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JUDICIAL CENTRE	CALGARY
APPLICANT	ACCESS MORTGAGE CORPORATION (2004) LIMITED
RESPONDENT	ARRES CAPITAL INC.
DOCUMENT	**BENCH BRIEF**

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BENCH BRIEF OF ALVAREZ & MARSAL CANADA INC.

APPLICATION TO DETERMINE CLAIMS IN RESPECT OF THE GRAYBRIAR FUNDS, TO BE HEARD BY THE HONOURABLE MR. JUSTICE C.M. JONES ON SEPTEMBER 21, 2018 AT 10:00 A.M.

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I. INTRODUCTION

1. This Bench Brief is submitted by Alvarez & Marsal Canada Inc., in its capacity as court-appointed receiver (the "**Receiver**") of Arres Capital Inc. (the "**Debtor**"), pursuant to the Order issued by the Honourable Madam Justice J. Strekaf under the *Civil Enforcement Act* (Alberta)[1] on February 13, 2015, as subsequently amended and restated pursuant to the Order issued by the Honourable Madam Justice B.E.C. Romaine on October 23, 2017 (the "**Receivership Order**") in Court File No. 1401-12431 (the "**Receivership Proceedings**").[2] On July 26, 2017, the Debtor was assigned into bankruptcy pursuant to the Order issued by the Honourable Madam Justice K. Eidsvik in Court File No. 25-094212 and the Receiver was appointed as trustee of the estate of the Debtor.

2. Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Claims Process Order, including Appendix "**A**" thereto, issued by the Honourable Madam Justice B.E.C. Romaine on June 4, 2018.

3. This submission of the Receiver pertains to the determination of Claims to the Graybriar Funds. In the Claims Process, the Receiver disallowed the Applicants' Claims. The Receiver says that the Applicants' Claims to the Graybriar Funds are unfounded.

4. One of the Applicants, Terrapin Mortgage Investment Corp. ("**Terrapin**"), claims a priority entitlement to the Graybriar Funds based on an alleged equitable mortgage. The Receiver says that this alleged equitable mortgage did not arise at law and, even if it did, it would not give Terrapin priority to the Graybriar Funds.

5. The other Applicants are Persons related to the Debtor: Staci Serra ("**Staci**"), Wesley Serra ("**Wesley**"), and 875892 Alberta Limited ("**875892**", and together with Staci and Wesley, the "**Related Parties**"). Staci and 875892 are related to the Debtor because of their relationship to Wesley, who is the Debtor's sole owner.[3] Staci is Wesley's spouse and Staci owns and controls 875892.[4] The Related Parties claim a priority entitlement to the Graybriar Funds as a result of alleged assignments of the Debtor's receivables that the Debtor supposedly made to one or more of them (the "**Alleged Assignments**").

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1 RSA 2000, c C-15.

2 Second Receiver's Report, at paragraphs 1-2 [Compendium, page 717].

3 Third Receiver's Report, at paragraph 8 [Compendium, page 909]; Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at paragraph 7 [Compendium, page 49].

4 Second Receiver's Report, at paragraphs 26, 28 [Compendium, pages 724-25]; Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at paragraphs 6, 8 [Compendium, page 49].

6. The Receiver says that these Alleged Assignments do not give any of the Related Parties any priority entitlement to the Graybriar Funds because (1) the Alleged Assignments are security interests that were not registered pursuant to the *Personal Property Security Act* (the "**PPSA**");[5] (2) there is insufficient evidence that the Related Parties gave consideration for the Alleged Assignments, such that the Related Parties do not qualify as creditors of the Debtor; and (3) the Alleged Assignments by the Debtor were impermissible pursuant to the Trust Agreements (defined below).

7. In short, and as set out in detail below, the Receiver contends that the Graybriar Investors have priority over Terrapin and the Related Parties as far as the Graybriar Funds are concerned. The Graybriar Investors made loans which were secured by first and second ranking mortgages (the "**Graybriar Mortgages**") duly registered under the *Land Titles Act* (the "**LTA**")[6] against title to condominium units (the "**Graybriar Units**") in the condominium development community referred to as "Graybriar". The Graybriar Funds are derived from the sale of the Graybriar Units. The Debtor held the Graybriar Mortgages in trust for the Graybriar Investors. As a result, the Graybriar Investors have priority entitlement to any funds owed to the Debtor as a result of the sale of the Graybriar Units, including the Graybriar Funds.

II. STATEMENT OF FACTS

A. Overview

8. Over the course of the administration of the Debtor's estate, one of the Receiver's main difficulties has been identifying assets of material value for the benefit of creditors. The Receiver has located funds totalling approximately $1,617,020.90 (the "**Funds**") that are composed of the following:

(a) **Graybriar Funds:** $1,382,020.90 which arises from the sale of the Graybriar Units; and,

(b) **Court Funds:** $235,000 posted in Court to stay the operation of a summary judgment order against the Debtor.

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5 RSA 2000, c P-7 (Book of Authorities, Tab 1).

6 RSA 2000, c L-4 (Book of Authorities, Tab 2).

9. This Application pertains to the Graybriar Funds. The Receiver, for the benefit and on behalf of the Debtor's creditors and stakeholders, advances a simple position regarding the Graybriar Funds.

10. The Graybriar Funds are derived from the sale of the Graybriar Units. The Debtor held first and second ranking mortgages against the Graybriar Units by virtue of the Graybriar Mortgages. The Graybriar Mortgages were held by the Debtor in trust for the benefit of the Graybriar Investors pursuant to agreements between them and the Debtor (collectively, the "**Trust Agreements**").[7]

11. The Graybriar Units were subject to certain subordinately registered builders' liens in favour of creditors that were vested off title pursuant to the Graybriar Sale Approval Orders (discussed below). Once it is confirmed that either the Lien Claims have been satisfied or the Debtor is entitled to receive the Graybriar Funds in priority to any lien claimants, the Receiver proposes to distribute the Graybriar Funds to the Graybriar Investors subject to their *pro rata* entitlement in accordance with the terms and conditions in the Trust Agreements.

B. The Sale to Plaintiff Order

12. Graybriar was the owner of certain Lands upon which the Graybriar Units were constructed. The Debtor provided certain funds to Graybriar which were secured pursuant to the Graybriar Mortgages and the Debtor held the Graybriar Mortgages as trustee for and for the benefit of the Graybriar Investors pursuant to the Trust Agreements.[8] The Graybriar Mortgages attached to, encumbered, and were perfected against all of the Graybriar Units.

13. Pursuant to an Order granted by Master W.H. Breitkreuz on February 3, 2014, as amended by Master L.A. Smart on February 7, 2014 (the "**Sale to Plaintiff Order**"),[9] the Debtor's offer to purchase the Graybriar Units was accepted.

14. The Sale to Plaintiff Order was made without notice to the Graybriar Investors.[10] After learning of the Sale to Plaintiff Order, some of the Graybriar Investors sought a stay. The Sale to

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7 Second Receiver's Report, at paragraphs 30-34 [Compendium, pages 725-26].

8 Second Receiver's Report, at paragraphs 30-34 [Compendium, pages 725-26].

9 Second Receiver's Report, Appendix D [Compendium, pages 769-71]; Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at paragraph 16, Exhibits "G" and "H" [Compendium, pages 50, 81-87].

10 See the transcript of the appearance by the Debtor's former counsel before Master W.H. Breitkreuz on February 3, 2014: Third Receiver's Report, Appendix B [Compendium, page 920].

Plaintiff Order was subsequently stayed pursuant to the Order of the Honourable Justice S.D. Hillier, granted on February 14, 2014 (the "**Stay Order**").[11]

15. All of the Graybriar Units have now been sold pursuant to the Graybriar Sale Approval Orders and all net proceeds have been paid to the Receiver pursuant to the Order (Directing Release of the Graybriar Funds and the Court Funds and Confirming the Receivership Charges) granted by Madam Justice B.E.C. Romaine on June 4, 2018. At this time, the Graybriar Funds represent the Debtor's most significant realizable asset that are the subject of competing claims by the Graybriar Investors, Terrapin, and the Related Parties, as summarized below.

C. The Graybriar Investors

16. The Graybriar Investors invested in the Graybriar Mortgages pursuant to the Trust Agreements. Based on the terms of the Trust Agreements, the Graybriar Investors have trust claims to the Graybriar Funds. The Receiver has accepted the Claims of the Graybriar Investors in the Claims Process.

D. Terrapin

17. Terrapin made a loan advance (the "**179 Loan**") to 1798582 Alberta Ltd. ("**1798592**"). 1798582 is related to the Debtor,[12] as its sole shareholder is 875892.[13] As set out above, 875892 is wholly-owned by Staci, who is the spouse of the Debtor's sole owner, Wesley.

18. Terrapin made the 179 Loan to finance 1798582's acquisition of certain of the Graybriar Units that was to occur by way of the Sale to Plaintiff Order. Terrapin advanced the 179 Loan to 1798582 shortly after the Sale to Plaintiff Order was granted but before title to any of the Graybriar Units were transferred to 1798582, and even before the transfer documents were transmitted to the Registrar of Land Titles.[14]

19. After the advance of the 179 Loan, the Sale to Plaintiff Order was subsequently appealed and stayed, pursuant to the Stay Order. The transactions that were being financed by Terrapin did not complete such that (1) the Debtor did not receive legal title from Graybriar; and (2) 1798582 did not receive legal title from the Debtor.

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11 Second Receiver's Report, Appendix F [Compendium, pages 776-78].

12 Second Receiver's Report, at paragraph 36 [Compendium, page 727].

13 Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at paragraph 6 [Compendium, page 49].

14 Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at paragraphs 22, 24, 32 [Compendium, pages 51-52].

20. Those Graybriar Units subject to the contemplated transactions to be financed by Terrapin were subsequently sold pursuant to the Graybriar Sale Approval Orders and the proceeds therefrom form part of the Graybriar Funds. Terrapin claims an equitable mortgage in the Graybriar Funds.

E. The Related Parties

21. The Related Parties, Staci, Wesley, and 875892, are all related to the Debtor. Wesley asserts that the Debtor made assignments of its receivables to the Related Parties from approximately 2007 to approximately 2013.[15]

III. ISSUES

22. This Bench Brief addresses the two main issues for this Honourable Court to determine on the within Application:

1. Does Terrapin have any priority entitlement to the Graybriar Funds based on an equitable mortgage? This issue raises the following two sub-issues:

   (a) Did 1798582 grant an equitable mortgage to Terrapin regarding any of the Graybriar Units?

   (b) If the answer to 1(a) above is yes, does Terrapin's equitable mortgage give it priority in respect of the Graybriar Funds, relative to the Graybriar Investors?

2. Do the Related Parties have any priority entitlement to the Graybriar Funds based on the Alleged Assignments? This issue raises the following three sub-issues:

   (a) Were the Alleged Assignments by the Debtor to the Related Parties subject to the PPSA?

   (b) Have the Related Parties proven that they are creditors of the Debtor?

   (c) Was the Debtor permitted to make the Alleged Assignments under the terms of the Trust Agreements?

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[15] Affidavit of Wesley Serra, sworn September 6, 2018, at paragraph 34 [Compendium, page 1000].

IV. LAW AND ARGUMENT

A. The Terrapin Claim

(i) 1798582 Did Not Grant an Equitable Mortgage to Terrapin

23. An essential feature of a legal mortgage is that it vests legal estate in land in the mortgagee. As such, a mortgage that does not transfer legal estate cannot be a legal mortgage.[16] An equitable mortgage, by contrast, is one that does not transfer legal estate in the property to the mortgagee, but creates, in equity, a charge upon the property.[17] This concept seeks to enforce a common intention of the mortgagor and mortgagee to secure property for a debt, past or future, where that common intention is unenforceable under the strict demands of the common law.[18]

24. An equitable mortgage may be created in three circumstances:[19]

(a) The interest mortgaged is equitable or future, because in such a case, even if the mortgage complies with all formalities, it cannot be a legal mortgage;

(b) The mortgagor has not executed an instrument sufficient to transfer the legal estate. In this case, it is the informality of the mortgage which prevents it from being a legal mortgage. This category also includes a written agreement to execute a legal mortgage, that is, a promise to grant a legal mortgage which is itself not a grant of a legal mortgage;[20] and

(c) An equitable mortgage may also be created by deposit of title deeds.

25. No deposit of any title deeds was made here, nor is there any defect in the mortgage documentation which prevented 1798582 from granting a legal mortgage to Terrapin; 1798582 could not grant a mortgage of any kind to Terrapin because 1798582 had no relevant interest in the Graybriar Units.

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16 Walter M Traub, *Falconbridge on Mortgages*, 5th ed (Toronto: Thomson Reuters Canada, 2017) (loose-leaf Release No 25, November 2017) at 5-1 (“***Falconbridge on Mortgages**”)* (Book of Authorities, Tab 3).

17 *Elias Markets Ltd (Re)*, [2006] 274 DLR (4th) 166 at para 63, 25 CBR (5th) 50 (Ont CA) (“***Elias Markets**”)* (Book of Authorities, Tab 4).

18 *Elias Markets*, *ibid* at para 65 (Book of Authorities, Tab 4). See also: *Trang v Nguyen*, 2015 ONSC 4287 at paras 38-39 (Book of Authorities, Tab 5).

19 *Falconbridge on Mortgages*, *supra* note 16 at 5-2 (Book of Authorities, Tab 3). See also: *Scherer v Price Waterhouse*, [1985] OJ No 881 at para 20 (HCJ) (Book of Authorities, Tab 6).

20 *Falconbridge on Mortgages*, *supra* note 16 at 5-4 (Book of Authorities, Tab 3).

26. Nor is there a written agreement to execute a legal mortgage. The executed agreement between the purported mortgagor (1798582) and purported mortgagee (Terrapin) is in fact a legal mortgage document,[21] not an agreement to execute a mortgage. Terrapin only faces a problem because certain of the covenants given by 1798582 in the mortgage document were never satisfied, namely that 1798582 "has a good title to the Land" and "has the right to mortgage the Land".[22]

27. 1798582 never obtained title to any of the Graybriar Units and never obtained any right to mortgage them, with the result that it could not have granted a legal mortgage to Terrapin. This case is analogous to *Elias Markets*, in which the Ontario Court of Appeal held that the failure to satisfy conditions precedent set out in the mortgage document precluded a finding that an equitable mortgage had been granted.[23] At least in *Elias Markets*, the purported mortgage was granted by the owner of the land; in this case, the purported mortgagor of the alleged equitable mortgage never owned anything to mortgage in the first place.

28. As such, Terrapin appears to rely on the first category of equitable mortgages set out above, a mortgage of an equitable or future interest. However, the nature of 1798582's interest in the Graybriar Units that it intended to acquire, but never did acquire, was such that it was never capable to grant any mortgage to Terrapin, whether legal or equitable. This is so even if 1798582 can be said to have once had an interest in the Graybriar Units that can be somehow characterized as "equitable" or "future".

29. Regarding an alleged equitable interest held by 1798582, it has been said, for example, that on a valid contract for the sale of land the equity is transferred to the purchaser (here, 1798582) such that the vendor (here, the Debtor or Graybriar) is a mere trustee until completion of the contract; but this principle only applies as between the parties to the contract and does not extend to third parties.[24]

30. Recently, the Supreme Court of the United Kingdom has confirmed this principle in holding that "the purchaser of land cannot create a proprietary interest in the land, which is capable of being an overriding interest, until his contract has been completed."[25]

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21 Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at Exhibit "J" [Compendium, pages 99-119].

22 See section 33 of the mortgage document: Affidavit of Michael John Cassidy Ellis, sworn July 12, 2018 at Exhibit "J", page 15 [Compendium, page 114].

23 *Elias Markets*, *supra* note 17 at paras 75-77 (Book of Authorities, Tab 4).

24 *Martin Commercial Fueling Inc v Virtanen*, [1994] 2 WWR 348 (BCSC) (Book of Authorities, Tab 7).

25 *Scott v Southern Pacific Mortgages Limited*, [2014] UKSC 52 at para 122 (Book of Authorities, Tab 8).

31. As the Supreme Court of Canada held in *Harris v Robinson*:[26]

> A purchaser under an executory contract is sometimes said, in loose phraseology, to have an equitable title, but the distinction as regards equitable title between his rights under such a contract before payment of the purchase money, and a true equitable title, is well marked … Whilst his rights under such a contract are incomplete owing to the non-payment of his purchase money a purchaser has an undoubted right to assign his contract, but he cannot sell the land itself, and cannot properly be called the equitable owner of it.

32. 1798582 never paid the purchase money for any of the Graybriar Units and never became the equitable owner of any of them. Accordingly, even if Terrapin could establish that 1798582 had some kind of equitable interest (as described in loose phraseology) in some of the Graybriar Units by virtue of a valid contract of purchase and sale, 1798582 was still incapable of granting any interest to Terrapin binding on third parties, because the contract between 1798582 and the vendor of the Graybriar Units was never completed.

33. Moreover, given that the Graybriar Units have now all been sold to third parties pursuant to the Graybriar Sale Approval Orders, the purchase contract involving 1798582 can never be completed and has been rendered moot, as is the case for the mortgage contract between 1798582 and Terrapin and the Sale to Plaintiff Order.

34. Regarding any allegation of a "future" interest that 1798592 might be said to have mortgaged to Terrapin, it must be recalled that one cannot immediately convey an interest or estate in property that one will or may acquire in the future. At most, one can enter into a binding contract to convey such an interest or estate if and when it is acquired that operates to grant security ***at the time of acquisition***. As set out in *Falconbridge on Mortgages*:[27]

> An assignment by way of mortgage of property to be acquired in the future, or of an expectancy or hope of succession on a person's future death, cannot of course transfer anything immediately, but the mortgagee has more than a mere right to enforce a contract and the assignment operates as security ***which becomes effective as soon as the property is acquired or the expectancy vests in interest***.

35. Here, the purported mortgagor, 1798592, never acquired the property that was the subject of its mortgage contract with Terrapin. Accordingly, even if it is possible to characterize 1798592's interest as a future interest that could potentially be the subject of an equitable mortgage, such security did not and never will become effective.

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[26] *Harris v Robinson* (1892), 21 SCR 390, [1892] SCJ No 68 at para 21 (Book of Authorities, Tab 9).

[27] *Falconbridge on Mortgages*, *supra* note 16 at 5-3 [emphasis added] (Book of Authorities, Tab 3).

(ii) Any Terrapin Equitable Mortgage is Subordinate to the Graybriar Mortgages

36. If it is found that 1798592 did grant an equitable mortgage to Terrapin, the priority of such mortgage relative to the Graybriar Mortgages will need to be determined. The Receiver says that any alleged equitable mortgage granted to Terrapin is subordinate to the Graybriar Mortgages pursuant to the LTA and related case law.

37. As noted above, the Graybriar Mortgages were duly registered under the LTA against title to the Graybriar Units. The Graybriar Mortgages are dated in 2006 and 2007,[28] long before Terrapin entered into any mortgage contract with 1798592.

38. Section 14 of the LTA provides that the serial number attached to each instrument or caveat in the Registrar's daily record determines the priority of the instrument or caveat filed or registered "[f]or purposes of priority between mortgagees, transferees, and others."[29]

39. As a result, as a general rule, first in time is first in right, ***even as between two legal mortgages***. In the case of a contest between a legal mortgage and an equitable mortgage, even an earlier equitable mortgage is subordinated to a later, registered legal mortgage. As set out in section 203(2) of the LTA, a person that takes a mortgage from an owner is not, except in the case of fraud by that person:

> (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money; or
>
> (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

40. This principle is confirmed by *Falconbridge on Mortgages*, which confirms that as "between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice."[30]

41. In this case, of course, the outcome is even more obvious, because the legal mortgages (the Graybriar Mortgages) were registered long before any alleged equitable mortgage was granted to

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[28] Second Receiver's Report, at paragraph 32 [Compendium, page 726].

[29] LTA, *supra* note 6 at s 14(3) (Book of Authorities, Tab 2).

[30] *Falconbridge on Mortgages*, *supra* note 16 at 7-4 [emphasis added] (Book of Authorities, Tab 3).

Terrapin. The law is clear that the first legal mortgage has priority except in very limited circumstances where the first mortgagee's conduct would make it inequitable for the first mortgage to take priority over the second equitable mortgage. As set out in *Falconbridge on Mortgages*, in a statement of law adopted by the Ontario Court of Appeal in *Elias Markets*:[31]

> As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.

42. Therefore, the first legal mortgages (the Graybriar Mortgages) have priority to any alleged equitable mortgage that may be alleged to exist by Terrapin.

B. The Related Parties' Claim

(i) The PPSA Applies to the Alleged Assignments

43. The Related Parties assert that the Alleged Assignments were made to them as consideration in transactions by which the Debtor became indebted to the Related Parties. Thus, for example, Wesley has adduced evidence consisting of an accounting journal entry showing a credit (liability) being recorded in the Debtor's accounting records for $1,017,487.29 as of June 30, 2008 (although the actual supporting document for this journal entry is not in evidence).[32] In exchange for this alleged advance of $1,017,487.29, the Debtor made the "June Assignment" to 875892.[33] As part of this "June Assignment", the Debtor allegedly assigned its accounts receivables, including the receivable from Graybriar secured by the Graybriar Mortgage, to 875892.[34]

44. Although the Receiver does not admit that either of the Related Parties are creditors of the Debtor (for reasons set out later in this brief), if the Related Parties did indeed provide consideration to the Debtor and thereby join the ranks of its creditors, the Alleged Assignments are subject to the application of the PPSA.

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31 *Falconbridge on Mortgages*, *supra* note 16 at 7-3 [emphasis added] (Book of Authorities, Tab 3); *Elias Markets*, *supra* note 17 at para 69 (Book of Authorities, Tab 4).

32 Affidavit of Wes Serra, sworn July 17, 2018 at paragraph 11 and Exhibit "F" [Compendium, pages 441, 467].

33 Affidavit of Wes Serra, sworn July 17, 2018 at paragraph 10 and Exhibit "F" [Compendium, pages 440, 467].

34 Affidavit of Wes Serra, sworn July 17, 2018 at paragraph 15 [Compendium, page 441].

45. As the Alleged Assignments were not registered in the Personal Property Registry, they are unperfected security interests ineffective as against the Receiver (which is also the Debtor's trustee in bankruptcy) pursuant to section 20(1)(a) of the PPSA.

46. The PPSA is intended to apply to a wide array of transactions and arrangements concerning personal property, including accounts, such as the Alleged Assignments, whether or not they were granted to secure any obligation. Pursuant to section 3 of the PPSA:

> **3**(1) Subject to section 4, **this Act applies to**
>
> (a) **every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral**, and
>
> (b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, **assignment**, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.
>
> (2) Subject to sections 4 and 55, this Act applies to
>
> (a) ***a transfer of an account*** or chattel paper,
>
> (b) a lease of goods for a term of more than one year, and
>
> (c) a commercial consignment,
>
> ***that does not secure payment or performance of an obligation***. [emphasis added]

47. An assignment of receivables made to secure payment or performance of an obligation is a "security interest" within the meaning of section 1(1)(tt)(i) of the PPSA:[35]

> **1**(1)(tt) "security interest" means
>
> (i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods; …

48. The PPSA provides certainty to credit and financing arrangements through the registry system, that is the Personal Property Registry. This policy objective is accomplished by capturing a

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[35] See also: *Alberta (Treasury Branches) v MNR*, [1996] 1 SCR 963 (Book of Authorities, Tab 10).

very broad variety of financing transactions through section 3(1) and non-financing transactions through section 3(2).

49. Accordingly, the PPSA applies to the Alleged Assignments, subject to section 4. The Related Parties argue that the Alleged Assignments are not subject to the PPSA because they amount to the "creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services", as set out in section 4(d) of the PPSA.

50. It must be recalled that section 4 is intended to provide narrow exceptions to transactions that would otherwise fall within the ambit of the PPSA, where policy reasons justify such exceptions. Thus, for example, under section 4(a) of the PPSA, builders' liens are not subject to the PPSA, even when the lien granted extends to personal property. Section 4(d) of the PPSA is a deliberately limited exception to the broad scope of the PPSA and is designed to exclude the rare circumstance where wages or compensation akin to wages may be validly assigned.[36] A "commission" is a form of compensation akin to a wage and is properly excluded from operation of the PPSA, as confirmed by the supporting case law.[37] A fee payable to a broker for administration of a commercial investment does not result in the payment of a wage. The acceptance of the Related Parties argument on this point would significantly expand the application of section 4(d) of the PPSA in a way that cannot have been intended by the Legislature. More substantively, it would directly undermine the policy goal of the statute and have the potential to cause tremendous uncertainty in credit and loan transactions.

51. With respect to section 4(d) of the PPSA, the issue of whether an assignment relates to "fees for professional services" does not arise unless it is first shown that there has been the creation or transfer of an interest in "wages, salary, pay, commission or any other compensation for labour or personal services". In this case, unlike in *Re Lloyd*,[38] the Alleged Assignments do not relate to commissions. Nor do they relate to wages, salary, or pay. As such, it appears that the Related Parties assert that the Alleged Assignments are related to "any other compensation for labour or personal services".

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[36] By way of example, one of the leading authorities on the PPSA describes the operation of section 4(d) as "Wage Assignments": Ronald CC Cuming & Roderick J Wood, *Alberta Personal Property Security Act Handbook*, 4th ed (Scarborough, Ont: Thomson Canada Limited, 1998) at 94 (Book of Authorities, Tab 11).

[37] Cuming and Wood at p 94 (Book of Authorities, Tab 11).

[38] [1995] AJ No 6 (QL) (QB) (Master).

52. The words “or any other compensation” must be read in light of the words that precede it, that is, “wages, salary, pay, [and] commission”. Section 4(d) is intended to deal with the narrow category of assignments of wages or analogous modes of payment for labour or personal services that are not void under section 53 of the *Consumer Protection Act*.[39] Where, for example, a valid absolute assignment of wages or similar receivable for “labour or personal services” is made, it would be impractical to require that the assignment be registered in the Personal Property Registry. This is a very different situation than the amounts owed to a mortgage broker.

53. The Debtor never provided any labour or personal services to Graybriar or anyone else. Therefore, the receivable allegedly owed by Graybriar to the Debtor with any compensation for labour or personal services. These fees include, for example, certain alleged renewal fees, administrative costs and spread fees.[40] None of these amounts can be said to relate to the provision of labour or personal services.

54. Finally, the Related Parties argue that they could validly receive assignments of receivables owed to the Debtor for fees allegedly owing under, for example, the Trust Agreements between the Debtor and the Graybriar Investors. The Related Parties contend that these receivables are not for “professional services” and therefore do not fall within the exception to section 4(d) of the PPSA that relates to “fees for professional services”.

55. However, these alleged fees are not “wages, salary, pay, commission or any other compensation for labour or personal services” in the first instance, as they appear to relate primarily, or entirely, to the reimbursement of expenses allegedly incurred by the Debtor in the course of administering the trust for the Graybriar Investors. Section 4(d) of the PPSA was not intended to exclude the assignment of such receivables from the scope of the PPSA. As such, the “professional services” issue, discussed at length in the Related Parties’ brief, is not relevant to the determination of entitlement to the Graybriar Funds.

56. Simply put, the policy objectives of the PPSA would be undermined if an exemption from registration in the Personal Property Registry is provided for any “fees” owed to a mortgage broker as a percentage of the transaction value or to reimburse the broker for expenses that it incurred. This is a very different situation from that before the Master in *Re Lloyd*, which dealt with commissions owed to a real estate agent for marketing services provided to real estate sellers and

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[39] RSA 2000, c C-26.3 at sections 52 and 53 (Book of Authorities, Tab 12).

[40] Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 45 [Compendium, page 442-443].

buyers. In this case, the Debtor functioned as an intermediary in mortgage transactions, not as a service provider. Accordingly, the assignments of any amounts owed to the Debtor are not exempted from the scope of the PPSA by section 4(d).

(ii) The Related Parties Are Not Creditors of the Debtor

57. As alluded to above, the Receiver does not agree that any of the Related Parties are creditors of the Debtor. The evidence adduced by the Related Parties (entirely through Wesley's Affidavits) does not establish that they gave sufficient or any consideration in exchange for which the Alleged Assignments could have been validly made.

58. The Related Parties claim that they paid millions of dollars to the Debtor by various means, which are not properly documented, or documented at all:

(a) 875892 allegedly transferred shares in Grand Lion Entertainment Group Ltd. to the Debtor in exchange for a mortgage receivable or new mortgage investment of not less than $250,000.[41] No document has been entered into evidence establishing that the Debtor ever actually received any shares in Grand Lion Entertainment Group Ltd. from 875892 or from anyone else.

(b) 875892 allegedly borrowed $1,574,750 from "Access Mortgage" (presumably Access Mortgage Corporation (2004) Limited) and, the net proceeds of this loan, after "certain debts were paid by Staci", were supposedly paid to the Debtor.[42] No document has been entered into evidence establishing that 875892 ever borrowed these funds from Access Mortgage or that the Debtor ever actually received any portion of these funds. Instead, Wesley has provided a copy of an accounting journal entry purporting to show a credit (liability) being recorded in the Debtor's accounting records for $1,017,487.29 as of June 30, 2008,[43] but which does not show any connection between that journal entry and any of the Related Parties, much less any funds received by the Debtor from the Related Parties. The journal entry in question in fact refers to a "TRUST liability" even though there is no indication that the Debtor held anything in trust for 875892, suggesting that this

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41 Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 9 [Compendium, page 440].

42 Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 10 [Compendium, page 440].

43 Affidavit of Wes Serra, sworn July 17, 2018, Exhibit "F" [Compendium, page 467].

journal entry, to the extent that it reflects any actual liability, most likely represents an amount owed to the Graybriar Investors, not 875892.

(c) 875892 allegedly contributed another $300,000 "towards the June Assignment" by agreeing to sell its interest in the "Bankview Mortgage" to Access Mortgage for $300,000, which funds were supposedly then to be transferred to the Debtor.[44] Apart from the self-serving assertions signed by or on behalf of the Related Parties,[45] the only documentation related to this $300,000 contribution is a deposit slip showing an amount received from Access Mortgage Corporation (2004) Limited that has no evident connection to 875892.[46]

(d) Wesley and Staci were allegedly entitled to "management bonuses" of approximately $2.2 million, the implication being that the Debtor's liability to Wesley and Staci for these "bonuses" was satisfied by in part by the Alleged Assignments, thus providing consideration to the Debtor from Wesley and Staci.[47] The existence of management bonuses of this magnitude is supported only by an account listing excerpt that (1) does not show that the alleged management bonuses were removed from the Debtor's accounting records as a result of the Alleged Assignments; and (2) does not show whether the alleged management bonuses were satisfied by other means such as by cheque or other consideration paid by the Debtor to Wesley and Staci.[48] At minimum, if the Related Parties argue that the elimination of their entitlement to be paid $2.2 million occurred by way of their receipt of the Alleged Assignments, one would expect that their evidence would include a copy of the journal entry by which this transaction was recorded. In addition, no evidence has been adduced to show that these alleged management bonuses were ever actually reported in Wesley's and Staci's tax returns, raising the possibility that the "management bonuses" of $2.2 million reflected in the document that was provided was simply reversed, in whole or in part, by a subsequent journal entry.

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44 Affidavit of Wes Serra, sworn July 17, 2018, at paragraphs 12-14 [Compendium, page 441].

45 Affidavit of Wes Serra, sworn July 17, 2018, at paragraphs 12-14, Exhibits "G", "H" [Compendium, pages 441, 469, 471].

46 Affidavit of Wes Serra, sworn July 17, 2018, Exhibit "I" [Compendium, page 473].

47 Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 22 [Compendium, page 442].

48 Affidavit of Wes Serra, sworn July 17, 2018, Exhibit "M" [Compendium, page 484].

(e) Wesley allegedly paid $8,000 in cash to the Debtor, a transaction said to be supported by a line item in a partial listing of the Debtor's bank transactions.[49] The line item in question is a debit entry to a bank account (increase to an asset balance) which is identified as "SH LOAN/Management Wages", but shows no connection to Wesley or the Alleged Assignments. It is reasonable to infer that this payment consists of a repayment of a shareholder loan that the Debtor made to Wesley and does not indicate that Wesley paid consideration for the Alleged Assignments.

(f) Wesley and Staci allegedly "allotted $105,000 from the proceeds of a separate project, Houseco" to the Debtor, a transaction that is supported by nothing other than a notice of assignment signed by Wesley and Staci, either on their own behalf or on behalf of 875892 or the Debtor.[50]

(g) Staci allegedly paid the amounts of $167,234.47 and $177,053.00 to the Debtor as consideration for the Alleged Assignments; Wesley's affidavit asserts that cheques from Staci in support of the consideration paid by Staci are attached to his Affidavit sworn on July 17, 2018.[51] However, the copies of the cheques provided to support this assertion were drawn on the Debtor's bank account, not Staci's.[52]

(h) Staci allegedly paid $243,568.20 to the Debtor in or around September 2013, but this alleged transaction is supported only by a line item in a listing of the Debtor's bank transactions that does not show any connection between Staci and the deposit in question.[53]

59. The alleged consideration described in the immediately preceding paragraph totals well over $4 million, yet none of that consideration is supported by evidence that is even remotely persuasive. Only one payment, for $97,500, is set out in a cheque payable to the Debtor by Wesley and Staci,[54] but without any overall accounting of amounts paid between the Debtor and the Related Parties, it

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49 Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 22, Exhibit "M" [Compendium, pages 442, 485].

50 Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 25, Exhibit "O" [Compendium, pages 442, 492].

51 Affidavit of Wes Serra, sworn July 17, 2018, at paragraphs 28, 30 [Compendium, page 443].

52 Affidavit of Wes Serra, sworn July 17, 2018, Exhibits "S" and "U" [Compendium, pages 501-502, 506].

53 Affidavit of Wes Serra, sworn July 17, 2018, at paragraph 33, Exhibit "W" [Compendium, pages 443, 510].

54 Affidavit of Wes Serra, sworn July 17, 2018, Exhibit "Q" [Compendium, page 497].

is impossible to verify whether even this payment represents consideration that can support the Alleged Assignments.

60. Simply put, the Related Parties' evidence is too flimsy to support any finding that the Alleged Assignments were made for valuable consideration or that the Relates Parties qualify as creditors of the Debtor. As such, the Alleged Assignments do not give the Related Parties any entitlement to the Graybriar Funds.

(iii) The Debtor Was Not Permitted to Make the Alleged Assignments Under the Terms of the Trust Agreements

61. Regardless of whether the Related Parties gave any consideration for the Alleged Assignments, or whether the Alleged Assignments are subject to the PPSA, the Debtor was prohibited from assigning any interest in the Trust Agreements. As such, the Debtor could not have made the Alleged Assignments.

62. Section 13.8 of the Trust Agreements provides as follows:[55]

> Except as may be otherwise permitted herein, neither party to this Agreement may assign its interest to another party without the prior written consent of the other party, such consent not to be unreasonably withheld.

63. As the Debtor was explicitly prohibited from assigning its interest, the Related Parties, one of whom (Wesley) controls the Debtor, cannot now be heard to argue that they received the Debtor's interest in receivables arising in connection with the Trust Agreements from assignments (the Alleged Assignments) to which the Graybriar Investors did not consent. Accordingly, the Related Parties cannot have any entitlement to the Graybriar Funds arising from the Alleged Assignments.

V. RELIEF REQUESTED

64. For the foregoing reasons, the Receiver respectfully requests that this Honourable Court dismiss the Applications of Terrapin and the Related Parties.

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[55] Affidavit of Wes Serra, sworn July 17, 2018, Exhibit "X" (Trust Agreement, s 13.8) [Compendium, page 520].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF SEPTEMBER, 2018.

McCarthy Tétrault LLP

"McCarthy Tétrault LLP"
Walker W. MacLeod / Pantelis Kyriakakis
Counsel to Alvarez & Marsal Canada Inc.

LIST OF AUTHORITIES

1. *Personal Property Security Act*, RSA 2000, c P-7.

2. *Land Titles Act*, RSA 2000, c L-4.

3. Walter M Traub, *Falconbridge on Mortgages*, 5th ed (Toronto: Thomson Reuters Canada, 2017) (loose-leaf Release No 25, November 2017)

4. *Elias Markets Ltd (Re)*, [2006] 274 DLR (4th) 166, 25 CBR (5th) 50 (Ont CA).

5. *Trang v Nguyen*, 2015 ONSC 4287.

6. *Scherer v Price Waterhouse*, [1985] OJ No 881 (HCJ).

7. *Martin Commercial Fueling Inc v Virtanen*, [1994] 2 WWR 348 (BCSC).

8. *Scott v Southern Pacific Mortgages Limited*, [2014] UKSC 52.

9. *Harris v Robinson* (1892), 21 SCR 390, [1892] SCJ No 68.

10. *Alberta (Treasury Branches) v MNR*, [1996] 1 SCR 963.

11. Ronald CC Cuming & Roderick J Wood, *Alberta Personal Property Security Act Handbook*, 4th ed (Scarborough, Ont: Thomson Canada Limited, 1998).

12. *Consumer Protection Act*, RSA 2000, c C-26.3.

TAB 1

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 13, 2016

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Personal Property Security Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Personal Property Security Act		
Personal Property Security	95/2001	*251/2001, 109/2003, 237/2004, 80/2006, 130/2007, 229/2007, 164/2010, 107/2012, 158/2015*
Personal Property Security Forms	231/2002	*35/2007, 230/2007, 108/2012, 159/2015*

PERSONAL PROPERTY SECURITY ACT

Chapter P-7

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Part 3
Perfection and Priorities

Part 4
Registration

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation

1(1) In this Act,

(a) "accessions" means goods that are installed in or affixed to other goods;

(b) "account" means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance, but does not include investment property;

(c) "advance" means the payment of money, the provision of credit or the giving of value and includes any liability of the debtor to pay interest, credit or other charges or costs, in connection with an advance or the enforcement of the security interest securing an advance;

(c.1) "broker" means a broker as defined in the *Securities Transfer Act*;

(d) "building" includes a structure, erection, mine or work built, erected, constructed or opened on or in land;

(e) "building materials" means materials that are incorporated into a building and includes goods attached to a building so that their removal

(i) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or

(ii) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include heating, air conditioning or conveyancing devices or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

(e.1) "certificated security" means a certificated security as defined in the *Securities Transfer Act*;

(f) "chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions;

(f.1) "clearing house" means an organization through which trades in options or standardized futures are cleared or settled;

(f.2) "clearing house option" means an option, other than an option on futures, issued by a clearing house to its participants;

(g) "collateral" means personal property that is subject to a security interest;

(h) "commercial consignment" means a consignment under which goods are delivered for sale, lease or other disposition to a consignee who, in the ordinary course of the consignee's business, deals in goods of that description, by a consignor who,

(i) in the ordinary course of the consignor's business, deals in goods of that description, and

(ii) reserves an interest in the goods after they have been delivered,

but does not include an agreement under which goods are delivered to an auctioneer for sale or to a consignee for sale, lease or other disposition if it is generally known to the creditors of the consignee that the consignee is in the business of selling or leasing goods of others;

(i) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

(j) "Court" means the Court of Queen's Bench;

(k) "creditor" includes an assignee for the benefit of creditors, an executor, an administrator or a committee of a creditor;

(l) "crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, but includes trees only if they are

(i) nursery stock,

(ii) trees being grown for uses other than the production of lumber or wood products, or

(iii) trees being grown for use in reforestation of land other than the land on which the trees are growing;

(m) "debtor" means, subject to subsection (4), a person who owes payment or other performance of the obligation secured, whether or not that person owns or has rights in the collateral, and includes any one or more of the following:

(i) a person who receives goods from another person under a commercial consignment;

(ii) a lessee under a lease for a term of more than one year;

(iii) a transferor of an account or chattel paper;

(iv) in sections 17, 24, 26, 58, 59, 60(12), 62(7), 65(2)(b), 65(3) and 67, a transferee of or a successor to a debtor's interest in collateral;

(n) "default" means the failure to pay or otherwise perform the obligation secured when due, or the occurrence of any event or set of circumstances on which under the terms of the security agreement the security interest becomes enforceable;

(o) "document of title" means a writing issued by or addressed to a bailee

(i) that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and

(ii) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of the person, to bearer or to the order of a named person;

(o.1) "entitlement holder" means an entitlement holder as defined in the *Securities Transfer Act*;

(o.2) "entitlement order" means an entitlement order as defined in the *Securities Transfer Act*;

(p) "equipment" means goods that are held by a debtor other than as inventory or consumer goods;

(p.1) "financial asset" means a financial asset as defined in the *Securities Transfer Act*;

(q) "financial institution" means a bank, a trust company, a credit union and a treasury branch;

(r) "financing change statement" means a financing change statement in the form authorized under the regulations and,

where the context permits, data authorized under the regulations to be transmitted to an office of the Registry to amend a registration;

(s) "financing statement" means

(i) a printed financing statement in the form authorized under the regulations and required or permitted to be registered under this Act, and

(ii) where the context permits,

(A) data authorized under the regulations to be transmitted to an office of the Registry to effect a registration,

(B) a financing change statement,

(C) a security agreement registered before October 1, 1990, and

(D) a financial interest statement or amending financial interest statement under the *Chattel Security Registries Act*, SA 1983 cC-7.1, accompanying a security agreement registered before October 1, 1990, if there is a conflict between the financial interest statement or amending financial interest statement and the security agreement;

(t) "fixture" does not include building materials;

(u) "future advance" means an advance whether or not made pursuant to an obligation and includes reasonable costs incurred and expenditures made for the protection, maintenance, preservation or repair of collateral;

(u.1) "futures account" means an account maintained by a futures intermediary in which a futures contract is carried for a futures customer;

(u.2) "futures contract" means a standardized future or an option on futures, other than a clearing house option, that is

(i) traded on or subject to the rules of a futures exchange recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority of another province or territory of Canada, or

(ii) traded on a foreign futures exchange and carried on the books of a futures intermediary for a futures customer;

(u.3) "futures customer" means a person for which a futures intermediary carries a futures contract on its books;

(u.4) "futures exchange" means an association or organization operated to provide the facilities necessary for the trading of standardized futures or options on futures;

(u.5) "futures intermediary" means a person that

(i) is registered as a dealer permitted to trade in futures contracts, whether as principal or agent, under the securities laws or commodity futures laws of a province or territory of Canada, or

(ii) is a clearing house recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority of another province or territory of Canada;

(v) "goods" means tangible personal property other than chattel paper, a document of title, an instrument, investment property and money, and includes fixtures, growing crops and the unborn young of animals, but does not include trees that are not crops until they are severed or minerals until they are extracted;

(w) "instrument" means

(i) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(ii) any other writing that evidences a right to the payment of money and is of a kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(iii) a letter of credit or an advice of credit if the letter or advice states that it must be surrendered on claiming payment under it,

but does not include

(iv) chattel paper, a document of title or investment property, or

(v) a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing;

(x) "intangible" means personal property other than goods, chattel paper, investment property, a document of title, an instrument and money;

(y) "inventory" means goods

(i) that are held by a person for sale or lease, or that have been leased by that person,

(ii) that are to be furnished by a person or have been furnished by that person under a contract of service,

(iii) that are raw materials or work in progress, or

(iv) that are materials used or consumed in a business;

(y.1) "investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account;

(z) "lease for a term of more than one year" includes

(i) a lease for an indefinite term even though the lease is determinable by one or both parties within one year after its execution,

(ii) subject to subsection (3), a lease initially for one year or less than one year if the lessee, with the consent of the lessor, retains uninterrupted, or substantially uninterrupted, possession of the leased goods for a period in excess of one year after the date the lessee first acquired possession of the goods, and

(iii) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties, or by agreement, for one or more terms, the total of which, including the original term, may exceed one year,

but does not include

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods,

(v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or

(vi) a lease of any prescribed goods, regardless of the length of the term of the lease;

(aa) "minerals" means minerals as defined in the *Mines and Minerals Act;*

(bb) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(cc) "money" means a medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency;

(dd) "new value" means value other than an antecedent debt or antecedent liability;

(ee) "obligation secured" means, when determining the amount payable under a lease that secures payment or performance of an obligation,

(i) the amount originally contracted to be paid under the lease,

(ii) any other amounts payable pursuant to the terms of the lease, and

(iii) any other amount required to be paid by the lessee to obtain full ownership of the collateral,

less any amount paid prior to the determination;

(ee.1) "option" means an agreement that provides the holder with the right, but not the obligation, to do one or more of the following on terms or at a price established by or determinable by reference to the agreement at or by a time established by the agreement:

(i) receive an amount of cash determinable by reference to a specified quantity of the underlying interest of the option;

(ii) purchase a specified quantity of the underlying interest of the option;

(iii) sell a specified quantity of the underlying interest of the option;

(ee.2) "option on futures" means an option the underlying interest of which is a standardized future;

(ff) "pawnbroker" means a person who engages in the business of granting credit to individuals for personal, family or

household purposes and who takes and perfects security interests in consumer goods by taking possession of them, or who purchases consumer goods under agreements or undertakings, express or implied, that the goods may be repurchased by the sellers;

(gg) "personal property" means goods, chattel paper, investment property, a document of title, an instrument, money or an intangible;

(hh) "prescribed" means prescribed by the regulations;

(ii) "prior security interest" means an interest created, reserved or provided for under a valid agreement or other transaction entered into before October 1, 1990, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the agreement or other transaction was entered into;

(jj) "proceeds" means identifiable or traceable personal property, including fixtures and crops,

(i) derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and

(ii) in which the debtor acquires an interest,

and includes

(iii) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral, and

(iv) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and

(v) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

(kk) "purchase" includes taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;

(ll) "purchase-money security interest" means

(i) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price,

(ii) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights,

(iii) the interest of a lessor of goods under a lease for a term of more than one year, or

(iv) the interest of a person who delivers goods to another person under a commercial consignment,

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable in respect of the purchase or loan;

(mm) "purchaser" means a person who takes by purchase;

(nn) "receiver" includes a receiver-manager;

(oo) "Registrar" means the Registrar of Personal Property designated under section 42;

(pp) "Registry" means the Personal Property Registry continued under Part 4;

(qq) "secured party" means

(i) a person who has a security interest,

(ii) a person who holds a security interest for the benefit of another person, and

(iii) the trustee, if a security agreement is embodied or evidenced by a trust indenture,

and, for the purposes of sections 17, 36, 38, 55, 56, 57, 58(1), 60(1), (3), (12) and (14), 61, 63(1)(a), 64 and 67, includes a receiver;

(qq.1) "securities account" means a securities account as defined in the *Securities Transfer Act*;

(qq.2) "securities intermediary" means a securities intermediary as defined in the *Securities Transfer Act*;

(rr) "security" means a security as defined in the *Securities Transfer Act*;

(ss) "security agreement" means an agreement that creates or provides for a security interest, and, if the context permits, includes

(i) an agreement that creates or provides for a prior security interest, and

(ii) a writing that evidences a security agreement;

(ss.1) "security certificate" means a security certificate as defined in the *Securities Transfer Act*;

(ss.2) "security entitlement" means a security entitlement as defined in the *Securities Transfer Act*;

(tt) "security interest" means

(i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods, and

(ii) the interest of

(A) a transferee arising from the transfer of an account or a transfer of chattel paper,

(B) a person who delivers goods to another person under a commercial consignment, and

(C) a lessor under a lease for a term of more than one year,

whether or not the interest secures payment or performance of the obligation;

(uu) "specific goods" means goods identified and agreed on at the time a security agreement in respect of those goods is made;

(uu.1) "standardized future" means an agreement traded on a futures exchange pursuant to standardized conditions

contained in the bylaws, rules or regulations of the futures exchange, and cleared and settled by a clearing house, to do one or more of the following at a price established by or determinable by reference to the agreement and at or by a time established by or determinable by reference to the agreement:

(i) make or take delivery of the underlying interest of the agreement;

(ii) settle the obligation in cash instead of delivery of the underlying interest;

(vv) "trust indenture" means any deed, indenture or document, however designated, including any supplement or amendment to it, by the terms of which a person issues or guarantees, or provides for the issue or guarantee of debt obligations secured by a security interest and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for under it;

(vv.1) "uncertificated security" means an uncertificated security as defined in the *Securities Transfer Act*;

(ww) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability.

(1.1) For the purposes of this Act,

(a) a secured party has control of a certificated security if the secured party has control in the manner provided for in section 23 of the *Securities Transfer Act*;

(b) a secured party has control of an uncertificated security if the secured party has control in the manner provided for in section 24 of the *Securities Transfer Act*;

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided for in section 25 or 26 of the *Securities Transfer Act*;

(d) a secured party has control of a futures contract if

(i) the secured party is the futures intermediary with which the futures contract is carried, or

(ii) the futures customer, the secured party and the futures intermediary have agreed that the futures intermediary will apply any value distributed on account of the futures

contract as directed by the secured party without further consent by the futures customer;

(e) a secured party having control of all security entitlements or futures contracts carried in a securities account or futures account has control over the securities account or futures account.

(2) For the purposes of this Act,

(a) an individual knows or has knowledge when information is acquired by the individual under circumstances in which a reasonable person would take cognizance of it;

(b) a partnership knows or has knowledge when information has come to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) a corporation knows or has knowledge when information has come to the attention of

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for service for the corporation;

(d) the members of an association know or have knowledge when information has come to the attention of

(i) a managing director or officer of the association,

(ii) a senior employee of the association with responsibility for matters to which the information relates, or

(iii) all the members

under circumstances in which a reasonable person would take cognizance of it;

(e) the Government knows or has knowledge when information has come to the attention of a senior employee of the Government with responsibility for matters to which the

information relates under circumstances in which a reasonable person would take cognizance of it.

(3) A lease referred to in subsection (1)(z)(ii) does not become a lease for a term of more than one year until the lessee's possession extends for more than one year.

(4) If the debtor and the owner of the collateral are not the same person, "debtor" means

(a) in a provision of this Act dealing with the collateral, an owner of, or a person with an interest in, the collateral, or

(b) in a provision of this Act dealing with the obligation, an obligor,

or both where the context permits.

(5) Unless otherwise provided in this Act, goods are "consumer goods", "inventory" or "equipment" if at the time the security interest in the goods attaches they are "consumer goods", "inventory" or "equipment".

(6) Proceeds are traceable whether or not there exists a fiduciary relationship between the person who has a security interest in the proceeds as provided in section 28 and the person who has rights in or has dealt with the proceeds.

RSA 2000 cP-7 s1;2006 cS-4.5 s108(2)

Part 1
General

The Crown is bound

2 The Crown is bound by this Act.

1988 cP-4.05 s2

Application of Act

3(1) Subject to section 4, this Act applies to

(a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and

(b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

(2) Subject to sections 4 and 55, this Act applies to

(a) a transfer of an account or chattel paper,

(b) a lease of goods for a term of more than one year, and

(c) a commercial consignment,

that does not secure payment or performance of an obligation.

1988 cP-4.05 s3;1991 c21 s29(3)

Non-application of Act

4 Except as otherwise provided under this Act, this Act does not apply to the following:

(a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;

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

(c) the creation or transfer of an interest or claim in or under any policy of insurance, except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;

(c.1) a transfer of an interest in or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;

(d) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services;

(e) the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract;

(f) the creation or transfer of an interest in land, including a lease;

(g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by investment property or an instrument;

(h) a sale of accounts or chattel paper as part of a sale of the business out of which they arose, unless the vendor remains in apparent control of the business after the sale;

(i) a transfer of accounts made solely to facilitate the collection of accounts for the transferor;

(j) the creation or transfer of an interest in a right to damages in tort;

(k) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency.

RSA 2000 cP-7 s4;2006 cS-4.5 s108(3)

Applicable law - general rules

5(1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of

(a) a security interest in goods, and

(b) a possessory security interest in chattel paper, a negotiable document of title, an instrument or money,

is governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province

(a) not later than 60 days after the goods are brought into the Province,

(b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or

(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached,

whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer's or lessee's interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

(3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected in the Province under this Act.

(4) If a security interest referred to in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act.

RSA 2000 cP-7 s5;2006 cS-4.5 s108(4)

Applicable law - goods to be removed from jurisdiction

6(1) Subject to section 7,

(a) if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and

(b) if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches,

the validity, perfection and effect of perfection or non-perfection of the security interest shall be governed by the law of the other jurisdiction.

(2) If the other jurisdiction referred to in subsection (1) is not the Province and the goods are later brought into the Province, the security interest in the goods is deemed to be a security interest to which section 5(2) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

1988 cP-4.05 s6

Applicable law - mobile goods, intangibles, etc.

7(1) For the purposes of this section and section 7.1, a debtor is deemed to be located

(a) at the debtor's place of business, if the debtor has a place of business,

(b) at the debtor's chief executive office, if the debtor has more than one place of business, and

(c) at the debtor's principal residence, if the debtor has no place of business.

(2) The validity, perfection and effect of perfection or non-perfection of

(a) a security interest in

(i) an intangible, or

(ii) goods that are of a kind that are normally used in more than one jurisdiction, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and

(b) a non-possessory security interest in chattel paper, a negotiable document of title, an instrument or money,

must be governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located at the time the security interest attaches.

(3) If the debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a security interest perfected in accordance with the applicable law as provided in subsection (2) continues perfected in the Province if it is perfected in the other jurisdiction

(a) not later than 60 days after the day the debtor relocates or transfers an interest in the collateral to a person in the other jurisdiction,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated or has transferred an interest in the collateral to a person located in the other jurisdiction, or

(c) prior to the day that perfection ceases under the law of the first jurisdiction,

whichever is the earliest.

(4) If the law governing the perfection of a security interest referred to in subsection (2) or (3) does not provide for public registration or recording of the security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to

(a) an interest in an account payable in the Province, or

(b) an interest in goods, chattel paper, a negotiable document of title, an instrument or money acquired when the collateral was situated in the Province,

unless it is perfected under this Act before the interest arises.

(5) A security interest referred to in subsection (4) may be perfected under this Act.

(6) Notwithstanding section 6 and subsection (2) of this section, the validity, perfection and effect of perfection or non-perfection of a security interest in minerals or in an account resulting from the sale of the minerals at the well-head or minehead that

(a) is provided for in a security agreement executed before the minerals are extracted, and

(b) attaches to the minerals on extraction or attaches to an account on the sale of the minerals

is governed by the law of the jurisdiction in which the well-head or minehead is located.

RSA 2000 cP-7 s7;2006 cS-4.5 s108(5)

Applicable law - investment property

7.1(1) The validity of a security interest in investment property is governed by the law, at the time the security interest attaches,

(a) of the jurisdiction where the certificate is located if the collateral is a certificated security,

(b) of the issuer's jurisdiction if the collateral is an uncertificated security,

(c) of the securities intermediary's jurisdiction if the collateral is a security entitlement or a securities account, or

(d) of the futures intermediary's jurisdiction if the collateral is a futures contract or a futures account.

(2) Except as otherwise provided in subsection (5), perfection, the effect of perfection or non-perfection and the priority of a security interest in investment property is governed by the law

(a) of the jurisdiction in which the certificate is located if the collateral is a certificated security,

(b) of the issuer's jurisdiction if the collateral is an uncertificated security,

(c) of the securities intermediary's jurisdiction if the collateral is a security entitlement or a securities account, or

(d) of the futures intermediary's jurisdiction if the collateral is a futures contract or a futures account.

(3) For the purposes of this section,

(a) the location of a debtor is determined by section 7(1);

(b) the issuer's jurisdiction is determined by section 44(5) of the *Securities Transfer Act*;

(c) the securities intermediary's jurisdiction is determined by section 45(2) of the *Securities Transfer Act*.

(4) For the purposes of this section, the following rules determine a futures intermediary's jurisdiction:

(a) if an agreement between the futures intermediary and futures customer governing the futures account expressly provides that a particular jurisdiction is the futures intermediary's jurisdiction for the purposes of the law of that jurisdiction, this Act or any provision of this Act, the jurisdiction expressly provided for is the futures intermediary's jurisdiction;

(b) if clause (a) does not apply and an agreement between the futures intermediary and futures customer governing the futures account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the futures intermediary's jurisdiction;

(c) if neither clause (a) nor (b) applies and an agreement between the futures intermediary and futures customer governing the futures account expressly provides that the futures account is maintained at an office in a particular jurisdiction, that jurisdiction is the futures intermediary's jurisdiction;

(d) if none of the preceding clauses applies, the futures intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the futures customer's account is located;

(e) if none of the preceding clauses applies, the futures intermediary's jurisdiction is the jurisdiction in which the chief executive office of the futures intermediary is located.

(5) The law of the jurisdiction in which the debtor is located governs

(a) perfection of a security interest in investment property by registration,

(b) perfection of a security interest in investment property granted by a broker or securities intermediary where the secured party relies on attachment of the security interest as perfection, and

(c) perfection of a security interest in a futures contract or futures account granted by a futures intermediary where the secured party relies on attachment of the security interest as perfection.

(6) A security interest perfected pursuant to the law of the jurisdiction designated in subsection (5) remains perfected until the earliest of

(a) 60 days after the day the debtor relocates to another jurisdiction,

(b) 15 days after the day the secured party knows the debtor has relocated to another jurisdiction, and

(c) the day that perfection ceases under the previously applicable law.

(7) A security interest in investment property that is perfected under the law of the issuer's jurisdiction, the securities intermediary's jurisdiction or the futures intermediary's jurisdiction, as applicable, remains perfected until the earliest of

(a) 60 days after a change of the applicable jurisdiction to another jurisdiction,

(b) 15 days after the day the secured party knows of the change of the applicable jurisdiction to another jurisdiction, and

(c) the day that perfection ceases under the previously applicable law.

2006 cS-4.5 s108(6)

Applicable law - substance and procedure

8(1) Notwithstanding sections 5, 6, 7 and 7.1,

(a) procedural issues involved in the enforcement of the rights of a secured party against collateral other than an intangible are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of the rights,

(b) procedural issues involved in the enforcement of the rights of a secured party against an intangible are governed by the law of the forum, and

(c) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

(2) For the purposes of sections 5, 6, 7 and 7.1, a security interest is perfected under the law of a jurisdiction when the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest, and the security interest has a status in relation to the interests of other secured parties, buyers, judgment creditors or a trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

RSA 2000 cP-7 s8;2006 cS-4.5 s108(7)

Law of a jurisdiction

8.1 For the purposes of section 7.1, a reference to the law of a jurisdiction means the internal law of that jurisdiction excluding its conflict of law rules.

2006 cS-4.5 s108(8)

Part 2
Validity of Security Agreements and Rights of Parties

Effectiveness of security agreement

9 Subject to this Act or any other Act, a security agreement is effective according to its terms.

1988 cP-4.05 s9

Enforceability of security interest

10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where

(a) the collateral is not a certificated security and is in the possession of the secured party,

(b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the *Securities Transfer Act* pursuant to the debtor's security agreement,

(c) the collateral is investment property and the secured party has control under section 1(1.1) pursuant to the debtor's security agreement, or

(d) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind or as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles",

(ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or futures contract,

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or

(iv) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except personal property described as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles".

(2) For the purposes of subsection (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.

(3) A description is inadequate for the purposes of subsection (1)(d) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

(4) A description of collateral as inventory is adequate for the purposes of subsection (1)(d) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

RSA 2000 cP-7 s10;2006 cS-4.5 s108(9);2016 c18 s14

Delivery of copy of security agreement

11 Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor not later than 10 days after the execution of the security agreement, and if the secured party fails to do so after a request by the debtor the Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.

1988 cP-4.05 s11

Attachment of security interests

12(1) A security interest, including a security interest in the nature of a floating charge, attaches when

(a) value is given,

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

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

unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in

(a) crops until they become growing crops,

(b) the young of animals until they are conceived,

(c) minerals until they are extracted, and

(d) trees other than crops until they are severed.

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(5) The attachment of a security interest in a futures account is also attachment of a security interest in the futures contracts carried in the futures account.

RSA 2000 cP-7 s12;2006 cS-4.5 s108(10)

Securities intermediary

12.1(1) A security interest in favour of a securities intermediary attaches to a person's security entitlement if

(a) the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and

(b) the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(2) The security interest described in subsection (1) secures the person's obligation to pay for the financial asset.

(3) A security interest in favour of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if

(a) the security or other financial asset is

(i) in the ordinary course of business transferred by delivery with any necessary endorsement or assignment, and

(ii) delivered under an agreement between persons in the business of dealing with such securities or financial assets,

and

(b) the agreement calls for delivery against payment.

(4) The security interest described in subsection (3) secures the obligation to make payment for the delivery.

2006 cS-4.5 s108(11)

After-acquired collateral

13(1) Except as provided in subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12, without the need for specific appropriation.

(2) A security interest does not attach to after-acquired property that is

(a) a crop that becomes a growing crop more than one year after the security agreement has been entered into, except that a security interest in crops that is given in conjunction with a lease, agreement for sale or mortgage of land may, if so agreed, attach to crops to be grown on the land concerned during the term of the lease, agreement for sale or mortgage, or

(b) consumer goods, other than an accession, unless the security interest is a purchase-money security interest or a security interest in collateral obtained by the debtor as replacement for collateral described in the security agreement.

1988 cP-4.05 s13;1990 c31 s9

Future advances

14(1) A security agreement may provide for future advances.

(2) Unless the parties otherwise agree, an obligation owing to a debtor to make future advances is not binding on a secured party if, pursuant to section 35(6), the security interest does not have priority over a writ of enforcement with respect to those future advances.

1988 cP-4.05 s14;1996 c28 s33

Seller's warranties

15 Where a seller has a purchase-money security interest in goods, the law relating to contracts of sale, including a disclaimer, limitation or modification of the seller's performance obligations with respect to the goods, governs the sale.

1988 cP-4.05 s15

Acceleration of payment or performance

16 Where a security agreement provides that the secured party may accelerate payment or performance if the secured party considers that the secured party is insecure or that the collateral is in jeopardy, the security agreement shall be construed to mean that the secured party has the right to do so only if the secured party, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy.

1988 cP-4.05 s16

Preservation of collateral

17(1) A secured party or civil enforcement agency shall use reasonable care in the custody and preservation of the collateral in the secured party's or civil enforcement agency's possession and, unless the parties to the security agreement otherwise agree, in the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against other persons.

(2) Unless the parties to the security agreement otherwise agree, if collateral is in the possession of a secured party or a civil enforcement agency,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in the obtaining, maintaining possession of and preserving the collateral, are chargeable to the debtor and are secured by the collateral,

(b) the risk of loss or damage, except if caused by the negligence of the secured party or civil enforcement agency,

is on the debtor to the extent of any deficiency in any insurance coverage,

(c) the secured party may hold as additional security any increase or profits, except money, resulting from the collateral, and money so received, unless remitted to the debtor, shall be applied forthwith on its receipt in reduction of the obligation secured, and

(d) the secured party or civil enforcement agency shall keep the collateral identifiable, but fungible collateral may be commingled.

(3) Subject to subsection (1), a secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement,

(b) for the purpose of preserving the collateral or its value, or

(c) pursuant to an order of the Court.

RSA 2000 cP-7 s17;2006 cS-4.5 s108(12)

Rights of secured party - investment property as collateral

17.1(1) Unless otherwise agreed by the parties and notwithstanding section 17, a secured party having control under section 1(1.1) of investment property as collateral

(a) may hold as additional security any proceeds received from the collateral,

(b) shall either apply money or funds received from the collateral to reduce the secured obligation or remit the money or funds to the debtor, and

(c) may create a security interest in the collateral.

(2) Notwithstanding subsection (1) and section 17, a secured party having control under section 1(1.1) of investment property as collateral may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement.

2006 cS-4.5 s108(13)

Request for statement from secured party

18(1) The debtor, a creditor, a civil enforcement agency, or a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party at the secured party's most recent address in a registered

financing statement relating to the property, or a more recent address if known by the person making the demand, require the secured party to send or make available to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following:

(a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;

(c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;

(d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;

(e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it.

(2) A person with an interest in personal property of the debtor is entitled to make a demand under subsection (1) only with respect to a security agreement providing for a security interest in the property in which that person has an interest.

(3) The secured party, on the demand of the person entitled to receive a copy of the security agreement under subsection (1), shall permit that person to inspect the security agreement or a copy of it during normal business hours at the location referred to in subsection (1)(e).

(4) Where a demand is made in accordance with subsection (1)(c) and the secured party claims a security interest in all of the personal property of the debtor, in all of the property of the debtor other than a specified kind or item of property or in all of a specified kind of property of the debtor, the secured party may indicate this instead of approving or correcting the itemized list of the property.

(5) The secured party shall comply with a demand under subsection (1) or (3) not later than

(a) 25 days after the secured party receives it, where the secured party is a trustee under a trust indenture, or

(b) 10 days after the secured party receives it, in the case of any other secured party.

(6) If, without reasonable excuse, the secured party fails to comply with a demand under subsection (5) or, in the case of a demand under subsection (1), if the secured party's reply is incomplete or incorrect, the person making the demand, in addition to any other remedy provided by this Act, may apply to the Court for an order requiring the secured party to comply with the demand.

(7) If the secured party who received a demand under subsection (1) or (3) no longer has an interest in the obligation or property of the debtor that is the subject of the demand, the secured party shall, not later than 10 days after receiving the demand, disclose the name and address of the secured party's successor in interest and the latest successor in interest, if known to the secured party, and if, without reasonable excuse, this is not done, the person making the demand, in addition to any other remedy provided by this Act, may apply to the Court for an order requiring the person to whom the demand was made to comply with this section.

(8) On an application under subsection (6) or (7), the Court may make an order requiring

(a) the secured party referred to in subsection (5) to comply with the demand referred to in that subsection, or

(b) the person receiving the demand referred to in subsection (7) to disclose the information referred to in that subsection,

and if the order is not complied with, may order that the security interest of the secured party with respect to which the demand was made is unperfected or extinguished and that any related registration be discharged, and may make any other order it considers necessary to ensure compliance with the demand.

(9) On an application of the secured party referred to in subsection (6) or the person receiving the demand referred to in subsection (7), the Court, subject to section 67(1), may exempt the secured party or person receiving the demand in whole or in part from complying with subsection (5) or (7), other than a demand made by the debtor, or may extend the time for compliance.

(10) A secured party who has replied to a demand referred to in subsection (1) is estopped for the purposes of this Act, as against the person making the demand and any other person who can

reasonably be expected to rely on the reply, to the extent that the person making the demand or the other person, as the case may be, has relied on the reply, from denying

(a) the accuracy of the information contained in the reply to the demand under subsection (1)(b), (c) or (d), and

(b) that the copy of the security agreement that the secured party provided in response to a demand under subsection (1)(a) is a true copy of the security agreement required to be provided under subsection (1)(a).

(11) Subject to subsection (12), a successor in interest referred to in subsection (7) is estopped for the purposes of this Act, as against the person making the demand referred to in subsection (1) and any other person who can reasonably be expected to rely on the reply to the demand, to the extent that the person making the demand or the other person, as the case may be, has relied on the reply, from denying

(a) the accuracy of the information contained in the reply to the demand under subsection (1)(b), (c) or (d), and

(b) that the copy of the security agreement that was provided in response to a demand under subsection (1)(a) is a true copy of the security agreement required to be provided under subsection (1)(a).

(12) A successor in interest referred to in subsection (7) is not estopped under subsection (11) if

(a) the person who relied on the reply knew that the interest had been transferred and knew the identity and address of the successor in interest, or

(b) prior to the demand, a financing change statement was registered as provided in section 45 disclosing the successor in interest as the secured party.

(13) The person to whom a demand is made under this section may require payment in advance of a fee in a prescribed amount for each demand, but the debtor is entitled to a reply without charge once every 6 months.

(14) A secured party who receives a demand that purports to be made by a person entitled to make the demand under subsection (1) may act as if the person is entitled to make the demand unless the secured party knows that the person is not entitled to make it.

1988 cP-4.05 s18;1990 c31 s11;1994 cC-10.5 s148

Part 3
Perfection and Priorities

Perfection of security interest

19 A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

1988 cP-4.05 s19

Perfection of security interest - securities or futures account

19.1(1) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(2) Perfection of a security interest in a futures account also perfects a security interest in the futures contracts carried in the futures account.

2006 cS-4.5 s108(14)

Perfection on attachment

19.2(1) A security interest arising in the delivery of a financial asset under section 12.1(3) is perfected when it attaches.

(2) A security interest in investment property created by a broker or securities intermediary is perfected when it attaches.

(3) A security interest in a futures contract or a futures account created by a futures intermediary is perfected when it attaches.

2006 cS-4.5 s108(14)

Priority of unperfected and certain perfected security interests

20 A security interest

(a) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the *Winding-up and Restructuring Act* (Canada) if the security interest is unperfected at the date the winding-up order is made;

(b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value, and

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

RSA 2000 cP-7 s20;2006 cS-4.5 s108(15)

Measure of damages suffered

21 Where the interest of a lessor under a lease for a term of more than one year or of a consignor under a commercial consignment is not effective against a trustee or liquidator under section 20(a), the lessor or consignor is deemed, as against the lessee or consignee, as the case may be, to have suffered, immediately before the date of the bankruptcy or winding-up order, damages in an amount equal to

(a) the value of the leased or consigned goods at the date of the seizure, bankruptcy or winding-up order, and

(b) the amount of the loss, other than that referred to in clause (a), resulting from the termination of the lease or consignment.

1988 cP-4.05 s21;1990 c31 s13;1994 cC-10.5 s148;1996 c28 s33

Priority of purchase-money security interest

22(1) A purchase-money security interest in

(a) collateral, other than an intangible, that is perfected not later than 15 days after the day that

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is the earlier, or

(b) an intangible that is perfected not later than 15 days after the day the security interest attaches

has priority over the interests of persons referred to in section 20(a).

(2) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor does not have possession of the goods until the debtor or the third person, at the request of the debtor, has obtained actual

possession of the goods or a document of title to the goods, whichever is earlier.

1988 cP-4.05 s22;1996 c28 s33

Continuity of perfection

23(1) If a security interest is perfected under this Act and is again perfected in some other way without an intermediate period during which it is unperfected, the security interest is continuously perfected for the purposes of this Act.

(2) A transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.

1988 cP-4.05 s23;1990 c31 s14

Perfection by possession

24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in

(a) goods,

(b) chattel paper,

(c) repealed 2006 cS-4.5 s108(16),

(d) a negotiable document of title,

(e) an instrument, and

(f) money,

but only while it is actually held as collateral and not while it is held as a result of a seizure or repossession.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

(3) Subject to section 19, a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 68 of the *Securities Transfer Act*.

(4) Subject to section 19, a security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 68 of the *Securities Transfer Act* and remains perfected by delivery until the debtor obtains possession of the security certificate.

RSA 2000 cP-7 s24;2006 cS-4.5 s108(16)

Perfection of security interest in investment property

24.1(1) Subject to section 19, a security interest in investment property may be perfected by control of the collateral under section 1(1.1).

(2) Subject to section 19, a security interest in investment property is perfected by control under section 1(1.1) from the time the secured party obtains control and remains perfected by control until

(a) the secured party does not have control, and

(b) one of the following occurs:

(i) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate,

(ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner, or

(iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

2006 cS-4.5 s108(17)

Perfection by registration

25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

1988 cP-4.05 s25

Temporary perfection

26(1) A security interest perfected under section 24 in

(a) an instrument or a certificated security that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registering a transfer,

or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected, notwithstanding section 10, for the first 15 days after the collateral comes under the control of the debtor.

(2) After the expiration of the period of time referred to in subsection (1), a security interest under this section is subject to the provisions of this Act for perfecting a security interest.

RSA 2000 cP-7 s26;2006 cS-4.5 s108(18)

Perfection where goods in possession of bailee

27(1) Subject to section 19, a security interest in goods in the possession of a bailee is perfected by

(a) the issuance of a document of title by the bailee in the name of the secured party,

(b) the perfection of a security interest in a negotiable document of title where the bailee has issued one,

(c) a holding by the bailee on behalf of the secured party pursuant to section 24, or

(d) the registration of a financing statement.

(2) The issuance of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A perfected security interest in a negotiable document of title covering goods takes priority over a security interest in the goods otherwise perfected after the goods become covered by the negotiable document of title.

1988 cP-4.05 s27;1990 c31 s16

Perfection re proceeds

28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

(1.1) The limitation of the amount secured by a security interest as provided in subsection (1) does not apply where the collateral is investment property.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected

(a) by the registration of a financing statement that contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) by the registration of a financing statement that covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) by the registration of a financing statement that covers the original collateral, if the proceeds consist of money, cheques or deposit accounts in a financial institution.

(3) Where the security interest in the original collateral was perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.

RSA 2000 cP-7 s28;2006 cS-4.5 s108(19)

Goods returned or repossessed

29(1) Where a debtor sells or leases goods that are subject to a security interest under circumstances in which the buyer or lessee takes free of the security interest under section 28(1)(a) or 30, the security interest in the goods reattaches to the goods if

(a) the goods are returned to, seized or repossessed by the debtor or a transferee of chattel paper created by the sale or lease, and

(b) the obligation secured remains unpaid or unperformed.

(2) Where a security interest reattaches under subsection (1), the perfection of the security interest and the time of registration or

perfection is determined as if the goods had not been sold or leased if the security interest was perfected by registration at the time of the sale or lease, and the registration is effective at the time of the return, seizure or repossession.

(3) Where a sale or lease of goods creates an account or chattel paper, and

(a) the account or chattel paper is transferred to a secured party, and

(b) the goods are returned to, seized or repossessed by the debtor or the transferee of the chattel paper,

the transferee of the account or chattel paper has a security interest in the goods that attaches when the goods are returned, seized or repossessed.

(4) A security interest arising under subsection (3) is perfected if the security interest in the account or chattel paper was perfected at the time of the return, seizure or repossession, but becomes unperfected on the expiry of 15 days after the return, seizure or repossession of the goods, unless the transferee registers a financing statement relating to the security interest or takes possession of the goods, whether by seizure or repossession of the goods or otherwise, before the expiry of that period.

(5) A security interest in goods that a transferee of an account has under subsection (3) is subordinate to a perfected security interest arising under subsection (1) and to a security interest of a transferee of chattel paper arising under subsection (3).

(6) A security interest in goods that a transferee of chattel paper has under subsection (3) has priority over

(a) a security interest in the goods arising under subsection (1), and

(b) a security interest in the goods as after-acquired property that attaches on the return, seizure or repossession of the goods

if the transferee of the chattel paper would have priority under section 31(6) as to the chattel paper over an interest in the chattel paper claimed by the holder of the security interest in the goods.

(7) A security interest in goods given by a buyer or lessee of the goods referred to in subsection (1) that attaches while the goods are in the possession of the buyer, the lessee or the debtor and that is perfected when the goods are returned, seized or repossessed has

priority over a security interest in the goods arising under this section.

1988 cP-4.05 s29;1990 c31 s18

Buyer or lessee takes free of security interest

30(1) For the purposes of this section,

(a) "buyer of goods" includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods' becoming a fixture or accession to property in which the person has an interest;

(b) "ordinary course of business of the seller" includes the supply of goods in the ordinary course of business as part of a contract for services and materials;

(c) "seller" includes a person who supplies goods that become a fixture or accession

(i) under a contract with a buyer of goods, or

(ii) under a contract with a person who is a party to a contract with a buyer of goods.

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of goods that are acquired as consumer goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in

(a) a fixture, or

(b) goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000.

(5) A buyer or lessee of goods takes free from a security interest that is temporarily perfected under section 26, 28(3) or 29(4) or a

security interest the perfection of which is continued under section 51 during any of the 15-day periods referred to in those sections, if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under section 25 if

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and

(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed by the regulations as serial number goods.

(8) A sale or lease under subsections (2), (3), (5) and (6) may be

(a) for cash,

(b) by exchange for other property, or

(c) on credit,

and includes delivering goods or a document of title to goods under a pre-existing contract for sale but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

(9) A purchaser of a security, other than a secured party, who

(a) gives value,

(b) does not know that the transaction constitutes a breach of a security agreement granting a security interest in the security to a secured party that does not have control of the security, and

(c) obtains control of the security,

acquires the security free from the security interest.

(10) A purchaser referred to in subsection (9) is not required to determine whether a security interest has been granted in the

security or whether the transaction constitutes a breach of a security agreement.

(11) An action based on a security agreement creating a security interest in a financial asset, however framed, may not be brought against a person who acquires a security entitlement under section 95 of the *Securities Transfer Act* for value and did not know that there has been a breach of the security agreement.

(12) A person who acquires a security entitlement under section 95 of the *Securities Transfer Act* is not required to determine whether a security interest has been granted in a financial asset or whether there has been a breach of the security agreement.

(13) If an action based on a security agreement creating a security interest in a financial asset could not be brought against an entitlement holder under subsection (11), it may not be asserted against a person who purchases a security entitlement, or an interest in it, from the entitlement holder.

RSA 2000 cP-7 s30;2006 cS-4.5 s108(20)

Protection of transferees of negotiable collateral

31(1) A holder of money has priority over any security interest perfected under section 25 or temporarily perfected under section 28(3) if the holder

(a) acquired the money without knowledge that it was subject to a security interest, or

(b) is a holder for value, whether or not the holder acquired the money without knowledge that it was subject to a security interest.

(2) A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery.

(3) A purchaser of an instrument has priority over a security interest in the instrument perfected under section 25 or temporarily perfected under section 26 or 28(3) if the purchaser

(a) gave value for the instrument,

(b) acquired the instrument without knowledge that it was subject to a security interest, and

(c) took possession of the instrument.

(4) A holder of a negotiable document of title has priority over a security interest in the document of title that is perfected under section 25 or temporarily perfected under section 26 or 28(3) if the holder

(a) gave value for the document of title, and

(b) acquired the document of title without knowledge that it was subject to a security interest.

(5) For the purposes of subsections (3) and (4), a purchaser of an instrument or a holder of a negotiable document of title who acquired the purchaser's or holder's interest in a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser or holder acquired that interest with knowledge that the transaction violated the terms of the security agreement creating or providing for the security interest.

(6) A purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of the purchaser's business and for new value has priority over any security interest in it that

(a) was perfected under section 25 if the purchaser does not have knowledge at the time of taking possession that the chattel paper is subject to a security interest, or

(b) has attached to proceeds of inventory under section 28 whatever the extent of the purchaser's knowledge.

RSA 2000 cP-7 s31;2006 cS-4.5 s108(21)

Rights under Securities Transfer Act

31.1(1) This Act does not limit the rights of a protected purchaser of a security under the *Securities Transfer Act*.

(2) The interest of a protected purchaser of a security under the *Securities Transfer Act* takes priority over an earlier security interest, even if perfected, to the extent provided in that Act.

(3) This Act does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under the *Securities Transfer Act*.

2006 cS-4.5 s108(22)

Priority of liens

32 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority.

1988 cP-4.05 s32;1990 c31 s21

Alienation of rights of debtor

33(1) For the purposes of this section, "transfer" includes a sale, the creation of a security interest or a transfer under proceedings to enforce a judgment.

(2) The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer does not prejudice the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

1988 cP-4.05 s33;1990 c31 s22

Priority of purchase-money security interests

34(1) In this section, "non-proceeds security interest" or "non-proceeds purchase-money security interest" means a security interest or purchase-money security interest, as the case may be, in original collateral.

(2) A purchase-money security interest in

(a) collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible or, subject to section 28, its proceeds, that is perfected not later than 15 days after the day the security interest in the intangible attaches

has priority over any other security interest in the same collateral given by the same debtor.

(3) Subject to subsection (6), a purchase-money security interest in inventory or, subject to section 28, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if

(a) the purchase-money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

(b) the secured party gives a notice to any other secured party who has, before the registration of the purchase-money security interest, registered a financing statement containing a description that includes the same item or kind of collateral,

(c) the notice referred to in clause (b) states that the person giving the notice expects to acquire a purchase-money security interest in inventory of the debtor, and describes the inventory by item or kind, and

(d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(4) A notice referred to in subsection (3) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the financing statement referred to in subsection (3)(b).

(5) A purchase-money security interest in goods or, subject to section 28, its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected

(a) in the case of inventory, at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

has priority over any other purchase-money security interest in the same collateral given by the same debtor.

(6) A non-proceeds security interest in accounts given for new value has priority over a purchase-money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase-money security interest is perfected or a financing statement relating to it is registered.

(7) A non-proceeds purchase-money security interest has priority over a purchase-money security interest in the same collateral as proceeds if the non-proceeds purchase-money security interest,

(a) in the case of inventory, is perfected at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, is perfected not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(8) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor is deemed not to have obtained possession of the goods until the debtor, or another person at the request of the debtor, has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

(9) A perfected security interest in crops or their proceeds, given for value to enable the debtor to produce or harvest the crops and given

(a) while the crops are growing crops, or

(b) during the 6-month period immediately prior to the time when the crops became growing crops,

has priority over any other security interest in the same collateral given by the same debtor.

(10) A perfected security interest in fowl, cattle, horses, sheep, swine, fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the fowl, animals or fish has priority over any other security interest in the same collateral given by the same debtor other than a perfected purchase-money security interest.

1988 cP-4.05 s34;1990 c31 s23

Residual priority rules

35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:

(i) the registration of a financing statement, without regard to the date of attachment of the security interest,

(ii) possession of the collateral under section 24, without regard to the date of attachment of the security interest, or

(iii) perfection under section 5, 7, 26, 29 or 77,

whichever is earlier,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1), a continuously perfected security interest shall be treated at all times as having been perfected by the method by which it was originally perfected.

(3) Subject to section 28, for the purposes of subsection (1), the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.

(4) A security interest in goods that are equipment and are of a kind prescribed by the regulations as serial number goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (9) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

(5) Subject to subsection (6), the priority that a security interest has under subsection (1) applies to all advances, including future advances.

(6) A perfected security interest that would otherwise have priority over a writ of enforcement issued under the *Civil Enforcement Act* has that priority only to the extent of

(a) advances made before the secured party acquires knowledge of the writ within the meaning of section 32 of the *Civil Enforcement Act,*

(b) advances made pursuant to an obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in clause (a), and

(c) reasonable costs incurred and expenditures made by the secured party for the protection, preservation or repair of the collateral.

(7) Subsection 8 applies to the re-registration of a security interest the registration of which has lapsed as a result of a failure to renew the registration or has been discharged in error or without authorization.

(8) If the secured party re-registers a security interest within 30 days after the lapse or discharge of its registration, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest or registered writ of enforcement that, immediately prior to the lapse or discharge, had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration.

(9) Where a debtor transfers an interest in collateral that, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer, except to the extent that the security interest granted by the transferee secures advances made or contracted for

(a) after the expiry of 15 days from the day the secured party who holds the security interest in the transferred collateral has knowledge of the information required to register a financing statement disclosing the transferee as the new debtor, and

(b) before the secured party referred to in clause (a) amends the registration to disclose the name of the transferee as the new debtor or takes possession of the collateral.

(10) Subsection (9) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

1988 cP-4.05 s35;1990 c31 s24;1994 cC-10.5 s148;1997 c18 s21

Priority among conflicting security interests

35.1(1) The rules in this section govern priority among conflicting security interests in the same investment property.

(2) A security interest of a secured party having control of investment property under section 1(1.1) has priority over a security interest of a secured party that does not have control of the investment property.

(3) A security interest in a certificated security in registered form that is perfected by taking delivery under section 24(3) and not by

control under section 24.1 has priority over a conflicting security interest perfected by a method other than control.

(4) Except as otherwise provided in subsections (5) and (6), conflicting security interests of secured parties each of which has control under section 1(1.1) rank according to priority in time of

(a) if the collateral is a security, obtaining control,

(b) if the collateral is a security entitlement carried in a securities account,

(i) the secured party's becoming the person for which the securities account is maintained, if the secured party obtained control under section 25(1)(a) of the *Securities Transfer Act*,

(ii) the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account, if the secured party obtained control under section 25(1)(b) of the *Securities Transfer Act*, or

(iii) if the secured party obtained control through another person under section 25(1)(c) of the *Securities Transfer Act*, when the other person obtained control,

or

(c) if the collateral is a futures contract carried with a futures intermediary, the satisfaction of the requirement for control specified in section 1(1.1)(d)(ii) with respect to futures contracts carried or to be carried with the futures intermediary.

(5) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(6) A security interest held by a futures intermediary in a futures contract or a futures account maintained with the futures intermediary has priority over a conflicting security interest held by another secured party.

(7) Conflicting security interests granted by a broker, securities intermediary or futures intermediary that are perfected without control under section 1(1.1) rank equally.

(8) In all other cases, priority among conflicting security interests in investment property is governed by section 35.

2006 cS-4.5 s108(23)

Fixtures

36(1) Subject to the regulations, this section applies only with respect to land for which a certificate of title has been issued under the *Land Titles Act.*

(2) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land.

(3) A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the land after the goods become fixtures, including an assignee for value of the interest of a person with an interest in the land at the time the goods become fixtures, and

(b) a person with a registered mortgage on the land who, after the goods become fixtures,

(i) makes an advance under the mortgage, but only with respect to the advance, or

(ii) obtains an order confirming sale or a vesting order in a foreclosure action

without fraud and before the security interest is registered in accordance with section 49.

(4) Where

(a) a search is made of a certificate of title,

(b) at the time of the search there is not any notice under section 49 endorsed on that certificate of title, and

(c) on the day that search is made, in reliance on that search, mortgage money is advanced under a mortgage registered against that certificate of title,

that mortgage money is deemed to have been advanced before the registration of any notice under section 49 not disclosed by that search notwithstanding that a notice was registered against that certificate of title on the day that the search was made.

(5) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who

(a) has an interest in the land at the time the goods become fixtures and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the goods or fixtures,

(iii) has not entered into an agreement under which a person is entitled to remove the goods, or

(iv) is not otherwise precluded from preventing the debtor from removing the goods, or

(b) acquires an interest in the land after the goods become fixtures, if the interest is acquired without fraud and before the security interest in the goods is registered in accordance with section 49.

(6) A security interest referred to in subsection (2) or (5) is subordinate to the interest of a creditor of the debtor who caused to be registered a writ of enforcement, judgment, order, certificate or similar instrument authorized to be registered pursuant to an Act in the appropriate land titles office after the goods became fixtures and before the security interest is registered in accordance with section 49.

(7) The interest of a creditor referred to in subsection (6) does not take priority over a purchase-money security interest in goods that is registered in accordance with section 49 not later than 15 days after the goods are affixed to the land.

(8) A secured party who, under this Act, has the right to remove goods from land shall exercise that right of removal in a manner that causes no greater damage or injury to the land and to other property situated on it and that puts the occupier of the land to no greater inconvenience than is necessarily incidental to the removal of the goods.

(9) A person, other than the debtor, who has an interest in the land at the time the goods subject to the security interest are affixed to the land is entitled to reimbursement for any damages to the person's interest in the land caused during the removal of the goods, but is not entitled to reimbursement for diminution in the value of the land caused by the absence of the goods removed or by the necessity of replacement.

(10) The person entitled to reimbursement as provided in subsection (9) may refuse permission to remove the goods until the secured party has given adequate security for the reimbursement.

(11) The secured party may apply to the Court for any one or more of the following:

(a) an order determining who is entitled to reimbursement under this section;

(b) an order determining the amount and kind of security to be provided by the secured party;

(c) an order prescribing the depository for the security;

(d) an order dispensing with the need to provide security for reimbursement under subsection (10).

(12) A person having an interest in the land that is subordinate to a security interest as provided in this section may, before the goods have been removed from the land by the secured party, retain the goods on payment to the secured party of the lesser of

(a) the amount secured by the security interest having priority over the person's interest, and

(b) the market value of the goods if they were removed.

(13) The secured party who has a right to remove the goods from the land shall give to each person who appears by the records of the land titles office to have an interest in the land a notice of the intention of the secured party to remove the goods, and the notice shall contain

(a) the name and address of the secured party,

(b) a description of the goods to be removed,

(c) the amount required to satisfy the obligation secured by the security interest,

(d) a description of the land to which the goods are affixed,

(e) a statement of intention to remove the goods unless the amount referred to in subsection (12) is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (14), and

(f) a statement of the market value of the goods.

(14) A notice referred to in subsection (13) shall be given at least 15 days before removal of the goods, and may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the records of the land titles office.

(15) A person entitled to receive a notice under subsection (13) may apply to the Court for an order postponing removal of the goods from the land.

1988 cP-4.05 s36;1990 c31 s25;1994 cC-10.5 s148

Security interests in crops

37(1) Subject to the regulations, this section applies only with respect to land for which a certificate of title has been issued under the *Land Titles Act.*

(2) Except as provided in this section, a security interest in crops has priority with respect to the crops over an interest in the crops claimed by a person with an interest in the land.

(3) A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the land while the crops are growing crops, including an assignee for value of the interest of a person with an interest in the land where the assignee acquires that interest for value and while the crops are growing crops, and

(b) a person with a registered mortgage on the land who, after the crops become growing crops,

(i) makes an advance under the mortgage, but only with respect to the advance, or

(ii) obtains an order confirming sale or a vesting order in a foreclosure action

without fraud and before the security interest in the growing crops is registered in accordance with section 49.

(4) A security interest referred to in subsection (2) is subordinate to the interest of a creditor of the debtor who causes to be registered a writ of enforcement, judgment, order, certificate or similar instrument authorized to be registered pursuant to an Act in force in the Province in the appropriate land titles office before the security interest is registered in accordance with section 49.

(5) The interest of a creditor referred to in subsection (4) does not take priority over a purchase-money security interest in the crops,

or a security interest in the crops referred to in section 34(9), that is registered in accordance with section 49 not later than 15 days after the time the security interest in the crops attaches.

(6) Section 36(8) to (15) apply to the seizure and removal of growing crops from land.

1988 cP-4.05 s37;1990 c31 s26;1994 cC-10.5 s148

Security interests re accessions

38(1) In this section,

(a) "other goods" means goods to which an accession is installed or affixed;

(b) "the whole" means an accession and the goods to which the accession is installed or affixed.

(2) Except as provided in this section and section 30, a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over a claim to the goods as an accession made by a person with an interest in the whole.

(3) A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the whole after the goods become an accession, including an assignee for value of the interest of a person with an interest in the whole at the time the goods become an accession, and

(b) a person with a security interest taken and perfected in the whole who, after the goods become accessions,

(i) makes an advance under a security agreement, but only with respect to the advance, or

(ii) acquires the right to retain the whole in satisfaction of the obligation secured

without knowledge of the security interest in the accession and before it is perfected.

(4) A security interest in goods that attaches after the goods become an accession is subordinate to the interest of a person who

(a) has an interest in the other goods at the time the goods become an accession and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the accession,

(iii) has not entered into an agreement under which a person is entitled to remove the accession, or

(iv) is not otherwise precluded from preventing the debtor from removing the accession,

or

(b) acquires an interest in the whole after the goods become an accession, if the interest is acquired without knowledge and before the security interest in the accession is perfected.

(5) A secured party who, under this Act, has the right to remove an accession from the whole shall exercise that right of removal in a manner that causes no greater damage or injury to the other goods and that puts the person in possession of the whole to no greater inconvenience than is necessarily incidental to the removal of the accession.

(6) A person, other than the debtor, who has an interest in the other goods at the time the goods subject to the security interest become an accession is entitled to reimbursement for any damages to the person's interest in the other goods caused during the removal of the accession, but is not entitled to reimbursement for diminution in the value of the other goods caused by the absence of the accession or by the necessity of its replacement.

(7) The person entitled to reimbursement as provided in subsection (6) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement.

(8) The secured party may apply to the Court for one or more of the following:

(a) an order determining who is entitled to reimbursement under this section;

(b) an order determining the amount and kind of security to be provided by the secured party;

(c) an order prescribing the depository for the security;

(d) an order dispensing with the need to provide security for reimbursement under subsection (7).

(9) A person having an interest in the whole that is subordinate to a security interest as provided in this section may, before the

accession has been removed from the whole by the secured party, retain the accession on payment to the secured party of the lesser of

(a) the amount secured by the security interest having priority over the person's interest, and

(b) the market value of the accession if it were removed.

(10) The secured party who has a right to remove the accession from the whole shall give

(a) to each person who is known by the secured party to have an interest in the other goods or in the whole, and

(b) to each person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the serial number of the other goods where the other goods are of a kind prescribed by the regulations as serial number goods

a notice of the intention of the secured party to remove the accession.

(11) A notice referred to in subsection (10) shall contain

(a) the name and address of the secured party,

(b) a description of the goods to be removed,

(c) the amount required to satisfy the obligations secured by the security interest,

(d) a description of the other goods,

(e) a statement of intention to remove the accession unless the amount referred to in subsection (9) is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (12), and

(f) a statement of the market value of the accession.

(12) A notice referred to in subsection (10) must be given at least 15 days before removal of the accession, and may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears on the financing statement.

(13) A person entitled to receive a notice under subsection (10) may apply to the Court for an order postponing removal of the accession.

1988 cP-4.05 s38;1990 c31 s27;1994 cC-10.5 s148

Security interests in processed or commingled goods

39(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product.

(2) For the purposes of section 35, perfection of a security interest in goods that subsequently become part of a product or mass is also to be treated as perfection of the interest in the product or mass.

(3) Any priority that a perfected security interest that has been continued in the product or mass under subsection (1) has over a perfected security interest in the product or mass is limited to the value of the goods at the time they became part of the product or mass.

(4) Subject to subsection (6), if more than one perfected security interest continues in the same product or mass under subsection (1), and each was a security interest in separate goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum of the obligations secured by all the security interests.

(5) For the purposes of subsection (4), the obligation secured by a security interest does not exceed the market value of the goods at the time the goods become part of the product or mass.

(6) A perfected purchase-money security interest in goods that continues in the product or mass under subsection (1) has priority over

(a) a non-purchase-money security interest in the goods that continues in the product or mass under subsection (1),

(b) a non-purchase-money security interest in the product or mass, other than as inventory, given by the same debtor, and

(c) a non-purchase-money security interest in the product or mass as inventory given by the same debtor if

(i) the secured party with the purchase-money security interest in the product or mass gives a notice to any secured party with a non-purchase-money security interest in the product or mass who registers a financing

statement containing a description of collateral that includes the product or mass, before the identity of the goods is lost in the product or mass,

(ii) the notice contains a statement that the person giving the notice has acquired or expects to acquire a purchase-money security interest in goods supplied to the debtor as inventory, and

(iii) the notice is given before the identity of the goods is lost in the product or mass.

(7) A notice referred to in subsection (6)(c) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears on the financing statement referred to in subsection (6)(c).

(8) This section does not apply to a security interest in an accession to which section 38 applies.

1988 cP-4.05 s39;1990 c31 s28

Subordination of interest

40 A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest, and the subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of a class of persons for whose benefit the subordination was intended.

1988 cP-4.05 s40;1990 c31 s29

Rights of assignee

41(1) In this section, "account debtor" means a person who is obligated under an intangible or chattel paper.

(2) The rights of an assignee of collateral that is either an intangible or chattel paper are subject to

(a) the terms of the contract between the account debtor and the assignor and any defence or claim arising out of the contract or a closely connected contract, and

(b) any other defence or claim of the account debtor against the assignor that accrues before the account debtor has knowledge of the assignment,

unless the account debtor has made an enforceable agreement not to assert defences or claims arising out of the contract.

(3) To the extent that an assigned right to payment arising out of the contract has not been earned by performance, and

notwithstanding notice of the assignment to the account debtor, any modification of or substitution for the contract, made in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's rights under the contract or the assignor's ability to perform the contract, is effective against the assignee unless the account debtor has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

(4) Nothing in subsection (3) affects the validity of a term in an assignment agreement that provides that a modification or substitution referred to in that subsection is a breach of contract by the assignor.

(5) Where collateral that is either an intangible or chattel paper is assigned, the account debtor may make payments under the contract to the assignor

(a) before the account debtor receives a notice that

(i) states that the amount payable or to become payable under the contract has been assigned and payment is to be made to the assignee, and

(ii) identifies the contract under which the amount payable is to become payable,

or

(b) after

(i) the account debtor requests the assignee to furnish proof of the assignment, and

(ii) the assignee fails to furnish the proof within 15 days from the date of the request.

(6) Payment by an account debtor to an assignee pursuant to a notice referred to in subsection (5)(a) discharges the obligation of the account debtor to the extent of the payment.

(7) A term in a contract between an account debtor and an assignor that prohibits or restricts assignment of the whole of the account or chattel paper for money due or to become due is binding on the assignor, but only to the extent of making the assignor liable in damages for breach of contract, and is unenforceable against third parties.

1988 cP-4.05 s41;1990 c31 s30

Part 4
Registration

Personal Property Registry

42(1) The Central Registry and the Vehicle Registry continued under the *Chattel Security Registries Act*, SA 1983 cC-7.1, are continued as the Personal Property Registry for the purposes of registrations under this Act and for registrations that are permitted or required under any other Act to be made in the Registry.

(2) Where any enactment permits or requires a registration to be made in the Registry, unless the regulations otherwise provide,

(a) the registration shall be in accordance with the regulations, and

(b) this Part applies to the registration.

(3) The Registrar may have a seal of office in the form prescribed by the Minister.

(4) The Minister may designate a person as Registrar and may designate any other persons to exercise the powers and perform the duties of the Registrar.

(5) The Registrar may designate one or more persons as deputy registrars.

(6) The Registrar shall direct and supervise the operation of the Registry under the direction of the Minister.

1988 cP-4.05 s42;1990 c31 s31;1992 c21 s34

Registration of financing statements

43(1) A financing statement may be submitted for registration at an office of the Registry specified by the Minister.

(2) Registration of a financing statement is effective from the time assigned to it by the Registrar, and, where 2 or more financing statements are assigned the same time, the order of registration is determined by reference to the registration numbers assigned by the Registrar.

(3) The Registrar may refuse to register a financing statement or to issue a search result under this Part until any prescribed fees have been paid or arrangements for their payment have been made.

(4) A financing statement may be registered before a security agreement is made and before a security interest attaches.

(5) A registration may relate to one or more than one security agreement.

(6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.

(7) Subject to subsection (9), where one or more debtors are required to be disclosed in a financing statement or where collateral is consumer goods of a kind that is prescribed by the regulations as serial number goods, and there is a seriously misleading defect, irregularity, omission or error in

(a) the disclosure of any debtor, other than a debtor who does not own or have rights in the collateral, or

(b) the serial number of the collateral,

the registration is invalid.

(8) Nothing in subsections (6) and (7) shall require, as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was actually misled by it.

(9) Failure to provide a description in a financing statement in relation to any item or kind of collateral does not affect the validity of the registration with respect to other collateral.

(10) Notwithstanding anything in this Part, the Registrar may reject a financing statement when, in the opinion of the Registrar, it does not comply with this Act or the regulations or any other Act and the regulations under any other Act under which registration of a financing statement is authorized, and the Registrar shall give the reason for the rejection.

(11) Except to the extent that a person entitled to a copy has in writing waived the person's right under this section to receive it, the secured party or person named as a secured party in a financing statement shall give to each person named as a debtor in the statement

(a) a printed copy of the financing statement, or

(b) a copy of the statement used by the Registry to confirm the registration

not later than 20 days after the financing statement is registered.

1988 cP-4.05 s43;1990 c31 s32

Duration of and amendments to registrations

44(1) Subject to the regulations, a registration under this Act is effective for the period of time indicated on the financing statement by which the registration is effected.

(2) A registration may be renewed by registering a financing change statement at any time before the registration expires, and, subject to the regulations, the period of time for which the registration is effective is extended by the renewal period indicated on the financing change statement.

(3) An amendment to a registration may be made by registering a financing change statement at any time during the period that the registration is effective, and the amendment is effective from the date the financing change statement is registered to the expiry of the registration being amended.

(4) When an amendment of a registration is not otherwise provided for in this Part, a financing change statement may be registered to amend the registration.

1988 cP-4.05 s44;1990 c31 s33

Registration of transfers and subordinations

45(1) Where a secured party with a registered security interest transfers the interest or a part of it, a financing change statement may be registered disclosing the transferee.

(2) Where an interest in part of the collateral is transferred, the financing change statement shall disclose the transferee and shall contain a description of the collateral in which the interest is transferred.

(3) Where a secured party transfers an interest in collateral and the security interest of the secured party is not perfected by registration, a financing statement may be registered disclosing the transferee as the secured party.

(4) A financing change statement referred to in subsection (1) or (2) may be registered before or after the transfer.

(5) After registration of a financing change statement referred to in subsection (1) or (2), the transferee is the secured party for the purposes of this Part.

(6) Where a secured party has subordinated the secured party's interest to the interest of another person, a financing change statement may be registered disclosing the subordination at any time during the period that the registration of the subordinated interest is effective.

1988 cP-4.05 s45;1990 c31 s34

Registry records

46(1) Where a document is registered in the Registry, the Registrar may have the document reproduced by any means the Registrar considers appropriate, and the reproduction is for all purposes deemed to be the document reproduced.

(2) Information in a registration may be removed from the records of the Registry

(a) when the registration is no longer effective or is superseded under section 77,

(b) on receipt of a financing change statement discharging or partially discharging the registration, or

(c) on receipt of an order of the Court compelling the discharge or partial discharge of a registration.

1988 cP-4.05 s46;1990 c31 s35

Registration not constructive notice

47 Registration of a financing statement in the Registry is not constructive notice or knowledge of its existence or contents to third parties.

1988 cP-4.05 s47

Registry searches

48(1) A person may request one or more of the following:

(a) a search according to the name of a debtor;

(b) a search according to the serial number of goods of a kind that are prescribed by the regulations to be serial number goods;

(c) a search according to a registration number;

(d) if authorized by the Minister, a search according to criteria other than that referred to in clauses (a) to (c);

(e) a printed result of a search referred to in clauses (a) to (d);

(f) a copy or certified copy of a registered printed financing statement or other document.

(2) A printed search result that purports to be issued by the Registry is receivable in evidence as proof, in the absence of evidence to the contrary, of its contents, including the following:

(a) the time of registration of a financing statement to which the search result refers, and

(b) the order of registration of the financing statement as indicated by the registration number.

(3) A copy of a registered printed financing statement or other registered document bearing the certification of the Registrar is receivable in evidence as a true copy of the statement or document without proof of the signature or official position of the Registrar.

1988 cP-4.05 s48;1990 c31 s36;1991 c21 s29(6)

Registration in land titles office

49(1) In this section,

(a) "debtor" includes any person named in a notice under this section as a debtor;

(b) "secured party" includes any person named in a notice under this section as a secured party.

(2) A security interest in a fixture under section 36 and a security interest in a growing crop under section 37 may be registered by tendering a notice in the prescribed form to the appropriate land titles office.

(3) The registrar of the land titles office to which the notice in subsection (2) is tendered shall make a memorandum of the notice on the certificate of title in respect of the parcel of land to which the notice relates, or on the condominium plan if the notice relates to common property shown on that plan.

(4) If a notice has been registered in a land titles office under subsection (2) and the registration of the notice has not expired, a notice in the prescribed form of a renewal, amendment, transfer or discharge of the security interest to which the original notice relates, or a notice in the prescribed form of postponement of the security interest to another interest, may be registered in the land titles office, and, on its being so registered, the registrar of the land titles office shall make a memorandum of it on the proper certificate of title or condominium plan, as the case may be.

(5) Sections 43(4), (5), (6), (8), (9) and (11), 44 and 45 apply to a notice registered under this section.

(6) If a notice registered under this section expires or has been discharged, the registrar of the land titles office in which it has been registered may vacate the registered notice and any other notice that relates to the same security interest.

(7) Where a notice is registered under this section and

(a) all of the obligations under the security agreement to which the notice relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the notice,

(c) the description of the collateral contained in the notice includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor,

(d) no security agreement exists between the secured party and the debtor, or

(e) the collateral described in the notice is not affixed to the land to which the notice relates,

the debtor or any person having a registered interest in the land may give a written demand to the secured party.

(8) A demand referred to in subsection (7) shall require that the secured party, not later than 40 days after the demand is given, either

(a) submit for registration a notice in the prescribed form

(i) discharging the registration of the notice, in a case falling within subsection (7)(a), (d) or (e),

(ii) amending or discharging the registration of the notice, as the case may be, to reflect the terms of the agreement, in a case falling within subsection (7)(b), or

(iii) amending the collateral description on the notice to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor, in a case falling within subsection (7)(c),

or

(b) submit for registration an order of the Court confirming that the registration need not be amended or discharged.

(9) If a secured party fails to comply with a demand referred to in subsection (7), the person giving the demand may submit for registration the notice referred to in subsection (8)(a) and the registrar of the land titles office shall register the notice on receiving satisfactory proof that the demand has been given to the secured party.

(10) A demand referred to in subsection (7) may be given in accordance with section 72 or by registered mail addressed to the address of the secured party as it appears on the notice registered under this section.

(11) Section 50(7) to (9) apply to a notice registered under this section.

(12) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand referred to in subsection (7).

1988 cP-4.05 s49;1990 c31 s37;1991 c21 s29(7)

Amendment or discharge of registrations

50(1) In this section,

(a) "debtor" includes any person named in a registered financing statement as a debtor;

(b) "secured party" includes any person named in a registered financing statement as a secured party.

(2) Where a registration relates exclusively to a security interest in consumer goods, the secured party shall discharge the registration not later than one month after all obligations under the security agreement creating the security interest are performed, unless prior to the expiry of that one-month period the registration lapses.

(3) Where a financing statement is registered and

(a) all of the obligations under the security agreement to which it relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the financing statement,

(c) the collateral description in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor or does not distinguish between original collateral and proceeds, or

(d) no security agreement exists between the secured party and the debtor,

the debtor or any person with an interest in property that falls within the collateral description in the financing statement may give a written demand to the secured party.

(4) A demand referred to in subsection (3) shall require that the secured party, not later than 40 days after the demand is given, either

(a) register a financing change statement

(i) discharging the registration, in a case falling within subsection (3)(a) or (d),

(ii) amending or discharging the registration, as the case may be, to reflect the terms of the agreement, in a case falling within subsection (3)(b), or

(iii) amending the collateral description in the registration to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor or to identify items or kinds of property as original collateral or proceeds, in a case falling within subsection (3)(c),

or

(b) provide to the Registrar an order of the Court confirming that the registration need not be amended or discharged, accompanied with a completed financing change statement in respect of the order.

(5) If a secured party fails to comply with a demand referred to in subsection (3), the person giving the demand may register the financing change statement referred to in subsection (4)(a) on providing to the Registrar satisfactory proof that the demand has been given to the secured party.

(6) A demand referred to in subsection (3) may be given in accordance with section 72 or by registered mail addressed to the address of the secured party as it appears on the financing statement.

(7) On application to the Court by the secured party, the Court may order that the registration

(a) be maintained on any conditions and, subject to section 44(1), for any period of time, or

(b) be discharged or amended.

(8) Subsection (5) does not apply to a registration of a security interest provided for in a trust indenture if the financing statement through which the security interest was registered indicates that the security agreement providing for the security interest is a trust indenture.

(9) Where a registration relates to a security interest provided for under a trust indenture and the secured party fails to comply with a demand referred to in subsection (3), the person making the demand may apply to the Court for an order directing that the registration be amended or discharged.

(10) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand referred to in subsection (3).

(11) Where there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations or otherwise give value, a secured party having control of investment property under section 25(1)(b) of the *Securities Transfer Act* or section 1(1.1)(d)(ii) shall, within 10 days after receipt of a written demand by the debtor, send to the securities intermediary or futures intermediary with which the security entitlement or futures contract is maintained a written record that releases the securities intermediary or futures intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party.

RSA 2000 cP-7 s50;2006 cS-4.5 s108(24)

Transfer of debtors' interests in collateral or change of debtors' names

51(1) Where a security interest has been perfected by registration and the debtor transfers all or part of the debtor's interest in the collateral with the prior consent of the secured party, the security interest in the transferred collateral is subordinate to

(a) an interest, other than a security interest in the transferred collateral, arising in the period from the expiry of the 15th day after the transfer to, but not including, the day the secured party amends the registration to disclose the transferee of the interest in the collateral as the new debtor or takes possession of the collateral,

(b) a perfected security interest in the transferred collateral registered or perfected in the period referred to in clause (a), and

(c) a perfected security interest in the transferred collateral registered or perfected after the transfer and before the expiry of the 15th day after the transfer, if, before the expiry of the 15 days,

(i) the registration of the security interest first mentioned in this subsection is not amended to disclose the transferee of the interest in the collateral as the new debtor, or

(ii) the secured party does not take possession of the collateral.

(2) Where a security interest is perfected by registration and the secured party has knowledge of

(a) information required to register a financing change statement disclosing the transferee as the new debtor, where all or part of the debtor's interest in the collateral has been transferred, or

(b) the new name of the debtor, where there has been a change in the debtor's name,

the security interest in the transferred collateral, where clause (a) applies, and in the collateral, where clause (b) applies, is subordinate to the interests referred to in subsection (3).

(3) Where subsection (2) applies, the security interest in the transferred collateral, where subsection (2)(a) applies, and in the collateral, where subsection (2)(b) applies, is subordinate to

(a) an interest, other than a security interest in the collateral, arising in the period from the expiry of the 15th day after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, to, but not including, the day the secured party amends the registration to disclose the transferee of the collateral as the new debtor, or to disclose the new name of the debtor, as the case may be, or takes possession of the collateral,

(b) a perfected security interest in the collateral registered or perfected in the period referred to in clause (a), or

(c) a perfected security interest in the collateral registered or perfected after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, and before the

expiry of the 15th day referred to in clause (a), if, before the expiry of the 15 days,

(i) the registration of the security interest first mentioned in subsection (2) is not amended to disclose the transferee of the collateral as the new debtor or disclose the new name of the debtor, as the case may be, or

(ii) the secured party does not take possession of the collateral.

(4) This section does not have the effect of subordinating a prior security interest under prior registration law deemed under section 77 to be registered under this Act.

(5) Where the debtor's interest in part or all of the collateral is transferred without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party acquires knowledge of the name of the most recent transferee, the secured party is deemed to have complied with subsection (2) if the secured party registers a financing change statement not later than 15 days after acquiring knowledge of the name of the most recent transferee and of the information required to register a financing change statement, and the secured party need not register financing change statements with respect to any intermediate transferee.

(6) This section does not apply to a registration made at a land titles office pursuant to section 49.

1988 cP-4.05 s51;1990 c31 s39

Recovery of loss caused by error in Registry

52(1) A person may bring an action against the Registrar to recover loss or damage suffered by that person if the loss or damage resulted from

(a) the person's reliance on a printed search result under section 48 that is incorrect because of an error or omission in the operation of the Registry, or

(b) subject to section 43(3) and (10), an error or omission of the Registrar relating to the registration of a printed financing statement submitted for registration.

(2) No action for damages under this section or section 53 lies against the Registrar unless it is commenced not later than

(a) one year after the person entitled to bring the action first had knowledge of the loss or damage, or

(b) 6 years from the date the printed search result was issued or the financing statement was submitted for registration, as the case may be,

whichever is earlier.

(3) No action under this section may be brought by a person who relied on a printed search result unless that person or an agent of that person requested the printed search result.

(4) Notwithstanding the *Proceedings Against the Crown Act,* no action may be brought against the Crown in right of the Province, the Registrar or an officer or employee of the Registry for any error or omission of the Registrar or an officer or employee of the Registry in respect of the discharge or purported discharge of any duty or function under this Act, the regulations or under any other Act except as provided in this section and in section 53.

1988 cP-4.05 s52;1990 c31 s41

Recovery of loss where trust deeds involved

53(1) An action for recovery of damages under section 52 brought by a trustee under a trust indenture or by a person with an interest in a trust indenture shall be brought on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the Registrar in respect of each error or omission.

(2) In an action brought by a trustee under a trust indenture or by a person with an interest in a trust indenture, proof that each person relied on the printed search result is not necessary if it is established that the trustee relied on the printed search result, but no person is entitled to recover damages under this section if the person knows at the time the person loans money to the debtor that the printed search result relied on by the trustee is incorrect.

(3) In proceedings under this section, the Court may make any order that it considers appropriate in order to give notice to the persons with interests in the same trust indenture.

(4) Subject to section 54, the Court may order payment of all or a portion of the damages awarded to identified persons with interests in the same trust indenture at any time after judgment, and the obligation of the Registrar to satisfy the judgment is satisfied to the extent that payment is made.

1988 cP-4.05 s53

Payment of claim for loss

54(1) The total amount recoverable in a single action under section 52 shall not exceed a prescribed amount, and the total amount recoverable for all claims in a single action under section 53 shall not exceed a prescribed amount.

(2) Where damages are paid to a claimant pursuant to section 52 or 53, the Crown is subrogated to the rights of the claimant against any person indebted to the claimant whose debt to the claimant was the basis of the loss or damage in respect of which the claim was paid.

(3) Where the claimant recovers pursuant to section 52 or 53 an amount less than the value of the interest the claimant would have had if the error or omission had not occurred, the right of subrogation under subsection (2) does not prejudice the right of the claimant to recover in priority to the Crown an amount equal to the difference between the amount paid to the claimant and the value of the interest the claimant would have had if the error or omission had not occurred.

(4) The Minister may, without an action being brought, pay the amount of a claim against the Registrar from the General Revenue Fund on the report of the Registrar setting out the facts and on receipt of a certificate of the Registrar stating that in the Registrar's opinion the claim is just and reasonable.

(5) When an award of damages has been made in favour of the claimant and the time for appeal has expired, or when an appeal is taken and is disposed of in favour of the plaintiff, the Minister shall pay the amount specified in the judgment from the General Revenue Fund.

RSA 2000 cP-7 s54;2006 c23 s63

Part 5
Rights and Remedies on Default

Application of Part

55(1) This Part does not apply to a transaction referred to in section 3(2).

(2) The rights and remedies referred to in this Part are cumulative.

(3) Notwithstanding subsection (1), this Part does not apply to a transaction between a pledgor and a pawnbroker.

(4) Subject to any other Act or rule of law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may

(a) proceed under this Part as to the personal property, or

(b) proceed as to both the land and the personal property, as if the personal property were land, in which case

(i) the secured party's rights, remedies and duties in respect of the land apply to the personal property as if the personal property were land, and

(ii) this Part does not apply.

(5) Subsection (4)(b) does not limit the rights of a secured party who has a security interest in the personal property taken before or after the security interest mentioned in subsection (4).

(6) The secured party referred to in subsection (5)

(a) has standing in proceedings taken in accordance with subsection (4)(b), and

(b) may apply to the Court for the conduct of a judicially supervised sale under subsection (4)(b).

(7) For the purpose of distributing the amount received from the sale of the land and personal property where the purchase price is not allocated to the land and the personal property separately, the amount of the purchase price that is attributable to the sale of the personal property is that proportion of the total price that the market value of the personal property at the time of the sale bears to the total market value of the land and the personal property.

(8) A security interest does not merge merely because a secured party has reduced the secured party's claim to judgment.

1988 cP-4.05 s55;1990 c31 s43

Rights and remedies

56(1) Where the debtor is in default under a security agreement,

(a) except as provided by subsection (2), the secured party has against the debtor the rights and remedies provided in the security agreement, the rights, remedies and obligations provided in this Part and in sections 36, 37 and 38 and when in possession or control, the rights, remedies and obligations provided in section 17 or 17.1, and

(b) the debtor has against the secured party, the rights and remedies provided in the security agreement, the rights and remedies provided by any other Act or rule of law not inconsistent with this Act and the rights and remedies provided in this Part and in section 17 and 17.1.

(2) Except as provided in sections 17, 17.1, 60, 61 and 63, no provision of section 17 or 17.1 or sections 58 to 67, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

RSA 2000 cP-7 s56;2006 cS-4.5 s108(25)

Collection rights of secured party

57(1) Where so agreed and in any event on default under a security agreement, a secured party is entitled

(a) to notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification, and

(b) to apply any money taken as collateral to the satisfaction of the obligation secured by the security interest.

(2) A secured party may deduct the secured party's reasonable collection expenses from

(a) money held as collateral, or

(b) an amount collected

(i) from a debtor on an intangible or chattel paper, or

(ii) from an obligor under an instrument.

1988 cP-4.05 s57;1990 c31 s45;1991 c21 s29(8)

Right of secured party to enforce, etc., on default

58(1) Subject to Part 2 of the *Civil Enforcement Act* and sections 36, 37 and 38, on default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

(b) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and any method of enforcement that is available with respect to the document of title is also available, with all the necessary modifications, with respect to the goods covered by it,

(c) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate alternative storage facilities are not readily available, the collateral may be seized without removing it from the debtor's premises in any manner by which a civil

enforcement agency may seize without removal under subsection (2)(b) to (d), if the secured party's interest is perfected by registration, and

(d) where clause (c) applies or where the collateral has been seized by a civil enforcement agency as provided in subsection (2)(b) to (d) and the collateral is of a kind mentioned in clause (c), the secured party may dispose of the collateral on the debtor's premises, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal.

(2) To make a seizure of property, the civil enforcement agency may

(a) take physical possession of the property,

(b) give to the debtor or the person in possession of the collateral a notice of seizure in the prescribed form,

(c) post in some conspicuous place on the premises on which the property is located at the time of seizure a notice of seizure in the prescribed form, or

(d) in the case of property in the form of goods, affix to the goods a sticker in the prescribed form,

and seizure by the civil enforcement agency shall continue until possession of the property is surrendered to the secured party or the secured party's agent, or the seizure has been released.

(3) At any time after making a seizure, the civil enforcement agency may appoint the debtor or other person in possession of the property seized as bailee of the civil enforcement agency on the debtor or such other person executing a written undertaking in the prescribed form to hold the property as bailee for the civil enforcement agency and to deliver up possession of the property to the civil enforcement agency on demand and property held by a bailee is deemed to be held under seizure by the civil enforcement agency.

(4) When a seizure occurs, a civil enforcement agency, on the written request of the person who has reasonable grounds to believe that the person has an interest in or a right to property seized by the civil enforcement agency, shall deliver to that person a list of items of property seized that fall within the general description of property in or to which that person claims to have an interest.

(5) On making a seizure, a civil enforcement agency may surrender possession or the right of possession of the property seized to the secured party or to a person designated in writing by the secured party.

(6) A civil enforcement agency may give before or after seizure of property, a notice to the secured party named in the warrant under which the seizure was made informing the secured party that the seizure shall be released at a date specified in the notice unless before that date the secured party takes possession of the property seized.

(7) If the person to whom the notice referred to in subsection (6) is given does not take possession of the property referred to in the notice on or before the date specified, the civil enforcement agency may release the seizure.

(8) After surrender of possession as provided in subsection (5) or release of seizure as provided in subsection (7), the civil enforcement agency has no liability for loss or damage to the property or for unlawful interference with the rights of the debtor or any other person who has rights in or to the property, occurring after the surrender or release.

(9) A seizure shall not affect the interest of a person who under this Act or under any other law has priority over the rights of the secured party.

1988 cP-4.05 s58;1990 c31 s46;1994 cC-10.5 s148

Seizure of mobile homes

59(1) In this section, "mobile home" means

(a) a vacation trailer or house trailer, or

(b) a structure, whether ordinarily equipped with wheels or not, that is designed to be moved from one point to another by being towed or carried and to provide living accommodation for one or more persons.

(2) When a mobile home is seized to enforce a security agreement and the mobile home is occupied by the debtor or some other person who fails, on demand, to deliver up possession of the mobile home, the person who has authorized the seizure or a receiver may apply to the Court under section 64 for an order directing the occupant to deliver up possession of the mobile home.

(3) The order may provide that if the occupant fails to deliver up possession of the mobile home within the time specified in the order, the civil enforcement agency shall eject and remove the

occupant together with all goods the occupant may have in the mobile home, and the civil enforcement agency may take any reasonable steps necessary to obtain possession of the mobile home.

(4) The civil enforcement agency may act under subsection (3) only after an affidavit has been filed with the civil enforcement agency indicating that a copy of the Court order has been served on the occupant of the mobile home and stating that the occupant has failed to deliver up possession of it as required by the order.

1988 cP-4.05 s59;1990 c31 s47;1994 cC-10.5 s148

Disposal of collateral on default

60(1) Collateral may be disposed of in accordance with this Part in its existing condition or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order to

(a) the reasonable expenses of enforcing the security agreement, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the party disposing of the collateral,

and the surplus, if any, shall be dealt with in accordance with section 61.

(2) Collateral may be disposed of as follows:

(a) by private sale;

(b) by public sale, including public auction or closed tender;

(c) as a whole or in commercial units or parts;

(d) if the security agreement so provides, by lease or by deferred payment.

(3) The secured party may delay disposition of the collateral in whole or in part.

(4) Not less than 20 days prior to the disposition of the collateral, the secured party shall give notice of disposition to

(a) the debtor and any other person who is known by the secured party to be an owner of the collateral,

(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party, and

(i) who has, prior to the date that the notice of disposition is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the secured party seized the collateral,

and

(c) any other person with an interest in the collateral who has given notice to the secured party of the person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(5) The notice referred to in subsection (4) shall contain

(a) a description of the collateral,

(b) the amount required to satisfy the obligations secured by the security interest,

(c) the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, and a brief description of any default other than non-payment, and the provision of the security agreement the breach of which resulted in the default,

(d) the amount of the applicable expenses referred to in subsection (1)(a) or, where the amount of those expenses has not been determined, a reasonable estimate,

(e) a statement that, on payment of the amounts due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral,

(f) a statement that, on payment of the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, or the curing of any other default, as the case may be, together with payment of the amounts due under subsection (1)(a), the debtor may reinstate the security agreement,

(g) a statement that, unless the collateral is redeemed or the security agreement is reinstated, the collateral will be disposed of and the debtor may be liable for any deficiency, and

(h) the date, time and place of any sale by public auction, the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted or the date after which any private disposition of the collateral is to be made.

(6) Where the notice required under subsection (4) is served on any person other than the debtor, it need not contain the information specified in subsection (5)(c), (f) and (g), and, where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in subsection (5)(c) and (f).

(7) No statement referred to in subsection (5)(g) shall make reference to any liability on the part of the debtor to pay a deficiency if under any Act or rule of law the secured party does not have the right to collect a deficiency from the debtor.

(8) Not less than 20 days prior to the disposition of the collateral, a receiver shall give notice to

(a) the debtor, and if the debtor is a corporation, a director of the corporation,

(b) any other person who is known by the secured party to be an owner of the collateral,

(c) any person referred to in subsection (4)(b), and

(d) any other person with an interest in the collateral who has given notice to the receiver of the person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(9) The notice referred to in subsection (8) shall contain

(a) a description of the collateral, and

(b) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(10) The notice required under subsection (4) or (8) may be given in accordance with section 72 or, where notice is to be given to the person who has registered a financing statement, by registered mail

addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(11) The secured party may purchase the collateral or any part of it only at a public sale and only for a price that bears a reasonable relationship to the market value of the collateral.

(12) When a secured party disposes of the collateral to a purchaser who acquires the purchaser's interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are, as regards the purchaser, deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(13) Subsection (12) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not been given a written notice under this section.

(14) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or a similar instrument and who receives a transfer of collateral from the secured party or who is subrogated to the rights of the secured party has the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

(15) The notice in subsection (4) or (8) is not required if

(a) the collateral is perishable,

(b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if not disposed of immediately after default,

(c) the cost of care and storage of the collateral is disproportionately large relative to its value,

(d) the collateral is a security or an instrument that is to be disposed of by sale in an organized market that handles large volumes of transactions between many different sellers and many different buyers,

(e) the collateral is money other than a medium of exchange authorized by the Parliament of Canada,

(f) the Court, on ex parte application, is satisfied that a notice is not required, or

(g) after default, every person entitled to receive the notice consents to the disposition of the collateral without notice.

1988 cP-4.05 s60;1990 c31 s48;1991 c21 s29(9)

Surplus or deficiency

61(1) Where a security interest secures an indebtedness and the collateral has been dealt with under section 57 or has been disposed of in accordance with section 60 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested persons, be accounted for and paid in the following order to

(a) a person who has a subordinate security interest in the collateral

(i) who has, prior to the distribution of the proceeds, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person who has an interest in the collateral, if that person has given a written notice of that person's interest to the secured party prior to distribution of the proceeds, and

(c) the debtor or any other person who is known by the secured party to be the owner of the collateral

but the priority of the interest in the surplus of a person referred to in clause (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

(2) Where there is a question as to who is entitled to receive payment under subsection (1), the secured party may pay the surplus into the Court and the surplus shall not be paid out except on an application under section 69 by a person claiming an entitlement to the surplus.

(3) Within 30 days after receipt of the written notice of a person referred to in subsection (1), the secured party shall provide to that person a written accounting of

(a) the amount collected pursuant to section 57(1) or the amount realized from the disposition of the collateral under section 60,

(b) the manner in which the collateral was disposed of,

(c) the amount of expenses deducted as provided in sections 17, 57 and 60,

(d) the distribution of the amount received from the collection or disposition, and

(e) the amount of any surplus.

(4) Unless otherwise agreed, or unless otherwise provided in this or any other Act, the debtor is liable for any deficiency.

1988 cP-4.05 s61;1990 c31 s49

Retention of collateral

62(1) After default, the secured party may propose to take the collateral in satisfaction of the obligations secured, and shall give a notice of the proposal to

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral,

(b) a creditor or person who has a security interest in the collateral whose interest is subordinate to that of the secured party, and

(i) who has, prior to the date that the notice of the proposal is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(c) any other person with an interest in the collateral who has given a written notice to the secured party of an interest in the collateral prior to the date that notice is given to the debtor, and

(d) the civil enforcement agency, unless possession or seizure has been surrendered or released by the civil enforcement agency pursuant to section 58(5) or (7).

(2) If any person who is entitled to notification under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal gives to the secured party a written notice of objection not later than 15 days after giving the notice under subsection (1), the secured party shall dispose of the collateral in accordance with section 60.

(3) If no notice of objection is given, the secured party is, at the expiry of the 15-day period referred to in subsection (2), deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interest of the debtor and any person entitled to receive a notice

(a) under subsection (1)(b), and

(b) under subsection (1)(c) whose interest is subordinate to that of the secured party,

who has been given the notice and all obligations secured by the interests referred to in clauses (a) and (b) are deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(4) The notice required under subsection (1) may be given in accordance with section 72 or, where notice is to be given to a person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(5) The secured party may require any person who has made an objection to the secured party's proposal to furnish the secured party with proof of that person's interest in the collateral and, unless the person furnishes the proof not later than 10 days after the secured party's demand, the secured party may proceed as if the secured party had received no objection from that person.

(6) On application by a secured party, the Court may determine that an objection to the proposal of a secured party is ineffective on the grounds that

(a) the person made the objection for a purpose other than the protection of the person's interest in the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) Where a secured party disposes of the collateral to a purchaser who acquires the purchaser's interest for value and in good faith

and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not been given a written notice under this section.

1988 cP-4.05 s62;1990 c31 s50;1991 c21 s29(10);1994 cC-10.5 s148

Redemption of collateral

63(1) At any time before the secured party has disposed of the collateral or has contracted for its disposition under section 60 or before the secured party is deemed to have irrevocably elected to take the collateral under section 62,

(a) any person entitled to receive a notice of disposition under section 60(4) or (8) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral, or

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

1988 cP-4.05 s63

Application to Court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,

(b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,

(c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

1988 cP-4.05 s64;1990 c31 s51;1994 cC-10.5 s148

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(7) On the application of any interested person, the Court may

(a) appoint a receiver;

(b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

1988 cP-4.05 s65;1990 c31 s52;1994 cC-10.5 s148

Part 6
Miscellaneous

Proper exercise of rights, duties and obligations

66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

(3) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply.

1988 cP-4.05 s66;1990 c31 s53

Deemed damages

67(1) If a person fails, without reasonable excuse, to discharge any duties or obligations imposed on the person by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

(2) Where a secured party, without reasonable excuse, fails to comply with obligations or limitations

(a) in section 43(11), 49 or 50, or

(b) in section 17, 18, 60, 61 or 62 and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 43(11), 49 or 50, the person disclosed as the debtor in a registration, is deemed to have suffered damages not less than the amount prescribed.

(3) In an action for a deficiency, the defendant may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 60 or 61, but non-compliance shall limit the right to the deficiency only to the extent that it has affected the right of the defendant to protect the defendant's interest in the collateral or has made the accurate determination of the deficiency impracticable.

(4) Where a secured party fails to comply with obligations in section 17, 18, 60 or 61, the onus is on the secured party to show that the failure,

(a) where the collateral is consumer goods, did not affect the debtor's ability to protect the debtor's interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, or

(b) did not make the accurate determination of the deficiency impracticable.

(5) Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act, or that purports to limit the liability of or the amount of damages recoverable from a person

who has failed to discharge a duty or obligation imposed on the person by this Act is void.

1988 cP-4.05 s67;1990 c31 s54

Unauthorized discharge or amendment

68 A person who signs a financing change statement to discharge or amend a registration and who is not authorized to do so by the secured party, section 49 or 50, the regulations or an order of the Court is liable to the secured party for loss or damage suffered by the secured party.

1990 c31 s55

Order of the Court

69 On application of an interested person, the Court may

(a) make an order determining questions of priority or entitlement to collateral;

(b) direct an action to be brought or an issue to be tried.

1988 cP-4.05 s68

Application to Court

70(1) An application to the Court under this Act must be made in accordance with the *Alberta Rules of Court*.

(2) Where a provision of this Act providing for an application to the Court does not specify the persons to whom notice is to be given, unless the Court otherwise directs notice shall be given to all persons whose rights may be affected.

(3) Repealed 2009 c53 s129.

RSA 2000 cP-7 s70;2009 c53 s129

Extension of time

71 Where in Part 5 or in sections 11, 36(13), 38(13) and 43(11) a time is prescribed not later than or before which an act or thing must be done, the Court, on application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance.

1988 cP-4.05 s69;1990 c31 s57

Service of notices and demands

72(1) A notice or demand, other than a demand under section 18, or a copy of a financing statement or statement used by the Registry to confirm a registration referred to in section 43(11), required or permitted to be given under this Act may be given as follows:

(a) to an individual by leaving it with the individual or by registered mail addressed by indicating the individual's

name and residence, or the name and place of any business of the person;

(b) to a partnership

(i) by leaving it with

(A) one or more of the general partners, or

(B) a person having at the time the notice is given control or management of the partnership business, or

(ii) by registered mail addressed to

(A) the partnership,

(B) any one or more of the general partners, or

(C) any person having at the time the notice is given control or management of the partnership business

at the address of the partnership business;

(c) to a corporation, other than a municipality or Metis settlement,

(i) by leaving it with an officer or director of the corporation or person in charge of any office or place of business of the corporation,

(ii) by leaving it with, or by registered mail addressed to, the registered or head office of the corporation, and

(iii) where the corporation has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, the attorney for service for the corporation appointed under Part 21 of the *Business Corporations Act;*

(d) to a municipal corporation by leaving it with, or by registered mail addressed to, the principal office of the corporation or to the chief administrative officer of the corporation;

(e) to a Metis settlement by leaving it with, or by registered mail addressed to, the permanent office of the settlement or to the settlement administrator;

(f) to an association

(i) by leaving it with an officer of the association, or

(ii) by registered mail addressed to an officer of the association at the address of the officer;

(g) to a cooperative

(i) by leaving it with an officer or director of the cooperative or a person in charge of any office or place of business of the cooperative,

(ii) by leaving it with or by registered mail addressed to the registered or head office of the cooperative, and

(iii) where the cooperative has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, the attorney for service for the cooperative appointed under Part 17 of the *Cooperatives Act*.

(2) A document referred to in subsection (1) that is sent by registered mail is deemed to be given when it is actually received by the addressee or on the expiry of 10 days after the mail is registered, whichever is earlier.

RSA 2000 cP-7 s72;2001 cC-28.1 s462

Regulations

73(1) The Lieutenant Governor in Council may make regulations

(a) respecting the kinds of goods the leases of which are not within the scope of this Act;

(b) respecting the Registry and the duties of the Registrar, including the transition from a prior registry system to the system established by this Act;

(c) respecting fees;

(d) respecting the registration of financing statements or other writings;

(e) respecting

(i) the form, contents and manner of use of financing statements and other writings,

(ii) the form, contents and manner of use of notices referred to in this Act, including notices registered under section 49 in a land titles office or at another place determined in accordance with clause (s)(ii),

(iii) the manner in which collateral, including proceeds collateral, is described in financing statements and other writings, and

(iv) what kinds of goods may be or shall be described in part by serial number and the requirements of a description by serial number;

(f) permitting the registration in the Registry of any interest, right or claim relating to property;

(g) respecting the manner in which any registration may be made in the Registry under this Act or any other enactment;

(h) respecting the application of Part 4 to interests that are permitted or required to be registered in the Registry;

(i) respecting searches of the Registry, the meaning of "search result" and the method of disclosure of registered information, including the form of a search result;

(j) requiring or permitting the use of statements to confirm the registration of information on financing statements and other writings;

(j.1) governing the examination of collateral and information to be provided by persons for the purposes of determining or verifying the location of collateral;

(k) respecting the Registrar's power to amend a registration that contains an error caused by the act of the Registrar or Registry employees;

(l) respecting abbreviations, expansions or symbols that may be used in a financing statement or other form, notice or document used in connection with the registration of security interests or the disclosure of information in the Registry;

(m) respecting any matter required or authorized by this Act to be prescribed;

(n) respecting the retention and disposition of Registry records;

(o) respecting the period of time during which a registration in the Registry or under section 49 is effective;

(p) authorizing the Registrar to enter into agreements whereby fees may be charged on account;

(q) respecting agreements under clause (p);

(r) respecting the grounds on which the Registrar may refuse to register a financing statement or other writing;

(s) respecting

(i) the application of all or part of sections 36 and 37 to any land for which a certificate of title has not been issued under the *Land Titles Act,* and

(ii) the place at which a registration is to be made and the manner of registration;

(t) respecting the circumstances in which a financing statement registered prior to October 1, 1990 is deemed to continue the perfected status of an interest referred to in section 77(4).

(2) A regulation under this section may be made in respect of different persons or transactions or classes of persons or transactions.

RSA 2000 cP-7 s73;2009 c53 s129

Conflict with other legislation

74(1) If there is a conflict between this Act and a provision for the protection of consumers in any Act, the provision of that Act prevails.

(2) Except as otherwise provided in this or any other Act, if there is a conflict between this Act and any Act other than those referred to in subsection (1), this Act prevails.

1988 cP-4.05 s72

References

75(1) A reference in an Act, regulation, agreement or document to the *Assignment of Book Debts Act*, RSA 1980 cA-47, the *Bills of Sale Act*, RSA 1980 cB-5, the *Business Corporations Act*, the *Chattel Security Registries Act*, SA 1983 cC-7.1, or the *Conditional Sales Act*, RSA 1980 cC-21, that relates to a security interest in personal property or fixtures is deemed to be a reference to this Act or to the corresponding provisions of this Act.

(2) A reference in an Act, regulation, agreement or document to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge or assignment of book debts, or any derivative of those terms, or to any transaction which under this Act is a security agreement, is deemed to be a reference to the corresponding kind of security agreement under this Act.

Transitional application of Act

76(1) In this section and section 77, "prior law" means the law in force immediately before October 1, 1990.

(2) This Act applies

(a) to every security agreement made after October 1, 1990, including an agreement that renews, extends or consolidates an agreement made before October 1, 1990,

(b) to a receiver appointed before or after October 1, 1990,

(c) to every security agreement made before October 1, 1990 that has not been validly terminated in accordance with the prior law before October 1, 1990, and

(d) subject to subsections (4) and (5), to every prior security interest that is not enforced or otherwise validly terminated in accordance with the prior law before October 1, 1990.

(3) Sections 10 and 11 do not apply to a security agreement referred to in subsection (2)(c).

(4) The validity of a prior security interest is governed by the prior law.

(5) The order of priorities

(a) between security interests is determined by the prior law, if all of the competing security interests arose under security agreements entered into before October 1, 1990, and

(b) between a security interest and the interest of a third party is determined by the prior law, if the third party interest arose before October 1, 1990 and the security interest arose under a security agreement entered into before October 1, 1990.

1988 cP-4.05 s74;1990 c31 s60

Security interest prior to commencement of Act

77(1) In this section, "prior registration law" means the *Assignment of Book Debts Act*, RSA 1980 cA-47, the *Bills of Sale Act*, RSA 1980 cB-5, the *Business Corporations Act*, the *Conditional Sales Act*, RSA 1980 cC-21, and the *Chattel Security Registries Act*, SA 1983 cC-7.1, as they existed immediately before October 1, 1990.

(2) Except as otherwise provided in this section, a prior security interest that on October 1, 1990 is covered by an unexpired filing or registration under prior registration law is deemed to have been registered and perfected under this Act, and, subject to this Act, the

registered and perfected status of the interest continues for the unexpired portion of the filing or registration, as the case may be, and may be further continued by registration under this Act if the security interest could have been perfected by registration if it had attached after October 1, 1990.

(3) A bill of sale that does not evidence a mortgage of chattels and that on October 1, 1990 is covered by a registration under the *Bills of Sale Act*, RSA 1980 cB-5, is deemed to be registered in the Registry for the purposes of section 26(2) of the *Sale of Goods Act* and section 9(2) of the *Factors Act*, and the registration ceases to be effective after September 30, 1993 unless it is continued by registration in the Registry before October 1, 1993.

(4) A prior security interest registered under the *Business Corporations Act* or the *Companies Act* is deemed to have been registered and perfected under this Act, and the registered and perfected status of the interest ceases to be effective after September 30, 1993, but may be further continued under this Act by registration under this Act if the security interest could have been perfected by registration if it had attached after September 30, 1990.

(5) A registration under the *Conditional Sales Act*, RSA 1980 cC-21, that remains unexpired on October 1, 1990 and which relates exclusively or partly to railway rolling stock, ceases to be effective after September 30, 1993, but may be further continued by registration under this Act in respect of any security interest that could have been perfected by registration if it had attached after October 1, 1990.

(6) Where the perfection of a prior security interest that is deemed registered or perfected under this section is continued by registration under this Act,

(a) registration under this Act continues any registration or perfected status under prior registration law for the purposes of section 76(5), and

(b) the registration under this Act supersedes any registration under prior law.

(7) A prior security interest that under prior law had the status of a perfected security interest without filing or registration and without the secured party taking possession of the collateral is perfected under this Act as of the date the security interest was created, and that perfection continues until September 30, 1993, after which it becomes unperfected unless, being a security interest that could

have been perfected under this Act if it had arisen after October 1, 1990, it is otherwise perfected under this Act.

(8) For the purposes of this Act, a security interest was perfected under prior law when the secured party complied with such law with respect to the creation and continuation of the security interest, and the security interest has a status in relation to the interests of other secured parties, buyers, judgment creditors or the trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

(9) A prior security interest in the form of an assignment of an existing or future debt to which the *Assignment of Book Debts Act*, RSA 1980 cA-47, did not apply

(a) is deemed perfected for the purposes of section 20(a), and

(b) is perfected under this Act for all other purposes as of the date notice of the assignment is given to the account debtor as defined in section 41(1),

and that perfection continues until September 30, 1993, after which the security interest will become unperfected unless it is otherwise perfected under this Act before October 1, 1993.

(10) A prior security interest that on October 1, 1990 could have been, but was not

(a) filed or registered under prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party

if it is a security interest that could have been perfected by registration or possession under this Act if it had arisen after October 1, 1990, may be perfected by registration or possession in accordance with this Act.

(11) A prior security interest that under this Act may be perfected by the secured party taking possession of the collateral is perfected for the purposes of this Act when possession of the collateral is taken in accordance with section 24 whether the possession was taken before or after October 1, 1990 and notwithstanding that under prior law the security interest could not be perfected by taking possession of the collateral.

(12) A prior security interest that, on October 1, 1990, was covered by an unexpired filing or registration under prior registration law, which is perfected under this Act without registration or the

secured party taking possession of the collateral, remains perfected under this Act.

(13) A prior security interest that, on October 1, 1990, could have been, but was not, covered by a filing or registration under prior registration law and that, under this Act, may be perfected without registration or the secured party taking possession of the collateral, is perfected under this Act if all of the conditions for perfection of a security interest are met.

1988 cP-4.05 s75;1990 c31 s61;1991 c21 s29(12);1996 c28 s33

Transitional provisions

78(1) The provisions of the *Securities Transfer Act*, including amendments made to this Act by section 108 of the *Securities Transfer Act*, do not affect an action or proceeding commenced before the coming into force of section 108 of the *Securities Transfer Act*.

(2) No further action is required to continue perfection of a security interest in a security if

(a) the security interest in the security was a perfected security interest immediately prior to the coming into force of section 108 of the *Securities Transfer Act*, and

(b) the action by which the security interest was perfected would suffice to perfect the security interest under this Act.

(3) A security interest in a security remains perfected for a period of 4 months from the coming into force of section 108 of the *Securities Transfer Act* and continues to be perfected after that 4-month period where appropriate action to perfect the security interest under this Act is taken within that period, if

(a) the security interest in the security was a perfected security interest immediately prior to the coming into force of section 108 of the *Securities Transfer Act*, but

(b) the action by which the security interest was perfected would not suffice to perfect the security interest under this Act.

(4) A financing statement or financing change statement may be registered within the 4-month period referred to in subsection (3) to continue that perfection or after that 4-month period to perfect the security interest, if

(a) the security interest was a perfected security interest immediately prior to the coming into force of section 108 of the *Securities Transfer Act*, and

(b) the security interest can be perfected by registration under this Act.

2006 cS-4.5 s108(26)

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TAB 2

Province of Alberta

LAND TITLES ACT

Revised Statutes of Alberta 2000
Chapter L-4

Current as of December 15, 2017

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

other than that official's duties as Registrar, Deputy Registrar, Assistant Deputy Registrar or clerk.

RSA 2000 cL-4 s11;2006 c21 s9

Office hours

12 Every Land Titles Office shall be kept open during the hours and on the days fixed by the Minister.

RSA 1980 cL-5 s15;1985 c48 s2(5);1994 cG-8.5 s40

Keeping of records

13 Where records are required to be kept under this Act, the Registrar may keep those records

(a) in written form,

(b) by any graphic, photographic, magnetic or electronic means, or

(c) by any other means or combination of means,

as the Registrar considers appropriate.

1988 c27 s6

Daily record

14(1) The Registrar shall keep a record that shall contain particulars of every instrument and caveat accepted by the Registrar for filing or registration.

(2) The Registrar shall cause each instrument or caveat received by the Registrar for filing or registration to be examined and if it is found to be complete and in the proper form and fit for filing or registration, the Registrar shall endorse on the instrument or caveat the serial number assigned to it and the date on which the serial number is assigned.

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

(4) Notwithstanding subsections (2) and (3), instead of assigning a serial number to an instrument or caveat, the Registrar may identify the instrument or caveat by a means other than a serial number so long as that other means of identification allows for the determination of priority between mortgagees, transferees and others.

RSA 1980 cL-5 s16;1985 c48 s2(6);1988 c27 s7;
1994 cC-10.5 s134;1996 c32 s5(5);1999 c10 s3

TAB 3

Falconbridge on Mortgages

Fifth Edition

Walter M. Traub

Chapter 5

EQUITABLE MORTGAGES*

§5:10 Definition of Equitable Mortgage

It has already been pointed out that it was an essential feature of a legal mortgage that it should vest the legal estate in land in the mortgagee,[1] and it followed that any mortgage which did not transfer the legal estate could not be a legal mortgage. Equity not only annexed to a legal mortgage certain inevitable terms which it enforced without regard to the contract of the parties,[2] but it recognized as valid charges mortgages other than legal mortgages and annexed to them the same inevitable terms.

An equitable mortgage therefore was a contract which created in equity a charge on property but did not pass the legal estate to the mortgagee.[3] Its operation was that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies were concerned, was equivalent to an actual assurance, and was enforceable under the equitable jurisdiction of the court.[4]

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* This chapter was prepared with the assistance of Milton J. Mowbray, Q.C., whose contribution is hereby gratefully acknowledged, and is being updated by the editor in chief Walter M. Traub.

1 See Chapter 2.

2 See Chapter 3.

3 The judgments in *London County and Westminster Bank Ltd. v. Tompkins*, [1918] 1 K.B. 515 (C.A.), contain an interesting discussion of the terms "mortgage", "equitable mortgage" and "equitable charge". See also *Re Beirnstein; Barnett v. Beirnstein*, [1925] Ch. 12.

4 32 Halsbury, *Laws of England*, 4th ed., at p. 189. The question of the priority of an equitable mortgage as regards a legal mortgage or another equitable mortgage will be discussed in Chapter 7. As to equitable

§5:20 How an Equitable Mortgage is Created

The equitable nature of a mortgage may be due either (i) to the fact that the interest mortgaged is equitable or future, or (ii) to the fact that the mortgagor has not executed an instrument sufficient to create a legal mortgage, which, in the case of land not subject to the provincial *Land Titles Act* or the Ontario *Land Registration Reform Act*, R.S.O. 1990, c. L.4, requires transfer of the legal estate. In the first case the mortgage, be it ever so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately.[5] Informality of form should be distinguished from an irregularity, which of itself may be found irrelevant to the substantive sufficiency of the document[6] on the other hand even if all formalities are satisfied, the document itself must be binding and enforceable and not subject to any conditions precedent which may be fatal to the creation of an equitable mortgage.[7] (iii) An equitable mortgage may also be created by a deposit of title deeds.[8]

Except in the case of a mortgage by deposit of title deeds, an equitable mortgage of an interest in land is not enforceable by action "unless the agreement upon which the action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized[9] or unless there has been part performance of the contract sufficient to take it out of the statute.[10]

If a registered mortgage under the *Land Titles Act* or the Ontario *Land Registration Reform Act* may be considered for the present purpose as being analogous to a mortgage of the legal estate,[11] equitable mortgages exist under those Acts in practically the same circumstances as in the case of land not under the land titles system or the Ontario *Land Registration Reform Act*, with this important exception, that a second mortgage in the case of land not under the land titles system or the Ontario *Land Registration Reform Act* is an equitable mortgage, even if it is in the form of a legal mortgage, the mortgagor not having the legal estate,[12] while under the *Land Titles Act* and Ontario *Land Registration Reform Act* a second registered mortgage is of exactly the same nature as a first registered mortgage.[13]

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mortgages generally, see the notes to *Russel v. Russel* in 2 *White & Tudor's Leading Cases in Equity*, 9th ed. (London: Sweet & Maxwell, 1928), pp. 70 *et seq.*

[5] See §§5:30 and 5:40.

[6] *Shire International Real Estate Investments Ltd., Re* (2013), 99 C.B.R. (5th) 302 (Alta. Q.B.).

[7] *Elias Markets Ltd., Re* (2006), 274 D.L.R. (4th) 166 (Ont. C.A.).

[8] See §5:50.

[9] *Statute of Frauds*, 1676, 29 Chas. 2, c. 3, s. 4 [see now *Statute of Frauds*, R.S.O. 1990, c. S.19, s. 4]. See also *Thomson Groceries Ltd. v. Scott*, [1943] 3 D.L.R. 25 (Ont. C.A.).

[10] Oral evidence is admissible to prove part performance, but the mere payment by the lender of the amount agreed to be lent on the security of the land is not sufficient part performance: *Ex p. Hooper* (1815), 19 Ves. 477, 34 E.R. 593; *Ex p. Hall* (1897), 10 Ch. D. 615 (C.A.), at p. 619; *Maddison v. Alderson* (1883), 8 App. Cas. 467 (H.L.), at p. 479; *Chaproniere v. Lambert*, [1917] 2 Ch. 356 (C.A.) (a case of payment of rent in advance in respect of a parol agreement for a lease of premises of which the lessee had not taken possession).

[11] All mortgages under the land titles system and under the Ontario *Land Registration Reform Act* are, however, merely charges.

[12] That is, if the land is already subject to a legal mortgage. See §5:30.

[13] See Chapter 8 as to the use of the terms "mortgage" and "equitable mortgage" under the land titles system, and Chapter 7 as to the validity of unregistered charges under that system.

§5:30 Mortgage of an Equitable or Future Interest

§5:30.10 Mortgage of an Equity of Redemption

After a mortgagor has made a legal mortgage he or she has merely a right to redeem and a second or any subsequent mortgage is necessarily an equitable mortgage.[14] The effect of a second mortgage in the form of a legal mortgage following a prior legal mortgage is twofold. It transfers to the second mortgagee the right to redeem the first mortgage and creates a new right in favour of the mortgagor, namely, to redeem the second mortgage. This process can be repeated *ad infinitum* in the case of third and subsequent mortgages.[15] The mortgages subsequent to the legal mortgage are inoperative at law, but in equity they operate *toties quoties* as mortgages of the mortgagor's equity of redemption.

§5:30.20 Mortgage of Other Equitable Interest

Certain land was bought and paid for by one W.H.F. and at his request was conveyed by the vendor to the purchaser's son, W.G.F. (an infant), to be held by him in trust for the purchaser. The purchaser afterwards signed his son's name to a mortgage of the land, adding his own name as a witness. It was held that the instrument created a valid charge in equity.[16]

So if a *cestui que trust* under a trust of land purports to mortgage the land or his or her interest therein without the concurrence of the trustee or other person having the legal estate, the mortgage is equitable.[17]

§5:30.30 Mortgage of a Future Interest

An assignment by way of mortgage of property to be acquired in the future, or of an expectancy or hope of succession on a person's future death, cannot of course transfer anything immediately, but the mortgagee has more than a mere right to enforce a contract and the assignment operates as security which becomes effective as soon as the property is acquired or the expectancy vests in interest.[18]

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[14] *Sadler v. Worley*, [1894] 2 Ch. 170, at p. 173; *Aikins v. Blain* (1867), 13 Gr. 646.

[15] See Chapter 14. As to the right to the legal estate in the event of the payment of the first mortgage, see Chapters 19 and 20.

[16] *Dennistoun v. Fyfe* (1865), 11 Gr. 372. See also *Re Cadwell's Ltd.; Trustee v. Royal Bank*, [1934] 2 D.L.R. 341 (Ont. C.A.).

[17] *Nemo dat quod non habet*. See §2:50. J.A. Strahan, *Law of Mortgages*, 2nd ed., pp. 11-12, mentions some exceptional cases, *e.g.*, under a settlement a power to revoke and declare new uses may be vested in a person who has not the legal estate, and under the English *Settled Land Act, 1882*, an equitable life tenant of settled land may in certain circumstances convey the legal estate. Conversely, the general rule is that a *cestui que trust* may make an equitable mortgage, but this rule is subject to exception in the case of a married woman as regards any separate property which she is restrained from anticipating. See also Strahan, *ibid.*, at pp. 56-7.

[18] *Re Lind; Industrials Finance Syndicate Ltd. v. Lind*, [1915] 2 Ch. 345 (C.A.), applying *Holroyd v. Marshall* (1862), 10 H.L.C. 191, 11 E.R. 999 (as explained in *Tailby v. Official Receiver* (1888), 13 App. Cas. 523 (H.L.)).

§5:40 Mortgage by Instrument Not Sufficient to Convey the Legal Estate

§5:40.10 Conveyance Defective in Form

If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate,[19] it is an equitable mortgage.

An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.[20]

Where the failure of formality is found to be irrelevant to the validity of a legal mortgage, a legal mortgage may be established notwithstanding same and an equitable mortgage may not need to be declared.[21]

Where the Lender failed to account for payments received nor could substantiate the amount advanced and state of account claimed under an unregistered Loan Agreement, such Loan Agreement could not constitute an equitable mortgage.[22]

§5:40.20 Agreement to Give a Mortgage

A written agreement to execute a legal mortgage duly signed is an equitable mortgage, operating as a present charge on the lands described in the agreement.[23]

An agreement which provides that a loan is to be repaid pursuant to terms to be negotiated in a future Instrument, is merely an agreement to agree and does not qualify as an equitable mortgage.[24]

It has been held in Saskatchewan that an agreement to give a mortgage, not being registrable under the *Land Titles Act*, creates no encumbrance on the land in question, even though a caveat is filed, and that in order to obtain a charge on the land the creditor must either obtain a judgment declaring that he or she has a charge on the land or obtain a judgment against the debtor for the amount owing and file an execution in the land titles office.[25]

§5:40.30 Other Instrument Not Amounting to a Conveyance

An agreement in writing duly signed, however informal, by which any property is made a security for a debt due or a present advance, creates an equitable charge upon the property.[26]

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[19] See Chapter 2.

[20] *Mestaer v. Gillespie* (1805), 11 Ves. Jun. 621, 32 E.R. 1230.

[21] See *Shire International Real Estate Investments Ltd., Re, supra*, footnote 6.

[22] *R. v. Nguyen*, 2013 CarswellBC 87 (B.C. S.C.).

[23] *Rooker v. Hoofstetter* (1896), 26 S.C.R. 41, affg 22 O.A.R. 175; see Words and Phrases for the judicial definition of "Equitable Mortgage or Charge" from this case; *Capital Finance Co. Ltd. v. Stokes*, [1968] 3 All E.R. 625 (C.A.). As to specific performance of the agreement to give a legal mortgage, and generally as to the enforcement of equitable mortgages, see §5:60.

[24] *Emmott v. Edmonds*, 2010 CarswellOnt 5440 (Ont. S.C.J.).

[25] *Gilbert v. Reeves & Co.* (1911), 4 Sask. L.R. 97 (S.C.), affg 4 Sask. L.R. 56.

[26] *Tebb v. Hodge and Cutten* (1869), L.R. 5 C.P. 73; *Rooker v. Hoofstetter, supra*, footnote 23; *Matthews v. Cartwright* (1742), 2 Atk. 347, 26 E.R. 611; *Burn v. Burn* (1797), 3 Ves. Jun. 573, 30 E.R. 1162; *Sawyer and Massey Co. v. Waddell* (1904), 6 Terr. L.R. 45 (S.C.) (a case under the *Land Titles Act*).

§5:40.40 Conveyance or Agreement Contrary to Law

Even though all criteria necessary to establish an equitable mortgage are present, no equitable mortgage will be established, where the document pursuant to which the claim is being made is contrary to statute and/or void *ab initio*. In the Ontario case of "In the matter of Elias Markets Ltd. etc."[40] a bank entered into a loan agreement with the borrower to be secured by a real property mortgage over real property owned by the borrower. Shortly after the loan agreement was entered into the borrower amalgamated with other corporate entities to create a new amalgamated entity. One of such entities owned lands abutting those to be mortgaged in favour of the bank and subject of the loan agreement. Unaware of this the bank proceeded with its loan and mortgage of the properties originally contemplated to be mortgaged, thus inadvertently creating a *Planning Act* violation which would nullify the validity of the registered mortgage. The loan agreement contained standard terms and conditions required for purposes of obtaining advances and in addition contained two conditions which were deemed "conditions precedent" namely: (i) requirement for a Completion Certificate indicating that the new building on the property and the renovations on such building were completed and (ii) a remediation report from an environmental consultant indicating that certain environmental concerns outlined in a previous reports have been remediated in accordance with MOE standards.

The motions judge refused to establish a legal mortgage due to the violation of the *Planning Act* and likewise denied claim for an equitable mortgage by virtue of the Loan Agreement for the same reasons, namely that a mortgage entered into in violation of the Ontario *Planning Act* is void *ab initio*. In reaching this conclusion the motions judge relied on the decision in *Tessis v. Scherer*[41] where a mortgagee sought to enforce a mortgage that had been made in violations of the *Planning Act* due to the mortgagor owing abutting parcels of land at the time of granting the mortgage. In *Tessis v. Scherer* the court concluded that the mortgage conveyed no interest in land as a result of the breach of the *Planning Act*. It does not appear however that any argument was made that the loan agreement between the parties in that instance created an equitable mortgage. That issue however was raised specifically in a related case of *Scherer v. Price Waterhouse Ltd.*,[42] where Sutherland J. carefully reviewed the law on equitable mortgages and concluded that no equitable mortgage could be established if to purport to do so would be to contravene the provisions of the statute. It is the view of this author that the import of that decision is that the document claimed in order to qualify as an equitable mortgage must be valid and binding and not in contravention of a statute making it void *ab initio*.

In *Elias* however, the loan agreement was duly executed prior to the amalgamation and accordingly at the time of its execution the loan agreement was not in contravention of the *Planning Act* and could be relied upon as an equitable mortgage. The motions judge's concern however was that if an equitable mortgage could be established the mortgagee could foreclose or sell the property and effect a

[40] *Elias Markets Ltd., Re, supra*, footnote 7.
[41] *Tessis v. Scherer* (1982), 140 D.L.R. (3d) 101 (Ont. C.A.), leave to appeal refused [1982] 2 S.C.R. xi (S.C.C.).
[42] (1985), 32 A.C.W.S. (2d) 259, [1985] O.J. No. 881 (Ont. H.C.).

change of ownership, the very thing that the *Planning Act* seeks to prevent and regulate.

The appeal court carefully scrutinized the motions judge's decision and reviewed in detail the nature of an equitable mortgage. The court declared that in essence, the concept of an equitable mortgage is to allow for enforcement and validation of a common intention of the mortgagor and mortgagee to secure the loan with property for either a past or future debt or future advances in a case where that common intention although clearly evident was unenforceable under the strictures of the common law. The only issue for the court therefore was whether the loan agreement constituted a valid and binding obligation which could, according to the principles, be sufficient to declare an equitable mortgage. The court acknowledged that at the time of the signing of the loan agreement no *Planning Act* violation existed and consequently an enforceable equitable mortgage could be found.

With that in mind the court turned its attention to the two extant conditions precedent contained in the loan agreement. It became evident that a loan agreement subject to conditions precedent was not binding and enforceable until such conditions precedent were satisfied or waived. Since no evidence was brought forth that same was effected prior to date of amalgamation the court declared that no valid and binding loan agreement existed at the time which could qualify as an equitable mortgage.

§5:50 Mortgage by Deposit of Title Deeds

If the owner of a freehold or leasehold estate in land deposits the title deeds with another person for the purpose of securing the repayment of an advance, an equitable charge is created and, notwithstanding the *Statute of Frauds*, the purpose of the deposit may be shown by oral evidence.[43] Lord Eldon, after having previously protested against the doctrine, acquiesced to it in 1813 as being settled law.[44] The doctrine has been defended, not very satisfactorily, on various grounds, including that of part performance.[45]

Although, by reason of the prevalence of systems of registration of deeds and registration of titles in this country mortgages of this kind are foreign to our ordinary ideas, our law is the same as the English law with respect to such mortgages, and an equitable mortgage by deposit may be created notwithstanding that the legal title is outstanding in some person other than the depositor.[46]

A written memorandum duly signed containing an agreement to deposit deeds as security is a valid charge without a deposit,[47] but an oral agreement for a deposit which is not performed is invalid.[48] If there is a written memorandum the terms of

[43] *Russel v. Russel* (1783), 1 Bro. C.C. 269, 28 E.R. 1121; *Montgomery v. Montgomery* (1970), 74 W.W.R. 41 (Alta. S.C.T.D.), affd [1971] 1 W.W.R. 575*n* (C.A.); *Kreick v. Wansborough* (1973), 35 D.L.R. (3d) 275 (S.C.C.); *Arnal v. Arnal* (1969), 6 D.L.R. (3d) 245 (Sask. C.A.); *Forrest v. Smiley and Robinson* (1956), 3 D.L.R. (2d) 210 (N.S.S.C.), and see Chapter 3.

[44] *Ex p. Kensington* (1813), 2 V. & B. 79, 35 E.R. 249.

[45] See 2 *White & Tudor's Leading Cases in Equity*, 9th ed. (London: Sweet & Maxwell, 1928), p. 71; 27 Halsbury, *Laws of England*, 3rd ed., p. 166; *Re Beetham, Ex p. Broderick* (1886), 18 Q.B.D. 380, affd *loc cit.* at p. 766 (C.A.); *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273 (P.C.).

[46] *Zimmerman v. Sproat* (1912), 5 D.L.R. 452 (Ont. H.C.J.), and cases cited; *Kerr v. Ruttle and Cruickshank*, [1953] 1 D.L.R. 266 (Ont. H.C.J.).

[47] *Re Carter and Justins, Ex p. Sheffield Union Banking Co.* (1865), 13 L.T. 477; *Bishop v. Western Trust*

the deposit must be ascertained solely by reference to the memorandum, but oral evidence may he given to show a new agreement with respect to a subsequent advance.[49]

Mere possession by a creditor of the debtor's title deeds is not sufficient to create an equitable mortgage without evidence as to the manner in which such possession originated.[50] The creditor must show that the deeds were in fact deposited with him or her by the debtor, and that the purpose was to create a charge, but if the deposit is proved, the purpose may, in the absence of an express charge, be inferred from the circumstances.[51]

The deposit must be made either with the creditor or with some third person over whom the debtor has no control. A deposit with the debtor's spouse for the creditor is not sufficient,[52] but a deposit with the debtor's solicitor for the creditor,[53] or with the debtor's spouse for his or her own benefit,[54] is sufficient.

It is not necessary that all the title deeds be deposited,[55] and the equitable mortgage may be good although the conveyance to the depositor is missing.[56] It follows that several valid equitable mortgages may be created by successive deposits of title deeds.[57] *Prima facie* a deposit of deeds creates an equitable charge on all the property comprised in them.[58] If a deposit is made for the purpose of obtaining credit, it will not cover money previously advanced and then due,[59] unless the intention to cover past due indebtedness may be inferred from the circumstances.[60] The deposit has been held to be ancillary to the equitable mortgage so that any lien created by the deposit is avoided if the mortgage is avoided.[61]

§5:60 Remedies of Equitable Mortgagee

An equitable mortgagee whether by deposit of title deeds, or by agreement to give a mortgage, or by formal mortgage of an equity of redemption or by conveyance defective in form, is entitled to enforce his or her security by foreclosure or sale, but a person who has any other mere charge on land other than a statutory charge

Co. (1922), 70 D.L.R. 451 (Sask. K.B.), at p. 455; see Words and Phrases for the judicial definition of "Constructive Notice" from this case.

48 *Re Beavan, Ex p. Coombe* (1819), 4 Madd. 249, 56 E.R. 698.

49 *Ex p. Kensington* (1813), 2 V. & B. 79, 35 E.R. 249; *Shaw v. Foster* (1872), L.R. 5 H.L. 321.

50 *Dixon v. Muckleston* (1872), L.R. 8 Ch. App. 155; *Wardle v. Oakley* (1864), 36 Beav. 27, 55 E.R. 1066.

51 2 *White & Tudor's Leading Cases in Equity*, 9th ed. (London: Sweet & Maxwell, 1928), p. 94; 32 Halsbury, *Laws of England*, 4th ed., p. 201; *Ex p. Langston* (1810), 17 Ves. Jun. 227, at p. 230, 34 E.R. 88.

52 *Ex p. Coming* (1803), 9 Ves. Jun. 115, 32 E.R. 545.

53 *Lloyd v. Attwood* (1859), 3 De G. & J. 614, at p. 652, 44 E.R. 1405.

54 *Re Wallis, Ex p. Jenks*, [1902] 1 K.B. 719.

55 *Ex p. Wetherell* (1805), 11 Ves. Jun. 398, 32 E.R. 1141; *Acme Co. Ltd. v. Huxley* (1912), 1 D.L.R. 860 (Alta. S.C.) (deposit of transfer without duplicate certificate of title); see Words and Phrases for the judicial definition of "Equitable Mortgage" from this case.

56 *Roberts v. Croft* (1857), 2 De G. & J. 1, 44 E.R. 887.

57 *Cf., Dixon v. Muckleston, supra*, footnote 50.

58 *Ashton v. Dalton* (1846), 2 Coll. 565, 63 E.R. 863. See further 2 *White & Tudor's Leading Cases in Equity*, 9th ed. (London: Sweet & Maxwell, 1928), pp. 82-3, as to the property covered by the mortgage.

59 *Mountford v. Scott* (1823), Turn. & R. 274, 37 E.R. 1105.

60 *Re New, Ex p. Farley* (1841), 1 Mont. D. & De G. 683; *cf.*, 2 *White & Tudor's Leading Cases in Equity*, 9th ed. (London: Sweet & Maxwell, 1928), pp. 83-4.

61 *Re Molton Finance Ltd.*, [1968] Ch. 325; *cf., Ex p. Coming, supra*, footnote 52.

assimilated to a mortgage is entitled to sale, but not foreclosure.[62] In the event of foreclosure under an equitable mortgage, other than a conveyance of the equity of redemption, the judgment or order foreclosing the owner of the equity should either vest the land in the plaintiff or direct the defendant to convey the land to the plaintiff.[63]

An agreement to borrow or lend money on mortgage will not be enforced by specific performance so long as it remains executory and neither party to it performs any of its terms. The remedy, if any, is in damages.[64] Upon breach of a contract to lend money the additional expense incurred in obtaining the loan elsewhere is a natural result of the breach, and this expense or any other substantial damage as was within the contemplation of the parties may be recovered.[65] But an agreement to give security[66] for a past debt in consideration of forbearance or for a present actual advance will be enforced by specific performance[67] even where only part of the amount agreed has been advanced.[68]

Where an agreement for a mortgage contains a stipulation that the intended mortgage shall contain the usual clauses, a personal covenant for payment of principal and interest will be inserted by the court; also a power of sale unless it be implied by statute.[69] If the agreement is under seal the power of sale may be exercised before the formal mortgage is executed.[70]

Under an agreement to execute a legal mortgage with such powers and provisions and in such form as the mortgagee may require, it has been held in England that the mortgagee is not entitled to insert in the mortgage a clause excluding the operation of the *Conveyancing and Law of Property Act*, 1881 (U.K.), c. 41, s. 17 (abolishing consolidation of mortgages).[71]

In the absence of any stipulation to the contrary in an agreement to give a mortgage on lands, it has been held in Ontario that the general form and terms of the mortgage must be in conformity with the form provided in the *Short Forms of Mortgages Act*, R.S.O. 1980, c. 474 [not consolidated and not repealed][72] and it has been held in British Columbia that an agreement to give a mortgage means that a registrable mortgage must be given.[73]

A mortgagee by deposit of title deeds may enforce the completion of the security by requiring a legal conveyance from the debtor,[74] and an equitable mortgagee who

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[62] See Chapter 24.

[63] See Chapter 25.

[64] *Rogers v. Challis* (1859), 27 Beav. 175, 54 E.R. 68; *Sichel v. Mosenthal* (1862), 30 Beav. 371, 54 E.R. 932; *Larios v. Bonany y Gurety* (1873), L.R. 5 P.C. 346; *South African Territories v. Wallington*, [1898] A.C. 309 (H.L.).

[65] *General Securities Ltd. v. Don Ingram Ltd.*, [1940] 3 D.L.R. 641 (S.C.C.).

[66] Assuming that there is either a memorandum sufficient under the *Statute of Frauds* or part performance sufficient to take the case out of the statute. See §5:40.

[67] *Alliance Bank v. Broom* (1864), 2 Dr. & Sm. 289, 62 E.R. 631; *Re Blew, Exp. Jones* (1835), 4 Deac. & Ch. 750.

[68] *Hunter v. Lord Langford* (1828), 2 Mol. (Ir. Ch.) 272.

[69] *Saunders v. Milsome* (1866), L.R. 2 Eq. 573; *Cockburn v. Edwards* (1881), 18 Ch. D. 449 (C.A.); *Hermann v. Hodges* (1873), L.R. 16 Eq. 18.

[70] *Re Solomon and Meagher's Contract* (1889), 40 Ch. D. 508.

[71] *Farmer v. Pitt*, [1902] 1 Ch. 954.

[72] *Reynolds v. Foster* (1912), 3 D.L.R. 506 (Ont. H.C.J.); *Thomson Groceries Ltd. v. Scott*, [1943] 3 D.L.R. 25 (Ont. C.A.).

[73] *Singh v. Gill*, [1929] 4 D.L.R. 396 (B.C.S.C.); see Words and Phrases for the judicial definition of "Mortgage" from this case; *cf., Owen v. Mercier* (1906), 12 O.L.R. 529 (H.C.J.), at p. 532.

commences an action for foreclosure may obtain an injunction restraining the owner from parting with the legal estate.[75]

As an equitable mortgage does not convey the legal estate, the general rule is that an equitable mortgagee is not entitled to bring an action for possession against the mortgagor in occupation of the mortgaged lands[76] or, apart from express contract between the mortgagor and the equitable mortgagee, to require payment of rent by tenants in occupation.[77] The equitable equivalent to the taking of possession is the appointment by the court of a receiver of the rents and profits.[78]

§5:70 Floating Charge

The essential characteristics of a floating charge were first defined by judicial decision in the case of *Re Panama, New Zealand, and Australian Royal Mail Co.*[79] A company incorporated with power to issue mortgages, bonds or debentures issued mortgage debentures charging the "undertaking, and all sums of money arising therefrom, and all the estate, right, title and interest of the company therein with the repayment at a specific time of money borrowed, with interest in the meantime. It was held that the object and meaning of the debentures was that the company was entitled to carry on its undertaking and deal with its property as if no charge existed until default should be made in payment of principal or interest or the company should be wound up, that in the event of default the debenture holders might have filed a bill to realize their security, and that in the event of winding up, which happened, they had a charge upon all the property of the company, past and future,[80] and were entitled to be paid out of the assets in priority to the general creditors.

A security of this kind is now known as a floating charge. It has become a common form of security for money lent to a trading corporation and is usually but not necessarily embodied in debentures issued by the company. The term "floating" is used by way of contrast with the term "specific". A specific charge

> . . . is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event happens which causes it to settle and fasten on the subject of the charge within its reach and grasp.[81]

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[74] *Ex p. Wright* (1812), 19 Ves. Jun. 255, 34 E.R. 513; *James v. James* (1873), L.R. 16 Eq. 153; *Harrold v. Plenty*, [1901] 2 Ch. 314. A promise to give a legal mortgage is implied: *Carter v. Wake* (1877), 4 Ch. D. 605, at p. 606.

[75] *London and County Banking Co. v. Lewis* (1882), 21 Ch. D. 490 (C.A.).

[76] See Chapter 22, where the exception in the case of a mortgage which conveys the equity of redemption is mentioned.

[77] See Chapter 15.

[78] See Chapter 36.

[79] (1870), L.R. 5 Ch. App. 318; *Robson v. Smith*, [1895] 2 Ch. 118, at p. 124. See Curtis, "The Theory of the Floating Charge (1941), 4 U.T.L.J. 131, and *Tailby v. Official Receiver* (1888), 13 App. Cas. 523 (H.L.), at p. 541. See also *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd.*, [1968] 2 O.R. 532 (H.C.J.).

[80] As to a mortgage of a future interest, see §5:30.

[81] *Illingworth v. Houldsworth*, [1904] A.C. 355, at p. 358. The subject of the charge need not be the whole undertaking or property of the company, but may be a particular class of assets: see *Re Yorkshire*

A floating security forms a present equitable charge[82] upon property for the time being of the company, and has been described thusly:

> A floating charge cannot be said to be a legal mortgage which requires that there be a present conveyance of the legal estate to the mortgagee subject to defeasance or reconveyance on non-payment. A floating charge, however, can be termed an equitable mortgage because it is a charge by which property is made a security for a debt owing which entitles the holder to payment out of the property.[83]

It is of the essence of the charge that it should not prevent the undertaking of the company from being carried on or the property charged from being disposed of or varied from time to time in the ordinary course of business. Whether a transaction will be held to be in the ordinary course of business depends on the circumstances of the particular case.[84] The holders may intervene and assert their charge either immediately after default or after such further period as may be provided for in the security and, if they intervene or if the company ceases to be a going concern and is wound up, the charge becomes a specific charge upon such property within the terms of the security as the company then has.[85]

As between different holders of debentures, containing a floating charge and a provision that the "debentures are all to rank *pari passu* as a first charge on the property hereby charged without any preference or priority over one another", the critical time is the moment when the charge crystallizes, that is, becomes specific. If, at that time, it appears that some holders have received payment of interest down to a later date than others, the latter (in the absence of some express provision to that effect) are not entitled to have the assets applied in equalizing the amount of interest before any further distribution is made, but the amount due to each holder for principal and interest is to be calculated, and the assets are to be distributed rateably according to the amounts found due.[86]

Woolcombers Ass'n, Ltd.; Houldsworth v. Yorkshire Woolcombers Ass'n Ltd., [1903] 2 Ch. 284, at pp. 294-5.

[82] *Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979 (C.A.), at pp. 994-9. See also *Gordon MacKay & Co. Ltd. v. Capital Trust Corp. Ltd.*, [1927] 2 D.L.R. 1150 (S.C.C.), and *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd.*, *supra*, footnote 79. A contract for the sale of debentures containing a floating charge is within the *Statute of Frauds* as regards the lands of the company: *Driver v. Broad*, [1893] 1 Q.B. 744 (C.A.).

[83] *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd.*, *supra*, footnote 79, at p. 537.

[84] *Re Old Bushmills Distillery Co., Ex p. Brett*, [1897] 1 I.R. 488; *Willmott v. London Celluloid Co.* (1886), 34 Ch. D. 147 (C.A.).

[85] *Governments Stock and Other Securities Investment Co. v. Manila Ry. Co.*, [1897] A.C. 81 (H.L.). At p. 86 Lord Macnaghten says: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default. See also *Evans v. Rival Granite Quarries Ltd.*, *supra*, footnote 82, especially at p. 994, as to the necessity for actual intervention by the holders in order to make the charge specific. As pointed out at p. 1008, it is not sufficient for the holders merely to give notice to seize a particular asset of the company; they must do something to turn the floating charge into a specific charge as regards all the assets covered by the charge: *Great Lakes Petroleum Co. v. Border Cities Oil Co. Ltd.*, [1934] 2 D.L.R. 743 (Ont. C.A.). See also *Nelson & Co. Ltd. v. Faber & Co.*, [1903] 2 K.B. 367. In *Industrial Development Bank v. Valley Dairy Ltd. and MacDonald*, [1953] 1 D.L.R. 788 (Ont. H.C.J.), at p. 791, it was held that a floating charge crystallized on the issue of the writ to enforce the security; *cf.*, *Re Hubbard & Co., Ltd.* (1898), 68 L.J. Ch. 54.

[86] *Re Midland Express, Ltd.; Pearson v. The Company*, [1914] 1 Ch. 41 (C.A.).

So long as the charge remains floating, and has not become specific, it is liable to be displaced by a specific security created subsequently in favour of a mortgagee, either legal or equitable,[87] even though the mortgagee has notice of the charge.[88] This is so even though the creation of a subsequent mortgage is prohibited by the terms of the floating charge, if the mortgagee takes without notice of the prohibition.[89] Notice of a floating charge is not notice of an assignment of a chose in action which will prevent a set-off of a debt accruing due after notice.[90] A specific assignment to a third party of book debts or of arrears of rent under leases covered by a floating charge will take precedence over the floating charge and the receiver for bondholders.

On the other hand a floating charge is entitled to priority over a subsequent floating charge, unless in effect it is provided by the earlier charge that it may be displaced by a subsequent charge. A general reservation by the company of the power to sell or mortgage its property would not be sufficient to enable it to give priority to a subsequent floating charge on the same assets as are covered by the earlier charge,[91] but a specific reservation of the power to create a prior charge upon certain classes of the assets would be effective to enable the company to give priority to a subsequent charge on the specified classes of assets.[92] A floating charge may extend to part only of a company's assets such as all the present and future book debts together with the securities for them,[93] the profits of certain schemes for developing land,[94] or the furniture and effects, present or future, located at certain specified premises.[95]

Until the floating charge becomes fixed, a company having power to do so can sell one of several businesses or the whole of its property and assets with the exception of certain securities, if the company's undertaking does not cease to be a going concern.[96]

It has been held that a contract for the creation of a floating charge to secure repayment of a loan is subject to such rights of redemption and such equities as are necessarily incident to a mortgage.[97]

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87 *Wheatley v. Silkstone and Haigh Moor Coal Co.* (1885), 29 Ch. D. 715; *cf., Trusts and Guarantee Co. Ltd. v. Abbott Mitchell Iron and Steel Co.* (1902), 11 O.L.R. 403 (H.C.J.); *Dominion Iron and Steel Co. v. Canadian Bank of Commerce*, [1928] 1 D.L.R. 809 (N.S.S.C.); *Governments Stock and Other Securities Investment Co. v. Manila Ry. Co., supra*, footnote 85; *Re Connolly Bros., Ltd. (No. 2)*, [1912] 2 Ch. 25 (C.A.). See also *Stave Falls Lumber Co. v. Westminster Trust Co.*, [1940] 4 D.L.R. 382 (B.C.C.A.).

88 *Re Hamilton's Windsor Ironworks, Ex p. Pitman & Edwards* (1879), 12 Ch. D. 707.

89 *Re Valletort Sanitary Steam Laundry Co., Ltd.; Ward v. Valletort*, [1903] 2 Ch. 654; *Union Bank of Halifax v. Indian and General Investment Trust* (1908), 40 S.C.R. 510, at pp. 520 *et seq.*; *cf., Re Connolly Bros., Ltd. (No. 2), supra*, footnote 87.

90 *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93 (C.A.). As to set-off against the assignee of a chose in action, see Chapter 11.

91 *Re Ind, Coope & Co., Ltd.*, [1911] 2 Ch. 223; *Re Benjamin Cope & Sons, Ltd.*, [1914] 1 Ch. 800.

92 *Re Automatic Bottle Makers*, [1926] Ch. 412 (C.A.).

93 *Re Yorkshire Woolcombers Ass'n, Ltd.; Houldsworth v. Yorkshire Woolcombers Ass'n Ltd.*, [1903] 2 Ch. 284, affd [1904] A.C. 355 *sub nom. Illingworth v. Houldsworth* (H.L.).

94 *Hoare v. British Columbia Development Ass'n* (1912), 107 L.T. 602.

95 *National Provincial Bank of England, Ltd. v. United Electric Theatres, Ltd.*, [1916] 1 Ch. 132.

96 *Re H. H. Vivian & Co. Ltd.*, [1900] 2 Ch. 654; *Re Borax Co.*, [1901] 1 Ch. 326 (C.A.); *cf., Hubbuck v. Helms* (1887), 56 L.J. Ch. 536.

97 In particular that the rule against clogging the equity of redemption applies. See *British South Africa Co. v. DeBeers Consolidated Mines Ltd.*, [1910] 2 Ch. 502 (C.A.), revd [1912] A.C. 52 (H.L.) (the point was left open in the appeal to the House of Lords). See also *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*, [1914] A.C. 25 (H.L.), discussed in §3:50.

When a charge upon all property or assets of a company has crystallized, it constitutes a charge upon all property or assets then belonging to the company and it has been held that the rights of holders of debentures conferring a floating charge are superior to those of an execution creditor before sale under the execution.[98] However, in the absence of crystallization, the rights of debenture holders may be defeated by an execution creditor.[99]

It was held in *Johnston v. Wade*[100] that a floating charge on the undertaking or property of a company, expressed in company debentures, was not, so far as it related to goods and chattels, a mortgage of goods and chattels within the Ontario *Bills of Sale and Chattel Mortgage Act* and therefore did not have to be registered under that statute in order to be valid as against the creditors of the company. The case was, however, distinguished in *National Trust Co. v. Trusts and Guarantee Co.*,[101] in which it was held that, if a mortgage of specific property is given by a company to secure payment of bonds or debentures, the mortgage, so far as it relates to goods and chattels, is within the statute. Subsequently, in *Gordon MacKay & Co. Ltd. v. Capital Trust Corp. Ltd.*,[102] a similar question was considered in connection with a "trust deed", by which a trading company, incorporated under the *Dominion Companies Act*, purported to "sell, assign, transfer, hypothecate, mortgage, pledge and set over and charge" to a trustee certain land, and all its movable assets for the time being, both present and future, in the province of Ontario, subject to the proviso that the "floating charge" thus created as to the movable assets should in no way hinder or prevent the company (until the security should become enforceable and the trustee should have demanded or become bound to enforce the same) either by dividends out of profits, leasing, mortgaging, pledging, selling, alienating or otherwise disposing of or dealing with the subject-matters of such "floating charge" in the ordinary course of its business and for the purpose of carrying on the same. The instrument was registered in the land registry office, and was filed with the Secretary of State as required by the *Dominion Companies Act*,[103] but was not registered under the Ontario *Bills of Sale and Chattel Mortgage Act*, and on this account was attacked on behalf of the company's creditors. The majority of the Supreme Court of Canada held, reversing the majority of the Appellate Division of the Supreme Court of Ontario, that the instrument was a mortgage within the Ontario statute and therefore, as regards goods and chattels, null and void as against creditors. In this case, it will be observed the floating charge was not, as it was in *Johnston v. Wade*, contained in the debentures themselves, but was contained in a separate covering instrument. The terms of that instrument nevertheless made it plain that it was intended, as regards the goods and chattels, to be merely a floating charge, notwithstanding the use of words of conveyance and charge which, if standing alone, would have been sufficient to create a specific mortgage or charge.

[98] *Re Opera, Ltd.*, [1891] 3 Ch. 260 (C.A.); *Taunton v. Sheriff of Warwickshire*, [1895] 2 Ch. 319 (C.A.). See also *Re Mohawk Sports Equipment Ltd. (No. 2)* (1972), 17 C.B.R. (N.S.) 115 (Ont. S.C. in Bkcy).

[99] *Robinson v. Burnell's Vienna Bakery Co. Ltd.*, [1904] 2 K.B. 624.

[100] (1908), 17 O.L.R. 372 (C.A.) (the judgments contain a review of the cases under the English Bills of Sale Acts).

[101] (1912), 5 D.L.R. 459 (Ont. H.C.J.).

[102] [1927] 2 D.L.R. 1150 (S.C.C.), revg [1926] 3 D.L.R. 864 *sub nom. MacKay v. Larocque* (Ont. C.A.).

[103] As to the necessity of registering a floating charge under the Companies Acts in England, see *National Trust Co. v. Trusts and Guarantee Co., supra*, footnote 101; *Illingworth v. Houldsworth*, [1904] A.C. 355 (H.L.); *Re North Wales Produce and Supply Society, Ltd.*, [1922] 2 Ch. 340.

The case might therefore have been regarded, as it was by the majority in the provincial court and the minority in the Supreme Court of Canada, as being substantially the same as *Johnston v. Wade*, and as being outside of the operation of the Ontario statute. The case was distinguished, and *Johnston v. Wade* was followed, in *Re Dominion Chocolate Co. Ltd.*[104] The Ontario *Bills of Sale and Chattel Mortgage Act* was amended by the addition of provisions[105] relating to the filing with the Provincial Secretary of Mortgages securing debentures and of debentures not secured by mortgage, but in 1932 these provisions were repealed,[106] and were superseded by the *Corporation Securities Registration Act, 1932*, S.O. 1932, c. 50,[107] which, as regards any mortgage, charge or assignment for the registration of which it provides, made inapplicable the *Bills of Sale and Chattel Mortgage Act*. The statute applied to both specific and floating charges, and provided for registration of a mortgage or charge of chattels, or an assignment of book debts, by filing a copy of the instrument containing the mortgage, charge or assignment with the approved governmental office together with affidavits in a prescribed form, or, if the mortgage, charge or assignment was contained in bonds, debentures or debenture stock, not secured by separate instrument, by filing an affidavit in a prescribed form. The *Corporation Securities Registration Act*, R.S.O. 1980, c. 94, was repealed and replaced by the *Personal Property Security Act, 1989*, S.O. 1989, c. 16 [now *Personal Property Security Act*, R.S.O. 1990, c. P.10], but a mortgage, charge or assignment registered under the *Corporation Securities Registration Act* before the *Personal Property Security Act, 1989* came into force has the same effect as if the *Corporation Securities Registration Act* had not been repealed and, except as provided in ss. 43, 44 and 78 of the *Personal Property Security Act*, the *Personal Property Security Act* does not apply to such mortgage, charge or assignment.

It was held in *J.R. Autobrokers Ltd. v. Hillcrest Auto Lease Ltd.*[108] that the interest of the secured party to a conditional sale contract had priority over the interest of the holders of debentures containing a floating charge and issued by the buyer prior in time to the execution of the conditional sale contract even though the floating charge had been declared crystallized and the conditional sale contract was never registered in accordance with the provisions of the *Conditional Sales Act*. While the floating charge did not operate or take effect from the date of its execution or upon the advancement of moneys as a specific mortgage so as to pass the legal estate in the chattels affected, the floating charge did operate from its creation as a general mortgage according to the wording of the document and the intention of the parties. Therefore, the court held that the interest of the debenture holders was not of a "subsequent mortgagee" under the *Conditional Sales Act*, and accordingly was not entitled to rank in priority to the interest of the vendor under the conditional sale contract. This was so because the debenture holders in taking their security did not rely upon the apparent ownership by the issuer of the debentures of the subject-matter of the conditional sale contract.

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[104] [1931] 2 D.L.R. 813 (Ont. H.C.J.) revg in part 12 C.B.R. 130 (Master).

[105] Re-enacted in *Bills of Sale and Chattel Mortgage Act*, R.S.O. 1927, c. 164, ss. 37 to 41.

[106] *Statute Law Amendment Act, 1932*, S.O. 1932, c. 53, s. 15.

[107] This statute was drawn by the Conference of Commissioners on Uniformity of Legislation in Canada in 1931, and was also adopted in some of the other provinces of Canada.

[108] [1968] 2 O.R. 532 (H.C.J.).

It has been held that the holder of a debenture containing a floating charge is entitled to sue for foreclosure,[109] but if there are other holders of debentures of the same issue who are not plaintiffs, they must be made defendants.[110] If a prior mortgagee commences an action for foreclosure, debenture holders are proper, if not necessary, parties and defendants, they having an immediate equitable charge, notwithstanding that the principal money secured by the floating charge is not yet due.[111] Each holder of a debenture may exercise the right to intervene whenever he or she pleases after default.[112]

[109] *Sadler v. Worley*, [1894] 2 Ch. 170; *cf.*, Chapter 24.
[110] *Re Continental Oxygen Co.; Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511; *cf.*, §25:20.
[111] *Wallace v. Evershed*, [1899] 1 Ch. 891.
[112] *Independent Order of Foresters v. Board of Trustees of Lethbridge Northern Irrigation District*, [1945] 1 D.L.R. 298 (Alta. C.A.).

Chapter 7

PRIORITIES IN EQUITY*

§7:10 The Question of Priorities

The question of how to rank the claims of two or more persons claiming interests in the same land, including the claims of successive mortgagees of the same land, is commonly known as the question of priorities. In this chapter, the rules about priorities will be discussed without regard to statutes providing for registration of instruments relating to land or statutes providing for registration of titles, and the effect of these statutes will be discussed in subsequent chapters.[1] In other words, this chapter provides the background to those chapters and explains what the law about priorities was and what it would be in the absence of land registry systems.

If the owner of land, that is, the holder of the legal estate, conveys the legal estate by way of mortgage, the owner makes a legal mortgage,[2] and, so long as that mortgage exists, neither the owner nor his or her successors in title can make a second legal mortgage of the same estate and any subsequent mortgage must be merely an equitable mortgage.[3] On the other hand, since an equitable mortgage does not involve the conveyance of the legal estate, any number of equitable mortgages of the same land may be made either before or after the making of the legal mortgage.[4] The question of priorities may, therefore, arise between a legal mortgage and an equitable mortgage or two or more equitable mortgages, or between an equitable mortgage and another equitable mortgage or other equitable mortgages. Adding the factor of the time of the creation of the competing mortgages yields only three possible combinations, namely: (i) two equitable mortgages; (ii) a first legal mortgage and a second equitable mortgage; and (iii) a first equitable mortgage and a second legal mortgage. There are three rules governing the priorities between two

* This chapter has been prepared with the assistance of Paul M. Perell whose contribution is hereby gratefully acknowledged.

1 See Chapters 8 and 9.

2 See §2:10.

3 See §5:10.

4 As to the effect of a second mortgage, see §14:10.

mortgages in these three combinations, and these rules are stated below. These rules apply to leasehold as well as freehold interests in land.[5]

§7:20 Priorities between Two Equitable Mortgages

> Rule 1. *As between two equitable mortgages the first in time has priority, unless the second mortgagee, taking in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee, or by a representation of the first mortgagee which estops him or her from claiming priority over the second mortgagee.*

The first rule is often, somewhat loosely, expressed by the maxim: "Where the equities are equal, the first in time prevails" — *Qui prior est tempore potior est jure.*[6] Equality in this connection means that there is no circumstance affecting the conduct of one of the rival claimants that makes his or her claim less meritorious than that of the other claimant.[7] If there is no other ground of preference, priority in time will prevail.[8] In *Phillips v. Phillips*,[9] Lord Westbury said:

> I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "Qui prior est tempore potior est jure. The first grantee is *potior* — that is, *potentior*. He has a better and superior — because a prior — equity.

The earlier claimant may, however, be postponed by negligence or, *a fortiori*, by fraud. In most of the old cases (which arose before the introduction of land registry systems), the negligence with which the prior mortgagee is charged is negligence relating to the title deeds.[10] In *MCAP Service Corp. v. Toronto-Dominion Bank*,[10a] the first equitable mortgagee should have easily protected its position by registering its mortgage security and the court held that this failure was sufficient to deny

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[5] *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231 (C.A.), at p. 255. The three rules were adopted by the Ontario Court of Appeal in *Elias Markets Ltd. (Re)* (2005), 77 O.R. (3d) 461, 14 C.B.R. (5th) 20 (S.C.J.), affd 274 D.L.R. (4th) 166, 216 O.A.C. 49 (C.A.).

[6] *Merchants' Bank of Canada v. Morrison* (1872), 19 Gr. 1.

[7] *Bailey v. Barnes*, [1894] 1 Ch. 25 at p. 36; *cf.*, *McDougall v. MacKay* (1922), 68 D.L.R. 245 (S.C.C.).

[8] *Phillips v. Phillips* (1862), 4 De G. F. & J. 208, 45 E.R. 1164; *Re Samuel Allen & Sons Ltd.*, [1907] 1 Ch. 575 (unpaid vendor of machinery affixed to the freehold entitled to priority over subsequent equitable mortgagee by deposit of deeds); *Re Morrison, Jones & Taylor Ltd.; Cookes v. Morrison*, [1914] 1 Ch. 50 (a similar case except that the subsequent claim was based on a floating charge); contrast *Hobson v. Gorringe*, [1897] 1 Ch. 182 (C.A.), in which the subsequent claim was based on a legal mortgage and was held entitled to priority in accordance with Rule 3, discussed in §7:40.

[9] *Supra*, at p. 215; *Cave v. Cave* (1880), 15 Ch. D. 639, at p. 646.

[10] *E.g.*, *Rice v. Rice* (1854), 2 Drew. 73, 61 E.R. 646 (unpaid vendor who had signed a receipt and given up possession of title deeds postponed to subsequent mortgagee by deposit of deeds); *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182 (negligence on part of first mortgagee in failing to get deeds); *Capell v. Winter*, [1907] 2 Ch. 376; *Farrow v. Rees* (1840), 4 Beav. 18, 49 E.R. 243; *Briggs v. Jones* (1870), L.R. 10 Eq. 92.

[10a] (2006), 15 B.L.R. (4th) 66, [2006] O.J. No. 580 (QL) (S.C.J.).

priority over a subsequent equitable mortgagee who also did not register. The court held that in the circumstance the rule that where the equities are equal, the first in time prevails did not apply. If the first equitable mortgagee makes no inquiry about the deeds or upon inquiry does not receive a reasonable explanation of their non-production,[11] with the result that a subsequent mortgagee is induced by the production of the deeds to advance money under the impression that no prior mortgage exists, the first mortgagee will be postponed to the second.[12] Similarly, an unpaid vendor who signs a receipt for the purchase money will be postponed to a subsequent mortgagee who advances money on the faith of the vendor's receipt.[13]

The general principle that as between two equitable claims the first in time is *prima facie* entitled to priority may be illustrated by the case of a mortgage made by a trustee in breach of trust. If the mortgage is equitable, it is subject to the earlier claim of the *cestui que trust*, unless there are special reasons for postponing the *cestui que trust*'s claim.[14]

§7:30 Priorities between First Legal and Second Equitable Mortgages

> Rule 2. *As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.*

Prima facie a first (legal) mortgagee has priority. However, the first mortgagee's conduct at the time of taking the mortgage may have the effect of postponing the claim, if the conduct makes possible the creation of a subsequent equitable claim and it is inequitable on the first mortgagee's part to assert his or her priority over the subsequent claimant.[15] Further, he or she may lose priority by subsequent fraud,[16] but not by subsequent conduct amounting merely to negligence.[17]

In some cases, the postponement of the earlier legal title is based on estoppel.[18] In other cases, in which it is more difficult to find any representation made or authorized by the holder of the legal title and acted upon to the prejudice of the subsequent claimant, it has been held that the owner's title is postponed because he or she has armed a third party with the power to make the representation or has transferred to the third party a legal estate or has given him or her the *indicia* of a

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[11] *Dixon v. Muckleston* (1872), L.R. 8 Ch. App. 155.
[12] *Clarke v. Palmer* (1882), 21 Ch. D. 124; *Re Castell & Brown, Ltd.*, [1898] 1 Ch. 315.
[13] *Lloyd's Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192, distinguished in *Capell v. Winter, supra*, footnote 10.
[14] *Shropshire Union Railways and Canal Co. v. The Queen* (1875), L.R. 7 H.L. 496; contrast *Cave v. Cave, supra*, footnote 9.
[15] *Walker v. Linom*, [1907] 2 Ch. 104, at pp. 112 *et seq.* (first mortgagee failing to inquire for the title deeds or failing to verify the truth of an excuse made for the mortgagor's not producing and handing over the title deeds); *Tyrell v. Mills*, [1924] 3 W.W.R. 387 (B.C. Co. Ct.).
[16] *Ibbotson v. Rhodes* (1706), 2 Vern. 554, 23 E.R. 958 (second mortgagee before making his advance is informed by the first mortgagee that the latter has no encumbrance on the property).
[17] *Northern Counties of England Fire Insurance Co. v. Whipp* (1884), 26 Ch. D. 482 (C.A.) (negligence in custody of title deeds); *cf., Grierson v. National Provincial Bank of England, Ltd.*, [1913] 2 Ch. 18.
[18] As in *Ibbotson v. Rhodes, supra*, footnote 16.

legal estate in excess of the interest which the third party was entitled in fact to have, and the subsequent claimant has dealt with the third party on the faith of his or her having the larger estate.[19] In the case of land, examples are to be found in the reports of the owner's title being for various reasons postponed to the claim of a subsequent purchaser or mortgagee.[20]

§7:40 Priorities between First Equitable and Second Legal Mortgages

Rule 3. *As between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice.*

This rule is often expressed by the maxim: "Where the equities are equal the law [that is, the legal title] prevails. Another way of expressing this rule is that the purchaser or mortgagee of the legal title in good faith for value and without notice takes free of prior equitable interests. The rationale for the rule is that if two claims are equally meritorious, then there is no ground for depriving the claimant who has the legal estate of the priority that the estate gives him or her.[21] If, however, the second mortgagee in taking his or her security is guilty of such negligence as to render it unjust to deprive the prior mortgagee of priority, the second mortgagee will be postponed, notwithstanding that he or she has the legal estate and has not been guilty of fraud or of negligence amounting to fraud.[22]

§7:50 The Equitable Doctrine of Notice

From the three preceding rules about priorities, a subsequent mortgagee, even if his or her mortgage is a legal mortgage, cannot gain priority over a person claiming under an earlier mortgage of which he or she has notice. The claims are not equal, that is, equally meritorious, nor can the second mortgagee fairly be said to take in good faith.[22a]

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[19] See *Abigail v. Lapin*, [1934] A.C. 491 (P.C.), at pp. 506-507.

[20] In *Brocklesby v. Temperance Permanent Building Society*, [1895] A.C. 173 (H.L.), it was held that if the owner gives possession of the title deeds to an agent with authority to raise money on them, the agent can make a valid pledge for an unauthorized amount to a lender who has no notice of the limitations of the authority; *cf.*, *Rimmer v. Webster*, [1902] 2 Ch. 163, discussed in *Burgis v. Constantine*, [1908] 2 K.B. 484 (C.A.); *Tsang Chuen v. Li Po Kwai*, [1932] A.C. 715 (P.C.); *Abigail v. Lapin*, *supra*.

[21] *Pilcher v. Rawlins* (1872), L.R. 7 Ch. App. 259; *Hobson v. Gorringe*, [1897] 1 Ch. 182 (C.A.). A trustee in breach of trust bought land and mortgaged it to several innocent persons in succession. The first mortgagee, having the legal estate, had priority over the claim of the *cestui que trust*, but the latter had priority over the subsequent mortgagees because their mortgages were merely equitable: *Cave v. Cave* (1880), 15 Ch. D. 639; *cf.*, *Coleman v. London County and Westminster Bank, Ltd.*, [1916] 2 Ch. 353, at pp. 359 and 360.

[22] *Oliver v. Hinton*, [1899] 2 Ch. 264 (C.A.) (purchaser of legal estate failing to require production of title deeds postponed to prior equitable mortgagee by deposit of title deeds); *cf.*, *Walker v. Linom*, *supra*, footnote 15, at p. 113; *Berwick & Co. v. Price*, [1905] 1 Ch. 632, at p. 640; *Hudston v. Viney*, [1921] 1 Ch. 98; *Tsang Chuen v. Li Po Kwai*, *supra*, footnote 20.

[22a] *Elias Markets Ltd. (Re)* (2005), 77 O.R. (3d) 461, 14 C.B.R. (5th) 20 (S.C.J.), affd 274 D.L.R. (4th) 166, 216 O.A.C. 49 (C.A.).

Notice may be actual or constructive. It is an elementary rule of equity that a purchaser or mortgagee takes subject to any earlier claim of which he or she has actual notice.[23] The words "actual notice" occur in the *Registry Act*, and their meaning will be discussed in connection with that statute.[24]

It having been decided in equity that a mortgagee takes subject to any earlier claim of which he or she has actual notice, another step was inevitable, otherwise the purchaser or mortgagee would take care not to learn of outstanding equities. Equitable claims are held to be good against a mortgagee who would have known of them if he or she had acted as a prudent mortgagee acts, that is, if he or she had made the usual search of title. The mortgagee is obliged not only to be honest but also to be diligent. This is the equitable doctrine of constructive notice.

Constructive notice means that the circumstances surrounding the taking of a mortgage are such as to induce the court to treat the mortgagee, who in fact has no actual notice of an earlier charge, as if in fact he or she had actual notice. The mortgagee with constructive notice cannot raise the plea of purchase for value without notice.[25] The circumstances that will affect a mortgagee with constructive notice are:[26] (i) knowledge of facts that would naturally suggest the existence of the earlier charge;[27] and (ii) failure to make the inquiries which ought reasonably to have been made, where, if he or she had made inquiries, the existence of an earlier charge would have been disclosed.[28]

§7:60 Purchaser for Value Without Notice

It follows from the three rules about priorities that for the second mortgagee to gain priority over the first mortgagee, it is not sufficient merely to prove that he or she is a purchaser in good faith for value and without notice. If a subsequent mortgagee is claiming priority over an earlier mortgage, he or she must, in order to make good the claim, be a purchaser for value without notice, and must either hold the legal estate, or prove that he or she has been misled by the misconduct of the first mortgagee or establish a case of estoppel against the first mortgagee. It would appear that a legal claim is measured by a different standard from that applied to an

[23] *Le Neve v. Le Neve* (1747), Amb. 436, 27 E.R. 291; *London and County Banking Co. v. Ratcliffe* (1881), 6 App. Cas. 722; *Morse v. Kizer* (1919), 46 D.L.R. 607 (S.C.C.), at p. 610; *Freeborn v. Goodman* (1969), 6 D.L.R. (3d) 384 (S.C.C.). A purchaser with actual notice of a prior claim completes the purchase at his or her peril: *Jared v. Clements*, [1903] 1 Ch. 428 (C.A.), an extreme case because the purchaser was convinced by the production of a forged receipt that the prior equitable mortgage had been paid off. Of course, a purchaser or mortgagee *prima facie* takes subject to an earlier legal claim whether he or she has notice of it or not.

[24] See Chapter 8.

[25] *Lawlor v. Day* (1899), 29 S.C.R. 441; *McIntosh v. The Ontario Bank* (1872), 19 Gr. 155; *Mortgage Corp. of Nova Scotia v. Muir*, [1937] 4 D.L.R. 231 (N.S.S.C.).

[26] See *Bishop v. Western Trust Co.* (1922), 70 D.L.R. 451 (Sask. K.B.), at p. 456; see Words and Phrases for the judicial definition of "Constructive Notice" from this case.

[27] *Oliver v. Hinton*, [1899] 2 Ch. 264 (C.A.), at p. 268 (knowledge of the fact that the deeds are not in the possession of the mortgagor, but in that of a third person); *Hunt v. Luck*, [1902] 1 Ch. 428 (C.A.) (knowledge that the rents are being paid to a third person).

[28] *Patman v. Harland* (1881), 17 Ch. D. 353 (constructive notice of a restrictive covenant contained in a deed forming part of the chain of title); *Imray v. Oakshette*, [1897] 2 Q.B. 218 (C.A.) (constructive notice of the contents of a deed, notwithstanding that by the contract the purchaser was precluded from requiring production of the title deeds).

equitable claim. *Prima facie* the former has priority over the latter, and while mere negligence will postpone one equitable claim in favour of another equitable claim, it is only in certain circumstances that mere negligence will postpone a legal claim.

In *Pilcher v. Rawlins*,[29] the position of a purchaser of the legal estate for value without notice was described by James L.J. as follows:

> I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

Some phases of the doctrine of purchaser for value without notice, with special reference to the acquisition of the legal estate, may be stated as follows:

1. A mortgagee,[30] who at the time of the advance acquires the legal estate in good faith for value and without notice of any earlier equitable claim, takes free from such claim, although the person who conveys the legal estate knowingly commits a fraud or breach of trust in conveying it and although the title is acquired through an instrument which discloses the earlier equitable claim, if such instrument is concealed from the mortgagee.[31]
2. If a mortgagee has no notice of an earlier equitable claim when he or she advances the money, and acquires the legal estate, such priority as he or she then has will not be affected by the subsequent receipt of notice, and the priority enures to the benefit of his or her transferee, even with notice.[32] The equitable principle is that a person who buys with notice from a person who bought without notice is entitled to shelter behind the first buyer. The equitable principle is subject to an exception if the transferee was a party to a fraud or illegality affecting the suppression of notice to the first buyer.[33]
3. A mortgagee in good faith for value and without notice who at the time of the purchase does not acquire the legal estate, and therefore *prima facie* takes subject to any earlier equitable claim, may gain priority by getting in the legal

[29] *Supra*, footnote 21, at pp. 268-9.

[30] For the sake of simplicity the propositions are stated with reference to a mortgagee alone, he or she being a purchaser *pro tanto*.

[31] *Pilcher v. Rawlins, supra*, footnote 21.

[32] *Lowther v. Carlton* (1741), 2 Atk. 242, 26 E.R. 549; *Sweet v. Southcote* (1786), 2 Bro. C.C. 66, 29 E.R. 38; *Wilkes v. Spooner*, [1911] 2 K.B. 473 (C.A.); *Ross v. Hunter* (1882), 7 S.C.R. 289, especially at p. 320; *McDonald v. McDonald* (1905), 38 N.S.R. 261 (S.C.); *Rogers v. Shortis* (1863), 10 Gr. 243 (U.C. Ch.); *Ferguson v. Winsor* (1885), 11 O.R. 88 (C.A.), revg 10 O.R. 13 (Ch.).

[33] If the transferee was a party to the suppression of notice of an earlier equitable claim, the transferee is not permitted to take advantage of the fraud: *Re Stapleford Colliery Co.* (1880), 14 Ch. D. 432, at p. 445.

estate even after receiving notice of the earlier claim, unless he or she has notice that the conveyance of the legal estate constitutes a breach of trust on the part of the grantor or that the earlier equitable claimant has the better right to call for the legal estate.[34]

4. A mortgagee in good faith for value and without notice who at the time of the advance does not acquire the legal estate but obtains the better right to call for it is entitled to priority over another equitable claim,[35] unless the other equitable claimant subsequently actually acquires the legal estate in good faith for value and without notice of the equitable priority conferred by the better right to call for the legal estate.[36]
5. If a mortgagee gets in the legal estate or obtains the best right to call for it in such circumstances that he or she acquires priority on one mortgage, he or she also acquires priority on any subsequent mortgage for any advances made without notice of intermediate encumbrancers.[37] Similarly, if a person advances money on what is in fact a third mortgage but which is taken without notice of the second mortgage, he or she may purchase the first mortgage and get in the legal estate and thereby become entitled to payment of the third mortgage as well as the first mortgage in priority to the second mortgage.[38] This latter doctrine is specifically designated as tacking.[39]

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[34] *Taylor v. Russell*, [1892] A.C. 244 (H.L.), affg [1891] 1 Ch. 8 (C.A.). In other words, a mortgagee cannot gain priority by subsequently getting in the legal estate if when the mortgagee acquires that estate he or she knows that there is a trust or equity in favour of the person against whom the legal estate is sought to be set up: *Taylor v. Russell, supra*, at p. 29; *Powell v. London and Provincial Bank*, [1893] 1 Ch. 610, at p. 616. It is not certain whether the limitation on the right to gain priority by subsequently getting in the legal estate applies where the grantor has notice of the breach of trust but the grantee has not: *Bailey v. Barnes*, [1894] 1 Ch. 25 (C.A.), at p. 37.

[35] This rule as to the better right to call for the legal estate is stated in *Wilkes v. Bodington* (1707), 2 Vern. 599, 23 E.R. 991; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231 (C.A.), at pp. 262-3. Many of the cases as to a "better right" acquired contemporaneously with the advance are collected in 2 *White & Tudor's Leading Cases in Equity*, 9th ed. (London: Sweet & Maxwell, 1928), pp. 126 *et seq.*, and it is suggested that an equitable mortgagee who made his or her advance without notice could rely on a "better right" *subsequently* acquired, provided that the conditions permitting him or her to rely on a legal estate actually acquired were fulfilled.

[36] As to the better right to the legal estate when a person pays off the first of two mortgages on the understanding that he or she is to get the legal estate, see *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866, and Chapter 21.

[37] *Lloyd v. Attwood* (1859), 3 De G. & J. 614, at p. 657, 44 E.R. 1405. The mortgagee is also entitled to priority for advances made on account of the first mortgage after the making of a later mortgage but without notice of it.

[38] *Marsh v. Lee* (1670), 2 Ventris, 337, 86 E.R. 473; *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 491, 24 E.R. 829, in which the law as to tacking is stated in a series of rules; *Blackwood v. London Chartered Bank of Australia* (1874), L.R. 5 P.C. 92, at p. 111.

[39] The doctrine of tacking and other rules stated in this chapter are here discussed without reference to the effect of the *Registry Act*, which is the subject of Chapter 8. The doctrine of tacking and that of consolidation are distinguished, and the effect upon them of the *Registry Act* is discussed, in Chapter 9. As to the *Land Titles Act*, see Chapter 8.

TAB 4

DATE: 20060919
DOCKET: C44161

COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., DOHERTY AND MACFARLAND JJ.A.

B E T W E E N :	)	
	)	
IN THE MATTER OF ELIAS MARKETS LTD., ELIAS GROUP LTD. AND ELIAS PROPERTIES LTD. CARRYING ON BUSINESS IN THE CITY OF WINDSOR, COUNTY OF ESSEX AND PROVINCE OF ONTARIO	)	**A. Duncan Grace for Bank of Montreal**
	)	**Milton A. Davis and Brett D. Moldaver for Royal Bank of Canada and Royal Trust Corporation of Canada**
- and -	)	**Fred Myers for RSM Richter Inc.**
IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, SECTION 47(1), AS AMENDED	)	
	)	**Heard: May 10, 2006**

On appeal from the order of Justice Helen A. Rady of the Superior Court of Justice dated August 19, 2005, reported at (2005), 77 O.R. (3d) 461.

MACFARLAND J.A.:

[1] The appellant, Bank of Montreal ("BMO") appeals from the order of Rady J. dated August 19, 2005. It asks this court to set aside that part of her order which entitles Royal Bank of Canada and Royal Trust Corporation of Canada (collectively "RBC") to the remedy of subrogation and to recover from the proceeds realized by the interim receiver, RSM Richter Inc. ("Interim Receiver") from the sale of the property municipally known as 655 and 755 Crawford Avenue, Windsor, Ontario. BMO seeks an order that RBC is not entitled to the remedy of subrogation or to recover any amount from the proceeds realized from the sale of the property and that BMO is entitled to recover under its security the proceeds.

[2] BMO also seeks to set aside that part of the order declaring that an assignment of rents to RBC is in priority to the security held by BMO. In its place, BMO seeks an order declaring the BMO security to be in priority to the RBC assignment of rents and directing the Interim Receiver to pay to BMO the rents collected in respect of the property.

[3] RBC cross-appeals and asks that this court set aside that portion of the order denying RBC an equitable mortgage on the subject lands. In its place, RBC seeks an order directing that RBC is entitled to the sale proceeds of the subject property in priority to any claim by BMO or any other creditor.

[4] By the terms of her order, the motion judge ordered that the Interim Receiver was authorized and directed to distribute on a final basis the proceeds of sale and rental of the property at 655/755 Crawford Avenue, Windsor, Ontario as follows:

(a) to Royal Bank of Canada, the net rental proceeds;

(b) to Royal Bank of Canada, the sum of $854,158.11 from the net sale proceeds;

(c) to Bank of Montreal, the balance of the net proceeds.

[5] BMO takes the position that because the mortgage held by RBC violated the provisions of the *Planning Act*, R.S.O. 1990, c. P.13 it is invalid as is the Assignment of Rents, which was taken at the same time and is, by its terms, “additional security” and therefore collateral to the mortgage. If BMO is correct, it would move into a first priority position ahead of RBC and be entitled to the entire net proceeds, both from the sale of the property and the rents collected.

THE FACTS

[6] The facts which give rise to this appeal are complex but must be set out in detail for a proper understanding of the issues.

[7] This proceeding arises out of the insolvency of Elias Markets Ltd. (“Markets”), Elias Properties Ltd. (“Properties”) and Elias Group Ltd. (“Group”) (collectively “the companies”). The companies carried on a retail grocery business in Windsor and surrounding area. Markets operated the grocery stores and Properties owned the real estate, including 655/755 Crawford Avenue. Group was a holding company and did not carry on any active business.

[8] The proceeding before Rady J. was an application by the Interim Receiver for directions as to the manner of distribution of the proceeds of the sale of the Crawford Avenue properties ($1,670,000) and rents collected therefrom.

[9] On January 6, 1996, one of the Elias companies, 1156712 Ontario Ltd. (hereinafter "1156712") and a predecessor to Properties, bought property at 655 Crawford Avenue, Windsor ("Parcel One").

[10] In so doing, 1156712 assumed: an existing mortgage in favour of Royal Trust with a principal balance of $657,700.18 outstanding on closing; and an existing mortgage in favour of Larcon Holdings Inc. ("Larcon") with a principal balance of $340,279.40 outstanding on closing.

[11] On June 10, 1997, another Elias Company, 882876 Ontario Ltd. ("882876"), also a predecessor to Properties, purchased four additional parcels of land adjacent to the north boundary of Parcel One. ("Parcels Two, Three, Four and Five").

[12] Markets operated a grocery store on Parcel One. In 1998, as part of a plan to develop the entire property, 1156712 and 882876 signed a site Plan Agreement with the City of Windsor. Parcels Four and Five were conveyed to the City. Parcels One, Two and Three remained in the hands of the numbered companies (Parcel One in 1156712 and Parcels Two and Three in 882876). The development proposed a new grocery store building at the south end of Parcel One. The existing building (where Markets was then operating a grocery store) at the north end of Parcel One was to be leased to a bingo hall operator. Parking was to be on Parcel One between the two buildings and on Parcels 2 and 3.

[13] On March 15, 1999, RBC issued a commitment letter agreeing to lend $2,300,000 to 1156712, secured by a first mortgage on Parcel One ("the mortgage commitment agreement" or "MCA"). The MCA required that the existing first mortgage against Parcel One in favour of RBC be discharged from the loan proceeds. As the terms of the MCA required that the security for the loan be a first mortgage on the subject property, any other encumbrances which would otherwise rank in priority to this new mortgage would necessarily have to be discharged.

[14] At this point in time, 1156712 did not own any abutting parcels of land; it owned only Parcel One.

[15] On March 26, 1999, Joseph Elias, on behalf of 1156712, signed the MCA and accepted its terms.

[16] Six days later, by Articles of Amalgamation dated April 1, 1999, 1156712 and 882876 and a third Elias company amalgamated to form Properties (“Properties”). The articles of amalgamation were registered only against title to Parcel One.

[17] At this time, Joseph Elias asked RBC to draw on the $2,300,000 of available financing in order to start the construction on Parcel One. As security for the construction financing, Properties granted to RBC a $1,400,000 construction mortgage, registered against Parcel One on May 26,1999.

[18] On November 26, 1999, the $2,300,000 mortgage was registered in favour of RBC against Parcel One. $1,400,000 of this money went to discharge the construction mortgage. Another $854,184.11 was paid to satisfy prior encumbrances, which included:

1. Royal Bank of Canada mortgage payout – $574,172.55

2. National Bank of Canada Mortgage payment – $161,000.00

3. City of Windsor taxes – $36,685.20

4. Larcon Holdings Inc. mortgage payout – $82,326.36

[19] At the time of the registrations, as a result of the amalgamation, Properties was now the owner of Parcels One, Two and Three. The RBC mortgages – registered May 26, 1999 and November 26, 1999 – were registered only against Parcel One, and thus were void under s. 50(3) of the *Planning Act.* RBC and Properties were unaware at the time that the mortgages were void. All parties to the mortgages had been represented throughout these transactions by the same solicitor, Jeffrey Slopen.

[20] On June 26, 2001, BMO granted Markets a revolving line of credit. As security, Properties gave a guarantee and executed a General Security Agreement (GSA) in favour of BMO. By spring of 2002, the companies were in financial difficulty.

[21] On May 6, 2002, almost one year later, BMO registered a Notice of Agreement Charging Lands against Parcel’s One and Six. On August 18, 2002, it registered a caution against Parcels One and Three. The registrations coincided with BMO’s realization that RBC’s mortgage was defective, a fact still unknown to RBC. On August 23, 2002, the Interim Receiver was appointed. It was only after the appointment of the Interim Receiver that questions were raised about the validity of the RBC mortgage.

[22] BMO admits it was aware of the mortgage financing in place before it granted the line of credit and obtained the GSA. It was also aware there were prior registrations in favour of RBC. BMO admits it granted the demand loan facility to Markets on the assumption the $2,300,000 RBC mortgage was validly registered and would have priority over its security interest.

THE RECTIFICATION APPLICATION

[23] On learning of the breach of the *Planning Act*, Jeffrey Slopen's law firm brought an application to rectify the mortgages, so that they would charge Parcels Two and Three in addition to Parcel One. RBC, BMO, Properties and the Interim Receiver were named as respondents to that application, which proceeded before Abbey J.

[24] In that application, both Slopen and the principal of the mortgagor filed evidence to the effect that it was their common intention to mortgage all three parcels of land.

[25] Abbey J. dismissed the application and, as a result, RBC's mortgage against Parcel One remained void under the *Planning Act*. In his reasons, Abbey J. noted that in March 1999, at the time RBC agreed to advance the $2,300,000, there was no *Planning Act* violation. The pre-amalgamation corporation, 1156712, owned only Parcel One and did not own abutting land at the time. The amalgamation that ultimately affected the validity of the mortgage was effected after the MCA was entered into but before the $2,300,000 RBC mortgage was registered. But for the amalgamation and the effect that triggered under the *Planning Act*, the registered mortgage would be valid.

ISSUES

[26] The appeal and the cross-appeal raise the following issues:

> 1. Did the motion judge err in failing to find that the principles of *res judicata* and abuse of process precluded RBC from asserting a priority claim to the net sale proceeds of the subject property?
>
> 2. If *res judicata* and abuse of process do not apply, should RBC be granted the equitable remedy of either equitable mortgage or subrogation?
>
> 3. Does the RBC Assignment of Rents have priority over BMO's security in respect of the net rents collected by the Interim Receiver from the subject property?

[27] For the reasons that follow, I am of the opinion that the motion judge did not err when she concluded that neither the principles of *res judicata* nor abuse of process precluded RBC from asserting its priority claim on the basis of equitable mortgage or subrogation; that RBC does not have a valid $2,300,000 equitable mortgage on Parcel One, but is entitled to priority over BMO to the extent of $854,184.11 on the basis of subrogation; and that the RBC Assignment of Rents has priority over BMO's security.

I. *RES JUDICATA* AND ABUSE OF PROCESS

[28] BMO argues that, on the motion before Rady J., RBC was in substance seeking the same remedy as was sought in the rectification application – priority over the net sale proceeds of the Crawford Avenue property – on the basis of different legal theories. On the basis of the doctrines of *res judicata* and abuse of process, BMO submits that those legal theories ought to have been advanced as part of the rectification application.

[29] The motion judge, in her careful reasons, concluded:

> [28] The unsuccessful application for rectification of the mortgage brought by Mr. Slopen's law firm was in the nature of a "salvage" action to rectify the mortgage to reflect what was argued to be the parties' intention. If rectification had been granted, RBC would have enjoyed a priority position and presumably the solicitor's malpractice suit would be avoided. There was no need to raise any argument with respect to equitable principles or the doctrine of subrogation.
>
> [29] The present proceeding is brought by the Interim Receiver, seeking the Court's direction on the issue of priorities, the RBC mortgage having been found to be illegal. Essentially the court is being asked to deal with the consequences of the illegal mortgage. No legal or factual issues are being relitigated and this is not an attempt to impeach, in any way, the findings made by Abbey J.

[30] I agree. In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 at 329, Laskin J.A. writing on behalf of this court noted:

> *Res judicata* itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding.

[31] In this appeal, BMO relies on cause of action estoppel.

[32] BMO submits that the evidence in support of the equitable mortgage and subrogation remedies sought before Rady J. was before the court on the rectification application. Having sought to advance RBC's claim to priority in the rectification application solely on the basis of rectification, BMO submits that RBC cannot now in this proceeding advance a claim to priority on the basis of different legal theories. Those legal

theories were properly part of and ought to have been advanced in the rectification application.

[33] The rectification application was concerned with the mortgage itself, where it was argued that it was always the intention of the parties – both RBC and Properties – that the mortgage was intended to apply to Parcels One, Two and Three. That application was brought by the solicitors who acted for both parties to the mortgage. Had the application been successful, the mortgage would no longer be in breach of the *Planning Act* and an action against the solicitors would have been avoided. When the application failed, the adversity of interest between the solicitors and RBC crystallized. An action against the solicitors in negligence and breach of contract has been instituted and remains outstanding.

[34] Had RBC sought to have the issue of priorities as between it and BMO adjudicated in the proceedings before Abbey J., it would have been obliged to bring a separate application – an application to which the solicitors would not be a party and to obtain an order to have its application heard immediately following the rectification application. The issue of priorities was, in my view, irrelevant to the issue raised in the rectification proceeding. Only when the application for rectification was dismissed did it become necessary to determine the competing priority claims.

[35] The proceeding before Rady J. was brought by the Interim Receiver and sought the direction of the court as to whom the monies it had collected from the sale of the property and the collection of rents should be paid. This was a very different issue than the one determined by Abbey J.

[36] While some of the evidence before Abbey J. was necessarily led before Rady J. to provide context and background, the evidence that specifically related to the priorities issue was new. Clearly relevant to the priorities claim was evidence about what BMO knew about prior encumbrances, specifically the RBC mortgage, when it made its decision to loan money and take a GSA as security. Such was not evidence before Abbey J., nor could it be.

[37] In *McQuillan v. Native Inter-Tribal Housing Co-Operative Inc.* (1998), 42 O.R. (3d) 46, Charron J.A. writing for this court, wrote at p. 50:

> The respondent does not contend that the cause of action is the same in both applications. Indeed, it is not. The respondent relies rather on a wider principle, often treated as covered by the plea of *res judicata*. The doctrine of *res judicata*, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in the earlier

proceedings but failed to do so. This principle was adopted by the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346 at pp. 358-9 … (citing the often-quoted words of Wigram V.C. in *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100 (Eng. V.C.)):

> … where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[38] In *McQuillan*, the appellant was seeking a prescriptive easement over a two-foot strip of land on the respondent's property. In earlier proceedings, the appellant had sought a declaration of possessory title to the same two-foot strip of land based on much the same evidence. In the circumstances, the court had no difficulty concluding that the second application was precluded by the doctrine of *res judicata*. The court noted, at p. 51:

> Upon careful review of the material filed in support of each application in this case, I am persuaded that the respondent's position should be adopted. Although, in a strict legal sense, a different cause of action is advanced on this application, the appellant is in effect seeking an analogous remedy based on virtually identical facts. In each application, the appellant asserted a right to continue to use the two-foot strip of land on the respondent's property as part of her

> driveway. It does not appear that it would make any practical difference to the appellant whether this right was asserted by way of possessory title or by way of prescriptive easement. On the facts as presented on the earlier application, it would have been open to advance not only the claim for possessory title but also, in the alternative, the claim to a prescriptive easement. In my view, the appellant's second application falls clearly within the scope of the doctrine of *res judicata* in its wider application.

[39] In my view, that is not this case. Very different relief was sought and different evidence heard in each of the two proceedings.

[40] Clearly, the Interim Receiver had to have the priorities issue resolved before it could disburse funds, and the rectification application did not and could not deal with that issue. The doctrine of *res judicata* simply does not arise nor is there any abuse of process by bringing the second application.

II. a) SUBROGATION

[41] BMO argues that when it acquired its security interest (some two years after the RBC mortgage had been granted) in the Crawford property, there were no other valid encumbrances affecting the Crawford property. It says that the RBC mortgage, although registered, was void and of no effect and as a result, BMO acquired a first priority position in the Crawford property. As a purchaser for value, the only equities enforceable against BMO are those of which it had notice at the time it acquired its interest in the Crawford Property. And BMO submits that it had no notice of RBC's equity of subrogation.

[42] The fallacy in BMO's argument is that at the time it advanced funds and obtained the GSA which secured those funds, it was aware of the RBC $2,300,000 mortgage, believed that that mortgage had priority over its GSA and was not aware that there was any problem with the RBC mortgage. It advanced funds believing that its GSA ranked behind the RBC $2,300,000 mortgage. It was only after the companies fell into financial difficulty and the receiver appointed that a question was raised (by the Interim Receiver and not BMO) about the validity of RBC's security in view of the apparent breach of the provisions of the *Planning Act*. Only after it became aware of the Elias financial difficulties. Thus, BMO was not in the position of a *bona fide* purchaser for value without notice as it did not give value for taking first place. It got what it paid for, and that did not include ranking as first mortgagee on the property.

[43] In *Mutual Trust Company v. Creditview Estate Homes Limited* (1997), 34 O.R. (3d) 583, this court considered the equitable remedy of subrogation. The facts in that case are as follows. The subject property was a family home purchased by IS and BS as joint tenants in December, 1988. As part of the purchase, IS and BS granted a first mortgage to Scotia Mortgage for $220,000. On April 23, 1990, IS and BS gave a further mortgage to the Bank of Nova Scotia in the sum of $15,000.

[44] In June 1991, RS, the son of IS and BS, was a commercial tenant of Creditview. On June 7, 1991, Creditview commenced an action against RS claiming damages for breach of lease. IS was also named a defendant in that action as the indemnifier of RS with respect to his obligations under the lease. IS transferred his interest in the home property to BS on March 12, 1991.

[45] On February 28, 1992, Creditview commenced an action against IS and BS for a declaration that the transfer from IS to BS was a fraudulent conveyance and void as against Creditview.

[46] On March 2, 1992, Creditview obtained a certificate of pending litigation (CPL) and registered it against the title to the home property.

[47] On September 3, 1992, Mutual Trust agreed to provide $230,000 to refinance the home property to be secured by a first charge. A solicitor retained by Mutual Trust to act on its behalf did not report the existence of the CPL to Mutual Trust.

[48] The Mutual Trust refinancing charge was registered September 16th, 1992, which secured the principal sum of $229,500. Discharges of the Scotia Mortgage and Bank charges were also registered. No request was made to Creditview to subordinate its CPL to the Mutual Trust charge.

[49] A total of $228,863.37 was advanced under the Mutual Trust charge. Of that sum, $227,967.14 was paid to Scotia Mortgage and the Bank for discharges of their charges.

[50] Following its discovery of the CPL on title, Mutual Trust brought an application for an order declaring that the CPL was subordinate to the Mutual Trust charge. The application succeeded on the ground that the Mutual Trust charge was subrogated to the Scotia Mortgage and the Bank charges that it replaced and, accordingly, it ranked ahead of the CPL. This court noted, at pp. 586-587:

> In granting Mutual Trust's application, Adams J. held that the doctrine of subrogation applied, that it was not proscribed by the *Registry Act*, R.S.O. 1990, c. R.20, that the fundamental principle underlying the doctrine was one of fairness in light of all the circumstances, that it applied to

> certificates of pending litigation, that the negligence of the party claiming subrogation was not determinative of the issue, that subrogation is not precluded by the fact that the lands in question are in the land titles system, and the fact that IS was only a guarantor of Mutual Trust's charge presented no obstacle to granting the declaration sought. I agree entirely with his reasoning and his conclusions of these points [citation omitted].

[51] The court went on to quote with approval the following reasoning of Adams J:

> The fundamental principle underlying the equitable doctrine of subrogation is one of fairness in light of all the circumstances. Within this principle is an understanding that no injustice is done by the appropriate subrogation of a party to the rights of original mortgages. Thus Street J. in *Brown v. McLean* (1889), 18 O.R. 533 (H.C.) at p. 536, stated:
>
> > I think, however, that the plaintiff here is entitled upon the ground of mistake to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he paid to discharge their mortgages. It is clear beyond question that he would not have discharged these mortgages had he been aware of the existence of the Defendant's *fi fa.* He would either have refused to make the advance altogether, or he would have had the mortgages assigned to him instead of discharging them.
> >
> > It is equally clear that the defendant has not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position.
>
> ….
>
> This is because the equity of subrogation affixes to the land in relation to which the third party advanced the mortgage funds. Further, it is not determinative that the entire situation arises because of the negligence of the party claiming

> subrogation. … In fact, the doctrine is usually called into play because of a mistake or inadvertence. Accordingly, it is not enough to point to negligent conduct to defeat the doctrine's application. The issue remains one of fairness between the affected parties having regard to all the circumstances.

[52] The motion judge in this case concluded that RBC was entitled to rely on the doctrine of subrogation to recover monies advanced to pay municipal taxes and to discharge prior mortgages on Parcel One, all of which totalled $854,184.11. She concluded there was ample authority for the proposition that a mortgagee who pays off earlier encumbrances is entitled to the priority position of those earlier charges. She quoted from *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866, as follows:

> [W]here a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in a default of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee.

[53] The motion judge reasoned:

> [47] … In my view, it would be simply unfair in the circumstances of this case to deny RBC its subrogation rights. BMO did not rely on the abstract of title to its detriment. Indeed, BMO was aware of the prior advances made by RBC and it assumed that RBC's security was validly registered. This is made evident by the candid testimony of James Graham, a representative of BMO, during the course of his cross-examination. The transcript reveals the following questions and answers.
>
> 58Q. And you were aware of the mortgage financing that had been put in place before Bank of Montreal got involved?
>
> A. That's right, yes.
>
> 125Q. And so Bank of Montreal knew that there were prior registrations including registrations in favour of Royal Bank, right?
>
> A. That's right.

127Q. Now can we agree, Mr. Graham, that when the Bank of Montreal first lent its money to or granted demand loan facility to Elias it assumed that Royal Trust mortgage of 2.3 million dollars was validly registered?

A. Yes, that's right.

[48] As a result, BMO made its lending decision knowing of RBCs prior registered interest. Presumably, it was content to rank behind the RBC mortgage of $2.3 million. That was a business decision that it was entitled to make after weighing the relative risks and benefits.

[49] BMO may suffer a loss but it seems to me that this was a risk undertaken by BMO in making the loan in question. Its loss is not, strictly speaking, caused by RBC's right of subrogation, but rather by reason of the deficiency in the value of the security and the underlying covenant. Moreover, to deny subrogation would give BMO an unanticipated windfall. BMO would be unjustly enriched ... In other words, BMO would receive the value of RBC's advances totalling $854,184 which increased the equity in the property and it would be unjustly enriched as a result. This windfall is made more unfair because BMO only discovered that there might be a defect in RBC's security in the spring of 2002, more than a year after its registrations under the PPSA. It was at that time that BMO took steps to register its GSA against Parcels 1 and 3. BMO also registered its Notices of Agreement Charging Land and Caution in May, August and October 2002, all after it became aware of the potential defect in the RBC mortgage.

[50] I pause here to note that RBC is entitled to subrogation not only for the mortgages that it retired but also for the City taxes it paid on behalf of the mortgagor. Authority for this is found in *Traders Realty Ltd. v. Huron Heights Shopping Plaza Ltd.*, [1967] 64 D.L.R. (2d) 278 (H.C.J.) and the rationale is consistent with the reasoning expressed in the *Creditview* trilogy reviewed above.

> [51] Before leaving the subject, I should deal with BMO's submissions on the issue. It asserts that the doctrine does not appear to have been applied to give a claimant priority over a creditor whose claim did not exist at the time of the payment or advance in question. I can see no reason, in principle, why subrogation should not apply in such a case, particularly where the subsequent creditor has not been misled or has not relied on an abstract of title to its detriment.
>
> [52] BMO asserts that subrogation cannot arise because the RBC mortgage was void. I disagree. Subrogation does not depend on the validity of the underlying registration but arises by virtue of the advance of funds to pay out prior encumbrances.

[54] I agree with her reasoning. On the facts, there is no question that BMO assumed that RBC's security had priority to the extent of $2,300,000 over its GSA. It made its loan to the companies on that basis and, at the time, had no basis to question the validity of the RBC mortgage. It advanced its funds on the assumption that the RBC mortgage was valid and had priority over the GSA.

[55] In such circumstances, there can be no unfairness to BMO if the doctrine of subrogation is invoked to give priority to RBC over BMO to the extent of the earlier mortgages and municipal taxes paid out from the funds advanced by RBC.

b) EQUITABLE MORTGAGE

[56] On cross-appeal, RBC argues that it has a valid equitable mortgage for $2,300,000 on Parcel One, which was created on March 26, 1999 when 1156712 accepted the terms of the RBC MCA dated March 15, 1999. When that equitable mortgage was created, title to Parcel One was in the name of 1156712, which owned no abutting land. Thus, RBC submits, there was no violation of the *Planning Act*.

[57] The motion judge rejected this argument. In reaching this conclusion, the motion judge relied on the decision of this court in *Tessis v. Scherer* (1982), 32 O.R. (2d) 149, leave to appeal to S.C.C. refused, [1982] 2 S.C.R. xi. In that case, a mortgagee sought to enforce a mortgage that had been made in violation of the *Planning Act*; the mortgagor owned abutting parcels of land at the time of the mortgage. This court concluded that the mortgage conveyed no interest as a result of this breach. It does not appear that an

argument was made about whether the loan agreement between the parties created an equitable mortgage.

[58] That issue was raised specifically in the related matter before Sutherland J. in *Scherer v. Price Waterhouse*, [1985] O.J. No. 881 (H.C.J.). In his decision, Sutherland J. carefully reviewed the law on equitable mortgages and concluded that an equitable mortgage had not arisen on the facts of that case. At para. 22, he wrote:

> The highest interest in the land that can have been conferred on Tessis by the loan agreement is the right to an equitable mortgage after the required planning consent had been obtained. In no true sense of the term can Tessis be said to have had an equitable mortgage before that consent was obtained. This is not a case of a want of formalities in the mortgage document or a case of the refusal by the borrower to execute a mortgage. Although there undoubtedly was a mistake the usual equitable remedies are not available if to purport to make them available would be to contravene the statute. No equitable mortgage arises upon the entry into the loan agreement. To put the matter another way, in the absence of the required consent the loan agreement does not create an equitable mortgage any more than a legal mortgage document, correct in all its documentary formalities, creates a legal mortgage. At the material times, Tessis was not an equitable mortgagee.

[59] Because the loan agreement was entered into at a time when the mortgagor owned abutting parcels of land and consent had not been obtained under the *Planning Act,* there was no equitable mortgage because to recognize one would have been in contravention of the statute.

[60] In the instant case, after reviewing the law on equitable mortgages, the motion judge concluded:

> This is not a case involving a want of formalities, an inadvertent omission or misdescription or a refusal on the part of the mortgagor to provide a mortgage. In fact, a mortgage was duly prepared, executed and registered as the parties had agreed. The wrinkle was that no planning consent was obtained and the mortgage was void as a result. I agree … that an equitable mortgage cannot arise upon acceptance of the commitment letter unless a consent is obtained because to hold otherwise would permit a contravention of the statute.

> [40] Moreover, if an equitable mortgage confers the same rights as a legal mortgage, it follows that the mortgagee could foreclose or sell the property. This would result in a change in ownership, the very thing the *Planning Act* seeks to prevent or at least, regulate. As a result, I am not persuaded that the commitment letter gave rise to an equitable mortgage in the circumstances of this case.

[61] I agree with the motion judge that there was no enforceable equitable mortgage on Parcel One. However, I reach this conclusion for different reasons.

[62] As noted by the motion judge, "[t]he legal concept of an equitable mortgage has existed for hundreds of years." Despite this long history, there is a dearth of recent jurisprudence in Ontario on this concept. As such, some comment is in order on the nature of an equitable mortgage, the manner by which an equitable mortgage is created, and the priorities of enforcement.

1) The nature of an equitable mortgage

[63] An equitable mortgage is distinct from a legal mortgage. "An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property": A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger: Law of Real Property*, 2d ed. (Aurora, Ont.: Canada Law Book) at 1643.

[64] The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that "equity looks on that as done which ought to be done". Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law.

[65] In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

2) How is an equitable mortgage created?

[66] In *Scherer v. Price Waterhouse*, Sutherland J. discussed the manner in which an equitable mortgage is created, at para. 20:

In one part of his submissions the applicant claimed to be an equitable mortgagee, citing, among other things, the following passage from *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p. 16:

> Equitable mortgages of the property of legal owners … are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.

In *Falconbridge, Law of Mortgages*, 4th ed., at p. 80, the following statement is made about equitable mortgages:

> An equitable mortgage therefore is a contract which creates in equity a charge on property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
>
> 5.2 How an Equitable Mortgage is Created
>
> The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it [ever] so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by deposit of title deeds.

> It is clear that neither (1) nor (3) above have any application to the facts of this matter and that we need be concerned only with (2) above. In the same publication there appears, at p. 83, under the heading "Mortgage by Instrument not Sufficient to Convey the Legal Estate", the following passage:
>
> > (1) Conveyance defective in form
> >
> > If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate, it is an equitable mortgage.
> >
> > An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.
> >
> > (2) Agreement to give a Mortgage
> >
> > An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

[67] In this case, we are concerned with a mortgage by an instrument that is insufficient to convey the legal estate – the MCA.

3) <u>Priorities</u>

[68] Given that this cross-appeal essentially involves a contest of priority between RBC and BMO to the funds realized upon the sale of the Crawford Avenue property, it is necessary to briefly consider the priorities of enforcement as they relate to equitable mortgages.

[69] In this regard, I adopt the following equitable "rules" as summarized in *Falconbridge on Mortgages*, 5th ed., looseleaf (Agincourt, Ont.: Canada Law Book, 2003) at paras. 7:20 – 7:40:

> Rule 1. *As between two equitable mortgages the first in time has priority, unless the second mortgagee, taking in good*

> *faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee, or by a representation of the first mortgagee which estops him or her from claiming priority over the second mortgage.*
>
> Rule 2. *As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.*
>
> Rule 3. *As between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice* [emphasis added].

4) Does the commitment letter give rise to an enforceable equitable mortgage?

[70] In order for the MCA to give rise to an enforceable equitable mortgage in this case, it must have arisen prior to April 1, 1999 – the date of amalgamation.

[71] With respect, I disagree with the motion judge that a *Planning Act* consent was required before the MCA could give rise to an equitable mortgage. In reaching this conclusion, the motion judge appears to have been wrongly influenced by the conclusion of Sutherland J. in *Scherer v. Price Waterhouse*.

[72] Importantly, in *Scherer*, the loan agreement contravened the *Planning Act* because the mortgagor owned an interest in an abutting parcel of land at the time the loan agreement was signed and accepted. Here, however, 1156712 did not have any interest in any abutting land at the time the MCA was signed and accepted on March 26, 1999. It only acquired an interest in abutting land on April 1, 1999 as a result of amalgamation. Consequently, if an enforceable equitable mortgage is found to have arisen prior to amalgamation, there would be no violation of the *Planning Act*; no consent was required at that time. Unlike *Scherer*, this would not be a case in which provisions of the *Planning Act* were not complied with.

[73] With that in mind, I turn to the consideration of whether an enforceable equitable mortgage actually arose prior to the date of amalgamation.

[74] RBC signed the MCA on March 15, 1999. It was accepted and signed back to RBC on March 26, 1999. Under the heading “SECURITY”, the mortgagor and mortgagee agreed as follows:

> The security for this loan, registered or recorded as required by [RBC], shall be:
>
> - A first charge/mortgage on the freehold property owned by [1156712] and known as 655 Crawford Avenue, in the City of Windsor, being Conc 1, Part 1, Ref Plan 12RI0596 (the “Property”).
>
> - A first ranking security interest in an assignment of rentals payable by all tenants of the Property, present and future.
>
> A first and specific registered assignment of the current leases to those tenants as outlined on Form J attached.
>
> Further, [1156712] will provide [RBC], on request, with a first and specific assignment of such other present and future leases of the Property which [RBC] may designate in writing from time to time.

[75] The MCA was subject to the following conditions precedent:

> Prior to an advance of funds hereunder, at [1156712’s] expense, [1156712 is] to provide [RBC] with:
>
> - Completion Certificate indicating the new building is completed and that the renovations are completed on the existing building.
>
> - A Remediation Report from Agra Earth & Environmental indicating that the environmental concerns outlined in the Agra Report of December 13, 1995 have been remediated in accordance with MOE guidelines.

[76] Thus, before it can be considered a binding contract, the two conditions must have been either satisfied or waived. And the finding of an enforceable equitable mortgage on Parcel One is dependent on satisfaction or waiver prior to April 1, 1999.

[77] On the record before this court, there is no evidence of compliance with or waiver of the two conditions prior to the date of amalgamation. As a result, RBC does not have a valid and enforceable equitable mortgage on Parcel One.

[78] I conclude with the following observations. Had the conditions precedent been satisfied or waived prior to April 1, 1999, I would have concluded that the MCA gave rise to a valid equitable mortgage for $2,300,000 on Parcel One. But for the conditions, the MCA evidenced a common intention to secure property, which was supported by the valuable consideration of the exchange of promises between RBC and 1156712 regarding the security of that property and the future advance of $2,300,000.

[79] In that context, the equitable mortgage would not have been in violation of the *Planning Act*, because it would have arisen prior to amalgamation. As already discussed, this is a key factual difference between this case and *Scherer v. Price Waterhouse*.

[80] In addition, the equitable mortgage would have been enforceable in priority to BMO's GSA. This is because, as already discussed, BMO acquired its legal charge with notice of RBC's mortgage financing. In this context, it makes no difference that BMO was not aware of the equitable mortgage, given its knowledge of the registered, albeit invalid, mortgage. As a result, and in accordance with the third rule of priorities already described, the equitable mortgage would rank in priority to BMO's subsequent legal interest.

[81] If that were the case, RBC would be entitled to that portion of the $1,670,000 realized upon the sale of 655/755 Crawford Avenue that can be attributed to Parcel One. This would not, as the motion judge feared, "result in a change in ownership [to Parcel One], the very thing the *Planning Act* seeks to prevent or at least, regulate."

III. NET RENTAL PROCEEDS

[82] In addition to the money it collected from the sale of the property, the Interim Receiver also collected money in rental proceeds from Parcel One.

[83] As noted by the motion judge, RBC was granted an Assignment of Rents by Properties, which was registered under both the *PPSA* and the *Land Titles Act.* RBC registered two Financing Change Statements under the *PPSA*. The first was dated April 7, 1998 and referred to an assignment of rents in respect of Parcel One. The second, dated August 31, 2000, referred to a general and specific assignment of rents.

[84] RBC conceded before the motion judge that the registration of the Assignment of Rents under the *Land Titles Act* was also void because of the *Planning Act* breach. It

argued, however, that the registration under the *PPSA* remained valid and binding and took priority over any subsequent *PPSA* registrations, including those of BMO.

[85] I agree with the motion judge's conclusion that the *PPSA* registrations are not inextricably bound to the Assignment of Rents. They are capable of existing independently, such that their valid registrations take priority over BMO's GSA registered under the *PPSA* in 2001. The *PPSA* registrations and the Assignment of Rents evidence an interest in an income stream and, as a result, are not dependent on the validity of the underlying registration against title to the lands. RBC is entitled to the net rental proceeds.

DISPOSITION

[86] In the result, the appeal is dismissed and the cross-appeal is dismissed. Counsel agree that the successful party on the appeal should have costs fixed in the sum of $10,000 and, on the cross-appeal, in the sum of $5000.

[87] Accordingly, RBC is entitled to costs of the appeal fixed in the sum of $10,000 and BMO is entitled to costs of the cross-appeal fixed in the sum of $5000. Both figures are inclusive of disbursements and G.S.T.

RELEASED: September 19, 2006 "DOC"

"J. MacFarland J.A."
"I agree D. O'Connor A.C.J.O."
"I agree Doherty J.A."

TAB 5

2015 ONSC 4287, 2015 CarswellOnt 21027

2015 ONSC 4287
Ontario Superior Court of Justice

Trang v. Nguyen

2015 CarswellOnt 21027, 2015 ONSC 4287

Rosaline Trang (Plaintiff) and Ha T. Nguyen and Quoc Dung Tran (Defendants) and Canada Revenue Agency (Defendants)

Patrick Smith J.

Heard: June 2, 2015
Judgment: July 2, 2015
Docket: Ottawa CV-09-45078

Proceedings: additional reasons at *Trang v. Nguyen* (2015), 2015 CarswellOnt 17473, 2015 ONSC 7030, Patrick Smith J. (Ont. S.C.J.)

Counsel: Michael Hebert, for Plaintiff
Tamara Sugunasiri, Stephanie Lauriault, Andrew Kinoshita, for Defendant, Her Majesty the Queen in right of Canada (Canada Revenue Agency)

Subject: Civil Practice and Procedure; Corporate and Commercial; Property
Related Abridgment Classifications
Real property
VII Mortgages
VII.2 Nature and form of mortgage
VII.2.g Equitable mortgage
VII.2.g.i What constituting
Headnote
Real property --- Mortgages — Nature and form of mortgage — Equitable mortgage — What constituting
Plaintiff entered into agreement to purchase property from defendant brother and his wife — Brother's tax debt led to CRA registering charges against his properties, including two purchased after transaction with plaintiff — Plaintiff brought action against defendants — Plaintiff brought motions for partial summary judgment granting her equitable mortgage against properties ahead of CRA's charges in priority — Motions dismissed — Agreement between parties was not proof of plaintiff's equitable mortgage as it did not establish that parties contemplated creation of debt — Clause stating that brother's line of credit would not form part of consideration of transfer but would remain registered on plaintiff's title showed intent that debt would remain owing from brother to bank, even if that was not legal effect of property transfer — There was serious issue as to plaintiff's credibility about source of funds for used by brother for first purchase, with her unsupported claim to have advanced personal funds contradicted by detailed CRA evidence suggesting that funds came from brother's business — Nothing in agreement suggested that parties intended to charge first property as security for debt as it, at best, suggested that brother would at some time in future sell property and use proceeds to pay off line of credit secured on property transferred to plaintiff — Allegation that defendants used proceeds from sale of their property to plaintiff to purchase second property could not alone, without written agreement showing mutual agreement to charge property as security for debt, support granting plaintiff's claim — There was genuine issue for trial as to whether plaintiff or brother was source of funds to purchase property — There were numerous contested facts and issues of credibility that could only be fairly assessed with viva voce evidence.
Table of Authorities
Cases considered by *Patrick Smith J.*:

Anderson v. Cardinal Health Canada Inc. (2013), 2013 ONSC 5226, 2013 CarswellOnt 11366 (Ont. S.C.J.) — referred to
Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered
Luscombe v. Luscombe (1990), 80 Nfld. & P.E.I.R. 325, 249 A.P.R. 325, 1990 CarswellNfld 261 (Nfld. T.D.) — considered

Statutes considered:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 223 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — considered

R. 20.04 — referred to

R. 20.04(2.1) [en. O. Reg. 438/08] — referred to

R. 20.04(2.2) [en. O. Reg. 438/08] — referred to

MOTIONS by plaintiff for partial summary judgment granting her equitable mortgages against defendant brother's two properties.

***Patrick Smith J.*:**

JUSTICE PATRICK SMITH

1 The Plaintiff, Rosaline Trang brings this motion seeking, inter alia:

• an order for partial summary judgment and partial default judgment against the Defendants granting the Plaintiff an equitable mortgage in the amount of $250,000.00 against the property owned jointly by the Defendants, Ha T. Nguyen and Quoc Dung Tran, described municipally as 46 Epson Avenue, in the City of Ottawa and 58 Granton avenue, in the City of Ottawa in priority to the lien registered on title by the Defendant, Canada Revenue Agency, on the same terms and conditions as the $250,000.00 line of credit on the Plaintiff's home located at 738 Parkdale Avenue;

• an order that the Plaintiff's equitable mortgage be registered on title to 46 Epworth Avenue in the City of Ottawa and 58 Granton Avenue in the city of Ottawa;

• in the alternative, an order for partial summary judgment and partial default judgment against the Defendants granting the Plaintiff an equitable interest in the proceeds of sale of 46 Epworth Avenue and 58 Granton Avenue, in the City of Ottawa in priority to the liens registered on title by the Defendant, Canada Revenue Agency.

Factual Overview

2 The Plaintiff is the sister of the Defendant, Quoc Dung Tran ("Alex"). The Defendant, Ha T. Nguyen ("Carolyn") is Alex's spouse.

3 In December of 2003, the Plaintiff, together with her nephew, Philip Tran, purchased 738 Parkdale Avenue in the City of Ottawa from Alex and Carolyn for the sum of $438,000.

4 Philip Tran transferred his interest in the property to the Plaintiff on May 23, 2006.

5 On December 2, 2003 Alex and Carolyn used the proceeds of the sale of 738 Parkdale Avenge to purchase 58 Granton Avenue in the city of Ottawa for the sum of $430,000.00.

6 On July 29, 2003, Alex and Carolyn purchased 46 Epworth Avenue in the City of Ottawa for the sum of $267,000.00. The Plaintiff submits that to fund the purchase, Carolyn and Alex borrowed $250,000.00 against a line of credit advance by the Canadian Imperial Bank of Commerce and secured by a mortgage registered against title to 738 Parkdale Avenue.

7 At the time that 738 Parkdale Avenue was purchased, the Plaintiff states that she agreed to allow the mortgage securing the line of credit to remain registered on title. The line of credit had been fully advanced by Carolyn and Alex to fund the purchase of 46 Epworth Avenue.

8 Further, the Plaintiff submits that the monies advanced by her to purchase 738 Parkdale Avenue were used by Alex and Carolyn to purchase 58 Granton Avenue rather than discharge the line of credit registered against 738 Parkdale Avenue.

9 A written agreement was entered into stipulating that the line of credit would remain registered against 738 Parkdale Avenue and be discharged from the proceeds of the sale of 46 Epworth Avenue.

10 The agreement provided:

> 1. The sum of $438,000.00 was transferred by Philip Tran and Rosaline Trang to Dr. Dung Tran to Dr. Dung Q. Tran and Ha T. Nguyen prior to the registration of the deed/transfer of land for 738 Parkdale Avenue, Ottawa;
>
> 2. The parties have agreed that the personal line of credit between Dr. Dung Q. Tran and the CIBC and registered on 738 Parkdale Avenue shall not form part of the consideration of the transfer but shall remain registered on title;
>
> 3. The parties agree that upon the sale of 46 Epworth Avenue, Dr. Quoc Dung Tran and Ha T. Nguyen shall discharge the CIBC personal line of credit registered on Parkdale Avenue; and
>
> 4. The parties agree that prior to the sale of 46 Epworth Avenue and the discharge of the CIBC line of credit Dr. Quoc Dung Tran and Ha T. Nguyen are responsible for making the ongoing payments on the line of credit.

11 The Plaintiff maintains that although it was intended that she be granted security by the registration of mortgages on title to 46 Epworth Avenue and 58 Granton Avenue to secure Alex and Carolyn's obligations under the agreement, no mortgages were ever registered.

12 On April 12, 2005 Alex's income tax liability was reassessed by Canada Revenue Agency ("CRA") and, as a result of the reassessment a claim for lien in the amount of $180,840.87 was registered against his properties including 58 Granton Avenue and 46 Epworth Avenue.

13 CRA later determined that Alex owed an additional tax liability and, on May 11, 2007 registered a second claim of lien in the amount of $1,184,242.25 against Alex's properties including 58 Granton Avenue and 46 Epworth Avenue.

14 On March 14, 2005, CRA obtained a Writ of Seizure and Sale against Tran from the Federal Court in Court File No. GST-1463-05. On March 11, 2011, the Federal Court ordered that the Writ of Seizure and Sale against Tran be extended for a further period of six years.

15 On May 11, 2007, the CRA registered the certificates with the Ontario Land Titles Registry Office, creating a charge on Tran's properties, including:

> (a) 58 Granton Avenue, Ottawa, ON
>
> Instrument No. OC717473 registered May 11, 2007 for $ 1,184,242.25

Instrument No. OC450984 registered April 12, 2005 for $ 180,840.87

Instrument No. OC717473 registered May 11, 2007 for $ 1,184,242.25

Instrument No. OC450984 registered April 12, 2005 for $ 180,840.87

Instrument No. OC717473 registered May 11, 2007 for $ 1,184,242.25

Instrument No. OC450984 registered April 12, 205 for $180,840.87

(b) 46 Epworth Avenue, Ottawa, ON

(c) 1340 Wellington Street West, Ottawa, ON — owned by TRAN

16 When CRA's charges were registered against the properties on May 11, 2007, there were no other instruments registered in priority to CRA's charges.

17 On February 26, 2009, Tran pleaded guilty to tax evasion charges for the undeclared income and GST. As a result of his guilty plea and conviction, he was required to pay a $250,000 fine.

18 On May 21, 2009, CRA received notice of the Plaintiff's claim for an equitable mortgage.

19 On June 15, 2010 the CRA filed the Writ with the Sheriff in the City of Ottawa and instructed the Sheriff to seize and sell Tran's equity of redemption in 1340 Wellington Street West.

20 On July 15, 2010, the Plaintiff issued a Statement of Claim against Tran in a separate action under Court File No. CV-10-48973.

21 On August 18, 2010, the Plaintiff obtained a default judgment against Tran in Court File No. CV-10-48973.

22 On September 28, 2010, Nguyen obtained a Certificate of Pending Litigation from the Family Court Branch regarding her Family Law claim and registered it against 1340 Wellington Street West.

23 The Certificates of Pending Litigation on title effectively prevent CRA from selling any of the properties.

Summary of the Issues

24 CRA acknowledges that prior equitable mortgages take priority over liens registered subsequently pursuant to section 223 of the *Income Tax Act*.

25 The central issue before this court is whether the Plaintiff has met the legal test to establish an equitable mortgage.

26 In the alternative, if the Plaintiff does not have an equitable mortgage the issue is whether she has an equitable interest in the proceeds of sale of the subject properties and, if so, whether her equitable interest is payable in priority to the CRA's claims for lien.

Rule 20 - Summary Judgment

27 Rule 20 of the Rules of Civil Procedure provides that summary judgment shall be granted where the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or a defence. [*Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended, Rule 20.04]

28 The onus is on a Plaintiff to establish that there is no triable issue with respect to its claims or any defence raised with respect to those claims. [*Anderson v. Cardinal Health Canada Inc.*, 2013 ONSC 5226 (Ont. S.C.J.)]

29 In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) [*Hryniak*], the Supreme Court of Canada discussed summary judgment under Rule 20. Writing for the unanimous court, Justice Karakatsanis called for balance and recognition "that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial" (at para 27).

30 According to the Court, achieving balance in the justice system,

requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. (at para 28)

31 In keeping with these principles, the test for when summary judgment should be granted is:

> *There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.* (at para 49).

32 At para 66, Justice Karakatsanis set out a roadmap for motion judges in summary judgment proceedings:

> *On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) a.nd (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.*

33 The overarching issue to be answered is "whether summary judgment will provide a fair and just adjudication" (ibid, at para 50). Justice Karakatsanis added that "the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (ibid).

34 The new fact-finding powers under Rule 20.04(2.1) — which allow motion judges to weigh evidence, evaluate credibility and draw inferences — are presumptively available; judges are allowed to exercise them unless it is in the interests of justice that they only be exercised at trial (ibid, at para. 45). Whether it is against the interest of justice to use these new powers will generally coincide with whether there is a genuine issue requiring trial (ibid, at para. 59).

35 It is also necessary however, to consider the context of the litigation as a whole — in cases of partial summary judgment, exercise of these powers may be inappropriate if there is a risk of duplicative proceedings or inconsistent findings of fact (ibid, at para. 60). By contrast, the ability to resolve significant issues may justify the use of these powers (ibid, at para. 60).

36 Under Rule 20.04(2.2), trial judges are permitted to hear oral evidence. The Supreme Court held that "in tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by" the principles of "proportionality, timeliness and affordability," and keep in mind "that the process is not a full trial on the merits, but is designed to determine if there is a genuine issue requiring trial" (ibid, at para 65).

What is Required to Establish an Equitable Mortgage?

37 The Plaintiff argues that the Agreement is the source of her equitable mortgage on 46 Epworth Avenue and that an equitable mortgage can be created in cases where a mortgagor has not executed an instrument sufficient to transfer legal estate in the subject property.

38 Falconbridge On Mortgages (5th ed) summarizes the attributes of an equitable mortgage as follows:

> *An agreement in writing duly signed, however informal, by which any property is made a security for a debt or a present advance, creates an equitable charge upon the property.*

39 In *Luscombe v. Luscombe* [1990 CarswellNfld 261 (Nfld. T.D.)], Wells J. of the Newfoundland Supreme Court referred to the following passage from Anger and Honsberger, Law of Real Property:

> *An essential feature of an equitable mortgage is a common intention that the property be made security for a debt due or for future advances. If that intention is lacking, no equitable mortgage can be created.*

46Epworth Avenue

40 As noted above, on a summary judgment motion a judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the court without using the expanded fact finding powers of Rule 20.

41 The essential position of the Plaintiff is that the Agreement is proof of her equitable mortgage for 46 Epworth Avenue.

42 In my view, the Agreement is deficient in that it fails to establish two essential requirements of an equitable mortgage: the existence of a debt and a charge securing the debt.

43 The Agreement does not provide satisfactory evidence that the parties contemplated the creation of a debt. I agree with the argument of the Defendant that "paragraph 2 of the Agreement states that Tran's CIBC line of credit "shall not form part of the consideration of the transfer [of Parkdale] but shall remained (sic) registered on title". The parties therefore intended that the debt would remain owing from Tran to CIBC, even if that was not the legal effect of the property transfer." [Defendant's Factum, para. 58]

44 The evidence submitted by the Plaintiff to support the requirement that she advanced her own money is contained in her affidavit which states that it came from her savings and from an inheritance. The Plaintiff does not provide any corroborating documentary evidence to prove her assertion. The circumstances surrounding the drafting, translation and signing of the affidavit do not provide me with sufficient confidence to give it much weight.

45 The evidence of the source of the funds provided by CRA, on the other hand, is detailed and thorough and concludes that the funds very likely came from cash deposits from Tran's acupuncture business. If this is the case, it was Tran and not the Plaintiff that purchased Parkdale and provided funds for Granton. This is a serious issue of credibility and one which requires a trial with viva voce evidence.

46 Further, nothing in the Agreement suggests that the parties intended to charge the Epworth property as security for the debt.

47 At best, the Agreement constitutes that Tran would at some time in the future sell Epworth and use the proceeds of sale to pay his line of credit with CIBC.

58 Granton Avenue

48 The basis for the Plaintiff's claim that she has an equitable mortgage over 58 Granton Avenue is not based on the Agreement but on the fact that Tran and Nguyen used proceeds from the sale of the Parkdale property to purchase Granton Avenue.

49 This fact alone without proof of a written agreement, signed by the parties and evidencing a mutual intention to charge a property as security for a debt is not sufficient evidence to grant the Plaintiff's claim.

50 As mentioned above, there is a genuine issue for trial. The evidence provided by CRA is significant and tends to show that Tran and not the Plaintiff was the source of the funds to purchase Granton Avenue. A trial will allow the court to hear and assess the evidence of the parties and is critical in deciding the issue of credibility.

Does the Plaintiff have an Equitable Interest in the Proceeds of Sale of the Epworth and Granton Properties?

51 With respect to 46 Epworth Avenue, in addition to the comments set out above regarding the evidence provided by the Applicant, the Agreement upon which the Plaintiff relies to support her claim that she has an equitable interest in the proceeds of sale may only prove that she has a contract upon which she can sue along with the usual contractual remedies.

52 With respect to the Granton Avenue property, the basis of the Plaintiff's claim of an equitable interest rests upon the fact that Tran used funds from the sale of Parkdale to purchase Granton. This fact is hotly contested and comes down to a matter of credibility which a court will only be able to resolve by conducting a trial.

Conclusion

53 Based upon the evidence before me I find that there is a genuine issue requiring a trial.

54 There are numerous contested facts and issues of credibility that can only be fairly assessed by a judge hearing viva voce evidence.

55 Further, I do not believe that this is a case where use of the expanded fact finding powers provided for in Rule 20 are of assistance in that they will not serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Disposition

56 For the reasons set out above, the Plaintiff's motion is dismissed.

57 In the event that the parties are unable to resolve the issue of costs, they may file written submissions within 45 days of the release of my decision.

Motions dismissed.

End of Document

TAB 6

1985 CarswellOnt 3839
Ontario Supreme Court, High Court of Justice

Scherer v. Price Waterhouse Ltd.

1985 CarswellOnt 3839, [1985] O.J. No. 881, 32 A.C.W.S. (2d) 259

BETWEEN: BERNARD SCHERER Applicant - and PRICE WATERHOUSE LIMITED Trustee - and NATHAN TESSIS A Creditor

Sutherland J

Judgment: August 16, 1985
Docket: None given.

Counsel: B.H Kellock Q. C. and Linda D. Robinson for the Applicant
R.J. Morris for the Trustee
Igor Ellyn for Nathan Tessis

Subject: Civil Practice and Procedure; Property; Estates and Trusts

***SUTHERLAND J.*:**

1 This is an application under the *Bankruptcy Act*, R.S.C. 1970, c.B-3, for an order declaring that Nathan Tessis is a secured creditor of the bankrupt, Agil Holdings Limited (hereinafter sometimes referred to as "Agil"), or in the alternative is the beneficiary of certain monies held in trust by Price Waterhouse Limited, the trustee of the bankruptcy estate of Agil. (Price Waterhouse Limited is hereinafter sometimes referred to as the "trustee"). The application, which also seeks appropriate directions, is brought on behalf of Bernard Scherer, who acted as solicitor for Nathan. Tessis with respect to a purported realty mortgage loan made by the latter to Agil.

2 Bernard Scherer (hereinafter sometimes referred to as "Scherer" and sometimes as "the applicant") was recognized by me as having standing to bring this application under the provisions of s.19 of the *Bankruptcy Act*, which section states as follows:

> 19. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

3 In 1977 Scherer acted for Nathan Tessis when the latter loaned $635,000 to Agil pursuant to a loan agreement (the "loan agreement") dated September 28, 1977, which called for Agil to collaterally secure the loan by a realty mortgage of premises known municipally as 1305-1309 Dundas Street West in Toronto, and which provided for the guarantee of the mortgage by Manuel Rodrigues, the president and principal shareholder of Agil. A mortgage document, containing such a guarantee, was executed and delivered and was registered against the title to the property on October 17, 1977, as Instrument CT259616 for the Registry Division of Toronto (No.63). The mortgage went into default and Scherer was instructed to commnce proceedings to enforce it.

4 It became apparent that, contrary to the statement made by Manuel Rodrigues in an affidavit attached to the mortgage to the effect that Agil did not own any abutting lands, Agil did in fact own abutting lands. Other counsel commenced to act for Tessis in seeking to enforce the mortgage. An action for possession and for judgment on the covenant to pay in the mortgage came on before Parker A.C.J.H.C., resulting in a judgment on the covenant, on consent, for $1,051,722.11, and in the dismissal of the claim for possession. In his oral reasons for judgment, delivered

on September 15, 1981, Parker A.C.J.H.C., after noting the existence of the abutting lands and the absence of a consent under the *Planning Act* (now R.S.O. 1980, c.379) to the mortgage in favour of Tessis, stated that "no legal interest in the lands passed to the mortgagee". The subsections of the *Planning Act* there referred to were s-ss. (4) and (7) of s.29, R.S.O. 1970, c.349, as amended, (now s-ss.29(5) and 29(18) of the *Planning Act*, R.S.O. 1980, c.379). The mortgage itself was found to contravene s.-s 29(4) (now s.-s.29(5) of the *Planning Act*, which provides that no person shall convey, mortgage or charge any part of any block of land if he retains the fee or equity of redemption in any abutting land unless a consent to the conveyance, mortgage or charge has been given by the committee of adjustment or other body or person authorized to give such consent. Subsection 29(7) (now s-s.29(18)) states as follows:

> An agreement, conveyance or mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

5 Subsequent to the trial Scerer was added as a party defendant to enable him to appeal the decision. On November 19, 1981, i.e. before the appeal came on for hearing, Agil made an assignment in bankruptcy, and the guarantor also became bankrupt. The trustee of the bankrupt estate of Agil was added as a party defendant and was represented by counsel on the appeal.

6 The following succinct statement of the background facts is taken from the judgment of MacKinnon A.C.J.O. for the Court of Appeal, reported at (1982) 39 O.R. (2d) 149, commencing at p.150:

> There is no dispute on the facts and a recital of the history of events will be helpful. On February 1, 1973, Agil Holdings Ltd. became the registered owner of a commercial property known municipally as 1305-1309 Dundas Street West in Toronto. The registration was pursuant to the provisions of the *Registry Act*, R.S.O. 1970, c.409 [now R.S.O. 1980, c.445].
>
> On March 5th of the same year Agil became the owner of the commercial property immediately adjacent or abutting to the west of 1305-1309, known municipally as 1315-1317 Dundas Street West. The registration of these lands was pursuant to the provisions of the *Land Titles Act*, R.S.O. 1970, 234 [now R.S.O. 1980, c:230]. From this time to the date of trial Agil was the registered owner of both properties save for a brief period in 1975 which is of no moment to the issues in this appeal.
>
> On October 17, 1977, Agil granted a first mortgage over 1305-1309 Dundas Street West to the plaintiff Tessis. The mortgage was guaranteed by Rodrigues, the mortgage being collateral to a promissory note between Agil and Rodrigues on the one hand and Tessis on the other.
>
> The search of title made by the appellant Scherer did not include a search of the adjoining lands registered in the land titles registry. Rodrigues as President of Agil, had sworn an affidavit to the mortgage in issue, stating as follows:
>
> > I am the President and Director of Agil Holdings Limited; the mortgagor and this crporation does not own any adjoining or abutting lands to that being mortgaged herein.
>
> This statement was, of course, false.
>
> The appellant's position is that he searched the title to the land being mortgaged but relied on Rodrigues' affidavit we have just quoted, and had no knowledge of Agil's interest in the abutting lands nor was he advised of any such interest by the solicitor acting for Agil and Rodrigues.
>
> It appears from the title that earlier mortgages or charges (four in all) had been granted by Agil on each of its respective properties which mortgages did not cover the adjoining lands owned by it.

The mortgage to Tessis went into default and on May 9, 1979, Tessis commenced the action for payment and for possession of the mortgaged premises.

On August 29, 1979, the committee of adjustment for the City of Toronto granted the application of Agil for a consent to permit the separate conveyance or mortgaging of 1305-1309 Dundas Street West and 1315-1317 Dundas Street West on condition that prior to the consent being issued the applicant was to file with the committee a letter from the commissioner of public works certifying that all requirements with respect to municipal services have been satisfied. Agil was unable to deliver the required letter from the commissioner of public works as it was involved in the present litigation and had not proceeded with the construction referred to in its application documents.

Agil made a further application and by decision dated July 2, 1980, the committee of adjustment granted a consent to allow 1315-1317 Dundas Street West to be mortgaged separately from 1305-1309 Dundas Street West. Finally, on July 3, 1980, Tessis gave notice of his intention to exercise his power of sale under the mortgage unless the principal, interest and costs payable under it, as calculated, were paid by August 11, 1980.

The learned trial judge held that because of the failure to secure the required consent under the *Plannig Act* no legal interest in the lands passed to the mortgagee. Accordingly, while giving judgment, on consent, on the promissory note, he refused to grant an order of possession of the mortgaged lands to Tessis.

7 The Court of Appeal upheld the refusal of Parker A.C.J.H.C. to make an order for possession under the mortgage, and rejected the alternative argument that, even if the mortgage did not convey any interest in land, the provisions of the mortgage purporting to give the mortgagee a power of sale should be regarded as intact and as entitling the mortgagee to cause the sale of the property after the appropriate *Planning Act* consents to such sale had been obtained. MacKinnon A.C.J.O. held that the Act was breached when the mortgage was given without the required *Planning Act* consent and, in effect, that it was not open to the mortgagee to go to the committee of adjustment after the event to seek a consent that, if granted, would permit a sale that would result in the lands being acquired by a third party.

8 In his oral reasons Parker A.C.J.H.C. stated that under the purported mortgage "no *legal* interest in the lands passed to the mortgagee". (Emphasis added)

9 Before this application was made the Trustee had sold to a single buyer both the lands purported to have been mortgaged to Tessis and the abutting lands, for an aggregate price of $740,000, of which $560,000 was attributed to the lands purported to have been mortgaged to Tessis. Also before this application, Tessis filed a proof of claim in the Agil bankruptcy, as an unsecured creditor. It should also be noted that before the application came on Tessis had commenced an action against Scherer and against the solicitor for Agil, claiming damages against Scherer for breach of contract and for negligence in the performance of his duties as solicitor for Tessis, and damages in tort against the solicitors for Agil.

10 In the statement of fact and law submitted on behalf of Scherer this appliation was stated to raise two issues, therein described as follows:

(a) Whether Tessis is a secured creditor of Agil. It is the position of the Applicant that Tessis is the holder of an equitable mortgage or lien upon the mortgaged lands giving rise to a secured interest in the proceeds of sale of the mortgaged property now held by the Trustee.

(b) Whether Tessis is the beneficiary of a trust. It is the position of the Applicant that in the circumstances Agil, and now the Trustee in its place, holds the funds advanced by Tessis to Agil upon a constructive trust for Tessis.

11 As argued, the application involves difficult questions with respect to *res judicata* or, more properly, issue estoppel, predicated upon the difference between an action and a cause of action. The applicant contends that the action commenced by Tessis was for judgment on the covenant to pay set forth in the mortgage document, and for possession under the mortgage, and that the resulting judgment and the decision on the appeal therefrom were similarly confined

and did not deal with the equitable claims now put forward based not on the mortgage but on the loan agreement. According to the applicant the claims put forward on this application constitute a different cause of action and so, even though the parties or their privies are the same as on appeal, there is no *res judicata* in the sense of cause of action estoppel, and there is no issue estoppel, because the issues on this application that are fundamental to it are different from any issues decided in the mortgage action that were fundamental to the decision in that action.

12 For the respondent it is submitted that it has been decided *in rem* and as between these parties that the mortgage passes or creates no interest in land, and it is further submitted that under the extended meaning given to *res judicata* in the landmark decision in *Henderson v. Henderson*, 3 Hare 100at p.103 where it was stated by Wigam V.C. that:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the same time ....

Scherer is estopped from raising the question of whether the debt of Agil to Tessis is secured upon any basis. It was also submitted by the respondent that the loan agreement was before the Court on the appeal, where Scherer was a party, and that arguments based upon the loan agreement therefore could and should have been made at that time, and that the applicant therefore cannot raise such arguments in these proceedings. Counsel for Tessis supports these contentions of the respondent. The latter argument raises the difficult question of the extent to which the extended meaning of *res judicata*, clearly applicable to cases cause of action estoppel, is or ought to be applicable to issue estoppel. Although there are strong policy reasons favouring an end to litigation, it was noted by Morden J.A. in *Hennig v. Northern Heights (Sault) Ltd. et al.* (1980), 30 O.R. (2d) 346, at p.355, that *Cross on Evidence*, 5th Ed. (1979), questions Lord Denning's suggestion (in *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4) that the extended form of *res judicata* (as in *Henderson*, *supra*,) may apply to issue estoppel. Thus, at p.333 of the last-mentioned work, the following statement appears:

> The second kind of estoppel by record *inter parties* is often called "issue stoppel". may be regarded as an extension of the first for, to quote Lord DENNING, M.R.: "within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been rased and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again." Although Lord DENNING went on to use words suggesting that the principle mentioned by WIGRAM, V.C., in connection with cause of action estoppel might apply to issue estoppel, it may be better to regard the latter as restricted to issues actually determined in the former litigation for there may be many reasons why a litigant did not raise a particular issue, and it would be unjust to prevent him from raising it in later proceedings.

With respect to the last sentence in the above quotation, there is a footnote reference to the reasons for judgment of Lords Reid and Upjohn in *Carl Zeiss Stiftung v. Rayne and Keeler, Ltd.*, [1966] 2 All E.R.

13 Although I shall have to return to issue estoppel and I recognize that a finding in that regard in favour of the respondent would make my remarks about the merits of certain claims *obiter*, I find it more convenient to continue by dealing upon their merits with the arguments of the applicant with respect to the first question, i.e. whether Tessis is a secured creditor in the bankruptcy.

Mortgage

14 As stated, Parker A.C.J.H.C. held that no legal interest in the lands passed to the mortgagee. Lest there be any suggestion that the mortgage itself may have passed an equitable, if not a legal, interest in the lands, I note that on the appeal MacKinnon A.C.J.O. states in *Tessis v. Scherer et al.*, *supra*, that:

> The *Planning Act* is clear that if the Act is breached *no* interest in the land is transferred by the mortgage.

[Emphasis added]

The above quoted s-s.29(7) (now s-s.29(18) of the *Planning Act*) states that a mortgage made in contravention of that Act "does not create or convey *any* interest in land". (Emphasis added). In my opinion it is quite clear that by virtue of that subsectionthe mortgage does not create any legal or equitable interest in the land.

Loan Agreement

15 There is dispute as to whether the loan agreement comes within the requirements of s-s.29(7) (now s-s.29(18)) as:

> ... an agreement entered into subject to the express condition contained therein, that such agreement is to be effective only if the provisions of this section are complied with.

It was provided in the loan agreement that it was a condition to the obligation of Tessis to make the loan thereunder:

> 6. That all municipal and provincial by-laws, acts, statutes and regulations have been complied with and without limiting the generality of the foregoing this shall include building, zoning, health, fire, air pollution, plumbing and development;
>
> [Emphasis added]

16 The applicant argues that that provision amounts to an "express condition" as referred to in s-s.19(7) of the *Planning Act*. The respondent, not surprisingly, argues that it is not such an express condition. It was held in *Re Davmark Developments and Tripp* (1974), 5 O.R. (2d) 17, 49 D.L.R. (3d) 331, that to qualify as an "express condition", the wording in the agreement need not be identical to that contained in the *Planning Act* but must be such as to be satisfied only if there has been full compliance with s.29 of that Act. In *Small v. Van der Wee* r (1977), 17 O.R. (2d) 480, 80 D.L.R. (3d) 704, a condition that "vendor will comply with the provisions of the *Planning Act*" was held to be clearly acceptable although it made no specific reference to s.29 of the Act. The respondent cites the decision of Haines J. in *Rogers v. Leonard* (1973), 1 O.R. (3d) 57, 39 D.L.R. (3d) 349, holding that a mere statement of intent in an informal agreement, made between laymen with regard to the purchase and sale of a summer cottage, that all official papers required were to be drawn up and that all formalities were to be complie with, did not constitute an "express condition" within the meaning of s-s.29(7). In the last-mentioned case there was no ground for a belief that the parties to the agreement were even aware of the prohibitions of s.29 of the Act. By contrast, in the present case it may be inferred that the parties or at least their lawyers were aware of the existence of the *Planning Act*, and aware of the prohibitions of selling part of abutting lands without the required consent. In my opinion the above-quoted condition of the loan agreement is an "express condition" within the meaning of the subsection being sufficiently clear in its references to "zoning" and "development" to bring itself within the reasoning in *Davmark and Small*, *supra*. It is therefore unnecessary to consider the submissions made by the applicant as to rectification of the loan agreement to make it more clearly reflect the intent of Tessis that the agreement be subject to such an "express condition".

17 What then are or were the effects of that provision of the loan agreement? Firstly, as between the parties to the loan agreement, it meant that Tessis was not obligated to make the loan unless the condition had been satisfied. Tessis could not have been sued for damages if he had refused to make the loan when any consent required under s.29 of the *Planning Act* had not been obtained. Secondly, if the required *Planning Act* consents (and any other requirements referred to in condition 6 of the loan agreement) had been obtained or satisfied neither party would be prevented from enforcing the agreement, or from obtaining damages for its breach, by the fact that when the agreement was entered into the required *Planning Act* consents had not yet been obtained. In the case of an agreement of purchase and sale of lands abutting other lands of the vendor that are not covered by the agreement, the existence in the agreement of an "express condition" that the required consents be obtained under s.29 f the *Planning Act* would mean that when the consents were obtained the purchaser could, other things being equal, succeed in an action for specific performance, notwithstanding that at the time the conditional agreement was entered into the required consents had not yet been obtained. With respect to the last-

mentioned effect, the situation is not quite so clear in the case of an agreement for a mortgage loan, because, of course, it is unlikely that such an agreement would be specifically enforceable, but even with regard to mortgage loan agreements the second effect of the exception would be to remove an impediment to an action for damages if the transaction was not proceeded with after the required consents were obtained.

18 But does the subsection protect the rights of parties who, having entered into an agreement containing the required "express condition" proceed to close their transaction without the required consents having been obtained? It was the position of the applicant that where the parties have entered into an agreement containing the required express condition the agreement survives and confers rights in the property or its proceeds, notwithstanding that a mortgage was purported to be granted where the required consents had not been obtained. On this approach, once the inclusion of the "express condition" in the agreement has shown the lender to be pure in heart, the subsequent illegal transaction, although passing no interest in the land, itself, would not prevent the intended mortgagee from asserting a property right, if not in the land then in its proceeds. On that theory the loan agreement, containing the required "express condition", is not spent or exhausted when that condition is not complied with before the closing. The assertion is made on behalf of the applicant that the applicable law is the law relating to innocent mistake (which in the circumstance would have to be a mistake of *fact*, because were it mistake of law it would undermine the assumption of knowldge of the law upon which the finding of the "express condition" was based).

19 One difficulty with the applicant's position in this regard is that we are not dealing with a criminal law or other penal provision; innocence has virtually nothing to do with the issue. We are dealing with a public policy that is so strongly put forward as to be enforced by making non-conforming transactions nullities. That is surely one of the most invasive procedures open to the Legislature. Where simple parties, innocent of the prohibitions of s.29, purport to convey land contrary to its provisions their purported transaction is a nullity, so, the argument runs, why should a person who started off on the right foot by including an "express condition" but then proceeded to close his transaction in a way that, if done without such an agreement, would have resulted in the transfer of no interest in land now be able to claim an interest in either the land or its proceeds? The applicant does not assert in these proceedings that the mortgage itself transfers any legal or equitable interest in the land. Rather, the applicant's argument is based upon the loan agreement and the fact that it contains an "express condition" which manifests the intent of the lender to comply with the *Planning Act* and, combined with reliance upon the false affidavit in the mortgage, means that the loan was advanced on the basis of a mistake of fact. The applicant asserts that Tessis is entitled to an equitable mortgage,. a subject I shall deal with below, and also asserts an equitable lien or charge upon the proceeds of the sale of the lands. It was held by the Court of Appeal, in the above-quoted judgment delivered by MacKinnon A.C.J.O., that the mortgage passed no interest, legal or equitable, in the lands. It was also specifically held that Tessis was not a *bona fide* purchaser for value and without notice. That finding may not be directly counter to submissions now being made on behalf of the applicant, but it is of relevance whre the equitable jurisdiction of the Court is sought to be invoked. The applicant contends, in effect, that the loan agreement is not spent, exhausted or merged when, by mistake, a loan is made and a purported mortgage is accepted in breach of the provisions of the *Planning Act*. Although the loan agreement formed part of the record before the Court of Appeal, it was not referred to in the judgment of MacKinnon A.C.J.O. for the Court. That judgment focused on the mortgage itself, and it was noted by MacKinnon A.C.J.O., *supra*, at p.152 that:

> There was of course no such condition, express or otherwise, in the mortgage document with which we are concerned.

That statement suggests that the loan agreement was not considered by the Court of Appeal in this connection. It also suggests that the matter was not argued, a matter to be considered below in relation to issue estoppel. I will proceed initially on the assumption that the applicant is not precluded by issue estoppel from making claims based upon the loan agreement where the purported mortgage was executed and delivered, and accepted, in purported compliance with the loan agreement, and will consider in turn substantive claims made by the applicant.

Equitable Mortgage

20 In one part of his submissions the applicant claimed to be an equitable mortgagee, citing, among other things, the following passage from *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p.16:

> Equitable mortgages of the property of legal owners ... are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.

In *Falconbridge, Law of Mortgages*, 4th ed., at p.80, the following statement is made about equitable mortgages:

> An equitable mortgage therefore is a contract which creates in equity a chargeon property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
>
> 5.2 *How an Equitable Mortgage is Created*
>
> The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the ?act the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it never so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by deposit of title deeds.

It is clear that neither (1) nor (3) above have any application to the facts of this matter and that we need be concerned only with (2) above. In the same publication there appears, at p.83, under the heading "Mortgage by Instrument not Sufficient to Convey the Legal Estate", the following passage:

> (1) *Conveyance defective in form*
>
> If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate, it is an equitable mortgage.
>
> An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.
>
> (2) *Agreement to give a Mortgage*
>
> An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

In this case there is no issue or question as to a want of formality with respect to the mortgage that was execued and delivered. It failed to pass an interest in the land not because of any defect in the form or execution, but because its execution and delivery contravened the *Planning Act* and accordingly by reason of express statutory provisions it passed no interest in the land. The many authorities cited by the applicant that dealt with want of formalities, or inadvertent omissions in documents, or refusals to carry out the terms of agreements to give deeds or mortgages are, therefore, not applicable. When we leave the mortgage and consider the loan agreement as an agreement to give a mortgage we encounter first the difficulty that the intended mortgagor did not refuse or fail to give to the intended mortgagee a mortgage in the form expected by the mortgagee. The difficulty is the absence of consent under the *Planning Act*. Without such a consent no interest in the land may be created except that the former s-s.29(7) (now s-s.29(18)) provided that s.29:

> ... does not affect an agreement subject to the express condition contained therein that such agreement is to be effective only if the provisions of the section are complied with.

The provisions of the section were not complied with. By its own terms therefore the agreement is not effective. Furthermore, it would be a most anomalous result under the statute if an agreement that is excepted from the annulling effect of s-s.29(7) only because it contains an express condition that it is to be effective only if the provisions of the section (as to obtaining the required consents) are complied with were to be held to create an equitable interest in the land where the required consents had not been obtained before the agreement was purported to be carried out. The exception provided in s-s.29(7) (now s-s.29(18)) reasonably construed has the limited purposes discussed above and does not in my opinion create a situation in which the prospective mortgagee having proceeded without the required consents, to close the transaction can "try agin" on the basis of the loan agreement and, ignoring the mortgage, proceed to obtain the required consent before entering into, or being deemed to have entered into, a new mortgage, or with the result that the Court in the exercise of its equity jurisdiction (conferred or confirmed by s-s.153(1) of the *Bankruptcy Act*) will, in effect, deem an equitable mortgage to have come into existence *nunc pro tunc*.

21 In the decision of the Court of Appeal in *Tessis v. Scherer et al.*, *supra*, MacKinnon A.C.J.O., dealt with a submission that, although the mortgage did not pass an interest in the land, the power of sale in the mortgage should be regarded as subsisting so as to permit a sale by the mortgage and a further submission that s-s.29(4d) (now s-s.29(9)) of the *Planning Act* would permit such a sale, in either case after the required consent from the committee of adjustment had been obtained. Those submissions were rejected. With regard to the second submission MacKinnon A.C.J.O., at p.153, stated as follows:

> Whatever may be the purpose of the subsection it is not for the purpose of permitting a party, in the circumstances of this case, to go to the committee of adjustment long after the mortgage has been placed and the Act breached. Such a procedure would obviate so far as mortgages are concerned, the necessity for or effect of the first part of s.29(7) in the 1979 *Planning Act* which subsection covers mortgages.

And with respect to the first submission his Lordship further stated at p.153 as follows:

> A mortgage is given as security for debt. The Planning Act is clear that if the Act is breached no interest in the land is transferred by the mortgage. It would defeat the principle of the legislation and be a perversion of the statutory language if the Court were to hold that the power of sale stands independently of the mortgage and is a legal basis for granting possession of the lands to the mortgage. This is so despitethe argument that the mortgagee would then go to the committee of adjustment for the required consent to sever and sell. A procedure which, as we have said, in our view, is not contemplated by the Act.

22 I set forth those two passages because of their stress on the fact that a breach of the provisions of the Act had taken place, and because of the disfavour expressed with regard to a proposal that the committee of adjustment be approached long after the mortgage has been placed and the Act breached. It was argued before me that all the submissions dealt with by the Court of Appeal related to the mortgage itself, and not to the loan agreement, and were concerned with possession. It must be acknowledged that there is no reference to the loan agreement as such in the reasons of the Court of Appeal. However, the loan agreement was referred to in the statement of claim in the action and it was among the documents before the Court of Appeal. It is really most unlikely that the Court of Appeal was not aware of the loan agreement or believed that a loan of $635,000 on a commercial property would be made without there being a written loan agreement, however brief. The last-quoted passages reveal the attitude of the Court of Appeal to submissions that would involve the obtaining of the required planning or severance consents long after the mortgage had been given in breach of the Act. No equitable mortgage could be obtained by Tessis without the required planning consent, and any consents so given would necessarily have to be given long after the execution and delivery of a mortgage found and acknowledged by the applicant to have been in contravention of the Act. Quite apart from issue estoppel the Court of Appeal appears to have laid it down as a matter of law that where there has been a mortgage in contravention of s.29 of the *Planning Act*, the Court will not undercut the objectives of the Act by making available an extraordinary remedy so that one of the parties to the breach, albeit the less culpableof the two, can try again.

23 An equitable mortgage is an equitable interest in land. The following statement, which I adopt, is taken from *Marriott and Dunn: Practice in Mortgage Actions in Ontario*, 4th ed., Carswell (Toronto) 1981, at p.18:

> An equitable title to a mortgage is just as good as a legal one: *Ex parte*, *Wright* (1812), 19 Ves. 255 at 257, and may be enforced by foreclosure, judicial sale or by the judicial appointment of a receiver: Waldock above, p.55.

A foreclosure would constitute, and a judicial sale would bring about, a change in ownership of the land without the required planning consent. That is contrary to s.29 of the *Planning Act*. The highest interest in the land that can have been conferred on Tessis by the loan agreement is the right to an equitable mortgage after the required planning consent had been obtained. In no true sense of the term can Tessis be said to have had an equitable mortgage before that consent was obtained. This is not a case of want of formalities in the mortgage document or a case of the refusal by the borrower to execute a mortgage. Although there undoubtedly was a mistake the usual equitable remedies are not available if to purport to make them available would be to contravene the statute. No equitable mortgage arises upon the entry into the loan agreement. To put the matter another way, in the absence of the required consent the loan agreement does not create an equitable mortgage any more than a legal mortgage document, correct in all its documentary formalities, creates a legal mortgage. At the material times, Tessis was not an equitable mortgagee.

Equitable Charge

24 For parallel reasons Tessis was not at the material times the holder of an equitable charge, quite apart from questions of issue estoppel. With respect to equitable charges or liens the following is stated in *Marriott and Dunn*, *supra*, at pp.18 and 19:

> It is sometimes diffiult to determine whether a security is an equitable mortgage or equitable charge; as to the distinction see Waldock *Law of Mortgages*, 2nd ed. (1950) pp.44-45. No debt is implied in the case of the latter but the property is expressly or constructively made liable or specially appropriated to the discharge of a burden, *and a right of realization by judicial sale is conferred*. Put another way, the right to foreclose depends upon a proprietary interest either legal or equitable: *Re Lloyd*, [1903] 1 Ch.385 (C.A.). Since a person holding an equitable charge (unless a legal mortgage is implied therein) or lien has no right to foreclose *but may realize his security by judicial sale*: *Tennant v. Trenchard* (1869), L.R. 4 Ch.537.
>
> [Emphasis added]

Here there clearly is a debt, and the loan agreement did call for a legal mortgage, and so it may well be that an equitable charge is not appropriate or available in any event. I do not decide that question. The holder of an equitable charge may not foreclose but may realize his security by judicial sale. He thus has an enforceable interest in the property. To put the matter in its brutal simplicity, Tessis cannot have been at the material times a holder of an equitable charge because an equitable charge is an interest, an equitable interest, in the land, and it is provided by s.29 of the *Planning Act* that in the case of abutting parcels owned by the same person the sale of one parcel without the other is not to take place, and *cannot* take place, without there having been first obtained the required consent under the Act.

25 For the applicant, Mr. Kellock also referred a floating charge but did not seem to me to press the argument that Tessis was entitled to one on the assets of Agil, which is just as well because the loan agreement makes no reference to a floating charge on the undertaking or any assets of Agil and, with respect to the only asset dealt with clearly, as argued on ehalf of the applicant in this very application, intended the creation of a valid and enforceable *specific* mortgage. But if a floating charge had been sought to be created it would have run into essentially the same difficulties as the claimed equitable mortgage and the claimed fixed or specific (as opposed to floating) equitable charge: it would have constituted, from the time of its creation, a purported equitable interest in the land, carrying the right, after its crystallization, to a judicial sale and differing from the fixed or specific equitable charge (and so offending the *Planning Act* even more) because it would also carry a right to foreclose on the property that is subject to its specific lien when it is crystallized.

Charge on the Proceeds of the Sale of the Land?

26 In the foregoing I have more than once used the phrase "at the material times". I did that so as not to lose sight of the importance of the sequence of events. The applicant's submissions in support of the contention that Tessis is, or was, the beneficiary of an equitable mortgage or equitable charge, which contentions are based in part on mistake and might in the absence of s.29 of the *Planning Act* have had some success, were, I believe, seen to be not sustainable in the face of the annulling provisions of s-s.29(7) (now s-s.29(18)). Tessis, under the last-mentioned statutory provisions simply could not acquire any interest, legal or equitable, in the land until the required *Planning Act* consents had been obtained, excepting only the limited interest, described above, under a contract subject to an "express condition" as discussed above. As no *Planning Act* consent had been obtained by the effective date of the bankruptcy Tessis had no security interest in the land by that critical date and so was not a "secured creditor" as that term is defined in s.2 of the *Bankruptcy Act*, R.S.C. 1970, c.B-3. In so far as the claim of Tessis to the proceeds of he sale of the lands is based upon the assertion of an equitable interest in the lands themselves, it must fail. Tessis acquired no interest legal or equitable in the lands or, more accurately, no legal interest whatsoever and no equitable interest that survived the act of the purported creation of a legal mortgage. in so far as the claim of Tessis may be based upon the law of unjust enrichment it will be dealt with below after discussion of the other arguments in which the applicant asserted Tessis has the status of a secured creditor of Agil.

Equitable Execution

27 It is submitted on behalf of the applicant that Tessis, who advanced his loan under the loan agreement which clearly showed the intention of the parties that he was to be a secured creditor of Agil, and who subsequently obtained a judgment on the covenant against Agil, is entitled to obtain the proceeds of the sale of the lands by way of equitable execution. In my opinion those submissions cannot be maintained in the face of s-s.51(1) of the *Bankruptcy Act* which states as follows:

> 50(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

28 The following statements are taken from *17 Halsbury* (4th ed.) under the general heading "Execution" in the subdivision entitled "Equitable Execution". In para.574, at p.358, are found the following statements:

> Equitable execution originated in the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a court of ordinary jurisdiction by entertaining an application for the appointment of a recever of such interests in the judgment debtor's property as could not, owing to their nature, be taken under a common law writ of execution.
>
> Equitable execution is not, strictly speaking, execution at all, but is a mode of equitable relief.

And from para.576 (at p.359):

> Except in the case of land and interests in land, the former practice continues and equitable execution will only issue where there is no remedy by execution at law or such remedy is likely to be ineffective owing to the particular nature of the property which it is sought to make available. There must be some legal impediment to the issue of execution in the ordinary course of law, whether by means of fieri facias, or by means of garnishee proceedings or charging orders.
>
> ... as a general rule a receiver will not be appointed if a method of legal execution is available.

And from para.584 of the same volume of *Halsbury* (at p.365):

> The appointment of a receiver of personal estate does not interfere with the possession of the trustees or other persons in whom the property is vested; it simply puts the receiver in the place of the judgment debtor to receive the money. It does not create a charge on property, nor does notice of appointment confer any priority, but the order has the effect of an injunction and prevents the judgment debtor from receiving the property or from dealing with it to the prejudice of the judgment creditor.

29 The foregoing quotations from *Halsbury*, while hardly exhaustive of the law relating to equitable execution, do disclose enough about the nature of the remedy to establish beyond doubt that, even if the remedy were available in accordance with its own limitations, it would be among the "executions or other process against the property of the bankrupt" that are subordinated by the provisions of s-s.50(1) of the *Bankruptcy Act* to any receiving order or assignment made under that Act, except where the executions or other process n question "have been completely executed by payment to the creditor or his agent", and excepting also the rights of secured creditors. Subsection 50(1) removes any possibility that Tessis could avail himself of equitable execution in any form to collect his debt or any part thereof after the date of the bankruptcy. Equitable execution cannot arise before judgment, and unless his judgment is fully executed by payment to the judgment creditor before the bankruptcy his judgment creates no rights to preference over the ordinary creditors in the bankruptcy.

Conclusion on the Merits on the Issue of Whether Tessis is a Secured Creditor of Agil

30 It is my conclusion that, even on the basis that the loan agreement was made subject to an "express condition" as described in s-s.29(7), now s-s.29(18) of the *Planning Act*, and without regard to the defences of *res judicata* or issue estoppel, Tessis is not to be regarded as a secured creditor of Agil. The claims based on the assertion of an equitable mortgage or an the assertion of an equitable charge, fixed or floating, fail because they cannot prevail against the provisions of s.29 of the *Planning Act* prohibiting severances without consent and providing that purported severances without the required consents are without effect. Claims based on equitable execution are defeated by the provisions of s-s.50(1) of the *Bankruptcy Act*.

Issue Estoppel

31 The foregoing discussion and negative conclusions on the merits of the applicant's contention that Tessis is a secured creditor in the bankruptcy of Agil are *obiter dicta* if the applicants' various assertions in that regard are barred by the defence of issue estoppel. The question of issue estoppel was strenuously argued and, accordingly, I considered it prudent to set forth my conclusions on the merits and the reasons therefor. These matters were dealt with first because their discussion established the background facts rquired for the discussion of issue estoppel.

32 It is common ground that the question of whether the mortgage, as such, passed any legal interest in the land to Tessis has been decided adversely to Tessis and to the applicant and its *res judicata*. I also find that in *Tessis v. Scherer et al*, *supra*, the Court of Appeal clearly found that the mortgage itself passed no equitable interest in the lands to Tessis. However, in this application the claims of the applicant are based upon the loan agreement and not upon the mortgage itself.

33 The applicant argues that the prior action was an action upon the mortgage alone, for possession and for judgment on the covenant, and that Scherer, when granted status to prosecute the appeal from the judgment of Parker. A. C. J. H. C. was similarly circumscribed and confined to arguments based upon the mortgage itself. It is noted that the Honourable Mr. Justice Goodman of the Court of Appeal, (acting as an *ex officio* member of the High Court) in his unreported reasons released February 9, 1982, with respect to his decision to allow Scherer to be added as a party defendant in the prior action so that he could prosecute the appeal, dealt with the matter as a question of whether the mortgage conferred upon Tessis an interest in the land and considered the judgment of Parker, A.C.J.H.C. to be a judgment *in rem*. There is nothing in the reasons of Goodman, J.A. to suggest that there was any mention before him of any claims equitable or otherwise, based upon the loan agreement as distinct from the mortgage. Of course, the real question is not whether

such rights were in fact asserted and adjudicated upon, but whether the applicant is precluded from asserting them now because he could, and therefore should, have asserted them on the appeal. The matter is complicated by the fact that Scherer was added as a party on the appeal and not on the original trial, and so unless he could have obtained permission to supplement them he may well have been constrained by the pleadings in the action. Against that it must be noted that counsel for Scherer did make, and persuade the Court of Appeal to deal with, albeit unfavourably to him, arguments going beyond the simple question of whether the mortgage created any interest in the land. It is certainly arguable and indeed it is probable that the Court of Appeal would likewise have entertained an argument for an equitable interest in the land based on the provisions of the loan agreement.

34 The claims of the applicant to be a secured creditor are not really based upon the mortgage itself but upon the loan agreement which, because of the "express condition" is said to escape the annulling effects of s.29(7).

35 With regard to claims based upon the loan agreement and in the alternative as to a constructive trust the applicant submits that such claims are not barred by *res judicata* or by issue estoppel. The applicant stresses to difference between an action and a cause of action, pointing out that Rule 69 of the (former) Rules of Practice provided that a plaintiff could unite in one action several causes of action and stressing the narrowness of what the courts were called upon to decide in the prior action, namely, claims for possession, payment and interest founded upon the purported mortgage itself. The applicant submits that in the prior action no equitable cause of action of any kind was alleged and accordingly that *res judicata* does not now arise because the claims put forth in this application are all based on equity and so are necessarily different causes of action. The position of the applicant is predicated upon the traditional and formalistic view that the matter or subject of the prior litigation must be seen to consist of one or more causes of action expressly asserted as such. While there is abundant authority supporting such a formulation, there appear to be important unresolved difficulties with respect to the applicability of the inclusive rulearticulated in the well-known dictum of Wigram V.C. in *Henderson v. Henderson* to issue estoppel as opposed to what has traditionally been thought of as cause of action estoppel. These difficulties raise the question of whether Canadian law, although still using the cause of action as the formal criterion, has not been evolving in the direction of a more holistic view of the issues in dispute between the parties in the prior litigation i.e. toward a less formal view of what constituted the 'matter' or 'substance' of the prior litigation. I shall return to that question after discussing the submissions of the parties.

36 Three cases stressed by the applicant were relatively old and more concerned with *res judicata* in the sense of cause of action estoppel than with issue estoppel. Thus the applicant's first reference in this area was to *16 Halsbury*4th ed., para.1528, a paragraph devoted to setting out the essentials of *res judicata* (conceived as cause of action estoppel), as follows:

> In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had the opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must either show actual merger, or that the same point has been actually decided between the parties. Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged might have been put in issue or that the relief sought might have been claimed. It is necessary to show that it actually was put in issue or claimed.

37 The applicant further asserts that no estoppel arises as to matters not in issue in the first action even if decided by implication. The authorities selected by the applicant from among those cited in *16 Halsbury* in relaton to the above statements were *Hadley v. Green* (1832), 2 Cr. & J. 374, *Bake v. French*, [1907] 1 cl. 478and *Saminathan v. Palaniappa*, 1914 A.C. 618.

38 In *Hadley v. Green*, *supra*, a landlord sued a tenant for rent and for money had and received. At trial the plaintiff recovered only for the rent. He later commenced a second action for damages against the defendant for quarrying and carrying away the stone the removal of which by the tenant had been the subject matter of the prior claim for money had and received. The second action was for the same amount as had been claimed as money had and received, and the

particulars of claim in the second action were found to correspond verbatim with those delivered in the prior proceedings. It appears that, having pleaded it, the plaintiff decided not to proceed with the claim for money had and received, for it is clear from the report that one or two days before the first trial the declaration in the second action was delivered. The report is rather sketchy but it would appear that the defendant in the second action objected on the ground that the plaintiff, having not proceeded with its claim for money had and received, and having taken a general verdict, could not later pursue a second action for the same recovery. The court refused to strike out the second action, saying in effect that full compensation could not have been obtained by the count for money had and received and so the second action was for something additional and the situation could be distinguished from the cases in which a plaintiff having a right to full recovery and having pleaded the appropriate count elected not to proceed with that count and later sought to bring a second action seeking the same recovery. The term *res judicata* did not appear in the report, and needless to say there was no reference to issue estoppel. The decision appears to stand for the proposition that a plaintiff need not combine in one action all of his causs of action against a defendant and where he has pleaded a cause of action and not proceeded with it the plaintiff will not be precluded from bringing a second action with the same objective if it can be shown:

(i) that the first cause of action would at best have been only partially successful, and

(ii) that the second action was started before the first action went to trial.

The case was decided over one hundred and fifty years ago when the forms of action had not been reduced to ruling us from their graves and when the common law and equity jurisdictions had not been combined. Nothing was brought forward on this application on the question of whether or not, over one hundred and fifty years ago, difficulties in amending pleadings may have made it more practical to commence a second action and to do so before the prior action came to trial. Nor have I researched that question. Nor was there any material brought forth on this application, other than two footnote references in *Halsbury*, to show the application of *Hadley v. Green* in modern cases, let alone Canadian cases.

39 In *Bake v. French*, *supra*, Mrs. French was indebted to her solicitor, Bake, and had given him six charges secured on her interest in an estate. Bake sued and obtained judgment and an order for foreclosure nisi on five of those charges, having lost or forgotten about the sixth charge. He later brought an amended action on the six charges and was met with a defence of estoppel by *res judicata* based on the above-quoted by Wigram, V.C. in *Henderson v. Henderson* to the effect that the law requires a party to bring forth the whole of his case. The plaintiff did not in the second action ask for a declaration based on the sixth charge alone but for a declaration that he was entitled to a lien based on six charges including the five charges as to which he had received a declaration in the first action. The plaintiff was successful The Court held, not surprisingly, that the first action was about five charges and that in the second action the addition of the sixth charge meant that there was not the same subject of litigation or a "point which properly belonged to the subject of litigation in the first action".

40 The thing that I find the most outstanding about *Bake v. French* is the apparent foolishness of the defence. It is difficult to generate a strong precedent in a decision that had only to overcome such a weak case. In modern terms the plaintiff held something roughly equivalent to debentures issued in series and equally or proportionately entitled to the benefit of a charge on the same security. The relief sought was a declaration and foreclosure and the plaintiff had obtained an order for foreclosure nisi on the five charges. His attempt to amend the foreclosure proceedings to include the sixth charge was denied and so he brought the second action on all six charges and obtained an order for foreclosure nisi on all six charges, a resolution which doubtless had the advantage of making it more difficult for the debtor to redeem. At the least, the case stands for the proposition that the doctrine of *Henderson v. Henderson* does not mean that all causes of action have to be combined in the same action even where they represent claims on the same property if the claims are based upon distinctive choses in action and are therefore not the same subject matter. It is important to remember that the sixth charge represented a sixth item of indebtedness i.e. more debt albeit secured on the same property. The reasons for judgment reflect that the plaintiff had sought unsuccessfully to amend his pleadings in the first action.

Saminathan v. Palaniappa, *supra*, is a decision of the Privy Council, reported in 1914 and involving the interpretation of a statute of Ceylon which was submitted to have codified a version of the law as to *res judicata*. In summary, the facts were that nder what may be regarded as a settlement agreement two promissory notes were issued by the defendant to the plaintiff and, probably by error, omitted to make any provision for interest. The notes were wrongfully altered to include a provision for interest. The defendant failed to pay on the due dates and the plaintiff began an action based on the notes. The action was dismissed because of the material alteration to the notes and the plaintiff then began a second action based upon the settlement agreement, for the consideration for which the notes had been issued. The trial judge accepted the defendant's argument that the action was barred by s.34 of the Ceylon Civil Procedure Code which stated as follows:

> Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action: but a plaintiff may relinquish any portion of his claim to bring the action within the jurisdiction of any Court.
>
> If the plaintiff omits to sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the court obtained before the hearing) to sue for any such remedies, he shall not afterwards sue for the remedy so omitted.
>
> For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

41 The Privy Council in reviewing the trial judge said of the above-quoted section that:

> It is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even although they come from the same transactions.

42 Their Lordships found the action on the notes and the action on the underlying agreement to be inconsistent and mutually exclusive causes of action and pointed out that so long as the notes were regarded a outstanding there was no right of action otherwise than upon the notes, and so it was impossible that the two claims constituted the same cause of action. Their Lordships also expressed the view that, but for the last paragraph of the section, an obligation and a collateral security for its performance would constitute two independent causes of action.

43 Thus in *Hadley v. Green* the second action had been commenced (in the days before the commencement of an action was accomplished by a simple writ of summons) before the relevant count in the prior action had been abandoned; and in *Bake v. French* a further evidence of indebtedness and charge, not before the court in the first action, was the basis for the second action, and so it is hardly surprising that neither action was said to involve *res judicata*. *Hadley v. Green* was decided before *Henderson v. Henderson*, and it, like *Bake v. French* was a case of *res judicata*, not issue estoppel; *Saminathan v. Palaniappa* was concerned with the interpretation of a statutory provision in the laws of Ceylon. It also turned in part on the fact that under laws applicable to negotiable instruments the action on the agreement could not have been proceeded with while the action on the promissory notes had not been shown to be doomed to failure. *Saminathan* too was a case where the defence of *res judicata*, not issue estoppel was asserted.

44 The applicant also cited the well-known Ontario decision of *Utterson Lumber Co. v. H. W. Petrie Ltd.* (1908), 17 O.L.R. 570, where machinery was sold on a conditional agreement calling for payment of the purchase price in instalments and providing that title was to remain in the vendor until payment in full and that in the event of default in payment the vendor could seize and sell the machinery without thereby eliminating the vendor's right to recover any remaining balance from the purchaser. The conditional purchser installed the machinery in his mill, fell into default in his payments and then sold the mill and the machinery to a third party who resold to the plaintiff. The conditional vendor obtained a judgment against the conditional purchaser and then seized the machinery. The Divisional Court decided in favour of the conditional vendor, noting that his position was protected from the negative effects of the Conditional Sales Act, R.S.O. 1897, c.49, by the affixing on the machinery of an appropriate name plate and holding,

(i) that the original indebtedness was not merged in the judgment so far as the "security" was concerned and that the conditional vendor was entitled to retain title until he was paid in full, and

(ii) that by suing for the balance of the price the conditional vendor had not elected to treat the transaction as an absolute sale, so as to waive his claim to title in the machinery. The applicant quoted the following statement of Mulock, C.J., found at p.574:

> Recovery of judgment is not payment of indebtedness. Its simple contract character has disappeared and it has become a debt of record. To that extent only has there been merger, but the original indebtedness still exists and until payment the defendant is entitled to retain his collateral security.

45 A reading of the reasons for judgment makes it clear that on the question of election - the plaintiffs having argued that the conditional vendor could not take a judgment for the unpaid purchase price and at the same time assert a property interest in the machinery - the decision turned on the language of the contract, which expressly provided that the vendor could sue for his money without title passing until he was paid in full. The decision sets some limitations on the doctrine of merger and shows that the parties can contract out of what might otherwise be held to be mandatory election between one remedy and another. There is no specific reference to *res judicata* as such but th doctrine under which a cause of action is merged into a judgment and so disappears is really a form of *res judicata*.

46 Tessis having been awarded judgment on the covenant and the applicant striving to have Tessis treated as a secured creditor in the bankruptcy of Agil, the *Utterson Lumber* decision may be put forth as an authority for the proposition that the taking of judgment on the covenant in the mortgage has not precluded the assertion that under the loan agreement Tessis is entitled to security or alternatively to a constructive trust. To arrive at such conclusions would be to stretch unwarrantedly the meaning of the decision in *Utterson Lumber*, a decision that was expressly based upon the provisions of the agreement there in question.

47 The only statement in the applicant's factum on the subject of issue estoppel, as distinct from traditional cause of action estoppel was taken from 16 *Halsbury* (4th ed.) para. 1530 which is set out in full below:

> *1530 Issue estoppel.* An estoppel which has come to be known as "issue estoppel" may arise where a plea of res judicata could not be established because the causes of action are not the same.
>
> A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proeedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out.
>
> To be distinguished, however, is the rule that where a plaintiff, having two inconsistent claims, elects to abandon one and pursues the other, he cannot afterwards choose to return to the former and sue on it.
>
> (Footnote references omitted]

48 With respect to the second paragraph of the foregoing I find that Tessis, in obtaining judgment on the covenant and in filing in the bankruptcy as an unsecured creditor, has not elected in such a way as to preclude Scherer from

proceeding to assent that Tessis has a secured claim based upon the loan agreement or a claim based upon constructive trust. Whatever way be the impact of *Henderson v. Henderson*, *supra*, and the Canadian authorities that are said to have applied it with respect to issue estoppel, Scherer has not elected one course in such a way as to evidence an intention to abandon the other courses pursued by him on this application. See *Rosental v. Newman*, [1953] 2 All E.R. 885 at p.887.

49 The footnotes to the above-quoted para.1530 of 16 *Halsbury* (4th ed.) refer to many of the leading English and Privy Council decisions on issue estoppel and to the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544, at pp.555-6. Thus, reference was made to the *Duchess of Kingston*'s Case (1776), 2 Smith L.C. (13th ed.) 644 (sometimes said to be the fountainhead of the English law of issue estoppel) and to *R. v. Hartington Middle Quarter Inhabitant* (1855), 4 Ex B 780(which the learned editor of *Spencer Bower and Turner*: *Doctrine of Res Judicata* (2nd ed.) 1969 states, at p.152, is in point of lucidity and precision a preferable exposition and guide) and to *Re Koenigsberg, Public Trustee v. Koenisberg*, [1949] 1 All E.R. (C.A.), *Thoday v. Thoday*, [1964] All E.R. 341 at p.352 C.A. per Diplock L.J., *Spens v. I.R.C.*, [1970] 3 All E.R. 295 at p.301 (Megarry J.) and *Carl Zeiss Stifting v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p.935; [1966] 2 All E.R. 536 (per Lord Guest).

50 I found it curious that in an application where so much stress was put on the question of issue estoppel there was no reference by any party to *Spencer Bower and Turner*: *Doctrine of Res Judicata* which is widely regarded as a leading work on the subject.

51 For his part, counsel for the respondent, supported at least initially by counsel for Tessis, took a position on issue estoppel that I believe with respect can be inelegantly but not entirely inaccurately summarized as "He (Scherer) had his chance and he cannot now raise the issues and assert claims that he did not raise in the prior action". The respondent relied upon the extended form of estoppel reflected in the above quotation from the judgment of Wigram V.C. in *Henderson v. Henderson* and also upon the decision of the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346. In the latter case on granting a decree nisi of divorce Schroeder J., after questioning the wisdom of the consent arrangement, included in his judgment an order for the payment of a modest lump sum to the petitioning wife in lieu of all alimony or maintenance for the wife and for a son until he attained the age of sixteen. Schroeder J. was assured by counsel for the both parties that they fully understood and both wanted that provision, and so he made the provision on consent. Somehow there were added to the formal udgment "or until this Court doth otherwise order". Those words had formed no part of the endorsement by Schroeder J. Prior to the decree absolute the wife commenced an action in the High Court, alleging that the agreement given effect to in the judgment of Schroeder J. had been induced by fraudulent misrepresentations, and consequently that no enquiry had been made as to the financial position of the respondent husband or as to his ability to pay alimony or maintenance, and claiming damages or in the alternative an order setting aside those provisions of the judgment giving effect to the alleged agreement to accept the lump sum payment in lieu of alimony. The action also included a claim for arrears of alimony payments provided for in the original written separation agreement or in the alternative such alimony as might be ordered by the court. That action came on before Mackay J. who dismissed it, finding against the allegation of fraud and misrepresentation and finding that the agreement as to the lump sum was entered into by the wife's solicitor with her understanding and authorization, and that the parties were *ad idem* that the lump sum was clearly agreed to be in full settlement. An appeal from the judgment of Mackay J. was dismissed with costs. In the meantime the motion under appeal was brought before Wells J. who ordered the trial of an issue. That order was appealed to the Court of Appeal, which concluded that the motion should have been dealt with by Wells J. but which agreed, on consent, to deal instead with that question itself. The point of law answered by the Court of Appeal was whether or not the Court had power to vary paragraph 3 of the judgment of Schroeder J. in view of the fact that the same was a consensual judgment for a lump sum settlement in full satisfaction of all claims for alimony and maintenance. The Court of Appeal answered that question in the negative, allowing the appeal and dismissing the motion. The appeal of that order came before the Supreme Court of Canada. In the riginal motion before Wells J. the applicant had sought an order rescinding or varying paragraph 3 of the order of Schroeder J. as to the lump sum payment in lieu of, or in payment of, all claims for alimony or maintenance and had sought an order of monthly or annual payments of alimony or maintenance. Before the Supreme Court of Canada it was conceded, in what we may consider to be an acceptance of issue estoppel, that by virtue of the decision of Mackay J. on the question of fraud or

misrepresentations as to the agreement for a lump sum payment, the appellant had to accept on that appeal that that agreement had been entered into voluntarily by the appellant. Notwithstanding that concession the appellant mounted an argument on the merits. It was countered by a defence of estoppel.

52 The estoppel defence was successful. Cartwright J. referred with approval to the following statement by Maugham J. in *Green v. Weatherall*, [1929] 2 Ch.213 at pp.221, 222:

> ...the plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: ....

His Lordship also quoted the famous dictum of Wigram V.C. in *Henderson v. Henderson*, set forth far above, and proceeded to the well-known excerpt from the judgment of the Privy Council in *Hoystead v. Commissioner of Taxation*, *supra*, at p.165:

> Parties are not permitted to begin fresh litigations because of new views which they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court to be the legal result of the documents or the weight of certain circumstance.
>
> If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle.

53 The above quotation from *Hoystead* would seem to be addressing cuse of action estoppel rather than issue estoppel. It is clearly saying, at the very least, that a question which has been decided cannot be relitigated on the ground that the party who was unsuccessful on the prior litigation has thought of a new argument. Many authorities, including *Maynard v. Maynard* itself, extend that prohibition to points that were fundamental to the prior decision, in the sense that the prior decision could not have been decided the way it was without also deciding explicitly or by necessary implication the point in question in the second proceedings. That Is the essence of issue estoppel and brings us close to the heart of the matter: the contest between what may be regarded as broad and narrow views of issue estoppel. The narrow view, as espoused by the applicant, employs a formal approach, stressing the cause of action, the pleadings and the record in the prior litigation, and confining the estoppel to what was actually decided and, by way of issue estoppel, to what was so fundamental to that decision that, whether expressly referred to or not, it must be taken to be a point settled between the parties or their privies.

54 The broader view espoused by the respondent does not expressly challenge the traditional role of the formal cause of action as the basic building block of *res judicata* but impliedly arrives at such a challenge by urging upon the Court dicta and decisions which may appear to accord with the views expressed by Lord Denning M.R. in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, [1965] 2 All E.R. 4, to the effect that the doctrine of *Henderson v. Henderson* applies not only to cause of action estoppel, but also to issue estoppel. As I understand the respondent's submissions, issue estoppel is not confined to a precise issue that was fundamental to the decision in the prior action and was decided, expressly or by necessary implication, in that prior action, but extends to bar also, in the second action, not only argumentsthat could have been raised in respect of the issues in the prior action but also issues that could have been raised in the prior action to achieve a party's over-all objective yet were not raised. Thus the respondent's focus was not so much upon what had been decided, expressly or by necessary implication in the prior action, but upon what had been omitted to be pleaded and argued in the prior action apparently whether or not the alleged omissions would have constituted, technically speaking, different causes of action.

55 On the respondent's view of the matter Tessis would now be estopped not only from reopening a decided issue to present new arguments on that issue, and not only from contesting anew points fundamental and necessary to the decision expressly made in the prior action, but also, it appears, from raising arguments such as that based upon the loan agreement as distinct from the mortgage and tending to show that Tessis was entitled to an equitable mortgage or charge. As argued, the reason for the estoppel would be that Tessis, or Scherer, could have asserted those equitable claims on the

basis of materials that were part of the record, and so, in pursuance of the public policy favouring an end to litigation, he should be estopped from raising them later. Logically developed (which it was not) this approach would set little store by formal distinctions as to causes of action or as to the difference between law and equity, at least in circumstances where, as here, it was known before the argument of the appeal in the prior action that Agil was in bankruptcy, that there was a problem under the *Planning Act* and that the trustee had denied that Tessis was a secured creditor. Although it was not so expressed by the respondent the broader approach could be expressed by saying that, where the parties cannot deny awareness of the breadth of their dispute and confrontation (as here where neither Tessis nor Scherer can have been unaware of the trustee's contention that Tessis had no higher rihts than those of an unsecured creditor in the bankruptcy), an omission to initiate or advance a claim or cause of action that could impact upon that confrontation and that could have been advanced, even as an alternative claim on the material before the Court, would invite and justify the defence of issue estoppel, as much as the failure to make in the prior proceedings an available argument on the cause of action there expressly pursued is the basis for estoppel under the *Hoystead* line of cases. Such an approach relies heavily on the policy in favour of an end to litigation but would not be devoid of controls in addition to those implicit in the above quotation from *Green v. Weatherall*, and those expressed by Denning L.J. in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, *supra*, where he said of the rule as to extended issue estoppel this is not an inflexible rule.

56 The traditional general rule as to issue estoppel is stated in *Spencer Bower and Turner*: *Doctrine of Res Judicata*, *supra*, (hereinafter referred to as " *Spencer Bower*") at p.167 as follows:

> And indeed, wherever a plaintiff has two separate causes of action (though they arise out of the same transaction) as distinct from several remedies for one cause of action, he is not generally under any duty to set up both in the first proceedings which he may institute. As will later be seen, if he sets up one cause of action only, and is successful, he is not thereby precluded by the operation of the doctrine of merger from proceeding subsequently on the other; and the same result will attend if he fails in his first proceedings he may thereafter, notwithstanding such failure, proceed independently on the separate and independent cause of action which has not yet been litigated. He is under no duty by which he is compelled to join all his available causes of action in the first proceedings.

However, in *Spencer Bower* there is noted at .167, and again at p.376, the decision of the Supreme Court of Canada in *Cahoon v. Franks* (1967), 63 D.L.R. (2d) 274, is referred to as a decision indicating that in Canada the law as to issue estoppel appeared to be different from that in England and other Commonwealth countries in that the Supreme Court of Canada there turned its back on the decision in *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141 by holding that, in connection with a motor vehicle action where the two causes of action were a cause of action for property damage and a cause of action for personal injuries, both arising out of the same accident, that both such causes of action must be litigated in one action. In Cahoon v. Franks the plaintiff had begun an action for property damage within the twelve month limitation period provided for under the highway legislation of Alberta and, after the expiry of that twelve month period, had sought to amend his pleadings to include claims in respect of what had developed into really very serious personal injuries. It was asserted for the defence that such a claim was a new cause of action and was therefore statute barred by the special limitation period. Hall J., speaking for the Supreme Court of Canada, rejected that contention, holding that *Brunsden* was no longer good law in Canada and adopting the reasoning of Porter J.A. of the Appellate Division of the Alberta Supreme Court who had held that to perpetuate the effect of the *Brunsden* decision would be to revive the dominance of the forms of action, abolished by the *Judicature Act*. The reasons of Porter J.A. included the following (quoted at pp.277 and 278 of the said report of the Supreme Court of Canada decision):

> It is important to bear in mind that it was the "forms of action" that were abolished by the Judicature Act. To apply the *Brunsden v. Humphrey* case to the facts here would be to revive one of the very forms of action which the Act abolished. The cause of action or, to usethe expression of Diplock L.J. [the Letang case [infra]], "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and

> the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

The "Letang case" referred to in the foregoing passage is *Letang v. Cooper*, [1969] 1 Q.B. 232. In the above passage Porter J.A. treated as heads of damages matters which used to be regarded as separate causes of action. Should the reasoning of that decision be applied beyond various tort claims arising from one and the same accident? The language quoted by Porter J.A. from the reasons of Diplock L.J., where the latter used the phrase "the factual situation" to describe what gave the plaintiff a right to sue, is inconsistent with a narrow "forms of action" approach that has been at the base of traditional *res judicata* and has been urged on behalf of the applicants in these proceedings.

57 The high courts have an inherent jurisdiction to control abuse of their process and, as pointed out in *Spencer Bower* at p.379, that jurisdiction has been invoked in cases where plaintiffs had multiplied costs and aggravation by bringing numerous suits in circumstances where under the laws then in force it could not be held that the latter actions were barred by estoppel. That inherent jurisdiction was invoked by Henry J. in *Re Heather's House of Fashion Inc. (No.2)* (1977), 24 C.B.R. 193, in addition to a finding of *res judicata*. In that case a trustee in bankruptcy had attacked a secured debenture issued by the bankrupt as being void because of a defect in its registration. The claim faled and in the course of the prior proceeding it was concluded that the debenture was given in good faith. Later the trustee brought an application to have the same debenture declared void as a fraudulent preference under s-s.73(1) of the *Bankruptcy Act*. In dismissing the application Henry J. noted that the Court of Appeal had determined that the debenture was not void against the trustee, and that in the prior proceeding it was common ground that the debenture was given in good faith and was not a fraudulent preference, and he held (i) that the trustee was estopped and, (ii) that it would be an abuse of the process of the Court to permit the trustee to raise on successive applications all the possible attacks on a security that are mandated under the *Bankruptcy Act*:

> ... when by the exercise of reasonable diligence the means could be found to assert them all and have them all disposed of at the same time.

58 The ground of abuse of process was held to be available to block the second application if needed, but it is clear from his reasons that the decision of Henry J. was primarily based on *res judicata*, the *res* being that the Court of Appeal had held that the debenture was not void against the trustee and that the trustee appeared to have admitted as much in the first proceeding. In his reasons Henry J. quoted from *Maynard v. Maynard*, including the famous passage from Wigram V.C. in *Henderson v. Henderson*, and he does state that the trustee could have asserted all his claims in the first application, those statements being indicative of a broad approach to estoppel, such as is urged on behalf of the respondent in these proceedings, and involve matters which, with respect, were not necessary to the decision. The actual decision need not depend on a consideration of what was omitted in the first proceedings; it turns on the express finding that the debenture had been expressly found not to be fraudulent or void against the trustee. Te approach of Henry J. is reminiscent of the broad approach of Porter J.A. as quoted in *Cahoon v. Franks*, *supra*, but on its facts what was actually decided fits easily within the traditional canons of issue estoppel. It is the reference to abuse of proceeds that I find to be of greatest general significance in the decision because there Henry J. is saying, in effect, that the trustee should have brought forward his whole case, without regard to how many causes of action that might entail.

59 As noted, in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, *supra*, Lord Denning M.R. suggested that the principle stated by Wigram V.C. with regard to cause of action estoppel might also apply to issue estoppel. That initiative has been referred to with approval in a number of Canadian decisions but, as discussed below, has been seriously questioned by the House of Lords in *Carl Zeiss Stiftung*, *supra*.

60 It is my observation that many of the decisions that employ or quote language suggesting the extension of the *Henderson v. Henderson* reasoning to issue estoppel are in cases where the result would be the same without any such extension, because they are cases that can be fitted into the narrower and traditional conception of issue estoppel. *Maynard v. Maynard* is itself such a case, as evidenced by the following statements of Cartwright J. at p.356:

> On comparing clauses (a) and (b) in the notice of motion in the present proceedings with paragraph 2 of the statement of claim in the former action, it appears to me that, although not expressed in identical words *they ask for the very same relief*.
>
> [Emphasis added]

The point is reiterated at p.358 as follows:

> It may be that some of the points of law argued before us were not thought of at the time. All this, however, would, it seems to me, be *nihil ad rem*. The issue now before us was, I think, expressly raised in the peadings in the earlier proceeding and was decided by the judgment of Mackay J. in dismissing that action. The appellant has submitted the same question as is now before us although perhaps not the same arguments) to the decision of a court of competent jurisdiction and he cannot now relitigate the matter.

What was actually decided in *Maynard* appears to fit within the description of *res judicata* in the sense of cause of action estoppel and not to involve issue estoppel, let alone to involve it in the extended sense referred to in *Fidelitas Shipping*, *supra*. Contrary to the reasons for which it was cited by the respondent, *Maynard* turned on a prior adjudication of the *same* question and not on some question or issue that could and ought to have been brought forth, under a party's obligations to present his whole case, but was not.

61 In *Spencer Bower*, at p.152, the following is offered as a compendious statement of the "rule" as to issue estoppel:

> Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a *res judicata* by implication.

It will be noted that that formulation makes no reference to matters that might have been argued, or causes of action that might have been asserted, but were not. The emphasis is all the other way, i.e. upon matters that were decided expressly or impliedly in the course of the prior decision and that were integral to it.

62 A recent statement of the broader view is that found in *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255, where Somervell L.J., at p.257, states:

> I think that on the authorities to which I will refer it would be accurate to say that res Judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly art of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

That statement speaks of the "subject-matter of the litigation" and not of a cause of action. Does it mean what *ought* to have been the subject-matter of the litigation because it was integrally bound up with the claims actually made? This, of course, raises the question of what actually is the "subject-matter of the prior litigation". Our applicant has argued that it is, in effect, what the plaintiff or applicant chose it to be and acknowledges, following *Hoystead*, that all arguments in support of that subject-matter should have been put forth in the prior litigation. In one sense, what we have on this application is a dispute as to what is the "subject-matter of the litigation".

63 In *Angle v. M.N.R.*, [1974] 47 D.L.R. (3d) 544, a decision of the Supreme Court of Canada, the majority judgment was delivered by Dickson J. and turned on the determination that the question in the second proceeding was not the same as was contested in the prior matter, with the result that there was no estoppel. In the course of his judgment Dickson

J. cited with approval the definition of the. requirements of issue estoppel given by Lord Guest in *Carl Zeiss Stiftung*, *supra*, at p.935, as follows:

> (1) that the same question has been decided:
>
> (2) that the judicial decision which is said to create the estoppel was final;
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies.

On this application there is no difficulty about meeting requirements (2) and (3) above. The question is the extent to which the same question has been decided and the subsidiary question is whether it is so to the extent that the other claims now made by the applicant could and ought to have been brought forward in the prior proceeding. There is no reference in *Angle v. M.N.R.* to that subsidiary question, nor was there any need for such a reference.

64 The dictum in *Fidelitas Shipping* that would make applicable to issue estoppel the doctrine of *Henderson v. Henderson* has been seriously questioned. In *Carl Zeiss Stiftung*, *supra*, Lord Reid stated at p.916:

> Indeed I think that some confusion has been introduced by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel, such as the oft-quoted passage from *Henderson v. Henderson*....

And at p.917:

> The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim, what is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel.

It is to be note that in the immediately preceding quotation it is to cause of action estoppel that issue estoppel is contrasted. Lord Upjohn expressed at p.947 of the report last referred to essentially the same views.

65 In *Spens v. Inland* Revenue Commrs., [19701 3 All E.R. 295, at p.301, Megarry J. approved a statement in *Spencer Bower* that one must enquire with unrelenting severity whether the determination in the prior action on which it is sought to base the estoppel is "so fundamental to the substantial decision that the latter cannot stand without the former. Nothing less than this will do".

66 My attention has been drawn to Ontario decisions stated by the respondent to stand for a broad interpretation of issue estoppel, of the sort disapproved in *Carl Zeiss Stiftung*. On examination those decisions, although some of them contain statements apparently supportive of the broader view, are seen to be either cases of cause of action estoppel or issue estoppel in the narrower, traditional, sense. Thus, I have already observed of the decision in *Heather's House of Fashion (No.2)* that it was, with respect to *res judicata*, a decision turning on the finding that the fundamental point in issue had been decided in prior litigation between the parties. That decision is more important from our point of view for what it said about abuse of process. *Henning v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346 (C.A.), was expressly a case of *res judicata* or cause of action estoppel and not issue estoppel.

67 The decision of Callaghan J. in *Dominion Trust Co. v. Kay et al.* (1983), 33 C.P.C. 130, is important to this enquiry in its own right and because it sets forth a quotation from the unreported decision delivered by Arnup J.A. for the Court of Appeal in *Peters v. Unacom Industrial Equipment*, released February 27, 1976. 1 shall refer first to the latter aspect. The quotation from the reasons of Arnup J.A. is as fllows:

> In our view the County Court Judge on the second application was right in holding that the matter was *res judicata*. A judgment or order finally settles between the parties all those matters which were actually raised as issues between the parties, and decided by the judgment but is also conclusive as to all other issues which could have been raised at the time of the hearing and were relevant to its determination. The leading authority in this province, which in turn is based upon a number of English cases, is the judgment of the Court of Appeal in *Re Knowles*, [1938] O.R. 369.

I am not aware of the facts in *Unacom* and I appreciate that the language of the above quotation could be consistent with the extended form of issue estoppel proposed in *Fidelitas Shipping*, *supra*. However, I am satisfied that that was not the burden of the decision of Arnup J.A., because he said he was applying law laid down in *Re Knowles*, [19381 O.R. 369 and I have read that decision. It relates to a will under which the residue of an estate was left to the Town of Dundas for paving a street and beautifying a park and some other municipal property. On an application for directions brought in 1933 by the executor it was held that the gift to the Town was valid. In 1937 a further application was brought, in effect contending that the gift was invalid because it was not charitable and was a perpetuity. The matter was held to be *res judicata*, pure and simple, because the applicant was seeking to relitigate the very same point, i.e. the validity of the gift to the Town. He was found to be introducing a new argument but no new facts and no different issue or issue not already decided. That decision is fully consistent with *Hoystead*, *supra*, and in no sense is it an application to issue estoppel of the *Henderson v. Henderson* doctrine. In so far as *Unacom* is based upon *Re Knowles* (and it is stted to be so) it is not an authority for the view contended for by the respondent.

68 The decision in *Dominion Trust Co. v. Kay et al.*, *supra*, is in my respectful opinion clearly correct as a disposition of the issue that came before Callaghan J. The plaintiff had sued in contract on an alleged oral agreement under which he was to be paid for services in relation to a sale of real estate. He was not at the material time registered under the *Real Estate and Business Brokers Act*, R.S.O. 1980, c.431, and so under that Act was prevented from bringing an action for such a commission or payment. The statement of claim in the first action was struck out as disclosing no cause of action. The plaintiff immediately brought an action in tort for deceit, claiming exactly the same amount. On a motion under Rule 126 of the *Rules of Practice* Callaghan J. found that on the merits that claim was equally barred by the Act and he struck out the statement of claim. He also found that the matter was *res judicata*, following *Fidelitas Shipping*, *supra*, *Unacom*, *supra*, and *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.). *Fidelitas Shipping* has been seriously questioned by the House of Lords in *Carl Zeiss Stiftung*, *supra*, and *Unacom*, as based on *Re Knowles*, *supra*, was not nearly as broad a decision as the quote from it might suggest to someone already accepting the doctrine of *Fidelitas Shipping*. With respect to the case before him and with respect to *Morgan Power Apparatus*, Callaghan J. made and quoted the following statements, at pp.138 and 139:

> In my view, the present action is simply an attempt to impose a different legal conception of the relationship between the parties upon the identical facts which were pleaded in the original action. In my view what has been done here is he same as was attempted in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.). In that case the plaintiff commenced an action against the defendant alleging that the defendant owed it sums of money on an account stated for services rendered, or for breach of contract, or on an accounting. After some time, by agreement between the parties, the action was dismissed without costs. The plaintiff then commenced a second action against the defendant based upon allegations that by contracts between the plaintiff and the defendant, they were partners in a joint venture or, alternatively, that the defendant was an agent for the plaintiff and had breached its duty as a partner or its duty under the fiduciary relationship established by the contracts. In this second action the plaintiff sought a somewhat lesser sum of money than in the first. Davey C.J.B.C. said at p.251:
>
> > That being the case, it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services but based upon a different legal conception of the relationship between the parties. The first action was one of contract, for damages for breach of contract (leaving aside for a moment the moneys claimed under an account stated) and the second action is dependent upon breach of a duty which the defendant assumed under the very same contracts, which would give the plaintiff in the second action the money it sought in the first action but under a different legal concept.

It seems to me that, that being so, the doctrine of *res judicata* applies.

69 As is probably apparent, I am unable to accept in full, with respect to issue estoppel, either the position put forward by the applicant or that put forward by the respondent. With respect to the latter, it is my opinion that the serious reservations expressed by Lords Reid and Upjohn in *Carl Zeiss Stiftung*, will have effectivly ended the influence of the doctrine in *Fidelitas Shipping Co.* and in *Thoday v. Thoday*, [1964] 1 All E.R. 341, which would have made the inclusive rule of *Henderson v. Henderson* applicable to issue estoppel. Furthermore, statements in Canadian decisions that seemed to support that sort of extension of *Henderson v. Henderson* have been seen to have been made in cases that were actually decided on more traditional grounds. *Maynard v. Maynard*, *Unacom*, *Re Knowles* and at least part of *Heather's House of Fashion (No.2)* are examples discussed above.

70 On the other hand, the position urged by the applicant, with its entire focus on the cause of action as the sole criterion for *res judicata* other than issue estoppel, seems to me to be excessively rigid and formal. It would leave the question of what constitutes *res judicata* (other than issue estoppel) for purposes of subsequent litigation between the parties or their privies to be determined entirely by what causes of action had been chosen to be put forward by the parties in their prior litigation, regardless of the range of the background confrontation between the parties or the comprehensive nature of the dispute between them. It seems to me that there is a broad evolution in the law, away from formalism, or perhaps, to state it more cautiously, away from formal distinctions from time to time found to be no longer relevant in the sense of representing meaningful and valuable differentiations or categories. It is surely time to question whether the distinction between legal remedies and equitable remedies, for disputes between the same parties arising out of the same factual situations or series of transactions, ought always to be determinative of whether or not the defence of *res judicata* is available. The fundamental concerns, operating in the background, are the public policy in favour of an end to litigation and the policy, in the interess of fairness between the parties, of not letting a party split his case. It appears to me that the law has been evolving in the direction of a revised set of criteria and control devices. The leading decision is *Cahoon v. Franks* where the Supreme Court of Canada treated as separate heads of damages claims which in the heyday of the analytical, parsing, fragmenting approach had long been categorized as separate causes of action. That decision seems to me to have been a significant departure, albeit that it was expressed in the traditional language of cause of action. Thus, it did not decide that the cause of action was no longer the touchstone. Rather it declared that what had hitherto been regarded as two causes of action would henceforth be regarded as two heads of damage in a single cause of action. The breakout having occurred, is it to stop there and be confined to a statement that where a party has suffered damages in a motor accident his cause of action is for all the damages he or she has suffered whether in the way of property damage or personal injuries, or anything else that is compensable? Or was the development more significant, signalling a move toward criteria and categories of more contemporary relevance than the traditional causes of action? I believe it was the latter and that the cause of action, narrowly conceived, is no longer always determinative. It is premature, and at this stage of the development inappropriate for judge of first instance to attempt to formulate the general criteria and the control devices that will come to supplement and sometimes displace the traditional ones stressed by the applicant. It is enough for these purposes to note that in *Cahoon v. Franks* the narrow version was broken away from. Moreover, the decision of Henry J. in *Heather's House of Fashion (No.2)*, where it dealt with abuse of process, was asserting the public interest in an end to litigation and referred to the whole series of transactions, claims and causes of action involed in the confrontation between the trustee in bankruptcy in that case and a creditor bank claiming to be a secured creditor on the basis of an impugned debenture. The remarks may have been *obiter*, as they dealt with an alternative argument where there was in effect a finding that the pre-empting defence of *res judicata* had been made out, but they are nevertheless important because they manifest an unwillingness to be confined to the criterion of the cause of action, narrowly conceived. Similarly, in *Dominion Trust Co. v. Kay et al.*, Callaghan J. looked to the reality of the underlying situation that gave rise to the claims in the two actions, to the illegality that affected both actions equally and to the facts that the dollar amount of the successive claims were the same and that the two claims arose out of the same transaction or series of transactions, differently characterized firstly as a contract claim and secondly as a tort claim.

71 As evidenced by the foregoing quotation therefrom, the decision of the British Columbia Court of Appeal in *Morgan Power Apparatus* was also one in which the court looked at the underlying realities of the relationship of the parties and did not base its decision on the technicality of whether the second action involved the same cause of action.

72 The four decisions last mentioned cannot properly be interpreted as applications of the doctrine of *Henderson v. Henderson* to the question of issue estoppel. Their focus is not on what was omitted to be argued in the prior action but upon what was in fact the issue, broadly and realistically stated, in the prior action. That, and not a narrow cause of action, was taken to be the *res*, or the 'matter' or 'substance' of the prior action. It was not confined to one or more formal causes of action. Regard was paid to the real scope of the confrontation in the prior action, including the whole of the relevant relationship between the parties, the transactions btween them and the objectives of the parties.

73 That certainly does not mean that parties should have to join in one action all causes of action that they may have against one another, or risk being met with the defence of *res judicata*. There are many situations, probably the majority of situations, where traditional criteria based upon the distinctness causes of action are quite appropriate as the basis for deciding whether a matter is *res Judicata*. Examples abound, including claims with respect to different motor accidents, or based on quite different contracts, or based on claims arising out of quite different transactions not part of a longer whole or related series of transactions. But where the prior litigation and the subsequent litigation arise out of the same transaction a claimant should not, particularly in a bankruptcy situation where there is an imperative about settling all claims because, for practical purposes, one of the parties may be going to disappear, be able after failing with a contract claim to bring, with no new evidence, a claim in tort to recover substantially the same amount in respect of the same transaction, or, having failed with a legal claim to bring in the same circumstances a claim based on equity, in each case attempting to rely on the fact that different causes of action are involved. In such circumstances the different cause of action should be treated as if it were no more than a different *argument* advanced to achieve essentially the same recovery, and the above-quoted dictum from *Hoystead v. Commissioner of Taxation* should be applied. That would be to treat the real confrontation and issues between the parties as the res or the substance or matter of the prior litigation and make it unnecessary to attempt to apply to issue estoppel the expanded scope of *res judicata* established in *Henderson v. Henderson*.

74 In *Tessis v. Scherer et al.*, *supra*, by the time the appeal was head the bankruptcy of Agil had taken place and the trustee in bankruptcy had been made a party to the action, the trial judgment had at the least raised a problem under the *Planning Act* and it was known that the trustee in bankruptcy was contending that Tessis had no rights vis-a-vis Agil or its property other than the rights of an unsecured creditor in the bankruptcy. Generally speaking, that was the scope of the confrontation between Scherer and the trustee as the main protagonists in the prior action. What then was the subject or matter of the defence of *res judicata*? In my opinion it properly included of all questions or causes of action, legal or equitable, impacting upon the question of whether or not Tessis was a secured creditor in the bankruptcy. As the loan agreement was before the Court of Appeal and was referred to in the pleadings at trial, rights assertable under it formed part of the res before the Court of Appeal. In my opinion the omission to make at that stage, arguments based on equity and the loan agreement, should not turn on the question of whether such arguments involved the assertion of a different, equitable, cause of action but should be regarded as the omission to make an argument available on the material before the Court, whether or not such arguments or claims would entail a different cause of action. The *res* in the prior action is the real confrontation between the parties and the finding of estoppel would be made on a basis complying with or analogous to, the decision in *Hoystead*, *supra*. Given the knowledge of the parties by the time of the appeal, the practical difficulties of concern to Lords Reid and Upjohn in *Carl Zeiss Stiftung* do not arise because neither Scherer nor the trustee would have decided to omit in the prior action any claim or argument on the ground that its importance would not justify the cost of putting it forward. Both knew what was actually at stake between them.

75 The result in my judgmen is that the applicant is estopped from asserting that Tessis is entitled to any interest in the real property in question, or to rank as a secured creditor in the bankruptcy of Agil.

76 The remaining issue with respect to the defence of *res judicata* or issue estoppel is whether the applicant is estopped from asserting a claim to the proceeds of the sale of the real property, not as a secured creditor but as the beneficiary of a constructive trust. Such a claim is based upon the same loan agreement which was before the court in the prior action. In one sense the assertion of entitlement to be the beneficiary of a constructive trust is merely another legal conception or argument to counter the trustee's position that Tessis is no more than an unsecured creditor in the bankruptcy and that the issue should have been raised on the appeal. The facts upon which the constructive trust argument was based were all known by the time of the argument of the appeal. Thus it was known that there was a loan agreement, that the expressed intention was that Tessis was to advance the money only if he obtained the mortgage and only if all zoning and similar regulatory requirements had been met, that the loan agreement provided that most of the proceeds of the loan were to be applied to paying off prior (purported) mortgages and to finance improvements to the building (meaning that as a factual matter all but a small fraction of the loan proceeds could be traced). All of the documentary and other factual elements available on this application as the basis for the submissions as to a constructive trust were available, or could readily have been made available, on the appeal in the prior action. The bankruptcy of Agil made it more urgent that all relevant causes of action be put forth. In *Heather's House of Fashion (No.2)*, *supra*, Henry J. stated that it would be an abuse of process for a trustee in bankruptcy to bring successive actions attacking the validity of the same debenture issued by the ankrupt, first because of alleged defects in its registration, next as a preference under the *Bankruptcy Act*, next as a fraudulent conveyance, and so forth. Although, based on the doctrine of *Re Condon; Ex parte* James, the duty on the trustee is probably higher than the duty on a person disputing the trustee's right to specific property, there is force to the contention that in a bankruptcy situation such a claimant should bring forth all his claims arising out of the transaction in question whether or not they involved different causes of action. On that basis the matter or substance of the prior litigation would include not only all issues impinging on the question of whether Tessis is a secured creditor in the Agil bankruptcy, but also all issues impinging on the broader question of whether Tessis is anything more than an unsecured creditor in the bankruptcy.

77 If Scherer had been a participant at the trial level and separately represented I would, on balance and not without difficulty, have held that he was estopped from putting forth in these proceedings a claim to be other than an unsecured creditor in the bankruptcy and therefore estopped from claiming to be the beneficiary of a constructive trust. However, the matter is complicated by the fact that Scherer became a party only at the appeal level and so might have encountered real difficulty, whether because of the pleadings or otherwise, in expanding the claims on behalf of Tessis to include the constructive trust claim. I conclude therefore that it would be unfair to hold Scherer to be estopped from asserting in these proceedings that Tessis should be dealt with as the beneficiary of a constructive trust. It is therefore necessary to consider the constructive trust claim on its merits.

Constructive Trust

78 The applicant's alternative submission is that Tessis should be regarded as the beneficiary of a constructive trust in accordance with which the trustee, as successor to Agil, holds s Trustee for Tessis the traceable proceeds of the funds advanced by Tessis.

79 It is submitted that Tessis advanced the $625,000 to Agil on the mistaken assumption, induced by the false representation of Agil, that Agil owned no abutting lands and therefore that the mortgage created a legal interest in the land. The loan agreement is cited as evidence of the intention of both Tessis and Agil that the loan be secured by a valid realty mortgage. It is therefore submitted that the proceeds of the loan were paid out by Tessis under a mistake, in effect that there was a fundamental mistake, and a material misrepresentation in the inducement, in that Tessis clearly would not have made the loan if he had known that it was not to be secured by a valid and enforceable legal mortgage. It was also strongly argued that, as between Tessis and Agil, Agil is more at fault, and that in all the circumstances, equity would not allow Agil to be unjustly enriched by keeping the loan proceeds without providing the security agreed to be given. The related assertion is that the trustee now stands in the shoes of Agil as representative of the unsecured creditors of Agil and that the same arguments should apply to prevent the unjust enrichment of such creditors.

80 I digress to deal with the question of whether an unsecured creditor in a bankruptcy can be said to be unjustly enriched where, even with the benefit of the disputed property, he would still be receiving less than one hundred cents in the dollar of his claim. Clearly the answer has to be in the affirmative. The focus of attention should be on the transaction or transactions in question and not on the totality of the financial position of the bankrupt estate. An unjust enrichment is no less an unjust enrichment where its receipt leaves the unsecured creditors receiving less than the amount of their respective claims.

81 Similarly, nothing should turn in these proceedings on the fact that it is Scherer and not Tessis who is arguing for the imposition of a cnstructive trust. Scherer having been given standing, he is fully entitled (subject to any applicable issue estoppel) to have the constructive trust question dealt with in these proceedings.

82 Another peripheral question arises from the oral submission by counsel for the applicant that the constructive trust claim is an alternative means of providing the security bargained for by Tessis. With respect, the assertion of a constructive trust is not a means of executing on the judgment or enforcing the alleged security of Tessis. It is an independent alternative claim which, if made out, does not require an interest in the land (such as would offend the *Planning Act*) and, at least arguably, is not affected by s-s.50(1) of the *Bankruptcy Act*. It is not to be seen as an assertion that Tessis is a secured creditor. Incidentally, if it were to be so regarded it would be met, successfully in my opinion, with the defence of issue estoppel. Furthermore, if the remedy of constructive trust based on unjust enrichment were to be regarded as some form of execution, it would be blocked by the provisions of s-s.50(1) of the *Bankruptcy Act*. In their written material and throughout most of their argument counsel for the applicant dealt with the constructive trust claim as a fully independent alternative claim, and that is how I propose to consider it.

83 Yet another peripheral question relates to the effect on this claim of claims Tessis may have against Scherer and indirectly against the latter's insurance. As acknowledged in the statement of fact and law filed on his behalf on this application, Scherer carried solicitor's liability insurance to which Tessis could look if he were successful in an action against Scherer. It is common ground that if Scherer is successful on this application that success will reduce his exposure and that of his insurer to the claims of Tessis against him. There arises the question of whether the existence of the claim against Scherer or of such insuranc should have any bearing upon the decision as to the imposition of a constructive trust in favour of Tessis. It is clear that if the claims put forward on behalf of Tessis had been based upon an express trust the existence of such insurance would have made no difference whatsoever. If property were found to have been held by the bankrupt on an express trust for another the property would not be property of the bankrupt and so the trustee in bankruptcy would have no claim to it. This position is confirmed by s.47(a) of the *Bankruptcy Act* which states:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) of property held by the bankrupt in trust for any other person,

84 The position would be the same with respect to the traditional forms of non-express trusts, such as implied trusts, resulting trusts and the older conception of the constructive trusts, all of which are sometimes, along with express trusts, referred to collectively as 'substantive trusts' to distinguish them from the openly remedial constructive trust which the courts do not purport to 'discover' or imply but frankly impose in order to do justice by preventing an unjust enrichment. When a remedial constructive trust is imposed the imposition necessarily reaches back in time to impose the trust upon property or its proceeds as of an earlier time. The imposition creates a property right. In effect, in a bankruptcy situation it would, if applicable, amount to a determination that the property in question was not property of the debtor and had not been so at the time of the bankruptcy. Once imposed the remedial constructive trust has the same effect as an ex press trust or other 'substantive' trust. The question is whether the existence of insurance that might indemnify a claimant for all or part of his losses is a factor that should be taken into account by the Court in deciding whether or not to impose a constructive trust. In my view it is not. Insurance is a contract of indemnity ad, whether by subrogation or otherwise, the insurer is entitled to see that all the insured's rights against third parties are enforced to the full. Although a remedial constructive trust is sometimes imposed where, the other required elements being present, it is expressly stated by the

Court (as in *Palachik v. Kiss*, *supra*), that the claimant has no other legal or equitable remedy, the primary meaning of such statements is that the claimant has no other remedies against the parties to the transactions. The existence or non-existence, of a claim against Scherer or of insurance not taken out pursuant to the agreement between the parties with respect to the transaction ought not in themselves, in my opinion, be factors affecting the Court's decision as to whether or not to impose a constructive trust. If the insurance had been taken out pursuant to an agreement relating to the transaction that would be a factor to be taken into account in relation to the question of the assignment of risks under the contract, but that is not our case. The question of the assignments of risks under the loan agreement will be dealt with below but on a basis quite independent of whether or not Scherer's liability to Tessis would be in whole or in part covered by insurance.

85 To return to the main argument, the submissions of Ms. Robinson on behalf of the applicant were based upon the conception of the remedial constructive trust clearly made part of the common law (as distinct from civil law) of Canada by the decisions of the Supreme Court of Canada in *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289, *Pettkus v. Becker* (1981), 117 D.L.R. (3d) 257 and *Palachik v. Kiss*, 146 D.L.R. (3d) 385. The remedial constructive trust as applied in such decisions differs from the earlier English and Canadian conceptions of the constructive trust in that it does not depend upon the finding of a pre-existing fiduciary relationship.

86 The recent Canadian developments have been centre in matrimonial or family property cases, starting with the minority judgment of Laskin C.J. in *Murdoch v. Murdoch*, [1957] 1 S.C.R. 423. As noted by John L. Dewar in his, article "The Development of the Remedial Constructive Trust", (1982) 60 C.B.R. 265 at p.260:

> Even before *Pettkus v. Becker*, a number of Canadian judgments had explained the constructive trust in terms of the American model, though they do not appear to have made a significant impact on the development of the law until the judgment of Laskin J. (dissenting) in *Murdoch v. Murdoch*. Laskin J.'s views-were adopted by three members of the Supreme Court in *Rathwell v. Rathwell*, and finally prevailed in *Pettkus v. Becker*.
>
> [Footnote references omitted]

To those decisions of the Supreme Court of Canada there should be added the decision of Wilson J., speaking for the Court, in *Palachik v. Kiss*, *supra*, one part of which was decided on the basis of quasi-contract but another major part of which was based squarely on a remedial constructive trust on the American model as approved and applied in *Pettkus v. Becker*. In *Palachik v. Kiss* the constructive trust was applied to a fund of money.

87 Although it emerges from the lengthy judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel British Bank (London) Ltd.* (1979), 3 All E.R. 1025 (Ch.D.) that the American law of unjust enrichment and the related constructive trust is not fully evolved or without fundamental disputes as to its nature, the following quotation from *Scott: The Law of Trusts* (3d.ed.) Vol.5, p.3215 may be taken as a very general description or outline of the American concept of the constructive trust:

> ... A constructive trust is imposed where a person holding title to a property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The dutyto convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of fiduciary duty, or through the wrongful disposition of another property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily a constructive trust arises without regard to the intention of the person who transferred the property.

In the same volume at pp.3427 and 3428, there appears the following statement which is of interest with relation to the factual background of the within application:

> *465. Transfer induced by mistake*. There are numerous cases in which a court of equity has decreed reformation or rescission where land is conveyed under a mutual mistake. Where under a mutual mistake the grantor conveys a piece of land which it was not intended by the parties should be conveyed, the title to the land passes to the grantee

> in spite of the mistake, and it is within the power of the grantee to pass the title to a purchaser for value and without notice of the mistake. If the land has not been conveyed to a bona fide purchaser, the grantee can be compelled to reconvey it to the grantor, since he would be unjustly enriched if he were permitted to retain it. While the grantee holds title to the land, therefore, he holds it upon a constructive trust for the grantor. If the grantee sells the land to a bona fide purchaser, the grantor can enforce a constructive trust of the proceeds in the hands of the grantee, although he cannot reach the land itself in the hands of the purchaser.
>
> Similarly where chattels are conveyed or money is paid by mistake, so that the person making the conveyance or payment is entitled to restitution, the transferee or payee holds the chattels or money upon a constructive trust. In such a case, it is true, the remedy at law for the value of the chattels or for the amount of money paid may be an adequate remedy, in which case court of equity will not ordinarily give specific restitution. If the chattels are of a unique character, however, *or if the person to whom the chattels art are conveyed or to whom the money is paid is insolvent*, the remedy at law Is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution. The beneficial interest remains in the person who conveyed the chattel or who paid the money, since the conveyance or payment was made under a mistake. ...
>
> [Emphasis added and footnote references omitted]

88 In *Dewar: The Development of the Remedial Constructive Trust*, *supra*, the following is stated at p.275:

> It should be noted that in American law the significant development which marked the transformation of the constructive trust into a generalized remedial device was the dispensing by the courts with any necessary connection with fiduciary relationship as a prerequisite to its imposition and to the granting of the tracing remedy.
>
> [Footnote references omitted]

Counsel for the respondent has argued that a constructive trust should not be imposed where there is an obvious and acknowledged relationship of debtor and creditor. With respect, that contention would have much greater force if a constructive trust depended on the prior existence of a fiduciary relationship, for the relationship of debtor and creditor might then be inconsistent with the fiduciary relationship. The remedial constructive trust is not similarly barred by the existence of a debtor-creditor relationship.

89 Turning to the above-mentioned Canadian authorities one finds in the judgment of Dickson J. in *Rathwell v. Rathwell*, *supra*, at p.306, the following statement with respect to the constructive trust:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the Court in order to achieve a result consonant with good conscience. As a matter of principle, the Curt will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; *but for the principle to succeed the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment*.
>
> [Emphasis added]

90 Although the above-mentioned Supreme Court of Canada decisions expressly adopting the remedial constructive trust have been decisions relating to matrimonial relationships and family property, there is nothing in them to suggest that the principles there adopted are to be confined to cases of that type. The statement by Dickson J. that the principle upon which a constructive trust is based is not to be defeated by the existence of a matrimonial relationship is to quite the opposite effect.

91 In *Rathwell* the majority did not decide the case on the basis of constructive trust but rather on the basis of resulting trust. It was in *Pettkus v. Becker* that a clear majority decided on the basis of constructive trust and approved the

above-quoted excerpt from *Rathwell*. The principle was further reinforced by the Supreme Court's unanimous decision in *Palachik v. Kiss*.

92 The decision in *Pettkus*, by clearly eliminating the former requirement of a pre-existing fiduciary relationship, has changed the character and greatly broadened the availability of the constructive trust remedy, but the three requirements outlined by Dickson J. in *Rathwell* are very broad. By adopting those requirements *Pettkus* inevitably raises questions not only as to control devices but as to the relationship of constructive trust to remedies such as subrogation and equitable lien. In *Unjust Enrichment* (Butterworths, Toronto 1983), Professor G. B. Klippert asserts at p. 193 that although future decisions wll be needed to work out its implications the decision in Pettkus is the clearest indication to date that the Supreme Court of Canada intends, with respect to the law of unjust enrichment, a real fusion of common law and equitable principles. It is to be expected that such a development will not only increase the scope and flexibility of the remedies based on unjust enrichment but will also increase the application in constructive trust cases of control devices developed with respect to common law restitution action based on unjust enrichment. There is concern, such as that expressed by Maitland J. in *Pettkus*, that a broad principle of liability based on unjust enrichment would result in too broad a judicial discretion. In Chapter 2 of *Unjust Enrichment* Professor Klippert states that the history of the development of control devices in the law of negligence after *Donoghue v. Stevenson*, [1932] A.C. 562, introduced the broad principle of liability based on negligence is instructive in this regard. He suggests that a similar development is necessary with respect to unjust enrichment. Thus at p.36 he states:

> A restitutionary action is not resolved by reciting the general principle of unjust enrichment, and leaving it to each judge to decide what is fair. As in a negligence case, the decision-making process is more complex. The definition of unjust enrichment becomes the starting point, and not a substitute, for an analytical approach focusing on the elements of the unjust enrichment cause of action. These constituent elements provide the courts with a means to test the limits of liability. Without the recognition of specific elements based on the general principle, there is no mechanism to delimit the scope of legal protection. This point has been stressed in the area of negligence:

Professor Dewar then quotes the following paragaraph from Fleming, " *Duty and Remoteness: The Control Devices in Liability for Negligence*" (1953), 31 Can. Bar Rev. 471:

> The basic problem in connection with the 'tort of negligence is, therefore, that of limitation of liability. The mechanisms associated with liability for negligence, such as the duty and causation concepts, are nothing more or less than the control devices fashioned by the courts to achieve that purpose. Their function may be assessed both from this general point of view as a necessary feature conditioned by the otherwise unlimited scope of the action of negligence or more particularly as instruments designed to assist judicial control of the jury 'law'.

93 An example of a control device attaching to prevent recovery on a claim based on alleged unjust enrichment is afforded by decision of our Court of Appeal in *Nicholson v. St. Denis* (1976) 57 D.L.R. 699. There the plaintiff made improvements to a building at the request of a person who occupied the lands under an agreement of purchase and sale. The plaintiff did not know of the vendor's interest in the land and the vendor was unaware that the improvements were being made. When the purchaser fell into arrears under the agreement of purchase and sale the vendor retook possession of the land. The unpaid plaintiff obtained judgment at trial for the value of the improvements, the judgment purporting to be given to avoid unjust enrichment. The judgment was reversed on appeal. MacKinnon J.A., as he then was, explicitly rejected the trial judge's contention that with regard to such a claim the outcome was totally dependent on the individual judge's conscience as to whether he considered the circumstances such as to give rise to the remedy of unjust enrichment, stating, at p.701:

> If this were a true statement of the doctrine then the unruly house of public policy would be joined in the stable by a steed of even more unpredictable propensities.

MacKinnon J.A. went on to state that restitution would not follow every enrichment of one person and corresponding loss by another. He noted the absence of both knowledge of the alleged benfit on the part of the defendant and

any suggestion that there was an express or implied request by the defendant for the benefit. The defendant had no opportunity to refuse the alleged benefit. The plaintiff had not troubled to ascertain the state of the title. In the literature the absence of knowledge, request or acquiescence on the part of the defendant is sometimes referred to as the absence of the "volition factor" required for an unjust enrichment. From the point of view of the defendant a person with whom the defendant had no prior contact incurred expenses officiously making alleged improvements, which the defendant was under no duty, statutory or otherwise,' to make and in circumstances where the defendant cannot be said to have asked for the improvements and where he was afforded no opportunity to refuse them. The volition factor is not an issue in our case. Clearly Agil wanted Tessis' money. And furthermore money is always deemed to be a benefit. *Nicholson v. St. Denis* is cited not because of its particular facts but because it provides such a clear statement of an important control factor and such a clear answer to those who assume that the doctrine of unjust enrichment is merely a matter of the conscience of the individual judge. I believe that none of the intervening decisions on unjust enrichment would result in *Nicholson v. St. Denis* being decided differently today and furthermore that the same general approach is applicable to the remedial constructive trust.

94 The inability to trace the proceeds of money or property has traditionally been a control device with respect to restitutionary claims, more so at common law than in equity. The absence of a generalized unjust enrichment remedy sometimes lead to decisions in which the ability to trace seemed to serve as the basis for a cause of action. Especially where there is developed doctrine of unjust enrichment, the factual ability or inability to trace must be seen as a control device. The ability to trace does not itslf confer a cause of action. In our case the application by Agil of the bulk of the loan proceeds is known. Under the terms of the loan agreement most of the proceeds were applied to the discharge of (what were believed to be) prior mortgages and most of the balance was expended upon improvements to the building. The property has been sold and the proceeds are segregated. Had the prior mortgages been shown to be valid, tracing as against the respondent would thus have presented little problem on the application of a subrogation or constructive trust remedy.

95 The adoption of the remedial constructive trust, viewed as evidence of an intent by the Supreme Court to develop generalized liability based on unjust enrichment, subject to appropriate control devices, casts new light on the remedies of subrogation and equitable charge. But even under the older law of subrogation Tessis on the facts of the case might, if the prior mortgages had been valid, have had a subrogation claim and then, in equity, a right to trace the proceeds into their present form. In this regard see *Brown v. McLean* (1889) O.R. 533 where the plaintiffs made a mortgage loan the proceeds of which were used to pay off a prior mortgage registered against the same property. Unbeknownst to the plaintiff the defendant judgment creditor had a writ of execution in the hands of the sheriff and had directed him to sell. In the absence of subrogation the defendant had priority over the plaintiff's mortgage. The subrogation claim was allowed. The court noted that, if the plaintiff had been aware of the defendants' writ of execution he would have either refused to make the loan or he would have taken assignments of the prior mortgages. The court also stated, at p.536, that the defendant judgment creditor had "not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position." The case has parallels with the present case. The mortgagee or his solicitors should, as a matter of ordinry prudence, have satisfied themselves as to the absence of writs of execution. It may be asked whether the plaintiff would have prevailed before the Court of Appeal that held in *Tessis v. Scherer et al.*, *supra*, that Tessis was not a *bona fide* purchaser for value and without notice because a search of the realty tax rolls for the adjoining properties would have disclosed that Agil owned abutting lands. Clearly a search for executions is as much a part of the obligation of the solicitor for a mortgagee as a search of tax rolls. There is nothing in the report of *Tessis v. Scherer et al.* to suggest that *Brown v. McLean* was brought to the attention of the court.

96 Subrogation itself is of no avail to Tessis on the facts of this case, because there is nothing to dispel the inference that the mortgages discharged with the proceeds of Tessis's loan were as invalid as Tessis' own mortgage, and for the same reason, contravention of the *Planning Act*. Thus, even if Tessis could claim the rights of the holders of the prior mortgages he would be no further ahead. On the facts, subrogation would avail Tessis nothing.

97 In *Brown v. McLean* the prior mortgage was not a nullity. *Brown v. McLean* remains of interest because of the statement that no injustice was done to the execution creditor by replacing him in his former position. It is clear that in *Brown v. McLean* a valid and prior ranking mortgage was in place before the judgment creditor commenced any steps to realize upon the property. The judgment creditor was deprived of a windfall gain by the granting of the subrogation remedy. If the prior mortgagees in this case had been valid, would the subrogation remedy have been granted to remove a windfall gain from the unsecured creditors in the bankruptcy? That question involves, but is not limited to, the question of whether *Brown v. McLean* would be decided the same way today. The strictures of the Court o Appeal in *Tessis v. Scherer et al* to the effect that Tessis was not in a position analogous to that of a *bona fide* purchaser for value suggest that it might not be decided the same way.

98 In the first part of these reasons, dealing with the several assertions by Scherer that Tessis was a secured creditor of Agil, I held that Tessis could not be regarded as the holder of an equitable lien because such a holder would have an interest in land, and such an interest would be contrary to express provisions of the *Planning Act*. Part of my reasoning was that if an equitable lien were found, its effective date would be the same as the date of the first advance of the loan under the invalid mortgage. It would have been contrary to the statute for the lien to have attached at that time. The equitable lien there considered was a substantive property right, found rather than imposed by the court. It had to arise, if at all, as a lien against land and the statute killed any possibility that the court would find such a lien. The question arises whether, in the context of unjust enrichment and imposed trust devices there could not be a species of equitable lien or charge that did not have to arise, if at all, at the time of the loan but might be imposed as of a later time, specifically when the land was sold and the lien or charge could attach to the proceeds without in any way constituting an infringement of the *Planning Act*. Such a lien might "spring" into existence as a remedial device when imposed by the court but only as of the earliest date upon which it would not offend the *Planning Act*. I believe that such an equitable lien could be imposed in a proper case, which I take to be a situation in which all of the main criteria for the imposition of a constructive trust had been satisfied but the imposition of the constructive trust would result in the trust beneficiary getting too high a proportion of the total property in question. An example would be where the roperty had been expensively improved by the innocent third party into whose hands it was wrongfully transferred by an intervening party. That is not our case. Here, the amount claimed by, or rather for, Tessis is substantially more than is available. The constructive trust remedy is more appropriate, and so no further consideration will be given to the possibility of imposing that sort of equitable lien to avoid unjust enrichment.

99 Although the applicant can correctly attest that Tessis would not have advanced his money unless he thought he was secured by a valid mortgage and can attest that, at least at the level of his solicitor there was reliance on misinformation provided by the governing mind of Agil, this is not a case of simple mistake such as gave rise to the riveting judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1979] 3 All E.R. 1025. In that case a New York bank by reason of a clerical error paid a second time a large amount of money through the New York clearing house system for the account of the defendant bank in London, which was insolvent. The New York bank sued for a declaration that the second payment was held in trust for it and so formed no part of the assets subject to the statutory trust on the winding up of the insolvent London bank. There was an important issue as to whether the law of England or the law of New York applied. After a lengthy trial Goulding J. found that for different reasons the result was the same under the laws of both jurisdictions, namely that the new York bank was entitled to a declaration that the defendant bank become a trustee for the New York bank as to the second payment. Goulding J. found the second payment was a "pure mistake" (at p.1028). Under English law he purported to find a fiduciary duty on the part of the receiving bank and a corresponding continuing propriety interest in the payor bank as a result of the court operating upon the conscience of the payee. As to the law of New York, GouldingJ. heard and dealt with extensive expert evidence and adopted as a proper statement of the law of New York the above-quoted passage from *Scott on Trusts*3rd ed. (1967), Volume 5 at p.3428. Summarizing the second paragraph of that passage to remove matters relating to different types of transactions, it could be stated as follows:

> ... that where money is paid by mistake so that the person making the payment is entitled to restitution, the payee holds the money upon a constructive trust; although it is true the remedy at law for the amount of the money may be an adequate remedy (with the result that a court of equity will not ordinarily grant specific resolution), where the person to whom the money is paid is insolvent, the remedy at law is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution.

Scott adds that the beneficial interest remains in the person who paid the money since the payment was made under a mistake. Under that description the constructive trust would appear to have been present in an inchoate way from the time the mistake was made, so that it is there to enforce if the remedy at law proves inadequate. Although it seems to have more of the character of a substantial legal institution than does the openly remedial constructive trust imposed in *Pettkus*, it is well to remember the opening words of Scott's statement, because they introduce the threshold criterion of an entitlement to restitution. It appears that the constructive trust is utilized so that a person already found to be entitled to restitution will not come up short because of the insolvency of the obligor. That is in one sense a narrower net than was set in *Pettkus* and so parts of the area covered by *Pettkus* may not qualify for the full reach of the back-up constructive trust remedy said by Scott to be available to keep a deserved restitutionary remedy from being cut down.

Re Clark (a bankrupt) exp. the Trusteev. Texaco Ltd., [1957] All E.R. 453 is a case that involved a claim by Texaco Ltd. for the price of motor fuel and oil supplied to a bankrupt petrol retailer after the effective date of the bankruptcy of the latter. Texaco was unaware of the bankruptcy when it made the deliveries and was not entitled to submit a proof of loss in the bankruptcy. The bankrupt had paid for certain of those deliveries and the bankruptcy trustee sued to recover those payments. It was held that the trustee could not recover. Although the trustee was clearly entitled under the term of applicable bankruptcy legislation to recover the money, it was decided by the court that in the circumstances it would be unfair for the trustee, as an officer of the court, to assert its legal rights and enrich the estate at the expense of Texaco by taking the whole benefit of the retail sales of the petrol and motor oil in question without paying its wholesale price. There being no constructive trust under the laws of England in the absence of a fiduciary relationship, the decision was founded in part on the rule in *Ex parte* James: Re Condon, [1874] 9 Ch., p.609 [874-80], All. E.R. Rep.388. That rule provides that where it would be unfair for a trustee or other officer of the court to take full advantage of his legal rights as such, the court will order him not to do so and indeed will order him to return monies which he may have collected. The rule imposes a higher standard on the trustee than would be imposed on an ordinary litigant not exercising statutory rights as an officer of the court. The decision in *Re Clark* was urged upon me with the argument that it would likewise be unfair to allow the trustee in bankruptcy to prevail over Tessis on our facts. However, it is my opinion important to note that in *Re Clark* Wolfan J. stated clearly the view that except in the most unusual cases the rule must not be applied where the claimant is in a position to submit an ordinary proof of claim in a bankruptcy. Tesis has submitted such a proof of claim and the trustee has not challenged it. At p.458 of the report Wolfan J. stated:

> The rule is not to be used merely to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any.

In my opinion *Re Clark*, *supra*, is no help to the applicant and indeed, although not directly, runs counter to his claim by showing equity less willing to interfere where the claimant has *some* remedy.

The Waters: Law of Trusts in Canada (1974 edn.) a work published before Pettkus made it clear that the remedial constructive trust was firmly established in the law of common law Canada, the learned author speaking of the older formulation of constructive trust based upon a pre-existing fiduciary relationship, said at.p.363-4:

> In principle the constructive trust should be the expression of the right of the claimant to priority in the wrongdoers insolvency; the right to trace should enable that priority to be claimed in the insolvency of the wrongdoing third party who has the property. At this point bankruptcy legislation would intervene to mark off those so-called trustee and *cestui que trust* relationships which having escaped debtor and creditor relationships through the artifice of fiduciary status ought not in policy terms to confer a priority upon the *cestui que trust* in the insolvency of the trustee.

100 Speaking still of the substantive as opposed to the imposed remedial constructive trust, Waters states in footnote is on p.364:

> The question for the courts will be whether, like third parties, the general creditors of the insolvent holder of the property have an equity of their own against the claimant asserting equitable title. They stand in the shoes of the bankrupt, but the relative ease with which the claimant can establish a fiduciary relationship means that persons are able to trace whose inherent merits may e no greater than those of the general creditor.

101 In both the above passages Walters is clearly speaking of express trusts. An imposed, remedial constructive trust has nothing to do with "the artifice of fiduciary status" in the sense of something contrived by the beneficiary to give him an advantage over an ordinary creditor. It arises on being imposed by the court.

102 It is noteworthy that in *Rathwell*, *Pettkus* and in *Palachik v. Kiss* the claimant would have had no basis for recovery had it not been for the finding of a resulting trust or latterly, the imposition of a constructive trust. Similarly, in *Re Clark*, *supra*, it was stated that the *Re Condon: Ex parte* James rule would not be applicable, except in rare circumstances where the claimant had any other remedy.

103 Although I believe it to be likely that the impetus of the recent Supreme Court of Canada decisions culminating in *Pettkus* and *Palachik v. Kiss* will result in the remedial constructive trust being applied in certain bankruptcy situations to avoid unjust enrichment, I do not believe this to be an appropriate case for such a remedy.

104 It has been asserted that the monies paid by Tessis produced a windfall for Agil and therefore for the unsecured creditors. However, most of those monies went to pay off prior mortgages, inferred to be equally invalid, and so, on a dollar for dollar basis, the position of the unsecured creditor was not much changed, on the not unreasonable assumption that a well-informed trustee would have come to realize that the prior mortgages were themselves invalid. The parties who really received the windfall were the prior mortgagees whose invalid mortgages were paid off out of the proceeds of Tessis' loan. They are not before the court. That argument does not apply to the parts of the Tessis loan that can be traced into improvements to the property. To the extent of such improvements the unsecured credtors have received a windfall from the fact that Tessis has advanced monies that he would not have advanced had he known that his mortgage would pass no interest in the land. However, not every windfall gain is an unjust enrichment.

105 The applicant stresses the element of mistake and the misleading affidavit and asserts that Agil should not be allowed to keep money when it has not delivered the consideration therefor, i.e. a valid mortgage, and that the trustee can stand in no better position than Agil. But this is not pure mistake as in *Chase Manhattan Bank N.A.*, *supra*. Tessis intended to pay over the money against Agil's promise to pay and the guarantee of Agil's president, and he did receive that consideration. He also expected to be a mortgagee under a valid mortgage and it must be acknowledged that he would not have made the loan if he had not believed that he was getting a good mortgage.

106 The difficulty with the mortgage, apart from the triggering fact that Agil could not keep up its payments, was that it was illegal in that it contravened the *Planning Act*. This was no mere matter of being hoisted by the "vagaries of the *Statute of Frauds*", to use the phrase employed by MacKinnon J.A. in *Nicholson v. St. Denis*, *supra*, to describe the claimant's difficulty in *Degelman v. Guaranty Trust Company of Canada*, [1954] 3 D.L.R. 785. The illegality was sufficiently serious to have been visited by the legislature with the dread remedy of nullity. Such a heavy legislative thrust should cause a court to be cautious about setting aside even its secondary effects. Clearly a court cannot thwart the primary legislative purpose by imposing any trust or other remedy that has the effect of conferring upon Tessis any interest in the land. It is not similarly impossible for the court to impose a trust upon the proceeds for that does not have the effect of creating an interest in the land. But even at that secondary level there is reasonfor caution: if the court imposed a trust upon the proceeds it would be weakening the sanction imposed by the legislature in pursuit of the legislative objective of preventing unauthorized subdivision of land. It is a factor to consider and, at some weight, it is always a factor against imposing a constructive trust. In a proper case a court may feel that other factors override it, but

it is not a factor not to be ignored. I believe it to be, on the above-mentioned tests in *Rathwell*, a juristic factor but not one that, alone, is necessarily determinative. I am not persuaded by the applicant's contention that this is merely a case of unjust enrichment occasioned by mistake based on misrepresentations.

107 A strong reason for not imposing a constructive trust in this case is the justice factor represented by the fact that the loan agreement, which governed and set out the relationship between Tessis and Agil assigned to Tessis the task and risk satisfying himself as to the title of Agil to the property in question and as to the validity of the mortgage. It was even provided that Agil was to pay the fees and disbursements of the solicitor for Tessis. As between Tessis and Agil, Tessis was not authorized to rely upon any affidavit as to non-ownership of abutting lands. Whether that statement was put into affidavit to comply with registration requirements or at the request of Tessis' solicitor, it could not reasonably have been intended to shift to Agil any part of Tessis' burden of satisfying himself as to the validity of the mortgage. Agil was required to pay for the necessary legal services and to allow Tessis to use a solicitor of his own choosing. This is not a simple case of monies paid under a mistake.

108 I appreciate that in unjust enrichment cases the focus is on the enrichment, in contrast to tort cases where the focus is on the damage and the liability. However, most of the proceeds of the Tessis loan went to enriching the holders of the invalid prior mortgages. The considerations dicussed above with respect to subrogation are relevant here. To the extent that unsecured debts were paid off out of the proceeds of what turned out to be another unsecured loan can Agil or its unsecured creditor be said to have been enriched? In my opinion they cannot. Although a constructive trust is imposed *nunc pro tunc* it is imposed, if at all, on the basis of contemporaneous scrutiny. Such scrutiny discloses here that, with respect to most of the Tessis loan, Agil simply exchanged unsecured creditors, so to that extent there was no enrichment of Agil let alone of its unsecured creditors and the test in *Rathwell* was not met. True, a smaller part of Tessis' funds were used to finance improvements of the building. Even although the low sale price of the property may call in question the objective value of the improvements, it must be assumed that they were worth something. We do not, however, know how much they contributed to the sale price. Clearly they would not of themselves justify the imposition of a constructive trust on the whole of the proceeds.

109 In my opinion, this is not a proper case for the imposition of a constructive trust.

110 Accordingly, the application is dismissed with costs, as to be assessed, against the applicant, those of the trustee on a solicitor and client basis and those of counsel to Tessis on a party and party basis.

"Signed"

TAB 7

1993 CarswellBC 284
British Columbia Supreme Court

Martin Commercial Fueling Inc. v. Virtanen

1993 CarswellBC 284, [1993] B.C.W.L.D. 2725, [1993] B.C.J. No. 2842, [1994] 2 W.W.R. 348, 35 R.P.R. (2d) 109, 84 B.C.L.R. (2d) 289

MARTIN COMMERCIAL FUELING INC. v. JERRY MORGAN VIRTANEN, KASHMIR GILL, NIRMAL GILL, SUNNY GILL, RUSSELL GILL, VANCOUVER CITY SAVINGS CREDIT UNION and MOHAN SINGH JASWAL

Coultas J. [in Chambers]

Heard: June 8, 1993
Judgment: October 28, 1993
Docket: Doc. Vancouver C924070

Counsel: *David A. Hobbs*, for petitioner.
Adrian Chaster, for respondents.

Subject: Property; Corporate and Commercial; Contracts

Related Abridgment Classifications

Debtors and creditors
VIII Executions
VIII.4 Exigibility
VIII.4.b Real property interests
VIII.4.b.vii Interests on sale of land
VIII.4.b.vii.B Purchaser's interest
Debtors and creditors
VIII Executions
VIII.14 Priorities between execution creditors and third parties
VIII.14.b Real property
VIII.14.b.iii Purchaser
Real property
III Sale of land
III.3 Completion of contract
III.3.a Rights and duties pending completion
III.3.a.i Vendor as trustee for purchaser
III.3.a.i.B Miscellaneous

Headnote

Execution --- Priorities between execution creditors and third parties — Real property — Purchaser
Sale of Land --- Completion of contract — Rights and duties pending completion — Vendor as trustee for purchaser
Creditors and debtors — Execution, — Execution against land — Priorities — Judgment creditor's right to attachment extending only to interest existing in judgment debtor.
Sale of land — Completion of contract — Position of parties pending completion — Vendors' and purchasers' relationship from execution to completion of purchase and sale contract being that of trustee and cestui que trust.
The petitioner held a judgment against the defendant in the amount of $143,260. The defendant owned a one-third interest in a parcel of land. After the defendant and his co-owners had entered an agreement to sell the land, the petitioner registered its judgment. Thereafter, on the closing date, the notary acting for the purchasers paid out three prior financial

charges, leaving the petitioner's judgment as the only registered charge. The petitioner claimed entitlement to a first charge on one-third of the land in priority to the purchasers and sought an order for sale to satisfy its judgment to the extent of an unencumbered one-third interest. The respondents maintained that the petitioner's claim was limited to the judgment debtor's share of the net proceeds of the sale.

Held:

For respondents.

A judgment creditor can only attach the interests that exist in the judgment debtor; he or she can stand in no better position with respect to the land than does the judgment debtor. The relationship of the vendors and purchasers from the time of execution of the purchase and sale contract to its completion was that of trustee and cestui que trust. During that period the vendors had legal title to the lands, but their beneficial interest was in the net sale proceeds. The judgment debtor had a one-third beneficial interest in the proceeds, but no beneficial interest in the lands, save for a lien for the purchase price and this involved his right, together with his co-tenants in common, to hold possession of the lands until the purchase money was paid. The petitioner's claim was limited to the judgment debtor's share of the net proceeds.

Table of Authorities

Cases considered:

Adanac Oil Co. v. Stocks (1916), 9 W.W.R. 1521, 11 Alta. L.R. 214, 28 D.L.R. 215 (T.D.) — *not followed*

Blower v. Sinclair Homesites Ltd., 14 W.W.R. 622, [1955] 5 D.L.R. 319 (B.C.S.C.) — *considered*

Buchanan v. Oliver Plumbing & Heating Ltd., [1959] O.R. 238, 18 D.L.R. (2d) 575 (C.A.) — *applied*

Church, Re, *(*sub nom. *Church v. Hill)* [1923] S.C.R. 642, [1923] 3 W.W.R. 405, [1923] 3 D.L.R. 1045 — *considered*

De Hoghten v. Money (1866), 2 Ch. App. 164 — *considered*

Homeplan Realty Ltd. v. Rasmussen, [1978] 3 W.W.R. 304 (B.C.S.C.) — *considered*

Howard v. Miller, [1915] A.C. 318 (P.C.) — *considered*

J.A.R. Leaseholds Ltd. v. Tormet Ltd., [1965] 1 O.R. 347, 48 D.L.R. (2d) 97 (C.A.) — *applied*

Jellett v. Wilkie (1896), 26 S.C.R. 282 — *considered*

Kimniak v. Anderson, 63 O.L.R. 428, [1929] 2 D.L.R. 904 (C.A.) — *considered*

La France v. La France (1982), [1983] 1 W.W.R. 169, 22 Alta. L.R. (2d) 341, 31 R.F.L. (2d) 36, 140 D.L.R. (3d) 347, 40 A.R. 425 (Q.B.) — *considered*

Lehmann v. B.R.M. Enterprises Ltd. (1978), 7 B.C.L.R. 8, 5 R.P.R. 192, 27 C.B.R. (N.S.) 271, 88 D.L.R. (3d) 87 (S.C.) — *distinguished*

eLysaght v. Edwards (1876), 2 Ch. D. 499 — *applied*

Morton v. Hoffert, [1924] 2 W.W.R. 529, *(*sub nom. *Re Smith)* [1924] 3 D.L.R. 16 (Alta. T.D.) — *considered*

Nicely v. Sagness (July 26, 1990), Doc. New Westminster C900276, Rowan J. (S.C.), [1990] B.C.W.L.D. 2062, affirmed (April 2, 1993), Doc. Vancouver CA013229 (C.A.), [1993] B.C.W.L.D. 1232 — *considered*

Palmer v. Southwood, [1976] 3 W.W.R. 556, 24 R.F.L. 84, 67 D.L.R. (3d) 327 (Alta. C.A.) — *referred to*

R. v. Caledonian Insurance Co., [1924] S.C.R. 207, [1924] 2 D.L.R. 649 — *applied*

Rayner v. Preston (1881), 18 Ch. D. 1 (C.A.) — *considered*

Rich v. Krause (1974), [1975] 1 W.W.R. 87 (B.C.S.C.) — *considered*

Rogers Lumber Co. v. Smith (1913), 6 Sask. L.R. 187, 4 W.W.R. 441, 11 D.L.R. 172 (C.A.) — *referred to*

Rose v. Watson (1864), 10 H.L. Cas. 672, 11 E.R. 1187 — *distinguished*

Shaw v. Foster (1872), L.R. 5 H.L. 321 — *referred to*

Shaw v. Ross (1859), 17 U.C.Q.B. 257 — *referred to*

Tasker v. Small (1837), 3 My. & Cr. 63, 40 E.R. 848 — *considered*

Wall v. Bright (1820), 1 Jac. & W. 494, 37 E.R. 456 — *considered*

Statutes considered:

Court Order Enforcement Act, R.S.B.C. 1979, c. 75

s. 79*referred to*

s. 84*referred to*

Land Title Act, R.S.B.C. 1979, c. 219

s. 20*referred to*

s. 22*referred to*

s. 27*referred to*

Law and Equity Act, R.S.B.C. 1979, c. 224

s. 7*considered*

s. 41*considered*

s. 54(3) [en. 1985, c. 10, s. 7]*considered*

Real Estate Act, R.S.B.C. 1979, c. 356

s. 48*referred to*

Trustee Act, R.S.B.C. 1960, c. 390

s. 50*referred to*

Rules considered:

British Columbia, Rules of Court (1990)

R. 18A*pursuant to*

Application for judgment pursuant to R. 18A.

***Coultas J.*:**

1 This is an application pursuant to R. 18A of the *Rules of Court*. Counsel submit that the application is properly one to be heard under the Rule, and I agree.

2 The parties have filed an agreed Statement of Facts which I shall summarize.

3 The Petitioner ("Martin") is a company incorporated in the State of Washington, carrying on the business of selling fuel to commercial trucking firms.

4 The Respondent Jerry Morgan Virtanen ("Virtanen") was the business manager and a director of Transexpress Services Ltd., a British Columbia company which carried on the business of hauling goods by truck in Canada and the United States.

5 By an agreement in writing dated February 7th, 1990, Virtanen and Transexpress agreed to purchase fuel from Martin. From February through August 1991, they purchased fuel and subsequently defaulted on their payment obligations to Martin.

6 On August 23rd, 1991, Martin commenced an action in the Supreme Court of British Columbia claiming Virtanen and Transexpress were indebted to Martin in the amount of $143,260.31 and issued pre-judgment garnishment proceedings. A forbearance Agreement dated August 29th, 1991, was entered into by Martin, Transexpress and Virtanen, whereupon Transexpress and Virtanen signed a consent to judgment, to be held in escrow. Virtanen and Transexpress agreed to make certain payments to Martin in consideration of Martin forbearing and Martin released the garnishment proceedings.

7 On October 10th, 1991, the Respondents Kashmir Gill, Nirmal Gill, Sunny Gill and Russell Gill (the "Gills") entered into a written agreement to purchase a property located at 10462 Oak Gate Boulevard in North Surrey (the "Lands"), to complete November 5th, 1991, for a price of $275,000, free and clear of all encumbrances. The offer was accepted on October 10th, 1991. The vendors were Virtanen, Monica Virtanen and Katherine Kim, who held the Lands as tenants in common, each owning a one-third interest. Later, the completion, possession and adjustment dates were extended to November 8th, 1991.

8 On October 10th, 1991, the Gills paid a deposit of $1,000 as part of the purchase price pursuant to the contract, in trust to Park Georgia Realty Ltd. ("Park") as stakeholder, and on October 18th, 1991, they paid an additional deposit of $4,000 as part of the purchase price, in trust to Park.

9 Naib Singh Brar ("Brar"), Notary Public, acted for the Gills in the conveyance of title of the Lands from the vendors to the Gills.

10 Transexpress and Virtanen defaulted in making payments and on October 18th, 1991, Martin filed a consent order for judgment. The judgment was entered in the amount of $147,145.51 on October 21st, 1991.

11 On October 25th, 1991, at 2:55 p.m. the Martin judgment was accepted for registration in the Land Title Office in New Westminster against the undivided one-third interest of Virtanen in the Lands. At the time this judgment was registered, the Lands were subject to the following registered encumbrances:

(a) mortgage in favour of Household Trust Company registered August 8, 1989, under No. AC111752 ("First Mortgage");

(b) mortgage in favour of Wilma Betty Cheng registered August 5, 1989, under No. AC111753 ("Second Mortgage"); and

(c) tax sale notice registered on October 4, 1991, under No. BE258695 ("Tax Notice").

12 On November 6th, 1991, the balance of the purchase price was paid by the Gills to Brar in trust. On that day, at 1:22 p.m., transfer of title to the Gills as joint tenants was accepted for registration at the Land Title Office in New Westminster.

13 The net proceeds of the sale were paid to the solicitor for the vendors on November 6th, 1991. A new mortgage in favour of Vancouver City Savings Credit Union was accepted for registration on November 6th and the second mortgage was paid out by Brar using the purchase monies and discharged from title on November 6th, 1991. The first mortgage was paid out by Brar using the purchase monies on November 7th, 1991, and discharged from title to the Lands on December 10th, 1991.

14 When Brar had completed discharge and registration of the financial encumbrances, the Martin judgment stood as the first registered charge on title to the Lands, followed by the Vancouver City Savings Credit Union mortgage.

15 Martin unsuccessfully attempted garnishment and a Writ of Seizure and Sale to collect its judgment.

16 Virtanen failed to attend an Examination In Aid of Execution on November 21st, 1991, and his whereabouts remain unknown to Martin.

17 On June 26th, 1992, Martin petitioned this court for an Order pursuant to s. 84 of the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, that a one-third interest in the Lands or a competent part of the Lands, be sold to realize the amount payable under its judgment, and for other ancillary relief.

18 Appearances to the Petition were entered by Vancouver City Savings Credit Union and the Gills.

19 On March 5th, 1993, Master Joyce ordered, inter alia:

(a) that $150,000 be placed in trust to stand in place of the Lands, and as security for costs of the Petitioner in these proceedings;

(b) that notwithstanding the substitution of the funds for the lands, Martin shall have all rights and remedies available to a judgment creditor, including those rights and remedies available under the *Court Order Enforcement Act*; and

(c) that issues of priority and the extent to which the lands are liable to satisfy the Martin judgment shall be heard and determined pursuant to R. 18A.

20 Pursuant to that Order, $150,000 was placed in trust and the Martin judgment was removed from title to the Lands on April 2nd, 1993.

21 So, in summary, by October 25th, 1991, the Gills had entered into a contract to purchase the Lands and had paid $5,000 by way of deposit to a stakeholder. They had employed a Notary, Brar, to protect their interests. They had their contractual rights and may have had a purchaser's lien for the deposit (that is in issue and may be considered later). On October 25th, the Martin judgment was registered on the title charging Virtanen's interest in the Lands.

Issues

22 A judgment creditor can only attach the judgment debtor's interest in land, so the issues are: What was Virtanen's interest in the Lands on October 25th, 1991? Did he have a beneficial interest in the Lands or a beneficial interest only in the proceeds of sale? Was he a trustee sub modo for the purchasers, a naked trustee or was the relationship between them that of trustee and cestui que trust, the contract of sale eventually completing?

23 Despite a diligent search, counsel have not found any case in this Province that has considered the effect of a judgment registered against lands after a contract to convey those lands has been executed by the vendor and purchaser, but before the conveyance has completed. Many of the cases relied upon by the parties are old and were decided before a land titles system was enacted. Many of the earlier decisions deal with competing claims arising from a bequest in a Will in situations where the testator had contracted to sell property while alive and bequeathing that property in a contrary manner in a Will.

24 Because the issues are novel and not without difficulty, and the submissions were ably argued, I propose to recite the respective propositions advanced by counsel and the law cited in support of them.

The Petitioner's Propositions

25 1. A judgment or execution against a vendor registered or lodged subsequent to an assignment (mortgage or transfer of his or her interest) of his or her total interest in an Agreement for Sale does not affect the land sold, but aliter, where the assignment (mortgage or transfer) of his or her interest leaves a residual interest in the vendor upon which the judgment or execution might attach. If the substantial and beneficial interest of an unpaid vendor were not exigible, all that would be necessary to put land beyond the reach of his or her judgment creditors would be for the owner to enter into an Agreement for Sale.

26 That proposition is taken from V. Di Castri, *The Law of Vendor and Purchaser*, vol. 2, 3rd ed. (Toronto: Carswell, 1989), at p. 13-24.

27 Continuing, Mr. Di Castri wrote, at p. 13-24:

> Absent a prior determination of the rights of all parties affected, it is doubtful if the court has the power, on the application of the debtor, to override an express enactment that provides that land registered in the name of the execution debtor is bound by the execution and that no transfer or other instrument executed by the registered owner shall be registered except subject to the execution.

28 2. The principle that on a valid contract for the sale of land the equity is transferred to the purchaser applies only as between the parties to the contract and cannot be extended so as to affect the interest of third parties, except in circumstances where all the purchase money has been paid to the vendor and the conveyancing documents have not been signed, so that the vendor has no residual interest in the land. In support, Mr. Di Castri is cited at p. 13-16:

> The question of whether or not a vendor, without the consent of the purchaser, can convey or transfer his legal estate in the land is not free from difficulty and is inextricably entwined with that venerable [1] proposition in the law of vendor and purchaser that, in the time between contract and conveyance, a vendor under an enforceable agreement for the sale of land is a constructive trustee for his purchaser.
>
> If the vendor, from the inception of the contract, is a mere naked trustee, the inevitable corollary would be that he could do nothing without the consent of his purchaser, the *cestui que trust*. But it has been stated by high authority: (1) the position of a vendor is not that of a mere naked or bare trustee; he is clothed with some of the attributes of a beneficial owner and for some purposes he is entitled to wear the trappings of a mortgagee; [2] (2) the vendor is not a mere trustee but is in progress towards becoming one, and finally does so when the price is paid and he is bound to convey; [3] (3) the vendor is a trustee but not a mere dormant one; he has a personal and substantial interest in the property, a paramount right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it; [4] (4) it is inaccurate, while the contract is *in fieri*, to call the relationship between vendor and purchaser that of trustee and *cestui que trust*. "But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*"; [5] (5) the purchaser has an interest in the land only so long as he is entitled to specific performance of his contract. On the other hand, his rights to enforce the contract are choses in action and, subject to the rules against champerty and maintenance, are capable of assignment and may survive his interest in the land. [6]
>
> It should also be noted that in *Tasker v. Small*, [7] the principle that on a valid contract for the sale of land the property is in equity transferred to the purchaser was whittled away by the *dictum* of Lord Cottenham that the rule applied only as between the parties to the contract and could not be extended so as to affect the interest of third parties. "If it could," he opined, "a contract for the purchase of an equitable estate would be equivalent to a conveyance of it." [8] .

29 Certain of the cases referred to and numbered by the learned author in the passage I have recited are [p. 13-17]:

30 In *Tasker v. Small* [(1837), 3 My. & Cr. 63, 40 E.R. 848], Lord Cottenham L.C. said, at p. 851:

> But it was argued at the bar that the Plaintiff was, in equity, invested with all the rights of Mrs. Small, upon the principle that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.

31 That principle was followed in *De Hoghten v. Money* [(1866), 2 Ch. App. 164], on Chancery appeal from a decision of the Master of the Rolls. Delivering the Judgment of the Court, Turner L.J. said, at p. 170:

> It was attempted, on the part of the Plaintiff, to distinguish this case from *Tasker v. Small*, but the argument failed to satisfy me that in principle there was any distinction between the cases. It was argued for the Plaintiff, that, independently of the right to specific performance, he was entitled to come to this Court to have the rights in the land, and the effect of what is called the letter or license of the 11th of March, 1862, declared, but the Plaintiff has no interest in the land except under the agreement; and here again his case is met by *Tasker v. Small*, in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed.

32 3. The only interest of the Gills at the time of registration of the Martin judgment was that of a purchaser under a contract of sale having paid a deposit pursuant to the contract, to a stakeholder. The Gills only possessed a possible right to claim specific performance. No purchaser's lien arose as the deposit was paid to a stakeholder.

33 In support, the Petitioner relies on P.V. Baker & P. St. J. Langan, *Snell's Equity*, 1990, 29th ed. (London: Sweet & Maxwell, 1990) at p. 466:

> 1. The lien. A purchaser has a lien which is somewhat analogous to the vendor's lien. This is a lien upon the property in the hands of the vendor for any deposit or instalment of his purchase-money which the purchaser has paid to the vendor (and not merely to a stakeholder ...) without obtaining a conveyance.

34 4. At the time of registration of the Martin judgment the vendors possessed the legal title to the Lands and all beneficial interest. The Martin judgment became a registered charge on the vendors' legal and beneficial interest.

35 In support, the Petitioner relies on Snell, at pp. 58-59:

> The tendency of modern times has been to curtail the equitable doctrine of purchaser without notice and to replace it by provisions for the registration of rights. In general, in such cases the question is no longer the state of the purchaser's mind but the state of the register.

And at pp. 60-61 of Snell:

> (b) *Void against purchaser of any interest*. The following are the principal matters which are void against a purchaser for value of any interest in the land ... if not registered before completion of the purchase.
>
> (4) PENDING ACTIONS, WRITS AND ORDERS. This head includes any action, information or proceeding pending in court relating to land or any interest in or charge on land; any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute or recognisance; and any order appointing a receiver or sequestrator of land.

36 The Petitioner stresses that the learned authors speak of a "purchaser for value" not a "prospective" purchaser; the Petitioner also stresses their use of the words " ... if not registered before completion of the purchase".

37 In further support, the Petitioner relies on the decision of Chief Justice Harvey of the Alberta Supreme Court (as it then was) in *Adanac Oil Co. v. Stocks* (1916), 9 W.W.R. 1521.

38 The headnote of that decision reads:

A vendor of lands under an agreement for sale by instalments whilst retaining the legal interest has also a beneficial interest in the lands until the whole of the instalments are paid and under an execution against such lands filed in the Land Titles Office the sheriff may sell that interest (*Traunweiser v. Johnson*, 8 W.W.R. 1028, and *Merchants Bank v. Price*, 5 W.W.R. 1279 disapproved).

39 In *Adanac* the plaintiff was the assignee from the purchaser of an agreement of sale of lands of which one Herron was the registered owner. The agreement was dated May 22nd, 1914. Nine of the defendants were execution creditors of Herron, their executions were issued and filed in the Land Titles Office subsequent to May 22nd, 1914. The plaintiff sought a declaration that the executions were ineffective against the plaintiff and asked for a direction to be given to the Registrar to register a transfer of the land, free and clear of the executions, from Herron to the plaintiff.

40 At p. 1525, Harvey C.J. said:

If then a vendor of land has an interest in the land while he remains registered owner until his purchase money is paid as the quotation suggests, it appears to me that it follows that under an execution against his lands filed in the Land Titles Office the sheriff may sell that interest.

41 In support of this proposition Chief Justice Harvey, at pp. 1525-27, cited cases which were referred to by Mr. Di Castri, at p. 13-16, (see p. 11 [pp. 295-96], supra): *Lysaght v. Edwards* [(1876), 2 Ch. D. 499], *Shaw v. Foster* [(1872), L.R. 5 H.L. 321], *Wall v. Bright* [(1820), 1 Jac. & W. 494, 37 E.R. 456]:

The nature of the respective interests of a vendor and purchaser upon an agreement of sale is declared by Jessel, M.R. in *Lysaght v. Edwards* (1876) 2 Ch. D. 499 at p. 506, 45 L.J. Ch. 554, where he says:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, 'Either pay me the purchase-money, or lose the estate.'

In *Shaw v. Foster* (1872) L.R. 5 H.L. 321, 42 L.J. Ch. 49, there had been a sale of a leasehold estate under a valid contract and the title had been accepted and at p. 338 Lord Cairns said:

> Under the circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.

This was a case in which the interests of the purchaser were under consideration and in it as well as in the preceding one reference is made to the case of *Wall v. Bright* (1820) 1 J. & W. 494, 37 E.R. 456, in which the interest of the vendor was directly concerned. Lord O'Hagan at p. 349 quotes the then Master of the Rolls (Sir Thomas Plumer) at p. 503 as saying:

> The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate.

In *Rose v. Watson* (1864) 10 H.L. Cas. 672, 33 L.J. Ch. 385, Lord Cranworth at p. 683 says:

> There can be no doubt I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate and he is in equity, considered as the owner of the estate. When instead of paying the whole of the purchase-money he pays a part of it, it would seem to follow as a necessary corollary, that to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him.

It seems clear from the above authorities that the vendor, until the purchase money is paid, while he retains the legal estate, has also a beneficial interest in the property.

Subject to the rights of the purchaser this interest may be conveyed in the usual way.

In *Rose v. Watson, supra*, a mortgage on part of the property had been given subsequent to the agreement of sale and it was held that it conveyed to the mortgagees only that which the vendor was entitled to under the contract.

42 Harvey C.J. found that at the time of the filing of the executions, the execution debtor had an interest in the lands to which the executions attached and, therefore, a transfer from him pursuant to the agreement of sale could only be registered subject to the rights of the execution creditors.

43 In further support of its proposition under this part, the Petitioner relies on the following passage from E. Sugden, *The Law of Vendors and Purchasers of Estates*, vol. 2, 14th ed. (Philadelphia: Kay & Brother, 1873), at p. 165:

> The enactment that the judgment shall operate as a charge upon the estate, means a charge upon the beneficial interest of the debtor. If he has a legal estate, subject to an equity, it will be a charge upon the estate, subject to the same equity; in the case of an equitable estate, it will be a charge upon the equitable interest.

44 5. Upon the contract of sale being entered into, the vendor of real property may become a trustee for the purchaser. The extent of the trust relationship depends on the circumstances of each case:

Discussion

45 (a) A naked or bare trustee is one who not only has no beneficial ownership of the property, but never had any beneficial ownership and could not contemplate disposition of the property as his or her own.

46 The vendor of real property may own the legal and beneficial estate and, between making the contract and conveyance, transfer the beneficial and legal estate to a purchaser. The vendor is only a trustee sub modo. In this sense the vendor differs from a naked trustee, though he is progressing during the period from contract to conveyance, towards the position of naked trustee.

47 For this proposition, the Petitioner relies not only on *Wall v. Bright*, cited by Harvey C.J. in *Adanac*, but also this further extract from the judgment in *Wall v. Bright*, at p. 459:

> Now, though there is a great analogy in the reasoning, with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate, yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as of his own. In that respect he does not resemble one who has agreed to sell an estate, that up to the time of the contract was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was at one time both the legal and beneficial owner, and may again become the beneficial owner, if any thing should happen to prevent the execution of the contract; and in the interim, between the contract and conveyance, it is possible that much may happen to prevent it. *Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee sub modo, and provided nothing happens to prevent it*. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not, therefore, pursue the analogy between them too far.
>
> *The agreement is not for all purposes considered to be completed. Thus, the purchaser is not entitled to possession, unless stipulated for; and if he should take possession, it would be a waiver of any objection to the title: the vendor has a right to retain the estate in the mean time, liable to account if the purchase is completed, but not otherwise. Till then it is uncertain whether he may not again become sole owner; the ownership of the purchaser is inchoate and imperfect; it is in the way to pass, but it has not yet passed.* (Emphasis added)

48 The Petitioner relies, too, on *Rayner v. Preston* [(1881), 18 Ch. D. 1 (C.A.)], an appeal from Sir George Jessel M.R. The court upheld the decision. Brett L.J., of the majority, said, at pp. 10-11:

> But there did exist a relation between the Plaintiffs and the Defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the Plaintiffs and the Defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of Equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a Court of Equity will under certain circumstances decree a specific performance.

49 (b) The nature of the interest of a purchaser who has paid a deposit to a stakeholder under contract of sale is not an interest in land. The purchaser is the owner of an interest proportionate with the interest which, under all the circumstances, equity would decree by way of specific performance of the contract of purchase. If the purchaser paid a deposit to the vendor, the purchaser would have a purchaser's lien to the extent of the deposit.

50 For this proposition, the Petitioner relies on: *Howard v. Miller* (1914), [1915] A.C. 318 (P.C.); *Re Church*, *(*sub nom. *Church v. Hill)* [1923] 3 D.L.R. 1045 [[1923] 3 W.W.R. 405] (S.C.C.); and *Kimniak v. Anderson*, [1929] 2 D.L.R. 904 (C.A.).

51 In *Howard v. Miller*, Lord Parker of Waddington, delivering the judgment of the Committee, said, at p. 326:

> It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.

52 In *Church v. Hill*, the headnote reads:

> Where land specifically devised is subsequently sold by the testator to a third person the devise is thereby rendered inoperative and the devisee is not entitled to any part of the unpaid purchase-money, but the latter goes to the residue of the estate.

53 At pp. 1048-49, Mignault J. said:

> Notwithstanding these clauses intended to secure the payment of the purchase-price, and although Lockerbie could demand a conveyance only when he had entirely completed the payment of the price and interest, it is unquestionable that he immediately acquired an equitable interest in the property.
>
> In the Appellate Court, Stuart, J.A. cited the well known case of *Rose v. Watson* (1864), 10 H.L. Cas. 672, 11 E.R. 1187, as determining what are respectively the rights of the vendor and the purchaser under a sale agreement such as this. The question there was whether the purchaser, who had ceased his payments on account of non-fulfilment of representations (which were adjudged to be sufficient to absolve him from specific performance) had a lien on the property for the payments he had already made. The decision was that the purchaser had such a lien and it was clearly laid down by Westbury, L.C., and by Lord Cranworth, who concurred with him, that where by an agreement of sale the ownership of an estate is transferred subject to the payment of the purchase-price, every portion of the purchase-money paid in pursuance of the agreement is a part performance and execution of the contract, and, to the extent of the money paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate.
>
> In *Rose v. Watson*, 10 H.L. Cas. 672, the exercise of his right to do so [sic] had refused to complete the purchase and it was decided that he had a lien on the property for the money he had paid. But, with deference, I cannot think that, to quote the language of Stuart, J.A., [1923] 1 D.L.R. at p. 206, the decision casts "some doubt upon the wide general proposition that in equity the property is the property of the purchaser." It appears, on the contrary, that the ownership in equity of the purchaser in *Rose v. Watson* was the foundation of the lien which he was held to possess.
>
> Lockerbie therefore, at the death of the testator, had acquired in equity, and to the extent of the purchase-money paid by him, the ownership of a corresponding portion of the estate of the testator.

54 In *Kimniak v. Anderson*, the judgment of the court was delivered by Hodgins J.A. who said, at p. 906:

> In *Robinson v. Moffatt* (1916), 31 D.L.R. 490, at p. 492, 37 O.L.R. 52, the Second Divisional Court held that a vendor having the legal estate in the lands under a contract for sale, occupied the position described by Meredith, C.J.C.P.: —
>
> > The vendor is a trustee for the purchaser, but bound to convey to him only on fulfilment by the purchaser of all things agreed to be done, on his part, before getting the conveyance. An agreement may never be carried into effect, it may end in nothing by various ways, and it may be that Equity, however measured, may refuse

> specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have: he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract.

This leaves the equitable right of the purchaser undefined, but correctly states the relative positions of vendor and purchaser under a contract for the sale of land and follows the late cases in England on the subject.

55 (c) Under the subject contract of sale, at the time of registration of the Martin judgment the vendor had a lien coupled with legal ownership as opposed to a vendor's lien after a conveyance. This distinction is significant.

56 The vendor, until the purchase monies are paid, has legal ownership and a beneficial interest in the property, which is subject to execution. Further, a transfer by the vendor of his interest can only be registered subject to the rights of an execution creditor.

57 In support of this proposition, the Petitioner relies on *Adanac Oil Co. v. Stocks*, supra.

58 6. By operation of s. 79 of the *Court Order Enforcement Act* and ss. 20 and 22 of the *Land Title Act*, R.S.B.C. 1979, c. 219, the interest of Martin as an execution creditor at the time of registration of the Martin judgment was subject only to:

59 (a) the prior registered mortgages and tax sale notice; and

60 (b) the Gills' equitable right to seek a decree of specific performance. The prior registered encumbrances were discharged by Mr. Brar, thereby placing the Martin judgment in first position on title with notice to the Gills of the registration of the Martin judgment from October 25th, 1991, by operation of s. 27 of the *Land Title Act*.

61 7. An execution binds not only the interest of the debtor at the time the execution is filed, but any further interest which he may acquire therein while the execution is still in force: see *Rogers Lumber Co. v. Smith* (1913), 4 W.W.R. 441 (Sask. C.A.).

62 8. The execution by a creditor continues to bind the land even after an inter vivos transfer of the interest.

63 Relying on these propositions, the Petitioner submits that it is entitled to a first charge on one-third of the Lands in priority to the Gills, and the Lands are subject to be sold to satisfy its judgment to the extent of an unencumbered one-third interest. The remedy of the Gills lies against Mr. Brar for negligence in the conveyance resulting in damages to them.

64 I pass now to the Respondents' propositions and the cases cited in support of them. A number of the cases have already been referred to in these Reasons, and I shall, so far as possible, refrain from repeating them.

The Respondents' Propositions

65 1. It is a venerable proposition of law that "as soon as a specifically enforceable contract for the sale of land is made, the purchaser becomes the owner of the land in equity, and the vendor becomes a constructive trustee of the land to the purchaser, subject in each case to their respective rights and duties under the contract." The contract is based on the intention of the parties and, as such, is an implied trust.

66 In support of the proposition, the Respondents rely on *Snell's Principles of Equity* at p. 195 and the decision upon which it is based: *Lysaght v. Edwards*, a decision of Sir George Jessel, Master of the Rolls.

67 The facts of *Lysaght* are contained in the headnote:

> In 1874 the Plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to *E.*, whom he

> appointed executor, and devised all his real estate to *H.* and *M.* upon trust for sale, and having also devised to *H.* alone all the real estate which at his death might be vested in him as trustee: —
>
> *Held*, that the real estate contracted to be purchased by the Plaintiffs passed to *H.* under the devise of trust estates.

At p. 506, the Master of the Rolls said (cited by Harvey C.J. in *Adanac*):

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord *Hardwicke*, who speaks of the settled doctrine of the Court as to it. *What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession*. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." (Emphasis added)

And at p. 507, he continued:

> *Now, what is the meaning of the term "valid contract?" "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser — a contract binding on both parties*. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, *if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee*; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. (Emphasis added)

68 2. In the interim period between contract and conveyance, the parties are bound by their respective rights and duties under the contract. The vendor's rights are limited to the purchase proceeds and to protect and assert the interest if anything is done in derogation of it. The purchaser's interest is commensurate with the relief that a Court of Equity would decree by way of specific performance of the contract. Until completion, the relationship between the parties remains in suspense. When the contract is performed, the fact of the conveyance determines the relations of the parties retrospectively to the initiation of the contract, and it is ascertained that the relationship throughout was that of cestui que trust and trustee. The vendor's interest as against the purchaser is converted into a claim for the purchase monies. While the legal estate was in the vendor prior to completion, the beneficial estate was wholly in the purchaser.

69 In support the Respondents rely on: *Rayner v. Preston*; *Buchanan v. Oliver Plumbing & Heating Ltd.* (1959), 18 D.L.R. (2d) 575 (Ont. C.A.); *Howard v. Miller*; *Homeplan Realty Ltd. v. Rasmussen*, [1978] 3 W.W.R. 304 (B.C.S.C.).

70 The Petitioner relied on the majority judgments in *Rayner v. Preston* (referred to at p. 21 [pp. 300-301], supra); the Respondents rely on the dissenting judgment of James L.J. which, they say, is now the accepted law.

71 At p. 13, James L.J. said:

> I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. *But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser*. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.
>
> This being the relation between the parties, *I hold it to be an universal rule of equity that any right which is vested in a trustee — any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property — that right and that benefit he takes as trustee for the beneficial owner*. (Emphasis added)

72 In *Buchanan v. Oliver Plumbing & Heating Ltd.* the court considered that part of the decision of James L.J., which I have recited, and Schroeder J.A. delivering the judgment of the court said, at pp. 580-81:

> In these circumstances the principles enunciated by James L.J. in *Rayner v. Preston* (1881), 18 Ch. D. 1 at p. 13, governs not only the rights of the immediate parties to the agreement, but also the rights of the purchaser against strangers to the contract ...
>
> This passage was quoted with approval by Duff J. (as he then was) in *The King v. Caledonian Ins. Co.*, [1924], 2 D.L.R. 649 at p. 655, S.C.R. 207, at p. 213, where he pointed out that what was stated by James L.J. in the passage quoted was entirely consistent with the judgment of Lord Parker in *Howard v. Miller*, 22 D.L.R. 75, [1915] A.C. 318, 20 B.C.R. 230.
>
> Applying that principle to the facts of this case, the completion of the contract on June 20, 1957 related back to the contract itself so that on the date of the explosion, namely, April 15, 1957, there had been established a comp lete and perfect trust, and on that date and, indeed, on March 5, 1957, the plaintiff, Buchanan, was the trustee and the plaintiff James the beneficial owner of the property, the *cestui que trust*. When, therefore, the writ of summons was issued in this action on June 26, 1957, the parties were entitled to claim in those respective capacities, as well as in their individual capacities to the extent hereinafter indicated.
>
> It is to be observed that in these cases the trusteeship is not from the beginning an absolute one, for it is recognized that the vendor has a personal and substantial interest in the property which he is bound to protect. His beneficial interest in the land consists first in his lien thereon for the price, and this involves his right to hold possession of the land until the whole purchase-money is paid as well as the right to take for his own use the rents and profits up to the proper time for completion.

73 In *R. v. Caledonian Insurance Co.*, [1924] 2 D.L.R. 649 (S.C.C.), the facts are found in the judgment of Duff J. (as he then was) at p. 653:

> This appeal raises a question as to the construction of the Succession Duty Act of B.C. The question arises in these circumstances: Sheriff Thomas Higginson, who died in September, 1911, and whose will was proved in November of that year by one Burdis, who was named one of his executors, had, before his death, sold to William H. Stonehouse

> and Frederick G. Carlow for the sum of $6,000 certain real estate, the identity of which is of no importance, under an agreement for sale which, at the time of his death was still *in fieri*; and under which there was owing at that date the sum of $1,207.84 for principal and interest. The purchase having been completed by payment of the purchase money and conveyance of the land to the purchasers, the title passed by several further conveyances to one George Allan Arbuthnot, who became the registered owner in indefeasible fee. Arbuthnot having mortgaged the land to the respondent, the Caledonian Ins. Co., foreclosure proceedings were ultimately taken by the respondent, and, a final Order for foreclosure having been obtained by May 29, 1922, an application was made to the Registrar of Titles for the registration of the respondent as owner in fee simple. It then appeared than [sic] on June 5, 1922, after the final Order for foreclosure had been obtained, a caution had been filed by the Minister of Finance, professing to act under the authority of s. 50 of the Succession Duty Act, in which it was declared that succession duty was claimed by the Minister in respect of the lands which were the subject of the respondent's application.

And at p. 654:

> On behalf of the Crown it is contended that a lien, the quantum of which was measured by the total amount of the duty which might ultimately prove to be payable, attached, upon the death of the testator, the deceased Sheriff Thomas Higginson, upon his interest in the lands which had been sold under the agreement for sale mentioned, and that the lien still attaches as security for the residue of the duty still unpaid. The amount involved is small, but leave to appeal was granted by the Court of Appeal for British Columbia on November 8, 1923.

And at p. 655:

> At the death of the testator the purchase monies under the agreement of sale became monies to which his legal personal representative would be entitled as legal assets *virtute officii* and the executor, upon the grant of probate, became entitled to them by virtue of the probate. *Att'y-Gen'l v. Brunning* (1860), 8 H.L. Cas. 243, 11 E.R. 421. The effect of the agreement of sale in the events which occurred may be stated in the terms of the following passage, taken from the judgment of James, L.J., in *Rayner v. Preston* (1881), 18 Ch. D. 1, at p. 13.

74 (That passage I have recited at pp. 31-32 [p. 306], supra, and need not repeat.)

75 Duff J. continued [pp. 655-56]:

> This passage is entirely consistent with the judgment of Lord Parker in *Howard v. Miller* (1914), 22 D.L.R. 75, 20 B.C.R. 230, [1915] A.C. 318, delivered on behalf of the Judicial Committee of the Privy Council, and the principle is not affected by the fact that the interest of the purchaser under the real property law of British Columbia is technically a charge upon the real estate. This is involved in the reasoning of Lord Parker's judgment, as well as in the decision of this Court in *Church v. Hill*, [1923] 3 D.L.R. 1045, [1923] S.C.R. 642. It follows that it was upon this interest of the testator, the purchase money, that the lien, if lien there was, attached. Assuming that the purchasers were bound to see to the application of the purchase money in payment of the duty, then their responsibility was a personal responsibility which did not in any way attach to the property and the burden of it did not pass to their grantees. This alone would be sufficient to dispose of the appeal ...

76 In *Homeplan Realty Ltd. v. Rasmussen*, the court found that a judgment registered against the interest of one Rasmussen in a jointly owned property did not have priority against an unregistered interest of Rasmussen's wife. Mrs. Rasmussen claimed that at the time the judgment was registered, she was the sole beneficial owner of the property and Mr. Rasmussen was a bare trustee, for she had transferred her share of the proceeds of a mortgage charging the property (in which she had a registered interest) as the purchase price of his equity in the property. This transaction had not been the subject of any registrable instrument. The court found that when Rasmussen accepted his share of the mortgage proceeds as payment for his equity in the property, he became trustee by implication of the property for her and had no beneficial interest — he was a "dry" or naked trustee.

77 I note that the fact pattern in the *Homeplan Realty* case is the exception that the Petitioner conceded in its second proposition that I have recited at p. 9 [p. 294] of these Reasons.

78 3.Under the Torrens' System of registration, equitable interests in land are recognized and protected. In support, the Respondents rely on: *Re Church*, [1923] 3 W.W.R. 405 (S.C.C.); and *Law and Equity Act*, R.S.B.C. 1979, c. 224, ss. 7 and 41.

79 Sections 7 and 41 of the Act read:

> **Judicial notice of equitable estates**
>
> 7. The court and every judge of it shall recognize and take notice of all equitable estates, titles and rights and all equitable duties and liabilities appearing incidentally in the course of any cause or matter in the same manner in which the court sitting in equity would have recognized and taken notice of the same in any suit or proceeding properly instituted therein before April 29, 1879.
>
> **Where rules of equity and law conflict, equity prevails**
>
> 41. Generally in all matters not particularly mentioned in this Act in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

80 4. A judgment filed against title only binds the judgment debtor's interest in the land. The judgment creditor can stand in no better position with respect to the land than does the judgment debtor. Where a property is to be transferred by an agreement of sale entered into by joint tenants prior to the filing of a writ of execution naming one joint tenant as execution debtor, the claim of the judgment creditor is limited to the judgment debtor's share of the net proceeds of the sale to a third party. The execution creditor can only sell the land of the debtor subject to the charges, liens and equities to which the same were subject in the hands of the execution debtor.

81 The Respondents rely on: *Blower v. Sinclair Homesites Ltd.*, [1955] 5 D.L.R. 319 [14 W.W.R. 622] (B.C.S.C.); *LaFrance v. LaFrance* (1982), [1983] 1 W.W.R. 169 (Alta. Q.B.); and *Jellett v. Wilkie* (1896), 26 S.C.R. 282.

82 In *Blower*, the court found that at the time the judgment creditor registered his judgment, the judgment debtor was a bare trustee, for the land had long been sold and paid for.

83 In *LaFrance*, the court considered the rule in *Jellett v. Wilkie*; at pp. 176-77, Stratton J. said:

> It was the intention of Robert Torrens, the originator of Alberta's land titles system, that, since the register was to represent the totality of ownership in land, any unregistered interest would be ineffective to create any right with respect to the land itself. What formally would have been equitable interests in land would be relegated to a right enforceable against the registered owner in personam: Thom's Canadian Torrens System, 2nd ed. (1961), at p. 167. This intent has not received the complete acceptance of Canadian courts which have continued to afford protection to equitable interests in land not disclosed by the certificate of title. In this respect the key decision is that of the Supreme Court of Canada in *Jellett v. Wilkie; Jellett v. Scottish Ont. & Man. Land Co.; Jellett v. Powell; Jellett v. Erratt* (1896), 26 S.C.R. 282 at 288-89, where it was stated by Strong C.J.C. as follows:
>
> > No proposition of law can be more amply supported by authority then ... that an execution creditor can only sell the property of his debtor subject to all other charges, liens and equities as the same was subject to in the hands of his debtor ...
>
> Thus an execution will only bind the beneficial interest in land held by the debtor at the time the writ is received by the registrar. In *Jellett v. Wilkie*, three of the parties whose rights were held under transfers which only required registration for completion were given priority over a registered execution, and another party claiming under an

agreement for sale was given the same priority. The effect of these agreements was to make the vendor the registered owner of merely a legal title to the lands without any beneficial interest to which the writs could attach.

84 5. The interest of an unpaid vendor of land made exigible under an execution against him includes the legal estate, as affected by the contract, together with the vendor's rights under the contract. The rights of the execution creditor against the purchaser under a valid contract of purchase and sale are limited. An execution creditor can only acquire the vendor's interest after sale by the sheriff, that is the right to enforce payment of the unpaid purchase price from the purchaser.

85 In support, the Respondents rely on: *Morton v. Hoffert*, [1924] 2 W.W.R. 529 (Alta. T.D.); *Palmer v. Southwood*, [1976] 3 W.W.R. 556 (Alta. C.A.); and *Shaw v. Ross* (1859), 17 U.C.Q.B. 257 at 259 (C.A.).

86 In *Morton v. Hoffert*, at p. 542, Tweedie J. said:

In the present case the executions were duly registered in the land titles office. The defendant took his assignments of the agreement and a transfer of the title all of which were executed subsequent to the delivery of the executions to the registrar and had at least constructive notice of the execution and, even though he gave value for them, was not a purchaser for value without notice ...

As to the enforcement of the execution: While it is true that the writ binds the vendor's interest including the right to receive the unpaid purchase-price the writ itself does not give to the execution creditor the right to proceed directly against the purchaser for the amount owing. The usual procedure is for the sheriff to sell the vendor's interest and transfer the legal title to the purchaser, who may be the execution creditor, and such purchaser having acquired the legal title acquires the vendor's interest and is in a position to enforce payment of the unpaid purchase-price subject to any defences, legal or equitable which the purchaser may be entitled to rely upon. The purchaser cannot be required to make payment in satisfaction of the execution nor any payment to the execution creditor or any other person until he or such other person has acquired the vendor's rights. See *May v. Emerson*, 16 A. & E. Ann. Cas. 1129.

87 6. The standard form of contract of purchase and sale provides that a deposit paid by a purchaser pursuant to the contract forms part of the purchase price. The vendor's signature on the contract is his or her acknowledgement of this term. The realtor is required by statute to hold the funds as a stakeholder "unless there is an express agreement to the contrary". The mechanics of payment and release of the deposit do not alter the rights of the parties, including the right to specific performance of the contract.

88 In support, the Respondents rely on: *Real Estate Act*, R.S.B.C. 1979, c. 356, s. 48; *Nicely v. Sagness* (26 July 1990), Vancouver C900276 [[1990] B.C.W.L.D. 2062], affirmed (2 April 1993), Vancouver CA013229 (B.C.C.A.) [[1993] B.C.W.L.D. 1232]; and the subject Purchase and Sale Agreement.

89 In *Nicely*, Rowan J. relied on s. 48 of the *Real Estate Act*. The case involved an action brought by the purchasers for specific performance of a contract of sale in regard to land owned by the defendant. The contract provided for a deposit of $10,000 which was paid. Shortly thereafter, the defendant insisted that the purchaser's deposit go to him and that he would not close the deal if he did not receive the purchase money. The purchasers were willing to have the purchase money transferred to a lawyer retained by the defendant, but the defendant refused to consider this compromise. At pp. 6-7 of his Reasons Rowan J. said:

The Defendant appeared in person on the application for judgment but filed no material in answer to the application. In his oral submissions he stated it was [sic] had been his intention to use the deposit moneys as a down payment on another property. He interpreted the written agreements to mean he was entitled to the deposit moneys for his own use. Unfortunately for the Defendant those provisions cannot be so read. When the agreements of December 3rd, 14th and 15th are read together they mean the deposit was to be held and could not have been used for the Defendant's purposes. What the written agreements did not spell out was where the deposit moneys were to be held. If that was an omission (and I do not think it was) any deficiency in the agreement is supplied by s. 48 of the *Real Estate Act* of British Columbia. Section 48(1) reads as follows:

> 48. (1) Unless there is an express agreement in writing to the contrary to which the principals in a real estate transaction are parties, an agent who receives money in connection with a real estate transaction shall, notwithstanding any rule of law to the contrary, hold the money, subject to any claim which he may have against the money for commission or remuneration arising out of the real estate transaction, as a stakeholder and not as an agent for one of the principals.

The remainder of the section contains provision for payment of those moneys into court when a dispute arises or the agent is unable to be discharged from his obligations with respect to the moneys.

When the agreement of December 15th was signed a binding, unconditional contract was reached. A deposit was paid to a real estate agent concerned in the transaction in the circumstances in which that agent was statutorily bound to hold the moneys as a stakeholder pending the completion or resolution of the transaction.

90 Rowan J. granted specific performance. The defendant appealed and his appeal was dismissed.

91 In the case at Bar, the contract provided that the deposit form a part of the purchase price and receipt of it was acknowledged by the selling agent.

92 7. Section 54(3) of the *Law and Equity Act*, provides that a written contract respecting the disposition of land is enforceable by specific performance where the subject matter is clear, the parties have signed the contract, and

> (*b*) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
>
> (*c*) the party alleging the contract or disposition has, in reasonable reliance on it, so changed his position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

93 8. Under an enforceable contract, the purchaser has the right on payment of the purchase price to have the land conveyed to him or her regardless of whether the land is held by the vendor or any new owner of the vendor's interest, including a judgment creditor.

94 9. There is no suggestion that the contract between the vendors and purchasers was anything but arm's length. On the basis of the agreed facts and the authorities cited above, the contract was unambiguous, certain, and legally binding. Should either the vendors or the purchasers have failed to complete, the remedy of specific performance would have been available.

95 10. Given that the contract did complete — title was conveyed to the purchasers — the relationship of the purchasers and vendors from the time of execution of the contract to its completion was that of cestui que trust and trustee. The vendors held legal title to the lands during this period, but their beneficial interest was in the net purchase proceeds. The judgment debtor, Virtanen, had a one-third beneficial interest in the net purchase proceeds. As judgment creditor, Martin cannot have been in a better position than Virtanen, the judgment debtor. Had the conveyance completed correctly, Martin would have received Virtanen's net proceeds to the extent of its judgment — between $4,000 and $5,000.

96 11.In fact, the conveyance did not complete correctly, for the Martin judgment was not paid and removed from title. In the result, the judgment was left in first position against title after the conveyance to the purchasers. It has accelerated in value from between $4,000 and $5,000, being Virtanen's equity, to approximately $150,000 — a complete windfall. The Petitioner is entitled only to the Virtanen's net equity at the time the judgment was registered — Virtanen's beneficial interest in the purchase proceeds.

Further Submissions and Additional Law

97 Subsequent to the hearing of this Application I received a short memorandum by way of a letter from counsel for the petitioner which referred to cases that he and counsel for the respondents had not put before the court. I shall now briefly consider those I find to be relevant.

98 In *Rich v. Krause* (1974), [1975] 1 W.W.R. 87 (B.C.S.C.), MacDonald J. (as he then was) was called upon to consider s. 50 of the *Trustee Act*, R.S.B.C. 1960, c. 390, in circumstances which are conveniently set out in the headnote to the case:

> Applicant and her late husband purchased in 1956 some real property from one K., by the assumption of an existing mortgage and monthly instalment payments of the balance under an agreement for sale. The monthly payments had been paid, as they fell due, into K.'s bank, but had not been collected, and K.'s whereabouts were unknown, despite substantial efforts to find her. Application was made for a transfer of the vendor's equity, upon payment of the balance due, pursuant to s. 50 of The Trustee Act.
>
> *Held*, on the authorities, K. was in effect a trustee of the lands for the applicant within the meaning and purpose of s. 50 of The Trustee Act; upon payment into court of the balance due, the applicant was entitled to an order vesting the property in her name: *Shaw v. Foster* (1872), L.R. 5 H.L. 321; *Rayner v. Preston* (1881), 18 Ch. D. 1 applied.

At pp. 88-90, MacDonald J. said:

> In order to succeed in her application the applicant must establish two things: (1) that Mrs. Krause held the property in trust for the purchaser Mrs. Drucilla Rich; and (2) that Mrs. Krause cannot be found.
>
> With respect to the latter requirement, I am satisfied that the applicant has made a substantial effort to find Mrs. Krause. The question arises now, is the vendor, Mrs. Krause, a trustee holding the property in trust for Mrs. Rich? In this regard, in 34 Hals. (3d) 290, the following statement of law is set out:
>
> > An agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property. As from the date of the contract, his beneficial interest is transferred from the land to the purchase-money, and, if his interest was of the nature of real estate, it is, as from that date, converted into personalty. As regards the land, he becomes, as between himself and the purchaser, constructively a trustee for the purchaser, with the right as trustee to be indemnified by the purchaser against the liabilities of the trust property; and the purchaser becomes beneficial owner, with the right to dispose of the property by sale, mortgage, or otherwise, and to devise it by will, while on his death intestate it devolves on his legal personal representatives, who hold it, subject to the requirements of administration, on trust for sale and for distribution of the net proceeds among the persons entitled on intestacy.
>
> In Lewin on Trusts, 16th ed., p. 153, the author states and I quote:
>
> > The moment you have a contract of sale of which specific performance could be obtained the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.
>
> In *Shaw v. Foster* (1872), L.R. 5 H.L. 321, Lord O'Hagan stated on p. 349 and I quote:
>
> > Although a good deal of time was occupied in a learned disquisition on the effect of a contract for sale, as creating an equitable estate in the purchaser, I do not apprehend that there is any doubt, or that the noble and learned lord whose judgment we are considering could have meant to suggest any doubt, upon that subject. The law is clear. It is, as Lord St. Leonards has said, 'one of the landmarks of the Court': *Baldwin v. Belcher*, 1 Jo. & Lat. 18; and it ought not to be called into question. By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively

> a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money; or, as Lord Westbury has put it in *Rose v. Watson* (1864), 10 H.L. Cas. 672 at 678, 11 E.R. 1187: 'When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in Equity transferred by that contract.' This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee. Thus, as it is stated by the Master of the Rolls in *Wall v. Bright* (1820), 1 Jac. & W. 494 at 503, 37 E.R. 456: 'the vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate.' Another qualification subsequently taken by Lord *Cranworth* in the case to which I have already referred, *Rose v. Watson*; 'When, instead of paying the whole of the purchase-money, he (the vendee) pays a part of it, it would seem to follow as a corollary that, to the extent to which he has paid the purchase-money, to that extent the vendor is a trustee for him.'

The same principle was followed in *Rayner v. Preston* (1881), 18 Ch. D. 1 at 6, wherein Cotton L.J. stated:

> An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold.

On the basis of these authorities I would find that Mrs. Krause is in effect a trustee within the meaning and purpose of s. 50 of The Trustee Act and that she holds the said property in trust for the purchaser, Mrs. Rich.

99 In *Lehmann v. B.R.M. Enterprises Ltd.* (1978), 7 B.C.L.R. 8 (S.C.), the plaintiff, a purchaser of a unit in a strata title project who had paid the purchase price in full, claimed a lien for the purchase price on the whole of the project of which the unit formed a part. He had never obtained title to the unit and the vendor had made a proposal in bankruptcy. The court granted him a lien upon the whole of the property.

100 Giving judgment, Hutcheon J. (as he then was) said, at p. 11:

> The existence of a purchaser's lien for moneys paid for the purchase of property *in the event of a sale falling through without any default on the part of the purchaser* has been recognized for many years. In *Wythes v. Lee* (1855), 106 R.R. 385, 61 E.R. 954, this principle was discussed but not applied. A more recent discussion is to be found in *J.A.R. Leaseholds Ltd. v. Tormet Ltd.*, [1965] 1 O.R. 347, 48 D.L.R. (2d) 97 (C.A.). (Emphasis added)

101 It is clear that the action concerned monies paid pursuant to a contract which failed. That is not the situation here.

102 In *J.A.R. Leaseholds v. Tormet Ltd.* [[1965] 1 O.R. 347 (C.A.)] the judgment of the court was delivered by Schroeder J.A. This, too, was a case of a purchaser under a failed contract of purchase and sale of lands claiming to recover his purchase monies.

103 At p. 348 Schroeder J.A. said:

> This action was instituted to recover the purchase money paid by the plaintiff under a contract of sale of lands in a subdivision to the defendant Tormet Ltd. as vendor, the plaintiff alleging that the contract had failed through no misconduct or fault on its part. Its claim against the defendant Kaye was founded upon a claim to an equitable lien upon the lands which was alleged to rank in priority over three, or at least two mortgages given by the vendor to the defendant Kaye, who is therefore said to be compellable to account for the monies realized by him in a private sale, without notice, in the exercise of a power of sale contained in the first of the three mortgages.

And at pp. 355-56:

> The nature and extent of a purchaser's lien was defined by the House of Lords in *Rose v. Watson* (1864), 10 H.L.C. 672, 11 E.R. 1187. It was there laid down that where under a contract for the purchase of land the money is to be paid in portions, every payment is a part performance of the contract by the purchaser and in equity transfers to him a corresponding portion of the estate.

And continuing at pp. 357-58:

> For the respondent Kaye it was urged that while, in a broad sense, a vendor becomes a trustee for a purchaser of land under an agreement for sale, he becomes a trustee in a modified sense only; that such a relationship does not truly exist while the contract is *in fieri* and is conditioned upon the performance of the contract, and upon fulfilment thereof it relates back to the formation of the contract. The doctrine has also been held to be subject to the obvious qualification that the contract must be one of which the Court, under the circumstances, would decree specific performance: *Cornwall v. Henson*, [1899] 2 Ch. 710 [revd on other ground [1900] 2 Ch. 298]. The authority most frequently cited upon this point is *Rayner v. Preston* (1881), 18 Ch. D. 1. This and other relevant authorities on the point were reviewed at some length by this Court in *Buchanan and James v. Oliver Plumbing & Heating Ltd.*, 18 D.L.R. (2d) 575, [1959] O.R. 238 and I therefore refrain from discussing them in detail.
>
> While the principles enunciated in those cases are well settled, I am at a loss to apprehend what bearing they have upon the vital issue in the present case. I quite agree that if the appellant, as purchaser under an uncompleted agreement for the sale of land, were attempting to assert rights of ownership against the respondent Kaye or other third parties, its right to do so could be challenged, but that point has no relevance to the present case. Nor do I appreciate that the case of *Kimniak v. Anderson*, [1929] 2 D.L.R. 904, 63 O.L.R. 428, cited and relied upon by the respondent, is in point. That case decides no more than that a writ of *fieri facias* binds legal estates and interests only, and that a trust estate cannot be sold under an execution against a trustee for his own debt. It does not touch the point with which was are here concerned.

104 Counsel for the Petitioner submits that the *Lehmann* and *J.A.R. Leaseholds Ltd.* cases uphold the principle that a purchaser's equity in the land only goes so far as money paid to the vendor. He is correct, but in each case the sale was never completed and thus the "relation back" theory spoken of in the judgment of James L.J. in *Rayner v. Preston* and those cases which have followed him, had no application to the facts in *Lehmann* and *J.A.R. Leaseholds Ltd.*

Judgment

105 The contract of October 10th, 1991, to purchase the Lands was a "valid contract" in the sense that it was sufficient in form and in substance so that there was no ground for setting it aside; it was a contract binding on both parties: see Jessel M.R. in *Lysaght v. Edwards* (supra, at pp. 29-30 [p. 305]). It was an arm's length transaction. Had either party failed to complete, the other had available the remedy of specific performance.

106 The contract did complete and title was conveyed to the purchasers. The relationship of the vendors and purchasers from the time of execution of the contract to its completion was that of trustees and cestui que trust. During that period the vendors had legal title to the Lands, but their beneficial interest was in the net purchase proceeds. The judgment debt or, Virtanen, had a one-third beneficial interest in the purchase proceeds but no beneficial interest in the lands, save for a lien for the purchase price and this involved his right, together with his co-tenants in common, to hold possession of the lands until the purchase money was paid: see *Buchanan v. Oliver Plumbing & Heating Ltd.* (supra, at pp. 32-33 [pp. 306-307]).

107 A judgment creditor can only attach the interest that exists in the judgment debtor; he can stand in no better position with respect to the land than does the judgment debtor. In the circumstances, the claim of the petitioner Martin is limited to Virtanen's share of the net proceeds of the sale to the Respondents. That sum has not been put to the court precisely, and I leave it to counsel to determine it. If they cannot agree, the matter may be spoken to.

108 Reaching these conclusions, I have been persuaded by the reasoning in *Lysaght v. Edwards* and in the dissent of James L.J. in *Rayner v. Preston*, which I am satisfied is now the law in Canada, and those cases which have approved his decision: *Buchanan v. Oliver Plumbing & Heating Ltd., J.A.R. Leaseholds Ltd. v. Tormet Ltd.*, both decisions of the Ontario Court of Appeal, and the Supreme Court of Canada in *R. v. Caledonian Insurance Co.*, all previously referred to in these Reasons.

109 It was James L.J. who pronounced what has become known as the relation-back theory [p. 13]:

> I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser.

110 In *Tasker v. Small* (supra, at p. 11 [p. 296]), Lord Cottenham limited the equitable doctrine, saying:

> But it was argued at the bar that the Plaintiff was, in equity, invested with all the rights of Mrs. Small, upon the principle that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.

111 I am not persuaded that this statement can be extended to give comfort to judgment creditors who, in this case and in any other, in law can only charge the interest of the judgment debtor in the land.

112 It is significant that in both *Tasker v. Small* and *De Hoghten v. Money* which followed it (supra, at pp. 11-12 [p. 296]) the contracts of purchase and sale had not completed, and, in effect, the purchasers in those cases were seeking to exercise rights of the vendor.

113 *Tasker v. Small* was decided some 40 years before the decision of Lord Justice James in *Rayner v. Preston*. Schroeder J.A. in *Buchanan v. Oliver Plumbing* ruled that the principles enunciated by James L.J. govern not only the rights of the "immediate parties to the agreement, but also the rights of the purchaser against strangers to the contract".

114 Something must be said about the decision of Harvey C.J. in the *Adanac Oil* case, for I have chosen not to follow it. With great respect to a distinguished judge, from my reading of *Lysaght v. Edwards* and *Shaw v. Foster*, I am unable to draw the conclusions from them that he has; namely, that until the whole of the purchase money has been paid, the vendor retains such a beneficial interest in the lands that it can be attached by creditors.

115 Judge Harvey cited *Wall v. Bright* (supra, at p. 17 [p. 299]). In that case, Sir Thomas Plumer M.R. said, at p. 503:

> The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate.

116 I find nothing in this passage inconsistent with the conclusions I have reached.

117 Judge Harvey also relied upon *Rose v. Watson* [(1864), 10 H.L. Cas. 672, 11 E.R. 1187] (supra, at p. 24 [p. 302]), but that was a case which dealt with a purchaser's lien before completion of the contract of sale and purchase of land.

118 For the reasons I have given, I find that the Martin judgment attached Virtanen's interest in the proceeds of sale of the Lands to the Respondents, but not the Lands itself.

119 The Respondents will have their costs at scale 3.

Order accordingly.

Footnotes

1 *Lysaght v. Edwards* (1876), 2 Ch. D. 499, *per* Jessel M.R., at 506; *cf. Tolhurst v. Assoc. Portland Cement Mfr. (1900) Ltd.*, [1902] 2 K.B. 660 at 668, affirmed [1903] A.C. 414 (as to transfer of the burden of contract so as to discharge the original contract).

2 *Lysaght v. Edwards*, *supra*, note 100.

3 *Wall v. Bright* (1820), 37 E.R. 456 at 459.

4 *Shaw v. Foster* (1872), L.R. 5 H.L. 321 at 356.

5 *Rayner v. Preston* (1881), 18 Ch. D. 1 at 13; *cf. Kimniak v. Anderson*, [1929] 2 D.L.R. 904 (Ont. C.A.); §815 ...

6

7 (1837), 40 E.R. 848 at 851.

8 See *De Hoghten v. Money* (1866), L.R. 2 Ch. 164.

TAB 8

United Kingdom Supreme Court

Summary

Michaelmas Term
[2014] UKSC 52
On appeal from: [2012] EWCA Civ 17

JUDGMENT

Rosemary Scott (Appellant/Second Defendant)
and
Southern Pacific Mortgages Limited (Claimant/First Respondent)
and
Mortgage Express (Second Respondent)
and
Amee Lydia Wilkinson (First Defendant)
and
The Mortgage Business Plc (Intervener)

before

Lady Hale
Lord Wilson
Lord Sumption
Lord Reed
Lord Collins

JUDGMENT GIVEN ON

22 October 2014

Heard on 3 and 4 March 2014

Appellant Bryan McGuire QC James Stark (Instructed by Paula Harris, David Gray Solicitors LLP)		*First Respondent* Justin Fenwick QC Nicole Sandells Nicholas Broomfield (Instructed by Paul Heeley, TLT LLP)
		Second Respondent Justin Fenwick QC Nicole Sandells Nicholas Broomfield (Instructed by Ian Drew, Walker Morris LLP)
		Intervener Lesley Anderson QC Daniel Gatty (Instructed by Richard Pitt, Eversheds LLP)

LORD COLLINS (with whom Lord Sumption agrees)

1. The transactions with which this appeal is concerned arose during a period when sale and rent back transactions were common. They were what was described by the Office of Fair Trading in 2008 (*Sale and rent back: An OFT market study*) as a relatively new type of property transaction whereby firms bought homes from individuals, usually at a discount, and allowed the former home owners to stay on in the property as tenants. The deals were often sold to home owners in financial difficulties and the firms selling them often told the home owners that they would be able to stay in their homes for years, when in fact the tenancies were rarely granted for more than six or twelve months. Many firms financed the purchase of the properties through secured borrowing, and former owners were being evicted following proceedings for possession by mortgage lenders after the purchasers defaulted on their loans. The home owners did not fully understand the risks involved, and the OFT's research found that solicitors provided by the sale and rent back companies to provide advice to the seller were sometimes suspected to be acting for the companies as well. By the time of the study the OFT estimated that there were 1,000 firms involved in selling the schemes and about 50,000 transactions.

2. In 2009 the Financial Services Authority recommended that consumer detriment occurring in this market warranted a fast regulatory response, and in the same year sale and rent back transactions became a regulated activity under section 19 of the Financial Services and Markets Act 2000. As a result, in February 2012 the FSA reported that most sale and rent back transactions were unaffordable or unsuitable and should never have been sold, but that in practice the entire market had shut down. They are now very rare.

3. This is an appeal in one of what were originally ten test cases in which the defendant home owners were persuaded to sell their properties to purchasers who promised the vendors the right to remain in their homes after the sale. The purchasers bought the homes with the assistance of mortgages from lenders, who were not given notice of the promises to the home owners. Criminal charges are pending and the original owners and the lenders may have been the victims of a fraud. Some of the solicitors involved in the transactions were subsequently the subject of disciplinary proceedings. Ultimately this appeal will determine which of the innocent parties will bear the consequences.

4. The purchasers/mortgagors were nominees for an entity called North East Property Buyers ("NEPB"). In each case the purchaser/mortgagor has taken no part in the proceedings. There are another 90 or so cases in the Newcastle area involving NEPB and some 20 different lenders, but also many other cases in other parts of England involving similar schemes.

5. In each case the purchaser applied for a loan from one of the lenders. The application form disclosed that the property was being purchased on a "buy to let" basis and that the tenancies granted would be assured shorthold tenancies of six months' duration. The mortgage terms generally permitted only assured shorthold tenancies for a fixed term of not more than 12 months. As a result the purchasers were able to obtain loans on the basis that they were purchasing properties at full value with vacant possession.

6. Exchange of contracts between the relevant vendor and the purchaser, and the completion of the contract by the execution of the transfer, and the execution of the mortgage, all took place on the same day. Neither the rights of occupation promised by the purchasers to the vendors nor the tenancies granted by the purchasers were permitted by the lenders' mortgages.

7. The purchasers defaulted on the loans, and the lenders sought possession of the homes in proceedings, which the original owners resisted, without success, before Judge Behrens sitting as a High Court judge in the Chancery Division at Leeds District Registry (sub nom *Various Mortgagors v Various Mortgagees* [2010] EWHC 2991 (Ch)) and on appeal before Lord Neuberger MR, and Rix and Etherton LJJ, with Etherton LJ giving the only reasoned judgment: sub nom *Cook v Mortgage Business* [2012] EWCA Civ 17, [2012] 1 WLR 1521.

8. The essence of the issue before this court is whether the home owners had interests whose priority was protected by virtue of section 29(2)(a)(ii) of, and Schedule 3, paragraph 2, to the Land Registration Act 2002 ("the 2002 Act").

9. There are two main questions on this appeal which divide the parties, and each of them concerns the effect of the contract of sale and purchase.

10. One question is whether the purchasers were in a position at the date of exchange of contracts to confer equitable proprietary rights on the vendors, as opposed to personal rights only. The second question is whether, even if the equitable rights of the vendors were more than merely personal rights, the rationale of the decision of the House of Lords on the Land Registration Act 1925 ("the 1925 Act") in *Abbey National Building Society v Cann* [1991] 1 AC 56 applies in this case. At the risk of oversimplification, that case decided that where a purchaser relies on a bank or building society loan for the completion of a purchase, the transactions of acquiring the legal estate and granting the charge are one indivisible transaction, and an occupier cannot assert against the mortgagee an equitable interest arising only on completion.

Mrs Scott's case

11. The only appeal before this court is that by Mrs Scott, but because this is a test case I shall for convenience refer to the arguments on her behalf as those of "the vendors". In order to put some flesh on the scheme, I propose to illustrate it by reference to some of the facts of Mrs Scott's case, although it should be emphasised that there have been no findings of fact and that the lenders have not agreed the statement of facts from which this account is taken.

12. Mrs Scott and her former husband Mr Scott were originally secure tenants of a house in Longbenton, Newcastle upon Tyne. They bought the house from North Tyneside Borough Council in 1999 on a mortgage from Cheltenham and Gloucester, and became the registered proprietors with absolute title. Five years later Mr Scott left Mrs Scott and she fell into financial difficulties. In 2005 she decided to put the house on the market at £156,000 but only received an offer significantly below the asking price.

13. Mrs Scott was subsequently approached by a man who told Mrs Scott that he had heard she was trying to sell her house, and said that a friend of his worked for a Mr Michael Foster who was looking to buy properties in the area and that Mr Foster would pay the asking price and rent it back to Mrs Scott.

14. Mr Foster, who was in some way connected with NEPB, then met Mrs Scott and told her that he would purchase the property for £135,000 and that she could stay as a tenant at a discounted rent of £250 a calendar month. If she stayed for ten years she would receive a lump sum of £15,000, which would make up some of the deficit in the sale price, and she would receive £24,000 from the net proceeds of sale. The outstanding mortgage to Cheltenham and Gloucester was in the region of £70,000, and so the equity would have been about £65,000. A deduction of £40,000 would be paid to NEPB.

15. Mrs Scott told Mr Foster that she wished to live in the property indefinitely and he assured her that she could stay as long as she liked, and that if she were to die the tenancy would be automatically transferred into her son's name and he would receive the lump sum at the end of the ten-year period.

16. Mr Foster said that he would arrange solicitors for her and be responsible for the legal fees so long as those solicitors were used. Those solicitors were Hall & Co, who also acted for the vendors in most of the other cases. The solicitors for the purchaser were Adamsons, who, in the usual way, also acted for the lenders (and also acted in other transactions of this type).

17. Ms Amee Wilkinson was the nominee purchaser for NEPB. Ms Wilkinson was made a buy to let interest only mortgage offer by Southern Pacific Mortgages Ltd on June 15, 2005. The loan amount was £114,750 and £1,751.50 fees. The mortgage offer stated that the purchaser was not bound by the terms of the offer until the purchaser had executed the legal charge, the funds had been released, and the legal transaction had been completed.

18. In the course of the conveyancing process, the answers to the requisitions on title in respect of vacant possession were that arrangements might be made direct with the seller "as to both the handover of keys and the time that vacant possession would be given."

19. The agreement for sale, dated August 12, 2005, was expressed to be with Full Title Guarantee and subject to the Standard Conditions of Sale (4th Edition). The Special Conditions attached at Clause 4 were left by both firms of solicitors without either of the alternatives being deleted so that it read, "The property is sold with vacant possession (or) The property is sold subject to the following Leases or Tenancies". No leases or tenancies were listed.

20. Completion of the transfer (TR1) from Mrs Scott and Mr Scott to Ms Wilkinson and the legal charge by Ms Wilkinson to SPML also took place on August 12, 2005. The transfer and the charge were registered on September 16, 2005.

21. Four days later, on August 16, 2005 UK Property Buyers acting as agents for Ms Wilkinson, contrary to the terms of Ms Wilkinson's mortgage, granted Mrs Scott a two-year assured shorthold tenancy at the reduced rent. On expiry of the fixed term, the tenancy was stated to become a monthly periodic tenancy terminable on not less than two months' notice in writing. Mrs Scott also received, dated August 16, 2005, a document promising that she could remain in the property as the tenant and that a loyalty payment of £15,000 would be paid after ten years.

22. Three years later, in August 2008, Mrs Scott became aware that there might be a mortgage on the property. A letter was sent to Mrs Scott by North East Property Lettings suggesting that there had been teething problems following an office move and that some tenants had been receiving letters from mortgage companies stating that the account was in arrears, which, the letter assured Mrs Scott, was incorrect. A few months later, Mrs Scott discovered, through accidentally opening a letter addressed to Ms Wilkinson at the house, that a possession order had been made on March 17, 2009 without her knowledge, pursuant to proceedings commenced in February 2009. Subsequently, she received a warrant of possession due to be executed on May 20, 2009.

23. The warrant of possession was suspended and Mrs Scott was joined as a defendant in the possession proceedings so that she could argue that she had an overriding interest under the 2002 Act.

24. It is impossible not to feel great sympathy with Mrs Scott and the former home owners in her position, who may have been not only the victims of a fraud which tricked them out of their homes, but also of unprofessional and dishonest behaviour by the solicitors appointed to act for them. They may have claims against the Solicitors' Compensation Fund, but the fact remains that they may lose their homes if they do not succeed on this appeal.

25. But there is also an important public interest in the security of registered transactions. There are more than 23 million registered titles in England and Wales, and each month the Land Registry may handle up to 75,000 house sales, of which the vast majority will be financed by secured loans.

The judgments of Judge Behrens and the Court of Appeal

26. Ultimately, Mrs Scott's case was selected as one of the ten test cases to be tried before Judge Behrens. At a case management conference, he ordered that three preliminary issues should be tried, of which only the first remains live, namely:

> "With reference to section 29 of the [2002 Act] are any of the interests alleged by the defendants capable of being interests affecting the estates immediately before and/or at the time of the disposition, namely the transfer and/or charge of the property in question, sufficient to be an overriding interest under paragraph 1 and/or 2 of Schedule 3 to the 2002 Act? …"

27. The vendors' argument throughout these proceedings has been, with some variations, that they had rights which took priority to the lenders' charges essentially because: (1) from the moment of exchange of contracts the vendors each had, by virtue of the assurances by the purchasers as to the vendors' right of occupation after completion, an equity in their property beyond and in addition to their registered freehold interest; (2) the equity was a proprietary right and not a mere personal equity, because the purchasers had proprietary rights as from exchange of

contracts, out of which they could carve the obligation to lease back the properties to the vendors, and it did not matter that the contract of sale did not reflect that obligation; (3) there was a sale subject to a reservation of the leaseback to the vendors (and not a separate sale and leaseback or one indivisible transaction of contract, transfer and mortgage), and the purchasers never had more than a title to the property subject to the vendors' rights; (4) the vendors' rights had effect from the time they arose: the 2002 Act, section 116; and (5) the equity took priority under Schedule 3, paragraph 2, to the 2002 Act and was therefore binding on the lenders by virtue of section 29(2)(a)(ii).

28. Although there was some suggestion in the appeal to this court that the property was held on resulting trust (on the basis that the sale was in reality a sale of the reversionary interest), Mrs Scott's primary case is that, because of the representations made to her by or on behalf of the purchaser, the purchaser is a constructive trustee or bound by a proprietary estoppel. In *Bannister v Bannister* [1948] 2 All ER 133, a claim that the owner had agreed to let the occupier live in a cottage rent free for as long as she wished was treated as a claim based on constructive trust, on the basis that the purchaser fraudulently set up "the absolute character of the conveyance … for the purpose of defeating the beneficial interest" (at p 136). The relationship between constructive trust and proprietary estoppel has been the subject of much discussion: see especially *Yaxley v Gotts* [2000] Ch 162, 176-177. It is likely that the difference would only be crucial in terms of remedies, but nothing turns on the distinction in this appeal.

29. The essence of Judge Behrens' judgment was as follows: (1) even if the promises to the vendors gave rise to a proprietary right on completion, there was no moment in time in which such an interest could bind the lender: *Abbey National Building Society v Cann* [1991] 1 AC 56; (2) the vendors did not obtain an interest on exchange of contracts, because contract, conveyance and mortgage were one indivisible transaction: *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381; (3) in any event, prior to completion the vendors' equitable rights were at best personal rights and not proprietary rights; (4) the transfers executed by the vendors on completion would have transferred any interest which they had in the properties to the purchaser under the Law of Property Act 1925, section 63.

30. The Court of Appeal decided that: (1) there was a separate sale of the freehold and a leaseback to the vendor on completion, and not a sale subject to a reservation; (2) the clear impression created by the contracts was that the vendors would be selling without reserving any beneficial interest or other rights in the property; (3) a mortgagee lending money to finance the purchase would be entitled to view the matter in the same way; (4) in those circumstances no equitable interest or equivalent equity could have arisen in favour of the vendors prior to completion; (5) even if an equity arose in favour of the vendors on exchange of contracts in consequence of the assurances given by the purchasers, there was no moment of time when the freehold acquired by the purchaser was free from the mortgage but subject to the equity, and it was unrealistic to separate out the contract, on the one hand, and the transfer and mortgage, on the other hand, as separate transactions: *Abbey National Building Society v Cann* [1991] 1 AC 56, as applied in *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381; (5) if the equitable interest arose on completion, then *Abbey National Building Society v Cann* [1991] 1 AC 56 was not distinguishable and the equitable interest could not take priority.

Land Registration legislation

31. Because the earlier authorities are concerned with the predecessor of the provisions in the 2002 Act relating to priority of unregistered interests which are the subject of this appeal, it is necessary to start with the relevant provisions of the 1925 Act.

32. Section 20(1)(b) of the 1925 Act provided:

> "In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein … shall, when registered, confer on the transferee or grantee an estate in fee simple …or other legal estate expressed to be created in the land dealt with … subject …(b) … to the overriding interests, if any, affecting the estate transferred or created ..."

33. Section 70(1) contained a list of miscellaneous overriding interests to which registered land was subject, and section 70(1)(g) provided:

> "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say) . . .
>
> (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed; . . ."

34. The object of section 70(1)(g) was "to protect a person in actual occupation of land from having his rights lost in the welter of registration … No one can buy the land over his head and thereby take away or diminish his rights": Lord Denning MR in *Strand Securities Ltd v Caswell* [1965] Ch 958, 979.

35. The rights which were overriding rights related primarily to rights which in unregistered conveyancing were not normally included in title deeds or revealed in abstracts of title. Overriding interests in general were an impediment to one of the main objectives of land registration, that the land register should be as complete a record of title as it could be: see, eg Gray and Gray, *Elements of Land Law* (5th ed. 2008), para 8.2.44. Reform of the law of land registration was on the agenda of the Law Commission from its inception. Overriding interests were considered in the Third Report on Land Registration (Law Com No 158, paras 2.54-2.70, 1987) and the Fourth Report (Law Com No 173, 1988), and in a joint consultation by the Law Commission and HM Land Registry in 1998. The Law Commission ultimately produced a draft Bill which led to the 2002 Act: *Land Registration for the 21st Century: A Conveyancing Revolution* (2001), Law Com No 271, in which it referred to section 70(1)(g) of the 1925 Act as "notorious and much-litigated" (para 8.15).

36. One of the principal objectives of what became the 2002 Act was to create a simplified conveyancing system, electronically based, under which it would be possible to investigate title to land almost entirely on-line with the bare minimum of additional inquiries: Law Com No 271, paras 8.1 et seq. A major obstacle to that goal was the existence of overriding interests. Although the 2002 Act was intended to minimise the circumstances in which new overriding interests arose, the Law Commission recommended the retention of the overriding status of occupiers' rights.

37. The reason which had been given in the joint consultation was that:

> "it is unreasonable to expect all encumbrancers to register their rights, particularly where those rights arise informally, under (say) a constructive trust or by estoppel. The law pragmatically recognises that some rights can be created informally, and to require their registration would defeat the sound policy that underlies their recognition. Furthermore, when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it. They will probably regard their occupation as the only necessary protection. The retention of this category of overriding interest is justified…because this is a very clear case where protection against purchasers is needed but where it is 'not reasonable to expect or not sensible to require any entry on the register'." (Law Com No 254, para 5.61).

38. The expression "overriding interests" is not found in the 2002 Act, except in relation to transitional matters. The heading to Schedule 3 is "Unregistered interests which override registered dispositions."

39. So far as is relevant the scheme of the 2002 Act (leaving aside the special provisions for leases of seven years or less, which do not now arise on this appeal) is as follows:

> (1) a registered owner has the power to make a disposition of any kind permitted by the general law in relation to an interest of that description: section 23(1)(a);
>
> (2) a person is entitled to exercise owner's powers in relation to a registered estate or charge if he is (a) the registered proprietor, or (b) entitled to be registered as the proprietor: section 24;
>
> (3) by section 27 certain dispositions, including transfers of land and legal mortgages, are required to be registered and do not operate at law until the relevant registration requirements are met;
>
> (4) the basic rule is that the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge: section 28;
>
> (5) section 29 deals with the effect of registered dispositions and provides:
>
> > "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
> >
> > (2) For the purposes of subsection (1), the priority of an interest is protected -
> >
> > (a) in any case, if the interest -
> >
> > (i) is a registered charge or the subject of a notice in the register,

> (ii) falls within any of the paragraphs of Schedule 3 …";

(6) Schedule 3 is headed "UNREGISTERED INTERESTS WHICH OVERRIDE REGISTERED DISPOSITIONS," and paragraph 2 includes:

> "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for -
>
> (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
>
> (c) an interest -
>
> > (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and (ii) of which the person to whom the disposition is made does not have actual knowledge at that time ...";

(7) section 72 grants priority protection to those who apply for an entry in the register during the priority period;

(8) section 116 is headed "Proprietary estoppel and mere equities" and provides:

> "It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following -
>
> (a) an equity by estoppel, and
>
> (b) a mere equity,
>
> has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)";

(9) section 132 is an interpretation section and provides (i) in section 132(1) that (a) "legal estate" has the same meaning as in the Law of Property Act 1925 and (b) "registered estate" means "a legal estate the title to which is entered in the register, other than a registered charge"; and (ii) in section 132(3)(b) that "references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge …";

(10) the effect of section 1 of the Law of Property Act 1925 for present purposes is:

> (a) that "legal estates" means "[t]he estates … and charges which under this section are authorised to subsist or to be conveyed or created at law … (when subsisting or conveyed or created at law)" (section 1(4));

> (b) "The only estates in land which are capable of subsisting or of being conveyed or created at law are – (a) An estate in fee simple absolute in possession; (b) A term of years absolute" (section 1(1));
>
> (c) "The only …charges in or over land which are capable of subsisting or of being conveyed or created at law are ….(c) A charge by way of legal mortgage …" (section 1 (2));
>
> (d) "All other estates, interests, and charges in or over land take effect as equitable interests" (section 1(3)).

40. The effect of sections 27 and 29 of the 2002 Act is that, although a registrable disposition takes place when it is executed, neither a conveyance nor a charge takes effect at law until registration, and the consequence is that a purchaser and a mortgagee acquire equitable interests on completion: Megarry and Wade, *The Law of Real Property*, 8th ed, 2012, para 7-053; *Mortgage Corpn Ltd v Nationwide Credit Corpn Ltd* [1994] Ch 49, 54, per Dillon LJ (a case on the 1925 Act).

Abbey National Building Society v Cann [1991] 1 AC 56

41. The principal issue in the courts below was whether the decision in *Abbey National Building Society v Cann* [1991] 1 AC 56 ("*Cann*") is controlling (as the lenders say) or distinguishable (as the vendors say), and the decision also has some bearing on the other issue on this appeal, namely whether proprietary rights can be granted to a third party by a purchaser prior to completion. Consequently it is necessary to go beyond summarising the principles for which it stands by setting out the essential facts (particularly those facts which the vendors say distinguish the present case) and some of the reasoning. The decision in *Cann* predates the reform of land registration law in the 2002 Act, and the relevant sections of the 1925 Act have been set out above.

The facts

42. Three properties in Mitcham, Surrey, were involved in *Cann*: 48 Warren Road, Mitcham ("48 Warren Road"); 30 Island Road, Mitcham ("30 Island Road"), and 7 Hillview, Mitcham ("7 Hillview"). Mrs Cann lived with her first husband in a house at 48 Warren Road. Her husband, who was the tenant of the property under a protected tenancy, died in 1962 and Mrs Cann succeeded to the tenancy as his widow and was entitled to the protection afforded by the Rent Acts. In 1977 the landlord's agents approached Mrs Cann as the sitting tenant with an offer to sell the freehold of 48 Warren Road to her for £5,000. Because neither she, nor her late husband's brother, Abraham Cann, who was by then living with her, could afford to purchase the property, her son George Cann ("George") offered to raise a mortgage and purchase it; and in 1977 it was conveyed into the joint names of Mrs Cann and George with the aid of an endowment mortgage covering the whole of the price. George assured his mother that she would not need to pay any rent and that she would always have a roof over her head. Later they came across a more attractive house, 30 Island Road. 48 Warren Road was sold for £20,500, and 30 Island Road was purchased in the name of George alone for £26,500 of which £15,000 was, with Mrs Cann's knowledge and acquiescence, raised on mortgage from the Nationwide Building Society.

43. By 1984 George was in financial difficulties and told Mrs Cann that he could no longer afford to pay for two homes. He arranged to sell 30 Island Road for £45,000 and to purchase instead a smaller leasehold property, 7 Hillview, at a price of £34,000. George applied to Abbey National for a loan of £25,000 to be secured on a mortgage of 7 Hillview stating that that property was being purchased for his own sole occupation. Abbey National inspected and approved the property, and made a formal offer of an advance, which was accepted. Contracts for the sale of 30 Island Road, and the purchase of 7 Hillview, were exchanged in July 1984 with the completion date for both transactions fixed for August 13, 1984. Prior to the completion date, in the normal way George's solicitors received a cheque from Abbey National and George executed a legal charge on the property in favour of Abbey National to secure the sum advanced. The solicitors were in a position to complete the purchase on the completion date subject only to completion of the sale of 30 Island Road, from which the balance of the purchase price was to come.

44. The sale of 30 Island Road and purchase of 7 Hillview by George were completed on August 13, 1984. George subsequently defaulted in his payments to Abbey National, and Abbey National commenced proceedings for possession against George, Mrs Cann and Abraham Cann. George took no part in the proceedings.

The decision

45. The defence of Mrs Cann and Abraham Cann was that, because of a contribution made by Mrs Cann to the purchase of 48 Warren Road (represented by her status as a sitting tenant) and by reason of the assurance given by George that she would always have a roof over her head, she had an equitable interest in 7 Hillview, which, by virtue of her actual occupation, had taken priority over Abbey National's charge as an overriding interest.

46. The first two main holdings of the House of Lords present no difficulty on the present appeal. First, it was held that the relevant date for determining the existence of overriding interests affecting the estate transferred or created was the date of registration of the estate rather than the date of completion: at pp 87, 106. The 2002 Act lays down the general principle in section 29(1) that completion of a disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration (including overriding interests: section 29(2)(a)(ii)).

47. Second, it was held that to substantiate a claim to an overriding interest against a transferee or chargee by virtue of section 70(1)(g) of the 1925 Act, as a person in actual occupation of the land, the person claiming the overriding interest had to have been in actual occupation at the time of completion: at pp 88, 106. Schedule 3, paragraph 2 of the 2002 Act now expressly confirms that the relevant interest must belong "at the time of the disposition to a person in actual occupation."

48. The other holdings are the crucial ones on this appeal, which are these: (1) where a purchaser relies on a bank or building society loan for the completion of a purchase, the transactions of acquiring the legal estate and granting the charge are one indivisible transaction; (2) George never acquired anything but an equity of redemption and there was no scintilla temporis during which the legal estate vested in him free of the charge and an estoppel affecting him could be "fed" by the acquisition of the legal estate so as to become binding on, and take priority over the interest of, the chargee; and (3) consequently Mrs Cann could have no overriding interest

arising from actual occupation on the day of completion. The vendor remained the proprietor until registration, but the charge was created on its execution: at p 80.

49. On the facts it was held in any event that Mrs Cann was not in actual occupation at the time of completion (since all that happened prior to completion was that removers were unloading her carpets and furniture for about 35 minutes) and that she was precluded from relying on any interest as prevailing over Abbey National because she had impliedly authorised George to obtain the mortgage.

50. Lord Oliver gave the leading opinion, with which Lords Bridge, Griffiths and Ackner expressly agreed. Lord Jauncey concurred in a full opinion, but there is no substantial difference between his reasoning and that of Lord Oliver. The following points emerge from Lord Oliver's opinion. First, prior to completion Mrs Cann had no interest in 7 Hillview, because she was not a party to the contract for the purchase of that property and if she had been led to believe that she would have an interest in and the right to occupy that property when George acquired it, at the stage prior to its acquisition she had no more than a personal right against him. Second, Abbey National, as an equitable chargee for money actually advanced prior to completion, had an interest ranking in priority to what was merely Mrs Cann's expectation of an interest under a trust for sale to be created if and when the new property was acquired. Third, there was no notional point of time at which the estate vested in George free from the charge and in which the estoppel affecting him could be "fed" by the acquisition of the legal estate so as to become binding on and take priority over the interest of the mortgagee, approving the analysis of Mustill LJ in *Lloyds Bank plc v Rosset* [1989] Ch 350, 388-393, and disapproving *Church of England Building Society v Piskor* [1954] Ch 553.

51. Lord Oliver said (at pp 92-93):

> "The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together. The acquisition of the legal estate is entirely dependent upon the provision of funds which will have been provided before the conveyance can take effect and which are provided only against an agreement that the estate will be charged to secure them. Indeed, in many, if not most, cases of building society mortgages, there will have been, as there was in this case, a formal offer and acceptance of an advance which will ripen into a specifically enforceable agreement immediately the funds are advanced which will normally be a day or more before completion. In many, if not most, cases, the charge itself will have been executed before the execution, let alone the exchange, of the conveyance or transfer of the property. This is given particular point in the case of registered land where the vesting of the estate is made to depend upon registration, for it may well be that the transfer and the charge will be lodged for registration on different days so that the charge, when registered, may actually take effect from a date prior in time to the date from which the registration of the transfer takes effect …The reality is that the purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, for the land is, from the very inception, charged with the amount of the loan without which it could never have been transferred

> at all and it was never intended that it should be otherwise. The 'scintilla temporis' is no more than a legal artifice …"

52. Lord Jauncey said that, on completion of the purchase of 7 Hillview, Mrs Cann acquired an equitable interest in that house. Since that interest derived from George it followed that she could acquire no equitable interest in the house prior to his acquisition of an interest therein on completion, nor could she acquire an interest greater than he acquired. He went on (at pp 101-103):

> "It is of course correct as a matter of strict legal analysis that a purchaser of property cannot grant a mortgage over it until the legal estate has vested in him. The question however is whether having borrowed money in order to complete the purchase against an undertaking to grant security for the loan over the property the purchaser is, for a moment of time, in a position to deal with the legal estate as though the mortgagee had no interest therein. …In my view a purchaser who can only complete the transaction by borrowing money for the security of which he is contractually bound to grant a mortgage to the lender eo instante with the execution of the conveyance in his favour cannot in reality ever be said to have acquired even for a scintilla temporis the unencumbered fee simple or leasehold interest in land whereby he could grant interests having priority over the mortgage or the estoppel in favour of prior grantees could be fed with similar results. Since no one can grant what he does not have it follows that such a purchaser could never grant an interest which was not subject to the limitations on his own interest. …
>
> In the present case George Cann borrowed money from the society in order to complete the purchase of 7 Hillview and in return granted to them a mortgage. The mortgage was executed by George Cann prior to 13 August 1984 when the purchase was completed. It follows that as a matter of reality George Cann was never vested in the unencumbered leasehold and was therefore never in a position to grant to Mrs Cann an interest in 7 Hillview which prevailed over that of the society. The interests that Mrs Cann took in 7 Hillview could only be carved out of George Cann's equity of redemption. In reaching this conclusion it is unnecessary to consider whether or not Mrs Cann was aware that George Cann would require to borrow money in order to finance the purchase of 7 Hillview."

Contract/conveyance

53. Logically the first question on this appeal is whether the purchasers were in a position at the date of exchange of contracts to confer equitable proprietary rights on the vendors, as opposed to personal rights only. The question whether the analysis in *Cann* applies where the equitable interest of the occupier arises on exchange of contracts only comes into play if the vendors acquired proprietary rights at that time.

54. It was the second question which exercised the courts below, and they decided that the analysis in *Cann* did apply where the equitable interest of the occupier arises on exchange of contracts.

Effect of contract

55. But I propose to deal with the logically prior question first, namely whether the vendors acquired proprietary rights on exchange of contracts. The lenders argued that, even if the decision in *Cann* did not have the result that the contract was part of the indivisible transaction, the vendors' claims against the purchasers were purely personal, and not proprietary, until the purchasers obtained the legal estate on completion and the estoppel was then "fed" which, on the basis of *Cann*, would have been too late to give the vendors priority over the charges.

56. The vendors relied on the 2002 Act, section 116, which is headed "Proprietary estoppel and mere equities" and declares "for the avoidance of doubt that, in relation to registered land, … an equity by estoppel …has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)." Their argument was that the 2002 Act expressly provided that their proprietary estoppel claims gave them proprietary rights, and that it is not necessary that the person who is estopped has a legal title.

57. They also supported their claim to proprietary rights by reliance on the long line of authority that following exchange of contracts the seller holds the property on trust for the purchaser. The argument was that (a) a person who has contracted to purchase has a proprietary interest and not a mere contractual right: *Lysaght v Edwards* (1876) 2 Ch D 499; (b) consequently, on exchange of contracts, the vendors became trustees for the purchasers; and (c) the purchasers were as a result able to confer on the vendors equitable interests in the properties carved out of their rights as purchasers.

58. The purpose of section 116 of the 2002 Act was to make it clear that the rights which arose after detrimental reliance were proprietary even before they were given effect by the court: Explanatory Notes, paras 183-185; Law Com No 271 (2001), paras 5.29-5.31. *Cf. Birmingham Midshires Mortgage Services Ltd v Sabherwal* (1999) 80 P & CR 256, [1999] EWCA Civ 3042, paras 24-31 per Robert Walker LJ. But section 116 is expressly subject to the priority rules in the 2002 Act, and takes the matter no further. It also begs the question as to when "the equity arises as an interest capable of binding successors in title" and probably assumes that it first arises (as it usually does) as against the legal owner who is estopped or who is bound by the equity.

59. I accept the argument for the lenders that the unregistered interests which override registered dispositions under the 2002 Act, Schedule 3, paragraph 2, by virtue of section 29(2) of the 2002 Act, must be proprietary in nature, because: (1) the interest which is postponed to a registered disposition of a registered estate under section 29(1) is "any interest affecting the estate"; (2) by section 132(1) "legal estate" has the same meaning as in the Law of Property Act 1925, and a "registered estate" means "a legal estate the title to which is entered in the register, other than a registered charge"; (3) the effect of the Law of Property Act 1925, section 1 is that the only estates which can exist at law are an estate in fee simple and a term of years absolute and a limited range of other interests including a charge by way of legal mortgage; (4) by section 132 (3)(b) references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge; (5) the effect of sections 23 and 24 is that only someone with owner's powers, i.e. the registered proprietor or a person entitled to be registered as proprietor, can make a disposition, such as granting a lease. Consequently, the combined effect of sections 116 and 132 is that section 116 rights require a proprietary element to have any effect.

60. The question therefore arises whether a purchaser, prior to acquisition of the legal estate, can grant equitable rights of a proprietary character, as opposed to personal rights against the purchaser. Many of the cases on the nature of the purchaser's interest after exchange of contracts, but before completion, were cited on this appeal, and I endeavoured at first instance in *Englewood Properties Ltd v Patel* [2005] 1 WLR 1961, paras 40-43 to deal with their effect. See also Turner, *Understanding the Constructive Trust between Vendor and Purchaser* (2012) 128 LQR 582.

61. The position of the vendor as trustee has been variously described as: (1) "something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate" and "a constructive trustee": *Lysaght v Edwards* 2 Ch D 499, 506, 510, Sir George Jessel MR; or (2) "constructively a trustee": *Shaw v Foster* (1872) LR 5 HL 321, 349, per Lord O'Hagan; (3) "a trustee … with peculiar duties and liabilities": *Earl of Egmont v Smith* (1877) 6 Ch D 469, 475, per Sir George Jessel MR; (4) "a trustee in a qualified sense only": *Rayner v Preston* (1881) 18 Ch D 1, 6, per Cotton LJ; and (5) "a quasi-trustee": *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264, 269, per Lord Greene MR.

62. It has frequently been said that a purchaser of land obtains rights which are akin to ownership: by Lord Cairns in *Shaw v Foster* (1872) LR 5 HL 321, 338, "the purchaser was the real beneficial owner in the eye of a court of equity of the property"; by Lord O'Hagan in the same case (at p 349), the ownership is transferred in equity to the purchaser, and the vendor is "in progress towards" being a trustee. In more modern times it has been recognised that the purchaser's interest is a "proprietary interest of a sort": *Oughtred v IRC* [1960] AC 206, 240, per Lord Jenkins. In *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, para 32, Lord Walker made the point that "beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed…"

63. In *Shaw v Foster* (at p 338) Lord Cairns said that a purchaser had not only the right to devise the property (under the equitable doctrine of conversion) but also the right to alienate it or charge it, and Lord O'Hagan said (at p 350) that the purchaser's interest could be the subject of a charge or assignment, and that the sub-assignee or encumbrancer could enforce his rights against the original vendor.

64. But in the same case Lord Hatherley LC referred (at p 357) to the "fiction of Equity which supposes the money to be paid away with one hand and the estate to be conveyed away with the other," and in the High Court of Australia Deane J said: "it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser ... the ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a 'trustee sub modo' unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription": *Kern Corpn Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 192. The High Court of Australia has said that the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the parties: *Chang v Registrar of Titles* (1976) 137 CLR 177, 190; *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57, (2003) 217 CLR 315, para 53.

65. But these are not cases dealing with the question whether a contract of sale can have a proprietary effect on parties other than the parties to the contract. It is true that the purchaser is given statutory rights to enforce the interests against third parties under a contract of sale by registration: the 2002 Act, sections 15(1)(b), 32, 34(1); Land Charges Act 1972, section 2(1), (4). But it does not follow that the purchaser has proprietary rights for all purposes. Thus in *Inland Revenue Commissioners v G Angus & Co* (1889) 23 QBD 579, 595, Lindley LJ quoted Lord Cottenham LC in *Tasker v Small* (1837) 3 My & C 63, 70, who said that the rule by which a purchaser becomes in equity the owner of the property sold "applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others."

66. In *Berkley v Poulett* [1976] EWCA Civ 1, [1977] 1 EGLR 86, 93 Stamp LJ said (at para 36) that the vendor "is said to be a trustee because of the duties which he has, and the duties do not arise because he is a trustee but because he has agreed to sell the land to the purchaser and the purchaser on tendering the price is entitled to have the contract specifically performed according to its terms. Nor does the relationship in the meantime have all the incidents of the relationship of trustee and cestui que trust." In that case Lord Poulett sold the Hinton St George Estate to X, and X sub-sold the house and grounds to Y. Both transactions were subsequently completed. In an action by Y against the executors of Lord Poulett, the main question which subsequently arose was whether certain objets d'art were fixtures or chattels. It was held that none of them was a fixture, but also by a majority (Goff LJ dissenting) that, even though Lord Poulett had notice of the sub-contract between X and Y, Lord Poulett was not under a duty to Y to take reasonable care of the house because Lord Poulett did not hold the house as trustee for the sub-purchaser Y. In my view it is implicit in this analysis, which I consider to be correct, that X did not obtain proprietary rights against Lord Poulett which he could pass to Y.

67. There are some cases in the Court of Appeal and at first instance (all decided in the early 1950s) which considered the effect on a mortgagee of a grant of tenancies by a purchaser after exchange of contracts but before completion of the sale and a mortgage of the property. *Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 901 was a pre-cursor of *Cann*, and was approved in that decision. Harman J decided that the conveyance and mortgage were one transaction, and there was no scintilla temporis between the time of the conveyance and the mortgage during which the purchaser had acquired sufficient estate to be able to perfect the purported grant of the tenancies. Prior to the conveyance, the purchaser only had an equitable interest in the property and the tenants only had personal rights against the purchaser: at p 903.

68. That decision was distinguished by the Court of Appeal in *Universal Permanent Building Society v Cooke* [1952] Ch 95 on the ground that the building society's charge in that case was executed a day later than the conveyance and there was nothing in the building society's "short statement" that "the conveyance and the mortgage were part of a single transaction" (at p 101). That is a surprising (and very formalistic) ground of distinction, since it is apparent from the statement of the facts (at p 96) that the mortgagor had applied for the mortgage two weeks before the contract of sale. But it was recognised that prior to completion the purchaser was only "able to make a contract, a promise" to the intended tenant: at p 103. In *Woolwich Equitable Building Society v Marshall* [1952] Ch 1 Danckwerts J distinguished *Coventry Permanent Economic Building Society v Jones* on the equally surprising ground that the charge to the Woolwich Building Society recited that the mortgagor was the estate owner in respect of the property.

69. In *Church of England Building Society v Piskor* [1954] Ch 553 purchasers of leasehold premises were given possession before completion and purported to grant tenancies of part of the premises. The purchase was completed on the same day as the purchasers granted a legal charge to the building society. The Court of Appeal disapproved *Coventry Permanent Economic Building Society v Jones* and held that the assignment of the lease to the purchasers and the legal charge to the building society could not be regarded as one indivisible transaction. Consequently the tenancies by estoppel were fed on the acquisition of the legal estate by the purchasers and prior to the grant of the charge: at p 558, per Sir Raymond Evershed MR, and p 566, per Romer LJ.

70. In *Cann* the decision in *Church of England Building Society v Piskor* was disapproved and, as I have said, *Coventry Permanent Economic Building Society v Jones* was approved: at p 93, per Lord Oliver and p 102, per Lord Jauncey. The decision in the *Woolwich Equitable* case was doubted by Lord Jauncey in *Cann* (at p 102), and I do not think that it or *Universal Permanent Building Society v Cooke* can stand with *Cann*.

71. But in each of these cases it was decided, or assumed, that, even if the tenant had equitable rights as against the purchaser, those rights would only become proprietary and capable of taking priority over a mortgage when they were "fed" by the purchaser's acquisition of the legal estate. That is because where the proprietary right is claimed to be derived from the rights of a person who does not have the legal estate, then the right needs to be "fed" by the acquisition of the legal estate before it can be asserted otherwise than personally. In *Cuthbertson v Irving* (1859) 4 H & N 742 Martin B said, at pp 754-755:

> "There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease. Secondly, where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel . . ."

72. In *Bell v General Accident Fire and Life Assurance Corp Ltd* [1998] L & TR 1, BAILII: [1997] EWCA Civ 2962, Mummery LJ said (at p 12):

> "the juristic basis and the legal effect of the estoppel doctrine were authoritatively expounded in the Court of Exchequer by Martin B in *Cuthbertson v Irving* … in terms applicable to this case. … The result is also consistent with the legal effect of the satellite doctrine of 'feeding the estoppel' … which applies when an interest in the land is acquired by the person deficient in title at the time of the grant from which the ?estoppel arose: 'so that, as Hale put it, 'by purchase of the land, that is turned into a lease in interest, which before was purely an ?estoppel": see Holdsworth's *History of English Law*, vol VII, p 246."

73. Thus in *Watson v Goldsbrough* [1986] 1 EGLR 265 licensees of land owned by the wife's parents agreed that an angling club could have fishing rights if they improved the ponds: the estoppel was fed when the licensees acquired the legal estate. It is true that in *Lloyds Bank plc v*

Rosset [1989] Ch 350, 386, Nicholls LJ said (in the case of a common intention constructive trust) that prior to completion of the purchase "the wife had some equitable interest in the property before completion, carved out of the husband's interest. …" But the decision of the Court of Appeal was reversed on the facts ([1991] 1 AC 107), although Lord Bridge seems to have contemplated (at p 134) that Mrs Rosset might have had a beneficial interest before completion. But the question whether a purchaser could grant proprietary equitable rights was not argued or decided.

74. The decision in *Cann* did not directly deal with this point but the conclusion that a purchaser of property cannot grant a proprietary right is strongly supported by the approach of Lord Oliver and Lord Jauncey. Lord Oliver said (at p 89) that prior to completion Mrs Cann had no interest in 7 Hillview, because she was not a party to the contract for the purchase of that property and if she had been led to believe that she would have an interest in and the right to occupy that property when George acquired it, at the stage prior to its acquisition she had no more than a personal right against him. Lord Jauncey said (at p 95) that Mrs Cann could not have acquired an equitable interest in 7 Hillview prior to completion because her rights derived from George and she was not a party to the contract of sale.

75. Nor are the vendors assisted by two further arguments. First, they say that they can justify the existence of an equitable right in the property of which they were legal owners by analogy to the position of an unpaid vendor, who has a proprietary right in property of which he is the legal owner, namely a lien for the unpaid purchase price.

76. In the rare case in which the legal estate is transferred before the purchase price is paid, it was accepted or assumed that the vendor's lien could be an overriding interest for the purposes of section 70(1)(g) of the 1925 Act: *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499; *UCB Bank plc v Beasley* [1995] NPC 144; *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415; *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381. It is not necessary to address the point on this appeal, but the position is probably the same under the 2002 Act; *cf* Law Com No 271, para 5.10. But I accept the lenders' answer that there is no analogy in the present case with the vendor's lien, which arises by operation of law and is the corollary of the purchaser's equitable interest in the property: *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261, 279; *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415, 420.

77. Secondly, the vendors say that the substance of the matter is that they did not sell their homes outright to the purchasers, but simply sold them subject to the rights to the leases which they had been promised, and that *Cann* should be distinguished on the basis that in a sale and leaseback transaction the purchaser in reality has no more than a reversionary interest subject to that leaseback. They rely on a decision of Megarry J at first instance, *Sargaison v Roberts* [1969] 1 WLR 951, in which the question was whether, for the purposes of the tax legislation then in force, a transfer by the taxpayer into a settlement of a farm and the simultaneous grant by the trustees to him of a lease resulted in the whole of the taxpayer's interest in the land being transferred to another person (which would have disentitled him to a tax allowance) or operated to reduce his interest from ownership of a freehold to ownership of a lease. Megarry J held that the effect of the transaction was that the taxpayer's interest had been reduced from ownership of the freehold to ownership of a lease.

78. I agree with Etherton LJ that the true nature of the transaction was that of a sale and lease back. *Sargaison v Roberts* is of no assistance since Megarry J made it clear (at p 958) that he was

considering the interpretation of a United Kingdom taxing statute and not "the technicalities of English conveyancing and land law." In the case of Mrs Scott, for example, the contract provided that the property was to be transferred with "full title guarantee" and "vacant possession" and a transfer in the normal form was executed.

79. Consequently, in my judgment, the appeal should be dismissed on the principal ground that the vendors acquired no more than personal rights against the purchasers when they agreed to sell their properties on the basis of the purchasers' promises that they would be entitled to remain in occupation. Those rights would only become proprietary and capable of taking priority over a mortgage when they were fed by the purchasers' acquisition of the legal estate on completion, and then *Cann* would apply, with the effect that the acquisition of the legal estate and the grant of the charge would be one indivisible transaction, and the vendors would not be able to assert against the lenders their interests arising only on completion.

An indivisible transaction?

80. It follows that the question whether the decision in *Cann* that conveyance and mortgage are one transaction also extends to include a case where the equitable interest is said to arise at the time of the contract of sale does not arise. If I am right on the main point, it is not easy to see how this question could arise in any future case, but I propose to express my view on it because it was the main question canvassed in the courts below and on this appeal.

81. The vendors say that *Cann* did not decide whether the indivisible transaction analysis applies where the equitable interest of the occupier arises on exchange of contracts, and that the answer is that the analysis does not apply. The lenders say that, even if an equitable interest arose on exchange of contracts, in any event the House of Lords has already decided that not only were the conveyance and the charge part of one indivisible transaction, but also that the contract (which had been exchanged some weeks before), conveyance and charge were indivisible. It is therefore necessary to consider whether (and if so, how) this point was dealt with in *Cann.*

82. The argument for Mrs Cann was that she had an interest from the time of exchange of contracts for the acquisition of 7 Hillview: her "equitable interest must have commenced not later than 20 July 1984, when a specifically enforceable contract for the purchase of 7 Hillview was entered into" (at p 66). Lord Oliver assumed (at p 89) that prior to completion George was estopped by his promise to keep a roof over her head from denying her right as against him to terminate her occupation of the property without her consent, but that is a reference to the estoppel which arose on the acquisition of 30 Island Road (as the reference to it not binding the Nationwide Building Society shows). He then goes on to say that Mrs Cann had acquired no rights in 7 Hillview prior to completion because she had not been a party to the contract for its purchase, and at the stage prior to its acquisition "she had no more than a personal right against him." Later on he gives a hypothetical example which may suggest that he thought that the relevant reliance by Mrs Cann would have been vacating 30 Island Road rather than merely agreeing that it be sold. It is possible that Lord Jauncey (at p 95) looked at the matter in the same way.

83. There are two inter-linked questions involved in this analysis. The first question was whether Mrs Cann had any rights at all against George in relation to 7 Hillview (as distinct from her rights in 30 Island Road) at the time of the contract. The second question was whether the contract, conveyance and legal charge were one indivisible transaction. I have already said that Lord Oliver and Lord Jauncey expressed the view that if Mrs Cann had rights against George in relation to 7 Hillview from the time of the contract, they were only personal rights. On the facts

of that case it seems to me that the relevant reliance would have been agreement to the sale of 30 Island Road rather than ceasing occupation of the house on completion of the purchase of 7 Hillview.

84. In *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381 A agreed to purchase a business, including some premises in Bradford, from B for £160,000. B was to retain the use of the property until the whole of the principal money and interest due under the agreement had been paid. A raised £80,000 by way of a secured loan from Nationwide and this was paid to B. The balance of £80,000 was left outstanding and secured by a second charge in favour of B against the property. The agreement, the transfer of the property, and the charges were all executed on the same day. A failed to pay B the balance of the purchase price and fell into arrears on the mortgage repayments. In possession proceedings by Nationwide, B sought to defend on the basis that he had an overriding interest in priority to Nationwide's charge, namely (1) his vendor's lien; and/or (2) the right to occupy given by the purchase agreement until payment of the price in full. The Court of Appeal decided that there was no vendor's lien, primarily because it was given up in consideration of the rights to a second charge and occupation of the property until payment. It also decided that the right to occupy was purely contractual and gave rise to no interest in the land. But it was also decided that B did not have an overriding interest in any event, because, applying *Cann* (per Aldous LJ at p 389):

> "the charges, the agreement and the transfer were all signed on the same day … Thus, [B's] right to occupation under clause 6, did not accrue prior to the creation of [Nationwide's] charge. In *Abbey National Building Society v Cann* the House of Lords … concluded that when a purchaser relied on a building society, such as [Nationwide], to enable completion, the transactions involved were one indivisible transaction and, therefore, there was no scintilla temporis during which the right to occupation vested free of [the] charge. The same reasoning is applicable to the facts of this case. On June 1, the contract, the transfer and the legal charges were completed. They formed an indivisible transaction and there was no scintilla temporis during which any right to occupation under clause 6 of the agreement vested in [B] which was free of [Nationwide's] charge. Thus, the right given by clause 6 did not provide an overriding interest under section 70(1)(g) of the 1925 Act, even if the right was a proprietary right. [Counsel for B] submitted that that conclusion ignored the reality of the position and that at all times [B] was in occupation. However that submission ignores the reality of the legal position. [B] gave up his right to occupy as an unpaid vendor by signing the agreement and thereby obtained permission to occupy, which permission did not take effect prior to [Nationwide's] charge."

85. In my judgment the decision of the Court of Appeal in *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381 was correct. As a matter of principle, Aldous LJ was right to take the view that it is implicit in *Cann* that contract, conveyance and mortgage are indivisible. In the present case, as in *Nationwide Anglia Building Society v Ahmed*, the contract and conveyance were executed on the same day, but the analysis is not dependant on that.

86. There are some 900,000 domestic conveyancing transactions per year in England and Wales. In almost every case, the Law Society's Conveyancing Protocol is used. The current version is the

2011 edition, but it is not different in substance from that current (5th ed, 2005) when the transactions in this appeal were carried out. The current edition sets out all the steps from instructions (Stage A) (which include the provision of the seller's Property Information Form which will give details of who is occupying the property and indicate whether vacant possession will be given), submission of contract (Stage B), steps prior to exchange, including confirmation of completion date and ensuring the seller is aware of the obligation to give vacant possession (Stage C), exchange of contracts (Stage D), completion (Stage E), and post-completion matters, including registration (Stage F). Prior to contract the buyer's solicitor should check whether the buyer requires a mortgage, whether an application has been made and whether a mortgage offer has been made, and whether any mortgage conditions remain to be performed. On exchange of contracts the buyer's solicitor sends the certificate of title and/or requisition of funds to the lender so that funds are available for completion. Prior to exchange of contracts the seller's solicitor submits to the buyer's solicitor a contract bundle, including (inter alia) the draft contract incorporating the latest edition of the Standard Conditions of Sale, official copies of the Register and title plan, replies to inquiries with supporting documentation, searches and inquiries, and (for consideration) a draft transfer.

87. The contract of sale does, of course, have separate legal effects, but it would be wholly unrealistic to treat the contract for present purposes as a divisible element in this process. That is why in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 this court adopted the reasoning in *Cann* to hold that where the same solicitor acts for a borrower and a mortgage lender, and the mortgage advance is paid to the solicitor to be held in the solicitor's client account, until completion, to the order of the mortgage lender; and on completion the solicitor transfers the advance to the vendor's solicitor against an executed transfer: "In the eyes of the law all these events occurred simultaneously" (per Lord Walker and Hughes LJ, at para 50). The purchaser never acquired more than an equity of redemption (at para 53) and "under the tripartite contractual arrangements between vendor, purchaser and mortgage lender, [the purchaser] obtained property in the form of a thing in action which was an indivisible bundle of rights and liabilities" (at para 54).

88. On this appeal the court was provided with notes from the parties on the effect on conveyancing practice, and particularly on the inquiries which mortgage lenders would have to undertake and on the increased risk from fraud, should the appeal succeed. I agree with the point made by Lady Hale in the course of argument that the court's duty is to apply the law irrespective of an unexpected impact on conveyancing practice and an adverse effect on the risks of secured lending. It is also important to emphasise that the scheme in the present case could not have worked if the solicitors for the vendors and the solicitors for the purchasers/lenders had complied with their professional obligations and proper and normal conveyancing practice. It is also to be noted that where a person, who might otherwise have rights which could be asserted against a mortgagee, agrees to funds being raised on the property by way of mortgage, the mortgagee will have priority: *Cann* (at p 94); *Bristol & West Building Society v Henning* [1985] 1 WLR 778; *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244.

89. It would follow that, even if (contrary to my view) the vendors had had equitable rights of a proprietary nature against the purchasers arising on exchange of contracts, the mortgages would have taken priority.

90. Accordingly I would dismiss the appeal on the preliminary issue.

Possession order

91. The final question is whether the remainder of Mrs Scott's undated Re-Amended Defence and Counterclaim should have been struck out without it being tried on the facts. The point arises because it is said on behalf of Mrs Scott that her pleadings raise specifically the point that, by virtue of the lenders' actual, constructive or imputed notice of the leases granted or intended to be granted to the purchasers, the lenders are estopped from denying that Mrs Scott was promised a lease and from relying on the provisions of the mortgage restricting the grant of leases. For the purposes of this appeal, Mrs Scott relies particularly on a letter (which was also written in some of the other cases) written by "her" solicitors to the solicitors for the purchaser/lenders, requiring them to inform the lenders that a sum of £40,000.00 was to be paid to UK Property Buyers (rather than NEPB) upon completion of the transaction from the proceeds of sale of the property, which is said to show that the sale was not an outright sale.

92. But Judge Behrens decided the third preliminary question against the vendors, namely, whether it was possible for the lenders' priority to be adversely affected by notice of such promises as were made and the circumstances of the transaction by virtue of their agent's knowledge: (a) if passed on, or (b) if not passed on to the lenders.

93. I agree with the Court of Appeal that the judge was entitled to take the view that any argument about the relevance of the lenders' knowledge of the promises made by the purchasers as to the right of the vendors to remain in occupation after completion fell within the third preliminary issue, on which there has been no appeal.

94. I would therefore dismiss the appeal. I would only add that I express the hope that the lenders will, before finally enforcing their security, consider whether they are able to mitigate any hardship which may be caused to the vendors.

LADY HALE

95. I am reluctantly driven to agree that this appeal must fail for the reason given by Lord Collins: the purchaser was not in a position either at the date of exchange of contracts or at any time up until completion of the purchase to confer equitable proprietary, as opposed to merely personal, rights on the vendor. But this produces such a harsh result that I would like to add a few additional words of explanation. Given that conclusion, the second question discussed by Lord Collins, which is whether the contract should be seen as an indivisible transaction with the conveyance and the mortgage, does not arise and is unlikely ever to arise. However, I must also explain why, with great respect, I take a different view from Lord Collins on that question.

Overriding interests: some preliminary remarks

96. It is important to bear in mind that the system of land registration is merely conveyancing machinery. The underlying law relating to the creation of estates and interests in land remains the same. It is therefore logical to start with what proprietary interests are recognised by the law and then to ask whether the conveyancing machinery has given effect to them and what the consequences are if it has not. Otherwise we are in danger of letting the land registration tail wag the land ownership dog.

97. It is also important to bear in mind that we are here concerned with events which took place before title to the land was registered in the name of the nominee purchaser. There is, of course, as Lord Collins says at para 25, an important public policy interest in the "security of registered transactions". But that does not mean that the fact that a transaction is registered should

automatically give it priority over all other interests. The land registration scheme accepts, as did the system of unregistered conveyancing, that there are some interests in land which deserve protection from later dispositions even if they are not protected by registration. There is also an important public policy interest in the accuracy of the register, so as to justify the reliance which later purchasers and mortgagees place upon it.

98. Thus the basic rule in section 28(1) of the Land Registration Act 2002 is that "Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge". By section 28(2), it makes no difference whether either the interest or the disposition is registered. Section 29(1) goes on to state:

> "If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration."

Section 29(2)(a)(ii) provides that among the interests protected for the purpose of subsection (1) is an interest which "falls within any of the paragraphs of Schedule 3". Falling within paragraph 2 of Schedule 3 is "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation". This is subject to a number of exceptions; the only relevant one for our purpose is "(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so".

99. It has never been in dispute that Mrs Scott was in actual occupation of the property at the time of the disposition to the nominee purchaser (and the contemporaneous mortgage to the lenders). Nor is it disputed that no inquiries were made of her personally before the disposition. So the only question in this case is, and has always been, whether she had an "interest" which belonged to her at the time of the disposition.

100. Of course, the whole idea of overriding interests is unpopular with those who would like the register to be a complete record of everything which will affect the estate or charge that they are acquiring. But it has always been recognised that the register cannot be a complete record and that there are some unregistered interests which require and deserve protection. The 2002 Act did reduce the list of overriding interests from that contained in section 70(1) of the Land Registration Act 1925. But the rights of those in actual occupation of the land remained on the list. Pejorative adjectives such as "notorious and much-litigated" do not assist the argument in this case.

101. Perhaps the most "notorious" example of litigation about the rights of those in actual occupation was *Williams and Glyn's Bank v Boland* [1981] AC 487. In that case it was held that the beneficial interest of a wife who had contributed to the purchase of the matrimonial home in which she lived when her husband mortgaged it to the bank was an overriding interest within the meaning of section 70(1)(g) of the 1925 Act. As Lord Wilberforce (with whom Viscount Dilhorne, Lord Salmon and Lord Roskill agreed) pointed out, in registered conveyancing, the fact of occupation takes the place which actual or constructive notice occupied in unregistered conveyancing: "In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them" (p 504E-F).

Later on, he repeated that "the doctrine of notice has no application to registered conveyancing" (p 508E).

102. It follows from that, and is clear from the wording of paragraph 2(b) of Schedule 3 to the 2002 Act (para 98 above), that the question of whether or not it was reasonable to expect the purchaser or lender to make inquiries of the person in actual occupation is irrelevant. The only question is whether they did so and what the answer was. It is worth emphasising this point, because it is to be expected that the vendor of residential property will be in occupation of it at the time of the disposition, and so there is nothing to give the purchaser or lender constructive notice of any other interest that she might have. But that is not the point. If the vendor does have an interest in the land, other than the one of which she is disposing, and a tenancy by estoppel could be an example, then the fact of her occupation at that time makes it an overriding interest.

103. *Williams and Glyn's Bank v Boland* did cause some consternation in some quarters at the time. The Law Commission devoted a whole report to the implications (1982, Law Com No 115), but their recommendations were not enacted. It was discussed in their third report on Land Registration (1987, Law Com No 158), where a constructive way of balancing the competing interests involved was proposed. That solution too did not find favour with the legislators. Nevertheless, the overriding interests of those in actual occupation survived into the 2002 Act. The lending world had meanwhile learned to live with *Boland*, mainly by insisting that matrimonial homes were conveyed into the joint names of husband and wife. There is no warrant at all for seeking to cut down the scope of overriding interests by giving them a narrower interpretation than they would otherwise have under the underlying law of property.

Can a prospective purchaser grant proprietary rights before completion?

104. The question, therefore, is whether a promise of the kind said to have been made here, made to the vendor by or on behalf of a prospective purchaser of land, is capable of giving the vendor a proprietary interest in the land, as opposed to a merely personal right against the purchaser, before the purchase is completed. On the face of it, the promises which were made here and on which Mrs Scott acted in giving up the ownership of her home, bore all the hallmarks of a proprietary estoppel. But is such an estoppel capable of being an interest in land before the person making the promise has become its owner?

105. The best case which can be cited in favour of the vendor's argument that it is so capable is the decision of the Court of Appeal in *Lloyd's Bank v Rosset* [1989] Ch 350. Mrs Rosset had done work on the house before it was conveyed to her husband and contemporaneously charged to the Bank. Nicholls LJ was "unable to accept that the wife had no beneficial interest in the property before completion" (p 385F). The husband had a specifically enforceable contract to purchase the property and hence he had an equitable interest in it. The wife had "some equitable interest in the property before completion, carved out of the husband's interest just described" (p 386A). Both Mustill and Purchas LJJ agreed with him on this point.

106. When *Rosset* reached the House of Lords, it was held that the judge's factual findings did not justify a finding that she had any beneficial interest in the property. Lord Bridge remarked that, had she become entitled to a beneficial interest prior to completion "it might have been necessary to examine a variant of the question regarding priorities which your Lordships have just considered in *Abbey National Building Society v Cann*": see [1991] 1 AC 107, 134B. Thus it can well be said that their Lordships did not allow the appeal on the basis that the Court of

Appeal were wrong on this point; they seem to have proceeded on the basis that the Court of Appeal were right, because otherwise no question of priorities would have arisen.

107. But that would indeed be odd, as the same appellate committee gave judgment in *Abbey National Building Society v Cann* on the very same day on which they gave judgment in *Rosset.* And in *Cann* they were well aware of the series of cases, beginning with *Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 951 ("*Coventry*"), *Woolwich Equitable Building Society v Marshall* [1952] Ch 1 (*"Woolwich"*), *Universal Permanent Building Society v Cooke* [1952] Ch 95 (*"Cooke"*), and ending with *Church of England Building Society v Piskor* [1954] Ch 553 (*"Piskor"*). These were all cases in which a person who had contracted to buy residential property granted a tenancy of all or part of the premises to another person who moved in before the contract was completed. The purchasers having mortgaged the property at or shortly after completion, the question was whether the mortgagees were bound by the tenancies.

108. All of them depended upon what Harman J in *Coventry*, at p 903, described as

> "an old doctrine (none the worse for being old) that if A purports to create a lease in B's favour, A having no estate sufficient to support the lease, then, if A afterwards acquires a sufficient estate, he will be bound not to deny that he always had a good right to create the tenancy and the lease is said to take effect by estoppel."

This is the doctrine described as among the "clear" points about estoppel at first instance in *Cuthbertson v Irving* (1859) 4 Hurl & N 742, 157 ER 1034 (affirmed on appeal at (1860) 6 Hurl & N 135, 158 ER 56): neither the lessee nor the lessor can dispute one another's title and if the lessor without a legal estate later acquires one, the estoppel is "fed".

109. In each of these four cases, the interest of the purchaser between contract and completion was considered not "sufficient to support the lease". Hence the question was whether there was a moment in time between the completion of the purchase and the grant of the mortgage – the so-called scintilla temporis – in which the purchaser acquired the unencumbered legal estate and so the estoppel was "fed" before the purchaser disposed of it by way of mortgage. In *Coventry*, Harman J held that there was no such scintilla, the conveyance and the mortgage being (for this purpose at least) indivisible. In *Woolwich*, Dankwerts J held that there was such a scintilla and hence the tenancy took priority over the mortgage. In *Cooke* and *Piskor*, the Court of Appeal, led by Evershed MR, adopted the *Woolwich* approach. In *Cann,* of course, the House of Lords held that *Piskor* was wrongly decided and that Harman J had adopted the correct approach in *Coventry*. It follows that *Woolwich* was also wrongly decided as in all these three cases the conveyance and the mortgage were virtually contemporaneous and the mortgage loan was required to complete the transaction.

110. It does not necessarily follow that *Cooke* was wrongly decided. As Lord Oliver explained in *Cann*, at p 92:

> "Of course, as a matter of legal theory, a person cannot charge a legal estate that he does not have, so that there is an attractive legal logic in the ratio in *Piskor's* case. Nevertheless, I cannot help feeling that it flies in the face of reality. The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only

> precisely simultaneous but indissolubly bound together. The acquisition of the legal estate is entirely dependent upon the provision of funds which will have been provided before the conveyance can take effect and which are provided only against an agreement that the estate will be charged to secure them."

In *Cooke*, the mortgage was the day after the conveyance and there was no evidence that they were one and the same transaction, or that the advance had been handed over to the vendor rather than the purchase being initially funded in some other way, although the mortgage was applied for before completion. It may be that the conveyance and the mortgage were in fact indivisible. It may be that they were not. *Cooke* was not cited to their Lordships in *Cann*, but it must have been known to them, because it features prominently in *Piskor*, and it was not overruled or even mentioned in their opinions.

111. But that is by the way. None of this scintilla temporis debate would have been necessary if the purchaser of land had been capable of creating a proprietary interest in that land before completion, which would be binding upon a lender whose mortgage could only be granted on or after completion. And if a tenancy cannot be carved out of the equitable interest which the purchaser has before completion, it is hard to see how the sort of beneficial interest which Mrs Rosset was claiming could be so carved out. So it is odd, to say the least, that the House of Lords appears to have assumed that it could. In any event, we are here dealing with a promise which is much closer to a tenancy by estoppel than to the sort of beneficial interest claimed by Mrs Rosset. My provisional conclusion, therefore, is that under the ordinary law of property the nominee purchaser in this case could not give Mrs Scott a tenancy which would bind the lenders in this case before her purchase of the land was completed.

112. How does this provisional conclusion sit with the scheme of the Land Registration Act 2002? Sections 28 and 29, dealing with priority, refer to interests "affecting the estate" (see para 98 above). The interests which are "protected" for the purpose of section 29(1) are interests affecting the estate immediately before the disposition in question, in this case the mortgage. Section 132(3)(b) makes it clear that "references to an interest affecting an estate are to an adverse right affecting the title to the estate …". In other words, there has to be an estate before there can be an interest which affects it. The 2002 Act does not define "estate" but "legal estate" has the same meaning as in the Law of Property Act 1925, section 1(1) of which contains the most basic rule of English land law:

> "The only estates in land which are capable of subsisting or of being conveyed or created at law are – (a) An estate in fee simple absolute in possession; (b) A term of years absolute."

The interest of the purchaser before completion, however it may be characterised, is not a legal estate. Hence the nominee purchaser could not create an interest which was capable of being a protected interest for the purpose of the 2002 Act until she had acquired the legal estate. This is entirely consistent with and confirms the provisional conclusion reached earlier.

113. There is a further complication. There is a gap between any transaction and its registration. The 2002 Act, confirming *Cann* on this point, makes it clear that the relevant date, when the person must be in actual occupation and have a proprietary interest in the land, is the time of the disposition over which priority is claimed: see Schedule 3, paragraph 2. Any unprotected interest affecting the estate immediately before the disposition is postponed to the interest under

the disposition: see section 29(1). The relevant disposition for this purpose is the mortgage. But neither the mortgage nor the transfer to the purchaser can "operate at law" until they are registered: see section 27(1). Until registration, the purchaser (and indeed the mortgagee) have only equitable interests. This might suggest that rights granted by the purchaser to an occupier could not be "fed" until registration. However, this is machinery, not substance. Assuming that all relevant registration requirements are met, the purchaser has now acquired an absolute right to the legal estate (and the mortgagee an absolute right to the charge). Her interest is of a different order from that of a purchaser before completion, who has the contractual right to have the property conveyed to her but may never in fact get it.

114. Were there to be a scintilla temporis between the conveyance and the grant of the mortgage, the vendor's tenancy by estoppel would indeed become an overriding interest. But it has not been argued in this case that *Abbey National Building Society v Cann* was wrongly decided. It has been accepted that, at least in the standard case where completion and mortgage take place virtually simultaneously and the mortgage is granted to secure borrowings without which the purchase would not have taken place, completion and mortgage are one indivisible transaction and there is no scintilla temporis between them. We have been invited to distinguish *Cann* but not to bury it.

Are contract, transfer and mortgage indivisible?

115. That simple analysis is sufficient to determine this case, without any resort to the much more controversial proposition that, not only are the conveyance and the mortgage one indivisible transaction for this purpose, but they are now to be joined by the contract as well. Whatever one's view of the decision in *Cann* (and Lord Oliver acknowledged, at p 92, that the contrary view had "an attractive … logic" to it) it does make sense. The conveyance vests the legal estate in the purchaser who instantly mortgages it to the lender. All the purchaser ever acquires is the equity of redemption. But that may not be true if the mortgage takes place sometime after the conveyance: there may be a period during which the purchaser owns the land without encumbrances. Not all conveyances and mortgages are indivisible: it depends upon the facts, which is why *Cooke* may not have been wrongly decided.

116. The lender is not a party to the contract to sell the land to the purchaser. This is an entirely separate matter between vendor and purchaser in which the lender is not involved. These days it may well take place on the same day as the conveyance and mortgage but it often takes place days, weeks or even months beforehand. In the olden days, it was common for vendor and purchaser to instruct the same solicitor. But that is no longer permitted, as it is recognised that they may well have a conflict of interest. The vendor may not know, and certainly has no right to know, how the purchaser proposes to fund the purchase and whether or not it is planned to mortgage the property immediately on completion. Indeed, the purchaser, perhaps particularly a corporate purchaser, may not know precisely where the money is coming from at the time when the contract is made. There may be a variety of options available and the choice between them not yet made.

117. Under the Law Society's Conveyancing Protocol (the current edition was published in 2011), the purchaser's solicitor should check whether the purchaser requires a mortgage, whether a mortgage application and offer have been made and whether any conditions remain to be performed. It is only sensible to do so before the purchaser client is legally committed to the purchase. The vendor obviously also has an interest in knowing whether the purchaser will be good for the money. The Protocol advises the vendor's solicitor to request details of the

purchaser's funding arrangements before exchange of contracts, but the purchaser's solicitor cannot disclose the information without the client's consent. The Protocol simply advises him to consider recommending disclosure. Even if the vendor does know that the purchaser proposes to borrow money to fund the purchase, she will not know the precise terms of any proposed mortgage. Indeed the purchaser may not know them at the time of the contract. Mrs Scott did not know that the nominee purchaser proposed to mortgage her home to the Bank, nor did she know that the mortgage would prohibit the granting of the tenancy which she had been promised.

118. Nor will the mortgagee necessarily know the precise terms of the contract of sale. The seller will of course do so. Nowadays it is common for purchaser and lender to be represented by the same solicitor or conveyancer, but it is not obligatory, and there is obviously a potential conflict in a situation such as this. The Council of Mortgage Lenders' Handbook provides that "Unless otherwise stated in your instructions, it is a term of the loan that vacant possession is obtained. The contract must provide for this. If you doubt that vacant possession will be given, you must not part with the advance and should report the position to us" (para 6.5.1). Existing and proposed lettings should be disclosed to the lender (paras 6.6.1 and 6.6.2). Under the Protocol, on exchange of contracts the purchaser's solicitor sends the certificate of title and/or requisition of funds to the lender, or to the lender's solicitor if they are separately represented, in order that the funds will be available to complete the purchase. The certificate of title set out in Appendix F to the 2011 Protocol confirms that the contract of sale provides for vacant possession on completion. It also undertakes not to part with the funds if it comes to the conveyancer's notice that the property will be occupied at completion otherwise than in accordance with the lender's instructions. All of this would not be necessary if the lender were a party to the contract of sale or otherwise automatically aware of its terms.

119. Thus in no sense is this a "tripartite" transaction, to which vendor, purchaser and lender are all party. Lord Walker and Hughes LJ cannot have meant that it was when they referred to the "tripartite contractual arrangements between vendor, purchaser and mortgage lender" in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294, para 53. *Waya* was in any event concerned with the true construction of the arrangements between the purchasing borrower and the lender for the purpose of defining the benefit which the borrower had obtained from the lender having made a false statement in his mortgage application form. The contract between vendor and purchaser did not come into it.

120. I am afraid that I cannot see how it is implicit in the rejection of *Piskor* by the House of Lords in *Cann* that the contract of sale was part of the indivisible transaction. I understand, of course, that the ratio of *Cann* is limited to those cases where the purchaser requires the loan in order to complete his purchase. In that sense, the contract of sale is a necessary pre-cursor to the conveyance and mortgage. But that does not explain why they are indivisible, nor does it explain what is meant by indivisibility in this context. If what is meant is that the purchaser only ever acquires an equity of redemption, out of which she is not able at completion to carve proprietary interests which are inconsistent with the terms of the mortgage, then to talk of the indivisibility of the contract adds nothing to the *Cann* analysis. It is still necessary to decide whether the purchaser can confer proprietary rights before completion. If what is meant is that the purchaser cannot do so, then it adds nothing to the analysis of the first question rehearsed earlier. The risk is that to talk of an indivisible transaction will not only fly in the face of the facts but also create confusion. Will it be taken, for example, to prevent a *vendor* from creating overriding interests between contract and conveyance?

121. In *Nationwide Anglia Building Society v Ahmed and Balakrishnan* (1995) 70 P & CR 381, the vendor agreed to sell his business, including its freehold premises, machinery, fixtures, fittings and vehicles, to the purchaser for £160,000. The vendor was prepared to leave up to £80,000 of the purchase price unpaid on completion. Hence the contract of sale provided that the vendor should have a first charge over the machinery, fixtures, fittings and vehicles and a second charge over the premises after the creation of a first charge to secure the intended mortgage loan. The contract also provided that the vendor should have a full set of keys and the use of an office at the property. All this duly happened. The Building Society provided a loan of £80,000 and was granted a first charge over the property. £80,000 remained owing to the vendor, who was granted a second charge over the property and a first charge over the chattels. He was also given the keys and allowed to use the office and therefore remained in actual occupation of the premises. The purchaser defaulted on the loan and the Building Society sought possession. The vendor argued, first, that his unpaid vendor's lien was an overriding interest; the Court of Appeal held that the lien had been given up in return for the rights obtained under the agreement. The vendor argued, second, that the licence to occupy the room was an overriding interest; the Court of Appeal held that this was a mere contractual right and not a proprietary interest. The Court of Appeal did go on to say that, because the contract, the transfer and the legal charges were all completed on the same day, they "formed an indivisible transaction and there was no scintilla temporis during which any right to occupation … vested in the [vendor] which was free of the [lender's] charge" (p 389). That observation was clearly not necessary for the decision, because the Court had already rejected the claimed overriding interests. It may have made factual sense in that particular case, as the transactions all took place on the same day and each of the participants knew what the terms of the arrangement were. It cannot, in my view, be extrapolated into a general proposition applicable to all ordinary domestic conveyancing transactions.

Conclusion

122. This case has been decided on the simple basis that the purchaser of land cannot create a proprietary interest in the land, which is capable of being an overriding interest, until his contract has been completed. If all the purchaser ever acquires is an equity of redemption, he cannot create an interest which is inconsistent with the terms of his mortgage. I confess to some uneasiness about even that conclusion, for two reasons. First, *Cann* was not a case in which the vendor had been deceived in any way or been made promises which the purchaser could not keep. Should there not come a point when a vendor who has been tricked out of her property can assert her rights even against a subsequent purchaser or mortgagee? Second, *Cann* was not a case in which the lenders could be accused of acting irresponsibly in any way. Should there not come a point when the claims of lenders who have failed to heed the obvious warning signs that would have told them that this borrower was not a good risk are postponed to those of vendors who have been made promises that the borrowers cannot keep? Innocence is a comparative concept. There ought to be some middle way between the "all or nothing" approach of the present law. I am glad, therefore, that the Law Commission have included a wide-ranging review of the 2002 Act in their recently announced Twelfth Programme of Law Reform (2014, Law Com No 354), which is to include the impact of fraud.

LORD WILSON AND LORD REED

123. We agree that this appeal should be dismissed for the reasons given by Lord Collins and Lady Hale. On the point on which they disagree, the indivisibility of the contract from the

conveyance and the mortgage, which is not part of the reasons for the decision, we agree with Lady Hale.

TAB 9

1892 CarswellOnt 34
The Supreme Court of Canada

Harris v. Robinson

1892 CarswellOnt 34, [1892] S.C.J. No. 68, 21 S.C.R. 390

Mary Harris (Defendant), Appellant and Francis Robinson (Plaintiff), Respondent

Strong, Taschereau, Gwynne and Patterson JJ. (Sir W.J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

Judgment: June 21, 1892
Judgment: June 22, 1892
Judgment: October 10, 1892

Proceedings: On Appeal from the Court of Appeal for Ontario.

Counsel: *Reeve Q.C.* for appellant.
Hodgins and *Coatsworth* for the respondent.

Subject: Property; Contracts; Civil Practice and Procedure
Related Abridgment Classifications
Contracts
XIV Remedies for breach
XIV.4 Specific performance
XIV.4.b Grounds for refusal
XIV.4.b.i Discretionary nature of remedy
Contracts
XIV Remedies for breach
XIV.4 Specific performance
XIV.4.b Grounds for refusal
XIV.4.b.iv Conduct of plaintiff
Real property
III Sale of land
III.3 Completion of contract
III.3.b Time of performance
III.3.b.iii Waiver
Real property
III Sale of land
III.4 Remedies
III.4.c Rescission
III.4.c.i Grounds for rescission
III.4.c.i.E Failure to make title
Remedies
III Specific performance
III.2 Grounds for refusal
III.2.a Discretionary nature of remedy
Remedies

III Specific performance
III.2 Grounds for refusal
III.2.d Conduct of plaintiff
III.2.d.ii Ready, willing and able to perform
Remedies
III Specific performance
III.5 Practice and procedure
III.5.e Availability of summary proceedings
III.5.e.i General principles

Headnote

Sale of Land --- Completion of contract — Time of performance — Waiver
Where there was an agreement to exchange lands, the value of which was admittedly speculative, held, time was originally of the essence of the contract, but the provision was waived by the entering of the parties into negotiations as to title after the time for completion had expired.
Sale of Land --- Remedies — Rescission — Grounds for rescission — Failure to make title
Per Strong J.: "The authorities ... are clear that when the vendor has no title whatever to the property he assumes to sell when he enters into the agreement, as distinguished from cases in which he has some, though an imperfect title, that the purchaser may in the first case peremptorily put an end to the bargain and is not bound to give that reasonable notice which is considered proper to require from him when the title is merely imperfect.".
Specific Performance --- Grounds for refusal — Discretionary nature of remedy
Principles contrasted with those applicable in Courts of law.
Per Strong J.: "The jurisdiction which Courts of equity formerly exercised by way of specific performance, a jurisdiction which is now in Ontario, since the Judicature Act, administered, but upon the same principles and subject to the same limitations, by all Courts, is peculiar. It is not sufficient to entitle a party seeking this peculiar relief to show what would be sufficient to entitle him to recover in a Court of law, namely, that a contract existed, but ... the exercise of the jurisdiction is a matter of judicial discretion, one which is to be said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shown to the conduct of the party seeking the relief.".
Specific Performance --- Grounds for refusal — Conduct of plaintiff — Ready, willing and able to perform
Necessity for willingness to perform contract on part of person seeking to enforce it.
Per Strong J.: "The rule which governs the courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must show that he has been always ready and eager to carry out the contract on his part.".
Specific Performance --- Practice and procedure — Availability of summary proceedings
As a general rule, under the practice of Courts of Equity, questions of title were not disposed of at the hearing of a suit for specific performance but were made the subject of a reference to the Master, but when the defence of the want of any title is raised, not with a view of compelling plaintiff to show a good title but as a substantive defence to the action, there is no reason why it should not be disposed of at the trial.

The judgment of the majority of the court was delivered by *Strong J.*:

1 On the 1st of August, 1888, the appellant and respondent entered into an agreement for the exchange of certain landed property and houses in the city of Toronto. By this agreement the appellant was to convey to the respondent seven lots situate in Dupont and Kendal avenues, subject to a mortgage for $4,375, and the respondent was to convey to the appellant two houses on George street, and in addition to give the appellant a mortgage for $1,000 on the avenue lots and to pay to the appellant $175 in cash. This agreement was in writing in the form of an offer or proposal signed by the appellant, to which was subjoined an acceptance signed by the respondent.

2 At the date of the contract the title to the property in George street which was to be conveyed by the respondent was as follows: — The legal estate in fee was vested in Mr. W.G. Schreiber who, by a contract dated the 1st of November,

1884, had agreed to sell the same to one Frank Simpson for the sum of $3,400, payable in certain instalments which need not be particularly specified. Part of the purchase money, amounting to $799, was to be paid by instalments before conveyance, and the residue was to be secured by a mortgage also payable by instalments. At the date of the agreement between the appellant and respondent $499 of these instalments had become due, and it does not appear whether at that time they had been paid by Simpson or not.

3 On the 26th of June, 1888, Simpson signed the following offer in the form of a letter of that date addressed to the respondent Francis Robinson: —

> I hereby offer to sell you the lands and premises lots 95 and 97 east side George street, Toronto, for the sum of $5,000 payable in cash on completion of the title, and give you the refusal thereof for 30 days from this date.

4 There is no evidence in the case showing that this offer was accepted by the respondent within the thirty days limited for its acceptance. Caston in his evidence says it was accepted in writing, and when asked "have you got that acceptance?" answers "it was forwarded," meaning, of course, forwarded to Simpson. The written acceptance was not, however, produced, and there is nothing to show, what was essential to make out a contract, that it was accepted within the time limited. In connection with this part of the case there is an important piece of evidence in the deposition of Mr. Henderson, who acted as the appellant's solicitor in carrying out the agreement. It is contained in the following extract: —

> Q. Didn't Caston tell you he had an agreement with Simpson? A. No; I didn't understand that he had an agreement with Simpson.
>
> Q. He had a contract of some kind? A. He claimed it was a contract.
>
> Q. And that Simpson was entitled to a deed from Schreiber? A. So he stated.
>
> Q. It is not an unusual thing that there should not be a deed registered? A. There are transactions of that kind.
>
> Q. You would not have regarded that at all as serious? A. If he produced the agreement; he gave me to understand he could not produce.

5 Simpson's father (Francis Simpson) being called as a witness for the respondent in reply does not prove an acceptance within the 30 days. What he says about it is contained in the following extract from his deposition: —

> Q. You instructed counsel that no agreement had been signed with Caston? A. Yes, until I understood differently. I understood the contract to be only to allow 30 days to sell it; I understood it voided the agreement if the sale did not take place within 30 days, and then of course it fell through; that is the way I understood it. Afterwards I went to Caston and I saw the original agreement, and, of course, as it was my signature for my son I must agree to it.
>
> Q. That was just before the judgment was pronounced? A. It was at Caston's, some time before that.
>
> Q. You came to my office with Miller? A. That was some time afterwards?
>
> Q. You made an affidavit in this case at the request of Harris? A. Yes; but I want it understood that I made it before I understood that that contract was binding; we had no solicitor up to the time the writ was issued against us.
>
> His Lordship — You thought if he could sell it within 30 days it was binding? A. Yes.
>
> His Lordship — If he could not sell it, it fell through? A. Yes.
>
> Q. You did not discover that was binding till shortly before the judgment was delivered against your son? A. No; then I was informed by my solicitor.

Q. Up to that time your son was refusing to carry out the contract? A. We refused to carry it out or had not done so; that was the way we refused.

6 Up to the time of the trial of this action on the 16th September, 1889, nothing had been paid by Robinson to Simpson on account of the purchase money payable under his contract.

7 Simpson, the father, speaks positively as to this. His evidence is as follows: —

His Lordship — They had not given you $5,000? A. No.

His Lordship — Have they offered it since? A. No; I am pretty sure they have not; it has not been paid yet.

Q. You would not know if it had been paid? A. Yes; they promised to do so.

His Lordship — It still stands in the same position? A. Yes.

8 Mr. Henderson, a solicitor, having been employed to examine the title on behalf of the appellant, raised two objections: First, that the contract which formed Simpson's title had not been registered; and secondly, that there appeared on the registry to be an annuity or rent charge which formed an incumbrance upon the lands having been granted by one Perry in favour of Sir William Campbell when Perry purchased from Campbell as part security for payment of the purchase money on that sale. These objections having been taken at the outset nothing whatever seems to have been done by the respondent towards removing them up to the 19th of November, on which day, as will be hereafter shown, notice of rescission was given on behalf of the appellant. In the interval nothing, so far as appears, was done by the respondent towards the removal of the difficulties. There were interviews and correspondence, but Caston does not show that he was at all active in endeavouring to surmount the objections to the title. As to the annuity he said "he had been trying to see those parties but could not find out who the man was." There is no evidence that he offered compensation for the annuity. He did, however, offer to give indemnity by a mortgage upon lands at Ingersoll which were subject to an overdue mortgage containing a power of sale. The evidence of Mr. Henderson appears to have been satisfactory to the learned Chief Justice of the Queen's Bench who tried the action. It is as follows: —

Q. Was there any other objection? A. There was an objection as to an annuity.

Q. What position did Caston take respecting the annuity objection? A. He said he would inquire into it, and endeavour to clear it up; he said it was the first he heard of it.

Q. Did you report the objections to Harris? A. Yes; Caston called at the office two or three times on the subject.

Q. Did he remove these objections? A. Never to my knowledge.

Q. What became of the matter, so far as you are concerned? A. He came in, and I met him upon the street once or twice, and he always told me he was endeavouring to get things into shape. He was in my office once or twice; he and Harris came in one morning and I said there was no use fooling away more time. He claimed there would be no difficulty in getting his title; he seemed to think that was a matter of very small moment at the time. I told him there was no use considering the matter till he had that settled. He said his client's title rested upon agreements. I asked him if he could produce copies of them; he could not even do that. I told him it was no use fooling about the matter; that I did not want to hear any more about it; that I was simply asked to report upon the title, and it seemed to me like a farce.

9 The evidence may therefore be summed up by saying that it is proved that two objections having been taken, the first as to the annuity and the second that neither the contract between Schreiber and Simpson nor that between Simpson and Robinson was regis tered or produced, the respondent took no steps to remove the first objection and declared his inability to produce even an agreement which formed his own immediate title. In this state of things L.G. Harris, the

appellant's son who acted for her in the matter, on the 19th November, 1888, wrote to Mr. Caston, as solicitor for the respondent, the following letter: —

> TORONTO, November 19, 1888.
>
> Mr. CASTON.
>
> Dear Sir, — Unless something definite is done *re* our "exchange" (of the day) we will have to call it null and void after to-morrow a.m. They have all been here to-day and say they are disgusted, so please, Mr. Caston, come over in the morning first thing and see what we can do.
>
> Yours truly,
>
> L.G. HARRIS.

10 Nothing further material to be mentioned occurred until the 1st December, 1888, when the respondent commenced an action against Simpson for specific performance of his alleged agreement with the latter.

11 Subsequently to this some letters appear to have been written by Mr. Caston to L.G. Harris, to one only of which the latter replied, in a letter written on the 29th January, 1889, in which he reiterated his abandonment of the purchase.

12 This action was commenced on the 22nd January, 1889, and came on to be tried before the Chief Justice of the Queen's Bench at the Toronto Assizes on the 16th September, 1889, when his Lordship gave judgment dismissing the action. This judgment was subsequently set aside by the Queen's Bench Division, composed of Falconbridge J. and Street J., and judgment for specific performance was ordered to be entered for the respondent. From this judgment the appellant appealed to the Court of Appeal, where his appeal was dismissed with costs. From this latter judgment the present appeal has been brought.

13 No decree was obtained in the action brought by the respondent against Simpson until the 12th December, 1889, when a decree by consent was made. This decree, which was not drawn up until the 25th February, 1890, referred it to the master to inquire as to whether a good title could be made. The master's report was made on the 16th June, 1890, reporting the title good. It does not appear what, if anything, was done in the master's office to remove the objections.

14 Thus, to begin with, we have a contract entered into on the 1st August, 1888, to be completed within ten days from its date, and nothing to show that a good title could be made earlier than 10th June, 1890, more than a year and ten months after the time originally fixed for completion.

15 The jurisdiction which courts of equity formerly exercised by way of specific performance, a jurisdiction which is now in Ontario, since the Judicature Act, administered, but upon the same principles and subject to the same limitations, by all courts, is peculiar. It is not sufficient to entitle a party seeking this peculiar relief to show what would be sufficient to entitle him to recover in a court of law, namely, that a contract existed, but, as is well shown by the quotations made in the judgment of the learned Chief Justice of the Court of Appeals from the judgment of the House of Lords in *Lamare v. Dixon* [1] and from Lord Justice Fry's Treatise [2] , the exercise of the jurisdiction is a matter of judicial discretion, one which is to be said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shown to the conduct of the party seeking the relief.

16 There can be no doubt, upon the evidence before us, that both parties entered into this contract for speculative purposes, and that the property which is the subject of it was recognized by both as having a speculative value. This was the conclusion of the learned Chief Justice of the Queen's Bench, and I entirely agree with him in that opinion. It follows that originally time was of the essence of the contract, and if there had been no waiver on the part of the appellant by entering into negotiations as to the title he would have been bound to have completed it within ten days, for I do not

regard the words "if possible" in the agreement as negativing this inference. The appellant did not, however, insist on a literal compliance with this term of the contract, but by negotiating as to the title after the expiration of the time limited recognized the existence of the contract. So far I agree with Mr. Justice Street's judgment.

17 I am of opinion, however, that two propositions, both equally fatal to the respondent, may upon the facts in evidence and upon the law applicable to those facts be safely laid down. I say, then, that in the first place the letter of the 19th November, 1888, having regard to the circumstances disclosed in the evidence, was sufficient to put an end to the bargain. Secondly, the conduct of the respondent in relation to the completion of the contract has been such that without reference to any actual rescission he has been guilty of such laches as disentitles him to specific performance. First, as regards rescission: The evidence entirely fails to establish that the respondent had any title whatever, equitable or legal, to the property he was to give in exchange at the time he entered into this contract. It is to be observed that the letter from Frank Simpson to the respondent of the 26th of June, 1888, which is relied on by the respondent as containing his contract with Simpson, is a mere offer to sell, not a concluded contract but an option, which did not become a contract unless the respondent, according to the express terms of the letter, should accept it within thirty days from the date of the letter, the 26th of June, 1888. During that period of thirty days, and until his proposal was accepted, Simpson could at any time have revoked his offer. Further, I need scarcely say that in a unilateral offer of this kind time is strictly material, and acceptance after the thirty days without more, that is, without some extension of the time in writing signed by Simpson, would not be sufficient to constitute a binding contract. Now there is no evidence whatever that there ever was an acceptance within the thirty days. All that Caston says in the extract from his deposition before given is that it was accepted in a writing which was forwarded to Simpson; but the written acceptance itself is not produced, as it ought to have been and might have been if it existed since it must have been in the possession of Simpson, nor does Caston say that it was sent within the thirty days. Simpson does not say that there was an acceptance within thirty days; it is true he does not say there was not, but he understood there was to be a sale within thirty days and that otherwise it fell through, which gives much colour to the inference that there was not, in fact, an acceptance within the specified time. Again, Mr. Henderson says that when, finding this agreement was not registered, he pressed Caston to produce it the latter admitted he could not even do that. So that up to the present time there has been no legal evidence in this action that there was, anterior to the 26th July, 1888, when the thirty days option expired, any acceptance by the respondent, either written or oral, of Simpson's offer, and consequently it does not appear that any binding contract whatever existed between Simpson and the respondent on the 1st August, 1888, the date of the contract between the respondent and the appellant.

18 The appellant by her pleading directly puts in issue the defence that the plaintiff had not at the date of the contract any title to the George street property.

19 The second paragraph of the statement in defence is as follows: —

> The defendant further says that the plaintiff had not at the time of the making of the alleged contract, or the rescission thereof as aforesaid, any title to the said lands on George Street or any such title thereto as the defendant was bound to accept, and the plaintiff was unable to perform the said alleged contract on his part.

20 By the first paragraph of the defence the appellant pleaded the rescission of the contract. As a general rule, under the practice of courts of equity, questions of title were not disposed of at the hearing of a suit for specific performance but were made the subject of a reference to the master, but when the defence of the want of any title is raised, as it is in the present case, not with a view of compelling the plaintiff to show a good title but as a substantive defence to the action, there is no reason why it should not be disposed of at the trial. Upon these pleadings the burden of proving that he had at least some title to the property was upon the respondent, and it is manifest that he has failed in doing so; on the contrary, the evidence raises at least a strong presumption to the contrary.

21 Another reason for saying that the plaintiff had no title at the time of the contract is this: he professed to deal with the property itself and not with a mere contract to purchase it, and yet he had nothing, according to his own statement of his case, but an executory contract in respect of which $5,000 had to be paid before his vendor, Simpson, could be called on to convey. This money had not been paid at the date of the trial, and it does not appear satisfactorily that the

respondent was in a position to pay it. Therefore, even assuming, what as I have said before is not proved, that the offer had been duly accepted before the contract with the appellant it still could not be said that the respondent had even an equitable title to the property. A purchaser under an executory contract is sometimes said, in loose phraseology, to have an equitable title, but the distinction as regards equitable title between his rights under such a contract before payment of the purchase money, and a true equitable title, is well marked, and is pointed out by Lord Cottenham in *Tasker v. Small*[3] ; and by Lord O'Hagan in *Shaw v. Foster*[4] . See also *Wall v. Bright*[5] . Whilst his rights under such a contract are incomplete owing to the non-payment of his purchase money a purchaser has an undoubted right to assign his contract, but he cannot sell the land itself, and cannot be properly called the equitable owner of it.

22 My conclusion is, therefore, that upon both the distinct grounds indicated the respondent had no title to the land which he could properly sell at the date of his contract. Had there been a sum of money in excess of, or equivalent to, the amount which the respondent was to pay as purchase money to Simpson, payable in cash under the contract between the appellant and the respondent, this might not have been an objection since the appellant would in that case have had it in her power to apply a proportion or the whole of the price she was herself to pay to paying off Simpson, but the only cash payment from the appellant which the contract of the 1st of August, 1888, calls for is the sum of $175.

23 Therefore, for this additional reason, the respondent had no title at the date of the contract.

24 Further, assuming that there had been no acceptance by Robinson at the time of the contract with the appellant, then that agreement could only have been an attempt to transfer a mere option which, according to Lord Justice Fry, is not the subject of assignment. That learned judge lays down the law thus:

> It must be added that even where a concluded contract would be assignable the benefit of an offer cannot, it seems, be transferred by the person to whom it was made to a third person.

25 Then to apply the law to this fact of want of title in the respondent to any marketable interest in the land at the date of the agreement, taken in connection with the letter of the 19th November, 1888, rescinding the contract. It is said that this notice did not allow a reasonable time to the respondent. The authorities, however, are clear that when the vendor has no title whatever to the property he assumes to sell when he enters into the agreement, as distinguished from cases in which he has some, though an imperfect, title, that the purchaser may in the first case peremptorily put an end to the bargain and is not bound to give that reasonable notice which it is considered proper to require from him when the title is merely imperfect. The case of *Forrer v. Nash*[6] , the circumstances of which are stated in the judgment of the learned Chief Justice of the Court of Appeal, is a strong authority for this proposition. *Lee v. Soames*[7] is to the same effect. That was an action by a purchaser claiming a declaration that the contract had been verbally rescinded; the defendant, the vendor, counterclaimed for specific performance.

26 Kekewich J. in his judgment says:

> As to Mr. Barber's point, that time not having been made of the essence of the contract the plaintiff was not entitled to fix an arbitrary date in the absence of unreasonable delay on the part of the vendor, the doctrine is laid down in Sugden's Vendor & Purch.[8] and cited by Fry J. in *Green v. Sevin*[9] and also in Fry on Specific Performance[10] . But both these statements of the law assume that there is a contract. In the present case there never was a contract between the real vendor and the purchaser. *Forrer v. Nash*[11] and *Brewer v. Broadwood*[12] support this view. It was not a contract which the vendor could have carried out. I think the plaintiff was, on the 8th November, 1887, entitled to say "this bargain is at an end. There is no contract."

27 This last observation of the learned judge exactly describes what, by a fair intendment, the appellant is to be taken as meaning by the letter of the 19th November, 1888. I am, therefore, of opinion that that letter was sufficient to terminate the bargain between the parties to this appeal.

28 It is further to be remarked that, as appears from the judgment of Mr. Justice Kekewich in the case just quoted from, it is only in cases where there has been no unreasonable delay in making out a title that a vendor is entitled to reasonable notice of rescission. It is impossible to say that the respondent here has shown that he is free from the imputation of unreasonable delay, for down to the time of bringing his action he had wholly failed in taking any active steps to remove the defect in the title, or even to produce the contract (if he had any) which constituted his own title.

29 Then there is another and wholly independent ground upon which, in my opinion, the action was properly dismissed by the original judgment, that of laches, which is distinctly pleaded by the fourth paragraph of the defence.

30 Granting that time was not originally of the essence, or that if so it had been waived by the appellant, yet considering the nature of the property and the object for which, as must have been well known to the respondent, the appellant was seeking to acquire it, namely, for a speculative purpose, that is, in order to sell again at a profit, and that, therefore, it was of the utmost consequence to him that he should be promptly put in a position to take advantage of a rise in the real estate market, the delay from the date of the contract on the 1st of August, 1888, up to the date of the action on the 22nd January, 1889, nearly six months, was most unreasonable. The rule which governs the courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must show that he has been always ready and eager to carry out the contract on his part. Can it possibly be said that the respondent has brought himself within such conditions in the present case? Most certainly it cannot. We see, indeed, that he did not obtain a decree in his suit against Simpson until the 12th December, 1889, and that he allowed more than two months to elapse before he had even caused this judgment to be drawn up, and further, that no report on the title was obtained until the 10th June, 1890. There was, therefore, not only gross laches and delay anterior to bringing the present action, but afterwards in prosecuting his action against Simpson. To grant specific performance in such a case would, it seems to me, be to set at defiance the wholesome rule before adverted to, which requires promptitude and diligence on the part of one who seeks at the hands of the court this extraordinary relief.

31 For these reasons, which are in the main identical with those assigned for their judgments by both the learned chief justices in the courts below, I am of opinion that we cannot do otherwise than allow this appeal, thus restoring the original judgment, with costs to the appellant in this court and both the courts below.

***Taschereau J.*:**

32 I dissent, and would dismiss this appeal. I adopt the reasoning of Street J. in the Divisional Court, and Maclennan J. in the Court of Appeal. It is a great satisfaction for me, seeing that I am alone of that opinion in this court, that the conclusion I have reached does not affect the result of the judgment.

Appeal allowed with costs.

Solicitors of record:
Solicitors for appellant: *Reeve & Woodworth.*
Solicitors for respondent: *McMurrich, Coatsworth, Hodgins & Geddes.*

Footnotes

1 L.R. 6 H.L. 423.

2 Fry on Specific Performance, 2nd ed. sec. 25.

3 3 Mylne & C. 63.

4 L.R. 5 H.L. 349.

5 1 Jac. & W. 503.

6 35 Beav. 167.

7 59 L.T.N.S. 366.

8 13 ed. 227.

9 13 Ch. D. 589.

10 2 ed. p. 471.

11 35 Beav. 167.

12 22 Ch. D. 105.

End of Document

TAB 10

Her Majesty The Queen *Appellant*

v.

Province of Alberta Treasury Branches *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

Province of Alberta Treasury Branches *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

The Toronto-Dominion Bank *Respondent*

INDEXED AS: ALBERTA (TREASURY BRANCHES) *v.* M.N.R.; TORONTO-DOMINION BANK *v.* M.N.R.

File No.: 24056.

1995: October 12; 1996: April 25.

Present: La Forest, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Taxation — Income tax — Goods and Services Tax — Garnishment — Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors — Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor — Meaning of "secured creditor" — Income Tax Act, S.C. 1970-71-72, c. 63, s. 224(1.2), (1.3) — Excise Tax Act, R.S.C., 1985, c. E-15, s. 317(3), (4).

Sa Majesté la Reine *Appelante*

c.

Province of Alberta Treasury Branches *Intimé*

et entre

Sa Majesté la Reine *Appelante*

c.

Province of Alberta Treasury Branches *Intimé*

et entre

Sa Majesté la Reine *Appelante*

c.

La Banque Toronto-Dominion *Intimée*

RÉPERTORIÉ: ALBERTA (TREASURY BRANCHES) *c.* M.R.N.; BANQUE TORONTO-DOMINION *c.* M.R.N.

N° du greffe: 24056.

1995: 12 octobre; 1996: 25 avril.

Présents: Les juges La Forest, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit fiscal — Impôt sur le revenu — Taxe sur les produits et services — Saisie-arrêt — Lois relatives à l'impôt sur le revenu et à la TPS prescrivant une procédure de saisie-arrêt permettant au ministre du Revenu national d'intercepter des sommes dues à des débiteurs fiscaux — Les dispositions en cause confèrent-elles au Ministre la priorité de rang sur les créanciers ayant obtenu d'un débiteur fiscal une cession générale de créances comptables? — Sens de l'expression «créancier garanti» — Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63, art. 224(1.2), (1.3) — Loi sur la taxe d'accise, L.R.C. (1985), ch. E-15, art. 317(3), (4).

Bankruptcy — Priorities — General assignments of book debts — Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors — Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor.

The first case involved in these appeals arose from a loan made by the respondent Alberta Treasury Branches to a hotel operator which was secured in part by a general assignment of book debts ("GABD"). The hotel operator was in arrears to the Minister of National Revenue ("MNR") for unremitted GST, plus interest and penalties. The MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* ("*ETA*") on all possible debtors of the hotel operator. That section provides for a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to a tax debtor. It applies to a "secured creditor", defined as "a person who has a security interest in the property of another person". After the hotel operator made an assignment under the *Bankruptcy Act*, the trustee estimated the realization of the assets of the estate would leave a shortfall to Alberta Treasury Branches. The Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the *ETA*. In the second case, an excavation company borrowed money from Alberta Treasury Branches and granted it a GABD. After the company completed certain contract work, the client held holdback funds which were claimed by various creditors of the company, including the MNR, to whom the company was indebted for unremitted employee source deductions, interest and penalties. The MNR served two requirements to pay on the client, under s. 224(1.2) of the *Income Tax Act* ("*ITA*"), which provides for a garnishment remedy identical to the one provided for in the *ETA*. On an application to determine priority to the monies in question, the master decided that Alberta Treasury Branches had priority through its GABD. This decision was upheld on appeal. In the third case, a drilling company borrowed money from the respondent bank which was secured in part by a GABD. The company owed the MNR unremitted GST, interest and penalties. The MNR served requirements to pay under s. 317(3) *ETA* on the company's trade debtors. Another of its creditors successfully filed a petition under the *Bankruptcy Act* to have the company declared a bankrupt. In an application to determine priority, the Court of Queen's Bench held that the MNR had priority under the provisions of the *ETA*. In all three cases the Court of

Faillite — Priorités — Cession générale de créances comptables — Lois relatives à l'impôt sur le revenu et à la TPS prescrivant une procédure de saisie-arrêt permettant au ministre du Revenu national d'intercepter des sommes dues à des débiteurs fiscaux — Les dispositions en cause confèrent-elles au Ministre la priorité de rang sur les créanciers ayant obtenu d'un débiteur fiscal une cession générale de créances comptables?

La première affaire en cause dans les présents pourvois découle d'un prêt qui a été consenti à une société hôtelière par l'intimé l'Alberta Treasury Branches, et qui était garanti en partie par une cession générale de créances comptables. La société hôtelière accusait des arriérés au titre de la TPS non versée au ministre du Revenu national («MRN»), plus intérêts et pénalité. Le MRN a signifié à tous les débiteurs possibles de la société hôtelière une demande de paiement fondée sur le par. 317(3) de la *Loi sur la taxe d'accise* («*LTA*»). Cette disposition prescrit une procédure de saisie-arrêt qui, dans certaines circonstances, permet au MRN d'intercepter des sommes dues à un débiteur fiscal. Elle s'applique à un «créancier garanti», qui est défini comme une «[p]ersonne qui a une garantie sur un bien d'une autre personne». Après que la société hôtelière eut fait cession de ses biens en vertu de la *Loi sur la faillite*, le syndic a estimé que la réalisation de l'actif de la faillite ne suffirait pas à payer entièrement l'Alberta Treasury Branches. À la suite d'une demande visant à établir l'ordre de priorité, la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *LTA*. Dans la deuxième affaire, une société d'excavation avait emprunté des sommes à l'Alberta Treasury Branches et lui avait consenti une cession générale de créances comptables. Après l'achèvement de certains travaux par la société, le client a retenu des fonds qui étaient réclamés par différents créanciers de la société, dont le MRN à qui la société devait des arriérés de retenues à la source, plus intérêts et pénalité. Le MRN a signifié au client deux demandes de paiement fondées sur le par. 224(1.2) de la *Loi de l'impôt sur le revenu* («*LIR*»), qui prescrit une procédure de saisie-arrêt identique à celle prévue dans la *LTA*. À la suite d'une demande visant à établir l'ordre de priorité relativement aux sommes en cause, le protonotaire a décidé que l'Alberta Treasury Branches avait priorité en vertu de sa cession générale de créances comptables. Cette décision a été confirmée en appel. Dans la troisième affaire, une société de forage avait contracté auprès de la banque intimée un emprunt qui était garanti en partie par une cession générale de créances comptables. La société devait au MRN une somme au titre de la TPS non versée, plus intérêts et pénalité. Le MRN a signifié aux

Appeal held that the lending institution had priority over the MNR.

Held (Iacobucci and Major JJ. dissenting): The appeals should be allowed.

Per La Forest, Cory and McLachlin JJ.: The definition of "security interest" is broad enough to include a GABD, and the wording of s. 224(1.2) *ITA* and s. 317(3) *ETA* is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the balance of the section applies. Moreover, an assignee of a GABD is a "secured creditor" within the meaning of s. 224(1.3) *ITA* or s. 317(3) *ETA* because the assignee holds a security interest "in the property of another person". Each assignment of book debts made in these cases provides that it is to be a "continuing collateral security". Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid, the lending institution would have no further interest in the assignment. Since the assignment by its terms can be redeemed by payment of the debt, it should not be construed as an absolute assignment. Neither the lending institutions nor the debtor companies by their actions gave any indication that the institutions were the owners of the book debts. The lending institutions made no efforts whatsoever to realize upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. So long as the possibility of redemption exists, the GABD remains as collateral security.

When there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts, then the statutory provision must be applied regardless of its object or purpose. However, the very

débiteurs commerciaux de la société des demandes de paiement fondées sur le par. 317(3) *LTA*. Un autre des créanciers de la société a présenté avec succès une pétition en faillite contre celle-ci. À la suite d'une demande visant à établir l'ordre de priorité, la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *LTA*. Dans les trois cas, la Cour d'appel a statué que l'établissement de crédit avait priorité sur le MRN.

Arrêt (les juges Iacobucci et Major sont dissidents): Les pourvois sont accueillis.

Les juges La Forest, Cory et McLachlin: La définition du terme «garantie» est suffisamment large pour comprendre une cession générale de créances comptables, et le libellé des par. 224(1.2) *LIR* et 317(3) *LTA* est suffisamment clair et net pour permettre de transférer au MRN la propriété des fonds saisis-arrêtés et lui accorder la priorité dans les circonstances où le reste de la disposition s'applique. De plus, le titulaire d'une cession générale de créances comptables est un «créancier garanti» au sens du par. 224(1.3) *LIR* ou du par. 317(3) *LTA*, parce que celui-ci détient une garantie «sur un bien d'une autre personne». Chaque cession de créances comptables consentie en l'espèce prévoit qu'elle constituera une «garantie accessoire et permanente». En outre, toutes les cessions limitent la dette au montant de la créance impayée. En conséquence, si le prêt garanti par la cession générale de créances comptables était remboursé, l'établissement de crédit n'aurait plus aucun autre droit sur la cession. Puisque l'acte de cession prévoit que la cession peut être rachetée par le paiement de la créance, celle-ci ne devrait pas être interprétée comme une cession absolue. Ni les établissements de crédit ni les sociétés débitrices n'ont agi de façon à indiquer que les établissements étaient propriétaires des créances comptables. Les établissements de crédit n'ont nullement cherché à réaliser les créances comptables ou à se comporter, de quelque manière que ce soit, comme «propriétaires» de ces créances jusqu'à ce que les sociétés débitrices soient de toute évidence en grave difficulté financière, pour ne pas dire en faillite. Le texte des documents et les actions des parties indiquent qu'elles considéraient que la cession avait été consentie à titre de garantie accessoire relativement aux créances. Dans la mesure où il existe une possibilité de rachat, la cession générale de créances comptables demeure une garantie accessoire.

Lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Cependant, l'historique même de

history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the scheme of the Act, the object of the Act and the intention of Parliament. The Parliamentary intent was to confirm the overriding right of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

The same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute. A GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This conclusion is supported by s. 63 of the Alberta *Personal Property Security Act*, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. To conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could result in a change in the ordering of priorities provided by the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act* and the *Canada Business Corporations Act*. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other *bona fide* creditors could be adversely affected.

Per Major J. (dissenting): A GABD falls within the definition of "security interest" in s. 224(1.3) *ITA*. The phrase an "assignment ... of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals. The lending institutions, however, do not fall within the defini-

la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner l'esprit de la loi, l'objet de la loi et l'intention du législateur pour déterminer le sens manifeste et ordinaire de la loi en cause. Le Parlement voulait confirmer le droit prépondérant du MRN de recouvrer par voie de saisie-arrêt les impôts perçus que la société débitrice aurait dû lui verser. On pourrait dire que les montants ainsi perçus appartiennent non pas aux entités débitrices qui les perçoivent, mais au gouvernement. Dans ces circonstances, on ne saurait dire que la priorité accordée au MRN en matière de recouvrement de ces fonds constitue une expropriation sans indemnisation.

Le même écrit ne saurait constituer à la fois une «garantie» et une «cession absolue». Si un écrit constitue une cession absolue, le débiteur ne peut alors conserver un droit résiduel de recouvrer les biens puisqu'une telle cession est complète et parfaite en soi. Conformément aux écrits présentés en l'espèce, l'emprunteur conserve le droit de racheter les créances comptables une fois la dette payée. Ce droit de rachat démontre de façon irréfutable que la cession n'est pas absolue. Une cession générale de créances comptables représente une garantie dont le titre en common law appartient au prêteur et le titre en *equity* continue d'appartenir à l'emprunteur. Cette conclusion est étayée par l'art. 63 de la *Personal Property Security Act* de l'Alberta, qui prévoit les cas où il y a extinction du droit de rachat de biens meubles, y compris des créances comptables. Il y aurait de graves répercussions à conclure qu'une cession générale de créances comptables donne lieu, en raison de son caractère absolu, à un transfert de propriété, au lieu de constituer une garantie accessoire pour le paiement d'une créance. Il pourrait en résulter une modification de l'ordre de priorité prévu par la *Loi sur la faillite et l'insolvabilité*, la *Loi sur les arrangements avec les créanciers des compagnies* et la *Loi sur les sociétés par actions*. De plus, cela pourrait permettre à un débiteur sans scrupule, encouragé sciemment ou à son insu par une société créancière, d'organiser ses affaires de façon à léser de nombreux autres créanciers de bonne foi.

Le juge Major (dissident): Une cession générale de créances comptables est visée par la définition du terme «garantie» au par. 224(1.3) *LIR*. L'expression «cessions [...] quelle qu'en soit la nature» est suffisamment générale pour inclure les cessions absolues de créances comptables visées dans les présents pourvois. Cepen-

tion of "secured creditor" because they do not hold a security interest "in the property of another person". An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor. The assignments in each of the three cases involved here all contain language which makes it clear that they are immediate and absolute. The fact that the GABD is referred to as "continuing collateral security" in the instruments does not make the GABD anything less than absolute. While the tax debtor retains an equity of redemption upon an assignment of its book debts, here the value of the loans secured by the book debts far exceeds the value of the debts themselves and there is thus no value in the equity of redemption. Further, an absolute assignment of book debts makes those book debts the property of the assignee, and they remain the property of the assignee until the assignor actually exercises his equitable right to redeem. In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the court must interpret the word in its plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. In the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation. In the context of these appeals, the interpretation urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation of property that, absent the security interest, is the property of another person. In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. If there is an ambiguity in the meaning of the word "property", then the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondent lending institutions.

Per Iacobucci J. (dissenting): While the general principles of statutory interpretation outlined by Cory J. were agreed with, the general assignments of book debts

dant, les établissements de crédit ne sont pas des «créanciers garantis» parce qu'ils ne détiennent pas une garantie «sur un bien d'une autre personne». Une cession transfère le titre de propriété et c'est donc l'établissement de crédit et non le débiteur fiscal qui a la propriété des créances comptables. Dans chacune des trois affaires ici en cause, le libellé de l'acte de cession établit clairement que la cession est immédiate et absolue. Le fait que la cession générale de créances comptables soit qualifiée de «garantie accessoire et permanente» dans les écrits n'en change pas le caractère absolu. Bien que le débiteur fiscal conserve un droit de rachat lorsqu'il cède ses créances comptables, la valeur des prêts garantis, en l'espèce, par les créances comptables excède de beaucoup celle des créances elles-mêmes et, ainsi, le droit de rachat n'est d'aucune utilité. De plus, le cessionnaire devient propriétaire des créances comptables visées par une cession absolue, et ces créances comptables demeurent sa propriété jusqu'à ce que le cédant exerce le droit de rachat qui lui est reconnu en *equity*. Pour déterminer si les créances comptables cédées constituent le «bien» du cédant ou celui du cessionnaire, la cour doit donner à ce terme son sens ordinaire. Le terme «bien» s'entend ordinairement d'un titre de propriété et non d'un droit futur éventuel, reconnu en *equity*, de racheter un bien qu'une personne ne détient pas pour l'instant. Dans les circonstances des présents pourvois, il convient d'interpréter restrictivement la loi fiscale. Il existe, en l'absence de termes clairs et non équivoques, une présomption que les droits de propriété d'une personne ne peuvent lui être retirés sans qu'elle soit indemnisée. Dans le contexte des présents pourvois, l'interprétation préconisée par le MRN aurait pour effet d'exproprier des biens auxquels le prêteur a légalement droit en vertu du contrat de garantie qu'il a conclu avec le débiteur fiscal. Le sens ordinaire des termes employés dans la Loi n'a aucun rapport avec l'interprétation forcée consistant à dire qu'il s'agit, en l'absence de garantie, du bien d'une autre personne. En plus de contrevenir au principe qu'il ne faut pas ajouter des mots à une disposition, sauf s'il est absolument nécessaire de le faire, l'interprétation proposée tente d'introduire des termes explicitement utilisés dans une autre partie de la même disposition. Si le sens du terme «bien» est ambigu, l'effet spécifique de cette disposition justifie alors que toute ambiguïté soit strictement résolue en faveur des établissements de crédit intimés.

Le juge Iacobucci (dissident): Bien que les principes généraux d'interprétation législative exposés par le juge Cory aient été acceptés, les cessions générales de

in this case were tantamount to an absolute transfer of property, as found by Major J.

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By Cory J.

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By Major J. (dissenting)

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créances comptables consenties en l'espèce équivalaient à un transfert absolu de propriété, comme l'a conclu le juge Major.

Jurisprudence

Citée par le juge Cory

Arrêts mentionnés: *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Pembina on the Red Development Corp. c. Triman Industries Ltd.*, [1991] 6 W.W.R. 481; *Thermo King Corp. c. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369, autorisation de pourvoi refusée, [1982] 1 R.C.S. xi; *Bonavista (Town) c. Atlantic Technologists Ltd.* (1994), 117 Nfld. & P.E.I.R. 19; *Bank of Montreal c. Baird* (1979), 33 C.B.R. (N.S.) 256, autorisation de pourvoi refusée, [1980] 1 R.C.S. v; *R.V. Demmings & Co. c. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465; *R. in Right of B.C. c. F.B.D.B.* (1987), 17 B.C.L.R. (2d) 273; *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Canada c. Banque Nationale du Canada*, [1993] 2 C.F. 206; *TransGas Ltd. c. Mid-Plains Contractors Ltd.* (1993), 101 D.L.R. (4th) 238, conf. par [1994] 3 R.C.S. 753; *Berg c. Parker Pacific Equipment Sales*, [1991] 1 C.T.C. 442; *Lundrigans Ltd. (Receivership) c. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91.

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Edward R. Sojonky, Q.C., and *Michael J. Lema*, for the appellant.

Written submissions only by *J. Gary Greenan* and *Scott Watson*, for the respondent Province of Alberta Treasury Branches.

Jeffery D. Vallis and *C. Bryce Code*, for the respondent the Toronto-Dominion Bank.

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POURVOIS contre un arrêt de la Cour d'appel de l'Alberta (1994), 16 Alta. L.R. (3d) 1, 149 A.R. 34, 63 W.A.C. 34, [1994] 4 W.W.R. 685, 24 C.B.R. (3d) 257, 94 D.T.C. 6650, [1995] 1 C.T.C. 75, qui a infirmé des décisions du juge Forsyth (1992), 5 Alta. L.R. (3d) 141, 134 A.R. 124, [1993] 1 W.W.R. 639, 15 C.B.R. (3d) 143, et du juge MacLeod, et qui a confirmé une décision du juge Hunt (1993), 9 Alta. L.R. (3d) 349, 139 A.R. 295, [1993] 5 W.W.R. 756, [1994] 1 C.T.C. 108, 5 P.P.S.A.C. (2d) 117, concernant l'ordre de priorité. Pourvois accueillis, les juges Iacobucci et Major sont dissidents.

Edward R. Sojonky, c.r., et *Michael J. Lema*, pour l'appelante.

Argumentation écrite seulement par *J. Gary Greenan* et *Scott Watson*, pour l'intimé le Province of Alberta Treasury Branches.

Jeffery D. Vallis et *C. Bryce Code*, pour l'intimée la Banque Toronto-Dominion.

The judgment of La Forest, Cory and McLachlin JJ. was delivered by

1 CORY J. — At issue on these appeals is whether, on the facts of this case, lending institutions are secured creditors pursuant to the provisions of s. 224 of the *Income Tax Act*, S.C. 1970-71-72, c. 63 (*ITA*) and s. 317 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (*ETA*), which are practically identical in their provisions.

2 The facts giving rise to these appeals and the decisions of the court below have been ably set out in the reasons of Justice Major.

3 Both the *ITA* and the *ETA* provide for the collection of funds due to the federal government by way of income tax deductions from the wages of employees and for the remission of monies owing for the Goods and Services Tax (GST). The sections under review provide for the recovery of monies owing from those who are responsible for the collection and remission of income tax deductions and GST collections by way of garnishment. This system of collection and remission of income tax is exceedingly important. For example, in 1987 some 87 per cent of all personal income tax was collected through employer's deduction and remission.

4 In the cases under consideration, the company responsible for collection and remission of income tax and GST borrowed money from a lending institution. To secure their indebtedness the debtor companies made a general assignment of book debts (GABD) to the lending institution. If the submissions of the appellant prevail then the Government of Canada will recover the monies which ought to be paid to it by way of employees' income tax or GST. If the respondents are correct in their position, then the lending institutions will retain the funds which have come into their possession as a result of the GABD. Thus the decision in this case will have a very real significance for both the federal government and lending institutions.

Version française du jugement des juges La Forest, Cory et McLachlin rendu par

LE JUGE CORY — Il s'agit en l'espèce de déterminer si, d'après les faits, les établissements de crédit sont des créanciers garantis conformément aux dispositions pratiquement identiques de l'art. 224 de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63 (*LIR*), et de l'art. 317 de la *Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15 (*LTA*).

Le juge Major expose fort bien, dans ses motifs, les faits à l'origine des présents pourvois et les décisions des tribunaux d'instance inférieure.

La *LIR* et la *LTA* prescrivent toutes les deux la perception de fonds dus au gouvernement fédéral par voie de retenues fiscales sur les salaires d'employés, ainsi que le versement des sommes dues au titre de la taxe sur les produits et services (TPS). Les dispositions examinées prévoient le recouvrement, au moyen d'une saisie-arrêt, des sommes dues auprès des personnes responsables de la perception et du versement des retenues fiscales et de la TPS. Ce régime de perception et de versement de l'impôt sur le revenu est extrêmement important. Par exemple, en 1987, quelque 87 pour 100 de l'impôt sur le revenu des particuliers a été perçu au moyen des retenues et des versements effectués par les employeurs.

Dans les présents pourvois, la société responsable de la perception et du versement de l'impôt sur le revenu et de la TPS avait emprunté une somme à un établissement de crédit. Pour garantir leur emprunt, les sociétés débitrices avaient consenti une cession générale de créances comptables à l'établissement de crédit. Si l'appelante obtient gain de cause, le gouvernement du Canada recouvrera alors les sommes qui devraient lui être versées au titre de l'impôt sur le revenu des employés ou de la TPS. Par contre, si les intimés ont raison, les établissements de crédit conserveront alors les fonds qui sont tombés en leur possession par suite de la cession générale de créances comptables. En conséquence, la décision en l'espèce revêt une très grande importance pour le gouvernement fédéral et les établissements de crédit.

In essence, s. 224(1.2) provides a form of garnishment enabling the federal government to intercept monies owed to tax debtors. It is not available for the collection of income tax generally, but is limited to the recovery of funds owing by a person or company which has withheld monies from another person, usually an employee, for income tax purposes pursuant to s. 153 *ITA* and has failed to remit the withheld amounts to the federal government. A similar garnishment remedy is provided by s. 317(3) *ETA*. It is applicable in circumstances where a company or an individual has failed to remit GST which was collected as required by the provisions of the *ETA*.

Major J. has concluded that the Alberta Court of Appeal was correct in finding that an assignee of a GABD is not a "secured creditor"within the meaning of s. 224(1.3) *ITA* or s. 317(3) *ETA* because the assignee does not hold a security interest "in the property of another person". Rather, the assignee is the owner of those book debts. With respect I cannot agree with that conclusion. However I am in complete agreement with these conclusions:

1. The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.

2. The wording of s. 224(1.2) *ITA* as amended in 1990 is sufficiently clear and non-equivocal to allow a transfer of property in the garnished funds to the Minister of National Revenue (MNR) and to grant him a priority in circumstances where the balance of the section applies.

The Provisions of the GABD Made in These Cases

It would be helpful first to consider the assignment of book debts made in these cases in order to ascertain the apparent intentions of the parties. The two assignments in which the Treasury Branch was the lender provide:

Le paragraphe 224(1.2) prescrit essentiellement une procédure de saisie-arrêt qui permet au gouvernement fédéral d'intercepter des sommes dues à des débiteurs fiscaux. Ce type de saisie-arrêt ne peut servir au recouvrement des créances fiscales en général. Il ne vise que le recouvrement de sommes dues par une personne ou une société qui a, en vertu de l'art. 153 *LIR*, prélevé des sommes auprès d'une autre personne, habituellement un employé, et qui a omis de verser les montants retenus au gouvernement fédéral. Le paragraphe 317(3) *LTA* prévoit l'application d'une procédure similaire de saisie-arrêt dans le cas où une société ou un particulier a omis de verser la TPS perçue conformément aux dispositions de la *LTA*.

Le juge Major a conclu que la Cour d'appel de l'Alberta a eu raison de statuer que le titulaire d'une cession générale de créances comptables n'est pas un «créancier garanti» au sens du par. 224(1.3) *LIR* ou du par. 317(3) *LTA*, parce que celui-ci ne détient pas une garantie «sur un bien d'une autre personne». Le titulaire d'une telle cession est plutôt propriétaire des créances comptables. En toute déférence, je ne puis souscrire à cette conclusion. Cependant, je suis entièrement d'accord avec les conclusions suivantes:

1. La définition du terme «garantie» est suffisamment large pour comprendre une cession générale de créances comptables même s'il s'agit d'une cession absolue.

2. Le libellé du par. 224(1.2) *LIR*, modifié en 1990, est suffisamment clair et net pour permettre de transférer au ministre du Revenu national (MRN) la propriété des fonds saisis-arrêtés et lui accorder la priorité dans les circonstances où le reste de la disposition s'applique.

Les dispositions de la cession générale de créances comptables consentie dans les présentes affaires

Il serait utile d'examiner tout d'abord la cession de créances comptables consentie dans les présentes affaires afin de déterminer les intentions apparentes des parties. Voici comment étaient formulées les deux cessions consenties au prêteur Treasury Branch:

THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury Branches. . . . [Emphasis added.]

To a similar effect, the Toronto Dominion assignment reads in part:

PROVIDED and it is hereby distinctly understood and agreed that these presents are and shall be a continuing collateral security to the Bank for the general balance due at any time by the Assignor to the Bank. . . .

PROVIDED ALWAYS and it is hereby distinctly agreed that these presents are and shall be continuing and collateral security to the present and any future indebtedness of the Assignor to the Bank. . . . [Emphasis added.]

8 Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid the Bank or Treasury Branch would have no further interest in the assignment. The documents themselves refer to the assignment as being a continuing collateral security for the payment of the indebtedness. The clear intention of the parties is that the assignment is given as security for the payment of a debt and upon payment of the debt the GABD is to be of no force or effect. That is to say the lending institution could not, after payment of the debt, make use of the GABD to realise upon any of the book debts of the assignor. In my view since the assignment by its terms can be redeemed by payment of the debt it cannot or at least should not be construed as an absolute assignment.

9 Neither the lending institutions nor the debtor companies by their actions gave any indication that the respondents were the owners of the book debts. This is demonstrated by the fact that the lending institutions made no efforts whatsoever to realise upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt.

[TRADUCTION] La cession et le transfert effectués AUX PRÉSENTES constituent une garantie accessoire et permanente en faveur de Treasury Branches au titre du paiement de toute créance et dette, présentes et futures, de la soussignée à Treasury Branches . . . [Je souligne.]

Dans la même veine, la cession consentie à la Banque Toronto-Dominion prévoyait notamment:

[TRADUCTION] SOUS RÉSERVE, et il est clairement entendu et convenu que les présentes constituent une garantie accessoire et permanente en faveur de la Banque pour tout solde général dû, à quelque moment que ce soit, par le cédant à la Banque . . .

TOUJOURS SOUS RÉSERVE, et il est clairement convenu que les présentes constituent une garantie accessoire et permanente au titre de toute créance, présente et future, du cédant à la Banque . . . [Je souligne.]

De plus, toutes les cessions limitent la dette au montant de la créance impayée. En conséquence, si le prêt garanti par la cession générale de créances comptables était remboursé, la Banque ou le Treasury Branch n'aurait plus aucun autre droit sur la cession. Les documents mêmes précisent que la cession constitue une garantie accessoire et permanente au titre du paiement de la créance. Les parties voulaient clairement que la cession générale de créances comptables constitue une garantie au titre du paiement d'une créance et qu'elle ne soit plus exécutoire une fois le paiement effectué. Cela signifie que l'établissement de crédit ne pourrait, une fois la créance payée, se servir de cette cession générale de créances comptables pour procéder à la réalisation de l'une ou l'autre des créances comptables du cédant. À mon avis, puisque l'acte de cession prévoit que la cession peut être rachetée par le paiement de la créance, celle-ci ne peut ou tout au moins ne devrait pas être interprétée comme une cession absolue.

Ni les établissements de crédit ni les sociétés débitrices n'ont agi de façon à indiquer que les intimés étaient propriétaires des créances comptables. Cela ressort du fait que les établissements de crédit n'ont nullement cherché à réaliser les créances comptables ou à se comporter, de quelque manière que ce soit, comme «propriétaires» de ces créances jusqu'à ce que les sociétés débitrices

Only then did the lending institutions seek to realise upon their security. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. In commercial affairs, it is well known that a GABD is indeed a means of granting collateral security for a debt. In my view, so long as the possibility of redemption exists, the GABD remains as collateral security.

soient de toute évidence en grave difficulté financière, pour ne pas dire en faillite. Ce n'est qu'à ce moment que les établissements de crédit ont cherché à réaliser leur garantie. Le texte des documents et les actions des parties indiquent qu'elles considéraient que la cession avait été consentie à titre de garantie accessoire relativement aux créances. En matière commerciale, il est bien connu qu'une cession générale de créances comptables est, en fait, un moyen d'accorder une garantie accessoire relativement à une dette. À mon avis, dans la mesure où il existe une possibilité de rachat, la cession générale de créances comptables demeure une garantie accessoire.

In light of this customary commercial understanding of a GABD, it may be helpful to review the legislation to determine if, by its wording, it renders a GABD something other than collateral security for a debt and makes the assignee the owner of the book debts.

10 Compte tenu de la façon dont une cession générale de créances comptables est habituellement interprétée en matière commerciale, il peut être utile d'examiner la mesure législative pour déterminer si, par sa formulation, elle fait de la cession générale de créances comptables autre chose qu'une garantie accessoire au titre d'une créance et si elle rend le cessionnaire propriétaire des créances comptables.

Pertinent Provisions of the *ITA* and the *ETA* and Their History

As Major J. pointed out, prior to 1987 the provisions of the garnishment remedy in the *ITA* (s. 224(1)) were almost unanimously interpreted by the courts in such a way that a demand made under the section was ineffective to attach any of the assigned debts. The courts held that by the assignment the tax debtor had transferred all its interest in the accounts to the assignee with the result that there was nothing left for the Minister of National Revenue (MNR) to attach by garnishment.

Les dispositions pertinentes de la *LIR* et de la *LTA* et leur historique

11 Comme l'a fait remarquer le juge Major, avant 1987, les tribunaux ont considéré quasi unanimement que les dispositions de la *LIR* relatives à la saisie-arrêt (par. 224(1)) ne permettaient pas de saisir-arrêter les créances cédées. Les tribunaux ont conclu que le débiteur fiscal avait, par la cession, transféré en totalité au cessionnaire son droit sur ses comptes, de sorte qu'il ne restait rien sur quoi pouvait porter la saisie-arrêt du ministre du Revenu national (MRN).

In an attempt to address these decisions, Parliament amended the *ITA* in 1987 by adding two new subsections. They provided that the MNR could garnish funds owed by a tax debtor to a "secured creditor" and defined the terms "secured creditor" and "security interest". As Major J. observed, there was a divergence of opinion in the provincial courts of appeal as to whether the 1987 amend-

12 Pour tenter de donner suite à ces décisions, le Parlement a modifié la *LIR* en 1987, en y ajoutant deux nouveaux paragraphes. Ces paragraphes prévoyaient que le MRN était habilité à saisir-arrêter les sommes dues par un débiteur fiscal à un «créancier garanti», et définissaient les expressions «créancier garanti» et «garantie». Comme l'a fait remarquer le juge Major, les cours d'appel des pro-

ments permitted the MNR to effectively garnish funds in the hands of an assignee of a GABD.

13 In order to further clarify the situation and resolve the differences of opinion in the appellate courts, Parliament again amended the *ITA* with the apparent aim of granting priority to the MNR. It may be helpful to set out s. 224(1.2) *ITA* as it now appears following the 1990 amendment:

224. . . .

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment

(*a*) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest. [Emphasis added.]

(1.3) In subsection (1.2),

"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

vinces ont eu des opinions divergentes quant à savoir si les modifications de 1987 permettaient au MRN de saisir-arrêter les sommes entre les mains du titulaire d'une cession générale de créances comptables.

Afin de clarifier davantage la situation et de résoudre les divergences d'opinions des cours d'appel, le Parlement a modifié de nouveau la *LIR* dans le but apparent d'accorder la priorité au MRN. Il peut être utile de reproduire le par. 224(1.2) *LIR*, tel qu'il se présente depuis la modification de 1990:

224. . . .

(1.2) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite*, tout autre texte législatif fédéral, tout texte législatif provincial et toute règle de droit, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les 90 jours, débiteur d'une somme:

a) soit à un débiteur fiscal, à savoir une personne redevable d'un montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable;

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au receveur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant de la cotisation en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable. Sur réception de la lettre par la personne donnée, la somme qui y est indiquée comme devant être payée devient, malgré toute autre garantie au titre de cette somme, la propriété de Sa Majesté et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme. [Je souligne.]

(1.3) Les définitions qui suivent s'appliquent au paragraphe (1.2).

«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

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;

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

The question then is how should these sections be interpreted. At the outset it should be remembered that Parliament was responding to the division of opinion in the appellate courts and attempting to make it clear that the MNR could undertake garnishment procedure in those situations where a GABD has been made. The appropriate principles to be considered in interpreting taxation legislation were clearly set out in *Friesen v. Canada*, [1995] 3 S.C.R. 103, at pp. 112-14. There the principles were summarized in these words:

C. *Principles of Interpretation*

The central question on this appeal of whether the appellant is entitled to take advantage of the inventory valuation method in s. 10 of the Act involves a careful examination of the wording of the provisions of the Act and a consideration of the proper interpretation of these sections in the light of the basic structure of the Canadian taxation scheme which is established in the *Income Tax Act*.

In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

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.

. . .

«garantie» Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

Il s'agit alors de déterminer comment ces dispositions devraient être interprétées. Au départ, il faudrait se rappeler que le Parlement réagissait à la divergence d'opinions des cours d'appel et tentait d'établir clairement que le MRN pourrait procéder à une saisie-arrêt dans les cas où il y aurait eu une cession générale de créances comptables. Les principes dont il faut tenir compte dans l'interprétation des lois fiscales sont clairement énoncés dans l'arrêt *Friesen c. Canada*, [1995] 3 R.C.S. 103, aux pp. 112 à 114, où ils sont résumés en ces termes:

C. *Principes d'interprétation*

La question principale soulevée dans le présent pourvoi, soit celle de savoir si l'appelant a le droit de se prévaloir de la méthode d'évaluation des biens figurant dans un inventaire prévue à l'art. 10 de la Loi, nécessite un examen attentif du libellé des dispositions de la Loi, de même qu'une étude de l'interprétation qu'il convient de donner à ces articles à la lumière de la structure de base du régime fiscal canadien établi dans la *Loi de l'impôt sur le revenu*.

Pour interpréter les dispositions de la *Loi de l'impôt sur le revenu*, il convient, comme l'affirme le juge Estey dans l'arrêt *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé *Construction of Statutes* (2e éd. 1983), à la p. 87:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

14

The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:

> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, [1993] 4 S.C.R. 695.

I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3(c) "Strict and purposive interpretation", at pp. 453-54:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision. . . . (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

15 Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between

Le principe voulant que le sens ordinaire des dispositions pertinentes de la *Loi de l'impôt sur le revenu* prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt *Canada c. Antosko*, [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327:

> Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté: *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, [1993] 4 R.C.S. 695.

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] «Interprétation stricte et fondée sur l'objet visé», aux pp. 453 et 454:

> [TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. [. . .] (L'arrêt *Antosko*) ne fait que reconnaître que «l'objet» ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.

En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que «fermez la porte, s'il vous plaît», et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente

the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament". What then was Parliament's intention in enacting the 1990 legislation?

affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner «l'esprit de la loi, l'objet de la loi et l'intention du législateur» pour déterminer le sens manifeste et ordinaire de la loi en cause. Quelle était alors l'intention du Parlement lorsqu'il a adopté la mesure législative de 1990?

The Purpose of the Legislation

There can be no doubt of the importance of levying taxation. The *ITA* entrusts to employers the duty of deducting income tax from the wages of employees and remitting it on their behalf. Similarly the *ETA* imposes on those who provide goods and services to others the duty to collect and remit the GST which is payable. In essence, companies collect taxes which they hold in trust for the government.

L'objet de la mesure législative

16 On ne saurait douter de l'importance de la levée d'impôts. La *LIR* impose aux employeurs l'obligation de retenir l'impôt sur le salaire de leurs employés et de le verser en leur nom. De même, la *LTA* impose à ceux qui fournissent des produits et services à autrui l'obligation de percevoir et de verser la TPS exigible. Essentiellement, les sociétés perçoivent des impôts qu'elles détiennent en fiducie pour le compte du gouvernement.

The purpose of the 1987 legislation, which I think is even more appropriately applied to the 1990 legislation, was very clearly and forcefully set forth in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, [1991] 6 W.W.R. 481 (Man. C.A.). There, at pp. 488-89, Scott C.J.M. observed:

> To determine the dominant characteristic of the legislation, it is important to know the governmental policy behind the section. The tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly. Revenue Canada, on the other hand, does not have the same opportunity to become acquainted with the affairs of the tax debtor or its creditors. It must therefore rely solely on the provisions of the legislation to mandate the employer to remit the employee income tax deductions as required by the [Income Tax] Act, and to establish its collectability in the event of default.

17 L'objet de la loi de 1987, qui, à mon avis, s'applique encore plus à la loi de 1990, a été exposé très clairement et avec vigueur dans l'arrêt *Pembina on the Red Development Corp. c. Triman Industries Ltd.*, [1991] 6 W.W.R. 481 (C.A. Man.). Dans cet arrêt, le juge en chef Scott fait remarquer, aux pp. 488 et 489:

> [TRADUCTION] Pour déterminer la caractéristique dominante de la mesure législative, il importe de connaître la politique gouvernementale qui la sous-tend. La banque du débiteur fiscal est la mieux placée pour connaître son client et organiser ses affaires en conséquence. Par contre, Revenu Canada n'a pas la même chance de se familiariser avec les affaires du débiteur fiscal ou de ses créanciers. Il doit donc s'en remettre uniquement aux dispositions de la Loi pour exiger de l'employeur qu'il verse les montants d'impôt sur le revenu des employés qu'il a retenus conformément à la Loi [de l'impôt sur le revenu], et déterminer s'il pourra percevoir les montants en question en cas de défaut.

. . . . . .

The purpose of the Act is not only to levy tax, but to collect it. There is a strong public duty on employers to remit; indeed, this is central to the scheme of self-assessment under the Act.

Further, Lyon J.A., dissenting in the result, stated at pp. 506-7:

One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987," a publication of Revenue Canada Taxation, catalogue No. RV-1987, one finds that 87 per cent of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.

. . .

In my opinion it was intended by Parliament that anyone who, in the ordinary course of business, made credit arrangements with a tax debtor involving assignments of accounts receivable, did so subject to the overriding right of the Crown to satisfy the primary obligations of the tax debtor to collect and remit taxes withheld from its employees. The words of the statute can mean nothing less. The section is cast in the broadest of possible terms precisely because it was meant to interfere with and interrupt payments under such assignments and divert them to meet this statutory obligation. I do not know what other words Parliament could use to make its overriding intention and claim more clear.

18 These statements can be applied even more forcefully to the 1990 amendments. The Parliamentary intent was to confirm the overriding right

La Loi vise non seulement à lever des impôts, mais aussi à les percevoir. Les employeurs ont une obligation publique importante de verser les montants perçus; en fait, c'est un élément crucial du régime d'autocotisation prévu par la Loi.

Plus loin, le juge Lyon, dissident quant au résultat, affirme, aux pp. 506 et 507:

[TRADUCTION] Il faut toujours se rappeler que les retenues d'impôt ou les retenues à la source visées par l'art. 224 sont au cœur de la procédure de perception de l'impôt sur le revenu des particuliers au Canada. En réalité, si l'on fait un calcul à partir des statistiques publiées dans «Statistiques fiscales de 1987», publication de Revenu Canada, Impôt, nº de catalogue RV-1987, on constate que 87 pour 100 de l'impôt sur le revenu des particuliers est perçu au moyen de retenues à la source. On peut donc considérer qu'en adoptant le par. 224(1.2), le Parlement lui a donné ce caractère exhaustif de façon à en assurer la viabilité. Aucun autre régime n'est aussi crucial relativement à la procédure globale de perception adoptée par l'État. Le Parlement a nettement voulu protéger ce régime. Se servir de l'employeur comme percepteur d'impôt requiert une protection additionnelle dans des cas comme celui dont nous sommes saisis où l'employeur utilise les retenues d'impôt à ses propres fins. Naturellement, on ne saurait approuver cette utilisation si l'on veut préserver l'intégrité du régime. Le Parlement a donc adopté, conformément à sa compétence constitutionnelle, ce recours extraordinaire pour protéger une source importante de perception.

. . .

À mon avis, le Parlement a voulu que quiconque conclut, avec un débiteur fiscal, dans le cours normal de ses affaires, une entente de crédit assortie d'une cession de comptes débiteurs, le fasse sous réserve du droit prépondérant de l'État d'obtenir l'acquittement des principales obligations du débiteur en matière de perception et de versement des impôts prélevés auprès de ses employés. Le texte de la Loi ne signifie rien de moins. Cette disposition est rédigée de la manière la plus générale possible précisément parce qu'elle visait à interrompre les paiements effectués aux termes d'une telle cession et à les utiliser de manière à remplir l'obligation prévue par la Loi. Je ne vois pas comment le Parlement aurait pu exprimer plus clairement son intention et sa réclamation prépondérantes.

Ces propos peuvent s'appliquer avec encore plus de vigueur aux modifications de 1990. Le Parlement voulait confirmer le droit prépondérant du

of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR.

What is the Nature of a General Assignment of Book Debts?

Like Major J., I am of the view that a GABD is a form of security for a loan which is always subject to the right of the debtor to redeem. It will be remembered that s. 224(1.3) defines the "security interest" in these words:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

This definition encompasses the general assignments of book debts which are at issue in these appeals. However, I cannot agree with Major J.'s conclusion that the creditors are not secured creditors. I find it difficult, indeed impossible, to conclude that the same document can be both a security interest and an absolute assignment. The same document cannot, simultaneously, embrace two such conflicting concepts.

Basically, security is something which is given to ensure the repayment of a loan. *Black's Law Dictionary* (6th ed. 1990), at p. 1357, gives a clear definition of a "security interest" in these terms:

> The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time, (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

MRN de recouvrer par voie de saisie-arrêt les impôts perçus que la société débitrice aurait dû lui verser.

Quelle est la nature d'une cession générale de créances comptables?

19 À l'instar du juge Major, j'estime qu'une cession générale de créances comptables constitue une forme de garantie relative à un prêt, qui sera toujours assujettie au droit de rachat du débiteur. Qu'on se rappelle la définition du terme «garantie», contenue au par. 224(1.3):

> «garantie» Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

Cette définition inclut les cessions générales de créances comptables en cause dans les présents pourvois. Cependant, je ne puis souscrire à la conclusion du juge Major que les créanciers ne sont pas des créanciers garantis. J'estime qu'il est difficile, voire impossible, de conclure que le même document peut constituer à la fois une garantie et une cession absolue. Le même document ne saurait englober simultanément deux concepts aussi contradictoires.

20 Fondamentalement, une garantie est quelque chose que l'on donne pour assurer le remboursement d'un prêt. Le *Black's Law Dictionary* (6e éd. 1990), à la p. 1357, définit clairement l'expression «*security interest*»:

> [TRADUCTION] Le terme «garantie» («*security interest*») désigne tout droit sur un bien acquis par contrat aux fins de garantir le paiement ou l'exécution d'une obligation ou l'indemnisation d'une perte ou d'une dette. Une garantie existe, à un moment donné, (A) si le bien existe à ce moment et si le droit sur ce bien est protégé en vertu du droit interne contre un privilège ultérieur constitué par jugement relativement à une obligation non garantie, et (B) dans la mesure où, à ce moment, le titulaire a déboursé une somme ou renoncé à une valeur en argent.

21 This definition is consistent with that set out in the *ITA*. It is in sharp contrast to the definition of the word "absolute" set out in the same source at p. 9 in these terms:

> Complete; perfect; final, without any condition or incumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.

22 These definitions are, in my view, correct. If that is the case, then it can be seen that the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. To say that the same instrument can operate both as an absolute assignment and as a security interest is to simultaneously put forward two incompatible positions. The two conflicting concepts cannot live together in the same document.

Cases Which Have Considered the Nature of a General Assignment of Book Debts

23 Major J. expressed the opinion that it is "well-established law" that a GABD, such as those in issue, has the effect of transferring all title and ownership in the property assigned so that they can no longer be considered to be the property of the assignor. Yet ordinarily, in the world of commerce, a GABD is considered to be a security interest. As a security interest, it simply cannot transfer all "right, title and ownership in and to the property assigned". This conclusion has found support in other cases.

24 In *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.), leave to

Cette définition est compatible avec celle formulée dans la *LIR*. Elle contraste vivement avec celle du terme «*absolute*» («absolu»), que l'on trouve à la p. 9 du même ouvrage:

> [TRADUCTION] Complet; parfait; final, sans condition ni privilège; comme une garantie absolue (*simplex obligatio*) par rapport à une garantie conditionnelle. Inconditionnel; complet et parfait en soi; sans rapport ni dépendance avec d'autres choses ou d'autres personnes.

À mon avis, ces définitions sont exactes. Si c'est le cas, le même écrit ne saurait alors constituer à la fois une «garantie» et une «cession absolue». Si un écrit constitue une cession absolue, le débiteur ne peut alors conserver un droit résiduel de recouvrer les biens puisqu'une telle cession est complète et parfaite en soi. Par définition, une cession complète et parfaite ne peut reconnaître le concept d'un droit de rachat. Une cession absolue ne peut servir à «garantir» le paiement d'une dette puisque le débiteur n'aurait aucune raison de recouvrer ce qui a fait l'objet d'une cession absolue. Une cession absolue est irrévocable. Affirmer que le même écrit peut constituer à la fois une cession absolue et une garantie revient à avancer simultanément deux points de vue incompatibles. Ces deux concepts contradictoires ne peuvent coexister dans le même document.

La jurisprudence dans laquelle la nature d'une cession générale de créances comptables a été examinée

Le juge Major affirme qu'il est «bien établi en droit» qu'une cession générale de créances comptables, comme celles dont il est question, a pour effet de transférer en totalité le titre et la propriété relatifs au bien cédé de sorte qu'il ne peut plus être considéré comme le bien du cédant. Pourtant, en matière commerciale, une cession générale de créances comptables est habituellement considérée comme une garantie. En tant que garantie, elle ne peut tout simplement pas transférer en totalité «le droit, le titre et la propriété relatifs au bien cédé». D'autres arrêts appuient cette conclusion.

Dans l'arrêt *Thermo King Corp. c. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.),

appeal refused, [1982] 1 S.C.R. xi, Wilson J.A. (as she then was) held, for a unanimous court, that a GABD is a security document. In that case she was required to consider an instrument which was very similar if not identical to those presented in these appeals. At p. 381 she concluded:

> While these provisions appear on their face to constitute the assignor a trustee for the bank of any payments it receives from its customers and to permit the bank to appropriate them at will, *whether or not any debt is then due to the bank by the assignor*, this seems to be quite incompatible with the nature of the instrument as a collateral security. [Emphasis in original.]

Similarly, in *Bonavista (Town) v. Atlantic Technologists Ltd.* (1994), 117 Nfld. & P.E.I.R. 19, Osborn J. considered a GABD. He wrote (at p. 24):

> One may ask, if the assignment is absolute to the point of ownership, why does it specifically give to the Bank the power to collect or dispose of the debts. Are not such powers incidents of ownership? Similarly, if the assignment is absolute, what remaining rights reside in the customer that may be "extinguished" if the Bank buys the accounts at a sale?
>
> In my view, the assignment contemplates that it will operate as a security interest. It vests in the Bank title to the debts owed to Atlantic, but such vesting is for the purpose of security; it is not to transfer ownership, as that term is commonly understood. . . . The Bank is a "secured creditor". The nature of the interest held by the Bank, even if considered to be an absolute assignment, cannot be divorced from the circumstances in which it arose. The commercial reality is that the Bank held a security interest in the property of Atlantic. Atlantic transferred its receivable to the Bank to secure payment of money Atlantic owed to the Bank. Once Atlantic paid off the Bank, it was entitled, not to a reassignment of the debt, but, by the wording of the assignment, "to the cancellation hereof". The Bank was a secured creditor holding a security interest. [Emphasis added.]

I agree with the reasoning expressed in these cases. As well, I would note that the Newfoundland Court of Appeal in *Bank of Montreal v. Baird*

autorisation de pourvoi refusée, [1982] 1 R.C.S. xi, le juge Wilson (plus tard juge de notre Cour) a statué, au nom de la Cour d'appel à l'unanimité, qu'une cession générale de créances comptables est un document de garantie. Dans cette affaire, elle devait examiner un écrit très semblable, voire identique, à ceux dont il est question dans les présents pourvois. Elle conclut, à la p. 381:

> [TRADUCTION] Bien que ces dispositions paraissent à première vue faire du cédant un fiduciaire de la banque relativement aux paiements qu'il reçoit de ses clients, et permettre à la banque de les affecter comme elle l'entend, peu importe *que le cédant ait alors ou non une dette échue envers la banque*, cela semble tout à fait incompatible avec la nature de l'écrit en tant que garantie accessoire. [En italique dans l'original.]

De même, dans *Bonavista (Town) c. Atlantic Technologists Ltd.* (1994), 117 Nfld. & P.E.I.R. 19, le juge Osborn a examiné une cession générale de créances comptables. Il écrit, à la p. 24:

> [TRADUCTION] On peut se poser la question suivante: si la cession est absolue au point de transférer la propriété, pourquoi donne-t-elle expressément à la banque le pouvoir de recouvrer les créances ou d'en disposer? De tels pouvoirs ne sont-ils pas accessoires au droit de propriété? De même si la cession est absolue, quels sont les droits résiduels du client qui risquent d'être «éteints» si la banque achète les comptes lors d'une vente?
>
> À mon avis, l'acte de cession prévoit qu'elle servira de garantie. Il attribue à la banque le titre relatif aux créances payables à Atlantic, mais cette attribution vise à constituer une garantie; elle ne transfère pas la propriété du bien, au sens que l'on donne habituellement à ce terme. [. . .] La banque est un «créancier garanti». La nature du droit détenu par la banque, même considéré comme une cession absolue, ne saurait être dissociée des circonstances qui y ont donné naissance. Sur le plan commercial, il reste que la banque détenait une garantie sur le bien d'Atlantic. Atlantic a transféré son compte débiteur à la banque pour garantir le paiement des sommes qu'elle lui devait. Après avoir payé la banque, Atlantic avait droit, aux termes de l'acte de cession, «à l'annulation de cette cession» et non à une rétrocession de la créance. La banque était un créancier garanti titulaire d'une garantie. [Je souligne.]

Je suis d'accord avec le raisonnement exprimé dans ces arrêts. De même, je tiens à préciser que, dans l'arrêt *Bank of Montreal c. Baird* (1979), 33

(1979), 33 C.B.R. (N.S.) 256, leave to appeal refused, [1980] 1 S.C.R. v, dealt with a GABD as a security interest. Further, the New Brunswick Court of Appeal in *R.V. Demmings & Co. v. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465, found that a bank holding a GABD was a secured creditor, subject to an equity of redemption in the assignor company.

26 I also find support for this conclusion from the reasoning in cases which considered a situation similar to that created by a GABD. These cases arise when a borrower grants to a lending institution a fixed charge or mortgage based upon the borrower's present and future stock-in-trade and inventory but reserves to the borrower the right to make sales of the stock-in-trade and inventory in the ordinary course of business.

27 In *R. in Right of B.C. v. F.B.D.B.* (1987), 17 B.C.L.R. (2d) 273, McLachlin J.A. (as she then was), on behalf of the majority of the Court of Appeal, considered the manner in which courts have dealt with such instruments and in so doing, reached the following conclusions at p. 303:

> Generally speaking, the authorities draw a clear distinction between fixed and floating charges, recognizing nothing between and taking the view that any charge which permits dealing in the ordinary course of business must be regarded as floating. . . .

28 She then went on, at pp. 303-4, to discuss the conceptual possibility of a fixed charge on stock-in-trade coupled with a licence to deal in those goods, a situation analogous to that which the lending institutions claim exists under a GABD. She noted at p. 305:

> The generally accepted view . . . is that such a charge should be regarded as floating rather than fixed because it involves no final and irrevocable appropriation of property to the creditor.

C.B.R. (N.S.) 256, autorisation de pourvoi refusée, [1980] 1 R.C.S. v, la Cour d'appel de Terre-Neuve a traité une cession générale de créances comptables comme une garantie. En outre, dans l'arrêt *R.V. Demmings & Co. c. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465, la Cour d'appel du Nouveau-Brunswick a statué qu'une banque titulaire d'une cession générale de créances comptables était un créancier garanti, sous réserve d'un droit de rachat de la part de la société cédante.

Cette conclusion s'appuie également sur le raisonnement suivi dans des affaires concernant une situation semblable à celle engendrée par une cession générale de créances comptables. Pareils cas se présentent lorsqu'un emprunteur consent à un établissement de crédit une charge fixe ou un *mortgage* sur ses stocks de marchandises et inventaire présents et futurs, tout en se réservant le droit de les vendre dans le cours normal des affaires.

Dans l'arrêt *R. in Right of B.C. c. F.B.D.B.* (1987), 17 B.C.L.R. (2d) 273, le juge McLachlin (maintenant juge de notre Cour) a examiné, au nom de la Cour d'appel à la majorité, la façon dont les tribunaux ont traité de tels écrits et, ce faisant, elle est arrivée à la conclusion suivante (à la p. 303):

> [TRADUCTION] En général, la jurisprudence établit une distinction claire entre les charges fixes et les charges flottantes, ne reconnaissant rien entre les deux et considérant qu'une charge qui permet des opérations dans le cours normal des affaires doit être considérée comme flottante . . .

Elle examine ensuite, aux pp. 303 et 304, s'il est possible, sur le plan conceptuel, d'avoir une charge fixe sur un stock de marchandises assortie d'une autorisation de faire des opérations sur ces marchandises, situation analogue à celle qui, selon les établissements de crédit, existe lorsqu'il y a cession générale de créances comptables. Elle souligne, à la p. 305:

> [TRADUCTION] Selon le point de vue généralement accepté [. . .] une telle charge devrait être considérée comme flottante et non fixe parce qu'elle ne comporte pas une attribution définitive et irrévocable de biens au créancier.

She also observed that the English courts have specifically rejected the possibility of an absolute assignment being coupled with a licence to deal (at pp. 305-6):

> . . . this theory was soon rejected by the English courts, as is seen from the comments of Lord Buckley in *Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979 at 999 (C.A.):
>
> > A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is *not a specific security*; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. *A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security*, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security. [Emphasis added by McLachlin J.A.]

In determining whether a particular charge over book debts is fixed or floating, McLachlin J.A. referred (at p. 307) to R. A. Pearce in "Fixed Charges over Book Debts", [1987] J. Bus. L. 18, at p. 29:

> . . . the essential characteristic for deciding whether a charge of book debts is fixed or floating is whether the book debts can be disposed of free from the charge; if they can, the charge is a floating charge, otherwise it is a fixed charge.

. . .

Modern authorities have accepted the either-or approach to fixed and floating charges upon which the courts settled in the late 19th and early 20th centuries. For example, they accept the conclusion that a fixed charge on book debts is inconsistent with the assignor having the freedom to deal with proceeds in the course of his business: see *Siebe Gorman & Co. v. Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 143 (Ch. D.); *Re Armagh Shoes Ltd.*, [1982] N.I. 59 (Ch. D.); *Re Keenan Bros. Ltd.* (1985), 5 I.L.R.M. 641 (S.C.). In *Great Lakes*

Elle a également fait remarquer que les tribunaux anglais ont expressément écarté la possibilité d'une cession absolue assortie d'une autorisation de faire des opérations (aux pp. 305 et 306):

> [TRADUCTION] . . . cette théorie a vite été rejetée par les tribunaux anglais, comme l'indiquent les commentaires de lord Buckley dans l'arrêt *Evans c. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979, à la p. 999 (C.A.):
>
> > Une charge flottante n'est pas une charge future; c'est une charge actuelle qui grève tous les biens de la société spécifiés dans l'acte qui la constitue. Par contre, il ne s'agit *pas d'une charge spécifique*; le titulaire ne peut soutenir qu'il possède un *mortgage* spécifique sur ces biens. Les biens sont grevés d'un *mortgage* de telle façon que le débiteur sur *mortgage* peut faire des opérations sur ces biens sans l'approbation du créancier sur *mortgage*. *Une charge flottante n'est pas un mortgage spécifique sur les biens, assorti d'une autorisation consentie au débiteur sur mortgage de les aliéner dans le cours normal de ses affaires; c'est plutôt un mortgage général qui grève tout bien visé par la charge*, mais qui n'affecte pas spécifiquement ces biens jusqu'à ce qu'un événement donné se produise ou jusqu'à ce que le créancier sur mortgage accomplisse un acte qui a pour effet de transformer cette charge en charge fixe. [Italiques ajoutés par le juge McLachlin.]

Pour déterminer si une charge particulière sur des créances comptables est fixe ou flottante, le juge McLachlin renvoie (à la p. 307) à l'article de R. A. Pearce, intitulé «Fixed Charges over Book Debts», [1987] J. Bus. L. 18, à la p. 29: 29

> [TRADUCTION] . . . pour décider si une charge sur des créances comptables est fixe ou flottante, il s'agit essentiellement de savoir si ces créances peuvent être aliénées libres et quittes de toute charge; dans l'affirmative, la charge est flottante, sinon elle est fixe.

. . .

En ce qui concerne les charges fixes et flottantes, la jurisprudence moderne a accepté l'analyse dichotomique à laquelle les cours de justice en sont arrivées à la fin du XIX^e siècle et au début du XX^e siècle. Par exemple, ils acceptent la conclusion qu'une charge fixe sur des créances comptables est incompatible avec le fait que le cédant ait la liberté de faire des opérations sur les produits dans le cours de ses affaires: voir *Siebe Gorman & Co. c. Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 143 (Ch. D.); *Re Armagh Shoes Ltd.*, [1982] N.I.

Petroleum Co. v. Border Cities Oil Ltd., [1934] O.R. 244, [1934] 2 D.L.R. 743 (C.A.), an assignment of book accounts which permitted the debtor to continue to "collect, get in, and deal with said debts, accounts, claims, moneys, and choses in action in the ordinary course of the business" was held to be a floating charge. The same result obtained in *R. v. Lega Fabricating Ltd.* (1980), 22 B.C.L.R. 145 (S.C.).

She indicated that the sole exception to this rule appeared to be the case of *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (B.C.C.A.), cited by Major J. in his reasons. Significantly she went on to observe at p. 307:

> Why did the courts reject the concept of a fixed charge with a licence to deal? In doing so, they undeniably limited the freedom of debtor and creditor to contract as they might choose in an age when freedom of contract was paramount. The answer, it may be suggested, lies in the effects which recognition of such a concept would have upon the rights of third parties and general commercial activity, as well as the perceived injustice of allowing the debtor to trade freely while remaining immune from the normal incidents of legal process. As Fletcher-Moulton L.J. put it in *Evans v. Rival Granite Quarries Ltd.*, supra (p. 995):
>
> > The results of such a contention are astonishing; it means that by giving such a debenture a company retains the full right of trading with untied hands and at the same time obtains immunity from the operation of all processes of law. I should be slow to come to the conclusion that such an anomaly was recognized by the law. Nor do I think that it is. A consideration of the effect of floating charges and of the fact that the freedom of the company to carry on its business is not based on special words creating that freedom, but on the nature of the charge itself, leads me to the conclusion that the right of the company to carry on its business as it wills pending the enforcement of the security must mean that it may carry it on in accordance with law, including a liability to the processes of the law if it does not pay its debts.

Finally, at p. 309, McLachlin J.A. concluded:

> In general, the courts have been unwilling to characterize charges which permit the debtor to deal with his property in the ordinary course of business as fixed

59 (Ch. D.); *Re Keenan Bros. Ltd.* (1985), 5 I.L.R.M. 641 (C.S.). Dans l'arrêt *Great Lakes Petroleum Co. c. Border Cities Oil Ltd.*, [1934] O.R. 244, [1934] 2 D.L.R. 743 (C.A.), on a statué que constituait une charge flottante une cession de créances comptables qui permettait au débiteur de continuer de «percevoir et d'effectuer des opérations sur lesdits comptes, créances, réclamations, sommes et droits incorporels dans le cours normal des affaires». On est arrivé à la même conclusion dans *R. c. Lega Fabricating Ltd.* (1980), 22 B.C.L.R. 145 (C.S.).

Le juge McLachlin a indiqué que la seule exception à cette règle semblait être l'arrêt *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (C.A.C.-B.), que le juge Major cite dans ses motifs. Fait révélateur, elle ajoute, à la p. 307:

> [TRADUCTION] Pourquoi les tribunaux ont-ils rejeté le concept d'une charge fixe assortie d'une autorisation de faire des opérations? Ce faisant, ils ont incontestablement restreint la liberté des débiteurs et des créanciers de contracter comme ils l'entendent à une époque où prédominait la liberté contractuelle. La réponse, peut-on suggérer, réside dans les répercussions que la reconnaissance d'un tel concept aurait sur les droits des tiers et le commerce en général, et dans l'injustice apparente de permettre au débiteur de faire librement des opérations, à l'abri de l'application normale de la loi. Comme le lord juge Fletcher-Moulton l'affirme dans l'arrêt *Evans c. Rival Granite Quarries Ltd.*, précité (p. 995):
>
> > Une telle prétention donne des résultats étonnants; cela signifie qu'une société, qui consent une telle débenture, conserve le plein droit de faire des opérations, sans aucune restriction, et qu'elle se trouve, en même temps, à l'abri de toute application de la loi. Je devrais hésiter à conclure qu'une telle anomalie a été reconnue par la loi. Je ne crois pas non plus que ce soit le cas. L'examen de l'incidence des charges flottantes et du fait que la liberté de la société d'exercer ses activités est fondée non pas sur des termes spéciaux établissant cette liberté, mais sur la nature de la charge elle-même, m'amène à conclure que le droit de la société d'exercer ses activités à sa guise jusqu'à l'exécution de la charge signifie qu'elle doit les exercer conformément à la loi, tout en étant assujettie à l'application de la loi si elle ne paie pas ses dettes.

Enfin, le juge McLachlin conclut, à la p. 309:

> [TRADUCTION] En général, les tribunaux ont refusé de qualifier de charges fixes, assorties d'une autorisation de vendre, les charges qui permettent au débiteur de

charges with licenses to sell. Rather, the courts have characterized such charges as floating, with the result that they give the chargeholder no priority over third parties prior to crystallization. . . . In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no . . . .

The Significance of the Equity of Redemption

For the resolution of these appeals, it is essential that there be a clear recognition of the fundamental difference between an absolute and a conditional assignment of book debts. In an absolute assignment, all interests are transferred and no property remains in the hands of the assignor. It is, simply, a sale of the book debts of the company. This is the basis of the business of factoring. Factoring is described in R. Burgess, *Corporate Finance Law* (2nd ed. 1992), at p. 100, in this manner:

> "Factoring is a legal relationship between a financial institution (the factor) and a business concern (the client) selling goods or providing services to trade customers (the customers) whereby the factor purchases the client's book debts either with or without recourse to the client and administers the client's sales ledger."

From this definition it is apparent that factoring arrangements involve:

(1) the purchase of the client's book debts;

(2) the taking over and administration of the client's sales ledger and credit control functions; and

(3) the provision to the client of finance which will be a specified percentage of the nominal value of the debts.

The author goes on (at p. 101) to consider the requirements for an assignment of book debts under English law and observes that to be effective the assignment must be absolute. The text defines "absolute", in these terms:

> The ordinary legal meaning of "absolute" is unconditional, so, for an assignment to be absolute, it must not

faire des opérations sur ses biens dans le cours normal des affaires. Les tribunaux les ont plutôt qualifiées de charges flottantes, ne conférant ainsi à leur titulaire aucune priorité de rang sur des tiers avant la matérialisation. [. . .] Bref, il faut répondre par la négative à la question de savoir si les tribunaux ont reconnu l'existence d'une charge fixe assortie d'une autorisation de vendre dans le cours ordinaire des affaires . . .

L'importance du droit de rachat

Pour trancher les présents pourvois, il est essentiel de reconnaître clairement la différence fondamentale qui existe entre une cession absolue et une cession conditionnelle de créances comptables. Une cession absolue transfère tous les droits et aucun bien ne demeure entre les mains du cédant. C'est simplement une vente de créances comptables de la société. C'est le fondement de l'affacturage. Voici comment R. Burgess décrit l'affacturage dans son ouvrage intitulé *Corporate Finance Law* (2e éd. 1992), à la p. 100:

> [TRADUCTION] «L'affacturage est une relation juridique entre une institution financière (la société d'affacturage) et une entreprise (le client) qui vend des marchandises ou fournit des services à des clients commerciaux (l'achalandage), en vertu de laquelle la société d'affacturage achète les créances comptables du client avec ou sans le concours de ce dernier et en administre le grand livre des ventes.»

Selon cette définition, une entente d'affacturage semble comporter les éléments suivants:

1) l'achat des créances comptables du client,

2) l'acquisition et l'administration du grand livre des ventes et des fonctions de contrôle du crédit du client, et

3) le financement du client qui correspond à un pourcentage précis de la valeur nominale des créances.

L'auteur examine ensuite (à la p. 101) les exigences d'une cession de créances comptables en vertu du droit anglais et fait remarquer que pour être efficace une cession doit être absolue. L'auteur définit ainsi le terme [TRADUCTION] «absolu»:

> [TRADUCTION] En droit, le terme «absolu» signifie ordinairement inconditionnel, de sorte que pour qu'une

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be conditional in any way; specifically, it must not purport to be by way of charge only.

31 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. In my view, s. 224 *ITA* does protect those engaged in the factoring business and those lending institutions that have succeeded in perfecting their security interest prior to any intervention by the MNR. However, I cannot accept the submission that Parliament, by this section, intended to create an interest which was both conditional as a security interest and at the same time unconditional as an absolute assignment. There cannot have been an intent to combine such incompatible concepts.

32 Clearly a GABD does not meet the standard required for a factoring arrangement which requires an absolute transfer of the proprietary interest of the assignor in the book debts. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute.

33 I agree with the MNR that what the actual equity of the borrower in the book debts may be from time to time is irrelevant for the purpose of determining the legal effect of the equity of redemption. It would be absurd if a company were to fluctuate between having title and not having title to their book debts based on their ratio of debt to assets. This is particularly true of a company engaged in a seasonal business. Yet if a GABD is treated as an absolute assignment, this can be the only result, as the bank is limited to recovering the amount of the loan. Since the bank could not recover any book debts if the company had a surplus in their account, the book debts would belong to the company. When there was a deficit, some or all of the book debts would belong to the bank. Such a fluctuating state of affairs is inconsistent with the certainty required in commercial matters. I believe that the correct view is that a GABD rep-

cession soit absolue, elle ne doit être aucunement conditionnelle; plus précisément, elle ne doit pas être apparemment constituée par une charge seulement.

Un affacturage de comptes débiteurs est basé sur leur cession absolue. C'est, en réalité, une société qui vend, selon leur valeur actualisée, ses comptes débiteurs à une société d'affacturage, moyennant contrepartie immédiate. À mon avis, l'art. 224 *LIR* protège les sociétés d'affacturage et les établissements de crédit qui ont réussi à réaliser leur garantie avant l'intervention du MRN. Cependant, je ne puis accepter l'idée que le Parlement a voulu, par cette disposition, créer un droit à la fois conditionnel en tant que garantie, et inconditionnel en tant que cession absolue. Il ne peut avoir eu l'intention de combiner des concepts aussi incompatibles.

De toute évidence, une cession générale de créances comptables ne satisfait pas au critère d'une entente d'affacturage qui exige un transfert absolu du droit de propriété que le cédant possède sur les créances comptables. Conformément aux écrits présentés en l'espèce, l'emprunteur conserve le droit de racheter les créances comptables une fois la dette payée. Ce droit de rachat démontre de façon irréfutable que la cession n'est pas absolue.

Je suis d'accord avec le MRN pour dire qu'il n'est pas pertinent de savoir quel peut être, à l'occasion, le droit réel de l'emprunteur sur les créances comptables lorsqu'il s'agit de déterminer l'incidence du droit de rachat sur le plan juridique. Il serait absurde qu'une société puisse tantôt détenir le titre sur ses créances comptables et tantôt ne pas le détenir, selon son ratio d'endettement. Cela est particulièrement vrai dans le cas d'une entreprise saisonnière. Cependant, si l'on considère une cession générale de créances comptables comme une cession absolue, c'est exactement ce qui se passe puisque la banque ne peut recouvrer que le montant du prêt. Puisque la banque ne pourrait recouvrer aucune créance comptable si la société accusait un surplus à son compte, les créances comptables appartiendraient à la société. En cas de déficit, une partie ou la totalité des créances comptables appartiendraient à la banque. Une situation

resents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This is supported both by the jurisprudence and by the wording of the section.

This Court, in *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, interpreted "property of a bankrupt" in what is now s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as including property subject to a security interest, even when the legal title to the property is transferred to the security holder. This indicates that the concept of "property" is not so narrow as to encompass only legal title. It would be inconsistent to hold in this case that a transfer of legal title by means of a GABD is an absolute transfer when it has already been held in another that an equity of redemption is a property interest which remains with the borrower.

The recent case of *Canada v. National Bank of Canada*, [1993] 2 F.C. 206, applied *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, *supra*, to provide an appropriate answer to the question as to whether or not a borrower under a GABD retains a property interest in the book debts. Rothstein J. held (at pp. 224-25):

> Based on the reasoning of Houlden J. in *Re Broydon Printers*, *supra*, as approved by Lamer J. in *Federal Business Development Bank*, *supra*, the right of redemption of the book debts, in my view, comes within the definition of "property" in the *Bankruptcy Act*. As such, the reasoning of Lamer J. in *Federal Business Development Bank* would apply and the book debts would constitute "property of the bankrupt" for purposes of subsection 107(1) of the *Bankruptcy Act*.

In summary, an assignment cannot be both absolute and yet leave an equity of redemption in the

aussi changeante est incompatible avec la certitude requise en matière commerciale. À mon avis, il est correct d'affirmer qu'une cession générale de créances comptables représente une garantie dont le titre en common law appartient au prêteur et le titre en *equity* continue d'appartenir à l'emprunteur. C'est ce que confirment la jurisprudence et le texte de la disposition en cause.

Dans l'arrêt *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061, notre Cour a affirmé que l'expression «biens d'un failli» contenue dans ce qui constitue maintenant l'art. 67 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3, comprend les biens assujettis à une garantie, même lorsque le titre de propriété du bien en cause est transféré au titulaire de la garantie. Cela indique que le concept des «biens» n'est pas restrictif au point de ne viser que le titre de propriété. Il serait contradictoire de statuer en l'espèce qu'un transfert de titre de propriété au moyen d'une cession générale de créances comptables est absolu alors qu'il a déjà été statué dans un autre arrêt qu'un droit de rachat est un droit de propriété qui continue d'appartenir à l'emprunteur.

Dans la décision récente *Canada c. Banque Nationale du Canada*, [1993] 2 C.F. 206, on a appliqué l'arrêt *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, précité, pour déterminer si un emprunteur sous le régime d'une cession générale de créances comptables conserve un droit de propriété sur les créances comptables. Le juge Rothstein conclut, aux pp. 224 et 225:

> À la lumière du raisonnement tenu par le juge Houlden dans *Re Broydon Printers*, *supra*, et approuvé par le juge Lamer dans *Banque fédérale de développement*, *supra*, j'estime que le droit de racheter les comptes clients s'accorde avec la définition de «biens» de la *Loi sur la faillite*. Puisqu'il en est ainsi, c'est le raisonnement tenu par le juge Lamer dans *Banque fédérale de développement* qui s'applique en l'espèce et les comptes clients représentent des «biens du failli» au sens du paragraphe 107(1) de la *Loi sur la faillite*.

En résumé, une cession ne peut à la fois être absolue et laisser au cédant un droit de rachat. Le fait

form of the right to redeem with the assignor. The retention of an equity of redemption is consistent with a security interest and not with an absolute assignment. A GABD simply cannot constitute an absolute transfer of property.

36 This conclusion is supported by s. 63 of the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. There must be either a disposition of the collateral by the secured party or an irrevocable election made by the secured party creditor under s. 62 of the Act to take the collateral. In the absence of these events, the debtor has certain rights under the section to redeem the collateral. The facts presented on these appeals do not disclose whether the lending institutions prior to receiving notice from the MNR, sold or transferred the book debts, or met the requisite conditions in order to be deemed irrevocably to have taken the collateral. If they did not, it would appear that the debtor companies still retained a right of redemption under the statute.

37 I would further add that to conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could, for example, result in a change in the ordering of priorities provided by the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, and the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other *bona fide* creditors could be adversely affected.

Summary

38 In *Friesen*, *supra*, it was held that the words of the *Income Tax Act* should be given their plain and ordinary meaning in accordance with the structure and purpose of the Act. It is clear that in enacting

de conserver un droit de rachat est compatible avec l'existence d'une garantie et non d'une cession absolue. Une cession générale de créances comptables ne peut tout simplement pas constituer un transfert absolu de propriété.

Cette conclusion est étayée par l'art. 63 de la *Personal Property Security Act* de l'Alberta, S.A. 1988, ch. P-4.05, qui prévoit les cas où il y a extinction du droit de rachat de biens meubles, y compris des créances comptables. Il doit y avoir aliénation par le créancier garanti du bien donné en garantie ou encore, en vertu de l'art. 62 de la Loi, un choix irrévocable du créancier garanti de prendre le bien donné en garantie. Hormis ces cas, le débiteur possède, en vertu de l'art. 63, certains droits de racheter le bien donné en garantie. Dans les présents pourvois, les faits ne révèlent pas si les établissements de crédit avaient, avant de recevoir l'avis du MRN, vendu ou transféré les créances comptables, ou satisfait aux conditions requises pour être irrévocablement réputés avoir pris le bien donné en garantie. Il semblerait que, s'ils ne l'ont pas fait, les sociétés débitrices conservent encore un droit de rachat en vertu de la Loi.

J'ajouterais qu'il y aurait de graves répercussions à conclure qu'une cession générale de créances comptables donne lieu, en raison de son caractère absolu, à un transfert de propriété, au lieu de constituer une garantie accessoire pour le paiement d'une créance. Il pourrait en résulter, par exemple, une modification de l'ordre de priorité prévu par la *Loi sur la faillite et l'insolvabilité*, la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36, et la *Loi sur les sociétés par actions*, L.R.C. (1985), ch. C-44. De plus, cela pourrait permettre à un débiteur sans scrupule, encouragé sciemment ou à son insu par une société créancière, d'organiser ses affaires de façon à léser de nombreux autres créanciers de bonne foi.

Résumé

Dans l'arrêt *Friesen*, précité, on a conclu que les dispositions de la *Loi de l'impôt sur le revenu* devraient être interprétées suivant leur sens ordinaire, conformément à l'économie et à l'objet de la

the sections of the *ITA* and *ETA* under consideration Parliament was attempting to ensure the priority of the claim of the MNR over that of other creditors. The primary task of collecting and remitting taxes and contributions under both Acts rests with those who are employers and those who sell goods and services. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In a sense the funds collected but not remitted might be considered to be held in a form of trust since the entities that have collected these funds are not in any circumstances entitled to retain them. Rather, they must remit the funds. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

Loi. Il est clair que, lorsqu'il a adopté les dispositions en cause de la *LIR* et de la *LTA*, le Parlement a tenté d'assurer la priorité de la réclamation du MRN sur celles des autres créanciers. Ce sont principalement les employeurs et les vendeurs de produits et services qui ont la tâche de percevoir et de verser les taxes et les cotisations établies en vertu des deux lois. On pourrait dire que les montants ainsi perçus appartiennent non pas aux entités débitrices qui les perçoivent, mais au gouvernement. En un sens, on pourrait considérer que les fonds perçus mais non versés sont détenus dans une sorte de fiducie puisque les entités qui les ont perçus ne sont, en aucun cas, habilitées à les conserver. Elles doivent plutôt les verser au gouvernement. Dans ces circonstances, on ne saurait dire que la priorité accordée au MRN en matière de recouvrement de ces fonds constitue une expropriation sans indemnisation.

In an effort to ensure the recovery of these amounts collected for the MNR, Parliament has endeavoured to ensure the priority of the claims of the MNR to these funds over other creditors. The majority of the courts that have considered this issue since the 1990 amendment have concluded that Parliament has succeeded in achieving this aim: see: *TransGas Ltd. v. Mid-Plains Contractors Ltd.* (1993), 101 D.L.R. (4th) 238 (Sask. C.A.), aff'd [1994] 3 S.C.R. 753; *Berg v. Parker Pacific Equipment Sales*, [1991] 1 C.T.C. 442 (B.C.S.C.); *Lundrigans Ltd. (Receivership) v. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91 (Nfld. T.D.); *Bonavista (Town) v. Atlantic Technologists Ltd.*, *supra*, as well as two of the trial decisions in this case on appeal.

39 Pour assurer le recouvrement des montants perçus pour le compte du MRN, le Parlement s'est efforcé d'assurer que les réclamations du MRN en la matière aient priorité sur celles des autres créanciers. La majorité des tribunaux qui ont examiné cette question, depuis la modification de 1990, ont conclu que le Parlement a réussi à atteindre cet objectif: voir *TransGas Ltd. c. Mid-Plains Contractors Ltd.* (1993), 101 D.L.R. (4th) 238 (C.A. Sask.), conf. par [1994] 3 R.C.S. 753, *Berg c. Parker Pacific Equipment Sales*, [1991] 1 C.T.C. 442 (C.S.C.-B.), *Lundrigans Ltd. (Receivership) c. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91 (Div. 1re inst., T.-N.), *Bonavista (Town) c. Atlantic Technologists Ltd.*, précité, ainsi que deux des décisions rendues en première instance en l'espèce.

I am in agreement with Major J. that a GABD is a security interest and as well that "secured creditor" excludes those individuals who own property absolutely. However I cannot agree that a GABD constitutes an absolute assignment so that the assignee becomes the owner of the book debts. The two concepts in the same instrument are incompatible and an impossible contradiction. Quite simply, a GABD cannot be an absolute

40 Je suis d'accord avec le juge Major pour dire qu'une cession générale de créances comptables est une garantie et que l'expression «créancier garanti» ne vise pas les personnes qui ont la propriété absolue d'un bien. Cependant, je ne puis convenir qu'une cession générale de créances comptables constitue une cession absolue de manière à rendre le cessionnaire propriétaire des créances comptables. Ces deux concepts, dans un

assignment since by its very nature it is a security interest.

même document, sont incompatibles et représentent une contradiction impossible. Une cession générale de créances comptables ne peut tout simplement pas constituer une cession absolue vu qu'elle est, de par sa nature même, une garantie.

41 In drafting the language of the sections it must be assumed that Parliament sought carefully to achieve its purpose, and that it did not intend to create an absurdity or a redundancy. My position can be summarized in this manner:

Il faut supposer que, lorsqu'il a rédigé les dispositions en cause, le Parlement a soigneusement cherché à atteindre son objectif et qu'il n'a pas voulu créer une absurdité ou une redondance. Mon point de vue peut se résumer ainsi:

(i) The definitions of a "security interest" and a "secured creditor" cannot be contradictory. Parliament cannot have intended to create definitions which overlap and contradict each other with the result that the same instrument can, at the same time, be both a "security interest" and not a "security interest". This is not to say that all assignments are "security interests". Rather it is simply that an instrument, once having been defined as a "security interest", cannot also be an absolute assignment. By definition, an absolute assignment cannot be a "security interest".

(i) Les définitions des expressions «garantie» et «créancier garanti» ne sauraient être contradictoires. Le Parlement ne peut avoir voulu établir des définitions qui se chevauchent et se contredisent, de sorte qu'un même écrit puisse à la fois constituer une «garantie» et ne pas en constituer une. Cela ne veut pas dire que toutes les cessions sont des «garanties». Cela signifie plutôt simplement qu'un écrit, une fois défini comme une «garantie», ne peut également constituer une cession absolue. Par définition, une cession absolue ne peut pas être une «garantie».

(ii) GABDs are "security interests" and not absolute assignments because they:

(ii) Une cession générale de créances comptables est une «garantie» et non une cession absolue pour les motifs suivants:

(a) meet the definition of "security interests" as set out in s. 224(1.3) *ITA*;

a) elle correspond à la définition du terme «garantie» énoncée au par. 224(1.3) *LIR*;

(b) are defined as collateral security on their face;

b) elle se définit à première vue comme une garantie accessoire;

(c) are treated as security for a loan on the part of the parties involved;

c) elle est considérée comme une garantie relative au paiement d'un prêt par les parties en cause;

(d) have been defined by this Court as including an equity of redemption, and thus provide a property interest for the borrower. As a result they cannot be absolute;

d) elle a été définie par notre Cour comme incluant un droit de rachat, et confère donc un droit de propriété à l'emprunteur. Elle ne saurait donc être absolue;

(e) cannot be simultaneously a security interest and an absolute assignment;

e) elle ne peut constituer à la fois une garantie et une cession absolue;

(f) to recognize GABDs as absolute assignments would frustrate the purpose of several other statutes.

f) reconnaître ce type de cession comme une cession absolue contrecarrerait l'objet de plusieurs autres lois.

(iii) "secured creditor" is meant to exclude absolute owners. By definition, one cannot be a secured

(iii) L'expression «créancier garanti» vise à exclure les propriétaires absolus. Par définition,

creditor and at the same time an owner of the security. An absolute assignee would be an owner of the book debts as is, for example, a factor. Parliament by this section has excluded those financial institutions engaged in factoring from the operation of the section, together with those financial institutions who have perfected their security interest by assuming ownership. There is no intention manifested by the 1990 amendment to accord any priority to holders of GABDs.

Disposition

I would allow the appeals, set aside the order of the Court of Appeal and confirm the priority of the MNR, and direct that the MNR recover in all three cases in the manner directed by the trial judge in *The Queen v. Toronto-Dominion Bank*. The MNR should have his costs throughout.

The following are the reasons delivered by

IACOBUCCI J. (dissenting) — While I agree with the general principles of statutory interpretation outlined by my colleague Justice Cory, I agree with Justice Major that the general assignments of book debts in this case were tantamount to an absolute transfer of property. Accordingly, I would dispose of the appeals in the manner proposed by Major J.

The following are the reasons delivered by

MAJOR J. (dissenting) —

I. Introduction

These are appeals from a decision of the Court of Appeal of Alberta involving three cases. In all cases Her Majesty in Right of Canada as represented by the Minister of National Revenue (the "MNR") is a party. Alberta Treasury Branches is a party in two of the cases and the Toronto-Dominion Bank is the other party. Each appeal involves a priorities contest between the MNR's

une personne ne peut être à la fois un créancier garanti et un propriétaire de la garantie. Le titulaire d'une cession absolue serait propriétaire des créances comptables comme l'est, par exemple, une société d'affacturage. Le Parlement a soustrait à l'application de cette disposition les institutions financières œuvrant dans le domaine de l'affacturage, ainsi que les institutions financières qui ont réalisé leur garantie en devenant propriétaires du bien grevé. La modification de 1990 ne révèle aucune intention d'accorder la priorité aux titulaires d'une cession générale de créances comptables.

Dispositif

Je suis d'avis d'accueillir les pourvois, d'annuler l'ordonnance de la Cour d'appel, de confirmer la priorité du MRN et d'ordonner que le MRN recouvre les sommes en cause dans les trois pourvois de la façon établie par le juge de première instance dans *The Queen c. Toronto-Dominion Bank*. Le MRN a droit à ses dépens dans toutes les cours. 42

Version française des motifs rendus par

LE JUGE IACOBUCCI (dissident) — Bien que je sois d'accord avec les principes généraux d'interprétation législative exposés par mon collègue le juge Cory, je conviens avec le juge Major que les cessions générales de créances comptables consenties en l'espèce équivalaient à un transfert absolu de propriété. En conséquence, je statuerais sur les pourvois de la manière proposée par le juge Major. 43

Version française des motifs rendus par

LE JUGE MAJOR (dissident) —

I. Introduction

Il s'agit de pourvois contre un arrêt de la Cour d'appel de l'Alberta relativement à trois affaires. Sa Majesté la Reine du chef du Canada, représentée par le ministre du Revenu national («MRN»), est partie au litige dans les trois cas. L'Alberta Treasury Branches est partie dans deux des affaires et l'autre partie est la Banque Toronto-Dominion. Dans les trois cas, il s'agit de déterminer la priorité 44

garnishee summons, and a general assignment of book debts ("GABD") to the lending institutions.

45 Section 224(1.2) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, as amended in 1990, S.C. 1990, c. 34, s. 1, provides a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to tax debtors. This form of garnishment is not available for the collection of income tax debts generally. It is limited to the collection of amounts owing by a person who has withheld, or should have withheld, monies from another under s. 153 of the *Income Tax Act* and who has failed to remit the withheld amounts. An identical garnishment remedy, provided by the *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 317(3), applies where a person has failed to remit GST which was, or ought to have been, collected from other persons.

46 The issue in these appeals is whether the sections apply to give the MNR a priority over creditors who have received an absolute assignment of book debts from the tax debtor. The resolution of the appeals turns on the definition of "secured creditor", which requires the holding of a security interest in the "property of another person".

47 In my opinion, the sections do not grant the MNR a priority over a creditor who holds an assignment of book debts. As a matter of law, such a creditor owns the book debts in question and thus cannot be said to have a security interest in the property of another person.

48 This result is dictated by the common law as well as basic principles of the interpretation of the *Income Tax Act*. The wording of the sections is simply not sufficiently clear and unambiguous to authorize the expropriation, without compensation, of a proprietary interest from the innocent holder of the assignment of the book debts.

entre le bref de saisie-arrêt du MRN et une cession générale de créances comptables aux établissements de crédit.

Le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, modifié en 1990, L.C. 1990, ch. 34, art. 1, prescrit une procédure de saisie-arrêt qui, dans certaines circonstances, permet au MRN d'intercepter des sommes dues à des débiteurs fiscaux. Ce type de saisie-arrêt ne peut servir au recouvrement des créances fiscales en général. Il ne vise que le recouvrement de sommes dues par une personne qui a retenu, ou aurait dû retenir, des sommes en vertu de l'art. 153 de la *Loi de l'impôt sur le revenu*, et qui a omis de verser les montants retenus. Le paragraphe 317(3) de la *Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15, prévoit une procédure identique de saisie-arrêt dans le cas où une personne a omis de verser la TPS qui a été ou aurait dû être perçue auprès d'autres personnes.

Il s'agit ici de savoir si les dispositions en cause s'appliquent pour conférer au MRN la priorité de rang sur les créanciers qui ont obtenu du débiteur fiscal une cession absolue de créances comptables. Le règlement des pourvois repose sur la définition de «créancier garanti», qui exige qu'une personne détienne une garantie sur le «bien d'une autre personne».

À mon avis, ces dispositions ne confèrent pas au MRN la priorité de rang sur un créancier qui est titulaire d'une cession de créances comptables. En droit, un tel créancier est propriétaire des créances comptables en question et on ne peut donc pas dire qu'il possède une garantie sur le bien d'une autre personne.

Cette conclusion est dictée par la common law et les principes fondamentaux d'interprétation de la *Loi de l'impôt sur le revenu*. Le libellé des dispositions n'est tout simplement pas assez clair et précis pour autoriser l'expropriation, sans versement d'une indemnité, du titulaire innocent de la cession de créances comptables.

II. Facts

The first case arose in 1987 from a loan made by the respondent, Alberta Treasury Branches, to Country Inns Inc., an Alberta hotel operator. The borrowed money was secured in part by a general assignment of book debts. Country Inns Inc. was in arrears to the appellant MNR for $33,312.67 in unremitted GST, plus interest and penalties. Zurich Canada owed Country Inns Inc. $15,000 while Zurich Insurance Company was alleged to owe $95,000.

In June 1992, the MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* on Zurich Canada and Zurich Insurance Company, and all other possible debtors. After Country Inns Inc. made an assignment under the *Bankruptcy Act*, R.S.C., 1985, c. B-3, the trustee estimated the realization of the assets of the estate would leave a shortfall to the respondent Alberta Treasury Branches, which was owed in excess of $6,000,000. Forsyth J. of the Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the *Excise Tax Act*: (1992), 5 Alta. L.R. (3d) 141.

In the second case, Pigott Project Management Ltd. contracted with Land-Rock Resources Ltd. for excavation work on the Old Man River Dam spillway. In 1989, Land-Rock borrowed monies from the respondent Alberta Treasury Branches and granted it a general assignment of book debts. After Land-Rock completed the contract work, Pigott held $161,821.77 in contract holdback funds. These funds were claimed by various creditors of Land-Rock, including the appellant MNR, to whom Land-Rock was indebted for unremitted employee source deductions, interests and penalties.

In 1991, the MNR served two requirements to pay on Pigott, under s. 224(1.2) of the *Income Tax Act*, for almost $600,000. On an application to determine priority to the monies in question, Master Waller of the Court of Queen's Bench decided the respondent Alberta Treasury Branches

II. Les faits

La première affaire découle d'un prêt consenti en 1987 par l'intimé l'Alberta Treasury Branches à Country Inns Inc., une société hôtelière albertaine. L'emprunt était garanti en partie par une cession générale de créances comptables. Country Inns Inc. accusait des arriérés de 33 312,67 $ au titre de la TPS non versée à l'appelant le MRN, plus intérêts et pénalité. Zurich Canada devait à Country Inns Inc. la somme de 15 000 $, et l'on alléguait que Zurich Insurance Company devait 95 000 $. 49

En juin 1992, le MRN a signifié à Zurich Canada, à Zurich Insurance Company et à tous les autres débiteurs possibles une demande de paiement fondée sur le par. 317(3) de la *Loi sur la taxe d'accise*. Après que Country Inns Inc. eut fait cession de ses biens en vertu de la *Loi sur la faillite*, L.R.C. (1985), ch. B-3, le syndic a estimé que la réalisation de l'actif de la faillite ne suffirait pas à payer entièrement l'intimé l'Alberta Treasury Branches qui était titulaire d'une créance de plus de 6 000 000 $. À la suite d'une demande visant à établir l'ordre de priorité, le juge Forsyth de la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *Loi sur la taxe d'accise*: (1992), 5 Alta. L.R. (3d) 141. 50

Dans la deuxième affaire, Pigott Project Management Ltd. avait conclu avec Land-Rock Resources Ltd. un contrat d'excavation pour l'évacuateur de crues du barrage de la rivière Old Man. En 1989, Land-Rock a emprunté des sommes à l'intimé l'Alberta Treasury Branches et lui a consenti une cession générale de créances comptables. Après l'achèvement des travaux par Land-Rock, Pigott a retenu 161 821,77 $ sur le montant fixé au contrat. Cette somme était réclamée par différents créanciers de Land-Rock, dont l'appelant le MRN à qui Land-Rock devait des arriérés de retenues à la source, plus intérêts et pénalité. 51

En 1991, en vertu du par. 224(1.2) de la *Loi de l'impôt sur le revenu*, le MRN a signifié à Pigott deux demandes de paiement de près de 600 000 $. À la suite d'une demande visant à établir l'ordre de priorité relativement à ces sommes, le protonotaire Waller de la Cour du Banc de la Reine a décidé 52

had priority through its general assignment of book debts. An appeal to Hunt J. was dismissed: (1993), 9 Alta. L.R. (3d) 349.

53 In the third case, Bodor Drilling Ltd. operated a drilling company which borrowed monies from the respondent Toronto-Dominion Bank. The borrowed money was secured in part by a general assignment of book debts. Bodor owed the appellant MNR $83,325.19, in unremitted GST, interest and penalties.

54 In March 1992, the MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* on the trade debtors of Bodor. Another of Bodor's creditors successfully filed a petition under the *Bankruptcy Act* to have Bodor declared a bankrupt. Bodor was indebted to the respondent Toronto-Dominion Bank in the amount of $266,331.12. In an application to determine priority, MacLeod J. of the Court of Queen's Bench held that the MNR had priority under the provisions of the *Excise Tax Act*.

55 All three cases were appealed to the Alberta Court of Appeal. It held that in each case the lending institution had priority over the MNR: (1994), 16 Alta. L.R. (3d) 1.

III. Analysis

56 Before 1987, the primary garnishment remedy in the *Income Tax Act* was provided by s. 224(1), which stated:

224. (1) Where the Minister has knowledge or suspects that a person is or will be, within 90 days, liable to make a payment to another person who is liable to make a payment under this Act (in this section referred to as the "tax debtor"), he may, by registered letter or by a letter served personally, require that person to pay forthwith . . . the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

que l'intimé l'Alberta Treasury Branches avait priorité en vertu de sa cession générale de créances comptables. L'appel interjeté devant le juge Hunt a été rejeté: (1993), 9 Alta. L.R. (3d) 349.

Dans la troisième affaire, Bodor Drilling Ltd. exploitait une société de forage qui avait emprunté des sommes à l'intimée la Banque Toronto-Dominion. L'emprunt était en partie garanti par une cession générale de créances comptables. Bodor devait à l'appelant le MRN la somme de 83 325,19 $ au titre de la TPS non versée, plus intérêts et pénalité.

En mars 1992, le MRN a signifié aux débiteurs commerciaux de Bodor des demandes de paiement fondées sur le par. 317(3) de la *Loi sur la taxe d'accise*. Un autre des créanciers de Bodor a présenté avec succès une pétition en faillite contre Bodor. Bodor devait 266 331,12 $ à l'intimée la Banque Toronto-Dominion. À la suite d'une demande visant à établir l'ordre de priorité, le juge MacLeod de la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *Loi sur la taxe d'accise*.

Ces trois affaires ont fait l'objet d'un appel devant la Cour d'appel de l'Alberta. Dans chaque cas, la cour a statué que l'établissement de crédit avait priorité sur le MRN: (1994), 16 Alta. L.R. (3d) 1.

III. Analyse

Avant 1987, la principale procédure de saisie-arrêt prévue dans la *Loi de l'impôt sur le revenu* figurait au par. 224(1):

224. (1) Lorsque le Ministre sait ou soupçonne qu'une personne est ou sera, dans les 90 jours, tenue de faire un paiement à une autre personne qui, elle-même, est tenue de faire un paiement en vertu de la présente loi (appelée au présent article le «débiteur fiscal»), il peut, par lettre recommandée ou par lettre signifiée à personne, exiger de cette personne que les deniers autrement payables au débiteur fiscal soient en totalité ou en partie versés, immédiatement [. . .] au receveur général au titre de l'obligation du débiteur fiscal en vertu de la présente loi.

Where a tax debtor had assigned its debts to another party as part of a security arrangement, courts were virtually unanimous in finding that a demand under s. 224(1) was ineffective to attach any of the assigned debts. The courts held that, by the assignment, the tax debtor had transferred its interest in its accounts to the assignee, leaving nothing for the MNR's garnishment to attach. See: *Royal Bank of Canada v. R.* (1984), 52 C.B.R. (N.S.) 198 (F.C.T.D.), at pp. 210-13, aff'd (1986), 60 C.B.R. (N.S.) 125 (F.C.A.).

Parliament amended the *Income Tax Act* in 1987 (S.C. 1987, c. 46, s. 66) and added two additional subsections (ss. 224(1.2) and (1.3)). Sections 317(3) and (4) were also added to the *Excise Tax Act*. For the purposes of the issue raised in these appeals the wording of the sections in the *Excise Tax Act* is identical to that of the *Income Tax Act*. For the sake of convenience I will refer to the sections of the *Income Tax Act*.

Section 224(1.2) provided that the MNR could garnish funds owed to a tax debtor or to a "secured creditor". Section 224(1.3) provided, *inter alia*, definitions of "secured creditor" and a "security interest":

224. . . .

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment

(*a*) to another person who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or to a legal representative of that other person (each of whom is in this subsection referred to as the "tax debtor"), or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay

Lorsqu'un débiteur fiscal a cédé ses créances à une autre partie dans le cadre d'un contrat de garantie, les tribunaux ont statué quasi unanimement qu'une demande fondée sur le par. 224(1) ne permet pas de saisir-arrêter les créances cédées. Les tribunaux ont conclu que le débiteur fiscal avait, par la cession, transféré au cessionnaire son droit sur ses comptes, et qu'il ne restait rien sur quoi pouvait porter la saisie-arrêt du MRN. Voir *Banque Royale du Canada c. R.* (1984), 52 C.B.R. (N.S.) 198 (C.F. 1re inst.), aux pp. 210 à 213, conf. par (1986), 60 C.B.R. (N.S.) 125 (C.A.F.).

En 1987, le Parlement a modifié la *Loi de l'impôt sur le revenu* (L.C. 1987, ch. 46, art. 66) et a ajouté deux paragraphes (les par. 224(1.2) et (1.3)). Les paragraphes 317(3) et (4) ont également été ajoutés à la *Loi sur la taxe d'accise*. Pour les fins de la question soulevée dans les présents pourvois, la formulation des dispositions de la *Loi sur la taxe d'accise* est identique à celles de la *Loi de l'impôt sur le revenu*. Pour plus de facilité, je vais me référer aux dispositions de la *Loi de l'impôt sur le revenu*.

Aux termes du par. 224(1.2), le MRN était habilité à saisir-arrêter les sommes dues à un débiteur fiscal ou à un «créancier garanti». Le paragraphe 224(1.3) définissait notamment les expressions «créancier garanti» et «garantie»:

224. . . .

(1.2) Nonobstant les autres dispositions de la présente loi et nonobstant la *Loi sur la faillite*, tout autre texte législatif fédéral, tout texte législatif provincial et toute règle de droit, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les 90 jours, débiteur d'une somme

a) soit à un débiteur fiscal, à savoir une personne redevable d'un montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable ou un représentant légal de cette personne,

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au rece-

forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole in or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.

(1.3) In subsection (1.2),

"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;

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

60 The operation of the 1987 version of s. 224(1.2) as against the holder of a GABD was considered by courts in Alberta, British Columbia, Saskatchewan, Manitoba and Nova Scotia.

61 In Alberta, in *Lloyds Bank of Canada v. International Warranty Co.* (1989), 64 Alta. L.R. (2d) 340 (Q.B.), rev'd (1989), 68 Alta. L.R. (2d) 356 (C.A.), McDonald J. held that the new definition of "security interest" was broad enough to include monies which were equitably assigned by a tax debtor to a bank (at pp. 352-53):

. . . the definition of "security interest" is so broad as to include moneys which have been equitably assigned by the tax debtor to, for example, a bank. The ownership by the bank of the funds that are the subject of the assignment constitutes an "interest in property". That interest in property is one which "secures payment" of the "obligation" of the tax debtor . . . . The provision of such

veur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable.

(1.3) Les définitions qui suivent s'appliquent au paragraphe (1.2).

«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.

. . .

«garantie» Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

Des tribunaux de l'Alberta, de la Colombie-Britannique, de la Saskatchewan, du Manitoba et de la Nouvelle-Écosse ont examiné l'application du par. 224(1.2), tel qu'il existait en 1987, au titulaire d'une cession générale de créances comptables.

En Alberta, dans la décision *Lloyds Bank of Canada c. International Warranty Co.* (1989), 64 Alta. L.R. (2d) 340 (B.R.), inf. par (1989), 68 Alta. L.R. (2d) 356 (C.A.), le juge McDonald a statué que la nouvelle définition du terme «garantie» était suffisamment large pour inclure des sommes qui avaient été cédées, selon l'*equity*, à une banque par un débiteur fiscal (aux pp. 352 et 353):

[TRADUCTION] . . . la définition du terme «garantie» est suffisamment large pour inclure des sommes que le débiteur fiscal a cédées, selon l'*equity*, à une banque par exemple. Le fait que la banque se trouve propriétaire des fonds visés par la cession constitue un «droit sur un bien». Ce droit garantit «l'exécution» de l'«obligation» du débiteur fiscal [. . .]. La constitution de cette garantie

security is the very purpose of the assignment of book debts. Moreover, the bank's interest is one "created by or arising out of [an] assignment . . . of any kind whatever, however or whenever arising . . . "

est l'objet même de la cession de créances comptables. De plus, le droit de la banque «[naît] ou découl[e] [d'une] cession[. . .], [. . .] quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elle [. . .] soi[t] créée. . .»

As a result, he held that the MNR obtained priority to the garnished funds over the claim of Lloyds Bank as the assignee of the book debts.

Le juge McDonald a donc conclu que le MRN avait priorité relativement aux fonds saisis-arrêtés par rapport à Lloyds Bank, cessionnaire des créances comptables.

The Alberta Court of Appeal reversed the trial decision in *Lloyds Bank* but on other grounds. Relying on its decisions in *Re Lamarre; University of Calgary v. Morrison*, [1978] 2 W.W.R. 465, and *Attorney General of Canada v. Royal Bank of Canada*, [1979] 1 W.W.R. 479, the Court of Appeal held that the provisions of s. 224(1.2) provided at most for a form of extra-judicial attachment which could bring the funds into the custody of the MNR. The court held that the section fell short of effecting a transfer of property in the funds or establishing the priority of the MNR's claim. It concluded (at p. 362) that "[s]omething further is required to accomplish either purpose". 62

La Cour d'appel de l'Alberta a, pour d'autres motifs, infirmé la décision de première instance dans l'affaire *Lloyds Bank*. Se fondant sur ses arrêts *Re Lamarre; University of Calgary c. Morrison*, [1978] 2 W.W.R. 465, et *Attorney General of Canada c. Royal Bank of Canada*, [1979] 1 W.W.R. 479, la Cour d'appel a statué que le par. 224(1.2) établissait tout au plus une forme de saisie-arrêt extrajudiciaire aux termes de laquelle le MRN pourrait avoir la garde des fonds. La cour a statué que cette disposition ne permettait pas un transfert de propriété des fonds ni n'accordait la priorité de rang à la réclamation du MRN. Elle conclut (à la p. 362) que [TRADUCTION] «[q]uelque chose de plus est nécessaire pour réaliser l'une ou l'autre de ces fins».

The decision of the Alberta Court of Appeal in *Lloyds Bank* was followed by the Manitoba Court of Appeal in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, [1991] 6 W.W.R. 481, and the British Columbia Court of Appeal in *Concorde International Travel Inc. v. T.I. Travel Services (B.C.) Inc.* (1990), 72 D.L.R. (4th) 405. In the B.C. decision, Hinkson J.A. referred to the decision of the Alberta Court of Appeal in *Lloyds Bank* and stated at p. 409: 63

L'arrêt *Lloyds Bank* de la Cour d'appel de l'Alberta a été suivi par la Cour d'appel du Manitoba dans *Pembina on the Red Development Corp. c. Triman Industries Ltd.*, [1991] 6 W.W.R. 481, et par la Cour d'appel de la Colombie-Britannique dans *Concorde International Travel Inc. c. T.I. Travel Services (B.C.) Inc.* (1990), 72 D.L.R. (4th) 405. Dans l'arrêt de la Cour d'appel de la Colombie-Britannique, le juge Hinkson a mentionné l'arrêt *Lloyds Bank* de la Cour d'appel de l'Alberta, affirmant, à la p. 409:

In my opinion, s. 224 styled as it is "Garnishment" deals in s-ss. (1) and (1.2) with the mechanics of garnishment. The Minister in serving a demand pursuant to that section must be proceeding upon the basis that he asserts a tax debtor's liability to him. That justified garnishing the funds in the hands of a creditor of the tax debtor. But, I am unable to see in that section any provision that would have the effect of transferring the property in the funds to the Minister or establishing a prior-

[TRADUCTION] À mon avis, les par. (1) et (1.2) de l'art. 224 intitulé «Saisie-arrêt» portent sur la procédure de saisie-arrêt. Lorsqu'il signifie une demande conformément à cette disposition, le Ministre doit partir du principe qu'il fait valoir l'assujettissement à l'impôt du débiteur fiscal, le justifiant ainsi de faire une saisie-arrêt des sommes qui sont entre les mains d'un créancier du débiteur fiscal. Cependant, je ne vois, dans cet article, aucune disposition qui aurait pour effet de transférer au

ity of Revenue Canada's claim. That was the point dealt with by the Alberta Court of Appeal. [Emphasis added.]

64 To the opposite effect are decisions by courts in Saskatchewan and Nova Scotia: *Royal Bank of Canada v. Saskatchewan Power Corp.*, [1991] 1 W.W.R. 1 (Sask. C.A.), aff'g [1990] 2 W.W.R. 655 (Sask. Q.B.) and *Touche Ross Ltd. v. M.N.R.* (1990), 71 D.L.R. (4th) 648 (N.S.S.C.T.D.).

65 Apparently in order to deal with the competing lines of authority as to whether s. 224(1.2) was sufficient to grant a priority to the MNR, Parliament amended the section in 1990 by adding the following to the end of the section:

> . . . and on receipt of that letter [i.e. the garnishment summons] by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.

66 This 1990 amendment was made to both the *Income Tax Act* and the relevant provisions of the *Excise Tax Act*. The three trial decisions in the cases at issue in these appeals are principally concerned with the issue of whether this amendment constituted the "something further" which *Lloyds Bank* had held was necessary to transfer the property interest in the funds to the MNR or to grant a priority to the MNR.

67 Two judges of the Court of Queen's bench held that the 1990 amendments did constitute the "something further" and that as a result the MNR gained priority over the book debts to the lending institutions in question. Forsyth J. based his decision expressly on the wording of the 1990 amendment and held that it was sufficiently explicit. In addition to the 1990 amendments, MacLeod J. placed reliance on the finding of McDonald J. in *Lloyds Bank* that a GABD falls within the definition of a security interest in s. 224(1.3).

Ministre la propriété des fonds ou d'accorder la priorité à la réclamation de Revenu Canada. C'est le point que la Cour d'appel de l'Alberta a examiné. [Je souligne.]

Par contre, en Saskatchewan et en Nouvelle-Écosse, les tribunaux ont exprimé des avis contraires: *Royal Bank of Canada c. Saskatchewan Power Corp.*, [1991] 1 W.W.R. 1 (C.A. Sask.), conf. [1990] 2 W.W.R. 655 (B.R. Sask.), et *Touche Ross Ltd. c. M.N.R.* (1990), 71 D.L.R. (4th) 648 (C.S. 1re inst., N.-É.).

Afin de remédier, semble-t-il, aux courants de jurisprudence contradictoires quant à savoir si le par. 224(1.2) était suffisant pour accorder la priorité au MRN, le Parlement a modifié ce paragraphe en 1990 en ajoutant le passage suivant à la fin:

> Sur réception de la lettre [le bref de saisie-arrêt] par la personne donnée, la somme qui y est indiquée comme devant être payée devient, nonobstant toute autre garantie au titre de cette somme, la propriété de Sa Majesté et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme.

Cette modification de 1990 a été apportée à la *Loi de l'impôt sur le revenu* et aux dispositions pertinentes de la *Loi sur la taxe d'accise*. Dans les trois affaires dont nous sommes saisis en l'espèce, les juges de première instance avaient principalement examiné si cette modification constituait le [TRADUCTION] «quelque chose de plus» qui, selon l'arrêt *Lloyds Bank*, était nécessaire pour transférer au MRN le droit de propriété sur les fonds ou pour lui accorder la priorité de rang.

Deux juges de la Cour du Banc de la Reine ont statué que les modifications de 1990 constituaient ce «quelque chose de plus» et que le MRN avait, de ce fait, obtenu la priorité de rang sur les créances comptables cédées aux établissements de crédit en question. Le juge Forsyth a fondé explicitement sa décision sur la modification de 1990 et a statué qu'elle était suffisamment explicite. Le juge MacLeod, lui, s'est en outre fondé sur la conclusion du juge McDonald dans *Lloyds Bank*, selon laquelle la définition de «garantie» au par. 224(1.3) vise une cession générale de créances comptables.

In the third case, the Master in Chambers held that the 1990 amendments were still not sufficiently broadly worded to allow Revenue Canada to attach monies in which the tax debtor has no interest by virtue of an absolute assignment. Hunt J. on appeal agreed with his conclusion. She relied on a perceived ambiguity in the definition of security interest, stating at pp. 360-61:

I am of the view, moreover, that it is not clear whether the modifying provisions at the end of the definition of "security interest" (the words "of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for") are meant to apply to each of the enumerated types of interests or instruments (debenture, mortgage, assignment, etc.) or whether these words are meant only to modify the term "encumbrance". McDonald, J. [in *Lloyds Bank*, *supra*] assumed the former to be the case, but in my view the meaning is not without doubt. There is a third way of reading the modifying words at the end, namely that the words "of any kind whatever" describe "encumbrance", with the balance of the words applying to each of the listed types of interests. The words "of any kind whatever" might also be taken to apply to assignments *and* encumbrances. Were this provision more clear, it would be easier to conclude that Parliament meant to include *all* types of assignments, including unconditional assignments, in the definition. This would make it plainer that, indeed, Parliament intended Revenue Canada's claim to take priority over the property of someone other than the tax debtor, such as an assignee of the tax debtor's book debts. [Emphasis in original.]

I agree with Forsyth J. that the 1990 amendments to the *Income Tax Act* and the *Excise Tax Act* were sufficient to provide the "something further" which the Alberta Court of Appeal thought to be necessary in *Lloyds Bank*. As Côté J.A. in the decision of the Court of Appeal in this case stated about the amendment to s. 224(1.2), at p. 6:

. . . the amendments to that subsection say that service transfers the debt to Her Majesty, and that it shall be paid to Her Majesty notwithstanding the security interest, and in priority to the security interest. Where those

Dans la troisième affaire, le protonotaire en chambre a statué que les modifications de 1990 n'étaient pas encore formulées de façon assez générale pour permettre à Revenu Canada de saisir-arrêter des sommes sur lesquelles le débiteur fiscal n'a aucun droit en vertu d'une cession absolue. En appel, le juge Hunt a souscrit à cette conclusion. Elle s'est fondée sur une ambiguïté qu'elle percevait dans la définition du terme «garantie» (aux pp. 360 et 361): 68

[TRADUCTION] De plus, je suis d'avis que l'on ne sait pas exactement si la modification apportée à la fin de la définition du terme «garantie» («quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs») est censée s'appliquer à chacun des types de droits ou d'instruments énumérés (débentures, *mortgages*, cessions, etc.) ou si elle n'est censée qualifier que le terme «charges». Le juge McDonald [dans *Lloyds Bank*, précité] opte pour la première hypothèse, mais, à mon avis, cette interprétation est douteuse. Il existe une troisième façon d'interpréter la modification en question, à savoir que l'expression «quelle qu'en soit la nature» qualifie le terme «charges», et que les autres mots s'appliquent à chacun des types de droit énumérés. On pourrait également considérer que l'expression «quelle qu'en soit la nature» s'applique aux cessions *et* aux charges. Si cette disposition était plus claire, il serait plus facile de conclure que le Parlement a voulu inclure dans la définition *tous* les types de cession, y compris les cessions inconditionnelles. Si tel était le cas, il serait plus évident que le Parlement a voulu que la réclamation de Revenu Canada ait priorité sur le bien d'une personne autre que le débiteur fiscal, comme le cessionnaire des créances comptables du débiteur fiscal. [En italique dans l'original.]

Je suis d'accord avec le juge Forsyth pour dire que les modifications apportées en 1990 à la *Loi de l'impôt sur le revenu* et à la *Loi sur la taxe d'accise* étaient suffisantes pour fournir le «quelque chose de plus» que la Cour d'appel de l'Alberta a jugé nécessaire dans l'arrêt *Lloyds Bank*. Comme le juge Côté l'a dit, dans l'arrêt de la Cour d'appel en l'espèce, relativement à la modification du par. 224(1.2), à la p. 6: 69

[TRADUCTION] . . . les modifications apportées à ce paragraphe précisent que la signification transfère la créance à Sa Majesté et que les sommes dues doivent lui être payées nonobstant la garantie, et ce, en priorité sur cette

amendments apply, in my view they reverse our *Lloyds Bank* decision and give the M.N.R. priority over earlier mortgages and assignments. I cannot confine them to floating or conditional assignments and must disagree with one of the Justices appealed from.

70 I also agree with MacLeod J. that McDonald J. at trial in *Lloyds Bank* was correct to hold that a GABD falls within the definition of security interest in s. 224(1.3). That section defines "security interest" as including:

> . . . any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of . . . [an] assignment . . . of any kind whatever, however or whenever arising. . . .

71 With respect, I do not accept the conclusion of Hunt J. that the definition of "security interest" is ambiguous and that the phrase "of any kind whatever" should be read to modify only "encumbrance" which is the last type of security listed. When the definition is read in its plain and ordinary sense, it is clear that the broad phrase "of any kind whatever" is intended to cover all of the listed types of security including an assignment. The phrase "a[n] assignment . . . of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals.

72 The finding that a GABD is a security interest for the purposes of the *Income Tax Act* or the *Excise Tax Act* is also consistent with the manner in which the assignments are dealt with in the contracts which create the assignments. For instance, the instrument which creates the assignment of book debts from Land-Rock Resources Ltd. to Alberta Treasury Branches provides, *inter alia*:

> THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury

garantie. Lorsqu'elles s'appliquent, ces modifications infirment, à mon avis, notre arrêt *Lloyds Bank* et accordent au MRN la priorité sur les *mortgages* et cessions antérieurs. Je ne puis en limiter l'application aux cessions générales ou conditionnelles et je ne puis qu'exprimer mon désaccord avec l'un des juges dont la décision a été portée en appel.

Je conviens également avec le juge MacLeod que le juge McDonald de première instance, dans l'affaire *Lloyds Bank,* a eu raison d'affirmer qu'une cession générale de créances comptables est visée par la définition du terme «garantie» au par. 224(1.3). Aux termes de cette disposition, le terme «garantie» comprend notamment:

> Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de [. . .] cessions [. . .] quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées . . .

En toute déférence, je n'accepte pas la conclusion du juge Hunt que la définition du terme «garantie» est ambiguë et que l'expression «quelle qu'en soit la nature» ne devrait viser que le terme «charges» qui est le dernier type de garantie énuméré. Lorsque l'on donne à la définition son sens ordinaire, il est clair que l'expression générale «quelle qu'en soit la nature» est destinée à s'appliquer à tous les types de garantie énumérés, dont les cessions. L'expression «cessions [. . .] quelle qu'en soit la nature» est suffisamment générale pour inclure les cessions absolues de créances comptables visées dans les présents pourvois.

La conclusion qu'une cession générale de créances comptables est une garantie pour les fins de la *Loi de l'impôt sur le revenu* ou de la *Loi sur la taxe d'accise* est également compatible avec la façon dont les cessions sont traitées dans les actes de cession. Par exemple, l'instrument aux termes duquel Land-Rock Resources Ltd. consent une cession de créances comptables à l'Alberta Treasury Branches prévoit notamment:

> [TRADUCTION] La cession et le transfert effectués AUX PRÉSENTES constituent une garantie accessoire et permanente en faveur de Treasury Branches au titre du paiement de toute créance et dette, présentes et

Branches and any ultimate unpaid balance thereof with interest. [Emphasis added.]

My conclusions that the GABDs at issue in these appeals fall within the statutory definition of a security interest and that the 1990 amendment is effective, when it applies, to give the MNR a priority over earlier mortgages and assignments, do not, however, lead inevitably to the conclusion that the MNR has priority over the lending institutions to the debts at issue in these appeals.

A new argument was raised before the Alberta Court of Appeal and this Court to the effect that even if an unconditional GABD is a security interest, the lending institutions do not fall within the definition of "secured creditor" in s. 224(1.3) of the *Income Tax Act*. Côté J.A. held at pp. 7-8:

The M.N.R. must believe or suspect that the intended recipient of the letter is liable, or will soon become liable to make a payment under para. (*a*) or para. (*b*) of the operative subs. (1.2). No one suggests that para. (*a*) applies here, given the general assignments of book debts and other assignments. So the effective precondition in these cases is para. (*b*). It says:

> (*b*) to a secured creditor who has a right to receive the payment that, but for [a] security interest in favour of the *secured creditor*, would be payable to the tax debtor. (emphasis added)

Subsection (1.3) defines "security interest", and that definition appears to be satisfied in the present cases. But subs. (1.3) also defines "secured creditor" .... I will restate that definition slightly using square brackets:

> . . . a [certain] 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 . . . (emphasis added)

In each of these three appeals, there was a general assignment of book debts which purported immediately to transfer title to the Bank or Treasury Branch. Doubtless it was done to secure a loan, but legal title was thereafter in the transferee, the Bank or Treasury

futures, de la soussignée à Treasury Branches ainsi que de tout solde impayé, avec intérêts. [Je souligne.]

Cependant, même si je conclus que les cessions générales de créances comptables ici en cause sont visées par la définition du terme «garantie» dans la Loi et que la modification de 1990 a pour effet d'accorder, lorsqu'elle s'applique, la priorité à la réclamation du MRN sur les *mortgages* et cessions antérieurs, il ne s'ensuit pas nécessairement pour autant que le MRN a priorité sur les établissements de crédit relativement aux créances visées en l'espèce. 73

Devant la Cour d'appel de l'Alberta et notre Cour, on a avancé le nouvel argument voulant que, même si une cession générale inconditionnelle de créances comptables est une garantie, les établissements de crédit ne sont pas des «créanciers garantis» au sens du par. 224(1.3) de la *Loi de l'impôt sur le revenu*. Le juge Côté de la Cour d'appel conclut, aux pp. 7 et 8: 74

[TRADUCTION] Le MRN doit croire ou soupçonner que le destinataire prévu de la lettre est ou sera sous peu tenu de faire un paiement en vertu de l'al. *a*) ou *b*) du par. (1.2) qui s'applique. Personne ne soutient que l'al. *a*) s'applique en l'espèce, vu les cessions générales de créances comptables et les autres cessions effectuées. Alors, la condition préalable à remplir dans ces cas est celle prévue à l'al. *b*) qui se lit ainsi:

> *b*) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en *sa* faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal. (italiques ajoutés)

Le paragraphe (1.3) définit le terme «garantie» et cette définition semble respectée dans les présentes affaires. Toutefois, ce même paragraphe définit aussi l'expression «créancier garanti». [. . .] J'indique entre crochets les légères modifications que j'apporterais à cette définition:

> . . . [Une certaine] [p]ersonne qui a une garantie *sur un bien d'une autre personne* — ou qui est mandataire de cette personne quant à cette garantie—, y compris . . . (italiques ajoutés)

Dans chacun de ces trois appels, il y a eu une cession générale de créances comptables qui était censée transférer immédiatement le titre à la Banque ou au Treasury Branch. Il n'y a aucun doute que l'on voulait ainsi garantir un prêt, mais le titre de propriété s'est par la

Branch. Therefore, the Bank or Treasury Branch is not a "secured creditor" under this definition, because it does not have any interest "in the property of another person". The Bank or Treasury Branch itself is the owner. The tax debtor, both sides agree, would have to be the "other person". But he has no title. So one cannot say that the book debts (receivables) assigned are "the property of" the tax debtor.

suite trouvé transféré au cessionnaire, c'est-à-dire la Banque ou le Treasury Branch. En conséquence, la Banque ou le Treasury Branch n'est pas un «créancier garanti» au sens de cette définition parce que ni l'un ni l'autre n'a un droit «sur un bien d'une autre personne». Le propriétaire est la Banque ou le Treasury Branch. Le débiteur fiscal devrait être, comme les deux parties le reconnaissent, l'«autre personne». Cependant, il ne possède aucun titre de propriété. Alors, on ne saurait dire que les créances comptables (comptes débiteurs) cédées sont un «bien» du débiteur fiscal.

75 I agree. The wording of s. 224(1.2) clearly requires not only that there is a security interest, but also that the payment be made either to the tax debtor or to a secured creditor. Here, because of the assignments, the payments are made to the lending institutions and the question is whether these lending institutions meet the definition of "secured creditor" as defined in the statutes.

Je suis d'accord. Le libellé du par. 224(1.2) exige clairement non seulement qu'il existe une garantie, mais aussi que le paiement soit fait à un débiteur fiscal ou à un créancier garanti. En l'espèce, en raison des cessions consenties, les paiements doivent être faits aux établissements de crédit et la question est de savoir si ces établissements constituent des «créanciers garantis» au sens des lois en cause.

76 The definition of secured creditor is a "person who has a security interest in the property of another", that other being the tax debtor. The critical issue is whether, after an assignment, the lending institutions have a security interest in the property of the tax debtor. In my view, they do not. An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor.

Un créancier garanti est une «[p]ersonne qui a une garantie sur un bien d'une autre personne», l'autre personne étant le débiteur fiscal. La question cruciale est de savoir si, à la suite d'une cession, les établissements de crédit possèdent une garantie sur le bien du débiteur fiscal. À mon avis, la réponse est négative. Une cession transfère le titre de propriété et c'est donc l'établissement de crédit et non le débiteur fiscal qui a la propriété des créances comptables.

77 It is well-established law that a GABD, such as the ones at issue in these appeals, has the effect of transferring all right, title and ownership in and to the property assigned so that it can no longer be considered the property of the assignor. See: *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (B.C.C.A.), at p. 42; *Lettner v. Pioneer Truck Equipment Ltd.* (1964), 47 W.W.R. 343 (Man. C.A.), at pp. 348-49; *Royal Bank of Canada v. Attorney General of Canada* (1977), 25 C.B.R. (N.S.) 233 (Alta. S.C.T.D.), at pp. 236 and 241, aff'd [1979] 1 W.W.R. 479; *Royal Bank of Canada v. R.*, *supra*, at pp. 206 and 212; *Toronto-Dominion Bank v.*

Il est bien établi en droit qu'une cession générale de créances comptables, comme celles dont il est question dans les présents pourvois, a pour effet de transférer en totalité le droit, le titre et la propriété relatifs au bien cédé de sorte qu'il ne peut plus être considéré comme le bien du cédant. Voir: *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (C.A.C.-B.), à la p. 42; *Lettner c. Pioneer Truck Equipment Ltd.* (1964), 47 W.W.R. 343 (C.A. Man.), aux pp. 348 et 349; *Royal Bank of Canada c. Attorney General of Canada* (1977), 25 C.B.R. (N.S.) 233 (C.S. Alb. 1re inst.), aux pp. 236 et 241, conf. par [1979] 1 W.W.R. 479; *Banque Royale du*

Minister of National Revenue (1990), 39 F.T.R. 102, at p. 105.

In *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.*, the plaintiff attempted to garnish funds owing to the defendant which were held by a bank. A second bank held a GABD executed by the defendant. The British Columbia Court of Appeal concluded that the GABD passed property in the book debts absolutely, and that the defendant no longer had an interest that could be garnisheed.

In *Royal Bank of Canada v. R.*, Muldoon J. of the Federal Court Trial Division came to a similar conclusion which was unanimously confirmed by the Federal Court of Appeal. Under the terms of the assignment, the assignor Miles contracted to act as a trustee for the funds assigned by him to the Royal Bank under a GABD. The MNR argued that an assignee can have no greater claim on the garnished money than the assignor. Muldoon J. rejected this argument and held at p. 212:

With respect, that contention misses the point. To equate the respective rights of the assignee and the assignor in and upon the book debts is to overlook the very nature and effect of the assignment, for the assignee owns the book debts and the assignor does not. To those who have not searched in the personal property security register, the assignor, of course, might still appear to be an ordinary trade creditor, but having assigned the book debts, the assignor, Miles, was in reality a trustee of them for the assignee, the plaintiff bank. Here, the Crown has received that which belonged to the bank.

In *Lettner v. Pioneer Truck Equipment Ltd.*, Guy J.A. of the Manitoba Court of Appeal commented upon the nature and effect a GABD as follows at pp. 348-49:

Canada c. R., précité, aux pp. 206 et 212; *Banque Toronto-Dominion c. Ministre du Revenu national* (1990), 39 F.T.R. 102, à la p. 105.

78 Dans l'affaire *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.*, la demanderesse avait tenté de saisir-arrêter des fonds dus à la défenderesse, qui étaient détenus par une banque. Une deuxième banque était titulaire d'une cession générale de créances comptables signée par la défenderesse. La Cour d'appel de la Colombie-Britannique a conclu que la cession générale de créances comptables avait complètement transféré la propriété des créances comptables, et que la défenderesse n'avait plus aucun droit susceptible de faire l'objet d'une saisie-arrêt.

79 Dans l'affaire *Banque Royale du Canada c. R.*, le juge Muldoon de la Cour fédérale, Section de première instance, est arrivé à une conclusion similaire que la Cour d'appel fédérale a confirmée à l'unanimité. Aux termes de l'acte de cession, le cédant Miles s'était engagé par contrat à agir à titre de fiduciaire des fonds qu'il avait cédés à la Banque Royale en vertu d'une cession générale de créances comptables. Le MRN prétendait qu'un cessionnaire ne peut détenir sur les sommes saisies-arrêtées un droit plus important que celui du cédant. Le juge Muldoon a rejeté cet argument, concluant, à la p. 212:

J'estime que cet argument passe à côté de la question. En mettant sur le même pied les droits du cédant et du cessionnaire sur les créances, on méconnaît la nature et l'effet mêmes du transport: en effet, les créances appartiennent au cessionnaire et non au cédant. Pour ceux qui ne consultent pas le registre des sûretés mobilières, le cédant apparaîtra bien sûr probablement comme un créancier commercial ordinaire. Cependant, après avoir transporté ses créances, le cédant, Miles, agit en réalité à titre de fiduciaire des créances pour le compte de la cessionnaire, la banque demanderesse. En l'espèce, la Couronne a reçu ce qui appartenait à la Banque.

80 Dans *Lettner c. Pioneer Truck Equipment Ltd.*, le juge Guy de la Cour d'appel du Manitoba fait des commentaires sur la nature et l'effet d'une cession générale de créances comptables, aux pp. 348 et 349:

As between Pioneer Truck and the bank, Pioneer Truck knows that its accounts receivable or book debts belong to the bank. In equity it cannot be heard to say that it owns these book debts.

. . .

The fact that banking practice in Canada permits the extension of credit to going concerns, and permits the borrowers (by licence, as it were) to collect some accounts to pay wages and current creditors, does not destroy the absolute and specific quality of the legal assignment to the bank.

81 In *Toronto-Dominion Bank v. Minister of National Revenue*, Jerome A.C.J. of the Federal Court Trial Division conducted a thorough review of the authorities, including those discussed above, and concluded at p. 105:

In light of the preceding authorities, and particularly in light of the Federal Court of Appeal's decision in *Royal Bank of Canada v. The Queen*, which is entirely binding on this Court, I must conclude that the general assignment of book debts granted April 26, 1983, by J.K. Campbell and Associates Limited to the Toronto-Dominion Bank constituted an absolute transfer of all property and interest previously held by J.K. Campbell in its accounts or other book debts, present or future. Accordingly, after April 26, 1983, the Toronto-Dominion Bank had full legal and equitable title in all accounts that were owing or that would become owing by debtors of J.K. Campbell unless such right was otherwise expropriated by competent and valid legislation.

82 In addition to establishing that an absolute assignment of book debts transfers property in the debts to the assignee, the cases discussed above also stand for the simple and obvious proposition that the true nature of an assignment can only be determined by examining the particular wording of the instrument which creates the assignment.

83 The assignments in each of the three cases which are involved in these appeals all contain language which makes it clear that they are immediate

[TRADUCTION] En ce qui concerne Pioneer Truck et la banque, Pioneer Truck sait que ses comptes débiteurs ou créances comptables appartiennent à la banque. Elle ne peut pas, en *equity*, déclarer qu'elle est propriétaire de ces créances comptables.

. . .

Le fait qu'il est d'usage courant dans les banques canadiennes de permettre aux entreprises en activité d'obtenir du crédit et aux emprunteurs (par autorisation administrative, pour ainsi dire) de percevoir certains comptes afin de payer les salaires et les comptes courants ne change en rien le caractère absolu et spécifique de la cession consentie à la banque.

Dans l'affaire *Banque Toronto-Dominion c. Ministre du Revenu national*, le juge en chef adjoint Jerome de la Cour fédérale, Section de première instance, a procédé à un examen approfondi de la jurisprudence, dont celle analysée plus haut, et a conclu, à la p. 105:

À la lumière des autorités précitées, et en particulier de l'arrêt de la Cour d'appel fédérale dans l'affaire *Banque Royale du Canada c. La Reine*, qui lie la présente Cour, je dois conclure que la cession générale de créances comptables faite le 26 avril 1983 par J.K. Campbell and Associates Ltd. à la Banque Toronto-Dominion constituait un transfert inconditionnel de tous les biens et droits détenus antérieurement par J.K. Campbell sur ces comptes ou autres créances comptables, actuels ou futurs. En conséquence, après le 26 avril 1983, la Banque Toronto-Dominion a un droit absolu, en common law et en *equity*, sur toutes les créances qui étaient ou seraient dues par les débiteurs de J.K. Campbell, à moins qu'elle n'ait été autrement expropriée de ce droit au moyen d'une loi valide.

En plus d'établir qu'une cession absolue de créances comptables transfère au cessionnaire la propriété des créances, la jurisprudence que je viens d'examiner étaye aussi la proposition simple et évidente voulant que la nature véritable d'une cession ne puisse être déterminée que par l'examen du texte de l'écrit constitutif de la cession.

Dans chacune des trois affaires ici en cause, le libellé de l'acte de cession établit clairement que la cession est immédiate et absolue. L'acte de cession

and absolute. Typical is the assignment from Land-Rock Resources to Alberta Treasury Branches, which provides:

THE UNDERSIGNED Land-Rock Resources Ltd. for valuable consideration HEREBY ASSIGNS AND TRANSFERS to Province of Alberta Treasury Branches (herein called "Treasury Branches") all debts, demands and choses in action now due or hereafter to become due, together with all judgments and securities for the said debts, demands and choses in action, and all other rights and benefits in respect thereof which now are or may hereafter become vested in the undersigned.

It was noted in *Royal Bank of Canada v. R.*, at p. 202, that there may be a distinction between an absolute assignment and one that provides that, in the event of default and the non-remedy of the default, the bank may without further notice deal with the book debts. Such wording appears to be less than an absolute assignment and creates for the lending institution a charge on the book debts which does not crystallize into property in the debts until there has been an unremedied default.

While it does not fall to be decided in this case, it seems likely that such an assignment does not transfer property to the lending institution and thus, at least prior to default on the part of the assignor, the lending institution would be a secured creditor under s. 224(1.3). This type of conditional wording is not present in any of the instruments at issue in these appeals, all of which are unconditional and absolute.

Moreover, at least one of the instruments provides that the assignor is a trustee for the book debts held by the lending institution. In *Royal Bank of Canada v. R.*, Muldoon J. held that the fact that the assignor is in the position of a trustee is a further indication that the assignment passes property to the assignee. The assignment from Bodor to the Toronto-Dominion Bank provides:

IT IS HEREBY DECLARED AND AGREED that all money received by the Assignor in payment of any

de Land-Rock en faveur de l'Alberta Treasury Branches est caractéristique:

[TRADUCTION] LA SOUSSIGNÉE Land-Rock Resources Ltd. CÈDE ET TRANSFÈRE, PAR LES PRÉSENTES, au Province of Alberta Treasury Branches (ci-après «Treasury Branches»), moyennant contrepartie, la totalité des créances, des demandes de paiement et des droits incorporels, échus ou à échoir, ainsi que tous les jugements et garanties au titre desdites créances, demandes de paiement et droits incorporels, ainsi que tous les autres droits et avantages y relatifs dont la soussignée est ou peut devenir titulaire.

On a fait remarquer dans la décision *Banque Royale du Canada c. R.*, à la p. 202, qu'il peut exister une distinction entre une cession absolue et une cession qui prévoit que, en cas de défaut et d'omission de remédier à ce défaut, la banque peut disposer des créances comptables sans autre préavis. Pareille formulation semble loin de constituer une cession absolue et crée en faveur de l'établissement de crédit un droit réel sur les créances comptables, dont il ne devient propriétaire que s'il n'est pas remédié au défaut. 84

Bien que nous n'ayons pas à trancher la question en l'espèce, il semble qu'une telle cession ne transfère pas la propriété à l'établissement de crédit et que, par conséquent, l'établissement de crédit soit un créancier garanti au sens du par. 224(1.3), tout au moins avant qu'il y ait défaut de la part du cédant. Ce genre de condition ne se trouve dans aucun des écrits en cause dans les présents pourvois, qui sont tous constitutifs de cessions inconditionnelles et absolues. 85

De plus, au moins un des écrits prévoit que le cédant est fiduciaire des créances comptables détenues par l'établissement de crédit. Dans la décision *Banque Royale du Canada c. R.*, le juge Muldoon a conclu que le fait que le cédant soit dans la position d'un fiduciaire constitue un autre indice que la cession transfère la propriété au cessionnaire. L'acte de cession conclu entre Bodor et la Banque Toronto-Dominion prévoit: 86

[TRADUCTION] IL EST DÉCLARÉ ET CONVENU, PAR LES PRÉSENTES, que toutes les sommes touchées par

debts, demands and choses in action . . . shall be received and held by the Assignor in trust for the Bank.

87 It should be noted that the fact that the GABD is referred to as "continuing collateral security" in two of the instruments does not make the GABD anything less than absolute. In both *Evans Coleman* and *Lettner*, the GABDs contained language that the general assignment of book debts would be continuing collateral security and in each case the courts held that such language did not affect the absoluteness of the assignment.

88 At the Alberta Court of Appeal, the MNR took the position that even if legal title was transferred to the assignee by the GABD, the assignor tax debtor retained an equitable interest in the nature of an equity of redemption which was sufficient for the book debts to remain the "property" of the tax debtor.

89 Côté J.A. responded to this argument by stating that while in theory the tax debtor held an equity of redemption, this equity could not be exercised in practice except by application to a court of equity. Such an application would only be granted by a court of equity where the value of the book debts exceeded the value of the loans which they secured. He concluded that in cases like the three on appeal, where the value of the loans exceeded the value of the book debts, there is no real equity of redemption. He also held that the only property of the tax debtor was the equity of redemption and that the MNR did not claim that interest.

90 I agree with Côté J.A. that the tax debtor retains an equity of redemption upon an assignment of its book debts. *Halsbury's Laws of England* (4th ed. 1980), vol. 32, at para. 401, defines a mortgage as "a disposition of property as security for a debt" which "may be effected . . . by an assignment of a chose in action" such as a book debt. At para. 407 *Halsbury's* also states that:

Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemp-

le cédant en paiement de créances, demandes de paiement et droits incorporels [. . .] sont reçues et détenues en fiducie par le cédant pour le compte de la banque.

Il y a lieu de souligner que le fait que la cession générale de créances comptables soit qualifiée de «garantie accessoire et permanente» dans deux des écrits n'en change pas le caractère absolu. Dans les affaires *Evans Coleman* et *Lettner*, l'acte de cession générale de créances comptables précisait qu'elle constituerait une garantie accessoire et permanente et, dans les deux cas, les tribunaux ont statué que cette qualification ne changeait en rien le caractère absolu de la cession.

Devant la Cour d'appel de l'Alberta, le MRN a soutenu que, même si le titre de propriété était transféré au cessionnaire par la cession générale de créances comptables, le débiteur fiscal cédant conservait un droit d'*equity* tenant d'un droit de rachat, qui suffisait pour que les créances comptables demeurent le «bien» du débiteur fiscal.

Le juge Côté a répondu à cet argument que le droit de rachat, que le débiteur fiscal possède en théorie, ne peut être exercé en pratique, sauf sur demande présentée à un tribunal d'*equity*. Un tribunal ne ferait droit à une telle demande que dans le cas où la valeur des créances comptables excéderait celle des prêts garantis par ces créances. Le juge Côté a conclu qu'il n'existe pas de véritable droit de rachat dans des cas comme en l'espèce où la valeur des prêts est supérieure à celle des créances comptables. Il a aussi conclu que le débiteur fiscal ne possède qu'un droit de rachat et que le MRN n'a pas revendiqué ce droit.

Je suis d'accord avec le juge Côté pour dire que le débiteur fiscal conserve un droit de rachat lorsqu'il cède ses créances comptables. *Halsbury's Laws of England* (4e éd. 1980), vol. 32, au par. 401, définit le *mortgage* comme étant [TRADUCTION] «l'aliénation d'un bien à titre de garantie d'une dette» qui «peut se faire [. . .] par la cession d'un droit incorporel» comme une créance comptable. Au paragraphe 407, *Halsbury's* affirme aussi:

[TRADUCTION] Le droit de rachat du débiteur sur *mortgage* se rattache à tout *mortgage*; c'est son droit de

tion .... This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate.

Thus *prima facie* an assignor of book debts retains an equitable right to redeem his assignment of the book debts once the debt obligation which is secured by the book debts has been completely discharged by the assignor.

I also agree with Côté J.A. that in the context of these appeals the fact that the tax debtors in theory hold an equity of redemption in their book debts is of purely academic interest since, on the facts, the value of the loans secured by the book debts far exceeds the value of the debts themselves. Thus there is no value in the equity of redemption held by the tax debtors. While the equity of redemption theoretically exists, for practical purposes it is incapable of any realization.

The appellant MNR argues, however, that Côté J.A. erred by focusing his attention on whether the value of the loans exceeds the value of the book debts. The MNR points out that if the relative value of the loan and the security is the only relevant factor then a tax debtor who operates his business with the assistance of a revolving line of credit secured by an assignment of book debts (which is a common business arrangement) would fluctuate between being and not being a secured creditor on an almost daily basis depending on the relative value of the collectibles and the line of credit of the business.

I share the MNR's concern that the relative value of the loan and the book debts is not the sole determining factor as to whether the assignor's equity of redemption makes the book debts his "property".

As a matter of law, an absolute assignment of book debts makes those book debts the property of the assignee. Those book debts remain the property of the assignee until the assignor actually exercises his equitable right to redeem. It is a necessary precondition to the exercise of the equity of redemption that the loans secured by the assignment be

rachat [. . .] Ce droit découle de l'opération considérée comme un simple prêt garanti par un nantissement de patrimoine.

Donc, à première vue, un cédant de créances comptables conserve un droit d'*equity* de racheter la cession en question une fois qu'il a acquitté entièrement la dette garantie par les créances comptables.

Je conviens également avec le juge Côté que, dans le contexte des présents pourvois, le fait qu'un débiteur fiscal possède, en principe, un droit de racheter ses créances comptables n'a qu'un intérêt purement théorique puisque, selon les faits, la valeur des prêts garantis par les créances comptables excède de beaucoup celle des créances elles-mêmes. En conséquence, le droit de rachat des débiteurs fiscaux ne leur est d'aucune utilité. Bien que ce droit existe en théorie, il ne peut être exercé en pratique. 91

L'appelant le MRN soutient cependant que le juge Côté a commis une erreur en se concentrant sur la question de savoir si la valeur des prêts excédait celle des créances comptables. Il souligne que si la valeur relative du prêt et de la garantie est le seul facteur pertinent, alors un débiteur fiscal qui exploite son entreprise au moyen d'une marge de crédit renouvelable garantie par une cession de créances comptables (une pratique commerciale courante) pourrait être un créancier garanti une journée, mais ne pas l'être le lendemain, selon la valeur relative des sommes recouvrables et de la marge de crédit de son entreprise. 92

À l'instar du MRN, je me demande si la valeur relative du prêt et des créances comptables n'est pas le seul facteur qui détermine si le droit de rachat du cédant a fait des créances comptables un «bien» lui appartenant. 93

En droit, le cessionnaire devient propriétaire des créances comptables visées par une cession absolue. Ces créances comptables demeurent la propriété du cessionnaire jusqu'à ce que le cédant exerce le droit de rachat qui lui est reconnu en *equity*. Pour que le droit de rachat puisse être exercé, les prêts garantis par la cession doivent 94

paid off in full, along with any accrued interest and costs.

95 With respect, however, while it is a necessary precondition that the value of the security exceed the value of the loan in order to exercise the right of redemption, the fulfilment of this precondition is not sufficient to return the book debts to the property of the assignor. The assignor must also choose to exercise the right of redemption which will mean a termination of the loan arrangement with the lending institution.

96 At base, the equity of redemption is no more than a recognition that the assignment of debts to the creditor, while immediate and absolute, is for a limited purpose. In equity, the creditor cannot unjustly enrich itself by realizing on more security than the value of the loan which is secured. At any given time the value of the security may exceed the value of the loan, but upon termination of the lending relationship, the assignor of the security is entitled, in equity, to an accounting.

97 In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the Court must choose between two competing definitions of "property". One definition is the immediate legal title to what had been assigned and the other is a potential interest enforceable only in equity to reacquire property which has been assigned to another, contingent upon successfully fulfilling the terms of the loan agreement.

98 In *Friesen v. Canada*, [1995] 3 S.C.R. 103, it was held that the words of the *Income Tax Act* are to be read in their plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. The very term "equity of redemption" highlights the fact that property is not presently held by the assignor, but rather there is a limited right to reacquire property at a future date.

avoir été payés en totalité, en plus des intérêts courus et des frais.

En toute déférence, toutefois, même si la valeur de la garantie doit nécessairement être supérieure à celle du prêt pour que puisse être exercé le droit de rachat, le respect de cette condition préalable n'est pas suffisant pour que le cédant redevienne propriétaire des créances comptables. Le cédant doit aussi choisir d'exercer ce droit de rachat et mettre ainsi fin à la convention de prêt avec l'établissement de crédit.

Au départ, le droit de rachat n'est qu'une façon de reconnaître que la cession des créances au créancier, quoique immédiate et absolue, ne vise qu'une fin limitée. En *equity*, le créancier ne peut s'enrichir sans cause en réalisant des garanties d'une valeur supérieure à celle du prêt garanti. La valeur de la garantie peut toujours excéder la valeur du prêt, mais lorsque la relation entre le prêteur et l'emprunteur prend fin, le cédant de la garantie a droit, en *equity*, à une reddition de compte.

Pour déterminer si les créances comptables cédées constituent le «bien» du cédant ou celui du cessionnaire, la cour doit choisir entre deux définitions opposées de ce terme. Ainsi, un bien peut être le titre de propriété immédiat relatif à ce qui a été cédé, ou un droit éventuel, exécutoire en *equity* seulement, de racheter le bien qui a été cédé à une autre personne pourvu que les conditions du prêt aient été respectées.

Dans l'affaire *Friesen c. Canada*, [1995] 3 R.C.S. 103, on a statué que les termes de la *Loi de l'impôt sur le revenu* doivent être interprétés selon leur sens ordinaire. Le terme «bien» s'entend ordinairement d'un titre de propriété et non d'un droit futur éventuel, reconnu en *equity*, de racheter un bien qu'une personne ne détient pas pour l'instant. L'expression «droit de rachat» elle-même fait ressortir le fait que le bien n'est pas actuellement détenu par le cédant, mais qu'il existe plutôt un droit restreint de racheter ce bien à une date ultérieure.

The central thrust of the MNR's submissions in this Court is contained in para. 45 of his factum, where he states that where title to property is transferred, the phrase "property of another person" must be read to mean "property that, *absent the security interest*, is the property of the person giving the security".

This proposition is contrary to the traditional Canadian jurisprudence that the words of a taxing statute are to read strictly for their plain and ordinary meaning and that only if there is a true ambiguity is the intention of Parliament to be considered.

In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. As pointed out by Hunt J. at p. 361, these appeals raise not only the traditional tax interpretation principle of resolution of ambiguity in favour of the taxpayer: *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 S.C.R. 46, at p. 72. They also raise the well-known principle that, in the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation.

In the context of these appeals, the interpretation of s. 224 urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The taxes which would be garnished and withheld from the lending institution are not taxes owed by the lender but rather taxes owed by its debtor.

The lending institutions are innocent third parties whose proprietary rights would be expropriated by the provisions of s. 224 and accordingly those provisions must be read strictly to determine whether the expropriatory language is clear and unequivocal.

However, it is not necessary to resort to strict interpretation to resolve these appeals. In this case the plain and ordinary meaning of the phrase "property of another person" is property now held

99 L'essentiel de l'argumentation du MRN devant notre Cour figure au par. 45 de son mémoire, où il affirme que, dans le cas où il y a transfert du titre de propriété, l'expression [TRADUCTION] «bien d'une autre personne» doit être interprétée comme signifiant «bien qui, *en l'absence de la garantie*, est le bien de la personne qui donne la garantie».

100 Cette proposition va à l'encontre de la jurisprudence canadienne traditionnelle qui veut que les termes d'une loi fiscale soient interprétés restrictivement selon leur sens ordinaire et qu'il ne faille tenir compte de l'intention du législateur qu'en cas d'ambiguïté véritable.

101 Dans les circonstances des présents pourvois, il convient d'interpréter restrictivement la loi fiscale. Comme l'a fait remarquer le juge Hunt, à la p. 361, ces pourvois soulèvent non seulement le principe traditionnel d'interprétation fiscale selon lequel toute ambiguïté doit jouer en faveur du contribuable (*Johns-Manville Canada Inc. c. La Reine*, [1985] 2 R.C.S. 46, à la p. 72), mais aussi le principe bien connu qu'il existe, en l'absence de termes clairs et non équivoques, une présomption que les droits de propriété d'une personne ne peuvent lui être retirés sans qu'elle soit indemnisée.

102 Dans le contexte de présents pourvois, l'interprétation de l'art. 224, préconisée par le MRN, aurait pour effet d'exproprier des biens auxquels le prêteur a légalement droit en vertu du contrat de garantie qu'il a conclu avec le débiteur fiscal. Les impôts qui seraient saisis-arrêtés et prélevés auprès de l'établissement de crédit sont non pas des impôts dus par le prêteur, mais bien des impôts dus par son débiteur.

103 Les établissements de crédit sont des tiers innocents dont les droits de propriété feraient l'objet d'une expropriation en vertu de l'art. 224, et il faut donc interpréter strictement cette disposition afin de déterminer si l'expropriation est prévue de manière claire et non équivoque.

104 Cependant, il n'est pas nécessaire de recourir à une interprétation stricte pour résoudre les présents pourvois. En l'espèce, le sens ordinaire de l'expression «bien d'une autre personne» est le bien

by another person. This interpretation makes sense of the words without reading anything into the statute and respects the well-established principle of interpretation that statutes are to be read as though presently speaking.

105 One of the cardinal principles of the plain and ordinary meaning approach is that nothing be read into a section unless no sense can be made of that section without the addition of the extra words. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation urged by the MNR of "property that, *absent the security interest*, is the property of the person giving the security".

106 In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. Section 224(1.2)(*b*) applies to "a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor". The emphasized words in s. 224(1.2)(*b*) are identical in effect to the words which the MNR seeks to introduce into the definition of secured creditor.

107 The use of a particular phrase in other parts of the *Income Tax Act* militates against reading that same phrase into a section of the Act where it is not found. This is particularly so where the phrase is found in the very same section as the disputed wording, and the section in question has been the subject of amendments twice within the last decade.

108 If Parliament had intended that s. 224(1.2) should cover all persons who hold a security interest, it could have defined "secured creditor" as any person who holds a security interest without the deliberately limiting words "in the property of another person". Alternatively, it could have expressly provided "property that but for a security interest in favour of the secured creditor would be

maintenant détenu par une autre personne. Cette interprétation dégage un sens des mots sans rien introduire dans la Loi et respecte le principe d'interprétation reconnu selon lequel la loi est censée parler au présent.

L'un des principes cardinaux de l'analyse fondée sur le sens ordinaire est qu'il ne faut rien introduire dans une disposition, sauf si l'on ne peut en dégager de sens sans y ajouter des mots. Le sens ordinaire des termes employés dans la Loi n'a aucun rapport avec l'interprétation forcée que préconise le MRN, savoir qu'il s'agit d'un [TRADUCTION] «bien qui, *en l'absence de garantie*, est le bien de la personne qui donne la garantie».

En plus de contrevenir au principe qu'il ne faut pas ajouter des mots à une disposition, sauf s'il est absolument nécessaire de le faire, l'interprétation proposée tente d'introduire des termes explicitement utilisés dans une autre partie de la même disposition. L'alinéa 224(1.2)*b*) s'applique à «un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal». Les mots que j'ai soulignés ont un effet identique à celui des termes que le MRN cherche à introduire dans la définition de «créancier garanti».

L'utilisation d'une expression particulière dans d'autres parties de la *Loi de l'impôt sur le revenu* milite contre son introduction dans une disposition où elle ne figure pas, à plus forte raison lorsque l'expression se trouve dans la même disposition que le libellé contesté et que la disposition en question a été modifiée à deux reprises au cours de la dernière décennie.

Si le Parlement avait voulu que le par. 224(1.2) s'applique à toutes les personnes qui détiennent une garantie, il aurait pu préciser que l'expression «créancier garanti» désigne une personne qui détient une garantie, sans y ajouter la restriction «sur un bien d'une autre personne». Subsidiairement, il aurait pu parler explicitement d'«un bien qui, en l'absence d'une garantie en faveur du

the property of another person", thus echoing the phrasing found in the rest of the section.

In spite of two recent amendments to this section, Parliament chose not to define secured creditor in the manner urged by the appellant MNR. To read into the section the words suggested by the MNR would be an unwarranted judicial usurpation of the legislative function. The only conclusion which can be drawn from the plain and ordinary meaning of the words which do appear in the Act is that Parliament did not intend to bring creditors who actually owned the title to the security interest within the purview of the section.

It is my conclusion that these appeals can be resolved without resort to any special principles of interpretation tailored to the expropriatory nature of this particular provision.

If I am mistaken in this conclusion, and there is an ambiguity in the meaning of the word "property" then I would hold that the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondents. Such an interpretation requires that "property" be read to mean present legal title in preference to a future contingent equitable right to reacquire property not currently held. It also requires that words expressly found in another part of the same section not be read without cause into the definition of secured creditor.

In summary, these appeals should be resolved as follows:

1. The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.

2. The wording of s. 224(1.2), as amended in 1990, is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the rest of that section applies.

créancier garanti, serait le bien d'une autre personne», reprenant ainsi la terminologie que l'on trouve dans le reste de la disposition.

Malgré deux modifications récentes apportées à cette disposition, le Parlement a choisi de ne pas définir l'expression «créancier garanti» de la façon proposée par l'appelant le MRN. Introduire dans la disposition les termes proposés par le MRN constituerait une usurpation injustifiée de la fonction législative par le pouvoir judiciaire. La seule conclusion qui peut être dégagée du sens ordinaire des termes utilisés dans la Loi est que le Parlement n'a pas voulu que les créanciers qui étaient en réalité propriétaires du titre de garantie soient visés par cette disposition. 109

Je conclus qu'il est possible de trancher les présents pourvois sans avoir recours à des principes d'interprétation particuliers en raison du caractère expropriateur de cette disposition particulière. 110

Si ma conclusion était erronée et si le sens du terme «bien» était ambigu, je conclurais alors que l'effet spécifique de cette disposition justifie que toute ambiguïté soit strictement résolue en faveur des intimés. Dans un tel cas, il faut interpréter le terme «bien» comme signifiant le titre de propriété actuel plutôt qu'un droit futur éventuel, reconnu en *equity*, de racheter un bien qu'on ne détient pas actuellement. Il faut également éviter de considérer, sans raison, que la définition de «créancier garanti» inclut des termes explicitement utilisés dans une autre partie de la disposition. 111

En résumé, les présents pourvois devraient être tranchés de la façon suivante: 112

1. La définition du terme «garantie» est suffisamment large pour comprendre une cession générale de créances comptables même s'il s'agit d'une cession absolue.

2. Le libellé du par. 224(1.2), modifié en 1990, est suffisamment clair et net pour permettre de transférer au MRN la propriété des fonds saisis-arrêtés et lui accorder la priorité dans les circonstances où le reste de la disposition s'applique.

3. An assignee of an absolute assignment of book debts is not a "secured creditor" within the meaning of s. 224(1.3) because he does not hold a security interest "in the property of another person".
4. Therefore, s. 224(1.2) of the *Income Tax Act* and s. 317(3) of the *Excise Tax Act* are not effective to grant the appellant MNR an interest in or priority over debts owed to the assignee of a GABD.

IV. Disposition

113 All three appeals should be dismissed with costs to the respondents.

Appeals allowed with costs, IACOBUCCI *and* MAJOR JJ. *dissenting.*

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

Solicitors for the respondent Province of Alberta Treasury Branches: Bruni Greenan Klym, Calgary; Parlee McLaws, Calgary.

Solicitors for the respondent the Toronto-Dominion Bank: Howard, Mackie, Calgary.

3. Le cessionnaire d'une cession absolue de créances comptables n'est pas un «créancier garanti» au sens du par. 224(1.3), parce qu'il ne détient pas une garantie «sur un bien d'une autre personne».
4. En conséquence, le par. 224(1.2) de la *Loi de l'impôt sur le revenu* et le par. 317(3) de la *Loi sur la taxe d'accise* n'ont pas pour effet d'accorder à l'appelant le MRN un droit ou la priorité sur les créances du cessionnaire d'une cession générale de créances comptables.

IV. Dispositif

Les trois pourvois devraient être rejetés avec dépens en faveur des intimés.

Pourvois accueillis avec dépens, les juges IACOBUCCI *et* MAJOR *sont dissidents.*

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

Procureurs de l'intimé le Province of Alberta Treasury Branches: Bruni Greenan Klym, Calgary; Parlee McLaws, Calgary.

Procureurs de l'intimée la Banque Toronto-Dominion: Howard, Mackie, Calgary.

TAB 11

Alberta Personal Property Security Act Handbook

Fourth Edition

Ronald C.C. Cuming, Q.C.
Professor of Law
University of Saskatchewan

Roderick J. Wood
Professor of Law
University of Alberta

CARSWELL
Thomson Professional Publishing

The meaning of "transfer of an interest" in a policy of insurance was addressed in two Ontario Supreme Court decisions. In *Re Rapid Auto Collision Ltd.*,[23] the court correctly concluded that an assignment by an automobile repair company to a third party of amounts to be paid to it by insurance companies pursuant to policies of insurance between the insurers and the company's customers was not excluded from the Ontario PPSA. In *Re Paul*,[24] the court concluded that a clause in an insurance policy providing for payment of loss compensation to the secured party did not amount to a "transfer" of an interest in the policy under the Ontario Act. This conclusion is difficult to justify. It would bring within the Act interests in any kind of insurance where the loss is payable to a secured party. The decision should have no authoritative value in the interpretation of equivalent provisions of the PPSA which excludes "the creation or transfer" of such an interest. Consequently, an insurance policy, other than a policy insuring collateral, which makes the loss payable to someone other than the insured is not governed by the Act even though the interest was taken to secure payment or performance of an obligation.

¶4[4] Wage Assignments

Section 4(d) excludes assignments of wages, salary, pay, commission or any other compensation for labour or personal services from the scope of the Act. The *Wage Assignments Act*[25] provides that an assignment of wages made in favour of a lending institution is against public policy and void. Assignments of wages to persons other than lending institutions are still possible (though commercially insignificant), and a priority competition would be governed by the first to give notice to the employer.[26]

The term "commission" has been interpreted to mean a payment based upon a selling price where the proceeds are used to calculate salary or wages. The fact that the commissions arose out of the relationship between a large real estate company and a developer involving hundreds of condominium units does not prevent the application of the section so long as the commissions were to compensate agents for their sales.[26a]

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23 (1983), 3 P.P.S.A.C. 187 (Ont. S.C.).

24 (1986), 5 P.P.S.A.C. 86 (Ont. S.C.).

25 R.S.A. 1980, c. W-1, s. 2 [repealed 1998, c. F-1.05, s. 197(g) (c.i.f.: September 1, 1999)]. Section 1(b) defines "wages" to include salary, pay, overtime pay and any other remuneration for work or services however computed, but not tips or other gratuities. The provision will be relocated in the *Fair Trading Act*, S.A. 1998, c. F-1.05, ss. 52-53 when the Act comes into force on September 1, 1999.

26 *Dearle v. Hall* (1823), 3 Russ. 1, 38 E.R. 475.

26a *522446 Alberta Ltd. v. Gladstone Village Inc.* (1997), 47 Alta. L.R. (3d) 291 (Q.B.).

The section expressly reserves from the exclusion assignments of fees for professional services. Accordingly, an assignment by a dentist of accounts generated through the provision of dental services would fall within the Act. In *Re Lloyd*[27] it was held that real estate commissions are not fees for professional services. The court concluded that the word "professional" refers to an occupation requiring special training in the liberal arts or sciences.

¶4[5] Transfer of Unearned Right to Payment Where Transferee Performs

Section 4(e) excludes a transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligation under the contract. Because the transferee earns the right to payment by performance, there is little possibility that a third party would be deceived into thinking that the transferor has rights under the contract.

¶4[6] Transfer of Interest in Land

Section 4(f) excludes the creation or transfer of interests in land, including a lease. At common law, a mortgage debt was regarded as personalty rather than realty. Leases of land were also classified as personalty (chattels real). Section 4(f) ensures that the creation and transfer of such interests are not within the scope of the Act, but are to be governed by the provisions of the *Land Titles Act*.[28]

Section 59.2 of the *Law of Property Act*[29] provides for the registration in the Personal Property Registry of "charges" on "real property" given by a corporation. The term "real property" is defined to mean land, an interest in land, including a leasehold interest in land, and a right to payment arising in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by a security or an instrument to which the PPSA applies. While these charges are registered in the Personal Property Registry, they are not governed by the PPSA. Section 59.2 of the *Law of Property Act* contains its own set of registration and priority rules applicable to them.[30]

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27 (1995), 9 P.P.S.A.C. (2d) 107 (Alta. Q.B.). See also *F.W.C. The Land Co. (Receiver of) v. Turnbull* (1997), 49 C.B.R. (3d) 82 (B.C. S.C.).

28 R.S.A. 1980, c. L-5.

29 R.S.A. 1980, c. L-8, s. 59.2 [en. 1992, c. 21, s. 22].

30 See R.J. Wood, "The Floating Charge on Land in the Western Provinces" (1992), 20 C.B.L.J. 132 at 143-46.

TAB 12

Province of Alberta

CONSUMER PROTECTION ACT

Revised Statutes of Alberta 2000
Chapter C-26.3

Current as of August 1, 2018

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Part 6
Wage Assignments

Definitions

52 In this Part and Part 7,

(a) "lender" means a supplier who engages in the activity of lending money or extending credit or who undertakes the activity through assignment or purchase of the lender's interest, but does not include an employer who makes an advance on wages to an employee;

(b) "wages" includes any salary, pay, overtime pay and other remuneration for work or services however computed, but does not include tips or other gratuities.

RSA 2000 cF-2 s52;2005 c9 s25

Assignments

53(1) Any assignment by any person of all or any part of the person's wages to secure the payment of an existing or future indebtedness

(a) is against public policy and void if it is made in favour of a lender;

(b) is unenforceable by a lender if it is originally made in favour of a person other than a lender and is later acquired by a lender.

(2) A lender or an officer, director, employee or agent of a lender shall not attempt to induce a person to assign wages in favour of the lender in contravention of subsection (1) or to enforce what purports to be an assignment of wages in favour of or acquired by the lender.

RSA 2000 cF-2 s53;2005 c9 s26

Part 7
Fees Charged by Loan Brokers

Charging and collecting fees

54(1) No loan broker may charge or collect a fee for assisting a person to obtain personal or business credit until the person has obtained access to the credit, unless the fee

(a) is paid directly to the loan broker by a credit grantor or lender for a referral of business, or

(b) is for the purpose of obtaining a lease or leasing arrangements.