COURT FILE NO.: CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O., 1990, c, C.43, AS AMENDED

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

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

\- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

BOOK OF AUTHORITIES OF THE CANADA REVENUE AGENCY

(Responding Factum)

May 1st, 2015

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COURT FILE NO.: CV-14-10766-00CL

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IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O., 1990, c, C.43, AS AMENDED

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BETWEEN:

TRISURA GUARANTEE INSURANCE COMPANY

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EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

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** Translation **

Case Name:

Canada (Minister of National Revenue - M.N.R.) v. National Bank of Canada; Canada (Minister of National Revenue - M.N.R.) v. Caisse populaire d'Amos; Canada (Minister of National Revenue - M.N.R.) v. Caisse populaire Desjardins de Lebel-sur-Quévillon

Between
Attorney General of Canada, appellant, and
National Bank of Canada, respondent
And between
Attorney General of Canada, appellant, and
Caisse populaire d'Amos, respondent
And between
Attorney General of Canada, appellant, and
Caisse populaire Desjardins de Lebel-sur-Quévillon, respondent
And between
Attorney General of Canada, appellant, and
National Bank of Canada, respondent

[2004] F.C.J. No. 371

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Dockets A-626-02, A-627-02, A-628-02, A-629-02

Federal Court of Appeal
Montréal, Quebec

Décary, Noël and Nadon JJ.A.

Heard: February 4, 2004.
Judgment: March 5, 2004.

(52 paras.)

Counsel:

Patrick Vézina, for the appellants.

Reynald Auger, for the respondent (A-626-02, A-629-02).

Jocelyn Geoffroy, for the respondent (A-627-02, A-628-02).

The judgment of the Court was delivered by

1 **NOËL J.A.**:-- These are four appeals from decisions handed down by Mr. Justice Martineau on October 11, 2002, dismissing the appellant's actions to recover source deductions that were deducted and not remitted (A.G.C. v. National Bank of Canada, 2002 DTC 7468; A.G.C. v. National Bank of Canada, 2002 DTC 7477; A.G.C. v. Caisse Populaire Desjardins de Lebel-sur-Quévillon, 2002 DTC 7493; and A.G.C. v. Caisse Populaire d'Amos, 2002 DTC 7484).

2 Martineau J. dismissed each of the actions, essentially on the ground that the appellant had to comply with provincial law in order to give effect to the deemed trust mechanism created under subsections 227(4) and (4.1) of the Income Tax Act (the ITA) and subsection 86(2.1) of the Employment Insurance Act (the EIA) and had failed to do so.

Context

3 In each of the cases, the record indicates that movable hypothecs on property belonging to their respective debtors were registered by the respondents in the Register of Personal and Movable Real Rights.

4 The debtors had failed to repay the loans guaranteed by these hypothecs. They had also failed to remit to the tax authorities the amounts withheld from the salaries paid to their employees.

5 Subsections 227(4) of the ITA and 86(2) of the EIA stipulate that every person who deducts or withholds any amount under these Acts is deemed to hold the amount in trust for Her Majesty.

Subsections 227(4.1) of the ITA and 86(2.1) of the EIA provide that where the amount is not paid, this trust extends as well to the property of the person, including property held by a secured creditor which, absent such secured interest, would be that of the person, and stipulate that the Receiver General "shall be paid" in priority out of the proceeds of such property.

6 The full text of these provisions reads as follows:

> Income Tax Act
>
> 227(4) [Trust for moneys deducted] Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) [Extension of trust] Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.
>
> * * *
>
> 227(4) [Montant détenu en fiducie] Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa

Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi

(4.1) [Non-versement] Malgré les autres dispositions de la présente loi, la Loi sur la faillite et l'insolvabilité (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;
b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

Employment Insurance Act

86(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 paid by the insured person but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the Income Tax Act) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the Income Tax Act) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

86(2.1) Notwithstanding the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (2) to be held by an employer in trust for Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the Income Tax Act) of that employer that but for a security interest (as defined in subsection 224(1.3) of the Income Tax Act) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted by the employer, separate and apart from the property of the employer, in trust for Her Majesty whether or not the property is subject to such a security interest, and
(b) to form no part of the estate or property of the employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

* * *

86(2) L'employeur qui a retenu une somme sur la rétribution d'un assuré au titre des cotisations ouvrières que l'assuré doit payer, mais n'a pas versé cette somme au receveur général est réputé, malgré toute autre garantie au sens du paragraphe 224(1.3) de la Loi de l'impôt sur le revenu la concernant, la détenir en fiducie pour Sa Majesté, séparée de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de l'employeur, et en vue de la verser à Sa Majesté selon les modalités et au moment prévus par la présente loi.

86(2.1) Malgré la Loi sur la faillite et l'insolvabilité (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et au moment prévus par la présente loi, d'une somme qu'un employeur est réputé par le paragraphe (2) détenir en fiducie pour Sa Majesté, les biens de l'employeur, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) de la Loi de l'impôt sur le revenu qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de l'employeur, d'une valeur égale à cette somme sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où la somme est retenue, séparés des propres biens de l'employeur, qu'ils soient ou non assujettis à une telle garantie;
b) ne pas faire partie du patrimoine ou des biens de l'employeur à compter du moment où la somme est retenue, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

> Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

7 The respondents appear to acknowledge that they are "secured creditors" within the meaning of subsection 224(1.3):

> "secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function;

* * *

> "créancier garanti" Personne qui a une garantie sur un bien d'une autre personne - ou qui est mandataire de cette personne quant à cette garantie -, y compris un fiduciaire désigné dans un acte de fiducie portant sur la garantie, un séquestre ou séquestre-gérant nommé par un créancier garanti ou par un tribunal à la demande d'un créancier garanti, un administrateur-séquestre ou une autre personne dont les fonctions sont semblables à celles de l'une de ces personnes.

8 After complying with the relevant provisions of the Civil Code of Québec and the Code of Civil Procedure, the respondents seized, took in payment or obtained by surrender the movable property secured by their movable hypothec and they eventually received the proceeds of their sale on account of their claim.

9 In the case of the Banks, they were the ones that made the sale after taking the property in payment pursuant to a forced surrender judgment in docket A-626-02 and after a voluntary surrender in docket A-629-02.

10 In the case of the Caisse populaire d'Amos, the sale was made by judicial authority pursuant to a judgment granting the forced surrender and leave to sell by agreement. In the case of the Caisse populaire Lebel-sur-Quévillon, the sale was made by bailiff after the Caisse seized the property subject to its movable hypothec pursuant to a judgment against its debtor.

11 Under subsection 227(4.1) of the ITA and subsection 86(2.1) of the EIA, the appellant gave formal notice to the respondents to pay the Receiver General the proceeds from the sale of the property subject to their security interest up to the amount of the source deduction "[TRANSLATION] withheld but not remitted" by the tax debtors. In the case of the National Bank of Canada (docket A-629-02), two such notices were given.

12 The four respondents ignored these notices, and recovery proceedings were commenced by way of a simplified action in the Trial Division of the Federal Court. The statements of claim filed in support of these actions allege in each of the cases the failure to pay to the Receiver General the proceeds from the sale of the property in violation of the provisions of subsections 227(4.1) of the

ITA and 86(2.1) of the EIA, and ask that the respondents be ordered to pay the proceeds of sale to the extent of the amounts withheld and not remitted by their respective debtors.

13 On October 11, 2002, Martineau J. dismissed these actions, citing in support a hundred or so unnumbered "whereases", which were repeated in each of the cases with a few minor variations reflecting their particular facts.

Decision under appeal

14 Since "the federal provisions do not indicate the manner or specific procedure whereby Her Majesty may assert her beneficial ownership", the provincial provisions must be followed as they are "neither contrary to nor inconsistent with the federal provisions, and do not prevent Her Majesty exercising her beneficial right and relying on her preferred claim". Accordingly, since the appellant has not become a party to the provincial proceedings brought by the respondents, the latter retain their title to the property taken in payment, seized or surrendered, and to the proceeds of their sale. The notion of "beneficial ownership", which is unknown in Quebec, does not affect this result in any way.

15 Going one step further, Martineau J. cites the "Rule of Law" and finds that the provincial provisions must apply in this case.

16 he trial judge criticized the appellant not only for failing to challenge the proceedings undertaken by the respondents but also for failing to take steps against the recalcitrant debtors. Although the appellant explained, in files A-627-02 and A-628-02, that it is generally unable to take timely action, the judge criticized it for failing to prove that it was unable to act. He added that the Crown's inability to act should not bar the application of the provincial law.

17 Subsections 227(4.1) of the ITA and 86(2.1) of the EIA "[do] not as such confer any real right or right of pursuit over the property". The respondents, being "bona fide purchaser[s]", must be protected against personal actions brought against them by the appellant if we are to ensure certainty in commercial and legal transactions. If Parliament intends to hold third parties liable for the debts of others, it must do so clearly and explicitly.

18 Finally, the trial judge notes that "since the federal provisions indicate no deadline for asserting Her Majesty's beneficial ownership and priority claim, she should have asserted them within the deadlines" laid down in the provincial law.

Issues

19 According to my reading of the judgments that are under appeal and the submissions made by the parties, the Court must answer the following questions:

1. Did the trial judge err in law by applying provincial law in a suppletive capacity to the federal scheme governing the appropriate procedure by the Crown in asserting its rights under subsection 227(4.1) of the ITA and subsection 86(2.1) of the EIA?
2. Did the trial judge err in law in characterizing the respondents as bona fide purchasers, thereby excluding from the deemed trust the property they had taken in payment, seized or obtained by surrender?

Analysis and decision

20 To begin with the second question, I am of the opinion that the recent decisions of the Supreme Court of Canada provide a complete and definitive answer.

21 In Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, the Bank and the Minister of National Revenue both claimed title to the proceeds of disposition of the property appearing in the inventory of the tax debtor.

22 The provisions then at issue were subsections 227(4) and (5) of the ITA, which read as follows:

> 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 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.
>
> * * *
>
> 227(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.
>
> (5) Malgré la Loi sur la faillite, en cas de liquidation, cession, mise sous séquestre ou faillite d'une personne un montant égal à l'un ou l'autre des montants suivants est considéré comme tenu séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non, en fait tenu séparé des propres fonds de la personne ou des éléments du patrimoine :
>
> a) le montant réputé par le paragraphe (4), être détenu en fiducie pour Sa Majesté;

23 As a secured creditor, the Bank had a fixed and specific lien on the property contained in the tax debtor's inventory, so that in case of default the Bank became the owner of the property in the possession of the tax debtor. The Court held that since the Bank's security interest already encumbered the property in question at the time the deductions at the origin of the deemed trust were made, the Bank's right to this property had priority over the right arising under the deemed trust.

24 After confirming the Bank's priority, the Court thought it was necessary to explain that Parliament remained free to assign absolute priority to the deemed trust by using precise language (Sparrow Electric, paragraph 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) 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. [Emphasis added]

25 Parliament responded to this invitation by amending the deemed trust provisions and adopting the current wording, which is reproduced in paragraph 6 of these reasons.

26 The Supreme Court had occasion to consider this new language in First Vancouver Finance v. M.N.R., [2002] 2 S.C.R. 720. At issue in this case was certain property purchased by the tax debtor following the crystallization of the deemed trust. The property in question had been sold by the tax debtor in the normal course of business to a bona fide third party and the Minister claimed that the property continued to be subject to the deemed trust notwithstanding this sale.

27 The Court held that the property, at the time of its acquisition by the tax debtor, was part of the deemed trust but that its sale to a third party in the normal course of business had removed it from the trust. Throughout its reasons, the Court compares the situation of the third party purchaser for value to that of the secured creditor, and finds that while property acquired by the third party purchasers was not caught by the amendments to the deemed trust provisions, in the absence of specific language to that effect, property taken in payment by the secured creditors in the exercise of their security interest was covered. In respect of the secured creditors, the Court was unambiguously of the view that the new provisions responded to the invitation it had issued to Parliament to give the Crown an "absolute priority".

28 It is worth reproducing the Court's reasoning in regard to the effect of these amendments:

> [27] In response to Sparrow Electric, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest ... in the amount so deducted or withheld" were added to s. 227(4). As well, s. 227(4.1) (formerly s. 227(5)) expanded the scope of the deemed trust to include "property held by any secured creditor ... that but for a security interest ... would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured creditors to be held in trust "at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act". Finally, s. 227(4.1) now explicitly deems the trust to operate "from the time the amount was deducted or withheld".
>
> [28] It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words "notwithstanding any security interest" in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the

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

29 As the Court explains later in its reasons, the deemed trust resembles a floating charge that hovers over all the assets of the tax debtor in the amount of the default. The trust continues to apply to all the assets for as long as the default continues. The only property that may be immune to it is property that the tax debtor alienates in the normal course of its business, in which case the trust extends to the proceeds of sale or the replacement property (reasons, paragraph 40).

30 This decision, which is not referred to by the trial judge in his reasons, establishes unambiguously that the Banks or the Caisses in the present cases are not comparable to third party purchasers. They are secured creditors and the property over which they asserted their security interest continued to be subject to the deemed trust and remained so at the time of its sale. It follows that, in accordance with the final words of subsections 227(4.1) of the ITA and 86(2.1) of the EIA, the proceeds from the sale had to be "paid" to the Receiver General in priority to the security interest they held.

31 This leads us to the second question. According to the trial judge, the ITA and EIA are silent as to the mode of recovery of this debt, so the Civil Code of Québec and the Code of Civil Procedure apply as suppletive law.

32 The possibility that provincial law may apply as supplementary law is now provided by Parliament in sections 8.1 and 8.2 of the Interpretation Act, R.S.C. 1985, c. I-21; 2001, c. 4, s. 8 which read as follows:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

* * *

8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

33 Thus, if, in interpreting the application of a federal enactment in a province, one is to refer to the province's law of property and civil rights as suppletive law, reference to that law must be necessary and there must be no provision to the contrary in federal law.

34 However, the ITA and EIA deemed trust provisions are complete and explicit as to their effect on property taken in possession by secured creditors in the exercise of their security interest, judging from the Supreme Court's reasons in First Vancouver: the Crown has an absolute priority over the proceeds from the property subject to the deemed trust, which must be paid to the Receiver General. Where this obligation is breached, section 222 of the ITA provides the following remedy:

222. All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

* * *

222. Tous les impôts, intérêts, pénalités, frais et autres montants payables en vertu de la présente loi sont des dettes envers Sa Majesté et recouvrables comme telles devant la Cour fédérale ou devant tout autre tribunal compétent, ou de toute autre manière prévue par la présente loi

[Emphasis added]

Subsection 86(1) of the Employment Insurance Act is to the same effect.

35 In view of this language, I fail to see how one could refer to Parliament's silence concerning the mode of collection of the tax debt arising out of the deemed trust mechanism.

36 It appears to be Mr. Justice Martineau's opinion that the obligation to pay the Receiver General is not sufficiently defined to be enforced by the Court. When Parliament decides to allocate liability for payment to a third party other than the tax debtor, he says, it does so expressly, providing that a request for payment shall be sent to the third party, as in the case of section 224 ITA. Similarly, when Parliament imposes a joint liability on persons other than the tax debtor, it proceeds by way of assessment (sections 160 and 227.1 of the ITA are cited in this regard).

37 With respect, Parliament is not confined to any particular method in establishing collection measures. Where a third party is to be made liable for paying on behalf of another, such liability must be imposed in clear and unambiguous language. As it happens, the positive obligation imposed on the secured creditor to pay the Receiver General the proceeds from the property subject to the trust could not be clearer.

38 It was this clear language that the Supreme Court noted in First Vancouver, when confirming the application of subsections 227(4) and (4.1) to secured creditors but not to third party purchasers for value (paragraph 43):

> ... It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227(4.1) whereas secured creditors are. In Pembina on the Red Development, supra, Twaddle J.A. took note of the "long-established principle of law that, in the absence of clear language to the contrary, a tax on one person cannot be collected out of property belonging to another" (p. 46). In Sparrow Electric, supra, at para. 39, Gonthier J. also referred to this principle, stating that:
>
>> [T]his provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Section 227(4) and (5) are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) [now s. 227(4.1)] to permit the expropriation of the property of third parties who are not specifically mentioned in the statute. [Emphasis added.]
>
> Thus, in the absence of an express reference to third party purchasers, there is no basis upon which to allow the Minister's interest in the tax debtor's property to continue once such property has been sold to third parties. [Emphasis added.]

39 Martineau J. further states that the deductions the appellant is attempting to recover are not amounts for which the respondents are personally liable. According to him, subsections 227(4.1) of the ITA and 86(2.1) of the EIA are not sufficiently clear to establish the existence of a cause of action in favour of the appellant against the respondents.

40 It seems obvious to me that a secured creditor who does not comply with his statutory obligation to "pay" the Receiver General the proceeds of property subject to the deemed trust in priority over his security interest is personally liable and thereby becomes liable for the unpaid amount. The amount is "payable" out of the proceeds flowing from the property and, as we have seen, section 222 of the ITA provides that "All ... amounts payable under this Act are debts due to Her Majesty and recoverable as such ...." (Emphasis added). In light of these provisions, and since the respondents concede that they

received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.

41 The trial judge also noted that the proceeding used by the appellant would not be subject to any limitation period if the civil law did not apply. It is true that the recovery provisions under the ITA and the EIA , including those at issue here, do not provide any deadline for their implementation. However, the general six-year limitation period provided for in section 32 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. 50, does apply.

42 That was what the Supreme Court held in Markevich v. Canada, [2003] 1 S.C.R. 94, regarding the recovery of amounts payable under the ITA. In reaching this conclusion, the Court referred to the disparity in the limitation periods under provincial law and the importance of a uniform limitation rule in federal tax legislation.

43 The Court held that the "cause of action" from which the limitation period was calculated was "a set of facts that provides the basis for an action in court" (Markevich, paragraph 27). Since in that case the tax debt had to be certified through an assessment, the Court held that the "cause of action" was constituted by the existence of the debt and the expiration of the 90-day period that must elapse following the issuance of an assessment before the Minister can initiate collection measures (see section 225.1 ITA).

44 Applying the same reasoning to the instant case, and bearing in mind that the tax debt resulting from a breach of the obligation under subsections 227(4.1) of the ITA and 86(2.1) of the EIA is not subject to the assessment process, the cause of action would arise at the time when the Minister becomes aware of the failure by the secured creditor to pay the Receiver General the amounts payable from the proceeds resulting from the property subject to the deemed trust.

45 The trial judge also seemed to be of the opinion that allowing the Crown to be paid in priority to the Banks and the Caisses in this case would "be likely to create legal uncertainty that would be harmful to the security of commercial transactions and would also compromise the operation and effectiveness of the provincial provisions in the province of Quebec".

46 But it must be understood that the Supreme Court in First Vancouver, in upholding the Crown's right to be paid in priority on the proceeds of the property subject to the deemed trust, was conscious of the uncertainty that such priority could engender. The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest which arises from an omission, unknown to anyone other than the person at fault (i.e. the one who makes deductions from wages without remitting them to the tax authorities), and gives this security interest absolute priority over those interests held by the secured creditors irrespective of whether those creditors have priority under the applicable provincial law.

47 According to the Supreme Court, this priority is justified by the fact that source deductions are "at the heart" of income tax collection in Canada and, "in contrast to a tax debtor's bank", the Minister is not familiar with the tax debtor's business. The Minister is, so to speak, "an involuntary creditor" (reasons, paragraph 23).

48 Finally, the trial judge questions the use in Quebec of the notion of "beneficial ownership", on the ground that it is a concept that is obviously derived from the common law. Although he acknowledges Parliament's right to enact the rules of its choice in giving effect to laws over which it has legislative authority, he notes the uncertainty that arises from the use in Quebec of common law concepts.

49 It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament's intention and giving effect to it.

50 In this case, Parliament's intention is not hard to decipher, notwithstanding the use of a legal concept from the common law. Parliament evidently wished to confer on the Crown an ongoing interest in the property that is deemed to be held in trust for as long as the tax debtor's default persists, and to subject the secured creditor to the obligation to remit to the Receiver General the proceeds arising from the property held in trust in absolute priority, to the extent of the unpaid debt.

51 The trial judge did not have to determine whether, prior to the sale of the property subject to the deemed trust, the Crown's "beneficial ownership" did or did not have priority over the respondents' rights under the civil law and, if so, how the Crown could assert this right in opposition to those of the respondents (see, in this regard, the decision this Court is delivering this very day in New Court Financial Ltd. v. The Queen, A-529-02). He simply had to record the fact that the respondents had received the proceeds of the property subject to the deemed trust and enforce their obligation to pay these proceeds to the Receiver General in priority over their security interest.

52 For these reasons, the appeals shall be allowed, the trial court judgment reversed and the actions of the appellant (plaintiff at trial) allowed. The respondents shall be ordered to pay to the Receiver General the amounts claimed by the appellant from the proceeds of the sale of the property subject to the deemed trust. The appellant shall be entitled to its costs both on appeal and at trial.

Certified true translation: Suzanne Gauthier, C.Tr., LL.L.

cp/e/qw/qlklc

Case Name:

First Vancouver Finance v. Canada (Minister of National Revenue - M.N.R.)

Her Majesty The Queen in Right of Canada, as represented by the Minister of National Revenue, appellant;
v.
First Vancouver Finance, respondent, and
Great West Transport Ltd., respondent.

[2002] S.C.J. No. 25

[2002] A.C.S. no 25

2002 SCC 49

2002 CSC 49

[2002] 2 S.C.R. 720

[2002] 2 R.C.S. 720

212 D.L.R. (4th) 615

288 N.R. 347

[2003] 1 W.W.R. 1

J.E. 2002-960

219 Sask.R. 185

45 C.B.R. (4th) 213

[2002] 3 C.T.C. 285

2002 D.T.C. 6998

2002 D.T.C. 7007

[2002] G.S.T.C. 23

113 A.C.W.S. (3d) 1098

2002 CarswellSask 317

File No.: 28062.

Supreme Court of Canada

Hearing and judgment: March 12, 2002.
Reasons delivered: May 23, 2002.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN (47 paras.)

Income tax -- Administration and enforcement -- Collection -- Source deductions -- Trust for moneys deducted -- Employer failing to remit payroll deductions -- Accounts receivable sold to third party -- Whether property acquired by tax debtor after statutory deemed trust arises subject to trust -- If so, whether sale of trust property to third party releases property from trust -- Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), (4.1).

The respondent, First Vancouver Finance, entered into a factoring agreement with Great West Transport whereby it would purchase Great West's accounts receivable at a discount. After purchase, the Great West invoices were forwarded to Great West's debtors, along with notification that the accounts had been sold and that subsequent payments should be made directly to First Vancouver. Among the accounts purchased were several owing by Canada Safeway Limited. As of the date of the factoring agreement, Great West owed money to the Minister of National Revenue because of unremitted payroll deductions. First Vancouver had made arrangements with the Minister to forward part of the purchase price of the accounts to be applied to Great West's arrears. The Minister served Canada Safeway with Enhanced Requirement to Pay Notices ("RTPs") as authorized by the Income Tax Act ("ITA"). In response, Canada Safeway made payments to the Minister relating to accounts which Great West had assigned to First Vancouver. First Vancouver brought an application to recover the amounts paid by Canada Safeway to the Minister pursuant to the RTPs. The Court of Queen's Bench granted the application in part, holding that First Vancouver was entitled to the moneys owing on accounts factored before the RTPs were issued. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

The ITA requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. Under s. 227 (4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. The trust is deemed to have existed from the moment the source deductions were made. The s. 227(4.1) deemed trust is similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty. As long as the tax debtor continues to be in default, the trust continues to float over the tax debtor's property. At any given point in time, whatever property then belonging to the tax debtor is subject to the deemed trust. As property comes into possession of the tax debtor, it is caught by the trust and becomes subject to Her Majesty's interest. Similarly, property which the tax debtor disposes of is thereby released from the deemed trust. The mutuality of treatment between incoming and outgoing property relating to the deemed trust is supported by both the plain language of the provisions as well as their purpose and intent. Her Majesty's interest in the tax debtor's property is protected because, while property which is sold to third party purchasers is released from the trust, at the same time, the proceeds of disposition of the alienated property are captured by the trust. Commercial certainty is promoted owing to the fact that third party purchasers are free to transact with tax debtors or suspected tax debtors without fearing that Her Majesty may subsequently assert an interest in the property so acquired.

Since the deemed trust created by ss. 227(4) and 227(4.1) encompasses property which comes into the hands of the tax debtor after the trust arises, when Great West came into possession of the Canada Safeway invoices, the deemed trust, which had already arisen as a consequence of Great West's default in remittances, successfully attached to those invoices. However, the deemed trust does not operate over assets which a tax debtor has sold in the ordinary course to third party purchasers. Once the Canada Safeway invoices had been factored to First Vancouver, the Minister was prevented from asserting its interest in these invoices.

Cases Cited

Approved: Royal Bank v. Tuxedo Transport Ltd. (2000), 79 B.C.L.R. (3d) 1, rev'g (1999), 6 C.B.R. (4th) 285; referred to: Alberta (Treasury Branches) v. M.N.R., [1996] 1 S.C.R. 963; Pembina on the Red Development Corp. v. Triman Industries Ltd. (1991), 85 D.L.R. (4th) 29; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411.

Statutes and Regulations Cited

Excise Tax Act, R.S.C. 1985, c. E-15, s. 317(3) [am. 1993, c. 27, s. 133].
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 153(1), 224, 224(1.2), 227(4) [repl. 1998, c. 19, s. 226(1)], (4.1) [en. idem].

APPEAL from a judgment of the Saskatchewan Court of Appeal (2000), 199 Sask. R. 9, [2000] 8 W.W.R. 386, [2000] 3 C.T.C. 93, [2001] G.S.T.C. 55, [2000] S.J. No. 330 (QL), 2000 SKCA 58, affirming a decision of the Court of Queen's Bench (1999), 190 Sask. R. 286, [2000] 1 W.W.R. 713, [2000] 1 C.T.C. 99, [2001] G.S.T.C. 54, [1999] S.J. No. 738 (QL), 1999 SKQB 166. Appeal dismissed.

Edward R. Sojonky, Q.C., and Mark Kindrachuk, for the appellant.
Joel A. Hesje and David M. A. Stack, for the respondent First Vancouver Finance.

Solicitor for the appellant: The Attorney General of Canada, Ottawa.
Solicitors for the respondent First Vancouver Finance: McKercher McKercher & Whitmore, Saskatoon.

The judgment of the Court was delivered by

IACOBUCCI J.:--

Introduction

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

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

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

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

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

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

II. Facts

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

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

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

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

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

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

that the RTPs had captured the two accounts assigned after the RTPs were issued ("post-RTP accounts").

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

III. Relevant Statutory Provisions

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

227... .

(4) [Trust for moneys deducted] Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) [Extension of trust] Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

IV. Judgments Below

A. Saskatchewan Court of Queen's Bench, [2000] 1 W.W.R. 713

15 On the preliminary issue of the ownership of the factored accounts, Wimmer J. relied upon the definition of a factoring agreement from Alberta (Treasury Branches) v. M.N.R., [1996] 1 S.C.R. 963, at paras. 30-31. In that case, Cory J. stated at para. 31 that, "A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration."

16 Wimmer J. observed that, according to Alberta (Treasury Branches), an absolute and unconditional assignment of book debts is beyond the reach of the Minister under garnishment provisions. He held further that the assignments from Great West to First Vancouver were absolute and unconditional because, upon completion of the assignments, Great West had no residual rights in the property and could not redeem or recover the accounts and, in that circumstance, Canada Safeway had no liability to Great West after there was a completed transfer of accounts. Although the Minister argued that the assignments were not absolute because under the factoring agreement First Vancouver had recourse to Great West if a customer disputed or failed to pay an account, Wimmer J. noted that the definition of factoring approved by Cory J. contemplated that a factor may acquire an absolute interest in book debts with or without recourse (p. 718).

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

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

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

B. Saskatchewan Court of Appeal, [2000] 8 W.W.R. 386

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

Issues

[para21 A. Is property acquired by an employer after a default in remitting payroll deductions ("after-acquired property") subject to the deemed trust in s. 227(4.1) of the ITA?

B. Does the deemed trust under s. 227(4.1) continue to attach to property which has been sold by the tax debtor to a third party purchaser for value?

VI. Analysis

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

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

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

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

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 Act, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount

(a) deemed by subsection (4) to be held in trust for Her Majesty ...

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

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

> Thus, s. 227(5) [now s. 227(4.1)] 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. [Emphasis in original.]

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

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

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

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

28 It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227 (4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> the fund or asset which the subject matter is being traced into.... [Emphasis added.]

37 This observation holds true despite the subsequent amendments to the deemed trust provisions. As with the previous enactment of the section, s. 227(4.1) refers to property "equal in value to the amount so deemed to be held in trust" (emphasis added), and states that this property is subject to the trust "whether or not the property has in fact been kept separate and apart". Indeed, if anything, by deeming the trust to be effective "at any time" the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made. In this regard, the remarks of Gonthier J. in Sparrow Electric, at para. 31, are apposite:

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

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

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

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

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

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

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

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

43 Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the ITA. It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227(4.1) whereas secured creditors are. In Pembina on the Red Development, supra, Twaddle J.A. took note of the "long-established principle of law that, in the absence of clear language to the contrary, a tax on one person cannot be collected out of property belonging to another" (p. 46). In Sparrow Electric, supra, at para. 39, Gonthier J. also referred to this principle, stating that:

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

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

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

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

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

VII. Conclusion

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

CANADA

CONSOLIDATION

CODIFICATION

Excise Tax Act

Loi sur la taxe d'accise

R.S.C., 1985, c. E-15

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made by the registrant of items of inventory of the registrant.

Cessation

(7) An authorization granted under subsection (2) to a registrant ceases to have effect on the earlier of

(*a*) the day on which a revocation of the authorization becomes effective, and

(*b*) the day that is three years after the day on which the authorization, or its renewal, became effective.

Application after revocation

(8) Where an authorization granted to a registrant under subsection (2) is revoked, effective on a particular day, the Minister shall not grant to the registrant another authorization under that subsection that becomes effective before

(*a*) where the authorization was revoked in circumstances described in paragraph (5)(*a*), the day that is two years after the particular day; and

(*b*) in any other case, the first day of the second fiscal year of the registrant commencing after the particular day.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1993, c. 27, s. 86; 2000, c. 30, s. 49; 2001, c. 15, s. 10; 2007, c. 18, s. 25.

Trust for amounts collected

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

Cessation

(7) L'autorisation accordée à un inscrit cesse d'avoir effet trois ans après la date de la prise d'effet de l'autorisation ou de son renouvellement, ou si elle est antérieure, à la date de la prise d'effet du retrait de l'autorisation.

Demande après retrait d'autorisation

(8) Toute autorisation que le ministre accorde, en application du paragraphe (2), à un inscrit à qui il a déjà retiré une semblable autorisation à compter d'un jour donné ne peut prendre effet qu'à compter du jour suivant :

a) si l'autorisation a été retirée en vertu de l'alinéa (5)*a*), le jour qui tombe deux ans après le jour donné;

b) dans les autres cas, le premier jour du deuxième exercice de l'inscrit qui commence après le jour donné.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1993, ch. 27, art. 86; 2000, ch. 30, art. 49; 2001, ch. 15, art. 10; 2007, ch. 18, art. 25.

Montants perçus détenus en fiducie

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

Montants perçus avant la faillite

(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

Retraits de montants en fiducie

(2) La personne qui détient une taxe ou des montants en fiducie en application du paragraphe (1) peut retirer les montants suivants du total des fonds ainsi détenus :

(*a*) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(*b*) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

a) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la présente section pour sa période de déclaration;

b) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.

Ce retrait se fait lors de la présentation au ministre de la déclaration aux termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

Non-versement ou non-retrait

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1990, c. 45, s. 12; 1993, c. 27, s. 87; 2000, c. 30, s. 50.

Sale of account receivable

222.1 If a person makes a taxable supply that gives rise to an account receivable and at any time the person supplies by way of sale or assignment the debt, for the purposes of sections 222, 225, 225.1 and 227,

(*a*) the person is deemed to have collected, at that time, the amount, if any, of the tax in respect of the taxable supply that was not collected by the person before that time; and

(*b*) any amount collected by any person after that time on account of the tax payable in respect of the taxable supply is deemed not to be an amount collected as or on account of tax.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 2000, c. 30, s. 51.

Disclosure of tax

223. (1) If a registrant makes a taxable supply, other than a zero-rated supply, the registrant shall indicate to the recipient, either in prescribed manner or in the invoice or receipt issued to, or in an agreement in writing entered into with, the recipient in respect of the supply,

(*a*) the consideration paid or payable by the recipient for the supply and the tax payable in respect of the supply in a manner that clearly indicates the amount of the tax; or

(*b*) that the amount paid or payable by the recipient for the supply includes the tax payable in respect of the supply.

Indication of total

(1.1) If a registrant makes a taxable supply, other than a zero-rated supply, and, in an invoice or a receipt in respect of the supply issued to the recipient or in an agreement in writing in respect of the supply, the registrant indicates the tax payable or the rate or rates at which tax is payable in respect of the supply, the registrant shall indicate in that invoice, receipt or agreement

Sens de droit en garantie

(4) Pour l'application des paragraphes (1) et (3), n'est pas un droit en garantie celui qui est visé par règlement.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1990, ch. 45, art. 12; 1993, ch. 27, art. 87; 2000, ch. 30, art. 50.

Vente d'un compte client

222.1 Lorsqu'une personne effectue une fourniture taxable donnée engendrant un compte client et que la personne fournit cette dette par vente ou cession, les présomptions suivantes s'appliquent dans le cadre des articles 222, 225, 225.1 et 227 :

a) la personne est réputée avoir perçu, au moment de la fourniture de la dette, le montant éventuel de la taxe qu'elle n'a pas perçu avant ce moment relativement à la fourniture taxable donnée;

b) tout montant perçu par une personne après ce moment au titre de la taxe payable relativement à la fourniture taxable donnée est réputé ne pas être un montant perçu au titre de la taxe.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 2000, ch. 30, art. 51.

Indication de la taxe

223. (1) L'inscrit qui effectue une fourniture taxable (sauf une fourniture détaxée) doit indiquer à l'acquéreur, selon les modalités réglementaires ou sur la facture ou le reçu délivré à l'acquéreur ou dans la convention écrite conclue avec celui-ci :

a) soit la contrepartie payée ou payable par l'acquéreur pour la fourniture et la taxe payable relativement à celle-ci, de sorte que le montant de la taxe apparaisse clairement;

b) soit la mention que le montant payé ou payable par l'acquéreur pour la fourniture comprend cette taxe.

Indication du total

(1.1) L'inscrit qui effectue une fourniture taxable (sauf une fourniture détaxée) et qui indique la taxe payable, ou le ou les taux auxquels la taxe est payable, relativement à la fourniture sur la facture ou le reçu délivré à l'acquéreur ou dans la convention écrite relative à la fourniture doit indiquer sur cette facture ou ce reçu, ou dans cette convention :

a) soit le total de la taxe payable relativement à la fourniture, de sorte que ce total apparaisse clairement;

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TRISURA GUARANTEE INSURANCE COMPANY and **EBERSOLE EXCAVATING INC., ET AL**

Applicant Respondents

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

BOOK OF AUTHORITIES OF THE CANADA REVENUE AGENCY

(Responding Factum)

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