COURT FILE NUMBER:	1303 15731
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	RIDGE DEVELOPMENT CORPORATION
DEFENDANT	1324206 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF LAW AND BOOK OF AUTHORITIES OF THE APPLICANT ALVAREZ & MARSAL CANADA INC.** **RETURNABLE AT 2:00 PM ON MARCH 26, 2015**
PARTY FILING THIS DOCUMENT	**ALVAREZ & MARSAL CANADA INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**McMillan LLP** 421 7th Avenue SW, Suite 1700 Calgary, Alberta T2P 4K9 **Attention:** **Adam C. Maerov / Marc-Elie Scott** Phone: 403.215.2752 Fax: 403.531.4720 Email: Adam.Maerov@mcmillan.ca File No. 222630

Clerk's Stamp

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BRIEF OF LAW

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I FACTS

1. On November 13, 2013, Alvarez & Marsal Canada Inc. was appointed Receiver and Manager, without security (the "**Receiver**"), of all current and future assets, undertakings and properties (the "**Property**") of 1324206 Alberta Ltd. ("**132**") pursuant to the receivership order granted by Justice D.R.G. Thomas of the Court of Queen's Bench of Alberta (the "**Receivership Order**").

   Second Report of the Receiver filed on March 23, 2015 at para 1 [Second Report].

2. 132 was established in May 2007 primarily to finance, develop, construct, operate and sell units in Whitemud Heights Project ("**Whitemud Heights**" or "**Project**").

   Second Report at para 2.

3. Pursuant to an approval and vesting order (the "**Approval and Vesting Order**") granted on November 28, 2014, this Court approved the sale of the Project pursuant to an agreement (the "**Sale Agreement**") between the Receiver and 18475315 Alberta Ltd. ("**184**") for the assets described therein (the "**Assets**").

   Second Report at para 28.

4. Whitemud Heights was a one hundred and twenty-three unit residential housing project on a portion of lands comprising the Stony Plain Indian Reserve No. 135 (being the lands occupied by the Enoch Cree Nation 440) (the "**Lands**").

   Second Report at para 2.

5. 132 leased the Lands pursuant to a lease dated February 21, 2008 (the "**Lease**") between 132, as lessee and Her Majesty the Queen in Right of Canada, as lessor.

   Second Report at para 4.

6. On December 12, 2014, the Receiver completed all closing matters, the transaction contemplated by the Sale Agreement approved by the Approval and Vesting Order closed and the Receiver received the deposit and closing proceeds aggregating $14,448,250.00.

   Second Report at para 14.

7. Pursuant to the Approval and Vesting Order the Receiver was authorized to repay the Receiver's borrowings and hold the balance of the sale proceeds pending further order of this Court. Paragraph 5 of the Approval and Vesting Order states:

   > For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Assets (to be held in an interest bearing trust account by the Receiver) shall stand in the place and stead of the Assets, and from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Assets with the same priority as they had with respect to the Assets immediately prior to the

sale, as if the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

8. The Receiver continues to hold the balance of the proceeds of the sale paid to the Receiver by 184 (the "**Sale Proceeds**") in accordance with the Approval and Vesting Order.

Second Report at para 15.

9. The Receiver wishes to distribute the Sale Proceeds, subject to certain holdbacks (the "**Holdbacks**") described in paragraph 45 of the Second Report.

10. In light of the information available to the Receiver, the Receiver is of the view that, subject to the approval of this Court, it is appropriate for the Receiver to distribute the Sale Proceeds (subject to the Holdbacks) to Royal Bank of Canada ("**RBC**").

II ISSUES

11. The issues addressed in this Bench Brief are:

(a) What is the scope of this Court's jurisdiction to provide advice and direction regarding the distribution of the Sale Proceeds?

(b) Did RBC have a valid security interest in the Assets at the time of the sale of the Whitemud Heights Project?

(c) Did the Depositors have contractual interests in the Assets at the time of the sale of the Whitemud Heights Project?

(d) Did the Depositors have equitable interests in the Assets because some or all of the deposit funds were required to be held in trust?

(e) Are the Depositors time-barred from pursuing their claims against 132 pursuant to the *Limitations Act*, RSA 2000, c L-12?

A. What is the scope of this Court's jurisdiction to provide advice and direction regarding the distribution of Sale Proceeds?

12. Pursuant to paragraph 25 of the Receivership Order, "the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties."

13. The Alberta Court of Appeal has held that "section 8 of the [*Judicature Act*] gives the court broad general jurisdiction" to provide advice and direction to a Receiver.

Canadian Western Bank v 702348 Alberta Ltd., 2010 ABCA 227, 2010 CarswellAlta 1380 at para 23 [Tab 1].

14. In *National Trust Co.*, a receiver applied to the court, pursuant to the *Farmers Creditors Arrangement Act*, for advice and direction regarding the status of certain leases. At paragraph 26 of *National Trust Co.*, the Supreme Court of Canada held that:

> The purpose of the procedure to enable the Official Receiver to obtain directions as to his own acts in the course of administration for his own protection and for the orderly conduct of the administration; it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding.
>
> It does not follow, of course, that on an application for directions, when all parties are present, questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way and the hearing of an application for directions in a particular case may be a convenient occasion for dealing with such questions, and there can be no objection to such a course when proper care is taken to see that everybody concerned is fully represented and has a full opportunity of bringing out the facts and presenting his case.
>
> *National Trust Co.* v. *Christian Community of Universal Brotherhood*, [1941] SCR 601, [1941] 3 DLR 529 [*National Trust Co.*] at para 26 [Tab 2].

15. In *YBM Magnex International Inc, Re.,* the Alberta Court of Appeal held at paragraph 32 that:

> ... a receiver is given the ability to apply to the court for advice and direction to ensure proper and timely administration of the estate, as well as to protect itself through court authorization of certain actions it wants to take in the course of the fulfilment of its duties under the receivership order. The court may also make substantive rulings in circumstances where the receiver takes an adversarial position against a third party where all affected parties have had the opportunity to present their case.
>
> *YBM Magnex International Inc, Re.*, 2000 ABCA 284, 2000 CarswellAlta 1133 at para 32 [*YBX*] [Tab 3].

16. Alberta Courts have recognized the ability of a receiver to apply to the Court for advice and direction regarding the validity and priority of security granted by a debtor.

> *Toronto-Dominion Bank v Nova Entertainment Inc.*, 1992 CarswellAlta 206, [1992] AJ No 1266 (ABQB), at para 1 [*Nova Entertainment*] [Tab 4].
>
> *Alberta Treasury Branches v Invictus Financial Corp.*, 1986 CarswellAlta 434, [1986] 68 AR 207, at para 1 (ABQB), aff'd 1986 CarswellAlta 435, (1986) 47 Alta LR (2d) 94, [*Invictus Financial Corp.*] [Tab 5].
>
> *Canadian Commercial Bank v Bird Oil Equipment Ltd.*, 1985 CarswellAlta 320, (1985) 17 DLR (4^{th}) 367 at para 7 (ABQB) [*Bird Oil*] [Tab 6].

17. It was held in *YBM* that a court should decline to provide advice and direction when:

    (a) such advice and direction would impact proceedings in another jurisdiction;

    (b) where the receiver is seeking *ex parte* legal advice from the Court; or

    (c) the advice sought is beyond the jurisdiction of the Court to provide.

YBX at paras 43, 46, and 51 [Tab 3].

18. The Receiver is not aware of any other proceedings in any other jurisdiction, the Receiver's application is not brought on an *ex parte* basis, and the advice sought is within the jurisdiction of the Court to provide.

19. Based on the foregoing, the Receiver respectfully submits that this Court has the jurisdiction to provide advice and direction regarding the distribution of the Sale Proceeds and that it is appropriate for this Court to provide such advice and direction.

B. Did RBC have a security interest in the Assets at the time of the sale of the Whitemud Heights Project?

20. On January 16, 2008, 132 granted RBC security by way of a collateral mortgage in the amount of $20,000,000 constituting a charge on 132's interest in the Lands (the "**Mortgage**") along with a general security agreement (the "**GSA**") and a general assignment of sale proceeds (the "**Sale Proceeds Assignment**", together with the Mortgage and the GSA are collectively referred to as the "**RBC Security Documents**").

Second Report at paras 17-18.

21. The Lands charged by the Mortgage are held by Dean Alexander ("**Alexander**") pursuant to a Certificate of Possession.

Second Report at para 4.

22. On April 8, 2008, the Mortgage was registered in the Indian Lands Registry (the "**ILR**"). The Mortgage is the first interest registered against the Lands at the ILR.

Second Report at para 18.

23. The *Indian Act* does not expressly provide for the granting of security in certificate of possession lands. However, the Receiver is not aware of anything in the *Indian Act* or related caw law that would prevent 132 from mortgaging or otherwise charging the Lease in favour of RBC for the purposes of securing a loan nor anything in the *Indian Act* or related case law that would prevent RBC from validly obtaining an interest in the Lease, once it exercised its creditor's rights, and assigning it to another party.

Indian Act, RSC 1985, c I-15 [*Indian Act*] [Tab 7].

24. RBC registered a financing statement in the Alberta Personal Property Registry in respect of all present and after acquired personal property of 132 on October 25, 2007.

Exhibit K" of the Affidavit of John Barath sworn November 4, 2013 at pp 2-3

25. The Receiver has received a confidential reasoned independent legal opinion from its counsel indicating the security of RBC is valid and enforceable as against 132.

Second Report at para 40.

26. Based on the information in the records of 132, other information and findings discussed in the Second Report, the Receiver is of the view that RBC had valid and enforceable security over the Assets at the time of the sale.

Second Report at para 44.

C. Did the Depositors have contractual interests in the Assets at the time of the sale of Whitemud Heights Project?

27. Prior to the Lease being signed, Skyrider Developments Inc. ("**Skyrider Developments**") entered into reservation agreements ("**Reservation Agreements**") with potential purchasers in respect of units in the Project.

Second Report at para 20.

28. Also prior to the Lease being signed, purchase agreements (the "**Purchase Agreements**") were entered into with various parties ("**Purchasers**") by either 132 or Skyrider Holdings Ltd. ("**Skyrider Holdings**", and together with Skyrider Developments, collectively "**Skyrider**"), as developer of the Project.

Second Report at para 21.

29. Subsequently and also prior to the Lease being signed, 132 entered into agreements ("**Sublease Interest Agreements**") with all but eleven of the Purchasers.

Second Report at para 22.

30. Deposits were lodged by some of the Purchasers (the "**Depositors**") with Skyrider and Kennedy Agrios LLP, counsel to Skyrider and Prairie Western Development Corp.

Second Report at para 23.

31. A number of Depositors commenced court actions for the recovery of their deposits and 132 was defending those actions when the Receiver was appointed. Some parties obtained judgments. Some of those parties have registered their claims at the ILR. All of those registrations were made at the ILR after the Mortgage was registered.

Second Report at para 29(viii).

32. The Sublease Interest Agreements provide that they supersede all previous agreements between the parties or any related parties.

Appendix "D" of the Second Report at para 1.2.

33. Accordingly, on their face, the Sublease Interest Agreements appear to be the only relevant agreements between the parties to those agreements and 132 for the purposes of determining if an interest in the Lease arose by contract.

34. The Sublease Interest Agreements did not contemplate that Depositors would obtain any interest in the Lease. Rather, the Sublease Interest Agreements provided that (a) the

Purchaser would enter into a sublease agreement with 132 with respect to the unit subject to the Sublease Interest Agreement, (b) the Purchaser would purchase a voting share in the Homeowner's Association, and (c) 132 would assign all of its interest in the Lease to the Homeowner's Association upon completion of the Project.

Appendix "D" of the Second Report at paras 1.1, 8.1, and 8.5

35. The Receiver is not aware of any sublease agreement having been signed or having been consented to by the Crown. No Homeowner's Association was ever formed. Accordingly, the Sublease Interest Agreements did not give the Depositors who signed them any contractual interests in the Lease.

36. The Purchase Agreement is the relevant agreement for the purposes of determining whether Depositors not party to the Sublease Interest Agreements obtained an interest in the Lease pursuant to contract.

37. Like the Sublease Interest Agreements, the Purchase Agreements also did not contemplate that Depositors would obtain any interest in the Lease, nor did they make any reference to the Lease. Rather, the Purchase Agreements provided that the Depositors would purchase units in Whitemud Heights. It appears that the transactions contemplated by the Purchase Agreements could not have been performed by 132 because the Lands could not be subdivided or conveyed by 132. Accordingly, the Purchase Agreements did not give the Depositors who did not sign a Sublease Interest Agreement any contractual interest in the Lease.

Appendix "C" of the Second Report at para 1.

38. In light of the foregoing, the Receiver is not aware of any basis under which the Depositors would have a contractual interest in the Lease or other Assets.

D. Did the Depositors have interests in the Assets because the deposit funds were required to be held in trust?

39. Property held by a debtor in trust for a third party is not subject to division amongst its creditors.

Ramgotra (Trustee of) v North American Life Assurance Co., [1996] 1 SCR 325, [1996] 3 WWR 457 at para 62 [Tab 8].

40. In determining whether or not property is trust property, the ordinary law of trust applies and it is necessary for a claimant to prove that a valid trust was in existence at the relevant time.

Re Kenny, 1997 CarswellOnt 6031, (1997) 149 DLR (4^{th}) 508 at para 32 (Ont Ct J) [*Re Kenny*] [Tab 9].

British Columbia v Henfrey Samson Belair Ltd., [1989] 2 SCR 24, 1989 CarswellBC 351 at para 44 [*Henfrey*] [Tab 10].

Funds Administrative Service v Northern Steel Inc (Receiver of), 1993 CarswellAlta 416, [1993] 3 WWR 695 (ABQB) [Tab 11].

41. For a valid trust to exist, an arrangement must have the three certainties present. These are: certainty of intent, certainty of subject matter and certainty of object.

Knight v Knight, (1840), 49 ER 58, (1840) 8 ER 1195 (HL) [Tab 12].

42. The Purchase Agreements provided that 132 would hold deposits in a trust account and that some or all of those funds could be removed from trust when they became guaranteed by a government-approved warranty program. The Receiver is not aware of any deposits having been guaranteed by such a program.

Second Report at para 29(ii).

43. The Sublease Interest Agreements arguably evidence certainty of intent to create a trust in respect of the deposit funds, but are superseded in most cases by the Sublease Interest Agreements.

44. The Sublease Interest Agreements did not require that deposits be held in trust and provided that the deposits were non-refundable except in certain limited circumstances.

Second Report at paras 29(iii) and 29(iv).

45. By their terms, the Sublease Interest Agreements supersede any other agreements between the parties or any related parties.

Second Report at para 22.

46. If no trust property is identifiable at the date of the commencement of an insolvency proceeding then not all of the attributes of a trust at common law are present. Specifically, there is no certainty of subject matter.

Henfrey at para 35-43 [Tab 10].

Royal Bank of Canada v Atlas Block Co., 2014 ONSC 3062, 2014 CarswellOnt 8345 at para 47 [Tab 13].

47. In particular, if the funds are commingled and cannot be identified, the requirements for a common law trust are not met.

Bassano Growers Ltd. v Price Waterhouse Ltd., 1998 ABCA 198, 1998 CarswellAlta 555 at paras 8-9 [Tab 14].

48. At the time the Receiver was appointed, there were no deposit funds held by 132. There is no evidence available to the Receiver that indicates that the deposit monies paid by the Depositors pursuant to the Purchase Agreements or the Sublease Interest Agreements were remitted to 132.

Second Report at para 25.

49. In order for Depositors to claim an interest in the Assets they would need to trace their deposit payments to the Assets.

50. The Receiver was advised by a representative of Ridge Development Corporation that the deposit funds that were not returned were used to fund the construction of Whitemud Heights. However, based on the information available to the Receiver, it is unclear whether the deposit funds were actually used in the construction of Whitemud Heights and if there were, how that came to pass.

> Second Report at para 29(vi).

51. *The Law of Trusts* states that:

> There is no 'right' to trace outside the specific rules under the common law and in equity. One cannot 'identify' one's property where it has been converted into another form; rather, one may only point to a chain of events that resulted in the sale of the original property and the purchase of another with the proceeds. The rules of tracing are artificial legal constructs that enable a person to lay a proprietary claim to the converted form of an original property.
>
> Mark R. Gillen and Faye Woodman, *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery Publications Limited, 2008) at p 676 [*The Law of Trusts*] [Tab 15].

52. As held by the court in *Re Delta Smelting and Refining Co.*:

> For a trust to be enforceable, the property originally impressed with the trust must be traceable. Courts of equity have always been acute to distinguish trust funds and will trace them however much their character or nature may be altered, provided the property which is claimed can be clearly identified as the fruit of the trust property. Conversely, no trust can be enforced if the trust property cannot be identified or traced into some specific fund or thing... When a beneficiary seeks to trace his property, he must be able to follow step by step the course of the property through whatever transformation occurred... It is essential that he show that his property is actually or notionally part of the property he seeks to trace.
>
> *Re Delta Smelting and Refining Co.,* 1988 CarswellBC 551, [1988] BCJ No 2532 at para 27 (BCSC) [Tab 16].

53. In addition, the court in *Canadian Commercial Bank v R T Holman Ltd.* held that:

> The rule of traceability of trust funds is then: (a) that the funds must be held in trust; (b) that they be converted by the trustee; (c) that they be converted into some other form of property; (d) that the property into which they have been converted be extant and identifiable; and (e) that the claimant be able to establish a direct consequential relationship between his specific trust funds and the ultimate identifiable property.

Canadian Commercial Bank v R T Holman Ltd, 1986 CarswellPEI 13, at para 19 (PEISC) [Tab 17].

54. As noted above, there were no deposit funds held by 132 at the date the Receiver was appointed. There is no evidence available to the Receiver that indicates that the deposit monies paid by the Depositors pursuant to the Purchase Agreements or the Sublease Interest Agreements were remitted to 132. Accordingly, the Receiver is not aware of any evidence that would allow the Depositors' deposits to be traced to specific property of 132.

55. The Receiver notes that records that belong to Skyrider that are not in the possession of the Receiver would be required in order to facilitate a tracing exercise. The Receiver respectfully submits that a tracing exercise would be costly.

56. Even if there was at one point an intention to create trusts in favour of the Purchasers, as of the date of the date that the Receiver was appointed no such trusts survived, either because such intention was overridden by contract or because it was not given effect.

57. To that extent, the Assets were property of 132 at the time of the sale of Whitemud Heights.

E. Are the Depositors time-barred from pursuing their claims against 132 pursuant to the *Limitations Act*, RSA 2000, c L-12?

58. Section 3(1)(a) of the Alberta *Limitations Act*, RSA 2000, c L-12 [*Limitations Act*] provides in part that, subject to certain exceptions:

> [I]f a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a remedial order had occurred,
> > >
> > > (ii) that the injury was attributable to conduct of the defendant, and
> > >
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
> > >
> > > ...
>
> ... the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Limitations Act at s 3(1)(a) [Tab 18].

59. The Receiver does not possess sufficient information to determine when the Depositors knew or ought to have known that the transactions contemplated by the Purchase Agreements and the Sublease Interest Agreements would not be completed.

60. However, the Receiver notes that:

(a) all of the Purchase Agreements and Sublease Interest Agreements were entered into more than seven years ago;

Appendix "E" of the Second Report.

(b) It is not aware that any of the Depositors entered into any subleases with 132 as contemplated by the Sublease Interest Agreements; and

(c) the units at Whitemud Heights were not serviced or ready for occupancy until December 2014, or later.

Appendix "C" of the First Report of the Receiver filed November 21, 2014.

61. In light of the foregoing, it appears to the Receiver that Depositors who did not commence actions against 132 on a timely basis may be time-barred from pursuing a claim against 132 in respect of the Purchase Agreements or Sublease Interest Agreements.

III CONCLUSIONS

62. The Receiver respectfully submits that this Court has the jurisdiction to provide advice and direction regarding the distribution of the Sale Proceeds.

63. The Receiver is of the view that RBC had valid and enforceable security over the Assets at the time of the sale to 184.

64. The Receiver is not aware of any contractual basis upon which Depositors could claim an interest in the Sale Proceeds.

65. The Receiver is not aware of any basis under which the Depositors could assert a trust interest in the Sale Proceeds.

66. It appears to the Receiver that some of the Depositors may be time-barred pursuant to the *Limitations Act*, from pursuing a claim against 132.

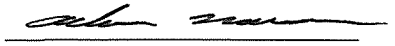
IV RELIEF SOUGHT

67. In light of the foregoing, the Receiver respectfully requests that this Court grant an Order in the form attached to the Application that, among other things, approves the distribution of the Sale Proceeds (subject to the Holdbacks) to RBC.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED THIS 24 day of March, 2015

McMillan LLP

Per:



Adam C. Maerov

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RIC New Brunswick Inc. and 1460518 Alberta Ltd. (Appellants / Respondents) and Telecommunications Research Laboratories and Alberta Treasury Branch (Respondents / Applicants)

Canadian Western Bank (Not a Party to the Appeal / Plaintiff) and 702348 Alberta Ltd. and Guild Developments Inc. (Not Parties to the Appeal / Defendants)

Ronald Berger, Peter Costigan, Patricia Rowbotham JJ.A.

Heard: May 27, 2010
Judgment: July 14, 2010
Docket: Edmonton Appeal 0903-0151-AC

Proceedings: affirming *Canadian Western Bank v. 702348 Alberta Ltd.* (2009), 472 A.R. 297, 2009 ABQB 271, 2009 CarswellAlta 641, 55 C.B.R. (5th) 298, 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 81 R.P.R. (4th) 288 (Alta. Q.B.)

Counsel: P.T. Linder, Q.C. for Appellants
J.J. Heelan, Q.C. for Respondent, Telecommunications Research Laboratories
D.N. Tkachuk for Respondent, Alberta Treasury Branch

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

G operated as commercial construction developer — In fall 2007, TR and G entered into negotiations regarding leasing of commercial property that had expected completion date in early 2008 — On execution of lease, TR paid deposit in amount of $71,000 to G and G agreed to provide approximately 10,000 square feet of space — G never completed construction of building — G had similar lease problems with ATB — Receiver was appointed to G in 2008 — Receiver did not consent to TR or ATB terminating their leases — ATB and TR brought successful applications seeking declaration that leases were terminated, and receiver brought application seeking directions — Application judge found that as result of G's fundamental breach, ATB and TR properly terminated leases — Respondents to application other than G appealed — Appeal dismissed — Application judge articulated correct law and applied relevant factors correctly to facts.

Real property --- Landlord and tenant — Term of lease — Termination — Miscellaneous

G operated as commercial construction developer — In fall 2007, TR and G entered into negotiations regarding leasing of commercial property that had expected completion date in early 2008 — On execution of lease, TR paid deposit in amount of $71,000 to G and G agreed to provide approximately 10,000 square feet of space — G never completed construction of building — G had similar lease problems with ATB — Receiver was appointed to G in 2008 — Receiver did not consent to TR or ATB terminating their leases — ATB and TR brought successful applications seeking declaration that

leases were terminated, and receiver brought application seeking directions — Application judge found that as result of G's fundamental breach, ATB and TR properly terminated leases — Respondents to application other than G appealed — Appeal dismissed — Application judge articulated correct law and applied relevant factors correctly to facts.

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Cases considered:

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Double N Earthmovers Ltd. v. Edmonton (City) (2005), 6 M.P.L.R. (4th) 25, 41 Alta. L.R. (4th) 205, 2005 ABCA 104, 2005 CarswellAlta 276, 363 A.R. 201, 343 W.A.C. 201, [2005] 10 W.W.R. 1 (Alta. C.A.) — referred to

First City Trust Co. v. Triple Five Corp. (1989), 65 Alta. L.R. (2d) 193, [1989] 3 W.W.R. 577, 57 D.L.R. (4th) 554, 94 A.R. 106, 1989 CarswellAlta 25 (Alta. C.A.) — referred to

Great Lakes Brick & Stone Ltd. v. Vandelinder (1993), 1993 CarswellOnt 4385 (Ont. Small Cl. Ct.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

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Judicature Act, R.S.A. 2000, c. J-2

s. 8 — considered

APPEAL by application respondents from judgment reported at *Canadian Western Bank v. 702348 Alberta Ltd.* (2009), 472 A.R. 297, 2009 ABQB 271, 2009 CarswellAlta 641, 55 C.B.R. (5th) 298, 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 81 R.P.R. (4th) 288 (Alta. Q.B.).

***Per curiam*:**

I. Introduction

1 The appellants, RIC New Brunswick Inc. (RIC) and 1460518 Alberta Ltd. (146), appeal two orders declaring that the respondents properly terminated lease arrangements that they had with 702348 Alberta Ltd. and Guild Developments Inc. (collectively referred to as Guild): *Canadian Western Bank v. 702348 Alberta Ltd.*, 2009 ABQB 271, 472 A.R. 297 (Alta. Q.B.).The respondents challenge the appellants' standing to appeal these orders.

2 Guild developed a commercial condominium complex and obtained financing from the Canadian Western Bank (CWB) and RIC, both secured creditors. Guild executed a lease with the respondent, Telecommunications Research Laboratories (TR Labs) and an offer to lease with the respondent, Alberta Treasury Branch (ATB). A series of construction delays prevented the respondents from commencing their leases at the agreed upon dates.

3 Guild defaulted on various commitments to CWB and a receiver was appointed. The receivership order provided that no person could terminate a contract or agreement without written consent of the receiver or leave of the court. Both ATB and TR Labs asked the receiver to terminate their lease arrangements on the ground that Guild was in fundamental breach of its obligations. The receiver refused both demands and the respondents applied to the court to terminate the leases.

II. Standing

4 146 was not a party to the original proceeding. It purchased certain of the debtors' assets from the receiver. The issue of standing arises in part because of the timing of the orders. The chronology is as follows:

1. On April 16, 2009 146 and the receiver entered into an asset purchase agreement for the Guild development (APA).

2. On April 22, 2009 the chambers judge heard oral arguments with regard to three applications: 1) ATB's application to have its lease terminated; 2) TR Labs' application to have its lease terminated; and 3) 146's application to purchase the Guild development.

3. On April 24, 2009 the chambers judge approved the APA (APA Order). The APA Order contemplated that the asset purchase would be effective on a closing date. The closing date was defined as three days following the issuance of the order or some other date agreed upon by the parties.

4. On May 1, 2009 the chambers judge released his decision with respect to the leases, finding that they had both been properly terminated and two orders were issued to that effect (termination orders).

5. On May 8, 2009 the sale of the Guild development to 146 closed. The land was transferred to 146 free and clear of any claims and interests of RIC. Title was registered in 146's name.

6. On or about May 20, 2009 the receiver indicated to RIC and 146 that it did not intend to appeal the termination orders. On May 26, 2009 (still within the appeal period) RIC filed its notices of appeal of the termination orders.

7. On January 21, 2010 RIC and 146 appeared before this court on a motion requesting that 146 be substituted for RIC in the pending appeal. The motions court refused to substitute 146 for the appellant RIC, but added 146 as a co-appellant: *RIC New Brunswick Inc. v. Telecommunications Research Laboratories*, 2010 ABCA 27 (Alta. C.A.).

8. On March 3, 2010 an application by 146 to extend the time for appeal was dismissed: *RIC New Brunswick Inc. v. Telecommunications Research Laboratories*, 2010 ABCA 75 (Alta. C.A.).

5 The respondents submit that neither appellant has standing to appeal the termination orders. It is clear that RIC does not have standing as it lost its interest as a Guild creditor on April 24, 2009 when the chambers judge issued the APA Order. Para. 4 of that Order states that "all of the Encumbrances affecting or relating to the Transferred Assets are **hereby** expunged and discharged as against the Transferred Assets".

6 The respondents submit that it is only the receiver who has the right of appeal. Pursuant to Clause 2(l) of the receivership order the receiver is empowered to initiate, prosecute and continue the prosecution of any and all proceedings, and its authority "shall extend to such appeals ...in respect of any order pronounced in such proceeding." The receiver chose not to appeal and the respondents accepted lesser amounts in costs, in exchange for the receiver's decision not to appeal. The receiver could have assigned its right of appeal, but did not. Moreover, CWB who holds the first secured charge and a prior assignment of leases did not appeal. The respondents submit that to permit 146 to appeal undermines the right of appeal contained in the receivership order.

7 The respondents further submit that for 146 to have standing it must have acquired a right of appeal from another party. 146 acknowledges that the receiver did not assign its right to appeal. 146 submits that it is a successor in interest to RIC and thereby acquired a right of appeal. However, Para. 4 of the APA Order states that:

> "**Upon the closing** of the sale of the Transferred Assets [...] possession and all estate, right, title, interest and equity of redemption of the Debtors [Guild] and the Receiver in the Transferred Assets[...] shall absolutely and irrevocably pass to and vest in the Buyer [146]"
>
> [emphasis added].

146 thus only inherited its interest in the Guild properties upon closing, on May 8, 2009 at which point the leases had already been terminated. Furthermore, by the time the chambers judge issued the termination orders, RIC had no interest in the leases.

8 146 says that in addition to the interest which it purchased under the APA, it acquired other rights from RIC. In 2007 when RIC advanced funds to Guild, the loan was guaranteed by Guild who, as security for repayment, granted an assignment of leases and rents, and a general security agreement. The general security agreement gave RIC personal property rights, including the right to enforce contracts. On April 28, 2009, before the closing, RIC assigned to 146 all of its right, title and interest to the loan and its security. 146 submits that as a result of the April 28, 2009 assignment of RIC's rights which pre-dated the vesting order, 146 has a right of appeal.

9 We are not persuaded that this is sufficient to grant standing to 146. Given the terms of the receivership order, all of the assets were placed in the hands of the receiver. Para. 4 of Yamauchi J.'s April 24, 2009 order approving the sale of the development specifies that the lands are transferred to the buyer free and clear of any and all claims and interests of the Appellant. It further provides that all of the Appellant's encumbrances against the assets sold to the buyer are expunged and discharged. 146 asks us to carve out a covenant to enforce in a situation where the underlying debt has been extinguished. We are not prepared to do so.

III. Termination of the Leases

TR Labs

10 In the fall of 2007 TR Labs and Guild entered into negotiations regarding the lease of commercial premises. At that time Guild projected that the building would be completed in early 2008. The lease was executed on February 29, 2008. A term of the lease was that the commencement date was to be April 1, 2008 and if the demised premises could not be delivered on that date, the commencement date could be adjusted by the landlord acting reasonably. Throughout the spring, summer and fall of 2008 TR Labs continued to communicate with Guild regarding completion of the premises. On September 16, 2008 Guild

promised in writing to have the premises ready for occupancy by December 15, 2008. However, by that time construction of the building had ceased and builders' liens had been registered.

ATB

11 The circumstances between ATB and TR Labs are similar. The parties entered into an offer to lease which contemplated the execution of a lease. The lease was not executed. The offer to lease was executed on June 10, 2008 and contemplated that the premises would be available for occupancy on December 1, 2008. On September 17, 2008 Guild advised that the premises would be completed no later than December 15, 2008. It was obvious during a site tour in October, 2008 that no work was being done. Guild advised that the premises would probably not be completed until mid-February 2009. In November, 2008 ATB requested that the exterior roadways and parking be completed by November 14, 2008 and the rest of the work by December 15, 2008. On November 20, 2008 ATB wrote to Guild advising that it considered Guild to be in fundamental breach of its obligations and that it would be treating the offer to lease as terminated.

12 The receiver was appointed on November 20, 2008. No further work was performed on the building. The receiver's report estimated that construction could not be completed for six to nine months after the work commenced. At the time of the hearing before the chambers judge, the work had still not commenced, so that even if the work commenced immediately, there would have been a delay of 15 months. The chambers judge found that this delay amounted to a fundamental breach of the agreements and ordered that the lease and offer to lease be terminated.

IV. Grounds of Appeal

13 The appellants submit that the chambers judge erred in concluding that Guild had fundamentally breached the terms of the lease agreements with TR Labs and ATB. The appellants also submit that the chambers judge ought not to have determined the issue in a summary manner, and that the issues warranted a trial.

V. Standard of Review

14 The issue of whether Guild fundamentally breached its lease agreements with the respondents involves the application of a legal standard to a set of facts, and as such is a question of mixed fact and law. The chambers judge's articulation of the law is reviewed for correctness: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 (Alta. C.A.) at para.11. His findings of fact and application of the law to the facts are subject to deference absent a clear and palpable error: *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 (Alta. C.A.) at para.16; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 36.

15 Whether the chambers judge was entitled to deal with the matter summarily is also an issue of law reviewable on the standard of correctness.

VI. Analysis

16 The appellants cite *National Carriers Ltd. v. Panalpina (Northern) Ltd.* (1980), [1981] 1 All E.R. 161 (U.K. H.L.) and *Great Lakes Brick & Stone Ltd. v. Vandelinder*, [1993] O.J. No. 2763 (Ont. Small Cl. Ct.) as support for their argument that a finding of fundamental breach is exceedingly rare in the context of a lease. The chambers judge acknowledged this but found that this was a situation to which the doctrine of fundamental breach could apply. He considered the *National Carriers* and *Vandelinder* decisions, as well as the Ontario Court of Appeal's recent decision in *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721 (Ont. C.A.), leave denied [2008] S.C.C.A. No. 151 (S.C.C.). In *Spirent* the court held that delays in construction which prevented a sublessee from taking possession of the premises could result in a finding of fundamental breach, although on the facts of *Spirent* no breach was found. This court has also considered fundamental breach in the context of commercial tenancies: *First City Trust Co. v. Triple Five Corp.* (1989), 94 A.R. 106, 57 D.L.R. (4th) 554 (Alta. C.A.) and *Brae Centre Ltd. v. 1044807 Alberta Ltd.*, 2008 ABCA 397, 446 A.R. 10 (Alta. C.A.).

17 The chambers judge correctly noted that *Spirent* suggests five factors that the court should consider when determining whether there has been a fundamental breach: (1) the ratio of the party's obligations not performed to that party's obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of the breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation not performed to the whole obligation: *Spirent* at para. 36.

18 The chambers judge then applied each of these factors to the circumstances of the respondents. With respect to the first and fifth factors he concluded that Guild and the receiver had performed little in relation to their obligation as a whole in respect of the construction of the building. With respect to TR Labs, Guild was to have completed the building by April 2008 and with respect to ATB by August 1, 2008. Although there had been extensions of the time to complete, the respondents had agreed to the latest extensions at a time when Guild was not even undertaking construction. The chambers judge's findings are amply supported by the evidence and the appellants have not demonstrated any palpable and overriding error in the findings of fact or in the application of law to those facts.

19 With respect to the third factor the chambers judge concluded that there was a high likelihood of the repetition of the breach as it was very unlikely that the building would be completed within a reasonable time. The receiver's report suggested that the building could be completed in six to nine months. The chambers judge questioned the reasonableness of this, but in any event there was no evidence as to when the construction would recommence. Although the court in *Spirent* found that there was no fundamental breach, the construction delay was a period of six months in a three year lease. Here, the delay was at least fifteen months, with no indication of when construction would recommence. The chambers judge's conclusion on this factor is entitled to deference.

20 In considering the second and fourth factors the chambers judge concluded that the breach and its consequences were serious to both TR Labs and ATB. With respect to TR Labs he concluded that without the leased premises TR Labs would be without suitable laboratory facilities in which to conduct its research in Edmonton. In August 2008 TR Labs had been forced to leave the premises that it leased from the University of Alberta. Indeed the non-renewable lease had expired in April 2008 and the University had permitted TR Labs to overhold for a further three months. As of August 2008 TR Labs was housed in temporary facilities which were unsuitable for a lab. These findings were amply supported by the affidavit evidence adduced by TR Labs. The chambers judge rejected the receiver's submission that TR Labs could relocate its research to another of its facilities in Calgary, Regina, Winnipeg or Saskatoon. His decision is entitled to deference.

21 When ATB negotiated the offer to lease, it did so on the expectation that the premises would be used to consolidate its corporate staff. The evidence disclosed that ATB's corporate staff was housed in various branches throughout Edmonton. The chambers judge concluded that the consequences of the breach were serious. His finding is supported by the evidence and the appellants have not demonstrated any palpable and overriding error.

22 The chambers judge articulated the correct law and applied the *Spirent* factors correctly to the facts. The appellants have not demonstrated any palpable and overriding error with respect to the facts found by the chambers judge. This ground of appeal is dismissed.

VII. Summary Procedure

23 The appellants submit that the chambers judge erred in terminating the leases in a summary manner, rather than by trial. These issues arose in the context of a receivership. In addition to the respondents' applications for declarations terminating their leases, the receiver applied to the court for advice and direction with a view to delaying the termination applications. At issue was whether the receiver should accept the terminations. Section 249 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and para. 23 of the receivership order authorize the receiver to apply to the court for advice and direction regarding the discharge of its powers and duties. The chambers judge was satisfied that he had jurisdiction to deal with the termination applications, noting that the receiver was appointed under the *Judicature Act*, R.S.A. 2000, c. J-2. Section 8 of that Act gives the court broad general jurisdiction. Moreover, the parties did not object to the summary procedure, opting for the "real time"

litigation which often characterizes insolvency proceedings. The chambers judge did not err in deciding these issues summarily. This ground of appeal is also dismissed.

VIII. Conclusion

24 The appeal is dismissed.

Appeal dismissed.

TAB 2

1941 CarswellBC 1
Supreme Court of Canada

National Trust Co. v. Christian Community of Universal Brotherhood Ltd.

1941 CarswellBC 1, [1941] 3 D.L.R. 529, [1941] S.C.R. 601, 23 C.B.R. 1

National Trust Company Limited (Plaintiff) Appellant v. Christian Community of Universal Brotherhood Limited and Board of Review for British Columbia (Defendants) Respondents

Duff C.J.C., Rinfret, Crocket, Davis and Hudson JJ.

Judgment: June 24, 1941

Counsel: *A. E. Hoskin, K.C.* and *D. N. Hossie, K.C.*, for appellant.
C. L. McAlpine, K.C., for Christian Community of Universal Brotherhood Ltd.
F. P. Varcoe, K.C., for Board of Review.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Receivers --- Possession of receiver — General

The Farmers' Creditors Arrangement Act, 1934, 16 C.B.R. 438 — Debenture-holders' Action by Plaintiff Company and Appointment of Receiver in Supreme Court — Subsequent Filing of Proposal by Defendant Company — Action in Supreme Court by Plaintiff Company inter alia for Declaration Defendant Company not a "Farmer" — Judgment in Favour of Plaintiff Company — Appeal Allowed — Exclusive Jurisdiction of County and District Courts — Jurisdiction of Supreme Court — Facts — Judgment of Trial Judge Restored on Appeal to Supreme Court of Canada.

An appeal by the plaintiff company from the judgment of the Court of Appeal for British Columbia reported in 22 C.B.R. 158 reversing the judgment of Robertson J., reported in 22 C.B.R. 49 was allowed, and the judgment of Robertson J., restored with costs throughout.

On the appeal it was argued on behalf of the respondent company and the Board of Review that the statute invests the County Court with exclusive jurisdiction in bankruptcy and that this includes any proceeding to determine the question raised by the action namely whether the respondent company was a "farmer" within the intendment of the statute; and so precludes the exercise of jurisdiction therein by the Supreme Court.

Held, that the respondent company Christian Community of Universal Brotherhood Limited on the facts disclosed was not a farmer within the contemplation of *The Farmers' Creditors Arrangement Act, 1934*.

Per Duff C.J.C. — "Had it not been for the decision of this Court in *Barickman Hutterian Mutual Corpn. v. Nault*, 20 C.B.R. 314, [1939] S.C.R. 223, 1939 Can. Abr. 413, it would never have occurred to anybody, I think, that the respondent company was a farmer within the intendment of that statute. The only point of law decided in that case was that a corporation may be a farmer and entitled as such to avail itself of the provisions of the statute. In the very special circumstances of that case

we held that the corporation was a farmer within the definition 'a person whose principal occupation consists in farming or the tillage of the soil'. There is little pertinent resemblance between the corporation whose status was there in question and the respondent company, and that decision is really of no assistance in the decision of the question before us."

Held, further, that the decision of the trial Judge on the question of jurisdiction was right.

Per Duff C.J.C. — "In the present case property of the respondent company affected by the debentures is in the hands of a Receiver appointed by the Supreme Court of British Columbia. ... Whatever may be the effect of the general language of the enactment which purports to give to the County Court exclusive jurisdiction in bankruptcy, such general language cannot, in my opinion, be read as giving to the County Court any control over the assets of the respondent company, in the hands of the receiver, which could be exercised without the consent of the Supreme Court. Only the most precise language would justify one in ascribing such an intention to the Legislature; and it seems necessarily to follow that it would be within the jurisdiction of the Supreme Court to ascertain by an examination of the facts (if such a claim were made) whether or not the purported proceedings under the statute were competent proceedings, — whether or not, in other words, the County Court had acquired exclusive jurisdiction in relation to the debtors' assets by force of the statute."

***Duff C.J.C.* (concurred in by Davis and Hudson JJ.):**

1 I shall refer to the respondent, The Christian Community of Universal Brotherhood, Limited (which is a company incorporated under the Dominion *Companies Act*) as the respondent company.

2 The respondent company is not, I am satisfied, on the facts disclosed in the evidence before us, a farmer within the contemplation of *The Farmers' Creditors Arrangement Act* of 1934 [16 C.B.R. 438], and for this and other reasons the proceedings of the Official Receiver and the respondent, the Board of Review, were without statutory warrant. Had it not been for the decision of this Court in *Barickman Hutterian Mutual Corpn. v. Nault*, 20 C.B.R. 314, [1939] S.C.R. 223, 1939 Can. Abr. 413, it would never have occurred to anybody, I think, that the respondent company was a farmer within the intendment of that statute. The only point of law decided in that case was that a corporation may be a farmer and entitled as such to avail itself of the provisions of the statute. In the very special circumstances of that case we held that the corporation was a farmer within the definition "a person whose principal occupation consists in farming or the tillage of the soil". There is little pertinent resemblance between the corporation whose status was there in question and the respondent company, and that decision is really of no assistance in the decision of the question before us. I think it is very clear that, although the members of the community for the most part are farmers, the incorporated company itself is not a farmer in the ordinary sense of the term, or in the sense of the statute. My brother Rinfret has given conclusive reasons for this.

3 An important question, however, which was very fully argued, arises. That question is whether it is competent to this Court to give practical effect on this appeal to its conclusion that the respondent company has not the right to avail itself of the benefit of the enactments of *The Farmers' Creditors Arrangement Act*, and that question again depends upon the answer to the question whether or not the Supreme Court of British Columbia was competent to adjudicate upon the respondent company's rights in that respect.

4 *The Farmers' Creditors Arrangement Act* provides in sec. 6(1) and (2) as follows [16 C.B.R. 440]:

6(1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

(2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.

5 By sec. 7:

7. A proposal may provide for a compromise or an extension of time or scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

6 By sec. 11(1) [19 C.B.R. 309] and (2) [16 C.B.R. 441]:

11 (1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy,or the realization of any security unless with leave of the court and on such terms as the court may impose; Provided, however, that the stay of proceedings herein provided shall only be effective until the date of the final disposition of the proposal.

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

7 By sec. 5(1):

5 (1) In the case of an assignment, petition or proposal in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act*.

8 The statute also provides for a Board of Review consisting of a Chief Commissioner and two Commissioners, and that where the Official Receiver reports that a farmer has made a proposal, but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal, and the Board shall consider representations. If the proposal so formulated is accepted by the debtor and the creditors it is to be filed in Court and then, by force of sec. 12(5) [16 C.B.R. 442], it becomes binding on the debtor and all the creditors. Even where a debtor and the creditors refuse to approve a proposal so formulated the Board may, nevertheless, confirm the proposal with or without amendments, and on being filed in Court it becomes binding on all the creditors and the debtor as if it had been accepted by the creditors and approved by the Court [sec. 12(6), 16 C.B.R. 445].

9 In May, 1938, the appellants instituted in the Supreme Court of British Columbia a debenture-holders' action against the respondent company, praying foreclosure or sale of certain properties and assets mortgaged to the appellant to secure the payment of debentures. In May and July, 1938, by orders of the Supreme Court of British Colum bia, one G. L. Salter was appointed receiver and immediately entered upon his duties. This action is still pending and the receiver is still executing his duties.

10 In June, 1939, the respondent company purported to file a proposal under *The Farmers' Creditors Arrangement Act* and on September 14, 1939, the Board of Review sent to the receiver a notice stating that a written request by a creditor of the respondent company had been addressed to the Board of Review, requesting the Board to formulate an acceptable proposal for a composition, extension of time or scheme of arrangements of the affairs of the said company, and that this request would be dealt with at Nelson, in the County of Kootenay, on September 26, 1939. The appellants immediately commenced an action in the Supreme Court of British Columbia, claiming, among other things, a declaration that the respondent company is not a farmer entitled to take advantage of *The Farmers' Creditors Arrangement Act*.

11 The issue of substance which the appellants sought to raise in their action in the Supreme Court of British Columbia was, of course, the question whether the respondent company was entitled to take advantage of *The Farmers' Creditors Arrangement Act*. The appellants, being the holders of debentures in the amount of three hundred and fifty thousand dollars ($350,000) and having, as already observed, in a debenture-holders' action had a receiver appointed of property affected by their security in

British Columbia, had, of course, an immediate and practical concern in the proceedings taken by the respondent company, purporting to be under the authority of *The Farmers' Creditors Arrangement Act*.

12 The statute, as appears from the enactments already set out, where a proposal, which is a proper proposal within the contemplation of the statute, is filed by a person who is entitled to the benefit of the provisions of the statute, effects (*inter alia*) a stay of all proceedings taken by the holder of the security to realize his security pending at the time the proposal is filed; and also brings the property of the debtor filing the proposal under the authority of the Court, which is the County Court of the county in which the debtor resides, and gives the County Court authority to make orders for the preservation of the property.

13 Furthermore (it cannot be too plainly kept in view), authority is given to the Board of Review to formulate a proposal providing for a compromise and extension of time or scheme of arrangement in relation (*inter alia*) to a debt owing to a secured creditor, and such proposal so formulated by the Board may be confirmed by the Board and filed in the County Court and thereupon (even without the consent of the secured creditor) it becomes binding upon all the creditors and the debtor.

14 The appellants, I repeat, were naturally and properly concerned with these proceedings, and when they received notice from the Board that the Board intended to consider the framing of a proposal they instituted their action in the Supreme Court of British Columbia, as already mentioned.

15 On behalf of the respondent company and the Board of Review it was argued that the statute invests the County Court with exclusive jurisdiction in bankruptcy and that this includes any proceeding to determine the question raised by the action; and so precludes the exercise of jurisdiction therein by the Supreme Court. I do not think it is necessary for the purpose of this appeal to determine generally the jurisdiction of the County Court and of the Supreme Court, respectively, in relation to the statutory validity of a proposal filed by a debtor who is invoking the provisions of the statute. *Prima facie* it would seem that an application made to the County Court Judge to set aside such a proposal as incompetent would fall within the "jurisdiction in bankruptcy" within the meaning of the statute, and that the County Court Judge would have jurisdiction to pass upon such an application.

16 In the present case property of the respondent company affected by the debentures is in the hands of a receiver appointed by the Supreme Court of British Columbia. On general principles any attempt to interfere with the possession of the receiver would constitute contempt of Court. In the absence of some statute to the contrary effect, the Supreme Court would not permit even an action to be brought against the receiver in respect of his receivership, unless leave of the Court were first obtained. *Blair v. Maidstone Palace of Varieties*, [1909] 2 Ch. 283, at p. 286, 78 L.J. Ch. 739; *Russell v. East Anglian Ry. Co.* (1850), 3 Mac. and G. 104, at p. 120, 20 L.J. Ch. 257, 42 E.R. 201; *Coleman v. Glanville* (1871), 18 Gr. 42, at pp. 43 and 44, per Strong V.C.

17 This, of course, is well-known law. Whatever may be the effect of the general language of the enactment which purports to give to the County Court exclusive jurisdiction in bankruptcy, such general language cannot, in my opinion, be read as giving to the County Court any control over the assets of the respondent company, in the hands of the receiver, which could be exercised without the consent of the Supreme Court. Only the most precise language would justify one in ascribing such an intention to the Legislature; and it seems neces sarily to follow that it would be within the jurisdiction of the Supreme Court to ascertain by an examination of the facts (if such a claim were made) whether or not the purported proceedings under the statute were competent proceedings, — whether or not, in other words, the County Court had acquired exclusive jurisdiction in relation to the debtors' assets by force of the statute.

18 In the present case the Board of Review was about to proceed to consider a proposal to be formulated under sec. 12(4) and (5) [16 C.B.R. 441, 442] and, in the case of a proposal being formulated and confirmed by the Board of Review, questions might very well arise as to the position of the receiver. It is to be noticed that sec. 11 read literally, when effect is given to it according to the full scope of its terms, without any qualification, would appear directly to affect the receiver in any proceedings by him to realize property within the receivership — in an action, for example, to collect a book debt charged by the debentures in suit. Only the very clearest language would, I repeat, justify the conclusion that the Legislature intended in these circumstances to deprive the Supreme Court of the authority to decide for itself whether the filing of the proposal had any statutory warrant.

19 The principle of *Stradling v. Morgan* (1558), 1 Plowden 199, at p. 204, 75 E.R. 305, must, I think, be applied. The words employed ought not, I think, to be read as excluding the jurisdiction of the Supreme Court to decide whether, in such circumstances as those before us, its jurisdiction in respect of property in its possession, and in respect of proceedings in relation to that property pending before it, has been ousted.

20 The learned trial Judge (1939), 22 C.B.R. 49, had all the circumstances before him and, having regard to those circumstances, felt it his duty to pronounce upon the issue. He held that the respondent company is not a farmer within the contemplation of the statute, a conclusion with which, as I have mentioned, we are in entire agreement.

21 As already observed, the only point remaining to be considered is whether or not the trial Judge was also right in exercising the jurisdiction he did exercise, or whether, on the contrary, the County Court was solely competent to pass upon the issue presented to him. If the learned trial Judge was wrong in holding that he was invested with jurisdiction, the only course open to us would be to dismiss the appeal, with the result that the question must go back to the County Court for determination, and the time and energy spent in trying the issue before the County Court Judge and in arguing it before the Court of Appeal and before this Court thrown away. Happily, in my opinion, this course is not forced upon us because I think the trial Judge's decision on the question of jurisdiction, as well as his decision on the question of substance, is right. He was not deciding upon any abstract question. It was important that the issue should be decided speedily in order to avoid conflict of jurisdiction, with resulting confusion and expense.

22 With the deepest respect for the learning and the judgment of the able and experienced Chief Justice of British Columbia, I am, for the reasons I have indicated, unable to accept his conclusion (1940), 22 C.B.R. 158. I may add, also, that I have read the valuable judgment of Mr. Justice O'Halloran (22 C.B.R. 162) with care, but, with respect, it does not meet the point upon which I think the appeal must be decided.

23 I think perhaps some observation ought to be made upon certain orders by the Judges of the County Court of Yale and the County Court of West Kootenay, respectively.

24 On June 26 an order was made by Judge Kelly, of the County Court of Yale, and on the 28th of the same month an order in the same terms was made by Judge Nisbet, of the County Court of West Kootenay. These orders are in the following terms:

June 1939.

In the County Court of , Holden at .

In the matter of 'The Farmers' Creditors Arrangement Act 1934' and Amendments thereto

and

In the matter of a proposal for composition, extension or scheme of arrangement of The Christian Community of Universal Brotherhood, Limited, Farmer.

Before His Honour } Judge } In Court }

, the day of June 1939.

Upon the Application of Walter Gordon Wilkins an Official Receiver under the said Farmers' Creditors Arrangement Act 1934 and amendments thereto for directions.

And upon reading the Statement of affairs herein and the proposal and the resolution of the Directors of the said Christian Community of Universal Brotherhood Limited and the Affidavit of Nicholas M. Plotnikoff attached thereto.

It is ordered that the said Christian Community of Universal Brotherhood Limited is hereby permitted to make application under and is entitled to take advantage of the Provisions of the said Farmers' Creditors Arrangement Act 1934 and amendments thereto.

And it is further ordered that the said Official Receiver Walter Gordon Wilkins is hereby permitted to accept the said proposal of the Christian Community of Universal Brotherhood Limited under the said Farmers' Creditors Arrangement Act 1934 and amendments thereto.

Judge, County Court of
(Seal)
C.C. of

Entered this day of June 1939

Registrar
County Court.

25 The recital shows that the order was made on an application by the Official Receiver to the County Court for directions before the proposal was filed. It may be open to question whether until the proposal is filed the Official Receiver has any status, or the Court any jurisdiction, under Rule 42 [18 C.B.R. 203]. It is not necessary, however, to decide that point.

26 Sec. 6 of *The Farmers' Creditors Arrangement Act* does not contemplate a proposal filed by leave of the County Court; it does not contemplate an application for such leave by a person seeking to avail himself of the provisions of the statute. The right of the farmer is a statutory right arising from the provisions of the statute and not from any leave of the Court. Rule 42 does not empower the County Court to give any direction contrary to the Act, or, on an *ex parte* application in the absence of the parties known to be principally concerned, to adjudicate upon any controversy touching the right of any person to file a proposal as an insolvent farmer under the authority of sec. 6 of *The Farmers' Creditors Arrangement Act*. The purpose of the procedure under Rule 42 is to enable the Official Receiver to obtain the advice of the Court in matters of administration where the application of the Act, which is the foundation of the authority of the Judge as well as the Official Receiver, is assumed. The purpose of the procedure is to enable the Official Receiver to obtain directions as to his own acts in the course of administration for his own protection and for the orderly conduct of the administration; it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding.

27 It does not follow, of course, that on an application for directions, when all parties are present, questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way and the hearing of an application for directions in a particular case may be a convenient occasion for dealing with such questions, and there can be no objection to such a course when proper care is taken to see that everybody concerned is fully represented and has a full opportunity of bringing out the facts and presenting his case.

28 The proper way to read the orders is to treat them as directions to the Official Receiver to receive and file proposals and the earlier paragraph must be regarded simply as introductory, expressing the Judge's opinion *quantum valeat* with regard to matters upon which he had no authority to make a binding pronouncement.

29 I think the appeal should be allowed and the judgment of the learned trial Judge restored with costs throughout.

***Rinfret J.*:**

30 Prior to the commencement of the action in respect of which the present appeal is asserted, the appellant had, on May 18, 1938, commenced in the Supreme Court of British Columbia a debenture-holders' action against the respondent community, asking for the foreclosure, or sale, of certain properties and assets of the community mortgaged to the appellant by the community to secure the payment of certain bonds of the community which are still outstanding and unpaid. In that first action, one Mr. G.

L. Salter, a chartered accountant and authorized trustee in bankruptcy, was appointed receiver by orders of the said Supreme Court of British Columbia, dated May 18 and July 15, 1938.

31 The receiver immediately entered upon his duties as such and he has been ever since and still is carrying out the same; and the debenture-holders' action is still pending in the Supreme Court.

32 The receiver is and at all material times was an officer of the Supreme Court of British Columbia.

33 About the end of the month of June, 1939, the community purported to file a proposal under *The Farmers' Creditors Arrangement Act,1934* [16 C.B.R. 438] ; and, on or about August 1, 1939, it purported to make a request under that Act to the respondent Board of Review.

34 On September 14, 1939, the Board sent out a notice of hearing, whereupon the appellant brought the present action on September 16, 1939.

35 At all material times, the debenture-holders' action was proceeding in the Supreme Court of British Columbia and the receiver appointed by that Court was in charge and acting.

36 In the present action, the appellant alleged, among other things, that the community was not a farmer within the meaning of *The Farmers' Creditors Arrangement Act* and was not entitled to the benefit of that Act; that the community had not made a proposal for a composition, extension of time or scheme of arrangement pursuant to the Act; and that accordingly the Act had no application to the community, and the Board of Review for the Province of British Columbia was without jurisdiction, that it had no jurisdiction over the appellant and the other creditors of the community.

37 The appellant asked and claimed:

38 (a) A declaration that *The Farmers' Creditors Arrangement Act* of 1934 does not apply to the respondent community;

39 (b) A declaration that the community is not entitled to make a proposal for a composition of its liabilities under the provisions of the Act;

40 (c) A declaration that the respondent Board is not authorized or empowered and has no jurisdiction to hold a hearing, or formulate a proposal for such a composition;

41 (d) A declaration that all proceedings of the Board pursuant to the application of the community are null and void;

42 (e) An injunction restraining the respondents, and each of them, from taking any further steps under the Act with respect to the application of the community, or with respect to its liabilities;

43 (f) The costs of this action;

44 (g) Such further or other relief as to this Honourable Court may seem meet.

45 The formal judgment of the Supreme Court of British Columbia, at the trial before Robertson J. (1939), 22 C.B.R. 49, was a declaration that the community was not a farmer within the meaning of the Act; and it gave liberty to apply for an injunction as against the Board, in the event of its deciding to proceed with the "Request for Review". The judgment gave costs to the appellant against the community.

46 Having decided that the community was not a farmer within the meaning of the Act, the learned Judge stated that, under the circum stances, it was not necessary to consider the appellant's alternative submissions.

47 Both the community and the Board appealed from this judgment to the Court of Appeal of British Columbia, where the appeal was allowed and the judgment was set aside with costs against the present appellant, (1940), 22 C.B.R. 158.

48 The Court of Appeal decided that the Supreme Court of British Columbia had no jurisdiction in the matter and that, by force of the provisions of the Act, such jurisdiction resided exclusively in the County Court. It decided further that, on the authority of *Barickman Hutterian Mutual Corpn. v. Nault*, 20 C.B.R. 314, [1939] S.C.R. 223, 1939 Can. Abr. 413, the community was a farmer.

49 The other questions raised in the action have not been dealt with by the Appeal Court.

50 The substantial question that stands to be decided in the present appeal is whether the community is a farmer within the meaning of *The Farmers' Creditors Arrangement Act* and, as such, entitled to a proposal for a composition of its liabilities under the provisions of that Act.

51 When once this point is settled, there will have to be examined the further question whether the respondent Board established under the Act is authorized and empowered and has jurisdiction to hold a hearing, or to formulate a proposal for a composition of the liabilities of the respondent community.

52 If these two questions be disposed of in accordance with the contentions of the appellant, there will remain to be decided whether the County Court is vested with the exclusive jurisdiction to pass upon these questions, subject to appeal as provided in sec. 174 of *The Bankruptcy Act* [9 C.B.R. 322], or if the appellant's action was competently brought before the Supreme Court of British Columbia; and, in such a case, whether the jurisdiction of that Court should have been exercised in a declaratory action such as was instituted here, or whether the intervention of the Supreme Court could be asked for only by petition for a writ of *certiorari*.

53 I will deal first with the question whether, on the evidence before the Court, the respondent community can be held to be a farmer within the meaning of *The Farmers' Creditors Arrangement Act*.

54 The Christian Community of Universal Brotherhood is a limited company incorporated by letters patent under the Dominion *Companies' Act* on April 25, 1917, with a capital stock of $1,000,000 divided into 10,000 shares of $100 each.

55 Its powers and objects are those usually granted to an ordinary commercial corporation. The charter contains no reference to any religious beliefs, practices, or observances.

56 Some of the objects and powers of the company are as follows:

> (a) To carry on agricultural pursuits, and to manufacture the products of the farm, the mine, the soil and the forest, to manufacture, purchase or otherwise acquire, to hold, own, sell, assign and transfer or otherwise dispose of, to invest, trade, deal in and deal with, either at retail or wholesale, goods, wares and merchandise, and real and personal property, corporeal and incorporeal, of every class and description whatsoever and whatsoever required; to grow, produce, manufacture, buy, sell, trade, deal in and deal with raw materials, live stock, grains, fruits, agricultural products and all other products and by-products of the soil, the forest, the mine, the lakes and rivers; including among others the raising, buying, selling, trading in and dealing with cattle, sheep, horses and live stock of every kind, and to manufacture any and all materials, goods, products and merchandise of any and every kind from any of the foregoing;
>
> (e) To distribute any of the property of the company in specie among the members;
>
> (f) To promote freedom of contract, and to resist, insure against, counteract and discourage interference therewith, and to subscribe to any association or fund for any such purposes;
>
> (g) To distribute any of the assets for the time being of the company among the members in kind, and to stipulate for and obtain for the members, or any of them any property, rights, privileges or options;

(h) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights;

(k) To enter into partnership or into any arrangement for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concessions or otherwise, with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which the company is authorized to carry on or engage in, or any busi ness or transaction capable of being conducted so as directly or indirectly to benefit the company; and to lend money to, guarantee the contracts of, or otherwise assist any such person or company, and to take or otherwise acquire shares and securities of any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with the same;

(t) To procure the company to be registered and recognized in any foreign country and to designate persons therein according to the laws of such foreign country to represent this company and to accept service for and on behalf of the company of any process or suit;

(w) To sell, improve, manage, develop, exchange, lease, enfranchise, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company;

(x) To do all or any of the above things in any part of the world and as principals, agents, contractors or otherwise, and by and through agents or otherwise, and either alone or in conjunction with others.

57 The incorporators of the company were nine individuals: Two farmers, a clerk, a carpenter, an accountant, a fruit dealer, a housekeeper, a gardener and a contractor. These nine individuals were among those subsequently appointed permanent directors of the company.

58 After its incorporation, the community purchased from Peter Verigin, one of its directors, certain city, town and farm lands and certain property in the Provinces of British Columbia, Saskatchewan and Alberta for $600,000, paid for by the allotment to each of the twelve directors of the company of 500 fully paid up shares.

59 Prior to the purchase of these properties, the same were occupied by members of an unincorporated association commonly called the Doukhobors, for whom Verigin held the same in trust.

60 The lands acquired from Verigin were registered in the name of the incorporated company (the respondent community).

61 The lands so owned by the community represented over 60,000 acres of land in British Columbia, Saskatchewan and Alberta, although in Alberta the lands there owned were registered in the name of a wholly subsidiary company: The Christian Community of Universal Brotherhood of Alberta Limited.

62 While a large part was farm land, the respondent community also owned city and town property and industrial sites, from the rental of which revenues were derived.

63 The business of the community in British Columbia, with which we are more directly concerned, included logging, milling of various products, the operation of a flour mill, the manufacture and selling of jam, the operation of a brick yard and the operation of several general stores.

64 The relative importance of these separate operations appears from an examination of the balance sheets of the community. For example, the community balance sheet as of December 31, 1928 shows, under the heading of "Received Assessment from Members of Community" rents in British Columbia, Alberta and Saskatchewan totalling $333,948.50. The profit and loss account headed "British Columbia Industry — Commercial Branch" shows a total of over $1,000,000, and the statement of profit and loss headed "Saskatchewan Industry — Commercial Branch" shows a total of over $230,000.

65 The balance sheet as of December 31, 1938, shows assets in excess of $5,300,000 and liabilities of a little over $860,000. Among the latter liabilities are shown $340,000 owing to individual Doukhobors or community groups of Doukhobors.

66 While the respondent community owned farm lands, it did not operate the farms itself, but rented the land to individuals or to groups of Doukhobors. The rent was paid to the community in the form of assessments, which were made "according to the quality of the land". These assessments were paid, whether the farms rented were or were not under cultivation, and without consideration to the value of the products. At all events, the products belonged to the individuals or the groups who were working the farm and did not belong to the community.

67 The debenture-holders' action was for the recovery of the amount outstanding on a bond issue of $350,000 secured by a deed of trust and mortgage in favour of the appellant, executed on December 3, 1925; and, at the time of the purported proceedings under *The Farmers' Creditors Arrangement Act*,the deed of trust and mortgage to the appellant covered all the property and assets of the community of whatsoever kind and wheresoever situate.

68 The mortgage and claim of the appellant had and has priority over the claims of all other creditors of the community and is a direct charge upon all its properties and assets.

69 Under the above circumstances, can it be said that the community is a farmer within the definition of sec. 2(1)(f) of the Act [16 C.B.R. 438]?

70 Under that definition, a farmer is "a person whose principal occupation consists in farming or the tillage of the soil".

71 Whether a person comes under that definition is almost exclusively a question of fact; and the learned trial Judge has held that the community was not a farmer, at least within the meaning so defined.

72 It seems clear that, so far as lands were concerned, the community was in the position of a landlord or vendor. The "farming or the tillage of the soil" was done by the individuals or the groups who paid the assessments to the community.

73 It need not be repeated here that a limited company is an entity separate from its component members: *Salomon v. Salomon*, [1897] A.C. 22, 66 L.J. Ch. 35; *Macaura v. Northern Assur. Co.*, [1925] A.C. 619, 94 L.J.P.C, 154; *Pioneer Laundry v. Minister of National Revenue*, [1940] A.C. 127, at p. 137, 1939 Can. Abr. 1199. The community never worked the farm lands itself. It rented them out to the members of the unincorporated Christian Community of Universal Brotherhood and received from their members who leased the lands an annual assessment which, to all intents and purposes, was a rental. On this point, the evidence, both documentary and verbal, is conclusive and fully warrants the holding of the trial Judge (22 C.B.R. 49). Indeed, the community itself did not contend at the trial that the farming was being carried on by it. Particularly after the year 1926, the community confined its endeavour in British Columbia to logging, milling forest products, manufacturing and selling jams and operating stores. Neither was it doing any farming in Alberta or Saskatchewan. Farm lands in Saskatchewan were all sold in 1928.

74 It is apparent from the "statement of affairs" accompanying the proposal made by the community and filed with the Official Receiver that the community itself hired no labour. All the work was done by families on the land. No record of the crop raised on the lands was kept by the community; it was "kept by each individual on land to whom the Corporation made assessments annually". In fact, the community had no knowledge of what the crop record was, since the crops belonged to the individuals.

75 In view of these facts, it does not seem possible to reverse the finding of fact of the trial Judge that the respondent community was not a farmer, and, more particularly, that it was not "a person whose principal occupation consisted in farming or the tillage of the soil", as defined in sec. 2(1)(f) of the Act [16 C.B.R. 438].

76 The decision of this Court in the *Barickman* case, 20 C.B.R. 314, [1939] S.C.R. 223, is, of course, authority for the principle that the definition of "farmer" in the Act may include a body corporate and politic and a corporation of such a nature as that of the Barickman Hutterian Mutual Corporation. In that case, such inclusion was said to be justified by the definitions of the words "person" and "corporation" in *The Bankruptcy Act* (secs. 2(cc) and 2(k), 9 C.B.R. 23, 19) which are brought into *The*

Farmers' Creditors Arrangement Act by sec. 2(2) of the latter Act, [16 C.B.R. 438], and also by the fact that, on consideration of *The Farmers' Creditors Arrangement Act*, such inclusion is consistent with and not obnoxious to the provisions and objects of that Act.

77 But an examination of the nature and the methods of operation of the respondent community with those under consideration in the Barickman case shows that there was no comparison between the two, in so far as *The Farmers' Creditors Arrangement Act* may be made to apply to each of them. There is no similarity between the two corporations.

78 The member of the Hutterian corporation can own nothing and does not own anything. He is, at best, an employee of the Hutterian corporation working for his board and lodging, not even in the ordinary position of a hired man on a farm who, in addition to board and lodging, would receive wages as his own. The farming operations are the operations of the Hutterian Corporation and the crops are theirs.

79 The position of the Hutterian is very fully described by my Lord the Chief Justice of Canada in the *Barickman* case.

80 The respondent community is an entirely different organization. In so far as lands are concerned, it is, in fact, like an ordinary land or real estate company leasing or selling its lands to others; and, so far as its other activities are concerned, it is like any other commercial corporation carrying on certain commercial undertakings and industries, such as stores, jam factories, saw mills, planing mills, brickyards, etc. In this case, as already stated, the individual or the group is the farmer. He is not a hired man; but he works for himself and he pays rent to the community. If he happens to work in a store, factory, or saw mill belonging to the community, he is paid wages. When he sells his fruit to the jam factory, he is paid for it. He is an independent tenant or owner; and when he harvests his crops the proceeds are his.

81 He can, and apparently does, accumulate large sums of money for, among the creditors of the community, as appears by the "Statement of Affairs" filed with the proposal, there are a large number of Doukhobors with claims amounting to two-thirds of the total indebtedness of the community, or over $342,000.

82 The Doukhobor, therefore, is the owner of wealth; he accumulates money and property and lends it to the community, while the Hutterian can and does own nothing. The latter works without wages and entirely for the corporation.

83 It need not be said that *The Farmers' Creditors Arrangement Act* does not concern itself with the landlord or the vendor, but only with the actual farmer — the man on the land. The farmers are those whom "it is important to retain on the land as efficient producers" or, in this case, the individual Doukhobors, the men who farm, and not their landlord or vendor, the respondent community. If the foreclosure action of the appellant be proceeded with and maintained, the farmer on the land in the present case will not be put off, he will merely change his landlord.

84 It seems that, for the purpose of ascertaining whether the respondent community can be classed as a farmer within the meaning of the Act, the facts, in the premises, clearly distinguish this case from the *Barickman* case.

85 The learned trial Judge held that, in view of all the circumstances, the community was not a farmer; and I am unable to think of any reason why his finding should be disturbed.

86 We now come to the point whether, in the circumstances, the respondent Board established under the Act is authorized and empowered and has jurisdiction to hold a hearing or to formulate a proposal for the composition of the liabilities of the respondent community.

87 In discussing this point, it is necessary to bear in mind that *The Farmers' Creditors Arrangement Act*, envisaged as the exercise of the jurisdiction of the Parliament of Canada, finds its justification, so far as legislative competency is concerned, on the ground that it is legislation dealing with insolvency and bankruptcy: *Reference re Farmers' Creditors Arrangement Act*, 17 C.B.R. 359, [1936] S.C.R. 384, 1936 Can. Abr. 225, affirmed (*sub nom. Atty.-Gen. for British Columbia v. Arty.-Gen. for Canada*), 18 C.B.R. 217, [1937] A.C. 391, 1937 Can. Abr. 168. It follows that the jurisdiction conferred by that Act upon the Official Receiver and the Board of Review must be strictly confined within the sphere of the Act for the dual reason that, unless

so confined, and if the case under discussion fails to come within it, the result would be not only that the receiver or the Board do not establish a foundation for their jurisdiction, but the matter itself would have to be regarded as beyond the competency of the Dominion Parliament and *ipso facto* would cease to have any effective operation.

88 We must, therefore, start from the point that, before the Act can be entered into at all, the applicant of a proposal for a composition or scheme of arrangement must be "a farmer who is unable to meet his liabilities as they become due": sec. 6 of the Act [16 C.B.R. 440]. Unless these conditions exist, not only is the Act not applicable, but it could not have been competently enacted by the Dominion Parliament.

89 Assuming, however, that we have a farmer who is unable to meet his liabilities as they become due, the latter is entitled, under the Act, to make a proposal which shall be filed with an Official Receiver. It is then the duty of such Official Receiver forthwith to convene a meeting of the creditors and perform the duties and functions required by *The Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time, or scheme of arrangement.

90 On the filing of a proposal with the Official Receiver, no creditor shall have any remedy against the property or the person of the debtor, or shall commence, or continue, any proceedings under *The Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security, unless with leave of the Court and on such terms as the Court may impose (sec. 11(1) [19 C.B.R. 309]).

91 On a proposal being filed, the property of the debtor is deemed to be under the authority of the Court, pending the final disposition of any proceedings in connection with the proposal (sec. 11(2) [16 C.B.R. 441]).

92 If the proposal filed with the Official Receiver fails to receive the approbation of the creditors, and the Official Receiver so reports, it is then that, on the written request of a creditor or of the debtor, the Board endeavours to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested (sec. 12(4) [16 C.B.R. 441]). If the proposal formulated by the Board is approved by the creditors and the debtor, it is filed in the Court and becomes binding on the creditors and on the debtor. If the creditors or the debtor decline to approve the proposal, the Board may nevertheless confirm the proposal, either as formulated or as amended by the Board. In that case, it is filed in the Court and becomes binding on all the creditors and on the debtor as in the case of the proposal accepted by the creditors and approved by the Court (secs. 12(5) and 12(6) [16 C.B.R. 442, 445]).

93 Certain rules, regulations and forms under the Act were made by the Governor General in Council pursuant to sec. 15 of the Act [16 C.B.R. 442], and became effective on June 1, 1935 [18 C.B.R. 196].

94 Under them, a farmer who is unable to meet his liabilities as they become due and who intends to make a proposal must, at the time when he asks for a convening of the meeting of his creditors, lodge with the Official Receiver a true statement of his affairs in the prescribed form, verified by statutory declaration. That statement must include a list of his creditors, with their address and the amount due to each of them; it must state for what purpose the debt was incurred; and it must contain a list of the assets of the farmer, an estimate of their productive value and of the present and prospective capacity of the farmer to meet his obligations, together with any corroborative evidence of the value which the farmer may furnish. The proposal must be in writing and signed by the farmer or his duly authorized agent (Rr. 5, 6 [18 C.B.R. 196]).

95 Certain rules are prescribed for convening the meetings of creditors, the procedure at those meetings and the proportion of the number of creditors which are to form the majority required to carry a proposition or a decision at such meetings.

96 Certain other rules are prescribed to regulate the procedure if the proposal filed with the Official Receiver fails to receive the required approval of the creditors; and an application is made to him by the farmer, or any creditor, requesting the review by the Board.

97 The only other regulation to which it is necessary to refer is Rule 42 [18 C.B.R. 203], whereby

> The Official Receiver may in the case either of a proposal, assignment or receiving order, apply to the court for directions.

98 The perusal of the material sections of the Act and of the Rules and Regulations made thereunder fails, therefore, to disclose any jurisdiction vested in the Board of Review, except to formulate a fresh proposal upon the written request of a creditor or of the debtor, where the Official Receiver has reported "that a farmer has made a proposal, but that no proposal has been approved by the creditors".

99 The Board may formulate the new proposal; it may amend it; and, if approved by the creditors and the debtor, it is then filed in Court and becomes binding on the debtor and all the creditors; or if the creditors or the debtor decline to approve the same, the Board may nevertheless confirm it, in which case it is filed in Court and becomes binding upon all the creditors and the debtor.

100 The Board may, upon receiving a request to formulate a proposal, direct any one or more of its members on its behalf to investigate any or all circumstances and report to the Board. The Board must base its proposal upon the present and prospective capacity of the debtor to perform the obligations prescribed and the prospective value of the farm; and, for the purposes of the performance of its duties and functions, the Board has the powers of a commissioner appointed under *The Inquiries Act*.

101 Finally, the Board may decline to formulate a proposal in any case where it considers it cannot do so in fairness and justice to the debtor or the creditors.

102 The powers above mentioned are all enumerated in sec. 12 of the Act and its subsections. It will be seen that they have to do with the inspection and investigation of all the circumstances surrounding the solvency of the farmer, his present and prospective capability to meet his liabilities and to perform his obligations, the productive value of his farm, and the formulation of a proposal based upon these several considerations which can be made consistently with all fairness and justice to the debtor or the creditors.

103 But nowhere is there to be found vested in the Board of Review the power to determine as a question of law the applicability of *The Farmers' Creditors Arrangement Act* to a person whose quality and status as a "farmer" is disputed, or where it is objected, by some party having an interest in the matter, that the applicant for a proposal does not come within the definition of the Act.

104 That the applicant should be a farmer to whom the Act applies is a condition precedent to the validity of a request that the Board should endeavour to formulate a proposal and is a prerequisite of its competency in the matter. The consequence must be that, if such a request is made to a Board of Review and if the status of the farmer in respect to whom a proposal is requested from the Board, either by one of the creditors, or by the debtor, be disputed, it is not within the province of the Board to decide that dispute; and the Courts of justice are the proper forum where the matter must be debated and determined.

105 By force of subsec. (4) of sec. 12 of the Act [16 C.B.R. 441], it is only upon the report of the Official Receiver "that a farmer has made a proposal" and the proposal has not been approved by the creditors, that the jurisdiction of the Board begins, at the written request of a creditor or of the debtor, and that jurisdiction is confined to the matters stated in the Act and analysed above.

106 It should only be added that, of course, the Official Receiver himself has no authority to decide whether the person filing the proposal is a "farmer who is unable to meet his liabilities" within the meaning, of the legislation, if that point be disputed by the interested parties; and, in that case, the receiver should avail himself of the provision contained in Rule 42, whereby he may "apply to the court for directions".

107 Now, the Court referred to in *The Farmers' Creditors Arrangement Act* and upon whom jurisdiction is conferred by that Act, in the case of an assignment, petition, or proposal of the nature contemplated by the Act is, by sec. 5(1) [16 C.B.R. 439] "in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court".

108 Sec. 5, however, enacts that the Courts so designated "shall have exclusive jurisdiction in bankruptcy subject to appeal, as provided in section one hundred and seventy-four of the *Bankruptcy Act*".

109 This provision means that an order or decision of the Court competently made under sec. 5 may, under certain conditions, be appealed to the Appeal Court, and therefrom to the Supreme Court of Canada.

110 Sec. 5(2) further provides that the Superior, County, or District Court Judge, acting under it, "shall exercise the powers vested in the registrar by section one hundred and fifty-nine of the *Bankruptcy Act*".

111 If we refer to sec. 159 [9 C.B.R. 306], we find that the Registrars of the several Courts exercising bankruptcy jurisdiction have power and jurisdiction, subject to the General Rules limiting the power conferred by that section,

(a) to hear bankruptcy petitions and to make receiving orders and adjudications thereon, where they are not opposed;

(b) to hold examinations of debtors;

(c) to grant orders of discharge, where the application is not opposed;

(d) to approve compositions, extensions, or schemes of arrangement, where they are not opposed;

(e) to make interim orders in cases of urgency;

(f) to make any order, or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers;

(g) to hear and determine any unopposed or *ex parte* application;

(h) to summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property;

(i) to hear and determine appeals from the decision of a trustee allowing or disallowing a creditor's claim, where such claim does not exceed five hundred dollars.

112 There are, therefore, two important points to be borne in mind with regard to sec. 5, and they are:

113 1. That the exclusive jurisdiction conferred upon the Court therein designated is a "jurisdiction in bankruptcy"; and

114 2. That the powers vested in the Court as a result of the inclusion of sec. 159 of *The Bankruptcy Act* are, generally speaking, powers limited to matters and applications *ex parte*, or "not opposed".

115 It follows that the Court specified in sec. 5 cannot rely on its powers under sec. 159 of *The Bankruptcy Act* to found jurisdiction upon the questions we are now discussing, for the appellant clearly denies the status of "farmer" to the respondent community and opposes its right to make a proposal under *The Farmers' Creditors Arrangement Act*; and, indeed, it urges that the Act is not in any way applicable to this particular community.

116 If, therefore, it is contended that, in the Province of British Columbia, a County or District Court alone and exclusively has jurisdiction in respect to the questions of status raised in the present case, such contention must rely on the first paragraph of sec. 5, whereby a wider jurisdiction is conferred upon these Courts, subject to appeal as therein stated.

117 But, in sec. 5, the enactment is that the Courts there mentioned "shall have exclusive jurisdiction in bankruptcy". The insertion of the words "in bankruptcy" cannot be taken to have been made without object.

118 According to the interpretation section of the Act (sec. 2(c), 16 C.B.R. 438), for the purposes of this legislation, the word "'court' means the court having jurisdiction under this Act"; and it would follow that wherever in the successive sections of the Act, reference is in terms made to "the court", it means that jurisdiction on the particular matter mentioned in those sections is specifically vested either in the Superior Court, if the matter be in Quebec, or, if it be in the other Provinces, it is

vested in the County or District Court. With regard to any matter specially dealt with in those sections, there can be no doubt as to where jurisdiction lies.

119 But, because of the qualifications implied in the addition of the words "in bankruptcy", it is not as easy to define the jurisdiction conferred upon these Courts by the first paragraph of sec. 5.

120 It is clear that the "court" mentioned in secs. 6A, 8, 10, 10A, 11, 12, and such other sections where a similar reference is made, and equally the "court" mentioned in the Rules and Regulations and, in particular, in Rule 42, or in Form C and, for that, generally speaking, in the other forms in the appendix to the rules and regulations, is intended to designate the Superior Court in Quebec and the County or District Court in the other Provinces. It is not as evident that the latter Courts are given exclusive jurisdiction on all other matters having relation to the application and the administration of the Act.

121 If the status as such of an alleged farmer making a proposal for a composition, extension of time, or scheme of arrangement and filing it with the Official Receiver is put in question by an interested party, the Official Receiver deeming it necessary or opportune to "apply to the court for directions" will, of course, by force of Rule 42, apply in British Columbia to the County or District Court of the judicial district where the farmer resides; but the question in the present case is whether, assuming the interested party himself of his own initiative decides to contest the status of the applicant as farmer and to dispute the latter's right to make a proposal under the Act, he will necessarily have to institute his proceedings in the County or District Court; and whether he is deprived of the right — which he would otherwise have in ordinary cases — of invoking the general jurisdiction of the Supreme Court of the Province.

122 The words "jurisdiction in bankruptcy" are, of course, well known to Canadian bankruptcy law. They can be found throughout the interpretation clause and the several sections of *The Bankruptcy Act*. It would seem that the Court which is invested with original jurisdiction in bankruptcy under the latter Act is given the competency to decide such questions, amongst others, as the following; whether a debtor has committed an act of bankruptcy; whether the person pre senting a bankruptcy petition to the Court is a creditor within the meaning of the Act, whether the debtor is able to pay his debts, whether an insolvent debtor may make an assignment of all his property for the general benefit of his creditors instead of being subject to a receiving order, whether a proposal made by an insolvent debtor should be approved or refused and upon what terms, whether an order already made should be reviewed, rescinded or varied.

123 As *The Farmers' Creditors Arrangement Act* may be regarded as a chapter of *The Bankruptcy Act*, as that Act "shall be read and construed as one with the *Bankruptcy Act* ... and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in that Act provided, apply *mutatis mutandis* in the case of proceedings hereunder, including meetings of creditors" (sec. 2(2)), I think I may conclude that the status of a farmer and the question whether he is entitled to invoke the benefit of *The Farmers' Creditors Arrangement Act* are included within the words "jurisdiction in bankruptcy" and that, therefore, these matters, under the Act, are within the exclusive jurisdiction of the Superior Court in Quebec and of the County and District Courts in the other Provinces.

124 It does not necessarily follow, however, that the Supreme Courts of these Provinces are divested by the Act of their supervisory authority over an official such as the Official Receiver or a Board such as the Board of Review with which we are now dealing.

125 It may be a question whether the Parliament of Canada may oust the Supreme Court of a Province of that well recognized jurisdiction; but that jurisdiction is exercised through the writs of prohibition, mandamus, or *certiorari*; and that question does not arise in this case as none of those writs were resorted to here.

126 The appellant contends that it may also be exercised by declaration and injunction.

127 It need only be mentioned that *The Farmers' Creditors Arrangement Act* does not purport to exclude the jurisdiction of a provincial Supreme Court through one of these proceedings, except in so far as it may be implied from the use in sec. 5(1) of the words "exclusive jurisdiction". The extent of that implication may be left for wider examination in a case where the point comes up squarely for decision.

128 In the premises, the situation as it presents itself, is that, as a matter of fact, two County Courts in British Columbia, the County Court of Yale, holden at Penticton, June 26, 1929, and the County Court of West Kootenay, holden at Nelson, on June 28, 1929, have issued orders "that the said Christian Community of Universal Brotherhood Limited is hereby permitted to make application and is entitled to take advantage of the said *Farmers' Creditors Arrangement Act, 1934* and amendments thereto" and "that the said Official Receiver, Walter Gordon Wilkins, is hereby permitted to accept the said proposal of the Christian Community of Universal Brotherhood Limited under the said *Farmers' Creditors Arrangement Act, 1934* and amendments thereto".

129 It was explained that the Official Receiver deemed it more prudent to apply to two Courts on account of the doubt which existed as to within which judicial district the respondent community could be said to have its "residence".

130 The Appellate Division of the Supreme Court of Alberta, in the case of *Kettenbach Farms Ltd. v. Henke* (1937) 19 C.B.R. 92, relying on the decision of the Privy Council in *Board v. Board*, [1919] A.C. 956, 88 L.J.P.C. 165, and quoting from it the statement: "... nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so", held that a Superior Court has always a supervisory authority over inferior Courts and over tribunals which are not judicial, for the purpose of seeing that they do not go beyond their jurisdiction, unless such authority is taken away by competent legal authority.

131 Harvey C.J.A. delivering the judgment of the Alberta Court, added, at p. 93: "There is no suggestion in *The Farmers' Creditors Arrangement Act, 1934*, or any other Act to which our attention has been directed that the Board of Review is not to be subject to such supervisory authority and, in view of the multitude of cases that come before it, it naturally must proceed generally upon a simple *prima facie* case of jurisdiction being established, and no special provision is made in the Act for the disposition of a contest on the point."

132 With due respect, it would appear that sec. 5 of the Act was there overlooked, as it can hardly be contended that the Courts named in that section are not given the required authority to dispose of a contest of the character contemplated.

133 Such was the decision of the Court of Appeal of Saskatchewan in the case of *Great West Life Assur. Co. v. Beck*, 22 C.B.R. 12, [1940] 2 W.W.R. 522. It was held there that the District Court Judge has jurisdiction to determine whether a debtor who has made a proposal to the Official Receiver under the Act is a "farmer" within the meaning of that Act; and that a creditor, in applying under sec. 11(1) of the Act [19 C.B.R. 309] for leave to proceed, may properly and conveniently do so on the ground that the debtor who has filed the proposal is not a "farmer".

134 In that case, the language of sec. 12(4) of the Act was pointed to; and it was said (p. 17) that that "language implies that the question of whether or not a debtor who has made a proposal is a farmer should be determined before the Official Receiver reports to the Board of Review".

135 The same Court, in *Lefebvre v. Lefebvre*, 22 C.B.R. 27, [1940] 2 W.W.R. 578, held that the discretion given by sec. 11 to the District Court Judge to grant leave to a creditor to commence or continue proceedings against a debtor, after the latter has filed a proposal under the Act, is unfettered; and, although it was stated that such discretion should be exercised with the greatest of care; it was added however, that, when it has been exercised, it should not lightly be interfered with on appeal.

136 I have already said that, in my view, the status of the applicant as a farmer must be determined, or accepted, at some point before the Official Receiver has become *functus* and before the jurisdiction of the Board can arise, because the Official Receiver has no authority to make a report to the Board unless that status exists: *Samejima v. The King*, [1932] S.C.R. 640; and it is undoubtedly within the spirit of the Act that the question of status should be decided by one of the Courts named in sec. 5. It is a familiar principle that where a specific remedy is given, it excludes, generally speaking, a remedy of any other form than that given by the statute: see Halsbury L.C. in *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387, at p. 394, 67 L.J.Q.B. 635, at p. 637.

137 In the *Barickman* case, 20 C.B.R. 314, [1939] S.C.R. 223, the appeal was from a decision of a County Court, on the question whether the applicant corporation could be considered as a "farmer" within the meaning of the Act, and it is significant that no one questioned the jurisdiction of the County Court Judge to decide the point.

138 In *Prudential Insur. Co. of America v. Liboiron*, 22 C.B.R. 112, [1940] 3 W.W.R. 556, the Court of Appeal of Saskatchewan, in an ordinary action otherwise within the jurisdiction of the Court of King's Bench of that Province, where the defendant moved to set aside the action on the ground that he had filed a proposal under the Act and the action was brought without the leave provided for by sec. 11(1) of the Act having been obtained, held that the Court had jurisdiction to inquire into and determine objections to the validity of the proposal, including the objections that the defendant was not a person authorized by the Act to make a proposal. There, it was decided that the jurisdiction of the Court of Appeal was not excluded by sec. 5(1) of the Act in the circumstances of that case, and that the onus was then on the defendant to show, not only that he had filed a proposal, but that he was a person authorized to do so, i.e., a farmer unable to meet his liabilities as they become due. The Court referred to *National Trust Co. v. Powers*, 17 C.B.R. 64, [1935] O.R. 490, 15 Can. Abr. 446 and disagreed with *Gaul v. Charbonneau*, [1937] O.W.N. 601, 1937 Can. Abr. 340, on the question of jurisdiction, though agreeing with the latter judgment on the question of onus.

139 In the *Liboiron* case, the Court of Appeal held that, assuming the defendant to be a farmer, she had failed to discharge the onus of showing that she was entitled to file a proposal, *viz.*, one who was insolvent.

140 In the course of his judgment, Turgeon C.J.S., at pp. 114, 115, stated that there may be various reasons why a plaintiff may wish to proceed against a person who has filed a proposal. If his contention was, as it was there, that the defendant was not authorized by the Act to file such a proposal and that the proposal was, therefore, a nullity, two courses were open to him:

> He may commence his action, as these plaintiffs have done, or take a further step in an action already commenced, leaving it to the defendant to move to set the proceeding aside. If the question of the defendant's status under the Act is determined in favour of the defendant, the action or other proceeding will, of course, be set aside. If the question is determined in favour of the plaintiff, he will be allowed to continue his action. This was the procedure followed in Ontario in *National Trust Co. v. Powers* (above referred to) and in *Gofton v. Shantz*, 19 C.B.R. 63, [1937] O.R. 856.

141 Incidentally, it may be pointed out that such was also the course followed in *Diewold v. Diewold*, decided by this Court, 22 C.B.R. 329, [1941] S.C.R. 35.

142 Turgeon C.J.S. continued, at p. 115:

> But the other course, the course of applying to the District Court Judge under sec. 11(1) before taking his action or commencing his further proceeding, is also open to the plaintiff .... Where, however, the right of the defendant to file a proposal is not questioned and, consequently, the validity of the proposal is assumed, but the plaintiff believes that for some reason he ought to have leave to proceed against the defendant without waiting for the final disposition of the proposal, he must apply for such leave to the District Court Judge, who alone has power to grant it. In a case of this nature, an action commenced without such leave would of necessity be set aside.

143 If the above reasoning be applied to the appellant in the present case, it should be said that the appellant had two courses open to it: either it should have applied to the County Court for permission to continue its debenture-holders' action already commenced, or it should have further proceeded with that action until the community had applied to have it set aside on the ground that it had filed a proposal.

144 But there was not in the *Liboiron* case, as there is here, the feature that a County Court had already given permission to the applicant and to the Official Receiver to proceed under *The Farmers' Creditors Arrangement Act*.

145 I do not overlook the appellant's argument that, unless the applicant is a farmer, the Act has no application to him whatsoever, and anything which he purports to do under it, and any proposal made or filed by him is a nullity, and the jurisdiction of the Superior Courts is in no way interfered with.

146 The appellant's contention is that, until a proposal within the meaning of the Act is filed with the Official Receiver, the statute has not been taken advantage of and there is no foundation for any proceedings under it, and anything purported to be done under the Act is a nullity. It further says that the County Courts' orders show on their face that no proposal had been filed with the Official Receiver at the time when they were made, as by these orders the respondent community is permitted to make application under the Act and the Official Receiver permitted to accept the proposal.

147 But the point is that the scheme of the Act is to submit these questions to the decision of the Courts named in sec. 5; and the Legislature entrusted these Courts with a jurisdiction which includes the jurisdiction to determine whether this preliminary set of facts existed, as well as the jurisdiction, on finding that it does exist, to allow the receiver or the Board to proceed further or to do something more.

148 In the present case, however, there is a special situation. As already stated, the appellants' debenture-holders' action was instituted before the respondent community applied to the Official Receiver under *The Farmers' Creditors Arrangement Act* and before the County Court orders were issued.

149 The debenture-holders' action is still pending; and the receiver appointed in that action by the Supreme Court of British Columbia is still carrying on his duties. The effect of the receiver's appointment by the Supreme Court was to put all the property and assets of the community under the authority of that Court. In such circumstances, its jurisdiction in respect of the assets of the respondent community and with regard to the proceedings then pending before it could not be interfered with by the mere application of the Official Receiver to the County Courts under *The Farmers' Creditors Arrangement Act*.

150 On the face of the orders issued by those Courts, they were simply *ex parte* orders, without any of the material and pertinent facts being put before the County Court Judges and in the absence of all the other parties interested in the matter.

151 Having regard to the particular situation, I entirely agree on this point with the reasoning and with the conclusion of my Lord the Chief Justice. It cannot be that the intention of Parliament was to give to the County Court the competency to interfere with the possession of the receiver appointed by the Supreme Court, which, in effect, would amount to an interference with the possession of the Supreme Court itself.

152 In the result, the appeal should be allowed and the judgment of the trial Judge should be restored with costs throughout.

***Crocket J.*:**

153 This appeal arises out of an alleged proposal for a composition, extension of time or scheme of arrangement under *The Farmers' Creditors Arrangement Act* [16 C.B.R. 438], made by the respondent, the Christian Community of Universal Brotherhood, Limited, on June 23, 1939, and a later request, purporting to be made under the provisions of the said Act on August 1, 1939, by one, Joseph Peter Shukin, "the vice-president of the above mentioned farmer", to the Board of Review under the said Act to "endeavour to formulate an acceptable proposal for a composition, extension of time or scheme of arrangement herein".

154 The appellant had commenced in the Supreme Court of British Columbia in May, 1938, a debenture-holders' action against the respondent community for a foreclosure or sale of certain property and assets of the community mortgaged to the appellant on December 3, 1925, to secure a bond issue of $350,000 in respect of which the community was then in default to the extent of $170,000. The writ in that action was issued on May 18, 1938, in pursuance of leave granted by Manson J. and on the same day the Supreme Court by order of the same Judge appointed a receiver of all the undertaking and property and assets of the defendant comprised in and subject to the said deed of trust and mortgage, to whom the same was ordered to be forthwith delivered, subject to permission to the defendant to carry on under the supervision of such receiver the ordinary businesses of

its general stores, flour mills, jam factory, brickyard and sawmills and planing mills in British Columbia, with liberty to the defendant and the receiver to apply to that Court for directions from time to time.

155 That action was pending and the receiver, one G. L. Salter, a chartered accountant and authorized trustee in bankruptcy, was acting as an officer of the Supreme Court of British Columbia therein for the purpose of enforcing the security created by the respondent corporation's deed of trust and mortgage, when the latter filed its alleged proposal on June 23, 1939, with the Official Receiver under *The Farmers' Creditors Arrangement Act* for the judicial district in which presumably the community had its residence and which, it may be inferred, included the Counties of Yale and West Kootenay, as the Judges of both these County Courts purported to have made analogous orders, one on June 26, 1939, and the other on June 28, 1939, upon the application of one Walter Gordon Wilkins, who is described therein simply as an Official Receiver under *The Farmers' Creditors Arrangement Act*, purporting to permit the community to make application under *The Farmers' Creditors Arrangement Act* and the said Official Receiver "to accept the said proposal". Mr. Wilkins was asked by counsel for the respondent before the trial Judge (Mr. Justice Robertson) (1939), 22 C.B.R. 49, if he could tell him "Were these applications and orders made by their Honours Judge Kelly and Judge Nesbitt at the time you had the application?", to which he replied, "Well, in answer to that I would say I received a tentative application to start with and during the course of a few weeks the order was built up and then I applied to Judge Kelly", and in cross-examination said that he could not tell whether he had given any notice of his application to either of the two County Court Judges. I suppose from the record, as it comes to us, it must be taken that the community's alleged proposal had been actually filed on June 23, notwithstanding that the orders of both County Court Judges purported to permit the community "to make application under and is entitled to take advantage of the provisions of the said F.C.A. Act, 1934", and the said Official Receiver "to accept the said proposal".

156 In any event the community filed its request to the Board of Review on August 1, 1939, from which it must be assumed, if we are to have any regard for the provisions of the Act, that the Official Receiver had called a meeting of the interested creditors and submitted the proposal with the required statement of its affairs for their consideration, and that the proposal had not been approved, for there is in the record an exhibit, which purports to be a notice to Mr. Salter, the receiver for the appellant trust company, that the Board would deal with the community's written request for the formulation of "an acceptable proposal for a composition, extension of time or scheme of arrangement of the affairs of the said farmer" at the court house at Nelson, B.C., on September 26, 1935 (which presumably is an error for 1939), which they could only do under the provisions of sec. 12 [16 C.B.R. 441, 444, 19 C.B.R. 310] in the event of the original proposal not having been approved by the creditors.

157 The appellant on September 16, ten days before the time fixed for the hearing before the Board of Review, commenced this action in the Supreme Court of British Columbia against the community and the Board, claiming a declaration that the community was not a farmer within the meaning of *The Farmers' Creditors Arrangement Act* and that the Board of Review had no jurisdiction to take any proceedings or consider the request for the formulation of an acceptable proposal under that Act, and on the same date an interim injunction was granted restraining the defendants and each of them until the trial of the action or until further order from taking any further steps under the Act with respect to the applications or liabilities of the community. This injunction was dissolved on October 20, 1939, by Fisher J., 21 C.B.R. 110, on the ground that it was premature, and on December 15, 1939, Robertson J., 22 C.B.R. 49, who tried the action, gave judgment declaring that the respondent, the Christian Community of Universal Brotherhood, Limited, is not a farmer within the meaning of *The Farmers' Creditors Arrangement Act, 1934* [16 C.B.R. 438, 444, 19 C.B.R. 307] and giving liberty to apply for an injunction as against the Board of Review in the event of its deciding to proceed with the request for review. From this judgment both defendants appealed to the Court of Appeal, with the result that the appeal was allowed and the trial judgment set aside with costs, (1940), 22 C.B.R. 158.

158 It had been argued in behalf of the community before the learned trial Judge that the decision of this Court in *Barickman Hutterian Mutual Corpn. v. Nault*, 20 C.B.R. 314, [1939] S.C.R, 223, 1939 Can. Abr. 413, was conclusive upon the question of the community being a farmer within the meaning of the Act. His Lordship, however, carefully compared the facts of that case with those of the present and pointed out that while the corporation in the *Barickman* case, as the owner of the farm lands, managed and directed the farming and owned all the produce of the farms, and that no one else had or could have any legal interest therein, in the present case it was the tenants of the com munity, whose principal occupation was farming or the tillage of the soil, and not the corporation itself, and thus distinguished it from the case relied upon by the community and held that the

decision of this Court in the former case could not be relied upon by the respondent corporation as an authority for its contention in the present action, and made the declaration prayed for that the community was not a farmer within the meaning of the Act.

159 Macdonald C.J.B.C., in his reasons for judgment in the Court of Appeal, 22 C.B.R. 158, with which McQuarrie J.A. agreed, adopted a dictum of Martin J.A., in *Great West Life Assur. Co. v. Beck*, 22 C.B.R. 12, at p. 17, [1940] 2 W.W.R. 522, that whether or not a debtor, who has made a proposal, is a farmer should be determined before the Official Receiver reports to the Board of Review, and that if the Official Receiver was in doubt as to the status of the debtor, he might apply to the County Court Judge for direction under Rule 42 [18 C.B.R. 203] of the Rules and Regulations made by the Governor in Council under sec. 15 of the Act [16 C.B.R. 442], and he held that the County Court Judge had jurisdiction to decide that question and that the above mentioned orders made by the two County Court Judges were "not things of naught whatever may be said of the right to vacate them by appropriate proceedings" (p. 161). If he was wrong in this view, he added, "and an action for a declaration as to whether or not the appellant Christian Community is a 'farmer' may be maintained in the Supreme Court I would say, with the greatest respect for any contrary views, on the authority of *Barickman Hutterian Mutual Corp. v. Nault, supra*, that it is a 'farmer'. This, of course, is the substantial question to be decided". O'Halloran J.A. (p. 162) held that the order of the Judge of the proper County Court was an order of a Court of competent jurisdiction under *The Farmers' Creditors Arrangement Act*, and that the Supreme Court of the Province had no jurisdiction to ignore it or set it aside in a declaratory action.

160 With every respect, upon a consideration of the record and of the relevant provisions of the statute and regulations, I am of opinion that the learned trial Judge had full jurisdiction to make the declaration which he did, and that his judgment was fully warranted by the evidence; and that the Court of Appeal therefore was not justified in setting it aside.

161 As its title, preamble and all its provisions and the Rules and Regulations thereunder clearly connote, *The Farmers' Creditors Arrangement Act* was designed by Parliament for the sole and exclusive benefit of farmers, who were unable to meet their liabilities as they became due. It is not questioned that no one, who was not a farmer within the definition prescribed by the Act ("a person whose principal occupation consists in farming or the tillage of the soil"), had any right to avail himself of its provisions to make a proposal either for a composition in satisfaction of his debts or an extension of time for payment thereof or a scheme of arrangement of his affairs, either by the Official Receiver or by the Board of Review. It seems to me, therefore, that if the respondent corporation was not a farmer, neither the Official Receiver nor the Board of Review nor either of the County Court Judges had any authority whatsoever to bring the respondent corporation within the operation of that Act, and that any orders or reports purporting to recognize the respondent as a farmer must be held under the explicit provisions of the Act to have been wholly void and of no effect. The learned Chief Justice of British Columbia, pointing out that the two analogous orders of the County Court Judges of the Counties of Yale and West Kootenay permitting the applicant to take advantage of the Act involves a decision that the applicant was a "farmer", himself states that that is the only basis upon which the orders could be made; and, as I have already stated, that the question of whether the community was a farmer, was the substantial question to be decided on the appeal to the Appeal Court.

162 I cannot, therefore, upon my part, comprehend how, if the community was not a farmer within the meaning of the Act, the fact that a County Court Judge had without authority and erroneously found that the respondent corporation was a farmer can possibly have the effect of ousting the jurisdiction of the Supreme Court to pronounce upon the validity of these proceedings and of removing from the custody and control of a special receiver appointed by the Supreme Court for the administration of the British Columbia assets and business of the respondent corporation for the realization of the moneys secured by the respondent's deed of trust and mortgage, and placing them in the exclusive control of either of the County Courts mentioned. The only possible construction of sec. 6 of the Act [16 C.B.R. 440], it seems to me, is that the right to make a proposal for a composition, extension of time or scheme of arrangement, is limited to a farmer, as above defined, and that the filing of a proposal by such a person with the Official Receiver is an essential pre-requisite of the jurisdiction of that official to act at all in any particular case in the same way that the filing of such a proposal is another essential pre-requisite under sec. 11(2) [16 C.B.R. 441] of the authority of any County Court in respect of the property of the appellant debtor.

163 In *Toronto Ry. Co. v. Toronto*, [1904] A.C. 809, an action had been brought by the railway company in the Supreme Court of Ontario for a declaration that the appellant's cars were personal property and as such were not liable for $8,775, sought to be levied as taxes thereon by the respondent. The trial Court found that the plaintiff's cars were real estate and dismissed the

action, and this judgment was affirmed by the Court of Appeal. On appeal to the Privy Council the Board held that the cars formed no part of the railway and were not fixed in any way to anything which was real estate and were, therefore, not assessable under the Ontario *Assessment Act*, R.S.O. 1897, ch. 224. It was argued that the decision of the Court of Appeal was *res judicata*, the question having been decided by the Revision Court appointed under the provincial *Assessment Act*, and the County Court Judge on appeal from that decision. The Judicial Committee rejected this contention on the ground that the jurisdiction of the County Court is confined to the amount of assessment and does not extend to validate an assessment unauthorized by the statute. Lord Davey in delivering the judgment of the Board said that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low and that those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. "In other words", his Lordship continued, "whether the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity". The Board therefore advised His Majesty that the order of the Court of Appeal should be reversed and instead thereof a declaration should be made and an injunction granted as claimed by the statement of claim.

164 In *Donohue Bros. v. Parish of St. Etienne*, [1924] S.C.R. 511, which was an action before a Superior Court in the Province of Quebec, under art. 50 C.C.P., to have the defendant's assessment roll declared null and void on the ground that it included the assessment of machinery as immoveable property, this Court held that the plaintiff having been assessed for property, which was non-assessable under *The Assessment Act*, the valuation roll was void *ab initio* and that the case fell within the principle of the decision of the Privy Council in *Toronto Railway Co. v. Toronto, supra.* The appeal from the Court of King's Bench, reversing the judgment of the Superior Court, dismissing the plaintiff's action, was consequently allowed. In that case Duff J., as he then was, said that he could see no reason why the principle of the *Toronto* case was not applicable and that there should be a declaration in accordance with the view above expressed, *viz.*, that the machinery in question was not assessable as immoveable property. Anglin and Mignault JJ. held that the decision of the Privy Council in *Shannon Realties Ltd. v. St. Michel*, [1924] A.C. 185, 93 L.J.P.C. 81, was not in point and that the failure of the appellants to proceed under articles 430 and 662 of *The Municipal Code* did not preclude their maintaining an action under art. 50 C.C.P., in order to have the valuation roll declared null.

165 In *London v. George Watt & Sons* (1893), 22 S.C.R. 300, this Court held that sec. 65 of the Ontario *Assessment Act*, R.S.O. 1887, ch. 193, does not enable the Court of Revision to make valid an assessment which the statute does not authorize. Taschereau C.J. in delivering the judgment of the Court held that that section of the Ontario *Assessment Act* does not make the roll as finally passed by the Court of Revision conclusive as regards a question of jurisdiction. "If there is no power", he said, at p. 302, "conferred by the statute to make the assessment it must be wholly illegal and void *ab initio*, and confirmation by the Court of Revision cannot validate it".

166 It is true that these three cases concern the exercise of statutory rights and powers provided for by provincial Assessments Acts, but if, as they all affirm, the unauthorized assumption of powers on the part of tribunals designated by such statutes makes their exercise null and void, and entitles the Supreme Courts of the Provinces to try declaratory actions brought by those against whom it is sought to exercise such powers, why should the principles thus affirmed in these cases not apply similarly to the exercise of the explicitly limited rights and powers provided for by *The Farmers' Creditors Arrangement Act?* I can conceive of no reason why they should not. The whole tenor of the statute, it seems to me with all respect, negatives the suggestion that the Parliament of Canada intended to interfere with the inherent jurisdiction of the Supreme Courts of the various Provinces to declare the nullity of wholly unauthorized proceedings and orders of all inferior statutory functionaries or tribunals at the suit of those whose property and civil rights such proceedings and orders purport to affect.

167 I would, therefore, allow the appeal and restore the judgment of the learned trial Judge with costs throughout against the respondent corporation.

TAB 3

2000 ABCA 284
Alberta Court of Appeal

YBM Magnex International Inc., Re

2000 CarswellAlta 1133, 2000 ABCA 284, [2000] A.J. No. 1231, [2001] 2 W.W.R. 628, [2001] A.W.L.D. 41, 234 W.A.C. 123, 271 A.R. 123, 88 Alta. L.R. (3d) 181, 9 B.L.R. (3d) 24

In Re S. 234 of the Business Corporations Act R.S.A. (1980) c.J-1; In Re the Matter of YBM Magnex International, Inc.; Griffiths McBurney & Partners and National Bank Financial Inc. (Appellants) and Ernst & Young YBM Inc., Roger Mondor, Admit M. Karia, the Plaintiff's Executive Committee, Royal Trust Corporation of Canada, in its Capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in its Capacity as the Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark & Lunn Investment Management Ltd., and her Majesty the Queen in Right of the Province of British Columbia (Respondents)

McFadyen, Sulatycky, Wittmann JJ.A.

Heard: July 18, 2000
Judgment: October 23, 2000
Docket: Calgary Appeal 00-18827, 00-18832, 00-18841

Proceedings: reversed in part *YBM Magnex International Inc., Re* (2000), 2000 CarswellAlta 380, 264 A.R. 275 (Alta. Q.B.)

Counsel: *A.D. Macleod, Q.C.* and *R.F. Smith*, for Griffiths McBurney, et al.
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D.F. Bell, for Appellants Parente, Randolph, et al.
P. Howard, for Ernst & Young YBM Inc.
C. Allen, for Roger Mondor and Amit Karia.
M.C. Freeman, for Plaintiff's Executive Committee.
E.A. Cherniak, Q.C., for Respondent, Royal Trust Corporation.

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Practice --- Discovery — Discovery of documents — Privileged document — Official reports

Corporation pleaded guilty in U.S. to conspiracy to commit fraud — Plaintiffs brought two uncertified class actions in Ontario and consolidated class action in U.S., seeking damages for losses incurred trading in corporation's shares — Receiver of corporation prepared report analysing potential legal claims of corporation, and obtained second report on share activity involving corporation — Receiver brought motion for order allowing innocent shareholders to provide first report to their employees or their counsel, directing receiver to waive privilege with respect to second report and authorizing receiver to provide copy of second report to U.S. Attorney and to class action plaintiffs — Chambers judge declared that receiver was in common interest privilege with class action plaintiffs and directed receiver to provide first report to counsel for plaintiffs — Chambers judge also authorized receiver to release second report to U.S. Attorney without waiving privilege, and permitted receiver to release second report to any entities with which receiver was satisfied it shared common

interests against common adversaries — Appeal allowed in part — Court should decline to provide advice and direction when to do so would substantively impact proceedings properly in another jurisdiction — Questions of common interest privilege and general waiver related entirely to actions in Ontario and U.S. — Chambers judge's order was proper to extent that it authorized receiver to release reports to certain parties if to do so would be in best interests of corporation's estate — Limits exist on when court should provide advice and directions under Pt. 33 of Alberta Rules of Court — Power of court to make declaratory judgments under s. 11 of Judicature Act is discretionary and should be exercised with "great care and caution" — Chambers judge should have declined to give advice and direction as to existence of common interest privilege and general waiver — Judicature Act, R.S.A. 1980, c. J-1, s. 11 — Alberta Rules of Court, Alta. Reg. 390/68, Pt. 33.

Receivers --- Conduct and liability of receiver — General conduct of receiver

Corporation pleaded guilty in U.S. to conspiracy to commit fraud — Plaintiffs brought two uncertified class actions in Ontario and consolidated class action in U.S., seeking damages for losses incurred trading in corporation's shares — Receiver of corporation prepared report analysing potential legal claims of corporation, and obtained second report on share activity involving corporation — Receiver brought motion for order allowing innocent shareholders to provide first report to their employees or their counsel, directing receiver to waive privilege with respect to second report and authorizing receiver to provide copy of second report to U.S. Attorney and to class action plaintiffs — Chambers judge declared that receiver was in common interest privilege with class action plaintiffs and directed receiver to provide first report to counsel for plaintiffs — Chambers judge also authorized receiver to release second report to U.S. Attorney without waiving privilege, and permitted receiver to release second report to any entities with which receiver was satisfied it shared common interests against common adversaries — Appeal allowed in part — Court should decline to provide advice and direction when to do so would substantively impact proceedings properly in another jurisdiction — Questions of common interest privilege and general waiver related entirely to actions in Ontario and U.S. — Chambers judge's order was proper to extent that it authorized receiver to release reports to certain parties if to do so would be in best interests of corporation's estate — No reason was put forward as to why receiver and class action plaintiffs could not apply to courts in Ontario and U.S. for determination of common interest privilege and waiver issues — Limits exist on when court should provide advice and directions under Pt. 33 of Alberta Rules of Court — Power of court to make declaratory judgments under s. 11 of Judicature Act is discretionary and should be exercised with "great care and caution" — Chambers judge should have declined to give advice and direction as to existence of common interest privilege and general waiver — Judicature Act, R.S.A. 1980, c. J-1, s. 11 — Alberta Rules of Court, Alta. Reg. 390/68, Pt. 33.

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YBM Magnex International Inc., Re (1999), 75 Alta. L.R. (3d) 99, 15 C.B.R. (4th) 140, (sub nom. *YBM Magnex International Inc. (Receivership), Re)* 252 A.R. 165 (Alta. Q.B.) — referred to

Statutes considered:

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s. 18(d) [en. 1921, c. 17, s. 18] — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
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Business Corporations Act, S.A. 1981, c. B-15
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s. 234 — considered

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Judicature Act, R.S.A. 1980, c. J-1
s. 11 — considered

Rules considered:

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Generally — considered

Pt. 33 — considered

R. 409 — considered

R. 410 — considered

R. 410(e) — considered

APPEAL from order reported at (2000), 264 A.R. 275 (Alta. Q.B.), providing advice and directions to receiver.

The judgment of the court was delivered by *Wittmann J.A.*:

INTRODUCTION

1 This is an appeal by Griffiths McBurney & Partners ("Griffiths"), National Bank Financial Inc. ("National"), Canaccord Capital Corporation ("Canaccord") and Parente Randolph Orlando Carey and Associates ("Parente") from the Order of Paperny, J. dated April 17, 2000. Ernst & Young YBM Inc., the Receiver of YBM Magnex International Inc. (the "Receiver") and the plaintiffs in three different class actions (the "Class Action Plaintiffs") applied for advice and direction in respect of certain reports known as the 3(o) Report and the Miller Tate Report, which were prepared on the direction of, and on behalf of, the Receiver regarding the business and affairs of YBM Magnex International Inc. ("YBM").

2 The learned chambers judge declared that the Receiver was in common interest privilege with the Class Action Plaintiffs and therefore could provide the 3(o) Report to counsel for those parties, on such terms and conditions as the Receiver deemed appropriate. She also authorized the Receiver to release the Miller Tate Report to the U.S. Attorney without waiving any privilege that exists with respect to that report on the basis that the waiver of privilege was limited to that document and is not a general or wider waiver of privilege. Finally, she held that if the Receiver was satisfied that it shared common interests with other entities against common adversaries on a particular issue, with benefit accruing to YBM's estate as a whole, the Receiver was authorized to release the Miller Tate Report to those entities on terms and conditions it deemed appropriate.

FACTS

3 YBM is an Alberta corporation which traded on the Toronto Stock Exchange until May 13, 1998 when it was cease traded by the Ontario Securities Commission after a raid at YBM's head office in Pennsylvania by a United States Organized Crime Strike Force.

4 YBM made a public offering of shares in a prospectus dated November 17, 1997. The share issue was underwritten by two lead underwriters, Griffiths and National, and three junior underwriters including Canaccord. The five underwriters (collectively the "Underwriters") entered into an Underwriting Agreement dated November 17, 1997 with YBM regarding the prospectus. The Underwriting Agreement contained indemnity provisions whereby YBM agreed to indemnify the Underwriters against all losses (other than loss of profits), claims, damages, liabilities, costs or expenses caused by, among other things, any statement which constituted or is alleged to have constituted a misrepresentation or material omission in YBM's offering documents or company information records. YBM also agreed to reimburse the Underwriters promptly, on demand, for any

legal or other expenses reasonably incurred by the Underwriters in connection with investigating or defending any such losses, claims, damages, liabilities or actions in respect of any claims alleging such misrepresentations as incurred.

5 Parente was the auditor of YBM from 1995 until mid-1997.

6 Connor Clark & Lunn Investment Management Ltd. ("Connor Clark") is a Vancouver-based investment management firm. In 1998, Connor Clark retained VC & Co. International ("VC") for advice with respect to YBM. At the time of the engagement of VC, Connor Clark, on behalf of its institutional and other clients, had acquired approximately 14.4% of YBM's outstanding shares. A controlling shareholder of VC was appointed as YBM's Chairman of the Board of Directors on September 23, 1998.

7 On December 8, 1998, YBM brought an application in the Court of Queen's Bench to have Ernest & Young YBM Inc. appointed as the Receiver of YBM. Ernst & Young YBM Inc. was appointed as the receiver of YBM by court order (the "Receivership Order"). Following the appointment, the Receiver appointed Stikeman Elliott to act as counsel for the Receiver.

8 On June 7, 1999, YBM, through its Receiver, pleaded guilty in the United States to a multi-object conspiracy to commit fraud (the "Guilty Plea Agreement"). In the Guilty Plea Agreement, YBM admitted to committing overt acts intended to deceive its auditors. Parente was one of those deceived auditors. Also, pursuant to the Guilty Plea Agreement, YBM agreed to cooperate with the U.S. Attorney by providing complete and accurate information. However, the provision of information to the U.S. Attorney was stated to be subject to attorney work product privilege.

9 The fraud and guilty plea have resulted in the following litigation:

> 1. An as yet, uncertified class action in Ontario, in which Connor Clark is Plaintiff, which alleges that certain misrepresentations were made in a short form prospectus filed by YBM dated November 17, 1997 (the "Ontario Prospectus Class Action");
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> 2. An as yet, uncertified class action in Ontario, asserting claims for persons in Canada who suffered losses trading YBM shares in the secondary market between March 10, 1996 and May 14, 1998 (the "Ontario General Class Action"); and
>
> 3. A consolidated class action in the United States, on behalf of all purchasers (not limited to the U.S.) of YBM common stock between January 19, 1996 and May 14, 1998, as represented by the Plaintiff's Executive Committee (the "U.S. General Class Action").

10 Each of the Underwriters, through their counsel, wrote to the Receiver and advised of their intention to assert their contractual indemnity rights against YBM under the Underwriting Agreement. The Receiver advised the Underwriters that indemnity claims would be treated as part of the proof of claims process. The Receiver anticipates that the indemnity claims will be disallowed and if the dis-allowances are contested by the Underwriters, there will be litigation as to whether the indemnity provisions in the Underwriting Agreement are enforceable. Parente has filed a proof of claim with the Receiver.

11 Paragraph 3(o) of the Receivership Order appointing the Receiver authorized the creation of the 3(o) Report. Ernest & Young, an affiliate of the Receiver, had certain audit and other business relationships with parties against which YBM may have potential causes of action. For this reason, the Receiver retained the law firms of Stikeman Elliott and Voorheis & Co. to assist the Receiver in the analysis of potential legal claims which YBM may have and to assist in the development of a plan to present the analysis to YBM stakeholders, subject to court direction, pursuant to section 3(o) of the Receivership Order.

12 On October 26, 1999, the Receiver sought an Order confirming that the 3(o) Report was privileged in the hands of the Receiver and that the provision of the 3(o) Report to certain specified individuals would not constitute waiver of privilege to the 3(o) Report. Paperny J. ruled that the Receiver was permitted to provide a copy of the 3(o) Report to institutional shareholders and shareholders who were not a party to the fraudulent acts of YBM (the "Innocent Shareholders"), subject to specific terms.

13 To ensure that privilege and confidentiality were maintained for the 3(o) Report, the October 26, 1999 Order required that the Innocent Shareholders execute an Acknowledgement of Privilege and Undertaking of Confidentiality (the "Undertaking").

The Undertaking provided that the 3(o) Report was received by the Innocent Shareholders only for the purposes of assessing and pursuing causes of action on behalf of YBM. The undertaking also expressly provides that the 3(o) Report will not be used by the receiving party, directly or indirectly, for any purpose other than evaluating potential causes of action on behalf of the estate of YBM.

14 On January 24, 2000, the Receiver filed a Notice of Motion seeking, among other things, an Order allowing the Innocent Shareholders to provide the 3(o) Report to their employees and/or their counsel provided that those individuals were approved by the Receiver, and provided they executed and delivered an Undertaking to the Receiver.

15 The Receiver engaged Miller Coffey Tate LLP, a firm of Certified Public Accountants and Consultants, to prepare a draft report on share activity involving YBM (the "Miller Tate Report"). As part of the January 24, 2000 Motion, the Receiver sought an Order:

> 1. Directing the Receiver to waive privilege, if any, with respect to the Miller Tate Report on the basis that the waiver is limited to that document.
>
> 2. Authorizing the Receiver to provide a copy of the Miller Tate Report to the representatives of the U.S. Attorney for the Eastern District of Pennsylvania on the basis of the express acknowledgement by the U.S. Attorney of the limited nature of the waiver.
>
> 3. Authorizing the Receiver to provide a copy of the Miller Tate Report to the Class Action Plaintiffs on terms and conditions satisfactory to the Receiver, including an express acknowledgement of the limited nature of the waiver of privilege, the application of the doctrine of absolute and qualified privilege to the document as if produced as an expert's report in litigation and that all parties and their counsel undertake not to use the document or the information contained in it for any purposes other than those of the proceeding or proceedings specified.

16 On June 14, 2000, a United States Bankruptcy Judge in the Eastern District of Pennsylvania modified the stay of proceedings imposed by the United States Bankruptcy Court for the Eastern District of Pennsylvania on February 1, 1999 to allow certain parties including Parente to assert claims against YBM in the U.S. General Class Action. Apparently, this decision is under appeal. Also, on July 14, 2000, the plaintiffs in the U.S. General Class Action filed a motion for an application to have the stay of proceedings against YBM lifted.

COMMON INTEREST PRIVILEGE

17 Litigation privilege, sometimes called legal professional privilege, protects documents from disclosure during litigation provided the dominant purpose of the creation of the documents is to submit the documents to a lawyer for advice and use in current or anticipated litigation: *Nova, an Alberta Corp. v. Guelph Engineering Co.*, [1984] 3 W.W.R. 314 (Alta. C.A.). For example, a lawyer's client obtains the written opinion of an expert to give to his lawyer to further the anticipated or current litigation.

18 Common interest privilege extends the litigation privilege where the document or information has been shared with a third party (other than the client and the lawyer) provided that third party has a common interest with the client in the same anticipated or current litigation. This general principle was first articulated in *Buttes Gas & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (Eng. C.A.) where Denning, L.J. stated that it is a privilege in aid of anticipated litigation where several person have a common interest. They independently may prepare documents for their own lawyer. The exchange of those documents among and between those having a common interest does not operate to waive the litigation privilege.

DECISION BELOW

19 In the decision below, the learned chambers judge referred to her decision of October 25, 1999,(1999), 75 Alta. L.R. (3d) 99 (Alta. Q.B.), in which she concluded that common interest privilege may attach to documents shared by parties with common interests even if the parties were also adverse in interest in some respects and that unusual circumstances present here

meant that adversarial aspects did not preclude a finding of common interest privilege. In the October 26, 1999 Order, Paperny J. directed that the Receiver be permitted to provide the 3(o) Report to the Innocent Shareholders subject to terms.

20 Paperny J. began by reviewing the law regarding common interest privilege. She adopted the law as set out in her October 25, 1999 decision and highlighted the decisions in *Supercom of California v. Sovereign General Insurance Co.* (1998), 37 O.R. (3d) 597 (Ont. Gen. Div.), *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), and *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 50 Alta. L.R. (3d) 131 (Alta. Q.B.). She concluded [at paragraph 36] "I accept the test as outlined in *Buttes* and refined in *Chrusz* and *Supercom*. There will be a common interest where parties anticipate litigation against a common adversary or share a united front against a common foe on the same issue."

21 She then went on to determine whether common interest privilege applied as between the Receiver and the Class Action Plaintiffs. She began by noting that since any adversity between the Receiver and the Class Action Plaintiffs was latent, they were not adverse in interest. She further found that Griffiths, National, Canaccord and Parente were adverse in interest with the Receiver since they were demanding indemnification and other benefits from the Receiver which the Receiver was assessing and might resist.

22 The learned chambers judge concluded by holding that the Receiver had the authority and discretion to distribute the 3(o) Report.

23 The learned chambers judge then went on to consider the issue of whether release of the Miller Tate Report to certain parties would constitute a general and wider waiver of privilege. She authorized the Receiver to release the Miller Tate Report to the U.S. Attorney without such release operating as a general waiver of the Receiver's privilege over that report. She also authorized the Receiver to release the Miller Tate Report on terms and conditions it deemed appropriate to the parties with whom it was satisfied it shared common interests against common adversaries on a particular issue.

24 In the result, Paperny J. held that assuming, without deciding, that the 3(o) Report was privileged, common interest privilege exists among the Receiver and the Class Action Plaintiffs such that there would be no general waiver of privilege should the Receiver decide to release the 3(o) Report and therefore the Receiver was permitted to use its discretion to distribute the 3(o) Report. She also held that the Receiver was permitted to use its discretion in deciding whether to distribute the Miller Tate Report.

ISSUE

25 The issue to be determined is whether the learned chambers judge erred in making the order as worded since it impacts the Ontario Prospectus Class Action, the Ontario General Class Action and the U.S. General Class Action. Stated another way, should the issues of common interest privilege and waiver between the Receiver and the Class Action Plaintiffs, and general waiver of privilege over the Miller Tate Report be determined only by courts in the jurisdictions in which the actions were commenced by the Class Action Plaintiffs?

ANALYSIS

(i) Nature of a Court-Ordered Receivership

26 In determining whether the learned chambers judge erred in making the order as worded since it impacts proceedings in other jurisdictions, it is useful to note the functions, powers and obligations of a court-ordered receiver.

27 In ***Bennett on Receiverships***, 2d ed. (Toronto: Carswell, 1999), the author [at page 1] defines a receiver as "a person who has been appointed to take possession of property belonging to a third party." One method by which a receiver may be appointed is by court order, as is the case here. The court order appointing the receiver sets out the receiver's powers and duties. In addition to the powers and duties set out in the court order, the receiver also has any powers and duties provided for in any relevant statute. In this case, the Receiver was appointed by the court pursuant to s.234 of the ***Business Corporations Act***, SA

1981, c. B-15 ("***ABCA***"), and therefore, it is bound by the powers and duties provided in the ***ABCA***, in addition to those set out in the Receivership Order.

28 Paragraph 1 of the Receivership Order provided for the appointment of the Receiver and its primary duties. It appointed the Receiver with respect to the present and future assets, property and undertaking of YBM wherever situate with authority to receive, preserve, protect realize and sell or otherwise dispose of the property and at its discretion, to oversee the operation of YBM. Paragraph 3 set out specific powers that the Receiver may exercise.

29 It is common for a Receivership Order to contain a clause empowering it to make applications to the court for advice and direction. Paragraph 23 of the Receivership Order authorizes the Receiver to apply to the court for advice and direction regarding the exercise of its powers and duties under the Receivership Order. Paragraph 3(o) specifically permits the Receiver to seek the direction of the court regarding a mechanism and methodology for releasing the 3(o) Report to relevant stakeholders on a confidential basis.

30 In ***Bennett on Receiverships***, ***supra***, the author notes [at 166] that a court appointed receiver as an officer of the court, "must discharge its duties properly and is afforded protection on any motion for advice and direction." He describes the scope of the power of the receiver to apply to the court for advice and directions as follows at page 209:

> [a] receiver may initiate on its own behalf a motion for advice and directions if it relates to the receiver's administration, the powers and performance of duties including custody of assets, their disposition and approval of settlements. ... [I]f a motion is brought for advice and direction where the court is requested to adjudicate a dispute between the receiver and some third party, the court may turn the motion for directions into a substantive motion since the receiver is taking an adversarial position.

31 The purpose behind granting a receiver the ability to apply to the court for advice and direction was noted in *National Trust Co. v. Christian Community of Universal Brotherhood Ltd.*, [1941] S.C.R. 601 (S.C.C.). In that case, a court appointed receiver applied to the court under the ***Farmer's Creditors Arrangement Act*** for advice and direction with respect to whether it could accept a proposal. In the course of its judgment, the Supreme Court of Canada considered the purpose of a procedure which allows a receiver to apply to the court for advice and direction. At 613, the Court stated:

> [t]he purpose of the procedure is to enable the Official Receiver to obtain directions as to his own acts in the course of administration for his own protection and for the orderly conduct of the administration; it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding.
>
> It does not follow, of course, that on an application for directions, when all parties are present, questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way and the hearing of an application for directions in a particular case may be a convenient occasion for dealing with such questions, and there can be no objection to such a course when proper care is taken to see that everybody concerned is fully represented and has a full opportunity of bringing out the facts and presenting his case.
>
> [emphasis added]

32 In summary, a receiver is given the ability to apply to the court for advice and direction to ensure proper and timely administration of the estate, as well as to protect itself through court authorization of certain actions it wants to take in the course of the fulfilment of its duties under the receivership order. The court may also make substantive rulings in circumstances where the receiver takes an adversarial position against a third party where all affected parties have had the opportunity to present their case.

(ii) Exercise of the Power to Give Advice and Direction to a Receiver

33 Although a receiver may be empowered to seek the advice and direction of the court, there are circumstances where the court should decline to provide it.

1. Impact on Proceedings in Another Jurisdiction

34 One circumstance in which a court should decline to provide advice and direction is when that advice and direction would substantively impact proceedings in another jurisdiction which are properly before the court in that other jurisdiction. That circumstance exists here. The court should refuse to provide advice and direction on matters that do not directly relate to the receivership. The receiver and other parties seeking advice and direction should apply in the court where the proceedings have been commenced for rulings as to matters that relate directly and substantively to those proceedings.

35 In *Abacus Cities Ltd., Re* (1981), 128 D.L.R. (3d) 566 (Alta. Q.B.), the Attorney-General of Ontario brought a prosecution in Ontario against the employee of a bankrupt corporation, an Alberta company. The Attorney-General asked the trustee in bankruptcy to waive privilege to certain communications between the company and its solicitor. The trustee made an application for advice and direction to the Court of Queen's Bench of Alberta. MacDonald J. authorized the trustee to waive privilege if there would be no prejudice to the interests it represented. However, he refused to give advice and direction as to whether any privilege actually existed. At page 280, he stated

> . . . this court can make no decision with respect to the proceedings in Ontario nor with respect to the admissibility of evidence and neither with respect to the existence or non-existence of solicitor-client privilege. All this is within the jurisdiction of the court seized with the hearing. The only matter that it may be proper for this court to consider is the attitude the trustee should take with respect to waiver should it be determined in Ontario that communications between the solicitors and the bankrupt are subject to privilege in proceedings against Mr. Rogers.
>
> [emphasis added]

36 MacDonald J. concluded at 284 by stating:

> I do not consider that an order should go directing the trustee to waive privilege as there may be circumstances of which this court has no knowledge, but an order will go authorizing the trustee to waive privilege and suggesting he do so, if he has no reason to believe that such waiver would be to the prejudice of the interests that he represents.
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> [emphasis added]

37 Paperny J.'s April 17, 2000 Order, in part, stated as follows:

> 1. The Receiver is authorized but not directed that in its discretion, and on terms and conditions the Receiver deems appropriate, it may waive privilege, if any, with respect to the Miller Tate Share Report on the basis that the waiver of privilege is limited to that document and is not a general or wider waiver of privilege, and it may provide the Report to representatives of the U.S. Attorney for the Eastern District of Pennsylvania if the Receiver considers that to do so would be in the best interests of the YBM estate as a whole.
>
> 2. The Receiver is in common interest privilege with the plaintiffs in the Ontario Prospectus Class Action, the Ontario General Class Action and the U.S. Class Action, and the Receiver may in its discretion if it considers to do so would be for the benefit of the receivership estate, and without waiving privilege if it exists, provide the 3(o) Report to counsel for those parties, on such terms and conditions the Receiver deems appropriate, including without limitation the condition that counsel execute and deliver to the Receiver the Acknowledgement of privilege and Undertaking of Confidentiality substantially in the form required by the Order of October 26, 1999 as amended for the particular recipient in a manner satisfactory to the Receiver prior to receipt of the Report.
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> [emphasis supplied]

38 It is clear that Paperny J.'s order went further than merely authorizing the Receiver to release the reports in question. She held that release of the Miller Tate Report will not constitute waiver to the documents that underlie that report, and declared the Receiver is in common interest privilege with the Class Action Plaintiffs and therefore it may release the 3(o) Report to the

Class Action Plaintiffs without waiving privilege in respect of it. She made declaratory orders which determine the existence or non-existence of common interest privilege and the conditions which prevent a general waiver of privilege. The April 17, 2000 Order is not merely permissive. It may be used, or an attempt may be made to use it, authoritatively, in the proceedings in Ontario and Pennsylvania.

39 The facts in *Abacus Cities Ltd.* and the present case are not strictly analogous. In *Abacus Cities Ltd.*, the trustee in bankruptcy applied for advice and direction which did not relate to the bankruptcy proceedings in Alberta but rather arose in response to a prosecution in Ontario. MacDonald, J. described the nature of the Ontario prosecutor's request in respect of charges brought in Ontario against a former officer and employee of the bankrupt, Kenneth D. Rogers at p.280:

> Counsel for the Attorney General of Ontario engaged to conduct the preliminary hearing into the charges has asked the trustee whether or not the trustee is prepared to waive privilege in connection with certain communications between the then solicitors for the bankrupt and the bankrupt, in order that the communications may be introduced in evidence at the preliminary hearings.

40 Here, the Receiver's application relates to an Alberta receivership, but the questions of whether common interest privilege exists between the Receiver and the Class Action Plaintiffs, and whether release of the Miller Tate Report constitutes a general waiver relate entirely to the actions in Ontario and Pennsylvania. No doubt the questions are of great concern to the Receiver in assessing whether or not to release the reports, but they do not relate to the receivership as it is being carried out by the Receiver in Alberta. These questions relate to the personal actions that the shareholders of YBM have against various parties as a result of the acts and omissions of YBM and others. The reason that the Receiver and the Class Actions Plaintiffs applied to the Alberta court for a ruling as to whether the Receiver could release the reports to the Class Action Plaintiffs was so that the reports could be released without waiving privilege. The purpose of the application is to allow the Receiver to release to the report without waiver of any privilege. It is clear that the Receiver and the Class Action Plaintiffs expect the April 17, 2000 Order and the Reasons of the learned chambers judge to be used in the Ontario and Pennsylvania proceedings. If the existence of common interest privilege and waiver were to be put in issue in Ontario and Pennsylvania, they may argue, among other things, that the issue has been decided in Alberta and therefore the matter is ***res judicata***.

41 The question of whether the Receiver is authorized to release the reports is properly before this court as it relates to the receivership. To the extent that the learned chambers judge authorized the Receiver to release the reports to certain parties if to do so would be in the best interests of YBM's estate, her order was properly made. However, she went on to make declaratory orders with respect to existence of common interest privilege and the nature of the waiver of privilege now contemplated to relate only to the actions in Ontario and Pennsylvania. In *Abacus Cities Ltd.*, the court recognized the notion that it should be the court that will actually determine the outcome of an action that should determine the existence and status of any privilege alleged.

42 No convincing reason has been put forward as to why the Receiver and the Class Action Plaintiffs could not apply to the courts in Ontario and Pennsylvania for a determination as to whether there is common interest privilege and whether release of the Miller Tate Report would constitute a general waiver. It was argued that the Receiver cannot do it because it is not a party to those proceedings. It was not suggested the Receiver could not participate if it chose to do so, particularly if the Class Action Plaintiffs bring the application.

43 Also, an issue arises as to whether a court in Ontario or Pennsylvania is bound to or will in fact obey an order of the Alberta court. Although arguments of abuse of process, estoppel and res judicata could be made to support upholding the decision of the Alberta court, the Ontario and Pennsylvania courts may determine they are masters of their own procedure, unfettered by a decision of an Alberta court.

44 An Alberta court generally should not make orders that it cannot enforce. The declaratory orders made are for use only outside this jurisdiction. An Alberta court should decline to make such orders. The courts which have proper jurisdiction over the relevant proceeding should deal with these issues.

45 If the Receiver wants to provide a copy of the 3(o) Report to the Class Action Plaintiffs without waiving any privilege that may attach to that report or release the Miller Tate Report without such release constituting a general waiver, it should seek such an order from the courts in the jurisdictions in which the actions have been brought, or await the Class Action Plaintiffs seeking and obtaining the ruling.

2. Legal Advice

46 Another circumstance in which the court should decline to provide directions is when the receiver is effectively using the court as a legal adviser. That circumstance is present here. The Receiver has its own counsel to whom it can turn for legal advice and should not turn to the court for such advice.

47 In *Canadian Steering Wheel Co., Re* (1921), 21 O.W.N. 15 (Ont. S.C.), Canadian Steering Wheel Co. made an assignment into bankruptcy. Section 18(d) of the ***Bankruptcy Act*** allowed a trustee to apply to the court for direction regarding the administration of the estate of a bankrupt. Under the ***Act***, any directions given by the court were binding and justified the subsequent consonant action of the trustee. The trustee of the estate made an ***ex parte*** application to the court for direction regarding the status of certain officers of the company and the validity of the assignment. The court refused to provide directions, stating at page 16 that "[c]lause (d) was not by any means intended to turn the Court into a sort of solicitor for the trustees to whom they might resort for advice in an informal way whenever they happened to be in doubt as to what they should do." The court went on to state that "on the affidavits filed, and in the absence of notice, it did not seem proper or possible to give the trustee any instructions as to what in the circumstances he should do or refrain from doing."

48 In ***Bennett on Receiverships***, the author considered receivership under the ***Bankruptcy and Insolvency Act***, S.C. 1992, c. 27 (the "***BIA***"). He considered s. 249 of the ***BIA*** which authorizes a receiver to apply to the court for directions in relation to provisions of the ***BIA***. At 698, he states:

> However, the court cannot be turned into a forum for giving advice nor should the court decide substantive law matters between the parties. In these situations, the court is directing its own officer. If there are substantive issues to be tried, the receiver should not apply for directions but rather commence an action or request a trial of an issue.

49 As noted, the Receiver retained independent counsel from which it receives advice.

(iii) Other Discretionary Powers

50 A party may make an application to the court for advice and directions. In the normal course, such applications are made by way of notice of motion pursuant to Part 33 of the ***Alberta Rules of Court***. Under the ***Alberta Rules of Court***, a party may apply to the court for advice and direction by way of a notice of motion in circumstances where there are no material facts in dispute between the parties. The matter is put to the court on the basis that the facts are as stated in the motion and on that given set of facts, advice or direction is sought. Part 33 of the Rules of Court sets out the rules relating to applications made by way of notice of motion. Rule 409 authorizes the court to dispose of applications in a summary manner while Rule 410 sets out the proceedings which may be commenced by way of originating notice. Under Rule 410(e), a proceeding may be commenced by way of originating notice where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument or legislation.

51 However, the courts have recognized that there are limits on when they should provide advice and directions under the Part 33 Rules. In *Edmonton Telephones Corp. v. Stephenson* (1994), 24 Alta. L.R. (3d) 96 (Alta. Q.B.), aff'd (1994), 26 Alta. L.R. (3d) 33 (Alta. C.A.), leave to appeal dismissed, (1995), 26 Alta. L.R. (3d) 1 (S.C.C.), the applicant corporation supported by the respondent City sought certain declarations regarding the City's relationship with the corporation pursuant to s. 410(e) of the ***Alberta Rules of Court***. Ritter J. summarized the general principles that apply when a party makes an application for advice and direction from the court as:

> 1. Rule 410(e) is a discretionary rule which should be exercised with restraint.

2. The question must be real and not a theoretical question.

3. The person raising it must have a real interest to raise it.

4. The person raising the question must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

5. Once the foregoing considerations have been met, the Court should endeavour to make a practical determination as to whether there is sufficient likelihood of relevant evidence being admitted at trial which will significantly assist the Court in interpreting the words of the document or documents to warrant the expense and delay of a full trial process.

6. Voluminous evidence will not take the matter outside Rule 410(e) by itself. If there are no material facts in dispute, then the matter may be brought to the Court by virtue of affidavit or affidavits.

52 The court is also empowered to make a declaratory judgment under s. 11 of the ***Judicature Act***, R.S.A. 1980, c. J-1. In ***The Law of Declaratory Judgments***, 2d ed. (Toronto: Carswell, 1988), Lazar Sarna at page 1 defines a declaratory judgment as a judicial statement confirming or denying legal rights.

53 Section 11 is often used in conjunction with Rule 410(e) so that the court may make a declaration as to the rights of parties in a summary way where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument. See *Oracle Resources Ltd. v. Dome Petroleum Ltd.* (1988), 86 A.R. 281 (Alta. Q.B.).

54 Section 11 provides that

[n]o proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

55 The power of the court to make a declaratory judgment is limited only to the proper exercise of its discretion. This Court has recognized that its discretion to make declaratory judgments is subject to certain restrictions. In *McMurray Homes Ltd. v. Fort McMurray (Town)*, [1976] 5 W.W.R. 442 (Alta. C.A.), this Court set out parameters for the exercise of its discretion under s. 11 of the *Judicature Act*. The Court underscored the fact that the exercise of the power to make declaratory judgments was subject to restraints and noted the comments of Estey J. in *Hugh W. Simmons Ltd. v. Foster*, [1955] S.C.R. 324 (S.C.C.)where he considered the English equivalent of s. 11. Estey J. stated at page 331 that the power to grant a declaratory judgment was discretionary and should be exercised with "great care and caution." The Court cited 19 Hals. (2d) 215, para. 512, which, in part, states that

[t]he power to make a declaratory judgment is a discretionary one; the discretion should be exercised with care and caution, and with regard to all the circumstances of the case, and must be exercised judicially. The power to make a declaration will not be exercised where the relief claimed would be unlawful or unconstitutional, or inequitable for the Court to grant, or contrary to the accepted principles upon which the Court exercises its jurisdiction. The Court will not make a declaratory judgment where the declaration would be useless or embarrassing, or where an adequate alternative remedy is available.

[emphasis added]

56 It is clear that under the ***Rules of Court*** and s. 11 of the ***Judicature Act***, the courts have recognized the discretionary nature of the powers given therein and have constructed tests accordingly which limits their ability to make such orders. The courts have balanced the powers that have been given to them by the Legislature with the practicality of making such orders in particular circumstances.

57 In the same way that the courts have recognized the limits on their powers to give advice and directions and make declaratory judgments, the courts should recognize that there are limits to the circumstances in which they should give advice and directions to receivers.

DECISION AND CONCLUSION

58 The chambers judge erred in making the order as worded. She should have declined to give advice and direction as to the existence or non-existence of common interest privilege and whether release of the Miller Tate Report constituted a general wider waiver. These are matters that should properly be determined by the courts in Ontario and Pennsylvania, the jurisdictions in which the three actions have been brought.

59 A receiver may ask the court for direction as to waiving privilege, if any, and for permission and direction to distribute the documents in question.

60 Here, the authorization for the Receiver to waive privilege, if any, with respect to the Miller Tate Report and the 3(o) report was a valid exercise of the discretion of the learned chambers judge. Similarly, the authorization of the Receiver to provide the 3(o) Report to counsel for the Class Action Plaintiffs on such terms as the Receiver thinks appropriate, was a reasonable exercise of the chambers judge's discretion.

61 The learned chambers judge ought not to have made any declaration as to the existence of common interest privilege, nor the legal effect or extent of any waiver.

62 The appeal is allowed to this extent and the order varied accordingly.

Appeal allowed in part.

TAB 4

1992 CarswellAlta 206
Alberta Court of Queen's Bench

Toronto Dominion Bank v. Nova Entertainment Inc.

1992 CarswellAlta 206, [1992] A.J. No. 1266, [1993] A.W.L.D. 113, 4 P.P.S.A.C. (2d) 323, 7 Alta. L.R. (3d) 132

TORONTO-DOMINION BANK v. NOVA ENTERTAINMENT INC.

Forsyth J.

Judgment: December 8, 1992
Docket: Doc. Calgary 9201-04019

Counsel: *J.R. Houghton*, for Blue Sky Enterprises Ltd.
C.J. Shaw, for Allied Film Laboratories Inc. c.o.b. "Allied Film & Video."
B.A.R. Smith, for receiver-manager of Nova Entertainment Inc.

Subject: Insolvency; Property; Contracts; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Contracts --- Consideration — What constitutes consideration — Release of legal right — Forbearance (to endorse legal rights) — General

Personal Property Security --- Attachment of security interest — General rules — Security agreements — General

Personal property security — Security interests under Personal Property Security Acts — Validity and enforceability — First company advancing funds to defendant company — Defendant subsequently granting personal property security to first company — At same time defendant and first company entering into agreement with third company whereby third company would advance funds to defendant and first company would postpone its claim to that of third company — Personal Property Security Act definition of "value" including past indebtedness — Forbearance to sue also constituting consideration.

Personal property security — Security interests under Personal Property Security Acts — Operation of legislation — First company advancing funds to defendant company — Defendant subsequently granting personal property security to first company — At same time defendant and first company entering into agreement with third company whereby third company would advance funds to defendant and first company would postpone its claim to that of third company — Personal Property Security Act definition of "value" including past indebtedness.

Contracts — Formation of contract — Consideration — Sufficiency — First company advancing funds to defendant company — Defendant subsequently granting personal property security to first company — At same time defendant and first company entering into agreement with third company whereby third company would advance funds to defendant and first company would postpone its claim to that of third company — Personal Property Security Act definition of "value" including past indebtedness — Forbearance to sue also constituting consideration.

B. Co. owned all of the outstanding capital of the defendant company. After B. Co. had advanced approximately $800,000 to the defendant, the defendant granted B. Co. a general security agreement covering all present or after acquired personal property. The agreement was registered at the Personal Property Registry. At the same time, the defendant entered into a loan agreement with B. Co. and a third company which provided that the defendant would grant security to the third company in return for the advance of funds, of which a portion could be used to repay B. Co., and B. Co. would forbear any claim against the defendant and postpone its claim in favour of the third company. Over a year later the defendant went into receivership and an unsecured creditor challenged B. Co.'s security. The receiver-manager sought a direction as to the validity of B. Co.'s security.

Held:

Security valid.

The definition of "value" in the *Personal Property Security Act* has been expanded to include past indebtedness. Even if that was not the case, forbearance to sue may well constitute consideration. B. Co., recognizing the situation that existed, forbore taking any steps to try and recover its indebtedness, recognizing that by doing so an injection of capital into the defendant would take place and hopefully help the defendant to continue its operation. The matter was not argued on the basis of a fraudulent preference. In the circumstances nothing turned on the fact that there was no evidence to suggest that it was in the contemplation of the parties at the time of the original loans from B. Co. that some form of security would be taken in the future.

Table of Authorities

Cases considered:

O'Brien v. Stebbins, [1927] 2 W.W.R. 176, 21 Sask. L.R. 478, [1927] 3 D.L.R. 274 (C.A.)*applied*

Statutes considered:

Personal Property Security Act, S.A. 1988, c. P-4.05

s. 1(1)(tt) [am. 1990, c. 31, s. 2]*considered*

Application by receiver-manager for direction as to validity of security.

***Forsyth J.* (orally):**

1 This application comes before me by the Receiver Manager of the undertakings, property, and assets of the Defendant, in which the Receiver Manager is seeking advice and directions as to the disposition of surplus monies realized from its liquidation of the Defendant. In particular the Receiver Manager is asking for a direction as to the validity of certain security granted by the Defendant, and if such security is valid, an order authorizing the Receiver to make disbursements thereunder.

2 The application of the Receiver Manager on the one hand has the support, or at least it is argued forceably by the "secured creditor", that its security is valid and that it is entitled to the surplus monies so realized. It is opposed vigorously by one of the ordinary creditors, but a creditor who is owed a substantial amount of money by the Defendant corporation, something in the order of $120,000. The secured creditor Blue Sky owns all of the issued and outstanding capital of the Defendant. It is alleged that as of July 28th, 1992, the Defendant owed Blue Sky a sum of approximately $800,000, incurred through a series of advances by repayments to Blue Sky made during the period commencing June of 1987, and ending in June 1990. On or about November 29th, 1990, the Defendant granted a general security agreement in favour of Blue Sky. The security seeks to

create a security interest over all of the present and after acquired personal property of the Defendant and secures all of the Defendant's indebtedness in favour of Blue Sky. The security was registered on December 19, 1990 at the Personal Property Registry in accordance with the provisions of the *Personal Property Security Act*, S.A. 1988, c. P-4.05. Concurrently with granting of the security the Defendant entered into a loan agreement with Blue Sky and Vencap Equities Alberta Ltd. which provided, inter alia, that:

3 (a) the Defendant would grant security to Vencap;

4 (b) Vencap would advance $600,000 to the Defendant; and

5 (c) the Defendant would use the advance of $600,000 to repay Blue Sky the sum of $61,000 but thereafter Blue Sky would forebear any claim it had against the Defendant and postpone and subordinate its claim in favour of Vencap's claim.

6 The creditor challenging this arrangement became involved with the Defendant in January, 1992, when it reached agreement to sell goods to the Defendant. Certain goods in February 1992 were delivered to the Defendant and as of the date of the Defendant's receivership, which is March 6, 1992, a substantial debt had been incurred. At first blush one would ordinarily consider whether of not in light of the non-arm's-length position between the Defendant and Blue Sky, whether a fraudulent preference had been involved in this case, but the matter was not argued on that basis. No evidence was forthcoming to support either the insolvency of the Defendant a the time of the loan agreement, or to challenge that position directly. Rather argument proceeded on the basis that there was no consideration given for the security agreement entered into between the parties. In addition it was argued there was no evidence, or the evidence was suspect, that the advances made by Blue Sky constituted a loan. It was further argued that there was no evidence that at the time of the advances Nova undertook or agreed that, at some future date, it would grant Blue Sky security for the advances. I think it is clear that there is no such evidence with respect to the latter proposition, but in my judgment nothing turns on that. There is affidavit evidence before me, uncontradicted, which indicates inter alia a series of cash injections made to the Defendant by Blue Sky commencing in June, 1987 and terminating in September 8, 1989, and in addition evidence by way of affidavit also uncontradicted, which indicates repayments to the shareholders concerning those loans commencing July, 1989 and continuing until October, 1990. Furthermore this affidavit evidence, made by a chartered accountant who has reviewed the books of Blue Sky, leads one to conclude in the absence of any evidence to the contrary, the advances were made as loans and should be so treated. I am not satisfied that anything turns, as I indicated previously, on the fact that there is no evidence to suggest that it was in the contemplation of the parties at the time of the original loans, that some form of a security would be taken in the future. But in my judgment nothing turns on that in the circumstances. Further there is nothing to suggest that the technical requirements of the Act have not been fully complied with, including registration and documentation. A further issue that was raised, however, was whether or not any considera tion was given for the security in question, particularly in light of the fact that it is clear from the evidence and is clear in common law, past consideration is no consideration. However, when one turns to the definition of "value" as defined in s. 1(1)(*tt*) of the P.P.S.A. defines value as:

> (*tt*) "value" means any consideration sufficient to support a simple contract, and *includes an antecedent debt or antecedent liability*. [italics are mine]

In short, the definition of "value" on my reading the section has been expanded from that of consideration in a simple contract to include past indebtedness. Even if that is not the case I am satisfied on a review of the authorities that forebearance to sue may well constitute consideration or the entering into an agreement for some form of security inter alia. Support for that proposition is found in the case of *O'Brien v. Stebbins*, [1927] 2 W.W.R. 176, 21 Sask. L.R. 478, [1927] 3 D.L.R. 274, a decision of the Court of Appeal of Saskatchewan, where the court in that decision stated at p. 180 [W.W.R.], after referring to a quotation from an English judgment of Justice Parker, Justice Lamont in the Saskatchewan Court of Appeal states:

> The authorities, in my opinion, support the proposition that, where a creditor grants an extension of time for payment of the past due debt, and at the same time obtains from the debtor security for the debt, the proper inference to be drawn in the absence of evidence to the contrary is that the extension was granted as a result of the creditor's obtaining the security ...

I am satisfied that in this case, while one must be cautious in light of the non-arm's-length relationship between the parties, Blue Sky, recognizing the situation that existed, forbore taking any steps to try to recover its indebtedness, recognizing that by so doing an injection of capital from Vencap would take place and hopefully continue the operation. That in my view was sufficient consideration under standard contract law. In any event it is clearly consideration under the definition of value as contained in the P.P.S.A.

7 Under all the circumstances I conclude, based on the evidence before me in the form of affidavits which are not contradicted, that the security granted to Blue Sky constituted good and valid security as against all parties including ordinary creditors and accordingly my advice and direction to the Receiver Manager is that he is at liberty to distribute the surplus proceeds to the beneficiary under the security, namely Blue Sky.

Security valid.

End of Document

TAB 5

1986 CarswellAlta 434
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Invictus Financial Corp.

1986 CarswellAlta 434, 37 A.C.W.S. (2d) 157, 42 Alta. L.R. (2d) 181, 61 C.B.R. (N.S.) 238, 68 A.R. 207

ALBERTA TREASURY BRANCHES v. INVICTUS FINANCIAL CORPORATION LTD. et al.

Stratton J.

Judgment: January 8, 1986
Docket: Edmonton No. 8303-13970

Counsel: *D. Simpson*, for city of Red Deer.
D. Tkachuk, for receiver Coopers & Lybrand.
D.G. Milen, for city of Lloydminster.
P.G. Yearwood, for Workers' Compensation Board.

Subject: Corporate and Commercial; Insolvency; Employment; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Employment Law --- Workers' compensation legislation — Employer assessments — Enforcement — Priorities — General

Employment Law --- Workers' compensation legislation — Employer assessments — Enforcement — Priorities — Liens

Secured creditors — Debentures — Lien or charge — Municipal taxes — Priorities — Workers' Compensation Act (Alberta) giving board fixed and continuing charge in priority to municipalities' tax claims and claims of debenture holder and receiver — Municipality L. ranking second for pre-receivership taxes — Municipalities L. and R. ranking third for post-receivership taxes — Receiver liable for post-receivership taxes and entitled to recovery from debtor's assets in priority to debenture holder.

Receivers — Liability — Court-appointed receiver carrying on business being liable for post-receivership taxes — Receiver entitled to recovery from assets of business in priority to debenture holder.

A court-appointed receiver-manager brought an application to the court for its advice and direction on the priority, in respect of personal property and its proceeds, of the claims of the Workers' Compensation Board of Alberta (the "board") for moneys owing to it for employer contributions, a debenture holder for moneys owing to it secured under a debenture, the claim of municipality L. for both pre-receivership and post-receivership business taxes and the claim of municipality R. for post-receivership business taxes.

Held:

Priorities determined.

The claim of the board had priority with respect to its claim over all the other parties. Municipality L. was entitled to priority over all the other parties, except the board, with respect to pre-receivership business taxes. The receiver was personally liable to each of municipalities L. and R. for the payment of post-receivership business taxes, but had the right to be indemnified therefor out of the assets of the debtor in priority to the claim of the debenture holder.

Subsection 126(1) of the Workers' Compensation Act, 1985, of Alberta creates in respect of any amount that an employer is required to pay to the board under that Act a fixed, specific and continuing charge in favour of the board on, inter alia, the property or proceeds of property in Alberta of the debtor, with such charge by virtue of s. 126(2) to be payable in priority to almost every other claim. The combined effect of ss. 120 and 283 of the Companies Act of Alberta confirm the priority of the board's claim over that of the debenture holder and any conflict between those provisions and s. 126(1) of the Workers' Compensation Act must be resolved in favour of the board, as s. 126(1) states that it applies notwithstanding any other Act and s. 126(2) gives priority to the charge created by s. 126(1).

By virtue of s. 330 of the Lloydminster Charter, where personal property, or the proceeds thereof, liable to be seized for taxes is in the possession of "any trustee", after receiving due notice from the treasurer, the trustee must pay the amount of such taxes to the treasurer in preference and priority to all other fees, charges, liens or claims. Section 330 of the Charter, although not ideally worded, is quite capable of standing on its own to create a priority for municipal business taxes. A court-appointed receiver, being a fiduciary, would fit within the term of "trustee" under s. 330.

If a receiver carries on a business, he should do so on the understanding that certain obligations must be met. Under the legislation governing both municipalities L. and R., persons carrying on or engaged in a business have the obligation to pay business taxes. A court-appointed receiver fits within the meaning of that term. The receiver is entitled to indemnity out of the assets of the debtor for amounts properly expended by him in the execution of his duties in priority to a secured creditor for whose benefit and with whose consent the receiver was appointed.

Table of Authorities

Cases considered:

Caroma Ent. Ltd., Re (1979), 108 D.L.R. (3d) 412, (sub nom. *Caroma Ent. Ltd. v. W.C.B.)* 23 A.R. 541 (Q.B.) — *referred to*

Credit Foncier Franco-Can. v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. T.D.) [affirmed 56 W.W.R. 623n (C.A.)] — *considered*

Decker's Delicatessen, Re, 56 O.L.R. 140, 27 O.W.N. 139, 5 C.B.R. 208, [1925] 1 D.L.R. 652 (S.C.) — *applied*

Edmonton v. McMullen, [1972] 6 W.W.R. 541, (sub nom. *Re Bates Elec. Ltd.)* 17 C.B.R. (N.S.) 253 (T.D.) — *distinguished*

Fotti v. 777 Mgmt. Inc., [1981] 5 W.W.R. 48, 9 Man. R. (2d) 142 (Q.B.) — *applied*

Kowal (Robert F.) Invt. Ltd. v. Deeder Elec. Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.) — *referred to*

Royal Bank of Can. v. 238842 Alta. Ltd.; Saskatoon v. Mowbrey Stout Ltd., [1985] 5 W.W.R. 373, 20 D.L.R. (4th) 450, 40 Sask. R. 177, affirming [1984] 2 W.W.R. 71, 51 C.B.R. (N.S.) 47, 25 M.P.L.R. 169, 29 Sask. R. 117 (C.A.) — *applied*

W.C.B. v. Prov. Treas. of Alta. (1967), 59 W.W.R. 298, (sub nom. *W.C.B. v. R.)* 61 D.L.R. (2d) 21 (Alta. C.A.) — *referred to*

Statutes considered:

Companies Act, R.S.A. 1980, c. C-20

s. 120(1) [re-en. 1983, c. 21, s. 4]

s. 283(1) [am. R.S.A. 1980 (Supp.), c. E-10.1, s. 117], (2)

Lloydminster Charter,

s. 2(v)

s. 258

s. 260

s. 302

s. 311

s. 319(2)

s. 325

s. 330

s. 331

Municipal Taxation Act, R.S.A. 1980, c. M-31

s. 80(1)

s. 124(2)

s. 125(1), (2)

s. 128

s. 136

s. 137(1)

Workers' Compensation Act, S.A. 1981, c. W-16

s. 126 [re-en. 1984, c. 68, s. 35]

s. 127(2) [en. 1984, c. 68, s. 36]

Authorities considered:

Kerr on Receivers, 16th ed. (1983), p. 210.

Application by court-appointed receiver-manager for advice directions on claims for priority.

***Stratton J.*:**

1 The present application is brought by the court-appointed receiver-manager for advice and direction pursuant to s. 18 of a receivership order of this court dated 25th April 1983 to determine the priority of the respective claims of four parties, namely, the Workers' Compensation Board, the city of Lloydminster, the city of Red Deer and the Province of Alberta Treasury Branches.

2 The claim of the Workers' Compensation Board is for moneys owing to it for employer contributions.

3 The claim of the Treasury Branches is for moneys owing to it secured under a debenture.

4 The claim of the cities of Red Deer and Lloydminster is with respect to business taxes that have not as yet been paid to them.

5 The taxes owing to the city of Red Deer were incurred after the receivership commenced.

6 The city of Lloydminster claims for both pre-receivership and post-receivership business taxes.

The Claim of the Workers' Compensation Board

7 The claim by the Workers' Compensation Board (the "board") of priority for the amounts owed to it must succeed.

8 An analysis of the position of the board's claim is somewhat complex as the Workers' Compensation Act underwent changes between the time the receiver was appointed and the time of the present application.

9 At the time the receiver was appointed, s. 126 of the Workers' Compensation Act, S.A. 1981, c. W-16, indicated that an amount due to the board was "*a charge* on the property or proceeds of property of the employer" (italics mine).

10 The predecessor section to s. 126 was similarly worded and interpreted as giving the board only a "floating" charge. Unless the board had "crystallized" the charge by issuing a certificate or a distress warrant prior to the appointment of the receiver, the board did not have a priority over other secured creditors (*Re Caroma Ent. Ltd.* (1979), 108 D.L.R. (3d) 412, *(*sub nom. *Caroma Ent. Ltd. v. W.C.B.)* 23 A.R. 541 (Q.B.); *W.C.B. v. Prov. Treas. of Alta.* (1967), 59 W.W.R. 298, *(*sub nom. *W.C.B. v. R.)* 61 D.L.R. (2d) 21 (Alta. C.A.)).

11 It is clear that in the instant case the board had not crystallized its claim prior to the appointment of the receiver.

12 However, this does not settle the matter. Since the time the receiver was appointed, the legislation has changed. Section 126(1) of the Workers' Compensation Act (S.A. 1981, c. W-16) now in force provides that a fixed, specific and continuing charge is created in favour of the board when any amount is due to the board by an employer. Section 126(1) reads as follows:

> 126(1) Notwithstanding anything in any other Act, any amount due to the Board by an employer
>
> (*a*) pursuant to an assessment made under this Act,
>
> (*b*) in respect of any amount that the employer is required to pay to the Board under this Act, or
>
> (*c*) on any judgment for an amount referred to in clause (*a*) or (*b*)
>
> *creates a fixed, specific and continuing charge* in favour of the Board

> (*d*) on the property or proceeds of property, whether real or personal, of the employer in Alberta, including money payable to, for or on account of the employer, whether the property, proceeds or money is acquired or is to be acquired by the employer before or after the amount becomes due, and
>
> (*e*) on any other property or proceeds of property, whether real or personal, in Alberta that is used by the employer in or in connection with, or produced by him in, the industry with respect to which he is assessed or the amount becomes due, whether the property is used or produced before or after the amount becomes due. [The italics are mine.]

13 That amended s. 126(1) did not affect the nature of the board's charge at the time the receiver was appointed as the section was not given retroactive effect. However, once the new section came into force, the board's charge ceased to be floating charge and became a fixed charge. As a result, the board is, at the present time, the holder of a fixed charge, albeit subsequent in time to that of the debenture holder.

14 Section 126(2) of the present Act makes the charge created by s. 126(1) payable in priority to almost every other amount owing:

> (2) Subject to subsection (3) and section 127, the charge created by subsection (1) is payable in priority over all writs, judgments, debts, liens, charges, mortgages, rights of distress, assignments (including assignments of book debts) and other claims or encumbrances of whatever kind of any person, including the Crown, whether legal or equitable in nature, whether absolute or not, whether specific or floating, whether crystallized or otherwise perfected or not and whenever created or to be created.

15 The limitations imposed by ss. 126(3) and 127(2) have no application to the case at bar. Therefore, the effect of s. 126(2) is to give the board a priority over the debenture holder with respect to the sums owed to the board.

16 Section 126(2) also gives the board priority over the municipalities claiming for business taxes.

17 Section 120(1) and s. 283(1) and (2) of the Companies Act (R.S.A. 1980, c. C-20) read as follows:

> 120(1) Whether either a receiver is appointed on behalf of the holder of any debentures of a company secured by a floating charge or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the floating charge, then, if the company is not at the time in course of being wound up, the debts that in every winding-up are, under the provisions of Part 10 relating to preferential payments, to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession, in priority to any claim for principal or interest in respect of the debentures.
>
> 283(1) Subject to section 100(1) of the *Employment Standards Act* in a winding-up there shall be paid in priority to all other debts
>
> (*a*) all Government or municipal taxes and rates assessed on or due by the company up to January 1 next before the date mentioned in subsection (6), but in respect of any particular tax or rate not exceeding in the whole one year's assessment, and
>
> (*b*) unless the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company, the amount of any assessment under the *Workers' Compensation Act*, the liability for which accrued before that date.
>
> (2) The foregoing debts
>
> (*a*) rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions ...

18 The combined effect of ss. 120 and 283 of the Companies Act confirms the priority of the board's claim over the Treasury Branch as the debenture holder but conflicts with s. 126(1) of the Workers' Compensation Act on the question of priority between the board's claim and those of the municipality. This conflict between the Companies Act and the Workers' Compensation Act must be resolved in favour of the board, as s. 126(1) of the Workers' Compensation Act states that it applies "notwithstanding any other Act" and subs. (2) of that section gives priority to the charge created by subs. (1).

19 Therefore, in terms of a priorities issue, the two municipalities do not rank pari passu with the board. The board's claim has priority.

The Claims of the City of Lloydminster and the City of Red Deer

20 The claims put forward by each of the cities must be treated separately, in part, as the city of Lloydminster is claiming priority for both pre-receivership and post-receivership business taxes while the city of Red Deer claims priority only for post-receivership business taxes.

Pre-Receivership Taxes

21 Counsel for the receiver based much of his argument on the provisions of the Municipal Taxation Act, R.S.A. 1980, c. M-31.

22 Lloydminster is a city which is uniquely situated on the border between Alberta and Saskatchewan. The business in question was located on the Alberta side of the border. However, because of the city's location, there was enacted the Lloydminster Charter (hereinafter referred to as "the charter") which has been approved by complementary Orders in Council in both provinces.

23 Section 380(2) of that charter provides, inter alia that, except as specifically provided for in the charter, the Municipal Taxation Act of Alberta has no application in the city of Lloydminster.

24 Certain of the relevant provisions contained in the charter parallel sections of the Municipal Taxation Act.

25 Section 128 of the Act and s. 325(1) of the charter both allow the appropriate agent to "levy the taxes with costs, by distress where such taxes remain unpaid over a certain period of time."

26 Likewise, s. 137 of the Act parallels s. 330 of the charter and indicates that where property is liable to seizure or has been seized for taxes to implement the municipality's right to priority it is sufficient for the appropriate municipal official to give notice of the amount due to be paid for taxes.

27 Section 137(1) of the Municipal Taxation Act states:

> 137(1) When personal property liable to seizure for taxes is under seizure or attachment or has been seized by the sheriff or by a bailiff or any court or is claimed by or in possession of any assignee for the benefit of creditors or any liquidators or any trustee or authorized trustee in bankruptcy, or when that property has been converted into cash and is undistributed, it is sufficient for the municipal secretary to, and he shall, give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy, notice of the amount due for taxes and in that case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount of the taxes, after deducting any costs properly incurred in seizing, holding and selling the property, to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever, except those of the Crown.

28 Section 330 of the charter provides:

> 330. Where personal property liable to seizure for taxes as herein before provided is under seizure or attachment or has been seized by the sheriff or by a bailiff, or is claimed by or in possession of any assignee for the benefit of creditors or a

liquidator or of any assignee for the benefit of creditors or a liquidator or any trustee or authorized trustee in bankruptcy, or where such property has been converted into cash and is undistributed, it shall be sufficient for the treasurer to, and he shall, give to the sheriff, bailiff, assignee, liquidator or trustee or authorized trustee in bankruptcy, notice of the amount due for taxes and in such case the sheriff, bailiff, assignee, liquidator or trustee or authorized trustee in bankruptcy shall pay the amount of the taxes to the treasurer in preference and priority to all other fees, charges, liens or claims whatever; but subject, where there has been a seizure, to payment of the fees of the sheriff or bailiff making the seizure.

29 No counterpart to s. 125(1) of the Municipal Taxation Act is found in the charter. Section 125(1) provides:

125(1) All personal property of every nature and kind in or on the premises belonging to the person assessed or used in connection with the business carried on therein or thereon and for which the occupant is assessed under the business assessment, is liable for the business taxes due by that occupant, and

(*a*) the business taxes are a *first charge* thereon and have priority over any other lien or claim thereto,

(*b*) the personal property may be seized while on those premises or at any place on removal therefrom after the taxes are made due and payable, and

(*c*) the personal property may be sold in the manner provided by this Act, for the distress and sale of personal property for the non-payment of arrears of taxes.

(2) this special remedy for the collection of business taxes in arrears is in addition to any other right of the municipality granted by this Act for the collection of taxes in arrears. (The italics are mine)

30 The first consideration that must be addressed is the effect of the absence from the charter of a section similar to s. 125(1) of the Act.

31 It is unnecessary for an equivalent of s. 125(1) of the Municipal Taxation Act to be present in the charter for the city of Lloydminster to be entitled to business taxes in priority to other claims. Section 330 of the charter, although perhaps not ideally worded, is quite capable of standing on its own to create a priority. The words "as herein before provided" found in s. 330 refer to s. 325, which determines the point at which personal property becomes liable to seizure.

32 This view is supported in *Re Decker Delicatessen*, 56 O.L.R. 140, 27 O.W.N. 139, 5 C.B.R. 208, [1925] 1 D.L.R. 652, a decision of the Ontario Supreme Court, wherein it was held that an Act of the legislature stating that an amount owed is a first charge on the property was unnecessary where a provision parallel to s. 330 of the charter was present.

33 At p. 142 Fisher J. stated:

I do not agree with the contention of the learned counsel for the landlord that, before Hydro-rates can be entitled to priority over the landlord's preferential lien, it is necessary that an Act of the Legislature be passed in favour of a municipality, to the effect that Hydro-rates shall constitute a first charge on the goods of a debtor, as effect must be given to the clear and unambiguous language of subsec. 11 in the 1922 amendment (*supra*)

34 Greschuk J. of the Alberta Supreme Court as part of his decision in *Edmonton v. McMullen*, [1972] 6 W.W.R. 541, (sub nom. *Re Bates Elec. Ltd.)* 17 C.B.R. (N.S.) 253 (T.D.), considered sections of the Municipal Taxation Act equivalent to the present ss. 137 (s. 330 of the charter) and 125(1) of that Act. Counsel for the receiver-manager cites the case as support for the submission that the statutory charge created in favour of the municipality is a floating charge which does not crystallize until steps are taken to seize the property.

35 Although the parallel section to s. 330 of the charter was considered, the key part of that decision was the interpretation of the predecessor to the present s. 125(1), which makes business taxes a *first charge* upon the personal property connected with the business.

36 As s. 125(1) has no counterpart in the charter, cases such as the *Bates Elec.* case, which involve the interpretation of the term "charge" as used in sections like 125(1), are inapplicable to the case at bar.

37 The *Bates Elec.* case is also distinguished from the instant case as it involved a direct conflict between the provisions of the Bankruptcy Act and the provisions of the Municipal Taxation Act. It was determined that the Municipal Taxation Act sections were overridden by the conflicting sections of the Bankruptcy Act.

38 Further, the *Bates Elec.* case certainly did not determine that a floating charge was created by the Municipal Taxation Act. Greschuk J. indicated specifically that he did not decide that point, and stated at p. 555 that he doubted such a charge was created:

> So that there may be no doubt as to my ruling I conclude that the granting of a receiving order does not crystallize the floating charges created by The Municipal Taxation Act, if such charge can be regarded as a floating charge, which I doubt; that the claimants are not secured creditors in respect of their claims for business taxes, whether the personal property of the debtor is under seizure or not; that the sections of the said provincial Act are in conflict with ss. 42(4) and 95 of the Act insofar as business taxes are concerned; that the provisions of the Bankruptcy Act must prevail; and that the claimants, insofar as business taxes are concerned, must accept payment in accordance with the priorities and preferences set out in s. 95 of the Act.

39 It is apparent, therefore, that the cases of *Re Decker's Delicatessen* and *Royal Bank of Can. v. 238842 Alta. Ltd.; Saskatoon v. Mowbrey Stout Ltd.*, [1984] 2 W.W.R. 71, 51 C.B.R. (N.S.) 47, 25 M.P.L.R. 169, 29 Sask. R. 117, a decision of the Saskatchewan Court of Queen's Bench (unsuccessfully appealed — see [1985] 5 W.W.R. 373, 20 D.L.R. (4th) 450, 40 Sask. R. 177 (C.A.)), are more applicable to the case at bar than is *Re Bates Elec.* Those cases considered the wording of sections similar to ss. 325(1) and 330 of the charter and determined that those sections granted to the municipality a preferred claim in priority to secured claims.

40 The reason for this finding was as follows:

> In my opinion, by subsec. 11, the Legislature intended to make special provision in favour of a municipality for the recovery of taxes due on personal property of an insolvent liable to seizure, by providing that, if the tax collector of the municipality gives notice to the trustee, the municipality shall be entitled to rank for payment in preference and priority to all claims, fees, charges, and liens against the debtor's property in the possession of the trustee undistributed, and that this was intended to include and apply to mortgages, bills of sale, lien-notes, conditional sales, and the preferential lien of a landlord created by s. 38 of R.S.O. 1914, ch. 155.

(*Re Decker's Delicatessen*, supra, at p. 142.)

41 Upon deciding that the *Decker's Delicatessen* and *Mowbrey Stout* cases apply to the case at bar, it must then be determined whether, in the present case, the receiver-manager falls within any of the categories listed in s. 330 of the charter. "Receiver" is not expressly mentioned in that section.

42 I am of the view that a court-appointed receiver-manager would fit within the term of "trustee". A court-appointed receiver-manager is a fiduciary. His obligations reach further than merely acting honestly and in good faith. Wilson J. of the Manitoba Court of Queen's Bench indicated in *Fotti v. 777 Mgmt. Inc.*, [1981] 5 W.W.R. 48 at 54, 9 Man. R. (2d) 142, that a receiver-manager appointed under a court order is:

> ... an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.

43 The scope of the priority created by s. 330 of the charter is clearly limited to personal property and to the proceeds of personal property.

44 It does not appear that business taxes are based on the assessed value of personal property as was indicated to be the case in *Re Decker's Delicatessen*. Rather, business taxes appear from s. 260 to be assessed on the basis of the area of the premises in question.

45 Section 319(2) of the charter makes it clear that business taxes are not a charge upon land. Therefore, the personal property forms the asset from which the taxes can be collected in priority to other claims regardless of the basis for assessing the taxes owed.

46 It is my understanding, based upon the submissions of counsel for the city of Lloydminster, that the subject matter of the present priorities dispute is either personal property or the proceeds of personal property.

47 In any event, I find that the priority of the city of Lloydminster for business taxes extends only to personal property and to the proceeds of personal property.

Post-Receivership Taxes

48 The language of the *Mowbrey Stout* case only relates to pre-receivership taxes. Post-receivership taxes were not considered in that case and I am not of the view that the language of the case can be extended to include post-receivership taxes.

49 A right of priority to post-receivership taxes must rest upon a different foundation. Counsel for the city of Lloydminster suggested that s. 302 of the charter combined with s. 330 (the section creating a preferential charge) created a priority for post-receivership business taxes. Section 302 states:

> 302. The owner of a building who is liable to assessment in respect of business carried on therein shall, in addition to his liability for taxes levied in respect of the land and building, be liable for the business tax levied in respect of the business.

Owner is defined in s. 2(v) of the charter:

> (v) "Owner" includes any person who has any right, title, estate or interest in land other than that of a mere occupant, tenant or mortgagee; but for the purposes of sections 105, 106, 153, 154 and 155 "owner" means the person in whose name the title to the property is registered and includes the person named as owner in the assessment records of the city ...

50 Unlike sections in the Municipal Taxation Act, s. 302 of the charter does not place an obligation on the person carrying on the business to pay taxes, such that a receiver-manager may be obligated. It places that burden upon the owner of the premises. Yet no evidence was adduced as to who owned the property. Certainly, the receiver-manager does not fit within the definition of owner set forth by s. 2(v) unless it is established that he had a "right, title, estate or interest in land other than that of a mere occupant, tenant or mortgagee". No such right, title, estate or interest was established.

51 The city of Lloydminster adopted the arguments submitted on behalf of the city of Red Deer as a further basis for claiming a right to the post-receivership business taxes.

52 At this point I will review the submissions of the city of Red Deer and will then indicate to what extent those arguments may be applied to the circumstances involving the city of Lloydminster.

The Claim of the City of Red Deer

53 Counsel for the city of Red Deer indicates that the city does not base its claim to business taxes on any priorities issue. The city suggests that the receiver-manager may himself be personally liable for the taxes that result from the carrying on of the business.

54 In part, the city of Red Deer relies upon the provisions of the Municipal Taxation Act, specifically s. 80(1):

> 80(1) A council may, by by-law passed not later than May 1 in any year, provide for the assessment of any business, and for the payment by *any person carrying on the business* of a tax on the assessment thereof, to be known as a business tax. (italics mine)

and s. 124(2):

> (2) all taxes and costs due in respect of any business may be recovered with interest as a debt due to the municipality *from the person carrying on the business at the time of its assessment.* (italics mine)

55 The city argues not only that the scope of these sections makes a receiver-manager as a "person carrying on the business" liable to pay business taxes, but that the receiver-manager is personally liable to pay the taxes as a court-appointed receiver acts, not as an agent but as a principal.

56 Counsel for the receiver-manager submits that s. 136 of the Municipal Taxation Act renders only the goods and chattels in the hands of the receiver liable for taxes. Section 136 states:

> 136 Goods and chattels in the hands of a receiver for the general benefit of creditors or of an authorized trustee in bankruptcy or in the hands of a liquidator under a winding-up order are liable only for the taxes of the assignor or of the company that is begin wound up and for the taxes charged on the premises in which the goods were at the time of the assignment or winding-up order and thereafter charged on the premises while the receiver, trustee or liquidator occupies the premises or while the goods remain thereon.

57 The wording of the section does not support the interpretation that counsel seeks to give the section. The section purports to limit what taxes the goods are liable for. It does not purport to limit liability for taxes only to the goods and chattels in the hands of the receiver.

58 The receiver-manager can be held to be liable for the post-receivership business taxes. If a receiver-manager is going to carry on a business, he should do so on the understanding that certain obligations will have to be met.

59 The situation is analogous to one where a receiver-manager enters new contracts in relation to the business. A receiver-manager would be held to be personally liable on such contracts.

60 In the present case, the statute imposes an obligation on the person carrying on the business to pay business taxes. The taxes must be paid.

61 The obligation to pay taxes cannot, however, be extended to taxes that accrued prior to the receivership. Again the situation is analogous to one where contracts are involved. A receiver is not personally liable on contracts entered prior to his appointment as he did not enter them. The receiver's obligations begin at the time of appointment.

62 Counsel has referred to the Alberta Supreme Court decision of *Credit Foncier Franco-Can. v. Edmonton Airport Hotel Co.* (1966), 55 W.W.R. 734 (T.D.). While the case does not impose an obligation on the receiver to pay amounts such as taxes, it does support the proposition that such amounts once paid by the receiver may be recovered by the receiver from the assets of the company as indemnity for amounts properly expended in the execution of his duties. Kerr on Receivers, 16th ed. (1983), indicates at p. 210:

> A receiver appointed by the court is an officer of the court: he is therefore not an agent for any person, but a principal, and *as such personally liable to all persons contracting with him, irrespective of the amount of assets in his hands, unless his personal liability is excluded by the express terms of the contract, subject to a correlative right to be indemnified out of the assets in respect of all liabilities properly incurred.* He is entitled to this *indemnity in priority even to the claims of persons who had advanced money under an order making the repayment of the advance a first charge on all the assets, and in priority to the costs of the action*, and subject only to the plaintiff's costs of realisation. (The italics are mine)

The Position of the City of Lloydminster

63 The city of Lloydminster piggybacks its claim for post-receivership business taxes on the argument put forward by the city of Red Deer.

64 Lloydminster cannot, however, rely on ss. 80(1) and 124(2) of the Municipal Taxation Act. Counterparts to ss. 80(1) and 124(2) are not found in the charter. Indeed, the charter imposes tax liability in a much less clear manner.

65 Section 258 of the charter reads in part as follows:

> (1) As soon as may be in each year but not later than the thirty-first day of May the assessor shall assess:
>
> 2. *Every person who is engaged in* mercantile, professional or any other *business in the city*, save that of a farmer, stock raiser or person otherwise engaged in agriculture pursuits, a person engaged in keeping bees or extracting honey or person engaged in fur farming ... (the italics are mine)

Section 311 provides for collection of taxes:

> 311(1) On or before the first day of October in each year the assessor shall prepare a tax roll and the treasurer shall proceed to collect the taxes specified therein.

66 The combined force of ss. 258(1)2 and 311(1) makes any "person ... engaged in ... business" liable for tax.

67 Again, the receiver-manager would fit within the scope of such a provision and would, therefore, be liable to pay the business tax. The charter imposes an obligation similar to the statutory obligation imposed by the Municipal Taxation Act.

Conclusions

68 I have concluded that the city of Red Deer and the city of Lloydminster have a claim against the receiver-manager for post-receivership business taxes. The receiver-manager is personally liable to pay such taxes but is entitled to be indemnified from the assets of the company.

Priorities

69 The Workers' Compensation Board has a priority with respect to its claim over all the other parties.

70 The city of Lloydminster is entitled to a priority with respect to pre-receivership taxes by the application of the rationale of the *Mowbrey Stout* and *Decker's Delicatessen* cases, supra, to the facts of this case. Its claim ranks just below that of the board.

71 The receiver-manager has priority over the debenture holder with respect to the taxes he is personally liable to pay.

72 In *Robert F. Kowal Invt. Ltd. v. Deeder Elec. Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, a decision of the Ontario Court of Appeal, it was determined that a receiver is not entitled to priority over a prior secured creditor unless he is appointed with the consent of the secured creditor or for his benefit or unless the expenses are necessary to protect the property for the benefit of all creditors.

73 Here the situation meets at least the former requirement. It is clear that the receiver was appointed both for the benefit of the Treasury Branch and with its consent.

Order accordingly.

End of Document

TAB 6

1985 CarswellAlta 320
Alberta Court of Queen's Bench

Canadian Commercial Bank v. Bird Oil Equipment Ltd.

1985 CarswellAlta 320, [1985] A.W.L.D. 644, [1985] A.W.L.D. 648, [1985] A.W.L.D. 658, 17 D.L.R. (4th) 367, 30 A.C.W.S. (2d) 435, 38 Alta. L.R. (2d) 102, 56 C.B.R. (N.S.) 52, 59 A.R. 342, 85 C.L.L.C. 14,029

CANADIAN COMMERCIAL BANK v. BIRD OIL EQUIPMENT LTD.

Shannon J.

Judgment: February 5, 1985
Docket: Calgary No. 8301-18855

Counsel: *K.J. Martens*, for receiver.
J.S. Glazer, for Director of Employment Standards.
B.P. O'Leary, for plaintiff.
K.M. Sullivan, for defendant.

Subject: Corporate and Commercial; Insolvency; Employment; Public

Table of Authorities

Cases considered:

Alta. Opportunity Co. v. Planidin (1977), 24 C.B.R. (N.S.) 30, 2 Alta. L.R. (2d) 193, 4 A.R. 528 (T.D.) — *followed*

Alta. Paper Corp. v. Metro. Graphics Ltd. (1983), 49 C.B.R. (N.S.) 63, 28 Alta. L.R. (2d) 52, 24 B.L.R. 134, 47 A.R. 279 (Q.B.) — *applied*

Athlumney, Re; Ex parte Wilson, [1898] 2 Q.B. 547 — *applied*

Bank of Montreal v. Woodtown Dev. Ltd. (1979), 25 O.R. (3d) 36, 31 C.B.R. (N.S.) 185, 99 D.L.R. (3d) 739 (H.C.) — *applied*

Campeau Corp. and Prov. Bank of Can., Re (1975), 7 O.R. (2d) 73, 20 C.B.R. (N.S.) 99, 54 D.L.R. (3d) 329 (Div. Ct.) — *applied*

Indust. Dev. Bank v. Valley Dairy Ltd., [1953] O.R. 71, 53 D.T.C. 1027, [1953] C.T.C. 132, [1953] 1 D.L.R. 788 (H.C.) — *applied*

Statutes considered:

Alberta Labour Act, 1973 (Alta.), c. 33 [repealed and substituted Employment Standards Act, R.S.A. 1980, c. E-10.1 (Supp.)], s. 48 [now s. 100(1)].

Business Corporations Act, 1981 (Alta.), c. B-15.

Companies Act, R.S.A. 1970, c. 60 [now R.S.A. 1980, c. C-20], ss. 105 [now s. 120], 266 [am. 1973, c. 33, s. 194; now s. 283].

Companies Act, R.S.A. 1980, c. C-20, ss. 120, 283 [am. R.S.A. 1980, c. E-10.1 (Supp.), s. 117].

Employment Standards Act, R.S.A. 1980, c. E-10.1 (Supp.), ss. 1(*f*) "entitlement", 100 [re-en. 1984, c. 16, s. 10], 101(8) [en. 1984, c. 16. s. 10].

Employment Standards Act, R.S.O. 1970, c. 147 [now R.S.O. 1980, c. 137], s. 8(1) [now s. 14].

Authorities considered:

7 Hals. (4th) 494, para. 830.

Appeal from order of master in chambers determining priority between creditors.

***Shannon J.*:**

1 Bird Oil Equipment Ltd. was incorporated under the Companies Act, R.S.A. 1955, c. 53, on 23rd September 1966. On 11th July 1979 it granted a $15,000,000 debenture to Canadian Commercial Bank. On 29th July 1981 and 22nd February 22, 1983 it granted supplemental debentures which increased the amount secured in favour of the bank.

2 It also entered into an assignment of book debts in favour of the bank on 28th October 1977. That assignment was renewed on two subsequent occasions.

3 All documents were duly registered.

4 On 30th March 1983 Bird Oil Equipment Ltd. was continued under the Alberta Business Corporations Act, 1981 (Alta.), c. B-15, and therefore became subject to the corporate law contained in that Act.

5 On 8th July 1983, by court order, Ernst & Whinney Inc. was appointed receiver-manager of all of the property, assets, and undertakings of Bird Oil Equipment Ltd. In that capacity it has collected money under the fixed and floating portions of the debentures and under the assignment of book debts.

6 Employees of Bird Oil Equipment Ltd. are claiming priority in the amount of $79,125.46 with respect to the proceeds realized by the receiver-manager from the sale of assets secured by the floating charge portion of the debenture. There are not sufficient assets to meet the employees' claim and that of the bank pursuant to the debenture.

7 The receiver-manager applied for advice and directions and the application was heard by a master in chambers on 6th April 1984. The issue before the master was set out in the notice of motion as follows:

> What are the priorities between the Plaintiff [Canadian Commercial Bank] under Debentures dated July 12, 1979, July 29, 1981 and February 22, 1983, and employees or the Employment Standards Branch, with respect to unpaid holiday pay owing by the Defendant [Bird Oil Equipment Ltd.]?

The master held that the former employees had priority over the debenture holder for vacation pay accruing prior to 30th March 1983, the date of continuance of Bird Oil Equipment Ltd. under the Business Corporations Act. He further held that the debenture holder had priority over the former employees for vacation pay accruing after 30th March 1983.

8 On this appeal from the master, the issue is: Do the claims of the employees for vacation pay enjoy priority over the rights of the bank with respect to the proceeds realized from the sale of assets under the floating charge portion of the debenture?

9 The former employees' claim to priority is based, in part, on s. 100 of the Employment Standards Act, R.S.A. 1980, c. E-10.1 (Supp.), (re-en. 1984, c. 16, s. 10) (formerly s. 48 of the Alberta Labour Act).

> 100. An employee shall have priority of payment to a maximum of $5000 over
>
> (*a*) the claims and rights of preferred, ordinary and general creditors of an employer including, without limitation, claims and rights of the Crown and agents of the Crown, and
>
> (*b*) any other unsecured claim or right against an employer,
>
> for wages, overtime pay and entitlement due and owing to the employee by the employer.

10 By the terms of s. 1(*f*) vacation pay is an "entitlement".

11 Section 101(8) states:

> (8) This section and section 100 apply notwithstanding any other Act to the contrary.

12 Section 100 gives employees priority over the claims of any and all unsecured creditors of the employer for wages, overtime pay and entitlement due and owing by the employer in an amount not exceeding $5,000. Greschuk J. had occasion to comment on this section (it was then s. 48 of the Alberta Labour Act) in *Alta. Opportunity Co. v. Planidin* (1977), 24 C.B.R. (N.S.) 30, 2 Alta. L.R. (2d) 193, 4 A.R. 528 at 538 (T.D.):

> There is a vast difference between a preferred, an ordinary and a secured creditor. If the legislature intended to give the employees priority over secured creditors as well as preferred and unsecured creditors it could have easily said so.

13 Therefore, it is clear that s. 100 does not give employees priority over secured claims. It follows that the employees' claim to priority under s. 100 fails if it can be shown that a floating charge debenture is a secured interest.

14 In my view, a floating charge debenture does represent a secured interest, at least at the moment the debenture crystallizes. In 7 Hals. (4th) 494, para. 830, it is stated:

> 830. Effect of floating charge becoming fixed. When a floating security upon all the property or assets of the company becomes fixed, it constitutes a charge upon all the property or assets then belonging to the company. It has priority over any subsequent equitable charges and over unsecured creditors...

And thus in *Alta. Paper Corp. Ltd. v Metro. Graphics Ltd.* (1983), 49 C.B.R. (N.S.) 63, 28 Alta. L.R. (2d) 52, 24 B.L.R. 134, 47 A.R. 279 (Q.B.), D.C. McDonald J. stated at p. 287:

Since crystallization fixes a floating charge, there should be no difference in the way in which it is treated from the way in which other fixed charges are treated.

15 It is well sealed that the appointment of a receiver is an event which results in the fixing, or crystallization of a floating charge: *Indust. Dev. Bank v. Valley Dairy Ltd.*, [1953] O.R. 71 at 73, 53 D.T.C. 1027, [1953] C.T.C. 132, [1953] 1 D.L.R. 788 (H.C.); *Bank of Montreal v. Woodtown Dev. Ltd.* (1979), 25 O.R. (2d) 36, 31 C.B.R. (N.S.) 185, 99 D.L.R. (3d) 739 at 743 (H.C.). Therefore, the appointment of the receiver in the case at bar caused the floating charge debenture to crystallize, which in turn created a secured interest in the hands of the debenture holder. Thus the debenture holder takes priority over unsecured creditors with respect to the moneys realized from the sale by the receiver-manager of those assets of Bird Oil Equipment Ltd. subject to the floating charge. This conclusion is not contradicted by s. 100 of the Employment Standards Act; nor by the provisions of the Alberta Business Corporations Act. Accordingly, the master was correct in ruling that the debenture holder had priority after 30th March 1984.

16 But what of the priorities before 30th March 1984 — the period during which Bird Oil Equipment Ltd. was registered as a company under the Companies Act? That Act contains certain sections dealing with preference for creditors which are not to be found in the Business Corporations Act. They give employees greater rights in opposition to floating charge debenture holders than they enjoy under the Business Corporations Act.

17 Section 105(1) (now s. 120(1)) of the Companies Act, R.S.A. 1970, c. 60 [now R.S.A. 1980, c. C-20], states:

> 105(1) Where either a receiver is appointed on behalf of the holder of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to such floating charge, then, if the company is not at the time in course of being wound up, the debts that in every winding-up are, under the provisions of Part 10 relating to preferential payments, to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver, or other person taking possession as aforesaid, in priority to any claim for principal or interest in respect of the debentures.

18 Section 266 as amended by 1973, c. 33, s. 194 (now s. 283) states:

> 266.(1) Subject to section 48 of *The Alberta Labour Act, 1973*, in a winding-up there shall be paid in priority to all other debts,
>
> (*a*) all Provincial or municipal taxes and rates assessed on or due by the company up to the first day of January next before the date hereinafter mentioned, but in respect of any particular tax or rate not exceeding in the whole one year's assessment, and ...
>
> (*d*) unless the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company, the amount of any assessment under *The Workmen's Compensation Act*, the liability for which accrued before the said date.
>
> (2) The foregoing debts
>
> (*a*) rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions, and
>
> (*b*) in so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.

19 Section 48 of the Alberta Labour Act, 1973 (Alta.), c. 33 (now s. 100(1) of the Employment Standards Act) states:

> 48. Notwithstanding any other Act or any agreement an employee has a priority over the claims and rights of
>
> (*a*) preferred, ordinary or general creditors,
>
> (*b*) the Crown or any agent of the Crown,
>
> (*c*) any other person, firm, corporation or partnership having a claim against the employer,
>
> for an amount of wages, vacation pay, general holiday pay or money in lieu of notice of termination of employment due and owing the employee by an employer in an amount not to exceed $5,000.

20 The combined effect of these sections gives employees priority over floating charge debenture holders "where a receiver is appointed" (s. 105): *Alta. Opportunity Co. v. Planidin*, supra.

21 Therefore, under the Companies Act, even though the floating charge debenture holder becomes a secured creditor upon appointment of a receiver, the employees have priority for accrued vacation pay. This priority does not exist under the Business Corporations Act; the two Acts differ in that respect.

22 The directors of Bird Oil Equipment Ltd. argue that the employees have rights as preferential creditors which accrued under the Companies Act and cannot be defeated by a continuation under the Business Corporations Act. They also contend that such rights exist independently of the appointment of a receiver. I am unable to accept those arguments because the employees do not possess accrued rights in the nature of a charge or lien on the employer's property. That is made clear by Houlden J. in *Re Campeau Corp. and Prov. Bank of Can.* (1975), 7 O.R. (2d) 73, 20 C.B.R. (N.S.) 99, 54 D.L.R. (3d) 329 at 331-32 (Div. Ct.), where he comments on the nature of the employee's rights under s. 8(1) of the Ontario Employment Standards Act, R.S.O. 1970, c. 147, the language of which is virtually identical to that of s. 48 of the Alberta Labour Act:

> On the plain reading of s. 8(1), it does not, in my opinion, create a charge or lien on the property of the employer for unpaid wages; rather, it merely provides for priority of payment of such claims over certain classes of creditors ...

23 Concerning the second argument, it is clear that the employees' rights as preferential creditors arise only upon a winding-up, pursuant to s. 283, or upon the appointment of a receiver, pursuant to s. 120. The plain and obvious meaning of the initial words of s. 120 is that the preferential payments referred to in the section are only to be made as a consequence of the appointment of a receiver.

24 During the period in which Bird Oil was still subject to the provisions of the Companies Act there was no receiver. Therefore, no rights as preferential creditors ever belonged to the employees during that period. No rights arose before the date of continuance, in other words. Prior to that date the employees could at best be said to have possessed a mere potential for preferential treatment under the Companies Act.

25 Although I need not decide this point, it appears that the situation would have been different if a receiver *had* been appointed prior to the date of continuance. In that instance the employees would possess rights as preferential creditors that could not be denied even though the Business Corporations Act does not have provisions similar to ss. 105 and 266. It would seem proper in such a case to interpret the Business Corporations Act so as not to derogate from rights already acquired under the previous law. In *Re Athlumney; Ex parte Wilson*, [1898] 2 Q.B. 547, Wright J. said at pp. 551-52:

> Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation ...

26 But the fact remains that no rights accrued to the employees before the change in company law regimes occurred so it cannot be said that any rights are being taken away. The claim of the debenture holder prevails because it is a secured creditor.

27 In conclusion the debenture holder has priority over the employees for the whole period in question and the appeal must be allowed, in part, as a result. There will be an order accordingly.

Appeal allowed.

TAB 7

CANADA

CONSOLIDATION

CODIFICATION

Indian Act

Loi sur les Indiens

R.S.C., 1985, c. I-5

L.R.C. (1985), ch. I-5

Current to March 3, 2015

À jour au 3 mars 2015

Last amended on February 26, 2015

Dernière modification le 26 février 2015

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 3, 2015. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of March 3, 2015 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 3 mars 2015. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 3 mars 2015 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

TABLE ANALYTIQUE

An Act respecting Indians

Loi concernant les Indiens

SHORT TITLE

Short title

1. This Act may be cited as the *Indian Act.*

R.S., c. I-6, s. 1.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur les Indiens.*

S.R., ch. I-6, art. 1.

INTERPRETATION

Definitions

2. (1) In this Act,

"band" « *bande* »

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"Band List" « *liste de bande* »

"Band List" means a list of persons that is maintained under section 8 by a band or in the Department;

"child" « *enfant* »

"child" includes a legally adopted child and a child adopted in accordance with Indian custom;

"common-law partner" « *conjoint de fait* »

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"council of the band" « *conseil de la bande* »

"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

DÉFINITIONS

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« argent des Indiens » *"Indian moneys"*

« argent des Indiens » Les sommes d'argent perçues, reçues ou détenues par Sa Majesté à l'usage et au profit des Indiens ou des bandes.

« bande » *"band"*

« bande » Groupe d'Indiens, selon le cas :

a) à l'usage et au profit communs desquels des terres appartenant à Sa Majesté ont été mises de côté avant ou après le 4 septembre 1951;

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent;

c) que le gouverneur en conseil a déclaré être une bande pour l'application de la présente loi.

« biens » *"estate"*

« biens » Tout bien meuble ou immeuble, y compris un droit sur des terres.

« boisson alcoolisée » *"intoxicant"*

« boisson alcoolisée » Tout liquide — alcoolisé ou non —, mélange ou préparation ayant des propriétés enivrantes et susceptible de consommation humaine.

« conjoint de fait » *"common-law partner"*

« conjoint de fait » La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an.

« conseil de la bande » *"council of the band"*

« conseil de la bande »

a) Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;

b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi

"Department" "Department" means the Department of Indian Affairs and Northern Development;

"designated lands" "designated lands" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

"elector" "elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of eighteen years, and

(*c*) is not disqualified from voting at band elections;

"estate" "estate" includes real and personal property and any interest in land;

"Indian" "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

"Indian moneys" "Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

"Indian Register" "Indian Register" means the register of persons that is maintained under section 5;

"intoxicant" "intoxicant" includes alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise intoxicating and all drinks, drinkable liquids, preparations or mixtures capable of human consumption that are intoxicating;

"member of a band" "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

"mentally incompetent Indian" "mentally incompetent Indian" means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent for the purposes of any laws of that province providing for the administration of estates of mentally defective or incompetent persons;

"Minister" "Minister" means the Minister of Indian Affairs and Northern Development;

selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci.

« électeur » Personne qui remplit les conditions suivantes : « électeur » "*elector*"

a) être inscrit sur une liste de bande;

b) avoir dix-huit ans;

c) ne pas avoir perdu son droit de vote aux élections de la bande.

« enfant » Sont compris parmi les enfants les enfants légalement adoptés, ainsi que les enfants adoptés selon la coutume indienne. « enfant » "*child*"

« Indien » Personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être. « Indien » "*Indian*"

« Indien mentalement incapable » Indien qui, conformément aux lois de la province où il réside, a été déclaré mentalement déficient ou incapable, pour l'application de toute loi de cette province régissant l'administration des biens de personnes mentalement déficientes ou incapables. « Indien mentalement incapable » "*mentally incompetent Indian*"

« inscrit » Inscrit comme Indien dans le registre des Indiens. « inscrit » "*registered*"

« liste de bande » Liste de personnes tenue en vertu de l'article 8 par une bande ou au ministère. « liste de bande » "*Band List*"

« membre d'une bande » Personne dont le nom apparaît sur une liste de bande ou qui a droit à ce que son nom y figure. « membre d'une bande » "*member of a band*"

« ministère » Le ministère des Affaires indiennes et du Nord canadien. « ministère » "*Department*"

« ministre » Le ministre des Affaires indiennes et du Nord canadien. « ministre » "*Minister*"

« registraire » Le fonctionnaire du ministère responsable du registre des Indiens et des listes de bande tenus au ministère. « registraire » "*Registrar*"

« registre des Indiens » Le registre de personnes tenu en vertu de l'article 5. « registre des Indiens » "*Indian Register*"

« réserve » Parcelle de terrain dont Sa Majesté est propriétaire et qu'elle a mise de côté à l'usage et au profit d'une bande; y sont assimilées les terres désignées, sauf pour l'application du paragraphe 18(2), des articles 20 à 25, 28, 37, « réserve » "*reserve*"

"registered" "registered" means registered as an Indian in the Indian Register;

« *inscrit* »

"Registrar" "Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;

« *registraire* »

"reserve" "reserve"

« *réserve* »

(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(*b*) except in subsection 18(2), sections 20 to 25, 28, 37, 38, 42, 44, 46, 48 to 51 and 58 to 60 and the regulations made under any of those provisions, includes designated lands;

"superintendent" « *surintendant* » "superintendent" includes a commissioner, regional supervisor, Indian superintendent, assistant Indian superintendent and any other person declared by the Minister to be a superintendent for the purposes of this Act, and with reference to a band or a reserve, means the superintendent for that band or reserve;

"surrendered lands" « *terres cédées* » "surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart;

"survivor" « *survivant* » "survivor", in relation to a deceased individual, means their surviving spouse or common-law partner.

Definition of "band" (2) The expression "band", with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.

Exercise of powers conferred on band or council (3) Unless the context otherwise requires or this Act otherwise provides,

(*a*) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and

(*b*) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

R.S., 1985, c. I-5, s. 2; R.S., 1985, c. 32 (1st Supp.), s. 1, c. 17 (4th Supp.), s. 1; 2000, c. 12, s. 148; 2014, c. 38, s. 3.

38, 42, 44, 46, 48 à 51 et 58 à 60, ou des règlements pris sous leur régime.

« surintendant » Sont assimilés à un surintendant un commissaire, un surveillant régional, un surintendant des Indiens, un surintendant adjoint des Indiens et toute autre personne que le ministre a déclarée un surintendant pour l'application de la présente loi; relativement à une bande ou une réserve, le surintendant de cette bande ou réserve.

« surintendant » *"superintendent"*

« survivant » L'époux ou conjoint de fait survivant d'une personne décédée.

« survivant » *"survivor"*

« terres cédées » Réserve ou partie d'une réserve, ou tout droit sur celle-ci, propriété de Sa Majesté et que la bande à l'usage et au profit de laquelle il avait été mis de côté a abandonné ou cédé.

« terres cédées » *"surrendered lands"*

« terres désignées » Parcelle de terrain, ou tout droit sur celle-ci, propriété de Sa Majesté et relativement à laquelle la bande à l'usage et au profit de laquelle elle a été mise de côté à titre de réserve a cédé, avant ou après l'entrée en vigueur de la présente définition, ses droits autrement qu'à titre absolu.

« terres désignées » *"designated lands"*

Définition de « bande » (2) En ce qui concerne une réserve ou des terres cédées, « bande » désigne la bande à l'usage et au profit de laquelle la réserve ou les terres cédées ont été mises de côté.

Exercice des pouvoirs conférés à une bande ou un conseil (3) Sauf indication contraire du contexte ou disposition expresse de la présente loi :

a) un pouvoir conféré à une bande est censé ne pas être exercé, à moins de l'être en vertu du consentement donné par une majorité des électeurs de la bande;

b) un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande pré-

sents à une réunion du conseil dûment convoquée.

L.R. (1985), ch. I-5, art. 2; L.R. (1985), ch. 32 (1er suppl.), art. 1, ch. 17 (4e suppl.), art. 1; 2000, ch. 12, art. 148; 2014, ch. 38, art. 3.

ADMINISTRATION

Minister to administer Act

3. (1) This Act shall be administered by the Minister, who shall be the superintendent general of Indian affairs.

Authority of Deputy Minister and chief officer

(2) The Minister may authorize the Deputy Minister of Indian Affairs and Northern Development or the chief officer in charge of the branch of the Department relating to Indian affairs to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or any other Act of Parliament relating to Indian affairs.

R.S., c. I-6, s. 3.

APPLICATION OF ACT

Application of Act

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

Act may be declared inapplicable

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(*a*) any Indians or any group or band of Indians, or

(*b*) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

Authority confirmed for certain cases

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that the Governor in Council has made in respect of section 11, 12 or 14, or any provision thereof, as each section or provision read immediately prior to April 17, 1985.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 117 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands

ADMINISTRATION

Le ministre est chargé de l'application de la loi

3. (1) Le ministre est chargé de l'application de la présente loi; il est le surintendant général des affaires indiennes.

Autorité du sous-ministre et du directeur

(2) Le ministre peut autoriser le sous-ministre des Affaires indiennes et du Nord canadien ou le fonctionnaire qui est directeur de la division du ministère relative aux affaires indiennes à accomplir et exercer tout pouvoir et fonction que peut ou doit accomplir ou exercer le ministre aux termes de la présente loi ou de toute autre loi fédérale concernant les affaires indiennes.

S.R., ch. I-6, art. 3.

APPLICATION DE LA LOI

Application de la loi

4. (1) La mention d'un Indien, dans la présente loi, exclut une personne de la race d'aborigènes communément appelés Inuit.

Pouvoir de déclarer la loi inapplicable

(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s'applique pas :

a) à des Indiens ou à un groupe ou une bande d'Indiens;

b) à une réserve ou à des terres cédées, ou à une partie y afférente.

Il peut en outre, par proclamation, révoquer toute semblable déclaration.

Confirmation de la validité de certaines déclarations

(2.1) Sans que soit limitée la portée générale du paragraphe (2), il demeure entendu que le gouverneur en conseil est réputé avoir eu le pouvoir de faire, en vertu du paragraphe (2), toute déclaration qu'il a faite à l'égard des articles 11, 12 ou 14, ou d'une disposition de ceux-ci, dans leur version antérieure au 17 avril 1985.

Certains articles ne s'appliquent pas aux Indiens vivant hors des réserves

(3) Les articles 114 à 117 et, sauf si le ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appar-

belonging to Her Majesty in right of Canada or a province.

R.S., 1985, c. I-5, s. 4; R.S., 1985, c. 32 (1st Supp.), s. 2; 2014, c. 38, s. 4.

tiennent à Sa Majesté du chef du Canada ou d'une province.

L.R. (1985), ch. I-5, art. 4; L.R. (1985), ch. 32 (1er suppl.), art. 2; 2014, ch. 38, art. 4.

Provisions that apply to all band members

4.1 A reference to an Indian in any of the following provisions shall be deemed to include a reference to any person whose name is entered in a Band List and who is entitled to have it entered therein: the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2, subsections 4(2) and (3) and 18(2), sections 20 and 22 to 25, subsections 31(1) and (3) and 35(4), sections 51, 52, 52.2 and 52.3, subsections 58(3) and 61(1), sections 63 and 65, subsections 66(2) and 70(1) and (4), section 71, paragraphs 73(*g*) and (*h*), subsection 74(4), section 84, paragraph 87(1)(*a*), section 88, subsection 89(1) and paragraph 107(*b*).

R.S., 1985, c. 32 (1st Supp.), s. 3, c. 48 (4th Supp.), s. 1.

4.1 La mention du terme « Indien » dans les définitions de « bande », « argent des Indiens » ou « Indien mentalement incapable » à l'article 2 et la mention de ce terme aux paragraphes 4(2) et (3) et 18(2), aux articles 20 et 22 à 25, aux paragraphes 31(1) et (3) et 35(4), aux articles 51, 52, 52.2 et 52.3, aux paragraphes 58(3) et 61(1), aux articles 63 et 65, aux paragraphes 66(2) et 70(1) et (4), à l'article 71, aux alinéas 73*g*) et *h*), au paragraphe 74(4), à l'article 84, à l'alinéa 87(1)*a*), à l'article 88, au paragraphe 89(1) et à l'alinéa 107*b*) valent également mention de toute personne qui a droit à ce que son nom soit consigné dans une liste de bande et dont le nom y est consigné.

L.R. (1985), ch. 32 (1er suppl.), art. 3, ch. 48 (4e suppl.), art. 1.

Dispositions applicables à tous les membres d'une bande

DEFINITION AND REGISTRATION OF INDIANS

DÉFINITION ET ENREGISTREMENT DES INDIENS

Indian Register

Registre des Indiens

Indian Register

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

Tenue du registre

5. (1) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant le droit d'être inscrite comme Indien en vertu de la présente loi.

Existing Indian Register

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

Registre existant

(2) Les noms figurant au registre des Indiens le 16 avril 1985 constituent le registre des Indiens au 17 avril 1985.

Deletions and additions

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

Additions et retranchements

(3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre.

Date of change

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

Date du changement

(4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché.

Application for registration

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

R.S., 1985, c. I-5, s. 5; R.S., 1985, c. 32 (1st Supp.), s. 4.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a le droit d'être inscrite soit consigné dans le registre des Indiens, à moins qu'une demande à cet effet soit présentée au registraire.

L.R. (1985), ch. I-5, art. 5; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Persons entitled to be registered

6. (1) Subject to section 7, a person is entitled to be registered if

Personnes ayant droit à l'inscription

6. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :

(*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(*c.1*) that person

(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(*b*) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,

(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,

(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

(*d*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iii) pursuant to an or-

a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;

b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)*a*)(iv), de l'alinéa 12(1)*b*) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

c.1) elle remplit les conditions suivantes :

(i) le nom de sa mère a été, en raison du mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)*b*) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions,

(ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951,

(iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17 avril 1985, est née avant cette dernière date,

(iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite;

d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une or-

der made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(*e*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(*f*) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

donnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :

(i) soit en vertu de l'article 13, dans sa version antérieure au 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article,

(ii) soit en vertu de l'article 111, dans sa version antérieure au 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;

f) ses parents ont tous deux le droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Idem

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Idem

(2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.

Deeming provision

(3) For the purposes of paragraph (1)(*f*) and subsection (2),

(*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(*a*);

(*b*) a person described in paragraph (1)(*c*), (*d*), (*e*) or (*f*) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision; and

(*c*) a person described in paragraph (1)(*c.1*) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

R.S., 1985, c. I-5, s. 6; R.S., 1985, c. 32 (1st Supp.), s. 4, c. 43 (4th Supp.), s. 1; 2010, c. 18, s. 2.

Présomption

(3) Pour l'application de l'alinéa (1)*f*) et du paragraphe (2) :

a) la personne qui est décédée avant le 17 avril 1985 mais qui avait le droit d'être inscrite à la date de son décès est réputée avoir le droit d'être inscrite en vertu de l'alinéa (1)*a*);

b) la personne visée aux alinéas (1)*c*), *d*), *e*) ou *f*) ou au paragraphe (2) et qui est décédée avant le 17 avril 1985 est réputée avoir le droit d'être inscrite en vertu de ces dispositions;

c) la personne visée à l'alinéa (1)*c.1*) et qui est décédée avant l'entrée en vigueur de cet alinéa est réputée avoir le droit d'être inscrite en vertu de celui-ci.

L.R. (1985), ch. I-5, art. 6; L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 43 (4e suppl.), art. 1; 2010, ch. 18, art. 2.

Persons not entitled to be registered

7. (1) The following persons are not entitled to be registered:

(*a*) a person who was registered under paragraph 11(1)(*f*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

(*b*) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(*f*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

Exception

(2) Paragraph (1)(*a*) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(*f*), entitled to be registered under any other provision of this Act.

Idem

(3) Paragraph (1)(*b*) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(*f*), entitled to be registered under any other provision of this Act.

R.S., 1985, c. I-5, s. 7; R.S., 1985, c. 32 (1st Supp.), s. 4.

Personnes n'ayant pas droit à l'inscription

7. (1) Les personnes suivantes n'ont pas le droit d'être inscrites :

a) celles qui étaient inscrites en vertu de l'alinéa 11(1)*f*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des Indiens en vertu de la présente loi;

b) celles qui sont les enfants d'une personne qui était inscrite ou avait le droit de l'être en vertu de l'alinéa 11(1)*f*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et qui sont également les enfants d'une personne qui n'a pas le droit d'être inscrite.

Exception

(2) L'alinéa (1)*a*) ne s'applique pas à une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)*f*), avait le droit d'être inscrite en vertu de toute autre disposition de la présente loi.

Idem

(3) L'alinéa (1)*b*) ne s'applique pas à l'enfant d'une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)*f*), avait le droit d'être inscrite en vertu de toute autre disposition de la présente loi.

L.R. (1985), ch. I-5, art. 7; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Band Lists

Band Lists

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

R.S., 1985, c. I-5, s. 8; R.S., 1985, c. 32 (1st Supp.), s. 4.

Band Lists maintained in Department

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

Existing Band Lists

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

Deletions and additions

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled,

Listes de bande

Tenue

8. Est tenue conformément à la présente loi la liste de chaque bande où est consigné le nom de chaque personne qui en est membre.

L.R. (1985), ch. 1-5, art. 8; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Liste de bande tenue au ministère

9. (1) Jusqu'à ce que la bande assume la responsabilité de sa liste, celle-ci est tenue au ministère par le registraire.

Listes existantes

(2) Les noms figurant à la liste d'une bande le 16 avril 1985 constituent la liste de cette bande au 17 avril 1985.

Additions et retranchements

(3) Le registraire peut ajouter à une liste de bande tenue au ministère, ou en retrancher, le nom de la personne qui, aux termes de la pré-

as the case may be, to have his name included in that List.

Date of change

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

Application for entry

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

R.S., 1985, c. I-5, s. 9; R.S., 1985, c. 32 (1st Supp.), s. 4.

Band control of membership

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

Membership rules

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(*b*) provide for a mechanism for reviewing decisions on membership.

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(*p.4*) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

Acquired rights

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

Idem

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that

sente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Date du changement

(4) La liste de bande tenue au ministère indique la date où chaque nom y a été ajouté ou en a été retranché.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a droit à ce que celui-ci soit consigné dans une liste de bande tenue au ministère y soit consigné, à moins qu'une demande à cet effet soit présentée au registraire.

L.R. (1985), ch. I-5, art. 9; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Pouvoir de décision

10. (1) La bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

Règles d'appartenance

(2) La bande peut, avec l'autorisation de la majorité de ses électeurs :

a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;

b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

Statut administratif sur l'autorisation requise

(3) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)*p.4*), un règlement administratif mettant en vigueur le présent paragraphe à l'égard de la bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande âgés d'au moins dix-huit ans.

Droits acquis

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

Idem

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)*c*) avant que celle-ci n'assume la responsabilité de la tenue de sa

person does not subsequently cease to be entitled to have his name entered in the Band List.

liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

Notice to the Minister

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

Avis au ministre

Notice to band and copy of Band List

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(*a*) give notice to the band that it has control of its own membership; and

(*b*) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;

b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

Transmission de la liste

Effective date of band's membership rules

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

Date d'entrée en vigueur des règles d'appartenance

Band to maintain Band List

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(*b*), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

(9) À compter de la réception de l'avis prévu à l'alinéa (7)*b*), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de cette date, est dégagé de toute responsabilité à l'égard de cette liste.

Transfert de responsabilité

Deletions and additions

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

Additions et retranchements

Date of change

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

Date du changement

R.S., 1985, c. I-5, s. 10; R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. I-5, art. 10; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Membership rules for Departmental Band List

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

Règles d'appartenance pour une liste tenue au ministère

(*a*) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;

(*b*) that person is entitled to be registered under paragraph 6(1)(*b*) as a member of that band;

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*d*) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(*f*) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

a) son nom a été consigné dans cette liste, ou elle avait droit à ce qu'il le soit le 16 avril 1985;

b) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)*b*) comme membre de cette bande;

c) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)*c*) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

d) elle est née après le 16 avril 1985 et a le droit d'être inscrite en vertu de l'alinéa 6(1)*f*) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Additional membership rules for Departmental Band List

(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(*a*) if that person is entitled to be registered under paragraph 6(1)(*d*) or (*e*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*b*) if that person is entitled to be registered under paragraph 6(1)(*f*) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

Règles d'appartenance supplémentaires pour les listes tenues au ministère

(2) À compter du jour qui suit de deux ans la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, ou de la date antérieure choisie en vertu de l'article 13.1, lorsque la bande n'a pas la responsabilité de la tenue de sa liste prévue à la présente loi, une personne a droit à ce que son nom soit consigné dans la liste de bande tenue au ministère pour cette dernière dans l'un ou l'autre des cas suivants :

a) elle a le droit d'être inscrite en vertu des alinéas 6(1)*d*) ou *e*) et elle a cessé d'être un membre de la bande en raison des circonstances prévues à l'un de ces alinéas;

b) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)*f*) ou du paragraphe 6(2) et un de ses parents visés à l'une de ces dispositions a droit à ce que son nom soit consigné dans la liste de bande ou, s'il est décédé, avait ce droit à la date de son décès.

Deeming provision

(3) For the purposes of paragraph (1)(*d*) and subsection (2),

(*a*) a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) and who was no longer living on the first day on which the person would otherwise be entitled to have the person's name entered in the Band List of the

Présomption

(3) Pour l'application de l'alinéa (1)*d*) et du paragraphe (2) :

a) la personne dont le nom a été omis ou retranché du registre des Indiens ou d'une liste de bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) et qui est décédée avant le premier jour où elle a acquis le droit à ce que son nom soit consigné dans la liste de bande dont elle a cessé d'être membre est

band of which the person ceased to be a member shall be deemed to be entitled to have the person's name so entered; and

(*b*) a person described in paragraph (2)(*b*) shall be deemed to be entitled to have the person's name entered in the Band List in which the parent referred to in that paragraph is or was, or is deemed by this section to be, entitled to have the parent's name entered.

réputée avoir droit à ce que son nom y soit consigné;

b) la personne visée à l'alinéa (2)*b*) est réputée avoir droit à ce que son nom soit consigné dans la même liste de bande que celle dans laquelle le parent visé au même paragraphe a ou avait, ou est réputé avoir, en vertu du présent article, droit à ce que son nom y soit consigné.

Additional membership rule — paragraph 6(1)(*c.1*)

(3.1) A person is entitled to have the person's name entered in a Band List maintained in the Department for a band if the person is entitled to be registered under paragraph 6(1)(*c.1*) and the person's mother ceased to be a member of that band by reason of the circumstances set out in subparagraph 6(1)(*c.1*)(i).

(3.1) Toute personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour celle-ci au ministère si elle a le droit d'être inscrite en vertu de l'alinéa 6(1)*c.1*) et si sa mère a cessé d'être un membre de la bande en raison des circonstances prévues au sous-alinéa 6(1)*c.1*)(i).

Règle d'appartenance supplémentaire — alinéa 6(1)*c.1*)

Where band amalgamates or is divided

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which that person has the closest family ties, as the case may be.

(4) Lorsqu'une bande fusionne avec une autre ou qu'elle est divisée pour former de nouvelles bandes, toute personne qui aurait par ailleurs eu droit à ce que son nom soit consigné dans la liste de la bande en vertu du présent article a droit à ce que son nom soit consigné dans la liste de la bande issue de la fusion ou de celle de la nouvelle bande à l'égard de laquelle ses liens familiaux sont les plus étroits.

Fusion ou division de bandes

R.S., 1985, c. I-5, s. 11; R.S., 1985, c. 32 (1st Supp.), s. 4, c. 43 (4th Supp.), s. 2; 2010, c. 18, s. 3.

L.R. (1985), ch. I-5, art. 11; L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 43 (4e suppl.), art. 2; 2010, ch. 18, art. 3.

Entitlement with consent of band

12. Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

(*a*) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

(*b*) is a member of another band,

is entitled to have his name entered in the Band List maintained in the Department for a band if the council of the admitting band consents.

12. À compter du jour qui suit de deux ans la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, ou de la date antérieure choisie en vertu de l'article 13.1, la personne qui :

a) soit a le droit d'être inscrite en vertu de l'article 6 sans avoir droit à ce que son nom soit consigné dans une liste de bande tenue au ministère en vertu de l'article 11;

b) soit est membre d'une autre bande,

a droit à ce que son nom soit consigné dans la liste d'une bande tenue au ministère pour cette dernière si le conseil de la bande qui l'admet en son sein y consent.

Inscription sujette au consentement du conseil

R.S., 1985, c. I-5, s. 12; R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. I-5, art. 12; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Limitation to one Band List

13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

13. Par dérogation aux articles 11 et 12, nul n'a droit à ce que son nom soit consigné en même temps dans plus d'une liste de bande tenue au ministère.

Nom consigné dans une seule liste

R.S., 1985, c. I-5, s. 13; R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. I-5, art. 13; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Decision to leave Band List control with Department

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

Première décision

13.1 (1) Une bande peut, avant le jour qui suit de deux ans la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, décider de laisser la responsabilité de la tenue de sa liste au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Notice to the Minister

(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.

Avis au ministre

(2) Si la bande décide de laisser la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre de la décision.

Subsequent band control of membership

(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.

Seconde décision

(3) Malgré la décision visée au paragraphe (1), la bande peut, à tout moment par la suite, assumer la responsabilité de la tenue de sa liste en vertu de l'article 10.

R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Return of control to Department

13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.

Transfert de responsabilités au ministère

13.2 (1) La bande peut, à tout moment après avoir assumé la responsabilité de la tenue de sa liste en vertu de l'article 10, décider d'en remettre la responsabilité au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Notice to the Minister and copy of membership rules

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.

Avis au ministre et texte des règles

(2) Lorsque la bande décide de remettre la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre de la décision et lui transmet une copie de la liste et le texte des règles d'appartenance fixées par la bande conformément au paragraphe 10(2) pendant qu'elle assumait la responsabilité de la tenue de sa liste.

Transfer of responsibility to Department

(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11.

Transfert de responsabilités au ministère

(3) Lorsque est donné l'avis prévu au paragraphe (2) à l'égard d'une liste de bande, la tenue de cette dernière devient la responsabilité du ministère à compter de la date de réception de l'avis. Elle est tenue, à compter de cette date, conformément aux règles d'appartenance prévues à l'article 11.

R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Entitlement retained

13.3 A person is entitled to have his name entered in a Band List maintained in the Department pursuant to section 13.2 if that person was entitled to have his name entered, and his name was entered, in the Band List immediately before a copy of it was provided to the Minister under subsection 13.2(2), whether or not

Maintien du droit d'être consigné dans la liste

13.3 Une personne a droit à ce que son nom soit consigné dans une liste de bande tenue par le ministère en vertu de l'article 13.2 si elle avait droit à ce que son nom soit consigné dans cette liste, et qu'il y a effectivement été consigné, avant qu'une copie en soit transmise au ministre en vertu du paragraphe 13.2(2), que cette personne ait ou non droit à ce que son

that person is also entitled to have his name entered in the Band List under section 11.

R.S., 1985, c. 32 (1st Supp.), s. 4.

nom soit consigné dans cette liste en vertu de l'article 11.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Notice of Band Lists

Affichage des listes de bande

Copy of Band List provided to band council

14. (1) Within one month after the day an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, the Registrar shall provide the council of each band with a copy of the Band List for the band as it stood immediately prior to that day.

14. (1) Au plus tard un mois après la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, le registraire transmet au conseil de chaque bande une copie de la liste de la bande dans son état antérieur à cette date.

Copie de la liste de bande transmise au conseil de bande

List of additions and deletions

(2) Where a Band List is maintained by the Department, the Registrar shall, at least once every two months after a copy of the Band List is provided to the council of a band under subsection (1), provide the council of the band with a list of the additions to or deletions from the Band List not included in a list previously provided under this subsection.

(2) Si la liste de bande est tenue au ministère, le registraire, au moins une fois tous les deux mois après la transmission prévue au paragraphe (1) d'une copie de la liste au conseil de la bande, transmet à ce dernier une liste des additions à la liste et des retranchements de celle-ci non compris dans une liste antérieure transmise en vertu du présent paragraphe.

Listes des additions et des retranchements

Lists to be posted

(3) The council of each band shall, forthwith on receiving a copy of the Band List under subsection (1), or a list of additions to and deletions from its Band List under subsection (2), post the copy or the list, as the case may be, in a conspicuous place on the reserve of the band.

(3) Le conseil de chaque bande, dès qu'il reçoit copie de la liste de bande prévue au paragraphe (1) ou la liste des additions et des retranchements prévue au paragraphe (2), affiche la copie ou la liste, selon le cas, en un lieu bien en évidence sur la réserve de la bande.

Affichage de la liste

R.S., 1985, c. I-5, s. 14; R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. I-5, art. 14; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Inquiries

Demandes

Inquiries relating to Indian Register or Band Lists

14.1 The Registrar shall, on inquiry from any person who believes that he or any person he represents is entitled to have his name included in the Indian Register or a Band List maintained in the Department, indicate to the person making the inquiry whether or not that name is included therein.

14.1 Le registraire, à la demande de toute personne qui croit qu'elle-même ou que la personne qu'elle représente a droit à l'inclusion de son nom dans le registre des Indiens ou une liste de bande tenue au ministère, indique sans délai à l'auteur de la demande si ce nom y est inclus ou non.

Demandes relatives au registre des Indiens ou aux listes de bande

R.S., 1985, c. 32 (1st Supp.), s. 4.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Protests

Protestations

Protests

14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

14.2 (1) Une protestation peut être formulée, par avis écrit au registraire renfermant un bref exposé des motifs invoqués, contre l'inclusion ou l'addition du nom d'une personne dans le registre des Indiens ou une liste de bande tenue au ministère ou contre l'omission ou le retranchement de son nom de ce registre ou d'une telle liste dans les trois ans suivant soit l'inclusion ou l'addition, soit l'omission ou le retranchement.

Protestations

Protest in respect of Band List

(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or that person's representative.

(2) Une protestation peut être formulée en vertu du présent article à l'égard d'une liste de bande par le conseil de cette bande, un membre de celle-ci ou la personne dont le nom fait l'objet de la protestation ou son représentant.

Protestation relative à la liste de bande

Protest in respect of Indian Register

(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or that person's representative.

(3) Une protestation peut être formulée en vertu du présent article à l'égard du registre des Indiens par la personne dont le nom fait l'objet de la protestation ou son représentant.

Protestation relative au registre des Indiens

Onus of proof

(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.

(4) La personne qui formule la protestation prévue au présent article a la charge d'en prouver le bien-fondé.

Charge de la preuve

Registrar to cause investigation

(5) Where a protest is made to the Registrar under this section, the Registrar shall cause an investigation to be made into the matter and render a decision.

(5) Lorsqu'une protestation lui est adressée en vertu du présent article, le registraire fait tenir une enquête sur la question et rend une décision.

Le registraire fait tenir une enquête

Evidence

(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as the Registrar, in his discretion, sees fit or deems just.

(6) Pour l'application du présent article, le registraire peut recevoir toute preuve présentée sous serment, par affidavit ou autrement, si celui-ci, à son appréciation, l'estime indiquée ou équitable, que cette preuve soit ou non admissible devant les tribunaux.

Preuve

Decision final

(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive.

R.S., 1985, c. 32 (1st Supp.), s. 4.

(7) Sous réserve de l'article 14.3, la décision du registraire visée au paragraphe (5) est définitive et sans appel.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Décision finale

Appeal

14.3 (1) Within six months after the Registrar renders a decision on a protest under section 14.2,

(*a*) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or the person in respect of whose name the protest was made or that person's representative, or

(*b*) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or that person's representative,

may, by notice in writing, appeal the decision to a court referred to in subsection (5).

14.3 (1) Dans les six mois suivant la date de la décision du registraire sur une protestation prévue à l'article 14.2, peuvent, par avis écrit, en interjeter appel devant le tribunal visé au paragraphe (5) :

a) s'il s'agit d'une protestation formulée à l'égard d'une liste de bande, le conseil de la bande, la personne qui a formulé la protestation ou la personne dont le nom fait l'objet de la protestation ou son représentant;

b) s'il s'agit d'une protestation formulée à l'égard du registre des Indiens, la personne dont le nom a fait l'objet de la protestation ou son représentant.

Appel

Copy of notice of appeal to the Registrar

(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.

(2) Lorsqu'il est interjeté appel en vertu du présent article, l'appelant transmet sans délai au registraire une copie de l'avis d'appel.

Copie de l'avis d'appel au registraire

Material to be filed with the court by Registrar

(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the deci-

(3) Sur réception de la copie de l'avis d'appel prévu au paragraphe (2), le registraire dépose sans délai au tribunal une copie de la déci-

Documents à déposer par le registraire

sion being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.

Decision

(4) The court may, after hearing an appeal under this section,

(*a*) affirm, vary or reverse the decision of the Registrar; or

(*b*) refer the subject-matter of the appeal back to the Registrar for reconsideration or further investigation.

Court

(5) An appeal may be heard under this section

(*a*) in the Province of Quebec, before the Superior Court for the district in which the band is situated or in which the person who made the protest resides, or for such other district as the Minister may designate;

(*a.1*) in the Province of Ontario, before the Superior Court of Justice;

(*b*) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, before the Court of Queen's Bench;

(*c*) in the Province of Newfoundland and Labrador, before the Trial Division of the Supreme Court;

(*c.1*) [Repealed, 1992, c. 51, s. 54]

(*d*) in the Province of Nova Scotia, British Columbia or Prince Edward Island, in Yukon or in the Northwest Territories, before the Supreme Court; or

(*e*) in Nunavut, before the Nunavut Court of Justice.

R.S., 1985, c. 32 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 10; 1990, c. 16, s. 14, c. 17, s. 25; 1992, c. 51, s. 54; 1998, c. 30, s. 14; 1999, c. 3, s. 69; 2002, c. 7, s. 183; 2015, c. 3, s. 118.

PAYMENTS IN RESPECT OF PERSONS CEASING TO BE BAND MEMBERS

15. (1) to (4) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 5]

Commutation of payments under former Act

(5) Where, prior to September 4, 1951, any woman became entitled, under section 14 of the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, or any prior provisions to the like effect, to share in the distribution of annu-

sion en appel, toute la preuve documentaire prise en compte pour la décision, ainsi que l'enregistrement ou la transcription des débats devant le registraire.

Décision

(4) Le tribunal peut, à l'issue de l'audition de l'appel prévu au présent article :

a) soit confirmer, modifier ou renverser la décision du registraire;

b) soit renvoyer la question en appel au registraire pour réexamen ou nouvelle enquête.

Tribunal

(5) L'appel prévu au présent article peut être entendu :

a) dans la province de Québec, par la Cour supérieure du district où la bande est située ou dans lequel réside la personne qui a formulé la protestation, ou de tel autre district désigné par le ministre;

a.1) dans la province d'Ontario, par la Cour supérieure de justice;

b) dans la province du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou d'Alberta, par la Cour du Banc de la Reine;

c) dans la province de Terre-Neuve-et-Labrador, par la Section de première instance de la Cour suprême;

c.1) [Abrogé, 1992, ch. 51, art. 54]

d) dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, au Yukon et dans les Territoires du Nord-Ouest, par la Cour suprême;

e) au Nunavut, par la Cour de justice.

L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 27 (2e suppl.), art. 10; 1990, ch. 16, art. 14, ch. 17, art. 25; 1992, ch. 51, art. 54; 1998, ch. 30, art. 14; 1999, ch. 3, art. 69; 2002, ch. 7, art. 183; 2015, ch. 3, art. 118.

PAIEMENTS AUX PERSONNES QUI CESSENT D'ÊTRE MEMBRES D'UNE BANDE

15. (1) à (4) [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 5]

Commutation de paiements prévus par une loi antérieure

(5) Lorsque, avant le 4 septembre 1951, une femme est devenue admissible, selon l'article 14 de la *Loi des Indiens*, chapitre 98 des Statuts revisés du Canada de 1927, ou selon quelque disposition antérieure ayant le même effet, à

ities, interest moneys or rents, the Minister may, in lieu thereof, pay to that woman out of the moneys of the band an amount equal to ten times the average annual amounts of the payments made to her during the ten years last preceding or, if they were paid for less than ten years, during the years they were paid.

R.S., 1985, c. I-5, s. 15; R.S., 1985, c. 32 (1st Supp.), s. 5.

participer à la distribution d'annuités, intérêts ou rentes, le ministre peut, en remplacement de ceux-ci, payer à cette femme, sur l'argent de la bande, un montant égal à dix fois les montants annuels moyens de ces paiements qui lui ont été versés au cours des dix années précédentes ou, s'ils l'ont été pendant moins de dix ans, au cours des années pendant lesquelles ils ont été faits.

L.R. (1985), ch. I-5, art. 15; L.R. (1985), ch. 32 (1er suppl.), art. 5.

16. (1) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 6]

16. (1) [Abrogé, L.R. (1985), ch. 32 (1er suppl.), art. 6]

Transferred member's interest

(2) A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

(2) Une personne qui cesse de faire partie d'une bande du fait qu'elle est devenue membre d'une autre bande n'a aucun droit sur les terres ou sommes d'argent détenues par Sa Majesté au nom de la bande dont elle faisait partie, mais elle jouit des mêmes droits en commun, sur les terres et les sommes d'argent détenues par Sa Majesté au nom de l'autre bande, que les membres de cette dernière.

Le droit d'un membre transféré

(3) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 6]

(3) [Abrogé, L.R. (1985), ch. 32 (1er suppl.), art. 6]

R.S., 1985, c. I-5, s. 16; R.S., 1985, c. 32 (1st Supp.), s. 6.

L.R. (1985), ch. 1-5, art. 16; L.R. (1985), ch. 32 (1er suppl.), art. 6.

New Bands

Nouvelles bandes

Minister may constitute new bands

17. (1) The Minister may, whenever he considers it desirable,

(*a*) amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated; and

(*b*) constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.

17. (1) Le ministre peut, lorsqu'il l'estime à propos :

a) fusionner les bandes qui, par un vote majoritaire de leurs électeurs, demandent la fusion;

b) constituer de nouvelles bandes et établir à leur égard des listes de bande à partir des listes de bande existantes, ou du registre des Indiens, s'il lui en est fait la demande par des personnes proposant la constitution de nouvelles bandes.

Constitution de nouvelles bandes par le ministre

Division of reserves and funds

(2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.

(2) Si, conformément au paragraphe (1), une nouvelle bande a été constituée à même une bande existante ou une partie de cette dernière, la fraction des terres de réserve et des fonds de la bande existante que le ministre détermine est détenue à l'usage et au profit de la nouvelle bande.

Division des réserves et des fonds

No protest

(3) No protest may be made under section 14.2 in respect of the deletion from or the addition to a Band List consequent on the exercise

(3) Aucune protestation ne peut être formulée en vertu de l'article 14.2 à l'égard d'un retranchement d'une liste de bande ou d'une addition à celle-ci qui découle de l'exercice par le

Aucune protestation

by the Minister of any of the Minister's powers under subsection (1).

R.S., 1985, c. I-5, s. 17; R.S., 1985, c. 32 (1st Supp.), s. 7.

ministre de l'un de ses pouvoirs prévus au paragraphe (1).

L.R. (1985), ch. I-5, art. 17; L.R. (1985), ch. 32 (1er suppl.), art. 7.

RESERVES

RÉSERVES

Reserves to be held for use and benefit of Indians

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Les réserves sont détenues à l'usage et au profit des Indiens

18. (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

Use of reserves for schools, etc.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

R.S., c. I-6, s. 18.

Emploi de réserves aux fins des écoles, etc.

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable usage, une indemnité d'un montant dont peuvent convenir l'Indien et le ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier.

S.R., ch. I-6, art. 18.

Children of band members

18.1 A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody.

R.S., 1985, c. 32 (1st Supp.), s. 8.

Enfants des membres d'une bande

18.1 Le membre d'une bande qui réside sur la réserve de cette dernière peut y résider avec ses enfants à charge ou tout enfant dont il a la garde.

L.R. (1985), ch. 32 (1er suppl.), art. 8.

Surveys and subdivisions

19. The Minister may

(*a*) authorize surveys of reserves and the preparation of plans and reports with respect thereto;

(*b*) divide the whole or any portion of a reserve into lots or other subdivisions; and

(*c*) determine the location and direct the construction of roads in a reserve.

R.S., c. I-6, s. 19.

Levés et subdivisions

19. Le ministre peut :

a) autoriser des levés de réserves et la préparation de plans et de rapports à cet égard;

b) séparer la totalité ou une partie d'une réserve en lots ou autres subdivisions;

c) décider de l'emplacement des routes dans une réserve et en prescrire la construction.

S.R., ch. I-6, art. 19.

POSSESSION OF LANDS IN RESERVES

Possession of lands in a reserve

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Certificate of Possession

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

Location tickets issued under previous legislation

(3) For the purposes of this Act, any person who, on September 4, 1951, held a valid and subsisting Location Ticket issued under *The Indian Act, 1880*, or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

Temporary possession

(4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

Certificate of Occupation

(5) Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

Extension and approval

(6) The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force

(*a*) approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or

(*b*) refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupa-

POSSESSION DE TERRES DANS DES RÉSERVES

Possession de terres dans une réserve

20. (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

Certificat de possession

(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.

Billets de location délivrés en vertu de lois antérieures

(3) Pour l'application de la présente loi, toute personne qui, le 4 septembre 1951, détenait un billet de location valide délivré sous le régime de l'*Acte relatif aux Sauvages, 1880*, ou de toute loi sur le même sujet, est réputée légalement en possession de la terre visée par le billet de location et est censée détenir un certificat de possession à cet égard.

Possession temporaire

(4) Lorsque le conseil de la bande a attribué à un Indien la possession d'une terre dans une réserve, le ministre peut, à sa discrétion, différer son approbation et autoriser l'Indien à occuper la terre temporairement, de même que prescrire les conditions, concernant l'usage et l'établissement, que doit remplir l'Indien avant que le ministre approuve l'attribution.

Certificat d'occupation

(5) Lorsque le ministre diffère son approbation conformément au paragraphe (4), il délivre un certificat d'occupation à l'Indien, et le certificat autorise l'Indien, ou ceux qui réclament possession par legs ou par transmission sous forme d'héritage, à occuper la terre concernant laquelle il est délivré, pendant une période de deux ans, à compter de sa date.

Prorogation et approbation

(6) Le ministre peut proroger la durée d'un certificat d'occupation pour une nouvelle période n'excédant pas deux ans et peut, à l'expiration de toute période durant laquelle un certificat d'occupation est en vigueur :

a) soit approuver l'attribution faite par le conseil de la bande et délivrer un certificat de possession si, d'après lui, on a satisfait aux conditions concernant l'usage et l'établissement;

b) soit refuser d'approuver l'attribution faite par le conseil de la bande et déclarer que la terre, à l'égard de laquelle le certificat d'oc-

tion was issued to be available for re-allotment by the council of the band.

R.S., c. I-6, s. 20.

cupation a été délivré, peut être attribuée de nouveau par le conseil de la bande.

S.R., ch. I-6, art. 20.

Register

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

R.S., c. I-6, s. 21.

21. Il doit être tenu au ministère un registre, connu sous le nom de Registre des terres de réserve, où sont inscrits les détails concernant les certificats de possession et certificats d'occupation et les autres opérations relatives aux terres situées dans une réserve.

S.R., ch. I-6, art. 21.

Registre

Improvements on lands

22. Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included.

R.S., c. I-6, s. 22.

22. Un Indien qui a fait des améliorations à des terres en sa possession avant leur inclusion dans une réserve, est considéré comme étant en possession légale de ces terres au moment de leur inclusion.

S.R., ch. I-6, art. 22.

Améliorations apportées aux terres

Compensation for improvements

23. An Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.

R.S., c. I-6, s. 23.

23. Un Indien qui est légalement retiré de terres situées dans une réserve et sur lesquelles il a fait des améliorations permanentes peut, si le ministre l'ordonne, recevoir à cet égard une indemnité d'un montant que le ministre détermine, soit de la personne qui entre en possession, soit sur les fonds de la bande, à la discrétion du ministre.

S.R., ch. I-6, art. 23.

Indemnité à l'égard des améliorations

Transfer of possession

24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

R.S., c. I-6, s. 24.

24. Un Indien qui est légalement en possession d'une terre dans une réserve peut transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de la terre, mais aucun transfert ou accord en vue du transfert du droit à la possession de terres dans une réserve n'est valable tant qu'il n'est pas approuvé par le ministre.

S.R., ch. I-6, art. 24.

Transfert de possession

Indian ceasing to reside on reserve

25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

25. (1) Un Indien qui cesse d'avoir droit de résider sur une réserve peut, dans un délai de six mois ou dans tel délai prorogé que prescrit le ministre, transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de toute terre dans la réserve, dont il était légalement en possession.

Indien qui cesse de résider sur la réserve

When right of possession reverts

(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such com-

(2) Lorsqu'un Indien ne dispose pas de son droit de possession conformément au paragraphe (1), le droit à la possession de la terre retourne à la bande, sous réserve du paiement, à l'Indien qui était légalement en possession de la terre, sur les fonds de la bande, de telle indem-

Le droit de possession non transféré retourne à la bande

pensation for permanent improvements as the Minister may determine.

R.S., c. I-6, s. 25.

nité pour améliorations permanentes que fixe le ministre.

S.R., ch. I-6, art. 25.

Correction of Certificate or Location Tickets

26. Whenever a Certificate of Possession or Occupation or a Location Ticket issued under *The Indian Act, 1880*, or any statute relating to the same subject-matter was, in the opinion of the Minister, issued to or in the name of the wrong person, through mistake, or contains any clerical error or misnomer or wrong description of any material fact therein, the Minister may cancel the Certificate or Location Ticket and issue a corrected Certificate in lieu thereof.

R.S., c. I-6, s. 26.

26. Lorsqu'un certificat de possession ou d'occupation ou un billet de location délivré sous le régime de l'*Acte relatif aux Sauvages, 1880* ou de toute loi traitant du même sujet, a été, de l'avis du ministre, délivré par erreur à une personne à qui il n'était pas destiné ou au nom d'une telle personne, ou contient une erreur d'écriture ou une fausse appellation, ou une description erronée de quelque fait important, le ministre peut annuler le certificat ou billet de location et délivrer un certificat corrigé pour le remplacer.

S.R., ch. I-6, art. 26.

Certificat corrigé; billet de location

Cancellation of Certificates or Location Tickets

27. The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.

R.S., c. I-6, s. 27.

27. Le ministre peut, avec le consentement de celui qui en est titulaire, annuler tout certificat de possession ou occupation ou billet de location mentionné à l'article 26, et peut annuler tout certificat de possession ou d'occupation ou billet de location qui, selon lui, a été délivré par fraude ou erreur.

S.R., ch. I-6, art. 27.

Certificat annulé; billet de location

Grants, etc., of reserve lands void

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

28. (1) Sous réserve du paragraphe (2), est nul un acte, bail, contrat, instrument, document ou accord de toute nature, écrit ou oral, par lequel une bande ou un membre d'une bande est censé permettre à une personne, autre qu'un membre de cette bande, d'occuper ou utiliser une réserve ou de résider ou autrement exercer des droits sur une réserve.

Nullité d'octrois, etc. de terre de réserve

Minister may issue permits

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

R.S., c. I-6, s. 28.

(2) Le ministre peut, au moyen d'un permis par écrit, autoriser toute personne, pour une période maximale d'un an, ou, avec le consentement du conseil de la bande, pour toute période plus longue, à occuper ou utiliser une réserve, ou à résider ou autrement exercer des droits sur une réserve.

S.R., ch. I-6, art. 28.

Le ministre peut émettre des permis

Exemption from seizure

29. Reserve lands are not subject to seizure under legal process.

R.S., c. I-6, s. 29.

29. Les terres des réserves ne sont assujetties à aucune saisie sous le régime d'un acte judiciaire.

S.R., ch. I-6, art. 29.

Insaisissabilité

TRESPASS ON RESERVES

VIOLATION DU DROIT DE PROPRIÉTÉ DANS LES RÉSERVES

Penalty for trespass

30. A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars

30. Quiconque pénètre, sans droit ni autorisation, dans une réserve commet une infraction et encourt, sur déclaration de culpabilité par

Peine

or to imprisonment for a term not exceeding one month or to both.

R.S., c. I-6, s. 30.

procédure sommaire, une amende maximale de cinquante dollars et un emprisonnement maximal d'un mois, ou l'une de ces peines.

S.R., ch. I-6, art. 30.

Information by Attorney General

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(*a*) unlawfully in occupation or possession of,

(*b*) claiming adversely the right to occupation or possession of, or

(*c*) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought.

Dénonciation par le procureur général

31. (1) Sans préjudice de l'article 30, lorsqu'un Indien ou une bande prétend que des personnes autres que des Indiens, selon le cas :

a) occupent ou possèdent illégalement, ou ont occupé ou possédé illégalement, une réserve ou une partie de réserve;

b) réclament ou ont réclamé sous forme d'opposition le droit d'occuper ou de posséder une réserve ou une partie de réserve;

c) pénètrent ou ont pénétré, sans droit ni autorisation, dans une réserve ou une partie de réserve,

le procureur général du Canada peut produire à la Cour fédérale une dénonciation réclamant, au nom de l'Indien ou de la bande, les mesures de redressement désirées.

Information deemed action by Crown

(2) An information exhibited under subsection (1) shall, for all purposes of the *Federal Courts Act*, be deemed to be a proceeding by the Crown within the meaning of that Act.

La dénonciation est réputée une action par la Couronne

(2) Une dénonciation produite sous le régime du paragraphe (1) est réputée, pour l'application de la *Loi sur les Cours fédérales*, une procédure engagée par la Couronne, au sens de cette loi.

Existing remedies preserved

(3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

Les recours existants subsistent

(3) Le présent article n'a pas pour effet de porter atteinte aux droits ou recours que, en son absence, Sa Majesté, un Indien ou une bande pourrait exercer.

R.S., 1985, c. I-5, s. 31; 2002, c. 8, s. 182.

L.R. (1985), ch. I-5, art. 31; 2002, ch. 8, art. 182.

32. [Repealed, 2014, c. 38, s. 5]

32. [Abrogé, 2014, ch. 38, art. 5]

33. [Repealed, 2014, c. 38, s. 5]

33. [Abrogé, 2014, ch. 38, art. 5]

ROADS AND BRIDGES

ROUTES ET PONTS

Roads, bridges, etc.

34. (1) A band shall ensure that the roads, bridges, ditches and fences within the reserve occupied by that band are maintained in accordance with instructions issued from time to time by the superintendent.

Routes, ponts, etc.

34. (1) Une bande doit assurer l'entretien, en conformité avec les instructions du surintendant, des routes, ponts, fossés et clôtures dans la réserve qu'elle occupe.

Idem

(2) Where, in the opinion of the Minister, a band has not carried out the instructions of the superintendent issued under subsection (1), the Minister may cause the instructions to be carried out at the expense of the band or any member thereof and may recover the cost thereof

Idem

(2) Lorsque, de l'avis du ministre, une bande n'a pas exécuté les instructions données par le surintendant en vertu du paragraphe (1), le ministre peut faire exécuter ces instructions aux frais de la bande ou de tout membre de cette dernière et en recouvrer les frais sur tout

from any amounts that are held by Her Majesty and are payable to the band or member.

R.S., c. I-6, s. 34.

montant détenu par Sa Majesté et payable à la bande ou à ce membre.

S.R., ch. I-6, art. 34.

LANDS TAKEN FOR PUBLIC PURPOSES

TERRES PRISES POUR CAUSE D'UTILITÉ PUBLIQUE

Taking of lands by local authorities

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

Les autorités locales peuvent prendre des terres

35. (1) Lorsque, par une loi fédérale ou provinciale, Sa Majesté du chef d'une province, une autorité municipale ou locale, ou une personne morale, a le pouvoir de prendre ou d'utiliser des terres ou tout droit sur celles-ci sans le consentement du propriétaire, ce pouvoir peut, avec le consentement du gouverneur en conseil et aux conditions qu'il peut prescrire, être exercé relativement aux terres dans une réserve ou à tout droit sur celles-ci.

Procedure

(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.

Procédures

(2) À moins que le gouverneur en conseil n'en ordonne autrement, toutes les questions concernant la prise ou l'utilisation obligatoire de terres dans une réserve, aux termes du paragraphe (1), doivent être régies par la loi qui confère les pouvoirs.

Grant in lieu of compulsory taking

(3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

Octroi au lieu d'une prise obligatoire

(3) Lorsque le gouverneur en conseil a consenti à l'exercice des pouvoirs mentionnés au paragraphe (1) par une province, une autorité municipale ou locale ou une personne morale, il peut, au lieu que la province, l'autorité ou la personne morale prenne ou utilise les terres sans le consentement du propriétaire, permettre un transfert ou octroi de ces terres à la province, autorité ou personne morale, sous réserve des conditions qu'il fixe.

Payment

(4) Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

R.S., c. I-6, s. 35.

Paiement

(4) Tout montant dont il est convenu ou qui est accordé à l'égard de la prise ou de l'utilisation obligatoire de terrains sous le régime du présent article ou qui est payé pour un transfert ou octroi de terre selon le présent article, doit être versé au receveur général à l'usage et au profit de la bande ou à l'usage et au profit de tout Indien qui a droit à l'indemnité ou au paiement du fait de l'exercice des pouvoirs mentionnés au paragraphe (1).

S.R., ch. I-6, art. 35.

SPECIAL RESERVES

RÉSERVES SPÉCIALES

36. [Repealed, 2014, c. 38, s. 6]

36. [Abrogé, 2014, ch. 38, art. 6]

Special reserves

36.1 Where lands the legal title to which is not vested in Her Majesty had been set apart for the use and benefit of a band before the coming

Réserves spéciales

36.1 L'article 36, dans sa version antérieure à la date d'entrée en vigueur du présent article, continue d'avoir effet à l'égard des terres dont

into force of this section, the effect of section 36 of this Act, as it read immediately before the coming into force of this section, continues in respect of those lands and this Act applies as though the lands were a reserve within the meaning of this Act.

2014, c. 38, s. 6.

Sa Majesté n'est pas propriétaire ayant été mises de côté à l'usage et au profit d'une bande avant l'entrée en vigueur du présent article et la présente loi s'applique à l'égard de ces terres comme si elles étaient une réserve, au sens de la présente loi.

2014, ch. 38, art. 6.

SURRENDERS AND DESIGNATIONS

CESSION ET DÉSIGNATION

Sales

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

Vente

37. (1) Les terres dans une réserve ne peuvent être vendues ou aliénées que si elles sont cédées à titre absolu conformément au paragraphe 38(1) à Sa Majesté par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté.

Other transactions

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

R.S., 1985, c. I-5, s. 37; R.S., 1985, c. 17 (4th Supp.), s. 2; 2012, c. 31, s. 206.

Opérations

(2) Sauf disposition contraire de la présente loi, les terres dans une réserve ne peuvent être données à bail ou faire l'objet d'un démembrement que si elles sont désignées en vertu du paragraphe 38(2) par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté.

L.R. (1985), ch. 1-5, art. 37; L.R. (1985), ch. 17 (4e suppl.), art. 2; 2012, ch. 31, art. 206.

Surrender to Her Majesty

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

Cession à Sa Majesté

38. (1) Une bande peut céder à titre absolu à Sa Majesté, avec ou sans conditions, tous ses droits, et ceux de ses membres, portant sur tout ou partie d'une réserve.

Designation

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

R.S., 1985, c. 1-5, s. 38; R.S., 1985, c. 17 (4th Supp.), s. 2.

Désignation

(2) Aux fins de les donner à bail ou de les démembrer, une bande peut désigner par voie de cession à Sa Majesté, avec ou sans conditions, autre qu'à titre absolu, tous droits de la bande, et ceux de ses membres, sur tout ou partie d'une réserve.

L.R. (1985), ch. I-5, art. 38; L.R. (1985), ch. 17 (4e suppl.), art. 2.

Conditions — surrender

39. (1) An absolute surrender is void unless

(*a*) it is made to Her Majesty;

(*b*) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender, or

(iii) by a referendum as provided in the regulations; and

Conditions de validité : cession

39. (1) La cession à titre absolu n'est valide que si les conditions suivantes sont réunies :

a) elle est faite à Sa Majesté;

b) elle est sanctionnée par une majorité des électeurs de la bande :

(i) soit à une assemblée générale de la bande convoquée par son conseil,

(ii) soit à une assemblée spéciale de la bande convoquée par le ministre en vue d'examiner une proposition de cession à titre absolu,

(*c*) it is accepted by the Governor in Council.

(iii) soit au moyen d'un référendum comme le prévoient les règlements;

c) elle est acceptée par le gouverneur en conseil.

Minister may call meeting or referendum

(2) If a majority of the electors of a band did not vote at a meeting or referendum called under subsection (1), the Minister may, if the proposed absolute surrender was assented to by a majority of the electors who did vote, call another meeting by giving 30 days' notice of that other meeting or another referendum as provided in the regulations.

Assemblée de la bande ou référendum

(2) Lorsqu'une majorité des électeurs d'une bande n'ont pas voté à une assemblée convoquée, ou à un référendum tenu, au titre du paragraphe (1), le ministre peut, si la proposition de cession à titre absolu a reçu l'assentiment de la majorité des électeurs qui ont voté, convoquer une autre assemblée en en donnant un avis de trente jours, ou faire tenir un autre référendum comme le prévoient les règlements.

Assent of band

(3) If a meeting or referendum is called under subsection (2) and the proposed absolute surrender is assented to at the meeting or referendum by a majority of the electors voting, the surrender is deemed, for the purposes of this section, to have been assented to by a majority of the electors of the band.

Assentiment de la bande

(3) Lorsqu'une assemblée est convoquée en vertu du paragraphe (2) ou qu'un référendum est tenu en vertu de ce paragraphe et que la proposition de cession à titre absolu est sanctionnée à l'assemblée ou lors du référendum par la majorité des électeurs votants, la cession est réputée, pour l'application du présent article, avoir été sanctionnée par une majorité des électeurs de la bande.

Secret ballot

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.

Scrutin secret

(4) Le ministre, à la demande du conseil de la bande ou chaque fois qu'il le juge opportun, peut ordonner qu'un vote, à toute assemblée prévue par le présent article, ait lieu au scrutin secret.

Officials required

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.

R.S., 1985, c. I-5, s. 39; R.S., 1985, c. 17 (4th Supp.), s. 3; 2012, c. 31, s. 207.

La présence de fonctionnaires est requise

(5) Chaque assemblée aux termes du présent article est tenue en présence du surintendant ou d'un autre fonctionnaire du ministère, que désigne le ministre.

L.R. (1985), ch. I-5, art. 39; L.R. (1985), ch. 17 (4e suppl.), art. 3; 2012, ch. 31, art. 207.

Conditions — designation

39.1 A designation is valid if it is made to Her Majesty, is assented to by a majority of the electors of the band voting at a referendum held in accordance with the regulations, is recommended to the Minister by the council of the band and is accepted by the Minister.

2012, c. 31, s. 208.

Conditions de validité : désignation

39.1 Est valide la désignation faite en faveur de Sa Majesté, sanctionnée par la majorité des électeurs de la bande ayant voté lors d'un référendum tenu conformément aux règlements, recommandée par le conseil de la bande au ministre et acceptée par celui-ci.

2012, ch. 31, art. 208.

Certification — surrender

40. A proposed absolute surrender that is assented to by the band in accordance with section 39 shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band and then submitted to the Governor in Council for acceptance or refusal.

R.S., 1985, c. I-5, s. 40; R.S., 1985, c. 17 (4th Supp.), s. 4; 2012, c. 31, s. 208.

Certificat : cession

40. La proposition de cession à titre absolu qui a été sanctionnée par la bande conformément à l'article 39 est attestée sous serment par le surintendant ou l'autre fonctionnaire qui a assisté à l'assemblée et par le chef ou un membre du conseil de la bande; elle est ensuite soumise au gouverneur en conseil pour acceptation ou rejet.

L.R. (1985), ch. I-5, art. 40; L.R. (1985), ch. 17 (4e suppl.), art. 4; 2012, ch. 31, art. 208.

Certification — designation

40.1 (1) A proposed designation that is assented to in accordance with section 39.1 shall be certified on oath by an officer of the Department and by the chief or a member of the council of the band.

Ministerial decision

(2) On the recommendation of the council of the band, the proposed designation shall be submitted to the Minister who may accept or reject it.

2012, c. 31, s. 208.

Effect of surrenders and designations

41. An absolute surrender or a designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

R.S., 1985, c. I-5, s. 41; R.S., 1985, c. 17 (4th Supp.), s. 4.

Certificat : désignation

40.1 (1) La proposition de désignation qui a été sanctionnée conformément à l'article 39.1 est attestée sous serment par un fonctionnaire du ministère et par le chef ou un membre du conseil de la bande.

Décision ministérielle

(2) Sur la recommandation du conseil de la bande, la proposition de désignation est soumise au ministre qui peut l'accepter ou la rejeter.

2012, ch. 31, art. 208.

Effet de la cession et de la désignation

41. La cession à titre absolu ou la désignation est censée conférer tous les droits nécessaires pour permettre à Sa Majesté de donner effet aux conditions de la cession ou de la désignation.

L.R. (1985), ch. I-5, art. 41; L.R. (1985), ch. 17 (4e suppl.), art. 4.

DESCENT OF PROPERTY

TRANSMISSION DE BIENS PAR DROIT DE SUCCESSION

Powers of Minister with respect to property of deceased Indians

42. (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

Regulations

(2) The Governor in Council may make regulations providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

Application of regulations

(3) Regulations made under subsection (2) may be made applicable to estates of Indians who died before, on or after September 4, 1951.

R.S., c. I-6, s. 42.

Particular powers

43. Without restricting the generality of section 42, the Minister may

(*a*) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;

(*b*) authorize executors to carry out the terms of the wills of deceased Indians;

(*c*) authorize administrators to administer the property of Indians who die intestate;

Pouvoirs du ministre à l'égard des biens des Indiens décédés

42. (1) Sous réserve des autres dispositions de la présente loi, la compétence sur les questions testamentaires relatives aux Indiens décédés est attribuée exclusivement au ministre; elle est exercée en conformité avec les règlements pris par le gouverneur en conseil.

Règlements

(2) Le gouverneur en conseil peut prendre des règlements stipulant qu'un Indien décédé qui, au moment de son décès, était en possession de terres dans une réserve, sera réputé, en telles circonstances et à telles fins que prescrivent les règlements, avoir été légalement en possession de ces terres au moment de son décès.

Application des règlements

(3) Les règlements prévus par le paragraphe (2) peuvent être rendus applicables aux successions des Indiens morts avant ou après le 4 septembre 1951 ou à cette date.

S.R., ch. I-6, art. 42.

Pouvoirs particuliers

43. Sans que soit limitée la portée générale de l'article 42, le ministre peut :

a) nommer des exécuteurs testamentaires et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;

b) autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;

c) autoriser des administrateurs à gérer les biens d'Indiens morts intestats;

(*d*) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

(*e*) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

R.S., c. I-6, s. 43.

d) donner effet aux testaments d'Indiens décédés et administrer les biens d'Indiens morts intestats;

e) prendre les arrêtés et donner les directives qu'il juge utiles à l'égard de quelque question mentionnée à l'article 42.

S.R., ch. I-6, art. 43.

Courts may exercise jurisdiction with consent of Minister

44. (1) The court that would have jurisdiction if a deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred on the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.

Les tribunaux peuvent exercer leur compétence, avec le consentement du ministre

44. (1) Avec le consentement du ministre, le tribunal qui aurait compétence si la personne décédée n'était pas un Indien peut exercer, en conformité avec la présente loi, la compétence que la présente loi confère au ministre à l'égard des questions testamentaires, ainsi que tous autres pouvoirs et compétence ordinairement dévolus à ce tribunal.

Minister may refer a matter to the court

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration of a deceased shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to that court any question arising out of any will or the administration of any estate.

Le ministre peut déférer des questions au tribunal

(2) Dans tout cas particulier, le ministre peut ordonner qu'une demande en vue d'obtenir l'homologation d'un testament ou l'émission de lettres d'administration soit présentée au tribunal qui aurait compétence si la personne décédée n'était pas un Indien. Il a la faculté de soumettre à ce tribunal toute question que peut faire surgir un testament ou l'administration d'une succession.

Orders relating to lands

(3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

Ordonnances visant des terres

(3) Un tribunal qui exerce sa compétence sous le régime du présent article ne peut, sans le consentement écrit du ministre, faire exécuter une ordonnance visant des biens immeubles sur une réserve.

R.S., c. I-6, s. 44.

S.R., ch. I-6, art. 44.

WILLS

TESTAMENTS

Indians may make wills

45. (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

Les Indiens peuvent tester

45. (1) La présente loi n'a pas pour effet d'empêcher un Indien, ou de lui interdire, de transmettre ses biens par testament.

Form of will

(2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.

Forme de testaments

(2) Le ministre peut accepter comme testament tout document écrit signé par un Indien dans lequel celui-ci indique ses désirs ou intentions à l'égard de la disposition de ses biens lors de son décès.

Probate

(3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

Homologation

(3) Nul testament fait par un Indien n'a d'effet juridique comme disposition de biens tant qu'il n'a pas été approuvé par le ministre ou homologué par un tribunal en conformité avec la présente loi.

R.S., c. I-6, s. 45.

S.R., ch. I-6, art. 45.

Minister may declare will void

46. (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

(*a*) the will was executed under duress or undue influence;

(*b*) the testator at the time of execution of the will lacked testamentary capacity;

(*c*) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;

(*d*) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

(*e*) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or

(*f*) the terms of the will are against the public interest.

Where will declared void

(2) Where a will of an Indian is declared by the Minister or by a court to be wholly void, the person executing the will shall be deemed to have died intestate, and where the will is so declared to be void in part only, any bequest or devise affected thereby, unless a contrary intention appears in the will, shall be deemed to have lapsed.

R.S., c. I-6, s. 46.

APPEALS

Appeal to Federal Court

47. A decision of the Minister made in the exercise of the jurisdiction or authority conferred on him by section 42, 43 or 46 may, within two months from the date thereof, be appealed by any person affected thereby to the Federal Court, if the amount in controversy in the appeal exceeds five hundred dollars or if the Minister consents to an appeal.

R.S., c. I-6, s. 47; R.S., c. 10(2nd Supp.), ss. 64, 65.

DISTRIBUTION OF PROPERTY ON INTESTACY

Surviving spouse's share

48. (1) Where the net value of the estate of an intestate does not, in the opinion of the Minister, exceed seventy-five thousand dollars or

Le ministre peut déclarer nul un testament

46. (1) Le ministre peut déclarer nul, en totalité ou en partie, le testament d'un Indien, s'il est convaincu de l'existence de l'une des circonstances suivantes :

a) le testament a été établi sous l'effet de la contrainte ou d'une influence indue;

b) au moment où il a fait ce testament, le testateur n'était pas habile à tester;

c) les clauses du testament seraient la cause de privations pour des personnes auxquelles le testateur était tenu de pourvoir;

d) le testament vise à disposer d'un terrain, situé dans une réserve, d'une façon contraire aux intérêts de la bande ou aux dispositions de la présente loi;

e) les clauses du testament sont si vagues, si incertaines ou si capricieuses que la bonne administration et la distribution équitable des biens de la personne décédée seraient difficiles ou impossibles à effectuer suivant la présente loi;

f) les clauses du testament sont contraires à l'intérêt public.

Cas de nullité

(2) Lorsque le testament d'un Indien est déclaré entièrement nul par le ministre ou par un tribunal, la personne qui a fait ce testament est censée être morte intestat, et, lorsque le testament est ainsi déclaré nul en partie seulement, sauf indication d'une intention contraire y énoncée, tout legs de biens meubles ou immeubles visé de la sorte est réputé caduc.

S.R., ch. I-6, art. 46.

APPELS

Appels à la Cour fédérale

47. Une décision rendue par le ministre dans l'exercice de la compétence que lui confère l'article 42, 43 ou 46 peut être portée en appel devant la Cour fédérale dans les deux mois de cette décision, par toute personne y intéressée, si la somme en litige dans l'appel dépasse cinq cents dollars ou si le ministre y consent.

S.R., ch. 1-6, art. 47; S.R., ch. 10(2e suppl.), art. 64 et 65.

DISTRIBUTION DES BIENS AB INTESTAT

Part du survivant

48. (1) Lorsque, de l'avis du ministre, la valeur nette de la succession d'un intestat n'excède pas soixante-quinze mille dollars ou tout

such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.

autre montant fixé par décret du gouverneur en conseil, la succession est dévolue au survivant.

Idem

(2) Where the net value of the estate of an intestate, in the opinion of the Minister, exceeds seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, shall go to the survivor, and

(*a*) if the intestate left no issue, the remainder shall go to the survivor,

(*b*) if the intestate left one child, one-half of the remainder shall go to the survivor, and

(*c*) if the intestate left more than one child, one-third of the remainder shall go to the survivor,

and where a child has died leaving issue and that issue is alive at the date of the intestate's death, the survivor shall take the same share of the estate as if the child had been living at that date.

Idem

(2) Lorsque la valeur nette de la succession d'un intestat excède, de l'avis du ministre, soixante-quinze mille dollars ou tout autre montant fixé par décret du gouverneur en conseil, une somme de soixante-quinze mille dollars ou toute autre somme fixée par décret du gouverneur en conseil est dévolue au survivant et le reste est attribué de la façon suivante :

a) si l'intestat n'a pas laissé de descendant, le solde est dévolu au survivant;

b) si l'intestat a laissé un enfant, la moitié du solde est dévolue au survivant;

c) si l'intestat a laissé plus d'un enfant, le tiers du solde est dévolu au survivant,

et lorsqu'un enfant est décédé laissant des descendants et que ceux-ci sont vivants à la date du décès de l'intestat, le survivant reçoit la même partie de la succession que si l'enfant avait vécu à cette date.

Where children not provided for

(3) Notwithstanding subsections (1) and (2),

(*a*) where in any particular case the Minister is satisfied that any children of the deceased will not be adequately provided for, he may direct that all or any part of the estate that would otherwise go to the survivor shall go to the children; and

(*b*) the Minister may direct that the survivor shall have the right to occupy any lands in a reserve that were occupied by the deceased at the time of death.

Cas où il n'est pas pourvu aux besoins des enfants

(3) Par dérogation aux paragraphes (1) et (2) :

a) si, dans un cas particulier, le ministre est convaincu qu'il ne sera pas suffisamment pourvu aux besoins de tout enfant du défunt, il peut ordonner que la totalité ou toute partie de la succession qui autrement irait au survivant soit dévolue à l'enfant;

b) le ministre peut ordonner que le survivant ait le droit d'occuper toutes terres situées dans une réserve que la personne décédée occupait au moment de son décès.

Distribution to issue

(4) Where an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the survivor, if any, *per stirpes* among such issue.

Distribution aux descendants

(4) Lorsqu'un intestat laisse à son décès des descendants, sa succession est, sous réserve des droits du survivant, s'il en est, distribuée par souche entre ces descendants.

Distribution to parents

(5) Where an intestate dies leaving no survivor or issue, the estate shall go to the parents of the deceased in equal shares if both are living, but if either of them is dead the estate shall go to the surviving parent.

Distribution aux parents

(5) Lorsqu'un intestat ne laisse à sa mort ni survivant ni descendant, sa succession est dévolue à ses parents en parts égales si tous deux sont vivants, ou au parent survivant si l'un des deux est décédé.

Distribution to brothers, sisters and their issue

(6) Where an intestate dies leaving no survivor or issue or father or mother, his estate shall be distributed among his brothers and sisters in equal shares, and where any brother or

Distribution aux frères, soeurs et descendants de frères et soeurs

(6) Lorsqu'un intestat ne laisse à sa mort ni survivant, ni descendant, ni père, ni mère, sa succession est dévolue à ses frères et soeurs en parts égales, et, si l'un de ses frères ou soeurs

sister is dead the children of the deceased brother or sister shall take the share their parent would have taken if living, but where the only persons entitled are children of deceased brothers and sisters, they shall take per capita.

est décédé, les enfants du frère ou de la soeur décédé reçoivent la part que leur père ou mère aurait reçue s'il avait été vivant, mais, lorsque les seuls ayants droit sont les enfants de frères et soeurs décédés, les biens leur sont distribués par tête.

Next-of-kin

(7) Where an intestate dies leaving no survivor, issue, father, mother, brother or sister, and no children of any deceased brother or sister, his estate shall go to his next-of-kin.

(7) Lorsqu'un intestat ne laisse à sa mort ni survivant, ni descendant, ni père, ni mère, ni frère, ni soeur, ni enfant d'un frère décédé ou d'une soeur décédée, la succession est dévolue à son plus proche parent.

Plus proche parent

Distribution among next-of-kin

(8) Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers' and sisters' children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

(8) Lorsque la succession est dévolue aux plus proches parents, elle doit être distribuée en parts égales entre tous les plus proches parents à un même degré de consanguinité avec l'intestat et leurs représentants légaux, mais dans aucun cas la représentation ne peut être admise après les enfants des frères et soeurs, et tout droit sur un bien-fonds situé dans une réserve est dévolu à Sa Majesté au bénéfice de la bande si le plus proche parent de l'intestat est plus éloigné qu'un frère ou une soeur.

Distribution aux plus proches parents

Degrees of kindred

(9) For the purposes of this section, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

(9) Pour l'application du présent article, les degrés de parenté sont établis en remontant les générations à partir de l'intestat jusqu'au plus proche auteur commun et en redescendant jusqu'au parent en question; les parents d'un seul côté héritent à parts égales avec les parents des deux côtés au même degré.

Degré de parenté

Descendants and relatives born after intestate's death

(10) Descendants and relatives of an intestate begotten before his death but born thereafter shall inherit as if they had been born in the lifetime of the intestate and had survived him.

(10) Les descendants et parents de l'intestat engendrés avant la mort de ce dernier mais nés ensuite héritent au même titre que s'ils étaient nés du vivant de l'intestat et lui avaient survécu.

Descendants et parents nés après la mort de l'intestat

Estate not disposed of by will

(11) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

(11) Tous les biens dont il n'est pas disposé par testament sont distribués comme si le testateur était mort intestat et n'avait laissé aucun autre bien.

Biens non aliénés par testament

No community of property

(12) There is no community of real or personal property situated in a reserve.

(12) Il n'y a aucune communauté de biens meubles ou immeubles situés dans une réserve.

Absence de communauté de biens

(13) and (14) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

(13) et (14) [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 9]

Equal application to men and women

(15) This section applies in respect of an intestate woman as it applies in respect of an intestate man.

(15) Le présent article s'applique à l'égard d'une femme intestat de la même manière qu'à l'égard d'un homme intestat.

Application aux personnes des deux sexes

(16) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

(16) [Abrogé, L.R. (1985), ch. 32 (1er suppl.), art. 9]

R.S., 1985, c. 1-5, s. 48; R.S., 1985, c. 32 (1st Supp.), s. 9, c. 48 (4th Supp.), s. 2; 2000, c. 12, ss. 149, 151.

L.R. (1985), ch. I-5, art. 48; L.R. (1985), ch. 32 (1er suppl.), art. 9, ch. 48 (4e suppl.), art. 2; 2000, ch. 12, art. 149 et 151.

Devisee's entitlement

49. A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister.

R.S., c. I-6, s. 49.

Droit du légataire

49. Une personne qui prétend avoir droit à la possession ou à l'occupation de terres situées dans une réserve en raison d'un legs ou d'une transmission par droit de succession est censée ne pas en avoir la possession ou l'occupation légitime tant que le ministre n'a pas approuvé cette possession.

S.R., ch. I-6, art. 49.

Non-resident of reserve

50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

Non-résident d'une réserve

50. (1) Une personne non autorisée à résider dans une réserve n'acquiert pas, par legs ou transmission sous forme de succession, le droit de posséder ou d'occuper une terre dans cette réserve.

Sale by superintendent

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

Vente par le surintendant

(2) Lorsqu'un droit à la possession ou à l'occupation de terres dans une réserve est dévolu, par legs ou transmission sous forme de succession, à une personne non autorisée à y résider, ce droit doit être offert en vente par le surintendant au plus haut enchérisseur entre les personnes habiles à résider dans la réserve et le produit de la vente doit être versé au légataire ou au descendant, selon le cas.

Unsold lands revert to band

(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

Les terres non vendues retournent à la bande

(3) Si, dans les six mois ou tout délai supplémentaire que peut déterminer le ministre, à compter de la mise en vente du droit à la possession ou occupation d'une terre, en vertu du paragraphe (2), il n'est reçu aucune soumission, le droit retourne à la bande, libre de toute réclamation de la part du légataire ou descendant, sous réserve du versement, à la discrétion du ministre, au légataire ou descendant, sur les fonds de la bande, de l'indemnité pour améliorations permanentes que le ministre peut déterminer.

Approval required

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

R.S., c. I-6, s. 50.

Approbation requise

(4) L'acheteur d'un droit à la possession ou occupation d'une terre sous le régime du paragraphe (2) n'est pas censé avoir la possession ou l'occupation légitime de la terre tant que le ministre n'a pas approuvé la possession.

S.R., ch. I-6, art. 50.

Regulations

50.1 The Governor in Council may make regulations respecting circumstances where more than one person qualifies as a survivor of an intestate under section 48.

2000, c. 12, s. 150.

Pouvoir réglementaire

50.1 Le gouverneur en conseil peut, par règlement, régir les cas où il existe plus d'un survivant à l'égard du même intestat visé à l'article 48.

2000, ch. 12, art. 150.

MENTALLY INCOMPETENT INDIANS

INDIENS MENTALEMENT INCAPABLES

Powers of Minister generally

51. (1) Subject to this section, all jurisdiction and authority in relation to the property of

Pouvoirs du ministre, en général

51. (1) Sous réserve des autres dispositions du présent article, la compétence à l'égard des

mentally incompetent Indians is vested exclusively in the Minister.

Particular powers

(2) Without restricting the generality of subsection (1), the Minister may

(*a*) appoint persons to administer the estates of mentally incompetent Indians;

(*b*) order that any property of a mentally incompetent Indian shall be sold, leased, alienated, mortgaged, disposed of or otherwise dealt with for the purpose of

(i) paying his debts or engagements,

(ii) discharging encumbrances on his property,

(iii) paying debts or expenses incurred for his maintenance or otherwise for his benefit, or

(iv) paying or providing for the expenses of future maintenance; and

(*c*) make such orders and give such directions as he considers necessary to secure the satisfactory management of the estates of mentally incompetent Indians.

Property off reserve

(3) The Minister may order that any property situated off a reserve and belonging to a mentally incompetent Indian shall be dealt with under the laws of the province in which the property is situated.

R.S., c. I-6, s. 51.

GUARDIANSHIP

Property of infant children

52. The Minister may administer or provide for the administration of any property to which infant children of Indians are entitled, and may appoint guardians for that purpose.

R.S., c. I-6, s. 52.

MONEY OF INFANT CHILDREN

Distributions of capital

52.1 (1) The council of a band may determine that the payment of not more than three thousand dollars, or such other amount as may be fixed by order of the Governor in Council, in a year of the share of a distribution under paragraph 64(1)(*a*) that belongs to an infant child who is a member of the band is necessary or proper for the maintenance, advancement or other benefit of the child.

biens des Indiens mentalement incapables est attribuée exclusivement au ministre.

Pouvoirs particuliers

(2) Sans que soit limitée la portée générale du paragraphe (1), le ministre peut :

a) nommer des personnes pour administrer les biens des Indiens mentalement incapables;

b) ordonner que tout bien d'un Indien mentalement incapable soit vendu, loué, aliéné, hypothéqué, qu'il en soit disposé ou que d'autres mesures soient prises à son égard aux fins, selon le cas :

(i) d'acquitter ses dettes ou engagements,

(ii) de dégrever ses biens,

(iii) d'acquitter les dettes ou les dépenses subies pour son entretien ou autrement à son avantage,

(iv) d'acquitter les frais de l'entretien ultérieur ou d'y pourvoir;

c) prendre les arrêtés et donner les instructions qu'il juge nécessaires pour assurer l'administration satisfaisante des biens des Indiens mentalement incapables.

Biens situés en dehors d'une réserve

(3) Le ministre peut ordonner que tout bien situé en dehors d'une réserve et appartenant à un Indien mentalement incapable soit traité selon la législation de la province où le bien est situé.

S.R., ch. 1-6, art. 51.

TUTELLE

Biens d'enfants mineurs

52. Le ministre peut administrer tous biens auxquels les enfants mineurs d'Indiens ont droit, ou en assurer l'administration, et il peut nommer des tuteurs à cette fin.

S.R., ch. 1-6, art. 52.

FONDS DES MINEURS

Versement

52.1 (1) Le conseil d'une bande peut statuer que le versement de la fraction dévolue, à la suite du partage visé à l'alinéa 64(1)*a*), à un enfant mineur qui est membre de la bande est dans l'intérêt de l'enfant, notamment pour son entretien ou son épanouissement. Ce versement ne peut toutefois excéder trois mille dollars par an ou le montant fixé par décret du gouverneur en conseil.

Procedure

(2) Before making a determination under subsection (1), the council of the band must

(*a*) post in a conspicuous place on the reserve fourteen days before the determination is made a notice that it proposes to make such a determination; and

(*b*) give the members of the band a reasonable opportunity to be heard at a general meeting of the band held before the determination is made.

Procédure

(2) Le cas échéant, le conseil affiche un avis de son intention, en un lieu bien en évidence dans la réserve, quatorze jours avant de prendre sa décision et donne aux membres de la bande la possibilité de présenter leurs observations lors d'une assemblée générale tenue avant la prise de la décision.

Minister's duty

(3) Where the council of the band makes a determination under subsection (1) and notifies the Minister, at the time it gives its consent to the distribution pursuant to paragraph 64(1)(*a*), that it has made that determination and that, before making it, it complied with subsection (2), the Minister shall make a payment described in subsection (1) for the maintenance, advancement or other benefit of the child to a parent or person who is responsible for the care and custody of the child or, if so requested by the council on giving its consent to that distribution, to the council.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Versement obligatoire

(3) Le ministre est tenu d'effectuer le versement mentionné au paragraphe (1) soit à un parent ou au détenteur de l'autorité parentale, soit, s'il le demande, au conseil de la bande lorsque celui-ci a d'une part, statué dans le sens prévu à ce paragraphe et, d'autre part, certifié au ministre, lors de l'acceptation du partage visé à l'alinéa 64(1)*a*), la conformité de cette décision à la procédure établie.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

Money of infant children of Indians

52.2 The Minister may, regardless of whether a payment is made under section 52.1, pay all or part of any money administered by the Minister under section 52 that belongs to an infant child of an Indian to a parent or person who is responsible for the care and custody of the child or otherwise apply all or part of that money if

(*a*) the Minister is requested in writing to do so by the parent or the person responsible; and

(*b*) in the opinion of the Minister, the payment or application is necessary or proper for the maintenance, advancement or other benefit of the child.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Fonds des mineurs

52.2 Sur demande écrite d'un parent ou du détenteur de l'autorité parentale, le ministre peut, sans qu'il soit tenu compte de tout versement effectué au titre de l'article 52.1, soit lui verser, en tout ou en partie, les sommes d'argent gérées par lui conformément à l'article 52 et appartenant aux enfants mineurs d'Indiens s'il l'estime être dans leur intérêt, notamment pour leur entretien ou leur épanouissement, soit les verser pour leur compte.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

Attaining majority

52.3 (1) Where a child of an Indian attains the age of majority, the Minister shall pay any money administered by the Minister under section 52 to which the child is entitled to that child in one lump sum.

Paiement à la majorité

52.3 (1) Le ministre est tenu de remettre, en un versement unique, toute somme d'argent gérée au titre de l'article 52 à l'Indien qui y a droit et a atteint sa majorité.

Exception

(2) Notwithstanding subsection (1), where requested in writing to do so before a child of an Indian attains the age of majority by a parent or a person who is responsible for the care and

Exception

(2) Sur demande écrite — avant que l'Indien atteigne sa majorité — d'un parent ou du détenteur de l'autorité parentale ou du conseil de la bande dont l'intéressé est membre, le ministre

custody of the child or by the council of the band of which the child is a member, the Minister may, instead of paying the money in one lump sum, pay it in instalments during a period beginning on the day the child attains the age of majority and ending not later than the day that is three years after that day.

R.S., 1985, c. 48 (4th Supp.), s. 3.

peut toutefois payer la somme en versements échelonnés à compter de la date de la majorité pendant au plus trois ans après celle-ci.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

Relief

52.4 Where, in a proceeding in respect of the share of a distribution under paragraph 64(1)(*a*) or of money belonging to an infant child that was paid pursuant to section 52.1, 52.2 or 52.3, it appears to the court that the Minister, the band, its council or a member of that council acted honestly and reasonably and ought fairly to be relieved from liability in respect of the payment, the court may relieve the Minister, band, council or member, either in whole or in part, from liability in respect of the payment.

R.S., 1985, c. 48 (4th Supp.), s. 3; 1992, c. 1, s. 144(F).

Libération

52.4 Le tribunal peut, dans toute affaire relative au versement d'une fraction dévolue à un enfant mineur dans le cadre du partage visé à l'alinéa 64(1)*a*) et effectué en application des articles 52.1, 52.2 ou 52.3, libérer, en tout ou en partie, le ministre, la bande, son conseil ou les membres de celui-ci de toute responsabilité à cet égard lorsqu'il lui apparaît que tel d'entre eux, ayant agi honnêtement et raisonnablement, devrait, en toute justice, l'être.

L.R. (1985), ch. 48 (4e suppl.), art. 3; 1992, ch. 1, art. 144(F).

Effect of payment

52.5 (1) The receipt in writing from a parent or person who is responsible for the care and custody of an infant child for a payment made pursuant to section 52.1 or 52.2

(*a*) discharges the duty of the Minister, the band, its council and each member of that council to make the payment to the extent of the amount paid; and

(*b*) discharges the Minister, the band, its council and each member of that council from seeing to its application or being answerable for its loss or misapplication.

Effet du versement

52.5 (1) L'accusé de réception transmis par le destinataire — parent ou détenteur de l'autorité parentale — du versement visé à l'article 52.1 ou 52.2 libère le ministre, la bande, son conseil et les membres de celui-ci, à concurrence du montant versé, de son obligation, ainsi que de toute responsabilité à l'égard de celui-ci ou de son éventuel détournement.

Idem

(2) The receipt in writing from the council of the band of which an infant child is a member for a payment made pursuant to section 52.1

(*a*) discharges the duty of the Minister to make the payment to the extent of the amount paid; and

(*b*) discharges the Minister from seeing to the application of the amount paid or being answerable for its loss or misapplication.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Idem

(2) L'accusé de réception transmis par le destinataire — conseil de la bande dont l'enfant est membre — du versement visé à l'article 52.1 libère le ministre, à concurrence du montant versé, de son obligation, ainsi que de toute responsabilité à l'égard de celui-ci ou de son éventuel détournement.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

MANAGEMENT OF RESERVES AND SURRENDERED AND DESIGNATED LANDS

Transactions re surrendered and designated lands

53. (1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

(*a*) manage or sell absolutely surrendered lands; or

(*b*) manage, lease or carry out any other transaction affecting designated lands.

Grant where original purchaser dead

(2) Where the original purchaser of surrendered lands is dead and the heir, assignee or devisee of the original purchaser applies for a grant of the lands, the Minister may, on receipt of proof in such manner as he directs and requires in support of any claim for the grant and on being satisfied that the claim has been equitably and justly established, allow the claim and authorize a grant to issue accordingly.

Departmental employees

(3) No person who is appointed pursuant to subsection (1) or who is an officer or a servant of Her Majesty employed in the Department may, except with the approval of the Governor in Council, acquire directly or indirectly any interest in absolutely surrendered or designated lands.

R.S., 1985, c. I-5, s. 53; R.S., 1985, c. 17 (4th Supp.), s. 5.

Assignments

54. Where absolutely surrendered lands are agreed to be sold and letters patent relating thereto have not issued, or where designated lands are leased or an interest in them granted, the purchaser, lessee or other person who has an interest in the absolutely surrendered or designated lands may, with the approval of the Minister, assign all or part of that interest to any other person.

R.S., 1985, c. I-5, s. 54; R.S., 1985, c. 17 (4th Supp.), s. 6.

Surrendered and Designated Lands Register

55. (1) There shall be maintained in the Department a register, to be known as the Surrendered and Designated Lands Register, in which shall be recorded particulars in connection with any transaction affecting absolutely surrendered or designated lands.

ADMINISTRATION DES RÉSERVES ET DES TERRES CÉDÉES OU DÉSIGNÉES

Opérations concernant les terres cédées ou désignées

53. (1) Le ministre ou son délégué peut, conformément à la présente loi et aux conditions de la cession à titre absolu ou de la désignation :

a) administrer ou vendre les terres cédées à titre absolu;

b) effectuer toute opération à l'égard des terres désignées et notamment les administrer et les donner à bail.

Concession lorsque l'acquéreur initial est décédé

(2) Lorsque l'acquéreur initial de terres cédées est mort et que l'héritier, cessionnaire ou légataire de l'acquéreur initial demande une concession des terres, le ministre peut, sur réception d'une preuve d'après la manière qu'il ordonne et exige à l'appui de toute demande visant cette concession et lorsqu'il est convaincu que la demande a été établie de façon juste et équitable, agréer la demande et autoriser la délivrance d'une concession en conséquence.

Fonctionnaires du ministère

(3) La personne qui est nommée à titre de délégué conformément au paragraphe (1), ou qui est un fonctionnaire ou préposé de Sa Majesté à l'emploi du ministère, ne peut, sauf approbation du gouverneur en conseil, acquérir directement ou indirectement d'intérêts dans des terres cédées à titre absolu ou désignées.

L.R. (1985), ch. I-5, art. 53; L.R. (1985), ch. 17 (4e suppl.), art. 5.

Transfert

54. Lorsqu'il a été convenu de la vente de terres cédées à titre absolu et que des lettres patentes n'ont pas été délivrées à leur égard, ou lorsque des terres désignées ont été données à bail ou ont fait l'objet d'un démembrement, l'acheteur, le locataire ou toute autre personne ayant un droit sur ces terres peut, avec l'approbation du ministre, transférer à toute autre personne tout ou partie de son droit.

L.R. (1985), ch. I-5, art. 54; L.R. (1985), ch. 17 (4e suppl.), art. 6.

Registre des terres cédées ou désignées

55. (1) Est tenu au ministère un registre, appelé Registre des terres cédées ou désignées, dans lequel sont consignés tous les détails relatifs à toute opération touchant les terres cédées à titre absolu ou désignées.

Conditional assignment

(2) A conditional assignment shall not be registered.

(2) Un transfert conditionnel n'est pas enregistré.

Transfert conditionnel

Proof of execution

(3) Registration of an assignment may be refused until proof of its execution has been furnished.

(3) L'inscription d'un transfert peut être refusée tant que la preuve de l'établissement de cet acte n'a pas été fournie.

Preuve de souscription

Effect of registration

(4) An assignment registered under this section is valid against an unregistered assignment or an assignment subsequently registered.

R.S., 1985, c. I-5, s. 55; R.S., 1985, c. 17 (4th Supp.), s. 7.

(4) Un transfert enregistré selon le présent article est valide à l'encontre d'un transfert non enregistré ou d'un transfert enregistré subséquemment.

L.R. (1985), ch. I-5, art. 55; L.R. (1985), ch. 17 (4e suppl.), art. 7.

Effet de l'inscription

Certificate of registration

56. Where an assignment is registered, there shall be endorsed on the original copy thereof a certificate of registration signed by the Minister or by an officer of the Department authorized by the Minister to sign such certificates.

R.S., c. I-6, s. 56.

56. Lorsqu'un transfert est enregistré, on appose sur la copie originale de l'acte un certificat d'enregistrement signé par le ministre ou par un fonctionnaire du ministère que le ministre autorise à signer.

S.R., ch. I-6, art. 56.

Certificat d'enregistrement

Regulations

57. The Governor in Council may make regulations

(*a*) authorizing the Minister to grant licences to cut timber on surrendered lands, or, with the consent of the council of the band, on reserve lands;

(*b*) imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licences granted under paragraph (*a*);

(*c*) providing for the disposition of surrendered mines and minerals underlying lands in a reserve;

(*d*) prescribing the punishment, not exceeding one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of any regulation made under this section; and

(*e*) providing for the seizure and forfeiture of any timber or minerals taken in contravention of any regulation made under this section.

R.S., c. I-6, s. 57.

57. Le gouverneur en conseil peut prendre des règlements :

a) autorisant le ministre à accorder des permis de couper du bois sur des terres cédées ou, avec le consentement du conseil de la bande, sur des terres de réserve;

b) établissant des conditions et des restrictions à l'égard de l'exercice des droits conférés par les permis accordés sous le régime de l'alinéa *a*);

c) pourvoyant à l'aliénation de mines et minéraux cédés dans le sous-sol d'une réserve;

d) prescrivant l'amende maximale de cent dollars et l'emprisonnement maximal de trois mois, ou l'une de ces peines, qui peuvent être infligés, sur déclaration de culpabilité par procédure sommaire, pour infraction à l'un des règlements prévus au présent article;

e) prévoyant la saisie et la confiscation du bois ou des minéraux pris en violation d'un règlement pris en vertu du présent article.

S.R., ch. I-6, art. 57.

Règlements

Uncultivated or unused lands

58. (1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,

(*a*) improve or cultivate that land and employ persons therefor, and authorize and direct the expenditure of such amount of the capital funds of the band as he considers nec-

58. (1) Lorsque, dans une réserve, un terrain est inculte ou inutilisé, le ministre peut, avec le consentement du conseil de la bande :

a) améliorer ou cultiver le terrain et employer des personnes à cette fin, autoriser et prescrire la dépense de telle partie des fonds en capital de la bande qu'il juge nécessaire à

Terrains incultes ou inutilisés

essary for that improvement or cultivation including the purchase of such stock, machinery or material or for the employment of such labour as the Minister considers necessary;

(*b*) where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and

(*c*) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.

l'amélioration ou à la culture, y compris l'achat du bétail, des machines ou du matériel ou l'emploi de la main-d'oeuvre qu'il estime nécessaire;

b) si le terrain est en la possession légitime d'un particulier, accorder la location de ce terrain à des fins de culture ou de pâturage ou à toute fin se trouvant au profit de la personne qui en a la possession;

c) si le terrain n'est pas en la possession légitime d'un particulier, accorder la location du terrain, au profit de la bande, à des fins de culture ou de pâturage.

Distribution of proceeds

(2) Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(*b*), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of the improvements from the rent payable to the individual under this subsection.

(2) Sur les montants provenant de l'amélioration ou de la culture de terrains selon l'alinéa (1)*b*), un loyer raisonnable est versé au particulier en possession légitime des terrains ou une partie de ceux-ci, et le solde est porté au crédit de la bande. Toutefois, lorsque des améliorations sont apportées à des terrains occupés par un particulier, le ministre peut déduire, du loyer payable à celui-ci sous le régime du présent paragraphe, la valeur de ces améliorations.

Distribution du produit

Lease at request of occupant

(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

(3) Le ministre peut louer au profit de tout Indien, à la demande de celui-ci, la terre dont ce dernier est en possession légitime sans que celle-ci soit désignée.

Location à la demande de l'occupant

Disposition of grass, timber, non-metallic substances, etc.

(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation

(*a*) dispose of wild grass or dead or fallen timber; and

(*b*) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.

(4) Nonobstant toute autre disposition de la présente loi, le ministre peut, sans cession à titre absolu ou désignation :

a) disposer des herbes sauvages ou du bois mort sur pied ou du chablis;

b) avec le consentement du conseil de la bande, disposer du sable, du gravier, de la glaise et des autres substances non métalliques se trouvant sur des terres ou dans le sous-sol d'une réserve, ou lorsque ce consentement ne peut être obtenu sans obstacle ou retard indu, peut délivrer des permis temporaires pour la prise du sable, du gravier, de la glaise et d'autres substances non métalliques sur des terres ou dans le sous-sol d'une réserve, renouvelables avec le consentement du conseil de la bande seulement.

Aliénation d'herbes, de bois et de substances non métalliques, etc.

Proceeds

(5) The proceeds of the transactions referred to in subsection (4) shall be credited to band

(5) Le produit de ces opérations doit être porté au crédit des fonds de bande ou partagé

Produit

funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

R.S., 1985, c. I-5, s. 58; R.S., 1985, c. 17 (4th Supp.), s. 8.

entre la bande et les Indiens particuliers en possession légitime des terres selon les proportions que le ministre peut déterminer.

L.R. (1985), ch. I-5, art. 58; L.R. (1985), ch. 17 (4e suppl.), art. 8.

Adjustment of contracts

59. The Minister may, with the consent of the council of a band,

(*a*) reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon; and

(*b*) reduce or adjust the amount payable to the band by an Indian in respect of a loan made to the Indian from band funds.

R.S., 1985, c. I-5, s. 59; R.S., 1985, c. 17 (4th Supp.), s. 9.

Ajustement de contrats

59. Avec le consentement du conseil d'une bande, le ministre peut :

a) réduire ou ajuster le montant payable à Sa Majesté à l'égard de toute opération touchant des terres cédées à titre absolu, des terres désignées ou toute autre terre située dans une réserve, ou le taux d'intérêt payable à cet égard;

b) réduire ou ajuster le montant qu'un Indien doit payer à la bande pour un prêt consenti à cet Indien sur les fonds de la bande.

L.R. (1985), ch. I-5, art. 59; L.R. (1985), ch. 17 (4e suppl.), art. 9.

Control over lands

60. (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

Contrôle sur des terres

60. (1) À la demande d'une bande, le gouverneur en conseil peut lui accorder le droit d'exercer, sur des terres situées dans une réserve qu'elle occupe, le contrôle et l'administration qu'il estime désirables.

Withdrawal

(2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

R.S., c. I-6, s. 60.

Retrait

(2) Le gouverneur en conseil peut retirer à une bande un droit qui lui a été conféré sous le régime du paragraphe (1).

S.R., ch. I-6, art. 60.

MANAGEMENT OF INDIAN MONEYS

ADMINISTRATION DE L'ARGENT DES INDIENS

Indian moneys to be held for use and benefit

61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

L'argent des Indiens est détenu pour usage et profit

61. (1) L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

Interest

(2) Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

R.S., c. I-6, s. 61.

Intérêts

(2) Les intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil.

S.R., ch. I-6, art. 61.

Capital and revenue

62. All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than

Capital et revenu

62. L'argent des Indiens qui provient de la vente de terres cédées ou de biens de capital d'une bande est réputé appartenir au compte en capital de la bande; les autres sommes d'argent

capital moneys shall be deemed to be revenue moneys of the band.

R.S., c. I-6, s. 62.

des Indiens sont réputées appartenir au compte de revenu de la bande.

S.R., ch. I-6, art. 62.

Payments to Indians

63. Notwithstanding the *Financial Administration Act*, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.

R.S., c. I-6, s. 63.

Versements aux Indiens

63. Par dérogation à la *Loi sur la gestion des finances publiques*, lorsque des sommes d'argent auxquelles un Indien a droit sont versées à un surintendant en vertu d'un bail ou d'une entente passé sous le régime de la présente loi, le surintendant peut remettre ces sommes à l'Indien.

S.R., ch. I-6, art. 63.

Expenditure of capital moneys with consent

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(*b*) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(*c*) to construct and maintain outer boundary fences on reserves;

(*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;

(*e*) to purchase for the band the interest of a member of the band in lands on a reserve;

(*f*) to purchase livestock and farm implements, farm equipment or machinery for the band;

(*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

Dépense de sommes d'argent au compte en capital avec consentement

64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

a) pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;

b) pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;

c) pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;

d) pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;

e) pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;

f) pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments suivants :

(i) les biens meubles appartenant à l'emprunteur,

(*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

(ii) la terre concernant laquelle il détient ou a le droit de recevoir un certificat de possession,

et percevoir des intérêts et recevoir des gages à cet égard;

i) pour subvenir aux frais nécessairement accessoires à la gestion de terres situées sur une réserve, de terres cédées et de tout bien appartenant à la bande;

j) pour construire des maisons destinées aux membres de la bande, pour consentir des prêts aux membres de la bande aux fins de construction, avec ou sans garantie, et pour prévoir la garantie des prêts consentis aux membres de la bande en vue de la construction;

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

Expenditure of capital moneys in accordance with by-laws

(2) The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p.3*) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

R.S., 1985, c. I-5, s. 64; R.S., 1985, c. 32 (1st Supp.), s. 10.

Dépenses sur les sommes d'argent au compte de capital

(2) Le ministre peut effectuer des dépenses sur les sommes d'argent au compte de capital d'une bande conformément aux règlements administratifs pris en vertu de l'alinéa 81(1)*p.3*) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de la bande pour un montant ne dépassant pas une part *per capita* de ces sommes.

L.R. (1985), ch. I-5, art. 64; L.R. (1985), ch. 32 (1er suppl.), art. 10.

Limitation in respect of paragraphs 6(1)(*c*), (*d*) and (*e*)

64.1 (1) A person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of a band in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) is not entitled to receive an amount under paragraph 64(1)(*a*) until such time as the aggregate of all amounts that the person would, but for this subsection, have received under paragraph 64(1)(*a*) is equal to the amount by which the amount that the person received under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, exceeds one thousand dollars, together with any interest thereon.

Réserve relative aux al. 6(1)*c*), *d*) ou *e*)

64.1 (1) Une personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)*a*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, du fait qu'elle a cessé d'être membre d'une bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) n'a pas le droit de recevoir de montant en vertu de l'alinéa 64(1)*a*) jusqu'à ce que le total de tous les montants qu'elle aurait reçus en vertu de l'alinéa 64(1)*a*), n'eût été le présent paragraphe, soit égal à l'excédent du montant qu'elle a reçu en vertu de l'alinéa 15(1)*a*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, sur mille dollars, y compris les intérêts.

Additional limitation

(2) Where the council of a band makes a by-law under paragraph 81(1)(*p.4*) bringing this subsection into effect, a person who has re-

Restriction additionnelle

(2) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)*p.4*), des règlements administratifs mettant en vigueur le présent para-

ceived an amount that exceeds one thousand dollars under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of the band in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) is not entitled to receive any benefit afforded to members of the band as individuals as a result of the expenditure of Indian moneys under paragraphs 64(1)(*b*) to (*k*), subsection 66(1) or subsection 69(1) until the amount by which the amount so received exceeds one thousand dollars, together with any interest thereon, has been repaid to the band.

graphe, la personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)*a*) dans sa version antérieure au 17 avril 1985, ou en vertu de toute autre disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, parce qu'elle a cessé d'être membre de la bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) n'a le droit de recevoir aucun des avantages offerts aux membres de la bande à titre individuel résultant de la dépense d'argent des Indiens au titre des alinéas 64(1)*b*) à *k*), du paragraphe 66(1) ou du paragraphe 69(1) jusqu'à ce que l'excédent du montant ainsi reçu sur mille dollars, y compris l'intérêt sur celui-ci, ait été remboursé à la bande.

Regulations

(3) The Governor in Council may make regulations prescribing the manner of determining interest for the purpose of subsections (1) and (2).

Règlements

(3) Le gouverneur en conseil peut prendre des règlements prévoyant la façon de déterminer les intérêts pour l'application des paragraphes (1) et (2).

R.S., 1985, c. 32 (1st Supp.), s. 11.

L.R. (1985), ch. 32 (1er suppl.), art. 11.

Expenditure of capital

65. The Minister may pay from capital moneys

Dépenses de capital

65. Le ministre peut payer, sur les sommes d'argent au compte en capital :

(*a*) compensation to an Indian in an amount that is determined in accordance with this Act to be payable to him in respect of land compulsorily taken from him for band purposes; and

a) une indemnité à un Indien, au montant déterminé en conformité avec la présente loi comme lui étant payable à l'égard de terres qui lui ont été enlevées obligatoirement pour les fins de la bande;

(*b*) expenses incurred to prevent or suppress grass or forest fires or to protect the property of Indians in cases of emergency.

b) les dépenses subies afin de prévenir ou maîtriser les incendies d'herbes ou de forêts ou pour protéger les biens des Indiens en cas d'urgence.

R.S., c. I-6, s. 65.

S.R., ch. I-6, art. 65.

Expenditure of revenue moneys with consent of band

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

Dépense des sommes d'argent du compte de revenu avec le consentement de la bande

66. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et ordonner la dépense de sommes d'argent du compte de revenu à toute fin qui, d'après lui, favorisera le progrès général et le bien-être de la bande ou d'un de ses membres.

Minister may direct expenditure

(2) The Minister may make expenditures out of the revenue moneys of the band to assist sick, disabled, aged or destitute Indians of the band, to provide for the burial of deceased indigent members of the band and to provide for the payment of contributions under the *Employment Insurance Act* on behalf of employed persons who are paid in respect of their employment out of moneys of the band.

Le ministre peut déterminer les dépenses

(2) Le ministre peut dépenser l'argent du compte de revenu de la bande en vue d'aider les Indiens malades, invalides, âgés ou indigents de la bande et pour pourvoir aux funérailles des membres indigents de celle-ci, de même qu'en vue de pourvoir au versement des contributions sous le régime de la *Loi sur l'assurance-emploi* pour le compte de personnes employées qui sont payées, à l'égard de leur emploi, sur l'argent de la bande.

Idem

(2.1) The Minister may make expenditures out of the revenue moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p.3*) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the revenue moneys.

Expenditure of revenue moneys with authority of Minister

(3) The Minister may authorize the expenditure of revenue moneys of the band for all or any of the following purposes, namely,

(*a*) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(*b*) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(*c*) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(*d*) to prevent overcrowding of premises on reserves used as dwellings;

(*e*) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves; and

(*f*) for the construction and maintenance of boundary fences.

R.S., 1985, c. I-5, s. 66; R.S., 1985, c. 32 (1st Supp.), s. 12; 1996, c. 23, s. 187.

Recovery of certain expenses

67. Where money is expended by Her Majesty for the purpose of raising or collecting Indian moneys, the Minister may authorize the recovery of the amount so expended from the moneys of the band.

R.S., c. I-6, s. 67.

Maintenance of dependants

68. Where the Minister is satisfied that an Indian

(*a*) has deserted his spouse or common-law partner or family without sufficient cause,

(*b*) has conducted himself in such a manner as to justify the refusal of his spouse or common-law partner or family to live with him, or

Idem

(2.1) Le ministre peut effectuer des dépenses sur les sommes d'argent de revenu de la bande conformément aux règlements administratifs visés à l'alinéa 81(1)*p.3*) en vue d'effectuer des paiements à une personne dont le nom a été retranché de la liste de bande jusqu'à concurrence d'un montant n'excédant pas une part *per capita* de ces sommes.

Le ministre peut autoriser la dépense de sommes d'argent du compte de revenu

(3) Le ministre peut autoriser la dépense de sommes d'argent du compte de revenu de la bande pour l'ensemble ou l'un des objets suivants :

a) la destruction des herbes nuisibles et la prévention de la propagation ou de la présence généralisée des insectes, parasites ou maladies susceptibles de ruiner ou d'endommager la végétation dans les réserves indiennes;

b) la prophylaxie des maladies infectieuses ou contagieuses, ou non, sur les réserves;

c) l'inspection des locaux sur les réserves et la destruction, la modification ou la rénovation de ces locaux;

d) l'adoption de mesures préventives contre le surpeuplement des locaux utilisés comme logements sur les réserves;

e) la salubrité dans les locaux privés comme dans les endroits publics, sur les réserves;

f) la construction et l'entretien de clôtures de délimitation.

L.R. (1985), ch. I-5, art. 66; L.R. (1985), ch. 32 (1er suppl.), art. 12; 1996, ch. 23, art. 187.

Recouvrement de certaines dépenses

67. Lorsqu'une somme d'argent est dépensée par Sa Majesté pour procurer ou percevoir des sommes d'argent destinées aux Indiens, le ministre peut autoriser le recouvrement du montant ainsi dépensé sur l'argent de la bande.

S.R., ch. I-6, art. 67.

Entretien des personnes à charge

68. Le ministre peut ordonner que les paiements de rentes ou d'intérêts auxquels un Indien a droit soient appliqués au soutien de l'époux ou conjoint de fait ou de la famille de celui-ci, ou des deux, lorsqu'il est convaincu que cet Indien, selon le cas :

a) a abandonné son époux ou conjoint de fait ou sa famille sans raison suffisante;

(*c*) has been separated by imprisonment from his spouse or common-law partner and family,

the Minister may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the spouse or common-law partner or family or both the spouse or common-law partner and family of that Indian.

R.S., 1985, c. I-5, s. 68; R.S., 1985, c. 32 (1st Supp.), s. 13; 2000, c. 12, s. 152.

b) s'est conduit de façon à justifier le refus de son époux ou conjoint de fait ou de sa famille de vivre avec lui;

c) a été séparé de son époux ou conjoint de fait et de sa famille par emprisonnement.

L.R. (1985), ch. I-5, art. 68; L.R. (1985), ch. 32 (1er suppl.), art. 13; 2000, ch. 12, art. 152.

Management of revenue moneys by band

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

Administration des sommes d'argent du compte de revenu par la bande

69. (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.

Regulations

(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

R.S., c. I-6, s. 69.

Règlements

(2) Le gouverneur en conseil peut prendre des règlements pour donner effet au paragraphe (1) et y déclarer dans quelle mesure la présente loi et la *Loi sur la gestion des finances publiques* ne s'appliquent pas à une bande visée par un décret pris sous le régime du paragraphe (1).

S.R., ch. I-6, art. 69.

LOANS TO INDIANS

PRÊTS AUX INDIENS

Loans to Indians

70. (1) The Minister of Finance may authorize advances to the Minister out of the Consolidated Revenue Fund of such sums of money as the Minister may require to enable him

(*a*) to make loans to bands, groups of Indians or individual Indians for the purchase of farm implements, machinery, livestock, motor vehicles, fishing equipment, seed grain, fencing materials, materials to be used in native handicrafts, any other equipment, and gasoline and other petroleum products, or for the making of repairs or the payment of wages, or for the clearing and breaking of land within reserves;

(*b*) to expend or to lend money for the carrying out of cooperative projects on behalf of Indians; or

(*c*) to provide for any other matter prescribed by the Governor in Council.

Prêts aux Indiens

70. (1) Le ministre des Finances peut autoriser l'avance au ministre, sur le Trésor, des sommes d'argent dont ce dernier a besoin pour être en mesure :

a) soit de consentir des prêts à des bandes ou à des groupes d'Indiens ou à des Indiens individuellement, pour l'achat d'instruments agricoles, de machines, d'animaux de ferme, de véhicules à moteur, d'agrès de pêche, de graines de semence, de matériaux à clôture, de matériaux destinés aux arts et métiers indigènes, de tout autre équipement, d'essence et d'autres produits du pétrole, ou pour des réparations ou le paiement de salaires, ou pour défricher et déblayer les terres à l'intérieur des réserves;

b) soit de dépenser ou de prêter des fonds en vue de l'exécution de projets coopératifs pour le compte d'Indiens;

c) soit de pourvoir à toute autre question prévue par le gouverneur en conseil.

Regulations

(2) The Governor in Council may make regulations to give effect to subsection (1).

Accounting

(3) Expenditures that are made under subsection (1) shall be accounted for in the same manner as public moneys.

Repayment

(4) The Minister shall pay to the Receiver General all moneys that he receives from bands, groups of Indians or individual Indians by way of repayments of loans made under subsection (1).

Limitation

(5) The total amount of outstanding advances to the Minister under this section shall not at any one time exceed six million and fifty thousand dollars.

Report to Parliament

(6) The Minister shall within fifteen days after the termination of each fiscal year or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session, lay before Parliament a report setting out the total number and amount of loans made under subsection (1) during that year.

R.S., c. I-6, s. 70.

Règlements

(2) Le gouverneur en conseil peut prendre des règlements pour l'application du paragraphe (1).

Comptabilité

(3) Il doit être rendu compte des fonds dépensés sous le régime du paragraphe (1) de la même manière que des deniers publics.

Remboursement

(4) Le ministre doit verser au receveur général tout l'argent qu'il reçoit des bandes, groupes d'Indiens ou Indiens pris individuellement, en remboursement des prêts consentis en vertu du paragraphe (1).

Limitation

(5) Le total non remboursé des avances consenties au ministre sous le régime du présent article ne peut dépasser six millions cinquante mille dollars.

Rapport au Parlement

(6) Le ministre doit, dans les quinze jours qui suivent la fin de chaque exercice ou, si le Parlement n'est pas alors en session, dans les quinze premiers jours de la session suivante, présenter au Parlement un rapport indiquant le nombre total et le chiffre global des prêts consentis au cours de l'exercice sous le régime du paragraphe (1).

S.R., ch. I-6, art. 70.

FARMS

Minister may operate farms

71. (1) The Minister may operate farms on reserves and may employ such persons as he considers necessary to instruct Indians in farming and may purchase and distribute without charge pure seed to Indian farmers.

Application of profits

(2) The Minister may apply any profits that result from the operation of farms pursuant to subsection (1) on reserves to extend farming operations on the reserves or to make loans to Indians to enable them to engage in farming or other agricultural operations or he may apply those profits in any way that he considers to be desirable to promote the progress and development of the Indians.

R.S., c. I-6, s. 71.

FERMES

Le ministre peut exploiter des fermes

71. (1) Le ministre peut exploiter des fermes dans les réserves et employer les personnes qu'il juge nécessaires pour enseigner l'agriculture aux Indiens. Il peut aussi acheter et gratuitement distribuer des semences pures aux cultivateurs indiens.

Emploi des bénéfices

(2) Le ministre peut employer les bénéfices provenant de l'exploitation de fermes dans les réserves, en conformité avec le paragraphe (1), à l'expansion des exploitations agricoles sur ces réserves, ou à effectuer des prêts aux Indiens pour leur permettre de s'adonner à la culture ou à d'autres travaux agricoles, ou de toute manière qu'il croit propre à favoriser le progrès et le développement des Indiens.

S.R., ch. I-6, art. 71.

TREATY MONEY

Treaty money payable out of C.R.F.

72. Moneys that are payable to Indians or to Indian bands under a treaty between Her Majesty and a band and for the payment of which the Government of Canada is responsi-

SOMMES PAYABLES EN VERTU D'UN TRAITÉ

Les sommes visées par des traités sont payables sur le Trésor

72. Les sommes payables à des Indiens ou à des bandes d'Indiens en vertu d'un traité entre Sa Majesté et la bande, et dont le paiement in-

ble may be paid out of the Consolidated Revenue Fund.

R.S., c. I-6, s. 72.

combe au gouvernement du Canada, peuvent être prélevées sur le Trésor.

S.R., ch. I-6, art. 72.

REGULATIONS

Regulations

73. (1) The Governor in Council may make regulations

(*a*) for the protection and preservation of fur-bearing animals, fish and other game on reserves;

(*b*) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(*c*) for the control of the speed, operation and parking of vehicles on roads within reserves;

(*d*) for the taxation, control and destruction of dogs and for the protection of sheep on reserves;

(*e*) for the operation, supervision and control of pool rooms, dance halls and other places of amusement on reserves;

(*f*) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(*g*) to provide medical treatment and health services for Indians;

(*h*) to provide compulsory hospitalization and treatment for infectious diseases among Indians;

(*i*) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(*j*) to prevent overcrowding of premises on reserves used as dwellings;

(*k*) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves;

(*l*) for the construction and maintenance of boundary fences; and

(*m*) for empowering and authorizing the council of a band to borrow money for band projects or housing purposes and providing for the making of loans out of moneys so

RÈGLEMENTS

Règlements

73. (1) Le gouverneur en conseil peut prendre des règlements concernant :

a) la protection et la conservation des animaux à fourrure, du poisson et du gibier de toute sorte dans les réserves;

b) la destruction des herbes nuisibles et la prévention de la propagation ou de la présence généralisée des insectes, parasites ou maladies susceptibles de ruiner ou d'endommager la végétation dans les réserves indiennes;

c) le contrôle de la vitesse, de la conduite et du stationnement des véhicules sur les routes dans les réserves;

d) la taxation et la surveillance relatives aux chiens et leur destruction, ainsi que la protection des moutons dans les réserves;

e) le fonctionnement, la surveillance et le contrôle des salles de billard, des salles de danse et autres endroits d'amusement dans les réserves;

f) la prophylaxie des maladies infectieuses ou contagieuses, ou non, sur les réserves;

g) les traitements médicaux et les services d'hygiène destinés aux Indiens;

h) l'hospitalisation et le traitement obligatoires des Indiens atteints de maladies infectieuses;

i) l'inspection des locaux sur les réserves et la destruction, la modification ou la rénovation de ces locaux;

j) l'adoption de mesures préventives contre le surpeuplement des locaux utilisés comme logements sur les réserves;

k) la salubrité dans les locaux privés comme dans les endroits publics, sur les réserves;

l) la construction et l'entretien de clôtures de délimitation;

m) l'octroi, au conseil d'une bande, du pouvoir et de l'autorisation d'emprunter de l'argent pour des entreprises de la bande ou à des fins d'habitation, et prévoyant l'octroi de

borrowed to members of the band for housing purposes.

Punishment

(2) The Governor in Council may prescribe the punishment, not exceeding a fine of one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of a regulation made under subsection (1).

Orders and regulations

(3) The Governor in Council may make orders and regulations to carry out the purposes and provisions of this Act.

R.S., c. I-6, s. 73.

prêts, sur l'argent ainsi emprunté, aux membres de la bande, à des fins d'habitation.

Peine

(2) Le gouverneur en conseil peut prescrire l'amende maximale de cent dollars et l'emprisonnement maximal de trois mois, ou l'une de ces peines, qui peuvent être infligés, sur déclaration de culpabilité par procédure sommaire, pour infraction à un règlement pris sous le régime du paragraphe (1).

Décrets et règlements

(3) Le gouverneur en conseil peut prendre des décrets et règlements en vue de l'application de la présente loi.

S.R., ch. I-6, art. 73.

ELECTIONS OF CHIEFS AND BAND COUNCILS

ÉLECTION DES CHEFS ET DES CONSEILS DE BANDE

Elected councils

74. (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

Conseils élus

74. (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi.

Composition of council

(2) Unless otherwise ordered by the Minister, the council of a band in respect of which an order has been made under subsection (1) shall consist of one chief, and one councillor for every one hundred members of the band, but the number of councillors shall not be less than two nor more than twelve and no band shall have more than one chief.

Composition du conseil

(2) Sauf si le ministre en ordonne autrement, le conseil d'une bande ayant fait l'objet d'un arrêté prévu par le paragraphe (1) se compose d'un chef, ainsi que d'un conseiller par cent membres de la bande, mais le nombre des conseillers ne peut être inférieur à deux ni supérieur à douze. Une bande ne peut avoir plus d'un chef.

Regulations

(3) The Governor in Council may, for the purposes of giving effect to subsection (1), make orders or regulations to provide

(*a*) that the chief of a band shall be elected by

(i) a majority of the votes of the electors of the band, or

(ii) a majority of the votes of the elected councillors of the band from among themselves,

but the chief so elected shall remain a councillor; and

(*b*) that the councillors of a band shall be elected by

(i) a majority of the votes of the electors of the band, or

Règlements

(3) Pour l'application du paragraphe (1), le gouverneur en conseil peut prendre des décrets ou règlements prévoyant :

a) que le chef d'une bande doit être élu :

(i) soit à la majorité des votes des électeurs de la bande,

(ii) soit à la majorité des votes des conseillers élus de la bande désignant un d'entre eux,

le chef ainsi élu devant cependant demeurer conseiller;

b) que les conseillers d'une bande doivent être élus :

(i) soit à la majorité des votes des électeurs de la bande,

(ii) soit à la majorité des votes des électeurs de la bande demeurant dans la sec-

(ii) a majority of the votes of the electors of the band in the electoral section in which the candidate resides and that he proposes to represent on the council of the band.

tion électorale que le candidat habite et qu'il projette de représenter au conseil de la bande.

Electoral sections

(4) A reserve shall for voting purposes consist of one electoral section, except that where the majority of the electors of a band who were present and voted at a referendum or a special meeting held and called for the purpose in accordance with the regulations have decided that the reserve should for voting purposes be divided into electoral sections and the Minister so recommends, the Governor in Council may make orders or regulations to provide for the division of the reserve for voting purposes into not more than six electoral sections containing as nearly as may be an equal number of Indians eligible to vote and to provide for the manner in which electoral sections so established are to be distinguished or identified.

R.S., c. I-6, s. 74.

(4) Aux fins de votation, une réserve se compose d'une section électorale; toutefois, lorsque la majorité des électeurs d'une bande qui étaient présents et ont voté lors d'un référendum ou à une assemblée spéciale tenue et convoquée à cette fin en conformité avec les règlements, a décidé que la réserve devrait, aux fins de votation, être divisée en sections électorales et que le ministre le recommande, le gouverneur en conseil peut prendre des décrets ou règlements stipulant qu'aux fins de votation la réserve doit être divisée en six sections électorales au plus, contenant autant que possible un nombre égal d'Indiens habilités à voter et décrétant comment les sections électorales ainsi établies doivent se distinguer ou s'identifier.

S.R., ch. I-6, art. 74.

Sections électorales

Eligibility

75. (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.

75. (1) Seul un électeur résidant dans une section électorale peut être présenté au poste de conseiller pour représenter cette section au conseil de la bande.

Éligibilité

Nomination

(2) No person may be a candidate for election as chief or councillor of a band unless his nomination is moved and seconded by persons who are themselves eligible to be nominated.

R.S., c. I-6, s. 75.

(2) Nul ne peut être candidat à une élection au poste de chef ou de conseiller d'une bande, à moins que sa candidature ne soit proposée et appuyée par des personnes habiles elles-mêmes à être présentées.

S.R., ch. I-6, art. 75.

Présentation de candidats

Regulations governing elections

76. (1) The Governor in Council may make orders and regulations with respect to band elections and, without restricting the generality of the foregoing, may make regulations with respect to

(*a*) meetings to nominate candidates;

(*b*) the appointment and duties of electoral officers;

(*c*) the manner in which voting is to be carried out;

(*d*) election appeals; and

(*e*) the definition of residence for the purpose of determining the eligibility of voters.

76. (1) Le gouverneur en conseil peut prendre des décrets et règlements sur les élections au sein des bandes et, notamment, des règlements concernant :

a) les assemblées pour la présentation de candidats;

b) la nomination et les fonctions des préposés aux élections;

c) la manière dont la votation doit avoir lieu;

d) les appels en matière électorale;

e) la définition de « résidence » aux fins de déterminer si une personne est habile à voter.

Règlements régissant les élections

Secrecy of voting

(2) The regulations made under paragraph (1)(*c*) shall provide for secrecy of voting.

R.S., c. I-6, s. 76.

Secret du vote

(2) Les règlements pris sous le régime de l'alinéa (1)*c*) contiennent des dispositions assurant le secret du vote.

S.R., ch. I-6, art. 76.

Eligibility of voters for chief

77. (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

Qualités exigées des électeurs au poste de chef

77. (1) Un membre d'une bande, qui a au moins dix-huit ans et réside ordinairement sur la réserve, a qualité pour voter en faveur d'une personne présentée comme candidat au poste de chef de la bande et, lorsque la réserve, aux fins d'élection, ne comprend qu'une section électorale, pour voter en faveur de personnes présentées aux postes de conseillers.

Councillor

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

R.S., 1985, c. I-5, s. 77; R.S., 1985, c. 32 (1st Supp.), s. 14.

Conseiller

(2) Un membre d'une bande, qui a dix-huit ans et réside ordinairement dans une section électorale établie aux fins d'élection, a qualité pour voter en faveur d'une personne présentée au poste de conseiller pour représenter cette section.

L.R. (1985), ch. I-5, art. 77; L.R. (1985), ch. 32 (1[er] suppl.), art. 14.

Tenure of office

78. (1) Subject to this section, the chief and councillors of a band hold office for two years.

Mandat

78. (1) Sous réserve des autres dispositions du présent article, les chef et conseillers d'une bande occupent leur poste pendant deux années.

Vacancy

(2) The office of chief or councillor of a band becomes vacant when

(*a*) the person who holds that office

(i) is convicted of an indictable offence,

(ii) dies or resigns his office, or

(iii) is or becomes ineligible to hold office by virtue of this Act; or

(*b*) the Minister declares that in his opinion the person who holds that office

(i) is unfit to continue in office by reason of his having been convicted of an offence,

(ii) has been absent from three consecutive meetings of the council without being authorized to do so, or

(iii) was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

Vacance

(2) Le poste de chef ou de conseiller d'une bande devient vacant dans les cas suivants :

a) le titulaire, selon le cas :

(i) est déclaré coupable d'un acte criminel,

(ii) meurt ou démissionne,

(iii) est ou devient inhabile à détenir le poste aux termes de la présente loi;

b) le ministre déclare qu'à son avis le titulaire, selon le cas :

(i) est inapte à demeurer en fonctions parce qu'il a été déclaré coupable d'une infraction,

(ii) a, sans autorisation, manqué les réunions du conseil trois fois consécutives,

(iii) à l'occasion d'une élection, s'est rendu coupable de manoeuvres frauduleuses, de malhonnêteté ou de méfaits, ou a accepté des pots-de-vin.

Disqualification

(3) The Minister may declare a person who ceases to hold office by virtue of subparagraph (2)(*b*)(iii) to be ineligible to be a candidate for

Privation du droit d'être candidat

(3) Le ministre peut déclarer un individu, qui cesse d'occuper ses fonctions en raison du sous-alinéa (2)*b*)(iii), inhabile à être candidat

chief or councillor of a band for a period not exceeding six years.

Special election

(4) Where the office of chief or councillor of a band becomes vacant more than three months before the date when another election would ordinarily be held, a special election may be held in accordance with this Act to fill the vacancy.

R.S., c. I-6, s. 78.

Governor in Council may set aside election

79. The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that

(*a*) there was corrupt practice in connection with the election;

(*b*) there was a contravention of this Act that might have affected the result of the election; or

(*c*) a person nominated to be a candidate in the election was ineligible to be a candidate.

R.S., c. I-6, s. 79.

Regulations respecting band and council meetings

80. The Governor in Council may make regulations with respect to band meetings and council meetings and, without restricting the generality of the foregoing, may make regulations with respect to

(*a*) presiding officers at such meetings;

(*b*) notice of such meetings;

(*c*) the duties of any representative of the Minister at such meetings; and

(*d*) the number of persons required at such meetings to constitute a quorum.

R.S., c. I-6, s. 80.

POWERS OF THE COUNCIL

By-laws

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(*b*) the regulation of traffic;

(*c*) the observance of law and order;

au poste de chef ou de conseiller d'une bande durant une période maximale de six ans.

Élection spéciale

(4) Lorsque le poste de chef ou de conseiller devient vacant plus de trois mois avant la date de la tenue ordinaire de nouvelles élections, une élection spéciale peut avoir lieu en conformité avec la présente loi afin de remplir cette vacance.

S.R., ch. I-6, art. 78.

Le gouverneur en conseil peut annuler une élection

79. Le gouverneur en conseil peut rejeter l'élection du chef ou d'un des conseillers d'une bande sur le rapport du ministre où ce dernier se dit convaincu, selon le cas :

a) qu'il y a eu des manoeuvres frauduleuses à l'égard de cette élection;

b) qu'il s'est produit une infraction à la présente loi pouvant influer sur le résultat de l'élection;

c) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises.

S.R., ch. I-6, art. 79.

Règlements sur les assemblées de la bande et du conseil

80. Le gouverneur en conseil peut prendre des règlements sur les assemblées de la bande et du conseil et, notamment, des règlements concernant :

a) les présidents de ces assemblées;

b) les avis de ces assemblées;

c) les fonctions de tout représentant du ministre à ces assemblées;

d) le nombre de personnes requis à ces assemblées pour constituer un quorum.

S.R., ch. I-6, art. 80.

POUVOIRS DU CONSEIL

Règlements administratifs

81. (1) Le conseil d'une bande peut prendre des règlements administratifs, non incompatibles avec la présente loi ou avec un règlement pris par le gouverneur en conseil ou par le ministre, pour l'une ou l'ensemble des fins suivantes :

a) l'adoption de mesures relatives à la santé des habitants de la réserve et les précautions à prendre contre la propagation des maladies contagieuses et infectieuses;

b) la réglementation de la circulation;

(*d*) the prevention of disorderly conduct and nuisances;

(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(*f*) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(*j*) the destruction and control of noxious weeds;

(*k*) the regulation of bee-keeping and poultry raising;

(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(*m*) the control or prohibition of public games, sports, races, athletic contests and other amusements;

(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(*p*) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

c) l'observation de la loi et le maintien de l'ordre;

d) la répression de l'inconduite et des incommodités;

e) la protection et les précautions à prendre contre les empiétements des bestiaux et autres animaux domestiques, l'établissement de fourrières, la nomination de gardes-fourrières, la réglementation de leurs fonctions et la constitution de droits et redevances pour leurs services;

f) l'établissement et l'entretien de cours d'eau, routes, ponts, fossés, clôtures et autres ouvrages locaux;

g) la division de la réserve ou d'une de ses parties en zones, et l'interdiction de construire ou d'entretenir une catégorie de bâtiments ou d'exercer une catégorie d'entreprises, de métiers ou de professions dans une telle zone;

h) la réglementation de la construction, de la réparation et de l'usage des bâtiments, qu'ils appartiennent à la bande ou à des membres de la bande pris individuellement;

i) l'arpentage des terres de la réserve et leur répartition entre les membres de la bande, et l'établissement d'un registre de certificats de possession et de certificats d'occupation concernant les attributions, et la mise à part de terres de la réserve pour usage commun, si l'autorisation à cet égard a été accordée aux termes de l'article 60;

j) la destruction et le contrôle des herbes nuisibles;

k) la réglementation de l'apiculture et de l'aviculture;

l) l'établissement de puits, citernes et réservoirs publics et autres services d'eau du même genre, ainsi que la réglementation de leur usage;

m) la réglementation ou l'interdiction de jeux, sports, courses et concours athlétiques d'ordre public et autres amusements du même genre;

n) la réglementation de la conduite et des opérations des marchands ambulants, colporteurs ou autres personnes qui pénètrent dans la réserve pour acheter ou vendre des pro-

(*p.1*) the residence of band members and other persons on the reserve;

(*p.2*) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(*p.3*) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(*p.4*) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

duits ou marchandises, ou en faire un autre commerce;

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve;

p) l'expulsion et la punition des personnes qui pénètrent sans droit ni autorisation dans la réserve ou la fréquentent pour des fins interdites;

p.1) la résidence des membres de la bande ou des autres personnes sur la réserve;

p.2) l'adoption de mesures relatives aux droits des époux ou conjoints de fait ou des enfants qui résident avec des membres de la bande dans une réserve pour toute matière au sujet de laquelle le conseil peut établir des règlements administratifs à l'égard des membres de la bande;

p.3) l'autorisation du ministre à effectuer des paiements sur des sommes d'argent au compte de capital ou des sommes d'argent de revenu aux personnes dont les noms ont été retranchés de la liste de la bande;

p.4) la mise en vigueur des paragraphes 10(3) ou 64.1(2) à l'égard de la bande;

q) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire;

r) l'imposition, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de mille dollars et d'un emprisonnement maximal de trente jours, ou de l'une de ces peines, pour violation d'un règlement administratif pris aux termes du présent article.

Power to restrain by order where conviction entered

(2) Where any by-law of a band is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

Pouvoir de rendre une ordonnance

(2) Lorsqu'un règlement administratif d'une bande est violé et qu'une déclaration de culpabilité est prononcée, le tribunal ayant prononcé la déclaration de culpabilité et tout tribunal compétent par la suite peuvent, en plus de toute autre réparation et de toute peine imposée par le règlement administratif, rendre une ordonnance interdisant la continuation ou la répétition de l'infraction par la personne déclarée coupable.

Power to restrain by court action

(3) Where any by-law of a band passed is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such

Pouvoir d'intenter une action en justice

(3) La violation d'un règlement administratif d'une bande peut, sans préjudice de toute autre réparation et de toute peine imposée par

contravention may be restrained by court action at the instance of the band council.

R.S., 1985, c. I-5, s. 81; R.S., 1985, c. 32 (1st Supp.), s. 15; 2000, c. 12, s. 152.

celui-ci, être refrénée par une action en justice à la demande du conseil de bande.

L.R. (1985), ch. I-5, art. 81; L.R. (1985), ch. 32 (1er suppl.), art. 15; 2000, ch. 12, art. 152.

82. [Repealed, 2014, c. 38, s. 7]

82. [Abrogé, 2014, ch. 38, art. 7]

Money by-laws

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

(*a.1*) the licensing of businesses, callings, trades and occupations;

(*b*) the appropriation and expenditure of moneys of the band to defray band expenses;

(*c*) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (*a*);

(*d*) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (*a*);

(*e*) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;

(*e.1*) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;

(*f*) the raising of money from band members to support band projects; and

(*g*) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

Règlements administratifs

83. (1) Sans préjudice des pouvoirs que confère l'article 81, le conseil de la bande peut, sous réserve de l'approbation du ministre, prendre des règlements administratifs dans les domaines suivants :

a) sous réserve des paragraphes (2) et (3), l'imposition de taxes à des fins locales, sur les immeubles situés dans la réserve, ainsi que sur les droits sur ceux-ci, et notamment sur les droits d'occupation, de possession et d'usage;

a.1) la délivrance de permis, de licences ou d'agréments aux entreprises, professions, métiers et occupations;

b) l'affectation et le déboursement de l'argent de la bande pour couvrir les dépenses de cette dernière;

c) la nomination de fonctionnaires chargés de diriger les affaires du conseil, en établissant leurs fonctions et prévoyant leur rétribution sur les fonds prélevés en vertu de l'alinéa *a*);

d) le versement d'une rémunération, pour le montant que le ministre peut approuver, aux chefs et conseillers, sur les fonds prélevés en vertu de l'alinéa *a*);

e) les mesures d'exécution forcée visant le recouvrement de tout montant qui peut être perçu en application du présent article, arrérages et intérêts compris;

e.1) l'imposition, pour non-paiement de tout montant qui peut être perçu en application du présent article, d'intérêts et la fixation, par tarif ou autrement, de ces intérêts;

f) la réunion de fonds provenant des membres de la bande et destinés à supporter des entreprises de la bande;

g) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire.

Restriction on expenditures

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so

Restriction

(2) Toute dépense à faire sur les fonds prélevés en application du paragraphe (1) doit l'être

made under the authority of a by-law of the council of the band.

Appeals

(3) A by-law made under paragraph (1)(*a*) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

Minister's approval

(4) The Minister may approve the whole or a part only of a by-law made under subsection (1).

Regulations re by-laws

(5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

By-laws must be consistent with regulations

(6) A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).

R.S., 1985, c. I-5, s. 83; R.S., 1985, c. 17 (4th Supp.), s. 10.

sous l'autorité d'un règlement administratif pris par le conseil de la bande.

Précision

(3) Les règlements administratifs pris en application de l'alinéa (1)*a*) doivent prévoir la procédure de contestation de l'évaluation en matière de taxation.

Approbation

(4) Le ministre peut approuver la totalité d'un règlement administratif visé au paragraphe (1) ou une partie seulement de celui-ci.

Règlement relatif au pouvoir réglementaire

(5) Le gouverneur en conseil peut, par règlement, régir l'exercice du pouvoir réglementaire de la bande prévu au présent article.

Maintien des règlements administratifs

(6) Les règlements administratifs pris en application du présent article ne demeurent en vigueur que dans la mesure de leur compatibilité avec les règlements pris en application du paragraphe (5).

L.R. (1985), ch. I-5, art. 83; L.R. (1985), ch. 17 (4e suppl.), art. 10.

Recovery of taxes

84. Where a tax that is imposed on an Indian by or under the authority of a by-law made under section 83 is not paid in accordance with the by-law, the Minister may pay the amount owing together with an amount equal to one-half of one per cent thereof out of moneys payable out of the funds of the band to the Indian.

R.S., c. I-6, s. 84.

Recouvrement d'impôts

84. Lorsqu'un impôt frappant un Indien en vertu ou sous l'autorité d'un règlement administratif pris en vertu de l'article 83 n'est pas acquitté conformément au règlement administratif, le ministre peut payer le montant dû ainsi qu'une somme égale à un demi pour cent dudit montant sur l'argent payable à l'Indien sur les fonds de la bande.

S.R., ch. I-6, art. 84.

85. [Repealed, R.S., 1985, c. 17 (4th Supp.), s. 11]

85. [Abrogé, L.R. (1985), ch. 17 (4e suppl.), art. 11]

By-laws relating to intoxicants

85.1 (1) Subject to subsection (2), the council of a band may make by-laws

(*a*) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;

(*b*) prohibiting any person from being intoxicated on the reserve;

(*c*) prohibiting any person from having intoxicants in his possession on the reserve; and

(*d*) providing for exceptions to any of the prohibitions established pursuant to paragraph (*b*) or (*c*).

Consent of electors

(2) A by-law may not be made under this section unless it is first assented to by a majority of the electors of the band who voted at a special meeting of the band called by the coun-

Règlements administratifs sur les boissons alcoolisées

85.1 (1) Sous réserve du paragraphe (2), le conseil d'une bande peut prendre des règlements administratifs en vue :

a) d'interdire la vente, le troc, la fourniture ou la fabrication de boissons alcoolisées sur la réserve de la bande;

b) d'interdire à toute personne d'être en état d'ivresse sur la réserve;

c) d'interdire à toute personne d'avoir en sa possession des boissons alcoolisées sur la réserve;

d) de prévoir des exceptions aux interdictions visées aux alinéas *b*) ou *c*).

Consentement des électeurs

(2) Les règlements administratifs prévus au présent article ne peuvent être pris qu'avec le consentement préalable de la majorité des électeurs de la bande ayant voté à l'assemblée spé-

cil of the band for the purpose of considering the by-law.

(3) [Repealed, 2014, c. 38, s. 8]

Offence

(4) Every person who contravenes a by-law made under this section is guilty of an offence and liable on summary conviction

(*a*) in the case of a by-law made under paragraph (1)(*a*), to a fine of not more than one thousand dollars or to imprisonment for a term not exceeding six months or to both; and

(*b*) in the case of a by-law made under paragraph (1)(*b*) or (*c*), to a fine of not more than one hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., 1985, c. 32 (1st Supp.), s. 16; 2014, c. 38, s. 8.

Publication of by-laws

86. (1) The council of a band shall publish a copy of every by-law made by the council under this Act on an Internet site, in the *First Nations Gazette* or in a newspaper that has general circulation on the reserve of the band, whichever the council considers appropriate in the circumstances.

Copies of by-laws

(2) The council of a band shall, on request by any person, provide to the person a copy of a by-law made by the council.

For greater certainty

(3) For greater certainty, publishing a by-law on an Internet site in accordance with subsection (1) does not discharge the council of a band from its obligation under subsection (2) to provide a copy of the by-law to any person who requests one.

Coming into force

(4) A by-law made by the council of a band under this Act comes into force on the day on which it is first published under subsection (1) or on any later day specified in the by-law.

Duration of publication — Internet site

(5) A by-law that is published on an Internet site under subsection (1) must remain accessible in that manner for the period during which it is in force.

R.S., 1985, c. I-5, s. 86; 2014, c. 38, s. 9.

ciale de la bande convoquée par le conseil de cette dernière pour l'étude de ces règlements.

(3) [Abrogé, 2014, ch. 38, art. 8]

Infraction

(4) Quiconque contrevient à un règlement administratif pris en vertu du présent article commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'un règlement pris en vertu de l'alinéa (1)*a*), une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

b) dans le cas d'un règlement pris en vertu des alinéas (1)*b*) ou *c*), une amende maximale de cent dollars et un emprisonnement maximal de trois mois, ou l'une de ces peines.

L.R. (1985), ch. 32 (1er suppl.), art. 16; 2014, ch. 38, art. 8.

Publication des règlements administratifs

86. (1) Le conseil d'une bande est tenu de publier tout règlement administratif qu'il a pris sous le régime de la présente loi sur un site Internet, dans la *Gazette des premières nations* ou dans un journal largement diffusé sur la réserve de la bande, selon ce qu'il estime approprié dans les circonstances.

Copies des règlements administratifs

(2) Le conseil d'une bande est tenu de fournir à toute personne qui en fait la demande une copie de tout règlement administratif qu'il a pris.

Précision

(3) Il est entendu que le fait de publier un règlement administratif sur un site Internet en conformité avec le paragraphe (1) ne libère pas le conseil de l'obligation prévue au paragraphe (2) de fournir des copies du règlement aux personnes qui en font la demande.

Entrée en vigueur

(4) Les règlements administratifs pris par le conseil d'une bande sous le régime de la présente loi entrent en vigueur à la date de leur publication initiale en application du paragraphe (1) ou à la date ultérieure qu'ils fixent.

Durée de la publication : site Internet

(5) Les règlements administratifs publiés sur un site Internet en application du paragraphe (1) doivent demeurer accessibles sur un tel site jusqu'à ce qu'ils cessent d'être en vigueur.

L.R. (1985), ch. I-5, art. 86; 2014, ch. 38, art. 9.

TAXATION

Property exempt from taxation

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Idem

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150; 2012, c. 19, s. 677.

TAXATION

Biens exempts de taxation

87. (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83 et de l'article 5 de la *Loi sur la gestion financière des premières nations*, les biens suivants sont exemptés de taxation :

a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;

b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

Idem

(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens.

Idem

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

L.R. (1985), ch. I-5, art. 87; 2005, ch. 9, art. 150; 2012, ch. 19, art. 677.

LEGAL RIGHTS

General provincial laws applicable to Indians

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151; 2012, c. 19, s. 678.

DROITS LÉGAUX

Lois provinciales d'ordre général applicables aux Indiens

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière des premières nations* ou sous leur régime.

L.R. (1985), ch. I-5, art. 88; 2005, ch. 9, art. 151; 2012, ch. 19, art. 678.

Restriction on mortgage, seizure, etc., of property on reserve

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Inaliénabilité des biens situés sur une réserve

89. (1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ou une bande.

Exception

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Dérogation

(1.1) Par dérogation au paragraphe (1), les droits découlant d'un bail sur une terre désignée peuvent faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution.

Conditional sales

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Ventes conditionnelles

(2) Une personne, qui vend à une bande ou à un membre d'une bande un bien meuble en vertu d'une entente selon laquelle le droit de propriété ou le droit de possession demeure acquis en tout ou en partie au vendeur, peut exercer ses droits aux termes de l'entente, même si le bien meuble est situé sur une réserve.

R.S., 1985, c. I-5, s. 89; R.S., 1985, c. 17 (4th Supp.), s. 12.

L.R. (1985), ch. I-5, art. 89; L.R. (1985), ch. 17 (4e suppl.), art. 12.

Property deemed situated on reserve

90. (1) For the purposes of sections 87 and 89, personal property that was

(*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

Biens considérés comme situés sur une réserve

90. (1) Pour l'application des articles 87 et 89, les biens meubles qui ont été :

a) soit achetés par Sa Majesté avec l'argent des Indiens ou des fonds votés par le Parlement à l'usage et au profit d'Indiens ou de bandes;

b) soit donnés aux Indiens ou à une bande en vertu d'un traité ou accord entre une bande et Sa Majesté,

sont toujours réputés situés sur une réserve.

Restriction on transfer

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

Restriction sur le transfert

(2) Toute opération visant à transférer la propriété d'un bien réputé, en vertu du présent article, situé sur une réserve, ou un droit sur un tel bien, est nulle à moins qu'elle n'ait lieu avec le consentement du ministre ou ne soit conclue entre des membres d'une bande ou entre une bande et l'un de ses membres.

Destruction of property

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

Destruction de biens

(3) Quiconque conclut une opération déclarée nulle par le paragraphe (2) commet une infraction; commet aussi une infraction quiconque détruit, sans le consentement écrit du ministre, un bien meuble réputé, en vertu du présent article, situé sur une réserve.

R.S., c. I-6, s. 90.

S.R., ch. 1-6, art. 90.

TRADING WITH INDIANS

Certain property on a reserve may not be acquired

91. (1) No person may, without the written consent of the Minister, acquire title to any of the following property situated on a reserve, namely,

(*a*) an Indian grave house;

(*b*) a carved grave pole;

(*c*) a totem pole;

(*d*) a carved house post; or

(*e*) a rock embellished with paintings or carvings.

Saving

(2) Subsection (1) does not apply to chattels referred to therein that are manufactured for sale by Indians.

Removal, destruction, etc.

(3) No person shall remove, take away, mutilate, disfigure, deface or destroy any chattel referred to in subsection (1) without the written consent of the Minister.

Punishment

(4) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months.

R.S., c. I-6, s. 91.

92. [Repealed, 2014, c. 38, s. 10]

REMOVAL OF MATERIALS FROM RESERVES

Removal of material from reserve

93. A person who, without the written permission of the Minister or his duly authorized representative,

(*a*) removes or permits anyone to remove from a reserve

(i) minerals, stone, sand, gravel, clay or soil, or

(ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or

(*b*) has in his possession anything removed from a reserve contrary to this section,

is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., c. I-6, s. 93.

COMMERCE AVEC LES INDIENS

Interdiction d'acquérir certains biens situés sur une réserve

91. (1) Nul ne peut, sans le consentement écrit du ministre, acquérir la propriété de l'un des biens suivants, situés sur une réserve :

a) une maison funéraire indienne;

b) un monument funéraire sculpté;

c) un poteau totémique;

d) un poteau sculpté de maison;

e) une roche ornée d'images gravées ou peintes.

Exception

(2) Le paragraphe (1) ne s'applique pas aux biens meubles y mentionnés qui sont fabriqués en vue de la vente par des Indiens.

Enlèvement, destruction, etc.

(3) Nul ne peut enlever, emporter, mutiler, défigurer, détériorer ou détruire un bien meuble mentionné au paragraphe (1), sans le consentement écrit du ministre.

Peine

(4) Quiconque contrevient au présent article commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de deux cents dollars ou un emprisonnement maximal de trois mois.

S.R., ch. I-6, art. 91.

92. [Abrogé, 2014, ch. 38, art. 10]

ENLÈVEMENT D'OBJETS SUR LES RÉSERVES

Enlèvement d'objets sur la réserve

93. Une personne qui, sans la permission écrite du ministre ou de son représentant dûment autorisé :

a) soit enlève ou permet à quelqu'un d'enlever d'une réserve :

(i) des minéraux, des pierres, du sable, du gravier, de la glaise, ou de la terre,

(ii) des arbres, de jeunes arbres, des arbrisseaux, des broussailles, du bois de service, du bois de corde ou du foin;

b) soit a en sa possession une chose enlevée d'une réserve contrairement au présent article,

commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq cents dollars et un

emprisonnement maximal de trois mois, ou l'une de ces peines.

S.R., ch. I-6, art. 93.

OFFENCES, PUNISHMENT AND ENFORCEMENT

94. to 100. [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 17]

Certificate of analysis is evidence

101. In every prosecution under this Act a certificate of analysis furnished by an analyst employed by the Government of Canada or by a province shall be accepted as evidence of the facts stated therein and of the authority of the person giving or issuing the certificate, without proof of the signature of the person appearing to have signed the certificate or his official character, and without further proof thereof.

R.S., c. I-6, s. 101.

Penalty where no other provided

102. Every person who is guilty of an offence against any provision of this Act or any regulation made by the Governor in Council or the Minister for which a penalty is not provided elsewhere in this Act or the regulations is liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., c. I-6, s. 102.

Seizure of goods

103. (1) Whenever a peace officer, a superintendent or a person authorized by the Minister believes on reasonable grounds that a by-law made under subsection 81(1) or 85.1(1) has been contravened or an offence against section 90 or 93 has been committed, he may seize all goods and chattels by means of or in relation to which he believes on reasonable grounds the by-law was contravened or the offence was committed.

Detention

(2) All goods and chattels seized pursuant to subsection (1) may be detained for a period of three months following the day of seizure unless during that period proceedings are undertaken under this Act in respect of the offence, in which case the goods and chattels may be further detained until the proceedings are finally concluded.

INFRACTIONS, PEINES ET CONTRÔLE D'APPLICATION

94. à 100. [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 17]

Le certificat de l'analyse constitue une preuve

101. Dans toute poursuite intentée sous le régime de la présente loi, un certificat d'analyse fourni par un analyste à l'emploi du gouvernement du Canada ou d'une province doit être accepté comme preuve des faits qu'il énonce et de l'autorité de la personne qui délivre le certificat, sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire et sans autre preuve à cet égard.

S.R., ch. I-6, art. 101.

Peine lorsque la loi n'en établit pas d'autre

102. Toute personne coupable d'une infraction à une disposition de la présente loi ou d'un règlement pris par le gouverneur en conseil ou le ministre, et pour laquelle aucune peine n'est prévue ailleurs dans la présente loi ou les règlements, encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de deux cents dollars et un emprisonnement maximal de trois mois, ou l'une de ces peines.

S.R., ch. I-6, art. 102.

Saisie des marchandises

103. (1) Chaque fois qu'un agent de la paix, un surintendant ou une autre personne autorisée par le ministre a des motifs raisonnables de croire qu'une infraction à un règlement administratif pris en vertu des paragraphes 81(1) ou 85.1(1) ou aux articles 90 ou 93 a été commise, il peut saisir toutes les marchandises et tous les biens meubles au moyen ou à l'égard desquels il a des motifs raisonnables de croire que l'infraction a été commise.

Détention

(2) Toutes les marchandises et tous les biens meubles saisis conformément au paragraphe (1) peuvent être détenus pendant une période de trois mois à compter du jour de la saisie, à moins que, dans cette période, on n'engage des poursuites en vertu de la présente loi à l'égard de cette infraction, auquel cas les marchandises et biens meubles peuvent être détenus jusqu'à la conclusion définitive des poursuites.

Forfeiture

(3) Where a person is convicted of an offence against the sections mentioned in subsection (1), the convicting court or judge may order that the goods and chattels by means of or in relation to which the offence was committed, in addition to any penalty imposed, are forfeited to Her Majesty and may be disposed of as the Minister directs.

Search

(4) A justice who is satisfied by information on oath that there is reasonable ground to believe that there are in a reserve or in any building, receptacle or place any goods or chattels by means of or in relation to which an offence against any of the sections mentioned in subsection (1) has been, is being or is about to be committed may at any time issue a warrant under his hand authorizing a person named therein or a peace officer at any time to search the reserve, building, receptacle or place for any of those goods or chattels.

R.S., 1985, c. I-5, s. 103; R.S., 1985, c. 32 (1st Supp.), s. 19; 2014, c. 38, s. 11.

Disposition of fines

104. (1) Subject to subsection (2), every fine, penalty or forfeiture imposed under this Act belongs to Her Majesty for the benefit of the band, or of one or more members of the band, with respect to which the offence was committed or to which the offender, if an Indian, belongs.

Exception

(2) The Governor in Council may from time to time direct that a fine, penalty or forfeiture described in subsection (1) shall be paid to a provincial, municipal or local authority that bears in whole or in part the expense of administering the law under which the fine, penalty or forfeiture is imposed, or that the fine, penalty or forfeiture shall be applied in the manner that he considers will best promote the purposes of the law under which the fine, penalty or forfeiture is imposed, or the administration of that law.

Disposition of fines imposed under by-laws

(3) If a fine is imposed under a by-law made by the council of a band under this Act, it belongs to the band and subsections (1) and (2) do not apply.

R.S., 1985, c. I-5, s. 104; 2014, c. 38, s. 12.

Confiscation

(3) Dans le cas où une personne est déclarée coupable d'une infraction aux articles mentionnés au paragraphe (1), le tribunal ou le juge qui la déclare coupable peut ordonner, en sus de toute peine infligée, que les marchandises et les biens meubles au moyen ou à l'égard desquels l'infraction a été commise soient confisqués au profit de Sa Majesté, et qu'il en soit disposé conformément aux instructions du ministre.

Perquisition

(4) Un juge de paix convaincu, après dénonciation sous serment, qu'il existe un motif raisonnable de croire que, sur une réserve ou dans un bâtiment, contenant ou lieu, se trouvent des marchandises ou des biens meubles au moyen ou à l'égard desquels une infraction à l'un des articles mentionnés au paragraphe (1) a été commise, se commet ou est sur le point de se commettre, peut lancer un mandat sous son seing, autorisant une personne y nommée ou un agent de la paix à faire, en tout temps, une perquisition dans la réserve, le bâtiment, contenant ou lieu, pour rechercher ces marchandises ou biens meubles.

L.R. (1985), ch. I-5, art. 103; L.R. (1985), ch. 32 (1er suppl.), art. 19; 2014, ch. 38, art. 11.

Emploi des amendes

104. (1) Sous réserve du paragraphe (2), toute amende, peine ou confiscation infligée en vertu de la présente loi appartient à Sa Majesté au bénéfice de la bande — ou d'un ou de plusieurs de ses membres — à l'égard de laquelle l'infraction a été commise, ou dont le délinquant, si c'est un Indien, fait partie.

Exception

(2) Le gouverneur en conseil peut ordonner que le montant de l'amende, de la peine ou de la confiscation soit versé à une autorité provinciale, municipale ou locale qui supporte, en totalité ou en partie, les frais d'application de la loi aux termes de laquelle l'amende, la peine ou la confiscation est infligée, ou que l'amende, la peine ou la confiscation soit employée de la manière qui, à son avis, favorisera le mieux les fins de la loi selon laquelle l'amende, la peine ou la confiscation est infligée, ou l'application de cette loi.

Emploi des amendes infligées en vertu des règlements administratifs

(3) Dans le cas où l'amende est infligée en vertu d'un règlement administratif pris par le conseil d'une bande sous le régime de la présente loi, elle appartient à la bande et les paragraphes (1) et (2) ne s'appliquent pas.

L.R. (1985), ch. I-5, art. 104; 2014, ch. 38, art. 12.

105. [Repealed, 2014, c. 38, s. 13]

Jurisdiction of provincial court judges

106. A provincial court judge has, with respect to matters arising under this Act, jurisdiction over the whole county, union of counties or judicial district in which the city, town or other place for which he is appointed or in which he has jurisdiction under provincial laws is situated.

R.S., 1985, c. I-5, s. 106; R.S., 1985, c. 27 (1st Supp.), s. 203.

Appointment of justices

107. The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have the powers and authority of two justices of the peace with regard to

(*a*) any offence under this Act; and

(*b*) any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.

R.S., c. I-6, s. 107.

Commissioners for taking oaths

108. For the purposes of this Act or any matter relating to Indian affairs

(*a*) persons appointed by the Minister for the purpose,

(*b*) superintendents, and

(*c*) the Minister, Deputy Minister and the chief officer in charge of the branch of the Department relating to Indian affairs,

are commissioners for the taking of oaths.

R.S., c. I-6, s. 108.

ENFRANCHISEMENT

109. to 113. [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 20]

SCHOOLS

Agreements with provinces, etc.

114. (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with

(*a*) the government of a province;

(*b*) the Commissioner of Yukon;

105. [Abrogé, 2014, ch. 38, art. 13]

Juridiction des juges de la cour provinciale

106. Un juge de la cour provinciale a compétence, à l'égard de toutes questions découlant de la présente loi, dans tout le comté, tous les comtés unis ou tout le district judiciaire où se trouve la ville ou autre endroit pour lequel il a été nommé ou dans lequel il a compétence aux termes de la législation provinciale.

L.R. (1985), ch. I-5, art. 106; L.R. (1985), ch. 27 (1er suppl.), art. 203.

Nomination de juges de paix

107. Le gouverneur en conseil peut nommer des personnes qui seront chargées, pour l'application de la présente loi, de remplir les fonctions de juge de paix, et ces personnes ont la compétence de deux juges de paix à l'égard :

a) des infractions visées par la présente loi;

b) de toute infraction aux dispositions du *Code criminel* sur la cruauté envers les animaux, les voies de fait simples, l'introduction par effraction et le vagabondage, lorsqu'elle est commise par un Indien ou se rattache à la personne ou aux biens d'un Indien.

S.R., ch. I-6, art. 107.

Commissaires aux serments

108. Aux fins de la présente loi ou de toute question concernant les affaires indiennes, les personnes suivantes sont des commissaires aux serments :

a) les personnes nommées à cet effet par le ministre;

b) les surintendants;

c) le ministre, le sous-ministre et le fonctionnaire qui est directeur de la division du ministère relative aux affaires indiennes.

S.R., ch. I-6, art. 108.

ÉMANCIPATION

109. à 113. [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 20]

ÉCOLES

Accords avec les provinces, etc.

114. (1) Le gouverneur en conseil peut, en conformité avec la présente loi, autoriser le ministre à conclure, au nom de Sa Majesté et pour l'instruction des enfants indiens conformément à la présente loi, des accords avec :

a) le gouvernement d'une province;

b) le commissaire du Yukon;

(*c*) the Commissioner of the Northwest Territories;

(*c.1*) the Commissioner of Nunavut; and

(*d*) a public or separate school board.

(*e*) [Repealed, 2014, c. 38, s. 14]

Schools

(2) The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.

R.S., 1985, c. I-5, s. 114; 1993, c. 28, s. 78; 2002, c. 7, s. 184; 2014, c. 38, s. 14.

Regulations

115. The Minister may

(*a*) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools; and

(*b*) provide for the transportation of children to and from school.

(*c*) and (*d*) [Repealed, 2014, c. 38, s. 15]

R.S., 1985, c. I-5, s. 115; 2014, c. 38, s. 15.

Attendance

116. (1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

Idem

(2) The Minister may

(*a*) require an Indian who has attained the age of six years to attend school; and

(*b*) require an Indian who becomes sixteen years of age during the school term to continue to attend school until the end of that term.

(*c*) [Repealed, 2014, c. 38, s. 16]

R.S., 1985, c. I-5, s. 116; 2014, c. 38, s. 16.

When attendance not required

117. An Indian child is not required to attend school if the child

(*a*) is, by reason of sickness or other unavoidable cause that is reported promptly to the principal, unable to attend school; or

(*b*) is under efficient instruction at home or elsewhere.

R.S., 1985, c. I-5, s. 117; 2014, c. 38, s. 17.

118. [Repealed, 2014, c. 38, s. 17]

119. [Repealed, 2014, c. 38, s. 17]

120. [Repealed, 2014, c. 38, s. 17]

c) le commissaire des Territoires du Nord-Ouest;

c.1) le commissaire du territoire du Nunavut;

d) une commission d'écoles publiques ou séparées.

e) [Abrogé, 2014, ch. 38, art. 14]

Écoles

(2) Le ministre peut, en conformité avec la présente loi, établir, diriger et entretenir des écoles pour les enfants indiens.

L.R. (1985), ch. I-5, art. 114; 1993, ch. 28, art. 78; 2002, ch. 7, art. 184; 2014, ch. 38, art. 14.

Règlements

115. Le ministre peut :

a) pourvoir à des normes de construction, d'installation, d'enseignement, d'inspection et de discipline relativement aux écoles, et prendre des règlements à cet égard;

b) assurer le transport, aller et retour, des enfants à l'école.

c) et *d*) [Abrogés, 2014, ch. 38, art. 15]

L.R. (1985), ch. I-5, art. 115; 2014, ch. 38, art. 15.

Fréquentation scolaire

116. (1) Sous réserve de l'article 117, tout enfant indien qui a atteint l'âge de sept ans doit fréquenter l'école.

Idem

(2) Le ministre peut :

a) enjoindre à un Indien qui a atteint l'âge de six ans de fréquenter l'école;

b) exiger qu'un Indien qui atteint l'âge de seize ans pendant une période scolaire continue à fréquenter l'école jusqu'à la fin de cette période.

c) [Abrogé, 2014, ch. 38, art. 16]

L.R. (1985), ch. I-5, art. 116; 2014, ch. 38, art. 16.

Cas où la fréquentation scolaire n'est pas requise

117. Un enfant indien n'est pas tenu de fréquenter l'école dans l'un ou l'autre des cas suivants :

a) il est incapable de le faire par suite de maladie ou pour une autre cause inévitable, qui est promptement signalée au principal;

b) il reçoit une instruction suffisante à la maison ou ailleurs.

L.R. (1985), ch. I-5, art. 117; 2014, ch. 38, art. 17.

118. [Abrogé, 2014, ch. 38, art. 17]

119. [Abrogé, 2014, ch. 38, art. 17]

120. [Abrogé, 2014, ch. 38, art. 17]

121. [Repealed, 2014, c. 38, s. 17]

Definitions

122. The following definitions apply in sections 114 to 117.

"child" « *enfant* »

"child" means an Indian who has attained the age of six years but has not attained the age of sixteen years, and a person who is required by the Minister to attend school;

"school" « *école* »

"school" includes a day school, technical school and high school.

"truant officer" [Repealed, 2014, c. 38, s. 18]

R.S., 1985, c. I-5, s. 123; 2014, c. 38, s. 18.

121. [Abrogé, 2014, ch. 38, art. 17]

Définitions

122. Les définitions qui suivent s'appliquent aux articles 114 à 117.

« agent de surveillance » [Abrogée, 2014, ch. 38, art. 18]

« école » *"school"*

« école » Sont assimilés à une école un externat, une école technique et une école secondaire.

« enfant » *"child"*

« enfant » Indien qui a atteint l'âge de six ans mais n'a pas atteint l'âge de seize ans, ainsi qu'une personne que le ministre oblige à fréquenter l'école.

L.R. (1985), ch. I-5, art. 123; 2014, ch. 38, art. 18.

RELATED PROVISIONS

DISPOSITIONS CONNEXES

— R.S., 1985, c. 32 (1st Supp.), ss. 22 and 23

— L.R. (1985), ch. 32 (1er suppl.), art. 22 et 23

Saving from liability

22. For greater certainty, no claim lies against Her Majesty in right of Canada, the Minister, any band, council of a band or member of a band or any other person or body in relation to the omission or deletion of the name of a person from the Indian Register in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) of the *Indian Act*.

Aucune réclamation

22. Il demeure entendu qu'il ne peut être présenté aucune réclamation contre Sa Majesté du chef du Canada, le ministre, une bande, un conseil de bande, un membre d'une bande ou autre personne ou organisme relativement à l'omission ou au retranchement du nom d'une personne du registre des Indiens dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) de la *Loi sur les Indiens*.

— R.S., 1985, c. 32 (1st Supp.), ss. 22 and 23

— L.R. (1985), ch. 32 (1er suppl.), art. 22 et 23

Report of Minister to Parliament

23. (1) The Minister shall cause to be laid before each House of Parliament, not later than two years after this Act is assented to, a report on the implementation of the amendments to the *Indian Act*, as enacted by this Act, which report shall include detailed information on

(*a*) the number of persons who have been registered under section 6 of the *Indian Act*, and the number entered on each Band List under subsection 11(1) of that Act, since April 17, 1985;

(*b*) the names and number of bands that have assumed control of their own membership under section 10 of the *Indian Act*; and

(*c*) the impact of the amendments on the lands and resources of Indian bands.

Rapport du ministre au Parlement

23. (1) Au plus tard deux ans après la date de sanction de la présente loi, le ministre fait déposer devant chaque chambre du Parlement un rapport sur l'application des modifications de la *Loi sur les Indiens* prévues dans la présente loi. Le rapport contient des renseignements détaillés sur :

a) le nombre de personnes inscrites en vertu de l'article 6 de la *Loi sur les Indiens* et le nombre de personnes dont le nom a été consigné dans une liste de bande en vertu du paragraphe 11(1) de cette loi, depuis le 17 avril 1985;

b) les noms et le nombre des bandes qui décident de l'appartenance à leurs effectifs en vertu de l'article 10 de la *Loi sur les Indiens*;

c) l'effet des modifications sur les terres et les ressources des bandes d'Indiens.

Review by Parliamentary committee

(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and may, in the course of that review, undertake a review of any provision of the *Indian Act* enacted by this Act.

Examen par un comité parlementaire

(2) Le comité parlementaire désigné ou constitué pour l'application du présent paragraphe examine sans délai après son dépôt par le ministre le rapport visé au paragraphe (1). Il peut, dans le cadre de cet examen, procéder à la révision de toute disposition de la *Loi sur les Indiens* édictée par la présente loi.

— R.S., 1985, c. 27 (2nd Supp.), s. 11

— L.R. (1985), ch. 27 (2e suppl.), art. 11

Transitional: proceedings

11. Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.

Disposition transitoire : procédure

11. Les procédures intentées en vertu des dispositions modifiées en annexe avant l'entrée en vigueur de l'article 10 se poursuivent en conformité avec les nouvelles dispositions sans autres formalités.

— R.S., 1985, c. 17 (4th Supp.), s. 7(2)

— L.R. (1985), ch. 17 (4e suppl.), par. 7(2)

Transitional

(2) The Surrendered Lands Register kept in the Department before the coming into force of this Act constitutes, on the coming into force of this Act, the Surrendered and Designated Lands Register.

Disposition transitoire

(2) Le registre appelé avant l'entrée en vigueur de la présente loi Registre des terres cédées devient, à compter de celle-ci, le Registre des terres cédées ou désignées.

— 1990, c. 16, s. 24(1)

— 1990, ch. 16, par. 24(1)

Transitional: proceedings

24. (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

Disposition transitoire : procédures

24. (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles des dispositions visées par la présente loi s'appliquent se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1990, c. 17, s. 45(1)

Transitional: proceedings

45. (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1990, ch. 17, par. 45(1)

Disposition transitoire : procédures

45. (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1998, c. 30, s. 10

Transitional — proceedings

10. Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1998, ch. 30, art. 10

Procédures

10. Les procédures intentées avant l'entrée en vigueur du présent article et auxquelles s'appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 2005, c. 9, s. 145

Continuation of existing by-laws

145. (1) By-laws made by a first nation under paragraph 83(1)(*a*), or any of paragraphs 83(1)(*d*) to (*g*), of the *Indian Act* that are in force on the day on which the name of the first nation is added to the schedule are deemed to be laws made under section 5 or 9, as the case may be, to the extent that they are not inconsistent with section 5 or 9, and remain in force until they are repealed or replaced.

— 2005, ch. 9, art. 145

Maintien des règlements administratifs existants

145. (1) Les règlements administratifs pris par une première nation en vertu de l'alinéa 83(1)*a*), ou de l'un des alinéas 83(1)*d*) à *g*), de la *Loi sur les Indiens* et qui sont en vigueur à la date à laquelle le nom de celle-ci est inscrit à l'annexe sont réputés être des textes législatifs pris en vertu des articles 5 ou 9, selon le cas, dans la mesure où ils ne sont pas incompatibles avec ces articles, et demeurent en vigueur tant qu'ils ne sont pas remplacés ou abrogés.

Amendment of existing by-laws

(2) For greater certainty, subsections 5(2) to (7) apply to amendments of by-laws referred to in subsection (1).

Modification des règlements administratifs existants

(2) Il est entendu que les paragraphes 5(2) à (7) s'appliquent à la modification des règlements administratifs visés au paragraphe (1).

— 2008, c. 32, s. 21

Existing interests — *Indian Act*

21. (1) Despite section 12, if an interest in land in the Former Tsawwassen Reserve was granted or approved under the *Indian Act* and exists on the effective date of the Agreement, the interest continues in effect in accordance with its terms and conditions unless a replacement interest is issued in accordance with Chapter 4 of the Agreement.

— 2008, ch. 32, art. 21

Droits existants : *Loi sur les Indiens*

21. (1) Malgré l'article 12, les droits sur les terres de l'ancienne réserve de Tsawwassen accordés ou approuvés sous le régime de la *Loi sur les Indiens* et existants à la date d'entrée en vigueur de l'accord sont maintenus, ainsi que les conditions dont ils sont assortis, à moins qu'un intérêt de remplacement soit accordé conformément au chapitre 4 de l'accord.

Transfer of rights and obligations

(2) On the effective date of the Agreement, the rights and obligations of Her Majesty in right of Canada as grantor in respect of such an interest are transferred to the Tsawwassen First Nation, which assumes those rights and obligations in accordance with the interest's terms and conditions.

Transfert des droits et obligations

(2) Les droits et obligations qui incombent à Sa Majesté du chef du Canada à l'égard de ces droits sur les terres sont, à la date d'entrée en vigueur de l'accord, transférés à la Première Nation de Tsawwassen qui s'en acquitte conformément aux conditions dont ceux-ci sont assortis.

— 2008, c. 32, s. 25

Documents in land registries

25. As of the effective date of the Agreement, registrations or records affecting Tsawwassen Lands that are registered or recorded in a land registry under the *Indian Act* or the *First Nations Land Management Act* have no effect.

— 2008, ch. 32, art. 25

Registres des terres

25. À compter de la date d'entrée en vigueur de l'accord, les inscriptions et dossiers relatifs aux terres tsawwassennes figurant dans tout registre des terres en vertu de la *Loi sur les Indiens* ou de la *Loi sur la gestion des terres des premières nations* sont sans effet.

— 2010, c. 18, s. 3.1

Report

3.1 (1) The Minister of Indian Affairs and Northern Development shall cause to be laid before each House of Parliament, not later than two years after this Act comes into force, a report on the provisions and implementation of this Act.

— 2010, ch. 18, art. 3.1

Rapport

3.1 (1) Au plus tard deux ans après la date d'entrée en vigueur de la présente loi, le ministre des Affaires indiennes et du Nord canadien fait déposer devant chaque chambre du Parlement un rapport sur les dispositions de la présente loi et sa mise en oeuvre.

Review by committee

(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and shall, in the course of that review, undertake a review of any provision of this Act.

(2) Le comité parlementaire désigné ou constitué pour l'application du présent paragraphe examine sans délai le rapport visé au paragraphe (1) après son dépôt. Dans le cadre de l'examen, le comité procède à la révision des dispositions de la présente loi.

Examen par le comité

— 2010, c. 18, s. 4, as amended by 2015, c. 3, s. 98

— 2010, ch. 18, art. 4, modifié par 2015, ch. 3, art. 98

Definitions

4. In sections 5 to 9, "band", "Band List", "council of a band", "registered" and "Registrar" have the same meaning as in subsection 2(1) of the *Indian Act*.

4. Aux articles 5 à 9, « bande », « conseil de bande », « inscrit », « liste de bande » et « registraire » s'entendent au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

Définitions

— 2010, c. 18, s. 5

— 2010, ch. 18, art. 5

Registration continued

5. For greater certainty, subject to any deletions made by the Registrar under subsection 5(3) of the *Indian Act*, any person who was, immediately before the day on which this Act comes into force, registered and entitled to be registered under paragraph 6(1)(*a*) or (*c*) of the *Indian Act* continues to be registered.

5. Il est entendu que, sous réserve de tout retranchement effectué par le registraire en vertu du paragraphe 5(3) de la *Loi sur les Indiens*, toute personne qui, à l'entrée en vigueur de la présente loi, était inscrite et avait le droit de l'être en vertu des alinéas 6(1)*a*) ou *c*) de la *Loi sur les Indiens* le demeure.

Inscription maintenue

— 2010, c. 18, s. 6

— 2010, ch. 18, art. 6

Registration entitlements recognized

6. For greater certainty, for the purposes of paragraph 6(1)(*f*) and subsection 6(2) of the *Indian Act*, the Registrar must recognize any entitlements to be registered that existed under paragraph 6(1)(*a*) or (*c*) of that Act immediately before the day on which this Act comes into force.

6. Il est entendu que, pour l'application de l'alinéa 6(1)*f*) et du paragraphe 6(2) de la *Loi sur les Indiens*, le registraire est tenu de reconnaître tout droit d'être inscrit qui existait en vertu des alinéas 6(1)*a*) ou *c*) de cette loi à l'entrée en vigueur de la présente loi.

Droit à l'inscription maintenu

— 2010, c. 18, s. 7

— 2010, ch. 18, art. 7

Membership maintained — paragraphs 6(1)(*a*) and (*c*)

7. For greater certainty, subject to any membership rules established by a band, any person who, immediately before the day on which this Act comes into force, was entitled to be registered under paragraph 6(1)(*a*) or (*c*) of the *Indian Act* and had the right to have their name entered in the Band List maintained by that band continues to have that right.

7. Il est entendu que, sous réserve des règles d'appartenance fixées par la bande, toute personne qui, à l'entrée en vigueur de la présente loi, avait le droit d'être inscrite en vertu des alinéas 6(1)*a*) ou *c*) de la *Loi sur les Indiens* et avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

Appartenance maintenue : alinéas 6(1)*a*) et *c*)

— 2010, c. 18, s. 8

— 2010, ch. 18, art. 8

Membership maintained — paragraph 6(1)(*c.1*)

8. For greater certainty, subject to any membership rules established by a band on or after the day on which this Act comes into force, any person who is entitled to be registered under paragraph 6(1)(*c.1*) of the *Indian Act*, as enacted by subsection 2(3), and who had, immediately before that day, the right to have their name entered in the Band List maintained by that band continues to have that right.

8. Il est entendu que, sous réserve des règles d'appartenance fixées par la bande à compter de la date d'entrée en vigueur de la présente loi, toute personne qui a le droit d'être inscrite en vertu de l'alinéa 6(1)*c.1*) de la *Loi sur les Indiens*, édicté par le paragraphe 2(3), et qui, à cette date, avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

Appartenance maintenue : alinéa 6(1)*c.1*)

— 2010, c. 18, s. 9

— 2010, ch. 18, art. 9

No liability

9. For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

9. Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une

Absence de responsabilité

(*a*) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this Act comes into force; and

(*b*) one of the person's parents is entitled to be registered under paragraph 6(1)(*c.1*) of the *Indian Act*, as enacted by subsection 2(3).

personne n'était pas consigné dans une liste de bande — à l'entrée en vigueur de la présente loi et que l'un de ses parents a le droit d'être inscrit en vertu de l'alinéa 6(1)*c.1*) de la *Loi sur les Indiens*, édicté par le paragraphe 2(3).

AMENDMENTS NOT IN FORCE

— 2014, c. 5, s. 43

43. Paragraph (*b*) of the definition "council of the band" in subsection 2(1) of the *Indian Act* is replaced by the following:

(*b*) in the case of a band that is named in the schedule to the *First Nations Elections Act*, the council elected or in office in accordance with that Act,

(*c*) in the case of a band whose name has been removed from the schedule to the *First Nations Elections Act* in accordance with section 42 of that Act, the council elected or in office in accordance with the community election code referred to in that section, or

(*d*) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band;

MODIFICATIONS NON EN VIGUEUR

— 2014, ch. 5, art. 43

43. L'alinéa *b*) de la définition de « conseil de la bande », au paragraphe 2(1) de la *Loi sur les Indiens*, est remplacé par ce qui suit :

b) s'agissant d'une bande dont le nom figure à l'annexe de la *Loi sur les élections au sein de premières nations*, le conseil élu ou en place conformément à cette loi;

c) s'agissant d'une bande dont le nom a été radié de l'annexe de la *Loi sur les élections au sein de premières nations* conformément à l'article 42 de cette loi, le conseil élu ou en place conformément au code électoral communautaire visé à cet article;

d) s'agissant de toute autre bande, le conseil choisi selon la coutume de celle-ci ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci.

TAB 8

1996 CarswellSask 418
Supreme Court of Canada

Ramgotra (Trustee of) v. North American Life Assurance Co.

1996 CarswellSask 212F, 1996 CarswellSask 418, [1996] 1 S.C.R. 325, [1996] 1 C.T.C. 356, [1996] 3 W.W.R. 457, [1996] S.C.J. No. 17, 10 C.C.P.B. 113, 114 W.A.C. 81, 132 D.L.R. (4th) 193, 13 E.T.R. (2d) 1, 141 Sask. R. 81, 193 N.R. 186, 37 C.B.R. (3d) 141, 60 A.C.W.S. (3d) 1109, 96 D.T.C. 6157, J.E. 96-443, EYB 1996-67919

Royal Bank of Canada v. North American Life Assurance Co. and Balvir Singh Ramgotra

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major, JJ.

Heard: November 8, 1995
Judgment: February 22, 1996
Docket: Court File No. 24316

Proceedings: on appeal of a decision of the Saskatchewan Court of Appeal reported at [1994] 8 W.W.R. 26, 26 C.B.R. (3d) 1, 115 D.L.R. (4th) 536.

Counsel: *Robert G. Kennedy* and *Ian A. Sutherland* for the appellant.
Gary A. Meschishnick and *Eric M. Singer* for the respondent.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Tax — Miscellaneous

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Property of bankrupt — Choses in action — Insurance policies of bankrupt — Life insurance — Other person as beneficiary

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Settlements of property — What constituting settlement

RRIF exempt from claims of creditors.

In June 1990, R, a medical doctor, transferred the funds from his two RRSPs into an RRIF under which his wife was designated as beneficiary. In February 1992, R made an assignment in bankruptcy. While R's RRSPs would have been subject to the claims of his creditors, the RRIF constituted a life insurance annuity, and was therefore exempt from their claims on the basis of paragraph 67(1)(b) of the *Bankruptcy and Insolvency Act* ("BIA"), when read in conjunction with subparagraph 2(kk)(vii) and subsection 158(2) of The Saskatchewan *Insurance Act* . However, the trustee in bankruptcy applied for a declaration that the transfer of the RRSP funds into the RRIF was void, pursuant to subsection 91(2) of the *BIA* . That provision declares that "settlements" made 1 to 5 years prior to bankruptcy are void against the trustee if "the interest of the settlor in the property did not pass" upon settlement. At trial, the trustee's application was dismissed because R's transfer of the RRSP funds into the RRIF had been made in good faith and not for the purpose of defeating the claims of his creditors. An appeal to the Saskatchewan Court of Appeal by the bank was also dismissed. The bank then appealed to the Supreme Court of Canada.

Held:

Appeal dismissed.

Since the designation of R's wife as a beneficiary under the life insurance policy was an in futuro settlement made within 5 years prior to R's bankruptcy, it was void against the trustee pursuant to subsection 91(2) of the *BIA* . Section 91 had the effect of bringing the settled property, the RRIF, back into the estate of the bankrupt in the possession of the trustee. However paragraph 67(1)(b) of the *BIA* was relevant in determining the property in the trustee's possession over which the trustee could exercise his or her administrative powers. Paragraph 67(1)(b) related to a different stage of bankruptcy than subsection 91(2) and was not in conflict with the latter provision. Therefore, even though R effected a void settlement under subsection 91(2) of the *BIA* when he designated his wife as beneficiary under his RRIF, that did not allow the trustee to use the funds in the RRIF to satisfy the claims of creditors such as the bank. The RRIF was an exempt asset pursuant to the provincial legislation incorporated into paragraph 67(1)(b), meaning that it was not property which was divisible among creditors. In the result, despite the fact that R's settlement was void against the trustee, the exempt status of the RRIF was an absolute bar to the bank's claim.

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2(iii)

2(iv)

2(vii)

158(1)

(2)

***Gonthier J.*:**

I. Issue

1 This case raises an important and controversial issue concerning the interpretation of ss. 67(1)(b) and 91 of the *Bankruptcy and Insolvency Act* , R.S.C., 1985, c. B-3, as amended (hereinafter "BIA"): Where a bankrupt has transferred registered retirement savings plan (RRSP) funds into a registered retirement income fund (RRIF) within the five years preceding

bankruptcy, and where the RRIF is exempt from the claims of creditors under provincial legislation incorporated into the *BIA* by s. 67(1)(b), may a creditor set aside the transfer as a s. 91 "settlement", and thereby get at the RRIF despite its exempt status?

II. Factual Background

2 The respondent Ramgotra is a medical doctor who practised from 1971 to 1991 in Saskatoon, Saskatchewan. During this period, as a self-employed doctor responsible for his own retirement planning, he built up savings and investments, including two RRSPs. In May 1989, he became an associate at a Saskatoon medical clinic, but his share of the clinic expenses proved higher than expected. As a result, in February 1990, he opened his own practice. Unfortunately, the practice was not as successful as Dr. Ramgotra had hoped, partly because of a slow patient load, but also because Dr. Ramgotra suffers from insulin dependent diabetes and was required to reduce his work hours in response to his medical condition.

3 In June 1990, at the suggestion of a financial adviser, Dr. Ramgotra transferred the funds from his two RRSPs into an RRIF under which his wife was designated as beneficiary. The RRIF was to provide Dr. Ramgotra with a gross monthly income of $1,066.20, and these payments commenced in August 1990. The respondent North American Life Assurance Company is the financial institution responsible for the management of the RRIF.

4 Ten months later, in May 1991, Dr. Ramgotra applied for and obtained a position as permanent physician with the Town of Dinsmore, Saskatchewan. He then attempted to negotiate with his landlord in Saskatoon in order to terminate the commercial lease for his practice there. These negotiations were unsuccessful, and the landlord obtained a judgment against Dr. Ramgotra for approximately $30,000. This event led Dr. Ramgotra to make an assignment into bankruptcy in February 1992. When he received an absolute discharge from bankruptcy in January 1993, the only assets which he retained were his clothing and household contents, and the RRIF.

5 While Dr. Ramgotra's RRSPs would have been subject to the claims of his creditors, the RRIF constituted a life insurance annuity, and was therefore exempt from their claims on the basis of s. 67(1)(b) of the *BIA* , when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act* , R.S.S. 1978, c. S-26. However, the trustee in bankruptcy applied under Rule 89 of the *Bankruptcy Rules* , C.R.C. 1978, c. 368, for a declaration that the transfer of the RRSP funds into the RRIF was void, pursuant to s. 91(2) of the *BIA* . That provision declares, in part, that "settlements" made one to five years prior to bankruptcy are void against the trustee if "the interest of the settlor in the property did not pass" upon settlement.

6 At trial, the trustee's application was dismissed because Dr. Ramgotra's transfer of the RRSP funds into the RRIF had been made in good faith, and not for the purpose of defeating the claims of his creditors. An appeal to the Saskatchewan Court of Appeal by the appellant Royal Bank, Dr. Ramgotra's major creditor, was also dismissed.

III. Relevant Statutory Provisions

7 *Saskatchewan Insurance Act* , R.S.S. 1978, c. S-26:

> 2(kk) "life insurance" means insurance whereby an insurer undertakes to pay insurance money:
>
> (i) on death;
>
> (ii) on the happening of an event or contingency dependent on human life;
>
> (iii) at a fixed or determinable future time; or
>
> (iv) for a term dependent on human life;
>
> and, without limiting the generality of the foregoing, includes:
>
> . . . . .

(vii) an undertaking given by an insurer, whether before or after this section comes into force, to provide an annuity or what would be an annuity except that the periodic payments may be unequal in amount;

158(1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

(2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure.

8 *Bankruptcy and Insolvency Act* , R.S.C., 1985, c. B-3, as amended:

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

. . . . .

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

91(1) Any settlement of property, if the settlor becomes bankrupt within one year after the date of the settlement, is void against the trustee.

(2) Any settlement of property, if the settlor becomes bankrupt within five years after the date of the settlement, is void against the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all his debts without the aid of the property comprised in the settlement or that the interest of the settlor in the property did not pass on the execution thereof.

(3) This section does not extend to any settlement made

. . . . .

(b) in favour of a purchaser or encumbrancer in good faith and for valuable consideration. ...

IV. Decisions Below

1. Saskatchewan Court of Queen's Bench (1993), 18 C.B.R. (3d) 1

9 In his reasons, Baynton J. made two factual findings: (1) Dr. Ramgotra was solvent at the time he transferred the RRSP funds into the RRIF, and (2) the transfer was made in good faith, and not for the purpose of defeating creditors. Because of the former factual finding, the first branch of s. 91(2) of the *BIA* could not be used by the trustee to void the transfer. However, the second branch of s. 91(2) was still available, and the issue was whether the transfer was a "settlement" in which the interest of the settlor in the property did not pass at the time of settlement.

10 Relying on recent case law establishing that the exchange of non-exempt property for exempt property (i.e., "self-settlement") could constitute a settlement under s. 91 of the *BIA* , Baynton J. reached the tentative conclusion that the transfer in the case at bar fell within the second branch of s. 91(2) because it was a settlement in which, by definition, the property interest of the settlor did not pass. He refused, however, to declare the settlement void against the trustee in bankruptcy. He referred to his previous decision in *Royal Bank v. Oliver* (1992), 11 C.B.R. (3d) 82 (Sask. Q.B.) , where a similar settlement was at issue. In Oliver, he decided that a *bona fide* exchange of property should not be a voidable settlement under s. 91(2). He effectively "borrowed" the concept of good faith which appears in s. 91(3)(b) of the *BIA* (but is not applicable in the case of self- settlement), and used it to limit the common law definition of settlement.

11 Since Dr. Ramgotra had acted in good faith, and not for the purpose of defeating creditors, when he transferred his non-exempt RRSP funds into an exempt RRIF, Baynton J. concluded that the transfer was not a settlement which could be set aside under s. 91(2).

2. Saskatchewan Court of Appeal (1994), 26 C.B.R. (3d) 1

12 The Saskatchewan Court of Appeal unanimously dismissed the appellant's appeal. For the court, Jackson J.A. rejected the submission (which had been accepted by Baynton J.) that a settlement had been effected by the transfer of the non-exempt RRSP funds into the exempt RRIF. In her view, settlement within the meaning of the *BIA* involved settlement on a third party; the mere conversion of non- exempt property into exempt property was insufficient.

13 However, after a review of the jurisprudence on the meaning of settlement, Jackson J.A. concluded that the designation of a beneficiary under an insurance policy could constitute a settlement. Thus, when Dr. Ramgotra designated his wife as beneficiary under the RRIF, he settled a property interest on her. Jackson J.A. characterized this interest as a future contingent property interest.

14 Jackson J.A. then considered whether such a settlement could be declared void under the second branch of s. 91(2) concerning the passing of property. In her view, the essential issue was whether or not it was necessary to convey, or give up control over, all the interests in a particular piece of property in order for the property passing exception to be met. Jackson J.A. reviewed the case law on this issue, most of which concluded that a settlement in the form of an insurance beneficiary designation does not involve the passing of property because the settlor always maintains property interests in, and control over, the insurance after the designation. However, she preferred to rely on two early English cases, In *re Lowndes; Ex parte Trustee* (1887), 18 Q.B.D. 677 , and *Shrager v. March*, [1908] A.C. 402 (P.C.) , for the proposition that property passes if a settlor divests him- or herself of all interest in the property acquired by a third party beneficiary. Thus, the beneficiary designation in the case at bar passed a contingent property interest to Mrs. Ramgotra, and fully divested Dr. Ramgotra of that same property interest. Jackson J.A. held that this was sufficient to meet the property passing requirement of the second branch of s. 91(2), with the result that Dr. Ramgotra's designation of his wife as beneficiary under the RRIF was not void against his trustee in bankruptcy.

15 Jackson J.A.'s conclusion that the property passing requirement had been met was further reinforced by her view that any other conclusion would be contrary to bankruptcy policy and the purpose of RRIFs. She noted that if the designation of a beneficiary under an insurance policy were not found to pass property to the beneficiary, then all insurance beneficiary designations made within five years of bankruptcy would be void against the trustee in bankruptcy by operation of the second branch of s. 91(2), including those made in good faith when the bankrupt was solvent. Jackson J.A. was of the view that s. 91 of the *BIA* should be interpreted to avoid such an absurd result.

16 Finally, with respect to the *bona fide* test applied by the trial judge, Baynton J., Jackson J.A. stated that it was not necessary for her to adopt his position, but she nevertheless endorsed his analysis of the difficulties associated with any interpretation of s. 91 of the *BIA* which would automatically void legitimate transactions made by solvent debtors. Jackson J.A. agreed with Baynton J. that to attack a beneficiary designation made by a solvent debtor, a trustee in bankruptcy should have to prove some lack of good faith on the part of the debtor. However, she disagreed that the creation of a good faith requirement for self-settlement under s. 91 would be appropriate. Instead, she opined that trustees may rely on other legislation, such as provincial fraud legislation, to attack bad faith self-settlements.

V. Analysis

1. Introduction

17 In my recent decision in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 , 128 D.L.R. (4th)1, 188 N.R. 1 , I had the opportunity to review the two fundamental purposes underlying the *BIA* . As I stated there, the first such purpose is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors, while the second is to provide for the financial rehabilitation of insolvent persons (at paragraph 7). The case at bar demonstrates that these

two purposes may come into conflict. The appellant bank, Dr. Ramgotra's principal creditor, wishes to attach his RRIF in order to satisfy its outstanding financial claims against him. Not surprisingly, in light of Dr. Ramgotra's post-bankruptcy financial position, he resists the bank's attempts to seize one of his few remaining assets. He argues that the RRIF, being life insurance under s. 2(kk)(vii) of *The Saskatchewan Insurance Act* , is exempt from execution or seizure by creditors (s. 158(2) of *The Saskatchewan Insurance Act* and s. 67(1)(b) of the *BIA*). In short, the bank seeks an "equitable distribution" of Dr. Ramgotra's assets, while Dr. Ramgotra's "financial rehabilitation" is furthered if he maintains his interest in the RRIF.

18 Since Dr. Ramgotra transferred the funds from his two RRSPs into his exempt RRIF when he was solvent, and not for the purpose of defeating his creditors, one might well wonder how the bank could get around the exempt status of the RRIF — a status which, on its face, constitutes an absolute bar to the bank's claim. In the general context of debtor-creditor relations, the bank would have no expectation at all of attaching Dr. Ramgotra's exempt RRIF. On the facts of this case, Dr. Ramgotra's creditors are not being denied something which they would otherwise have, since the general rule is that they would not be entitled to attach the RRIF unless it had been removed from Dr. Ramgotra's estate through a fraudulent conveyance. Why should Dr. Ramgotra's bankruptcy place creditors like the bank in a better position than they would be in absent the bankruptcy? The bank's position before this Court appears to conflict with the principle that creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy: *Minister of National Revenue v. Anthony* (1995), 124 D.L.R. (4th) 575 (Nfld. C.A.) , at p. 580.

19 Moreover, the policy of exempting life insurance investments and policies from execution or seizure under the *BIA* , where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity. In Saskatchewan, as in the other provinces, many other necessities are excluded from the property of a bankrupt which is subject to execution or seizure by creditors. Examples include food, fuel, clothing, household items, tools of a trade (*The Exemptions Act* , R.S.S. 1978, c. E-14, s. 2), farm buildings, farming equipment, and livestock (*The Saskatchewan Farm Security Act* , S.S. 1988-89, c. S-17.1, s. 65). One might well characterize exempt property collectively as the "bare minimum" which a bankrupt is entitled to maintain in order to facilitate his or her rehabilitation following bankruptcy.

20 Thus, the bank's claim before this Court is at odds with the exempt status of the property in question, the policy justification underlying that exempt status, and its own expectations prior to Dr. Ramgotra's bankruptcy as to what it would be able to attach. However, the bank is challenging the transaction which transferred the RRSP funds into the RRIF. The bank claims that this transaction was a settlement within the meaning of s. 91 of the *BIA* , that Dr. Ramgotra's property interest did not pass at the time of the settlement, and that the settlement is void pursuant to the second branch of s. 91(2) (i.e., the "property passing branch"). According to the bank, the funds at issue are not exempt from execution or seizure because the transaction which rendered them exempt is void.

21 The issues raised by the bank are three-fold: (1) is the transaction in the case at bar a settlement within the meaning of s. 91 of the *BIA* ; (2) if so, is the settlement void against the trustee in bankruptcy under the second branch of s. 91(2); and (3) if so, are the funds in the RRIF available to satisfy the claims of Dr. Ramgotra's creditors despite the RRIF's exempt status under s. 67(1)(b). These issues are not new. They have been the source of considerable controversy in the lower courts, where four competing approaches have been adopted. I will deal with each of these in turn. However, I should state at the outset that I find none of them to be a satisfactory resolution of the problem presented by the case at bar and similar cases. I prefer an approach which recognizes the distinct roles of ss. 67(1)(b) and 91 in bankruptcy, as outlined below.

2. The Competing Approaches in the Lower Courts

22

(i) The exchange of a non-exempt asset for an exempt asset is a settlement under the *BIA* , and is voidable against the trustee in bankruptcy pursuant to s. 91 where made in the five years preceding bankruptcy (the "*Wilson* approach")

23 The first approach to the problem raised by the case at bar involves the more general issue of whether a self-settlement is caught by s. 91 of the *BIA* . Such an approach is typified by the decision of the Alberta Court of Appeal in *Wilson v. Doane Raymond Ltd.* (1988), 69 C.B.R. (N.S.) 156 , leave to appeal to S.C.C. refused 66 Alta L.R. (2d) xlix (note), *(sub nom. Wilson (Bankrupt), Re)*, 100 A.R. 60n, 102 N.R. 158n . There, the appellant dairy farmers sold their milk quota, a non-exempt asset, and used the proceeds to purchase a condominium, an exempt asset. A month later, they made assignments into bankruptcy. The trustee in bankruptcy sought an order declaring the condominium purchase to be a void settlement of property under s. 69(1) of the *Bankruptcy Act* , R.S.C. 1970, c. B-3, (now s. 91(1)) of the *BIA* .

24 For the Court of Appeal, Haddad J.A. relied upon the decision of the Alberta Queen's Bench in *Wozniuk, Re* (1987), 76 A.R. 42 , a case the facts of which are strikingly similar to those of the case at bar. In *Re Wozniuk* , it was held that a self-settlement in which a non-exempt RRSP was exchanged for an exempt life insurance annuity was a settlement within the meaning of the *BIA* . Haddad J.A. agreed with this proposition, adding at page 159 that "[a] settlement within the scheme of the statute occurs when a disposition of property reduces the bankrupt estate available to the trustee for distribution to creditors". He thus concluded that the appellants' conversion of non-exempt property into exempt property was a void settlement under the *BIA* , since it had the effect of reducing the estate which was available to creditors. It made no difference that the appellants had effected the conversion for the purpose of obtaining a home for themselves, and not for the purpose of defeating creditors.

25 The principle flowing from *Wilson* and *Wozniuk* , namely that the exchange of a non-exempt asset for an exempt asset is a settlement under the *BIA* , and is voidable under s. 91, has been adopted in numerous cases: *Malloy, Re* (1983), 48 C.B.R. (N.S.) 308 (Ont. S.C.) ; *Alberta Treasury Branches v. Guimond* (1987), 70 C.B.R. (N.S.) 125 (Alta. Q.B.) ; *Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131 (Sask. Q.B.) , aff'd (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.) ; *Klassen (Trustee of) v. Great West Life Assurance Co.* (1990), 1 C.B.R. (3d) 263 (Sask. Q.B.) . Moreover, this principle was adopted by the trial judge, Baynton J., in the case at bar, and in his earlier decision in *Oliver, supra* .

26 The approach which found favour with the Alberta Court of Appeal in *Wilson* was rejected, I think properly, by the Saskatchewan Court of Appeal in the case at bar. In my view, it is incorrect to conclude that a person may settle property on him- or herself. This is confirmed by the traditional judicial understanding of "settlement", as stated by this Court in *Bozanich, Re*, [1942] S.C.R. 130, [1942] 2 D.L.R. 145, 23 C.B.R. 234 . Rinfret J. described "settlement" as follows at pages 138-39 (D.L.R. 151, C.B.R. 241):

> Without attempting to give a definition of the word __ and more particularly of that word as used in section 60 __ it seems to me sufficient for the purpose of interpreting the section to adopt a passage of Cave J., in the case of *In v. Player; Ex parte Harvey* (1885), 15 Q.B.D. 682 , at 686-687:
>
> > One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement". Although "settlement", by the 3rd subsection, "shall for the purposes of this section include any conveyance or transfer of property", yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. *The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person* .

[Emphasis added.]

27 Rinfret J. then added, at page 141 (D.L.R. 153, C.B.R. 243):

> The Act, as broad as it is, allows of a clear distinction between settlements though effected by a conveyance or transfer of property and conveyances or transfers of property not in the nature of a settlement.

28 There is no room in the definition of settlement adopted by this Court in *Re Bozanich* for a "settlement onto oneself", since the settlement must involve the transfer of property to be held for the enjoyment of another person. It would seem that the lower courts have departed from this aspect of *Re Bozanich* , and have held that a self-settlement is a settlement under the

BIA , because the exchange of non-exempt property for exempt property is one convenient means of defeating creditors. As the court reasoned in *Wozniuk, Re* at p. 62, a bankrupt should not be able to "bootstrap himself" out of s. 91 "by taking non-exempt property and converting it into property which would be exempt".

29 Although the court in *Wilson* thought that excluding self-settlements from s. 91 of the *BIA* would allow for considerable abuse, it seems to me that the contrary conclusion is more problematic. If creditors may attach self-settled property by attacking the self-settlement under s. 91 of the *BIA* , notwithstanding the exempt status of the property, then the result follows that such property is attachable in all cases where the self-settlement occurred in the five years preceding bankruptcy, including those cases where the bankrupt was solvent and acting in good faith at the time of the impugned transaction. In his article, "Section 91 (Settlements) of the *Bankruptcy and Insolvency Act* : A Mutated Monster" (1995), 25 *Can. Bus. L.J.* 235, Professor R. C. C. Cuming strongly criticized the judicial extension of the concept of settlement to include self-settlement as "patently unreasonable", at page 235, and "a dramatic mutation", at page 238. He added, at page 242:

> The problem of injustice arises when this expanded interpretation of the concept of settlement is combined with another Canadian-made adjunct to s. 91: that, in both such situations, the interest of the settlor does not pass on execution of the transfers, thereby bringing them within the third arm of s. 91. *The logic of this reasoning appears to be as follows: the transfer of the property to the debtor is a settlement and the interest of the settlor did not pass on execution since, by definition, he retained or ended up with the interest or its equivalent* .
>
> This approach alone, while unable to withstand close technical scrutiny, would not be a source of injustice if the property has not been converted into exempt property as a result of the unexecuted transaction. The "settled" property is divisible among the bankrupt settlor's creditors. *The potential for injustice arises in situations where the "settlement" involves conversion of property from non-exempt to exempt property* .

[Emphasis added.]

30 I agree that there is considerable potential for injustice if the Wilson approach to self-settlement is adopted. The situation is quite different in the case of settlements on third parties, not only because in such cases the property of the settlor may well have passed, but also because of s. 91(3)(b). That provision states that a "settlement made ... in favour of a purchaser or encumbrancer in good faith and for valuable consideration" is not void against the trustee in bankruptcy, thus providing a *bona fide* exception to ss. 91(1) and (2). However, the provision is not available in the case of self-settlement because, (1) there is no "purchaser or encumbrancer", and (2) there is no exchange of "valuable consideration". The Act therefore affords no protection to self-settlors like Dr. Ramgotra, who have acted in good faith. This anomaly is a persuasive indication that Parliament did not intend s. 91 to apply to self-settlement.

31 Further to this, I think that the inclusion of self-settlements within s. 91 is contrary to the purpose of that provision. As I will explain in greater detail below, s. 91 empowers the trustee in bankruptcy to return property to the bankrupt's estate, where it has been removed from the estate through a settlement by the bankrupt on a third party. Since a self-settlement does not transfer property to a third party, the property remains in the bankrupt's estate and vests in the trustee at the time of the bankruptcy (s. 71(2) of the *BIA*). What possible role could s. 91 have in that situation? Moreover, the property passing branch of s. 91(2) has traditionally been viewed as providing a means by which the trustee in bankruptcy may challenge in *futuro* settlements by the bankrupt on third party beneficiaries, and thereby avoid future claims by those beneficiaries against the bankrupt's estate. In other words, as Jackson J.A. reasoned in the court below at paragraph 50, the property passing test catches those transactions by solvent debtors that do not confer an immediate interest. The purpose of the second branch of s. 91(2) would be distorted if creditors could employ it to attach self- settled property, since a self-settlement is qualitatively different from the kinds of dealings at which the property passing test is aimed.

32 Ultimately, I think that the *Wilson* approach to s. 91 fails to strike an appropriate balance between the Act's dual, and sometimes conflicting, purposes of protecting creditors and rehabilitating bankrupts. Even though a self-settlement which creates an exempt asset has the effect of reducing the property available to creditors, one must not lose sight of the fact that the result of the transaction is the acquisition of an asset which is so essential to the bankrupt and his or her dependents that it has

been rendered exempt from execution or seizure by provincial legislation incorporated into the Act by s. 67(1)(b). To interpret s. 91 of the *BIA* in a manner which automatically allows creditors to attach exempt property of such an essential character is, in my view, going too far.

33 Thus, I see no reason in this case to depart from the definition of settlement adopted by this Court in *Bozanich, Re* , which requires a disposition by the settlor to a third party. To borrow the words of Rinfret J., self-settlement is a transfer of property not in the nature of a settlement.

(ii) *Bona fide* self-settlements are not settlements under s. 91 of the *BIA* (the "*Oliver* approach")

34 In light of my rejection of the *Wilson* approach, it is not necessary to deal with the bona fide exception developed by Baynton J. in *Oliver, supra* , and applied in the case at bar. Suffice it to say that I share Baynton J.'s concerns about the harshness of the legal approach taken in cases like *Wilson* . While I appreciate his solution to the problem, I note that he was bound to follow the *Wilson* view that self-settlements are subject to s. 91, since the Saskatchewan Court of Appeal had accepted this proposition in *Camgoz, supra* . As I explain below, I do not think that good faith is relevant to the question of whether a settlement has been made within the meaning of s. 91. I prefer the approach to self-settlement taken by the Saskatchewan Court of Appeal in the instant case.

(iii) The designation of a beneficiary under a life insurance plan is a settlement under the *BIA* , and is voidable against the trustee in bankruptcy pursuant to s. 91 where made in the five years preceding bankruptcy (the "*Geraci* (Court of Appeal) approach")

35 Although the Court of Appeal in the instant case found that Dr. Ramgotra's exchange of a non-exempt asset for an exempt asset was not, by the fact of the exchange alone, a settlement under s. 91, Jackson J.A. proceeded to hold that when Dr. Ramgotra designated his wife as beneficiary of the RRIF, he effected a s. 91 settlement. This approach, which is particular to life insurance plans, was based on the decision of the Ontario Court of Appeal in *Swallow v. Geraci* (1970), 14 C.B.R. (N.S.) 253 . There, at a time when the bankrupt was clearly insolvent, he designated his wife as beneficiary of a life insurance policy with a cash surrender value of $9,000. The effect of the designation was to render the insurance exempt from execution or seizure. The trustee in bankruptcy applied for a declaration that the beneficiary designation was void under the first branch (i.e., the "insolvency branch") of what is now s. 91(2) of the *BIA* . For the court, Jessup J.A. reasoned at pages 255-56:

> I think there emerges from the authorities a definition of the ordinary meaning of "settlement" that it is a disposition of property to be held, either in original form or in such form that it can be traced, for the enjoyment of some other person; and that the designation of a beneficiary of an insurance policy is such a disposition. ... Having regard to the wide ranging affairs to which the *Bankruptcy Act* applies, I do not think that the word "settlement" in s. 60(1) [now s. 91] of that statute should be given a restricted meaning. The respondent argues that the designation of the wife as beneficiary of the policy was not a disposition of property because she would acquire no property rights in or benefit from the policy, unless and until the prior death of the bankrupt. I think it would be more accurate to say the wife's rights are contingent on the death of her husband. But the definition of property in s. 2(o) of the *Bankruptcy Act* , which is in the widest terms, includes "every description of estate, interest and profit, present or future, vested or *contingent* , in, arising out of, or incident to property". ... Moreover, the circumstance that the wife's contingent interest in the policy may be divested by the designation of a different beneficiary does not derogate from the fact that she has an interest until there is divestiture.

[Emphasis in original.]

36 He thus concluded that the beneficiary designation in question, having been made when the bankrupt was insolvent, was void against the trustee in bankruptcy.

37 This reasoning appealed to Jackson J.A., and has been followed by several courts: *Douyon, Re* (1982), 134 D.L.R. (3d) 324 (C.S. Que.) ; *MacDonald, Re* (1991), 21 C.B.R. (3d) 211 (Alta. Q.B.) ; *Yewdale, Re* (1995), 30 C.B.R. (3d) 194 (B.C.S.C.) . I too find it persuasive. It is also significant that the *BIA* was amended in 1992 to include a definition of "settlement" as follows:

2. "settlement" includes a contract, covenant, transfer, gift and *designation of beneficiary in an insurance contract* , to the extent that the contract, covenant, transfer, gift or *designation* is gratuitous or made for merely nominal consideration;

[Emphasis added.]

38 (*Act to Amend the Bankruptcy Act* , S.C. 1992, c. 27, s. 3(2))

39 This definition was not in force when the circumstances of the instant appeal arose (in fact, between 1949 and 1992, there was no statutory definition of settlement in *BIA*). However, in light of *Geraci* and the cases following it, I think that a jurisprudential consensus has emerged that the designation of a beneficiary under a life insurance policy constitutes a s. 91 settlement. The new statutory definition reflects this consensus. On this basis, I agree with Jackson J.A. that Dr. Ramgotra effected a settlement triggering s. 91.

40 After concluding that the designation of Mrs. Ramgotra as beneficiary of Dr. Ramgotra's RRIF was a s. 91 settlement, Jackson J.A. turned to the second branch of s. 91(2), and inquired as to whether Dr. Ramgotra's interest in the settled property passed at the time of settlement. The settlement would only be void against the trustee in bankruptcy if Dr. Ramgotra's interest had not passed. This raised the perplexing issue of which "interest" should be considered in relation to the property passing requirement: Dr. Ramgotra's present interest in the RRIF itself, which certainly did not pass at the time of settlement, or the future contingent interest which he had obviously passed to Mrs. Ramgotra when she became his beneficiary? (For a general discussion of this controversial issue, see David J. McKee, "Debtor-Creditor Issues Affecting Annuity Contracts" (1993), 12 *Estates and Trusts J.* 247, at pages 272-78, and Norwood and Weir, *Norwood on Life Insurance Law in Canada* (2nd ed. 1993), at pp. 253-56.)

41 Before this Court, the parties focused their submissions on the property passing issue. This was not surprising, as Jackson J.A. wrote substantial reasons justifying her conclusion that the relevant property interest was the future contingent interest which had passed to Mrs. Ramgotra. Jackson J.A.'s position was in direct conflict with the decision in *Re MacDonald, supra* . The difficulty with Jackson J.A.'s position is that it does violence to the distinction which s. 91(2) requires to be made between in *futuro* and immediate transfers of property. The settlement of a contingent and revocable future interest in RRIF funds is an in *futuro* settlement, i.e., the settlor's interest in the property does not pass at the moment of the settlement. If the settlement of a contingent and revocable future interest were considered an immediate transfer of property, as Jackson J.A. proposes, it is difficult to imagine what sort of settlement of future property could not be so described.

42 Since the designation of a beneficiary was an in *futuro* settlement made within the five years prior to Dr. Ramgotra's bankruptcy, it is void against the trustee, pursuant to s. 91(2). However, this does not mean that the RRIF funds may be distributed to the creditors of the estate. For the reasons given below, the exempt status of the life-assured RRIF remains in effect under provincial law so as to block the creditors' claims. Before explaining why this is so, I will examine the fourth approach to the problem raised in the instant case.

(iv) Where property is exempt from execution or seizure by creditors, pursuant to s. 67(1)(b) of the *BIA* , then its exempt status prevails over the fact that it became exempt as a result of a voidable settlement (the "*Geraci* (trial) approach").

43 Dr. Ramgotra argued forcefully in his submissions that since his RRIF was an exempt property under *The Saskatchewan Insurance Act* , and since this exemption is incorporated into the *BIA* by s. 67(1)(b), then it should be irrelevant that the funds in the RRIF were settled when his wife was designated as the beneficiary. In essence, Dr. Ramgotra urged this Court to hold that the exemption provision of the Act should be given effect regardless of s. 91.

44 Support for Dr. Ramgotra's submission can be found in the judgment of Houlden J. in the trial decision in *Re Geraci* (1969), 13 C.B.R. (N.S.) 86 (Ont. S.C.) (a judgment later overturned by the Ontario Court of Appeal, as discussed above). Houlden J. began by confirming that the designation of a beneficiary under a life insurance policy is a settlement within the *BIA* . He then observed that by reason of the beneficiary designation, the policy itself was exempt from execution or seizure

by creditors pursuant to s. 162(2) of *The Insurance Act* , R.S.O. 1960, c. 190 (re-enacted by S.O. 1961-62, c. 63, s. 4) (now s. 196(2) of the *Insurance Act* , R.S.O. 1990, c. I-8). He construed the effect of the exemption as follows, at pages 92-93:

> ... I believe on a close examination of s. 162(2) that it is the clear intention of the section to make the policy immune from attack by creditors while the wife is designated as beneficiary.
>
> . . . . .
>
> In my opinion, s. 162(2) has been drafted to provide for the group of persons who were formerly called "preferred beneficiaries". It is now possible to name a person who would formerly have been a preferred beneficiary and at the same time, if the designation is not irrevocable, to retain the right to borrow against, surrender or otherwise deal with the policy, but in my view, the Legislature by the wording of s. 162(2) has made it plain that the policy, while such a designation is in effect, is not to be "exigible for the benefit of (his) creditors": see Mulock C.J.O., in *Royal Bank of Canada v. Dumart*, [1932] O.R. 661 (C.A.) .

45 Houlden J. recognized that some injustice would result from giving precedence to the exempt status of the life insurance policy. For example, an insolvent debtor could convert all his or her assets into cash, purchase a life insurance policy, and render it exempt from seizure by designating a family member as beneficiary. However, he wrote at page 94:

> At the present time, if my interpretation of *The Insurance Act* is correct, the Legislature had decided that an insurance policy coming within s. 157(1) or s. 162(2) is not available to creditors and, in my opinion, there is good moral justification for this position. Insurance is a very different asset from say a house or an automobile. ... It is purchased to provide for the dependants of the insured and it is ordinarily paid for in small amounts over the insured's lifetime. I believe there are very good reasons for exempting policies of insurance from seizure. ...

46 Houlden J.'s reasons in Geraci largely repeat the view he expressed in an earlier article, "Life Insurance Contracts in Ontario" (1963), 4 C.B.R. (N.S.) 113 , at page 115:

> If a [beneficiary] designation is made in favour of a spouse, child, grandchild or parent of a person whose life is insured, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure (s. 162(2)). Even if the designation of such a beneficiary is not irrevocable, a trustee in bankruptcy cannot deal with such a policy because the rights and interests of the insured are declared to be exempt from execution and seizure and by s. 39(b) [now s. 67(1)(b)] of the *Bankruptcy Act* property of a bankrupt does not include property which is exempt from execution or seizure. It would seem that s. 162(2) is drawn with s. 39(b) in mind as it uses the identical wording of s. 39(b).

47 On appeal, Jessup J.A. rejected Houlden J.'s construction of the exemption and settlement provisions of the *BIA* , arguing at page 258:

> If a settlement of property which comes within s. 60(1) [now s. 91(1)] of the *Bankruptcy Act* , both as to substance and as to time, is none the less to be taken as exempt, by virtue of s. 39(b), from the claims of a bankrupt's creditors merely because it would enjoy that exemption under provincial law apart from s. 60(1), *the result would be to make s. 60(1) completely nugatory* . I cannot conceive that to have been the intent of Parliament. The proper rule of construction is to harmonize all sections of an enactment and this is achieved in the present case by applying s. 39(b) in the light of s. 60(1) and not despite s. 60(1). I would, therefore, hold that property settled by a bankrupt within a year before his bankruptcy includes property rendered exempt from execution or seizure, under the laws of the relevant province, as a result of the settlement.

[Emphasis added.]

48 Jessup J.A.'s reasoning was expressly rejected in preference to that of Houlden J. by the British Columbia Supreme Court in *Sykes, Re* (1993), 18 C.B.R. (3d) 148 . Meredith J. noted, at paragraph 19, that Jessup J.A.'s reasons in *Geraci* :

> ... seem ... to tag onto s. 167(1)(b) [*sic*] words such as "unless the disposition of the property referred to amounts to a settlement referred to in s. 91". That comes close to judicial legislation.

49 Meredith J. was not prepared to go that route, and instead concluded that the exempt status of the life insurance policy in question was conclusive in that it was not available for seizure by creditors, even though it became exempt as a result of a voidable settlement (see also, *Canadian Imperial Bank of Commerce v. Meltzer* (1991), 6 C.B.R. (3d) 1 (Man. Q.B.) , which adopted Houlden J.'s construction of the exemption provisions of the *BIA*).

50 The debate between Houlden J. and Jessup J.A. in *Geraci* , which was taken up by Meredith J. in *Sykes* , was premised on the view that ss. 67(1)(b) and 91 of the *BIA* were in conflict. As Michael J. McCabe stated in his article, "Execution Against an R.R.S.P." (1990), 76 C.B.R. (N.S.) 218 , at p. 234:

> The issue, simply stated, is which takes precedence, the exemption provision of s. 67 incorporating the provincial exemptions or the settlement provision of s. 91.

51 In resolving this issue, both Houlden J. and Jessup J.A. undertook a "lesser of two evils"-type analysis. Houlden J. preferred to give effect to s. 67(1)(b) over s. 91, to avoid the result that every designation of a beneficiary under a life insurance policy, made within one year of bankruptcy (or within five years if the designation was made when the debtor was insolvent, or if the property interest of the debtor did not pass when the beneficiary was designated), would be voidable. He thought that instances in which such a designation would be made for the purpose of defeating creditors would be rare, and that "it is better to permit injury to the creditors [in those rare cases] than to inflict the undoubted hardship of the forfeiture of a life's investment" (at p. 94). Jessup J.A. reached the opposite conclusion, because Houlden J.'s interpretation of s. 67(1)(b) would render s. 91 "completely nugatory". Nevertheless, Jessup J.A. added, at page 259:

> It does seem unjust that moneys paid in good faith over a period of years to secure a man's wife and children should be available to his creditors. ...

52 He then suggested a legislative amendment to avoid this result.

53 If I had to choose between the approaches of Houlden J. and Jessup J.A., then I would prefer that of Houlden J. for two reasons. First, I think that Jessup J.A. exaggerated the impact on s. 91 of Houlden J.'s construction, since settlements which change the status of property from non-exempt to exempt are only a portion of the settlements subject to s. 91. Houlden J.'s position certainly does not render s. 91 "completely nugatory", as stated by Jessup J.A. at page 258. Second, Jessup J.A.'s interpretation of s. 67(1)(b) clearly favours the interests of creditors over the rehabilitation interest of the bankrupt settlor. The Act itself provides no indication that this should be so in the circumstances presented by the instant case, or *Geraci* . I do not believe that Parliament intended the funds in exempt life insurance plans to be subject to execution and seizure by creditors, simply on the basis that a settlement occurred when a beneficiary was designated. After all, it is the designation which makes the asset exempt under the provincial legislation incorporated into s. 67(1)(b). Are we really to believe that Parliament intended the very act which renders an asset exempt to be the cause of its losing its exempt status? I do not think so. Like Houlden J., I think that it would be preferable to respect the exempt status of a life insurance policy, even where the policy became exempt as a result of a s. 91 settlement.

54 In any event, I reject the view that ss. 67(1)(b) and 91 of the *BIA* are in conflict, and that the resolution of the case at bar requires me to choose one provision over the other on the basis of policy considerations. In fact, I think that it is possible to reconcile the two provisions by giving effect to their distinct terms, and by recognizing their distinct roles in bankruptcy.

3. The Preferred Approach to the Problem in the Case at Bar

55

> (v) Even if a settlement which creates an exempt asset is void *against the trustee in bankruptcy* under s. 91, the exempt status of the asset under provincial law remains in effect to block *the claims of creditors* . ...

56 In reconciling ss. 67(1)(b) and 91 of the *BIA* , it is important to remember that the general scheme through which a bankrupt's estate is divided by the trustee among creditors involves two distinct stages. First, the Act provides that an insolvent

person "may make an assignment of all his property for the general benefit of his creditors" (s. 49(1)), or that creditors "may file in court a petition for a receiving order against a debtor" (s. 43(1)). At the time of the assignment or receiving order, the trustee in bankruptcy is obligated to take possession of the assets forming the estate of the bankrupt. Thus, by operation of s. 71(2), the bankrupt's property passes to and vests in the trustee:

> 71. ...
>
> (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

57 Section 16(3) of the Act imposes a duty on the trustee to "take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory. ..." Section 158(a) imposes a complimentary duty on the bankrupt to inform the trustee of all his or her property which is in his or her possession or control, and to deliver it to the trustee. Other provisions of the Act elaborate upon the powers, duties and functions of the trustee during the property-passing stage of bankruptcy (see, in particular, ss. 17, 18, 19 and 24 of the Act).

58 Once the bankrupt's property has passed into the possession of the trustee, the Act provides the trustee with the power to administer the estate. For example, the trustee may, with the permission of the estate inspectors, sell or dispose of assets (s. 30(1)(a)), lease real property (s. 30(1)(b)), carry on the business of the bankrupt (s. 30(1)(c)), or divide certain property among the creditors (s. 30(1)(j)). The ultimate purpose of these administrative powers is to manage the estate, in order to provide equitable satisfaction of the creditor's claims. This, then, is the estate-administration stage of bankruptcy, one distinct aspect of which is the distribution of the estate among creditors.

59 During the property-passing stage of bankruptcy, the trustee is empowered under s. 91 of the Act to set aside certain settlements which have reduced the size of the estate. Thus, s. 91 outlines the circumstances in which a settlement will be voidable at the behest of the trustee in bankruptcy. If a settlement is declared void against the trustee, then the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy. Several other provisions of the *BIA* have relevance to the property-passing stage. For example, s. 94 renders certain assignments of book debts void against the trustee; s. 98(1) empowers the trustee to take possession of any money or proceeds from the sale of settled property to a third party, where the original settlement was void; and s. 99 dictates that while property acquired by the bankrupt after the bankruptcy vests in the trustee, it may be transferred by the bankrupt to a good faith purchaser, unless the trustee intervenes in the transaction (in which case the transaction is void against the trustee).

60 After-acquired property is also dealt with in s. 68, which constitutes a complete code in respect of a bankrupt's salary, wages or other remuneration. The provision stipulates that after-acquired remuneration will not pass to and vest in the trustee unless the trustee intervenes by applying for a court order directing the payment of the remuneration (or a portion of it) to the trustee (*Marzetti v. Marzetti*, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577 , *(sub nom. Marzetti v. Marzetti (Bankrupt))*, 169 N.R. 161 , at page 794 (D.L.R. 596, N.R. 196). Where the trustee obtains such a court order, then the remuneration which passes into his or her possession is also divisible among creditors, even if it would otherwise be exempt from execution or seizure under provincial law. This is because s. 68 operates "notwithstanding section 67(1)", with the result that a provincial exemption for remuneration which would otherwise be incorporated into s. 67(1)(b) is ineffective: *Marzetti* , at pp. 792-93 (D.L.R. 595-597, N.R. 194 and 197) and 795. I note that Parliament considered it necessary to exclude explicitly after-acquired remuneration from the operation of s. 67(1)(b), thereby overriding the exempt status of the remuneration under provincial law, in order to ensure that in those circumstances where such remuneration passed to the trustee, it was also divisible among creditors. This supports the view that absent a specific override of s. 67(1)(b), exempt property which passes to and vests in the trustee, whether as a result of ss. 71(2) or 91, will not be divisible among creditors.

61 Unlike provisions of the Act such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy

the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property. Thus, property which is divisible among creditors is defined very broadly in s. 67(1) as:

> (c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

62 However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.

63 Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(b), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors. This two-stage analysis is similar to the one adopted by Henry J. of the Ontario Supreme Court in *Pearson, Re* (1977), 23 C.B.R. (N.S.) 44 . That case was concerned with the issue of whether a trustee in bankruptcy could revoke the designation of a beneficiary under a life insurance plan, and substitute the estate as beneficiary. Although the plan itself was exempt from the *BIA* , the trustee sought to defeat the exemption by exercising a "power" under s. 47(d) [now s. 67(1)(d)]. Henry J. dismissed the trustee's application, and in doing so characterized the effect of the exemption provisions of the Act as follows, at pp. 48-49:

> What comes into the hands of the trustee on the occurrence of the bankruptcy are the rights and interests of the insured in the insurance money and in the contract as they stood at the date of the bankruptcy. When that event occurred, those rights and interests were, by s. 170 of *The Insurance Act* , exempt from execution or seizure. In my opinion, so far as the creditors of the bankrupt are concerned, that situation crystallized at the time the bankruptcy occurred, and that property by virtue of s. 47(b) [now s. 67(1)(b)] of the *Bankruptcy Act* was impressed with its character of not being divisible among the creditors, for all the purposes of the bankruptcy.

64 I adopt this as a correct statement of the law. Therefore, while an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(b) is operative.

65 Relating this to the circumstances in the case at bar, at the time of Dr. Ramgotra's bankruptcy application, his property interest in the RRIF passed to and vested in the trustee in bankruptcy by operation of s. 71(2) of the *BIA* . Mrs. Ramgotra's future contingent interest as the designated beneficiary under the RRIF was not captured by s. 71(2), since it had been settled on her prior to bankruptcy. It was open to the trustee in bankruptcy to apply to have this settlement set aside under s. 91(2) of the *BIA* . As I noted above, the settlement was void under s. 91(2) and, consequently, Mrs. Ramgotra's future contingent interest passed to and vested in the trustee. The trustee in bankruptcy possessed the complete set of property interests associated with the RRIF. But the trustee could not divide the RRIF among creditors because its exempt status under s. 67(1)(b) of the *BIA* continued regardless of s. 91. In other words, the role of s. 91 is to bring settled property back into the estate of the bankrupt in the possession of the trustee. Therefore, while s. 91 could be employed to bring Dr. Ramgotra's RRIF fully into the possession of the trustee in bankruptcy, it has no bearing on the issue of whether or not the RRIF is exempt under s. 67(1)(b).

66 The appellant has argued that when a settlement creating an exempt asset has been set aside under s. 91, then the exempt status itself is no longer effective. In other words, the existence of a valid settlement is a logical precondition to the enforceability of a s. 67(1)(b) exemption. This argument found favour in *Yewdale, Re, supra* , where Tysoe J. stated at page 204:

> While s. 67(1)(b) does provide an exemption for insurance annuities, it cannot be viewed in isolation. An asset can only be properly exempted under s. 67(1)(b) if the transaction creating the asset is valid. If the transaction is void under s. 91 (or any other provision), the exempted asset must be considered to revert to its form prior to the invalid transaction. If its prior form was not an exempted asset, s. 67(1)(b) is not applicable.

67 With respect, I cannot agree. The effect of s. 91 is to render certain settlements void against the trustee in bankruptcy. However, in the case of a life insurance policy, it must be remembered that what renders it exempt under s. 67(1)(b) is the designation of a beneficiary. According to s. 158(2) of *The Saskatchewan Insurance Act* , the exempt status of the life insurance policy continues so long as the designation is "in effect". To reach the conclusion of Tysoe J. in *Yewdale, Re* , I would have to find that the designation in the case at bar is no longer "in effect" for the purpose of preventing distribution of the funds in the RRIF to Dr. Ramgotra's creditors, because the designation "is void against the trustee". However, I do not think that the fact a beneficiary designation is void against the trustee under federal legislation necessarily results in it no longer having effect vis-*-vis the claims of creditors under the provincial legislation which s. 67(1)(b) incorporates. As I stated above, ss. 91 and 67(1)(b) are directed at different stages of bankruptcy, and play different roles. Section 91 assists in identifying the property of the bankrupt which comes into the possession of the trustee, whereas s. 67(1)(b) is relevant in determining the property in the trustee's possession over which he or she may exercise his or her administrative powers. I therefore prefer a construction of ss. 91 and 67(1)(b) which recognizes their distinct roles in bankruptcy, as opposed to a construction which holds one to be a precondition of the other.

68 Therefore, even though Dr. Ramgotra effected a void settlement under the second branch of s. 91(2) when he designated his wife as beneficiary of his RRIF, that does not allow the trustee to use the funds in the RRIF to satisfy the claims of creditors such as the appellant bank. The RRIF is an exempt asset pursuant to the provincial legislation incorporated into s. 67(1)(b), meaning that it is not property which is divisible among creditors. Given this, even though Mrs. Ramgotra's future contingent interest in the RRIF had passed into the possession of the trustee through the application of s. 91(2), the RRIF was property "incapable of realization" by the trustee pursuant to s. 40(1) of the *BIA* . Therefore, the trustee was obliged to return it to Dr. Ramgotra prior to applying for his discharge: *Thompson v. Coulombe* (1984), 54 C.B.R. (N.S.) 254 (C.A. Que.) , at page 257; *Zemlak (Trustee of) v. Zemlak* (1987), 66 C.B.R. (N.S.) 1 (Sask. C.A.) , at pages 9 and 11. Despite the fact that Dr. Ramgotra's settlement was void against the trustee, the exempt status of the RRIF is an absolute bar to the appellant bank's claim.

4. The Application of Provincial Fraud Legislation

69 In the lower courts which have considered the issue presented by the case at bar, considerable concern has been expressed over the fact that the conversion of a non-exempt asset into an exempt asset is a convenient means for a bankrupt to reduce the size of his or her estate available to creditors. Thus, the bankrupt's intention in effecting a transaction, and the impact of the transaction on creditors, have both been important factors directing the jurisprudence related to ss. 91 and 67(1)(b) of the *BIA* . Of course, in the case at bar, Dr. Ramgotra acted in good faith, and not for the purpose of defeating his creditors' claims. One could well imagine more troubling circumstances, however.

70 In her case comment on the Saskatchewan Court of Appeal decision in the instant case ((1994), 26 C.B.R. (3d) 252), Lisa H. Kerbel Caplan argues that at common law, the role of intention has focused "on the settlor's intention that the donee hold the settled property in its current form or in a traceable form", and not on the settlor's purpose in making a settlement (at page 253). Like her, I am of the view that whether a settlor has acted in good faith, or for the purpose of defeating creditors, is not relevant to the question of whether a settlement has been made within s. 91.

71 In contrast, however, a settlor's intention is highly relevant where a settlement is being challenged under provincial (or territorial) fraud legislation: *Fraudulent Conveyances Act* , R.S.N. 1990, c. F-24, s. 3; *Assignments and Preferences Act* , R.S.N.S. 1989, c. 25, s. 4; *Assignments and Preferences Act* , R.S.N.B. 1973, c. A-16, s. 2; *Frauds on Creditors Act* , R.S.P.E.I. 1988, c. F-15, s. 2; *Civil Code of Quebec* , art. 1631 ("Paulian Action"); *Assignments and Preferences Act* , R.S.O. 1990, c. A.33, s. 4(1), and *Fraudulent Conveyances Act* , R.S.O. 1990, c. F.29, s. 2; *The Fraudulent Conveyances Act* , R.S.M. 1987, c. F160, s. 2; *The Fraudulent Preferences Act* , R.S.S. 1978, c. F-21, s. 3; *Fraudulent Preferences Act* , R.S.A. 1980, c. F-18,

s. 2; *Fraudulent Conveyance Act* , R.S.B.C. 1979, c. 142, s. 1, and *Fraudulent Preference Act* , R.S.B.C. 1979, c. 143, s. 3; *Fraudulent Preferences and Conveyances Act* , R.S.Y. 1986, c. 72, s. 2. (Note: the Northwest Territories has no legislation on fraudulent conveyances or preferences.) In fact, several lower courts have suggested that bad faith settlements, made for the purpose of defeating creditors, may be set aside under these statutes. Although it is not strictly necessary to decide this issue in the case at bar, since Dr. Ramgotra was found by Baynton J. to have acted in good faith, I am mindful of the need to provide some guidance to bankrupts, trustees, creditors and lower courts.

72 Generally, where a conveyance has rendered property exempt from execution or seizure by creditors under provincial legislation, but the conveyance itself is void against those creditors pursuant to provincial fraud legislation, then the exemption is not in effect *vis-à-vis* those creditors. In terms of the law of bankruptcy, I would hold that a bankrupt cannot enjoy the benefit of a s. 67(1)(b) exemption where the property in question became exempt by reason of a fraudulent conveyance declared void pursuant to provincial law. I note that Houlden J. concluded in *Geraci* (trial), at page 92, that a s. 67(1)(b) exemption has force even where the property became exempt under provincial law as a result of a fraudulent conveyance. I do not agree. In my view, a precondition to s. 67(1)(b) protection is that the property in question is exempt against the claims of creditors under provincial law. A fraudulent conveyance rendering property exempt is void against creditors, as illustrated by s. 3 of the *Saskatchewan Act* :

> 3. ... every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, *is void as against the creditor or creditors injured, delayed or prejudiced* .

[Emphasis added.]

73 Since a fraudulent conveyance rendering property exempt is void against creditors by operation of provincial law, the property is not exempt from execution or seizure by creditors under provincial law, as required by s. 67(1)(b) of the *BIA* . Section 67(1)(b) therefore has no application, once a fraudulent conveyance is found to have occurred.

74 Can a life insurance beneficiary designation be set aside as a fraudulent conveyance of property? This question has generated some conflict in the lower courts. In *Geraci* (trial), for example, Houlden J. found at p. 89 that the beneficiary designation could be attacked under s. 2 of *Ontario's Act* , since it was a conveyance made with the fraudulent intent of defeating creditors. The Court of Appeal, *per* Jessup J.A., agreed, at page 259:

> I agree with the learned trial Judge that the declaration made by the bankrupt, changing the beneficiary of his policy of insurance to his wife while he was insolvent, was a fraudulent conveyance within the meaning of s. 2 of *The Fraudulent Conveyances Act* and, if it were necessary to do so, I would hold that it was therefore fraudulent and void against his creditors and that such a void designation does not attract the protection against creditors provided by either s. 162 or s. 157 of the present *Insurance Act* .

75 *Geraci* was not followed on this point in *Sovereign General Insurance Co. v. Dale* (1988), 32 B.C.L.R. (2d) 226 (S.C.) . There, the defendant had transferred the funds from a non-exempt RRSP into an insurance annuity which was exempt from execution or seizure under s. 147 of British Columbia's *Insurance Act* , R.S.B.C. 1979, c. 200, because his wife was the designated beneficiary of the plan. The plaintiff, who had obtained judgment against the defendant, sought to set aside the transfer of the RRSP funds into the annuity on the basis that it was a fraudulent conveyance. Gibbs J. held that the defendant had the necessary intent for fraud because he effected the fund transfer in order to hinder the plaintiff from realizing on its judgment. He then turned to the question of whether the transfer was a "disposition of property" which could be set aside under the British Columbia's *Fraudulent Conveyance Act* . After stating that Jessup J.A.'s reasons in *Geraci* were obiter on this point, and that the issue remained unresolved, Gibbs J. held at pages 230-31:

> In my opinion, it is not appropriate to look at the consequences that flow from the naming of the wife as beneficiary under the insurance contract to determine whether an interest in property has been disposed of. That seems to have happened in

> a number of the cases cited. With respect, I think that is the wrong approach for whatever statutory protection might or might not be afforded to the "interest" conveyed cannot be determinative of what the "interest" is. In my view, the task must be to inquire whether the "interest", if that is the correct terminology, has any of the commonly understood incidents of property. When I follow that course I am led to the conclusion that it does not.
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> . . . . .
>
> Until a vesting occurs, the expression "interest" is probably nothing more than a convenient label to describe a future expectation which may never become a reality; for instance, the insured may change the beneficiary, or the beneficiary may predecease the insured. Until vesting, if that ever occurs, the expectation of the beneficiary is not real property, or personalty; it is not a chose in action; it is not merchantable; it is not exigible. At the most it is expectancy based upon a contingency. It has been held to be within the broad definition of property in the *Bankruptcy Act* which includes a future contingent interest incident to property, but it does not follow that it is subsumed within the single word "property" in the *Fraudulent Conveyance Act* . In my opinion, it is not.

76 Thus, according to Gibbs J., the transfer of funds at issue was not a conveyance of "property" which could be set aside under the *British Columbia Act* .

77 I do not intend to resolve this issue in the case at bar. However, I would make the following observation. The technical question of whether a life insurance beneficiary designation is a "property conveyance" does not arise under art. 1631 of the *Civil Code of Quebec* , which allows creditors to set aside fraudulent "juridical acts":

> 1631. A creditor who suffers prejudice through a juridical act made by his debtor in fraud of his rights, in particular an act by which he renders or seeks to render himself insolvent, or by which, being insolvent, he grants preference to another creditor may obtain a declaration that the act may not be set up against him.

78 However, the other provincial statutes all refer to some sort of "conveyance" or "disposition" of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation (see, for example, *The Interpretation Act* , 1993, S.S. 1993, c. I-11.1, s. 10). I agree with the following observation by Professor C. R. B. Dunlop in *Creditor-Debtor Law in Canada* (2nd ed. 1995), at page 598, that the purpose of fraudulent conveyance legislation:

> ... is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. *The legislation is couched in very general terms and should be interpreted liberally* .

[Emphasis added.]

79 Given the need for a broad and liberal interpretation, I would suggest that there is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act", and a "disposition" or "conveyance" of "property".

5. The Application of the Statute of Elizabeth

80 In the Court of Appeal, Jackson J.A. suggested that the *Acte agaynst fraudulent Deedes Gyftes Alienations, &c. (Statute of Elizabeth)* , 1571 (13 Eliz. 1, c. 5) would be available to challenge fraudulent transactions rendering property exempt from execution or seizure. The *Statute of Elizabeth* is the model for the fraudulent conveyance legislation of the common law provinces, as discussed above. Its archaic language states that:

> ... all and every Feoffment Gyfte Graunte Alienation Bargayne and Conveyaunce of Landes Tenements Hereditams Goodes and Catalls or of any of them [[which were] contryved of Malyce Fraude Covyne Collusion or Guyle [with the] Purpose and Intent to delaye hynder or defraude Creditors] [shall be] clearely and utterly voyde frustrate and of none Effecte.

81 In *Nicholson v. Milne* (1989), 74 C.B.R. (N.S.) 263 (Alta. Q.B.) , Virtue J. considered the applicability of the *Statute of Elizabeth* in a situation where the defendants had each rendered RRSP and mutual funds exempt under Alberta's *Insurance Act* , R.S.A. 1980, c. I-5, s. 265, by transferring the funds into life insurance policies under which family members were named as beneficiaries. The issue before Virtue J. was whether the transfers could be set aside under Alberta's *Fraudulent Preferences Act* , or alternatively under the *Statute of Elizabeth* . He observed that the principal difference between the two statutes was that the provincial legislation required the gift or conveyance to have been made when the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency, whereas this was not a requirement under the *Statute of Elizabeth* . He then decided to proceed under the *Statute of Elizabeth* , in order to avoid dealing with the insolvency issue. He found that the fund transfers were effected for the purpose of defeating creditors, and then decided that the transfers, and the beneficiary designations, were "conveyances" subject to the *Statute of Elizabeth* , at page 274:

> The term "Conveyance" (like the term transfer) is itself wide enough to encompass every method of disposing of, or parting with, property or an interest therein, absolutely or conditionally. The word is of general meaning and, given a liberal interpretation, includes the transactions here which resulted in the transfer of entitlement to the benefits of the R.R.S.P. property from the debtor to another in such a way as to remove it from execution by creditors. In my view, such a transaction comes within the meaning of "conveyance", as that term is used in the *Statute of Elizabeth* .

82 Thus, the fraudulent transfers and beneficiary designations were void, and the funds in the life insurance policies were not exempt from execution or seizure under the *Insurance Act* (see also *Technurbe Building Construction Ltd. v. McKinley* (1989), 76 C.B.R. (N.S.) 106 (Alta. Q.B.)).

83 Several of the provincial fraudulent conveyance statutes impose an insolvency requirement, like that contained in *Alberta's Act* : Nova Scotia, New Brunswick, Prince Edward Island, Saskatchewan, Yukon. Thus, assuming without deciding that the *Statute of Elizabeth* remains in force in those jurisdictions, it would allow creditors to challenge fraudulent conveyances without having to prove that, at the time of the conveyance, the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency.

84 There remains some controversy as to whether the *Statute of Elizabeth* is in force in all of the common law provinces and territories. Professor Dunlop discusses this issue in *Creditor-Debtor Law in Canada, supra* , and suggests at page 597 that the Statute has likely been repealed in British Columbia, Manitoba, Newfoundland and Ontario, where pure fraudulent conveyance legislation (i.e., legislation without the insolvency requirement) has been enacted. Since the matter was not argued in the case at bar, it would be inappropriate to decide here whether the *Statute of Elizabeth* remains in force in any particular jurisdiction. Suffice it to say that if the Statute is in force in a province or territory, then it will be available to challenge fraudulent conveyances rendering property exempt from execution or seizure under provincial law. I should add that my comments above concerning the issue of whether a life insurance beneficiary designation is a "property conveyance" apply equally in the case of the *Statute of Elizabeth* .

6. Conclusion

85 When Dr. Ramgotra transferred the funds from his two RRSPs into an RRIF under which his wife was the designated beneficiary, the funds became exempt from execution or seizure by reason of s. 67(1)(b) of the *BIA* , when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act* . Even though the beneficiary designation was a settlement within s. 91 of the *BIA* , and was void against the trustee in bankruptcy pursuant to the second branch of s. 91(2), the RRIF remained exempt from the claims of Dr. Ramgotra's creditors and, in particular, the appellant bank.

VI. Disposition

86 The appeal is therefore dismissed with costs to the respondents.

Appeal dismissed.

TAB 9

1997 CarswellOnt 6031
Ontario Court of Justice, General Division [Commercial List]

Kenny, Re

1997 CarswellOnt 6031, 149 D.L.R. (4th) 508, 34 O.T.C. 321, 37 C.B.R. (4th) 291, 72 A.C.W.S. (3d) 612

In the Matter of the Bankruptcy of Kelly-Anne Kenny, Travel Consultant, of the City of Barrie, in the Province of Ontario

In the Matter of the Bankruptcy of Peter Eugene Kenny, Unemployed/ Disabled, of the Town of Aurora, in the Province of Ontario

Rosenberg J.

Heard: June 16, 18, 1997
Judgment: July 2, 1997 *
Docket: 31-260607, 31-274520

Proceedings: reversing (1997), 48 C.B.R. (3d) 243 (Ont. Bktcy.); additional reasons at (1997), 1 C.B.R. (4th) 34 (Ont. Gen. Div. [Commercial List])

Counsel: *Harvey G. Chaiton*, for Appellant, Murray H. Kideckel, Trustee.
Miles O'Reilly, Q.C., *Elliot Goldstein*, for Respondent, Kelly-Anne Kenny
Peter Kenny in person

Subject: Insolvency; Property; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Property of bankrupt — Joint tenancies and joint accounts

Husband and wife purchased property, taking out first and second mortgages — Husband and wife took out mortgage insurance on first mortgage — Property was transferred into husband's name with intention of placing it out of reach of wife's creditors — Husband and wife claimed 50 per cent of property was held in trust for wife — Husband became disabled and first mortgage went into default — Husband and wife each filed assignment in bankruptcy — Action was brought against insurer after it refused to pay disability benefit under mortgage insurance policy — Property was sold and proceeds discharged first mortgage — Husband and wife were discharged from bankruptcy — Action against insurer was settled — Part of settlement was held in trust for creditors of husband and wife — Wife consented to release part of surplus to husband — Trustee's motion for advice and directions was granted — Registrar found estates of husband and wife were each entitled to 50 per cent interest in settlement funds — Registrar found funds belonged to wife's creditors and she did not have capacity to release funds to husband — Trustee appealed — Appeal allowed — Transfer of property extinguished wife's interest in property since it was her intention to have interest extinguishable as against creditors — Husband had full title to property — Upon husband's bankruptcy property would have vested in trustee free and clear of mortgage — Proceeds from sale of property would be distributed among husband's creditors and husband would be entitled to surplus — Result of sale of property and payout of first mortgage would not change on grounds wife ceased to have insurable interest on property — Wife had capacity to release funds to husband since they were surplus to funds available after creditors were paid.

Bankruptcy --- Property of bankrupt — Trust property — Property held in trust for spouse

Husband and wife purchased property, taking out first and second mortgages — Husband and wife took out mortgage insurance on first mortgage — Property was transferred into husband's name with intention of placing it out of reach of wife's creditors — Husband and wife claimed 50 per cent of property was held in trust for wife — Husband became disabled and first mortgage went into default — Husband and wife each filed assignment in bankruptcy — Action was brought against insurer after it refused to pay disability benefit under mortgage insurance policy — Property was sold and proceeds discharged first mortgage — Husband and wife were discharged from bankruptcy — Action against insurer was settled — Part of settlement was held in trust for creditors of husband and wife — Wife consented to release part of surplus to husband — Trustee's motion for advice and directions was granted — Registrar found estates of husband and wife were each entitled to 50 per cent interest in settlement funds — Registrar found funds belonged to wife's creditors and she did not have capacity to release funds to husband — Trustee appealed — Appeal allowed — Transfer of property extinguished wife's interest in property since it was her intention to have interest extinguishable as against creditors — Husband had full title to property — After husband's bankruptcy property would have vested in trustee free and clear of mortgage — Proceeds from sale of property would be distributed among husband's creditors and husband would be entitled to surplus — Result of sale of property and payout of first mortgage would not change on grounds wife ceased to have insurable interest on property.

Bankruptcy --- Administration of estate — Trustees — Legal proceedings against trustee — Personal liability of trustee

Husband and wife purchased property, taking out first and second mortgages — Husband and wife took out mortgage insurance on first mortgage — Property was transferred into husband's name with intention of placing it out of reach of wife's creditors — Husband and wife claimed 50 per cent of property was held in trust for wife — Husband became disabled and first mortgage went into default — Husband and wife each filed assignment in bankruptcy — Action was brought against insurer after it refused to pay disability benefit under mortgage insurance policy — Property was sold and proceeds discharged first mortgage — Husband and wife were discharged from bankruptcy — Action against insurer was settled — Part of settlement was held in trust for creditors of husband and wife — Wife consented to release part of surplus to husband — Trustee's motion for advice and directions was granted — Registrar found trustee personally liable for funds distributed to husband — Trustee appealed — Appeal allowed — Issue of trustee's personal liability was not before registrar and trustee was not given opportunity to retain counsel or address issue of liability — Registrar did not have jurisdiction to find trustee personally liable.

Table of Authorities

Cases considered by *Rosenberg J.*:

Achilles, Re, 83 B.C.L.R. (2d) 116, 23 C.B.R. (3d) 20, 1993 CarswellBC 574 (B.C. S.C.) — referred to

Delaney, Re, 36 C.B.R. (3d) 27, 13 B.C.L.R. (3d) 50, 1995 CarswellBC 884 (B.C. S.C.) — referred to

Gilmartin, Re (1988), [1989] 2 All E.R. 835, [1989] 1 W.L.R. 513 (Eng. Ch. Div.) — referred to

Maysels v. Maysels, 3 O.R. (2d) 321, 14 R.F.L. 286, 45 D.L.R. (3d) 337, 1974 CarswellOnt 104 (Ont. C.A.) — followed

Minister of National Revenue v. Sillito (Trustee of), 11 Alta. L.R. (3d) 138, [1993] 7 W.W.R. 278, 20 C.B.R. (3d) 240, (sub nom. *Sillito (Bankrupt), Re)* 142 A.R. 127, (sub nom. *Sillito v. Canada)* [1994] 1 C.T.C. 146, 1993 CarswellAlta 547, 1993 CarswellNB 123 (Alta. Q.B.) — referred to

Paquin Motors Ltd., Re, 28 C.B.R. 266, [1947] O.W.N. 1007, [1948] 1 D.L.R. 31, 1947 CarswellOnt 115 (Ont. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 34(1) — referred to

s. 144 — referred to

s. 192(4) — referred to

APPEAL by trustee in bankruptcy from judgment reported at 48 C.B.R. (3d) 243, 1997 CarswellOnt 735 (Ont. Bktcy.), granting trustee's motion for advice and directions.

Editor's Note

This judgment was only recently brought to the attention of the Editor.

Rosenberg J.:

1 This is an appeal by Murray H. Kideckel (the "Trustee"), personally, and in his capacity as the trustee in bankruptcy of the estate of Peter Eugene Kenny ("Peter") and as the trustee in bankruptcy of the estate of Kelly-Anne Kenny ("Kelly-Anne") from the decision of the Registrar dated January 8, 1997. The application to the Registrar was by motion for advice and directions. The Registrar was asked to determine what interest the Trustee had in certain funds held by Elliott Goldstein in trust.

2 These funds represented the balance of settlement funds received from the Mutual Life Assurance Company of Canada ("Mutual Life"). The settlement was with regard to an action ("Counterclaim") commenced by Peter and Kelly-Anne on a policy of disability mortgage insurance.

Facts

3 On May 1, 1989, Peter and Kelly-Anne bought a house located at 19 Wynes Road, Barrie. Ontario (the "Property"), for a price of $119,900.00, paid in cash. Title to the Property was taken by them as joint tenants.

4 Peter and Kelly-Anne borrowed the sum of $110,597.50 from the Toronto Dominion Bank and this was secured by way of a first mortgage on the property.

5 Peter and Kelly-Anne also arranged a second mortgage on the property.

6 Mutual Life issued an insurance policy with respect to the first mortgage. The application for insurance shows Peter as the applicant and Kelly-Anne is shown as the spouse. She was a joint applicant for the insurance. The Certificate of Insurance provided that in the event that an insured person becomes totally and permanently disabled, Mutual Life will pay the total and permanent disability benefit as defined in the policy to the Toronto Dominion Bank to immediately discharge the first mortgage.

7 On January 17, 1990, Peter and Kelly-Anne, as joint tenants, transferred title to the Property into the name of Peter only (the "Transfer"). The stated consideration for the Transfer was the sum of $2.00 and the assumption of the First Mortgage and Second Mortgage. The transfer was effected to place Kelly-Anne's interest in the Property beyond the reach of her potential creditors. However, both Kelly-Anne and Peter swore that it was intended that Peter hold one-half interest in the property in trust for Kelly-Anne.

8 Peter became disabled and was unable to continue working. As a result, the First Mortgage went into default on or about December 1, 1991.

9 Kelly-Anne filed an Assignment in Bankruptcy in May 1992.

10 Mutual Life refused to pay the disability benefit to the Toronto-Dominion Bank under the Policy. As a result, action was commenced against Mutual Life for damages for breach of the Policy. Peter and Kelly-Anne are named as the plaintiffs (by counterclaim).

11 In February 1993, Peter sold the Property with the consent of Kelly-Anne, and with the agreement of the Toronto-Dominion Bank.

12 To enable the sale of the Property to be completed without prejudicing the claim against Mutual Life under the Policy, an agreement was concluded on March 4, 1993 among Peter, Kelly-Anne, Mutual Life, the Toronto-Dominion Bank and Beneficial (the "Agreement").

13 The Agreement provided in part, that:

> 3. The mortgagors, the Bank and Mutual agree that notwithstanding the payout of the Bank from the sale proceeds herein the payout shall be deemed to have been received by the Bank pursuant to power of sale proceedings and the insurance claims shall remain as if the mortgage were not discharged until completion of the trial in the said action (or settlement of the matter). For clarity Mutual agrees that it will not plead the discharge of the subject mortgage as a bar or estoppel against the insurance claims.

14 The sale of the Property was completed on April 23, 1993 and the proceeds of sale were paid to the Toronto-Dominion Bank to discharge the First Mortgage and the respective obligation of Peter and Kelly-Anne thereunder.

15 Kelly-Anne was discharged from bankruptcy on May 13, 1993.

16 Peter filed an Assignment in Bankruptcy on May 31, 1993 and was discharged from bankruptcy on March 10, 1995.

17 On October 18, 1995 Mutual Life offered to settle the Counterclaim and a default judgment thereunder for the sum of $160,000.00.

18 Mutual Life paid the settlement monies *on behalf of Peter* by way of a cheque dated December 14, 1995, made payable to Milton Verskin, in trust.

19 On December 20, 1995 the Trustee advised Mr. Verskin that he should retain from the settlement monies the sum of $95,000.00 (the "Fund"). This was the amount calculated by the Trustee as sufficient to satisfy the proven claims of creditors in both Peter's and Kelly-Anne's estates, plus accrued interest from the dates of bankruptcy at the statutory rate of five (5%) percent and the costs of administration. The Fund was retained in escrow by Mr. Goldstein pending the Trustee's motion for advice and directions as to whether any part of the settlement monies constituted property of the estate of Peter, Kelly-Anne, or both. Peter and Kelly-Anne did not admit that the Trustee had any interest in the settlement monies and reserved their rights to maintain that no portion of the settlement monies should be paid to their creditors. Because of the personal and financial difficulties then being experienced by Peter, the Trustee consented to the release of the surplus.

20 By consent and release dated January 2, 1996, Kelly-Anne consented to the release to Peter of $49,552.41. At that time Kelly-Anne had been discharged from bankruptcy.

21 The Trustee retained the services of Chaiton and Chaiton to bring a motion for advice and directions with respect to the disposition of the Fund.

22 The questions put to the Registrar on the motion for advice and directions, confirmed in the Registrar's Reasons for Decision, were as follows:

(a) What interest does Murray H. Kideckel, as Trustee of Peter's estate have in the Fund?

(b) What interest does Murray H. Kideckel as Trustee of Kelly-Anne's estate have in the Fund?

23 The learned Registrar rejected the main submission of counsel for the Trustee that since Kelly-Anne had conveyed away her interest in the Property to Peter and the benefit payable under the Policy was required to be paid to the Toronto Dominion Bank to discharge the First Mortgage, she (or her estate) could have no interest in the settlement monies, finding that "the question of her interest in the [Property] is a red herring".

24 Instead, the Registrar concluded that the estates of Kelly-Anne and Peter were each entitled to a 50% interest in the settlement funds received from Mutual Life on the basis that Peter and Kelly-Anne had jointly obtained a judgment against Mutual Life for the amount owing under the Policy.

25 The Registrar also concluded that Kelly-Anne's direction of the settlement monies to Peter was invalid due to her lack of capacity, finding that "once the settlement with the insurance company was made the funds belonged not to Kelly-Anne but to her creditors".

26 The Registrar found that:

> ...Kelly-Anne was not and is not competent to agree or consent to pay over the 50% of the settlement funds attributed to her since these funds belonged to her creditors and neither she nor her trustee has the authority to [arbitrarily agree] to their payment to anyone except her creditors in accordance with the distribution scheme of the Act.

27 On the basis of the learned Registrar's conclusion that each of the estates has a 50% interest in the settlement monies, he gave, *inter alia*, the following directions:

(a) $72,276.20 of the Fund (plus a proportionate share of accrued interest) belong to Kelly-Anne's estate (the "Kelly-Anne Portion");

(b) $22,723.80 of the Fund (plus a proportionate share of accrued interest) belong to Peter's estate (the "Peter Portion");

(c) costs of the motion were awarded to Kelly-Anne on a solicitor and client basis payable equally from Kelly-Anne and Peter's estates;

(d) the Trustee's costs of the motion were ordered to be paid from Peter's estate only;

(e) the net balances remaining from the Kelly-Anne Portion and Peter Portion after payment of the aforesaid costs (the "Net Kelly-Anne Portion" and "Net Peter Portion") were to be delivered to the Trustee to be held on account of their respective estates; and

(f) for the purposes of preparing the Statement of Receipts and Disbursements respecting Peter's estate and for the purpose of distribution to Peter's creditors, the Trustee was directed to credit Peter's estate as having received the sum of $72,276.20, inclusive of the Net Peter Portion.

As a result of the foregoing, the learned Registrar imposed personal liability on the Trustee for the monies distributed to Peter, and he deprived the Trustee of his costs of the motion for advice and directions. His decision also created a substantial surplus for Kelly-Anne.

Issues

28

1. What is the standard of review on an appeal from a decision made by the Registrar on a motion for advice and directions?

2. Did the learned Registrar err either on the facts, the law, or both, in finding that Kelly-Anne's estate had any interest in the settlement monies?

3. Did Kelly-Anne, after her discharge from bankruptcy, lack capacity to release any interest she may have had in surplus funds pursuant to s. 144 of the *Bankruptcy and Insolvency Act* ("*BIA*").

4. Was it proper for the Registrar to impose personal liability on the Trustee for consenting to the release of perceived surplus funds to Peter, on a motion for advice and directions as to the disposition of the balance of the Fund.

5. Did the Registrar err in law in making an order which effectively denied the Trustee his costs of the motion for advice and directions?

Standard of Review

29 An appeal under s. 192(4) of the *BIA* from an "order" of a Registrar is a true appeal and not a hearing *de novo*. Accordingly, the appellant must satisfy the court that the Registrar erred in principle or in law in the way in which he has applied or exercised his discretion or that he omitted the consideration of, or misconstrued some fact:

Gilmartin, Re, [1989] 1 W.L.R. 513 (Eng. Ch. Div.) at 516

Achilles, Re (1993), 23 C.B.R. (3d) 20 (B.C. S.C.) at 27-28

Minister of National Revenue v. Sillito (Trustee of) (1993), 20 C.B.R. (3d) 240 (Alta. Q.B.) at 243.

30 By s.192(4) in granting an appeal from a "decision" of the Registrar there is a broader appellate jurisdiction than an appeal from an "order". An appeal from the registrar's decision is reviewable on appeal: see *Delaney, Re* (1995), 36 C.B.R. (3d) 27 (B.C. S.C.), at 32-33. At p.33 Preston J. stated:

I am satisfied that the wording of s.192(4) implies a broader jurisdiction than an appeal from an "order" of a registrar and that Master Doolan's ruling regarding the power of the trustee was a "decision" within the meaning of s.192(4) of the Act.

The Interest of Kelly-Anne and her Estate in the Settlement Monies

31 If the Property belonged to Peter (as discussed below) then the settlement monies would have been paid to the Toronto Dominion Bank to discharge the first mortgage. Upon the bankruptcy of Peter, the property would have vested in the Trustee free and clear of the first mortgage and the proceeds from the sale of the property by the Trustee would be distributed amongst Peter's creditors only with any surplus payable to Peter. The sale of the Property and the payout of the first mortgage prior to receipt of the said monies should not alter the result because Kelly-Anne ceased to have an insurable interest in the Property once her obligation on the first mortgage had been discharged (on the assumption that the property belonged to Peter as discussed below).

Did Peter Hold the Property in Trust for Kelly-Anne?

32 In determining whether or not a property is trust property, the ordinary law of trusts applies, and it is necessary for a claimant to prove that a valid trust was in existence at the date of bankruptcy.

33 Declarations or creations of trust respecting land must be in writing, failing which they are not enforceable.

34 Where a spouse transfers property to her spouse with the manifest intention of rendering her interest in the property inexigible to satisfy judgments against her, the courts have consistently held that the transfer extinguishes the transferor's interest since that is necessary to carry out the transferor's intention.

35 *Maysels v. Maysels* (1974), 3 O.R. (2d) 321 (Ont. C.A.) Kelly J.A. on behalf of himself, Brooke and Dubin JJ.A. in the Court of Appeal stated at p.321:

> Following the trial of an action for alimony, custody and maintenance of infant children in which was put in issue the beneficial ownership of property which had been the matrimonial home, municipally known as 73 Greenbush Rd. in the Borough of North York, Galligan, J., on July 19, 1972, gave judgment the parts of which pertinent to this appeal declared that the property was owned by Gertrude Maysels (the wife) and Max Maysels (the husband) equally as tenants in common. The wife launched this appeal which is confined to that part of the judgment which declared that the parties were the joint owners of the property.

And further at p.323:

> The evidence discloses that following their marriage the husband was engaged in business in the United States, and that some two years before the purchase of the property the husband and wife moved to Toronto where they resided at some periods with the wife's family. In 1967 it was decided to buy the property as a family home. Of the down payment $3,502 was the wife's and approximable $2,000 was the husband's; in addition the husband paid for some improvements to the property.
>
> By the husband's instructions the wife's name was inserted in the deed as the sole grantee. The wife does not claim that she gave any valuable consideration to the husband for his interest in the property but claims that what occurred with respect to the property constituted a gift by the husband to her of his complete interest in the property.
>
> The husband alleges that the purpose of putting the property in the wife's name was to protect the property against the possible claims of creditors. Although he does not allege that he was at the critical time insolvent, he says: "I think what I had in mind was that if there were any liabilities against me, it was in my wife's name and they couldn't touch it. That is what I was attempting to say." The learned trial Judge found that the husband's intention in so instructing his solicitor was "to protect the house in the event that he should have business reverses in the future and so to prevent the house from being taken from the family by creditors". He also found that the wife in her evidence confirmed that such was the husband's "intention at that time".

And later at p.330-31 Kelly JA stated:

> There is another feature which must be considered with respect to the husband's contention, in support of his claim to a beneficial interest in the property, that his intention was to make the property immune from the claims of his creditors. Even assuming that what he intended to do was not illegal, to be effective to carry out his intention to make the property inexigible to satisfy judgments against him, it would be necessary that he divest himself completely of any beneficial interest in the property as well as any interest reserving to him a power by the exercise of which he could direct to himself the beneficial interest in the property. In using the means he did in causing the property to be recorded in his wife's name, the only way in which the husband could achieve the object of defeating his creditors would be to divest himself completely of all interest in the property - in other words, to make an absolute and irrevocable transfer to his wife.
>
> If he retains any interest by means of which he could ask the Court to revest the property in him that interest itself would be exigible and effectively prevent the accomplishment of his purpose. To cause the property to be conveyed to the wife and at the same time to have retained any beneficial interest in it might have prevented his creditors discovering he had an interest but would not be a means of preserving the property from the resources of the Court seeking to enforce the payment of a judgment against the husband. On this account it may be said that in order to carry out his avowed intention of protecting the property from his creditors, he must have intended to extinguish his own interest in or claim to the property.

36 In my view this decision is binding upon this court. The transfer of the property from Kelly-Anne to Peter gives Peter the full title to the property. Mr. O'Reilly argued that the situation in the present case is different from the *Maysels* case because this is not a contest between husband and wife as was in the *Maysels* case. In this case both the husband and wife acknowledge the trust. In my view that is not an appropriate distinction to make. Both the husband and wife appear to want to sustain the wife's windfall under the Registrar's decision. However, the facts raise issues that are identical to the issues in the *Maysels v. Maysels* case.

Capacity of the Bankrupt to deal with the Surplus

37 The bankrupt is entitled to any surplus remaining after payment in full of his creditors with interest and of the costs, charges and expenses of the bankruptcy proceedings:

Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 as amended, s. 144.

38 A bankrupt has a right during his bankruptcy to the surplus assets, and may dispose of them by deed or will even before they are ascertained.

39 Kelly-Anne had the capacity to deal with the amount taken by Peter since it was calculated as the surplus that would be available after paying all creditors of both Peter and Kelly-Anne. Although she had no real interest in the Funds, even if she had, she has agreed that they could be paid to Peter and they in fact were.

Jurisdiction of the Registrar

40 "A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances": *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 as amended, s.34(1)

41 The Trustee brought the motion for advice and direction. The issue of personal liability of the Trustee was not before the Registrar. The Trustee had no opportunity to retain independent counsel or to make submissions on the issue of potential personal liability. Accordingly the Trustee was deprived of natural justice. Even if the Registrar had jurisdiction, the Registrar had a duty of fairness to the Trustee to advise the Trustee that there was the possibility of personal liability and to allow the Trustee an opportunity to retain independent counsel and to prepare to meet that issue.

Costs

42 Ordinarily, the Trustee will be awarded costs of a motion for advice and directions, unless the court finds that the motion has been improperly brought:

Paquin Motors Ltd., Re (1947), 28 C.B.R. 266 (Ont. H.C.)

43 The Registrar made no finding that the motion for advice and directions was improperly brought and accordingly there should be the usual order for costs.

44 The decision of the Registrar is accordingly set aside and in its place all funds, except the sum which is equal to the total of the unpaid creditors of the estate of Kelly-Anne, will be paid into the estate of Peter.

45 Although I would have held that all of the monies belong to Peter and thus Peter's estate, the creditors of Kelly-Anne were not represented. The Trustee was in a difficult position and as trustee for the Estate of Kelly-Anne had an obligation to protect the assets of that estate at least to the extent that there were monies owing to creditors. Kelly-Anne had no interest in those funds. It was her estate that had the interest and was not represented. Accordingly it would be improper to deprive those creditors of the amount that was calculated to be necessary to pay all creditors of Kelly-Anne in full.

46 The Trustee shall have its costs throughout on a solicitor and client basis payable out of the Kelly-Anne estate notwithstanding that this may reduce the amount available to pay creditors.

47 I have so determined because it seems to me to be the fairest way to dispose of these costs. In my view the Trustee has not been guilty of any wrongdoing and the creditors of the estate of Kelly-Anne have received a windfall long after Kelly-Anne has been discharged.

Appeal allowed.

Footnotes

* Additional reasons at 1997 CarswellOnt 5358, 1 C.B.R. (4th) 34 (Ont. Gen. Div. [Commercial List]).

TAB 10

59 D.L.R. (4th) 726
Supreme Court of Canada

British Columbia v. Henfrey Samson Belair Ltd.

1989 CarswellBC 351, 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, [1989] 2 S.C.R. 24, [1989] 5 W.W.R. 577, [1989] B.C.W.L.D. 2137, [1989] C.L.D. 1119, [1989] S.C.J. No. 78, 2 T.C.T. 4263, 34 E.T.R. 1, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 75 C.B.R. (N.S.) 1, 97 N.R. 61, J.E. 89-1098, EYB 1989-66987

R. IN RIGHT OF BRITISH COLUMBIA v. HENFREY SAMSON BELAIR LTD. et al.

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

Heard: April 21, 1989
Judgment: July 13, 1989
Docket: No. 20515

Counsel: *W.A. Pearce* and *J.G. Pottinger*, for appellant.
W.G. Baker, Q.C., and *G.E. Parson*, for respondent.
J.M. Mabbutt, Q.C., for intervener Attorney General of Canada.
J.E. Minor and *T. Macklem*, for intervener Attorney General for Ontario.
Y. de Montigny and *M. Aubé*, for intervener Attorney General of Quebec.
R.M. Endres, for intervener Attorney General of Nova Scotia.
R. Burns, for intervener Attorney General for New Brunswick.
W.G. McFetridge and *D.D. Blevins*, for intervener Attorney General of Manitoba.
R.C. Maybank, for intervener Attorney General for Alberta.
W.G. Burke-Robertson, Q.C., for intervener Attorney General of Newfoundland.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Provincial Tax

Debtor and creditor --- Priorities — Crown

Statutory trust — Bankrupt corporation — Provincial Crown claiming priority to receiver in respect of amounts collected as provincial sales tax — Provincial legislation in conflict with bankruptcy legislation — No priority for provincial Crown — Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1) — Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18(1).

Trusts and trustees

Statutory trust — Statute imposing trust on amounts collected as provincial sales tax — Amounts mingled with assets of company making assignment in bankruptcy — Not true trust — Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18(1).

A company pledged its assets to a bank to secure a debt to the bank. The company collected sales tax for the province, but mingled the collected tax with its own assets. The bank appointed a receiver of the company and its assets. The company then made an assignment in bankruptcy. The receiver sold the company's assets and applied the full proceeds in reduction of the company's bank debt. The province claimed that the Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18(1), created a statutory trust of the company's assets in the amount of the collected sales tax and that the receiver ought to have given the province priority over the bank for the amount of the trust funds. On a stated case, the chambers judge held that no statutory trust was created. The Court of Appeal held that the legislation did create a valid trust, but that it was inoperative because it conflicted with the scheme of distribution set out in the Bankruptcy Act, R.S.C. 1970, c. B-3.

On further appeal, held, Cory J. dissenting, the appeal should be dismissed.

Per McLachlin J., Lamer, Wilson, La Forest, L'Heureux-Dubé and Gonthier JJ. concurring: Section 47(a) of the Bankruptcy Act would only give the province priority if there were a true trust of the moneys collected for taxes. There was no true trust, since there was no specific property impressed with a trust that could be identified. This was apparent from s. 18 of the Social Service Tax Act, in that it deems the collected moneys to be kept separate and apart. That being the case, the province's claim fell under s. 107(1)(f) of the Bankruptcy Act, which postpones the claim of the Crown to that of other creditors. It could not be argued that the money remained that of the Crown throughout, for if that were the case, there would have been no need to impose a lien and charge under s. 18.

Per Cory J., dissenting: Having regard to the scheme of the Social Service Tax Act, it was clear that moneys collected for taxes never belong to the vendor. Hence there was no objection to the province imposing a lien and charge to collect the tax in cases where a vendor failed to pay it. Moreover, s. 18 created a valid trust. It had all the requirements of a trust and the fact that the moneys were mingled with the bankrupt's other assets did not destroy the trust. The section was not a ruse to evade the provisions of the federal Act, but merely protected funds which were truly trust funds at the moment they were paid. Further, s. 18 did not conflict with the federal Act, since the property was never the property of the bankrupt.Re Bourgault (1979), 19 D.L.R. (4th) 577, [1985] 1 S.C.R. 785, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 168, 55 C.B.R. (N.S.) 241, 63 A.R. 321, 60 N.R. 81, folld

Re Phoenix Paper Products Ltd. (1983), 3 D.L.R. (4th) 617, 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, overd

Annotation

The question whether a "deemed" trust created by the provincial legislature is a trust within the meaning of s. 67 of the Bankruptcy Act, R.S.C. 1985, c. B-3, or is entitled to priority only under the provisions of s. 136 of the Bankruptcy Act has been a matter of controversy between several provincial appellate courts. For instance, the courts in Nova Scotia (*Dir. of Lab. Standards (N.S.) v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253, 126 D.L.R. (3d) 417, 47 N.S.R. (2d) 446, 90 A.P.R. 446 (C.A.)) and the appellate courts in British Columbia (*R. v. C.I.B.C.* (1983), 50 C.B.R. (N.S.) 116; *A.G. Can. v. Samson Belair Ltd.*, 55 C.B.R. (N.S.) 114, [1985] 3 W.W.R. 651, 61 B.C.L.R. 24, 17 D.L.R. (4th) 544, leave to appeal to S.C.C. refused 55 C.B.R. (N.S.) xxvii, 62 B.C.L.R. xli, 17 D.L.R. (4th) 544n, 61 N.R. 78) held that provincial "deemed" trusts fell within the provisions of s. 136 of the Bankruptcy Act, while the courts in Ontario, culminating with the case of *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 1 O.A.C. 215, 3 D.L.R. (4th) 617 (C.A.), held the opposite, namely, that a "deemed" statutory trust created by the province falls within s. 67 of the Bankruptcy Act and therefore has priority over other preferred creditors such as the trustee. The judgment of the Supreme Court of Canada in the case of *R. v. Henfrey Samson Belair Ltd.* now settles this question in an authoritative manner.

The law is now quite clear: the provisions of s. 67 of the Bankruptcy Act should be confined to trusts arising under general principles of law (namely, that the res must be identifiable or traceable) while s. 136 applies to claims not established by general law but secured "by Her Majesty's personal preference" through legislation. As the court stated, this conclusion is supported by the wording of ss. 67 and 136 of the Bankruptcy Act, by the jurisprudence of the Supreme Court of Canada, and by policy considerations.

However, the court made it clear that at some stage the "deemed" trust may still meet the requirements for a trust under the principles of trust law because, at some point, the trust property may still be identifiable or traceable. But once the trust property is mingled with other funds and converted to other property, it can no longer be traced and at this point there is no longer a trust under general principles of law. In the latter case, s. 67 of the Bankruptcy Act no longer applies.

It is interesting that the court considered practical policy considerations when it stated at p. 19 as follows:

"The difficulties of extending [s. 67] to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise

in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets".

C.H. Morawetz, Q.C.

Table of Authorities

Other cases referred to

Royal Trust Co. v. Tucker, , [1982] 1 S.C.R. 250, 40 N.R. 361

John M.M. Troup Ltd. v. Royal Bank of Canada , (1962), 50 D.L.R. (4th) 577, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 14 Q.A.C. 140, 84 N.R. 308

Statutes referred to

Bankruptcy Act, R.S.C. 1970, c. B-3,
ss. 47(a), 107(1)(j) R.S.C. 1985, c. B-3, ss. 67(a), 136(i)(j)

Builders' Lien Act, R.S.A. 1980, c. B-12,
s. 16.1 (enacted 1985, c. 14, s. 8)

Business Corporations Act, S.A. 1981, c. B-15,
s. 191(1)

Canada Pension Plan, R.S.C. 1985, c. C-8,
s. 23(4)

Construction Lien Act, 1983, S.O. 1983, c. 6,
s. 7

Employment Standards Act, R.S.A. 1980, c. E-10.1 (since repealed by
s. 126 of and replaced by the

Employment Standards Code, S.A. 1988, c. E-10.2),
s. 113

Health Insurance Act, R.S.O. 1980, c. 197,
s. 18

Insurance Act, R.S.A. 1980, c. I-5,
s. 123(1)

Insurance Act, R.S.O. 1980, c. 218,
s. 359

Mechanics' Lien Act, R.S.O. 1950, c. 227

Pension Benefits Act, 1987, S.O. 1987, c. 35,
s. 58

Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5,
s. 14 (rep. & sub. 1984, c. 36, s. 12)

Revenue Act, R.S.B.C. 1979, c. 367

Social Service Tax Act, R.S.B.C. 1979, c. 388 (as amended by 1980, c. 52; 1981, cc. 15, 29; 1982, c. 39; 1983, c. 6; 1985, cc. 32, 73), ss. 5, 6, 8, 9, 10, 18(1), (2), 22-28

Rules and regulations referred to

Health Insurance Premiums Regulation, Alta. Reg. 217/81

Social Service Tax Act, Regulations, B.C. Reg. 84/58, Division 5

APPEAL from a judgment of the British Columbia Court of Appeal, 40 D.L.R. (4th) 728, 13 B.C.L.R. (2d) 346, [1987] 4 W.W.R. 673, 65 C.B.R. (N.S.) 24, 5 A.C.W.S. (3d) 47, affirming a judgment of Meredith J., 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59, holding that a trustee in bankruptcy had priority over a statutory trust for social services tax in favour of a province.

***Cory J.* (dissenting):**

1 I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree that s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3], does not apply in this case [appeal from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728]. If s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the British Columbia Social Service Tax Act

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

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

may be seized. As a quid pro quo s. 8 of the Social Service Tax Act provides that vendors are to receive remuneration for the service they provide to the government by collecting the tax.

4 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Service Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than 15 days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

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

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

> 18. (1) Where a person collects an amount of tax under this Act
>
> (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (*a*) is collected and held in trust in accordance with subsection (1); or
>
> (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (*c*) the estate of the trustee under paragraph (*a*);
>
> (*d*) the person required to collect or remit the tax under paragraph (*b*); or
>
> (*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

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

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

9 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does s. 18 create a valid trust?

10 The question may be phrased more precisely by asking: If, as the chambers judge found [61 C.B.R. (N.S.) 59 at 60, 5 B.C.L.R. (2d) 212], sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax, nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(*a*) and s. 107 [now s. 136] of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchases, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this court that the civil law of trust is not the same as that of common law: see *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250 at 261, 12 E.T.R. 257, 40 N.R. 361 [Que.].

11 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, S.A. 1988, c. E-10.2, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 124(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14; and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

12 This court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 at 494, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.], the trust provisions of the Mechanics' Lien Act, R.S.O. 1950, c. 227 (now the Construction Lien Act), were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

13 Section 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In *Re Deslauriers Const. Prod. Ltd.*, [1970] 3 O.R. 599, (sub nom. *A.G. Can. v. Perlmutter)* 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.), Gale C.J.O., for a unanimous court, noted that the Act deemed pension plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> ... [these words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-603:

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

Gale C.J.O.'s judgment was cited with approval by Pigeon J. writing for the majority in this court in *Dauphin Plains Credit Union Ltd. v. Xyloid Indust. Ltd.*, [1980] 1 S.C.R. 1182 at 1198, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, [1980] C.T.C.

247, (sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301, who stated: "I find the reasoning in *Deslauriers* wholly persuasive."

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

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person.
>
> 107.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

15 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], by Dickson J., as he then was, in these words:

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

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

17 It is true that this court has in *Deloitte Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchases for payment to the province. I do not think that the decision in *Deloitte Haskins & Sells v. W.C.B.* can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

18 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with *Deloitte Haskins & Sells v. W.C.B.*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at pp. 107-108 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types of deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and

> subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should, I think, prevail.

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

> When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it" ...
>
> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

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

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

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

22 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those moneys can be traced "either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": *Re Diplock's Estate; Diplock v. Wintle*, [1948] Ch. 465 at 521, [1948] 2 All E.R. 318 at 347, per Lord Green M.R.; affirmed *(*sub nom. *Min. of Health v. Simpson)* [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts: see D.W.M. Waters at p. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, *(*sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, *(*sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24; *Deloitte Haskins & Sells v. W.C.B.*, supra; and *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

23 If as stated in *Dep. Min. of Revenue (Que.) v. Rainville* mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the subcontractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

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

Disposition

25 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in *Dep. Min. v. Rainville, Deloitte Haskins & Sells v. W.C.B.*, and *F.B.D.B. v. Que. (Comm. de la santé et de la sécuritié du travail)*, for the following reasons:

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

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

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

(i) does not negate the trusts;

(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in *Re Bourgault, Deloitte Haskins & Sells* and *F.B.D.B.*;

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

26 I would therefore answer the constitutional question as follows:

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

Answer: No.

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

***McLachlin J. (Lamer, Wilson, La Forest, L'Heureux-Dubé* and *Gonthier JJ.* concurring)::**

28 The issue on this appeal [from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728] is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3].

29 Tops Pontiac Buick Ltd. ("Tops") collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian

Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

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

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

32 The section of the Social Service Tax Act which the province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (*a*) is collected and held in trust in accordance with subsection (1); or
>
> (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (*c*) the estate of the trustee under paragraph (*a*);
>
> (*d*) the person required to collect or remit the tax under paragraph (*b*); or
>
> (*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

33 The province argues that s. 18(1) creates a trust within s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, which provides:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person.

34 The respondents, on the other hand, submit that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. They submit that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) [now s. 136(1)(*j*)] of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

> 107.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

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

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

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

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

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

39 Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this court in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24. Pigeon J., speaking for the majority, stated at p. 45:

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

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

41 This construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this court in *Deloitte, Haskins &*

Sells Ltd. v. W.C.B., [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81. As Wilson J. stated at p. 806:

> ... the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte, Haskins & Sells Ltd. v. W.C.B.* was concerned with provincial legislation purporting to give the province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

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

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

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

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

46 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act which I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is

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

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

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

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

50 The province relies on *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215, where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(*a*) of the Bankruptcy Act. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in *Re Phoenix Paper Prod. Ltd.*, in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in *Deloitte, Haskins & Sells v. W.C.B.*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

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

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

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

Conclusion

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

53 I would dismiss the appeal, with costs.

Appeal dismissed.

TAB 11

1993 CarswellAlta 416
Alberta Court of Queen's Bench

Funds Administrative Service v. Northern Steel Inc. (Receiver of)

1993 CarswellAlta 416, [1993] 3 W.W.R. 695, [1993] A.W.L.D. 161, 139 A.R. 256,
18 C.B.R. (3d) 84, 37 A.C.W.S. (3d) 1279, 48 E.T.R. 305, 7 Alta. L.R. (3d) 293

FUNDS ADMINISTRATIVE SERVICE v. COOPERS & LYBRAND LIMITED (Receiver and Manager of NORTHERN STEEL INC.)

Bielby J.

Judgment: January 18, 1993
Docket: Doc. Edmonton 9203-20090

Counsel: *D. McCalla* , for applicant.
D. Stollery , for respondent.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Labour; Employment; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Employment Law --- Wages and benefits — Priority of claims for wages against creditors of employer

Labour Law --- Collective agreement — Wages — General

Pensions

Statutes --- Retroactivity and retrospectivity — Rebutting presumption — Remedial purpose

Trusts and Trustees --- Express trust — Creation — General

Administrator of pension funds having priority to employer's unpaid pension contributions as against secured creditors.

The employer entered into a collective agreement in which it undertook to make certain payments to various pension and other funds administered by the applicant. The employer was placed in receivership on October 11, 1991. At the time of the receivership, the employer owed, but had not yet paid, certain amounts to these funds. The employer had not segregated funds from its general assets to pay these amounts at any time. The applicant claimed that the funds that the employer should have remitted to it under the collective agreement were impressed with a trust and should now be paid out of the employer's general funds, in the hands of the receiver. The receiver argued that the applicant was no more than an unsecured creditor. The receiver contended that the *Employment Pension Plans Amendment Act* (Alta.) (the "Act"), which came into force on July 8, 1992, some eight months after the employer was placed in receivership, did not apply to the unremitted pension contributions.

Held:

The applicant had priority to unremitted pension contributions but not to other sums payable under the provisions of the collective agreement.

The Act was passed to better protect workers, who are generally less able to protect themselves against financial loss arising from their employer's insolvency than are the employer's creditors. Therefore, the Act had overall beneficial intent and retrospective operation, creating a deemed trust for unpaid pension contributions. Morover, although the "deemed trust" provisions of the Act did not create an actual trust, they did create a priority in pension plans for unpaid employer remittances which superseded the priority of secured creditors. The applicant therefore had priority to the employer's unremitted pension contributions. However, the applicant did not have priority to certain other sums payable to it under the provisions of the collective agreement since there was no trust implied by the collective agreement.

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Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182, 33 C.B.R. (N.S.) 107, [1980] 3 W.W.R. 513, [1980] C.T.C. 247, 108 D.L.R. (3d) 257, (sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 3 Man. R. (2d) 283, 31 N.R. 301 — *referred to*

Manufacturers Life Insurance Co. v. Hanson, [1924] 1 W.W.R. 809, 20 Alta. L.R. 260, [1924] 2 D.L.R. 692 (C.A.) — *referred to*

Noren v. Tarsands Machine & Welding Co. (1975) Ltd. (1982), 20 Alta. L.R. (2d) 242, 24 R.P.R. 290, 138 D.L.R. (3d) 335, 45 A.R. 223 (Q.B.) , affirmed (1983), 119 A.R. 161 (C.A.) — *referred to*

R. v. St. Mary, Whitechapel (Inhabitants) (1848), 12 Q.B. 120, 116 E.R. 811 — *referred to*

RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd., 10 C.B.R. (3d) 41, [1992] 2 W.W.R. 641, 89 D.L.R. (4th) 405, [1992] 2 C.T.C. 138, 76 Man. R. (2d) 211 (C.A.) — *considered*

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235 (Ont. Gen. Div.) — *considered*

XMCO Canada Ltd., Re (1991), 15 C.B.R. (3d) 92, 3 O.R. (3d) 148 (Bktcy.) — *considered*

Statutes considered:

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 —

s. 92

Employment Pension Plans Act, S.A. 1986, c. E-10.05 —

s. 40.1(1) [en. S.A. 1992, c. 13, s. 34]

s. 40.1(2) [en. S.A. 1992, c. 13, s. 34]

s. 40.1(4) [en. S.A. 1992, c. 13, s. 34]

Employment Pension Plans Amendment Act, 1992, S.A. 1992, c. 13.

Employment Standards Code, S.A. 1988, c. E-10.2 —

s. 1(1)(s) "wage"

s. 113

s. 113(1)

Application by administrator of funds for priority to certain sums payable to it under collective agreement.

Bielby J. **:**

Summary of Conclusions

1 The collective agreement made between Northern Steel Inc. ("the employer") and its employees did not create a trust for those contributions the employer contracted to remit to union pension, welfare and education funds. The agreement does not give the Applicant priority for these debts, unpaid by the employer now in receivership.

2 The *Employment Standards Code* , S.A. 1988, c. E-10.2, does not create a deemed trust for these funds so as to give the Applicant a priority to them over that of the employer's secured creditors. The *Employment Pension Plans Amendment Act, 1992* , S.A. 1992, c. 13, has retrospective operation, catching the unpaid pension contributions although it did not come into force until after the receiver was appointed. This legislation creates a deemed trust over funds which should have been remitted to the employees' pension plan, which results in the Applicant having a claim to those funds which is superior to that of the employer's secured creditors.

Facts

3 The employer entered into a collective agreement in which it undertook to make certain payments to each of the Ironworkers' Health and Welfare Trust Fund of Western Canada, the Alberta Ironworkers' Pension Fund and the Alberta Ironworkers' Apprenticeship and Training Fund, all administered by the Applicant.

4 The employer was placed into receivership pursuant to court order on October 11, 1992. The Respondent is the receiver. At that time it owed, but had not yet paid, certain amounts due to each of these three funds. It had not segregated funds from its general assets to pay these amounts at any time.

5 There are insufficient assets to pay the employer's secured creditors, let alone other creditors. The Applicant claims, however, that the funds which the employer should have remitted to it under the collective agreement were impressed with a trust so that it should now be paid out of the employer's general funds, now in the hands of the Respondent. The Respondent argues that the Applicant is no more than an unsecured creditor, not entitled to be paid out in priority to the secured creditors.

Summary of the Applicant's Argument

6 The Applicant argues that it has a prior claim to the general funds in the Respondent's hands for the following reasons:

(a) the collective agreement creates a trust for these remittances, so that this Court should impress upon the employer's general funds a prior obligation to payment notwithstanding its inability to trace such funds and absent specific trust property;

(b) alternately, the *Employment Standards Code* , ss. 1(1)(*s*) and 113 create a deemed trust over wages due to an employee; the unpaid remittances fall within the definition of unpaid wages and are thus subject to this trust;

(c) alternately, in regard to the unpaid pension remittances alone, the *Employment Pension Plans Amendment Act, 1992* , s. 40.1 creates a deemed trust over the general funds of the employer; this enactment should be applied notwithstanding that it came into force some nine months after the employer entered receivership.

The Creation of a Trust by the Collective Agreement

7 The Applicant concedes that there is nothing in the collective agreement which expressly creates a trust of the unpaid remittances but argues one should be implied from the wording used in cls. 20.04 and 21.04.

8 Each of these clauses state: "Contributions shall be paid *on behalf of an employee* ..." (emphasis added).

9 The Applicant argues that these words "on behalf of" constitute the implied trust. It notes that in *Noren v. Tarsands Machine & Welding Co. (1975) Ltd.* (1982), 20 Alta. L.R. (2d) 242, 24 R.P.R. 290, 138 D.L.R. (3d) 335 (Q.B.) , approved by the Alberta Court of Appeal at (1983), 119 A.R. 161 , the leading Alberta authority on employer remissions, MacNaughton J. of this Court did not find an implied trust in a similar case. However, the collective agreements in *Noren* were absent the words "on behalf of an employee".

10 In his decision MacNaughton J. does not state that, had such words been present, a trust would be created. Indeed, whether the collective agreement created a trust for employee remissions was not considered by him.

11 The Respondent argues, and I agree, that it would take much more to show agreement to create a trust obligation than simply the use of the words "on behalf of". No trust obligation, express or implied, arises therefore from the wording of these collective agreements.

A Deemed Trust Created by the Employment Standards Code

12 The Applicant next argues that the unpaid remittances are part of the employees' wages and thus subject to a deemed trust under the *Employment Standards Code* , s. 113, which reads:

(1) Notwithstanding any other Act, every employer shall be deemed to hold all wages ... accruing due or due to an employee in trust for the employee, whether or not the amount accruing due or due has in fact been kept separate and apart by the employer.

13 The Applicant argues that the unpaid remittances are to be considered to be wages because the employer agreed to this by defining them as such under art. 16.00 of the collective agreement.

14 It reads:

Article 16.00 Wages

16.01 Wage Rate and Hourly Cost Items — Structural and Ornamental Ironworkers, Machinery Movers and Riggers, Alberta Government Certificate Journeyman Welders.

Journeyman:

Effective Date	Base Rate	Vac. Pay	Hol. Pay	H & W Fund	Pens. Fund	Appr. Fund	Total
06-May-91	$21.46	$1.29	$0.86	$0.90	$1.50	$0.10	$26.11

15 The parties agree that the references to "H & W Fund", "Pens. Fund" and "Appr. Fund" refer to the remittances to be paid to the Applicant. By their inclusion in the Article referring to "Wages", the Applicant argues that the employer agreed they were part of wages.

16 However, the Respondent notes that art. 16.00 does not deal only with wages, notwithstanding the title of that Article. By the first paragraph it is said to deal with "Wage Rate and Hourly Cost Items". The Respondent argues that the contributions to the three funds fell within this second category, as they were calculated on the basis of the number of employee hours worked.

17 Second, the Respondent argues that the collective agreement elsewhere expressly provides that these payments were not to be considered as wages. The collective agreement incorporates by reference the trust agreements setting up the welfare and pension funds. Each of these state: "Contributions to the Fund shall not constitute or be deemed to be wages of employees with respect to whose work such payments are made ..."

18 The Respondent argues that the collective agreement should be interpreted to be internally consistent, which would require that cl. 16.00 be interpreted to exclude the pension and welfare contributions from wages to be consistent with the provisions incorporated from the trust agreements establishing the pension and welfare trusts.

19 The Applicant responds that the collective agreement governs the nature of the unpaid contributions, not the trust agreements establishing the trusts into which these contributions were to have been paid: see *Noren v. Tarsands Machine & Welding Co. (1975) Ltd.* , supra. This is true, but does not mean the Court cannot consider the terms of the trust agreements where incorporated by reference into the collective agreement; they then become part of that collective agreement, and part of the contract which governs the nature and qualities of the employer contributions.

20 I agree with the Respondent that the words of the collective agreement fall far short of that needed to include the unpaid remittances within the definition of wages so as to allow for the creation of a deemed trust under the *Employment Standards Code* . Clause 16.00 is ambiguous, at best, on the issue of whether the unremitted contributions are wages. This inconsistency must be resolved in favour of exclusion, in light of the express provisions of the incorporated trust agreements. Even if this were not the case, the wording of the collective agreement itself is simply not adequate to define the unremitted contributions as wages within the meaning of the relevant legislation.

The Lack of Retroactive Application of the Employment Pension Plans Amendment Act, 1992

21 The *Employment Pension Plans Amendment Act, 1992* , S.A. 1992, c. 13 (the "amendment"), which came into force on July 8, 1992, purports to create a deemed trust for those unpaid remittances owing to the pension fund. [This argument is not relevant to the unpaid remittances to the Health and Welfare Fund and to the Apprenticeship Fund.]

22 The relevant portions of the amendment read:

> 40.1(1) Where an employer receives or withholds money from an employee under an arrangement whereby the employer will pay the money into a pension fund as the employee's contributions under the pension plan, the employer holds the money in trust for the employee until the employer pays the money into the pension fund.
>
> (2) An employer who is required to pay contributions to a pension fund holds in trust for the beneficiaries of the pension plan an amount equal to the employer contributions due and not paid into the pension fund.
>
> . . . . .
>
> (4) Subsections (1), (2) ... apply whether or not the money has been kept separate and apart from other property of the employer.

23 However, the Respondent argues that the amendment does not apply to these funds as it came into force some eight months after the employer was placed in receivership. A well-known rule of statutory interpretation provides that legislation is not to be construed so as to operate retrospectively unless the language of the statute clearly shows such an intention on the part

of the Legislature. See *Manufacturers Life Insurance Co. v. Hanson*, [1924] 1 W.W.R. 809, 20 Alta. L.R. 260, [1924] 2 D.L.R. 692 , Alberta Supreme Court, Appellate Division. Nothing in the statute expressly purports to give it retrospective application.

24 How should this statute be construed? E.A. Driedger answers this question as follows in *The Construction of Statutes* at p. 196:

> ... the position appears to be that whenever the operation of a statute depends upon the doing of something or the happening of some event, the statute will not operate in respect of something done or in respect of some event that took place before the commencement of the statute: but if the operation of the statute depends merely upon the existence of a certain state of affairs, the *being* rather than the *becoming* , the statute will operate with respect to a status that arose before the commencement of the statute, if it exists at that time.

25 The author illustrates this point by reference to the old case of *R. v. St. Mary, Whitechapel (Inhabitants)* (1848), 12 Q.B. 120, 116 E.R. 811 , where the Court considered the retrospectivity of a new statute that prevented a municipality from evicting a widow within twelve months of her husband's death. The statute was held to apply to those widowed before its enactment; it was held to apply only to a future eviction (an event) but to every widow (a status).

26 Applying this rule the amendment would apply to all security, employees and employers, including those existing before the date it came into force (statuses) but would apply only to the remission of pension monies (an event) due after that date. As the pension remissions here were due on or before October 11, 1991 (when the employer went into receivership), but the amendment did not come into force until July 8, 1992, it does not catch them.

27 However, the Applicant also argues that another exception to the presumption against retrospective application should be applied. That exception exists for beneficial enactments.

28 Driedger describes this at p. 198 as follows: "... the presumption [against retrospective application] applies only to prejudicial statutes; not beneficial ones." He then goes on to discuss the difficulties in determining whether a particular enactment is beneficial or prejudicial, concluding by noting on pp. 202-203 that in the end resort must be had to the object of the statute and that there can be differences of opinion about its intent. This difficulty may be seen in this case where the amendment is beneficial to the employee but prejudicial to the employer's creditors.

29 Driedger's concluding comments on p. 203 are of some assistance in determining the object of the amendment:

> 3. The presumption [against retrospective application] does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
>
> 4. The presumption does not apply if the new prejudicial consequences are intended as a protection for the public rather than as punishment for a prior event.

30 The Applicant argues that the Legislature intended the amendment to have retrospective operation because it must have been passed to remedy an evil found to exist, the employees' deprivation of earned benefits upon the insolvency of the employer. The employer, and its creditors, are presumably in a better position to prevent loss, and to bear any loss not prevented, than employees would be.

31 However, the amendment is conversely prejudicial to those creditors; it redirects monies that would have been paid to them to employees.

32 The consequences attaching to the failure to remit by the amendment are not a new penalty, disability or duty, but rather the creation of a priority. The consequences, while prejudicial to the employer, are intended as a protection for a section of the public seen as unprotected prior to its passage — employees entitled to pension contributions. In other words, overall the scheme of the amendment is to create a better scheme to protect employees' pension rights.

33 I accept this, and would find that the amendment has an overall beneficial intent. The presumption against retrospective operation therefore does not apply.

34 This, then, takes us back to the statute itself. Absent express provision for retrospective operation, may such a legislative intent be implied from the words or purpose of the statute?

35 I find such an intent may be implied, for the same reasons I found the statute to be beneficial. It was passed to better protect workers, who are generally less able to protect themselves against financial loss arising from their employer's insolvency than are the employer's creditors.

36 Therefore, I hold that the amendment has retrospective operation, creating a deemed trust for unpaid pension contributions.

Is the Employment Pension Plans Amendment Act, 1992 Effective to Create a Priority For Unpaid Contributions to Pension Plans?

37 The Respondent argued that even if the amendment catches the unpaid pension contributions through retrospective operation, it is not effective to give the Respondent priority for them.

38 It notes there is no specific property to which this trust attaches and no funds traceable to these unpaid contributions. Therefore, arguably, notwithstanding the express provisions of s. 40.1(1) and (4) of the amendment, priority does not arise.

39 McLachlin J. commented on the need for a common law trust to attach to specific property in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164 . In that case, the Court held that a British Columbia statute purporting to create a "deemed trust" of sales tax payments did not create the type of trust that would create a priority under the bankruptcy legislation. Rather, the trust referred to by the federal statute was a trust at common law, which required that a specific pool of money be created and held, to which the trust attached. Where the monies sought to be impressed with the deemed trust had never been held in a separate fund, being intermixed with other funds and untraceable, no common law trust was ever created.

40 If this argument applied to the case at Bar the Applicant would fail, because the deemed trust created by the amendment has no specific corpus to which it may attach.

41 However, the Supreme Court of Canada in the *Henfrey Samson Belair Ltd.* case, supra, was not commenting upon whether Parliament or legislatures could ever create a "deemed trust" or otherwise alter priorities upon an insolvency. Indeed, McLachlin J. notes at p. 35 [S.C.R.]:

> The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act* ...

42 Therefore, provincial statutes may not effectively create a "deemed trust" which alters trust-based priorities under federal legislation. They may, however, do so effectively in regard to creditors' rights where no aspect of federal jurisdiction is involved. This is a valid exercise of their legislative powers under the "property and civil rights" portion of s. 92 of the *Constitution Act, 1867* .

43 In other words, where a debtor has given security by contract to a lender, priorities upon default may properly be subject to provincial "deemed trust" legislation, barring any federal involvement such as bankruptcy.

44 This has been accepted, admittedly obliquely, by other provincial courts since the decision in *Henfrey Samson Belair Ltd.* , supra, was released. For example, in *Toronto Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314 [reported at 42 E.T.R. 235], Farley J. of the Ontario Court of Justice also considered provincial legislation purporting to create a deemed trust for unremitted contributions to an employee pension plan by an employer then in receivership. He states at p. 18 [p. 244]: "By s. 58(6) [of the Ontario pension legislation] the deemed trust applies whether or not the employer kept these moneys separate and apart."

45 Similarly, the Supreme Court of Canada accepted without question that Parliament could pass "deemed trust" legislation affecting areas of federal legislative competence, such as income tax, unemployment insurance and Canada pension contributions, in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, 33 C.B.R. (N.S.) 107, [1980] 3 W.W.R. 513, [1980] C.T.C. 247, 108 D.L.R. (3d) 257, 80 D.T.C. 6123 .

46 More recently, in *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1992] M.J. No. 105 [reported at 10 C.B.R. (3d) 41, [1992] 2 W.W.R. 641, 89 D.L.R. (4th) 405, [1992] 2 C.T.C. 138], the Manitoba Court of Appeal expressly considered the effect of a deemed trust created by federal statutes in regard to unremitted employer withholdings for employee income tax, Canada pension contributions and unemployment insurance premiums. Twaddle J.A. makes the following comments in regard to the absence of a specific fund to which these trusts attach at p. 5 [pp. 47-48 C.B.R.]:

> I would ordinarily have thought that even Parliament could not create a trust without a *res* ... Yet, if the legislative language means what it says, that is what happens here. Her Majesty's claim would then be that of a beneficiary under a non-existent trust.
>
> . . . . .
>
> The deemed trust arising on the appointment of a receiver is not a trust at all. It is a mechanism for tracing. Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her.

47 With respect, I do not agree that the deemed trust is a mechanism for tracing. Tracing poses the same problem as does the absence of a corpus for the creation of a common law trust. Where assets were never in fact withheld, it is fiction to pretend they may later be traced by statutory device.

48 I agree that the "deemed trust" provisions of the amendment do not create an actual trust. Notwithstanding the use of these words, they create a priority in pension plans for unpaid employer remittances which supersedes the priority of secured creditors. The creation of such a priority is within the legislative authority of the province as an aspect of the property and civil rights powers, including the right to alter the law of contract.

49 Another example of judicial acceptance of "deemed trust" legislation is found in *Re XMCO Canada Ltd.* (1991), 3 O.R. (3d) 148, 15 C.B.R. (3d) 92 , where Killeen J. of the Ontario Court (General Division) defined the creation of deemed trusts. He stated at p. 152 [O.R.]:

> In my view, the combined effect [of the "deemed trust" sections of the *Income Tax Act*] is to create a special form of statutory trust in favour of the federal Crown of monies to be withheld by an employer from employees for income tax and, in the eventuality of a bankruptcy of that employer, an amount equal to the amount to be withheld or deducted must be carved out of the property of the bankruptcy in virtue of the explicit deeming formula contained in [this statute].
>
> This conclusion may appear to have a somewhat artificial, after-the-event flavour — and even draconian features — but it is, nevertheless, the clear effect and purpose of the *Income Tax Act* scheme.
>
> There can be no doubt that the federal Parliament has the power to create such an expansive statutory trust.

50 And, from the comments of McLachlin J. in the *Henfrey Samson Belair Ltd.* case, supra, we also know that the province has the power to do so as well, in areas properly within its jurisdiction, including the employer's pension withholdings in the case at Bar.

51 Therefore, whether it is called "a special form of statutory trust" or a "deemed trust" or simply "a priority" the Applicant's claim to the unremitted pension contributions is superior to those of the creditors in this case.

52 There was no evidence or argument claiming the nature or kind of assets in the hands of the receiver were not otherwise of a type which could be attached by the amendment.

53 The Applicant is therefore successful on this point.

Other Claims

54 The Applicant also asked for an order of priority for certain other sums payable to it under the provisions of the collective agreement, called "liquidated damages and audit costs". It admitted that the former had priority only as an aspect of any trust implied by contract that I might find. As I have found none, they are not payable in priority to the secured creditors. The Applicant suggested that the audit costs incurred to determine the exact quantum of the unpaid remittances could be awarded as an aspect of costs in this matter. I deal with this issue below.

Costs

55 As there has been mixed success, each party will generally bear its own legal costs and disbursements. However, as the Applicant has borne all of the audit costs for all claims, and has been successful in regard to one of them, I direct that the Respondent pay one-third of those costs to the Applicant.

Application allowed in part.

End of Document

TAB 12

(1844) XI Clark & Finnelly 513

*1195 John Knight and Others v Sir William Edward Rouse Boughton, Baronet, and Others

HL

1844

[513] [May 1, 9, 15, 22, 23, 26, and 30, 1843; Sept. 4, 1844].

Devise in Fee; whether Absolute or in Trust—Precatory Words.—Uncertainty of Subject.

[Mews' Dig. xv. 1469. S.C. 8 Jur. 923; and, in Court below, *sub nom.* *Knight* v. *Knight*, 3 Beav. 148; 9 L.J. Ch. 354; 4 Jur. 839. Commented on in *Holmesdale**1196 v. *West*, 1866, LR. 3 Eq. 485; *Shelley* v. *Shelley*, 1868, L.R. 6 Eq. 544, 545; *Ellis* v. *Ellis*, 1875, 44 L.J. Ch. 226.]

R. P. K. being entitled, under a settlement and will of his grandfather, to real estates in tail male, with remainders to his cousins in tail, with remainder to himself in fee as right heir of the settlor, suffered a recovery, and acquired the fee simple. He had other estates in fee simple by purchase, and considerable personal estate. He by his will gave all his estates, real and personal, to his brother, T. A. K., if living at his own decease, and if not, to T. A. K.'s son, T. A. K. the younger; and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother and his next descendant in the direct male line; but in case no such issue or descendant of his said brother or nephew should be living at the time of the testator's decease, to the next descendant in the direct male line of nis said grandfather, according to the purport of his will, under which the testator inherited those estates, subject in every case to certain reservations out of the rents; and he appointed the person who should inherit his said estates under his will, his sole executor "and trustee, to carry the same and everything contained therein duly into execution, confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain and obvious meaning of his words." He then, after giving some legacies, gave his gems and other articles to the British Museum, "on condition that the next descendant in the direct male line then living of his said grandfather should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line." And he concluded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather."

T. A. K. survived the testator, and died without leaving any son:—

Held, that T. A. K. took the estates in fee, absolutely, and that no trust was, or was intended to be, created by the will, a discretion being left to the devisees to defeat the testator's expressed desire.

Semble, that the property to which the words of desire applied, and the nature of the estate to be taken in it, were not sufficiently certain to raise a trust: *Per the Lord Chancellor.*

This was an appeal from a decree of the Master of the Rolls, upon the construction of the will of Richard **[514]** Payne Knight, who, at the time of making the same, and thenceforth down to, and at the time of his decease, was seised in fee simple of divers freehold estates; and was also, at the time of his decease, possessed of a large personal estate, comprising, among other things, a valuable collection of gems and articles of virtu. The greater part of the freehold estates (known by the general name of the Downton estates, and situate in the counties of Hereford and Salop) had devolved on him as tenant in tail male under the will, and a settlement also of his grandfather Richard Knight, who died in 1745 (the settlement, and the substance of the will of Richard Knight, are stated in the report of this case, 3 Beavan, p. 148); and he, previously to the date of his will, had, by common recoveries or other assurances, acquired the absolute fee simple and inheritance of these estates. The testator's other freehold estates had been purchased by himself.

The will of Richard Payne Knight, dated 30th of June 1814, and duly executed and attested for devising freehold estates, was as follows:—"I give and bequeath all my estates, real and personal, except such parts as are hereinafter excepted, to my brother Thomas Andrew Knight, should he be living at the time of my decease; and if not, to his son, Thomas Andrew Knight the younger; and in case that he should die before me, to his eldest son or next descendant in the direct male line; and in case that he should leave no such descendant in the direct male line, to the ***1197** next male issue of my said brother and his next descendant in the direct male line; but in case that no such issue or descendant of my said brother or nephew should be living at the time of my decease, to the **[515]***next descendant in the direct male line of my late grandfather Richard Knight, of Downton, according to the purport of his will, under which I have inherited those estates, which his industry and ability had acquired, and of which he had therefore the best right to dispose;* subject nevertheless and liable in every case to the following reservations and deductions out of the rents and profits thereof, which I give and bequeath to the purposes and in the manner following." Here followed a bequest of £300 to be distributed among the poor of Downton and other parishes in the county of Hereford. The will then went on thus:—

"And I do hereby tute *and appoint the person who shall inherit my said estates under this my will, my sole executor and trustee, to carry the same and everything contained herein duly into execution; confiding in the approved honour and integrity of my ly* to take no advantage of any technical inaccuracy, but to admit all the comparatively small reservations which I make out of so large a property, according to the plain and obvious meaning of my words."

The testator then bequeathed, "out of the said reserved rents and profits," a weekly sum of 25s. to his faithful servant Anne Payne, and £3 weekly to a Mrs. Gregory, as a reward for her kindness to him; and then proceeded:—

"And I moreover give and bequeath all coins and medals, and all wrought or sculptured articles in every kind of metal, ivory, and gems or precious stones, together with all descriptive catalogues of the **[516]** same; and all drawings or books of drawings of every kind, which shall be found in the gallery or western room of my house in Soho-square, to the British Museum, on condition that, within one year after my cease, *the next descendant in the direct male line then living of my above-named grandfather, be made an hereditary trustee* , with all the privileges of the other family trustees, to be *continued in perpetual succession to his next descendants in the direct male line, so long as*

any shall exist, and in case of their failure, to the next in the female line; and also upon condition that all duties and other expenses attending the taking possession of and removing the said articles, be paid out of the funds of the said Museum."

The will concluded thus: " *I trust to the liberality of my successors* to reward any others of my old servants and tenants according to their deserts; and to *their justice, in continuing the estates in the male succession, according to the will of the founder of the family* , my above-named grandfather Richard Knight. Given under my hand," etc.

The testator died in April 1824, without having revoked or altered his said will, leaving the said Thomas Andrew Knight, his only brother and heir-at-law, and Thomas Andrew Knight the younger, him surviving; and also leaving surviving him the Appellant John Knight, and his sons, Frederic Winn Knight, Charles Allanson Knight, and Edward Lewis Knight, who are the other Appellants; and also the said John's younger brother, Thomas Knight the elder, and his sons, Thomas Knight the younger and Edward Knight (three of the Respondents), and other sons of the said Thomas Knight the elder, hereinafter mentioned. (See pedigree, *infra* , p. 524.)

Thomas Andrew Knight, soon after the testator's **[517]** death, proved his will, and possessed himself of his personal estate and effects, and entered into possession or receipt of the rents of the real estates. He also became a trustee of the British Museum, by virtue of the said will, and of an Act of Parliament, 5 G. 4, c. 68, passed pursuant thereto, for vesting the said bequests of R. Payne Knight in the trustees of the Museum, in perpetuity.

By indentures of lease and release and assignment, dated respectively the 27th and 28th of December 1825, the release and assignment being made between the said T. A. Knight of the first part, T. A. Knight the younger of the second part, and Thomas Pendarves Stackhouse of the third part;—After reciting the will of ***1198** R. Payne Knight, and that it was apprehended that T. A. Knight was not made subject to or bound by any trust by virtue thereof, or if bound by a trust, that he might exercise or perform the same by settling the real estate, so devised as aforesaid, on T. A. Knight the younger, his only son, in tail male, and by settling the personal estate on him and the heirs male of his body, subject, nevertheless, to an estate for the life of T. A. Knight therein; and further reciting that T. A. Knight, with the consent and approbation of T. A. Knight the younger, had determined to settle the said real and personal estates accordingly;—It was witnessed that the said T. A. Knight, in pursuance of such determination, and with such consent and approbation, granted and released to the said T. P. Stackhouse, his heirs and assigns, all the manors, lands, tenements, and hereditaments devised by the said will; To hold the same to the use of T. A. Knight and his assigns during his life, with remainder to the use of T. A. Knight the younger and the heirs male of his body, and in default of such issue, to the use of **[518]** T. A. Knight, his heirs and assigns for ever, subject, nevertheless, to the trusts, if any, created by the said will, and which were not performed or duly executed by such indenture: And by the same release and assignment, T. A. Knight also assigned to T. P. Stackhouse, his executors and administrators, all the personal estate and effects which were the property of R. Payne Knight at the time of his decease, and of which any trusts were in terms, or by construction, or in effect, declared by his will for the benefit of the members of the Knight family; To hold the same in trust, to permit T. A. Knight to have the use and enjoyment thereof during his life, and from and after his decease, in trust for T. A. Knight the younger and the heirs male of his body.

In Trinity Term 1826, T. A. Knight, with Frances his wife, and T. A. Knight the younger, suffered a recov-

ery of the devised estates in the county of Hereford, to the use of T. A. Knight, his heirs and assigns.

T. A. Knight the younger did no other act to affect the real or the personal estates of R. Payne Knight, and in November 1827 he died without issue and intestate; and T. A. Knight, his father, duly obtained administration of his goods and chattels, rights and credits.

By indentures of lease and release, dated respectively the 24th and 25th of April 1835, and made between T. A. Knight and Sir W. E. R. Boughton, Bart. (one of the Respondents),—the release reciting that doubts were entertained whether T. A. Knight was not tenant in tail at law or in equity of the messuages, lands, and hereditaments described in the schedule thereto, and that he had determined to bar the same estate tail, if any;—It was witnessed, that in pursuance of the said determination, and also of the powers and **[519]** provisions of the Act 3 and 4 W. 4, c. 74, for the abolition of fines and recoveries, etc., T. A. Knight granted, bargained, sold, released, and confirmed to Sir W. E. R. Boughton and his heirs, the messuages, lands, and hereditaments described or referred to in the said schedule, and situate in the counties of Middlesex, Salop, and Gloucester (being part of the estates devised by the said will of R. Payne Knight); To hold the same, discharged of all estates in tail and interests in the nature of estates tail, to the use of T. A. Knight, his heirs and assigns, in fee simple.

The Appellants, in the year 1836, exhibited their bill in Chancery, against the said T. A. Knight, Thomas Knight the elder, and his sons T. Knight the younger and Edw. Knight, and against John Knight and Humphrey Senhouse Knight (other sons of T. Knight the elder), then out of the jurisdiction, and also against Edw. Wynne Pendarves, the personal representative of T. P. Stackhouse, deceased, the trustee named in the indentures of December 1825. The bill, after stating the wills, deeds, recovery, assurances, and facts before mentioned, among others, further stated that T. A. Knight had claimed to be absolutely entitled to all the real and personal estates of the testator R. Payne Knight, and to be entitled to cut down timber on the real estates, either by virtue of his will, or of the said indentures of December 1825, and the said recovery, or by virtue of the said indentures of April 1835; and that he had lately cut down divers timber and other trees which were standing on the said real estates, and disposed of them, and received and applied the proceeds to his own use; and had in like manner applied to his own use and benefit divers parts of the residuary personal **[520]** estate of the said testator. But the Appellants stated that they were advised that the said indentures of December ***1199** 1825, and the recovery, and the indentures of April 1835, were not in conformity to, but in violation of the trusts and purposes of the will of the said testator, and that neither the defendant T. A. Knight, nor the said T. A. Knight the younger, could by the said indentures, or any of them, or by the said recovery, derive any title to any part of the real or personal estate of the said testator; and that his will contained a direction, and created a trust, in pursuance of which all his real estates ought to be conveyed, and all his residuary personal estate ought to be invested and secured, in such manner as might continue the enjoyment thereof in the male descendants of Richard Knight the grandfather.

The bill prayed that the will of R. Payne Knight might be established, and the trusts thereof carried into execution; and that it might be declared that, according to the true construction thereof, and under the directions and trusts therein contained, all the real estates, and all the residue of the personal estate of the testator, ought to be conveyed and assigned in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight, the grandfather of the testator, as long as the rules of law and equity would permit; and for that purpose, that the same ought to be so limited, conveyed, and assigned that the defendant T. A. Knight should have only a life estate therein, with such remainders to his issue male

and to the Appellants as might best answer the purposes aforesaid; and that all proper accounts might therefore be taken of the real and personal property of the testator, R. Payne Knight, and of the application of such personal estate, and **[521]** of all timber cut from the real estates since his death; and that proper persons might be appointed trustees of such real and personal estates and timber money; and that the defendants, T. A. Knight and Ed. Wynne Pendarves, might be decreed to execute all necessary and proper deeds, and do all necessary acts, for the purpose of conveying, assigning, and securing such real and personal estates and timber money accordingly.

The defendants, T. A. Knight (see the tenor of his answer, 3 Beav. 159), T. Knight the elder, T, Knight the younger, and Ed. Wynne Pendarves, put in their answers to the bill.

In May 1838, before the cause came to be heard, T. A. Knight died. By his will, dated the 5th February 1836, and duly executed and attested for passing freehold estates, he (after stating certain conferences (Id. 156) and arrangements between himself and his son, before the son's death, as to the future disposition of the estates devised by R. Payne Knight's will) devised and bequeathed unto the Respondent Sir W. E. R. Boughton, his heirs, executors, administrators, and assigns, all his freehold, copyhold, and leasehold estates whatsoever and wheresoever situate, comprising as well those which were R. Payne Knight's as his own (excepting two messuages with their appurtenances situate as therein mentioned), upon certain trusts therein declared for the several benefits of the testator's wife Frances Knight, of his daughters Mrs. Acton and Mrs. Walpole, and of the said Sir W. E. R. Boughton and Dame Charlotte his wife (another of the testator's daughters), and of their second son Andrew Johnes Boughton. And after directing (among other things) that his household goods and furniture, books and pictures, etc. in his **[522]** mansion-house of Downton Castle, should be held and enjoyed with his said mansionhouse and premises, so far as the rules of law and equity would admit, by the person or persons for the time being entitled under his will to the same mansion-house and premises respectively; as to all the residue of his personal estate and effects which he should die possessed of or entitled to, and not thereinbefore disposed of, he bequeathed the same unto his wife, for her own absolute use and benefit.

The testator then made provision for the expenses of litigating the questions arising on the will of R. P. Knight; and in the event of its being ultimately decided that he had not the right of disposing of the real and personal estates of his said brother as he had done by his will, then and in such case only, and if he had power to direct the order of succession and appoint the real and personal estates of his said brother to such one or more of the male descendants of his grandfather Richard Knight as he should think proper, he gave and devised all and singular the real estates which were the property of his brother R. Payne Knight, unto his cousin T. Knight the elder, for his life, with remainders to his sons, John, Robert, Edward, James, and Humphrey Senhouse Knight, successively in tail male. And as to the personal estate of his said brother, in the event only and under the circum- ***1200** stances aforesaid, and as far as he was authorized and enabled thereto, he bequeathed the same unto the said T. Knight the elder, for his life, and after his decease to the said J. Knight (his son) and the heirs male of his body; and for default of such issue, to the said Robert Knight and the heirs male of his body: And after devising all estates which should be vested in him as a trustee, unto and to the use of Sir W. E. R. Boughton, his heirs and **[523]** assigns for ever, upon and for the trusts and purposes for which he held the same respectively, he appointed him the sole executor of his will.

This will was duly proved by Sir W. E. R.

Boughton, who thereby became the legal personal representative of T. A. Knight, and of R. Payne Knight; and also of T. A. Knight the younger, by obtaining administration *de bonis non* to him.

The Appellants filed a bill of revivor and supplement against Sir W. E. R. Boughton and the other defendants to the original bill, and also against the several persons named and beneficially interested in the will of T. A. Knight, except Robert and James Knight, who died some time before. The suit and proceedings were accordingly revived by an order of Court, dated the 24th November 1838; and by the decree made on the hearing of the causes in July 1839, it was referred to the Master to inquire what male issue of Richard Knight the grandfather were in *esse* at the death of R. Payne Knight and since his death respectively, and whether any of them, and which, had since died.

The Master, by his report, found that the Appellants (plaintiffs in both the causes), and the late T. A. Knight and his son T. A. Knight the younger, and the Respondents T. Knight the elder, and his sons, T. Knight the younger, John, Edward, and Humphrey Senhouse, and his other sons, Robert, James, and William Knight, were the only male issue of Richard Knight the grandfather, who were in *esse* at the time of the death of R. Payne Knight; that T. A. Knight and T. A. Knight the younger died respectively at the times before mentioned; that the said Robert died in 1834, James in 1836, and William in 1825, without issue; and the Master found that the only **[524]** male issue of the said Richard Knight, who had come in *esse* since the death of R. Payne Knight, were John Knight the younger,.James Thomas Knight, and Charles Knight, sons of the Respondent John, and grandsons of the Respondent T. Knight the elder.

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***1201** On the death of T. A. Knight, the Appellant John Knight, by virtue of R. Payne Knight's will and of the Act of Parliament before mentioned, and as the then next descendant in the direct male line of Richard Knight the grandfather, became and now is an hereditary trustee of the British Museum.

The causes were finally heard by the Master of the Rolls in December 1839; and his Lordship, by his order dated the 7th of August 1840, dismissed the bill (3 Beav. 148).

The appeal was brought against that order; and **[525]** the questions were, whether Thomas Andrew Knight took an estate in fee simple absolutely for his own benefit under the will of R. Payne Knight, or whether an executory trust was not thereby created for the benefit of the next male descendants of Richard Knight the grandfather.

The Appellants, as such descendants, insisted that such trust was created by the will of R. Payne Knight.

The Respondents consisted of two classes: the first class,—viz., Sir W. E. R. Boughton and his wife, a daughter of the said T. A. Knight; Frances Knight, his widow; Mrs. Acton and Mrs. Walpole, two other daughters of the said T. A. Knight; and Andrew Johnes Boughton, a son of Sir W and Lady Boughton,—claimed various interests under the will of T. A. Knight, and contended that he was not a trustee, or if he was a trustee, that he had executed the trust by the conveyance, before stated, of the estates to the use of himself for life, with remainder to his son T. A. Knight the younger, in tail male, with remainder to himself in fee; and had also acquired the fee simple by the recovery before mentioned, previously to making his will. The second class of Respondents, Thomas Knight the elder, and his sons, claimed interests under the appointment made by the will of T. A. Knight in

their favour, and intended to take effect only in case he was not competent to dispose of the estates in favour of the first-named Respondents, which T. Knight the elder, and his sons, contended he was not competent so to dispose of; agreeing so far with the Appellants.

The only other Respondent was Mr. Pendarves, who was the personal representative of the deceased trustee named in the indentures of 1825; but claimed no beneficial interest.

[526] Mr. Pemberton Leigh and Mr. J. Humphry. (Mr. G. Turner was with them), for the Appellants:—It may be admitted that Thomas Andrew Knight took an estate in fee in the property devised to him by Richard Payne Knight; and the question is, whether he held that property absolutely at his own disposal, or subject to a trust for the benefit of the next male descendants of Richard Knight the grandfather. The Master of the Rolls entertained considerable doubts on that question, and came with much hesitation to the opinion that he took the property absolutely. T. A. Knight, assuming that he had an absolute power over the estates, disposed of them by his will, first to his daughter and her issue; and then, providing for the event of its being decided that he had not such power, he appointed those estates to certain male descendants of the grandfather, passing over the nearest male descendants altogether. The pedigree shows the state of the family at the respective deaths of both the testators.

It is hardly possible for any person, reading the several passages (see the passages printed in *italics* , ante pp. 515-16) in the will of R. Payne Knight, to say that he did not intend that the estates should be continued in the direct male line of the family. The questions to be decided are, first, whether a trust was not impliedly created by those words of "confidence in the honour of the family," etc., and of "trust in their justice," etc.; and secondly, whether there is such uncertainty of subject and of objects, as to render it impossible to carry such trust into execution? If the House should decide the first question in the affirmative, then no difficulty, it is submitted, will be allowed to stand in the way of framing a settlement to execute the trust according to the will.

[527] By affirming the order of the Master of the Rolls, the House would subvert a rule of construction that has subsisted for more than a century, and overturn hundreds of cases that have been decided in that time. The rule is first stated with clearness in the case of *Pierson* v. *Garnet* (2 Bro. C. C. 38). There the testator, bequeathing a residue to Peter Pierson, his executors, etc., added, "and it is my ***1202** dying request to the said Peter Pierson, that if he shall die without issue living at his death, he do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt." On the question whether these words created a trust, the Master of the Rolls (Sir Lloyd Kenyon) said, "The principles appear to be those which are recognized by Lord Thurlow in the cases *land* v. *Trigg* , and *Wynne* v. *Hawkins* *kins* (1 Bro. C. C. 142; 179), that where the property to be given is certain, and the objects to whom it is given are certain, there a trust is created. The principles were not first laid down by Lord Thurlow, but extracted by him with great wisdom from those cases on which preceding Chancellors have decided questions of this nature." He then referred to several cases, and upon the reasoning and authority of them, he held that the words were imperative and created a trust; and that decision was affirmed by the Lord Chancellor (2 Bro. C. C. 225). In *Malim* v. *Keighley* (*ley* (2 Ves. jun. 335; 529), Lord Alvanley laid down the broad rule, that "wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he

shall **[528]** have an option to defeat it." There also the decision that the words created a trust, was affirmed on appeal. In *Cary* v. *Cary* (2 Sch. and Lef. 189), Lord Redesdale states the rule more fully, thus: "Where a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command; and if he shows his desire, he in fact expresses his intention, provided the objects to which he refers are so defined that a Court can act upon the desire so expressed. If he is sufficiently explicit in that respect, words expressing desire, words simply intimating that he has no doubt such and such things will be done, will operate as imperative on the person to whom they are directed." This exposition of the rule is most important, as it embraces all the requisites to the creation of an executory trust. The rule is laid down in a similar manner, but more in form, by Lord Eldon in *Wright* v. *Atkins* (T *kins* (Turn. and R. 157), in which the words held to create a trust were almost the same as in the present case. The devise was to the testator's mother, Mrs. A., "and *her heirs for ever, in the fullest confidence* that after her decease she will devise *the property to my family.* " On a question whether Mrs. A. was impeachable of waste, Lord Eldon said, "I confess I cannot help thinking that if there is a title in the plaintiffs, it must be founded on the doctrine of trusts, that this is a fee given to Mrs. Atkins, with an obligation imposed upon her conscience to dispose of the property after her death to the family of the testator." His Lordship then says, "In order to determine whether the trust is a trust this Court will **[529]** interfere with, it is a matter of observation, 1st, that the words must be imperative; that the words are imperative in this case there can be no doubt: 2dly, that the subject must be certain; and that brings me to the question, what is meant by the words 'the property'? 3dly, that the object must be as certain as the subject; and then the question will be, whether the words 'my family' have as much of the quality of certainty as this species of trust requires." The words of the will in *Prevost* v. *Clarke* (2 Madd. 458), which were held sufficient to raise a trust in a bequest of a residue of a personal estate, were these: " *Convinced of the high sense of honour* , etc. of my son-in-law, I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave, at his decease, to my children and grandchildren the share of my property I have bestowed on her." In *Wood* v. *Cox* (1 Keen, 317) the testatrix bequeathed "all her personal estate to Sir G. Cox, his heirs, executors, etc. for his and their own use and benefit for ever, *trusting and wholly confiding* in his honour that he will act in strict conformity with my wishes." She on the same day dictated a testamentary paper, containing a list of persons, ending thus: "Such is the wish of S. C." On the above words, Lord Langdale, M. R., held that Sir G. Cox was a trustee of all the testatrix's property; but Lord Cottenham (Chancellor) thought he was trustee only of so much as the testatrix expressed her wish about (2 Myl. and C. 684).

In all these cases, decided by the most eminent Judges, supported by the reasoning and authority of **[530]** numerous other decisions to which attention shall be directed, the principle of the rule raising a trust on precatory words, is so well established that no Court can now venture to reverse or disturb it. Among the ***1203** various useful recommendations of the Real Property Commissioners, on Wills, several of which have been carried into effect by the Wills Act (1 Victoria, c. 26), there was no recommendation or even suggestion to alter this rule. If the policy of it was considered objectionable, the Commissioners would unquestionably have recommended some alteration or modification of it. The policy of the rule is stated by the Master of the Rolls, in *Pierson* v. *Garnet;* and the principle of it was collected with great wisdom by Lord Thurlow from former cases.

The Appellants ask no extension of the principle, but they protest against any contraction of it. The rule has been acted on for a long period, and is analogous to another rule on which Courts of Equity act, the rule *cy pres*, in the construction of instruments.

There are three essential requisites to the rule, according to the definition of it in most of the cases: 1st, the words indicating the testator's wish, such as "desire," "will," "request," "recommendation," "entreaty," "hoping," "not doubting," "confiding," "trusting," etc., must be so expressed as to be imperative on the person to whom the devise or bequest is made in the first instance; 2dly, the subject of the wish, etc. must be certain, or capable of being ascertained; and 3dly, the objects or persons to take the ultimate interest must also be certain, or so pointed out by the testator that they may be ascertained. All the requisites are found to concur in a great number of cases besides those before cited, and they are stated in the third edition of Roper on **[531]** Legacies (Vol. 2, p. 373 *et* *son* v. *Limbury* (cited in Amb. 4), *Eales* v. *England* (*land* (Prec. Chan. *ding* v. *Glyn* (1 Atk. 468; 5 Ves. 501; 8 Ves. 571; and T. and R. 161), *Massey* v. *Shearman* (Amb. 520), *Nowlan* v. *Nelligan* (1 Bro. C. C. 489), *Brown* v. *Higgs* (4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192), *Birch* v. *Wade* (3 V. and B. 198), *Tibbits* v. *Tibbits* (19 Ves. 655; 1 Jac. 317), *Cruwys* v. *Colman* *man* (9 Ves. 319), *Forbes* v. *Ball* (3 Meriv. 437), *Horwood* v. *West* (1 Sim. and Stu. 387), *Dashwood* v. *Peyton* (18 Ves. 41).

In the same book (2 Rop. on Leg. 388) are stated those cases in which one or more of the three requisites was wanting, and, consequently, the presumption of implied trust negatived. That two of those requisites exist in the present case, namely, words clearly expressing the testator's wishes, and pointing out the objects, was admitted by the Master of the Rolls in giving his judgment (3 Beav. 171, 177, 179), and is placed beyond doubt by the cases on the subject. The doubts entertained by the Master of the Rolls regarded the uncertainty of the property devised. The subject or property is considered uncertain when there is any legal doubt or ambiguity in the description of it, or when the amount is made to depend on a contingency, or a discretion is impliedly or expressly given to the first testator to dispose of the whole or any undefined part of it, or to augment or diminish it; *Attorney-general* v. *Hall* *ney-general* v. *Hall* (cited 1 Ves. sen. 9), *Bland* v. *Bland* (2 Cox, 349), *Wynne* v. *Hawkins* (1 Bro. C. C. *land* v. *Trigg* (Id. 142), *Sprange* v. *Barnard* (2 Bro. C. C. 586), *Pushman* v. *Filliter* (3 Ves. jun. 7), *Morice* v. *The Bishop of Durham* (9 Ves. 399; 10 Ves. 535), **[532]***Wilson* v. *Major* (11 Ves. 205), *Gibbs* v. *Rumsey* *sey* (2 V. and B. *lis* v. *Selby* (1 Myl. and C. 286), *Lechmere* v. *Lavie* (2 Myl. and K. 197), Jarman on Wills (Vol. 1, p. 341 *et seq.*), and Jarman's Powell on

Devises (Vol. 1, p. 352 *et seq.* notes), *Eade* v. *Eade* (5 Madd. *tis* v. *Rippon* (Id. 434), *Sale* v. *Moore* (1 Sim. 534), *Shaw* v. *Lawless* (5 Clark and Fin. 129), *Ex parte Payne* (2 You. and C. 636).

The subject of the trust, in this case, is free from any legal uncertainty, which is the only uncertainty that the Courts notice. The testator gave all his estates real and personal to his devisee, except certain reservations to a charity and other purposes in the will mentioned. The trust therefore applies to the whole property so given; or if it should be held to apply only to the estates which came to the testator from his grandfather, they may be easily ascertained.

It was contended in the Court below, on behalf of the Respondents, that the interest to be taken by the parties should be as certain as the subject: but there is no ground for that argument; it is not a part of the rule as laid down in the cases before cited, and there is no case to warrant it.

If it shall appear that an executory trust was created, within the control of the Court, and that the objects and subjects are sufficiently certain, the next question is in what manner is it to be carried into effect. There can be no difficulty, in a Court of Equity, in effectuating the testator's intention. The whole of the will shows his anxiety to preserve the estates in his family, and the Court has jurisdiction to ***1204** enforce his intention, if the family should be disposed to disappoint it. The difference between a trust ed **[533]** and an executory trust is recognised in many cases, and is simply this; that the former is created and executed by the instrument which passes the legal estate to the trustee; the latter is to be executed by the trustee whom the donor appoints to carry his intention into effect, or by a Court of Equity; which, in cases where full effect cannot be given to the intention, as being inconsistent with the rules of law, will give effect to it as far as those rules will admit; *Humberston* v. *Humbe* mit; *Humberston* v. *Humberst on* (1 P. Wins. 332), *Papillon* v. *Voice* (2 P. Wms. *kins* v. *Hopkins* (1 Atk. 593; see 2 Jac. and W. 18, n. b.), *Countess of Lincoln* v. *Duke of Newcastle* (12 Ves. 218-27-30-38), *Wheate* v. *Hal l* (17 Ves. *ster* v. *Angell* (1 Jac. and W. 625), *Higginson* v. *Barneby* *ginson* v. *Barneby* (2 Sim. and Stu. 516), *Lord ter* v. *Earl of Effingham* (3 Beav. 180 n.), *Woolmore* v. *Burrows* (1 Sim. 512, 525), *Mortimer* v. *West* (2 Sim. 282), *Hill* v. *Hill* (6 Sim. 144), *Lindow* v. *Fleetwood* (Id. 152), *Tollemache* v. *Earl of Coventry* (2 Clark and Fin. 611), *Bankes* v. *Baroness Le Despencer* (10 Sim. 576-590), *Ommaney* v. *Butcher* (Turn. and R. 270-1).

It is clear from these cases that there can be no reasonable difficulty in settling these estates so as to continue them in the family as the testator wished. It was suggested in the Court below, that the old settlement made by the grandfather should be taken as a model; but T. A. Knight has dealt with the estates in a manner that was not in accordance with the intention of that settlor, or of R. P. Knight; for by the deeds of 1825 he made his son tenant in tail, instead of giving him a life estate. The estates should be limited in strict

settlement, on the principle that estates for life should **[534]** be given to all the male descendants of the grandfather who were living at the death of the testator R. P. Knight, with limitations in tail male to their then unborn issue, respectively and successively. That form of settlement must have been in the view of the Court in making the first decree in the cause, as appears by the inquiries thereby directed. Whether, in framing the proposed settlement, the tenants for life should be unimpeachable of waste, and have powers of leasing, are questions for the consideration of the House. The cases on them are, *Leonard* v. *Earl of Sussex* (2 Vern. *tard* v. *Proby* (2 Cox, 6), *Wright* v. *Atkins* (T *kins* (Turn. and R. 143), *Woolmore* v. *Burrows* (1 Sim. 528), *Bankes* v. *Le Despencer* (7 Jurist, 210).

Some doubt was suggested in the Court below whether the words of R. P. Knight's will would not create a perpetuity; and if this was a direct trust, there would be ground for the doubt; but the proposed settlement will model the trust so as to bring the devolution of the property within the rules of law; *Lord Dorchester* v. *The Earl of Effingham* (3 Beav. 180, n.), *Humberston* v. *Humberston* (1 P. Wms. 332).

It is, on the whole, submitted, that according to the true construction of the will of R. Payne Knight, the devise and bequest of his real estates and of the residue of his personal estate to T. A. Knight were made subject to an executory trust, which T. A. Knight ought to have carried into effect by a strict settlement, conveying and assigning the real estates and residuary personal estate in such manner as best to secure the continuance and enjoyment of them to the male descendants of Richard Knight the grand- **[535]** -father, as long as the rules of law and equity would permit. The Appellants, being the next male descendants, are therefore now entitled to, and ought to have conveyed and assigned to and in trust for them, estates and interests for their respective lives successively according to their respective seniorities, with such remainders or limitations and trusts over to or for the benefit of their respective issues male, and with such further remainders or limitations and trusts over, as may best answer and secure the purposes of the will. 2 As to the estates to be so settled, it ***1205** appears **[536]** by the will that the trust was meant to extend to the whole of the testator's estates real and personal (with the exception of the reservations in his will mentioned). If any uncertainty should be considered to exist, whether his residuary personal estate, or even some parts of the real estates which may not have devolved to him from his grandfather, were intended to be subjected to the trust, such uncertainty, if considered as affecting the residuary personal estate, could not invalidate the trust as regards the real estates; or if considered as affecting any parts of the real estates as may not have devolved to him from his grandfather, could not affect or invalidate the trust as regards the other certain and ascertainable parts of the real estates, to which such trust would clearly apply.

The Solicitor-general and Mr. Tinney, for the Respondents of the first class 3 :—It has been contended by the Appellants' Counsel, that a trust is raised on the face of this will; that it is an executory trust; and they propose a form of strict settlement for carrying it into execution. It is not necessary to follow them through the vast number of cases they cited, nor to controvert many of the propositions they extracted from them. It must be admitted that if the testator created an executory trust, it shall be carried into effect, whatever may be the difficulty or difference of opinion as to the mode of effecting it. The first question therefore is, does the will create a

trust, or did the testator intend it? And in order to discover the testator's intention and arrive at a true construction, the House may look, not only to every **[537]** part of the will, but also to the state of the testator's property and family at the time he made it.

It has been argued that the principle of the old decisions, raising trusts upon precatory words, has been so long and universally recognized and acted upon, that though it has been sometimes disapproved of, no Court, not even this House, would venture to subvert it. That proposition may be conceded; but for the same reason, it is submitted that the principle of the rule is not to be extended. There are several cases, in which, although the rule was upheld, the policy of it was questioned, and a disposition shown rather to contract than extend it. In *Wright* v. *Atkins* (17 Ves. 255), the decision of Sir W. Grant, that the devise to Mrs. Atkins "and her heirs for ever, in the fullest confidence that she would at her death devise the property to the testator's family," gave her a life estate only, was clearly contrary to the intention; but that learned Judge thought he was bound by the principle of the decisions in Chapman's Case (Dyer, 333), *Counden* v. *Clerke* (Hob. 33), and *Crossley* v. *Clare* (Amb. 397). Sir W. Grant's decree was, for the same reason, affirmed by Lord Eldon (19 Ves. 299); but his Lordship, on granting an injunction to restrain Mrs. Wright from cutting timber on the estate, said (1 Ves. and B. 315-16; S. C. G. Coop. 111), ***1206** "This sort of trust is generally a surprise on the intention; but it is too late to correct that." "Conceiving these cases upon words of hope, confidence, etc. to be generally decided against the intention, I have endeavoured to raise a distinction in the defendant's favour, but cannot. I do not believe the testator intended a mere trust." Those orders of **[538]** Sir W. Grant and Lord Eldon were reversed in this House; and both Lord Eldon and Lord Redesdale came to the conclusion, after a great deal of consideration, that Mrs. Atkins took an estate in fee, unimpeachable of waste. 4 In *Meredith* v *dith* v. *Heneage* (1 Sim. 542; see pp. 550-1-2; S.C. 10 Price, 230; see pp. 265-6), Lord Chief Baron Richards says, in reference to the words of Mr. Heneage's will, "Do they impose a trust on Mrs. Heneage, and are they imperative on her with respect to the disposition of the property; or do they import more than the wish of the testator, etc., leaving it to her own option, however, to deal with it as her own?" "But I hope to be forgiven, if I entertain a strong doubt whether in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator." "In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative," etc.

In *Sale* v. *Moore* (1 Sim. 540), Sir A. Hart, V. C., said, "the first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions has of late years been against converting the legatee into a trustee." In those two last-mentioned cases, it was decided that no trust was created upon the words "recommending and not doubting," etc. in the latter; and "in full confidence," etc. in the former. We do **[539]** not seek to reverse the old cases, in which the rule so disapproved of originated, but only to show that the tendency of modern decisions is not to extend, but to narrow the rule.

The question whether a trust was raised in the present case, turns on the construction of the words of the will, regard being had also to the situation of the testator in respect to his family and property. If it were not irregular to cite the opinions of a living author, as has been done on the other side, enough might be found in Mr. Jarman's notes to Powell on Devises, to dispose of this question:—

[The Lord Chancellor: However eminent a living author may be, we cannot act on his opinions, but we attend to the authorities to which he refers us.]

The doctrine laid down upon words of recommendation in *Meggison* v. *Moore* (2 Ves. jun. 632-3), shows that, as such words are not necessarily imperative, you must, for the true construction of them, consider the subject-matter, the situation of the parties, and what is the probable intention. And in *Morice* v. *The Bishop of Durham* (10 Ves. 536), Lord Eldon said, that where *prima facie* an absolute interest was given, and the question was whether precatory, not mandatory, words imposed a trust on the person taking that interest, it must be shown that the object and subject are certain, and if neither is certain, the recommendation or request does not create a trust; "for of necessity the alleged trustee is to execute the trust, and the property being so uncertain and indefinite, it may be conceived the testator meant to leave it entirely to the will and pleasure of the legatee." "Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not ex- **[540]** -pressly creating trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed on the Court to say what should be so applied, and to what objects, has been the foundation of the argument that no trust was intended."

There is in the present case a devise of property in fee, and the well-known rule of construction must prevail; namely, that where property is given absolutely in clear terms, to take away that gift or cut it down to a life interest requires terms equally clear to be used. Have such terms been used in this will, or has it been shown by the Appellants that the testator meant to cut down the devise in fee to an estate for life? The House must be judicially satisfied, free from all doubt, that the legal fee was so ***1207** cut down, before it can hold it to be fettered with a trust. It should have appeared that there was a trust, an executory trust, before application was made to the Court to carry it into effect. Lord Eldon applied that principle in *Wright* v. *Atkins*, in the passage cited on the other side (Turn. and Russ. 157-8); and it is most important to notice what he there says on the uncertain description of the words "property" and "family," as the subject and object of an alleged trust.

It is quite certain, on the words of Mr. Payne Knight's will, that no trust was, or was intended to be, created as to any part of his property. A mere wish or recommendation to continue the property in his family, however clearly expressed, would not create a trust. The testator being himself without children, and desirous to constitute a head of the **[541]** family, he wished that his successors would continue the estates in the family. Did he wish that his successors should be without powers of jointuring or leasing? or that any of them, who might have daughters and no sons, should be without any power to make provision for them out of the estates, but should in that case denude himself of the whole of the property in favour of some remote relation? It is beyond all question that the testator did not intend to impose on his successors any legal obligation to a strict settlement of the property; he merely appealed to them not to dispose of it away from the family; and the tying them down by settlement, such as was proposed, would not secure the object of continuing it in the family, inasmuch as the first tenant in tail might get rid of the entail. The testator did not make any reference whatsoever to any settlement, and in most cases of executory trust there is found in the wills an allusion to some instrument to be executed; *Woolmore* v. *Bur-*

rows (1 Sim. 512), *Ford* v. *Fowler* (3 Beav. 146), *Lord ter* v. *Earl of Effingham* (Id. 180. n.). The word "continue," on which the Appellants lay some stress, was used in *Mortimer* v. *West* (2 Sim. 282), and *Lawless* v. *Shaw* (*less* v. *Shaw* (5 Clark and Fin. 129), but no effect was given to it.

But how can any settlement be executed of the property devised by this will, which leaves it quite uncertain what property is to be settled, or on whom, or what estate or interest the parties are to take? And where there is an uncertainty of interest, which is included in the uncertainty of objects, it is impossible to execute a trust. It is no answer to this objection to say that the Court will determine the **[542]** quantity of interest. The Lord Chancellor says, in *Malim* v. *Keighley* (*ley* (2 Ves. jun. 531), "You must first see what interest the person to whom the recommendation applies takes;" and the same is said or implied in all the cases in which it was held that there was no trust on account of uncertainty as to the ject; *Lechmere* v. *Lavie* (1 Myl. and K. 197), *Ex parte Payne* (2 You. and C. 636), *Harland* v. *Trigg* (2 Bro. C.C. 142), *Shaw* v. *Lawless* *less* (5 Clark and Fin. 129), and *Earl of Stamford* v. *Hobart* (3 Bro. P.C. 38), *Henry* v. *Hancock* (4 Dow. 145), Jarm. Pow. on Dev. (Vol. 1, p. 353, n.). To raise an executory trust on precatory words, clearness, distinctness, and precision of description, both of object and of subject, are essentially necessary, and uncertainty in any of these is fatal to a trust. Can any description of object be more vague than the words "family," and "descendants," and "successors?" If a trustee or the Court is to execute a trust, there must be three certainties: what is to be settled in trust, on whom settled, and in what manner. As to the subject in this case, the reason given by the testator for his recommendation does not apply to any part of the property which he had not derived from his grandfather; and yet the will makes no distinction. If a trust were created, it ought to be confined to the property derived from the grandfather; and regard being had to the language and the nature of the limitations, it must be restricted to the real estate. There is, at any rate, no sufficient ground for including the personal estate, and especially the testator's own personal estate, most of which he bequeathed to the British Museum.

The testator explained his views by his own con- **[543]** -duct in cutting off the entail in his grandfather's estates, and in devising those estates, together with part of his own property, to the persons who would have inherited the grandfather's estates. He exercised a discretion himself, by giving away some parts of the property to other objects; and he has left a discretion to his successor expressly as to certain points, such as rewarding old tenants and servants, which is inconsistent with a trust binding the whole property. In giving some legacies, which he called reservations from the rents, he expressed confidence in the integrity and honour of his family to take no technical objection to these gifts. Those words unquestionably applied to the small ***1208** reservations, and cannot be construed to take away the estates from the persons to whom he had before given them. He, in a subsequent part of the will, "trusts to the liberality of his successors, to reward his old servants and tenants; and to their justice, to continue the estates in the male succession." Can any one for a moment seriously contend that these latter words create a trust? To whose justice does he trust?—the justice of all who should succeed him in all time, without limit. As well might it be said that the first part of the sentence created a trust for old servants and tenants,—which is not pretended,—as that the latter part raised a trust for

their descendants. The appeal to the liberality and justice of his successors did not import that any of them should denude himself of the property, or do any act that would require a suit in equity. It is not denied that the rule of raising trusts on precatory words in a will is correctly laid down in the cases of *Pierson* v. *Garnet* , and *Malim* v. *Keighley;* *ley;* but these and the numerous other cases which have been cited for the Appellants, fall far short of what they ask the **[544]** House to do; to grant which would be extending the rule even beyond the principle of the old decisions.

It should not be forgotten (supposing the language of the will to be imperative) that a settlement was executed by Mr. T. A. Knight by the deeds of 1825, in conformity with the expressed wishes of the testator; and if T. A. Knight the younger had lived or left a son, the questions raised in this appeal could not have occurred. In the event that has happened, the Respondents, and not the Appellants, are entitled under those deeds, as well as under the will of T. A. Knight.

[Mr. Kenyon Parker said he was instructed on behalf of Mrs. Walpole, one of the Respondents, to support the decree; but as it appeared that her interest was sustained by the Counsel who were heard for other Respondents, the Lords declined to hear him.]

Mr. Pemberton Leigh, in reply:—The main argument for the Respondents is, that to raise a trust upon precatory words there must be such certainty of subject and of object, and also of interest, pointed out by the instrument of gift, that the trustee may be able to execute the trust without the assistance of a Court. That is new doctrine; such a degree of certainty is inconsistent with the established rule. Why should more certainty of subject or object be required in a trust raised by precatory words, than in direct trusts? No such certainty is required by the Courts in the construction of instruments. If from the words of the instrument it can be collected that the testator intended to create a trust, that intention will be carried into effect. In *Jones* v. *Morley* (12 Mod. 159), Lord Holt says it is not necessary in declaring a use in equity, if there be a transmutation of possessicn, to use the **[545]** word "use;" any word by which the party's mind may be known is sufficient. And in order to create a trust, all that is necessary is to show, first, that the person to whom the property is given is not to take the whole; or, secondly, that a beneficial interest in it is given to one person, with the ulterior benefit to others. In none of the numerous cases collected in Jarman's Powell on Devises (vol. 1, p. 348 *et seq.*), or in White's Edition of Roper on Legacies (vol. 1, pp. 373. 388), and before referred to, was there such certainty required as the Respondents' counsel allege. The certainty of subject and of object required to constitute a trust on precatory words, is that degree of certainty that will enable the Court to determine them as if the testator himself had declared them; and that is the scope of the rule as laid down by four eminent Judges: Sir William Grant, in *Parsons* v. *Baker* (1 *sons* v. *Baker* (18 Ves. 478); Lord Eldon, in *Tibbits* v. *Tibbits* (1 9 Ves. 664); Sir T. Plumer, *maney* v. *Butcher* (Turn. and Russ. 270); and the present Lord Chancellor of Ireland, in *Phillips* v. *Eastwood* (Lloyd and Gould, 297). The Respondents notwithstanding, insist that there must be a clear certainty, and no discretion left to the donee. It is true no discretion is to be left to him to dispose of or to diminish the property, but he may have a discretion to select the persons, the objects of the trust; Roper on Legacies (vol. 1, p. 273 (3d ed.)), *Eales* v. *England* (P *land* (Prec. Chan. *sey* v. *Shearman* (Amb. 520), *Malim* v. *Keighley* *ley* (2 Ves. jun. 335), *Brown* v. *Higgs*

(4 Ves. 708). The rule to be collected from these cases is, that where a testator points out a class of persons out of whom the trustee is to select, if he **[546]** does not select, the trust still remains. The trust is raised if it appears that a beneficial interest is to go to the first donee; *Harland* v. *Trigg* (1 Bro. C. C. 142), as explained by Lord Eldon in *Wright* v. *Atkins* (G. Coop. 122). There was no decision in *Wright* v. *Atkins*, that a trust was not created. The decree pro- ***1209** nounced at the Rolls, and affirmed by Lord Eldon (17 Ves. 255; 19 Ves. 299), declaring a trust to have been created by the words of confidence used by the testator, was not shaken, in that respect, on the appeal to this House, where so much only of the judgments below as declared Mrs. Atkins to have taken an estate for life only, was reversed; this House declaring that she took an estate in fee, but that it was premature to decide the ultimate trust until after her death. The rule, as qualified by Chief Baron Richards *dith* v. *Heneage* (1 Sim. 543), and which was taken by him from the judgment of Lord Alvanley in *Malim* v. *Keighley*, must govern the decision in this case. The ultimate decision *dith* v. *Heneage* rested on the words, "free and unfettered," added to the gift. In this case the testator uses no such words, but says, "And I do hereby constitute and appoint the person who shall inherit my said estates under this my will, my sole executor and *trustee to carry the same and everything therein contained into execution.* " If the testator intended that the first donee of this property should take it absolutely, why should he call him a trustee? These words could not be confined in their application to the pecuniary legacies that immediately precede them; they apply expressly to everything contained in the will. The words in this and other parts of the will, indicating a desire that the property should go in the direct male line to the descendants of the grandfather, amount to a mand, **[547]** according to the rule deduced from the cases before referred to. And in the clause bequeathing the articles of virtu to the British Museum, the testator makes it a condition that the same descendant, the representative of the family, should be made an hereditary trustee of the Museum, "to be continued in perpetual succession to his next descendant in the direct male line." The testator having so indicated his desire, and designated the class of persons to succeed to the property, concludes, trusting to the justice of his successors to exercise such a disposition of the estates as will continue them in the male succession of the family. There can, from these clauses, be no doubt of the objects of the trust. The class of persons who are to take is clearly designated; and it is inconsistent with the will to dispose of any part of the property in favour of females. It was argued that it could not be the testator's intention to exclude the daughters of T. A. Knight, in case he should leave no son; but, in fact, they were passed over by the testator, and they could not take any part of this property if their father had died intestate: an executory trust was clearly created, and though the testator did not point out, as he might not himself have known, the manner of carrying it into execution, the Court will give effect to the intention, by directing the person who is in possession to be a trustee to carry it into execution.

The Lord Chancellor (Sept. 4):—The question in this appeal—which was argued before your Lordships in the last Session—arose upon the will of the late Richard Payne Knight. He had succeeded to a large real estate and to considerable personal property, under the will of his grandfather Richard Knight. These, with other real **[548]** estates and other personal property, he bequeathed "to his brother Thomas Andrew Knight, should he be living at the time of his, the testator's, decease, and if not, to his son Thomas Andrew Knight the younger; and in case he should die before the testator, to his eldest son, or

next descendant in the direct male line; and in case he should leave no such descendant in the direct male line, then to the next male issue of the testator's said brother, and his next descendant in the direct male line; but," he adds, "in case no such issue or descendant of my said brother or nephew shall be living at the time of my decease, to the next descendant, in the direct male line, of my late grandfather Richard Knight, of Downton, according to the purport of his will, under which I have inherited these estates, which his industry and abilities had acquired, and of which he had therefore the best right to dispose." This property so bequeathed was given in fee.

The will, in a subsequent part of it, contained this clause: "I trust to the liberality of my successors to reward any others of my old servants and tenants, according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather Richard Knight."

The question is whether by the words, "I trust to the justice of my successors, in continuing the estates in the male succession," etc., a trust was created; or whether the ***1210** testator intended to leave a discretion in the persons whom he calls his successors, with respect to the disposal of their property. The law upon questions of this nature is well laid down by Lord Alvanley in *Malim* v. *Keighley* (*ley* (2 Ves. jun. 335): er," **[549]** he says, "any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."

I have shared the doubt expressed by the Master of the Rolls in his judgment in this case (3 Beav. 175 *et seq.*); but I have come to the conclusion, upon considering the whole of the will, that the testator had no intention to create a trust; that no trust has in fact been created; and that it was in the discretion of the devisee, Thomas Andrew Knight, to dispose of the property as he should think proper. I do not think that the testator intended to control his successors in the disposal of the property, but to leave the whole to their discretion. In the very clause in question, the testator "trusts to the liberality of his successors to reward any others of his old servants and tenants, according to their deserts." This, it is clear, does not raise a trust; it creates no legal obligation; and when the testator, therefore, goes on and expresses his trust in "their justice, in continuing the estates in the male succession, according to the will of the founder of the family," it would be difficult to suppose that he intended to create a different description of obligation. He had himself suffered a recovery of the estate to which he had succeeded under the will of his grandfather, and thereby converted the entail into an estate in fee simple. By his will he disposed of this to the nearest male descendant of his grandfather, who should be living at his own death. He then gave him the power of acting as he himself had **[550]** done in furtherance of his grandfather's view; and he might, and probably did, suppose that this mode of disposing of the property would be more effectual for that purpose than any special limitation of it that the law would permit.

Another observation arising out of the clause is, that it is not confined to his immediate successors but is without limit: as he must have known that such an injunction could not be imperative on his successors generally, he must, I think, have meant it as a mere suggestion applicable in the same way to his immediate as to his more remote successors, and not intending thereby to fetter their discretion as to the disposal of the property.

Another argument in support of this view arises out of the language of the clause as to the property to which it refers. It is not clear to what it applies. By the use of

the word "continuing," it would seem to be confined to the estates which the testator took from his grandfather; but this is by no means clear. It is doubtful, too, whether it includes the personal as well as the real estate. This vagueness is not inconsistent with the intention that everything should be left to the discretion of the successors, but is not easily reconcileable with the intention of imposing a positive obligation upon them.

This obscurity, as to the property to which the clause was intended to apply, and the circumstance that an indefinite portion of the personal estate was subject to be disposed of according to the liberality of his successors, raise another difficulty in the way of considering this as an imperative trust.

Then as to the nature of the estate to be taken in the property, supposing the property itself to be sufficiently ascertained, what is there to guide the Court **[551]** in determining it? The testator has said nothing upon the subject. This affords a further reason against the supposition that the testator intended to impose an imperative obligation on his successors as to the settlement of the property.

Referring then to the rule stated by the learned Judge (Lord Alvanley) to whom I have referred, there is, I think, too much uncertainty in this disposition to admit of a trust being raised in the devisee with respect to any part of the property in question; and considering the terms that the testator has used, in connexion with the other circumstances to which I have adverted, I am persuaded he had no intention to do so. I recommend your Lordships, therefore, to affirm this judgment.

Lord Brougham:—I heard the argument in this case, and I take the same view of it as that which has been expressed by my noble and learned friend. With respect to the precatory words, I had some doubt at first, but on further looking into the case ***1211** these doubts have been removed; and on the whole I agree with my noble and learned friend in thinking that this judgment ought to be affirmed.

Lord Cottenham:—I concur in thinking that the decree in this case ought to be affirmed. I adopt the rule as laid down by Lord Alvanley in *Malim* v. *Keighley*, and I think this case comes within the exception he there lays down: his words are thus reported: "Wherever a person gives property, and points out the object, the property, and the way in which it shall go, that creates a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he is to have an option to feat **[552]** it." "If a testator shows his desire that a thing shall be done, unless there are plain express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust" (2 Ves. jun. 335).

I will not consider whether the testator has sufficiently described the property, or expressed the way in which it should go; because, assuming that he has done so, I think there is sufficient upon the face of this will to show that he did not intend to take away from the devisee the discretion of defeating the devise he expressed. Having by his will expressed his sense of the justice of continuing the estate in the male succession, according to the will of his grandfather, it must be assumed that he conceived the obligation to be binding on himself; and how did he perform this duty? He had a brother, and that brother had a son at the time he made his will; but so far from himself limiting the succession of the estates according to the will of his grandfather, he gives absolute estates to his brother, and to his brother's son, but only in the event of his brother not being alive at the time of his own death; and he makes provision in terms for the next descendant in the male line of his grandfather, only in the event of there being no issue male of his brother at

the time of his own death. Such next descendant, in the direct male line, of his grandfather was to take according to the purport of his (the grandfather's) will; but there was no such direction as to his brother or his brother's sons. He, no doubt, assumed that the sons of his brother and their issue male would in due succession enjoy the property; but **[553]** not doubting but that such would be the case, he took no means to secure it, unless the provision at the close of his will had that effect; and if it had, all would have taken immediate interests in remainder under the will, and not absolute interests, such as he gave to his brother and his brother's son in certain events.

It is an observation incident to all trusts created by precatory words, that the testator might, if he had intended, have created an express trust; but there is a peculiarity in this case which seems to give peculiar force to that observation: the testator must have been aware of his own legal power over the property, obtained by his own act (the recovery he had suffered), but he felt bound by a moral obligation to give effect to the supposed wishes of his grandfather. To effect that he must have intended either to subject his successors to the same moral obligation and so to effect his object through their acts, or to secure it by his own. The provisions of his will are precisely calculated for the first purpose, but are inapplicable to the second. An act which is to depend upon the sense of justice of another, must be discretionary in the person from whom it is to proceed. In ordinary cases the testator must be supposed either to have considered his recommendation as equivalent to a command, or as imposing a condition upon the gift; both of which exclude the idea of discretion, which is in the present case necessarily implied.

This construction is, I think, strengthened by the clause which relates to the donation he gave to the poor and others out of his estate; he intended that those directions should be imperative, and with this view he declared "that the person who should inherit his estates under his will should be his sole tor **[554]** and trustee, to carry the same and every thing contained therein duly into execution." But apprehending that there might be some technical inaccuracies fatal to the legal validity of these gifts, he in that case expresses his "confidence in the approved honour and integrity of his family to take no advantage of any such technical inaccuracy, but to admit all the comparatively small reservations he had made out of so large a property, according to the plain and obvious meaning of his words;" terms very similar to those by which he expresses his wishes as to the line of succession to his estates, but very different from those in which he gives directions which he intended to be imperative.

***1212** I think, for these reasons, that the testator contemplated, and, in the words of Lord Alvanley, intended that the desire he expressed should be subject to the control of those who might succeed to his estates, and liable to be defeated at their discretion and option; and consequently that the judgment of Lord Langdale was right, and ought to be affirmed.

Lord Campbell:—Having been Counsel in this case, I have regarded my own opinion upon it with a good deal of distrust, although that opinion was very strongly in favour of the decree; but now, having heard the opinions of the noble and learned Lords who have preceded me, I have no hesitation in saying that I do not entertain the smallest doubt that the decree was right; feeling strongly that the testator had not the remotest notion that there was to be any resort to a Court of Justice to keep the estate in the family, but that those precatory words were considered by him as intimating what he desired that the settlement should be. I can hardly say that that is **[555]** a strict settlement, because that is not at all the model on which such a settlement should be framed. It has caused great confusion in this particular case, and might tend, I think, to unsettle the law upon the subject. I therefore heartily concur in the motion, that the judgment be affirmed.

The Lord Chancellor: I think the costs are provided for by the will.

Mr. Humphry: The doubt expressed by Lord Langdale arose upon the terms of the will (3 Beav. p. 175 *et seq.*); and in such circumstances the costs of litigation should be paid out of the property.

The Lord Chancellor: Is there not a provision in the will for the costs, in case it should come to the House of Lords?

Mr. Hodgson: That is in the will of Thomas Andrew Knight. Hitherto each party has paid his own costs.

The Lord Chancellor: Lord Langdale expresses great doubt. It is a question arising on the will.

Lord Campbell: Where a will is so worded as to render litigation almost inevitable, it is hard that parties should be involved in it at their own costs.

Lord Brougham: The rule in the Court of Chancery is, that where the will raises a doubt, you make the estate pay the costs of the litigation. The question arose out of the will in this case.

The decree was accordingly affirmed, and the appeal dismissed:

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1. On those passages printed in *italics* , in this and the next page, the question, whether a trust was created, depended, and they will be often referred to in the argument.

2. Mr. Humphrey proposed a form of settlement, containing limitations and trusts as follows:— 1st. As to the real estates: To John Knight (Appellant) for his life, with the usual limitation to trustees to support contingent remainders; remainder to his eldest son F. Winn Knight for his life, with the usual limitation to trustees to support, etc.; remainder to his first and other sons successively according to seniority in tail male; remainder to C. Allanson Knight (second son of the said J. Knight) for his life, with the usual limitation to trustees to support, etc.; remainder to his first and other sons successively according to seniority in tail male; remainder to E. Lewis Knight (third son of the said J. Knight), for his life, with the usual limitation to trustees to support, etc.; remainder to his first and other sons successively according to seniority in tail male; remainder to all the sons of the said J. Knight, born after R. P. Knight's death, successively according to seniority in tail male; with remainders over in a similar form and manner to Thomas Knight (Respondent) for his life, and to his sons in *esse* at the time of the death of the testator Richard Payne Knight for their respective lives, and to their respective first and other sons in tail male; and to the sons of the said T. Knight thereafter born in tail male, and with the usual intervening limitations to trustees to support contingent remainders after each life estate; with the ultimate remainder to the right heirs of, or other parties entitled under, Thomas Andrew Knight. 2dly. As to the personal estate: The trusts thereof to be made to correspond with those of the real estates, with a proviso that such personal estate should not vest absolutely in any person entitled to the real estates as tenant in tail male, until such person should attain the age of 21 years, or die under that age, leaving issue male surviving him; with an ultimate trust for the executors or administrators of, or other parties entitled under, Thomas Andrew Knight.

3. Mr. K. Parker and Mr. Hodgson also appeared for some of those Respondents;

de *infra* , p. 544. The Respondents of the second class (see p. 525, *ante*) did not appear on the appeal at all.

4. Several passages were read from the short-hand writer's notes of their speeches on two appeals to the House in 1823; one against the orders before mentioned, the other against the order of Lord Eldon set out in the report in Turner and Russell, p. 164. For the orders of the House on these appeals, see 55 Lords' Journ. pp. 589. 844.

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TAB 13

2014 ONSC 3062
Ontario Superior Court of Justice

Royal Bank of Canada v. Atlas Block Co.

2014 CarswellOnt 8345, 2014 ONSC 3062, [2014] W.D.F.L. 3298,
15 C.B.R. (6th) 272, 241 A.C.W.S. (3d) 532, 37 C.L.R. (4th) 286

Royal Bank of Canada, Applicant and Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

Penny J.

Heard: May 5, 2014
Judgment: May 21, 2014
Docket: CV-13-10201-00CL

Counsel: Sam Babe, Courtney Raphael for Applicants
Howard Krupat, Brendan Clancy for Receiver, KPMG Inc.
Max Shafir, Q.C., Fay Sulley for Holcim (Canada) Inc.

Subject: Contracts; Corporate and Commercial; Estates and Trusts; Family; Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Property of bankrupt — Trust property — Miscellaneous

Bankrupt was family-owned group of companies that manufactured range of concrete building and landscaping products including paving stones, masonry, concrete veneers and concrete blocks — On October 4, 2013, receiver was appointed over all of bankrupt's assets, undertaking and property — On December 6, 2013, bankrupt filed assignments in bankruptcy and receiver was appointed as trustee — H. Inc. was supplier of materials that were incorporated into bankrupt's manufactured products — H. Inc. alleged that its invoices for period from April 2013 to October 4, 2013, had not been paid — H. Inc. alleged it had trust claim with respect to moneys it was owed pursuant to s. 8 of Construction Lien Act — Receiver brought motion for directions on whether H. Inc. had valid trust claim — Applicant bank brought application for declarations that any funds subject to trust under Act were not excluded under s. 67(1)(a) of Bankruptcy and Insolvency Act (BIA) and that there was no common law trust sufficient for purposes of excluding trust property from bankrupt's estate — Order accordingly — H. Inc. should, in principle, be entitled to put its assertion, that material supplied by H. Inc. used by bankrupt after June 1, 2013 was not paid for, to test in reference — H. Inc. would have opportunity on reference, where all material accounting records had been produced, to try to prove, on balance of probabilities, that amounts owed by large, identified construction projects for bankrupt's cement products purchased after June 1, 2013 were traceable to H. Inc. material for which it has not already been paid — However, only funds which met test for trust at common law were exempt from bankrupt's estate — Funds in issue did not meet that test — Altogether apart from certainty of intention and of object, they could not meet test of certainty of subject matter because they had been co-mingled with other funds which were clearly and admittedly, not subject to trust — Receiver was under no obligation to segregate funds received from construction projects even if it had capacity to do so — Funds in issue were not trust funds at common law and were not excluded from bankrupt's estate — Therefore, priorities under BIA governed disposition of those funds.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous

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s. 67(1)(a) — considered

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — referred to

s. 8 — considered

MOTION by receiver for directions on whether H. Inc. had valid trust claim and APPLICATION by bank for declarations that any funds subject to trust under *Construction Lien Act* were not excluded under s. 67(1)(a) of *Bankruptcy and Insolvency Act* and that there was no common law trust.

***Penny J.*:**

The Motion

1 This is a motion for directions by the court appointed Receiver of the respondent debtors (Atlas) for directions on whether Holcim Canada Inc., a supplier of materials that were incorporated into Atlas's manufactured products, has a trust claim under s. 8 of the *Construction Lien Act*, R.S.O. 1990, c. C-30.

2 The applicant Royal Bank of Canada also moves for certain declarations of law associated with Holcim's potential claims. Specifically, the Bank seeks:

> (i) a declaration that any funds subject to a deemed trust claimed under the *CLA* but otherwise lacking all the properties of a common law trust are not excluded under paragraph 67(1)(a) of the *Bankruptcy And Insolvency Act*, R.S.C. 1985, c. T-3 from the property divisible among Atlas's creditors; and

(ii) a declaration that, if paragraph 67(1)(a) of the *BIA* does not apply to a *CLA* deemed trust claim, there is no common law trust sufficient for purposes of excluding trust property from the bankrupts' estate pursuant to paragraph 67(1)(a).

Background

3 Atlas was a family-owned group of companies that manufactured a range of concrete building and landscaping products including paving stones, masonry, concrete veneers and concrete blocks. Atlas operated out of three locations: Hillsdale, Victoria Harbour and Brockville. Generally, Atlas products were sold to industrial and commercial construction contractors, residential builders, bricklayers, large retailers such as Home Hardware and Rona and homeowners, as well as through a dealership network throughout Ontario, Michigan and New York State. The dealers who purchased inventory from Atlas sold the product to retailers. Atlas also conducted retail operations from its own premises.

4 On October 4, 2013, KPMG Inc. was appointed as receiver of all of Atlas's assets, undertaking and property. On December 6, 2013, certain Atlas entities filed assignments in bankruptcy and KPMG was appointed as trustee. On December 20, 2014, the Superior Court of Justice approved the sale of substantially all Atlas's assets, including inventory.

5 Holcim supplied all three Atlas locations with cement powder. Holcim delivered the product in bulk truckloads. Deliveries to the Hillsdale plant were nearly every day. Upon delivery, Holcim's cement powder was blown into three separate silos at the Hillsdale plant. Deliveries were made, on average, twice a week to two silos at the Victoria Harbour plant and to one silo at the Brockville plant. The different Holcim materials were used to manufacture virtually all of Atlas's numerous types of finished products.

6 In addition to bulk loads of cement powder, Holcim also supplied Atlas with bags of different types of cement powder. These bagged goods were sold as retail items and to construction projects.

Applicant and Receiver's Position

7 Atlas produced approximately 1,450 different product types, of which only 180 are cement block products. The vast majority of Atlas's products were landscaping products, which Atlas sold either directly to the public or to dealers who sell to retailers.

8 The majority of products sold to construction projects were cement block products and bagged goods. Not all construction customers purchased block products or bagged goods and not all block products and bagged goods were sold to construction projects. Non-construction customers, including retailers such as Home Hardware, Home Depot and Rona, also purchased block products and bagged goods from Atlas. Atlas also operated a retail sales desk at each of its three locations from which it sold block products and bagged goods to the general public.

9 Atlas did not produce inventory based on specific customer orders. Atlas's customers, including construction customers, did not usually provide Atlas with a purchase order at all. Most customers, including construction customers, simply called Atlas with a purchase request for shipment the next day. Atlas produced all of its inventory items for stock based on anticipated demand and not for specific construction projects.

10 Atlas had over 440 accounts receivable at the time of the Receiver's appointment. Approximately 50% of Atlas's customers were construction customers. Atlas provided payment terms to all its customers, including construction customers, which were not linked to construction milestones or progress billings but based solely on credit applications and the creditworthiness of the particular customer. Atlas did not track the construction contract details of its construction customers and frequently did not know the location of the project or identity of the property owner. Atlas did not segregate funds received from construction projects from other revenues from sales of all its other products.

11 Atlas's accounting system did track what type and what number of finished goods were supplied to a construction customer. This is because every type of finished product had its own inventory code. For example, a certain type of patio stone would have a product number and description common to all such patio stones. However, no individual patio stone had a unique product number or description. Thus, Atlas's accounting system could not track which specific finished goods were supplied to

a particular construction project or when those finished goods had actually been produced. Further, Atlas's accounting system could not track whether any cement powder in the finished goods supplied to a construction project had already been paid for, or which specific batch of cement powder from Holcim had been used to make specific finished goods or when those specific goods had been produced.

12 Holcim's deponent on this motion admitted in cross-examination that:

(a) Holcim supplied cement powder to Atlas, invoiced for that cement powder and then expected to be paid 90 days later;

(b) payments from Atlas to Holcim were not tied to any specific construction project;

(c) Holcim expected to be paid 90 days after delivery regardless of whether its cement product was still sitting in Atlas's inventory or whether it had been incorporated into finished goods delivered to a construction project or otherwise;

(d) Atlas held less than 30 days' worth of Holcim cement powder on hand in its silos at any given time and used this powder in the production of finished goods on an ongoing basis;

(e) Atlas could not track which individual finished products had been supplied to a specific project; it could only determine the type and number of finished products that had been supplied;

(f) Holcim did not know how a particular batch of product incorporating its cement powder could be tracked to a particular end-user and it might well be impossible to do so; and

(g) Holcim did not expect to be paid for the same product twice (i.e., once upon the sale of the cement powder to Atlas and a second time upon Atlas's sale of its own finished product to its customer). Instead, payment to Holcim was simply based upon its sale to Atlas of the cement powder.

13 Essentially, the evidence is that there is no way to determine with precision which particular shipment of Holcim product was incorporated into any particular finished Atlas product. There is also no way to determine when the specific finished product was produced or the ultimate disposition of that specific product, i.e., the product could have been sold from an Atlas retail location, sold to Home Depot, supplied to a construction project, or never sold at all and remained in inventory as of the date of the receivership.

14 As a result of this tracing problem, the Receiver takes the position that it is not possible to discern whether there is any connection between: (i) the amounts owing by and collected from Atlas's large construction customers; and (ii) the materials supplied by Holcim. The Receiver therefore takes the position that Holcim cannot have a trust claim because it is not possible to determine whether Atlas owed Holcim money for the actual material supplied to any given construction projects.

Holcim's Position

15 Holcim says that it first ran into payment problems with Atlas in May 2013. At that point, Holcim was owed money for deliveries dating back to January/February 2013. Payments received were applied against the oldest invoices first. Holcim's invoices since April 2013 (up to October 4) have not been paid.

16 Holcim concedes that its cement powder, bagged or bulk, cannot be traced through Atlas to specific construction projects. Holcim takes the position, however, that all Atlas cement products sold to construction projects contained Holcim cement powder. The amount and value of the Holcim-supplied material can be calculated from the Atlas product "recipes" and ranges from 31% to 55% of the cost of various Atlas products sold to construction projects. The type and volume of Atlas products sold to construction projects, and when, is also generally known.

17 Holcim says that it replenished bulk cement powder at all three Atlas locations weekly and replenished bag goods more frequently than monthly. The evidence is that Atlas made a practice of selling the oldest bagged goods first, which tended to keep

inventory current. In any event, the vast majority of Holcim's claim is in respect of bulk cement powder used to manufacture cement blocks.

18 Accordingly, Holcim says that because: i) all Atlas cement blocks and bagged cement sold to construction projects contained Holcim cement powder in amounts that can be determined; and ii) all sales of cement products to identified major construction projects are known, it is possible to determine what percentage of the Receiver's recoveries from the identified major construction projects are attributable to the supply of Holcim material to Atlas for those products.

19 Holcim concedes the theoretical risk that some Atlas products sold to construction projects might have been produced using pre-April 2014 deliveries of Holcim cement powder for which Holcim has, admittedly, already been paid. However, Holcim is prepared to waive any claim to payment in respect of invoices before June 1, 2013 — a 45 day grace period.

20 Given the pace of Holcim's replenishments of cement powder to Atlas, and the implied rate of turnover of Atlas inventory, Holcim argues that a 45 day grace period ensures that most, if not all, pre-April 2013 cement powder (for which it was paid) would have cleared Atlas's inventory of manufactured products. Holcim argues that after June 1, 2013, all Atlas inventory of cement blocks and bagged powder sold to construction projects would more than likely have contained Holcim cement powder sold to Atlas after the end of March, for which Holcim has not been paid. The rate of turnover of Holcim cement powder and Atlas inventory, taken together with Atlas's financial difficulties, Holcim argues, makes it inconceivable that Holcim could have already been paid for cement powder incorporated into Atlas cement blocks sold to construction projects after May 31, 2013.

21 On a without prejudice basis, in the face of this dispute, the Receiver held back approximately $400,000, representing the amount of Holcim's potential claim based on Holcim's estimations as outlined above. [1]

Analysis

1. Section 8 of the CLA

22 To establish a trust under s. 8 of the *CLA*, Holcim must establish that:

> (a) Atlas was a contractor or subcontractor;
>
> (b) Holcim supplied material to projects for which Atlas was a contractor or suncontractor;
>
> (c) Atlas received or was owed money on account of its contract or subcontract price for materials supplied to the improvement; and
>
> (d) Atlas owes Holcim money in respect of those materials,

Sunview Doors Ltd. v. Academy Doors & Windows Ltd., [2010] O.J. No. 1043 (Ont. C.A.).

23 Holcim has conceded that it is only money owed with respect to Atlas products containing Holcim materials supplied to certain large, identified construction projects that could be shown to be impressed with a trust. Money owed with respect to Atlas products sold to wholesalers or directly to retail customers could not, for example, qualify. Holcim appears to concede that the accounting problems associated with tracing claims to smaller construction projects exceeds the likely benefits of making a claim.

24 The Receiver and Applicant acknowledge that Ontario courts have found that trust rights under s. 8 of the *CLA* can accrue to suppliers of material where: (i) their material is combined with other material to form a finished good; (ii) the finished good is ultimately supplied to a construction project; and (iii) the supplier was not aware of the specific construction project that was being supplied with its material, see *Schulz Concrete Pipe Ltd., Re* (1979), 32 C.B.R. (N.S.) 157 (Ont. S.C.); *Richmond Brothers Insulation Inc., Re* (1989), 69 O.R. (2d) 22 (Ont. S.C.); *Maple Leaf Homes & Cottages v. Zoellner Windows (1982) Ltd.*, [1989] O.J. No. 22 (Ont. H.C.).

25 They argue, however, that this case is distinguishable from these cases because:

> (a) in those cases, all of the supplied material was incorporated into finished products *all of which* were supplied to improvements whereas, in this case, only a portion of the finished products were supplied to improvements, the rest being sold on a retail and wholesale basis. Thus, all Holcim material supplied to Atlas was not (unlike the circumstance of the cases relied on by Holcim) "earmarked" for products sold to construction projects; and
>
> (b) in this case it is not possible to determine whether "Atlas owed Holcim money" for the actual materials "supplied to construction projects" because, as noted above, there is no way to determine definitively what Holcim material used by Atlas to manufacture products sold to construction projects between April and October 2013 was paid for and what was not.

Retail Sales

26 There is a clear distinction in the law between a retailer of construction goods and a supplier of construction goods to construction projects. The material supplier to the former has no reasonable expectation of protection under the *CLA* whereas a material supplier to the latter does, see *Central Supply Co. (1972) Ltd. v. Modern Tile Supply Co.* (2001), 55 O.R. (3d) 783 (Ont. C.A.).

27 The unique feature of this case is that Atlas was both a retailer and a supplier of construction goods to construction projects.

28 About half of Atlas's customers were construction projects. As of the date of the Receiver's appointment, Atlas had a total receivable of about $2.3 million from construction project customers. The amount owed to Atlas by the six largest projects exceeded $1.5 million. These are identified in para. 14 of Holcim's factum on the Receiver's motion.

29 The Court of Appeal in *Sunview Doors*, *supra*, held that a supplier of materials need not know the specific projects to which its materials were to be supplied in order to benefit from the provisions of the *CLA*.

30 Given this principle, I cannot agree that merely because Atlas sold some of its products to customers other than construction projects, the hypothetical right to assert trust claims is lost. The fact that Atlas had some retail customers is not, in principle, a bar to Holcim's ability to assert a trust claim under s. 8 of the *CLA* over monies identifiably owed by and collected from the large, identified construction projects. Whether such claims could be proved is, of course, another matter and would depend upon the sufficiency of the evidence. Holcim would be, in my view, however, at least entitled *to try* to prove what portion of monies collected by Atlas from these projects is attributable to Holcim's cement powder.

What did Atlas Pay For?

31 Similarly, I am not able to conclude that merely because every ounce of cement powder supplied to Atlas for which Holcim has not been paid cannot be traced to a specific product supplied to a specific construction project for which the Receiver collected payment, Holcim's ability to try to make a trust claim is barred.

32 It seems to me that Holcim should, in principle, be entitled to put its assertion, that Holcim material used by Atlas after June 1, 2013 was not paid for, to the test, in a reference. Holcim would have the opportunity, on such a reference, where all material accounting records had been produced, to try to prove, on a balance of probabilities, that amounts owed by large, identified construction projects for Atlas cement products purchased after June 1, 2013 are traceable to Holcim material for which it has not already been paid. If it were unable to do so, its claim would fail. To the extent it were able to do so, its claim might possibly succeed, subject to the second issue.

2. The Paramountcy Argument

33 The more fundamental problem, advanced in the Applicant's motion and argument, is that, even if Holcim has a theoretical trust claim under s. 8 of the *CLA*, that claim does not survive Atlas's bankruptcy.

34 Paragraph 67(1)(a) of the *BIA* excludes from estate property divisible among the creditors of the bankrupt "any property held by the bankrupt in trust for any other person." According to a long line of Supreme Court of Canada decisions, however, para. 67(1)(a) does not extend to assets subject to a deemed trust created by provincial statute where such deemed trust does not otherwise have all the attributes of a valid trust at common law.

35 These Supreme Court cases were summarized by the Ontario Court of Appeal in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 7 C.B.R. (5th) 202 (Ont. C.A.), at para. 15:

> A consistent series of cases from the Supreme Court of Canada has addressed the effect of provincial statutory deemed trusts in a bankruptcy...
>
> These cases hold that because bankruptcy is a matter under federal jurisdiction, provincial statutory deemed trusts that do not conform to general trust principles cannot operate to reorder the priorities in a bankruptcy. Therefore, although such deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating... Upon bankruptcy the funds that are subject to a deemed trust, but are not held in accordance with general trust principles, will not be excluded from the property of the bankrupt under 67(1)(a) of the *BIA* and will be distributed in the priority prescribed by the *BIA*.

36 Having reviewed these cases, and subsequent decisions considering them, as outlined in paras. 14 to 17 of the Applicant's factum, there is no apparent reason why a deemed trust under the *CLA* should be treated differently than any other provincial statutory deemed trust for the purposes of paragraph 67(1)(a) of the *BIA*. Three decisions of the Saskatchewan courts have held that the deemed trust under comparable legislation in Saskatchewan did not survive bankruptcy, see *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)* (1995), 34 C.B.R. (3d) 196 (Sask. Q.B.); *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.* (1998), 161 D.L.R. (4th) 725 (Sask. Q.B.); *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.* (2002), 33 C.B.R. (4th) 217 (Sask. Q.B.).

37 Thus, the issue on the Applicant's motion becomes whether the trust alleged by Holcim meets the requirements of a trust at common law. It is not controversial that the existence of a trust depends on the three certainties: certainty of intention, certainty of subject matter and certainty of object. The issue here arises from the certainty of subject matter requirement. This is because Atlas (and the Receiver after October 4, 2013) did not segregate payments from construction projects for products sold which contained Holcim material. This issue is dealt with in the *TCT* case, *supra*, at para 19:

> With respect to the motion judge, in my view, this conclusion was not open to her at law, and is contrary to the Supreme Court cases referred to above. Once the purported trust funds are co-mingled with other funds, they can no longer be said to be "effectively segregated" for the purpose of constituting a trust at common law...McLachlin J. (as she then was) held that once the funds were co-mingled they were no longer identifiable and therefore no longer subject to the trust. She explained at p. 34:
>
> > At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The trust money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law.

38 Holcim concedes that it has no trust claim with respect to funds collected by Atlas pre-receivership because Atlas co-mingled funds received from all sources. However, Holcim argues that the Receiver, as an officer of the court, had a positive obligation to keep funds subject to s. 8 of the *CLA* separate and apart such that collections by the Receiver of accounts receivable from construction projects post — October 4, 2013 are subject to a trust. Holcim relies, for this argument, on *TCT* and two other decisions of the Court of Appeal, *Norame Inc., Re*, 2008 ONCA 319 (Ont. C.A.) and *Canadian Imperial Bank of Commerce v. Nadiscorp Logistics Group Inc.* (2010), 67 C.B.R. (5th) 17 (Ont. C.A.).

39 In *TCT*, the Court of Appeal made a distinction between funds received by the debtor and funds received by the Receiver (paras. 33, 36 and 37):

> we are dealing on this appeal with two separate funds of money collected during two different time periods. The first is the carriers' funds collected by TCT prior to July 24, 2002 and co-mingled with TCT's own funds. The second is the pre-January 4, 2002 accounts receivable of TCT collected by the interim receiver...
>
> as the interim receiver stands in the shoes of the debtor, and is furthermore acting as an officer of the court, it is incumbent on the receiver (as it was on TCT), irrespective of the subsequent court orders, to comply with the regulation as funds are received, and to hold the carriers' portion of the collected account in trust for the carriers...
>
> if the funds are not co-mingled with other corporate funds, the security interest of GMAC is subject to the interest of the trust beneficiaries in the trust funds.

40 In my view, however, Holcim's argument must fail on the facts of this case. The authority of *TCT*, *Norame* and *Nadiscorp* on the obligation of a receiver or trustee to segregate carrier funds all turns on the specific regulatory obligations imposed on load brokers. Those regulations require every load broker:

> i) to hold funds received from consignors in respect of carriage of goods, in trust for the benefit of the carriers of the consigner's goods;
>
> ii) to maintain an account designated as a trust account for such funds;
>
> iii) to keep the money held in trust separate from money belonging to the load broker;
>
> iv) to deposit the money held in trust into the trust account without delay; and
>
> v) to disburse the money held in trust by the load broker only to persons for whom the money is held in trust and who are entitled to payment.

41 In *Ivaco Inc., Re* (2006), 25 C.B.R. (5th) 176 (Ont. C.A.) the Court of Appeal for Ontario dealt with a deemed trust under the provincial pension benefits legislation. The Court held that a deemed trust "is, in a sense a legal fiction." Only a trust at common law is exempt from the bankrupt's estate. The designation "deemed trust" does not "by itself create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so" (para. 46).

42 The Court contrasted this position with the requirements under the load broker regulations, which "required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account" (para. 57).

43 Precisely the same reasoning applies to s. 8 of the *CLA*. Although the Receiver undoubtedly stepped into the shoes of Atlas upon its appointment, Atlas, unlike the debtors in *TCT*, etc., was under no obligation to keep the putative trust funds separate and apart from other funds received. Nor did Atlas do so. It co-mingled all funds received from sales of its products, regardless of whether they were to individuals off the street, wholesalers, retailers or construction projects.

44 The Receiver's obligations cannot exceed what the debtor was obliged to do. Thus, the Receiver was under no obligation to establish and maintain a separate account for funds received from construction projects on account of products sold containing Holcim cement power, see *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 37 C.B.R. (5th) 107 (Ont. S.C.J.) at para. 33.

45 Because funds from construction projects were co-mingled with funds from other sources, there can be no certainty of subject matter, as described by the S.C.C. in *British Columbia v. Henfrey Samson Belair Ltd.* [1989 CarswellBC 711 (S.C.C.)] quoted above in para. 37. The mere fact that it might be possible to trace the funds for products incorporating Holcim materials

to particular construction projects does not change this. Once co-mingling has occurred, that is the end of the matter (see, *TCT supra*, para. 19).

46 Holcim also sought to analogize this case to cases involving money paid into court. Money paid into court is not held in trust. The office of the Accountant for the Superior Court of Justice "is simply a repository which responds not to the terms of a trust but to the rules of court and court orders." The proper characterization of the funds, therefore, depends on the circumstances which existed prior to its payment into Court. Most of the cases relied on by Holcim dealt either with lien claims — which were discharged on the strength of the money paid into court, (such that the funds stood in place of the lien) - or funds in respect of which there had been no co-mingling. I do not find the analogy to funds paid into court, or the cases relied upon in this regard, helpful on the issue before me in this case.

47 In conclusion, I agree with the Applicant and Receiver on this issue. Only funds which meet the test for a trust at common law are exempt from the bankrupt's estate. The funds in issue here do not meet that test. Altogether apart from certainty of intention and of object, they cannot meet the test of certainty of subject matter because they have been co-mingled with other funds which were clearly, and admittedly, not subject to a trust. The Receiver was under no obligation to segregate funds received from construction projects even if, although this was disputed, it had the capacity to do so.

48 Accordingly, I find the funds in issue are not trust funds at common law and are not excluded from the bankrupt's estate. The priorities under the *BIA* therefore govern the disposition of these funds.

Costs

49 Holcim submitted that the successful party on the motion should receive no more than $25,000. The Applicant, if successful, sought $46,000. The Receiver, if successful, sought $48,000.

50 In my view, all parties contributed unnecessarily to the complication of this motion. More cooperation could have significantly narrowed the issues and reduced the apparent complexity.

51 On the pure *CLA* s. 8 point, I would have found that Holcim was at least entitled to try to prove its case on a reference. While I agree that the paramountcy point, although settled in principle some time ago, was unresolved in respect of s. 8 of the *CLA* and circumstances comparable to this case, in result I found in favour of the Applicants' position, which ended the matter.

52 In view of these circumstances, I fix costs payable to RBC by Holcim in the amount of $25,000 and make no other order as to costs.

Order accordingly.

Footnotes

1 All of the detailed records necessary to conduct a precise calculation have not been produced. Although the Receiver's records on amounts collected during the receivership have not been produced, those records would become relevant if Holcim establishes that it is a trust claimant and if there is a separate proceeding to determine the amount of its provable claim.

End of Document

TAB 14

1998 ABCA 198
Alberta Court of Appeal

Bassano Growers Ltd. v. Price Waterhouse Ltd.

1998 CarswellAlta 555, 1998 ABCA 198, [1998] A.J. No. 689, 175 W.A.C. 328, 216 A.R. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199, 80 A.C.W.S. (3d) 727

Bassano Growers Ltd., Calvin Kanomata, Lukey Farms Ltd., Hutterian Brethren Church of Fairview (Fairview Colony), M. Tsukishima & Sons Farms Ltd., Nakamura Farms Ltd., Sonny Nakashima Farms Ltd., Okuma & Tashiro Farms Ltd., S.L.M. Spud Farms Ltd. S-Scan Farms Ltd., Tri-T Farms Ltd., Setoguchi Farms Ltd., Torsius Tater Farms Ltd. and Potato Growers of Alberta, Appellants and Price Waterhouse Limited, Respondent

McClung, O'Leary, LoVecchio JJ.A.

Heard: June 17, 1998
Judgment: June 19, 1998
Docket: Calgary Appeal 97-17411

Proceedings: affirming *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1997), (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 214 A.R. 380 (Alta. Q.B.)

Counsel: *L. V. Halyn*, for the Appellants.
F. R. Dearlove, for the Respondents.
D. S. Nishimura, for the Intervenant, Alberta Treasury Branches.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Property of bankrupt — Trust property — General

Bankrupt owed money to appellant growers for produce purchased for them and subsequently resold and owed fees payable to appellant marketing board — Appellants filed proof of claim asserting that funds on deposit in bankrupt's general operating account were held in trust pursuant to s. 31 of Marketing of Agricultural Products Act and should be excluded from property of bankrupt pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Chambers judge ruled that deemed trust created by s. 31 did not qualify as trust contemplated by s. 67(1)(a) and that evidence did not support existence of trust under general law or finding that appellants were entitled to benefit of constructive trust — Appellants appealed — Funds in question were commingled with other funds of bankrupt and could not be identified — Trusts contemplated by s. 67(1)(a) are only those that qualify as trusts under general law — Funds in question did not so qualify as there was no certainty of subject matter because of commingling — Claim for constructive trust failed for same reason — Appeal dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1, s. 31.

Table of Authorities

Cases considered:

Barnabe v. Touhey (1995), 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477 (Ont. C.A.) — referred to

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

British Columbia v. National Bank of Canada (1994), 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 52 B.C.A.C. 180, 86 W.A.C. 180, 2 G.T.C. 7348 (B.C. C.A.) — referred to

Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of), [1995] 9 W.W.R. 498, 34 C.B.R. (3d) 196, 23 C.L.R. (2d) 239, (sub nom. *Factory Window & Door Ltd. (Bankrupt), Re)* 135 Sask. R. 235 (Sask. Q.B.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131 (S.C.C.) — referred to

Points of Call Holidays Ltd., Re (1991), 5 C.B.R. (3d) 299, 41 E.T.R. 56, 54 B.C.L.R. (2d) 384 (B.C. S.C.) — referred to

Points of Call Holidays Ltd., Re (1991), 5 C.B.R. (3d) 307 (B.C. C.A.) — referred to

Robinson, Little & Co. (Trustee of) v. Saskatchewan (Minister of Labour) (1989), [1990] 1 W.W.R. 354, 76 C.B.R. (N.S.) 193, 63 D.L.R. (4th) 392, 80 Sask. R. 9 (Sask. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 67(1)(a) [renumbered 1992, c. 27, s. 33] — considered

Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1
s. 31 — considered

APPEAL from ruling, in judgment reported at (1997), 6 C.B.R. (4th) 188 (Alta. Q.B.), that deemed trust created by s. 31 of *Marketing of Agricultural Products Act* did not qualify as trust contemplated by s. 67(1)(a) of *Bankruptcy and Insolvency Act*.

***Per curiam*:**

1 This is an appeal from a ruling that the "deemed trust" created by s.31 of the *Marketing of Agricultural Products Act*, ("MAPA") S.A. 1987, c. M-5.1 does not qualify as a trust contemplated by s.67(1)(a) of the *Bankruptcy and Insolvency Act*, ("BIA") R.S.C. 1985, c. B-3. The latter provision exempts trust property from the property divisible and distributable among creditors on bankruptcy.

2 The chambers judge also found that the evidence did not support the existence of a trust under the general law or a finding that the appellants are entitled to the benefit of a constructive trust.

3 At the conclusion of the hearing we dismissed the appeal and promised these Reasons.

4 The appellant Potato Growers of Alberta ("PGA") is a marketing board created under the MAPA to regulate the production and marketing of potatoes and other agricultural products in the province of Alberta. The other appellants are growers who sold produce to Diamond S. Produce Ltd., now bankrupt, pursuant to a marketing scheme operated under the auspices of the PGA.

Diamond S. Produce Ltd. was petitioned into bankruptcy in March, 1997. It owed the appellant growers money for produce purchased from them and subsequently re-sold, and it was indebted to the PGA for fees payable under the marketing scheme. On the date of bankruptcy, the bankrupt had a sum of money on deposit in its general operating account at the Alberta Treasury Branch. The funds were insufficient to pay the claims of the appellants.

5 The appellants filed proofs of claim asserting that the funds on deposit were held in trust for their benefit and should be excluded from the property of the bankrupt pursuant to s.67(1)(a) of the BIA. The respondent trustee in bankruptcy rejected the claims. The respondent Alberta Treasury Branches asserts a security interest in the funds on deposit.

6 Under s.31 of the MAPA, if a person "has the possession or control over funds (a) owing to a producer for a regulated product sold to the person by the producer; (b) owing to a board or commission .... that person holds those funds in trust for the producer, board ... as the case may be....". Section 67(1)(a) of the BIA excludes from the property of a bankrupt divisible among creditors "property held by the bankrupt in trust for any other person."

7 The funds subject to dispute include proceeds from the sale of regulated produce. However, these funds are commingled with other funds of the bankrupt. No portion of the funds is identifiable or can be attributed to the sale of any regulated products by any particular grower.

8 The chambers judge held that the trusts contemplated by s.67(1)(a) are only those that qualify as trusts under the general law, that is, only those that meet the conditions necessary for the creation of a valid trust under the general law. Because the funds in question were commingled and cannot be identified there is no certainty of subject matter, one of the essential requirements for a common law trust. The chambers judge also rejected the submission that the funds are subject to a constructive trust in favour of the appellants for the same reason, namely lack of certainty of subject-matter.

9 The circumstances of this case fall squarely within the rationale of the majority judgment of the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1, 59 D.L.R. (4th) 726 (S.C.C.). The *ratio* of *Henfrey Samson* has been applied in a number of subsequent judgments involving statutory trusts of various kinds created pursuant to provincial legislation; *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1 (S.C.C.); *Robinson, Little & Co. (Trustee of) v. Saskatchewan (Minister of Labour)* (1989), 76 C.B.R. (N.S.) 193, [1990] 1 W.W.R 354 (Sask. C.A.); *British Columbia v. National Bank of Canada* (1994), 30 C.B.R. (3d) 215, 119 D.L.R. (4th) 669 (B.C. C.A.); *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, 34 C.B.R. (3d) 196, [1995] 9 W.W.R 498 (Sask. Q.B.); *Points of Call Holidays Ltd., Re* (1991), 5 C.B.R. (3d) 299 (B.C. S.C.), aff'd (1991), 5 C.B.R. (3d) 307 (B.C. C.A.).

10 The underlying principle of *Henfrey Samson* was concisely stated by the British Columbia Court of Appeal in *British Columbia v. National Bank of Canada [supra]* C.B.R. at 232:

> That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish the same end.

11 In our view, this answers all of the arguments raised by the appellants in an effort to distinguish this case from *Henfrey Samson* and the cases that have applied it.

12 This is not to say that a trust that meets the requirements of the general law, and therefore qualifies as a trust under s.67(1)(a) of the BIA, may not have its genesis in a deemed or statutory trust. It must, however, satisfy the essential requirements of a valid trust under the general law in order to do so. Here, the purported trust fails to meet the necessity for certainty of subject-matter.

13 The appellants' submission that the funds should be declared subject to a constructive trust fails for the same reason. A constructive trust cannot arise unless there is identifiable property to which it can attach: *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73, 26 O.R. (3d) 477 (Ont. C.A.).

Appeal dismissed.

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TAB 15

The Law of Trusts

A Contextual Approach

Second Edition

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The reason why equity was able to avoid the problems associated with the mixed fund is that unlike the common law, it imposes a charge on the asset being traced. As Lord Greene MR explained in *Re Diplock*, "The equitable remedies presuppose the continued existence of the money either as a separate fund or as a part of a mixed fund or as latent in property acquired by means of such a fund."[48] An owner's right to follow property via equitable tracing is not dependent on either a rightful or wrongful disposition of property. Equity's only requirement is that initially there was separate property in which the claimant could establish title before any transfer, disposition, or conversion of that property. Furthermore, there is a requirement that the property remain ascertainable in the hands of a defendant.

It is noteworthy, however, that where trust proceeds are spent on services, equitable tracing is not available. If trust proceeds are spent on a vacation to Paris or a haircut, there is no ascertainable property that may be derived from either of these. A payment for a haircut is a payment for the expertise of the person cutting the hair. While hair cuttings on the floor after the service is performed are readily ascertainable, focusing on the cuttings misses the point entirely. The cuttings are not what one pays for when one pays for a haircut; they are simply the byproduct of the service offered. Consequently, the value is in the service, not in the leftover cuttings. Because the service itself cannot be recovered, there is no ability to trace under these circumstances.

In equity, if a person with a right to specific property is able to trace the property into the hands of another, that person may commence an action to retrieve it. If the property has been sold and the proceeds invested in the purchase of other property, the person with the proprietary right to the original property may elect either to take the property purchased or to place a charge on it equal to the proceeds from the sale of the original property.[49] These principles hold true only where the proceeds from the sale of the original property have not been added to any other money or have not had any money added to them.[50] It is not only a trust beneficiary who possesses the right to trace in these circumstances, but also a trustee who has been concerned in the breach of trust.

Like other equitable principles, tracing developed on an ad hoc basis. There is no "right" to trace outside the specific rules under the common law and in equity. One cannot "identify" one's property where it has been converted into another form; rather, one may only point to a chain of events that resulted in the sale of the original property and the purchase of another with the proceeds. The rules of tracing are artificial legal constructs that enable a person to lay a proprietary claim to the converted form of an original property. Given this historical reality, it is not surprising that particular rules have been the subject of contention over time. The rules pertaining to tracing in situations where the proceeds from original trust property are reinvested in the purchase of other property are straightforward. However, not all tracing actions proceed on such a simple

48 *Re Diplock*, [1948] 2 All ER 318.

49 See the explanation of this provided by Jessel MR in *Re Hallett's Estate*, supra note 46. A charge will not be granted, though, when to do so would work an injustice: see *Re Diplock*, supra note 48, at 361.

50 Where there is a payment into a bank account that is the subject of a tracing action, a *chose in action*—the bank's obligation to pay the money to the customer—is substituted for the money itself.

TAB 16

1988 CarswellBC 551
British Columbia Supreme Court

Delta Smelting & Refining Co., Re

1988 CarswellBC 551, [1988] B.C.J. No. 2532, [1989] B.C.W.L.D. 203, [1989] C.L.D. 187, 13 A.C.W.S. (3d) 160, 33 B.C.L.R. (2d) 383, 72 C.B.R. (N.S.) 295

Re DELTA SMELTING & REFINING CO. LTD.

McLachlin C.J.S.C.

Heard: November 7 and 8, 1988
Judgment: December 12, 1988
Docket: Vancouver Nos. 01982; 660/83

Counsel: *G. Holeksa*, for consignment metal claimants.
R. Dresser, for return of metal claimants.
T.J. Maledy, for trustee, Pannell, Kerr, MacGillivray Inc.,
E.M. McDonald, for pay by cheque and credit accounts receivable claimants.
J.I. McLean, for hold on deposit claimants.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Priorities of claims — Secured claims

Preferred creditors — Customers of bankrupt metal refiner doing business with refiner in one of five ways, involving delivery of metal to bankrupt for refining and return or refining and sale — All five classes of creditors asserting priority rights to metals recovered by trustee in bankruptcy — Court finding no class entitled to assert direct proprietary interest in fund of metals or to return of metal from fund based upon claims in bailment or trust — Pro rata distribution of fund ordered.

A precious metal refiner which had speculated on the commodities market with some of its stored product went bankrupt after the 1981 crash of the silver market. Five classes of creditors sought to share in the proceeds of metals worth $543,738, including $541,326 in gold and silver, which had been recovered by the trustee in bankruptcy and held by the court-appointed receiver.

Held:

Fund of metal to be distributed pro rata among five classes of creditors.

The first two classes, known as the "pay by cheque" and the "credit accounts receivable" creditors could not claim a direct proprietary interest in the fund, since under s. 23(2) of the Sale of Goods Act they had conveyed the property in the metal-containing materials to the bankrupt when they had contracted for a price to be based on assay results. Neither could the "hold on deposit" creditors claim a proprietary interest because they had loaned their gold or silver to the bankrupt as a depositor loans money to a bank, and the property in the metal had then passed to the bankrupt. The bankrupt was

not a bailee of the "return of metal" and "consignment" creditors, because they had contracted for a return of a certain amount of equivalent metal in kind, not the same property they had delivered to the bankrupt for refining. The bankrupt was not the fiduciary of those classes of creditors, having given no undertaking to act in their best interests; it owed them no duty of loyalty, its relationship with them had been at arm's length, and the relationship did not fall under any of the classes of special contracts to which the law assigns a higher duty. Alternatively, there was no enforceable trust where the metal allegedly impressed with a trust was no longer traceable, as the refined bars of gold and silver were not identified in proportions attributable to any particular customer. Thus, none of the five classes of creditors could assert a proprietary right in the metals held by the receiver, and since there was no legal basis on which to distinguish the various categories of claimants, the fund was to be distributed pro rata.

Table of Authorities

Cases considered:

Br. Can. Securities Ltd. v. Martin, 27 Man. R. 423, [1917] 1 W.W.R. 1313 — *referred to*

Busse v. Edmonton Grain & Hay Co., 26 Alta. L.R. 83, [1932] 1 W.W.R. 296, [1932] 1 D.L.R. 744 (C.A.) — *considered*

C.A. Macdonald & Co., Re (1958), 26 W.W.R. 116, 37 C.B.R. 119, 17 D.L.R. (2d) 416 (Alta. T.D.) — *referred to*

Can. Aero Services Ltd. v. O'Malley, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371 — *referred to*

Crawford v. Kingston, [1952] O.R. 714, [1952] 4 D.L.R. 37 (C.A.) — *referred to*

Evans v. Anderson, [1977] 2 W.W.R. 385, 76 D.L.R. (3d) 482, 3 A.R. 361 (C.A.) — *referred to*

Frame v. Smith, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 78 N.R. 40 — *referred to*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 [Fed.] — *considered*

Hosp. Prod. Ltd. v. U.S. Surgical Corp. (1984), 58 A.L.J.R. 587 (Aus. H.C.) — *applied*

Int. Corona Resources Ltd. v. Lac Minerals Ltd. (1987), 62 O.R. (2d) 1, 28 E.T.R. 245, 46 R.P.R. 109, 18 C.P.R. (3d) 263, 44 D.L.R. (4th) 592, 23 O.A.C. 263 (C.A.) [leave to appeal to S.C.C. granted 62 O.R. (2d) 1n, 28 E.T.R. 245n, 46 R.P.R. 109n, 44 D.L.R. (4th) 592n] — *referred to*

Jirna Ltd. v. Mister Donut of Can. Ltd., [1972] 1 O.R. 251, 3 C.P.R. (2d) 40, 22 D.L.R. (3d) 639, affirmed 12 C.P.R. (2d) 1, 40 D.L.R. (3d) 303 (S.C.C.) — *referred to*

Midcon Oil & Gas. v. N.B. Dom. Oil Co., [1958] S.C.R. 314, 12 D.L.R. (2d) 705 — *referred to*

South Australian Ins. Co. v. Randell (1869), L.R. 3 P.C. 101, 16 E.R. 755 — *referred to*

Statutes considered:

Sale of Goods Act, R.S.B.C. 1979, c. 370

s. 23(2)

Authorities considered:

Baxter, The Law of Banking, 3rd ed. (1981), p. 2.

Shepherd, The Law of Fiduciaries, (1981), p. 45 et seq.

Waters, The Law of Trusts in Canada, 2nd ed. (1984), p. 33.

Application by way of interpleader to determine ownership of assets held by receiver of bankrupt.

***McLachlin C.J.S.C.*:**

I. Introduction

1 Delta Smelting & Refining Co. Ltd., now bankrupt, carried on the business of refining and storing precious metal. Unfortunately, as matters turned out, it used some of the metal in its possession for speculation on the commodities market. The crash of the silver market in 1981 plunged Delta into financial difficulty from which it never recovered.

2 The trustee in bankruptcy recovered $543,738 worth of precious metal, including $541,326 in gold and silver, which he still retains. By order of this court, a receiver was appointed to hold the metal, and the ownership of the metal was directed to be tried by way of interpleader.

3 Five classes of creditors seek to share the proceeds of the metal held by the receiver. They represent the creditors who had dealings with Delta in metal and ore. The five classes of claimants arise from the five different ways Delta recorded these transactions. Upon delivery to Delta, each customer's material was tagged by a receipt recording customer in formation. The official receipt contained four boxes which could be checked off to indicate classification of the transaction as one of accounts receivable, pay by cheque, hold on deposit or return of metal. The document also contained space for special instructions, which was used, among other things, to record the fifth category, consignment transactions.

4 Initially, each customer's material was kept separate and discrete. After being treated to remove impurities, the resulting product was tested to determine the percentage of precious metal. The assay results were recorded on the receipt, the pricing formula determined, and the custom

5 Up to this point each customer's material could be identified. But this changed in the refining process which pooled material from various customers together with metal Delta considered its own.

6 Gold and silver were refined by different processes. Gold was refined in small batches, normally representing the accumulation of metal over one week. The silver batch process continued for approximately four to six months. During the course of the batch, silver was continually added and removed from the batch.

7 At the end of a batch, the refined bars of gold or silver were placed in the vault. No attempt was made by Delta to identify proportions of a batch as being attributable to any particular customer. Metal was withdrawn from the vault for Delta's own purposes (including trading and speculation on the metal market) as well as for return or sale to customers, generally on a "last-in, first-out" basis. As a consequence of this policy none of the metal in the vault is specifically identifiable as coming from any of the particular claimants in this proceeding.

8 The metal which the receiver now holds came in part from the vault and in part from "clean-up". "Clean-up metal" is metal which the trustee recovered after bankruptcy by cleaning out furnaces and ducts, burning carpets, rerunning slag, collecting drillings and collecting metal content from the silver bath solutions.

II. The Issue

9 There are five categories of claimants to the fund: pay by cheque ("P.B.C."); credit accounts receivable ("C.A.R."); hold on deposit ("H.O.D."); return of metal ("R.O.M."); and consignment metal creditors ("C.C."). The main issue is what interest if any each class of claimant possesses in the metal held by the trustee. On the answer to that question hangs the respective entitlement of the five categories of claimants.

III. Discussion

A. The "pay by cheque" (P.B.C.) and "credit accounts receivable claimants" (C.A.R.)

10 The pay by cheque and credit accounts receivable claimants may be treated together. In both cases, their transactions with Delta involved the sale of material containing a content of precious metal, for a price to be determined at a later date based on the results of an assay.

11 The contracts were clearly for the sale of goods, conveying property in the metal to Delta. That conveyance occurred when the contract was made: s. 23(2) of the Sale of Goods Act. Property in the metal containing materials having passed to Delta, the P.B.C. and C.A.R. claimants can claim no direct proprietary interest in the fund.

B. The "hold on deposit" creditors

12 The hold on deposit creditors assert that under the terms of their contract with Delta property in the metal was retained in the depositor and did not pass to Delta. These creditors each purchased a "hold on deposit" contract for gold or silver from Delta. At the end of the contract they were to receive the metal back, together with interest. Although the contract purported to reserve property in the depositor, Delta was free to use, deal in or trade the metal as it saw fit for a certain period of time, and was not required to account to the depositor for the type of use to which the metal was put nor for any profits made. These facts are inconsistent with either bailment or trust, which would permit the property to remain in the creditors. The correct legal characterization is that the customers loaned their metal to Delta, at which time property passed to Delta.

13 The position of these creditors is indistinguishable from that of depositors at a bank. The relationship between banker and depositing customer is viewed as a contract of loan, under which property in the money loaned passes to the bank. Baxter, in The Law of Banking, 3rd ed. (1981), at p. 2 states:

> 14 But the ordinary business meeting of a bank deposit is not to create the banker or bailee, an agent, or a trustee for the money. It is not the purpose that the *identical res* should be returned, nor that the banker shall account to the customer for any profit made by the use of the money, or be subject to the law relating to trusts and trustees in the manner in which he invests or otherwise employs the money. The basic meaning of a bank deposit is that it is a loan of money by the depositor to the bank. *When the money is lodged it becomes the property of the bank to use as it sees fit, within the scope of its legal powers.* The customer thereafter has no *jus in re* in the money, and the bank is under no duty to account to the customer for the way in which it uses the money or for any profits earned upon it. The bank's main obligation is to repay the deposit according to the contract. Repayment means return of an equivalent amount of currency. It is misleading to regard the customer as having any rights of property in money after it has been deposited and has passed into the hands of the bank. [emphasis added]

15 It follows that the H.O.D. claimants can claim no proprietary interest in the property of the metal remaining in the fund.

C. The "return of metal" and "consignment" creditors

16 The return of metal and consignment creditors delivered metal to Delta for refining. After refining, Delta was obliged to return either the specific quantity of purified metal contained within the material delivered, or alternatively, a proportionate share of the specific bulk of pure metal into which the raw material was refined, less charges for the refining process.

17 These creditors assert that property in the metal which they delivered to Delta never passed to Delta. Delta obtained possession of the material, they contend, only so far as necessary to refine it to a pure product. The relationship, they submit, was one of bailment or trust. If this submission is correct, the R.O.M. and C.C. claimants would be entitled to priority to the metal held by the receiver over the P.C.B., C.A.R. and H.O.D. creditors.

18 A bailment arises only where there is a delivery of property on the basis that the same property will be returned. Its form may be altered, but it must be the same property. Thus where the material delivered is mixed with other material, on the basis that an equivalent quantity of the same type of material will be returned, the contract is one of sale, not bailment: *Crawford v. Kingston*, [1952] O.R. 714, [1952] 4 D.L.R. 37 (C.A.); *South Australian Ins. Co. v. Randell* (1869), L.R. 3 P.C. 101, 16 E.R. 755. (The facts are distinguishable from those in *Busse v. Edmonton Grain & Hay Co.*, 26 Alta. L.R. 83, [1932] 1 W.W.R. 296, [1932] 1 D.L.R. 744 (C.A.), where no intermixing was contemplated and there was a right to return the identical grain and, the grain was not to be consumed.)

19 These principles negate the claim that Delta was merely a bailee with property remaining with the creditors. The refining process neces sarily involved the intermixing of metal derived from various customers together with Delta's own metal. The final product was indistinguishable as to source, and was treated as such in Delta's accounting and inventory systems. All the R.O.M. and C.C. customers bargained for was the return of a certain amount of equivalent metal in kind — not the same property they turned over to Delta.

20 In the alternative, the return of metal and consignment creditors claim metal from the fund on the ground that it is impressed by a trust in their favour.

21 In order for a trust to arise, Delta must be found to have stood in the position of fiduciary to the R.O.M. and C.C. creditors (Waters, The Law of Trusts in Canada, 2nd ed. (1984), at p. 10). The concept of fiduciary duty does not lend itself to a simple definition because of the diversity of situations in which such a relationship may be found. As Dickson J. (as he then was) stated in *Guerin v. R.*, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321 at 341, 55 N.R. 161 [Fed.]:

> 22 It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence should not be considered closed: see, *e.g., Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385 at p. 392, [1972] 1 O.R. 465 (C.A.); *Goldex Mines Ltd. v. Revill et al.* (1974), 54 D.L.R. (3d) 672 at p. 680, 7 O.R. 216 (C.A.) at p. 224.

23 Although it may be impossible to achieve a definition of fiduciary duty which is at once precise and universally applicable, certain concepts are fundamental in determining whether a fiduciary relationship exists in a given case. First, a fiduciary has a duty to act in the best interests of another, and not in his own: *Midcon Oil & Gas v. N.B. Dom. Oil Co.*, [1958] S.C.R. 314, 12 D.L.R. (2d) 705; *Evans v. Anderson*, [1977] 2 W.W.R. 385, 76 D.L.R. (3d) 482, 3 A.R. 361 (C.A.); *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371. Second, the term "fiduciary" imports a duty of loyalty: Waters, The Law of Trusts in Canada, 2nd ed. (1984), at p. 33; see also Shepherd, The Law of Fiduciaries (1981), at p. 45 et seq. Third, a fiduciary relationship involves scope for the fiduciary's unilateral exercise of power or discretion effecting the beneficiary's legal or practical interest, as a consequence of which the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary: see *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 78 N.R. 40, per Wilson J. dissenting.

24 Finally, an arm's length commercial contractual relationship generally does not give rise to a fiduciary duty. Although certain categories of contractual relationship have historically been regarded in law as being of fiduciary character (such as solicitor/client, principal/agent, partner-to-partner, etc.), the courts have not ordinarily found a fiduciary relationship between

businessmen who enter into commercial dealings at arm's length, even if the contract creates continuing obligations between them, including a duty to act in a certain manner: *Jirna Ltd. v. Mister Donut of Can. Ltd.*, [1972] 1 O.R. 251, 3 C.P.R. (2d) 40, 22 D.L.R. (3d) 639, affirmed 12 C.P.R. (2d) 1, 40 D.L.R. (3d) 303 (S.C.C.); *Hosp. Prod. Ltd. v. U.S. Surgical Corp.* (1984), 58 A.L.J.R. 587 (Aus. H.C.); *Int. Corona Resources Ltd. v. Lac Minerals Ltd.* (1987), 62 O.R. (2d) 1, 28 E.T.R. 245, 46 R.P.R. 109, 18 C.P.R. (3d) 263, 44 D.L.R. (4th) 592, 23 O.A.C. 263 (C.A.). Gibbs C.J. Aus. in *Hosp. Products*, supra, at p. 597 put this proposition as follows:

> 25 On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by the Court as important, if not decisive, in indicating no fiduciary duty arose...

26 In the case at bar, Delta gave no undertaking to act in the best interests of the creditors who delivered metal to it for refining. It owed them no duty of loyalty. It was entitled to use the metal as it chose without accounting to the creditors, its only obligation being to ultimately deliver a specific quantity of metal to them pursuant to its contract with them. Delta's relationship with these creditors was defined by an arm's length commercial contract. The relationship did not fall within any of the classes of special contracts to which the law assigns a higher duty. The relationship was simply one of contract for the sale or exchange of goods. Delta assumed no higher duty than the commercial duty set out in the contract.

27 I conclude that Delta was not the fiduciary of the return of metal and consignment creditors, and that their claim in trust must fail. But if I were wrong in that conclusion there is a further bar to the claim of the return of metal and consignment creditors. For a trust to be enforceable, the property originally impressed with the trust must be traceable. Courts of equity have always been acute to distinguish trust funds and will trace them however much their character or nature may be altered, provided the property which is claimed can be clearly identified as the fruit of the trust property. Conversely, no trust can be enforced if the trust property cannot be identified or traced into some specific fund or thing: *Re C.A. Macdonald & Co.* (1958), 26 W.W.R. 116 at 121, 37 C.B.R. 119, 17 D.L.R. (2d) 416 (Alta. T.D.) . When a beneficiary seeks to trace his property, he must be able to follow step by step the course of the property through whatever transformation occurred: *Br. Can. Securities Ltd. v. Martin*, 27 Man. R. 423, [1917] 1 W.W.R. 1313. It is essential that he show that his property is actually or notionally part of the property he seeks to trace. Thus if he seeks to trace funds into purchases, the claimant must show that his moneys were in the account when the purchase was made: *Br. Can. Securities Ltd. v. Martin*.

28 The return of metal and consignment creditors can establish that their metal went into Delta's operations. Thereafter, however, their metal lost its identity. It is impossible to say that the metal which the receiver now holds — the bars found in the vault and the proceeds of clean-up contain, actually or notionally, any particular customer's metal. It is equally possible that a particular customer's metal was incorporated in bars that were sold or used in speculation, as in the bars which remained in the vault. In short, the customers who brought their metal to Delta for refining cannot trace their metal to the metal which the receiver now holds. It follows that the principles of trust law cannot assist it.

IV. Conclusion

29 None of the five categories of claimants are able to assert a proprietary right in the metal held by the receiver. There is thus no legal basis on which to distinguish the various categories of claimants from each other. The fund of precious metal on hand should be distributed pro rata amongst the five categories of claimants.

Order accordingly.

End of Document

TAB 17

1986 CarswellPEI 13
Prince Edward Island Supreme Court

Canadian Commercial Bank v. R.T. Holman Ltd.

1986 CarswellPEI 13, 170 A.P.R. 129, 37 A.C.W.S. (2d) 75, 57 Nfld. & P.E.I.R. 129, 59 C.B.R. (N.S.) 79

CANADIAN COMMERCIAL BANK and PARISTYLE NOVELTY CO. LTD. and SHEEN'S FOR SHOES LTD. v. R.T. HOLMAN LTD.

McQuaid J. [in Chambers]

Heard: January 30 and 31, 1986
Judgment: February 12, 1986
Docket: No. GDC-5878

Counsel: *D.W. Hooley* , for Canadian Commercial Bank.
A. Walker , for Paristyle Novelty Co. Ltd.
B. McCabe, Q.C. , for Sheen's For Shoes Ltd.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Table of Authorities

Cases considered:

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

British Can. Securities Ltd. v. Martin, [1917] 1 W.W.R. 1313, 27 Man. R. 423 — *applied*

Ont. Egg Producers' Marketing Bd. and Clarkson Co., Re (1981), 33 O.R. (2d) 657, 125 D.L.R. (3d) 714 (H.C.) — *applied*

Authorities considered:

Waters, comment, 53 Can. Bar Rev. 366.

Waters, Law of Trusts in Canada, 2nd ed. (1984), pp. 107, 1038 et seq.

Special Case to determine status of creditors of bankrupt.

McQuaid J. **:**

1 This matter arises out of the bankruptcy proceedings respecting the firm of R.T. Holman Ltd., now in receivership, represented by the accounting firm of Touche Ross Ltd. It comes before me as a special case.

2 Paristyle and Sheen's were each, for lack of a better term, sub-stores in the Holman complex. Paristyle was a hairdressing establishment, while Sheen's was a retail footwear outlet.

3 Paristyle had a formal lease, to which reference will be later made, which provided that it, as lessee, would pay to Holman's, as lessor, 17 $^{1}/_{2}$ per cent of all net sales transacted in the beauty salon. At the close of each day's business, the gross funds arising therefrom would be deposited with Holman's, with the understanding that after the appropriate adjustments were made, there would be a periodic remittance of the net back to Paristyle.

4 Holman's was in progressively worsening financial difficulties and ceased to remit the net, as required, as of 1st February 1985. When the receiver took control of all assets, including bank accounts, on 15th May 1985, the records indicate that $13,340.32 was the accumulated amount which had not been remitted by Holman's to Paristyle.

5 The Sheen's situation was parallel, but with variation. Here, there was no formal lease, merely a mutually agreed upon letter of intent. The rental figure was stipulated as being 7 per cent of sales, with a further amount unspecified as to quantum to cover such things as wages, supplies and other incidentals. Settlement was to be on a monthly basis with weekly advances. The apparent reason for this variation as to repayment was that while Paristyle was essentially a service business with a minimum of saleable inventory, Sheen's was totally dependent upon its inventory turnover, which must of necessity be replenished on a regular basis, which in turn required a regular cash outlay if it were to succeed.

6 On 15th May 1985 the records indicated a failure to have remitted $4,343.51 (or $2,755.83, depending on the accounting approach). The exact figure is irrelevant to the questions before the court for resolution.

7 There is general agreement that on the critical date, 15th May 1985, the Holman's operating bank account, into which the funds had been deposited in either case, was overdrawn. There is also general agreement that the funds taken in charge by Holman's in either case, were not segregated, but rather intermingled with other Holman funds, deposited into a common bank account, which Holman's obviously used and indeed overdrew in the course of its final day-to-day operations.

8 The questions put to the court in each are the same.

9 (a) Did the agreement entered into by Paristyle [Sheen's] and Holman's whereby Holman's collected and deposited daily sales receipts of Paristyle [Sheen's] constitute such receipts as being a trust fund?

10 (b) If the answer to (a) is "yes", were the funds impressed with the trust traceable to the hands of the receiver?

11 (c) In any event, does the failure of Holman's to actually maintain a separate trust account for the sales proceeds from Paristyle [Sheen's] prevent the existence in law of a trust arising out of the agreement?

12 (d) What legal priority, if any, is to be given to the plaintiff, Paristyle [Sheen's], vis-à-vis other secured, preferred, and unsecured creditors of Holman's?

13 Essentially, the issue can be reduced to this: Was the relationship which existed between Paristyle and Sheen's on the one part, and Holman's on the other part, that of creditor and debtor, or was it a trust relationship?

14 It is then first necessary to ascertain the characteristics of the trust relationship, be it expressed, resulting or constructive, and second, to test the Paristyle situation on the one part, and the Sheen's situation on the other part, against the characteristics of the respective forms of trust. If a concordance can be found in either or both instances, then there may be said to exist a trust relationship in the one, or the other, or both. If no such concordance can be found, then in such case a simple creditor-debtor relationship must be found to be the applicable one.

15 Waters, Law of Trusts in Canada, 2nd ed. (1984), at p. 107 enumerates the three essential characteristics of the express trust, which are described as "The Three Certainties". The language of the alleged settlor must be imperative. The subject matter or trust property must be certain. The objects of the trust must be certain, that is to say, that the language employed by the settlor must clearly show the settlor's intention that the recipient should hold in trust. The objects of the trust must be clearly

delineated, neither may there be any uncertainty as to who, or what is the beneficiary. If any of these three certainties do not exist, there can be no trust.

16 The obligation on the part of the trustee to keep the trust property separate from his own is an element which distinguished the trust relationship from that of debtor and creditor: Waters, p. 1038 et seq.

17 Tracing or following a trust fund requires identifiability but identifiability ceases at law when the trust funds find their way as money into a fund which includes both the converted property of the claimant and other moneys. Once either the actual or notional existence of the moneys in question is gone, so also is the traceability of the fund.

18 The rule is enunciated in the leading case of *British Can. Securities Ltd. v. Martin*, [1917] 1 W.W.R. 1313 at 1319, 27 Man. R. 423 :

> The defendants' claim is based upon the well established equitable right of a *cestui que trust* to follow the trust property into whatever it may have been converted by his trustee: *Godefroi on Trusts* , 504; *In re Hallett's Estate*, 13 Ch. D. 696 ; 49 L.J. Ch. 415; *In re Oatway*, [1903] 2 Ch. 356 ; 72 L.J. Ch. 575. At one time it was held that money could not be followed because it could not be earmarked, but that is no longer the law. Money can now be followed into any other form of property into which it has been converted, subject only to this, that the claimant must be prepared to show that the property was in fact acquired, or partially acquired, by his money: *In re Hallett's Estate*, 13 Ch. D. 696 , per Jessel, M.R. at pp. 713 *et seq.* , per Thesiger, L.J. at p. 722; *Ex parte Cooke*, 4 Ch. D. 123 at p. 128; 46 L.J. Bk. 52; *Godefroi on Trusts* , 565; *Scales v. Baker*, 28 Beav. 91 .
>
> Every step by which the trust property assumed its new form must be shown: *Harford v. Lloyd*, 20 Beav. 310 ; *In re Hallett*, [1894] 2 Q.B. 256 ; 63 L.J.Q.B. 676; and the claim will be disallowed unless the moneys are so traced: *In re Ulster Building Company*, 25 L.R. Ir. 24 .

19 The rule of traceability of trust funds is then: (a) that the funds must be held in trust; (b) that they be converted by the trustee; (c) that they be converted into some other form of property; (d) that the property into which they have been converted be extant and identifiable; and (e) that the claimant be able to establish a direct consequential relationship between his specific trust funds and the ultimate identifiable property.

20 If the situation in question does not fall within the parameters of an expressed trust, then it must be examined to ascertain whether or not it falls within the parameters of an implied trust, i.e., a resulting trust or a constructive trust.

21 While the express trust is a creature of the parties, the implied trust, be it resulting or constructive, is a creature of the law. The resulting trust is founded in the concept of common intent, that is to say, it arises in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest in the property in question was not to reside in the party in possession, but rather was to be shared between them in some determined or determinable proportion. See *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257 at 269, 34 N.R. 384 [Ont], citing *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367 at 377 , which in turn cites *Gissing v. Gissing*, [1971] A.C. 886, [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780 (H.L.) . Dickson J. in *Pettkus* at p. 270 states:

> The sought-for "common intention" is rarely, if ever, express; the Courts must glean "phantom intent" from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property.

There can be, he goes on to state, benefits either directly conferred, or indirectly conferred.

22 Useful reference can also be made to the comment of Professor Waters in 53 Can. Bar Rev. 366.

23 At the risk of being over-simplistic in relation to a doctrine which defies simplification, I perceive the situation to be thus. If the court, in its quest for a remedy within the law, cannot find the existence of an express trust, it may then look to the resulting trust. It will look first to determine whether there has been an acquired property; whether that property has been

acquired in whole or in part through the contribution, in whatever form and in whatever proportion, of a person other than that person in whose possession a title is vested; and finally, whether or not there can be determined to have existed by implication, prior to the acquisition of the property, a common intention that, notwithstanding the fact of possession or vesting of title, it was to be a shared property. It is not sufficient that there be that intention in the mind of the contributing party alone; it must have been a "common intention", that is to say, an intention which must have been, or may be imputed by the court to have been, a mutually shared intention.

24 And, in common with the express trust, if the claimant is to have his remedy out of the funds or the acquired property, the factor of traceability must be present. Otherwise he may be put only to an action for breach of trust, for whatever useful purpose that might serve.

25 Dickson J., in *Pettkus* , supra, at p. 273, discusses the concept of the constructive trust. It is based on the principle of unjust enrichment. "It is not enough", he states at p. 274, "for the Court simply to determine that one spouse [person] has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be 'unjust' in the circumstances of the case."

26 O'Brien J., in *Re Ont. Egg Producers' Marketing Bd. and Clarkson Co.* (1981), 33 O.R. (2d) 657 at 661, 125 D.L.R. (3d) 714 (H.C.) , comments further on *Pettkus* :

> ... it is noted that three requirements must be satisfied before an unjust enrichment can be said to exist: (a) an enrichment; (b) a corresponding deprivation; and (c) absence of any juristic reason for the enrichment.

27 It would be element (c), of course, which would render the enrichment unjust.

28 There is no doubt that if the claim of the trustee herein was to succeed he, as such trustee, could be thereby said to have been enriched, and that each of the claimants could be thereby said to have suffered a corresponding deprivation. Whether, in either case, a juristic reason exists will be considered, post, when the respective claims are examined.

29 The receivership of R.T. Holman Ltd. came into being originally as a result of the crystallization of a floating debenture security held by the now defunct Canadian Commercial Bank in the principal sum of $5,000,000. When default was made, the bank called in its security and placed its receiver in charge. Subsequently, on application to the court, the same receiver was appointed receiver-trustee for all creditors, rather than on behalf of the bank alone. Although Holman's was originally a department store, in the strict sense, it ultimately took on the characteristics of a shopping centre in that certain of the sales departments were leased out to independent franchise operators of which Paristyle Novelty Co. Ltd. was one and Sheen's For Shoes Ltd. was anotner. The former was a beauty salon operation and the latter was, obviously, a retail footwear outlet.

Paristyle Novelty Co. Ltd.

30 The critical term of the agreement is contained in para. 5 of the lease.

> The lessee [Paristyle] shall pay to the lessor [Holman's] as rent during the term of this lease a sum equal to seventeen and one-half (17 $^{1}/_{2}$ %) percent of the net cash sales and net credit sales transacted by the lessee in each said beauty salon. Net cash sales and net credit sales shall be deemed to mean gross sales less (a) refunds, adjustments, allowances and returns made to customers for articles sold or services rendered and (b) sales or excise taxes, if any, paid by customers, or otherwise payable by the lessee.
>
> *It is understood that at the end of each business day all proceeds of sale and services shall be and remain the property of the lessee, and that the lessor is merely constituted the temporary custodian of the same for the convenience of all parties hereto* . (The italics are mine.)

31 From the face of the document, the clear intent was that when each day's business was done, all appropriate cash receipts for the day were taken from the salon and deposited with the central accounting office, subsequent to which:

> On or before the 15th day of each month during the term of this lease, the lessor shall forward to the lessee a detailed and complete statement showing all business transacted up to and including the last day of lessor's retail calendar month, and at the same time shall pay to the lessee such sum or sums as may be due to the lessee by reason of the sales made during the prior month, after first deducting all authorized charges due to the lessor, from the lessee, as follows: amounts due for the rent, payrolls, advertising, freight, laundry and other incidental expenses incurred by the lessee and required to be paid by the lessee during the preceding month.

There also follow in the lease, particulars as to how other and specific financial matters were to be handled.

32 It would have been helpful if there had been direct evidence on the point, or at least an agreed statement of facts touching the matter, but it appears to be clear from a reading of the lease that the envisioned practice would be, and I suspect actually was, that when the daily cash proceeds were taken to the main office, the appropriate entry would have been made in the accounting records, and the cash itself placed with and deposited together with the day's receipts from all other departments and satellite stores in the general operating account of Holman's in the local bank.

33 Immediately before the end of the indicated accounting date, all the necessary arithmetic would be done in the central office, deductions made, a net figure arrived at, and that balance, as shown in the Paristyle ledger sheet, remitted to Paristyle.

34 As a matter of fact, no such monthly remittances were made between February and May 1985, when the total operation was placed in receivership, which accounts for the $13,340.32 figure claimed. Parenthetically, this failure to remit, extending over a number of months, should have alerted Paristyle that "something was wrought in Denmark".

35 The clause in the lease first above referred to, appears to contemplate, on its face, something in the nature of a bailment situation. This, however, would appear to be negated if my interpretation of those clauses covering the processing of the funds in question is correct. Bailment contemplates the integrity of the subject matter, that is to say, that it retains its individual substance, form and identity throughout the transaction. I do not conceive this to be the situation here.

36 It is common ground, as I understand it, that as a matter of fact Paristyle funds, whether rightly or wrongly, found their way into the general funds of Holman's, which in turn found their way into Holman's general operating account in the bank, which operating account was in a deficit, overdrawn position on 15th May 1985 when the receiver took charge. So far as the bank account was concerned, the cupboard was bare.

37 I do not find an express trust contained in the clause under which the possession of Paristyle funds came into Holman's hands. This, if for no other reason, that it is critical to the express establishment of a trust that the settlor transfer title, i.e., ownership, of the trust property to the trustee who holds it for the benefit of the beneficiary, which could of course be the settlor himself. The clause itself is in conflict with the character of an express trust. Neither is there anything in the subsequent operational clauses which, in my view, imposes an express trust.

38 There being no express trust, then, can there be said to be a resulting trust? That depends upon the existence of a perceived common intention to create a trust. While it may (or may not) have been in the mind of Paristyle from the execution of the lease that there did exist such mutuality of understanding necessary for the creation of a resulting trust, I interpret the document, in its operational clauses, to spell out a simple, straightforward business transaction. Paristyle is to make daily deposits with Holman's, to be credited to the Paristyle account. Over the course of the month various and varying debits are to be charged against the account. If at the end of the monthly accounting period there remains a credit balance showing on the ledger sheet, Holman's are to forward to Paristyle its cheque representing that credit balance. This exemplifies a common intention as to how the account is to be operated, which is not the same thing, in my view, as the common intention to create a trust. Accordingly, I find no resulting trust in the lease document.

39 Finally, can it be said that, failing an express or resulting trust, there exists, nonetheless, a constructive trust? I think not. Assuming, but which is not a fact, that there exists in reality the sum of $13,340.32 in the receiver's hands which the claimant

claims as its own, unquestionably then, there would be an enrichment in the hands of the receiver and a deprivation at the cost of Paristyle. But this alone is not enough, that enrichment must be an unjust enrichment.

40 As Dickson J. observed in *Pettkus* , the constructive trust arises out of inequitable withholding resulting in an unjust enrichment, or as O'Brien J. suggested in *Clarkson* , supra, there must be an absence of any juristic reason for the enrichment, that is, for the withholding of the funds.

41 By virtue of the operation of the debenture, the receiver became vested, as trustee for the bank, with all the assets of the defaulting firm, Holman's, not only of such things as material assets, but also of such intangible assets as bank accounts and receivables. By virtue of the subsequent application, the same receiver was appointed to a higher calling, trustee for all the creditors, including the bank. Thus, both in the first and second instances, the trustee-receiver came into being, and vested with such assets as he now holds and is accountable for, by operation of law. If he holds those assets under the law and is accountable in law for them, then, although he may be enriched by these assets, he cannot be said to be unjustly enriched thereby. Consequently, there can be no constructive trust.

42 Even if one were to assume that the funds were impressed with a trust of whatever nature when they were passed from the hands of Paristyle into the hands of Holman's, this would not avail the claimant for two reasons. The first is that the money was merged and intermingled with the general funds, completely lost its identity and could, in any event, no longer be traced. Traceability is of the essential nature of a trust. The second is that even if it were possible to segregate these funds specifically among the general funds of which they formed a part, the general funds themselves have ceased to exist. The bank account is in deficit. The stream has flowed into the river, and the river into the lake, but the lake itself has dried up. As the waters of the stream have ultimately dissipated into thin air, no longer ascertainable or recoverable, so also have the Paristyle funds.

43 To answer the questions, then:

44 to (a) the answer is "no";

45 to (b) no answer is required, but if the answer to (a) were to have been "yes", the answer to (b) is "no";

46 to (c) the answer is "yes";

47 to (d) Paristyle is an unsecured creditor.

Sheen's for Shoes Ltd.

48 The principal distinction between this claimant and that previously considered is that in this case there is no formal lease as such. The terms of agreement are summarized in a letter dated 1st February 1984.

Term:	1 Year
Premises:	500 square feet in the Alberton Store
Rent:	7% of net sales, to be settled in month following, with weekly advances. Sales collected initially by Holmans
Hours of Operation:	Same as Alberton store
Additional Rent:	Expenses to be recharged to include wages, supplies, etc. as appropriate
Renewal:	Renewable annually, with rate and space to be negotiated at each renewal date.

49 I am given to understand that there is one other significant difference between the two situations. In Paristyle the funds were initially collected by it and retained until the close of business each day, then deposited by Paristyle personnel with Holman's. In Sheen's, the funds were never retained, but rather, as each sale was made, deposited directly and immediately with Holman's.

50 Sheen's could not at any time be said to have been possessed of the funds, beyond having conveyed them from the customer to Holman's, for credit to Sheen's, to be held, and for subsequent accounting adjustments.

51 In my opinion, each of those arguments, seriatim, which militated against the claim of Paristyle militate even more strongly against Sheen's and with the same result.

52 I would give the same answers to the questions posed in this matter as I gave to the same Paristyle questions.

53 In my opinion, the relationship which existed between Paristyle and Holman's, and between Sheen's and Holman's was, in each case, from the beginning, that of creditor and debtor.

54 Mr. McCabe, in support of his client's, Sheen's, case, advanced one other ingenious, if ingenuous, argument. It was this. Even if support for his client's position could not be found strictly within the narrow interpretation of the law and particularly the law of trusts, the court should, nevertheless, take the high road. It should do what is patently right and award the questioned funds to the claimant. However appealing that approach might appear to be in its simplicity, it would, if generally accepted, wreak havoc with the institution of the law as we know it, and bring about not only the consequential decimation of the barristerial ranks, but Heaven forfend, of the judicial ranks as well. That is a consequence too disastrous even to contemplate.

55 Both claims will be dismissed. There will be no order for costs.

Order accordingly.

TAB 18

Province of Alberta

LIMITATIONS ACT

Revised Statutes of Alberta 2000
Chapter L-12

Current as of December 17, 2014

Office Consolidation

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Shop on-line at www.qp.alberta.ca

(5) The Crown is bound by this Act.

RSA 2000 cL-12 s2;2007 c22 s1

Limitation periods

3(1) Subject to subsections (1.1) and (1.2) and section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(1.1) If a claimant who is liable as a tort-feasor in respect of injury does not seek a remedial order to recover contribution under section 3(1)(c) of the *Tort-feasors Act* against a defendant, whether as a joint tort-feasor or otherwise, within

(a) 2 years after

(i) the later of

(A) the date on which the claimant was served with a pleading by which a claim for the injury is brought against the claimant, and

(B) the date on which the claimant first knew, or in the circumstances ought to have known, that the defendant was liable in respect of the injury or would have been liable in respect of the injury if the defendant had been sued within the limitation period provided by subsection (1) by the person who suffered the injury,

if the claimant has been served with a pleading described in paragraph (A), or