trust for Her Majesty". No law of Manitoba can possibly change that. Also, by virtue of s. 153(3) the employees are deemed to have received their wages in full, so that they are liable for income tax on that basis. But, the position taken by Dauphin means that it would get the benefit of the deductions so that the employees would have to pay income tax to the Department of National Revenue on what they have not received and for which they would get no credit.

mée les fonds ainsi déduits et n'a pas tenu ces déductions ou retenues séparées de ses propres fonds ou de son actif. Après sa nomination, le séquestre a versé aux employés de Xyloid du salaire gagné durant la période antérieure à sa nomination, en conformité de *The Payment of Wages Act* du Manitoba. Il a déduit de ce paiement les montants prescrits, mais le séquestre n'a rien remis à l'intimée au titre des lois fédérales susmentionnées.

La seule question est donc celle de savoir si, en vertu de ces lois fédérales, l'intimée doit être préférée aux créances de Dauphin à titre de créancière garantie de Xyloid, à l'égard de la somme de $7,416.57 détenue par le séquestre.

Le juge de première instance a conclu que Sa Majesté n'avait pas réussi à établir qu'elle devait être préférée pour quelque partie du montant réclamé et a ordonné au séquestre de verser à Dauphin le montant total de $7,416.57. La Cour d'appel du Manitoba, qui a infirmé le jugement du juge de première instance, a ordonné à Dauphin de verser à Sa Majesté la somme de $6,278.81. Sur autorisation de cette Cour, Dauphin se pourvoit contre l'arrêt de la Cour d'appel.

Arrêt (Les juges Estey et Chouinard sont dissidents en partie): Le pourvoi doit être accueilli à seule fin de déduire du montant accordé par la Cour d'appel la somme réclamée pour les déductions d'impôt faites avant l'ordonnance du séquestre, soit la somme de $2,550.78, avec rajustement en conséquence de l'intérêt et des pénalités.

Les juges Martland, Ritchie, Pigeon, Beetz et McIntyre: Le pourvoi échoue pour ce qui est des déductions faites par le séquestre sur le salaire payé en vertu de *The Payment of Wages Act*. Dauphin soutient, en réalité, que *The Payment of Wages Act* autorisait le séquestre à faire la déduction d'impôt sur le revenu au profit du créancier de l'obligation. C'est là fausser complètement l'objet de cette déduction. L'article 153 de la *Loi de l'impôt sur le revenu* est le seul texte de loi qui permet à quelqu'un de faire une déduction au titre de l'impôt sur le revenu, mais cet article dispose ensuite, au par. (4), que le montant ainsi déduit est retenu «en fiducie pour Sa Majesté». Aucune loi du Manitoba ne peut changer cela. Il faut aussi tenir compte de ce qu'en vertu du par. 153(3), les employés sont réputés avoir reçu leur salaire en entier, et sont en conséquence assujettis à l'impôt sur cette base. La position adoptée par Dauphin aurait cependant pour résultat qu'elle bénéficierait des déductions de sorte que les employés devraient payer au ministère du Revenu national un impôt sur un revenu qu'ils n'ont pas reçu et au titre duquel ils n'obtiendraient aucun crédit.

The trial judge failed to consider the consequences of allowing a receiver to make deductions for income tax when paying wages and then failing to treat those deductions as withholdings on account of income tax. This is not only a contradictory position but, if upheld, would amount to an unfair diversion which the Legislature of Manitoba cannot possibly have intended to authorize by the definition of wages in *The Payment of Wages Act*.

In view of the purpose of *The Payment of Wages Act* the deductions contemplated in the definition of "wages" are only those which may be made for the benefit of the employer. The statute should not be construed in a manner which would deprive a third party, the tax collector, of his proper rights. The Legislature is not presumed to have intended an inconsistency and it would be inconsistent to authorize deductions to be made for income tax only to be appropriated to the benefit of the employer's creditor.

With respect to the deductions made by the receiver for the Canada Pension Plan, and Unemployment Insurance, employee portion, the amounts withheld represented a debt due by the recipients of the wages under the provisions of s. 8 of the *Canada Pension Plan* and s. 62 of the *Unemployment Insurance Act, 1971*. The receiver had ample funds for paying the full amount of wages due and therefore the deductions made were true deductions, not mere book-keeping entries, they were money withheld for the purpose of satisfying the employees' indebtedness for contributions and premiums in respect of those earnings. This money withheld for such purpose became held in trust in favour of the tax collector who is therefore entitled to claim it from the receiver. Dauphin cannot justify the judgment at trial directing the receiver to give it those moneys and it was therefore properly ordered by the judgment of the Court of Appeal to turn them over to the Department of National Revenue so that they may be credited against the employees' indebtedness.

The Court of Appeal was correct in holding that there was no legal basis for the claims for the Canada Pension Plan and Unemployment Insurance deductions, employer portion. This conclusion was not challenged on the appeal to this Court and no question was raised as to the correctness of the adjustments which were made for those sums with interest and penalties and resulted in the amount fixed by the judgment.

Following the reasoning in *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599, the claim for income tax deductions on wages paid by the employer

Le juge de première instance a omis de tenir compte des conséquences que cela comporte si l'on permet à un séquestre de faire des déductions au titre de l'impôt sur le revenu en payant du salaire et de ne pas considérer ces déductions comme des retenues à ce titre. Non seulement c'est contradictoire, mais, si on l'admettait, cela constituerait un détournement injuste que la législature du Manitoba n'a pas pu avoir l'intention d'autoriser par la définition de salaire dans *The Payment of Wages Act*.

Compte tenu de l'objet de *The Payment of Wages Act*, les déductions visées par la définition de «salaire» sont seulement celles qui peuvent être faites au profit de l'employeur. La Loi ne doit pas être interprétée de façon à dépouiller un tiers, le fisc, de ses droits légitimes. On ne doit pas présumer que la législature a voulu créer une contradiction et il serait contradictoire de permettre que des déductions soient faites au titre de l'impôt sur le revenu pour être affectées au profit du créancier de l'employeur.

En ce qui concerne les déductions que le séquestre a faites au titre du Régime de pensions du Canada et de l'assurance-chômage, part de l'employé, ces sommes représentaient une dette due par les personnes qui ont reçu le salaire, en vertu des dispositions de l'art. 8 du *Régime de pensions du Canada* et de l'art. 62 de la *Loi de 1971 sur l'assurance-chômage*. Le séquestre avait des fonds suffisants pour payer le montant complet des salaires dus et, en conséquence, les déductions effectuées étaient de véritables déductions, et non de simples inscriptions comptables, elles constituaient des sommes retenues afin de satisfaire à la dette des employés au titre des contributions et cotisations relatives à ces gains. Les sommes retenues à cette fin, se sont trouvées retenues en fiducie au bénéfice du fisc qui a donc le droit de les réclamer au séquestre. Dauphin ne peut justifier la décision de première instance qui ordonne au séquestre de les lui remettre et la Cour d'appel a donc eu raison d'ordonner qu'elles soient remises au ministère du Revenu national à valoir sur la dette des employés.

La Cour d'appel a eu raison de décider que les réclamations relatives à la part de l'employeur au titre du Régime de pensions du Canada, et à la part de l'employeur de la déduction au titre de l'assurance-chômage, n'étaient pas fondées en droit. On n'a pas contesté cette conclusion dans le pourvoi à cette Cour ni attaqué l'exactitude des rajustements faits pour ces sommes avec intérêts et peines et qui ont donné le montant fixé par l'arrêt.

Suivant le raisonnement de l'arrêt *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599, la réclamation au titre des déductions d'impôt sur le

itself before the receiving order could not be supported. *Deslauriers* dealt with the *Canada Pension Plan*, the relevant provisions of which were subss. 24(3) and (4). After providing in subs. 24(3) as in subs. 227(4) of the *Income Tax Act*, that the employer who has deducted an amount "shall be deemed to hold the amount so deducted in trust for Her Majesty", subs. 24(4) goes on to provide that "In the event of any liquidation" an equal amount "shall be deemed to be separate from ... the estate in liquidation ... whether or not that amount has in fact been kept separate". The claim for the Pension Plan deductions was upheld in *Deslauriers* by reason only of those words which are not in the *Income Tax Act*.

There remained the further question whether the quoted provisions of the *Canada Pension Plan* and the similar provisions of the *Unemployment Insurance Act* are applicable to a receiver appointed by the Court pursuant to fixed and floating charges covering all assets of an employer company. The claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions.

The final question was whether the realization by the receiver is a "liquidation, assignment or bankruptcy" within the meaning of the provisions under consideration. There was no reason not to give the word "liquidation" its wide meaning in usual language. The majority in the Court of Appeal properly held that the amount deducted by the employer from employees' wages for Pension Plan and Unemployment Insurance contributions was to be deemed to have been held in trust for Her Majesty at the date of the receiving order and consequently was to be deemed to have been realized by the receiver out of the assets subject to the floating charge.

Board of Industrial Relations v. Avco, [1979] 2 S.C.R. 699; *Wiltshire v. Barrett*, [1966] 1 Q.B. 312; *Royal Trust Co. v. Montex Apparel Industries Ltd.*,

revenu prélevées sur les salaires versés par l'employeur lui-même avant l'ordonnance de séquestre n'est pas fondée. *Deslauriers* portait sur le *Régime de pensions du Canada*, les dispositions pertinentes étaient les par. 24(3) et (4). Après avoir établi au par. 24(3), comme au par. 227(4) de la *Loi de l'impôt sur le revenu*, que l'employeur qui a déduit un montant «est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté», le par. 24(4) établit qu'«en cas de liquidation» un montant égal «doit être considéré comme étant séparé ... des biens en liquidation ... que ce montant ait été ou non, en fait, conservé distinct et séparé». La réclamation pour les déductions au titre du Régime de pensions a été accueillie dans l'arrêt *Deslauriers* uniquement à cause de ces termes que l'on ne retrouve pas dans la *Loi de l'impôt sur le revenu*.

Il reste à examiner la question de savoir si les dispositions précitées du *Régime de pensions du Canada* et les dispositions analogues de la *Loi sur l'assurance-chômage* s'appliquent à un séquestre nommé par la Cour en exécution de privilèges fixes et généraux portant sur tout l'actif d'une société employeur. La réclamation des déductions au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. A partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions.

La dernière question est celle de savoir si la réalisation par le séquestre constitue une «liquidation, cession ou faillite» au sens des dispositions en cause. Il n'y a aucune raison de ne pas donner au terme anglais «liquidation» son sens large dans la langue courante. A bon droit, la majorité de la Cour d'appel a statué que le montant que l'employeur a prélevé sur les salaires des employés au titre des contributions au Régime de pensions et à l'assurance-chômage devait être réputé avoir été détenu en fiducie pour Sa Majesté à la date de l'ordonnance de séquestre et, en conséquence, devait être réputé avoir été réalisé par le séquestre à même l'actif grevé du privilège général.

Jurisprudence: *Commission des relations de travail c. Avco*, [1979] 2 R.C.S. 699; *Wiltshire v. Barrett*, [1966] 1 Q.B. 312; *Royal Trust Co. v. Montex Apparel Indus-*

[1972] 2 O.R. 673, aff'd [1972] 3 O.R. 132; *Davey v. Gibson* (1930), 65 O.L.R. 379, referred to.

Per Estey and Chouinard JJ., *dissenting in part*: *The Payment of Wages Act* of Manitoba created a charge secured by a statutory lien against the assets of Xyloid, in an amount equal to the wages owing as defined in the Act, which means those wages owing less an amount equal to lawful deductions that may be made by an employer.

The lien against the assets of Xyloid as subsequently received by the receiver on its appointment was in existence at the time of that appointment, and attached to and continued to exist as a lien and charge on those assets into the post-appointment period. The receiver, in making the payments it did to the former employees of Xyloid, was not distributing wages to those employees but was rather simply paying off the statutory lien and charge. In doing so, it clearly did not act as the agent of Xyloid but simply as an officer of the court in the discharge of its responsibilities under the order of appointment. Dauphin therefore was entitled against the respondent to retain the sum of $3,474.83 claimed by the respondent with reference to the post-appointment period.

Xyloid contrary to the direction contained in each of the *Canada Pension Plan* Act, the *Unemployment Insurance Act* and the *Income Tax Act* failed to keep "separate and apart from his own moneys . . ." any amount so deducted or withheld upon the payment of wages to its then employees. Each of the three sections, after giving such a direction, provides in different ways that the moneys deducted or withheld are held "in trust for Her Majesty". The terms of the *Canada Pension Plan* Act and the *Unemployment Insurance Act* provide further that "in the event of any liquidation, assignment or bankruptcy of an employer [an amount equal to these moneys] shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate".

Clearly, there was no assigment or bankruptcy of Xyloid. The meaning to be properly applied to the word 'liquidation' in each of the three statutes is liquidation of the employer entity. In legal matters, such a term connotes the winding up of the entity by realizing upon its assets, paying off its liabilities, and distributing the surplus, if any, rateably amongst shareholders according to their precedence. There was no such proceeding with reference to Xyloid and hence the provisions of subs. (4) of s. 24 of the *Canada Pension Plan* Act, subs. (3) of s.

tries Ltd., [1972] 2 O.R. 673, conf. par [1972] 3 O.R. 132; *Davey v. Gibson* (1930), 65 O.L.R. 379.

Les juges Estey et Chouinard, *dissidents en partie*: *The Payment of Wages Act* du Manitoba a créé une créance garantie par un privilège sur l'actif de Xyloid, d'un montant égal aux salaires dus suivant la définition de la Loi, savoir les salaires dus, moins une somme égale aux déductions qu'un employeur peut légalement faire.

Le privilège sur l'actif de Xyloid dont le séquestre a pris possession à sa nomination, existait au moment de cette nomination et il a continué à grever cet actif pendant la période de post-nomination. Lorsque le séquestre a fait ces versements aux anciens employés de Xyloid, il ne leur distribuait pas un salaire, mais réglait simplement la créance privilégiée créée par la loi. Ce faisant, il est clair qu'il n'agissait pas comme mandataire de Xyloid mais simplement comme officier de la Cour dans l'exécution des obligations imposées par l'ordonnance de nomination. En conséquence, Dauphin a gain de cause et a droit de retenir la somme de $3,474.83 que l'intimée réclame à l'égard de la période de post-nomination.

Contrairement aux obligations imposées respectivement par le *Régime de pensions du Canada*, la *Loi sur l'assurance-chômage* et la *Loi de l'impôt sur le revenu*, Xyloid a omis de conserver «distinct et séparé de ses propres fonds . . .» tout montant déduit ou retenu du salaire de ses employés d'alors. Après avoir créé cette obligation, chacune des trois dispositions établit de différentes façons que les sommes déduites ou retenues le sont «en fiducie pour Sa Majesté». Les termes employés par le *Régime de pensions du Canada* et la *Loi sur l'assurance-chômage* établissent de plus qu'«en cas de liquidation, de cession ou de faillite d'un employeur, [un montant égal à ces fonds] doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait conservé distinct et séparé des propres fonds de l'employeur et de la masse des biens».

Il est clair qu'il n'y a pas eu de cession ni de faillite de Xyloid. Le sens qu'il faut donc donner au terme «liquidation» dans chacune de ces trois lois est celui de liquidation de l'entité de l'employeur. En matière juridique, ce terme signifie la dissolution (winding-up) de l'entité par la réalisation de son actif, le règlement de son passif et la distribution du surplus, s'il y en a un, aux actionnaires, proportionnellement et selon leur rang. Il est évident qu'aucune procédure de cette nature n'a été entreprise en l'espèce à l'égard de Xyloid et les disposi-

71 of the *Unemployment Insurance Act* and s. 227(4) and (5) of the *Income Tax Act* have no application.

The *Income Tax Act* provision (s. 227(5)) does not include the extended provision with reference to a deeming of separation in the event of liquidation and hence the respondent, even if the event of liquidation had occurred, would have no assistance from the statute in determining a segregation of accounts.

The payments by Xyloid, therefore, in the pre-appointment period post-date the accrual of the wage entitlement. Xyloid failed to maintain the deductions separate and apart from its own moneys and assets, and Xyloid was not in liquidation, was not in bankruptcy, and had made no assignment, and therefore the express waiver of the requirement of separation legislated in two of the three statutes does not avail the respondent. Therefore, as in the case of the post-appointment period, the appellant is entitled to those moneys withheld by the receiver with reference to deductions made in this period as well.

Royal Trust Co. v. Montex Apparel Industries Ltd., supra; Bank of Nova Scotia v. Middleton Motors Ltd. (1978), 78 D.T.C. 6307; *Re KRA Restaurants Ltd. v. Toronto Dominion Bank* (1977), 74 D.L.R. (3d) 272, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], reversing a judgment of Wright J., and allowing certain claims of the Crown in respect of source deductions under the *Income Tax Act*, the *Canada Pension Plan* and the *Unemployment Insurance Act*. Appeal allowed in part, Estey and Chouinard JJ. dissenting in part.

John Lamont and *R. T. Willis*, for the plaintiff appellant.

T. B. Smith, Q.C., and *Craig Henderson*, for the applicant, respondent.

The judgment of Martland, Ritchie, Pigeon, Beetz and McIntyre JJ. was delivered by

PIGEON J.—This is an appeal by leave of this Court from the judgment of the Court of Appeal for Manitoba[1] reversing the judgment of Wright J.[2] and directing that Dauphin Plains Credit

[1] [1979] 2 W.W.R. 514.
[2] [1978] 3 W.W.R. 658.

tions des par. 24(4) du *Régime de pensions du Canada*, 71(3) de la *Loi sur l'assurance-chômage* et 227(4) et (5) de la *Loi de l'impôt sur le revenu* ne s'appliquent donc pas.

Le paragraphe 227(5) de la *Loi de l'impôt sur le revenu* ne contient pas la disposition élargie qui crée une présomption en cas de liquidation et, par conséquent, même s'il y avait eu liquidation, l'intimée ne trouverait aucun secours dans la Loi pour établir une séparation des comptes.

Par conséquent, les paiements effectués par Xyloid pendant la période de pré-nomination sont postérieurs à la naissance du droit au salaire. Xyloid n'a pas conservé les déductions séparées et distinctes de ses propres fonds et de son actif, et elle n'était pas en liquidation ni en faillite ni n'avait fait de cession; par conséquent, l'intimée ne peut se prévaloir de la dispense expresse de l'obligation de séparer les fonds, établie dans deux des trois lois. Comme dans le cas de la période de post-nomination, l'appelante a droit aux montants qu'a retenus le séquestre à l'égard des déductions faites durant cette période.

Jurisprudence: *Royal Trust Co. v. Montex Apparel Industries Ltd.*, précité; *Bank of Nova Scotia v. Middleton Motors Ltd.* (1978), 78 D.T.C. 6307; *Re KRA Restaurants Ltd. v. Toronto Dominion Bank* (1977), 74 D.L.R. (3d) 272.

POURVOI à l'encontre d'un arrêt de la Cour d'appel du Manitoba[1] qui a infirmé le jugement du juge Wright et accueilli certaines réclamations de Sa Majesté à l'égard de retenues à la source faites en vertu de la *Loi de l'impôt sur le revenu*, du *Régime de pensions du Canada* et de la *Loi sur l'assurance-chômage*. Pourvoi accueilli en partie, les juges Estey et Chouinard étant dissidents en partie.

John Lamont et *R. T. Willis*, pour la demanderesse, appelante.

T. B. Smith, c.r., et *Craig Henderson*, pour la requérante, intimée.

Version française du jugement des juges Martland, Ritchie, Pigeon, Beetz et McIntyre rendu par

LE JUGE PIGEON—Ce pourvoi est interjeté avec l'autorisation de cette Cour à l'encontre de l'arrêt de la Cour d'appel du Manitoba[1] qui infirme le jugement du juge Wright[2] et ordonne à Dauphin

[1] [1979] 2 W.W.R. 514.
[2] [1978] 3 W.W.R. 658.

Union Limited (the "Credit Union"), the appellant in this Court, do pay to Her Majesty The Queen, the respondent in this Court, the sum of $6,278.81.

As security for debts in excess of a million dollars, the Credit Union had obtained from Xyloid Industries Ltd. (the "Company") debentures whereby a first fixed and specific charge was created on all its real and immovable property with a floating charge on all its other assets. The debtor being in default, the Credit Union instituted an action on March 30, 1977 and, on the following day, March 31, 1977, obtained a receiving order whereby the Clarkson Company Limited was appointed receiver. The receiver having realized the assets of the company was authorized to pay the net proceeds of realization to the secured creditor, the Credit Union, subject to a claim of the Department of National Revenue in the amount of $7,416.57. An application for an order directing the payment of this sum was made on behalf of the Crown based on assessments made up as follows:

1. Pre March 31, 1977	
Income tax source deductions	$2,550.78
Canada Pension Plan, employee portion	275.43
Canada Pension Plan, employer portion	275.43
Unemployment Insurance deduction employee portion	244.77
Unemployment Insurance deduction employer portion	342.68
Interest and penalties	647.25
TOTAL ASSESSMENT	$4,336.34
2. Post March 31, 1977	
Income tax source deductions	2,068.05
Canada Pension Plan, employee portion	220.05
Canada Pension Plan, employer portion	220.05
Unemployment Insurance deduction employee portion	196.16
Unemployment Insurance deduction employer portion	274.63
Interest and penalties	495.89
	$3,474.83

Plains Credit Union Limited (la «Caisse»), appelante en cette Cour, de verser à Sa Majesté La Reine, intimée en cette Cour, la somme de $6,278.81.

En garantie de dettes de plus d'un million de dollars, la Caisse avait obtenu de Xyloid Industries Ltd. (la «Société») des obligations qui créaient un premier privilège fixe et spécifique sur tous ses biens immeubles et un privilège général sur tout le reste de son actif. La débitrice étant en défaut, la Caisse a intenté une action le 30 mars 1977 et le lendemain, 31 mars 1977, a obtenu une ordonnance de mise sous séquestre par laquelle Clarkson Company Limited a été nommée séquestre. Ayant réalisé l'actif de la Société le séquestre a été autorisé à en verser le produit net à la créancière garantie, la Caisse, sous réserve d'une réclamation du ministère du Revenu national au montant de $7,416.57. Sa Majesté a demandé une ordonnance portant que cette somme lui soit versée; sa demande est fondée sur des cotisations établies comme suit:

[TRADUCTION] 1. Avant le 31 mars 1977	
Déductions à la source au titre de l'impôt sur le revenu	$2,550.78
Régime de pensions du Canada, part de l'employé	275.43
Régime de pensions du Canada, part de l'employeur	275.43
Déduction au titre de l'assurance-chômage, part de l'employé	244.77
Déduction au titre de l'assurance-chômage, part de l'employeur	342.68
Intérêts et peines	647.25
COTISATION TOTALE	$4,336.34
2. Après le 31 mars 1977	
Déductions à la source au titre de l'impôt sur le revenu	$2,068.05
Régime de pensions du Canada, part de l'employé	220.05
Régime de pensions du Canada, part de l'employeur	220.05
Déduction au titre de l'assurance-chômage, part de l'employé	196.16
Déduction au titre de l'assurance-chômage, part de l'employeur	274.63
Intérêts et peines	495.89
	$3,474.83

The amounts under the heading "Pre March 31, 1977" were claimed in respect of wages paid by the company before the receiving order and as to this the trial judge made the following finding (at p. 660):

... Because of the specific allegation of Mr. Johnson (para. 4 of his affidavit) that an audit shows the deductions claimed were in fact made, and because, in argument, counsel for the defendant made no submission otherwise, I accept as factual that the required statutory amounts were deducted by the defendant before or when the wage payments were made by it *before* the date of receivership.

The allegation referred to by the trial judge is para. 2 of the affidavit reading as quoted (at p. 659):

2. That I am advised and believe that the Minister of National Revenue caused an assessment to be raised against Xyloid Industries Ltd. This assessment was raised pursuant to an audit that was performed on the books of Xyloid Industries Ltd. in Receivership and represents unpaid source deductions apparent on the books of Xyloid Industries Ltd. for the months of February, March, and April, 1977.

The assessment under the heading "Post March 31, 1977" was made against the receiver but it did not relate as Monnin J.A. said (at p. 517) to "wages earned in April 1977, after the receivership". It was admitted at the hearing in this Court that deductions on wages earned in the service of the receiver had been duly remitted. The assessment related to wages which were earned prior to March 31, 1977, but were paid by the receiver pursuant to *The Payment of Wages Act* of Manitoba. Counsel for the Credit Union admitted that when paying those wages to the employees the receiver had withheld the amounts claimed as income tax source deductions, Canada Pension Plan, employee portion and Unemployment Insurance deduction, employee portion. In other words, the receiver paid the employees the amount of wages due, net of those deductions and he was assessed under date January 25, 1978, "for failure to remit as required" in this respect. I find it

Les sommes qui figurent sous la rubrique «Avant le 31 mars 1977» ont été réclamées à l'égard des salaires versés par la Société avant que ne soit rendue l'ordonnance de séquestre et, à ce sujet, le juge de première instance est venu à la conclusion suivante (à la p. 660):

[TRADUCTION] ... Vu l'allégation spécifique de M. Johnson (par. 4 de son affidavit) qu'une vérification démontre que les déductions réclamées ont effectivement été faites et vu que, dans sa plaidoirie, l'avocat de la défenderesse n'a pas soutenu le contraire, j'accepte comme établi que la défenderesse a déduit les sommes exigées par la loi avant de verser les salaires ou au moment où elle les a versés et cela, *avant* la date de la mise sous séquestre.

L'allégation que mentionne le juge de première instance est le paragraphe 2 de l'affidavit qui se lit comme suit (à la p. 659):

[TRADUCTION] 2. Que l'on m'informe et que je crois que le ministre du Revenu national a établi une cotisation contre Xyloid Industries Ltd. Cette cotisation a été établie à la suite d'une vérification des livres de Xyloid Industries Ltd. sous séquestre, et représente les déductions à la source impayées qui figurent aux livres de Xyloid pour les mois de février, mars et avril 1977.

La cotisation qui figure sous la rubrique «Après le 31 mars 1977» a été établie contre le séquestre mais, comme l'a dit le juge Monnin en Cour d'appel (à la p. 517), ne se rapporte pas à [TRADUCTION] «du salaire gagné en avril 1977, après la mise sous séquestre». On a reconnu à l'audition devant cette Cour que les déductions faites sur le salaire gagné au service du séquestre ont bien été remises. La cotisation se rapporte à du salaire gagné avant le 31 mars 1977, mais payé par le séquestre conformément à *The Payment of Wages Act* du Manitoba. L'avocat de la Caisse a reconnu que, lorsqu'il a versé ce salaire aux employés, le séquestre a retenu les montants réclamés comme déduction à la source au titre de l'impôt sur le revenu, comme part de l'employé au titre du Régime de pensions du Canada et comme part de l'employé de la déduction au titre de l'assurance-chômage. En d'autres termes, le séquestre a versé aux employés le montant du salaire dû, moins ces

convenient to deal with this part of the claim first.

The Payment of Wages Act, 1975 (Man.), c. 21, provides:

1. In this Act,

. . .

(h) "wage" or "wages" includes salaries, commissions, or any compensation for labour or services measured by time, piece, or otherwise, and any pay which is due and payable to an employee including moneys payable under The Vacations With Pay Act or moneys payable in cases of termination of employment under The Employment Standards Act; but does not include any deductions from wages that may be lawfully made by an employer.

. . .

7(1) Notwithstanding any other Act, the amount of wages due and payable by an employer to an employee not exceeding $2,000.00 constitutes a lien and charge on the property and assets of the employer in favour of the employee, and is payable in priority to any other claim or right, including those of the Crown in right of Manitoba, and without limiting the generality of the foregoing that priority extends over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage on real or personal property, and every debenture.

The relevant provisions of the *Income Tax Act* (enacted 1970-71-72, c. 63) are:

153. (1) Every person paying

(*a*) salary or wages or other remuneration to an officer or employee,

. . .

at any time in a taxation year shall deduct or withhold therefrom such amount as may be prescribed and shall, at such time as may be prescribed, remit that amount to the Receiver General of Canada on account of the payee's tax for the year under this Part.

. . .

(3) When an amount has been deducted or withheld under subsection (1), it shall, for all the purposes of this Act, be deemed to have been received at that time by

déductions, et il a été cotisé en date du 25 janvier 1978, [TRADUCTION] «pour omission de remettre tel qu'exigé» à cet égard. Il est plus commode de traiter en premier lieu de cette partie de la réclamation.

The Payment of Wages Act, 1975 (Man.), chap. 21, dispose:

[TRADUCTION] 1. Dans la présente loi,

. . .

h) «salaire» ou «salaires» comprend un traitement, une commission ou autre indemnité pour un travail ou des services mesurés au temps, à la pièce ou autrement, et toute rémunération due et payable à un employé y compris les sommes payables en vertu de The Vacations With Pay Act ou les sommes payables en cas de cessation d'emploi en vertu de The Employment Standards Act; mais ne comprend pas les déductions du salaire qu'un employeur peut légalement faire.

. . .

7(1) Nonobstant toute autre loi, le montant du salaire n'excédant pas $2,000, dû et payable par un employeur à un employé, constitue une créance privilégiée sur les biens et l'actif de l'employeur, payable à l'employé par préférence à toute autre dette ou créance, y compris celles de Sa Majesté du chef du Manitoba et, sans limiter la portée de ce qui précède, ce privilège prévaut contre toute cession, y compris une cession de créance, absolue ou non, toute hypothèque sur biens réels ou personnels, et toute obligation.

Les dispositions pertinentes de la *Loi de l'impôt sur le revenu* (1970-71-72, chap. 63) sont les suivantes:

153. (1) Toute personne qui verse

a) un traitement, un salaire ou autre rémunération à un cadre ou employé,

. . .

à une date quelconque dans une année d'imposition, doit en déduire la somme qui peut être prescrite ou retenir cette somme, et elle doit, à la date qui peut être fixée, remettre cette somme au receveur général du Canada à valoir sur l'impôt du bénéficiaire pour l'année en vertu de la présente Partie.

. . .

(3) Lorsqu'une somme a été déduite ou retenue en vertu du paragraphe (1), elle est, pour l'application générale de la présente loi, réputée avoir été reçue à

the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid.

It is important to consider the nature of the deduction for income tax. It is not a deduction for the benefit of the employer, it is a withholding for the benefit of the employee because it is to be remitted to the Receiver General of Canada on account of the employee's tax indebtedness. By virtue of other provisions of the *Income Tax Act* if, as happens in a large number of cases, the withholdings exceed the employee's tax liabilities, a refund will be made to the employee by the Department of National Revenue. Therefore, the amount withheld remains a part of the wages, and subs. 153(3) provides that it is "deemed to have been received" by him at the time the payment was made less the deduction. Furthermore, subs. 227(4) of the *Income Tax Act* provides:

(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.

In the present case, the Credit Union is, in effect, contending that *The Payment of Wages Act* authorized the receiver to make the income tax deduction for the benefit of the debenture holder. In my view, this is a complete subversion of the purpose of such a deduction. At the hearing, I said to the appellant's counsel: "You contend that the deductions made from the wages enure to the benefit of the creditor?" His answer was: "That is the practical, but not the legal result". I just cannot see how what is true in fact, may be false in law. In my view, counsel's assertion reveals the inherent contradiction in the Credit Union's position. Section 153 of the *Income Tax Act* is the only law under which anyone can make a deduction for income tax, but this section goes on to provide in subs. (4), that the amount so deducted shall be held "in trust for Her Majesty". No law of Manitoba can possibly change that. How can the Credit Union claim that the amount deducted was held for its benefit?

cette date par la personne à qui la rémunération, la prestation, le paiement, les honoraires, les commissions ou d'autres sommes ont été payées.

Il importe d'examiner la nature de la déduction au titre de l'impôt sur le revenu. Ce n'est pas une déduction au profit de l'employeur, c'est une retenue au profit de l'employé, parce qu'elle doit être remise au receveur général du Canada à valoir sur l'impôt dû par l'employé. En vertu d'autres dispositions de la *Loi de l'impôt sur le revenu*, si, ce qui est fréquent, les retenues excèdent l'obligation fiscale de l'employé, le ministère du Revenu national remboursera l'employé. En conséquence, une somme retenue fait toujours partie du salaire, et le par. 153(3) prévoit qu'elle est «réputée avoir été reçue» par l'employé à la date où le versement a été fait moins la déduction. De plus, le par. 227(4) de la *Loi de l'impôt sur le revenu* établit ce qui suit:

(4) Toute personne qui déduit ou retient un montant quelconque en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.

En l'espèce, la Caisse soutient, en réalité, que *The Payment of Wages Act* autorisait le séquestre à faire la déduction d'impôt sur le revenu au profit du créancier de l'obligation. A mon avis, c'est là fausser complètement l'objet de cette déduction. A l'audition, j'ai dit à l'avocat de l'appelante: [TRADUCTION] «Vous prétendez que les déductions prélevées sur les salaires profitent au créancier?» Il a répondu: [TRADUCTION] «C'est là l'effet pratique, mais non l'effet en droit.» Je suis incapable de voir comment ce qui est vrai en fait peut être faux en droit. A mon avis, l'assertion de l'avocat fait ressortir la contradiction inhérente à la position de la Caisse. L'article 153 de la *Loi de l'impôt sur le revenu* est le seul texte de loi qui permet à quelqu'un de faire une déduction au titre de l'impôt sur le revenu, mais cet article dispose ensuite, au par. (4), que le montant ainsi déduit est retenu «en fiducie pour Sa Majesté». Aucune loi du Manitoba ne peut changer cela. Comment la Caisse peut-elle prétendre que le montant déduit a été retenu à son profit?

It must also be considered that, by virtue of s. 153(3) the employees are deemed to have received their wages in full, so that they are liable for income tax on that basis. But, the position taken by the Credit Union means that it would get the benefit of the deductions so that the employees would have to pay income tax to the Department of National Revenue on what they have not received and for which they would get no credit.

With respect, it appears to me that the trial judge has failed to consider the consequences of allowing a receiver to make deductions for income tax when paying wages and then failing to treat those deductions as withholdings on account of income tax. This is not only a contradictory position but, if upheld, would amount to an unfair diversion which the Legislature of Manitoba cannot possibly have intended to authorize by the definition of wages in *The Payment of Wages Act*.

In view of the purpose of *The Payment of Wages Act* it appears to me that the deductions contemplated in the definition of "wages" are only those which may be made for the benefit of the employer. This appears not only from the considerations above stated, but also from the very wording of the provision: "deductions from wages that may be lawfully made by an employer". The withholdings directed by the *Income Tax Act* etc. are not deductions that may be made by an employer, they are deductions that shall be made. In my view, the Legislature of Manitoba when speaking of deductions that may be made by an employer had in mind deductions of the same nature as those which are contemplated in s. 25 of *The Employment Standards Act*, R.S.M. 1970, c. E110:

25. A board upon the written authorization of the minister may, with respect to the area for which it is appointed, make recommendations in writing respecting

(a) standards of minimum wages to be paid to employees

(i) of different ages; or

(ii) who are inexperienced, handicapped, or special employees;

Il faut aussi tenir compte de ce qu'en vertu du par. 153(3), les employés sont réputés avoir reçu leur salaire en entier, et sont en conséquence assujettis à l'impôt sur cette base. La position adoptée par la Caisse aurait cependant pour résultat qu'elle bénéficierait des déductions de sorte que les employés devraient payer au ministère du Revenu national un impôt sur un revenu qu'ils n'ont pas reçu et au titre duquel ils n'obtiendraient aucun délit.

Avec égards le juge de première instance me paraît avoir omis de tenir compte des conséquences que cela comporte si l'on permet à un séquestre de faire des déductions au titre de l'impôt sur le revenu en payant du salaire et de ne pas considérer ces déductions comme des retenues à ce titre. Non seulement c'est contradictoire, mais, si on l'admettait, cela constituerait un détournement injuste que la législature du Manitoba n'a pas pu avoir l'intention d'autoriser par la définition de salaire dans *The Payment of Wages Act*.

Compte tenu de l'objet de *The Payment of Wages Act*, les déductions visées par la définition de «salaire» me paraissent être seulement celles qui peuvent être faites au profit de l'employeur. Cela ressort non seulement des considérations déjà énoncées, mais également des termes mêmes de la disposition: «déductions du salaire qu'un employeur peut légalement faire». Les retenues prescrites par la *Loi de l'impôt sur le revenu* etc. ne sont pas des déductions qu'un employeur peut faire, ce sont des déductions qu'il doit faire. A mon avis, la législature du Manitoba, en parlant de déductions qu'un employeur peut faire, avait à l'esprit des déductions de la même nature que celles visées à l'art. 25 de *The Employment Standards Act*, R.S.M. chap. E110:

[TRADUCTION] 25. Un comité peut, sur autorisation écrite du ministre, faire des recommandations écrites, concernant la région pour laquelle il a été constitué, à l'égard

a) des normes de salaire minimum à verser à des employés

(i) d'âges différents; ou

(ii) qui n'ont pas d'expérience, sont handicapés ou sont des employés spéciaux;

(b) the maximum proportion of employees classified under sub-clause (ii) of clause (a) to other employees in the same employment; and

(c) the maximum amount, if any, that may be deducted from the prescribed minimum wage in cases where the employer furnishes to the employee board, lodging, uniforms, laundry, or other service.

I have underlined the words "that may be deducted" which appear in this statute in *pari materia* of the same province; they are indicative of what was contemplated. In *The Payment of Wages Act* as in *The Employment Standards Act* the legislature was exclusively concerned with matters within its jurisdiction. In respect of deductions, minimum wage orders are concerned only with those which are under the control of the provincial legislature, they make no reference to the deductions required by federal statutes although employers obviously have to make them. In my view, the provision with respect to deductions in *The Payment of Wages Act* is to be similarly viewed. It is concerned only with matters under the control of the Legislature. It is a well-established rule that provincial enactments are presumed to be intended to avoid interference with federal legislation.

The recent judgment of this Court in *Board of Industrial Relations v. Avco*[3] affords an example of a restricted meaning ascribed to a provision of the British Columbia *Payment of Wages Act* to avoid untoward consequences. The provision under consideration created "a lien and charge . . . payable in priority over any other claim or right . . .". Giving the unanimous opinion, Martland J. said (at p. 706):

. . . The property to which a s. 5A lien attaches is not defined nor identified. In the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights.

In my view, the Manitoba statute should not be construed in a manner which would deprive a third party, the tax collector, of his proper rights. The Legislature is not presumed to have intended an inconsistency and I would find it inconsistent to

[3] [1979] 2 S.C.R. 699.

b) la proportion maximale des employés de la catégorie (ii) de l'alinéa a) par rapport aux autres employés exerçant le même emploi; et

c) le montant maximum, s'il en est, qui peut être déduit du salaire minimum prescrit dans les cas où l'employeur fournit à un salarié la pension, le logement, les uniformes, les services de buanderie ou d'autres services.

J'ai souligné l'expression «qui peut être déduit» que l'on trouve dans cette loi connexe de la même province; ils donnent une idée de ce que l'on vise. Dans *The Payment of Wages Act* tout comme dans *The Employment Standards Act*, la législature ne vise que le domaine de sa compétence. A l'égard des déductions, les ordonnances de salaire minimum ne visent que celles qui relèvent du pouvoir de la législature provinciale, elles ne font pas référence aux déductions exigées par des lois fédérales, bien que les employeurs soient évidemment obligés de les faire. A mon avis, il faut interpréter de la même façon la disposition touchant les déductions dans *The Payment of Wages Act*. Elle ne vise que ce qui relève de la législature. La présomption que les lois provinciales entendent éviter d'entrer en conflit avec les lois fédérales est une règle bien établie.

L'arrêt récent de cette Cour dans *Commission des relations de travail c. Avco*[3] illustre le sens restreint donné à une disposition de la *Payment of Wages Act* de la Colombie-Britannique pour éviter des résultats indésirables. La disposition en cause créait [TRADUCTION] «une créance privilégiée payable . . . par préférence à toute autre dette ou créance . . .». Rendant l'opinion unanime, le juge Martland a dit (à la p. 706):

. . . Les biens auxquels s'applique le privilège de l'art. 5A ne sont pas définis ou désignés. En l'absence d'une disposition statutaire en ce sens, l'art. 5A ne doit pas être interprété de façon à dépouiller les tiers de leurs droits antérieurs sur ces biens.

A mon avis, la loi du Manitoba ne doit pas être interprétée de façon à dépouiller un tiers, le fisc, de ses droits légitimes. On ne doit pas présumer que la législature a voulu créer une contradiction et je considère qu'il serait contradictoire de per-

[3] [1979] 2 R.C.S. 699.

authorize deductions to be made for income tax only to be appropriated to the benefit of the employer's creditor.

In *R. v. Biron*[4] the majority in this Court approved and applied the decision in *Wiltshire v. Barrett*[5] where a provision reading: "A police constable may arrest without warrant a person committing an offence under this section" was held to mean "apparently committing an offence". In that case Lord Denning, dealing with the argument that if the man arrested was not prosecuted then the arrest was unlawful, said (at p. 325):

> ... The section does not mention cases of a third kind, namely, those cases where on inquiry at the police station it appears that there is no sufficient ground on which to proceed further against the man. Clearly, in those cases, the man should be released forthwith. There was no need in the statute to mention that contingency. It is too obvious for words. (Emphasis added.)

The trial judge held that the receiver in this case was not a person within the meaning of subs. 153(1) of the *Income Tax Act*. For this conclusion he relied on the decision of the Ontario Court of Appeal in *Royal Trust Co. v. Montex Apparel Industries Ltd.*[6] But, in that case the question was whether the receiver came within the provisions of subs. 50(9) of the *Excise Tax Act* reading:

> When the Minister has knowledge that any person has received from a licensee any assignment of any book debt ...

Here the question is whether the receiver comes within the words "Every person paying salary or wages ..." and I fail to see any reason for holding that the receiver did not come within the terms of this provision. There is no need to consider the definition of "person" in the Act. In any case this definition is not a restrictive but an extensive definition due to the word "includes". Assuming the receiver was not authorized to make the deduc-

[4] [1976] 2 S.C.R. 56.
[5] [1966] 1 Q.B. 312.
[6] [1972] 3 O.R. 132.

mettre que des déductions soient faites au titre de l'impôt sur le revenu pour être affectées au profit du créancier de l'employeur.

Dans l'arrêt *R. c. Biron*[4], la majorité de cette Cour a approuvé et appliqué l'arrêt *Wiltshire v. Barrett*[5] où l'on a décidé qu'une disposition se lisant: [TRADUCTION] «Un constable peut arrêter sans mandat une personne en train de commettre une infraction sous le présent article» signifiait «apparemment en train de commettre une infraction». Dans cet arrêt, lord Denning, en réponse à l'argument que si la personne arrêtée n'était pas poursuivie, l'arrestation était illégale, a dit (à la page 325):

> [TRADUCTION] ... Cet article ne fait pas mention de cas d'une troisième espèce, savoir, lorsque, après enquête au poste de police, il s'avère qu'il n'y a pas de preuves suffisantes pour justifier une poursuite. Il est clair que dans ces cas-là, l'individu doit être relâché sur-le-champ. Il n'était pas nécessaire de mentionner cette éventualité dans la loi. Elle est trop évidente pour qu'on en parle. (C'est moi qui souligne.)

Le juge de première instance a décidé qu'en l'espèce le séquestre n'est pas une personne au sens du par. 153(1) de la *Loi de l'impôt sur le revenu*. Pour venir à cette conclusion, il s'est fondé sur l'arrêt de la Cour d'appel de l'Ontario dans *Royal Trust Co. v. Montex Apparel Industries Ltd.*[6] Dans cet arrêt, cependant, la question était de savoir si le séquestre était visé par les dispositions du par. 50(9) de la *Loi sur la taxe d'accise* qui se lit:

> Lorsque le Ministre sait qu'une personne a reçu d'un titulaire de licence la cession d'une dette active ...

En l'espèce la question est de savoir si les termes «toute personne qui verse un traitement ou salaire ...» visent le séquestre et je ne vois aucune raison de décider qu'ils ne le visent pas. Il n'est pas nécessaire d'examiner la définition de «personne» dans la Loi, car elle n'est pas restrictive mais extensive vu le terme «comprend». Si l'on tenait pour acquis que le séquestre n'était pas autorisé à faire les déductions, la Caisse n'aurait pas droit à

[4] [1976] 2 R.C.S. 56.
[5] [1966] 1 Q.B. 312.
[6] [1972] 3 O.R. 132.

tions, the Credit Union is not entitled to that part of the employees' wages, it should go to them. By having it remitted to the tax authorities the employees will be given credit therefor.

I will finally note that no argument was addressed to the Court urging that, by virtue of subs. 152(8) and 227(10), the assessment on the receiver could not be disputed otherwise than by appeal under the provisions of the *Income Tax Act*. Under the circumstances, I do not find it necessary to consider the point before coming to the conclusion that the appeal fails in respect of the deductions made by the receiver out of wages paid under *The Payment of Wages Act*.

With respect to the deductions made by the receiver for the Canada Pension Plan, employee portion, and the Unemployment Insurance, employee portion, the trial judge said (at pp. 664-665):

Both acts speak in terms of the obligation to deduct as lying with the employer of the persons receiving the payments, and the receiver-manager, not being such an employer, therefore had no obligation to make the deductions claimed.

In my view, the question is not whether the claim would succeed if the receiver had not made those decuctions. The fact is, as appears from the Johnson affidavit already quoted, that the deductions were duly made and entered in the books. In making payments to the employees pursuant to *The Payment of Wages Act* the receiver actually withheld the proper amount for Pension Plan contributions and Unemployment Insurance premiums. These amounts represented a debt due by the recipients of the wages under the provisions of s. 8 of the *Canada Pension Plan* and s. 62 of the *Unemployment Insurance Act, 1971*. The receiver had ample funds for paying the full amount of wages due and therefore the deductions made were true deductions, not mere book-keeping entries, they were money withheld for the purpose of satisfying the employees' indebtedness for contributions and premiums in respect of those earnings. This money withheld for such purpose became held in trust in favour of the tax collector who is therefore entitled to claim it from the receiver.

cette partie du salaire des employés, c'est à eux qu'elle devrait échoir. En ordonnant qu'elle soit remise au fisc, les employés se la verront créditer.

Je note enfin que l'on n'a pas soutenu devant la Cour qu'en vertu des par. 152(8) et 227(10), la cotisation établie contre le séquestre ne pouvait être contestée autrement que par un appel interjeté conformément aux dispositions de la *Loi de l'impôt sur le revenu*. Dans les circonstances, je suis d'avis qu'il n'est pas nécessaire d'examiner ce point pour venir à la conclusion que le pourvoi doit échouer à l'égard des déductions que le séquestre a faites sur le salaire payé conformément à *The Payment of Wages Act*.

En ce qui concerne les déductions que le séquestre a faites au titre du Régime de pensions du Canada, part de l'employé, et de l'assurance-chômage, part de l'employé, le premier juge a dit (aux pp. 664 et 665):

[TRADUCTION] Les deux lois prescrivent que l'employeur de personnes qui reçoivent les paiements a l'obligation de faire les déductions, le séquestre-gérant, qui n'est pas un tel employeur, n'avait donc aucune obligation de faire les déductions réclamées.

A mon avis, la question n'est pas de savoir si la demande réussirait si le séquestre n'avait pas effectué les déductions. Le fait est, comme il ressort de l'affidavit de Johnson déjà cité, que les déductions ont bien été effectuées et inscrites aux livres. En faisant des paiements aux employés conformément à *The Payment of Wages Act*, le séquestre a bien retenu le montant exact des contributions au Régime de pensions et des cotisations d'assurance-chômage. Ces sommes représentaient une dette due par les personnes qui ont reçu le salaire, en vertu des dispositions de l'art. 8 du *Régime de pensions du Canada* et de l'art. 62 de la *Loi de 1971 sur l'assurance-chômage*. Le séquestre avait des fonds suffisants pour payer le montant complet des salaires dus et, en conséquence, les déductions effectuées étaient de véritables déductions, et non de simples inscriptions comptables, elles constituaient des sommes retenues afin de satisfaire à la dette des employés au titre des contributions et cotisations relatives à ces gains. Les sommes retenues à cette fin, se sont trouvées retenues en

The Credit Union cannot justify the judgment at trial directing the receiver to give it those moneys and it was therefore properly ordered by the judgment of the Court of Appeal to turn them over to the Department of National Revenue so that they may be credited against the employees' indebtedness.

I find it clear that the Court of Appeal was correct in holding that there was no legal basis for the claims for the Canada Pension Plan, employer portion, and the Unemployment Insurance deduction, employer portion. This conclusion was not challenged on the appeal to this Court and no question has been raised as to the correctness of the adjustments which were made for those sums with interest and penalties and resulted in the amount fixed by the judgment.

The assessment entitled "Pre March 31, 1977" involves entirely different considerations. The claim is for deductions which were made by the employer when paying wages prior to the making of the receiving order. The sums withheld were merely deducted from the wages paid, they were not set apart. In fact, the company was short of funds and did not have funds available to be set aside as required by law. It was not disputed that the funds corresponding to the deductions could not be traced. These withholdings merely represented deductions from the wages paid, not money set aside at the time. The material statutory provisions of the *Income Tax Act* are subss. 227(4) and (5):

(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) All amounts deducted or withheld by a person under this Act shall be kept separate and apart from his own moneys and in the event of any liquidation, assignment or bankruptcy the said amounts shall remain apart and form no part of the estate in liquidation, assignment or bankruptcy.

The trial judge said on this point (at p. 662):

Insofar as the claim for income tax deductions from wages paid *before* the receivership is concerned, under

fiducie au bénéfice du fisc qui a donc le droit de les réclamer au séquestre. La Caisse ne peut justifier la décision de première instance qui ordonne au séquestre de les lui remettre et la Cour d'appel a donc eu raison d'ordonner qu'elles soient remises au ministère du Revenu national à valoir sur la dette des employés.

J'estime évident que la Cour d'appel a eu raison de décider que les réclamations relatives à la part de l'employeur au titre du Régime de pensions du Canada, et à la part de l'employeur de la déduction au titre de l'assurance-chômage, n'étaient pas fondées en droit. On n'a pas contesté cette conclusion dans le pourvoi à cette Cour ni attaqué l'exactitude des rajustements faits pour ces sommes avec intérêts et peines et qui ont donné le montant fixé par l'arrêt.

La cotisation sous la rubrique «Avant le 31 mars 1977» soulève des questions entièrement différentes. Elle vise les déductions que l'employeur a faites lorsqu'il a payé des salaires avant l'ordonnance de séquestre. Les sommes retenues ont simplement été déduites des salaires versés, et n'ont pas été mises à part. En fait, la Société était à court d'argent et n'avait pas en main le montant qu'elle était tenue de mettre à part conformément à la loi. On n'a pas contesté que le montant correspondant aux déductions ne pouvait être retracé. Ces retenues représentaient simplement des déductions faites sur les salaires payés et non de l'argent mis à part à l'époque. Les dispositions pertinentes de la *Loi de l'impôt sur le revenu* sont les par. 227(4) et (5):

(4) Toute personne qui déduit ou retient un montant quelconque en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.

(5) Tous les montants déduits ou retenus par une personne en conformité de la présente loi doivent être tenus séparés de ses propres fonds et, dans le cas d'une liquidation, cession ou faillite, ces montants doivent demeurer à part et ne former aucune partie des biens en liquidation, cession ou faillite.

Sur ce point le juge de première instance a dit (à la p. 662):

[TRADUCTION] En ce qui concerne la réclamation des déductions d'impôt relatives aux salaires versés *avant* la

the above provisions the employer must first deduct or withhold the requisite moneys, which then must be kept separate. If they are not kept separate they must be traceable as trust moneys in order to be recovered by the Crown: *Re Hallets Estate; Knatchbull v. Hallett* (1880), 13 Ch. D. 696 (C.A.); *Re Craftsmen Painting Contractors Ltd.*, [1968] 1 O.R. at 522, 11 C.B.R. (N.S.) 91, 67 D.L.R. (2d) 37, leave to appeal refused 11 C.B.R. (N.S.) 91n, and cases cited there. In the present circumstances the Crown has not established that the moneys purported to be deducted actually existed, or, if they did, that the moneys were kept in such a way as to be traceable. Thus the Crown's claim here cannot succeed.

The majority opinion in the Court of Appeal was based on the overruling of the *Craftsmen*'s case by the Ontario Court of Appeal in *Re Deslauriers Construction Products Ltd.*[7] That case, like *Craftsmen's*, dealt with the *Canada Pension Plan*, 1964-65 (Can.), c. 51 (now R.S.C. 1970, c. C-5). The relevant provisions are subss. 24(3) and (4) as follows:

(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed 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 or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

It will be noted that after providing in subs. 24(3) as in subs. 227(4) of the *Income Tax Act*, that the employer who has deducted an amount "shall be deemed to hold the amount so deducted in trust for Her Majesty", subs. 24(4) goes on to provide that "In the event of any liquidation" an equal amount "shall be deemed to be separate from ... the estate in liquidation ... whether or

[7] [1970] 3 O.R. 599.

mise sous séquestre, l'employeur, conformément aux dispositions citées, doit d'abord déduire ou retenir les sommes requises qui doivent alors être tenues séparées. Si elles ne sont pas tenues séparées, elles doivent pouvoir être identifiées comme sommes en fiducie pour que Sa Majesté puisse les recouvrer: *Re Hallets Estate; Knatchbull v. Hallett* (1880), 13 Ch. D. 696 (C.A.); *Re Craftsmen Painting Contractors Ltd.*, [1968] 1 O.R. à la p. 522, 11 C.B.R. (N.S.) 91, 67 D.L.R. (2d) 37, autorisation d'appel refusée 11 C.B.R. (N.S.) 91n, et les décisions qui y sont citées. En l'espèce, Sa Majesté n'a pas établi que les sommes que l'on a prétendu déduire existaient réellement, ou, si c'était le cas, qu'elles avaient été conservées de telle façon qu'elles puissent être identifiées. La réclamation de Sa Majesté en l'espèce ne peut donc être accueillie.

L'opinion de la majorité en Cour d'appel est fondée sur l'arrêt *Re Deslauriers Construction Products Ltd.*[7] par lequel la Cour d'appel de l'Ontario a statué à l'encontre du jugement rendu dans l'affaire *Craftsmen*. Cet arrêt, comme l'affaire *Craftsmen*, portait sur le *Régime de pensions du Canada*, 1964-65 (Can.), chap. 51 (maintenant S.R.C. 1970, chap. C-5). Les dispositions pertinentes étaient les par. 24(3) et (4) que voici:

(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.

(4) En cas de liquidation, de cession ou de faillite d'un employeur un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.

On notera qu'après avoir établi au par. 24(3), comme au par. 227(4) de la *Loi de l'impôt sur le revenu*, que l'employeur qui a déduit un montant «est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté», le par. 24(4) établit qu'«en cas de liquidation» un montant égal «doit être considéré comme étant séparé ... des biens en liquidation ... que ce montant ait été ou non, en

[7] [1970] 3 O.R.599.

not that amount has in fact been kept separate". It is clear from the following passage of the judgment delivered by Gale C.J.O. (at pp. 601-602) that the claim for the Pension Plan deductions was upheld in *Deslauriers* by reason only of those words which are not in the *Income Tax Act*:

On the facts of the instant case again, only notional deductions appearing on the payroll records had been made as the company could meet only its net payroll and its operational expenses.

On behalf of the Attorney-General it was submitted that, while the Minister would have no claim such as is asserted in this case under s-s. (3) if s. 24 ended there, none the less, in the light of s-s. (4), the Minister did have the right to receive out of the realization of the assets a sum representing the amount which was deducted from the employees' salaries, totalling $1,068.82. We agree with that interpretation of s-s. (4). It seems to us that s-s. (4), and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

. . .

We agree with Mr. Olsson on behalf of the Attorney-General that the word "deemed" in the fourth line of s-s. (4) must be used in the sense of a conclusive rather than a rebuttable presumption since the contrary case, where the amount has not in fact been kept separate and apart, is specifically dealt with in the concluding part of that very subsection.

I find the reasoning in *Deslauriers* wholly persuasive and would note that in 1956, (c. 39, s. 27) Parliament repealed subs. (6) of s. 123 of the *Income Tax Act*, R.S.C. 1952, c. 148, whereby a first charge was created on the property of an employer for income tax deductions. I must therefore hold that the claim for the income tax deductions on wages paid by the employer itself before the receiving order cannot be supported.

There remains for consideration the further question whether the quoted provisions of the *Canada Pension Plan* and the similar provisions of

fait, conservé distinct et séparé». Il ressort clairement du passage suivant de l'opinion du juge en chef Gale (aux pp. 601 et 602) que la réclamation pour les déductions au titre du Régime de pensions a été accueillie dans l'arrêt *Deslauriers* uniquement à cause de ces termes que l'on ne retrouve pas dans la *Loi de l'impôt sur le revenu*:

[TRADUCTION] Encore une fois, suivant les faits de l'espèce, la Société n'avait fait que des déductions fictives inscrites aux livres de paie, ne pouvant rencontrer que sa liste de paie nette et ses dépenses d'exploitation.

Au nom du procureur général, on a soutenu que, bien que la réclamation du ministre ne serait pas fondée en vertu du par. (3) si l'art. 24 se terminait là, le ministre n'en avait pas moins, par l'effet du par. (4), le droit de recevoir, à même l'actif réalisé, une somme représentant le montant prélevé sur les salaires des employés, totalisant $1,068.82. Nous partageons cette interprétation du par. (4). Il nous semble que le par. (4), en particulier les six derniers mots, a été inséré dans la Loi dans le but spécifique de soustraire de la masse des biens du failli, par la création d'une fiducie, un montant équivalent aux déductions et d'en faire la propriété du ministre.

. . .

Nous sommes d'accord avec Me Olsson qui soutient au nom du procureur général que le terme «réputé» à la quatrième ligne du par. (4) doit être pris dans le sens d'une présomption irréfragable plutôt que d'une présomption simple, vu que le cas contraire, celui où le montant n'a pas en fait été conservé distinct et séparé, forme spécifiquement l'objet de la dernière partie de ce même paragraphe.

Je trouve le raisonnement suivi dans l'arrêt *Deslauriers* tout à fait convaincant et ferai remarquer qu'en 1956, (chap. 39, art. 27) le Parlement a abrogé le par. 123(6) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, chap. 148, qui constituait «une première charge» sur les biens d'un employeur pour les déductions d'impôt sur le revenu. Je dois en conséquence conclure que la réclamation au titre des déductions d'impôt sur le revenu prélevées sur les salaires versés par l'employeur lui-même avant l'ordonnance de séquestre n'est pas fondée.

Il reste à examiner la question de savoir si les dispositions précitées du *Régime de pensions du Canada* et les dispositions analogues de la *Loi sur*

the *Unemployment Insurance Act* are applicable to a receiver appointed by the Court pursuant to fixed and floating charges covering all assets of an employer company. Subsections 71(2) and (3) of the *Unemployment Insurance Act, 1971* (enacted 1970-71-72, c. 48) read:

(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be made by the insured person but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own monies and shall be deemed to hold the amount so deducted in trust for Her Majesty.

(3) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (2) is deemed 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 or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own monies or from the assets of the estate.

It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions.

The remaining question is whether the realization by the receiver is a "liquidation, assignment or bankruptcy" within the meaning of the provisions under consideration. This question was considered by Osler J. in *Royal Trust Co. v. Montex Apparel Industries Ltd.*[8] His conclusion denying the claim for Unemployment Insurance deductions was

[8] [1972] 2 O.R. 673.

l'assurance-chômage s'appliquent à un séquestre nommé par la Cour en exécution de privilèges fixes et généraux portant sur tout l'actif d'une société employeur. Les paragraphes 71(2) et (3) de la *Loi de 1971 sur l'assurance-chômage* (1970-71-72, chap. 48) se lisent comme suit:

(2) Lorsqu'un employeur a retenu une somme sur la rémunération d'un assuré au titre des cotisations ouvrières que l'assuré doit payer, mais n'a pas versé cette somme au receveur général, il doit séparer cette somme de ses propres fonds et il est censé la détenir en fiducie pour Sa Majesté.

(3) En cas de liquidation, de cession ou de faillite d'un employeur, la somme qui est censée, aux termes du paragraphe (2), être détenue en fiducie pour Sa Majesté est censée ne pas être comprise dans la masse de la liquidation, cession ou faillite, que cette somme ait été séparée ou non des propres fonds de l'employeur ou de l'actif de la masse.

Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt *Avco* précité, la réclamation des déductions au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. A partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions.

La dernière question est celle de savoir si la réalisation par le séquestre constitue une «liquidation, cession ou faillite» au sens des dispositions en cause. Le juge Osler a examiné cette question dans *Royal Trust Company v. Montex Apparel Industries Ltd.*[8] Sa conclusion, rejetant la réclamation des déductions au titre de l'assurance-chômage, a

[8] [1972] 2 O.R. 673.

affirmed on appeal[9]. However, it is important to note that the provision in force at the material time (R.S.C. 1970, c. U-2, subs. 40(2)) did not include the words "whether or not the amount thereof has in fact been kept separate and apart from the employer's own assets or from the assets of the bankrupt estate". At that time those words which are now in subs. 71(3) of the *Unemployment Insurance Act, 1971*, were found only in subs. 24(4) of the Pension Plan and, as we have seen, it is only by reason of those additional words that the claim was allowed in *Deslauriers*. Consequently, in their absence the claim failed on the basis of the reasoning made by Gale C.J.O. which I have already quoted and on which Osler J. relied. This was clearly sufficient to dispose of the point but he went on to say *obiter* (at p. 681):

Although no authority on this branch of the case was cited to me, it is trite law that taxing statutes are to be strictly construed and, in my view, a receivership by order of the Court is not a liquidation, assignment or bankruptcy and hence, neither s. 40 of the *Unemployment Insurance Act* nor s. 24 of the *Canada Pension Plan* have application, regardless of the above reasons. On the facts of the present case, it appears that the receiver has in reality been engaged in liquidating the defendant's enterprise. However, as was pointed out by counsel for the trustee, liquidation is not the inevitable result of a receivership and indeed, there have been many successful receiverships which have resulted in the enterprise being handed back to its owner as a going concern. It cannot be known with any degree of certainty at the moment of the appointment of a receiver whether in fact liquidation is inevitable and the effect of the various statutes must be assessed as at that moment. The task of the receiver might well be made an impossible one if the application of these statutes were made to await the outcome of his endeavours rather than being ascertainable upon his appointment.

With respect, I am unable to agree. We are not concerned with a situation where the receivership does not end up in a liquidation, just as when considering a distribution in bankruptcy one is not concerned with the situation where the receiving order is discharged. We are here dealing with a receivership which was completed by the sale and distribution of all the assets of the employer com-

[9] [1972] 3 O.R. 132.

été confirmée en appel[9]. Il importe cependant de noter que la disposition en vigueur à l'époque (S.R.C. 1970, chap. U-2, par. 40(2) n'incluait pas les termes «que cette somme ait été séparée ou non des propres fonds de l'employeur ou de l'actif de la masse». A l'époque, on ne retrouvait ces termes, qui figurent maintenant au par. 71(3) de la *Loi de 1971 sur l'assurance-chômage*, qu'au par. 24(4) du *Régime de pensions du Canada* et, comme nous l'avons vu, ce n'est qu'à cause de ces termes additionnels que la réclamation a été accueillie dans l'arrêt *Deslauriers*. Par conséquent, en leur absence, la réclamation doit échouer sur la base du raisonnement du juge en chef Gale que j'ai déjà cité et sur lequel le juge Osler s'est fondé. Il est clair que cela suffisait à régler la question, mais celui-ci a poursuivi, en *obiter* (à la p. 681):

[TRADUCTION) Quoique l'on ne m'ait cité aucune jurisprudence sur cet aspect de l'affaire, il est de droit élémentaire que les lois fiscales doivent recevoir une interprétation stricte et, à mon avis, une mise sous séquestre par ordre de la Cour ne constitue pas une liquidation, cession ou faillite et en conséquence ni l'art. 40 de la *Loi sur l'assurance-chômage* ni l'art. 24 du *Régime de pensions du Canada* ne s'appliquent, nonobstant les motifs qui précèdent. Suivant les faits en l'espèce, le séquestre a réellement procédé à la liquidation de l'entreprise de la défenderesse. Cependant, comme l'a fait remarquer l'avocat du fiduciaire, une mise sous séquestre n'a pas pour résultat inévitable la liquidation et, d'ailleurs, de nombreuses mises sous séquestre ont eu pour résultat heureux la remise de l'entreprise en état de fonctionnement à ses propriétaires. Il est impossible de savoir avec certitude au moment de la nomination du séquestre si la liquidation est en fait inévitable et c'est à ce moment-là qu'il faut évaluer la portée des diverses lois. Retarder l'application de ces lois jusqu'à la fin de la tâche du séquestre plutôt que de la déterminer au moment de sa nomination pourrait bien rendre cette tâche impossible.

Avec égards, je ne peux être d'accord. Il ne s'agit pas d'une situation où la mise sous séquestre ne résulte pas en une liquidation. Lors d'une répartition en faillite, on ne se préoccupe pas de la situation qui aurait existé si la déclaration de faillite avait été annulée. Il s'agit en l'espèce d'une mise sous séquestre terminée par la vente et la distribution de tout l'actif de la société employeur.

[9] [1972] 3 O.R. 132.

pany. In the statutes of Canada as they stood when the two provisions we have to construe were enacted, "liquidation" was not the word used to describe the voluntary or forced distribution of the assets of a company, the word used was "winding-up", see the *Winding-up Act*, R.S.C. 1970, c. W-10. However, the word "liquidation" was sometimes used to describe this process of dissolution of a company, for instance, in s. 6 subpar. (*b*) providing for the application of the Act to Canadian Companies:

(*b*) that are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under this Act.

The word is also found in s. 166 with reference to a British or foreign company that "is in liquidation in the country in which its head office is situated". In the *Canada Cooperative Associations Act*, 1970-71-72 (Can.), c. 6, the word "liquidation" is found in s. 74 making the directors liable for employees' wages when, among other cases, the association has

(ii) gone into liquidation or been ordered to be wound up under the *Winding-Up Act*, or has made an assignment under the *Bankruptcy Act* or a receiving order under the *Bankruptcy Act* has been made against it . . .

It seems to me that it would not make sense to hold that, because the assets of a company were realized by a receiver appointed at the request of a creditor rather than by a liquidator or a trustee in bankruptcy appointed by a court, the claim for wages should fail. It appears to me that there is no reason not to give the word "liquidation" its wide meaning in usual language. I would follow the reasoning made by Middleton J.A. in *Davey v. Gibson*[10], at p. 381:

The argument before us turned rather upon a discussion of the question whether the Act should be strictly or liberally construed. It is not, in my view, necessary to enter upon any such discussion. . . .

[10] (1930), 65 O.L.R. 379.

Dans les lois du Canada en vigueur lorsque les deux dispositions que nous devons interpréter ont été adoptées, le terme «*liquidation*» n'était pas employé dans la version anglaise pour décrire la distribution volontaire ou forcée de l'actif d'une société, le terme employé était «*winding-up*», voir la *Loi sur les liquidations*, S.R.C. 1970, chap. W-10. Cependant le terme «*liquidation*» était parfois employé pour décrire le processus de dissolution d'une société, par exemple à l'al. 6*b*) qui prescrit l'application de la Loi aux sociétés canadiennes:

b) qui sont en liquidation ou en voie de passer par la liquidation et, par pétition de la part de quelqu'un de leurs actionnaires ou créanciers, cessionnaires ou liquidateurs, demandent à être assujetties à la présente loi.

Ce terme se retrouve également à l'art. 166, à propos d'une compagnie britannique ou étrangère qui est «en liquidation dans le pays où est situé son siège social». Dans la *Loi sur les associations coopératives du Canada*, 1970-71-72 (Can.), chap. 6, le terme «*liquidation*» se trouve à la version anglaise de l'art. 74 qui exclut la responsabilité des administrateurs pour les salaires des employés à moins que, entre autres conditions, l'association

(ii) ne se soit mise en liquidation ou n'ait été mise en liquidation par ordonnance en vertu de la *Loi sur les liquidations*, ou n'ait fait une cession en vertu de la *Loi sur la faillite*, ou qu'une ordonnance de séquestre n'ait été rendue contre elle en vertu de la *Loi sur la faillite* . . .

Il me paraîtrait absurde de décider que, parce que l'actif d'une société a été réalisé par un séquestre nommé à la demande d'un créancier plutôt que par un liquidateur ou un syndic nommé par un tribunal, la réclamation de salaires devrait échouer. Il ne me paraît pas y avoir de raison de ne pas donner au terme anglais «*liquidation*» son sens large dans la langue courante. J'adopterais le raisonnement fait par le juge Middleton de la Cour d'appel dans l'arrêt *Davey v. Gibson*[10], à la p. 381:

[TRADUCTION] La plaidoirie devant nous a surtout porté sur la question de savoir si la Loi devait recevoir une interprétation stricte ou large. A mon avis, il n'est pas nécessaire de traiter de cette question . . . .

[10] (1930), 65 O.L.R. 379.

The term "gone into liquidation" is not anywhere defined; the language is more or less colloquial, for there is not, at the present time, any legal proceeding known as liquidation. At one time there was, but it has long since been obsolete. The technical term used in the Companies Act is "wind-up," although the officer appointed to conduct the winding-up is designated a liquidator.

If one searches dictionaries, it is not hard to find a definition of liquidation wide enough to include bankruptcy. In the Century Dictionary this is given: "Liquidation: the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of each partner's or shareholder's profit or loss, etc." In the Oxford Dictionary is the following: "Liquidate: Law and commerce: To ascertain and set out clearly the liabilities of (a company or firm) and to arrange the apportioning of the assets; to wind up." In Corpus Juris, that mine of information, is this definition: "Liquidation, a word of French origin, is not a technical term, and, therefore, can have no fixed legal meaning; but it has a fairly defined legal meaning, and it is said to be a term of jurisprudence, of finance, and of commerce. It is defined as the act of settling, adjusting debts, or ascertaining their amounts or balance due; settlement or adjustment of an unsettled account .... Applied to a partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss." . . .

In my opinion the majority in the Court of Appeal of Manitoba properly held that the amount deducted by the employer from employee's wages for Pension Plan and Unemployment Insurance contributions was to be deemed to have been held in trust for Her Majesty at the date of the receiving order and consequently was deemed to have been realized by the receiver out of the assets subject to the floating charge. The exact amount of such assets was not established, but one of the exhibits shows that more than $100,000 were realized from inventory. It is therefore clear that the receiver had ample funds to cover those two small claims.

For those reasons I would allow the appeal only to the extent of deducting from the amount allowed by the judgment of the Court of Appeal

L'expression «*gone into liquidation*» n'est définie nulle part; il s'agit plus ou moins d'une expression courante, car il n'y a pas, aujourd'hui, de procédure juridique connue en anglais sous le nom de «*liquidation*». Cela a déjà été le cas, mais elle est depuis longtemps périmée. Le terme technique employé dans la *Loi sur les compagnies* est «*wind up*», bien que l'officier nommé pour procéder au «*winding-up*» soit appelé un liquidateur.

Si l'on fouille les dictionnaires, il n'est pas difficile de trouver une définition de «*liquidation*» suffisamment large pour inclure la faillite. Dans le Century dictionary, on trouve ceci: «*Liquidation*: l'acte ou l'opération de «*winding-up*» liquider les affaires d'une entreprise ou société, en réalisant l'actif, réglant les débiteurs et créanciers, et répartissant le montant du profit ou de la perte de chaque associé ou actionnaire, etc.» Dans l'Oxford Dictionary, on trouve ceci: «*Liquidate*: droit et commerce: déterminer et calculer clairement les dettes (d'une société ou entreprise) et répartir l'actif; (to) «*wind up*». Dans le Corpus Juris, cette mine de renseignements, se trouve la définition suivante: «*Liquidation*», un mot d'origine française, n'est pas un terme technique, et, en conséquence, il ne peut avoir de sens fixe en droit; mais il est assez bien défini en droit, et l'on dit qu'il s'agit d'un terme de doctrine, de finance et de commerce. Il est défini comme l'acte de régler, calculer des dettes, ou d'en déterminer le montant ou solde dû; règlement ou calcul d'un compte indéterminé . . . Dans le cas d'une association ou société, l'acte ou l'opération de «*winding-up*» liquider les affaires d'une entreprise ou société en réalisant l'actif, réglant les débiteurs et créanciers et répartissant le montant du profit ou de la perte.» . . .

A mon avis, c'est à bon droit que la majorité de la Cour d'appel du Manitoba a statué que le montant que l'employeur a prélevé sur les salaires des employés au titre des contributions au Régime de pensions et à l'assurance-chômage devait être réputé avoir été détenu en fiducie pour Sa Majesté à la date de l'ordonnance de séquestre et, en conséquence, devait être réputé avoir été réalisé par le séquestre à même l'actif grevé du privilège général. Le montant exact de cet actif n'a pas été établi, mais une des pièces démontre que la réalisation du stock a produit plus de $100,000. Il est donc clair que le séquestre avait des fonds suffisants pour régler ces deux petites réclamations.

Pour ces motifs, je suis d'avis d'accueillir le pourvoi à seule fin de déduire du montant accordé par la Cour d'appel la somme réclamée pour les

the sum claimed for income tax deductions made prior to the date of the receiving order, that is, $2,550.78, with the appropriate adjustment for interest and penalties as directed by the Court of Appeal (*per* Monnin J.A. at p. 523). The appellant succeeds on a major point and, in the circumstances of the case where no costs have been allowed below, I think it is entitled to costs in this Court.

The reasons of Estey and Chouinard JJ. were delivered by

ESTEY J. (*dissenting in part*)—The issue arising in these proceedings is whether or not a receiver appointed by the court to enforce security granted by the defendant/debtor to the plaintiff/appellant is obligated to pay to the respondent, in priority to the claims of the appellant as a secured creditor, certain moneys with reference to deductions made (or which, in the view of the respondent, should have been made) from wages paid or payable by the defendant under three federal statutes.

For simplicity, the plaintiff/appellant will be referred to as Dauphin, the debtor/defendant and the employer in question as Xyloid, and Her Majesty The Queen in the Right of Canada as the respondent. On March 31, 1977, Dauphin obtained the appointment by the Court of Queen's Bench of the Province of Manitoba of a receiver and manager (the Clarkson Company Ltd.) of "all the undertaking, property and assets of" Xyloid. In due course, the receiver/manager (hereinafter referred to as the "receiver") realized the assets secured by a debenture, a floating charge and a chattel mortgage and distributed the net proceeds of such realizations, less the sum of $7,416.57, which upon the discharge of the receiver by Deniset J. was directed to be held until the validity and priority of the claims of the respondent under certain federal statutes was determined by the court. We are not here concerned with the events leading up to the discharge of the receiver and indeed the record does not reveal whether the aforementioned sum of $7,416.57 was the product of realization of the fixed charge in the debenture, the assets secured by the chattel mortgage, or the floating charge embodied in the debenture. Nothing appears to turn upon the origin of these funds.

déductions d'impôt faites avant l'ordonnance de séquestre, soit la somme de $2,550.78, avec rajustement en conséquence de l'intérêt et des pénalités comme la Cour d'appel l'a ordonné (le juge Monnin à la p. 523). L'appelante réussit sur un point majeur et, dans les circonstances de l'espèce où aucuns dépens n'ont été adjugés dans les cours d'instance inférieure, je suis d'avis qu'elle a droit aux dépens en cette Cour.

Version française des motifs des juges Estey et Chouinard rendus par

LE JUGE ESTEY (*dissident en partie*)—Il s'agit en l'espèce de savoir si un séquestre nommé par la cour pour réaliser une garantie consentie par la défenderesse-débitrice à la demanderesse-appelante est tenu de payer à l'intimée, par préférence aux réclamations de l'appelante à titre de créancière garantie, des sommes relatives à des déductions faites en vertu de trois lois fédérales (ou qui, de l'avis de l'intimée, auraient dû l'être) sur le salaire payé ou payable par la défenderesse.

Pour plus de commodité, la demanderesse-appelante sera appelée Dauphin, la défenderesse-débitrice et employeur en cause, Xyloid, et Sa Majesté la Reine du chef du Canada, l'intimée. Le 31 mars 1977, Dauphin a obtenu de la Cour du banc de la Reine de la province du Manitoba la nomination d'un séquestre-gérant (Clarkson Company Ltd.) pour [TRADUCTION] «la totalité de l'entreprise, des biens et de l'actif de» Xyloid. En temps utile, le séquestre-gérant (ci-après appelé le «séquestre») a réalisé l'actif garanti par une obligation, un privilège général et une hypothèque mobilière et en a distribué le produit net, moins la somme de $7,416.57, dont, à la libération du séquestre par le juge Deniset, on a ordonné la retenue jusqu'à ce que la validité et le rang des réclamations de l'intimée en vertu de certaines lois fédérales soient établis par la Cour. Nous ne nous intéressons pas en l'espèce aux circonstances qui ont conduit à la libération du séquestre et, d'ailleurs, le dossier ne révèle pas si la somme susmentionnée de $7,416.57 est le produit de la réalisation du privilège fixe prévu par l'obligation, des éléments d'actif grevés par l'hypothèque mobilière ou du privilège général constaté par l'obligation. L'origine de ces sommes n'a apparemment pas d'incidence.

It is important, however, to appreciate that prior to the appointment of the receiver (which I shall refer to for convenience as the pre-appointment period), Xyloid paid certain wages to its employees and effected the deductions prescribed by the *Income Tax Act* of Canada, the *Canada Pension Plan Act* and the *Unemployment Insurance Act*. With reference to these payments, the learned trial judge found that Xyloid made the statutory deductions. He stated:

I accept as factual that the required statutory amounts were deducted by the defendant before or when the wage payments were made by it *before* the date of the receivership.

However, Xyloid did not remit the funds so withheld to the respondent nor did it keep such deductions or withholdings separate and apart from its "own moneys or from the assets of . . ." Xyloid. After the appointment of the receiver (and this period I shall for convenience refer to as the post-appointment period), the receiver paid to the employees of Xyloid wages accruing in the pre-appointment period, allegedly pursuant to *The Payment of Wages Act* of Manitoba. When doing so, the receiver made no remittance to the respondent (and by this, I mean to include all agencies and departments of the respondent) in respect of the three federal statutes.

It is sufficient to observe in passing that in the post-appointment period the receiver carried on some operations of Xyloid and engaged in that connection some former employees of Xyloid to whom wages were paid by the receiver and remittances were forwarded to the respondent pursuant to the three above-mentioned federal statutes. No issue arises with respect to this phase of the receiver's activities.

The only issue therefore arising is what priority, if any, did the respondent enjoy by virtue of these federal statutes over the claims of Dauphin as the secured creditor of Xyloid with reference to the moneys held by the receiver in the amount of $7,416.57.

1. Payments made by the receiver in the post-appointment period

It is convenient to commence with the position taken by the appellant with reference to the pay-

Il importe, cependant, de se rendre compte qu'avant la nomination du séquestre (période que j'appellerai pour plus de commodité la période de pré-nomination), Xyloid a versé du salaire à ses employés et effectué les déductions prescrites par la *Loi de l'impôt sur le revenu* du Canada, le *Régime de pensions du Canada* et la *Loi sur l'assurance-chômage*. A l'égard de ces versements, le savant juge de première instance a conclu que Xyloid avait effectué les déductions obligatoires. Il a dit:

[TRADUCTION] . . . j'accepte comme établi que la défenderesse a déduit les sommes exigées par la loi avant de verser les salaires ou au moment où elle les a versés et cela, *avant* la date de la mise sous séquestre.

Xyloid n'a cependant pas remis à l'intimée les fonds ainsi retenus et n'a pas tenu ces déductions ou retenues séparées de ses propres fonds ou de son actif. Après la nomination du séquestre (période que j'appellerai pour plus de commodité la période de post-nomination), le séquestre a versé aux employés de Xyloid du salaire gagné durant la période de pré-nomination, apparemment en conformité de *The Payment of Wages Act* du Manitoba. Ce faisant, le séquestre n'a rien remis à l'intimée (par cela, je veux dire tous les organismes et ministères de l'intimée) au titre des trois lois fédérales.

Il suffit de faire remarquer en passant que pendant la période de post-nomination le séquestre a poursuivi certaines activités de Xyloid et, pour ce faire, a embauché d'anciens employés de Xyloid auxquels il a versé du salaire à l'égard duquel des sommes ont été versées à l'intimée conformément aux trois lois fédérales susmentionnées. Cette phase des activités du séquestre ne fait l'objet d'aucun litige.

La seule question est donc celle de savoir si, en vertu de ces lois fédérales, l'intimée doit être préférée aux créances de Dauphin à titre de créancière garantie de Xyloid, à l'égard de la somme de $7,416.57 détenue par le séquestre.

1. Paiements effectués par le séquestre pendant la période de post-nomination

Il est préférable d'aborder en premier lieu la position adoptée par l'appelante à l'égard de ce que

ment by the receiver in the post-appointment period to the former employees of Xyloid of certain moneys accruing to them as wages in the pre-appointment period. The appellant states that these payments were made by the receiver pursuant to *The Payment of Wages Act* of Manitoba, the relevant terms of which are as follows:

7(1) Notwithstanding any other Act, the amount of wages due and payable by an employer to an employee not exceeding $2,000.00 constitutes a lien and charge on the property and assets of the employer in favour of the employee, and is payable in priority to any other claim or right, including those of the Crown In Right of Manitoba, and without limiting the generality of the foregoing that priority extends over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage on real or personal property, debenture and security, whether registered or not, made, given, accepted or issued before or after the coming into force of this Act.

3(4) Every employer shall be deemed to hold the wages accruing due to an employee in trust for the employee whether or not the amount thereof has been kept separate and apart by the employer and the employee has a lien and charge in the amount of wages on the assets of the employer that in the ordinary course of business would be entered in the accounts of the business of the employer whether so entered or not.

1(h) "wage" or "wages" includes salaries, commissions, or any compensation for labour or services measured by time, piece, or otherwise, and any pay which is due and payable to an employee including moneys payable under The Vacations With Pay Act or moneys payable in cases of termination of employment under The Employment Standards Act; but does not include any deductions from wages that may be lawfully made by an employer.

24 Where there is a conflict between the provisions of this Act and those of any other Act of the Legislature, the provisions of this Act prevail.

The appellant submits that the Manitoba statute constitutes a statutory lien against the assets of Xyloid in favour of the latter's employees, and is payable in priority to "any other claim or right . . . whether registered or not, made, given . . . or issued before or after the coming into force of this Act". Furthermore, the statute provides that the employer shall "be deemed to hold the wages

le séquestre a versé pendant la période de post-nomination aux anciens employés de Xyloid à titre de salaire gagné pendant la période de pré-nomination. L'appelante affirme que le séquestre a effectué ces versements conformément à *The Payment of Wages Act* du Manitoba, dont voici les dispositions pertinentes:

[TRADUCTION] 7(1) Nonobstant toute autre loi, le montant du salaire n'excédant pas $2,000, dû et payable par un employeur à un employé, constitue une créance privilégiée sur les biens et l'actif de l'employeur, payable à l'employé par préférence à toute autre dette ou créance, y compris celles de Sa Majesté du chef du Manitoba et, sans limiter la portée de ce qui précède, ce privilège prévaut contre toute cession, y compris une cession de créance, absolue ou non, toute hypothèque sur biens réels ou personnels, obligation et garantie enregistrée ou non, faite, donnée, acceptée ou émise avant ou après l'entrée en vigueur de la présente loi.

3(4) Tout employeur est réputé détenir en fiducie pour l'employé le salaire qui lui est dû, qu'il ait gardé ou non ce montant à part, et l'employé détient une créance privilégiée sur l'actif de l'employeur pour le montant du salaire qui, dans le cours ordinaire des affaires, figurerait dans les livres de l'entreprise de l'employeur, qu'il y figure ou non.

1h) «salaire» ou «salaires» comprend un traitement, une commission ou autre indemnité pour un travail ou des services mesurés au temps, à la pièce ou autrement, et toute rémunération due et payable à un employé y compris les sommes payables en vertu de The Vacations With Pay Act ou les sommes payables en cas de cessation d'emploi en vertu de The Employment Standards Act; mais ne comprend pas les déductions du salaire qu'un employeur peut légalement faire.

24 En cas de conflit entre les dispositions de la présente loi et celles de toute autre loi de la Législature, les dispositions de la présente loi ont priorité.

L'appelante fait valoir que la loi du Manitoba crée un privilège sur l'actif de Xyloid en faveur des employés de celle-ci, et qu'on doit le régler par préférence [TRADUCTION] «à toute autre dette ou créance . . . enregistrée ou non, faite, donnée . . . ou émise avant ou après l'entrée en vigueur de la présente loi». De plus, la Loi dispose que l'employeur (Xyloid) [TRADUCTION] «est réputé déte-

accruing . . ." in trust for the employee "whether or not the amount thereof has been kept separate and apart by" Xyloid. By reason of the definition of "wage" in s. 1(h), the receiver, in the submission of the appellant, properly paid off this lien in the statutory amount, being the wages accruing but not including any deductions therefrom "that may be lawfully made by an employer". In the result, according to this line of argument, the receiver applied the net realizations from the assets secured by the aforementioned debenture, chattel mortgage and floating charge to the extent necessary to pay off the statutory lien arising under the Manitoba statute.

In determining the consequences in law of the payment by the receiver in response to the Manitoba Act in the post-appointment period, one must determine whether the payments were in fact and in law the payment of wages, or whether the effect of the Act is that the payment in question was a payment of debt. I have concluded that the Manitoba statute has created a charge secured by a statutory lien against the assets of Xyloid, in an amount equal to the wages owing as defined in the Act, which means those wages owing less an amount equal to lawful deductions that may be made by an employer. The portion of the pool of assets of the employer's estate so charged (and which here is included in the security being enforced by the court through a receivership) is limited to a defined portion of the accrued wages which remained unpaid at the time of the appointment of the receiver and the receipt by him of the assets of the employer.

In the interpretation and the application of the Manitoba statute to these circumstances, it is important to note that the lien and charge on the assets of Xyloid in favour of the employees arose when the wages became "due and payable" and hence the charge in respect of such accrued wages came into being on their accrual. This was prior to the appointment of the receiver and prior to any deductions made by Xyloid under the federal statutes.

But even if this be so, the application of the federal statutes still must be determined by an interpretation thereof to ascertain their intended

nir le salaire gagné . . .» en fiducie pour l'employé, qu'il «ait gardé ou non ce montant à part». Vu la définition de salaire à l'al. 1h), c'est à bon droit que le séquestre, selon l'appelante, a réglé cette créance privilégiée au montant fixé par la Loi, savoir le salaire gagné, sans y inclure les déductions «qu'un employeur peut légalement faire». En définitive, si l'on adopte ce raisonnement, le séquestre a utilisé le produit net de la réalisation de l'actif donné en garantie de l'obligation, de l'hypothèque mobilière et du privilège général susmentionnés dans la mesure nécessaire pour régler la créance privilégiée créée par la loi du Manitoba.

Pour déterminer les conséquences juridiques du paiement qu'a effectué le séquestre en application de la loi du Manitoba pendant la période de post-nomination, il faut déterminer s'il représentait, en fait et en droit, un salaire, ou s'il résulte de la Loi qu'il s'agissait du règlement d'une dette. J'ai conclu que la loi du Manitoba a créé une créance garantie par un privilège sur l'actif de Xyloid, d'un montant égal aux salaires dus suivant la définition de la Loi, savoir les salaires dus, moins une somme égale aux déductions qu'un employeur peut légalement faire. L'étendue de l'actif de l'employeur qui est ainsi grevé (et qui est en l'espèce inclus dans la garantie à laquelle la cour a donné effet par la mise sous séquestre) se limite à une partie précise du salaire impayé au moment où le séquestre a été nommé et où il a reçu l'actif de l'employeur.

Dans l'interprétation et l'application de la loi du Manitoba en l'espèce, il importe de noter que le privilège sur l'actif de Xyloid au profit des employés est né lorsque le salaire est devenu «dû et payable» et, par conséquent, que le privilège y afférent est né une fois ce salaire gagné, c'est-à-dire avant la nomination du séquestre et avant que Xyloid ne fasse de déductions en vertu des lois fédérales.

Mais, même si c'est le cas, il faut malgré tout interpréter les lois fédérales afin d'établir leur portée envisagée et de décider de leur application.

reach. The three federal statutes provide as follows:

The Income Tax Act (hereafter referred to as ITA) s. 227 Withholding Taxes

(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) All amounts deducted or withheld by a person under this Act shall be kept separate and apart from his own moneys and in the event of any liquidation, assignment or bankruptcy [of an employer] the said amounts shall remain apart and form no part of the estate in liquidation, assignment or bankruptcy.

The Canada Pension Plan Act (hereafter referred to as CPPA)

s. 24(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.

s. 24(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by sub-section (3) is deemed 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 or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

The Unemployment Insurance Act (hereafter referred to as UIA)

s. 71(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be made by the insured person but has not remitted such amount to the Receiver General, the employer shall keep such amount separate and apart from his own monies and shall be deemed to hold the amount so deducted in trust for Her Majesty.

s. 71(3) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by sub-section (2) is deemed 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 or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own monies or from the assets of the estate. (Emphasis added.)

Les trois lois fédérales prévoient ce qui suit:

La Loi de l'impôt sur le revenu (ci-après la LIR) art. 227 Retenue des impôts

(4) Toute personne qui déduit ou retient un montant quelconque en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.

(5) Tous les montants déduits ou retenus par une personne en conformité de la présente loi doivent être tenus séparés de ses propres fonds et, dans le cas d'une liquidation, cession ou faillite [d'un employeur], ces montants doivent demeurer à part et ne former aucune partie des biens en liquidation, cession ou faillite.

Le Régime de pensions du Canada (ci-après le RPC)

24(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.

24(4) En cas de liquidation, de cession ou de faillite d'un employeur, un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.

La Loi sur l'assurance-chômage (ci-après la LAC)

71(2) Lorsqu'un employeur a retenu une somme sur la rémunération d'un assuré au titre des cotisations ouvrières que l'assuré doit payer, mais n'a pas versé cette somme au receveur général, il doit séparer cette somme de ses propres fonds et il est censé la détenir en fiducie pour Sa Majesté.

71(3) En cas de liquidation, de cession ou de faillite d'un employeur, la somme qui est censée, aux termes du paragraphe (2), être détenue en fiducie pour Sa Majesté est censée ne pas être comprise dans la masse de la liquidation, cession ou faillite, que cette somme ait été séparée ou non des propres fonds de l'employeur ou de l'actif de la masse. (C'est moi qui souligne.)

The ITA, for example, requires that "every person paying salary or wages or other remuneration to an employee shall deduct . . .". Assuming for the moment that the definition of 'person' includes a receiver*, is that person liable to make deductions from payments which in law at the moment of payment were not wages but amounts paid to satisfy a statutory lien? I do not think the statute can be so read, for the reasons stated above.

As regards the other federal statutes, apart altogether from the other reasons I have discussed, I reach the same conclusion as regards the taxation statute for the additional reason that both the UIA and the CPPA by their express terminology contemplate a payment by an employer, and the receiver here is neither employer nor the agent of the employer.

In my view, then, the result is that the lien against the assets of Xyloid as subsequently received by the receiver on its appointment was in existence at the time of that appointment, and attached to and continued to exist as a lien and charge on those assets into the post-appointment period. The receiver, in making the payments it did to the former employees of Xyloid, was not distributing wages to those employees but was rather simply paying off the statutory lien and charge. In doing so, it clearly did not act as the

La LIR exige, par exemple, que «toute personne qui verse un traitement ou salaire ou autre rémunération à un employé doit en déduire . . .». Si l'on présume pour le moment que la définition de «personne» comprend un séquestre*, cette personne est-elle tenue de faire des déductions sur des montants qui, en droit, au moment du paiement, ne constituaient pas du salaire mais des montants versés en règlement d'une créance privilégiée créée par la loi? Pour les motifs que j'ai exposés, je ne crois pas que l'on puisse interpréter la loi en ce sens.

Quant aux autres lois fédérales, abstraction faite des autres motifs que j'ai déjà énoncés, je viens à la même conclusion que dans le cas de la loi fiscale pour le motif supplémentaire que les termes tant de la LAC que du RPC envisagent expressément un versement par un employeur, et le séquestre en l'espèce n'est ni employeur ni mandataire de l'employeur.

A mon avis, il en découle donc que le privilège sur l'actif de Xyloid dont le séquestre a pris possession à sa nomination, existait au moment de cette nomination et qu'il a continué à grever cet actif pendant la période de post-nomination. Lorsque le séquestre a fait ces versements aux anciens employés de Xyloid, il ne leur distribuait pas un salaire, mais réglait simplement la créance privilégiée créée par la loi. Ce faisant, il est clair qu'il n'agissait pas comme mandataire de Xyloid mais simplement comme officier de la cour dans l'exé-

* It has been found in other courts (*vide* Aylesworth J.A. in *Royal Trust v. Montex*, [1972] 3 O.R. 132) that 'person' as defined in s. 2(1)(*c*) of the *Excise Tax Act* does not include a receiver. The definition in the present *Income Tax Act*, which is about the same as that in the *Excise Tax Act*, reads as follows:

> "person", or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends.

No explanation is found in the judgment for this conclusion, but the trial judge in these proceedings applied the case and reached the same conclusion. I do not find it necessary to determine whether 'person' includes a receiver, but if such a conclusion were necessary, I would be inclined to believe that applying the definition in s. 248 to the operative words of s. 153(1), the term 'person' does include a receiver in the circumstances here present.

*D'autres tribunaux ont décidé (voir le juge d'appel Aylesworth dans *Royal Trust v. Montex*, [1972] 3 O.R. 132) que «personne» définie à l'al. 2(1)*c*) de la *Loi sur la taxe d'accise*, ne comprend pas un séquestre. La définition dans l'actuelle *Loi de l'impôt sur le revenu*, qui est semblable à celle de la *Loi sur la taxe d'accise*, se lit comme suit:

> «personne» ou tout mot ou expression désignant une personne, comprend tout corps constitué et politique, les héritiers, exécuteurs testamentaires, administrateurs ou autres représentants légaux de cette personne, selon la loi de la partie du Canada visée par le contexte;

On ne trouve aucune explication de cette conclusion dans l'arrêt, mais le juge de première instance en l'espèce a appliqué cet arrêt et en est venu à la même conclusion. Je n'estime pas qu'il soit nécessaire de décider si le mot «personne» comprend un séquestre, mais si pareille conclusion était nécessaire, je serais porté à croire qu'en appliquant la définition de l'art. 248 aux termes du par. 153(1), le mot «personne» comprendrait effectivement le séquestre dans les circonstances de l'espèce.

agent of Xyloid but simply as an officer of the court in the discharge of its responsibilities under the order of appointment. See *Falconbridge on Mortgages*, 4th ed. (1977), pp. 759-60, quoted with approval by the Manitoba Court of Appeal in *International Woodworkers of America, Local 1-324 v. Wescana Inn Ltd. and Clarkson Company Limited*[11], at p. 204. See also R.W.S. Johnston, "Receivers", L.S.U.C. Special Lectures (1961) 101, at p. 105. This comment in the *Wescana* judgment, *supra*, at p. 204, seems at odds on this point with the judgment of the Court of Appeal in this case: see (1979), 29 CBR 276 at p. 283.

Therefore, I conclude that Dauphin succeeds and is entitled as against the respondent to retain the sum of $3,474.83 claimed by the respondent with reference to the post-appointment period.

2. The pre-appointment period

I turn now to the pre-appointment period in respect of which additional conditions arise. From the record in these proceedings it is clear that Xyloid, contrary to the direction contained in each of the CPPA, the UIA and the ITA failed to keep "separate and apart from his own moneys . . ." any amount so deducted or withheld upon the payment of wages to its then employees. Each of the three sections, after giving such a direction, provides in different ways that the moneys deducted or withheld are "in trust for Her Majesty". The terms of the CPPA and the UIA are identical and provide that these moneys shall be deemed to be held in trust; and furthermore "in the event of any liquidation, assignment or bankruptcy of an employer . . . shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employers own moneys or from the assets of the estate". Whether this provision, which is found in s. 24(4) of the CPPA and s. 71(3) of the UIA, is applicable turns upon the interpretation of the expression "liquidation, assignment or bankruptcy of an employer". Clearly, there has been no assignment or bankruptcy of Xyloid and the question

[11] (1977), 27 C.B.R. (N.S.) 201.

cution des obligations imposées par l'ordonnance de nomination. Voir *Falconbridge on Mortgages*, 4e éd. (1977), aux pp. 759 et 760, que la Cour d'appel du Manitoba a cité avec approbation dans l'arrêt *International Woodworkers of America, Local 1-324 v. Wescana Inn Ltd. and Clarkson Company Limited*[11], à la p. 204. Voir aussi R.W.S. Johnston, «Receivers», L.S.U.C. Special Lectures (1961) 101, à la p. 105. Le commentaire dans l'arrêt *Wescana* précité, à la p. 204, paraît contredire sur ce point l'arrêt de la Cour d'appel en l'espèce: voir (1979), 29 CBR 276 à la p. 283.

En conséquence, je conclus que Dauphin a gain de cause et a droit de conserver la somme de $3,474.83 que l'intimée réclame à l'égard de la période de post-nomination.

2. La période de pré-nomination

Je passe maintenant à la période de pré-nomination à l'égard de laquelle des éléments supplémentaires entrent en ligne de compte. Il ressort clairement du dossier que, contrairement aux obligations imposées respectivement par le RPC, la LAC et la LIR, Xyloid a omis de conserver "distrinct et séparé de ses propres fonds . . ." tout montant déduit ou retenu du salaire de ses employés d'alors. Après avoir créé cette obligation, chacune des trois dispositions établit de différentes façons que les sommes déduites ou retenues le sont "en fiducie pour Sa Majesté". Les termes employés par le RPC et la LAC sont presque identiques et établissent que ces montants sont réputés détenus en fiducie; et de plus qu'"en cas de liquidation, de cession ou de faillite d'un employeur, . . . (ce montant) doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur et de la masse des biens". L'application de cette disposition, que l'on trouve au par. 24(4) du RPC et en des termes presque identiques au par. 71(3) de la LAC, dépend de l'interprétation de l'expression "liquidation, cession ou faillite d'un employeur". Il

[11] (1977), 27 C.B.R. (N.S.) 201.

therefore is, has there been a liquidation of Xyloid. The term has been variously defined in legal and other dictionaries and the following are illustrative.

Stroud's Judicial Dictionary, 4th ed., vol. 3, at p. 1555:

Liquidation. Voluntary liquidation of a company, though merely for the purpose of reconstruction, is none the less a "liquidation" within a clause of forfeiture in a lease to the company (*Horsey v. Steiger* [1898] 2 Q.B. 259). But a voluntary liquidation is equivalent to "bankruptcy", as that latter word was used in Conveyancing and Law of Property Act 1881 (c. 41), s. 14(6,i), and Conveyancing and Law of Property Act 1892 (c. 13), s. 2(2); . . .

Shorter Oxford English Dictionary, 1959, p. 1150:

Liquidation . . .

1. Law. The action or process of ascertaining and apportioning the amounts of a debt, etc.

2. The clearing off or settling (of a debt) 1786.

3. The action or process of winding up a company; the state or condition of being wound up; esp. in phr. to go into l. 1869.

Black's Law Dictionary

Liquidation. The act or process of settling or making clear, fixed, and determinate that which before was uncertain or unascertained. Payment, satisfaction, or collection; realization on assets and discharge of liabilities. To clear away (to lessen) a debt. Craddock-Terry Co. v. Powell, 180 Va. 242, 22 S.E.2d 30, 34. To pay or settle. In re Klink's Estate, 310 Ill.App. 609, 35 N.E.2d 684, 687. To take over for collection. Belden v. Modern Finance Co., Ohio App., 61 N.E.2d 801, 804, 44 O.L.A. 163. Winding up or settling with creditors and debtors. Wilson v. Superior Court in and for Santa Clara County, 2 Cal.2d 632, 43 P.2d 286, 288. Winding up of corporation so that assets are distributed to those entitled to receive them. Process of reducing assets to cash, discharging liabilities and dividing surplus or loss.

. . .

The term as employed in our law generally, whether or not it be qualified by the presence of the words 'assignment' or 'bankruptcy', relates either to the realization of assets to pay debts or to the total disposition of the undertaking of an entity

est clair qu'il n'y a pas eu de cession ni de faillite de Xyloid et la question est donc de savoir s'il y a eu une liquidation. Le terme a été défini de différentes façons par les dictionnaires juridiques et les autres, ce qu'illustrent les définitions suivantes:

Stroud's Judicial Dictionary, 4e éd., vol. 3, à la p. 1555:

[TRADUCTION] Liquidation. La liquidation volontaire d'une compagnie, bien que dans le seul but de réorganisation, n'en constitue pas moins une "liquidation" au sens d'une clause de résiliation dans un bail consenti à la compagnie (*Horsey v. Steiger* [1898] 2 Q.B. 259). Mais une liquidation volontaire équivaut à une "faillite", au sens où ce terme a été employé dans la *Conveyancing and Law of Property Act 1881* (chap. 41), art. 14(6,i), et la *Conveyancing and Law of Property Act 1892* (chap. 13), par. 2(2); . . .

Shorter Oxford English Dictionary, 1959, p. 1150:

[TRADUCTION] Liquidation . . .

1. Droit. L'action ou le processus qui consiste à calculer et à répartir le montant d'une dette, etc.

2. La compensation ou le règlement (d'une dette) 1786.

3. L'action ou le processus qui consiste à dissoudre (winding-up) une compagnie; l'état ou le résultat de la dissolution; not. dans l'express. se mettre en liquidation 1869.

Black's Law Dictionary

[TRADUCTION] Liquidation. L'acte ou le processus qui consiste à régler ou compenser, à fixer et à déterminer ce qui était auparavant incertain ou indéterminé. Paiement, règlement ou perception; réalisation de l'actif et acquittement des dettes. Supprimer (diminuer) une dette. Craddock-Terry Co. v. Powell, 180 Va. 242, 22 S.E. 2d 30, 34. Payer ou régler. In re Klink's Estate, 310 Ill. App. 609, 35 N.E. 2d 684, 687. Prendre en charge pour perception. Belden v. Modern Finance Co., Ohio App., 61 N.E. 2d 801, 804, 44 O.L.A. 163. Dissolution ou règlement avec les créanciers et débiteurs. Wilson v. Superior Court in and for Santa Clara County, 2 Cal. 2d 632, 43 P. 2d 286, 288. Dissolution d'une société de sorte que l'actif est distribué à ceux qui y ont droit. Processus qui consiste à transformer l'actif en argent comptant, à acquitter les dettes et à diviser le surplus ou la perte.

. . .

Le terme est généralement employé dans notre droit, qu'il soit ou non accompagné des termes "cession" ou "faillite", à l'égard soit de la réalisation de l'actif pour régler des dettes soit de la vente totale d'une entité incluant non seulement la réali-

including not only the realization of assets to pay debts but for the distribution of any net surplus to the owners of the entity prior to its termination. Where the term is used as in the pension and unemployment statutes with reference to the liquidation "of an employer", it is clear, in my view, that the term carries its broad and general meaning, that is the process of disposing of an undertaking and terminating the existence of the entity. As that has not happened here, the provisions of subs. (4) of the CPPA and (3) of the UIA are not applicable. Osler J., sitting at trial in *Royal Trust Co. v. Montex Apparel Industries Ltd.*[12], reaches the same conclusion by still another avenue when he states:

On the facts of the present case, it appears that the receiver has in reality been engaged in liquidating the defendant's enterprise. However, as was pointed out by counsel for the trustee, liquidation is not the inevitable result of a receivership and indeed, there have been many successful receiverships which have resulted in the enterprise being handed back to its owner as a going concern. It cannot be known with any degree of certainty at the moment of the appointment of a receiver whether in fact liquidation is inevitable and the effect of the various statutes must be assessed as at that moment. The task of the receiver might well be made an impossible one if the application of these statues were made to await the outcome of his endeavours rather than being ascertainable upon his appointment.

It may be argued that the term 'liquidation' would apply to the lesser project, that is to say realization of assets for the purpose of paying a debt, where the debt in question was secured by an all-embracing charge reaching, as is apparently the case here, 100 per cent of the assets. The argument would be that since the process of realization reduces the undertaking to zero, the entity has, in one sense at least, been put in liquidation. As a legal proposition, however, it is not sound because even in that circumstance, the charter still remains in existence, and upon the discharge of the receiver, the entity remains under the control of its owners and although its assets may be nil and although some of its liabilities may still survive in law, it cannot be said that the entity has either been liquidated or placed in liquidation.

[12] [1972] 2 O.R. 673.

sation de l'actif pour régler les dettes, mais la distribution du surplus net aux propriétaires de l'entité avant qu'elle disparaisse. Lorsque le terme est utilisé dans les lois sur les pensions et l'assurance-chômage à l'égard de la liquidation "d'un employeur", il est clair, à mon avis, qu'il l'est dans son sens large et général, c'est-à-dire le processus qui consiste à vendre une entreprise et à mettre fin à l'existence de l'entité. Comme cela ne s'est pas produit ici, les dispositions des par. (4) du RPC et (3) de la LAC ne sont pas applicables. Le juge Osler, siégeant en première instance dans *Royal Trust Co. v. Montex Apparel Industries Ltd.*[12], en vient à la même conclusion par une autre voie lorsqu'il dit:

[TRADUCTION] Suivant les faits en l'espèce, le séquestre a réellement procédé à la liquidation de l'entreprise de la défenderesse. Cependant, comme l'a fait remarquer l'avocat du fiduciaire, une mise sous séquestre n'a pas pour résultat inévitable la liquidation et, d'ailleurs, de nombreuses mises sous séquestre ont eu pour résultat heureux la remise de l'entreprise en état de fonctionnement à ses propriétaires. Il est impossible de savoir avec certitude au moment de la nomination du séquestre si la liquidation est en fait inévitable et c'est à ce moment-là qu'il faut évaluer la portée des diverses lois. Retarder l'application de ces lois jusqu'à la fin de la tâche du séquestre plutôt que de la déterminer au moment de sa nomination pourrait bien rendre cette tâche impossible.

On peut soutenir que le terme «liquidation» s'applique au projet moindre de la réalisation de l'actif pour régler une dette, lorsque la dette en question est garantie par un privilège général grevant, comme c'est apparemment le cas en l'espèce, cent pour cent de l'actif. Le fondement de l'argument serait que, puisque la réalisation réduit l'entreprise à zéro, l'entité, dans un sens au moins, a été mise en liquidation. En droit, cependant, ce n'est pas une proposition valable car, même dans ce cas, la charte demeure, et sur libération du séquestre, l'entité demeure sous le contrôle de ses propriétaires et, bien que son actif puisse être nul et qu'une partie de son passif puisse encore exister en droit, on ne peut dire que l'entité a été liquidée ou mise en liquidation.

[12] [1972] 2 O.R. 673.

The appropriate definition of the word as employed in the relevant sections is that relating to the liquidation of an entity inasmuch as the term is used in the CPPA and UIA with reference to "the liquidation . . . of an employer". In s. 227(5) of the *Income Tax Act* the term is used in company with "assignment" or "bankruptcy" but without express reference to an entity, such as an employer. The subsection goes on to refer, however, to "the estate in liquidation" which plainly refers to the 'liquidation' of the entity and not simply to the liquidation of a part of its assets in the process of payment of a particular secured debt. Furthermore, the three words 'liquidation, assignment or bankruptcy' together all pertain to an entity which has either gone into liquidation, made an assignment, or been placed in bankruptcy. This is particularly the case where, as here, the subsection requires that the amounts so withheld be kept separate and apart from the moneys of a person effecting the withholding, and hence the 'liquidation, assignment or bankruptcy' relates to that person as an entity and not only to the assets of that entity. Hence the meaning to be properly applied to the word 'liquidation' in each of these three statutes is liquidation of the employer entity. In legal matters, such a term connotes the winding up of the entity by realizing upon its assets, paying off its liabilities, and distributing the surplus, if any, rateably amongst shareholders according to their precedence. There is here, of course, no such proceeding with reference to Xyloid and hence the provisions of subs. (4) of s. 24 of the CPPA, subs. (3) of s. 71 of the UIA and s. 227(4) and (5) of the *Income Tax Act* have no application.

La définition correcte du terme employé dans les dispositions pertinentes est celle qui a trait à la liquidation d'une entité puisque dans le RPC et la LAC, le terme est employé à l'égard de «la liquidation . . . d'un employeur». Au paragraphe 227(5) de la *Loi de l'impôt sur le revenu* le terme est employé avec les mots «cession» ou «faillite» mais ne fait pas expressément référence à une entité, comme un employeur. Le paragraphe fait cependant mention des «biens en liquidation», ce qui renvoie clairement à la «liquidation» de l'entité et non simplement à la liquidation d'une partie de son actif dans le cadre du règlement d'une dette donnée garantie. De plus, les trois termes «liquidation, cession ou faillite» pris ensemble renvoient tous à une entité qui a été mise en liquidation, a fait une cession ou a été mise en faillite. C'est notamment le cas lorsque, comme en l'espèce, le paragraphe exige que les montants ainsi retenus soient conservés séparés et distincts des fonds de la personne qui fait la retenue, et par conséquent la «liquidation, cession ou faillite» se rapporte à cette personne comme entité et pas seulement à l'actif de cette entité. Le sens qu'il faut donc donner au terme «liquidation» dans chacune de ces trois lois est celui de liquidation de l'entité de l'employeur. En matière juridique, ce terme signifie la dissolution de l'entité par la réalisation de son actif, le règlement de son passif et la distribution du surplus, s'il y en a un, aux actionnaires, proportionnellement et selon leur rang. Il est évident qu'aucune procédure de cette nature n'a été entreprise en l'espèce à l'égard de Xyloid et les dispositions des par. 24(4) du RPC, 71(3) de la LAC et 227(4) et (5) de la *Loi de l'impôt sur le revenu* ne s'appliquent donc pas.

In each of those two subsections there is the further term to the trust-establishing provision that deductions shall be deemed to be separate and apart from the estate in liquidation whether or not in fact the deduction has been kept separate from the employer's own money. This term might well reach the circumstance here where Xyloid made no such segregation of funds, but these provisions are not here applicable.

Ces deux paragraphes ajoutent chacun une condition supplémentaire à la disposition établissant la fiducie, savoir, que les déductions doivent être considérées comme séparées et distinctes des biens en liquidation, qu'elles aient été ou non, en fait, tenues séparées des propres fonds de l'employeur. Cette condition pourrait bien viser les circonstances présentes puisque Xyloid n'a pas tenu ces fonds séparés, mais ces dispositions ne s'appliquent pas en l'espèce.

The *Income Tax Act* provision (s. 227(5)) does not include the extended provision with reference to a deeming of separation in the event of liquidation and hence the respondent, even if the event of liquidation had occurred, would have no assistance from the statute in determining a segregation of accounts.

This may be of considerable significance in the law of trusts in that trust property must ordinarily be identifiable, and the specific *res* of a trust set aside before it can be said that the trust has come into being. (*Vide* Waters, *The Law of Trusts in Canada, 1974*, p. 64 *et seq.*, *Mussoorie Bank v. Raynor*[13], *Perry v. Perry*[14].) We of course are not here concerned with the general law of trusts but rather with the operation of the cited statutes.

The payments by Xyloid, therefore, in the pre-appointment period post-date the accrual of the wage entitlement. Xyloid failed to maintain the deductions separate and apart from its own moneys and assets, and Xyloid was not in liquidation, was not in bankruptcy, and had made no assignment, and therefore the express waiver of the requirement of separation legislated in two of the three statutes does not avail the respondent. Therefore, I conclude that, as in the case of the post-appointment period, the appellant is entitled to those moneys withheld by the receiver with reference to deductions made in this period as well. (To the same effect, *Bank of Nova Scotia v. Middleton Motors Limited*[15].)

While the issues with which we are here concerned have not come directly to this Court before, I find the reasoning followed by other Courts supportive of the conclusion I have reached. For example, the Supreme Court of Ontario in *Royal Trust Company v. Montex Apparel Industries Limited*, (at trial[16]) and (Court of Appeal[17]) concluded, with reference to the UIA, that a corporation under the administration of a receiver and

[13] (1882), 7 App. Cas. 321.
[14] [1918] 2 W.W.R. 485 (Man. C.A.).
[15] (1978), 78 D.T.C. 6307.
[16] [1972] 2 O.R. 673.
[17] [1972] 3 O.R. 132.

Le paragraphe 227(5) de la *Loi de l'impôt sur le revenu* ne contient pas la disposition élargie qui crée une présomption en cas de liquidation et, par conséquent, même s'il y avait eu liquidation, l'intimée ne trouverait aucun secours dans la Loi pour établir une séparation des comptes.

Ceci peut avoir une importance considérable en droit des fiducies, parce que les biens en fiducie doivent habituellement être identifiables et l'objet spécifique de la fiducie mis à part avant que l'on puisse dire que la fiducie est née. (Voir Waters, *The Law of Trusts in Canada, 1974*, p. 64 et suiv., *Mussoorie Bank v. Raynor*[13], *Perry v. Perry*[14].) En l'espèce, ce n'est pas le droit général des fiducies qui nous occupe, mais plutôt l'application des lois précitées.

Par conséquent, les paiements effectués par Xyloid pendant la période de pré-nomination sont postérieurs à la naissance du droit au salaire. Xyloid n'a pas conservé les déductions séparées et distinctes de ses propres fonds et de son actif, et elle n'était pas en liquidation ni en faillite ni n'avait fait de cession; par conséquent, l'intimée ne peut se prévaloir de la dispense expresse de l'obligation de séparer les fonds, établie dans deux des trois lois. Je conclus dont que, comme pour la période de post-nomination, l'appelante a droit aux montants qu'a retenus le séquestre à l'égard des déductions faites durant cette période. (Dans le même sens, voir *Bank of Nova Scotia v. Middleton Motors Limited*[15].)

Bien que ce soit la première fois que cette Cour est appelée à se prononcer directement sur ces questions, je considère que le raisonnement suivi par d'autres cours appuie la conclusion à laquelle je suis venu. Par exemple, la Cour suprême de l'Ontario dans *Royal Trust Company v. Montex Apparel Industries Limited* (première instance)[16] et (Cour d'appel)[17] a conclu, à propos de la LAC, qu'une société administrée par un séquestre-gérant

[13] (1882), 7 App. Cas. 321.
[14] [1918] 2 W.W.R. 485 (C.A. Man.).
[15] (1978), 78 D.T.C. 6307.
[16] [1972] 2 O.R. 673.
[17] [1972] 3 O.R. 132.

manager appointed under a bond mortgage is not in liquidation, assignment or bankruptcy and accordingly, what is now s. 71(3) did not apply. Similar issues arose in the Courts in Nova Scotia in *Re KRA Restaurants Ltd. v. Toronto Dominion Bank et al.*[18] The Court was there concerned with the identical problem as here with reference to the CPPA and the UIA. Hart J. concluded that these provisions do not create in the Crown in the Right of Canada any priority as regards moneys withheld in a period analogous to the pre-appointment period hereunder, over secured creditors. In the end, the Court interpreted these provisions as creating a trust which impresses only those funds realized from assets which remain after the trustee in bankruptcy has satisfied the secured creditors.

The position of the respondent under the ITA is more difficult to establish in competition with the claims of the appellant because the ITA does not include the deeming provision found in the other two statutes, but simply leaves the matter to be decided on two simple provisions in s. 227, the first being a deeming provision that amounts deducted are held in trust for Her Majesty and the second being a directive that moneys so deducted shall be kept separate from the moneys of the person making the deduction and the further direction that in the event of any liquidation, the amounts shall remain separate and apart from the estate in liquidation. The provision of the ITA, at least in one respect, however, is more helpful to the respondent than the provisions of the other two statutes because the reference to liquidation does not specify that it be the liquidation "of an employer", nor does it direct that moneys withheld shall remain apart from the estate in liquidation on the liquidation of an employer, etc.; rather the provision simply states "and in the event of *any* liquidation . . . the said amount shall remain apart . . .". It may be argued that "any liquidation" is broader than "liquidation of an employer" in the sense that the former, unlike the latter, would include the liquidation of the assets of a debtor without amounting to a formal liquidation of the

[18] (1977), 74 D.L.R. (3d) 272.

nommé en vertu d'une obligation hypothécaire n'est pas en liquidation, cession ou faillite et que, par conséquent, l'actuel par. 71(3) ne s'applique pas. Des questions semblables ont été soulevées devant les tribunaux de la Nouvelle-Écosse dans *Re KRA Restaurants Ltd. v. Toronto Dominion Bank et al.*[18] La Cour faisait face à un problème identique au nôtre à l'égard du RPC et de la LAC. Le juge Hart a conclu que ces dispositions ne confèrent à Sa Majesté du chef du Canada aucune préférence sur des créanciers garantis quant aux montants retenus pendant une période analogue à la période de pré-nomination en l'espèce. En conclusion, la Cour a interprété ces dispositions comme établissant une fiducie qui ne touche que le solde de la réalisation de l'actif une fois que le syndic de faillite a désintéressé les créanciers garantis.

La situation de l'intimée aux termes de la LIR est plus difficile à établir par rapport aux réclamations de l'appelante parce que la LIR ne contient pas la présomption que l'on trouve dans les deux autres lois. La question doit être tranchée d'après deux paragraphes simples de l'art. 227: le premier établit une présomption que les montants déduits sont détenus en fiducie pour Sa Majesté, le second prescrit que les montants ainsi déduits doivent être tenus séparés des fonds de la personne qui fait la déduction et, de plus, qu'en cas de liquidation, les montants doivent demeurer à part et ne former aucune partie des biens en liquidation. Toutefois la disposition de la LIR, du moins à un égard, est plus favorable à l'intimée que les dispositions des deux autres lois parce que la mention de la liquidation ne spécifie pas qu'il doit s'agir de la liquidation «d'un employeur», ni ne prescrit que les montants retenus doivent demeurer séparés des biens en liquidation au moment de la liquidation d'un employeur, etc.; la disposition établit plutôt que «dans le cas d'*une* liquidation . . . ces montants doivent demeurer à part . . .". L'on peut soutenir que l'expression «une liquidation» est plus large que l'expression «liquidation d'un employeur» en ce sens que la première, contrairement à la seconde, comprendrait la liquidation de l'actif d'un débiteur sans constituer une liquidation formelle de l'entre-

[18] (1977), 74 D.L.R. (3d) 272.

undertaking of the debtor or the existence in law of the debtor. I do not so interpret súbs. (5). The word "liquidation" is again used in association with assignment or bankruptcy and refers to an estate in liquidation. In the context of the subparagraph, liquidation, in my view, relates to the winding up of the legal entity and the consequential retirement of indebtedness and distribution of the net residue to the ultimate owners thereof as, for example, the shareholders.

It was urged by the appellant that the ITA should fall into the category of statutes which receive a strict or penal interpretation by the courts. Such a canon of statutory interpretation has, in recent years, lost a great deal of its force, perhaps due in part to the position of taxing statutes in the scheme of government regulation of the economic affairs of the community or indeed to the practice of including in the ITA what might generally be described as rights to deductions, to special rates of taxation, to postpone liability, and other affirmative rights in the taxpaying sector of society. The application of the old rules of strict and beneficial construction no longer fit such statutes *in toto*, and sometimes not at all. *Vide W.A. Sheaffer Pen Company of Canada Limited v. Minister of National Revenue*[19]; *Lumbers v. Minister of National Revenue*[20]. In any case, in the context of these proceedings, it is difficult to classify subss. (4) and (5) of s. 227, being as they are mechanical provisions with reference to the disposition of funds withheld from taxpayers pursuant to the statute, and being taxing provisions calling for strict interpretation in the historic sense of that term in the field of statutory interpretation.

It is readily apparent that the direct result of the interpretation of these three statutes in the manner I have done produces an anomaly. The taxpayer and the insured, who are here one and the same person, under the three statutory patterns loses the benefit of part of the wages which he has earned from the third party employer. Under the pension plan, he does not receive credit which, but for the default of his employer, he would have received in the pension plan established by the CPPA. Simi-

[19] (1953), 53 D.T.C. 1223.
[20] [1943] Ex. C.R. 202, [1944] S.C.R. 167.

prise du débiteur ou la fin de son existence juridique. Je n'interprète pas le par. (5) de cette façon. Le terme «liquidation» est de nouveau employé en conjonction avec cession ou faillite et renvoie à des biens en liquidation. Dans le contexte de ce paragraphe, la liquidation se rapporte à mon avis à la dissolution de l'entité juridique, au règlement des dettes qui s'ensuit et à la distribution du solde net aux propriétaires réels, par exemple, les actionnaires.

L'appelante a fait valoir que la LIR fait partie de la catégorie des lois auxquelles les tribunaux doivent donner une interprétation stricte ou pénale. Pareille règle d'interprétation des lois a perdu beaucoup de son importance ces dernières années, en partie peut-être à cause de la place des lois fiscales dans l'ensemble de la réglementation gouvernementale des affaires économiques de la collectivité ou, bien sûr, de la pratique qui consiste à inclure dans la LIR ce que l'on pourrait généralement qualifier de droits à des déductions, à des taux spéciaux d'imposition, au report de l'assujettissement, et d'autres droits positifs conférés aux contribuables. L'application des anciennes règles d'interprétation stricte et avantageuse ne convient plus totalement, et parfois plus du tout, à ces lois. Voir *W. A. Sheaffer Pen Company of Canada Limited v. Minister of National Revenue*[19]; *Lumbers c. Ministre du Revenu national*[20]. Quoi qu'il en soit, dans le présent contexte, il est difficile de classer les par. 227(4) et (5), qui sont effectivement des mécanismes relatifs au traitement des fonds retenus des contribuables conformément à la Loi, et des dispositions fiscales qui commandent une interprétation stricte au sens historique de ce terme dans le domaine de l'interprétation des lois.

Il est clair que l'interprétation que je donne de ces trois lois a pour résultat immédiat de créer une anomalie. Le contribuable et assuré, en l'espèce une seule et même personne, perd aux termes des trois mécanismes législatifs le bénéfice d'une partie du salaire qu'il a gagné au service du tiers employeur. Au titre du régime de pensions, il ne reçoit pas le montant qui, n'eût été le défaut de son employeur, aurait été crédité à son régime de pensions établi par le RPC. De même, aucune

[19] (1953), 53 D.T.C. 1223.
[20] [1943] R.C. de l'E. 202, [1944] R.C.S. 167.

larly, his account under the UIA will not reflect any contribution as a result of moneys which were diverted from his earnings in the manner detailed above before those earnings reached the employee. Under the ITA, his tax position is clouded, to say the least, by the collapse of the employer. A deduction in the result having been effected at source one way or another does not find itself as a credit to the tax account of the employee. It may be that his taxable income will, under the taxing statute, be limited to the proceeds paid over by the receiver on the retirement of the wage lien and to the cash amount paid over by the employer in the pre-appointment period to the employee. In either or both of these events, the tax impact will be less than the impact of taxation would be were the gross wages channelled through the tax screen. Nevertheless, the employee will receive a lesser proportionate credit, at least in theory, than would have been the case had the employer not fallen into default on its secured debt. I use the word "theoretical" because the actual dollar impact will vary according to the amount of outside earnings, if any, in the taxation year in question of the employee, which is of course unknown in these proceedings.

I adverted at the outset to the difficulty arising in the disposition of this appeal because of the fact that the record does not disclose whether the distribution by the receiver of moneys to the employees in the two periods originated in whole or in part from realizations by the receiver under the specific charge included in the debenture or under the chattel mortgage registered against the personal property of Xyloid or under the floating charge contained in the debenture. The Court was informed by counsel in the course of the hearing that the case has proceeded at all levels on the basis that the moneys employed by the receiver in making the two payments to the employees came from realizations on the assets of Xyloid on the enforcement of the floating charge. This floating charge, of course, crystallized and came into effect in law as against the assets of Xyloid upon the appointment of the receiver-manager by the Court on March 31, 1977. Up to that date, there had been no allocation or separation by Xyloid of the deductions effected by it under these statutes. The

cotisation ne sera portée à son compte aux termes de la LAC pour les montants qui ont été prélevés de ses gains de la manière décrite précédemment avant qu'il ne les touche. Aux termes de la LIR, sa situation fiscale est embrouillée, c'est le moins que l'on puisse dire, par l'effrondrement de son employeur. Finalement une déduction à la source effectuée d'une façon ou d'autre n'est pas portée au crédit du compte d'impôt de l'employé. Il se peut que son revenu imposable se limite, aux termes de la loi fiscale, aux montants versés par le séquestre lors de la radiation du privilège pour les salaires et aux montants d'argent comptant que l'employeur a versé à l'employé pendant la période de pré-nomination. Dans les deux cas, les répercussions fiscales seront moindres que si le salaire brut devait franchir le filtre fiscal. Néanmoins l'employé aura un crédit proportionnellement moindre, du moins en théorie, à celui qu'il aurait eu si l'employeur n'avait pas été en défaut relativement à sa dette garantie. Je dis «en théorie» parce que les répercussions monétaires réelles varieront selon le montant que l'employé tirera éventuellement d'autres sources pendant l'année d'imposition en cause, montant qui est évidemment inconnu en l'espèce.

J'ai mentionné au départ la difficulté que pose la solution du présent pourvoi parce que le dossier n'indique pas si les sommes que le séquestre a distribuées aux employés pendant les deux périodes provenaient en totalité ou en partie du produit de la réalisation effectuée en vertu du privilège spécifique prévu par l'obligation, de l'hypothèque mobilière enregistrée sur les biens meubles de Xyloid ou du privilège général donné par l'obligation. Les avocats ont informé la Cour à l'audition que, dans toutes les cours, on avait tenu pour acquis que les fonds utilisés par le séquestre pour effectuer les deux versements aux employés provenaient de la réalisation de l'actif de Xyloid en vertu du privilège général. Ce privilège général, bien sûr, s'est cristallisé et a pris effet en droit contre l'actif de Xyloid le 31 mars 1977 à la nomination du séquestre-gérant par la cour. Avant cette date, Xyloid n'avait ni réparti ni tenu séparées les déductions qu'elle avait faites conformément à ces lois. Xyloid avait alors $137 en caisse. Avant cette date, il n'y avait eu ni procédure de la

cash on hand of Xyloid at that date was $137. There had been at that date no proceedings in the nature of liquidation proceedings, no bankruptcy proceedings, and no assignment by Xyloid. In the result, therefore, it matters not whether the funds came from the enforcement of one security or the other. There was no deemed separation of deductions or withholdings from the assets or estate of the estate of Xyloid; and under the ITA there could be no statutory deeming of such separation in any case; and finally, the receiver was not a person within the meaning of subs. (4) of s. 227 who deducted anything "under this Act" inasmuch as the receiver, as I have said, simply made a payment in retirement of a provincial statutory lien. Xyloid is the person contemplated in subs. (4), and for reasons already set forth, deductions by Xyloid were not constituted a trust of property separate and apart from the estate of Xyloid when the assets of Xyloid passed upon the enforcement of security into the hands of the receiver.

Courts elsewhere and before this have bemoaned the results thrust upon them by the interaction of federal and provincial laws with reference to debtor-creditor priorities. The resolution of anomalies in this complex field is a legislative process. The duty of the Court is to interpret the legislation as it finds it. The result must follow, and if it is a result with which the community interests do not coincide, it is a matter for the Legislature. For these reasons, I would allow the appeal, set aside the Order of the Manitoba Court of Appeal, and restore the Order entered at trial, with costs throughout to the appellant, Dauphin Plains Credit Union Limited.

Appeal allowed in part, with costs in this Court, ESTEY *and* CHOUINARD JJ. *dissenting in part.*

Solicitors for the plaintiff, appellant: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitor for the applicant, respondent: Roger Tassé, Ottawa.

nature d'une liquidation, ni procédures de faillite, ni cession de biens de la part de Xyloid. En conséquence, il importe peu que les fonds proviennent de l'exécution d'une garantie ou d'une autre. Il n'y avait aucune présomption de séparation des déductions ou retenues prélevées de l'actif ou des biens de Xyloid; de toute façon, il ne pouvait y avoir pareille présomption de séparation en vertu de la LIR; enfin, le séquestre n'est pas, au sens du par. 227(4), une personne qui a déduit quelque chose «en vertu de la présente loi», vu que, comme je l'ai dit, il a simplement effectué un paiement pour acquitter une créance privilégiée créée par une loi provinciale. Xyloid est la personne visée au par. 4 et, pour les motifs qui précèdent, les déductions faites par Xyloid ne constituaient pas une fiducie séparée et distincte des biens de Xyloid lorsque son actif est passé aux mains du séquestre au moment de l'exécution de la garantie.

Les tribunaux ont déjà déploré ailleurs les résultats que leur impose l'interaction des lois fédérales et provinciales relatives au rang des débiteurs-créanciers. La correction des anomalies dans ce domaine complexe relève du pouvoir législatif. La Cour a le devoir d'interpréter les lois telles qu'elles existent. Si le résultat qui en découle obligatoirement ne coïncide pas avec les intérêts de la collectivité, c'est à la législature d'intervenir. Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'infirmer l'ordre de la Cour d'appel du Manitoba et de rétablir l'ordonnance prononcée en première instance, avec dépens en faveur de l'appelante, Dauphin Plains Credit Union Limited, dans toutes les cours.

Pourvoi accueilli en partie avec dépens en cette Cour, les juges ESTEY *et* CHOUINARD *étant dissidents en partie.*

Procureurs de la demanderesse, appelante: Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureur de la requérante, intimée: Roger Tassé, Ottawa.

TAB 12

ESSENTIALS OF CANADIAN LAW

PERSONAL PROPERTY SECURITY LAW

RONALD C.C. CUMING
University of Saskatchewan, College of Law

CATHERINE WALSH
McGill University, Faculty of Law

RODERICK J. WOOD
University of Alberta, Faculty of Law

IRWIN LAW

arrangement), or as a trustee under a trust indenture (who holds the security interest as representative of all the debenture-holders).[17] The definition also extends to a receiver for the purposes of the provisions enumerated in the definition. This ensures that a receiver is subject to the obligations imposed by the PPSA enforcement regime even where the receiver is not appointed by the secured party (as in the case of a court appointment), and even where the security agreement under which the receiver is appointed purports to make the receiver an agent of the debtor rather than the secured party.

As with the definition of debtor, the term "secured party" is meant to be read in conjunction with the PPSA concept of a security interest as an interest in personal property that secures payment or performance of an obligation, regardless of the form of the transaction or the location of title as between the secured party and the debtor. Thus, it does not matter what formal label is assigned to the secured party in the security documentation. Whether called a mortgagee, a chargee, a pledgee, a seller, a lessor, or any other term, the important question is whether the person holds a security interest in the functional sense contemplated by the Act.

As noted earlier, the PPSA concept of security interest also captures certain deemed secured transactions that do not secure payment or performance of an obligation; namely, an assignment of accounts or chattel paper, and, except for the Ontario Act, a commercial consignment and a true lease for a term of more than one year; the Atlantic Acts also extend to a sale of goods outside the ordinary course of business where the seller remains in possession after the sale. Since the Act defines "secured party" as a person who has a security interest, it follows that the term includes both secured parties in the ordinary sense and those who hold a deemed security interest.

4) Attachment

The PPSA uses the term "attachment" to describe the creation of the security interest as distinct from the entry into of the security agreement. Until attachment occurs, no security interest exists and the secured party's rights against the debtor are purely personal and contractual. Conversely, once a security interest attaches, the secured party acquires proprietary rights in the collateral.

---

17 PPSA (A, BC, NWT, Nu, O, Y) s. 1(1); (M, NB, PEI) s. 1; (NL, NS) s. 2; S s. 2(1).

Under the Act, attachment requires the satisfaction of three conditions.[18] First, the secured party must give value. Second, the debtor must have rights in the collateral. Third, the parties' agreement must satisfy the evidentiary requirements imposed by the Act; that is, either possession of the collateral by the secured party or completion of a security agreement signed by the debtor that describes the collateral.[19] Satisfaction of the third requirement is necessary only for attachment as against third parties. As between the secured party and the debtor, satisfaction of the first two requirements is enough.

5) Perfection

To acquire the best rights possible against third parties, the security interest must also be perfected. Under the Act, a security interest is perfected only when it has attached *and* all steps necessary to perfect it have been performed.[20] Except for the limited situations in which perfection is automatic for a temporary period, the Act recognizes only two possible perfecting steps: registration of a financing statement[21] or taking possession of the collateral.[22]

6) Priority

Perfection, while distinct from priority, is nonetheless intertwined with priority. Until a security interest is perfected, it cannot be set up against the debtor's bankruptcy trustee or judgment creditors or against a buyer or lessee of the collateral who takes without knowledge.[23] In addition, a perfected security interest takes ahead of an unperfected security interest regardless of the time of attachment or knowledge, and ranking among competing perfected security interests is generally determined by the order of registration, taking possession, or automatic perfection, as the case may be.[24]

---

18 PPSA (A, BC, M, NB, PEI, Nu, NWT, S) s. 12(1); (NL, NS, Y) s. 13(1); O s. 11(2).

19 PPSA (A, BC, M, NB, PEI, S) ss. 12(1)(c), 10(1); (NL, NS) ss. 13(1)(c), 11(1); O ss. 11(2)(c), 11(1); Y ss. 13(1)(c), 8(1).

20 PPSA (A, BC, M, NB, NWT, Nu, O, PEI, S) s. 19; (NL, NS) s. 20; Y s. 18.

21 PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s. 25; (N, NS) s. 26; (O, Y) s. 23.

22 PPSA (A, BC, M, NB, Nu, NWT, PEI, S) s. 24(1); (NL, NS) s. 25 (1); O s. 22; Y s. 22(1).

23 PPSA (A, BC, M, NB, Nu, NWT, O, PEI, S) s. 20; (NL, NS) s. 21; Y s. 19.

24 PPSA (A, BC, M, NB, Nu, NWT, PEI, S) s. 35(1); (NL, NS) s. 36(1); O s. 30(1); Y s. 34(1).

"bound" to make even though, upon default by the debtor (including, presumably, seizure of the collateral under judgment enforcement process) the secured party is released from the obligation.

The Alberta Act[57] provides that the tacking priority given to secured parties applies to advances made before the secured party acquires knowledge of a writ of enforcement[58] within the meaning of section 32 of the *Civil Enforcement Act*,[59] advances made pursuant to a statutory requirement or a legally binding obligation owing to a person other than the debtor entered into by the secured party before it acquired knowledge that the collateral was seized, and reasonable costs and expenses incurred by the secured party for the protection, preservation, maintenance, or repair of the collateral. A very similar approach is contained in the PPSAs of the Atlantic provinces. Tacking gives priority to secured parties over judgment enforcement creditors to the extent that the advances are made prior to the time the secured party acquires knowledge that a judgment has been registered in the Personal Property Registry.[60] The same exceptions with respect to binding obligations and collateral preservation costs are recognized.

B. PRIORITY COMPETITIONS WITH NON-CONSENSUAL SECURITY INTERESTS

A property interest most often arises out of an agreement under which one party agrees to transfer an interest in the property to another. This transfer may be absolute, as in the case of a sale, or it may involve a transfer of a more limited right, as in the case of a security interest. However, there are other events that can create property rights. These are commonly grouped under the category of property rights arising by operation of law. Property interests that are created by statute or recognized by the common law or equity and that secure payment or performance of an obligation are referred to in this book as non-consensual security interests.

A security interest that is governed by the PPSA will often come into competition with a non-consensual security interest. Non-con-

---

57 A s. 35(5).

58 This requires actual knowledge. The registration of the writ of enforcement in the Personal Property Registry is not sufficient.

59 Above note 30, s. 33(2).

60 PPSA (NL, NS) s. 36(6); NB s. 35(6); PEI s. 35(9).

sensual security interests do not fall within the scope of the PPSA.[61] The priority rules of the PPSA that govern disputes between competing security interests therefore do not apply, as these rules only apply where both of the security interests are governed by the Act. The only exception is the priority rule provided by the PPSA to resolve a priority competition between a security interest and commercial liens. This does not provide a comprehensive priority rule, because liens are only one of a number of different non-consensual security devices, and in any event the provision does not even apply to all categories of liens. It is therefore necessary to look to non-PPSA priority rules and principles to resolve such disputes.

One of the difficulties with this area is that non-consensual security interests originate from several different sources of law. Some are created by statute, others by the common law or equity. There are liens, rights of distress, statutory security interests, deemed statutory trusts, and statutory rights of attachment. There are literally hundreds of non-consensual security interests that have been created by statute in Canada, and there is a wide variation in drafting in the provisions that create them. The area is further complicated by the fact that federal bankruptcy legislation has a profound effect on the resolution of priority competitions involving non-consensual security interests, and the outcome is therefore frequently different depending upon whether or not the debtor is bankrupt. It is accordingly not possible to describe the priority status of every non-consensual security interest. Instead, in the discussion that follows, the authors have provided a brief description of the different types of non-consensual security interests and an examination of the rules and principles that should be applied in resolving a priority competition between a PPSA security interest and a non-consensual security interest. The effect of the bankruptcy of the debtor on the outcome of priority competitions is also examined.[62]

---

61 PPSA (A, BC, M, NB, O, S) s. 4; (NWT, Nu, Y) s. 3; (NL, NS) s. 5. The Ontario formulation is narrower in that it only refers to a lien whereas the other Acts exclude a lien, charge, or other interest given by statute or rule of law. However, there is an even more basic reason why non-consensual security interests fall outside the scope of the Acts. The Acts clearly contemplate that the security interest is created by a security agreement, and this condition is not satisfied in the case of non-consensual security interests. See the definitions of "security agreement" and "security interest" in PPSA (A, BC, NWT, Nu, O, Y) s. 1(1); (M, NB, PEI) s. 1; (NL, NS) s. 2; S s. 2(1).

62 For a more in-depth examination of this topic, see R. Wood and M. Wylie, "Non-consensual Security Interests in Personal Property" (1992) 30 Alta. L. Rev. 1055.

The deemed statutory trust in respect of federal source deductions required to be made under the *Income Tax Act* gives the Crown's claim priority over prior competing interests. The statute provides that the deemed trust is imposed on the debtor's property as well as the property of any secured creditor.[89] This gives the deemed trust priority over a security interest. The Act defines security interest as "any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, lien, pledge, charge, deemed or actual trust, assignment or encumbrance."[90] Courts have held that this definition does not include leases or conditional sales agreements.[91] As a result, these transactions would take priority over the statutory deemed trust.

d) Order of Attachment

If a statute that creates a non-consensual security interest provides a priority rule, that provision will govern. In the absence of such a provision, a priority competition will be governed by the order of creation of the interests. Although this might appear to be a simple application of traditional property law concepts, it is not so. A simple deemed statutory trust would ordinarily create only an equitable interest in the property and would therefore be liable to be defeated by a person who acquires a legal interest for value and without knowledge. The courts have not purported to draw a distinction between legal and equitable interests, but have simply resolved priorities on the basis of a first-in-time rule.[92]

In the past, the first-in-time rule had to deal with the effect of the floating charge. For the purpose of determining the time of creation of the security interest, the courts looked to the time of crystallization of the charge. The concept of the floating charge has no counterpart under the PPSA.[93] A security interest in all present and after-acquired personal property attaches to the collateral when the ordinary requirements for attachment have been satisfied. This will generally mean that the security interest attaches to the collateral at a much earlier point than was the case under the prior law.

---

89 *Income Tax Act*, R.S.C. 1985, c. 1. (5th Supp.), s. 227(4.1).

90 Ibid., s. 224(1.3).

91 See *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.* (2002), 212 D.L.R. (4th) 41 (B.C.C.A.); *Canada (Deputy Attorney General) v. Schwab Construction Ltd.*, [2002] 4 W.W.R. 628 (Sask. C.A.).

92 *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, above note 70; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411.

93 See *Royal Bank of Canada v. Sparrow Electric Corp.*, *ibid.*

TAB 13

1997 CarswellAlta 112
Supreme Court of Canada

Royal Bank v. Sparrow Electric Corp.

1997 CarswellAlta 112, 1997 CarswellAlta 113, [1997] 1 S.C.R. 411, [1997] 2 W.W.R. 457, [1997] S.C.J. No. 25, 12 P.P.S.A.C. (2d) 68, 135 W.A.C. 321, 143 D.L.R. (4th) 385, 193 A.R. 321, 208 N.R. 161, 44 C.B.R. (3d) 1, 46 Alta. L.R. (3d) 87, 69 A.C.W.S. (3d) 295, 97 D.T.C. 5089, J.E. 97-523

Her Majesty the Queen (Appellant) v. Royal Bank of Canada (Respondent)

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 19, 1996
Judgment: February 27, 1997
Docket: 24713

Proceedings: Affirming 28 Alta. L.R. (3d) 153, [1995] 6 W.W.R. 718, 165 A.R. 132, 89 W.A.C. 132, 33 C.B.R. (3d) 34, 10 P.P.S.A.C. (2d) 1, [1995] 2 C.T.C. 445 (C.A.)

Counsel: *E.R. Sojonky, Q.C.*, and *Michael J. Lema*, for the Crown.
Ray C. Rutman, for respondent.

Subject: Corporate and Commercial; Public; Insolvency; Income Tax (Federal)

APPEAL by Crown from judgment reported at 28 Alta. L.R. (3d) 153, [1995] 6 W.W.R. 718, 165 A.R. 132, 89 W.A.C. 132, 33 C.B.R. (3d) 34, 10 P.P.S.A.C. (2d) 1, [1995] 2 C.T.C. 445 (C.A.), allowing appeal by bank from judgment granting Crown priority over bank's security interest in inventory of bankrupt.

***Gonthier J.* (dissenting) (*La Forest* and *Cory JJ.* concurring):**

1 This case involves a determination of priority between a deemed statutory trust and various security instruments in regard to the proceeds of a liquidation sale of inventory. In particular, the appeal requires a determination of the priority status of Her Majesty's deemed trust under s. 227(4) and (5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (hereinafter the "*ITA*"), these provisions becoming operative in this case because of the misappropriation of unremitted payroll deductions lawfully belonging to Her Majesty. In competition to this

claim, the Royal Bank of Canada asserts priority under both a general security agreement and an assignment of inventory under s. 427 of the *Bank Act*, S.C. 1991, c. 46.

I — Facts

2 The debtor, Sparrow Electric Corporation (hereinafter "Sparrow"), carried on business as an electrical contractor in Alberta. The enterprise was of a substantial size, employing 200 to 300 employees in its business operations. To finance these operations, Sparrow borrowed heavily from the respondent Royal Bank of Canada (hereinafter the "bank"). The bank secured Sparrow's borrowing with various forms of security, covering most of the assets utilized in Sparrow's business. Of particular relevance to this appeal, however, the bank held a general security agreement over all of Sparrow's present and after-acquired personal property, as well as an assignment of inventory under s. 178 (now s. 427) of the *Bank Act*, R.S.C., 1985, c. B-1.

3 In 1992, it became apparent to the bank that Sparrow was having financial difficulties. On two occasions, August 5, 1992 and September 30, 1992, the bank wrote to Sparrow advising its management that Sparrow was in default on its loan obligations. On October 16, 1992, in order to give Sparrow some time to correct its default situation, the bank and Sparrow entered into a "Standstill Agreement". This agreement permitted Sparrow to continue carrying on business under the proviso that, should Sparrow's position fail to improve, the bank would be entitled to appoint a receiver and enforce its security.

4 Sparrow's financial position did not improve. For this reason, on November 19, 1992, the bank appointed a receiver to take over Sparrow's business, and on December 8, 1992, the bank successfully petitioned Sparrow into bankruptcy. The order appointing the receiver empowered the receiver to, among other things, carry on Sparrow's business as it deemed necessary. The receiver did in fact carry on Sparrow's business for some time, employing approximately 200 employees in order to fulfil Sparrow's outstanding contractual obligations. These employees were terminated effective January 15, 1993.

5 In addition to the failure to pay the loan obligations which inevitably led to its bankruptcy and receivership, Sparrow had failed to honour other obligations in its attempt to remain in business. In particular, Sparrow failed to remit payroll deductions as required by s. 153 of the *ITA*. While the record does not disclose the exact date of these failures, it appears that the first instance of non-remittance could have occurred no later than August 7, 1992. Having regard to the amount of payroll deductions outstanding as of August 7, and to the average number of Sparrow's employees on the payroll, we can conclude that the actual payroll deductions which give rise to Her Majesty's claim in all likelihood occurred some time in the year 1992. In any event, by the time of its receivership, in addition to substantial amounts outstanding to the

bank, Sparrow was indebted to the appellant ("Her Majesty") in the amount of $625,990.86 for unremitted income tax payroll deductions.

6 On January 12, 1993, the receiver applied to the Alberta Court of Queen's Bench for authorization to sell various Sparrow assets. Part of the pool of assets to be sold included Sparrow's inventory which is the subject of this appeal. On January 15, 1993, Wilson J. authorized both the sale of the assets and remittance of its proceeds to the bank in partial repayment of its claims, but ordered that an amount equal to Her Majesty's claim for unremitted payroll deductions be held in trust pending a resolution as to the entitlement to this portion of the proceeds. At some later date, the assets were in fact sold, and the amount of $625,990.86 set aside. It has been held in judicial proceedings that the amount held is constituted entirely of proceeds from inventory (*Royal Bank v. Sparrow Electric Corp.* (November 24, 1993), Doc. Edmonton (Alta. Q.B.), unreported). That ruling is not at issue in this appeal.

7 At present, the fund being held and constituting the proceeds of inventory is sufficient to satisfy either Her Majesty's claim, or part of the outstanding claims owing to the bank. The determination of priority in this appeal will therefore be determinative as to which party is entitled to the entirety of the disputed fund.

II — The Competing Interests

8 For convenience, I will at the outset outline the claims of the bank and of Her Majesty which are advanced as being entitled to the proceeds of the inventory.

(A) The Bank

9 The respondent bank advances two distinct security instruments in order to establish its claim to the disputed fund. First, the bank argues that its general security agreement ("GSA"), executed on February 25, 1992, and perfected pursuant to the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"), is entitled to priority. By this agreement, Sparrow assigned to the bank a security interest in all of its present and after-acquired personal property, including "all inventory of whatever kind and wherever situate" (para. 1(a)(i)). In addition, para. 7 of that agreement provided that proceeds of the collateral received by Sparrow would be received and held in trust for the bank. Of significance to this appeal, however, para. 4 of the GSA contained two express covenants, providing:

> So long as this Security Agreement remains in effect Debtor covenants and agrees:
>
> (a) to defend the Collateral against the claims and demands of all other parties claiming the same or an interest therein; to keep the Collateral free from all Encumbrances ...;

> *provided always that, until default, Debtor may, in the ordinary course of Debtor's business, sell or lease inventory* and, subject to Clause 7 hereof, *use Money available to Debtor*,
>
> . . . . .
>
> (e) *to pay all taxes*, rates, levies, *assessments* and other charges of every nature *which may be lawfully* levied, *assessed or imposed against or in respect of Debtor* or Collateral as and when the same become due and payable; [Emphasis added.]

Additionally, under the credit facilities agreement between Sparrow and the bank, dated January 22, 1992, Sparrow covenanted as follows:

> (3) it will promptly pay when due all business, income and other taxes properly levied on its operations and property *and remit all statutory employee deductions when due*; [Emphasis added.]

10 The bank's second claim is that its *Bank Act* security ("BAS") entitles it to priority to the inventory proceeds. That security instrument was executed on two occasions, January 29, 1990 and December 12, 1990. Under the General Assignment, Sparrow assigned to the bank, *inter alia*, "all goods inventory, [and] stock-in-trade" as continuing security for the payment of loans to the bank. In addition, as part of the Agreement as to Loans and Advances, Sparrow granted security in both its inventory and its proceeds. At the time these instruments were executed, s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, was in effect. However, on June 1, 1992, that Act was replaced with the *Bank Act*, S.C. 1991, c. 46. The relevant portions of these two acts are identical. However, as the facts giving rise to this case occurred while the latter Act was in force, I will refer to the provisions of this new Act for the purposes of this appeal. As such, the bank's claim for security under its BAS is grounded in s. 427 (formerly s. 178) of the *Bank Act*, which provides:

> *427.* (1) A bank may lend money and make advances
>
> (*a*) to any wholesale or retail purchaser or shipper of, or dealer in, products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers *or goods, wares and merchandise*, manufactured or otherwise, on the security of such products or goods, wares and merchandise and of goods, wares and merchandise used in or procured for the packing of such products or goods, wares and merchandise,
>
> . . . . .
>
> (2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described

> (*a*) of which the person giving security is the owner at the time of the delivery of the document, or
>
> (*b*) of which that person becomes the owner at any time thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,
>
> the following rights and powers, namely,
>
> (*c*) if the property is property on which security is given under paragraph (1)(*a*), (*b*), (*g*), (*h*), (*i*), (*j*) or (*o*), under paragraph (1)(*c*) or (*m*) consisting of aquacultural implements, under paragraph (1)(*d*) or (*n*) consisting of agricultural implements or under paragraph (1)(*p*) consisting of forestry implements, *the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described*, ...
>
> . . . . .
>
> and all such property in respect of which such rights and powers are vested in the bank under this section is for the purposes of this Act property covered by the security. [Emphasis added.]

Section 425(1) (formerly contained within s. 2(1)) provides that:

> *425.* (1) ...
>
> "goods, wares and merchandise" includes products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers, and *all other articles of commerce*; [Emphasis added.]

And s. 435(2) (formerly s. 186(2)) provides:

> *435.* ...
>
> (2) Any warehouse receipt or bill of lading acquired by a bank under subsection (1) vests in the bank, from the date of the acquisition thereof,
>
> (*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and
>
> (*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired

> by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise.

11 In addition, the respondent directed this Court's attention to s. 428(1) (formerly s. 179(1)), which it was submitted affected the priority position of the bank's BAS:

> *428.* (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by a security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, *priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor*. [Emphasis added.]

Finally, s. 434(2) (formerly s. 185(2)) provides:

> *434.* ...
>
> (2) *Nothing in any charter, Act or law shall be construed as ever having been intended to prevent or as preventing a bank from acquiring and holding an absolute title to* and in any mortgaged or hypothecated real property, whatever the value thereof, or from exercising or acting on any power of sale contained in any mortgage given to or held by the bank, authorizing or enabling it to sell or convey any property so mortgaged. [Emphasis added.]

12 While no provision in the BAS explicitly permitted Sparrow to sell its inventory, the respondent bank has conceded that such a licence existed, as a practical matter, as between the parties. In any event, I would have thought that once a licence to sell inventory had been granted under the GSA, it would be impossible to grant a more restricted licence to deal with the *same* collateral under the provisions of the BAS.

(B) Her Majesty's Interest

13 Her Majesty's claim arises under the s. 227 deemed trust provisions of the *ITA*. Section 153(1)(*a*) of that Act requires employers to withhold from the pay cheques of its employees and remit to the Receiver General amounts on account of the payee's tax for the year:

> *153.* (1) Every person paying at any time in a taxation year
>
> (*a*) salary or wages or other remuneration,
>
> . . . . .

> shall deduct or withhold therefrom such amount as may be determined in accordance with prescribed rules *and shall*, at such time as may be prescribed, *remit that amount to the Receiver General on account of the payee's tax for the year*. ... [Emphasis added.]

Such amounts are deemed to be held in trust for Her Majesty by virtue of s. 227(4) and (5) of the *ITA*, which provide:

> *227.* ...
>
> (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 and Insolvency 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.

As of June 15, 1994, these provisions have been repealed and replaced by a revised s. 227(4): S.C. 1994, c. 21, s. 104(1). However, as this amendment was not effective at the time the facts of this appeal arose, I decline to comment on the application of the new s. 227(4) to this case.

III — Judgments of the Courts Below

Alberta Court of Queen's Bench (1993), 19 Alta. L.R. (3d) 183

14 The first application brought to determine the priority over the inventory proceeds involved the competing claims under the GSA advanced by the bank, and Her Majesty's deemed trust. Agrios J. held that the deemed trust took priority over the GSA. In characterizing the statutory trust, Agrios J. concluded at p. 189 that the trust attaches to "whatever assets are left" upon bankruptcy. With regard to the GSA security interest, Agrios J. was of the view that it took the form of a fixed charge on the inventory with a licence to sell in the ordinary course of business. However, this latter characterization was not necessary to reach his decision, as the learned chambers judge ultimately reasoned, at p. 188, "[w]hether the charge is floating or fixed, if there is an ability to deal with an asset such as inventory, the asset becomes exposed to the normal market incidents of carrying on business". Relying on the decision of McLachlin J.A. (as she then was) in *British Columbia v. Federal Business*

Development Bank, [1988] 1 W.W.R. 1 (B.C. C.A.) (hereinafter *FBDB*), Agrios J. found that a normal incident of selling inventory was the payment of statutory liens. The sale of the inventory therefore permitted the statutory trust to attach.

Alberta Court of Queen's Bench (1994), 21 Alta. L.R. 275

15 The bank subsequently applied for a determination of whether their BAS over Sparrow's inventory took priority over Her Majesty's deemed trust. For substantially similar reasons, Agrios J. held that the deemed trust once again took priority. Whether the BAS could be characterized as a fixed charge with a licence to sell, or a floating charge, the sale of the inventory subjected the bank's interest in it to the "normal incidents of business" (at p. 283). And, in Agrios J.'s view, one of these incidents was the paying of wages and withholdings. As these proceeds were impressed with the deemed trust, whatever interest the bank had could not attach to them, as they were no longer the property of Sparrow.

Alberta Court of Appeal (1995), 28 Alta. L.R. (3d) 153

16 Both the decisions of Agrios J. were appealed to the Alberta Court of Appeal. As such, the priority of both the GSA and the BAS were at issue before that court. However, the Court of Appeal, unanimously deciding to dispose of the appeal solely on the grounds that the BAS took priority over the statutory trust, neither heard oral argument nor ruled with regard to the priority of the GSA.

17 The Court of Appeal began with the premise that BAS was a fixed and specific charge transferring legal title to the bank and not a floating charge over inventory. For this proposition, the court relied upon two judgments of this Court, *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, and *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, both decisions which the court considered binding upon it. As the claim of Her Majesty arose subsequent to the execution of the BAS, in the court's opinion, the deemed trust could have nothing to attach to. In addition, the court rejected the argument that the inventory was subject to a licence to sell which would provide Her Majesty with an opportunity to attach its interest. The Court of Appeal found *FBDB, supra*, relied upon by Agrios J. to be distinguishable on the basis that the intimacy in that case between the sale of inventory and the statutory trust was not present in the case before it. In contrast, in the present case, the court found no conceptual or evidentiary link between the sale of inventory and the withholding of payroll deductions. In any event, the court found that any licence to sell inventory only lasted until default, and as the sale in this case occurred well after any default by Sparrow, the licence must therefore have been extinguished at the relevant time. For these reasons, the Court of Appeal found that the BAS took priority over Her Majesty's deemed trust.

IV — Issues

18 There are two issues to be resolved in this appeal: (1) whether, on the facts of this case, Her Majesty's s. 227(5) *ITA* deemed trust takes priority over a previously executed GSA with respect to the proceeds of the sale of inventory; and (2) whether, on the facts of this case, Her Majesty's s. 227(5) *ITA* deemed trust takes priority over a previously executed BAS with respect to the proceeds of the sale of inventory?

V — Analysis

(A) Introduction

19 The law reports are replete with cases involving competing claims between statutory liens and deemed trusts, such as the one found in s. 227 of the *ITA*, and other previously executed consensual security interests: *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., supra; Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd.*, (sub nom. *Industrial Relations Board v. Avco Financial Services Realty Ltd.*) [1979] 2 S.C.R. 699; *Re G.M. Homes Inc.* (1984), 52 C.B.R. (N.S.) 244 (Sask. C.A.); *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1992] 2 W.W.R. 641 (Man. C.A.); *FBDB, supra; Ford Motor Co. of Canada v. Manning Mercury Sales Ltd. (Trustee of)*, [1994] 6 W.W.R. 372 (Sask. Q.B.); *National Bank of Canada v. Director of Employment Standards* (1986), 5 P.P.S.A.C. 326 (Ont. Div. Ct.); *Abraham v. Canadian Admiral Corp. (Receiver of)* (1993), (sub nom. *Abraham v. Coopers & Lybrand Ltd.*) 13 O.R. (3d) 649 (Gen. Div.) (under appeal); *Armstrong v. Canadian Admiral Corp. (Receiver of)* (1986), 24 D.L.R. (4th) 516 (Ont. H.C.), affirmed (1987), (sub nom. *Armstrong v. Coopers & Lybrand Ltd.*) 61 O.R. (2d) 129 (Ont. C.A.), leave to appeal to S.C.C. refused (sub nom. *National Bank of Canada v. Armstrong*) [1988] 1 S.C.R. xii. The ubiquitousness of this legal dilemma in our courts speaks no doubt, at least in part, to the prevalence of the unfortunate factual situation which such statutory trusts and liens were meant to counter. Namely, such deemed trusts or liens are devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business, e.g., *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23(3) and 23(4); *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, s. 57(2) and (3); and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4) and (5). Indeed, it is perhaps more accurate to speculate that this sort of misappropriation of public funds is often a manifestation of an already-existing financial difficulty in a debtor's business, as a debtor foregoes statutory payments as required of it in order to increase artificially its supply of working capital.

20 At the same time that legislators have sought to protect the fiscal integrity of public institutions through the devices of statutory trusts and liens, however, they have also endeavoured to protect the security interests of those private institutions who are involved in providing credit to Canadian businesses. For example, the *Bank Act* has historically provided

for the protection of the collateral of banking institutions. The current provision of the *Bank Act* granting a security interest in a debtor's inventory, s. 427, can be traced back over one hundred years to the enactment of its predecessor section, s. 74, in 1890 (S.C. 1890, c. 31). The historical and societal importance of this form of security was observed by this Court in *Hall, supra*, where, at p. 139, La Forest J. commented that "[i]n a word, the creation of the *Bank Act* security interest has been a key factor in the evolution of banking in this country". Later, at p. 140, La Forest J. concluded:

> The above considerations establish, to my satisfaction, that the s. 178 security interest, which originated as a policy response to structural deficiencies in the lending regimes of the nascent Canadian economy, has, since its inception, *played a primordial role in facilitating access to capital by several groups that play a key role in the national economy*. [Emphasis added.]

21 More recently, provincial legislatures have moved to protect secured creditors generally through the enactment of personal property security legislation: e.g. *Personal Property Security Act*, R.S.O. 1990, c. P.10; *Personal Property Security Act*, S.B.C. 1989, c. 36; and the *PPSA*. These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities: Ronald C. C. Cuming & Roderick J. Wood, *British Columbia Personal Property Security Act Handbook* (2nd ed. 1993), at pp. 4-5; *G. M. Homes Inc., supra*, at p. 252. The benefits of such certainty in commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.

22 It can be seen from the foregoing, therefore, that the priority competition between statutory trusts and consensual security interests represents, in a broad sense, a clash between conflicting legislative objectives. To this extent, then, a resolution of the priority competition in the present case requires a sensitivity to the differing legislative objectives here at play. In particular, however, to the extent that the aim of personal property security regimes is to effect certainty in commercial transactions, the interpretation by the courts of such legislation and the development of the jurisprudence generally in this area must, to every extent possible, seek to achieve predictable results.

23 It has been unfortunate that the development of the case law, to this point, has not inspired the degree of certainty which is so manifestly desirable in this area of commercial law. Indeed, the jurisprudence has been referred to as a "troubled area of the law" (*Manitoba (Minister of Labour) v. Omega Autobody Ltd. (Receiver of)* (1989), 59 D.L.R. (4th) 34 (Man. C.A.)), and has been the subject of, at times, scathing academic criticism (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp*." (1995), 10 *B.F.L.R.* 429 and Roderick J. Wood and Michael I. Wylie, "Non-Consensual Security Interests In Personal Property" (1992), 30 *Alta. L. Rev.* 1055).

The general view, I believe, has been summarized by Professor Wood in his most helpful case commentary, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" *supra*, at p. 430: "[i]t is somewhat of an embarrassment that after more than two decades we still cannot confidently predict the outcome of a priority dispute between a deemed trust and a security interest". The above judicial and academic commentary, I believe, invites this Court to proceed steadfastly towards the pronouncement of clear principles to be applied in determining the priority between statutory trusts and consensual security interests.

24 With these general observations in mind, I will now proceed to analyze the specific aspects of the competing claims advanced by the parties in the present case.

(B) The Nature of Subsections 227(4) and (5) Statutory Trusts

25 Subsection 153(1)(*a*) of the *ITA* places an affirmative duty upon employers to deduct and withhold amounts from their employees' pay cheques, and remit those withholdings to the Receiver General on account of the employees' tax payable. By virtue of s. 153(3) of the *ITA*, these withholdings are deemed to become the property of the employee:

> *153.* ... (3) When an amount has been deducted or withheld under subsection (1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid.

In a perfect world, these deductions would be made, a cash fund would be set aside by the employer, and the withheld amounts would be promptly remitted to the Receiver General when due. The deducted amounts, lawfully the property of the employee, would in this way be transferred to Her Majesty to be set against his overall tax payable.

26 As a practical reality, however, these deductions are often not remitted as required under the *ITA*. Instead, the withholdings are commonly made solely as a book entry, and therefore the deduction of taxes from wages becomes merely a notional transaction; no cash is actually set aside for remittance and, often, the deductions are not transferred to the Receiver General: see, e.g., *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599 (C.A.), at p. 601. It is at this point which a business becomes indebted to Her Majesty for the amount of moneys only fictionally deducted. I hasten to add, however, that while it can be said Her Majesty at this point becomes *de facto*, if not *de jure*, a creditor of the non-remitting employer, the arrangement is dissimilar to an ordinary debtor-creditor situation in two fundamental respects. First, in contrast to usual negotiated credit arrangements, this transaction is of manifestly a non-consensual nature. Second, by virtue of s. 153(3), the debtor can in law be considered to be utilizing an asset which is the property of its employees. In this sense, it is not inaccurate to characterize the non-remittance of payroll deductions as a "misappropriation"

of the property of another. Indeed, the authorities, correctly in my view, commonly refer to the conduct of the tax debtor in this manner: *Roynat, supra*, at p. 646, *per* Twaddle J.A.; and *Pembina on the Red Development Corp. v. Triman Industries Ltd.* (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 48, *per* Lyon J.A. dissenting.

27 The economic reality of this sort of misappropriation of statutory deductions is artificially to increase the working capital of the tax debtor. By foregoing a cash payment to Her Majesty in the amount of the payroll deductions, the tax debtor is able to utilize the freed resources elsewhere in its business. The effect of non-remittance was summarized by Lyon J.A. in his dissenting reasons in *Pembina on the Red Development, supra*, at p. 48:

> ... either the tax debtor used the misappropriated deductions for its own purposes or the pool of moneys available for distribution to the tax debtor's creditors ... has been increased by the amount which the tax debtor failed to remit to the Receiver-General.

28 It is against the backdrop of this unfortunate factual scenario that the provisions of s. 227(4) and (5) can be seen to have been enacted. While it can be said that at the point of withholding the employer becomes the trustee of a fund which is in law the property of its employee, s. 227(4) has the effect of making Her Majesty the beneficiary under that trust. I agree with the observation of the mechanics of s. 227(4) made by Twaddle J.A. in *Roynat, supra*, at p. 646, where he states:

> Although [ss. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer anymore. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.

The conceptual difficulty arises, of course, when the tax debtor fails to set aside moneys which are to be remitted. At this point, the subject of Her Majesty's beneficial interest becomes intermingled with the general assets of the tax debtor. As Twaddle J.A. rightly observed in *Roynat, supra*, at p. 646, "Her Majesty's claim ... then be[comes] that of a beneficiary under a non-existent trust". In short, the misappropriation of statutory deductions conceptually problematizes the legal vehicle — the concept of the trust — which Parliament has invoked in order to regain the moneys lawfully owed to Her Majesty.

29 This conceptual dilemma is resolved by s. 227(5). That provision states that:

> *227.* ...

> (5) Notwithstanding any provision of the *Bankruptcy and Insolvency 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.

The effect of s. 227(5) naturally falls to be determined through a proper interpretation of the language contained in that subsection.

30 This Court recently had occasion to review the principles of law to be applied to the interpretation of tax legislation. In *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963, at pp. 975-76, Cory J. quoted this Court's decision in *Friesen v. Canada*, [1995] 3 S.C.R. 103, at pp. 112-14, where the relevant principles were summarized as follows:

> In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:
>
> > While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, [1993] 4 S.C.R. 695.

> I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3(c) "Strict and purposive interpretation" at pp. 453-54:
>
> > It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision. ... (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

At pp. 976-77 of *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, Cory J. concluded:

> Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object and purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament". ...

31 In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. 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: D. W. M. Waters, *The Law of Trusts in Canada* (2nd ed. 1984), at p. 117. However, s. 227(5) 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".

32 I add that this approach was taken to a provision substantially similar to s. 227(5) by Gale C. J. in *Re Deslauriers Construction Products Ltd., supra*, at p. 601, whose reasoning was affirmed by this Court in *Dauphin Plains, supra*. The *Deslauriers* case, *supra*, involved a priority competition between a trustee-in-bankruptcy and a statutory deemed trust provision created under the *Canada Pension Plan*, S.C. 1964-65, c. 51. Subsections 24(3) and (4) of that Act stated:

> *24.* ...
>
> (3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General of Canada, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.
>
> (4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed 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 or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

This Court in *Dauphin Plains, supra*, at p. 1198, approved of Gale C.J.'s conclusion as to the interpretation of s. 24(4) (at p. 601 of *Deslauriers, supra*):

> It seems to us that s-s. (4), and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

33 This interpretation of s. 227(5) also has the virtue of being consistent with the scheme of distribution under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Section 67 of that Act expressly removes claims for unremitted payroll deductions, which are held in trust (*inter alia*) pursuant to s. 227 of the *ITA*, from the bankrupt's estate:

> *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,
>
> . . . . .

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of subsections 227(4) and (5) of the *Income Tax Act*, subsections 23(3) and (4) of the *Canada Pension Plan* or subsections 57(2) and (3) of the *Unemployment Insurance Act*. ...

34 It is to be observed that in addition to attaching Her Majesty's interest to the debtor's property upon the triggering of any of the events mentioned in s. 227(5), the deemed trust operates to the benefit of Her Majesty in a secondary manner. Namely, s. 227(5) permits Her Majesty's interest to attach to collateral which is subject to a fixed charge if the deductions giving rise to Her Majesty's claim arose before that charge attached to that collateral. This proposition flows from the decision of this Court in *Dauphin Plains, supra. Dauphin Plains* involved a determination as to priority in respect of the proceeds of a liquidation sale of a receiver-manager. In that case, the claims of Her Majesty (*inter alia*) arose by virtue of the non-remittance of payroll deductions in regard to payments under the *Canada Pension Plan*, R.S.C. 1970, c. C-5, and the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48. Those Acts provided Her Majesty with claims pursuant to deemed trusts whose language is substantially similar to the version of s. 227(4) and (5) at issue in this appeal. In finding that these claims took precedence over a floating charge which had crystallized after the deductions at issue were actually made, Pigeon J. stated at p. 1199:

> It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. *The claim for the deductions arose subsequently* and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, *both are subsequent to the deductions*. [Emphasis added.]

Thus, s. 227(5) alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached *after* 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. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. In *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd., supra*, this Court *per* Martland J.commented upon just such a scenario, at p. 706:

> From that date, the lien attaches to the employer's property and, as provided in subs. (1), it will take priority over any other claim, including an assignment or mortgage. *In other words, after the lien attaches, its priority is unaffected by a disposition of his property made by the employer*. Where a mortgage has been made prior to the lien attaching, it is not affected. The lien will only attach to the employer's equity in that property. [Emphasis added.]

See also *G. M. Homes, supra*, at p. 250.

35 In this appeal, however, the deductions of tax from the employees' pay cheques occurred after the attachment of the bank's fixed charge to the inventory. As such, this second aspect of s. 227(5)'s operation is not at issue in this case.

36 I find support for the interpretation of s. 227(5) that I have taken in as much as it is consistent with the overall purpose of s. 227(4) and (5). In *Pembina on the Red Development, supra*, Lyon J.A. (dissenting) had occasion to comment upon the purpose of the predecessor section to the current s. 224(1.2) of the *ITA*, namely s. 224(1.2) and (1.3) of the *Income Tax Act*, S.C.1970-71-72, c. 63, which were added by S.C. 1987, c. 46, s. 66. I find that Lyon J.A.'s comments in this respect to be fully applicable to the articulation of the purpose of s. 227(5). At p. 51, Lyon J.A. stated:

> One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987" a publication of Revenue Canada Taxation, Catalogue No. RV-1987, one finds that 87% of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.

Similarly, Parliament has clearly sought to protect the collection of unremitted payroll deductions through the device of the statutory deemed trust. Accordingly, s. 227(5) must be interpreted in light of this purpose. To summarize, it operates in a twofold manner: upon the triggering of an event specified in s. 227(5), Her Majesty's beneficial interest (i) attaches to the tax debtor's property then in existence; or (ii) attaches to collateral subject either to a fixed charge, or a crystallized floating charge, if the actual deductions giving rise to Her Majesty's claim occurred before the fixed charge attached, or the floating charge crystallized, respectively.

37 One further point with respect to terminology is necessary before leaving the present discussion. The method of attachment of Her Majesty's beneficial interest pursuant to s. 227(5) has been referred to at times as a "mechanism for tracing": *Roynat, supra*, at p. 647. This was indeed how it was presented by counsel for Her Majesty in his submissions before this Court. During the hearing of this case, it was questioned whether this was not an awkward usage of the word "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: D. W. M. Waters, *The Law of Trusts in Canada, supra*, at pp. 1037-53. For this reason, I find Professor Wood's description of the operation of s. 227(5), namely, a "relaxation of the equitable tracing rules", to be most accurate: Roderick J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta L. Rev.* 191, at 221; see also *Manitoba (Minister of Labour) v. Omega Autobody Ltd. (Receiver of), supra*, at p. 43; and *Deslauriers Construction, supra*, at p. 603.

38 In conclusion, s. 227(5) is a provision designed to minimize the adverse effect upon Her Majesty from the misappropriation of trust funds held by tax debtors on account of their employees' tax payable. The provision contemplates an intermingling of Her Majesty's property with that of a tax debtor's, such that the subject matter of the trust cannot be (or indeed never was) identifiable. To address this conceptual problem, s. 227(5) allows Her Majesty to attach its interest to any property which lawfully belongs to the debtor at the time of liquidation, assignment, receivership or bankruptcy; this property is then deemed to exist "separate" and apart from the tax debtor's estate. The *ITA* thus permits Her Majesty to transfer title in the property from the tax debtor to Herself in order to satisfy the tax debtor's outstanding unremitted payroll obligations.

39 I would hasten to add to this, however, that this 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. Subsections 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) to permit the expropriation of the property of third parties who are not specifically mentioned in the statute. As Martland J. stated in *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd., supra*, at p. 706:

> The property to which a s. 5A lien attaches is not defined nor identified. In the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights.

Similarly, in *Pembina on the Red Development, supra*, Scott C.J. stated the presumption against expropriation of property, at p. 38:

> In Cross, *Statutory Interpretation* (London: Butterworths, 1987), the author writes at p. 180:
>
> > There is a *general presumption that Parliament does not intend to take away private property rights unless the contrary is clearly indicated*. Lord Atkinson stated that there is a canon of interpretation "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms." After all, the protection of property is generally regarded as one of the fundamental values of a liberal society. [Emphasis added.]

Later in that same case, Twaddle J.A., in separate concurring reasons, articulated this same principle as follows, at p. 46, "[i]t is a 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".

40 Thus, while s. 227(5) can be seen as a provision enacted to solve the conceptual dilemma precipitated by an intermingling of unremitted payroll deductions with a tax debtor's general assets, it is a legal vehicle not without its own conceptual limitations. Namely, while the s. 227(5) deemed trust permits Her Majesty to attach Her beneficial interest to property of the tax debtor upon liquidation (assignment, receivership or bankruptcy), it does not permit the expropriation of property which may belong to a third party creditor at the time the subsection becomes engaged.

41 However, as will be discussed in further detail, *infra*, it is my opinion that the licence theory may, in certain cases, create an exception to this general principle. In particular, where a secured creditor consents to the disposition of his collateral in order to pay wage deductions, that consent, coupled with the statutory trust provisions here at issue, may act to divest that creditor of its proprietary interest in that collateral at the time of liquidation, assignment,

receivership or bankruptcy. Indeed, it is my view that this exception is engaged in the present case such that the s. 227(5) claim of Her Majesty must prevail.

(C) The Nature of the Bank's Security Interests

42 I begin from the observation that Parliament, in enacting s. 227(4) and (5), has chosen to secure Her Majesty's claims to unremitted payroll deductions through employing the concept of a deemed trust. Therefore, the proper analysis to follow in determining whether Her Majesty is entitled to priority pursuant to these subsections must utilize principles of property law. For this reason, it becomes relevant and indeed essential to scrutinize the nature of the interests which compete with Her Majesty's trust in order to determine whether and to what extent such interests have title in the disputed fund. As I mentioned previously, Her Majesty's trust can attach to the disputed collateral only to the extent that that collateral is not in law the property of a party other than the tax debtor at the time the deemed trust is engaged. More specifically, subject to the application of the licence theory, if it is found that legal title in the collateral is in the bank, and not Sparrow, Her Majesty's deemed trust could only attach to Sparrow's equity of redemption: see *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd., supra*, at p. 706.

43 This "statutory trust" approach can be distinguished from other legislative methods which are used to secure an interest to unremitted payroll deductions, namely, through employing an explicit "Crown priority" provision. An example of such a provision can be found in s. 224(1.2) of the *ITA*, a subsection which was recently the subject of consideration of this Court in *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc., supra*. That provision reads:

> *224. ...*
>
> (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> > (*a*) to another person ... who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or
> >
> > (*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in

> any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, *the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest*. [Emphasis added.]

In contrast to the "deemed trust" approach, the application of this section to a priority competition can proceed without regard to the quality of the "security interest" which competes with Her Majesty's claim. Indeed, s. 224(1.2) simply transfers title in the collateral to Her Majesty regardless of whose interest may compete with it, so long as the requirements of s. 224(1.2) are met: see, e.g., *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc., supra*. For a general discussion of these two distinct analytical methods of determining priority between non-consensual security interests (such as statutory trusts) and consensual security interests, see Wood and Wylie, "Non-Consensual Security Interests in Personal Property" *supra*, at pp. 1072-83.

44 In the present case, it therefore becomes necessary to characterize the bank's interest in Sparrow's inventory as either a floating, or a fixed and specific charge.

45 The basic distinction between fixed and floating charges was articulated by Lord Macnaghten in *Illingworth v. Houldsworth*, [1904] A.C. 355 (H.L.), at p. 358:

> A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

The "event ... or ... act" to which Lord Macnaghten refers to as causing the floating interest to "settle and fasten" is described in the modern authorities as "crystallization". Generally speaking, crystallization occurs upon the default of the debtor. Once the floating interest has been said to crystallize, that interest is transformed into a fixed and specific charge over the inventory. See Wood, "The Floating Charge in Canada", *supra*, at pp. 204-08.

46 The critical significance of the characterization of an interest as being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral. For this reason, if a statutory trust or lien attaches during this time, it will attach to the debtor's interest and

take priority over a subsequently crystallized floating charge. However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor's equity of redemption in the collateral: *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd., supra*, at p. 706. This correlative relationship between fixed charges and legal ownership was articulated by this Court in *Dauphin Plains, supra*, at p. 1199, where Pigeon J. stated:

> It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. *From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge*. [Emphasis added.]

See also *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd., supra*.

47 There has been much debate as to whether it is appropriate to characterize a security interest over inventory which permits the debtor to sell that inventory in the ordinary course of business as a floating charge. The debate centres around the ability to characterize a security interest as fixed, in the presence of a licence given to the debtor to sell the collateral, where such an arrangement involves "no final and irrevocable appropriation of property to the creditor": *FBDB, supra*, at p. 33. McLachlin J.A. (as she then was) in *FBDB, supra*, fully considered the conflicting authorities on this point and concluded at pp. 37-38 and 40:

> In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no, with the exception of the line of cases confirming the right of a chattel mortgagor to sell mortgaged stock in the ordinary course of business.
>
> . . . . .
>
> If a charge conferred on the debtor the right to deal with the goods in the ordinary course of business then, regardless of what the parties chose to call it, it was regarded as floating with the result that third party interests acquired prior to crystallization of the charge had priority over the chargeholder.

Adopting this "either-or" doctrine, McLachlin J.A. (as she then was) chose to characterize the security agreement in *FBDB*, which permitted the debtor to sell the secured collateral in the ordinary course of the debtor's business, as a floating charge.

48 I note also that this Court very recently referred to the decision of McLachlin J.A. in *FBDB, supra*, with approval: *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc., supra*. While the issue in that case was different from that in *FBDB*, the comments of Cory J. can, I think, be taken as affirming the "either-or" doctrine as applied in *FBDB*.

49 The relevance of the "either-or" doctrine to the present case, of course, lies in the fact that Sparrow had been granted by the bank, both expressly and impliedly, a licence to sell the inventory over which the bank held a security interest. It therefore could be argued that such a licence renders the interest of the bank in the nature of a floating charge, an interest which must yield to a statutory trust which attaches prior to the charge's crystallization.

50 I do not find it necessary to comment on *FBDB* to the extent that that decision suggests that in the present case the interests of the bank should be characterized as a floating charge. It should be noted that the decision of McLachlin J.A. in the *FBDB* case predated the enactment of personal property security legislation in British Columbia, and so does not speak to the state of the law in a *PPSA* jurisdiction. Nor did that case deal with any other statutory enactment, such as the *Bank Act*, which could affect the characterization of the security agreement there at issue. For these reasons, I consider the comments of McLachlin J.A. in *FBDB* to be directed to the common law position with regard to the characterization of fixed and floating charges. Whatever those common law principles may be, they cannot be taken to alter the effect that legislation may have on the characterization of security interests. As it is my view that the Alberta *PPSA* and the *Bank Act* are determinative of the characterization of the bank's GSA and BAS, respectively, I do not need to address the common law view articulated in *FBDB*.

51 I turn now to consider each of the bank's security interests.

(i) The General Security Agreement (GSA)

52 Counsel for the appellant, Her Majesty, argued in his factum that the bank's GSA is to be considered in the nature of a floating charge. In support of this proposition, counsel advances the decision of the Ontario Court of Appeal in *Re Urman* (1983), 44 O.R. (2d) 248. In that case, involving a general assignment of book debts perfected under the Ontario *Personal Property Security Act*, the security interest was characterized as a floating charge.

53 For the reasons which follow, I cannot accept this submission. In my view, the general security agreement in this case, which was subject to the Alberta *PPS* legislation, must be characterized as a fixed and specific charge subject to a licence to sell the inventory.

54 It is of course true that the *PPSA* does not govern the priority competition between a statutory trust and a security interest. Subsection 4(a) explicitly removes statutory trusts such as the one created by s. 227 of the *ITA* from the province of the Alberta *PPSA*:

> *4* Except as otherwise provided in this Act, this Act does not apply to the following:
>
> (a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;

However, this does not mean that the *PPSA* does not affect the characterization of a charge executed in a jurisdiction which is subject to such an Act. To the contrary, the effect of *PPS* legislation has been said to have "fundamentally changed the characterization of security interests": Wood and Wylie, "Non-Consensual Security Interests in Personal Property" *supra*, at p. 1082. In particular, while pre-*PPSA*, a security agreement purporting to create a floating charge could be said to remain unattached to the collateral until crystallization, s. 12(1) of the Alberta *PPSA* manifestly alters this situation. That subsection reads:

> *12*(1) A security interest, including a security interest in the nature of a floating charge, attaches when
>
> (a) value is given,
>
> (b) the debtor has rights in the collateral, and
>
> (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,
>
> unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

The relevant portion of s. 10 for our purposes states:

> *10*(1) Subject to subsection (2), a security interest is enforceable against a third party only where
>
> (a) the collateral is in the possession of the secured party, or
>
> (b) the debtor has signed a security agreement that contains
>
> . . . . .
>
> (ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property. ...

Generally speaking, therefore, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. Once attachment has occurred, in my view, the GSA then becomes in law a fixed and specific charge over the collateral.

55 I find support in this conclusion as to the effect of *PPS* legislation upon security interests from the fact that the academic literature is unanimous on this point. For example,

Professor Jacob S. Ziegel in his article "Symposium: Recent and Prospective Developments in the Personal Property Security Law Area" (1985), 10 *Can. Bus. L.J.* 131, commented as follows, at p. 152:

> It is of the first importance to determine whether a security interest under the PPSA retains any of the common law characteristics of a floating charge and if so which. My own view is that *once a security interest has attached under the PPSA it has no "floating" attributes* even though the security agreement, expressly or impliedly, gives the debtor considerable powers to dispose of the collateral in the course of his business. *In brief, the PPSA only recognizes specific or fixed security interests* although admittedly the collateral itself may often change its character because of the express or implied powers of disposition given the debtor. [Emphasis added.]

This opinion is echoed by Professor Wood in his recent article "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" *supra*, at p. 433:

> Under pre-PPSA law, a plausible argument could be made that a security interest in the form of a fixed charge combined with a licence to deal is, in effect nothing more than a floating charge. However, this argument [is] untenable in the cases involving PPSA security interests. ...

Similarly, Professor Ronald C. C. Cuming, in "Commercial Law — Floating Charges and Fixed Charges of After-Acquired Property: *The Queen in the Right of British Columbia v. Federal Business Development Bank*" (1988), 67 Can. Bar Rev. 506, at pp. 510-11, opined:

> In effect, [PPS] *legislation treats all charges, including floating securities, as fixed charges*. The legislatures that have enacted Personal Property Security Acts have implicitly declared that, as a matter of public policy, there is nothing objectionable to having a fixed charge on stock-in-trade of a debtor coupled with a licence to deal with the collateral in the ordinary course of business. [Emphasis added.]

At p. 519, the learned author concludes "there can be no such thing as a floating charge under a Personal Property Security Act".

56 Applying this principle to the case at bar, the GSA held by the respondent bank must certainly be characterized as a fixed and specific charge. It attached at the time the agreement was executed, February 25, 1992. More specifically, however, because of the permission granted by the bank which allowed Sparrow to sell the encumbered inventory, the GSA is in the nature of a fixed charge with a licence to deal with the inventory.

(ii) Bank Act Security (BAS)

57 The appellant has further submitted that the respondent bank's BAS is in the nature of a floating charge over the inventory. Several lower court decisions have been relied upon in support of this proposition: *Abraham, supra*, (under appeal); *Armstrong, supra*; and *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)* (1994), (sub nom. *North Sky Trading Inc. (Bankrupt), Re*) (1994), 158 A.R. 117 (Q.B.) (under appeal).

58 The earliest authority to comment upon the nature of BAS is the decision of this Court in *Royal Bank v. Nova Scotia (Workmen's Compensation Board)*, [1936] S.C.R. 560. That case involved a priority competition between security under s. 88 of the *Bank Act*, R.S.C. 1927, c. 12, the predecessor of s. 427, and a lien created by s. 79(2) of *The Workmen's Compensation Act*, R.S.N.S. 1923, c. 129. In his concurring judgment, Davis J. observed the effect of s. 88 security as follows, at p. 567:

> the security [does] not operate to transfer absolutely the ownership in the goods but ... the transaction [is] *essentially a mortgage transaction* and subject to the general law of mortgages except where the statute has otherwise expressly provided. ... Section 88 set up by the *Bank Act* enables manufacturers, who desire to obtain large loans from their bankers in order to carry on their industrial activities, to give to the bank a special and convenient form of security for the bank's protection in the large banking transactions necessary in the carrying on of industry throughout the country. *Until the moneys are repaid, the bank is the legal owner of the goods* but sale before default is prohibited and provision is made for the manufacturer regaining title upon repayment. To say that Parliament did not use language to expressly provide that the bank shall have a first lien on the goods is beside the mark. *The bank acquires ownership in the goods by the statute*. [Emphasis added.]

59 More recently, this Court had occasion to consider the attributes of *Bank Act* security in *Bank of Montreal v. Hall, supra*. In that case, La Forest J. underlined this Court's previous ruling in *Royal Bank v. Nova Scotia (Workmen's Compensation Board), supra*, that BAS gives to the lender legal title in the collateral. At pp. 133-34, La Forest J. stated:

> By section 178(2) [now s. 427(2)], a bank may take security in property owned by the borrower at the time of the loan transaction, and any property acquired during the pendency of the security agreement. The rights and powers of the bank with respect to the secured property are set out in s. 178(2)(*c*). By the terms of s. 178(2)(*c*), these rights and powers are stated to be "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which such property was described". These powers are defined, in turn, in s. 186 [now s. 435] of the Act where it is specified that any warehouse receipt or bill acquired by a bank as security for the payment of a debt, vests

in the bank all the right and title to goods, wares and merchandise covered by the holder or owner thereof.

The nature of the rights and powers vested in the bank by the delivery of the document giving the security interest has been the object of some debate. Argument has centred on whether the security interest should be likened to a pledge or bailment, or whether it is more in the nature of a chattel mortgage. I find the most precise description of this interest to be that given by Professor Moull in his article "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar. Rev.* 242, at p. 251. *Professor Moull, correctly in my view, stresses that the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out*. He states, at p. 251:

> The result, then, is that a bank taking security under section 178 *effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank*, despite changes in the attributes or composition of the assigned property. *The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time*. [Emphasis added.]

60 It follows from the comments of this Court regarding the ownership rights in inventory conferred by the *Bank Act* that security taken under that Act must be considered to be in the nature of a fixed and specific charge. As stated above, the concept of the fixed charge is correlative to the notion of a creditor's having legal proprietary rights in the collateral. I add that this view has been adopted by academic literature in this area: R. J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" *supra*, at p. 433; and William D. Moull, "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 Can. Bar. Rev. 242. I find this following passage, at p. 251, from the article written by Professor Moull which was cited with approval by this Court in *Bank of Montreal v. Hall, supra*, particularly persuasive:

> Because of its scope and flexibility, some commentators have suggested that section 178 [now 427] security is in the nature of a floating charge. This can be misleading, however. Because the bank effectively acquires legal title, section 178 security is really in the nature of a fixed charge on the present and after-acquired property of the borrower assigned to the bank. One attribute that section 178 security may be said to share with a floating charge is its application to all property of a specified kind held by the borrower from time to time. But while a floating charge may apply to all property of a specified kind held by the borrower from time to time, it does not affix itself specifically upon any particular item of property until it crystallizes upon default by the borrower. Conversely, a section

> 178 security is a fixed charge on each item of assigned property held from time to time whether or not the loan is in default. This gives a bank significantly greater rights than it would hold under a floating charge debenture on inventory.

61 For these reasons, I consider the security interest of the bank in the form of BAS to be in the nature of a fixed and specific charge with a licence to sell the inventory.

(iii) Summary — Fixed and Specific Charge Over Inventory

62 It would seem appropriate at this point, before leaving the present discussion, to comment briefly upon this novel and perhaps abstract notion of possessing a fixed charge over all of the present and future inventory of a debtor. To begin with, I note that traditional definitions of the fixed charge, as for example the one I previously quoted above from *Illingworth, supra*, emphasize the ability to "settle and fasten" upon ascertainable and defined property as being an integral attribute to this particular form of charge. This type of attachment to tangible and ascertainable property, of course, is impossible to achieve in the case of an assignment of inventory, where that collateral is changing constantly. In short, the traditional concept of the fixed charge seems to be at odds with the notion of having a proprietary right over collateral such as after-acquired inventory which, by definition, is not yet in existence at the time the security agreement is executed.

63 In my view, however, a fixed charge over all present and future inventory represents a proprietary interest over a dynamic collective of present *and future* assets. To this extent, as stated above, this form of security interest challenges our traditional conception of a fixed charge; to the same extent, in my opinion, our conception of this form of charge must change to meet the modern realities of commercial law, and in particular the legislative provisions which have been brought to bear in this appeal.

64 In effect, the fixed and specific charge gives to the secured creditor the title (subject, of course, to the debtor's equitable right of redemption) to the present inventory of the debtor, as well as the after-acquired inventory of the debtor. In this way, the secured creditor becomes the legal owner of inventory as it comes into possession of the debtor. I note that the Alberta *PPSA* contains a specific provision securing a creditor's proprietary right to after-acquired property in this way:

> 13. (1) Except as provided in subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest *attaches in accordance with section 12, without the need for specific appropriation*. [Emphasis added.]

Professors Cuming and Wood, in their published annotation of the Alberta *PPSA*, observe that by virtue of this subsection "the security interest in after-acquired property *has equal status* with a security interest in collateral in existence at the time the security agreement is

executed": Cuming and Wood, *Alberta Personal Property Security Act Handbook, supra*, at p. 121 (emphasis added). Similarly, the BAS has the effect of presently attaching the secured creditor's interest to the after-acquired inventory of the debtor. In *Hall, supra*, La Forest J. approved of Professor Moull's description of the effect of the relevant provisions of the *Bank Act*, at p. 134, which is particularly apposite to the present discussion:

> The result, then, is that a bank taking security under section 178 [now s. 427] *effectively acquires legal title to the borrower's interest in the* present and *after-acquired property assigned to it by the borrower*. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and *remains attached until released by the bank, despite changes in the attributes or composition of the assigned property*. The borrower retains an equitable right of redemption, of course, but the bank *effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time*. [Emphasis added.]

65 It follows from these observations that where, as here, a secured creditor holds a fixed charge over a debtor's inventory, that charge will have the effect of ensuring the creditor has legal title to any and all inventory subject to the charge at any given point in time. This, of course, is subject to the caveat (not operative in this case) that no outstanding statutory payroll deductions had in fact been made prior to the attachment of the fixed charge. Thus, in the present case, the inventory which was subject to the liquidation sale belonged in law to the respondent bank: both under its GSA and its BAS the bank held a fixed charge over Sparrow's inventory. As such, all that Her Majesty's beneficial interest could attach to, before its sale, was Sparrow's equity of redemption in the property: *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd., supra; Canadian Imperial Bank of Commerce v. Klymchuk* (1990), 74 Alta. L.R. (2d) 232 (C.A.), at p. 240.

66 But this of course does not end the matter. While it is true that the bank held legal title in the inventory which is the subject of the dispute in this case, it is also true that at the time the deductions were made the bank had given its permission to Sparrow to sell this inventory in the course of its business. The GSA contained an express licence to this effect; and the BAS impliedly contained such a licence. In this way, the bank had consented, contractually, to the divestment of their interest in the collateral taken in inventory and the usage of the proceeds of that collateral for certain purposes. The critical issue which falls to be decided is, then, what is the scope of this contractual licence? In particular, if this bank's consent included the right to sell the inventory in order to pay wages, then that consent by necessity included the right to sell inventory to remit payroll deductions. In such a situation, for the following reasons, Her Majesty's interest would be able to attach to the proceeds of the inventory, and in this way take priority over the bank's interest.

67 As stated previously in my reasons, at para. 41, *supra*, it is my opinion that the licence theory may operate, in the context of the statutory scheme at issue in the present appeal, as an exception to the general rule that at the time of "liquidation, assignment, receivership or bankruptcy" Her Majesty's interest cannot attach to property which is at that time the property of a secured creditor. More specifically, where it can be said that at the time the deductions were made a secured creditor had consented to the use of its collateral in order to pay the statutory deductions which are the object of a deemed trust, it may also be said that that creditor has bound itself by the statutory requirements relating to those deductions. Here, therefore, if it can be said that at the time the wage deductions at issue were made the bank had permitted the sale of inventory in order to pay wages, and thus wage deductions, it will be possible for s. 227(5) to attach to the bank's inventory existent at the time of receivership. With regard to this approach to the licence theory, see *FBDB, supra*, at pp. 40-41, *Roynat, supra*, at pp. 649-50, and *G. M. Homes Inc., supra*, at pp. 252-54.

68 In short, where the bank has consented to the reduction in the value of its security in order to pay statutory deductions at the time those deductions are made, they have to the same extent, by virtue of s. 227(5), consented to the reduction in their security at the time of receivership. The critical question which falls to be decided in this case, then, is what was the scope of the bank's consent to sell inventory at the time the deductions were made?

(D) Whether on the Facts the Licence to Sell Included the Right to Use the Proceeds to Pay Wages?

69 I underline at the outset that the critical factor in the "licence to sell" argument is the permission which must be found to have been granted with respect to the usage of the proceeds of the disputed collateral. Thus, while licences may often be mouthed in terms of a "right to sell in the ordinary course of business" it must not be forgotten that it is permission with respect to the *usage of proceeds*, and not necessarily the *circumstances of sale*, which is the proper focus of the inquiry.

70 When interpreting the contractual provisions which gave Sparrow the right to sell the encumbered inventory, it is necessary to look at the words of the contract, the nature of the transaction which the parties entered into, and all of the surrounding circumstances.

71 The express provisions of the GSA establishes that Sparrow was granted a licence to sell the encumbered inventory. In particular, the licence stated that:

> until default, *Debtor may, in the ordinary course of Debtor's business, sell* or lease *inventory* and, subject to Clause 7 hereof, *use Money available to Debtor*. [Emphasis added.]

Therefore, Sparrow was permitted to sell its inventory in the ordinary course of its business and "use" the proceeds generated therefrom. The critical question is what "us[age]" this licence to sell in the "ordinary course of ... business" contemplated. In this connection, I find two of the express covenants in Sparrow's contractual arrangements to be salient. Paragraph 4(e) of the GSA required Sparrow:

> (e) *to pay all taxes*, rates, levies, *assessments* and other charges of every nature *which may be lawfully* levied, *assessed or imposed against or in respect of Debtor* or Collateral as and when the same become due and payable; [Emphasis added.]

In addition, in the Credit Facilities Agreement, Sparrow covenanted to the bank as follows:

> (3) it will promptly pay when due all business, income and other taxes properly levied on its operations and property *and remit all statutory employee deductions when due*; [Emphasis added.]

72 Looking at these express provisions of the contractual arrangements between Sparrow and the bank, I conclude that the payment of payroll deductions would be a usage to which the bank contemplated Sparrow would use the proceeds of inventory sold in the "ordinary course of ... business". My conclusion in this respect is buttressed when the nature of the dealings between Sparrow and the bank, and all the surrounding circumstances, are observed.

73 The bank was Sparrow's primary lender; it held a security interest in most, if not all, of Sparrow's assets. In particular, the bank held various security interests in Sparrow's inventory. It was of course in the bank's best interest that Sparrow function as a viable economic unit. To do so, Sparrow was required to sell its services as an electrical contractor and, necessarily, sell its inventory. From the sales of the inventory, Sparrow could generate revenues to, *inter alia*, pay its outstanding operating debts. If it failed to do so, Sparrow could be petitioned into bankruptcy, with the result that Sparrow could no longer generate the profits necessary to pay its loan obligations to the bank in the long term. One of Sparrow's ongoing obligations, its costs of doing business, was the paying of wages. In order to stay in business, and operate as a profitable business enterprise, Sparrow would have to pay its employees. This is a necessary requirement of continuing in business. It would be reasonable that the bank expect, taking into consideration all the circumstances of this arrangement, that revenue from the sale of inventory would be used to pay wages.

74 From these observations, I consider the licence to sell inventory in the ordinary course of business in this case necessarily included a licence to sell inventory to pay wages, and remit wage deductions, in the course of its business. Where, as here, the secured party has security over the majority of the assets of the debtor, the security interest over the inventory must permit the debtor to sell the inventory and put it to the general use of its business,

including towards the payment of wages. Indeed, the express terms of the licence intimates this, providing Sparrow could, "in the ordinary course of ... business, ... use Money available". The scope of the licence can thus be ascertained either from the express terms of the security agreement, or from the nature of the agreement and the conduct of the parties. To be clear, however, the scope of the licence in this case flows not merely from a right to sell inventory *per se*. Instead, it is the licence to sell inventory in the "ordinary course of [Sparrow's] business ... and use [the proceeds]" which renders it of such a quality as to include a right to use the proceeds to pay wages. As Professor Wood has correctly observed in "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.", supra*, at p. 435, a licence to sell inventory may in certain circumstances be circumscribed so as to not include a right to use the proceeds to pay wages:

> The fact that the secured party permits the debtor to sell the inventory does not in itself imply that the secured party permits the debtor to use these proceeds to pay employees. In some cases the secured party will not restrict the debtor's ability to use the proceeds in the ordinary course of business, but this depends entirely on the security arrangement negotiated between the debtor and the secured party. Consider the following scenario:
>
> > SP finances the acquisition of inventory by an automobile dealer (D), and is granted a security interest in the inventory. The wholesale security agreement provides that D may sell the inventory in the ordinary course of business and that upon doing so D must immediately remit the wholesale purchase price of the automobile to SP.
>
> In this scenario, SP clearly does not permit the debtor to use the proceeds of inventory to pay its employees. Indeed, it is common for SP to regularly monitor the debtor to ensure that the debtor is not "out of trust" by failing to remit the proceeds of sale.

75 In summary, the true test of whether the licence to sell inventory includes the right to pay wages must therefore be a matter of interpreting the contractual arrangement between the parties. The focus is not so much on the circumstances of the selling of inventory, but rather the permitted usage of the proceeds of inventory. As in Professor Wood's example, where the licence has a limited scope, that licence may not include the right to use proceeds to pay wages. However, the expression of a limited use for proceeds of inventory cannot prevail if the arrangement between the parties is such as to allow, in practice, the debtor to use the inventory proceeds in the course of its business. In this respect, I agree with Professor Wood's comments regarding the appropriate test for determining whether a licence to sell inventory includes permission to pay wages with the proceeds ("Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.", supra*, at pp. 435-36):

> This is not to say that the analysis should hinge on the existence of a trust proceeds clause or other contractual provision requiring the debtor to remit proceeds. *A contractual provision of this type should not govern if the real arrangement between the parties is such that the debtor has the freedom to use the proceeds of inventory in the ordinary course of business*.
>
> . . . . .
>
> To make any sense at all, the licence theory must, at the very least, be restricted to cases where the secured party permits the debtor to pay employees either out of its collateral or out of the proceeds of its collateral. This permission cannot be derived merely from the existence of a licence to sell inventory. *The test should be whether the debtor had the freedom to use these funds in the ordinary course of business as opposed to being under an obligation to remit them to the secured party*. [Emphasis added.]

76 In the case at bar, the GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, I find that this cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to immediately remit proceeds of inventory to it. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its enterprise. For these reasons, applying Professor Wood's test, I find that under the licence to "sell .. inventory" "in the ordinary course of ... business" and "use [the] [m]oneys available" the bank permitted Sparrow to sell inventory to pay wages and, necessarily, payroll deduction obligations.

77 For all these reasons, through the application of the licence theory, it is my conclusion that the appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. To reiterate, the bank consented to the reduction in its security in inventory in order to pay wage deductions at the time those deductions were made, and s. 227(5) of the ITA has the effect of carrying forward that consent to the time of receivership. By consenting to the payment of wages out of the proceeds of inventory during the course of Sparrow's business, the bank *ipso facto* consented to the statutory scheme under the ITA designed to cover unpaid wage deductions. In short, in the present case the licence to deal with inventory proceeds coupled with the statutory scheme in s. 227(4) and (5) of the ITA gives priority to Her Majesty's claims for statutory wage deductions. This result is obtained both in regard to the bank's GSA, and its BAS.

78 The respondent bank has submitted that this result is necessarily precluded with regard to their BAS by virtue of s. 428(1) of the *Bank Act*, which provides as follows:

> *428.* (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by a security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, *priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor*. [Emphasis added.]

I cannot agree with this submission. It is true that s. 428(1) secures the respondent bank's proprietary right to the disputed collateral. However, for the reasons I have expressed, the fact remains that the bank has consented to the divestment of this interest. Such a waiver of priority, in my view, renders s. 428(1) of no assistance to the respondent bank.

79 I add as a final matter that in addition to providing certainty in disputes between consensual and non-consensual security interests, the licence theory has the virtue of achieving fairness in commercial law. Here, the respondent bank had permitted Sparrow to sell its inventory in the course of its business in order to, among other things, pay wages and wage deductions. To this extent, therefore, the bank permitted the reduction in the value of its security interest in Sparrow's inventory, during the ordinary course of Sparrow's business. Implicit in the bank's consent is the assumption that in so doing, Sparrow would generate profits from the conversion of inventory into revenues; this economic process, as I noted above, ensures that interest payments owing to the bank would be paid to them on a sustainable basis. In short, the bank benefitted in a general sense from Sparrow's carrying on its business operations, an endeavour which required Sparrow to pay wages and wage deductions. More specifically, however, when Sparrow stopped paying its wage deductions, as required, the bank could be said to benefit from the artificial increase in Sparrow's working capital, allowing an extension of the life of Sparrow's business.

80 Now, when Sparrow's business is no longer a viable enterprise, the bank says that it is entitled to the very payments which allowed Sparrow, in part at least, to stay in business longer than was legally economical. In essence, the bank is willing to accept the benefits of Sparrow's non-payment of statutory deductions, and can be said to have reasonably permitted the use of its collateral to pay these deductions at the time they should have lawfully been paid, but refuses to accept the burden of Sparrow's unlawful action at the time of its receivership. In my view, it should be the policy of the law that the respondent bank be held accountable for Sparrow's outstanding statutory obligations. The licence theory, as I have

developed it, ensures that in appropriate circumstances this result will obtain. In this way, in my opinion the licence theory is grounded not only in legal principles, but also in sound policy.

81 Since writing the foregoing, I have had the benefit of reading the careful reasons of my colleague, Mr. Justice Iacobucci. With deference however, I do not share his views or his concerns.

82 I note that Iacobucci J., in his reasons, has taken me to have adopted the licence theory in extremely broad terms. Specifically, when summarizing the conceptual basis of my reasoning, he states at para. 91:

> Consequently, says the [licence] theory, the bank's claim to the inventory must give way to *any debts incurred* in the ordinary course of business. [Emphasis added.]

Similarly, Iacobucci J. writes at para. 97:

> The satisfaction of any legitimate debt or obligation, whenever incurred, is arguably "in the ordinary course of business". Certainly, the payment of creditors is a permissible "use" of the proceeds of a sale of inventory. Following my colleague's reasoning, this would mean that *every subsequent claim* should prevail over the respondent's general security agreement, *because every rival claim might have been satisfied out of the proceeds of a hypothetical sale of the inventory*. [Emphasis added.]

83 With respect, as he acknowledges, my reasons do not go this far. It is not the consent to payment of wage deductions from the proceeds of inventory *simpliciter* which drives me to the conclusion that Her Majesty's interest must prevail. This is a necessary, but not sufficient, condition. In addition, however, what is significant to the outcome of this case is that the bank has consented to payment of wages including deductions, out of inventory *which, at the time of the deductions, are by statute deemed to be taken out of the estate of the debtor* (see ss. 153(3) and 227(4) of the *ITA*). Subsection 227(5) carries that consent forward to the time of liquidation, assignment, receivership or bankruptcy, to realize Her Majesty's claim out of the bank's inventory.

84 Therefore, the unique nature of the statutory provisions applicable to wage deductions, and the bank's consent thereto, are integral to the success of the s. 227(5) claim in the case at bar. In this way, the licence theory, as I have employed it, is circumscribed.

85 It must be stressed that the issue relates to wages actually paid to employees — not a simple obligation to pay wages — a portion of which has been deducted from the amount remitted to the employee and must be remitted to Her Majesty. Pending such remittance, the amount deducted is deemed under s. 227(4) to be held in trust for Her Majesty. By

virtue of these *ITA* provisions, and unlike ordinary debts and obligations, unpaid wage deductions are, in law, *performed* obligations. The consent by the bank to the payment of wages out of the proceeds of the sale of inventory must be taken to cover the wages paid according to law including that portion which has been deducted from the remittance to the employee, pursuant to the *ITA*, in order that it be remitted to Her Majesty. While the value of the bank's security in the inventory may be thereby reduced, this is by virtue of specific statutory requirements under well-defined rules limited in their application to actual payment of wages. These requirements are well known and are encompassed by the bank's consent to the payment of wages in the ordinary course of business and do not open the door to uncertainty as to the value of security. Any risk to the bank's security is part of the very risk involved in consenting to the payment of wages. This does not open the door to any uncertainty as to the value of the bank's security arising from unperformed obligations incurred by the debtor in the ordinary course of business.

86 For these reasons, I cannot agree with the premise underlying Iacobucci J.'s reasons, namely, that the licence theory as I have employed it is inimical to the integrity of commercial law. It does not have the extensive application suggested by my colleague; it does not create uncertainty in commercial transactions. Instead, the licence theory operates narrowly, in conjunction with unique statutory provisions, so as to actualize legally performed obligations when they, in fact, exist.

VI — Conclusion

87 It is possible to summarize my conclusions in this case into the following five propositions:

1. Priorities between statutory trusts and consensual security interests are resolved by determining which interest has an attached interest in the disputed collateral at the time the statutory trust becomes operative.

2. The s. 227(5) *ITA* deemed trust attaches to any property of the debtor which exists upon liquidation, assignment, bankruptcy or receivership.

3. For example, if deductions are made prior to the attachment of a fixed charge over collateral, the s. 227(5) deemed trust will engage to retroactively attach Her Majesty's beneficial interest to that collateral. The fixed charge over that collateral will thereafter be subject to Her Majesty's pre-existing claims for unremitted payroll deductions.

4. Otherwise, if a security interest is in the nature of a fixed and specific charge, that interest gives the holder legal title to the collateral, such that a subsequent competing statutory trust will not be able to attach its interest. In such a case, all the statutory trust can attach to is the equity of redemption in the collateral.

5. However, as an exception to propositions 2 and 4, where the holder of a fixed security interest permits the debtor to sell the collateral, this may provide an opportunity for the statutory trust to attach. Whether this actually occurs depends entirely on the facts of each case. The test is whether, at the time the deductions occurred, the debtor had the right to sell the collateral and use the proceeds to pay the obligation to which the statutory trust is related.

88 I have found that, on the facts of this case, the licence invoked to sell inventory included the permission to use its proceeds to pay wages or wage deductions. The test in proposition 5 has therefore been made out. Accordingly, I would allow the appeal with costs.

***Iacobucci J.* (*Sopinka, McLachlin* and *Major JJ.* concurring):**

89 I have read the lucid reasons of my colleague, Justice Gonthier, and although I agree with much of his reasoning, I cannot, with respect, accept the conclusion that he reaches. In particular, I do not accept that the deemed trust that arises in favour of the Crown by operation of s. 227(4) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (hereinafter *ITA*) takes priority over the security interests that the respondent has under the *Bank Act*, S.C. 1991, c. 46, and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 (hereinafter *PPSA*). Even conceding that the latter interests are subject to a licence to sell, the licence is not nearly so broad as to encompass the satisfaction of income tax obligations. As I will discuss below, a licence to sell inventory authorizes at most only the satisfaction of obligations that are immediately incidental to an actual sale of the inventory.

90 Because my only disagreement with my colleague is in his application of the licence-to-sell approach to this case, I do not propose to discuss the facts or background that he has so ably described or to dwell on any other part of his reasons. I need not say anything more about the character of the respondent's security interests than that they are fixed and specific.

91 My colleague disposes of this appeal on the basis of the so-called "licence theory". Briefly, the licence theory holds that a bank's security interest in a debtor's inventory, though it be fixed and specific, is subject nevertheless to a licence in the debtor to deal with that inventory in the ordinary course of business. Consequently, says the theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business. The leading articulation of the licence theory appears in McLachlin J.'s reasons in *British Columbia v. Federal Business Development Bank*, [1988] 1 W.W.R. 1 (B.C. C.A.) (hereinafter *FBDB*), at p. 40.

92 The theoretical basis of the licence theory seems to be that a creditor who has granted a licence to sell inventory has thereby consented to the subjection of his security interest to

other obligations that may arise "in the ordinary course of business". My colleague says this in his reasons:

> In short, where the bank has consented to the reduction in the value of its security in order to pay statutory deductions at the time those deductions are made, they have to the same extent, by virtue of s. 227(5) [of the *ITA*], consented to the reduction in their security at the time of receivership.

This is sensible, because it is only if the licence is understood as a kind of tacit lessening of the creditor's security interest that the appellant's cause is advanced. Certainly the actual operation of the licence is not relevant, because in this case the inventory in question was never actually sold pursuant to the licence. Rather, the receiver sold it by court order. If the licence is to have anything to do with the disposition of this appeal, it must be by virtue of the evidence it affords of the respondent's intention to take less than an entire security interest in the inventory.

93 In my view, the licence affords no such evidence. My colleague seems to think that the potential sale of the inventory amounts to an actual limitation of the security interest. For my part, I do not see what the one thing has to do with the other. There is a great difference between saying, on the one hand, that if a debtor sells inventory and applies the proceeds to a debt to a third party, *then* the third party takes the proceeds free of any security interest and saying, on the other hand, that because a third party *could* take the proceeds free of any security interest, no security interest exists in the proceeds as against that third party. A licence to sell inventory in the ordinary course of business is a condition of the former kind. The consequent (defeasance of the security interest) follows only if the the antecedent (sale of the inventory and application of proceeds to an obligation to a third party) is satisfied. In other words, the security interest in the inventory disappears *only if* the debtor actually sells the inventory and applies the proceeds to a debt to a third party.

94 That this is so is suggested by s. 28(1) of the *PPSA*, which provides:

> *28*(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest
>
> (a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and
>
> (b) extends to the proceeds,
>
> but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

In accordance with this provision, the result of a sale of inventory is to give the purchaser an unencumbered interest in the inventory and the licensor a continuing security interest in the proceeds of the sale. It is only if the debtor subsequently uses the proceeds to satisfy an obligation to a third party that the proceeds will be removed from the scope of the licensor's security interest in them. Accordingly, what a security agreement with a licence to sell creates is a defeasible interest; but the event of defeasance is the *actual* sale of the inventory and the *actual* application of the proceeds against an obligation to a third party.

95 I recognize that the operation of s. 28(1) of the Act is not necessarily inconsistent with the broad interpretation of the licence to sell that my colleague advances. However, it seems to me that this is an appropriate case for the invocation of the maxim *expressio unius est exclusio alterius*. The statute prescribes certain consequences for the security interest that follow a dealing with inventory. In particular, the statute contemplates defeasance of the interest if the debtor actually sells the inventory and applies the proceeds to an obligation to a third party. Significantly, the statute does not contemplate a defeasance on the happening of any other event. In my view, the statute occupies the field and crowds out other possible interpretations of the licence, including the one that Gonthier J. favours.

96 Because in this case there was no actual sale of the inventory in question, let alone any disposition of the proceeds, the licence can have had no effect on the respondent's security interest. What the debtor *might have done* with the licence does not matter.

97 If it were otherwise, the licence to sell inventory would entirely eviscercate the respondent's general security agreement. The satisfaction of any legitimate debt or obligation, whenever incurred, is arguably "in the ordinary course of business". Certainly the payment of creditors is a permissible "use" of the proceeds of a sale of inventory. Following my colleague's reasoning, this would mean that every subsequent claim should prevail over the respondent's general security agreement, because every rival claim might have been satisfied out of the proceeds of a hypothetical sale of the inventory. Moreover, the priority rules of the *PPSA*, whose general policy is to assign priority to the earliest registered security interest, would be turned on their head. Presuming that every charge against inventory is subject to a licence to sell — a presumption that accords with the interest of creditors in ensuring the debtor's continued vitality — the last security interest would take priority over all earlier ones, because only the last interest would not be subject to some charge arising in the ordinary course of business. In answer to this objection, it might be said that as between two *PPSA* securities, the rules in the Act should be applied to determine priority. However, such an answer would not be consistent with the licence theory, which supposes that the original security interest in the inventory ends where obligations incurred in the ordinary course of business begin. The subsequent interest would prevail because the earlier interest would disappear before it.

98 It is open to my colleague to distinguish the fact situation in this appeal from the hypothetical priority contests I have mentioned on the ground that the Crown's interest in the inventory is unlike other charges against inventory in that it depends on the fictional device of deeming. What makes this case different, it might be said, is that the *ITA* deems to have been done what could have been done. On this understanding, it does not matter that the inventory was not actually sold and the proceeds were not actually remitted to the Receiver General, because ss. 227(4) and 227(5) of the *ITA* deem these things to have been done. But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the respondent's and not attachable by the deemed trust. As Gonthier J. himself says:

> ... [subsection 227(4)] 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.

99 The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is *first* determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.

100 Indeed, Gonthier J. does seize on the peculiar nature of the deemed trust as a possible ground for distinguishing the Crown's interest from rival interests. However, his argument differs from the one I have outlined to the extent that it emphasizes the deemed performance of the obligation to the Crown. It appears to be my colleague's position that the licence to sell represents a reduction in the value of the security interest only with respect to performed obligations but not with respect to unperformed ones. In his view, this represents a sufficient check on the licence theory. I agree that, if the distinction between performed and unperformed obligations were maintainable, then the likelihood of the licence consuming the security interest would be greatly reduced. However, in my view, the distinction cannot be maintained. As Gonthier J. says more than once in his reasons, the licence theory rests on the consent of the parties. But the parties to this case consented to the sale of inventory "in the ordinary course of Debtor's business". The language is unqualified. No distinction is drawn between performed and unperformed obligations. The only performance that is contemplated in the licence is the actual sale of the inventory and the application of the proceeds to a debt. And, as I have already argued, the deeming mechanism does not furnish the needed actual sale. Accordingly, I conclude that if the words of the licence are to be

given their due as an *indicium* of the parties' intent, then there can be no distinction between performed and unperformed obligations.

101 My colleague places great emphasis on the fact that the debtor covenanted, in the general security agreement, "to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable". But this covenant is not part of the licence. And in any event, it is merely a covenant to obey the law. It adds nothing to s. 153(1) of the *ITA*. Furthermore, it does not prescribe the outcome of a priority contest. What is more, the covenant to pay taxes is only one of several in the agreement. Another covenant provides that the debtor shall "carry on and conduct the business of Debtor in a proper and efficient manner". Presumably the debtor might incur subsequent debts in the course of carrying on and conducting its business. Gonthier J. advances no principle that might permit the settlement of priority disputes as between the Crown and subsequent lenders. In the event of a dispute, both would have the benefit of the licence to sell inventory and of express covenants, so that some other criterion would have to be found to determine which takes priority. Here, as before, the prospect of a reversal of the ordinary priority rules is immediate and troubling.

102 My colleague also relies on comments made in *FBDB*. In that case, the British Columbia Court of Appeal said, after having disposed of the appeal on another ground, that a licence to sell inventory carries with it a requirement that the licencee should satisfy obligations incurred in "dealing with the stock in the ordinary course of business": *FBDB, supra*, at p. 40. Because the obligation to set aside provincial sales taxes is a "legal incident" of the sale of inventory, a lien for unpaid sales taxes comes within the scope of the licence and so is excepted from any security interest that is subject to it: *idem*.

103 As I understand the comments in *FBDB*, a licence to sell inventory permits the satisfaction of obligations out of the proceeds only to the extent of the "legal incidents" of the sale. In itself, this greatly limits the scope of the theory. Because the payment of wages, except perhaps to the sales agent, is not a "legal incident" of the sale of inventory, deduction of income taxes from wages does not come within the scope of the licence. This alone would appear sufficient to distinguish *FBDB* from the instant appeal.

104 However, I think that on closer examination it turns out that *FBDB* does not even depend on a licence theory, or at least does not depend on a licence theory of the kind advanced by my colleague. I say this because his reasons posit a charge that arises against the *value* of the inventory as a result of the operation of the licence. But the sales taxes that were at issue in *FBDB* were not against the value of the inventory. Rather, they were superadded to the underlying value, which is to say that they were calculated on the basis of the sale price of the inventory. Thus, the sales taxes that attend a sale of inventory represent something

over and above the value of the inventory. Because a bank's charge is against the *inventory*, it does not extend so far as the sales taxes generated by a sale of inventory. But income taxes are not like sales taxes in that they are not as directly related to sales of inventory as sales taxes are. To the extent that income taxes have anything to do with the proceeds of a sale of inventory, they are payable out of the monies received for the value of the inventory. A bank's charge against the inventory is therefore adequate to defeat subsequent claims for the payment of income taxes. For this reason, McLachlin J.'s reasoning in *FBDB* is not contrary to what I am advancing herein.

105 I should also mention that in 1988, when the *FBDB* case was decided, British Columbia's *Personal Property Security Act*, S.B.C. 1989, c. 36, was not in force. As a consequence, the British Columbia Court of Appeal did not have to contend with the legislative considerations that we face in this appeal. In particular, there was at the time no equivalent in British Columbia law to s. 28(1) of Alberta's *PPSA*. The Court of Appeal therefore had greater latitude than we have to interpret a licence to sell as a tacit consent to a reduction of the security interest in the inventory. It seems to me that as a result of the enactment of the *PPSA*, something more than an unadorned licence to sell is needed to justify the conclusion that a creditor intended to abridge considerably its security interest in inventory.

106 And so I conclude that the licence to sell inventory is not an exception to the respondent's fixed and specific charge against the debtor's inventory. To hold otherwise would be to eviscerate the respondent's security interest. This is not to say, however, that Parliament could not legislate otherwise. Parliament has shown that it knows how to assert priority over rival security interests. See *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963, at p. 975. All that is needed to overtake a fixed and specific charge is clear language to that effect.

107 Though I consider the above legal arguments sufficient to dispose of this appeal, I observe that policy considerations also tell in favour of the conclusion I have reached.

108 In this respect, the first thing to notice is that the security agreement that the debtor and the respondent had in this case is an example of a very common and important financing device. To a considerable extent, commerce in our country depends on the vitality of such agreements. As several leading academics have observed, the amounts at stake run into the billions of dollars each year. And though not every creditor seeks security, the incentives to do so are powerful. See Jacob S. Ziegel, Benjamin Geva and R. C. C. Cuming, *Commercial and Consumer Transactions* (Rev. 2nd ed. 1990), at pp. 957-60. Accordingly, tinkering with security interests is a dangerous business. The risks of judicial innovation in this neighbourhood of the law are considerable.

109 Chief among these is the risk that attends legal uncertainty. If the legal rule is not clear, then inventory financiers will have to provide against the risk that their security interest might be defeated by some rival claim. The danger is particularly acute where as here, the language is as broad as "in the ordinary course of business". In this regard, I agree with what Professor Roderick J. Wood said in his article ("Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp*." (1995), 10 *B.F.L.R.* 429, at p. 429) that my colleague cites:

> ... there is little controversy with the proposition that a priority rule should be capable of producing reasonably predictable results. An unclear priority rule imposes a number of social costs. It means that creditors must plan their affairs against less certain outcomes. Uncertain rules generate more litigation than clear rules. Over time an uncertain rule is sometimes transformed into a clear rule through the process of judicial interpretation. However, this is a piecemeal approach which often occurs at a glacial pace.

110 Indeed, the consequences of my colleague's approach might be more dire than even Professor Wood supposes. For, as I have observed, almost any subsequent financial arrangement might be in the ordinary course of business. Accordingly, the possibility is real that my colleague's proposed rule would effectively obliterate the *PPSA* charge against inventory. As insurance against this outcome, the costs of financing would presumably increase. I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal.

111 Moreover, and for reasons I have already given, there is every likelihood that a broad interpretation of the licence theory would do violence to the *PPSA*. The Act clearly contemplates that inventory financing will be an important commercial device. But allowing the mere potential operation of a licence to sell to defeat a security interest in inventory would deprive the interest of all efficacy. It would not be any sort of security against subsequent obligations.

112 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) of the *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. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

113 It remains to make a few remarks by way of conclusion. Because I believe that the respondent's general security agreement gave it a fixed and specific charge against the debtor's inventory, and because I conclude that the licence to sell that inventory does not derogate from the respondent's security interest, I conclude that this appeal should be dismissed. I do not need to decide whether the *Bank Act* security would have priority over the deemed trust as well; though given that the licence to sell inventory under the *Bank Act* security is only implied, I do not see how the Crown could have a greater claim under the *Bank Act* than it has under the *PPSA*.

114 Therefore I would dismiss the appeal with costs.

Appeal dismissed.

TAB 14

2002 SKQB 356
Saskatchewan Court of Queen's Bench

Van Den Bogerd (Trustee of) v. Paulsen

2002 CarswellSask 541, 2002 SKQB 356, [2002] S.J. No. 516, 116 A.C.W.S. (3d) 329, 36 C.B.R. (4th) 307

IN THE MATTER OF THE BANKRUPTCY OF PAUL VAN DEN BOGERD; DELOITTE & TOUCHE INC. as Trustee(s) in Bankruptcy for PAUL VAN DEN BOGERD (APPLICANT) and JASON PAULSEN, operating as K & K LOGGING (RESPONDENT)

JASON PAULSEN, operating as K & K LOGGING (CLAIMANT/ APPLICANT) and PAUL VAN DEN BOGERD, operating as WOODCHUCK FOREST PRODUCTS (DEFENDANT)

Krueger J.

Judgment: September 9, 2002
Docket: Prince Albert Q.B. 8718/02, Q.B. 255/01

Counsel: *D. Moore*, for Applicant
Barry E. Wilcox, for Respondent, Jason Paulsen

Subject: Insolvency; Natural Resources; Civil Practice and Procedure

APPLICATION by trustee in bankruptcy to quash Bankruptcy Registrar's decision granting P's appeal from trustee's decision disallowing P's claim as secured creditor; APPLICATION by P to have monies held in court pursuant to Woodmen's Lien paid out to him.

***Krueger J.*:**

1 There are two applications before the Court: The Trustee in Bankruptcy for Paul Van Den Bogerd applied to quash the decision of the Bankruptcy Registrar, who on June 18, 2002, granted an appeal by Jason Paulsen from the decision of the Trustee disallowing his claim as a secured creditor. Written reasons by the Bankruptcy Registrar were not provided until August 1, 2002. In the meantime Jason Paulsen applied by Notice of Motion to have the monies held in court pursuant to a Woodmen's Lien, which lien was the basis of his security claim, paid out to him. Both applications were heard at the same time and counsel agreed

that a ruling on the application by the Trustee to quash the appeal decision of the Bankruptcy Registrar would determine the outcome of the application for payment out of court.

FACTS

2 Between February 16, 2001, and March 14, 2001, Jason Paulsen cut, skidded and stacked a quantity of timber on behalf of and pursuant to the permit of Paul Van Den Bogerd. For those logging services Paul Van Den Bogerd became indebted to Jason Paulsen for the sum of $3,605.93 plus interest at 5 percent per annum from March 14, 2001. When Jason Paulsen did not receive payment, he instructed his solicitors to pursue remedies available to him. A Statement of Claim, Writ of Attachment and one affidavit were filed on April 10, 2001, pursuant to *The Woodmen's Lien Act*, R.S.S. 1978, c. W-16.

3 On May 17, 2001, the Sheriff seized timber from Paul Van Den Bogerd. In order to obtain the release of the seized timber, Paul Van Den Bogerd paid into court the sum of $4,125.00, being the amount of the claim of Jason Paulsen plus interest and costs. On August 14, 2001, Paul Van Den Bogerd signed a consent to payment out of the monies. Before Jason Paulsen could apply to have the monies paid out of court, the Province of Saskatchewan asserted a priority claim on the monies for dues and fees owing on harvested forest products. Those fees and dues are payable by Paul Van Bogerd and will be addressed in the second application.

4 On February 11, 2002, Paul Van Den Bogerd made an assignment in bankruptcy and Deloitte & Touche Inc. was appointed Trustee. Jason Paulsen filed with the Trustee in Bankruptcy a Proof of Secured Claim. The Trustee disallowed that claim and the subsequent appeal to the Bankruptcy Registrar from that disallowance and this application to quash followed in due course.

ANALYSIS

5 The Trustee contends that the decision of the Bankruptcy Registrar allowing Paulsen's appeal should be quashed for two reasons:

> 1. Jason Paulsen failed to comply with *The Woodmen's Lien Act* by not filing an affidavit as required by s. 11(2) of *The Woodmen's Lien Act*. That failure caused his lien to lapse; and
>
> 2. When Paul Van Den Bogerd paid monies into court in exchange for the release of the timber, the Woodmen's Lien was effectively discharged in order to allow for the sale of the timber. Jason Paulsen was no longer a secured creditor. The monies in court were not subject to the Woodmen's Lien.

6 Section 11(2) of *The Woodmen's Lien Act* reads:

> (2) Proceedings shall be commenced by filing in the office of the local registrar a copy of the statement of claim and affidavit along with an affidavit made and sworn by the claimant verifying the amount of the claim and showing that the statement of claim has been filed as required by section 7, that the amount is justly due and owing to him and that payment thereof has been demanded but has not been received.

Jason Paulsen did not file the required affidavit verifying the amount of the claim and showing that the statement of claim had been filed as required by s. 7 and swearing that the amount claimed was justly due and owing.

7 Section 9(3) of *The Woodmen's Lien Act* provides:

> (3) The lien shall cease to be a lien on the property described in the statement of claim unless proceedings to enforce the lien are commenced within thirty days after the date upon which the statement of claim and affidavit were filed or within thirty days after the date upon which the period of credit expired.

Failure to file the required affidavit, it was argued, meant that enforcement proceedings were not taken within thirty days of the time when the statement of claim was filed. Consequently, the lien ceased and Jason Paulsen's security interest lapsed. He was not a secured creditor.

8 In his written reasons for judgment dated August 1, 2002, the Bankruptcy Registrar stated in part:

> Essentially, I concurred with the submissions of counsel for the appellant that Mr. Paulsen had a valid Woodmen's Lien and, as such, should have been admitted as a secured creditor.
>
> The premise of the submission of counsel for the trustee was that Woodmen's Lien was deficient because of non-compliance with section 11(2) of *The Woodmen's Lien Act*. The claimant had not filed an affidavit as required by this provision. Notwithstanding this alleged defect the Local Registrar had issued a writ of attachment as prescribed in section 12 of the *Act*.
>
> Counsel for the appellant submitted that the alleged defect was procedural only and not substantive. He also pointed out that it would be improper for me to go behind the issuance of the writ of attachment in this proceeding.

The decision of the Bankruptcy Registrar can only be quashed if an error in principle was made or if the Registrar failed to consider some proper factor or took into account some improper factor. See *Chaban, Re* (1996), 143 Sask. R. 136 (Sask. Q.B.); *Saskatchewan Student Aid Fund (Trustees of) v. Grey* (2001), 209 Sask. R. 312 (Sask. Q.B.).

9 Issuance of the Writ of Attachment is the enforcement procedure referred to in s. 9(3). This application is not the proper forum for an argument that the Local Registrar of the Court of Queen's Bench did not have sufficient affidavit evidence to authorize the issuance of that Writ of Attachment. No application was made to set aside the Writ of Attachment or to declare the Woodmen's Lien invalid. Before Paul Van Den Bogerd made an assignment in bankruptcy, he negotiated the release of the seized timber and gave up any interest in the monies in court by consenting to payment out. It does not now serve the Trustee to argue on behalf of the bankrupt that the issuance of the Writ of Attachment was improper and that the lien ceased to attach without an affidavit being filed as required by s. 11(2) of the *Act*. That argument no longer has merit.

10 In support of the argument that the lien was discharged when the timber was exchanged for payment into court of $4,125.00, the Trustee relies on *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.* (1998), 169 Sask. R. 240 (Sask. Q.B.). There Zarzeczny J. drew a parallel between funds paid into court under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and monies paid into court pursuant to a garnishee summons before judgment. In both cases the monies remain the property of the debtor or bankrupt and are available for distribution to all creditors.

11 In *Roscoe*, *supra*, a dispute arose between Roscoe, a subcontractor engaged to demolish certain existing buildings, and the general contractor, Wasscon. A Builders' Lien for $74,845.00 was registered by Roscoe against the property of the owner. In order to have that lien vacated, Roscoe paid into court $93,556.25, being the amount of the lien plus 25 percent pursuant to s. 56(1) of *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1. Roscoe then commenced an action to enforce its claim of lien. At a pre-trial settlement conference the claim of Roscoe was settled for $32,500.00. That sum was paid out of court by consent. Wasscon was thereafter petitioned into bankruptcy and the judgment of Zarzeczny J. deals with the monies that remained in court. It was not suggested in *Roscoe* that the exchange of the Builders' Lien for payment into court of money altered the security position of Roscoe. That case dealt with the position of the other creditors of the bankrupt. It did not affect the $32,500.00 already paid out by consent to Roscoe.

12 More on point is *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.* (2002), 216 Sask. R. 199 (Sask. Q.B.). There Barclay J., applying *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.), concluded that money paid into court pursuant to a Builders' Lien is not the property of the bankrupt. I see no distinction between a Woodmen's Lien and a Builders' Lien for the purpose of determining the security interest created. When the encumbered goods are exchanged for money, either by consent or pursuant to a legislated right, the lien attaches the money. That money is not the property of the bankrupt who paid it into court or the trustee who represents the creditors of the bankrupt.

13 I am unable to conclude that the Bankruptcy Registrar made an error in principle. He did not misconstrue the facts, fail to consider relevant factors or take into account improper factors. The second ground raised in this application to quash was not argued before the Bankruptcy Registrar. The application to quash is accordingly dismissed. Jason Paulsen is entitled to his taxable costs on the first application.

14 By a letter dated May 11, 2002, the Province of Saskatchewan (Crown) advised that Paul Van Den Bogerd owed the Crown $4,300.00 in unpaid dues and fees. Jason Paulsen made application by Notice of Motion returnable on July 30, 2002, to have the monies paid into court pursuant to *The Woodmen's Lien Act* paid out to him. The Crown indicated by a letter dated July 15, 2002, that it would not make any representations or pursue its claim to those monies. The Trustee has no claim to the monies in court. In the circumstances, it is appropriate that an order issue authorizing payment out of the court to Jason Paulsen or his solicitors of the sum of $4,125.00 plus interest pursuant to s. 22 of *The Woodmen's Lien Act*. There shall, however, be no order as to costs on the second application.

Order accordingly.

TAB 15

APPENDIX B

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3,[Extracts, Section 2]

Definitions

2 In this Act,

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; (*créancier garanti*)

TAB 16

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, [Extracts, Section 2]

Definitions

2 (1) In this Act,

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

TAB 17

This is an official version.

Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Public Statutes Main Site How current is this statute?

Responsible Department

RSNL1990 CHAPTER M-3

MECHANICS' LIEN ACT

Amended:

1991 c49; 1997 c22; 1999 c22 s17; 2004 cL-3.1 s47; 2013 c16 s25

CHAPTER M-3

AN ACT RESPECTING THE LIENS OF MECHANICS AND OTHERS

Analysis

Short title

1. This Act may be cited as the *Mechanics' Lien Act.*

RSN1970 c229 s1

Back to Top

Interpretation

2. (1) In this Act

(a) "approved claim" means a pending claim for a lien which has been approved by the registrar;

(a.1) "completion of the contract" means substantial performance, not necessarily total performance of the contract;

(b) "contractor" means a person contracting with, or employed directly by, the owner or his or her agent for the doing of work or the placing or providing of materials for any of the purposes mentioned in this Act;

(c) "corporation" includes a municipal authority and a railway company;

(d) "court" means the Trial Division;

(e) "doing of work" includes the performance of a service, and corresponding expressions have corresponding meanings;

(f) "judge" means a judge of the court;

(g) "materials" includes every kind of movable property;

(h) "municipal authority" includes

(i) the City of St. John's ,

(ii) the Corner Brook City Council,

(iii) the Mount Pearl City Council,

(iv) The St. John's Metropolitan Area Board, and

(v) the council of a town, community, region or local service district committee established or continued under the *Municipalities Act;*

(i) "owner" includes a person having an estate or interest in the land upon which or in respect of which work is done or materials are placed or provided, at whose request, and

(i) upon whose credit,

(ii) on whose behalf,

(iii) with whose privity or consent, or

(iv) for whose direct benefit

work is done or materials are placed or provided and persons claiming under him or her whose rights are acquired after the work in respect of which the lien is claimed is begun or the materials placed or provided have started to be placed or provided;

(i.1) "pending claim" means a claim for a lien which has been received by the registry but which has not yet been approved by the registrar;

(j) "person" includes a corporation;

(k) "registrar" means the Registrar of Deeds referred to in the *Registration of Deeds Act* and includes the Deputy Registrar of Deeds;

(l) "registry" means the Registry of Deeds referred to in the *Registration of Deeds Act;*

(m) "subcontractor" means a person not contracting with or employed directly by the owner or his or her agent for a purpose mentioned in this Act, but contracting with or employed by a contractor or, under him or her, by another subcontractor and "subcontract" has a corresponding meaning;

(n) "wages" means the money earned by a worker for work done by time or as piece-work, and includes all monetary supplementary benefits, whether by statute, contract or collective bargaining agreement; and

(o) "worker" means a person employed for wages whether employed under a contract of service or not.

(2) For the purposes of this Act, a contract shall be considered to be substantially performed

(a) when the work or a substantial part of the work is ready for use or is being used for the purpose intended; and

(b) when the work to be done under the contract is capable of completion or correction at a cost of not more than

(i) 3% of the lst $250,000 of the contract price,

(ii) 2% of the next $250,000 of the contract price, and

(iii) 1% of the balance of the contract price.

(3) For the purposes of this Act, where the work or a substantial part of the work is ready for use or is being used for the purpose intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

RSN1970 c229 s2; 1971 No14 s2; 1971 No47 s2; 1979 c33 Sch C; 1986 c42 Sch B; 1988 c35 s443; 1997 c22 s1

Back to Top

Labrador Inuit rights

2.1 This Act shall be read and applied in conjunction with the *Labrador Inuit Agreement Act* and, where a provision of this Act is inconsistent or conflicts with a provision, term or condition of the *Labrador Inuit Land Claims Agreement Act,* the provision, term or condition of the *Labrador Inuit Land Claims Agreement Act* shall have precedence over the provision of this Act.

2004 cL-3.1 s47

Back to Top

Agreements waiving application of Act are void

3. (1) An agreement, oral or written, expressed or implied, on the part of a worker, that this Act, or a part of it, shall not apply to, or that a remedy provided by it shall not be available for the benefit of, that worker, or which in a way limits or abrogates or in effect limits, modifies or abrogates that remedy, is void and of no effect.

(2) Subsection (1) does not apply to

(a) a manager, officer or supervisor; or

(b) a person whose wages are more than $50 a day.

RSN1970 c229 s4

Back to Top

Effect upon 3rd party of agreement waiving lien

4. An agreement does not deprive a person, otherwise entitled to a lien under this Act and who is not a party to the agreement, of the benefit of the lien, but the lien attaches, notwithstanding that agreement.

RSN1970 c229 s5

Back to Top

Exception of public streets, roads or highways

5. (1) Except for the purpose of section 12, the lien given by subsection 6(1) does not attach to a public street, road or highway or to a work or improvement done on, in or to a public street, road or highway.

(2) The expression "street", "road" or "highway" includes all land lying between the boundaries of the street, road or highway whether designed or intended for vehicular or pedestrian traffic or not.

RSN1970 c229 s6

Back to Top

General right to a lien

6. (1) Unless a person signs an express agreement to the contrary, where he or she does work upon or in respect of, or places or provides materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of land, a building, structure or works or the appurtenances to that land, building, structure or works for an owner, contractor or subcontractor, that person has, by doing that work or placing or providing those materials, a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied or enjoyed, or upon or in respect of which the work is done, or upon which the materials are placed or provided to be used, limited, however, in amount to the sum due to the person entitled to the lien and to the sum owing, except as provided here, by the owner.

(2) The placing or providing of the materials to be used upon the land or other place in the immediate vicinity of the land designated by the owner or the owner's agent is sufficient delivery for the purpose of this Act, but delivery on the designated land does not make that land subject to a lien.

(3) The lien given by subsection (1) attaches as set out in that subsection where the materials delivered to be used are incorporated into the land, building, structure or works, notwithstanding that the materials may not have been delivered in strict accordance with subsection (1).

(4) For the purposes of subsection (1), "agent" includes the contractor or subcontractor for whom the materials are placed or provided, unless the person placing or providing the materials has had actual notice from the owner to the contrary.

RSN1970 c229 s7

Back to Top

Lien for rented equipment

7. A person who rents equipment to an owner, contractor or subcontractor for use on a contract site is considered, for the purposes of this Act, to have performed a service for which he or she has a lien for the price of the rental of the equipment used on the contract site, limited, however, in amount to the sum owed to the person entitled to the lien from the owner, builder, contractor or subcontractor in respect of the rental of the equipment.

RSN1970 c229 s8

Back to Top

Where estate charged is leasehold

8. (1) Where the estate or interest upon which the lien attaches is leasehold, the fee simple is also subject to the lien if the person doing the work or placing or providing the material gives written notice, by personal service, to the owner in fee simple or his or her agent of the work to be done or material to be placed or provided unless the owner in fee simple or his or her agent within 15 days after the service on him or her of the notice, gives written notice, by personal service, to that person that he or she will not be responsible for the lien.

(2) A forfeiture or attempted forfeiture of the lease on the part of the landlord, or cancellation or attempted cancellation of the lease except for non-payment of rent, does not deprive a person otherwise entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay rent arising after he or she becomes entitled, and the amount paid may be added to his or her claim.

(3) Where the land and premises upon or in respect of which work is done or materials are placed or provided are encumbered by a mortgage or other charge that was registered in the registry before a lien under this Act arose, the mortgage or other charge has priority over all liens under this Act to the extent of the actual value of the land and premises at the time the 1st lien arose, which value is to be ascertained by the judge.

(4) The time at which the 1st lien arose shall be considered to be the time at which the 1st work was done or the 1st materials placed or provided, irrespective of whether a claim for lien in respect of those materials or that work is registered or enforced and whether or not that lien is before the court.

(5) A mortgage existing as a valid security, notwithstanding that it is a prior mortgage within the meaning of subsection (3), may also secure future advances.

(6) A registered agreement for the sale and purchase of land, and money in good faith secured or payable under that agreement, has the same priority over a lien as is provided for a mortgage and mortgage money in subsections (3) and (5) and, for the purposes of this Act, the seller shall be considered to be a mortgagee, and money paid in good faith secured and payable under that agreement shall be considered to be mortgage money secured or advanced in good faith.

RSN1970 c229 s9

Back to Top

Application of insurance on that property

9. Where property upon which a lien attaches is wholly or partly destroyed by fire, money received because of insurance by an owner or prior mortgagee or charge shall take the place of the property destroyed and is, after satisfying a prior mortgage or charge in the manner and to the extent set out in subsection 8(3), subject to the claims of all persons for liens to the same extent as if the money had been realized by a sale of the property in an action to enforce the lien.

RSN1970 c229 s10

Back to Top

Limit of amount of owner's liability

10. Except as provided in this Act, the lien does not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

RSN1970 c229 s11

Back to Top

Limit of lien when claimed by other than contractor

11. Except as provided in this Act, where the lien is claimed by a person other than the contractor, the amount that may be claimed in respect of the lien is limited to the amount owing to the contractor or subcontractor or other person for whom the work has been done or the materials were placed or provided.

RSN1970 c229 s12

Back to Top

Holdback

12. (1) In all cases, the person primarily liable upon a contract under and by virtue of which a lien may arise shall, as the work is done or the materials are provided under the contract, retain for a period of 30 days after the completion or abandonment of the work done or to be done under the contract 10% of the value of the work and materials actually done, placed or provided, as referred to in section 6, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value shall be calculated, upon evidence given in that regard, on the basis of the contract price or, where there is no specific contract price, on the basis of the actual value of the work or materials.

(2) In the case of a contract that is under the supervision of an architect, engineer or other person upon whose certificate, in this section referred to as the "certificate", payments are to be made, where 30 days have elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed to his or her satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 10% of the subcontract price or, where there is no specific subcontract price, by 10% of the actual value of the work done or materials placed or provided under that subcontract, but this subsection does not operate if and so long as a lien derived under the subcontract is preserved by anything done under this Act.

(3) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed to the satisfaction

of that architect, engineer or other person has been given to that subcontractor, then for the purposes of subsections 22(1), (2) and (3) and for the purposes of section 24, that subcontract and materials placed or provided or to be placed or provided under that subcontract and work done or to be done under that subcontract shall, so far as concerns a lien under that subcontract of that subcontractor, be considered to have been completed or placed or provided not later than the time at which the certificate was given.

(4) Where an architect, engineer or other person neglects or refuses to issue and deliver a certificate upon which payments are to be made under a contract or subcontract, the court, upon application and upon being satisfied that the certificate should have been issued and delivered, may, upon terms and conditions as to costs and otherwise that it considers just, make an order that the work or materials to which the certificate would have related has been done or placed or provided and that order has the same effect as if the certificate had been issued and delivered by the architect, engineer or other person.

(5) Where there is a lien under section 6, the lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the money required to be retained are respectively payable and where there is no lien on the land by virtue of section 5, a claim for work done or materials placed or furnished is a charge upon the amount directed to be retained by this section.

(6) All payments up to 90% as fixed by subsection (1) and payments permitted as a result of the operation of subsections (2) and (3) and sections 13.1 and 13.4 made in good faith by an owner to a contractor, or by a contractor to a subcontractor, or by 1 subcontractor to another subcontractor, before written notice of the lien given by the person claiming the lien to the owner, contractor or subcontractor operate as a discharge to the extent of the lien.

(7) Payment of the percentage required to be retained under this section may be validly made so as to discharge all claims in respect of that percentage after the expiration of the period of 30 days mentioned in subsection (1) unless in the meantime proceedings have been started to enforce a lien or charge against the percentage as provided by sections 23 and 24, in which case the owner may pay the percentage into court in the proceedings, and that payment constitutes valid payment in discharge of the owner to the amount paid into court.

(8) A contract shall be considered to be amended where necessary to be in conformity with this section.

(9) Where the contractor or subcontractor defaults in completing his or her contract, the percentage required to be retained shall not, as against a lien claimant who by subsection (5) has a charge, be applied by the owner, contractor or subcontractor to the completion of the contract or for another purpose nor to the payment of damages for the non-completion of the contract by the contractor or subcontractor nor in payment or satisfaction of a claim against the contractor or subcontractor.

RSN1970 c229 s13; 1991 c49 s1

Back to Top

Holdback on large contracts

12.1 (1) Notwithstanding subsections 12(2), (3) and (4), where

(a) a contract price is in excess of $20,000,000 or a greater amount that may be prescribed by the regulations;

(b) the contract provides for a completion schedule longer than 1 year;

(c) no proceedings have been commenced to enforce a lien or charge against the percentage required to be withheld under subsection 12(1) in accordance with sections 24 and 25; and

(d) notice of early release of holdback is given and posted in the manner provided for the giving and posting of notice under section 12.2,

the person primarily liable upon the contract or a subcontract shall, following each anniversary date of the day services or materials were first provided under the contract or subcontract, if the amount is otherwise owing to the contractor or subcontractor under the contract or subcontract, make payment of the amount that has been required to be retained under subsection 12(1), calculated as of the last anniversary date of the day services or materials were first provided under the contract or subcontract, 30 days after the day notice of early release is completed in accordance with section 12.2.

(2) Whether a contract price is in excess of $20,000,000 or a greater amount that may be prescribed, shall be determined on the day of the execution of the contract and not as a result of an amendment to the contract.

(3) Notwithstanding subsection (1), where the unexpired term of the contract is less than 1 year from the last anniversary date of the contract, subsections 12(2), (3) and (4) apply with the necessary changes to the contract.

1991 c49 s2

Back to Top

Notice

12.2 Where an anniversary date of the day services or materials were first provided under a contract or subcontract which meets the requirements of section 12.1 has passed, the person primarily liable on the contract or subcontract shall within 10 days after that anniversary date

(a) by personal service or by prepaid registered mail, give notice in writing to all persons providing services or materials in the performance of the contract or subcontract that the person primarily liable on the contract or subcontract intends to release the holdback under section 12.1;

(b) post a copy of the notice in a prominent place on the main job site; and

(c) publish the notice in the *Gazette.*

(2) Where a notice required by this section is given by prepaid registered mail, it is considered to be given when the addressee actually receives it or 2 days after the day of registration, whichever is earlier, which time shall be included in the days allotted for giving the notice.

1991 c49 s2

Back to Top

Expiry date of lien

12.3 (1) The lien of a contractor or subcontractor for services or materials provided on or before the annual anniversary date of the day services or materials were first provided under a contract or subcontract which meets the requirements of section 12.1 expires 30 days after the day on which notice of release of the holdback is completed in accordance with section 12.2.

(2) The lien of a person other than a contractor or subcontractor for services or materials provided on or before the annual anniversary date of the day services or materials were first provided under a contract or subcontract which meets the requirements of section 12.1 expires 30 days after the day on which notice of release of the holdback is completed in accordance with section 12.2.

(3) Notwithstanding subsections (1) and (2), where a person has provided services or materials on or before the annual anniversary date of the day services or materials were first provided under a contract or subcontract which meets the requirements of section 12.1 and has also provided or is to provide, services or materials after those days, his or her lien in respect of the services or materials provided on or before any of those days expires without affecting a lien that he or she may have for the provision of services or materials after the applicable day.

1991 c49 s2

Back to Top

Court proceedings

12.4 (1) Where proceedings have been commenced to enforce a lien, and where the person primarily liable under a contract or subcontract which meets the requirements of section 12.1 would otherwise be entitled under section 12.1 to pay out the holdback, the person primarily liable under the contract or subcontract may apply to the court for an order vacating the registration of the claim for lien on notice to the contractor or subcontractor otherwise entitled to payment under section 12.1 and to the persons who have filed claims for the lien in accordance with this Act.

(2) On an application under subsection (1) the court shall

(a) determine the amount then retained by the person primarily liable under the contract or subcontract under this Act;

(b) allow security for or payment into court of an amount equal to the total of the sums claimed as due or to become due under the claims for lien registered in respect of the contract or subcontract be paid into court together with security for costs in an amount equal to $50,000 for each claim for lien registered in respect of the contract or subcontract or 25% of the total of the sums claimed as due or to become due under the claims for lien registered in respect of the contract or subcontract, whichever is less; and

(c) order that the registration of the claim for lien be vacated;

and the court may

(d) make the order vacating the claim for lien on the condition that the person making the application provides security for or pays into court the amount referred to in paragraph (b);

(e) give directions respecting payment into court under paragraph (b); and

(f) have regard to an agreement between the parties as to the amount retained, in determining the amount retained under paragraph (a).

(3) Where it is proven at trial that a lien claimant unreasonably withheld his or her agreement as to the amount then retained by the person primarily liable under the contract or subcontract under this Act, the court may award costs against the lien claimant whether or not he or she has proven his or her lien.

(4) Where an order is made under subsection (2)

(a) the lien

(i) ceases to attach to the amounts subject to a charge under subsection 12(5),

(ii) in the case of a claim for lien registered under section 18, ceases to attach to the land, and

(iii) becomes instead a charge on the amount paid into court or security posted; and

(b) the person primarily liable under the contract or subcontract shall be, in respect of the operation of section 13, in the same position as if the claim of lien had not been registered and the person primarily liable under the contract or subcontract shall release to the contractor or subcontractor the amount of the holdback which would otherwise have been released to the contractor or subcontractor under section 12.1 less the aggregate of the amounts paid into court or in respect of which security is posted under paragraph (2)(b),

and the person primarily liable under the contract or subcontract under which payment is made under this section shall be discharged from all liability under this Act with respect to the amounts so paid except to the extent of the aggregate of the amounts paid into court or in respect of which security is posted under paragraph (2)(b).

(5) Where an order is made under subsection (2), the lien claimant whose registered claim for lien has been vacated may proceed with an action to enforce his or her claim against the amount paid into court or security posted in accordance with the procedures set out in section 25 or the court may make an order to facilitate the resolution of all claims, but no certificate of action shall be registered against the land.

1991 c49 s2

Back to Top

Payments made directly by owner to persons entitled to lien

13. Where an owner, contractor or subcontractor makes a payment to a person entitled to a lien under section 6, or to a person who but for section 5 would be entitled to a lien under section 7, for or on account of a debt, due to him or her for work done or for materials placed or provided, for which he or she is not primarily liable, and within 3 days afterwards gives written notice of the payment to the person primarily liable, or his or her agent, the payment shall be considered to be a payment on his or her contract generally to the contractor or subcontractor primarily liable but not so as to affect the percentage to be retained by the owner as provided by section 12.

RSN1970 c229 s14

Back to Top

Rights of subcontractor

14. A subcontractor is entitled to enforce his or her lien, notwithstanding the non-completion or abandonment of the contract by a contractor or subcontractor under whom he or she claims.

RSN1970 c229 s15

Back to Top

Priority of lien

15. (1) Notwithstanding subsection 8(5), the lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of a conveyance or mortgage after written notice of the lien has been given to the person making those payments or after registration of a claim for the lien as provided here, and, in the absence of that written notice or the registration of a claim for lien, all payments or advances have priority over that lien.

(2) Except where it is otherwise provided by this Act, a person entitled to a lien on a property or money is not entitled to a priority or preference over another person of the same class entitled to a lien on that property or money, and each class of lienholders ranks equally for their

several amounts, and the proceeds of a sale shall be distributed among them proportionally, without preference according to their several classes and rights.

(3) A conveyance, mortgage or charge of or on land given to a person entitled to a lien under this Act in payment of or as security for that claim, whether given before or after that lien claim has arisen, shall, as against other parties entitled to liens under this Act, on that land be considered to be fraudulent and void.

RSN1970 c229 s16

Back to Top

Priority of wages

16. (1) A worker whose lien is for wages has priority to the extent of 30 days' wages over all other liens derived through the same contractor or subcontractor to the extent of and on the percentage directed to be retained by section 12 to which the contractor or subcontractor through whom the lien is derived is entitled, and those workers rank equally.

(2) A worker is entitled to enforce a lien in respect of a contract or subcontract that has not been completed, and, notwithstanding anything to the contrary in this Act, may serve a notice of motion on the appropriate persons, returnable in 4 days after service before the court, that the applicant will, on the return of the motion, ask for judgment on his or her claim for lien, registered particulars of which shall accompany the notice of motion verified by affidavit.

(3) Where the contract has not been completed when the lien is claimed by a worker, the percentage shall be calculated on the value of the work done or materials placed or provided by the contractor or subcontractor by whom the worker is employed, having regard to the contract price.

(4) A device by an owner, contractor or subcontractor to defeat the priority given to a worker for his or her wages and a payment made for the purpose of defeating or impairing a lien is void and of no effect.

RSN1970 c229 s17

Back to Top

Registration

17. (1) A claim for a lien may be registered in the registry and shall set out

(a) the name and address for service of the person claiming the lien and of the owner or of the person whom the person claiming the lien, or his or her agent, believes to be the owner of the land, and of the person for whom the work was or is to be done, or the materials were or are to be placed or provided, and the time within which the work was or was to be done or the materials were to be placed or provided;

(b) a short description of the work done or to be done, or the materials placed or provided or to be placed or provided;

(c) the sum claimed as due or to become due; and

(d) a description of the land.

(2) The claim shall be verified in duplicate by the affidavit of the person claiming the lien, or of his or her agent or assignee who has a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he or she has that knowledge.

(3) When registering a claim for lien against a railway, it is sufficient description of the land of the railway company to describe it as the land of the railway company.

(4) A claim for a lien shall be registered by entering it into an electronic database, including the names of the parties to the claim and the position, with identifying particulars, of the affected property.

(5) The time of registration of a lien shall be electronically determined to the day, hour and minute upon the completion of subsection (4) at which time the claim shall have pending status.

(6) A pending claim under subsection (5) may be approved by the registrar, and the date and time of the registration of the approved claim shall be the date and time of the pending claim.

RSN1970 c229 s18; 1974 No84 s12; 1997 c22 s2

Back to Top

What may be included in claim

18. (1) A claim for lien may include claims against a number of properties, and a number of persons claiming liens upon the same property may unite in the claim, but, where more than 1 lien is included in 1 claim, each claim for lien shall be verified by affidavit as provided in section 17.

(2) The court has jurisdiction equitably to apportion against the respective properties the amounts included in a claim under subsection (1).

RSN1970 c229 s19

Back to Top

Informality in registering liens

19. (1) Substantial compliance with sections 17, 18 and 30 is sufficient, and a claim for lien is not invalidated because of failure to comply with the requirements of those sections unless, in the opinion of the judge, the owner, contractor or subcontractor, mortgagee or other person is prejudiced by that claim, and then only to the extent to which he or she is prejudiced.

(2) Nothing in this section dispenses with the requirement of registration of the claim for lien.

RSN1970 c229 s20

Back to Top

Duplicate to be filed

20. A duplicate of the claim for lien, bearing the registrar's certificate of registration, shall be filed with the court on or before the trial of the action.

2013 c16 s25

Back to Top

Status of lien claimant

21. Where a claim is registered, the person entitled to a lien shall be considered to be a purchaser to the extent of the value of the lien and a purchaser for valuable consideration within the provisions of the*Registration of Deeds Act,* but, except as otherwise provided here, that Act does not apply to a lien arising under this Act.

RSN1970 c229 s22

Back to Top

Limit of time for registration

22. (1) A claim for lien by a contractor or subcontractor in cases not otherwise provided for may be registered before or during the performance of the contract or of the subcontract or within 30 days after the completion or abandonment of the contract or of the subcontract.

(2) A claim for lien for materials may be registered before or during the placing or providing of the materials, or within 30 days after the placing or providing of the last material so placed or provided.

(3) A claim for lien for services may be registered during the performance of the service or within 30 days after the completion of the service.

(4) A claim for lien for wages may be registered during the doing of the work for which the wages are claimed or within 30 days after the last work was done for which the lien is claimed.

(5) Where there is no lien on the land by virtue of section 5, a person who is asserting a claim under subsection 12(5) for work done or materials placed or provided shall give written notice of his or her claim to the owner, to every person in whose hands sums are retained under section 12 to which his or her claim may relate and to the municipal authority in whose area of authority the land is situated within 30 days after the completion or abandonment of the work or the placing or providing of the materials.

RSN1970 c229 s23

Back to Top

Expiry and discharge

23. (1) A lien for which a claim is not registered stops existing on the expiration of the time limited in section 22 for the registration of the claim.

(2) Upon an action under this Act being started, a certificate of action shall be registered in the registry.

(3) The certificate referred to in subsection (2) may be granted by the clerk of the court.

(4) Where a certificate of action has been registered for 1 year or more in the registry and no appointment has been taken out for the trial of the action, the judge may, upon the unilateral application of an interested person, make an order vacating the certificate of action and discharging all liens depending on the certificate of action.

RSN1970 c229 s24

Back to Top

When lien stops

24. (1) A lien for which a claim is registered stops existing on the expiration of 90 days after the work has been completed or the materials have been placed or provided, unless in the meantime an action is started to realize the claim or in which an existing claim may be realized, and a certificate is registered as provided by section 23.

(2) A claim asserted under subsection 12(5) for work done or materials placed or provided stops existing on the expiration of 90 days after

(a) the work has been completed or abandoned; or

(b) the materials have been placed or provided,

unless in the meantime an action under this Act is started to realize the claim or in which an existing claim may be realized.

(3) Subsection 23(2) does not apply to an action referred to in subsection (2) of this section, but sections 30, 32, 33, 34, 35 and 36 apply, with the necessary changes, to such an action.

RSN1970 c229 s25; 1974 No84 s3

Back to Top

Assignment or death of lien claimant

25. The rights of a lien claimant may be assigned by a written instrument and, if not assigned, upon his or her death those rights pass to his or her personal representative.

RSN1970 c229 s26

Back to Top

Discharge of lien

26. (1) A claim for lien may be discharged by the registration of a receipt acknowledging payment

(a) where made by a lien claimant that is not a corporation, signed by the lien claimant or his or her agent authorized in writing and verified by affidavit; or

(b) where made by a lien claimant that is a corporation, sealed with its corporate seal or signed by an officer of the corporation and verified by affidavit,

and the registrar shall number and index each receipt and enter particulars of the receipt in a memorandum on the margin of the entry in the registry of the claim for lien to which the receipt relates.

(2) Upon application, the court may

(a) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of other existing lien claimants, together with costs that it may fix, and order that the registration of the claim for lien and the registration of the certificate of action be vacated;

(b) upon another appropriate ground, order that the registration of the claim for lien and the registration of the certificate of action be vacated; or

(c) upon appropriate grounds, dismiss the action.

(3) Notwithstanding sections 23 and 24, where an order to vacate the registration of a lien is made under paragraph (2)(a) or (b), the lien does not stop existing for the reason that no certificate of action is registered.

(4) Money paid into court, or a bond or other security for securing the amount and satisfactory to the court, takes the place of the property discharged and is subject to the claims of every person who has at the time of the application an existing claim for lien or given notice of the claim under subsection 12(6) or under section 15 to the same extent as if the money, bond or other security were realized by a sale of the property in an action to enforce the lien, but the amount that

the court finds to be owing to the person whose lien has been so vacated is a 1st charge upon the money, bond or other security.

(5) Where the certificate required by section 23 or 24 has not been registered within the prescribed time and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate, the order vacating the lien may be made unilaterally upon production of a certificate of result of search referred to in subsection 37(2) of the *Registration of Deeds Act,* together with a certified copy of the registered claim for lien, and, for the purposes of subsections 37(4) & (5) of the *Registration of Deeds Act,* the applicant under this subsection is considered to be a person entitled to a search and certificates or copies of certificates referred to in section 37 of the *Registration of Deeds Act.*

(6) Where money has been paid into court or a bond deposited in court under an order under subsection (2), the court may, upon notice to the parties that the court may require, order the money to be paid out to the persons entitled to the money or the delivery up of the bond for cancellation.

(7) An order discharging a claim for lien or vacating a certificate of action shall be registered by registering the order or a certificate, under the seal of the court, that includes a description of the land and a reference to the registration number of every registered claim for lien and certificate of action affected by the order.

(8) Subsection 17(4) applies, with the necessary changes, to the registration of a certificate of action.

(9) The registrar shall index each order discharging a claim for lien or vacating a certificate of action which is registered under subsection (7) and shall enter particulars of that order in a memorandum on the margin of the entry in the registry of the claim for lien to which the order relates.

RSN1970 c229 s27

Back to Top

Effect of taking security

27. (1) The taking of security for, or the acceptance of a promissory note or bill of exchange for, or the taking of an acknowledgment of the claim, or the giving of time for the payment of the claim, or the taking of a proceeding for the recovery, or the recovery of a personal judgment for the claim, does not merge, waive, pay, satisfy, prejudice or destroy the lien, unless the claimant agrees in writing that it has that effect.

(2) Where a promissory note or bill of exchange has been negotiated, the lien claimant does not as a result lose his or her right to claim for lien, if, at the time of bringing his or her action to enforce it, or where an action is brought by another lien claimant, he or she is, at the time of proving his or her claim in the action, the holder of a promissory note or bill of exchange.

(3) Nothing in subsection (2) extends the time limited by this Act for bringing an action to enforce a claim for lien.

(4) A person who has extended the time for payment of a claim for which he or she has a claim for lien, in order to obtain the benefit of this section, shall start an action to enforce the claim within the time prescribed by this Act and shall register a certificate as required by sections 23 and 24, but further proceedings shall not be taken in the action until the expiration of that extension of time.

RSN1970 c229 s28

Back to Top

Proving claim in action by another party

28. Where the period of credit in respect of a claim has not expired or there has been an extension of time for payment of the claim, the lien claimant may, nevertheless, if an action is started by another person to enforce a claim for lien against the same property, prove and obtain payment for his or her claim in the action as if the period of credit or the extended time had expired.

RSN1970 c229 s29

Back to Top

Statement of mortgagee or unpaid vendor

29. (1) A lien claimant may in writing, at any time, demand of a mortgagee or unpaid vendor or his or her agent the terms of a mortgage on the land or of an agreement for the purchase of the land in respect of which the work was or is to be done or the materials were or are to be placed or provided and a statement showing the amount advanced on the mortgage or the amount owing on the agreement and, if the mortgagee or vendor or his or her agent fails to inform the lien claimant at the time of the demand, or within a reasonable time after the demand, of the terms of the mortgage or agreement and the amount advanced or owing or if he or she knowingly falsely states the terms of the mortgage or agreement and the amount owing and the lien claimant sustains loss by the refusal or neglect or misstatement, the mortgagee or vendor is liable to him or her for the amount of the loss in an action for it or in an action for the enforcement of a lien under this Act, and subsection 36(4) applies.

(2) The court may, on a summary application at any time before or after an action is started for the enforcement of the claim for lien, make an order requiring the mortgagee or his or her agent or the unpaid vendor or his or her agent to produce and permit a lien claimant to inspect a mortgage or agreement for sale referred to in subsection (1) upon the terms as to costs that the court considers just.

RSN1970 c229 s30

Back to Top

How claim enforceable

30. (1) A claim for lien is enforceable in a proceeding in the Trial Division.

(2) A proceeding under this section shall be started by filing a statement of claim with the court.

(3) The statement of claim shall be served within 30 days after it is filed, but the court may extend the time for service.

(4) The statement of defence in the action shall be delivered within 10 days after the statement of claim has been served, but the court may extend the time for delivery.

(5) It is not necessary to make any lien claimants parties defendant to the action, but all lien claimants served with the notice of trial shall for all purposes be considered to be parties to the action.

(6) After the start of the action, a lien claimant or other person interested may apply to the court to speed the trial of the action.

(7) Lien claimants claiming liens on the same land may join in an action, and an action brought by a lien claimant shall be considered to be brought on behalf of himself or herself and all other lien claimants.

RSN1970 c229 s31; 1986 c42 Sch B; 2013 c16 s25

Back to Top

Where contract covers several buildings

31. Where an owner enters into an entire contract for the supply of materials to be used in several buildings, the person supplying the materials may ask to have his or her lien follow the form of the contract and that it be for an entire sum upon all the buildings, but, where the owner has sold 1 or more of the buildings, the court has jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

RSN1970 c229 s33

Back to Top

Power to appoint receiver of rents and profits

32. (1) At any time after the delivery of the statement of claim, the court may, on the application of a lien claimant, mortgagee or other interested person, appoint a receiver of the rents and profits of the property against which the claim for lien is registered, upon terms and upon the giving of security or without security that the court considers just.

(2) A lien claimant, mortgagee or other interested person may, before or after judgment, make an application to the court, which may hear oral or affidavit evidence and appoint, upon terms and upon the giving of security or without security that the court considers just, a trustee with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of those powers shall be under the supervision and direction of the court, and with power, when so directed by the court, to complete or partially complete the property, and, in the event that mortgage money is advanced to the trustee as the result of the powers conferred upon him or her or them under this subsection, that money takes priority over every claim of lien existing as of the date of the appointment.

(3) Property directed to be sold under subsection (2) may be offered for sale subject to a mortgage or other charge or encumbrance if the court so directs.

(4) The proceeds of a sale made by a trustee under subsection (2) shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other persons interested in the property so sold as their respective rights are determined, and, where applicable, section 37 applies.

(5) The court shall make all necessary orders for the completion of a mortgage, lease or sale authorized to be made under subsection (2).

(6) A vesting order made of property sold by a trustee appointed under subsection (2) vests the title of the property free from all claims for liens, encumbrances and interests of any kind, except in cases where sale is made subject to a mortgage, charge, encumbrance or interest as provided in this section.

(7) The court shall make all necessary orders to enable the trustee referred to in subsection (2) to carry out and implement powers conferred on him or her or them under that subsection.

RSN1970 c229 s34

Back to Top

Order for preservation of property

33. At any time after delivery of the statement of claim and before judgment, or after judgment and pending the hearing and determination of an appeal, a lien claimant, mortgagee or other interested persons may make an application to the court having jurisdiction to try the action, which

court may hear oral or affidavit evidence and make an order for the preservation of property pending the determination of the action and an appeal.

RSN1970 c229 s35

Back to Top

Consolidation of actions

34. Where more than 1 action is brought to realize liens in respect of the same land, the court may, on the application of a party to any of the actions or on the application of another interested person, consolidate all those actions into 1 action and award the conduct of the consolidated action to a plaintiff that the court considers just.

RSN1970 c229 s36

Back to Top

Transferring carriage of proceedings

35. A lien claimant entitled to the benefit of an action may apply to the court for the carriage of the proceedings, and the court may make an order awarding that lien claimant the carriage of the proceedings.

RSN1970 c229 s37

Back to Top

Appointing day for trial

36. (1) After

(a) the delivery of the statement of defence, where the plaintiff's claim is disputed, and upon 4 days' notice to the other party, either party may apply; or

(b) the time for delivery of defence in a case not referred to in paragraph (a), either party may apply unilaterally

to a judge to fix a day for the trial, and the judge shall appoint the time and place of the trial, and the order, signed by the judge, shall form part of the record of the proceedings.

(2) The party obtaining an appointment for the trial shall, at least 10 clear days before the day appointed, serve notice of trial upon the solicitors for the defendants who appear by solicitors and upon the defendants who appear in person, and upon all the lienholders who have registered their claims as required by this Act or of whose claims he or she has notice, and upon all other persons having a charge, encumbrance or claim on the land subsequent in priority to the lien, who are not parties, and that service shall be personal unless otherwise directed by the judge, who may direct in what manner the notice of trial is to be served.

(3) Where a person interested in the land has been served with a statement of claim and defaults in delivering a statement of defence, he or she shall nevertheless be served with notice of trial and is entitled to defend on terms as to costs and otherwise that the court considers just.

(4) The court shall

(a) try the action, including set-off and counterclaim, and all questions that arise or that are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served;

(b) take all accounts, make all inquiries, give all directions and do all other things necessary to finally dispose of the action and of all matters, questions and accounts arising before or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial; and

(c) embody the results of the trial in a judgment, which judgment may direct payment immediately by the person primarily liable to pay the amount of the claims and costs as ascertained by the judgment, and execution may be issued immediately.

(5) The form of the judgment may be varied by the court in order to meet the circumstances of the case so as to give to a party to the proceedings a right or remedy in the judgment to which he or she may be entitled.

(6) The court may order that the estate or interest charged with the lien be sold, may refer the conduct of the sale to the clerk of the court, and may direct the sale to take place at a time after judgment allowing, however, a reasonable time for advertising the sale.

(7) A lien claimant who did not prove his or her claim at the trial may, on the application to the court, be let in to prove his or her claim, on terms as to costs and otherwise that are considered just, at a time before the amount realized in the action for the satisfaction of liens has been distributed, and, where his or her claim is allowed, the judgment shall be amended so as to include his or her claim.

(8) An action may be tried by a judge of the court having jurisdiction to try the action notwithstanding that the time and place for the trial were appointed and fixed by another judge.

(9) A party to an action under this Act or another interested person may apply to the court for directions as to pleadings, production or other matters relating to the action, including the cross-examination of a lien claimant or his or her agent or assignee on his or her affidavit verifying the claim.

(10) Notwithstanding subsection (6) or another provision of this Act, an order shall not be made for the sale of lands that are Labrador Inuit Lands as defined in the *Labrador Inuit Land Claims Agreement Act* .

RSN1970 c229 s38; 2004 cL-3.1 s47

Back to Top

Report on sale

37. (1) Where there has been a sale, the money arising from the sale shall be paid into court to the credit of the action, and the court shall direct to whom the money in court shall be paid and may add to the claim of the person conducting the action his or her fees and actual disbursements incurred in connection with the sale, and, where sufficient money to satisfy the judgment and costs is not realized from the sale, the court shall certify the amount of the deficiency and the names of the persons who are entitled to recover it, showing the amount that each is entitled to recover and the persons adjudged to pay it, giving credit for payments made under subsection 36(4) and the persons entitled may enforce payment of the amount found to be due by execution or otherwise.

(2) The court may make all necessary orders for the completion of the sale and for vesting the property in the purchaser.

RSN1970 c229 s39

Back to Top

Where lien not established

38. Where a lien claimant fails to establish a lien, he or she may nevertheless recover a personal judgment against a party to the action for a sum that may appear to be due to him or her and which he or she might recover in an action against that party.

RSN1970 c229 s40

Back to Top

Right of lienholder whose claims are not payable to share in proceeds

39. Where property subject to a lien is sold in an action to enforce a lien, every lienholder is entitled to share in the proceeds of the sale in respect of the amount then owing to him or her, although the proceeds or part of the proceeds was not payable at the time of the start of the action or is not then presently payable.

RSN1970 c229 s41

Back to Top

Appeal

40. An appeal lies from an order or decision under this Act to the Court of Appeal.

1986 c42 Sch B

Back to Top

Certain judgments final

41. Notwithstanding section 40, A judgment in respect of a claim or counterclaim for an amount not exceeding $200 is final and without appeal.

RSN1970 c229 s44

Back to Top

Fees and costs

42. (1) The fees and costs in all proceedings taken to realize a lien under this Act shall be as are payable in respect of the same or similar matters, according to the ordinary procedure of the court.

(2) Notwithstanding subsection (1), where a lien is discharged or vacated under section 26 or where judgment is given in favour of or against a claim for a lien, in addition to the costs of the action, the judge may allow a reasonable amount for the costs of drawing and registering the claim for lien or of vacating the registration of the lien, but this does not apply where the claimant fails to establish a valid lien.

RSN1970 c229 s45

Back to Top

Rules

43. (1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

(2) Except where otherwise provided by this Act, interlocutory proceedings shall not be permitted without the consent of the court, and then only upon appropriate proof that those proceedings are necessary.

(3) The court may, for the purpose of determining a matter of fact in question, obtain the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person, and the court may fix the remuneration of that person and direct payment of it by any of the parties.

(4) Unless otherwise provided in this Act, the Rules of the Supreme Court apply to proceedings under this Act.

RSN1970 c229 s46; 1986 c42 Sch B

Back to Top

Service of documents

44. Except where otherwise directed by the court, all documents relating to an action under this Act, other than statements of claim and notices of trial, are sufficiently served upon the intended recipient if sent by registered mail addressed to him or her at his or her address for service.

RSN1970 c229 s47

Back to Top

Right of chattel lienholder to sell chattel

45. (1) A person who has bestowed money, skill or materials upon a chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it, so as a result to be entitled to a lien upon the chattel or thing for the amount or value of the money or skill and material bestowed, has, while the lien exists but not afterwards in case the amount to which he or she is entitled remains unpaid for 3 months after it ought to have been paid, the right, in addition to another remedy to which he or she may be entitled, to sell by auction the chattel or thing on giving 1 week's notice by advertisement in the *Gazette* and in a newspaper circulating in the place in which the work was done, setting out the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a similar written notice at the last known place of residence of the owner.

(2) A person referred to in subsection (1) shall apply the proceeds of the sale in payment of the amount due to him or her and the costs of advertising and sale and shall, upon application, pay over a surplus to the person entitled to that surplus.

RSN1970 c229 s48

Back to Top

Persons before whom affidavits may be taken

46. (1) Affidavits required under this Act may be taken within the province before

(a) the registrar;

(b) a judge of the Supreme Court;

(c) a Provincial Court judge;

(d) a commissioner of the Supreme Court;

(e) a notary public under his or her official seal;

(f) a commissioner for oaths in and for the province, including a barrister referred to and under the conditions specified in section 4 of the *Commissioners for Oaths Act;* or

(g) a justice of the peace.

(2) Affidavits required by this Act may be taken outside the province before

(a) a judge of a court of record, under the seal of that court;

(b) the mayor of a city or town, under the seal of that city or town;

(c) Crown's consul or vice-consul;

(d) a commissioner of the Supreme Court;

(e) a commissioner for oaths outside the province; or

(f) a notary public, under his or her official seal.

(3) It shall not be necessary for the purpose of registration under this Act to prove or certify the seal or signature of that court, city or town, judge, Provincial Court judge, mayor, consul, vice-consul, justice of the peace, commissioner or notary public on that affidavit.

(4) An affidavit made under this Act shall not be held to be defective or void solely on the ground that it was taken before a solicitor for any of the parties to the document or before a partner of that solicitor.

RSN1970 c229 s49; 1979 c38 s7; 1986 c42 Sch B

Back to Top

Regulations

47. (1) The Lieutenant-Governor in Council may make regulations

(a) prescribing forms for use under or for the purposes of this Act and providing for the use of those forms;

(b) [Rep. by 1999 c22 s17]

(b.1) increasing the amount of a contract for which there may be early release of the holdback for the purposes of section 12.1;

(c) providing for the holding of inquiries into the operation of this Act and into a charge or complaint that a person has contravened this Act or the regulations, or has made a false statement in a form or other document required to be completed or made under this Act or the regulations, or into another matter arising in the administration of this Act, and providing that the person holding that inquiry shall have the powers that are or may be conferred upon a commissioner under the *Public Inquiries Act,* including the power to take evidence under oath or affirmation; and

(d) generally, to give effect to the purpose of this Act.

(2) Regulations made under subsection (1) may be made with retroactive effect.

(3) The registrar shall pay all fees collected by him or her under this Act through the Department of Justice into the Consolidated Revenue Fund.

RSN1970 c229 s50; 1991 c49 s3; 1999 c22 s17

Back to Top

Fees

48. The minister may set fees for the purpose and administration of this Act.

1999 c22 s17

TAB 18

Amounts to be held in trust

32. (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that

(a) the money in the pension fund;

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) any special payments prescribed by the regulations, that have accrued to date; and

(c) all

(i) amounts deducted by the employer from the member's remuneration, and

(ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

TAB 19

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under this section. R.S.O. 1990,

TAB 20

Personal Property Security Act, SNL 1998 [Extracts, Section 5]

Application of this Act

5. Except as otherwise provided in this Act, this Act does not apply to the following:

(a) a lien, charge or other interest given by rule of law or statute unless the statute provides that this Act applies;

(b) the creation or transfer of an interest or claim in or under a policy of insurance except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;

(b.1) a transfer of an interest in a claim in or under a contract of annuity other than a contract of annuity held by a securities intermediary for another person in a securities account;

(c) the creation or transfer of an interest in present or future wages, salary, pay, commission or other compensation for work or services, the assignment or transfer of which is prohibited by an Act or rule of law;

(d) the transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligation under the contract;

(e) the creation or transfer of an interest in land including a lease;

(f) the creation or transfer of an interest in a right to payment that arises in connection with an interest in or lease of land other than an interest in a right to payment evidenced by investment property or an instrument;

(g) a sale of accounts, chattel paper or goods as part of a sale of the business out of which they arose unless the vendor remains in apparent control of the business after the sale;

(h) a transfer of accounts made solely to facilitate the collection of accounts for the transferor;

(i) the creation or transfer of a right to damages in tort;

(j) a mortgage registered under the *Canada Shipping Act* (Canada); and

(k) a security agreement governed by an Act of the Parliament of Canada that deals with the rights of the parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including a security agreement governed by Part VIII of the *Bank Act* (Canada).